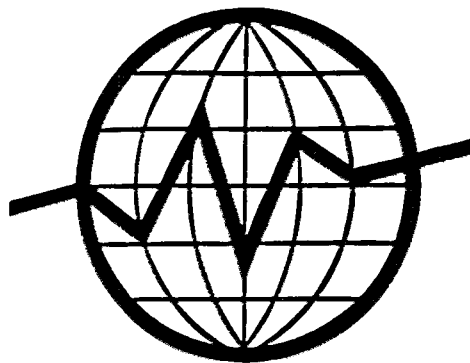


**MEASURES AVAILABLE ON A CROSS-BORDER BASIS
TO PROTECT INTERESTS AND ASSETS OF
DEFRAUDED INVESTORS**



**Technical Committee
of the
International Organization of Securities Commissions**

July 1996

This report was prepared by the Technical Committee Working Group on Enforcement and the Exchange of Information. It was approved by the Technical Committee during its June 4, 1996 Edinburgh meeting.

TABLE OF CONTENTS

Part I: Summary Report

Part II: Individual Contributions of the IOSCO Members

Part I

"Measures available on a cross-border basis to protect interests and assets of defrauded investors"

Summary Report

INTRODUCTION

IOSCO has long been committed to encouraging greater enforcement cooperation among regulators ⁽¹⁾. Through the efforts of IOSCO, as well as the unilateral and bilateral initiatives of its members, securities and futures regulators have established mechanisms to share information necessary to bring cases. As a result they have considerably improved their ability to investigate cross-border frauds, thereby permitting the initiation of legal actions against the wrongdoers.

Such legal actions can lead to the twin benefits of sanctioning wrongdoers and removing their ill gotten assets, as well as allowing investors to seek compensation for the wrongdoing. The relevant regulators may be able to play a significant role in that respect.

In particular, with the ease that funds can now be transferred from one jurisdiction to another, and thereby out of the reach of defrauded

(1) "Resolution on commitment on basic IOSCO principles of high regulatory standards and mutual cooperation and assistance"; 19th Annual Conference of IOSCO, October 1994 ; "Issues raised for securities and futures regulators by under-regulated and uncooperative jurisdictions", released at the 19th Annual Conference of ISOCO, October 1994 ; "Principles for Memoranda of Understanding", released at the 16th Annual Conference of IOSCO, September 1991.

investors, the need for regulators to cooperate with each other to track and facilitate the recovery of money across international borders is increasing.

In the following study, securities and futures authorities address this issue by reporting on the range of measures available in their jurisdictions, on both a domestic and cross-border basis, to preserve and recover assets illicitly obtained through securities and futures law violations.

I. OBJECTIVE AND METHODOLOGY

The objectives of the study are twofold : first, to provide a written compendium of information that would be a useful resource for IOSCO members in considering the actions that may be taken by regulatory and other authorities, or by investors themselves, to preserve and recover funds from abroad. Indeed, the absence of readily accessible information about available mechanisms for freezing and returning assets may have discouraged efforts in this regard. Secondly, the Working Party is seeking to highlight potential pathways for improvement for those jurisdictions where there are few means to preserve and return the assets of defrauded investors.

To tackle this mandate, Working Party n°4 believed it important to obtain information from a wide range of members. Accordingly, not only Working Party members but also other IOSCO delegations ⁽²⁾—submitted country reports on these issues, with the goal of developing a road map that can be followed when seeking to recover assets in each country.

⁽²⁾ Other IOSCO members from European, South American or Asian countries and members of the Consultative Committee provided voluntary contributions.

These reports were provided on the basis of guidelines which intended to cover the wide range of measures available, which vary from one legal system to another. Consequently, all measures available, to any authority whatsoever (e.g. regulatory, judicial, administrative ...) entered the scope of this study.

The Working Party asked the responding delegations to address two topics in their reports : first, the measures available in each of their respective jurisdictions for preserving and returning assets to defrauded investors ; and, second the measures available in each jurisdiction for authorities or investors from a foreign jurisdiction to preserve and recover assets.

In responding to the first topic, each delegation discussed the available domestic mechanisms including relevant legal and regulatory requirements. The purpose of that section was to see how these issues were approached domestically with the objective of identifying new avenues that potentially could be adopted for use by foreign authorities.

In responding to the second topic, the delegations discussed the various routes that are available in their own jurisdictions to foreign authorities or foreign investors. The delegations described inter alia the types of assistance they can provide, and under which conditions foreign authorities or foreign investors could initiate a substantive action in their jurisdiction, have access to the relevant domestic measures and, where possible, have foreign orders (civil, administrative or criminal) enforced in their jurisdiction. The Working Party n°4 also asked each delegation to describe its own experiences in seeking to have assets located abroad preserved and returned to defrauded investors located in their jurisdictions in an effort to offer practical examples to other authorities.

II. GENERAL OBSERVATIONS

The responses of the delegations present a clear picture of the measures that are available and a description of the particular legal requirements in each country. The attached country reports thus provide an excellent resource for regulators and investors to use when considering action so as to facilitate the possibility of successfully preserving and returning assets located abroad.

Based on the reports of the delegations, the following general observations can be made :

- Through established information sharing mechanisms, regulators are sharing information with each other relevant to tracing assets, and such information is often critical.

Regulators can more effectively enforce the securities and futures laws when they are able to thwart the dissipation or secreting of the fruits of fraud, thus facilitating the return of illicit profits to injured investors. The reports confirm that regulators, in their enforcement capacity, utilize bilateral and multilateral information sharing mechanisms, including MOUs, to obtain key information, such as bank accounts and other relevant corporate records, useful for cases to be brought and which may help the return of illicit assets to investors.

- The responses indicate the regulators' willingness to assist and cooperate with one another whenever possible to facilitate the preservation and recovery of the proceeds of fraud.

The delegations set forth in detail the measures that exist in each of their jurisdictions to preserve and freeze assets.

In a few cases, securities and futures regulators may take direct action to preserve and return assets to foreign investors. However in many cases, due to the legal framework of the jurisdictions, they do not have such authority.

Nevertheless, there are various measures that can be used which will have an actual impact on the preservation of investors' interests (e.g., suspension of activity of an intermediary, revocation of license, appointment of a receiver). Moreover, regulatory authorities are willing to provide information and advice based on their own experience with the legal framework of their respective domestic jurisdictions. These forms of assistance can be very useful.

- Although the measures available and the routes to be taken vary greatly, in each jurisdiction there are some routes that can be taken to facilitate the preservation and return of assets to defrauded investors.

The ability to preserve and return assets to foreign investors is embedded in each jurisdiction's legal structure. Recognising the differing legal and regulatory structures in IOSCO members' jurisdictions, the Working Party believes that no uniform approach is appropriate for all countries.

The reports reveal significant differences among members in their domestic powers, including, for example, whether the regulatory authority, a judicial or prosecutorial authority, or investors themselves, have the ability to take measures or initiate actions against suspected wrongdoers. There are also

differences as to whether such actions can be brought civilly, administratively, criminally, or some combination of all three. The reports make it apparent that there are significant differences as to the identity of the parties who are entitled to initiate legal actions in a jurisdiction abroad. Foreign authorities or foreign defrauded investors usually must meet specific criteria in order to be parties to judicial proceedings.

Furthermore and generally speaking, enforcement of foreign orders are most likely to occur through court actions. There are also differences as to the identity of the party seeking to enforce an order. In addition, the nature of the order (e.g. civil, administrative or criminal) may have a significant impact on available remedies.

- Where civil routes are not available or are unlikely to be successful, alternative mechanisms identified in the reports include the use of mutual legal assistance treaties (MLATs)

MLATs often specifically provide for the provisional freeze of assets, as well as the forfeiture of assets. In some cases, an MLAT may be used to recover the proceeds of securities or future fraud. In addition, criminal violations of money laundering laws may, also provide a basis for using MLATs in securities and futures cases ; often the illegal proceeds of securities and futures fraud are transferred out of a jurisdiction into bank accounts in another country, and such transfers may constitute money laundering.

- Multilateral conventions may also assist regulators in this regard.

The responses note that other available mechanisms may include multilateral conventions on the enforcement of judgements. For example, the European Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters, which provides for assistance in executing all types of judgements for both final relief and provisional relief in civil matters, may be of particular utility. It may be useful for securities and futures regulators to review such conventions in order to determine whether they can be utilised in their cases. In addition, the Hague Conference on Private International Law is currently considering the preparation between 1996 and 2000 of a general convention on jurisdiction and the recognition and enforcement of judgements, which could have wide application to IOSCO members. Individual regulatory authorities and IOSCO as a whole may wish to provide input in this process.

CONCLUSION

The attached country reports provide a resource for IOSCO members by specifying pathways that can be accessed in actions to preserve and return to investors assets illicitly obtained through securities and futures violations. The reports contain useful information on the various routes available to that end, as well as on the direct and/or indirect role securities and futures authorities may play, as, in a few instances, they can resort to their compulsory powers in their sphere of competence or, in other cases, give valuable advice necessary to the competent authorities to fulfil their mission.

Hence, the reports are informative for foreign authorities to consider when initiating or participating directly or indirectly in actions which are expected to result in protective measures abroad. The alternative means of assisting foreign counterparts described in the reports may provide useful examples of approaches that could be replicated in other jurisdictions, particularly for those jurisdictions where there are insufficient avenues available to a foreign authority.

The Working Party believes that the review of the attached responses should lead to the development of additional avenues and mechanisms designed to facilitate the preservation and return of assets to defrauded investors. Indeed, in those jurisdictions where available routes are few, delegations could then consider whether it is possible to encourage domestic legislative or regulatory changes in that respect.

In addition, the Working Party is of the view that bilateral and multilateral mechanisms are useful reference tools that could serve the various authorities involved in preserving and returning the assets to defrauded investors.

In view of the increasing need for regulatory authorities to reach across each other's borders to facilitate the recovery of the proceeds of illicit securities and futures activities, the Working Party believes that it is important for each individual delegation to study the reports of others as well as their own legal framework to see whether it is possible for improvements to be made.

Prior to making any order the Court may direct that notice of the application be given to such persons as it thinks fit and/or direct that notice of the application be published in such manner as it thinks fit⁵⁷. Although this may limit the capacity of the ASC to obtain expeditious relief, that problem could presumably be overcome by the Court granting interim relief. The Court shall not make an order if it is satisfied that the order would unfairly prejudice any person⁵⁸.

⁵⁷ Section 1114(5), section 1268(5).
⁵⁸ Section 1114(4), section 1268(4).

10SC0701.DOC

A

33 1 40586821

COB INSPECTION

1995-12-29 07:28

BON

P34

B. Description of measures used to return assets to defrauded investors

6. Recovery Actions

Although the ASC has several types of recovery actions available to it, there are only two which are specifically relevant to the present topic. These are restitutionary orders and representative public interest actions.

6.1 Restitutionary orders: section 1325

Section 1325 confers wide powers on the Court to make remedial orders in proceedings involving a contravention of the provisions regarding conduct in relation to securities⁵⁹ or offering securities for subscription or purchase⁶⁰. Application for relief under section 1325 may be made by a person who has suffered or is likely to suffer loss or damage because of the contraventions or by the ASC on behalf of such a person. When a person is found to have engaged in contraventions of the Corporations Law, before applying on behalf of aggrieved investors for restitutionary orders, the ASC must obtain the consent in writing of the person on whose behalf the application is to be made.

The Court may grant a remedy during these proceedings at its discretion where it finds that a person who is a party to the proceeding has suffered, or is likely to suffer, loss or damage as a result of the contraventions. The Court may make such order as it thinks appropriate against the person who engaged in the

⁵⁹ Part 7.11 Corporations Law.

⁶⁰ Part 7.12 Corporations Law.

conduct or against a person who was involved in the contravention, including, but not limited to, all or any of the following orders:

- an order declaring the whole or any part of a contract made between the person who suffered loss and either the person who committed the contravention/s or a person who was involved in the contravention to be void and, if the Court thinks fit, to have been void *ab initio* or at all times on and after a specified day before the order is made;
- an order varying such a contract or refusing to enforce all or any of the provisions of such a contract;
- an order directing the person who engaged in the conduct or a person who was involved in the contravention to refund money, return property or pay the amount of the loss or damage to the person who suffered/is likely to suffer loss or damage; or
- an order directing the person who engaged in the conduct or a person who was involved in the contravention to supply specified services to the person who suffered/is likely to suffer loss or damage.

The Court may also make an order which is available under section 1323.

6.2 Representative public interest actions: section 50 *ASC Law*

The ASC's capacity to bring recovery proceedings is considerably enhanced by section 50 of the *ASC Law*. This section allows the ASC in special circumstances to undertake representative civil litigation on behalf of corporations or individuals where it appears to the ASC as a result of an investigation or from a record of an examination to be in the public interest to commence and carry on a proceeding for the recovery of damages for

- (a) fraud, negligence, default, breach of duty, or other misconduct, committed in connection with a matter to which the investigation or examination related; or
- (b) recovery of property of the person.

The ASC may take into account various public interest factors in making a decision whether to commence an investigation, including the nature and the seriousness of the possible offences involved, the amounts involved and the number of persons affected, the level of risk to investors' or creditors' funds, the capacity to recover funds or prevent or contain losses, the probability of obtaining sufficient relevant evidence and the need to respond to perceived corporate delinquency and thereby maintain public confidence in the integrity of corporate practices and their effective regulation⁶¹.

The decision to cause such proceedings to be commenced and carried on may be taken only where it appears to the Commission to be in the "public interest". The requirement that the proceedings be in the public interest need only apply

⁶¹ Butterworths Australian Corporations Law: Principles and Practice at para 15.1.0060.

to the commencement of the proceedings, so that the public interest is not a relevant factor once the proceedings have begun.

The ASC may act in the name of the company with or without its consent. The ASC may only act in the name of natural persons if it obtains their written consent prior to the proceedings being commenced. The section however accepts that the "private interests and wishes of the person having the cause of action are to be determinative of the question whether proceedings shall be brought". The ASC is responsible for the costs of running the litigation and could not seek to recover those costs from the person in whose name the proceedings were taken.

To date, very few actions have been commenced by the ASC under section 50 of the *ASC Law*. Section 50 actions have in most cases been instituted (or threatened) in circumstances where there is a large group of investors or shareholders who would not individually (or even collectively) have the resources to fund a recovery action. Unlike a private civil litigant's objective, the ASC's civil and administrative actions are aimed at maintaining market participants' compliance with the *Corporations Law*, thus ensuring a properly regulated market.

6.3 Fidelity funds

Although not strictly a "recovery action", it should nonetheless be mentioned that under the *Corporations Law*⁶² securities exchanges and futures exchanges are required to keep a fidelity fund for the purpose of compensating persons who have suffered pecuniary loss because of a defalcation or fraudulent misuse of securities or documents of title to securities or of other property that were

⁶² Securities exchanges - section 895, futures exchanges - section 1228.

entrusted to a sole trading member of the securities exchange, a partner in a member firm, or an employee of a member or firm⁶³.

A person who has suffered pecuniary loss in such circumstances is entitled to claim compensation from the fidelity fund of the relevant securities exchange and to take proceedings in the Court against the exchange to establish that claim⁶⁴. The amount that can be claimed as compensation is the amount of actual pecuniary loss suffered by the claimant less the amount of all moneys or other benefits received or receivable by the claimant in reduction of the loss. Interest may also be claimed on the compensation.

6.4 Proceeds of Crime Legislation

Under the *Proceeds of Crime Act 1987* (Commonwealth) and the corresponding legislation in each of the States, ("proceeds of crime legislation") proceeds and assets derived from criminal activity can be traced and frozen. The Commonwealth Director of Public Prosecutions (and his or her State counterpart), in conjunction with the Australian Federal Police and the National Crime Authority, is responsible for instituting appropriate action under the proceeds of crime legislation.

The proceeds of crime legislation was enacted to attack the profit motive of organised crime and was a result of a concern that few economic sanctions existed to deter certain forms of criminal activity⁶⁵. The object of such legislation is to prevent offenders from enjoying the proceeds of, and the benefits derived from, the commission of offences⁶⁶.

⁶³ Section 907 - securities, section 1239 - futures.

⁶⁴ Section 908 - securities, section 1240 - futures

⁶⁵ Gray, M "The Proceeds of Corporate Offences: Making the Weed of Crime Bear Bitter Fruit". Corporate Law Enforcement Conference, Perth, 16 September 1994.

⁶⁶ See for example *Faher* (1989) 16 NSWLR 67 at 71 referred to in Gray, 1994 at 5.

Property and other assets within the ambit of proceeds of crime legislation may be identified by the use of information gathering powers, and made subject to forfeiture, restraining or pecuniary penalty orders. Notably, the definition of property in the legislation is expansive, and the court is permitted to take into consideration the concept of "effective control" of the property in question. There has, however, been some judicial resistance to this approach.

Remedies which are available under the proceeds of crime legislation generally require a person to have been convicted of an indictable criminal offence before a final order over property can be made. As corporations legislation offences are Commonwealth offences, indictable offences are covered by the *Proceeds of Crime Act 1987 (Cth)*⁶⁷.

6.4.1 Restraining orders

Under proceeds of crime legislation, restraining orders are available which effectively prohibit all dealings with the assets to which they apply. Such orders are designed to prevent the dissipation or concealment of an offender's assets pending trial. A restraining order operates in much the same way as a Mareva injunction, although in an application for a restraining order it is not necessary for the prosecution to establish that the property the subject of the order sought is in any way in danger of dissipation or concealment. A restraining order may be obtained in relation to particular property if the Court is satisfied that there are reasonable grounds for believing that the person has

⁶⁷ Corporations legislation offences may also be linked to other Commonwealth or State indictable offences such as fraud or theft, bringing in the concurrent operation of the Commonwealth or State Acts. References will be made generally to the "proceeds of crime legislation"

committed an offence, and either that the property is tainted, or that the person has derived a benefit from the commission of an offence⁶⁸.

The Court may make provision for restrained assets being used to meet the defendant's reasonable living and business expenses, and reasonable expenses in defending a criminal charge⁶⁹. To ensure that a restraining order will not unduly harm a defendant, the Commonwealth is normally required to give undertakings as to damages and costs⁷⁰.

Restraining orders may be sought 48 hours before charges are laid and without notice to the intended subject of the order. This enables restraint of a person's assets without prior warning that the assets may be targeted for restraint or forfeiture⁷¹.

6.4.2 Forfeiture Orders

Proceeds of crime legislation also provides that tainted property used in an offence, or in connection with an offence or which was derived or realised directly or indirectly by any person from the commission of the offence, is forfeited to the Crown⁷². The Court making a forfeiture order usually has a discretion as to whether or not to make the order, and may consider any hardship that the order may cause to the person, the gravity of the offence and the use ordinarily made of the property⁷³.

⁶⁸ Proceeds of Crime Act 1987 (Commonwealth), section 44; *DPP v Saffron* (1989) 85 ALR 153; *DPP (Cth) v Toro-Martinez* (1993) 119 ALR 517.

⁶⁹ Proceeds of Crime Act 1987 (Commonwealth), section 43(3).

⁷⁰ *Ibid*, section 44(10).

⁷¹ Gray, 1994 at 8.

⁷² Proceeds of Crime Act 1987 (Commonwealth), section 14(1).

⁷³ Gray, 1994 at 9.

10SC001100C

The forfeiture powers do not directly benefit the victims of corporate or securities fraud. Assets obtained under the legislation are forfeited to the confiscated assets trusts fund and used in part to assist law enforcement programs.

6.4.3 Pecuniary penalty orders

On the application of the DPP, the Court may make a pecuniary penalty order against a defendant for an amount equal to the benefits that the defendant derived from the commission of an offence. In calculating those benefits, all the existing property of the defendant, as well as all property which previously belonged to the defendant back to the day the offence was committed (but not exceeding five years) is presumed to stem from the criminal activity unless the contrary is proved⁷⁴. The Court may also lift the "corporate veil" to determine whether property that does not formally belong to the defendant, but is nevertheless under his or her effective control, should be included in the pecuniary penalty order⁷⁵.

A pecuniary penalty order is designed to recover the profits of crime and therefore does not take into account any damage or loss caused by the contravention. In making an order, the court may reduce the amount payable under the pecuniary penalty by any amount that is payable by way of fine, restitution, compensation or damages, in relation to the offence⁷⁶.

⁷⁴ Proceeds of Crime Act 1987 (Commonwealth), section 27.

⁷⁵ *Ibid*, section 28.

⁷⁶ *Ibid*, section 26(5). This ensures that the proceeds of crime legislation does not interfere with rights of recovery in civil penalty actions

Pecuniary penalty orders operate as civil debts and may be enforced in the same manner as judgment debts. This allows execution against property through the normal procedures of the Courts.

IOSCOFIN.DOC

A

33 1 40586821

COB INSPECTION

1995-12-29 07:33

BON

P43

7. Procedural and practical considerations

7.1 Appeal rights

The Full Court of the Federal Court of Australia has jurisdiction to hear and determine appeals from judgments of single judges of the Federal Court, and, in certain circumstances, appeals from judgments of the Supreme Court of a State exercising Federal jurisdiction⁷⁷.

There is no inherent right of appeal. It exists by virtue of statute rather than common law, and therefore, the nature of an appeal depends on the statutory provision that creates it. Essentially an appeal is the procedure by which an unsuccessful party seeks to have a court decision set aside, or varied in a manner favourable to the appellant.

In general, an appeal is not a rehearing of the matter. When an appellate court considers an appeal it must confine its consideration to whether the judgment appealed from was correct when it was given. The function of the appellate court is to ascertain whether the judgment of the trial judge discloses any error, not to substitute its own judgment. In the proper sense an appeal is called to redress error in the court below, looking only to the material which was before the court below⁷⁸.

New circumstances cannot be taken into account - only the law and circumstances which existed at the time of the judgment can be considered. Although the appeal court can review the evidence given in the court below, it

⁷⁷ Subsection 24(1), Federal Court of Australia Act 1976.

⁷⁸ *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 109.

cannot admit new evidence. If the appeal court concludes that the judgment given by the trial judge was correct, that judgment cannot be set aside or varied by an appeal.

An appeal must be commenced by a notice of appeal filed and served within 21 days after the date when the judgment appealed from was pronounced, the date when leave to appeal was granted, or any later date fixed for that purpose by the Court appealed from.

Leave to appeal must be obtained from the Court before an appeal may be brought from an interlocutory judgment⁷⁹. In general terms, an interlocutory judgment is one which does not finally determine the issues between the parties, for example, an interlocutory injunction. An application for leave to appeal from an interlocutory judgment may be made orally to the judge who pronounced the judgment, at the time of the pronouncement⁸⁰, or by motion on notice, which shall be filed and served within seven days from the pronouncement of the interlocutory judgment, or within such further time as the Court may allow.

Where an appeal has been instituted, the Court may, on such conditions (if any) as it thinks fit, order a stay of all or any proceedings under the judgment appealed from, or suspend the operation of an injunction or other order to which the appeal, in whole or in part, relates⁸¹.

In general, appeals can only be made on the basis of questions of law. The jurisdiction of the Full Court to hear and determine appeals is not limited to an

⁷⁹ Subsection 24(1A).
⁸⁰ Order 52 rule 10, Federal Court Rules.
⁸¹ Section 29, Federal Court of Australia Act 1976.

appeal on a question of law⁸², however, it is very difficult to challenge findings of fact which were made by the trial judge. This is primarily because the trial judge has had the advantage of seeing and hearing the evidence of the witnesses.

"not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case"⁸³.

Consequently, where a trial judge has made a finding of fact contrary to the evidence of a witness but has made no reference to that evidence, an appellate court cannot act on that evidence to reverse the finding unless it is satisfied "that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion"⁸⁴.

Before reaching a factual conclusion which is different from the one accepted by the trial judge, an appellate court requires strong grounds for concluding that the conclusion was mistaken, such as it being inconsistent with an overwhelming body of evidence or it being glaringly impossible⁸⁵.

In an appeal, the Court shall have regard to the evidence given in the proceedings out of which the appeal arose, and has power to draw inferences of

⁸² *Annand & Thompson v TPC* (1979) 25 ALR 91 at 110 per Northrop J. See also *Warren v Coombs* (1979) 23 ALR 405.

⁸³ *SS Hontestroom v SS Sagaporack* [1927] AC 37 per Lord Sumner at 47, cited in *Abolas v Australian Postal Commission* (1990) 65 ALJR 11 at 16.

⁸⁴ *Watt or Thomas v Thomas* [1947] AC 484 at 488, cited in *Abolas, ibid.*

⁸⁵ *Holvorsen Boats Pty Ltd v Robinson* (1993) 31 NSWLR 1.

fact⁸⁶. The appellate court must reach its own conclusions as to the inferences to be drawn from the primary facts found by the trial judge⁸⁷. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge but will reach its own conclusion on the inferences to be drawn from the facts⁸⁸.

Where the decision appealed from involves the exercise of a discretion by a trial judge, the Court will not interfere unless an error of the kind outlined below is shown to have been made in exercising the discretion:

- i) the primary judge acts on a wrong principle;
- ii) the primary judge allows extraneous or irrelevant matters to guide or affect him or her;
- iii) the trial judge mistakes the facts; or
- iv) the trial judge does not take into account some material consideration⁸⁹.

It may not appear how the primary judge has reached the result embodied in the order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure by the court of first instance to properly exercise the discretion⁹⁰.

⁸⁶ Federal Court of Australia Act 1976, section 27.

⁸⁷ *Annand v Thompson, ibid.*

⁸⁸ *Warren v Coombs, ibid.*

⁸⁹ *House v R (1936) 55 CLR 499 at 505.*

⁹⁰ *Ibid.*

7.2 Practical considerations

Several problems can be identified that may arise in relation to the measures that may be utilised to preserve, protect and recover assets. Several of these may be attributed to the fact that such remedies may only be obtained from the Court. The expense and delays associated with civil litigation as well as the general reluctance of the Court to interfere with private property rights, are potentially an obstacle to recovery by aggrieved investors.

The reluctance of the Court to interfere with private property rights in the absence of a judgment or a strong *prima facie* case can also be a bar to recovery. Generally, a claim that there is a real risk that the assets will be dissipated or put beyond the reach of the Court or the claimant must be supported by strong evidence before the Court will consider an application for interlocutory relief. The Court is also reluctant to make *ex parte* orders concerning assets, except in emergencies.

These factors can make it extremely difficult for an aggrieved investor to obtain a judicial remedy, except in the case of an emergency or with a strong *prima facie* case supported by persuasive evidence.

7.3 ASC Action

Each year the ASC receives and processes over 8000 external complaints relating to corporate law matters. In addition, the ASC responds to matters which come to its attention through its surveillance programs and through market intelligence. Being a government regulatory authority, the ASC is naturally constrained by available resources, and having regard to the number

and complexity of the matters which come to its attention, it can investigate only a proportion of these matters.

Matters to be resourced must be checked against a list of serious contraventions criteria which must be established in order to determine the priority of the matter. In determining whether to take action, the ASC will also have regard to the facts and circumstances of each case including the availability of evidence, the likely deterrent effect of any enforcement action and the impact on other investigations or regulatory action.

The use of civil remedies to preserve or recover property which has been jeopardised or lost through contravention of the *Corporations Law* is a priority of the enforcement policy of the ASC. However, it should not be assumed that the ASC is always the proper plaintiff in civil actions. Instead of commencing civil proceedings the ASC may decide to release records of examinations and related books under section 25 of the *ASC Law* to assist private litigants, or intervene under section 1330 of the *Corporations Law* in proceedings commenced by another party.

Below are several case studies in which the ASC was successful in taking action to preserve assets and to return them to investors who had been defrauded through the violation of securities or futures laws or regulations.

10820FIN.DOC

8. Enforcement of judgments and orders

8.1 Enforcement as a debt

This paper does not contain a detailed analysis of the law affecting the enforcement of judgments as debts. The procedures for the enforcement of judgments are set out in the rules of court for the court in which the judgment is obtained.

In the event that a judgment debt remains unsatisfied bankruptcy may follow in the case of a personal defendant and winding up in the case of a corporate defendant.

The law of personal insolvency is set out in the *Bankruptcy Act* 1966 as amended and the Rules made under that Act.

A petition leading to personal bankruptcy may follow upon the committing of an act of bankruptcy as defined. Under section 40(1)(d) of the *Bankruptcy Act* a debtor commits an act of bankruptcy if execution against the debtor of any process of a court is returned unsatisfied or results in the seizure or sale of the debtor's property.

The law governing the winding up of corporate entities is set out in the *Corporations Law*, in particular Chapter 5.

Under sections 459A and 459B of the *Corporations Law*, a court may order the winding up of a company if satisfied that the company is insolvent. The court must presume that a company is insolvent if, during or after the 3 months ending on the day when the application to wind the company up was made, the

USCOPIN DOC

company has failed to comply with a statutory demand for the payment of a debt: section 459C(2)(a).

Generally where action is brought leading to personal bankruptcy or the winding up of a company a creditor who relies upon a judgment debt ranks equally with other unsecured creditors.

9. Other means to assist in returning assets to defrauded investors

9.1 Release of information under section 25

Under section 25 of the *ASC Law*, the ASC may assist a party that is *bona fide* carrying on or contemplating proceedings by providing to that party copies of transcripts of examinations conducted by the ASC, together with any related books.

9.2 Intervention in proceedings

Under section 1330 of the *Corporations Law*, the ASC may intervene in any proceeding relating to a matter arising under the *Corporations Law*.

Intervention may be used by the ASC to assist a litigant in the presentation of legal or factual matters. The ASC has issued a Policy Statement setting out the circumstances, in which it will ordinarily be appropriate to intervene in proceedings: see Policy Statement 4.

IOSCOFIN DOC

9.3 Other statutory rights of action

The ASC has a range of statutory actions available to it under which it may assist in the preservation and recovery of assets. Some of those rights of action are described elsewhere in this paper. For completeness, a full list is here set out.

ASC Law:

- Section 8:** allows the ASC to sue in its corporate name.
- Section 50:** allows the ASC to bring proceedings on behalf of a person or company for recovery of damages or property, where it appears to the ASC to be in the public interest to do so.
- Section 61:** allows the ASC to refer to the Court a question of law arising at an ASC hearing.
- Section 132:** allows the ASC to bring an action under section 129 the *ASC Law* (for compensation of loss caused by prohibited dealings in futures by ASC staff) where the ASC considers it in the public interest to do so.
- Section 262:** gives the ASC such rights of action as existed in favour of the NCSC immediately before the commencement of the *ASC Law*.

Corporations Law:

- Section 260:** allows the ASC to apply for various remedial orders in cases of oppression or injustice connected with affairs of companies.
- Section 459P:** allows the ASC to apply for the winding up of a company in insolvency.
- Section 462:** allows the ASC to apply for the winding up of a company on any ground provided in section 461.
- Section 464:** allows the ASC to apply for the winding up of a company where the ASC is investigating its affairs.
- Section 598:** allows the ASC to apply for orders that persons concerned with a corporation pay money, transfer property or pay the amount of any loss or damage to the corporation.
- Section 599:** allows the ASC to apply for orders prohibiting persons from managing corporations for up to 5 years.
- Section 729:** allows the ASC to apply for orders that persons comply with conditions relating to exemptions from the Law granted under section 728.
- Section 736:** allows the ASC to apply for orders securing compliance with orders made by the Corporations and Securities Panel under section 734.
- Section 737:** allows the ASC to apply for remedial and other orders in relation to prohibited acquisitions under section 615.

IOSCOFIN DOC

- Section 738:** allows the ASC to apply for remedial and other orders where **offers are not sent** pursuant to a Part A statement.
- Section 739:** allows the ASC to apply for remedial and other orders to protect the interests of persons affected by **contraventions of conditions** in consents given under section 653.
- Section 740:** allows the ASC to apply for orders in relation to **unfair or unconscionable agreements, payments or benefits.**
- Section 741:** allows the ASC to apply for remedial or other orders with respect to **substantial shareholders** who have contravened sections 709, 710 or 711.
- Section 742:** allows the ASC to apply for orders where **beneficial ownership** of shares is not disclosed.
- Section 777:** allows the ASC to apply for orders relating to compliance with or enforcement of the business or listing **rules of a securities exchange.**
- Section 779G:** allows the ASC to apply for orders relating to compliance with the provisions of the **SCH business rules.**
- Section 838:** allows the ASC to apply for orders **disqualifying persons from holding dealers licences or advisers licences or acting as representatives of dealers or advisers.**
- Section 874:** allows the ASC to apply for orders **freezing bank accounts of dealers and former dealers.**

KJKLOPIN.DOC

- Section 877:** allows the ASC to apply for orders that amounts frozen under section 874 be paid to the ASC or its nominee.
- Section 1004:** allows the ASC to apply for orders that persons contravening Parts 7.11 or 7.12 of the Law disclose specified information or publish advertisements in relation to it.
- Section 1013:** allows the ASC to bring an action, where it considers it in the public interest to do so, on behalf of a body corporate for recovery of loss arising from insider trading.
- Section 1114:** allows the ASC to apply for various orders in cases where persons have contravened Chapter 7 of the *Corporations Law*, licence conditions, or rules of securities exchanges.
- Section 1201:** allows the ASC to apply for orders disqualifying persons from holding futures brokers licences or advisers licences or acting as representatives of futures brokers or advisers.
- Section 1224:** allows the ASC to apply for orders restraining dealings in futures brokers' bank accounts.
- Section 1226:** allows the ASC to apply for orders that monies affected by section 1224 orders be paid to the ASC or its nominee.
- Section 1268:** allows the ASC to apply for various orders in cases where persons have contravened Chapter 8 of the *Corporations Law*, licence conditions, or rules of futures exchanges.
- Section 1315:** allows the ASC to make application in relation to any proceedings for an offence against the *Corporations Law*.

KJSCORPN.DOC

Section 1317EB: allows the ASC to make application for a civil penalty order.

Section 1323: allows the ASC to apply for various orders where an investigation, prosecution or civil proceeding has been commenced, including orders for payment of money, orders prohibiting dealings, orders appointing a receiver or trustee, etc.

Section 1324: allows the ASC to apply for Injunctions restraining persons from engaging in conduct that contravenes the *Corporations Law*.

Section 1325: allows the ASC to apply for orders compensating persons who have suffered loss or damage as a consequence of conduct that contravened the *Corporations Law*.

Section 1330: allows the ASC to Intervene in any proceedings relating to a matter arising under the *Corporations Law*.

Section 1336A: gives the ASC such rights of action as existed in favour of the National Companies and Securities Commission immediately before the commencement of the *Corporations Law*.

PART II: MEASURES AVAILABLE FOR FOREIGN AUTHORITIES

10. *Foreign Judgments Act 1991*

10.1 Summary of Provisions

The *Foreign Judgments Act 1991* is the principle statute governing the registration and enforcement of judgments obtained in foreign courts. The legislation defines the types of foreign judgments that may be registered and enforced and the Rules made under the legislation prescribe the countries and the courts whose judgement may be registered and enforced.

"Judgment" is defined in the *Foreign Judgments Act, inter alia*, to mean:

- (a) a final or interlocutory judgment given or made by a court in civil proceedings; or
- (b) a judgment or order given or made by a court in criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party.

Subject to some minor and technical matters, a judgment registered under the *Foreign Judgments Act* is treated as if it were a judgment of the court in which it is registered. Sub-section 7(6) of the *Foreign Judgments Act* provides that:

- (a) a registered judgment has, for the purposes of enforcement, the same force and effect; and

- / 2
- (b) proceedings may be taken on a registered judgement; and
 - (c) the amount for which a judgment is registered carries interest; and
 - (d) the registering court has the same control over the enforcement of a registered judgment;

as if the the judgement had been originally given in the court in which it is registered and entered on the date of registration.

Enforcement of a registered judgment may be stayed pending the outcome of any appeal process in the jurisdiction in which the judgment was originally obtained: section 8.

10.2 Countries and Courts Prescribed under Regulations .

The following is a list of the countries and courts that have been prescribed in Rules made under the *Foreign Judgments Act* as countries and courts to which the legislation applies.

Country	Court
New Zealand	Court of Appeal High Court
Province of Alberta, Canada	Supreme Court of Canada Court of Appeal of Alberta Court of Queen's Bench of Alberta
Bahamas, The Commonwealth of the	Court of Appeal Supreme Court

KOSCOFIN.DOC

Province of British Columbia, Canada	Supreme Court of Canada Court of Appeal of BC Supreme Court of BC Provincial Court of BC
British Virgin Islands	Eastern Caribbean Supreme Court
Cayman Islands	Grand Court
Dominica, Commonwealth of	Eastern Caribbean Supreme Court Court of Appeal High Court of Justice
Falkland Islands	Court of Appeal Supreme Court
Fiji, Republic of	High Court
France (French Republic)	Cour de Cassation Cours d'Appel Tribunaux de grand instance Tribunaux de commerce Cours d'assise Tribunaux correctionnels
Germany, Federal Republic of	Bundesgerichtshof Oberlandesgerichte

	Bayerische Oberste Landesgericht Landesgerichte
Gibraltar	Court of Appeal Supreme Court
Grenada	Supreme Court (consisting of Court of Appeal, High Court)
Hong Kong	Privy Council Supreme Court of Judicature (consisting of Court of Appeal, High Court)
Israel, State of	Supreme Court District Courts Moslem Religious Courts Druze Religious Courts
Italy (Italian Republic)	Corte Suprema di Cassazione Corte di Assise Corte d'Appello Tribunale
Japan	Supreme Court High Courts District Courts Family Courts
Malawi	High Court

	Supreme Court
Province of Manitoba, Canada	Court of the Queen's Bench of Manitoba
Montserrat	Privy Council Eastern Caribbean Court of Appeal High Court of Montserrat
Papua New Guinea	Supreme Court of Justice National Court of Justice
St Helena	Supreme Court
St Kitts and Nevis, Federation of	Privy Council Eastern Caribbean Court of Appeal High Court (St Christopher Circuit) High Court (Nevis Circuit)
St Vincent and the Grenadines	Eastern Caribbean Supreme Court (consisting of Court of Appeal, High Court)
Seychelles, Republic of	Court of Appeal Supreme Court
Singapore, Republic of	Privy Council: in respect of orders made on appeals from the Singapore Supreme Court and filed with the Court of Appeal of Singapore

	Supreme Court of Singapore (consisting of the Court of Appeal, High Court)
Solomon Islands	Court of Appeal High Court
Sri Lanka	Supreme Court Court of Appeal High Court District Court
Tonga	Court of Appeal Supreme Court
Tuvalu	Court of Appeal High Court
United Kingdom, The	House of Lords Supreme Court of England and Wales Supreme Court of Judicature of Northern Ireland Court of Session County Courts (England and Wales) County Courts (Northern Ireland) Sheriff Courts (Scotland)

11. Case Studies

11.1 *MacLeod & Starlight Film Studies Ltd ("Starlight")*

MacLeod was a director of a number of companies including Starlight and Trainex Pty Ltd (Trainex). MacLeod and the companies were promoting tax driven film investment schemes.

Despite the initial prospectus being rejected both Trainex and Starlight solicited investments for film schemes and over a four year period received over \$5,500,000 from investors. The ASC determined from the evidence that:

- approximately \$840,000 had been spent on the production of films;
- approximately \$2,500,000 had been expended for MacLeod's benefit; and
- approximately \$2,200,000 was unaccounted for.

In June 1992 the ASC obtained ex parte orders appointing receivers over the assets of MacLeod, Starlight and Trainex and restrained them from dealing with any of their assets. In July 1992 the Court made final orders in the same form. MacLeod, in contempt of those orders failed to notify the receivers of his interest in a property, transferred the said property by a backdated transfer form and attempted to have a cheque made payable to a company controlled by him endorsed to himself. MacLeod was sentenced to six months imprisonment for contempt.

10SCOPFN.DOC

11.2 *Aust-Home Securities Pty Ltd & Ors ("Aust-Home")*

In 1992 the Commission commenced investigation into Aust-Home Investments Ltd (AHI), Aust-Home Securities Pty Ltd and QGIS Finance Ltd, as well as subsequent investigations into a large number of individuals and corporations thought to be concerned in the affairs of AHI or related companies. The investigation stemmed from a negatively geared investment scheme designed supposedly to produce substantial taxation deductions for investors.

The Aust-Home scheme required investors to purchase securities in a public company which then invested in income producing properties. Investors were also offered debentures issued by a public company. In neither case was a prospectus registered to cover these investments. An investigation into the activities of Aust-Home revealed that only a limited number of loans were ever made and the scheme was so highly geared that many deposits were lost because the scheme could not complete the purchase.

It was the view of the ASC that various offences under the *Corporations Law* might have been committed, as well as breaches of fiduciary and common law duties. The Commission applied to the court in March 1992 for orders under section 1323 of the *Corporations Law* that, *inter alia*, receivers be appointed to the assets of the various corporations and individuals.

In April 1993 the ASC obtained further orders winding up 17 corporate respondents. In late 1994 the common liquidators of the core scheme undertook recovery action on behalf of numerous of those entities.

11.3 *Corporate Affairs Commission v Home-Buyers Finance Ltd*

Since December 1986, Home Buyers Finance ("Home Buyers") Ltd had been soliciting money, refundable on seven days notice, from members of the public by way of subscription for "shares" in the company with those of its subscribers winning a weekly lottery conducted by it being entitled to a special housing loan.

Application by the ASC for the appointment of a receiver and manager of the company was pending. The ASC (in this case) sought the appointment of an interim receiver and manager (pending determination of the primary application) under the predecessor of section 1323(3) of the *Corporations Law* (section 573(1A), *Companies Code*).

Home Buyers had been soliciting money from members of the public by way of subscription for shares in the company. This was on the understanding that subscribers who fulfilled certain minimum subscription conditions, and maintained continuity of subscriptions, became eligible to be included in a "lottery". The winner of the lottery each week became entitled to a housing loan from Home Buyers at a relatively low interest rate. The moneys were refundable to the subscribers on 7 days notice to Home Buyers. The court was of the opinion that this made it somewhat doubtful that the subscribers became shareholders.

Since December 1986 Home Buyers had collected subscriptions amounting to just under \$2,500,000, of which just over a million dollars had already been advanced by way of loans secured by mortgages. The net amount received by way of contributions from subscribers (after repayment of subscriptions have been made) was approximately \$1,500,000. Against the apparent liabilities, the

company had in hand \$300,000. Its only other assets comprised the mortgages which it already held, which secured \$1,153,000 (plus interest). The figures in evidence suggested that the current liabilities, which would include the approved applications for mortgages which had not actually been settled, very substantially exceeded the current assets, and that in the short term there was likely to be a severe cash flow difficulty.

The Court considered that the evidence disclosed serious irregularities in the manner in which the affairs of the company had been conducted. Subscribers were considered to have no proper or adequate security for the benefits which they were led to expect as a result of their subscriptions.

The Court held that to obtain an order under the predecessor of section 1323(3) it was merely necessary that an application under section 1323(1) shall have been made, and that the Court form the opinion that the making of the order is desirable. It is not necessary that the conditions which must be established to obtain an order under section 1323(1) be made out, although it was considered that in this case, those conditions had been made out. Accordingly, the interim receiver and manager was appointed.



Canada

*Commission des Valeurs
Mobilières du Québec*



COMMISSION DES VALEURS MOBILIÈRES DU QUÉBEC

"Mandate on measures available on a cross-border basis
to protect interests and assets of defrauded investors"

SUMMARY

I Measures Available for Use Domestically

In order to carry out its mandate to protect the investing public, the Commission des valeurs mobilières du Québec ("CVMQ") has several powers, including the power to order the freezing of funds, securities and other assets. Alternate measures provided by the Québec Securities Act ("QSA") which may have a similar impact on the preservation of assets are the appointment of a provisional administrator by the Minister of Finance and cease trade orders issued by the CVMQ.

Other government authorities who may seek to freeze assets through the judicial channel are the Director under the Canada Business Corporations Act ("CBCA"), as well as the Attorney General in well-defined circumstances outlined in the Criminal Code.

The QSA does not provide for any mechanisms whereby the CVMQ may cause the return of assets to defrauded investors. However, it does contain recourses whereby investors may apply to have securities transactions rescinded or the price thereof revised on specific grounds, as well as claim damages against various persons. Such recourses concern transactions effected without a prospectus or circular, transactions effected with documents containing a misrepresentation and finally, transactions involving the use of privileged information. Other recourses are also available to defrauded investors under Québec civil law, the CBCA and the Criminal Code.

II Measures Available for Use by Foreign Authorities

The CVMQ may, pursuant to a violation of a foreign jurisdiction's securities legislation, order the freezing of funds, securities or other assets in the possession of a person located within the province of Québec. No specific procedure for requesting such assistance is required by the QSA.

The CVMQ has the power to enter into agreements with persons or organizations from Québec or elsewhere in order to foster the application of the QSA or foreign legislation in securities matters. Since 1988, the CVMQ has entered into memoranda of understanding with the United States, France, Hungary and Romania, the purpose of which is to increase cooperation and mutual assistance in securing compliance with and enforcement of the signatories' respective securities laws.

No mechanisms exist under the QSA for assets to be expatriated for return to foreign investors. However, said investors may attempt to recover their assets through recourses provided under Québec civil law, the CBCA and the Criminal Code.

COMMISSION DES VALEURS MOBILIÈRES DU QUÉBEC

"Mandate on measures available on a cross-border basis to protect interests and assets of defrauded investors"

Prior to answering the specific questions set out in the "Guidelines for Contributions" regarding the above-captioned mandate, we thought that it would be beneficial to provide an overview of the freeze order provisions of the Québec Securities Act¹ ("QSA").

Freeze Orders under the QSA

In order to carry out its broad-sweeping mandate to protect the public interest in securities matters, as defined in Section 276², the Commission des valeurs mobilières du Québec ("CVMQ") has several powers, including the power to investigate as provided in the first paragraph of Section 239:

"The Commission may order an investigation to aid it in the due administration of this Act and the regulations or to repress contraventions to the Act or the regulations, or the securities legislation of another legislative authority."

In view of or in the course of such an investigation, the CVMQ may order the freezing of funds, securities or other assets as set out in Sections 249 to 256. Let us briefly examine these provisions.

¹R.S.Q., c. V-1.1, as amended.

²Unless otherwise indicated, all references are to the QSA.

- Section 249 of the Act states :

"The Commission may, in view of or in the course of an investigation,

(1) order the person who is or is about to be under investigation not to dispose of the funds, securities or other assets in his possession ;

(2) order the person who is or is about to be under investigation to refrain from withdrawing funds, securities or other assets from any other person having them on deposit, under control or in safekeeping ;

(3) order any other person not to dispose of the funds, securities or other assets referred to in paragraph (2)."

The scope of "in view of or in the course of an investigation" was examined by the CVMQ in the case of Richard Mercille³. The Commission concluded that this expression should be given a broad interpretation in that an investigation not only includes a fact gathering phase, but also an analysis phase. Moreover, a conclusion initially arrived at, may be subsequently set aside or confirmed pursuant to new facts brought to the attention of the investigator of the CVMQ. In view of the wide ambit attributed to the term "investigation", a freeze order may thus be validly issued until an ultimate conclusion is reached.

The Commission found support for its liberal interpretation of its investigatory and freeze order powers in the Supreme Court of Canada decision of Brosseau v. Alta. Securities Commission⁴, where Madame Justice L'Heureux-Dubé stated the following with respect to the role of securities commissions in general :

"Securities acts in general can be said to be aimed at regulating the market and protecting the general public. This role was recognized by this court in Gregory & Co. v. Commission des valeurs mobilières du Québec, [1961] S.C.R. 584, where Fauteux J. observed at p. 588 :

³Decision n° 90-C-0338, (1990) 21 B.C.V.M.Q. n° 50, pp. 22-26.

⁴[1989] 1 S.C.R. 301.

The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, in the province or elsewhere, from being defrauded as a result of certain activities initiated in the province by persons therein carrying on such a business.

This protective role, common to all securities commissions, gives a special character to such bodies which must be recognized when assessing the way in which their functions are carried out under their Acts." (p. 314)

The nature of a freeze order was also considered in the Mercille case. The CVMQ explained that such an order is not only a tool by which to gather information, but also a means by which to conserve this information until the completion of the investigation as such term is described above. A freeze order is thus a conservatory measure of both evidence and physical assets.

The conservatory nature of freeze orders has also been recognized in other cases. In Géoneu Enr. (société en nom collectif) et al⁵, the CVMQ stated:

[translation] "Being a measure of temporary nature, the particular effect of a freeze order is to prevent that additional expenses be incurred during its effective period and that funds be temporarily preserved." (p. 15)

In the matter of Amswiss Scientific Inc. et al⁶, the British Columbia Securities Commission set forth the following :

"The immediate effect of a freeze order is to maintain the status quo, ensuring that the frozen property is not dissipated or destroyed before the Commission is in a position to determine, what, if any, further steps or orders in the public interest should be made under the Act." (pp. 32-33)

⁵Decision n° 92-C-0033, (1992) 23 B.C.V.M.Q. n° 8, pp. 2-20.

⁶B.C.S.C. Weekly Summary, issue 92:7, week ending February 14, 1992, pp. 12-48.

- An order made pursuant to Section 249 is effective for a renewable period of 90 days from the time the person concerned is notified. As was also decided in the Mercille case, this period may be renewed more than once. The person concerned will be notified at least 15 days before any hearing before the CVMQ regarding the extension of a freeze order (Section 250).
- If the person to whom an order under Section 249(3) is directed has leased a safety deposit box to the person concerned or has put it at his disposal, he must immediately notify the CVMQ. At the request of the CVMQ, the person will break open the safety deposit box in the presence of a CVMQ agent, draw up an inventory of the contents in triplicate and give one copy to the CVMQ and one copy to the person concerned (Section 251).
- The CVMQ cannot freeze funds or securities in a clearing-house or with a transfer agent, unless the order states otherwise (Section 252).
- If a bank, loan and investment society or trust company is the person to whom is directed an order under Section 249(3), such order only applies to the branches or agencies mentioned therein (Section 253).
- An order made pursuant to Section 249 will also apply to funds, securities or other assets received after the effective date of the order (Section 254).
- Every person directly affected by a freeze order made pursuant to Section 249 may apply to the CVMQ for clarification if in doubt as to the application of the order to particular funds, securities or other assets (Section 255).
- The CVMQ may notify the registry office or the Ministère des Ressources naturelles to register an order made pursuant to Section 239 or 249. An order so registered may be set up against any person whose right is registered subsequently (Section 256).

Guidelines for Contributions

I Measures Available for Use Domestically

A. Description of the available measures to preserve that may lead directly or indirectly to preservation of assets or interests of defrauded investors

- 1. Can you administratively freeze assets located in bank or brokerage accounts without recourse to the Courts?**

In view of the broad language of Section 249(3), such assets may be frozen without recourse to the Courts. However, we draw your attention to Section 253 which provides that specific bank branches must be mentioned in the freeze order.

2. Can you ask for such measures through the judicial channel? In particular, can you obtain an interim or provisional judicial order freezing assets?

The CVMQ cannot ask for such measures through the judicial channels.

3. What other government or public authority in your jurisdiction can either freeze assets administratively or obtain such measure through the judicial channel?

- (a) The "Director" under the Canada Business Corporations Act⁷ (R.S.C., 1985, c. C-44).

Section 241 of the Canada Business Corporations Act ("CBCA") provides in part:

"241. (1) [Application to court re oppression] A complainant may apply to a court for an order under this section.
 (2) [Grounds] If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
 (a) any act or omission of the corporation or any of its affiliates effects a result,
 (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
 (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
 that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of. [...]"

A "complainant", as defined in Section 238 CBCA, includes the Director appointed by Consumer and Corporate Affairs (Canada).

⁷The text of all relevant provisions cited herein may be found in the Annexes : See Annex 1.

One of the court orders which may be obtained by the Director is that of appointing a receiver or receiver-manager (Section 241(3)(b)) of the property of a given corporation. The duties of such a receiver are set out in sections 94 to 101 CBCA and include taking "into his custody and control the property of the corporation in accordance with the court order or instrument under which he is appointed" (Section 101 (b) CBCA). The appointment of a receiver under the CBCA is therefore of a conservatory nature similar to that of a freeze order under the QSA.

It should be noted that the recourse provided by Section 241 CBCA is only applicable to federally incorporated corporations carrying on business in Québec. Furthermore, no equivalent remedy exists under the Québec Companies Act (R.S.Q., c. C-38).

- b) The Attorney General under the Criminal Code (R.S.C., 1985, c. C-46)

We wish to briefly draw your attention to certain recourses which may be instituted by the Attorney General in well-defined circumstances pursuant to Part XII.2⁸ of the Criminal Code ("CrC") entitled "Proceeds of Crime".

"Proceeds of crime" is defined in Section 462.3 CrC as any property, benefit or advantage within or outside Canada, obtained or derived directly or indirectly as a result of an "enterprise crime offence", designated drug offence or conduct that would have constituted such an offence had it occurred in Canada.

⁸See Annex 2.

The same provision defines the term "enterprise crime offences" as consisting of several Criminal Code offences and notably, for our purposes, "fraudulent manipulation of stock exchange transactions" (Section 382 CrC).

Pursuant to Sections 462.32 and 462.33 CrC respectively, the Attorney General may apply for (i) a warrant to search and seize or (ii) a restraint order with respect to property which is classified as "proceeds of crime" and which is subject to a forfeiture order under Part. XII.2 CrC.

4. What alternate measures can you use or ask for that could have a similar impact on the preservation of assets? (e.g. (temporary) bars of activities, management of a company under the close control of an appointed trustee, replacement of a company manager by an appointed trustee, insolvency proceedings).

a) Provisional Administration

Pursuant to Sections 257 to 260⁹, the Minister of Finance may, upon the CVMQ's recommendation, appoint a provisional administrator to administer the property of a person or the affairs of the company in the place of the board of directors in any of the following cases :

- where an investigation is being made in respect of the person;
- where the CVMQ considers that one or more senior executives of the person have committed a malversation, a breach of trust or any other offence;

⁹See Annex 3.

- where the management by the senior executives is being effected in an unacceptable manner, having regard to generally accepted principles, and is of a nature that would tend to depreciate the securities issued by the person;
- where the CVMQ deems it imperative that the clients of a registrant or the holders of securities be protected.

(Section 257)

Subject to the terms of his mandate under the order, the provisional administrator takes possession of the property belonging to the person named in the order or held by him for any other person. (Section 259)

He must file a provisional report with the Minister and the CVMQ setting out his findings and recommendations. (Section 259.1)

b) Cease Trade Order

Section 265 provides as follows :

"The Commission may order a person to cease any activity in respect of a transaction in securities.

The Commission may, furthermore, order any person or category of persons to cease any activity in respect of a transaction in a particular security."

This CVMQ power may therefore result in the preservation of securities of a given corporation.

5. On what basis can the measures be taken?

a) Freeze Order

A freeze order may be issued "in view of or in the course of an investigation" carried out by the CVMQ. (Section 249)

b) Provisional Administration

See the four cases outlined in Section 257 above.

c) Cease Trade Order

A cease trade order is issued at the discretion of the CVMQ, which discretion is exercised in accordance with the public interest (Section 316).

6. What are the effects and consequences of the measures: what (funds, securities, futures contracts...) and whose assets may be frozen? For how long? Can such measures be renewed? What kind of allegations must be made to freeze the assets (e.g. criminal conduct)?

a) Freeze Order

Section 249 provides that "funds, securities or other assets" may be frozen. This order may be issued against a person who is or is about to be investigated by the CVMQ or against any other person who has these funds, securities or assets on deposit, under control or in safekeeping.

As set out above, Section 250 states that a freeze order is effective for a renewable period of 90 days from the time the person concerned is notified. This period may be renewed more than once.

No criminal conduct need be alleged in order to freeze assets under the QSA. Section 249 simply requires that there be an on-going investigation or that such investigation be anticipated.

b) Provisional Administration

The grounds, effects and consequences of this recourse are set out in the answer to question 4 above.

With respect to the duration of this measure, Section 259.2 states that the provisional administration may be terminated by the Minister of Finance if he considers that the financial situation of the person named in the order will not permit payment of the costs associated with said administration or that the administration cannot reasonably be expected to benefit holders of securities or, in the case of a registrant, his clients.

c) Cease Trade Order

A cease trade order is effective from the time the person concerned is notified or becomes aware of it (Section 267) and continues to be in effect until it is lifted at the discretion of the CVMQ. Such an order is normally set aside when the conduct not in accordance with the QSA is corrected by the person concerned.

7. Must there be notice given to the person whose assets have been frozen ? What sort of appeal rights are available ?

a) Freeze Order

Pursuant to Section 318, a person whose assets have been frozen must be given the opportunity to be heard by the CVMQ within 15 days from the freeze order.

With respect to the renewal of such an order, Section 250 provides that the person concerned will be notified at least 15 days before any hearing during which the CVMQ is to consider an extension.

Sections 324 to 330¹⁰ set out the procedure regarding appeals of CVMQ decisions. A person directly interested in a CVMQ decision to freeze assets may appeal therefrom to three judges of the Court of Québec (Section 324). The final appeal judgment may then be appealed to the Québec Court of Appeal with leave of a judge of the latter court (Section 330).

¹⁰See Annex 4.

b) Provisional Administration

Pursuant to Section 258, the Minister of Finance, before appointing a provisional administrator, will give the person concerned an opportunity to assert his rights in writing within seven days from receiving the Minister's notice. However, where it is imperative to do so and upon the recommendation of the CVMQ, the Minister may make the order first, provided that the person concerned is given the opportunity to assert his rights within the same time limit. It should be noted that the Minister's decision to appoint a provisional administrator is not appealable, given that it has been qualified as being administrative in nature¹¹.

c) Cease Trader Order

Section 318 regarding the right to be heard and Sections 324 to 330 regarding appeals from CVMQ decisions apply to this recourse.

8. What uses can be made of assets that have been frozen ?

The QSA does not provide for any particular uses of frozen assets.

However, a person directly affected by a freeze order may ask that the CVMQ review its decision in order to partially lift its order so that the person concerned may use funds to meet certain financial obligations (e.g. general upkeep expenses).

¹¹A.G. (Que.) v. Udeco Inc., [1984] 2 S.C.R. 502.

B. Description of the measures used to return assets to defrauded investors

1. What procedures are available to you, in order to have assets returned to defrauded investors ?

The QSA does not provide for any mechanisms whereby the CVMQ may cause the return of assets to defrauded investors.

The CVMQ may only try to encourage a person who is the object of a freeze order to return such assets to investors on a voluntary basis.

2. Can you bring a judicial action on behalf of defrauded investors ? On what basis ? Can a trustee, receiver or other third party be designated to represent the defrauded investors ? On what basis can defrauded investors bring an action on their own behalf ?

a) Under the QSA

Title VIII of the QSA entitled "Civil Actions"¹² provides for recourses whereby investors may apply to have securities transactions rescinded or the price thereof revised on specific grounds, as well as claim damages against various persons, including a given issuer, promoter or dealer :

- (i) Transactions effected without a prospectus or circular - Sections 214 to 216.

¹²See Annex 5.

- (ii) Transactions effected with documents containing a misrepresentation - Sections 217 to 225.1.
- (iii) Transactions involving the use of Privileged Information - Sections 226 to 233.1. It should be noted that pursuant to Section 233, the CVMQ has an interest to bring an action for recovery with respect to the use of Privileged Information in the same manner as a holder.

Section 234 states that any action for rescission or for revision for the price under Title VIII is prescribed by the lapse of one year from the date of the transaction. Sections 235 and 236 set out prescriptive periods of one or three years with respect to actions for damages under this title.

- b) Under the Civil Code of Québec (S.Q., 1991, chapter 64) and the Civil Code of Procedure (R.S.Q., c. C-25)

We wish to draw your attention to two particular recourses under Québec civil law which may be used by defrauded investors to regain their funds:

- (i) Seizure Before Judgment

Section 733 of the Québec Civil Code of Procedure ("CPC")¹³ allows a plaintiff, upon judicial authorization, to seize the property of a defendant prior to a judgment deciding the latter's liability.

In order to exercise this conservatory measure, a plaintiff must establish that, without this remedy, the recovery of his debt is in

¹³See Annex 6.

jeopardy. It must be noted that the "jeopardy" criterion is an objective one.

Once a judgment is rendered against the defendant, the Court will validate the seizure and order the sale of the property or, for our purposes, the return of the funds to a defrauded investor.

(ii) Annulment of Contract on the Basis of Fraud

An investor who acquired securities pursuant to misrepresentations in a prospectus may attempt to apply for the annulment of his subscription contract on the basis of fraud as provided in Section 1407 of the Québec Civil Code ("CC"). In addition to the cancellation of the contract, he may claim damages or, if he prefers that the contract be maintained, he may apply for a reduction of his obligation - in this case, the amount invested - equivalent to the damages he would be justified in claiming.

c) Under the Canada Business Corporation Act

As discussed above, the Director appointed by Consumer and Corporate Affairs (Canada) may apply for a court order under Section 241 CBCA.

Such an order may also be sought by an investor, in view of the fact that the definition of "complainant" provided in Section 238 CBCA also includes "a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates".

A Section 241 application may be successful in returning assets to defrauded investors, given that pursuant to Section 241(3), the Court may:

- direct a corporation (subject to certain solvency limitations), or any other person, to purchase securities of a security holder (paragraph (f));
- direct a corporation (subject to certain solvency limitations), or any other person, to pay a security holder any part of the moneys paid by him for securities (paragraph (g)); and
- make an order compensating an aggrieved person (paragraph (j)).

d) Under the Criminal Code

As discussed above, upon application of the Attorney General, a forfeiture order regarding the proceeds of crime may be obtained after an accused person has been convicted of an enterprise crime offence (Section 462.37 CrC).

In accordance with the procedure set out in Section 462.42 CrC, an innocent third party - in the case at hand, a defrauded investor - may make a written application for relief from forfeiture within 30 days after such forfeiture is ordered, and ultimately have his property returned.

3. Can you obtain a final judgment by a court that would include an order for return of assets ?

N / A

4. What other means can you use to assist in returning assets to defrauded investors ?

N / A

5. Are assets that have been frozen also available to pay penalties imposed by a securities or futures regulators or by a court ?

N / A

II Measures Available for Use by Foreign Authorities

A. Measures available for use by Foreign Authorities

1. Preservation of assets

a) *Powers to assist*

1. Can you freeze assets administratively on behalf of a foreign authority without recourse to the courts ?

Section 239(1), mentioned above, allows the CVMQ, inter alia, to "order an investigation [...] to repress contraventions to [...] the securities legislation of another legislative authority". (emphasis added)

Hence, this provision permits the CVMQ, "in view of or in the course of an investigation" (Section 249) requested by a foreign jurisdiction pursuant to a violation of said jurisdiction's securities legislation, to order the freezing of funds, securities or other assets in the possession of a person located within the province of Québec.

No specific procedure for requesting such assistance is required by the QSA.

2. **Are you authorized to request such measures through the judicial channel ? Can you obtain a judicial freeze enforcing a foreign order on behalf of a foreign authority ? If so, what procedure should the foreign authority follow in making its request ? For example, can the foreign authority make its request pursuant to a mutual legal assistance law or treaty ? What conditions should be met ?**

N / A

3. **Is there any other government or public entity in your jurisdiction that can either freeze assets administratively or obtain a judicial freeze order on behalf of a foreign securities or futures authority ? What procedure should the foreign authority follow in making its request ? What conditions should be met ?**

Pursuant to information obtained from a foreign securities authority, the Attorney General may apply under the Criminal Code for the same court orders as those described in question 3 of Part I A above.

4. **What other measures can you use or ask for and on what basis, on behalf of a foreign authority that could have a similar impact on the preservation of assets ? How can they be used ? What are their consequences on the assets ?**

- Provisional Administration

Pursuant to a foreign authority's request, the CVMQ may also recommend that the Minister of Finance appoint a provisional administrator. This measure is available following a joint reading of Section 239, cited above, which allows the CVMQ to order an investigation to repress contraventions to the securities legislation of another legislative authority, and Section 257(1), also mentioned earlier, whereby a provisional administrator may be appointed where an investigation is being made of a given person.

It should be noted, however, that in practice more than an on-going investigation will be necessary for the CVMQ to recommend the appointment of a provisional administrator. Indeed, it will need some proof of actual wrong-doing such as that illustrated in Section 257(2), (3) and (4).

We also draw your attention to the last paragraph of section 257 which provides that "in the case of a company incorporated outside Québec, the recommended mandate of the provisional administrator is to administer the property of that company which is situated in Québec".

b) *Direct access by foreign authority*

1. **Whether a foreign authority can have standing in the courts in your jurisdiction in order to request a judicial freeze order enforcing a foreign judgment, order or other decision ?**

Pursuant to Sections 3155 to 3163¹⁴ of the Civil Code of Québec, a foreign civil decision may be recognized and enforced in Québec.

¹⁴See Annex 7.

An application for the recognition and enforcement of a decision rendered outside of Québec is made by way of a motion. Details of the procedure to be followed are set out in Sections 785 and 786¹⁵ of the Code of Civil Procedure.

2. **What are the obstacles that the foreign authority may encounter in seeking judicial enforcement of a foreign judgment, order or other decision (such as, for example, domestic unwillingness to enforce a foreign penal order) ?**

As indicated above, the CCQ and CPC provisions apply to foreign civil decisions. The foreign authority will not be able to have its decision enforced in Québec if the circumstances surrounding this decision fall within one of the categories outlined in Section 3155 CCQ.

3. **What other means are available to a foreign authority that would have a similar impact on the preservation of assets ?**

N / A

4. **What additional assistance in matters relating to securities and futures violations can your organization provide to assist a foreign authority (including regulatory, criminal and judicial authorities) in its efforts to freeze or repatriate assets located in your jurisdiction, including gathering or providing access to non-public information?**

¹⁵See Annex 8.

In the context of the CVMQ's assistance to a foreign jurisdiction, it is interesting to note Section 295.1 which states :

«The Commission may, according to law, make an agreement with a person or with an organization from Québec or elsewhere, with a view to fostering the application of this Act or foreign legislation in matters of securities.»

Such an agreement was entered into on January 7, 1988 between the United States Securities and Exchange Commission, on the one hand, and the Ontario Securities Commission, the CVMQ and the British Columbia Securities Commission, on the other hand. The purpose of this Memorandum of Understanding ("M.O.U.") is to increase cooperation and mutual assistance in securing compliance with and enforcement of the above-mentioned parties respective securities laws. More particularly, assistance is to be provided to facilitate the conduct of investigations, litigation or prosecution in cases where information located within the jurisdiction of one party is needed to determine whether, or prove that, the laws of the other party have been violated. The types of assistance available under the M.O.U. include 1) providing access to information in the official files of one party; 2) taking the evidence of persons and 3) obtaining documents from persons. It should be noted that such assistance may be denied on grounds of public interest.

The M.O.U. sets out the procedure to be followed in requesting assistance thereunder and in executing such requests, as well as the permissible use of the information obtained pursuant thereto.

The contents of requests made under the M.O.U., information gathered in response to such requests and any other matters arising during the operation of the M.O.U. are to be kept confidential by the parties involved. Moreover, at the completion of an investigation, all non-public documents

received by one authority must be returned to the authority having provided them.

Finally, to the extent permitted by the laws and regulations of its own jurisdiction, each party will use reasonable efforts to provide the other party with any information it discovers which gives rise to a suspicion of a violation, or anticipated violation, of the laws or regulations of the other party.

The CVMQ has entered into similar memoranda of understanding with other jurisdictions, namely, France (January 31, 1992), Hungary (March 4, 1992) and Romania (September 28, 1993).

c) *Procedures*

1. **Whether the measures available to the foreign authority depend on the purpose for which they are sought (e.g. : sanctioning violators) ?**

Freeze orders as well as the appointment of a provisional administrator may be granted on specific grounds. We refer you to Sections 249 and 257 discussed above.

2. **Whether the type of decision affects its enforcement, (e.g., does it matter whether the foreign decision is civil, administrative, criminal or disciplinary ?) ?**

The CCQ and CCP provisions regarding the recognition and execution of foreign judgments only apply to civil decisions.

3. **What sort of notice and appeal rights are available to the person whose assets have been frozen ? Can a freeze be put into place without prior notice to the party holding the assets ?**

We refer you to Sections 318 and 324 mentioned above regarding the right of a person whose assets have been frozen to be heard as well as his right to appeal.

2. Repatriation of funds

1. **Whether mechanisms exist for assets to be expatriated for return to foreign investors ?**

No such mechanisms exist under the QSA. Assets may only be returned to foreign investors on a voluntary basis.

2. **If so, what are these mechanisms, which channels and what procedures should be followed (direct request through judiciary channels, through the securities and futures counterpart or through other administrative or public authorities) ?**

N / A

3. **Can foreign investors recover assets lost as a result of violations of foreign securities and futures laws through a private cause of action in your jurisdiction ?**

Foreign investors may attempt to recover their assets through the civil recourses discussed above (e.g. annulment of contract, seizure before judgment). It should be noted that for any civil action instituted in Québec, a non-residing plaintiff must give security for the cost which may be incurred as a result of his suit (Section 65 CPC).

Foreign investors may also obtain the return of their assets pursuant to a Section 241 CBCA application. However, no payment of security for costs is required in this instance (Section 242(3) CBCA).

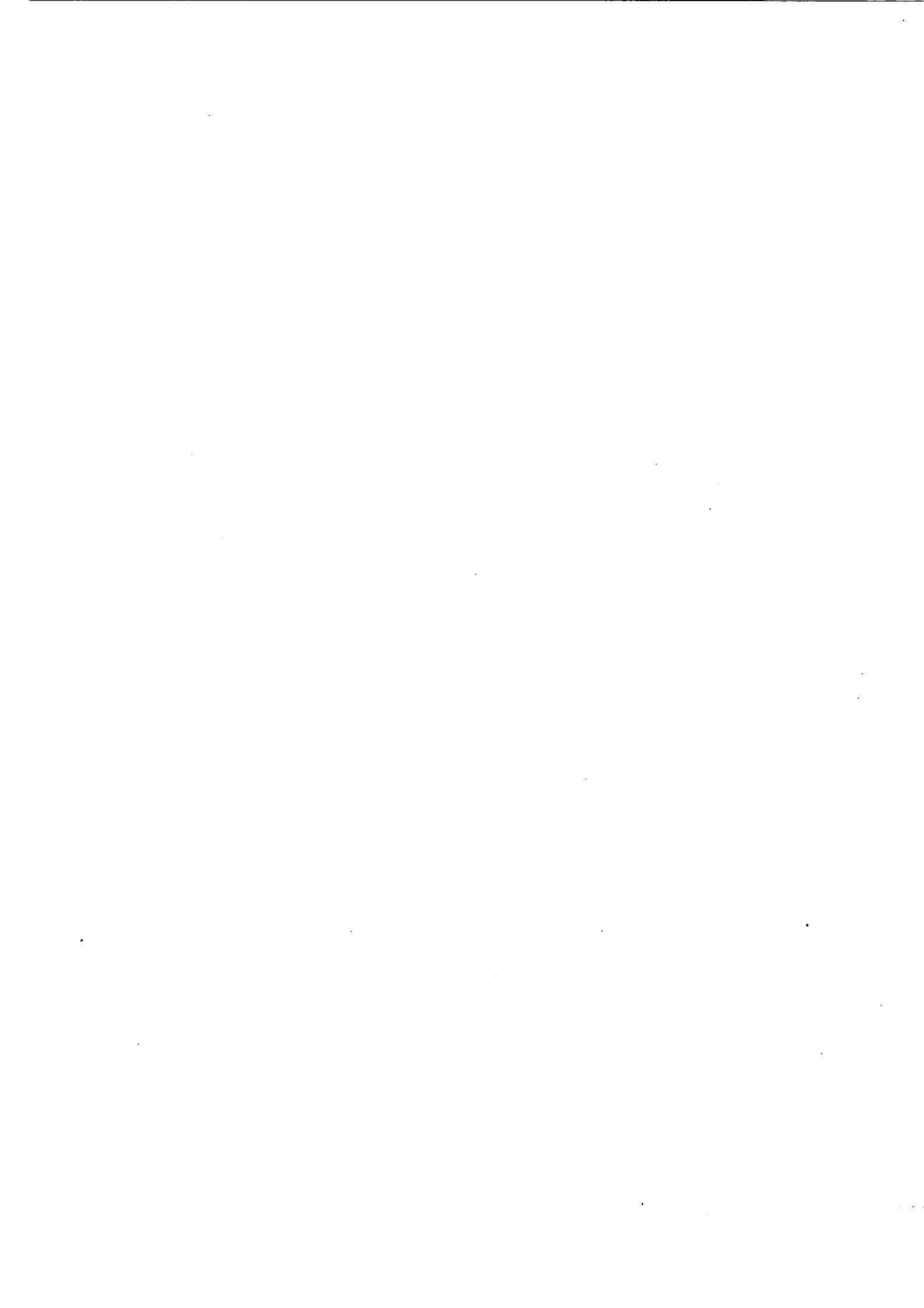
Finally, said investors may attempt to recover their assets through a written application for relief from forfeiture as provided under the Criminal Code.

B. Experience of delegations in the preservation and return of assets located in foreign jurisdictions

The CVMQ has never sought to obtain the freezing of assets in a foreign jurisdiction or the repatriation of assets located abroad for return to defrauded investors.



ANNEX 1



PARTIE XX
RECOURS, INFRACTIONS ET
PEINES

238. [Définitions] Les définitions qui suivent s'appliquent à la présente partie.
[-action- "action"] -action- Action intentée en vertu de la présente loi.

[-plaignant- "complainant"] -plaignant-
a) Le détenteur inscrit ou le véritable propriétaire, ancien ou actuel, de valeurs mobilières d'une société ou de personnes morales du même groupe;
b) tout administrateur ou dirigeant, ancien ou actuel, d'une société ou de personnes morales du même groupe;
c) le directeur;
d) toute autre personne qui, d'après un tribunal, a qualité pour présenter les demandes visées à la présente partie.

174-75-76, ch. 33, art. 231; 1978-79, ch. 9, art. 1.

241. (1) [Demande en cas d'abus] Tout plaignant peut demander au tribunal de rendre les ordonnances visées au présent article.

(2) [Motifs] Le tribunal, saisi d'une demande visée au paragraphe (1), peut, par ordonnance, redresser la situation provoquée par la société ou l'une des personnes morales de son groupe qui, à son avis, abuse des droits des détenteurs de valeurs mobilières, créanciers, administrateurs ou dirigeants, ou porte atteinte à leurs intérêts ou n'en tient pas compte:

- a) soit en raison de son comportement;
- b) soit par la façon dont elle conduit ses affaires tant commerciales qu'internes;
- c) soit par la façon dont ses administrateurs exercent ou ont exercé leurs pouvoirs.

(3) [Pouvoirs du tribunal] Le tribunal peut, en donnant suite aux demandes visées au présent article, rendre les ordonnances provisoires ou définitives qu'il estime pertinentes pour, notamment:

- a) empêcher le comportement contesté;
- b) nommer un sequestre ou un sequestre-gerant;
- c) régler les affaires internes de la société en modifiant les statuts ou les règlements administratifs ou en établissant ou en modifiant une convention unanime des actionnaires;
- d) prescrire l'émission ou l'échange de valeurs mobilières;
- e) faire des nominations au conseil d'administration, soit pour remplacer tous les administrateurs en fonctions ou certains d'entre eux, soit pour en augmenter le nombre;
- f) enjoindre à la société, sous réserve du paragraphe (6), ou à toute autre personne, d'acheter des valeurs mobilières d'un détenteur;
- g) enjoindre à la société, sous réserve du paragraphe (6), ou à toute autre personne, de

PART XX
REMEDIES, OFFENCES AND
PUNISHMENT

238. [Definitions] In this Part,
["action" -action-] "action" means an action under this Act;
["complainant" -plaignant-] "complainant" means

- (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
- (b) a director or an officer or a former director or officer of a corporation or any of its affiliates,
- (c) the Director, or
- (d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

241. (1) [Application to court re oppression] A complainant may apply to a court for an order under this section.

(2) [Grounds] If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates

- (a) any act or omission of the corporation or any of its affiliates effects a result,
- (b) the business or affairs of the corporation or any of its affiliates are or have been carried out or conducted in a manner, or
- (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

(3) [Powers of court] In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

- (a) an order restraining the conduct complained of;
- (b) an order appointing a receiver or receiver-manager;
- (c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;
- (d) an order directing an issue or exchange of securities;
- (e) an order appointing directors in place of or in addition to all or any of the directors then in office;
- (f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;
- (g) an order directing a corporation, subject to subsection (6), or any other person, to pay to a security holder any part of the moneys paid by him for securities;

rembourser aux détenteurs une partie des fonds qu'ils ont versés pour leurs valeurs mobilières;

h) modifier les clauses d'une opération ou d'un contrat auxquels la société est partie ou de les résilier, avec indemnisation de la société ou des autres parties;

i) enjoindre à la société de lui fournir, ainsi qu'à tout intéressé, dans le délai prescrit, ses états financiers en la forme exigée à l'article 155, ou de rendre compte en telle autre forme qu'il peut fixer;

j) indemniser les personnes qui ont subi un préjudice;

k) prescrire la rectification des registres ou autres livres de la société, conformément à l'article 243;

l) prononcer la liquidation et la dissolution de la société;

m) prescrire la tenue d'une enquête conformément à la partie XIX;

n) soumettre en justice toute question litigieuse.

(4) [Duty of directors] Dans les cas où l'ordonnance rendue en vertu du présent article ordonne des modifications aux statuts ou aux règlements administratifs de la société:

a) les administrateurs doivent se conformer sans délai au paragraphe 191(4);

b) toute autre modification des statuts ou des règlements administratifs ne peut se faire qu'avec l'autorisation du tribunal, sous réserve de toute autre décision judiciaire.

(5) [Exclusion] Les actionnaires ne peuvent, à l'occasion d'une modification des statuts faite conformément au présent article, faire valoir leur dissidence en vertu de l'article 190.

(6) [Limitation] La société ne peut effectuer aucun paiement à un actionnaire en vertu des alinéas (3)f) ou g) s'il existe des motifs raisonnables de croire que:

a) ou bien elle ne peut, ou ne pourrait de ce fait, acquitter son passif à échéance;

b) ou bien la valeur de réalisation de son actif serait, de ce fait, inférieure à son passif.

(7) [Choix] Le plaignant, agissant en vertu du présent article, peut, à son choix, demander au tribunal de rendre l'ordonnance prévue à l'article 214.

1974-75-76, ch. 33, art. 234; 1978-79, ch. 9, art. 1 et 74.

(h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 155 or an accounting in such other form as the court may determine;

(j) an order compensating an aggrieved person;

(k) an order directing rectification of the registers or other records of a corporation under section 243;

(l) an order liquidating and dissolving the corporation;

(m) an order directing an investigation under Part XIX to be made; and

(n) an order requiring the trial of any issue.

(4) [Duty of directors] If an order made under this section directs amendment of the articles or by-laws of a corporation,

(a) the directors shall forthwith comply with subsection 191(4); and

(b) no other amendment to the articles or by-laws shall be made without the consent of the court, until a court otherwise orders.

(5) [Exclusion] A shareholder is not entitled to dissent under section 190 if an amendment to the articles is effected under this section.

(6) [Limitation] A corporation shall not make a payment to a shareholder under paragraph (3)f) or (g) if there are reasonable grounds for believing that

(a) the corporation is or would after that payment be unable to pay its liabilities as they become due; or

(b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities.

(7) [Alternative order] An applicant under this section may apply in the alternative for an order under section 214.

PARTIE IX
SÉQUESTRES ET
SÉQUESTRES-GÉRANTS

94. [Fonctions du séquestre] Sous réserve des droits des créanciers garantis, le séquestre des biens d'une société peut en recevoir les revenus, en acquitter les dettes, réaliser les sûretés de ceux pour le compte desquels il est nommé et, dans les limites permises par le tribunal, en exploiter l'entreprise.

1974-75-76, ch. 33, art. 89; 1978-79, ch. 9, art. 1.

95. [Fonctions du séquestre-gérant] Le séquestre peut, s'il a également été nommé séquestre-gérant, exploiter l'entreprise de la société afin de protéger les sûretés de ceux pour le compte desquels il est nommé.

1974-75-76, ch. 33, art. 90; 1978-79, ch. 9, art. 1.

96. [Suspension des pouvoirs des administrateurs] Les administrateurs ne peuvent exercer les pouvoirs conférés au séquestre-gérant nommé par le tribunal ou en vertu d'un acte.

1974-75-76, ch. 33, art. 91; 1978-79, ch. 9, art. 1.

97. [Obligation] Le séquestre ou le séquestre-gérant nommé par le tribunal doit agir en conformité avec les directives de celui-ci.

1974-75-76, ch. 33, art. 92; 1978-79, ch. 9, art. 1.

98. [Obligations prévues dans un acte] Le séquestre ou le séquestre-gérant nommé en vertu d'un acte doit agir en se conformant à cet acte et aux directives que lui donne le tribunal en vertu de l'article 100.

1974-75-76, ch. 33, art. 93; 1978-79, ch. 9, art. 1.

99. [Obligation de diligence] Le séquestre ou le séquestre-gérant d'une société, nommé en vertu d'un acte, doit:

PART IX
RECEIVERS AND
RECEIVER-MANAGERS

94. [Functions of receiver] A receiver of any property of a corporation may, subject to the rights of secured creditors, receive the income from the property and pay the liabilities connected with the property and realize the security interest of those on behalf of whom he is appointed, but, except to the extent permitted by a court, he may not carry on the business of the corporation.

95. [Functions of receiver-manager] A receiver of a corporation may, if he is also appointed receiver-manager of the corporation, carry on any business of the corporation to protect the security interest of those on behalf of whom he is appointed.

96. [Directors' powers cease] If a receiver-manager is appointed by a court or under an instrument, the powers of the directors of the corporation that the receiver-manager is authorized to exercise may not be exercised by the directors until the receiver-manager is discharged.

97. [Duty to act] A receiver or receiver-manager appointed by a court shall act in accordance with the directions of the court.

98. [Duty under instrument] A receiver or receiver-manager appointed under an instrument shall act in accordance with that instrument and any direction of a court made under section 100.

99. [Duty of care] A receiver or receiver-manager of a corporation appointed under an instrument shall

- a) agir en toute honnêteté et bonne foi;
- b) gérer conformément aux pratiques commerciales raisonnables les biens de la société qui se trouvent en sa possession ou sous son contrôle.

1974-75-76, ch. 33, art. 94; 1978-79, ch. 9, art. 1 et 25.

100. [Directives du tribunal] À la demande du séquestre ou du séquestre-gérant, conventionnel ou judiciaire, ou de tout intéressé, le tribunal peut, par ordonnance, prendre les mesures qu'il estime pertinentes et notamment:

- a) nommer, remplacer ou décharger de leurs fonctions le séquestre ou le séquestre-gérant et approuver leurs comptes;
- b) dispenser de donner avis ou préciser les avis à donner;
- c) fixer la rémunération du séquestre ou du séquestre-gérant;
- d) enjoindre au séquestre, au séquestre-gérant ainsi qu'aux personnes qui les ont nommés ou pour le compte desquelles ils l'ont été, de réparer leurs fautes ou les en dispenser, notamment en matière de garde des biens ou de gestion de la société, selon les modalités qu'il estime pertinentes, et d'entériner les actes du séquestre ou séquestre-gérant;
- e) donner des directives concernant les fonctions du séquestre ou du séquestre-gérant.

1974-75-76, ch. 33, art. 95; 1978-79, ch. 9, art. 1.

101. [Obligations du séquestre et du séquestre-gérant] Le séquestre ou le séquestre-gérant doit:

- a) aviser immédiatement le directeur tant de sa nomination que de la fin de son mandat;
- b) prendre sous sa garde et sous son contrôle les biens de la société conformément à l'ordonnance ou à l'acte de nomination;
- c) avoir, à son nom et en cette qualité, un compte bancaire pour tous les fonds de la société assujettis à son contrôle;
- d) tenir une comptabilité détaillée de toutes les opérations qu'il effectue en cette qualité;
- e) tenir une comptabilité de sa gestion et permettre, pendant les heures normales d'ouverture, aux administrateurs de la consulter;
- f) dresser, au moins une fois tous les six mois à compter de sa nomination, les états financiers concernant sa gestion et, si possible, en la forme que requiert l'article 155;
- g) après l'exécution de son mandat, rendre compte de sa gestion en la forme mentionnée à l'alinéa f).

- (a) act honestly and in good faith; and
- (b) deal with any property of the corporation in his possession or control in a commercially reasonable manner.

100. [Directions given by court] On an application by a receiver or receiver-manager, whether appointed by a court or under an instrument, or on an application by any interested person, a court may make any order it thinks fit including, without limiting the generality of the foregoing,

- (a) an order appointing, replacing or discharging a receiver or receiver-manager and approving his accounts;
- (b) an order determining the notice to be given to any person or dispensing with notice to any person;
- (c) an order fixing the remuneration of the receiver or receiver-manager;
- (d) an order requiring the receiver or receiver-manager, or a person by or on behalf of whom he is appointed, to make good any default in connection with the receiver's or receiver-manager's custody or management of the property and business of the corporation, or to relieve any such person from any default on such terms as the court thinks fit, and to confirm any act of the receiver or receiver-manager; and
- (e) an order giving directions on any matter relating to the duties of the receiver or receiver-manager.

101. [Duties of receiver and receiver-manager] A receiver or receiver-manager shall

- (a) immediately notify the Director of his appointment and discharge;
- (b) take into his custody and control the property of the corporation in accordance with the court order or instrument under which he is appointed;
- (c) open and maintain a bank account in his name as receiver or receiver-manager of the corporation for the moneys of the corporation coming under his control;
- (d) keep detailed accounts of all transactions carried out by him as receiver or receiver-manager;
- (e) keep accounts of his administration that shall be available during usual business hours for inspection by the directors of the corporation;
- (f) prepare at least once in every six month period after the date of his appointment financial statements of his administration as far as is practicable in the form required by section 155; and

- (g) on completion of his duties, render a final account of his administration in the form adopted for interim accounts under paragraph (f).

ANNEX 2



382. [Fraudulent manipulation of stock exchange transactions] Every one who, through the facility of a stock exchange, curb market or other market, with intent to create a false or misleading appearance of active public trading in a security or with intent to create a false or misleading appearance with respect to the market price of a security,

- (a) effects a transaction in the security that involves no change in the beneficial ownership thereof.
- (b) enters an order for the purchase of the security, knowing that an order of substantially the same size at substantially the same time and at substantially the same price for the sale of the security has been or will be entered by or for the same or different persons, or

(c) enters an order for the sale of the security, knowing that an order of substantially the same size at substantially the same time and at substantially the same price for the purchase of the security has been or will be entered by or for the same or different persons.

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

382. [Manipulations frauduleuses d'opérations boursières] Est coupable d'un acte criminel et passible d'un emprisonnement maximal de cinq ans quiconque, par l'intermédiaire des facilités d'une bourse de valeurs, d'un curb market ou d'une autre bourse, avec l'intention de créer une apparence fausse ou trompeuse de négociation publique active d'une valeur mobilière, ou avec l'intention de créer une apparence fausse ou trompeuse quant au prix courant d'une valeur mobilière, selon le cas:

- a) fait une opération sur cette valeur qui n'entraîne aucun changement dans la propriété bénéficiaire de cette valeur;
- b) passe un ordre pour l'achat de la valeur, sachant qu'un ordre sensiblement de même importance, à une époque sensiblement la même et à un prix sensiblement semblable pour la

vente de la valeur, a été ou sera passé par ou pour les mêmes personnes ou des personnes différentes;

c) passe un ordre pour la vente de la valeur, sachant qu'un ordre sensiblement de même importance, à une époque sensiblement la même et à un prix sensiblement semblable pour l'achat de la valeur, a été ou sera passé par ou pour les mêmes personnes ou des personnes différentes.

**PART XII.2
PROCEEDS OF CRIME**

Interpretation

462.3 [Definitions] In this Part,

["designated drug offence" *-infraction désignée...*] "designated drug offence" means

(a) an offence against section 39, 44.2, 44.3, 48, 50.2 or 50.3 of the *Food and Drugs Act*,

(b) an offence against section 4, 5, 6, 19.1 or 19.2 of the *Narcotic Control Act*, or

(c) a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a) or (b);

["enterprise crime offence" *-infraction de...*] "enterprise crime offence" means

(a) an offence against any of the following provisions, namely,

(i) section 119 (bribery of judicial officers, etc.),

(ii) section 120 (bribery of officers),

(iii) section 121 (frauds on the government),

(iv) section 122 (breach of trust by public officer),

(v) section 163 (corrupting morals),

(v.1) section 163.1 (child pornography),

**PARTIE XII.2
PRODUITS DE LA CRIMINALITÉ**

Définitions

462.3 [Définitions] Les définitions qui suivent s'appliquent à la présente partie.

["infraction de criminalité organisée" *-entreprise...*] "infraction de criminalité organisée" signifie

a) Une infraction prévue par l'une des dispositions suivantes:

(i) article 119 (corruption de fonctionnaires judiciaires, etc.),

(ii) article 120 (corruption de fonctionnaires),

(iii) article 121 (fraudes envers le gouvernement),

(iv) article 122 (abus de confiance par un fonctionnaire public),

(v) article 163 (corruption des mœurs),

(v.1) article 163.1 (pornographie juvénile),

(vi) paragraphe 201(1) (tenancier d'une maison de jeu ou de pari),

(vii) article 202 (cageurs, bookmaking, etc.),

(viii) article 210 (tenue d'une maison de jeu),

(ix) article 212 (proxénétisme),

(x) article 235 (meurtre),

(xi) article 234 (vol).

(vi) subsection 201(1) (keeping gaming or betting house),

(vii) section 202 (betting, pool-selling, book-making, etc.),

(viii) section 210 (keeping common bawdy-house),

(ix) section 212 (procuring),

(x) section 235 (punishment for murder),

(xi) section 334 (punishment for theft),

(xii) section 344 (punishment for robbery),

(xiii) section 346 (extortion),

(xiii.1) section 347 (criminal interest rate),

(xiv) section 367 (punishment for forgery),

(xv) section 368 (uttering forged document),

(xvi) section 380 (fraud),

(xvii) section 382 (fraudulent manipulation of stock exchange transactions),

(xviii) section 426 (secret commissions),

(xix) section 433 (arson),

(xx) section 449 (making counterfeit money),

(xxi) section 450 (possession, etc., of counterfeit money),

(xxii) section 452 (uttering, etc., counterfeit money), or

(xxiii) section 462.31 (laundering proceeds of crime),

(b) an offence against section 354 (possession of property obtained by crime, committed in relation to any property, thing or proceeds obtained or derived directly or indirectly as a result of

(i) the commission in Canada of an offence referred to in paragraph (a) or a designated drug offence, or

(ii) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence referred to in paragraph (a) or a designated drug offence,

(b.1) an offence against section 126.1 or 126.2 or subsection 233(1) or 240(1) of the *Excise Act* or section 153, 159, 163.1 or 163.2 of the *Customs Act*, or

(c) a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a), (b) or (b.1);

["judge" - *juge* -] "judge" means a judge as defined in section 552 or a judge of a superior court of criminal jurisdiction;

["proceeds of crime" - *produits...* -] "proceeds of crime" means any property, benefit or advantage, within or outside Canada, obtained or derived directly or indirectly as a result of

(xii) article 344 (vol qualifié),

(xiii) article 346 (extorsion),

(xiii.1) article 347 (taux d'intérêt criminel),

(xiv) article 367 (faux),

(xv) article 368 (emploi d'un document contrefait),

(xvi) article 380 (fraude envers le public),

(xvii) article 382 (manipulations frauduleuses d'opérations boursières),

(xviii) article 426 (commissions secrètes),

(xix) article 433 (crime d'incendie),

(xx) article 449 (fabrication de monnaie contrefaite),

(xxi) article 450 (possession, etc. de monnaie contrefaite),

(xxii) article 452 (mise en circulation de monnaie contrefaite),

(xxiii) article 462.31 (recyclage des produits de la criminalité);

b) l'infraction visée à l'article 354 (avoir en sa possession des biens criminellement obtenus) lorsqu'elle est commise à l'égard d'un bien, d'une chose ou de leur produit qui ont été obtenus ou qui proviennent directement ou indirectement:

(i) soit de la perpétration au Canada d'une infraction mentionnée à l'alinéa a) ou d'une infraction désignée en matière de drogue,

(ii) soit d'un acte ou d'une omission survenu à l'extérieur du Canada qui, au Canada, aurait constitué une infraction visée à l'alinéa a) ou une infraction désignée en matière de drogue;

b.1) une infraction visée aux articles 126.1 ou 126.2 ou aux paragraphes 233(1) ou 240(1) de la *Loi sur l'accise* ou aux articles 153, 159, 163.1 ou 163.2 de la *Loi sur les douanes*;

c) un complot ou une tentative de commettre une infraction visée aux alinéas a), b) ou b.1) ainsi qu'une complicité après le fait à l'égard d'une telle infraction ou le fait de conseiller à une personne d'en commettre une.

[«infraction désignée en matière de drogue» - *designated drug...* -] «infraction désignée en matière de drogue»

a) Une infraction prévue par l'un des articles 39, 44.2, 44.3, 47, 50.2 ou 50.3 de la *Loi sur les aliments et drogues*;

b) une infraction prévue par l'un des articles 4, 5, 6, 19.1 ou 19.2 de la *Loi sur les stupéfiants*;

c) un complot ou une tentative de commettre une infraction visée aux alinéas a) et b) ainsi qu'une complicité après le fait à l'égard d'une telle infraction ou le fait de conseiller à une personne d'en commettre une.

- (a) the commission in Canada of an enterprise crime offence or a designated drug offence; or
- (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an enterprise crime offence or a designated drug offence;
- (c) repealed.

[Juge- "judge"] - Juge au sens de l'article 352 ou un juge d'une cour supérieure de justice criminelle.

[produits de la criminalité- "products of criminality"] - Bien, le produit ou l'avantage qui est obtenu ou qui est produit au Canada ou à l'extérieur du Canada, directement ou indirectement:

- a) soit de la perpétration d'une infraction de criminalité organisée ou d'une infraction désignée en matière de drogue;
- b) soit d'un acte ou d'une omission qui, au Canada, aurait constitué une infraction de criminalité organisée ou une infraction désignée en matière de drogue;
- c) abrogé.

L.R., ch. 42 (4^e suppl.), art. 2; 1993, ch. 25, art. 95, ch. 37, art. 32, ch. 46, art. 5; 1994, ch. 4

Offence

462.31 (1) [Laundering proceeds of crime] Every one commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds and knowing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of

- (a) the commission in Canada of an enterprise crime offence or a designated drug offence; or
- (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an enterprise crime offence or a designated drug offence.

2. [Punishment] Every one who commits an offence under subsection (1)

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or
- (b) is guilty of an offence punishable on summary conviction.

L.R., ch. 42 (4^e suppl.), art. 2.

Search, Seizure and Detention of Proceeds of Crime

462.32 (1) [Special search warrant] Subject to subsection (3), where a judge, on application of the Attorney General, is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in any building, receptacle or place any property in respect of which an order of forfeiture may be made under subsection 462.37(1) or 462.38(2), the judge may issue a warrant authorizing a person named therein or a peace officer to search the building.

Infraction

462.31 (1) [Recyclage des produits de criminalité] Est coupable d'une infraction — de quelque façon que ce soit — de recevoir, envoyer, faire à une personne ou à un lieu, transporter, transmettre, altérer, modifier ou aliéner des biens ou des produits — ou en transfère la possession — avec l'intention de les cacher ou de les convertir et sachant qu'ils ont été obtenus ou produits en totalité ou en partie, directement ou indirectement:

- a) soit de la perpétration, au Canada, d'une infraction de criminalité organisée ou d'une infraction désignée en matière de drogue;
- b) soit d'un acte ou d'une omission qui, à l'extérieur du Canada, a constitué une infraction de criminalité organisée ou une infraction désignée en matière de drogue.

2. [Peine] Quiconque commet l'infraction visée au paragraphe (1) est coupable:

- a) soit d'un acte criminel et est passible d'un emprisonnement maximal de dix ans;
- b) soit d'une infraction punissable par procédure sommaire.

Perquisitions, fouilles et saisies et détention

462.32 (1) [Mandat spécial] Sous réserve du paragraphe (3), si un juge, sur demande du procureur général, est convaincu par des renseignements sur serment en vertu de la formule 1, qu'il existe des motifs raisonnables de croire que des biens ou des produits sont cachés ou convertis en vertu du paragraphe 462.37(1) ou 462.38(2) dans un bâtiment, contenant ou recevant, il peut émettre un mandat autorisant la perquisition.

receptacle or place for that property and to seize that property and any other property in respect of which that person or peace officer believes, on reasonable grounds, that an order of forfeiture may be made under that subsection.

(2) [Procedure] An application for a warrant under subsection (1) may be made *ex parte* and shall be made in writing.

(3) [Execution of warrant in other territorial jurisdictions] Subsections 487(2) to (4) and section 488 apply, with such modifications as the circumstances require, to a warrant issued under this section.

(4) [Detention and record of property seized] Every person who executes a warrant issued by a judge under this section shall

(a) detain or cause to be detained the property seized, taking reasonable care to ensure that the property is preserved so that it may be dealt with in accordance with the law;

(b) as soon as practicable after the execution of the warrant but within a period not exceeding seven days thereafter, prepare a report in Form 5.3, identifying the property seized and the location where the property is being detained, and cause the report to be filed with the clerk of the court; and

(c) cause a copy of the report to be provided, on request, to the person from whom the property was seized and to any other person who, in the opinion of the judge, appears to have a valid interest in the property.

(5) [Notice] Before issuing a warrant under this section in relation to any property, a judge may require notice to be given to and may hear any person who, in the opinion of the judge, appears to have a valid interest in the property unless the judge is of the opinion that giving such notice before the issuance of the warrant would result in the disappearance, dissipation or reduction in value of the property or otherwise affect the property so that all or a part thereof could not be seized pursuant to the warrant.

(6) [Undertakings by Attorney General] Before issuing a warrant under this section, a judge shall require the Attorney General to give such undertakings as the judge considers appropriate with respect to the payment of damages or costs, or both, in relation to the issuance and execution of the warrant.

L.R., ch. 42 (4^e suppl.), art. 2.

462.33 (1) [Application for restraint order] The Attorney General may make an application in accordance with subsection (2) for a restraint order under subsection (3) in respect of any property.

est nommée ou un agent de la paix à perquisitionner dans ce bâtiment, contenant ou lieu et à saisir les biens en question ainsi que tout autre bien dont cette personne ou l'agent de la paix a des motifs raisonnables de croire qu'il pourrait faire l'objet d'une telle ordonnance.

(2) [Procédure] La demande visée au paragraphe (1) est à présenter par écrit mais peut être faite *ex parte*.

(3) [Exécution dans une autre circonscription territoriale] Les paragraphes 487(2) à (4) et l'article 488 s'appliquent aux mandats décernés en vertu du présent article, compte tenu des adaptations de circonstance.

(4) [Rapport d'exécution] La personne qui exécute un mandat décerné en vertu du présent article est tenue de:

a) détenir — ou faire détenir — les biens saisis en prenant les précautions normales pour garantir leur préservation jusqu'à ce qu'il ait été statué à leur égard conformément à la loi;

b) dans les meilleurs délais après l'exécution du mandat mais au plus tard le septième jour qui suit celle-ci, faire un rapport, selon la formule 5.3, comportant la désignation des biens saisis et indiquant le lieu où ils se trouvent et le faire déposer auprès du greffier du tribunal;

c) faire remettre, sur demande, un exemplaire du rapport au saisi et à toute autre personne qui, de l'avis du juge, semble avoir un droit sur les biens saisis.

(5) [Avis] Avant de décerner un mandat sous le régime du présent article, le juge peut exiger qu'en soient avisées les personnes qui, à son avis, semblent avoir un droit sur les biens visés; il peut aussi les entendre. Le présent paragraphe ne s'applique toutefois pas si le juge est d'avis que le fait de donner cet avis risquerait d'occasionner la disparition des biens visés, une diminution de leur valeur ou leur dissipation de telle façon qu'il serait impossible de les saisir ou d'en saisir une partie.

(6) [Engagements du procureur général] Avant de décerner un mandat sous le régime du présent article, le juge exige du procureur général qu'il prenne les engagements que le juge estime indiqués à l'égard du paiement des dommages et des frais que pourrait entraîner le mandat.

462.33 (1) [Demande d'ordonnance de blocage] Le procureur général peut, sous le régime du présent article, demander une ordonnance de blocage de certains biens.

(Art. 462.33)

Code criminel

(2) [Procédure] An application made under subsection (1) for a restraint order under subsection (3) in respect of any property may be made *ex parte* and shall be made in writing to a judge and be accompanied by an affidavit sworn on the information and belief of the Attorney General or any other person deposing to the following matters, namely,

- (a) the offence or matter under investigation;
- (b) the person who is believed to be in possession of the property;
- (c) the grounds for the belief that an order of forfeiture may be made under subsection 462.37(1) or 462.38(2) in respect of the property; and
- (d) a description of the property.

(3) [Restraint order] Where an application for a restraint order is made to a judge under subsection (1), the judge may, if satisfied that there are reasonable grounds to believe that there exists any property in respect of which an order of forfeiture may be made under subsection 462.37(1) or 462.38(2), make an order

(a) prohibiting any person from disposing of, or otherwise dealing with any interest in, the property specified in the order otherwise than in such manner as may be specified in the order; and

(b) at the request of the Attorney General, where the judge is of the opinion that the circumstances so require,

(i) appointing a person to take control of and to manage or otherwise deal with all or part of that property in accordance with the directions of the judge, which power to manage or otherwise deal with all or part of that property includes, in the case of perishable or rapidly depreciating property, the power to make an interlocutory sale of that property, and

(ii) requiring any person having possession of that property to give possession of the property to the person appointed under subparagraph (i).

(3.1) [Appointment of Minister of Supply and Services] Where the Attorney General of Canada so requests, a judge appointing a person under subparagraph 462.33(3)(b)(i) shall appoint the Minister of Supply and Services.

(4) [Idem] An order made by a judge under subsection (3) may be subject to such reasonable conditions as the judge thinks fit.

(5) [Notice] Before making an order under subsection (3) in relation to any property, a judge may require notice to be given to and may hear any person who, in the opinion of the judge, appears to have a valid interest in the property

(2) [Procédure] La demande d'ordonnance est à présenter à un juge par écrit mais peut être faite *ex parte*; elle est accompagnée de l'affidavit du procureur général ou de toute autre personne comportant les éléments suivants:

- a) désignation de l'infraction ou de l'objet sur lesquels porte l'enquête;
- b) désignation de la personne que l'on croit en possession du bien visé;
- c) exposé des motifs de croire qu'une ordonnance de confiscation pourrait être rendue à l'égard du bien visé en vertu du paragraphe 462.37(1) ou 462.38(2);
- d) description du bien.

(3) [Ordonnance de blocage] Le juge saisi de la demande peut rendre une ordonnance de blocage s'il est convaincu qu'il existe des motifs raisonnables de croire qu'existent des biens qui pourraient faire l'objet d'une ordonnance en vertu du paragraphe 462.37(1) ou 462.38(2); l'ordonnance prévoit:

a) qu'il est interdit à toute personne de se départir des biens mentionnés dans l'ordonnance ou d'effectuer des opérations sur les droits qu'elle détient sur ceux-ci, sauf dans la mesure où l'ordonnance le prévoit;

b) dans les cas où le juge estime que les circonstances le justifient et si le procureur général le demande:

(i) la nomination d'un administrateur de ces biens et l'ordre à cet administrateur de les prendre en charge — en totalité ou en partie —, de les administrer ou d'effectuer toute autre opération à leur égard conformément aux directives du juge avec le pouvoir de vendre en cours d'instance ceux qui sont périssables ou qui se déprécient rapidement.

(ii) l'ordre à toute personne qui a la possession d'un bien à l'égard duquel un administrateur est nommé de le lui remettre.

(3.1) [Ministre des Approvisionnement et Services] Le juge nommé, à la demande du procureur général du Canada, le ministre des Approvisionnement et Services a titre d'administrateur visé par le sous-alinéa 462.33(3)(b)(i).

(4) [Idem] L'ordonnance de blocage peut être assortie des conditions raisonnables que le juge estime indiquées.

(5) [Avis] Avant de rendre une ordonnance de blocage, le juge peut exiger qu'en soient avisées les personnes qui, à son avis, semblent avoir un droit sur les biens visés; il peut aussi les entendre. Le présent paragraphe ne s'applique toutefois pas

22-91.01.01
262.6

Criminal Code

(Art. 462.34)

unless the judge is of the opinion that giving such notice before making the order would result in the disappearance, dissipation or reduction in value of the property or otherwise affect the property so that all or a part thereof could not be subject to an order of forfeiture under subsection 462.37(1) or 462.38(2).

(6) [Order in writing] An order made under subsection (3) shall be made in writing.

(7) [Undertakings by Attorney General] Before making an order under subsection (3), a judge shall require the Attorney General to give such undertakings as the judge considers appropriate with respect to the payment of damages or costs, or both, in relation to the making and execution of the order.

(8) [Service of order] A copy of an order made by a judge under subsection (3) shall be served on the person to whom the order is addressed in such manner as the judge directs or as may be prescribed by rules of court.

(9) [Registration of order] A copy of an order made under subsection (3) shall be registered against any property in accordance with the laws of the province in which the property is situated.

(10) [Continues in force] An order made under subsection (3) remains in effect until

(a) it is revoked or varied under subsection 462.34(4) or revoked under paragraph 462.43(a);

(b) it ceases to be in force under section 462.35; or

(c) an order of forfeiture or restoration of the property is made under subsection 462.37(1), 462.38(2) or 462.41(3) or any other provision of this or any other Act of Parliament.

(11) [Offence] Any person on whom an order made under subsection (3) is served in accordance with this section and who, while the order is in force, acts in contravention of or fails to comply with the order is guilty of an indictable offence or an offence punishable on summary conviction.

L.R., ch. 42 (4th suppl.), art. 2; 1963, ch. 37, art. 21.

462.34 (1) [Application for review of special warrants and restraint orders] Any person who has an interest in property that was seized under a warrant issued pursuant to section 462.32 or in respect of which a restraint order was made under subsection 462.33(3) may, at any time, apply to a judge

(a) for an order under subsection (4); or

(b) for permission to examine the property

si le juge estime que le fait de donner cet avis risquerait d'occasionner la disparition des biens visés, une diminution de leur valeur ou leur dissipation de telle façon qu'il serait impossible de rendre à leur égard une ordonnance de confiscation en vertu du paragraphe 462.37(1) ou 462.38(2).

(6) [Ordonnance écrite] L'ordonnance de blocage est rendue par écrit.

(7) [Engagements du procureur général] Avant de rendre une ordonnance de blocage, le juge exige du procureur général qu'il prenne les engagements que le juge estime indiqués à l'égard du paiement des dommages et des frais que pourraient entraîner l'ordonnance.

(8) [Signification] Une copie de l'ordonnance de blocage est signifiée à la personne qu'elle vise; la signification se fait selon les règles du tribunal ou de la façon dont le juge l'ordonne.

(9) [Enregistrement] Une copie de l'ordonnance de blocage est enregistrée à l'égard d'un bien conformément aux lois de la province où ce bien est situé.

(10) [Validité] L'ordonnance de blocage demeure en vigueur jusqu'à ce que l'une des circonstances suivantes survienne:

a) elle est annulée ou modifiée en conformité avec le paragraphe 462.34(4) ou annulée en conformité avec l'alinéa 462.43a);

b) elle cesse d'être en vigueur en conformité avec l'article 462.35;

c) une ordonnance de confiscation ou de restitution des biens est rendue en vertu du paragraphe 462.37(1), 462.38(2) ou 462.41(3) ou d'une autre disposition de la présente loi ou d'une autre loi fédérale.

(11) [Infraction] Toute personne à qui une ordonnance de blocage est signifiée en conformité avec le présent article et qui, pendant que celle-ci est en vigueur, contrevient à ses dispositions ou fait défaut de s'y conformer est coupable d'un acte criminel ou d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

462.34 (1) [Demande de révision] Le détenteur d'un droit sur un bien saisi en vertu d'un mandat délivré sous le régime de l'article 462.32 ou d'un bien visé par une ordonnance de blocage rendue sous le régime du paragraphe 462.33(3) peut en tout temps demander à un juge de rendre une ordonnance en vertu du paragraphe (4) ou de lui accorder l'autorisation d'examiner le bien.

(Art. 462.34)

Code criminel

262.7

(2) [Notice to Attorney General] Where an application is made under paragraph (1)(a),

(a) the application shall not, without the consent of the Attorney General, be heard by a judge unless the applicant has given to the Attorney General at least two clear days notice in writing of the application; and

(b) the judge may require notice of the application to be given to and may hear any person who, in the opinion of the judge, appears to have a valid interest in the property.

(3) [Terms of examination order] A judge may, on an application made to the judge under paragraph (1)(b), order that the applicant be permitted to examine property subject to such terms as appear to the judge to be necessary or desirable to ensure that the property is safeguarded and preserved for any purpose for which it may subsequently be required.

(4) [Order of restoration of property or revocation or variation of order] On an application made to a judge under paragraph (1)(a) in respect of any property and after hearing the applicant and the Attorney General and any other person to whom notice was given pursuant to paragraph (2)(b), the judge may order that the property or a part thereof be returned to the applicant or, in the case of a restraint order made under subsection 462.33(3), revoke the order, vary the order to exclude the property or any interest in the property or part thereof from the application of the order or make the order subject to such reasonable conditions as the judge thinks fit,

(a) if the applicant enters into a recognizance before the judge, with or without sureties, in such amount and with such conditions, if any, as the judge directs and, where the judge considers it appropriate, deposits with the judge such sum of money or other valuable security as the judge directs;

(b) if the conditions referred to in subsection (a) are satisfied; or

(c) for the purpose of

(i) meeting the reasonable living expenses of the person who was in possession of the property at the time the warrant was executed or the order was made or any person who, in the opinion of the judge, has a valid interest in the property and of the dependants of that person,

(ii) meeting the reasonable business and legal expenses of a person referred to in subparagraph (i), or

(iii) permitting the use of the property in order to enter into a recognizance under Part XVI.

(2) [Préavis au procureur général] La demande d'ordonnance prévue au paragraphe (1) ne peut, sans le consentement du procureur général, être entendue par un juge à moins que le demandeur n'en ait remis un préavis de deux jours francs au procureur général; le juge peut exiger que le préavis soit remis aux personnes qui, à son avis, semblent avoir un droit sur les biens visés; il peut aussi les entendre.

(3) [Conditions de l'autorisation d'examen] Sur demande présentée en vertu du paragraphe (1), le juge peut, par ordonnance, permettre au demandeur d'examiner le bien visé sous réserve des modalités qu'il juge nécessaires ou souhaitables pour garantir la préservation du bien en question à toutes fins utiles.

(4) [Restitution ou modification de l'ordonnance de blocage] Le juge saisi d'une demande d'ordonnance présentée en vertu du paragraphe (1) peut, après avoir entendu le demandeur, le procureur général et, éventuellement, les personnes à qui le préavis mentionné au paragraphe (2) a été remis, ordonner que les biens soient restitués en tout ou en partie au demandeur, annuler ou modifier l'ordonnance de blocage rendue en vertu du paragraphe 462.33(3) de façon à soustraire, en totalité ou en partie, ces biens ou un droit sur ceux-ci à son application, selon le cas, ou rendre l'ordonnance de blocage sujette aux conditions qu'il estime indiquées dans les cas suivants:

a) le demandeur contracte devant le juge un engagement, avec ou sans caution, d'un montant que celui-ci fixe ou estime indiqué et, si le juge l'estime indiqué, dépose auprès du juge la somme d'argent ou l'autre valeur que celui-ci fixe;

b) les conditions mentionnées au paragraphe (5) sont remplies;

c) afin de permettre au détenteur des biens bloqués ou saisis — ou à toute autre personne qui, de l'avis du juge, a un droit valide sur ces biens — de prélever, sur les biens ou certains de ceux-ci, les sommes raisonnables pour ses dépenses courantes, celles des personnes à sa charge, ses dépenses et ses frais juridiques ou afin de permettre d'utiliser ces biens pour contracter un engagement sous le régime de la partie XVI.

(6) [Hearing] For the purpose of determining the reasonableness of legal expenses referred to in subparagraph (4)(c)(ii), a judge shall hold an *in camera* hearing and without the presence of the Attorney General.

(6) [Conditions to be satisfied] An order under paragraph (4)(b) in respect of property may be made by a judge if the judge is satisfied

(a) where the application is made by

(i) a person charged with an enterprise crime offence or a designated drug offence, or

(ii) any person who acquired title to or a right of possession of that property from a person referred to in subparagraph (i) under circumstances that give rise to a reasonable inference that the title or right was transferred from that person for the purpose of avoiding the forfeiture of the property,

that a warrant should not have been issued pursuant to section 462.32 or a restraint order under subsection 462.33(3) should not have been made in respect of that property, or

(b) in any other case, that the applicant is the lawful owner of or lawfully entitled to possession of the property and appears innocent of any complicity in an enterprise crime offence or designated drug offence or of any collusion in relation to such an offence.

and that the property will no longer be required for the purpose of any investigation or as evidence in any proceeding.

(7) [Saving provision] Section 354 of this Act, sections 44.2 and 50.2 of the *Food and Drugs Act* and section 19.1 of the *Narcotic Control Act* do not apply to a person who comes into possession of any property or thing that, pursuant to an order made under paragraph (4)(c), was returned to any person after having been seized or was excluded from the application of a restraint order made under subsection 462.33(3).

(8) [Form of recognizance] A recognizance entered into pursuant to paragraph (4)(c) may be in Form 32.

L.R., ch. 42 (4th suppl.), art. 2.

462.35 [Automatic expiration of special warrants and restraint orders] Where property has been seized under a warrant issued pursuant to section 462.32 or a restraint order has been made under section 462.33 in relation to property, the property shall not be detained or the order shall not continue in force, as the case may be, for a period of more than six months after the time of the seizure or the making of the

(5) [Audience] Pour déterminer le caractère raisonnable des frais juridiques visés à l'alinéa (4)c), le juge tient une audience à huis clos, hors la présence du procureur général.

(6) [Conditions] L'ordonnance visée à l'alinéa (4)b) peut être rendue si le juge est convaincu qu'on n'a plus besoin de ces biens soit pour une enquête soit à titre d'éléments de preuve dans d'autres procédures et:

a) qu'un mandat de perquisition n'aurait pas dû être délivré en vertu de l'article 462.32 ou qu'une ordonnance de blocage visée au paragraphe 462.33(3) n'aurait pas dû être rendue à l'égard de ces biens, lorsque la demande est présentée par:

(i) soit une personne accusée d'une infraction de criminalité organisée ou d'une infraction désignée en matière de drogue,

(ii) soit une personne qui a obtenu un titre ou un droit sur ces biens d'une personne visée au sous-alinéa (i) dans des circonstances telles qu'elles permettent raisonnablement d'induire que l'opération a été effectuée dans l'intention d'éviter la confiscation des biens;

b) dans tous les autres cas, que le demandeur est le propriétaire légitime de ces biens ou a droit à leur possession légitime et semble innocent de toute complicité ou de toute collusion à l'égard de la perpétration d'une infraction de criminalité organisée ou d'une infraction désignée en matière de drogue.

(7) [Réserve] L'article 354 de la présente loi, les articles 44.2 et 50.2 de la *Loi sur les aliments et drogues* et l'article 19.1 de la *Loi sur les stupéfiants* ne s'appliquent pas à la personne qui obtient la possession d'un bien qui, en vertu d'une ordonnance rendue sous le régime de l'alinéa (4)c), a été remis à une personne après avoir été saisi ou a été exclu de l'application d'une ordonnance de blocage rendue en vertu du paragraphe 462.33(3).

(8) [Formule] L'engagement visé à l'alinéa (4)c) peut être contracté selon la formule 32.

462.35 [Expiration automatique des mandats spéciaux et des ordonnances de blocage] Le blocage de certains biens en vertu d'une ordonnance rendue sous le régime de l'article 462.32 ou leur détention après saisie en vertu d'un mandat délivré sous le régime de l'article 462.32 ne peut se poursuivre au-delà de six mois que si avant l'expiration de cette période le procureur général démontre à la satisfaction du juge que les

(Art. 462.36-462.37)

Code criminel

262.9

order, as the case may be, unless, before the expiration of that period, the Attorney General establishes to the satisfaction of a judge that the property may be required after the expiration of that period for the purpose of section 462.37 or 462.38 or any other provision of this or any other Act of Parliament respecting forfeiture or for the purpose of any investigation or as evidence in any proceeding.

L.R., ch. 42 (4^e suppl.), art. 2.

462.36 [Forwarding to clerk where accused to stand trial] Where a judge issues a warrant under section 462.32 or makes a restraint order under section 462.33 in respect of any property, the clerk of the court shall, when an accused is ordered to stand trial for an enterprise crime offence, cause to be forwarded to the clerk of the court to which the accused has been ordered to stand trial a copy of the report filed pursuant to paragraph 462.32(4)(b) or of the restraint order in respect of the property.

L.R., ch. 42 (4^e suppl.), art. 2.

Forfeiture of Proceeds of Crime

462.37 (1) [Order of forfeiture of property on conviction] Subject to this section and sections 462.39 to 462.41, where an offender is convicted, or discharged under section 736, of an enterprise crime offence and the court imposing sentence on the offender, on application of the Attorney General, is satisfied, on a balance of probabilities, that any property is proceeds of crime and that the enterprise crime offence was committed in relation to that property, the court shall order that the property be forfeited to Her Majesty to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law.

(2) [Proceeds of crime derived from other offences] Where the evidence does not establish to the satisfaction of the court that the enterprise crime offence of which the offender is convicted, or discharged under section 736, was committed in relation to property in respect of which an order of forfeiture would otherwise be made under subsection (1) but the court is satisfied, beyond a reasonable doubt, that that property is proceeds of crime, the court may make an order of forfeiture under subsection (1) in relation to that property.

(3) [Fine instead of forfeiture] Where a court is satisfied that an order of forfeiture under sub-

biens peuvent être nécessaires après l'expiration de celle-ci pour l'application des articles 462.37 ou 462.38 ou d'une autre disposition de la présente loi ou d'une autre loi fédérale en matière de confiscation ou qu'ils sont nécessaires soit pour une enquête soit à titre d'éléments de preuve dans d'autres procédures.

462.36 [Citation à procès] Le greffier du tribunal dont un juge a décerné un mandat en vertu de l'article 462.32 ou a rendu une ordonnance de blocage en vertu de l'article 462.33 transmet au greffier du tribunal devant lequel un accusé est cité à procès pour une infraction à l'égard de laquelle le mandat a été décerné ou l'ordonnance rendue un exemplaire du rapport qui lui est remis en conformité avec l'alinéa 462.32(4)b) ou de l'ordonnance de blocage.

Confiscation des produits de la criminalité

462.37 (1) [Confiscation lors de la déclaration de culpabilité] Sur demande du procureur général, le tribunal qui détermine la peine à infliger à un accusé coupable d'une infraction de criminalité organisée — ou absous en vertu de l'article 736 à l'égard de cette infraction — est tenu, sous réserve des autres dispositions du présent article et des articles 462.39 à 462.41, d'ordonner la confiscation au profit de Sa Majesté des biens dont il est convaincu, selon la prépondérance des probabilités, qu'ils constituent des produits de la criminalité obtenus en rapport avec cette infraction de criminalité organisée; l'ordonnance prévoit qu'il est disposé de ces biens selon les instructions du procureur général ou autrement en conformité avec la loi.

(2) [Produits de la criminalité obtenus par la perpétration d'une autre infraction] Le tribunal peut rendre une ordonnance de confiscation à l'égard des biens d'un contrevenant dont il n'est pas prouvé qu'ils ont été obtenus par la perpétration de l'infraction de criminalité organisée dont il a été déclaré coupable — ou à l'égard de laquelle il a été absous sous le régime de l'article 736 — à la condition d'être convaincu, hors de tout doute raisonnable, qu'il s'agit de produits de la criminalité.

(3) [Amende] Le tribunal qui est convaincu qu'une ordonnance de confiscation devrait être

section (1) should be made in respect of any property of an offender, but that that property or any part thereof or interest therein cannot be made subject to such an order and, in particular,

- (a) cannot, on the exercise of due diligence, be located,
- (b) has been transferred to a third party,
- (c) is located outside Canada,
- (d) has been substantially diminished in value or rendered worthless, or
- (e) has been commingled with other property that cannot be divided without difficulty,

the court may, instead of ordering that property or part thereof or interest therein to be forfeited pursuant to subsection (1), order the offender to pay a fine in an amount equal to the value of that property, part or interest.

(4) [Imprisonment in default of payment of fine] Where a court orders an offender to pay a fine pursuant to subsection (3), the court shall

(a) impose, in default of payment of that fine, a term of imprisonment

- (i) not exceeding six months, where the amount of the fine does not exceed ten thousand dollars,
- (ii) of not less than six months and not exceeding twelve months, where the amount of the fine exceeds ten thousand dollars but does not exceed twenty thousand dollars,
- (iii) of not less than twelve months and not exceeding eighteen months, where the amount of the fine exceeds twenty thousand dollars but does not exceed fifty thousand dollars,
- (iv) of not less than eighteen months and not exceeding two years, where the amount of the fine exceeds fifty thousand dollars but does not exceed one hundred thousand dollars,
- (v) of not less than two years and not exceeding three years, where the amount of the fine exceeds one hundred thousand dollars but does not exceed two hundred and fifty thousand dollars,
- (vi) of not less than three years and not exceeding five years, where the amount of the fine exceeds two hundred and fifty thousand dollars but does not exceed one million dollars, or
- (vii) of not less than five years and not exceeding ten years, where the amount of the fine exceeds one million dollars; and

(b) direct that the term of imprisonment imposed pursuant to paragraph (a) be served consecutively to any other term of imprisonment imposed on the offender or that the offender is then serving.

rendue à l'égard d'un bien — d'une partie d'un bien ou d'un droit sur celui-ci — d'un contrevenant peut, en remplacement de l'ordonnance, infliger au contrevenant une amende égale à la valeur du bien s'il est convaincu que le bien ne peut pas faire l'objet d'une telle ordonnance et notamment dans les cas suivants:

- a) impossibilité, malgré des efforts en ce sens, de retrouver le bien;
- b) remise à un tiers;
- c) situation du bien à l'extérieur du Canada;
- d) diminution importante de valeur;
- e) fusion avec un autre bien qu'il est par ailleurs difficile de diviser.

(4) [Incarcération] Le tribunal qui inflige une amende en vertu du paragraphe (3) est tenu:

a) d'infliger, à défaut du paiement de l'amende, une peine d'emprisonnement:

- (i) maximale de six mois, si l'amende est égale ou inférieure à dix mille dollars,
- (ii) de six mois à un an, si l'amende est supérieure à dix mille dollars mais égale ou inférieure à vingt mille dollars,
- (iii) de un an à dix-huit mois, si l'amende est supérieure à vingt mille dollars mais égale ou inférieure à cinquante mille dollars,
- (iv) de dix-huit mois à deux ans, si l'amende est supérieure à cinquante mille dollars mais égale ou inférieure à cent mille dollars,
- (v) de deux ans à trois ans, si l'amende est supérieure à cent mille dollars mais égale ou inférieure à deux cent cinquante mille dollars,
- (vi) de trois ans à cinq ans, si l'amende est supérieure à deux cent cinquante mille dollars mais égale ou inférieure à un million de dollars,
- (vii) de cinq ans à dix ans, si l'amende est supérieure à un million de dollars;

b) d'ordonner que la peine d'emprisonnement visée à l'alinéa a) soit purgée après toute autre peine d'emprisonnement infligée au contrevenant ou que celui-ci est en train de purger.

(Art. 462.38-462.39)

Code criminel

262.11

(5) [Fine option program not available to offender] Section 718.1 does not apply to an offender against whom a fine is imposed pursuant to subsection (3).

(5) [Mode facultatif de paiement] L'article 718.1 ne s'applique pas au contrevenant à qui une amende est infligée en vertu du paragraphe (3).

L.R., ch. 42 (4^e suppl.), art. 2; 1992, ch. 1, art. 60.

462.38 (1) [Application for forfeiture] Where an information has been laid in respect of an enterprise crime offence, the Attorney General may make an application to a judge for an order of forfeiture under subsection (2) in respect of any property.

462.38 (1) [Demande de confiscation] Le procureur général peut demander à un juge une ordonnance de confiscation, sous le régime du présent article, visant quelque bien que ce soit lorsqu'une dénonciation a été déposée à l'égard d'une infraction de criminalité organisée.

(2) [Order of forfeiture of property] Subject to sections 462.39 to 462.41, where an application is made to a judge under subsection (1), the judge shall, if the judge is satisfied that

(2) [Ordonnance de confiscation] Le juge saisi de la demande peut, sous réserve des articles 462.39 à 462.41, rendre une ordonnance de confiscation au profit de Sa Majesté de certains biens s'il est convaincu que les conditions suivantes sont réunies:

- (a) any property is, beyond a reasonable doubt, proceeds of crime,
- (b) proceedings in respect of an enterprise crime offence committed in relation to that property were commenced, and
- (c) the accused charged with the offence referred to in paragraph (b) has died or absconded,

- a) ces biens constituent hors de tout doute raisonnable des produits de la criminalité;
- b) des procédures à l'égard d'une infraction de criminalité organisée commise à l'égard de ces biens ont été commencées;
- c) la personne accusée de l'infraction visée à l'alinéa b) est décédée ou s'est esquivée.

order that the property be forfeited to Her Majesty to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law.

L'ordonnance prévoit qu'il est disposé de ces biens selon les instructions du procureur général ou autrement en conformité avec la loi.

(3) [Person deemed absconded] For the purposes of this section, a person shall be deemed to have absconded in connection with an enterprise crime offence if

(3) [Définition] Pour l'application du présent article, une personne est réputée s'être esquivée à l'égard d'une infraction de criminalité organisée si les conditions suivantes sont réunies:

- (a) an information has been laid alleging the commission of the offence by the person,
- (b) a warrant for the arrest of the person has been issued in relation to that information, and
- (c) reasonable attempts to arrest the person pursuant to the warrant have been unsuccessful during the period of six months commencing on the day the warrant was issued,

- a) une dénonciation a été déposée à l'effet qu'elle aurait perpétré cette infraction;
- b) un mandat d'arrestation fondé sur la dénonciation a été délivré à l'égard de cette personne;
- c) malgré des efforts raisonnables en ce sens il a été impossible d'arrêter cette personne durant la période de six mois qui suit la délivrance du mandat.

and the person shall be deemed to have so absconded on the last day of that period of six months.

La personne est alors réputée s'être esquivée le dernier jour de cette période de six mois.

L.R., ch. 42 (4^e suppl.), art. 2.

462.39 [Inference] For the purpose of subsection 462.37(1) or 462.38(2), the court may infer that property was obtained or derived as a result of the commission of an enterprise crime offence where evidence establishes that the value, after the commission of that offence, of all the property of the person alleged to have committed the offence exceeds the value of all the property of that person before the commission of that of-

462.39 [Dédution] Pour l'application des paragraphes 462.37(1) ou 462.38(2), le tribunal peut déduire que des biens ont été obtenus ou proviennent de la perpétration d'une infraction de criminalité organisée lorsque la preuve démontre que la valeur du patrimoine de la personne accusée de cette infraction après la perpétration de l'infraction dépasse la valeur de son patrimoine avant cette perpétration et que le tri-

262.12

Criminal Code

(Art. 462.4-462.41)

fence and the court is satisfied that the income of that person from sources unrelated to enterprise crime offences or designated drug offences committed by that person cannot reasonably account for such an increase in value.

L.R., ch. 42 (4^e suppl.), art. 2.

462.4 [Voidable transfers] A court may.

- (a) prior to ordering property to be forfeited under subsection 462.37(1) or 462.38(2), and
(b) in the case of property in respect of which a restraint order was made under section 462.33, where the order was served in accordance with subsection 462.33(8).

set aside any conveyance or transfer of the property that occurred after the seizure of the property or the service of the order under section 462.33, unless the conveyance or transfer was for valuable consideration to a person acting in good faith and without notice.

L.R., ch. 42 (4^e suppl.), art. 2.

462.41 (1) [Notice] Before making an order under subsection 462.37(1) or 462.38(2) in relation to any property, a court shall require notice in accordance with subsection (2) to be given to and may hear any person who, in the opinion of the court, appears to have a valid interest in the property.

(2) [Service, duration and contents of notice]

A notice given under subsection (1) shall

- (a) be given or served in such manner as the court directs or as may be prescribed by the rules of the court;
(b) be of such duration as the court considers reasonable or as may be prescribed by the rules of the court; and
(c) set out the enterprise crime offence charged and a description of the property.

(3) [Order of restoration of property] Where a court is satisfied that any person, other than

- (a) a person who was charged with an enterprise crime offence or a designated drug offence, or
(b) a person who acquired title to or a right of possession of that property from a person referred to in paragraph (a) under circumstances that give rise to a reasonable inference that the title or right was transferred for the purpose of avoiding the forfeiture of the property,

is the lawful owner or is lawfully entitled to possession of any property or any part thereof that would otherwise be forfeited pursuant to subsection 462.37(1) or 462.38(2) and that the person

bunale est convaincu que son revenu de sources non reliées à des infractions de criminalité organisée ou à des infractions désignées en matière de drogue ne peut raisonnablement justifier cette augmentation de valeur.

462.4 [Cessions annulables] Avant d'ordonner la confiscation d'un bien en vertu des paragraphes 462.37(1) ou 462.38(2) et dans le cas d'un bien visé par une ordonnance de blocage rendue sous le régime de l'article 462.33 à la condition que celle-ci ait été signifiée en conformité avec le paragraphe 462.33(8), le tribunal peut écarter toute cession de ce bien survenue après la saisie ou le blocage; le présent article ne vise toutefois pas les cessions qui, pour contrepartie, ont été faites de bonne foi à une personne qui ignorait l'origine criminelle des biens.

462.41 (1) [Avis] Avant de rendre une ordonnance en vertu des paragraphes 462.37(1) ou 462.38(2) à l'égard d'un bien, le tribunal doit exiger qu'un avis soit donné à toutes les personnes qui, à son avis, semblent avoir un droit sur le bien; le tribunal peut aussi les entendre.

(2) [Idem] L'avis mentionné au paragraphe (1):
a) est donné ou signifié de la façon que le tribunal ordonne ou que prévoient les règles de celui-ci;

b) prévoit le délai que le tribunal estime raisonnable ou que fixent les règles de celui-ci;
c) mentionne l'infraction de criminalité organisée à l'origine de l'accusation et comporte une description du bien en question.

(3) [Ordonnance de restitution] Le tribunal peut ordonner que des biens qui autrement seraient confisqués en vertu du paragraphe 462.37(1) ou 462.38(2) soient restitués en tout ou en partie à une personne — autre que celle qui est accusée d'une infraction de criminalité organisée ou d'une infraction désignée en matière de drogue ou celle qui a obtenu un titre ou un droit de possession sur ces biens d'une personne accusée d'une telle infraction dans des circonstances telles qu'elles permettent raisonnablement d'induire que l'opération a été effectuée dans l'intention d'éviter la confiscation des biens — à la condition d'être convaincu que cette personne en est le propriétaire légitime ou a droit à leur possession légitime et semble innocente de toute complicité ou de toute collusion à l'égard de la

(Art. 462.42)

Code criminel

262.13

appears innocent of any complicity in an offence referred to in paragraph (a) or of any collusion in relation to such an offence, the court may order that the property or part thereof be returned to that person.

perpétration de l'infraction.

L.R., ch. 42 (4^e suppl.), art. 2.

462.42 (1) [Application by person claiming interest for relief from forfeiture] Where any property is forfeited to Her Majesty under subsection 462.37(1) or 462.38(2), any person who claims an interest in the property, other than

(a) a person who was charged with an enterprise crime offence or a designated drug offence that was committed in relation to the property forfeited, or

(b) a person who acquired title to or a right of possession of that property from a person referred to in paragraph (a) under circumstances that give rise to a reasonable inference that the title or right was transferred from that person for the purpose of avoiding the forfeiture of the property,

may, within thirty days after that forfeiture, apply by notice in writing to a judge for an order under subsection (4).

(2) [Fixing day for hearing] The judge to whom an application is made under subsection (1) shall fix a day not less than thirty days after the date of filing of the application for the hearing thereof.

(3) [Notice] An applicant shall serve a notice of the application made under subsection (1) and of the hearing thereof on the Attorney General at least fifteen days before the day fixed for the hearing.

(4) [Order declaring interest not subject to forfeiture] Where, on the hearing of an application made under subsection (1), the judge is satisfied that the applicant is not a person referred to in paragraph (1)(a) or (b) and appears innocent of any complicity in any enterprise crime offence or designated drug offence that resulted in the forfeiture or of any collusion in relation to any such offence, the judge may make an order declaring that the interest of the applicant is not affected by the forfeiture and declaring the nature and extent of the interest.

(5) [Appeal from order under subsection (4)] An applicant or the Attorney General may appeal to the court of appeal from an order under subsection (4), and the provisions of Part XXI with respect to procedure on appeals apply, with such modifications as the circumstances require, to appeals under this subsection.

462.42 (1) [Demandes des tiers intéressés] Toute personne qui prétend avoir un droit sur un bien confisqué au profit de Sa Majesté en vertu des paragraphes 462.37(1) ou 462.38(2) — à l'exception de celle qui est accusée de l'infraction de criminalité organisée ou de l'infraction désignée en matière de drogue commise à l'égard du bien confisqué ou celle qui a obtenu un titre ou un droit sur ce bien d'une personne accusée d'une telle infraction dans des circonstances telles qu'elles permettent raisonnablement d'induire que l'opération a été effectuée dans l'intention d'éviter la confiscation des biens — peut dans les trente jours de la confiscation demander, par écrit, à un juge de rendre en sa faveur une ordonnance en vertu du paragraphe (4).

(2) [Date d'audition] Le juge saisi de la demande visée au paragraphe (1) fixe la date d'audition; celle-ci ne peut être postérieure de plus de trente jours à celle du dépôt de la demande.

(3) [Avis] Le demandeur fait signifier un avis de sa demande et de la date d'audition au procureur général au moins quinze jours avant celle-ci.

(4) [Ordonnance: protection d'un droit] Le juge qui est convaincu lors de l'audition d'une demande présentée en vertu du paragraphe (1) que le demandeur n'est pas la personne visée à ce paragraphe et semble innocent de toute complicité et de toute collusion à l'égard de l'infraction qui a donné lieu à la confiscation peut rendre une ordonnance portant que le droit du demandeur n'est pas modifié par la confiscation et déclarant la nature et l'étendue de ce droit.

(5) [Appel] Le demandeur ou le procureur général peut interjeter appel à la cour d'appel d'une ordonnance rendue en vertu du paragraphe (4) et les dispositions de la partie XXI qui traitent des règles de procédure en matière d'appel s'appliquent, compte tenu des adaptations de circonstance, aux appels interjetés en vertu du présent paragraphe.

(6) [Return of property] The Attorney General shall, on application made to the Attorney General by any person who has obtained an order under subsection (4) and where the periods with respect to the taking of appeals from that order have expired and any appeal from that order taken under subsection (5) has been determined,

(a) direct that the property or the part thereof to which the interest of the applicant relates be returned to the applicant; or

(b) direct that an amount equal to the value of the interest of the applicant, as declared in the order, be paid to the applicant.

L.R., ch. 42 (4th suppl.), art. 2.

462.43 [Residual disposal of property seized or dealt with pursuant to special warrants or restraint orders] Where property has been seized under a warrant issued pursuant to section 462.32, a restraint order has been made under section 462.33 in relation to any property or a recognizance has been entered into pursuant to paragraph 462.34(4)(a) in relation to any property and a judge, on application made to the judge by the Attorney General or any person having an interest in the property or on the judge's own motion, after notice given to the Attorney General and any other person having an interest in the property, is satisfied that the property will no longer be required for the purpose of section 462.37, 462.38 or any other provision of this or any other Act of Parliament respecting forfeiture or for the purpose of any investigation or as evidence in any proceeding, the judge

(a) in the case of a restraint order, shall revoke the order;

(b) in the case of a recognizance, shall cancel the recognizance; and

(c) in the case of property seized under a warrant issued pursuant to section 462.32 or property under the control of a person appointed pursuant to subparagraph 462.32(3)(b),

(i) if possession of it by the person from whom it was taken is lawful, shall order that it be returned to that person,

(ii) if possession of it by the person from whom it was taken is unlawful and the lawful owner or person who is lawfully entitled to its possession is known, shall order that it be returned to the lawful owner or the person who is lawfully entitled to its possession, or

(iii) if possession of it by the person from whom it was taken is unlawful and the lawful owner or person who is lawfully entitled to its possession is not known, may order that it be forfeited to Her Majesty, to be

(6) [Restitution] Le procureur général est tenu, sur demande qui lui est faite par une personne qui a obtenu une ordonnance en vertu du présent article et lorsque les délais d'appel sont expirés et que tout appel interjeté a fait l'objet d'une décision définitive:

a) soit d'ordonner que les biens ou la partie de ceux-ci sur lesquels porte le droit du demandeur lui soient restitués;

b) soit d'ordonner qu'une somme d'argent égale à la valeur du droit du demandeur, telle qu'il appert de l'ordonnance, lui soit remise.

462.43 [Disposition des biens saisis ou bloqués] Le juge qui, à la demande du procureur général ou du titulaire d'un droit sur le bien en question ou d'office — à la condition qu'un avis soit donné au procureur général et aux personnes qui ont un droit sur le bien en question —, est convaincu qu'on n'a plus besoin d'un bien, saisi en vertu d'un mandat délivré sous le régime de l'article 462.32 ou bloqué en vertu d'une ordonnance rendue sous le régime de l'article 462.33 ou visé par un engagement contracté en vertu de l'alinéa 462.34(4)(a), soit pour l'application des articles 462.37 ou 462.38 ou de toute autre disposition de la présente loi ou de toute autre loi fédérale qui traite de confiscation, soit pour une enquête, soit à titre d'élément de preuve dans d'autres procédures est tenu:

a) dans le cas d'un bien bloqué, d'annuler l'ordonnance de blocage;

b) dans le cas d'un engagement, d'annuler celui-ci;

c) dans le cas d'un bien saisi ou remis à un administrateur nommé en vertu du sous-alinéa 462.33(3)(b)(i):

(i) soit d'en ordonner la restitution au saisi ou à la personne qui l'a remis à l'administrateur, si le saisi ou cette personne en avait la possession légitime,

(ii) soit, si le saisi ou la personne qui l'a remis à l'administrateur n'en avait pas la possession légitime, d'en ordonner la remise à son véritable propriétaire ou à la personne qui a droit à sa possession légitime à la condition que le véritable propriétaire ou cette dernière personne soit connu;

toutefois, si le saisi ou la personne qui l'a remis à l'administrateur n'en avait pas la possession légitime et si le véritable propriétaire ou la personne qui a droit à sa possession légitime est inconnu, le juge peut en ordonner la confiscation au profit de Sa Majesté, l'ordonnance prévoyant qu'il est disposé du bien selon les instructions du procu-

(Art. 462.44-462.46)

Code criminel

262.16

disposed of as the Attorney General directs, or otherwise dealt with in accordance with the law.

reur general ou autrement en conformité avec la loi.

L.R., ch. 42 (4^e suppl.), art. 2.

462.44 [Appeals from orders under subsection 462.38(2) or section 462.43] Any person who considers himself aggrieved by an order made under subsection 462.38(2) or section 462.43 may appeal from the order as if the order were an appeal against conviction or against a judgment or verdict of acquittal, as the case may be, under Part XXI and that Part applies, with such modifications as the circumstances require, to such an appeal.

462.44 [Appels] Les personnes qui s'estiment lésées par une ordonnance rendue en vertu du paragraphe 462.38(2) ou de l'article 462.43 peuvent en appeler comme s'il s'agissait d'un appel à l'encontre d'une condamnation ou d'un acquittement, selon le cas, en vertu de la partie XXI; les dispositions de celle-ci s'appliquent à cet appel, compte tenu des adaptations de circonstance.

L.R., ch. 42 (4^e suppl.), art. 2.

462.45 [Suspension of forfeiture pending appeal] Notwithstanding anything in this Part, the operation of an order of forfeiture or restoration of property under subsection 462.34(4), 462.37(1), 462.38(2) or 462.41(3) or section 462.43 is suspended pending

462.45 [Suspension d'exécution pendant un appel] Par dérogation aux autres dispositions de la présente partie, l'exécution d'une ordonnance de confiscation ou de restitution de certains biens en vertu des paragraphes 462.34(4), 462.37(1), 462.38(2) ou 462.41(3) ou de l'article 462.43 est suspendue jusqu'à:

(a) any application made in respect of the property under any of those provisions or any other provision of this or any other Act of Parliament that provides for the restoration or forfeiture of such property;

a) décision définitive à l'égard de toute demande de restitution ou de confiscation de ceux-ci présentée sous le régime de l'une de ces dispositions ou d'une autre disposition de la présente loi ou d'une autre loi fédérale;

(b) any appeal taken from an order of forfeiture or restoration in respect of the property, or

b) décision définitive sur un appel à l'égard de l'ordonnance de confiscation ou de restitution de ceux-ci;

(c) any other proceeding in which the right of seizure of the property is questioned.

c) décision définitive dans toutes autres procédures ou le droit de saisie est contesté.

and property shall not be disposed of within thirty days after an order of forfeiture is made under any of those provisions.

Toutefois il ne peut être disposé de biens confisqués dans les trente jours qui suivent une ordonnance de confiscation rendue en vertu de l'une de ces dispositions.

L.R., ch. 42 (4^e suppl.), art. 2.

462.46 (1) [Copies of documents returned or forfeited] Where any document is returned or ordered to be returned, forfeited or otherwise dealt with under subsection 462.34(3) or (4), 462.37(1), 462.38(2) or 462.41(3) or section 462.43, the Attorney General may, before returning the document or complying with the order, cause a copy of the document to be made and retained.

462.46 (1) [Copies des documents restitués ou confisqués] Le procureur général peut faire et conserver une copie des documents saisis avant de les remettre ou de se conformer à une ordonnance, notamment de confiscation ou de restitution, rendue en vertu des paragraphes 462.34(3) ou (4), 462.37(1), 462.38(2) ou 462.41(3) ou de l'article 462.43.

(2) [Probative force] Every copy made under subsection (1) shall, if certified as a true copy by the Attorney General, be admissible in evidence and, in the absence of evidence to the contrary, shall have the same probative force as the original document would have had if it had been proved in the ordinary way.

(2) [Valeur probante] Les copies faites en vertu du paragraphe (1) et certifiées conformes par le procureur général sont admissibles en preuve et, en l'absence de preuve contraire, ont la même valeur probante que l'original aurait eue s'il avait été déposé en preuve de la façon normale.

L.R., ch. 42 (4^e suppl.), art. 2.

Disclosure Provisions

462.47 [No civil or criminal liability incurred by informants] For greater certainty but subject to section 241 of the *Income Tax Act*, a person is justified in disclosing to a peace officer or the Attorney General any facts on the basis of which that person reasonably suspects that any property is proceeds of crime or that any person has committed or is about to commit an enterprise crime offence or a designated drug offence.

L.R. (ch. 42) 4^e suppl., art. 2.

462.48 (1) [Disclosure of income tax information] The Attorney General may, for the purposes of an investigation in relation to

- (a) a designated drug offence, or
- (b) an offence against section 354 or 462.31 where the offence is alleged to have been committed in relation to any property, thing or proceeds obtained or derived directly or indirectly as a result of

- (i) the commission in Canada of a designated drug offence, or
- (ii) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated drug offence.

make an application in accordance with subsection (2) for an order for disclosure of information under subsection (3).

(2) [Application] An application under subsection (1) shall be made *ex parte* in writing to a judge and be accompanied by an affidavit sworn on the information and belief of the Attorney General or a person specially designated by the Attorney General for that purpose deposing to the following matters, namely:

- (a) the offence or matter under investigation;
- (b) the person in relation to whom the information or documents referred to in paragraph (a) are required;
- (c) the type of information or book, record, writing, return or other document obtained by or on behalf of the Minister of National Revenue for the purposes of the *Income Tax Act* to which access is sought or that is proposed to be examined or communicated; and
- (d) the facts relied on to justify the belief, on reasonable grounds, that the person referred to in paragraph (b) has committed or benefited from the commission of an offence referred to in paragraph (1)(a) or (b) and that the information or documents referred to in paragraph

Restriction du droit d'action

462.47 [Nullité des actions contre les informateurs] Il est déclaré pour plus de certitude mais sous réserve de l'article 241 de la *Loi de l'impôt sur le revenu* qu'aucune action ne peut être intentée contre une personne pour le motif qu'elle aurait révélé à un agent de la paix ou au procureur général des faits sur lesquels elle se fonde pour avoir des motifs raisonnables de croire que des biens sont des produits de la criminalité ou pour croire qu'une autre personne a commis une infraction de criminalité organisée ou une infraction désignée en matière de drogue ou s'apprête à le faire.

462.48 (1) [Communication de renseignements fiscaux] Le procureur général peut, en conformité avec le paragraphe (2), demander une ordonnance en vertu du paragraphe (3) aux fins d'une enquête sur:

- a) soit une infraction désignée en matière de drogue;
- b) soit une infraction prévue à l'article 354 ou 462.31 qui aurait été commise à l'égard de biens, objets ou produits qui ont été obtenus ou proviennent directement ou indirectement de la perpétration au Canada d'une infraction désignée en matière de drogue ou d'un acte ou d'une omission survenu à l'extérieur du Canada et qui, au Canada, aurait constitué une infraction désignée en matière de drogue.

(2) [Demande d'ordonnance] La demande d'ordonnance est à présenter à un juge par écrit et doit être faite *ex parte*; elle est accompagnée de l'affidavit du procureur général — ou d'une personne qu'il désigne expressément à cette fin — comportant les éléments suivants:

- a) désignation de l'infraction visée par l'enquête ou de l'objet de celle-ci;
- b) désignation de la personne visée par les renseignements ou les documents demandés;
- c) désignation du genre de renseignements ou de documents — livre, dossier, texte, rapport ou autre document — qu'a obtenus le ministre du Revenu national — ou qui ont été obtenus en son nom — dans le cadre de l'application de la *Loi de l'impôt sur le revenu* et dont la communication ou l'examen est demandé;
- d) les faits à l'origine des motifs raisonnables de croire que la personne mentionnée à l'alinéa b) a commis une infraction visée à l'alinéa (1)a) ou b) — ou en a bénéficié — et que les renseignements ou documents demandés ont vraisemblablement une valeur importante, en soi

(Art. 462.18)

Code criminel

21-91.07.01
262.17

(c) are likely to be of substantial value, whether alone or together with other material, to the investigation for the purposes of which the application is made.

(3) [Order for disclosure of information] Where the judge to whom an application under subsection (1) is made is satisfied

(a) of the matters referred to in paragraph (2a), and

(b) that there are reasonable grounds for believing that it is in the public interest to allow access to the information or documents to which the application relates, that he requires the benefits likely to accrue to the investigation if the access is obtained,

the judge may, subject to such conditions as the judge considers advisable in the public interest, order the Deputy Minister of National Revenue or any person specially designated in writing by that Deputy Minister for the purposes of this section

(c) to allow a police officer named in the order access to all such information and documents and to examine them, or

(d) where the judge considers it necessary in the circumstances, to permit an officer named in the order to require the police officer named in the order to allow the police officer named in the information and documents,

within such period after the expiration of seven clear days following the service of the order pursuant to subsection (4) as the judge may specify.

(4) [Service of order] A copy of an order made by a judge under subsection (3) shall be served on the person to whom the order is addressed in such manner as the judge directs or as may be prescribed by rules of court.

(5) [Extension of period for compliance with order] A judge who makes an order under subsection (3) may, on application of the Minister of National Revenue, extend the period within which the order is to be complied with.

(6) [Objection to disclosure of information] The Minister of National Revenue or any person specially designated in writing by that Minister for the purposes of this section may object to the disclosure of any information or document in respect of which an order under subsection (3) has been made by certifying orally or in writing that the information or document should not be disclosed on the ground that

(a) the Minister of National Revenue is prohibited from disclosing the information or document by any bilateral or international treaty, convention or other agreement respecting

ou avec d'autres éléments, pour l'enquête mentionnée dans la demande.

(3) [Ordonnance de communication] Sous réserve des conditions qu'il estime indiquées dans l'intérêt public, le juge saisi de la demande peut ordonner au sous-ministre du Revenu national — ou à un pers. que celui-ci a désigné expressément par écrit pour l'application du présent article — de permettre à un policier nommé dans l'ordonnance — d'avoir accès aux renseignements ou documents à l'égard desquels l'application a été faite — et de permettre au policier, s'il est convenu à la fois de l'existence

a) des faits mentionnés à l'alinéa (2a);

b) de motifs raisonnables de croire qu'il est dans l'intérêt public d'en permettre l'accès, compte tenu des avantages pouvant vraisemblablement en résulter pour l'enquête en question.

L'ordonnance est valide pour la période que précise le juge; elle ne peut toutefois entrer en vigueur avant l'expiration d'un délai de sept jours francs suivant qu'il en est signifié en conformité avec l'alinéa (4).

(4) [Signification] Une copie de l'ordonnance est signifiée à la personne qu'elle vise; la signification se fait selon les règles du tribunal ou de la façon que le juge ordonne.

(5) [Prolongation] Le juge qui rend une ordonnance en vertu du paragraphe (3) peut, à la demande du ministre du Revenu national, prolonger la période durant laquelle le destinataire de celle-ci est tenu de s'y conformer.

(6) [Opposition à la communication] Le ministre du Revenu national — ou la personne qu'il a désignée expressément par écrit pour l'application du présent article — peut s'opposer à la communication des renseignements ou documents visés par une ordonnance rendue sous le régime du paragraphe (3) en attestant, oralement ou par écrit:

a) soit qu'une entente, une convention ou un autre traité, bilatéraux ou internationaux, en matière d'impôt que le gouvernement du Canada a signés interdisent au ministre du Revenu national de les communiquer;

21 - 91.07.01
262.18

Criminal Code

(Art. 462.48)

taxation to which the Government of Canada is a signatory;

(b) a privilege is attached by law to the information or document;

(c) the information or document has been placed in a sealed package pursuant to law or an order of a court of competent jurisdiction; or

(d) disclosure of the information or document would not, for any other reason, be in the public interest.

7. [Determination of objection] Where an objection to the disclosure of information or a document is made under subsection (6), the objection may be determined, on application, in accordance with subsection (8), by the Chief Justice of the Federal Court, or by such other judge of that Court as the Chief Justice may designate to hear such applications.

(8) [Judge may examine information] A judge who is to determine an objection pursuant to subsection (7) may, if the judge considers it necessary to determine the objection, examine the information or document in relation to which the objection is made and shall grant the objection and order that disclosure of the information or document be refused where the judge is satisfied of any of the grounds mentioned in subsection (6).

(9) [Limitation period] An application under subsection (7) shall be made within ten days after the objection is made or within such greater or lesser period as the Chief Justice of the Federal Court, or such other judge of that Court as the Chief Justice may designate to hear such applications, considers appropriate.

(10) [Appeal to Federal Court of Appeal] An appeal lies from a determination under subsection (7) to the Federal Court of Appeal.

(11) [Limitation period for appeal] An appeal under subsection (10) shall be brought within ten days from the date of the determination appealed from or within such further time as the Federal Court of Appeal considers appropriate in the circumstances.

(12) [Special rules for hearings] An application under subsection (7) or an appeal brought in respect of that application shall

(a) be heard *in camera*; and

(b) on the request of the person objecting to the disclosure of information, be heard and determined in the National Capital Region described in the schedule to the *National Capital Act*.

(13) [Ex parte representations] During the hearing of an application under subsection (7) or an appeal brought in respect of that application,

b) soit que les renseignements ou documents font l'objet d'un privilège reconnu par la loi;

c) soit que ces renseignements ou documents ont été placés dans un contenant scellé en conformité avec la loi ou en vertu d'une ordonnance d'un tribunal compétent;

d) soit que la communication des renseignements ou documents serait, pour toute autre raison, contraire à l'intérêt public.

(7) [Juge en chef de la Cour fédérale] Là où est faite d'une opposition fondée sur le paragraphe (6) est décidée, sur demande, conformément au paragraphe (8) par le juge en chef de la Cour fédérale ou tout autre juge de cette cour qu'il charge de l'audition de ce genre de demande.

(8) [Décision] Le juge saisi d'une opposition peut examiner les documents ou renseignements dont la communication est demandée, s'il l'estime nécessaire pour rendre sa décision, et doit déclarer l'opposition fondée et interdire la communication s'il constate l'existence d'une des circonstances prévues au paragraphe (6).

(9) [Délai] Le délai à l'intérieur duquel la demande visée au paragraphe (7) peut être présentée est de dix jours suivant l'opposition, mais le juge en chef de la Cour fédérale ou le juge de cette cour qu'il charge de l'audition de ce genre de demande peut modifier ce délai s'il l'estime indiqué.

(10) [Appel devant la Cour d'appel fédérale] Il y a appel de la décision visée au paragraphe (7) devant la Cour d'appel fédérale.

(11) [Délai d'appel] Le délai à l'intérieur duquel l'appel prévu au paragraphe (10) peut être interjeté est de dix jours suivant la date de la décision frappée d'appel, mais la Cour d'appel fédérale peut le proroger si elle l'estime indiqué dans les circonstances.

(12) [Règles spéciales] Les demandes visées au paragraphe (7) font, en premier ressort ou en appel, l'objet d'une audition à huis clos; celle-ci a lieu dans la région de la capitale nationale définie à l'annexe de la *Loi sur la capitale nationale* si la personne qui s'oppose à la communication le demande.

(13) [Présentation *ex parte*] La personne qui a formulé une opposition ou fait l'objet d'une demande ou d'un appel a, au cours des auditions,

(Art. 462.49)

Code criminel

the person who made the objection in respect of which the application was made or the appeal was brought shall, on the request of that person, be given the opportunity to make representations *ex parte*.

(14) [Copies] Where any information or document is examined or provided under subsection (3), the person by whom it is examined or to whom it is provided or any officer of the Department of National Revenue may make, or cause to be made, one or more copies thereof and any copy purporting to be certified by the Minister of National Revenue or an authorized person to be a copy made pursuant to this subsection is evidence of the nature and content of the original information or document and has the same probative force as the original information or document would have had if it had been proved in the ordinary way.

(15) [Further disclosure] No person to whom information or documents have been disclosed or provided pursuant to this subsection or pursuant to an order made under subsection (3) shall further disclose the information or documents except for the purposes of the investigation in relation to which the order was made.

(16) [Form] An order made under subsection (3) may be in Form 47.

(17) [Definition of "police officer"] In this section, "police officer" means any officer, constable or other person employed for the preservation and maintenance of the public peace.

L.R., ch. 42 (4^e suppl.), art. 2; 1994, ch. 13, art. 7.

Specific Rules of Forfeiture

462.49 (1) [Specific forfeiture provisions unaffected by this Part] This Part does not affect the operation of any other provision of this or any other Act of Parliament respecting the forfeiture of property.

(2) [Priority for restitution to victims of crime] The property of an offender may be used to satisfy the operation of a provision of this or any other Act of Parliament respecting the forfeiture of property only to the extent that it is not required to satisfy the operation of any other provision of this or any other Act of Parliament respecting restitution to or compensation of persons affected by the commission of offences.

L.R., ch. 42 (4^e suppl.), art. 2.

en première instance ou en appel et sur demande, le droit de présenter des arguments *ex parte*.

(14) [Copies] Lorsque des renseignements ou documents sont remis à une personne en application du paragraphe (3) ou lorsqu'elle est autorisée à les examiner, celle-ci ou un fonctionnaire du ministère du Revenu national peut en faire une copie; toute copie faite en vertu du présent paragraphe fait preuve de la nature et du contenu de l'original et a la même valeur probante que celui-ci autant que s'il avait été déposé en preuve de la façon normale.

(15) [Communication subséquente] Il est interdit aux personnes à qui des renseignements ou documents ont été communiqués ou remis en vertu du présent paragraphe ou d'une ordonnance rendue sous le régime du paragraphe (3) de les communiquer par la suite à d'autres personnes, sauf dans le cadre de l'enquête qui a donné lieu à l'ordonnance.

(16) [Formule] L'ordonnance peut être rendue au moyen de la formule 47.

(17) [Définition de «policier»] Au présent article, «policier» s'entend d'un officier ou d'un agent de police ou de toute autre personne chargée du maintien de la paix publique.

Autres dispositions en matière de confiscation

462.49 (1) [Maintien des dispositions spécifiques] La présente partie ne porte pas atteinte aux autres dispositions de la présente loi ou de toute autre loi fédérale qui visent la confiscation de biens.

(2) [Priorité aux victimes] Les biens d'un contrevenant ne peuvent être affectés à l'exécution d'une disposition de la présente loi ou d'une autre loi fédérale en matière de confiscation que dans la mesure où ils ne sont pas requis dans le cadre d'une autre disposition de la présente loi ou d'une autre loi fédérale en matière de restitution aux victimes d'infractions criminelles ou de leur dédommagement.

23—94.07.01
262.20

Criminal Code

(Art. 462.5-463)

Regulations

462.5 [Regulations] The Attorney General may make regulations governing the manner of disposing of or otherwise dealing with, in accordance with the law, property forfeited under this Part.

L.R., ch. 42 (1st suppl.), art. 2.

Rèlements

462.5 [Rèlements] Le procureur général peut prendre des règlements sur la façon dont il peut être disposé des biens confisqués sous le régime de la présente partie.

ANNEX 3

SECTION II

Administration provisoire et liquidation

257. [Administrateur provisoire] La Commission peut recommander au ministre de désigner un administrateur provisoire, chargé de l'administration des biens d'une personne ou de l'administration d'une société à la place du conseil d'administration, dans l'un ou l'autre des cas suivants:

1° une enquête a été instituée sur cette personne;

2° la Commission estime qu'il y a eu malversation, abus de confiance ou un autre délit commis par un ou plusieurs dirigeants de cette personne;

3° la gestion des dirigeants, menée d'une manière inadmissible au regard des principes généralement acceptés, est de nature à entraîner une dépréciation des titres émis par cette personne;

4° la Commission juge qu'il s'impose de protéger les clients d'une personne inscrite ou les porteurs de valeurs.

[Biens au Québec] Dans le cas d'une société constituée à l'extérieur du Québec, le mandat recommande pour l'administrateur provisoire est d'administrer ses biens qui se trouvent au Québec.

1982, c. 48, a. 257; 1990, c. 77, a. 40.

258. [Occasion de faire valoir ses droits] Le ministre, avant de désigner l'administrateur provisoire, donne à la personne intéressée l'occasion de faire valoir ses droits par écrit dans un délai de sept jours à compter de la réception de l'avis du ministre.

[Ordonnance préalable] Toutefois, lorsqu'un motif impérieux le requiert, il peut, sur recommandation de la Commission à cet effet, prononcer d'abord l'ordonnance, à la condition de donner à la personne intéressée l'occasion de

DIVISION II

Provisional administration and winding-up

257. [Provisional administrator] The Commission may recommend that the Minister appoint a provisional administrator to administer the property of a person or the affairs of a company in the place of the board of directors in any of the following cases:

(1) where an investigation is being made in respect of the person;

(2) where the Commission considers that one or more senior executives of the person have committed a malversation, a breach of trust or any other offence;

(3) where the management by the senior executives is being effected in an unacceptable manner, having regard to generally accepted principles, and is of a nature that would tend to depreciate the securities issued by the person;

(4) where the Commission deems it imperative that the clients of a registrant or the holders of securities be protected.

[Incorporation outside Québec] In the case of a company incorporated outside Québec, the recommended mandate of the provisional administrator is to administer the property of that company which is situated in Québec.

258. [Assertion of rights] Before appointing a provisional administrator, the Minister shall give the person concerned an opportunity to assert his rights in writing within seven days from receiving the notice from the Minister.

[Exception] The Minister may, however, where it is imperative to do so and if the Commission so recommends, make the order first, provided that the person concerned is given an opportunity to assert his rights in writing within

—91.07.01
B-76

Securities

(Art. 259.2-262)

nablement esperer que l'administration provisoire sera a l'avantage des porteurs de titres de la personne visee ou, dans le cas d'une personne inscrite, de ses clients.

1990, c. 77, a. 44.

260. [Rapport de l'administrateur] Sur demande du ministre ou de la Commission, l'administrateur provisoire fait rapport, à l'un et à l'autre, de ses constatations et de l'exécution de son mandat.

1982, c. 48, a. 260.

cannot reasonably be expected to benefit holders of securities or, in the case of a registrant, his clients.

260. [Report] At the request of the Minister or the Commission, the provisional administrator shall report his findings and the execution of his mandate to both of them.

ANNEX 4

CHAPITRE VI
L'APPEL

324. [Appeal] Une personne directement intéressée par une décision de la Commission peut interjeter appel devant trois juges de la Cour du Québec.

1982, c. 48, a. 324; 1988, c. 21, a. 66; 1990, c. 77, a. 55.

325. [Dépôt d'un avis] L'appel est formé par le dépôt d'un avis à cet effet auprès du secrétaire de la Commission, dans un délai de 30 jours à compter de la date de la décision attaquée.

[Signification à la Commission] Le dépôt de cet avis tient lieu de signification à la Commission.

1982, c. 48, a. 325.

325. [Transmission de l'avis] Le secrétaire transmet immédiatement l'avis d'appel au greffe de la Cour du Québec, à Montréal ou à Québec, selon le choix de l'appellant.

[Transmission de la décision] Il transmet au greffe quatre exemplaires de la décision attaquée.

1982, c. 48, a. 326; 1984, c. 41, a. 65; 1988, c. 21, a. 66.

327. [Dispositions applicables] L'appel est régi par les articles 491 à 524 du Code de procédure civile (chapitre C-25), compte tenu des adaptations nécessaires. Toutefois, les parties ne sont tenues de déposer que quatre exemplaires du mémoire de leurs prétentions.

1982, c. 48, a. 327.

328. [Dispositions applicables] Les règles de procédure de la Cour d'appel en matière civile sont également applicables, sauf que le secrétaire de la Commission est substitué au protonotaire de la Cour supérieure.

1982, c. 48, a. 328; 1984, c. 41, a. 66.

CHAPTER VI
APPEALS

324. [Appeal] Any person directly interested in a decision of the Commission may appeal therefrom to three judges of the Court of Quebec.

325. [Notice] The appeal is made by filing a notice to that effect with the secretary of the Commission within 30 days from the date of the decision appealed from.

[Service] Filing of the notice is in lieu of service on the Commission.

325. [Notice] The secretary shall immediately send the notice to the office of the Court of Quebec at Montréal or Québec, at the option of the appellant.

[Sending of copies] The secretary shall send four copies of the decision appealed from to the office.

327. [Applicable provisions] The appeal is governed by articles 491 to 524 of the Code of Civil Procedure (chapter C-25), *mutatis mutandis*. However, the parties are required to file only four copies of the factum of their pretensions.

328. [Rules of practice] The rules of practice of the Court of Appeal in civil matters also apply, except that the secretary of the Commission is substituted for the protonotary of the Superior Court.

(Art. 329-331)

Valeurs mobilières

—92.07.01

B-87

329. [Décision exécutoire] L'appel ne suspend pas l'exécution de la décision attaquée, à moins que la Commission ou un juge de la Cour du Québec n'en décide autrement.

1982, c. 48, a. 329; 1988, c. 21, a. 66.

330. [Appeal] Le jugement final d'appel est susceptible d'appel devant la Cour d'appel, sur permission d'un juge de cette Cour.

1982, c. 48, a. 330; 1984, c. 41, a. 67; 1988, c. 21, a. 66; 1990, c. 77, a. 56.

329. [Execution] An appeal does not suspend the execution of the decision appealed from, unless the Commission or a judge of the Court of Quebec decides otherwise.

330. [Appeal] The final appeal judgment may be appealed to the Court of Appeal with leave of a judge of the latter court.

ANNEX 5

216. [Moyens de défense] Le défendeur à l'action en dommages intentée en vertu de l'article 214 ou 215 est tenu aux dommages, sauf preuve que le défaut de prospectus ou de note d'information n'est pas imputable à son fait.

1982, c. 48, a. 216.

CHAPITRE II
OPÉRATIONS EFFECTUÉES AVEC DES
DOCUMENTS CONTENANT DES
INFORMATIONS FAUSSES OU
TROMPEUSES

217. [Nullité ou révision du prix] La personne qui a souscrit ou acquis des titres à l'occasion du placement d'une valeur effectuée avec un prospectus contenant des informations fausses ou trompeuses peut demander la nullité du contrat ou la révision du prix, sans préjudice de sa demande en dommages.

[Moyens de défense] Le défendeur ne peut faire échec à la demande qu'en rapportant la preuve que le demandeur connaissait, au moment de l'opération, la nature fautive ou trompeuse de l'information reprochée.

1982, c. 48, a. 217.

218. [Dommages] Le demandeur peut rechercher en dommages, selon le cas, l'émetteur ou le porteur dont les titres ont été placés, leurs dirigeants ou le courtier engagé envers l'émetteur ou le porteur dont les titres ont été placés.

1982, c. 48, a. 218.

219. [Dommages] Le demandeur peut également rechercher en dommages l'expert dont un avis contenant des informations fausses ou trompeuses a été reproduit, avec son consentement, dans le prospectus.

1982, c. 48, a. 219.

220. [Moyens de défense] Le défendeur aux actions prévues aux articles 218 et 219 est tenu aux dommages à moins qu'il ne rapporte l'une des preuves suivantes:

1^o il a agi avec prudence et diligence, sauf dans le cas d'une action intentée contre l'émetteur ou le porteur dont les titres ont été placés;

2^o le demandeur connaissait, au moment de l'opération, la nature fautive ou trompeuse de l'information reprochée.

1982, c. 48, a. 220.

216. [Defence] The defendant in an action for damages under section 214 or 215 is responsible for damages unless it is proved that the absence of a prospectus or circular was not imputable to any act on his part.

CHAPTER II

TRANSACTIONS EFFECTED WITH
DOCUMENTS CONTAINING A
MISREPRESENTATION

217. [Rescission of contract] A person who has subscribed for or acquired securities in a distribution effected with a prospectus containing a misrepresentation may apply to have the contract rescinded or the price revised, without prejudice to his claim for damages.

[Defence] The defendant may defeat the application only if it is proved that the plaintiff knew, at the time of the transaction, of the alleged misrepresentation.

218. [Damages] The plaintiff may claim damages from the issuer or the holder, as the case may be, whose securities were distributed, from its senior executives, or from the dealer under contract to the issuer or holder whose securities were distributed.

219. [Damages] The plaintiff may also claim damages from the expert whose opinion, containing a misrepresentation, appeared, with his consent, in the prospectus.

220. [Defence] The defendant in an action provided for in sections 218 and 219 is responsible for damages unless it is proved that

(1) he acted with prudence and diligence, except in an action brought against the issuer or the holder whose securities were distributed, or that

(2) the plaintiff knew, at the time of the transaction, of the alleged misrepresentation.

TITRE VIII
SANCTIONS CIVILES

CHAPITRE I
OPÉRATIONS EFFECTUÉES SANS
PROSPECTUS OU SANS NOTE
D'INFORMATION

214. [Nullité ou révision du prix] La personne qui a souscrit ou acquis des titres à l'occasion du placement d'une valeur effectuée sans le prospectus exigé par le titre deuxième peut demander à son choix la nullité du contrat ou la révision du prix, sans préjudice de sa demande en dommages.

[Dommages] Le demandeur peut rechercher en dommages, selon le cas, l'émetteur ou le porteur dont les titres ont été placés sans prospectus, le promoteur de l'affaire, leurs dirigeants ou le courtier chargé du placement.

[Dommages] Toutefois, le demandeur qui n'a pas reçu le prospectus qu'il avait le droit de recevoir ne peut rechercher en dommages que le courtier tenu de lui transmettre le prospectus en vertu de l'article 29.

1982, c. 48, a. 214; 1990, c. 77, a. 36.

215. [Nullité ou révision du prix] La personne qui a cédé des titres en réponse à une offre publique effectuée sans la note d'information exigée par le titre quatrième peut demander à son choix la nullité de la cession ou la révision du prix. En outre, le demandeur peut rechercher en dommages l'initiateur et ses dirigeants.

[Dommages] Le porteur qui n'a pas reçu la note d'information qu'il avait le droit de recevoir peut rechercher en dommages l'initiateur et ses dirigeants.

1982, c. 48, a. 215.

TITRE VIII
CIVIL ACTIONS

CHAPTER I
TRANSACTIONS EFFECTED WITHOUT A
PROSPECTUS OR CIRCULAR

214. [Rescission of transaction] Every person who has subscribed for or acquired securities in a distribution of securities effected without the prospectus required under Title II may apply to have the transaction rescinded or the price revised, at his option, without prejudice to his claim for damages.

[Damages] The plaintiff may claim damages from the issuer or the holder, as the case may be, whose securities were distributed without a prospectus from the promoter of the venture, from its senior executives, or from the dealer responsible for the distribution.

[Damages] However, if the plaintiff did not receive the prospectus he was entitled to receive, he has no claim in damages except against the dealer required to send the prospectus to him pursuant to section 29.

215. [Rescission of transfer] Every person who has transferred securities in response to a take-over bid or issuer bid effected without the circular required under Title IV may apply to have the transfer rescinded or the price revised, at his option. In addition, the plaintiff may claim damages from the offeror and the senior executives of the offeror.

[Damages] If a holder did not receive the circular he was entitled to receive, he may claim damages from the offeror and from the senior executives of the offeror.

(Art. 221-225)

Valcurs mobilières

221. [Autres documents] Il y a également ouverture aux sanctions établies aux articles 217 à 219 lorsqu'une information fausse ou trompeuse est contenue dans:

- 1° l'information présentée au dossier d'information et intégrée au prospectus simplifié;
- 2° la notice d'offre prévue au titre II ou prévue par règlement;
- 3° tout autre document dont la Commission autorise l'utilisation au lieu d'un prospectus.

1982, c. 48, a. 221; 1984, c. 41, a. 52.

222. [Nullité ou révision du prix] La personne qui a cédé des titres en réponse à une offre publique effectuée avec une note d'information contenant des informations fausses ou trompeuses peut demander la nullité de la cession ou la révision du prix que la note d'information soit établie en application de la présente loi ou dans le cadre de la dispense prévue à l'article 119.

[Moyens de défense] Le défendeur ne peut faire échec à la demande qu'en rapportant la preuve que le demandeur connaissait, au moment de la cession, la nature fautive ou trompeuse de l'information reprochée.

1982, c. 48, a. 222; 1984, c. 41, a. 53.

223. [Dommages] En outre, le demandeur peut rechercher en dommages l'initiateur et ses dirigeants de même que l'expert dont un avis contenant des informations fausses ou trompeuses a été reproduit, avec son consentement, dans la note d'information.

1982, c. 48, a. 223.

224. [Moyens de défense] Le défendeur à l'action prévue à l'article 223 est tenu des dommages, à moins qu'il ne rapporte l'une des preuves suivantes:

- 1° il a agi avec prudence et diligence, sauf dans le cas de l'initiateur;
- 2° le demandeur connaissait, au moment de la cession, la nature fautive ou trompeuse de l'information reprochée.

1982, c. 48, a. 224.

225. [Action en dommages] Une information fautive ou trompeuse contenue dans l'un des documents prévus par les articles 134 à 139 et établis par le conseil d'administration ou l'un des dirigeants de la société visée donne ouverture, en faveur de tous les porteurs de titres de la société visée au moment de l'offre, à une action en dommages contre le ou les signataires du document.

[Moyens de défense] Le défendeur est tenu aux dommages sous réserve des moyens de défense prévus à l'article 224.

1982, c. 48, a. 225; 1984, c. 41, a. 54.

221. [Rights of action] Rights of action established under sections 217 to 219 may also be exercised if a misrepresentation is contained in

- (1) the information presented in the permanent information record and incorporated in the simplified prospectus;
- (2) the offering memorandum or the offering notice provided for in Title II or prescribed by regulation;
- (3) any other document authorized by the Commission for use in lieu of a prospectus.

222. [Rescission of transfer] A person who has transferred securities in response to a takeover bid or issuer bid effected with a circular containing a misrepresentation may apply to have the transfer rescinded or the price revised, whether the circular is prepared in application of this Act or in accordance with the exemption in virtue of section 119.

[Defence] The defendant may defeat the application only if it is proved that, at the time of the transfer, the plaintiff knew of the alleged misrepresentation.

223. [Damages] The plaintiff may also claim damages from the offeror and its senior executives and from the expert whose opinions, containing a misrepresentation, appeared, with his consent, in the circular.

224. [Defence] The defendant in an action provided for in section 223 is responsible for damages unless it is proved that

- (1) he acted with prudence and diligence, except in the case of the offeror, or that
- (2) the plaintiff knew, at the time of the transfer, of the alleged misrepresentation.

225. [Right of action] Any misrepresentation contained in any of the documents prescribed in sections 134 to 139 prepared by the board of directors or any of the senior executives of the offeree issuer gives rise to a right of action in damages, in favour of all the holders of securities of the offeree issuer at the time of the bid, against the signatory or signatories of the document.

[Defence] The defendant is responsible for damages, subject to the grounds for defence set forth in section 224.

—92.07.01
B-68

Securities

(Art. 225.1-230)

225.1. [Offre publique] Dans le cas d'une offre publique faite par l'intermédiaire d'une bourse, une information fautive ou trompeuse contenue dans un document d'information équivalent à l'un de ceux qui sont mentionnés aux articles 222 à 225, et déposé auprès de la bourse ou envoyé aux actionnaires selon les exigences de celle-ci donne ouverture aux actions prévues à ces articles.

225.1. [Bid through stock exchange] Where a bid is made through the facilities of a stock exchange, any misrepresentation contained in a disclosure document equivalent to a document referred to in any of sections 222 to 225 and filed with the stock exchange or forwarded to the shareholders in accordance with the exchange's requirements gives rise to a right of action under those sections.

1987, c. 40, a. 24.

CHAPITRE III
USAGE D'INFORMATIONS
PRIVILEGIEES

226. [Responsabilité du préjudice] La personne qui réalise une opération en contravention des articles 187, 189, 189.1 ou 190 est tenue du préjudice subi par l'autre partie à l'opération.

1982, c. 48, a. 226; 1984, c. 41, a. 55.

227. [Responsabilité du dommage] La personne qui communique une information privilégiée en contravention des articles 188 ou 189 est responsable du dommage causé à un tiers du fait d'une opération réalisée avec celui qui a exploité l'information ainsi communiquée.

1982, c. 48, a. 227.

228. [Cession du bénéfice] La personne qui exploite une information privilégiée en infraction à l'article 187, 189, 189.1 ou 190 est en outre tenue de céder le bénéfice lui résultant de l'opération interdite, après réparation du préjudice, en faveur des personnes suivantes:

- 1° l'émetteur dont les titres sont en cause, dans le cas de l'infraction aux articles 187, 189 ou 189.1;
- 2° la société d'investissement ou le titulaire du portefeuille, dans le cas de l'infraction à l'article 190.

1982, c. 48, a. 228; 1984, c. 41, a. 56.

229. [Action en recouvrement] Sur autorisation du tribunal, obtenue par requête signifiée à l'émetteur, à la société d'investissement à capital variable ou au fonds commun de placement, l'action en recouvrement prévue à l'article 228 peut être exercée, au nom et pour le compte des titulaires de l'action, par celui qui possédait à la date de l'opération interdite ou possède à la date de sa requête des titres émis par eux.

1982, c. 48, a. 229.

230. [Intervenant] Le porteur qui remplit les conditions prévues à l'article 229 peut également

CHAPTER III
USE OF PRIVILEGED INFORMATION

226. [Responsibility] Every person who carries out a transaction contrary to section 187, 189, 189.1 or 190 is responsible for the harm suffered by the other party to the transaction.

227. [Responsibility for damages] Every person who discloses privileged information in contravention of section 188 or 189 is responsible for damages caused to a third person as a result of a transaction effected with the person who used the information so disclosed.

228. [Recoverable benefit] Every person using privileged information contrary to section 187, 189, 189.1 or 190 is also accountable for the benefit accruing to him from the prohibited transactions, after repairing the harm caused, to the following persons:

- (1) the issuer of the securities concerned, in the case of an offence under section 187, 189 or 189.1;
- (2) the mutual fund or the client for whom the portfolio is managed, in the case of an offence under section 190.

229. [Action for recovery] With the authorization of the court, obtained on a motion served on the issuer, the mutual fund or the unincorporated mutual fund, the rights of action for recovery under section 228 may be exercised, in the name of and for the account of the holders of shares, by a person who was at the time of the prohibited transaction or is at the time of the motion a holder of outstanding securities of the issuer, the mutual fund or the unincorporated mutual fund.

230. [Intervention] Every holder who satisfies the conditions set forth in section 229 may

(Art. 230-234)

Valeurs mobilières

Intervenir à l'action déjà introduite en vertu de l'article 228 ou 229.
1982, c. 48, a. 230.

also intervene in an action instituted under section 228 or 229.

231. [Autorisation] Pour obtenir l'autorisation prévue à l'article 229, il faut établir que les dirigeants de l'émetteur, de la société d'investissement à capital variable ou du fonds commun de placement n'ont pas intenté l'action ou n'ont pas agi avec diligence au cours de l'instance.
1982, c. 48, a. 231.

231. [Authorization] To obtain the authorization provided for in section 229, it must be established that the senior executives of the issuer, of the mutual fund or of the unincorporated mutual fund have failed to institute the action, or have failed to prosecute it diligently.

232. [Ordonnance du tribunal] Le tribunal peut rendre toute ordonnance nécessaire en vue de permettre l'exercice efficace du droit accordé au porteur d'intenter l'action ou d'y intervenir. Il peut notamment mettre à la charge de l'émetteur les frais exposés par le porteur.
1982, c. 48, a. 232.

232. [Court order] The court may make any necessary order to facilitate the timely exercise of a holder's right to institute or intervene in an action. In particular, it may charge the holder's costs to the issuer.

233. [Intérêt de la Commission] La Commission possède l'intérêt lui permettant d'exercer, de la même façon que le porteur, les droits définis aux articles 229 et 230.
1982, c. 48, a. 233; 1984, c. 41, a. 57.

233. [Action by the Commission] The Commission has an interest to bring an action under section 229 or 230 in the same manner as a holder.

**CHAPITRE III.1
 OFFRES PUBLIQUES IRRÉGULIÈRES**

**CHAPTER III.1
 IRREGULAR TAKE-OVER BIDS OR
 ISSUER BIDS**

233.1. [Demande au tribunal] La société visée, l'initiateur, leurs dirigeants et leurs porteurs, au moment de l'opération ou au moment de l'instance, peuvent demander au tribunal de rendre toute ordonnance propre à réparer les conséquences d'une contravention à la loi ou au règlement en matière d'offres publiques.

233.1. [Motion to the court] The offeree company, the offeror, their senior executives and persons holding their securities at the time of the transaction or action may move that the court make any order of such a nature as to rectify the consequences of a contravention of the Act or the regulations regarding a take-over bid or issuer bid.

[Mesures possibles] Ils peuvent notamment demander au tribunal d'annuler une opération ou une émission, d'ordonner à une partie de se départir de titres acquis à l'occasion d'une offre ou d'interdire à un porteur d'exercer le droit de vote adhérent à des titres acquis à l'occasion d'une offre.
1984, c. 41, a. 58.

[Possible measures] They may in particular move that the court cancel a transaction or an issue, order a party to dispose of securities purchased during a bid or prohibit a holder from exercising voting rights attached to securities purchased during a bid.

**CHAPITRE IV
 PRESCRIPTION ET DISPOSITIONS
 DIVERSES**

**CHAPTER IV
 PRESCRIPTION AND MISCELLANEOUS
 PROVISIONS**

234. [Actions en nullité et en révision de prix] Les actions en nullité et en révision de prix établies par le présent titre se prescrivent par un an à compter de la date de l'opération.
1982, c. 48, a. 234.

234. [Prescription] Any action for rescission or for revision of the price under this title is prescribed by the lapse of one year from the date of the transaction.

235. [Prescription] Les actions en dommages établies par le présent titre se prescrivent par un an à compter de la connaissance des faits y donnant ouverture, sauf preuve d'une connaissance tardive imputable à la négligence du demandeur.

1982, c. 48, a. 235.

236. [Limites] Toutefois, les prescriptions établies par l'article 235 sont subordonnées aux limites suivantes:

1^o trois ans à compter de l'opération, dans le cas des actions en dommages prévues aux articles 214, 215, 226, 227 et 228;

2^o trois ans à compter de la date du dépôt à la Commission du document d'information, dans le cas des actions prévues aux articles 218, 219, 221, 223 et 225.

1982, c. 48, a. 236; 1990, c. 77, a. 37.

236.1. [Tribunal compétent] L'action fondée sur le présent titre ou l'action intentée selon le droit commun pour des faits reliés au placement d'une valeur ou à une offre publique peut être portée devant le tribunal de la résidence du demandeur.

[Loi du Québec applicable] En ce qui concerne le placement d'une valeur, la loi du Québec est applicable des lors que le souscripteur ou l'acquéreur réside au Québec, indépendamment du lieu du contrat.

[Stipulation nulle] Toute stipulation contraire concernant la compétence des tribunaux ou la loi applicable est nulle.

1987, c. 40, a. 26.

235. [Prescription] Any action for damages under this title is prescribed by the lapse of one year from knowledge of the facts giving rise to the action, except on proof that tardy knowledge is imputable to the negligence of the plaintiff.

236. [Limitations] However, the prescriptive periods under section 235 are subordinate to the following limitations:

(1) three years from the transaction, in the case of actions for damages provided for in sections 214, 215, 226, 227 and 228;

(2) three years from the filing of the information document with the Commission, in the case of actions under sections 218, 219, 221, 223 and 225.

236.1. [Place of action] Any action under this Title or any action under the ordinary rules of law in respect of facts related to the distribution of a security or to a take-over bid or issuer bid may be brought before the court of the plaintiff's residence.

[Applicable legislation] In matters pertaining to the distribution of a security, the laws of Québec are applicable where the subscriber or purchaser resides in Québec, regardless of the place of the contract.

[Contrary stipulation] Any contrary stipulation as to the jurisdiction of the courts or the applicable legislation is null.

ANNEX 6



LIVRE V
PROCÉDURES SPÉCIALES

TITRE I
DES MESURES
PROVISIONNELLES

CHAPITRE I
DES SAISIES AVANT JUGEMENT

733. Le demandeur peut, avec l'autorisation d'un juge, faire saisir avant jugement les biens du défendeur, lorsqu'il est à craindre que sans cette mesure le recouvrement de sa créance ne soit mis en péril.

1965 (1^{re} sess.), c. 80, a. 733.

BOOK V
SPECIAL PROCEEDINGS

TITLE I
PROVISIONAL REMEDIES

CHAPTER I
SEIZURE BEFORE JUDGMENT

733. The plaintiff may, with the authorization of a judge, seize before judgment the property of the defendant, when there is reason to fear that without this remedy the recovery of his debt may be put in jeopardy.

P. 12, 39, 94.2, 100, 735

734. Le demandeur peut aussi faire saisir avant jugement:

1. le bien meuble qu'il est en droit de revendiquer;
2. supprimé;
3. le véhicule automobile qui lui a causé un dommage;
4. le bien meuble sur le prix duquel il est fondé à être colloqué par préférence et dont on use de manière à mettre en péril la réalisation de sa créance prioritaire;

5. le bien meuble qu'une disposition de la loi lui permet de faire saisir pour assurer l'exercice de ses droits sur icelui.

1965 (1^{re} sess.), c. 80, a. 734; 1992, c. 57, a. 359.

P. 12, 94.2, 100, 734.0.1; C.C.Q. 1124, 1222, 1734, 2651

734.0.1 Dans une instance en nullité de mariage, en séparation de biens, en paiement d'une prestation compensatoire, en séparation de corps ou en divorce, chaque époux peut aussi faire saisir avant jugement les biens meubles qui lui appartiennent, qu'ils soient entre les mains de son conjoint ou d'un tiers; il peut en outre, avec l'autorisation d'un juge, faire saisir les biens de son conjoint à une part desquels il aurait droit en cas de dissolution du régime matrimonial.

Les biens saisis restent sous la garde du saisi, à moins qu'un juge n'en décide autrement.

1982, c. 17, a. 27; 1989, c. 55, a. 34.

P. 39, 735, 813.3

734.1 Lorsque la cause a été portée en appel, le demandeur peut faire une saisie avant jugement avec l'autorisation d'un juge de première instance.

1975, c. 53, a. 51.

P. 39, 735

735. La saisie avant jugement se fait en vertu d'un bref, délivré par le greffier sur requête écrite; celle-ci doit être appuyée d'un affidavit qui affirme l'existence de la créance et des faits qui donnent ouverture à la saisie, et indique les sources d'information du déclarant, le cas échéant.

Dans les cas prévus par les articles 733, 734.0.1 et 734.1, l'autorisation du juge doit apparaître sur la requête elle-même.

1965 (1^{re} sess.), c. 80, a. 735; 1982, c. 17, a. 28; 1992, c. 57, a. 420.

P. 38, 733

734. The plaintiff may also seize before judgment:

- (1) the movable property which he has a right to revendicate;
- (2) struck out;
- (3) the motor vehicle which caused him damage;
- (4) the movable property upon the price of which he is entitled to be colloated by preference and which is being used in such a way as to jeopardize the realization of his prior claim;

(5) the movable property which a provision of law permits him to seize in order to assure the exercise of his rights upon it.

734.0.1 In a suit in nullity of marriage, for separation as to property, for payment of a compensatory allowance, for separation as to bed and board or for divorce, each spouse may also seize before judgment the movables belonging to him, whether they are in the hands of his spouse or of a third person; he may, in addition, with leave of a judge, seize the property of his spouse that he would be entitled to share in if the matrimonial regime were dissolved.

The seized property remains in the custody of the debtor, unless a judge decides otherwise.

734.1 Where the case is in appeal, the plaintiff may make a seizure before judgment with the authorization of a trial judge.

735. A seizure before judgment is effected in virtue of a writ, issued by the clerk upon a written requisition supported by an affidavit affirming the existence of the debt and the facts which give rise to the seizure and, if based on information, indicating the sources thereof.

In the cases provided for in articles 733, 734.0.1 and 734.1, the leave of the judge must appear upon the requisition itself.

736. Le bref enjoint à l'officier qui en est chargé, de saisir tous les biens meubles du défendeur, ou les seuls meubles ou immeubles qui y sont spécialement désignés. Lorsque la saisie est en main tierce, le bref doit être conforme aux prescriptions des articles 625 et 641.

Le bref ordonne en outre au défendeur, à qui il doit être signifié avec une copie de l'affidavit, de comparaître pour répondre à la demande formée contre lui et entendre déclarer la saisie valable.

1965 (1^{re} sess.), c. 80, a. 736; 1972, c. 70, a. 24.

P. 580, 588, 592, 594, 625, 641, 660

737. La saisie avant jugement a pour seul but de mettre les biens sous la main de la justice pendant l'instance; elle est pratiquée de la même manière et obéit aux mêmes règles que la saisie après jugement, dans la mesure où elles sont applicables.

Les articles 552 et 553 s'appliquent à la saisie avant jugement, sauf dans les cas prévus par l'article 734.

L'officier confie la garde et la possession des biens saisis à un gardien qu'il choisit à moins que le saisissant ne l'autorise à les laisser sous la garde et en la possession du saisi.

1965 (1^{re} sess.), c. 80, a. 737; 1975, c. 83, a. 52; 1977, c. 73, a. 31; 1983, c. 28, a. 26; 1992, c. 57, a. 360.

P. 552, 553, 580, 581, 583, 583.1, 660 ss., 734

738. Dans les cinq jours de la signification du bref, le défendeur peut demander l'annulation de la saisie en raison de l'insuffisance ou de la fausseté des allégations de l'affidavit sur la foi duquel le bref a été délivré.

Si une enquête est nécessaire, elle doit être tenue avec diligence.

Il appartient au saisissant de prouver la véracité des allégations contenues dans son affidavit.

1965 (1^{re} sess.), c. 80, a. 738; 1982, c. 32, a. 50.

P. 28

739. Le défendeur peut éviter l'enlèvement ou obtenir manivée des biens saisis en fournissant à l'officier saisissant une garantie suffisante que le défendeur choisit.

Le montant de la garantie est déterminé par le chiffre de la demande ou par la valeur marchande des biens saisis telle que certifiée par l'officier saisissant, selon le cas, à moins

736. The writ orders the officer charged with it to seize all the movable property of the defendant or only the movable or immovable property specially described therein. When the seizure is in the hands of a third party, the writ must be conform to the provisions of article 625 and 641.

The writ, moreover, orders the defendant, upon whom it must be served with a copy of the affidavit, to appear to answer the demand made against him and to hear the seizure declared valid.

737. Seizure before judgment has, as its sole purpose, to place the property in the hands of justice pending suit; it is carried out in the same way and is governed by the same rules as seizure after judgment, so far as they are applicable.

Articles 552 and 553 apply to a seizure before judgment, except in the cases provided for in article 734.

The officer entrusts the property seized to a guardian designated by him, unless the seizing creditor authorizes him to leave them with the debtor.

738. The defendant may, within five days of service of the writ, demand that the seizure be quashed because of the insufficiency or the falsity of the allegations of the affidavit on the strength of which the writ was issued.

If a proof is necessary, it must take place as soon as possible.

The burden is on the seizing party to prove the allegations of his affidavit.

739. The defendant may prevent the removal of the seized property or be released from the seizure by giving the seizing officer sufficient guarantee chosen by the defendant.

The amount of the guarantee is determined by the amount sued for the market value of the property seized as certified by the seizing officer, according to the circumstances, unless

24—94.01.01
206

Code of Civil Procedure

(Art. 740-742)

que le juge ou le greffier n'en décide autrement.

Seul le dépôt d'une somme d'argent, d'une garantie émise par un établissement financier exerçant ses activités au Québec, d'obligations au sens des dispositions du Code civil du Québec relatives aux placements présumés sûrs ou d'une police d'assurance garantissant l'exécution de ses obligations constitue une garantie suffisante au sens du présent article.

Le défendeur peut aussi, en tout temps après l'enlèvement des biens saisis, obtenir la remise de ses biens en s'adressant au juge et en fournissant une garantie suffisante au sens du présent article ou toute autre garantie que le juge peut autoriser.

1965 (1^{re} sess.), c. 80, a. 739; 1973, c. 83, a. 53; 1977, c. 73, a. 32; 1983, c. 28, a. 27; 1992, c. 57, a. 361, 420.

P. 525, 5S3.1; C.C.Q. 1339

740. Lorsque la déclaration n'a pas été signifiée au défendeur avec le bref de saisie, le demandeur doit la produire au greffe dans les cinq jours, avec une copie pour le défendeur.

La demande est contestée de la manière ordinaire, mais elle doit être instruite et jugée d'urgence.

La saisie avant jugement peut être pratiquée en cours d'instance; elle obéit alors aux règles de ce chapitre, en autant qu'elles peuvent s'appliquer.

1965 (1^{re} sess.), c. 80, a. 740.

the judge or clerk otherwise decides.

Only the deposit of a sum of money, of a guarantee issued by a financial institution carrying on business in Québec, of bonds within the meaning of the provisions of the Civil Code of Québec relating to presumed sound investments or of an insurance policy securing the performance of the dependant's obligations constitutes sufficient guarantee within the meaning of this article.

The defendant may also, at any time after the removal of the property seized, have such property returned to him on applying to the judge and on giving sufficient guarantee within the meaning of this article or any other guarantee that the judge may authorize.

1965 (1st sess.), c. 80, a. 739; 1973, c. 83, a. 53; 1977, c. 73, a. 32; 1983, c. 28, a. 27; 1992, c. 57, a. 361, 420.

P. 525, 5S3.1; C.C.Q. 1339

740. When the declaration has not been served on the defendant with the writ of seizure, the plaintiff must file it at the office of the court within five days, with a copy for the defendant.

The suit is contested in the ordinary manner, but it must be heard and decided by preference.

Seizure before judgment may be taken during the suit; it is then subject to the rules of this chapter, so far as they apply.

ANNEX 7



TITRE QUATRIÈME
DE LA RECONNAISSANCE
ET DE L'EXECUTION
DES DECISIONS
ETRANGERES ET DE
LA COMPETENCE DES
AUTORITES ETRANGERES

TITLE FOUR
RECOGNITION
AND ENFORCEMENT
OF FOREIGN DECISIONS
AND JURISDICTION
OF FOREIGN AUTHORITIES

CHAPITRE PREMIER
DE LA RECONNAISSANCE
ET DE L'EXECUTION
DES DECISIONS ETRANGERES

CHAPTER I
RECOGNITION
AND ENFORCEMENT
OF FOREIGN DECISIONS

Art. 3155. Toute decision rendue hors
du Quebec est reconnue et, le cas echeant,

Art. 3155. A Quebec authority recog-
nizes and, where applicable, declares en-

RECOGNITION AND ENFORCEMENT OF FOREIGN DECISIONS

RECONNAISSANCE ET EXECUTION DES DECISIONS ETRANGERES

declaree exécutoire par l'autorité du
Quebec, sauf dans les cas suivants:

enforceable any decision rendered outside
Quebec except in the following cases:

1. L'autorité de l'Etat dans lequel la de-
cision a été rendue n'est pas compétente
suivant les dispositions du présent titre.

(1) the authority of the country where the
decision was rendered had no jurisdiction
under the provisions of this Title;

2. La decision, au lieu où elle a été ren-
due, est susceptible d'un recours ordinaire,
ou n'est pas définitive ou exécutoire.

(2) the decision is subject to ordinary
remedy or is not final or enforceable at the
place where it was rendered;

3. La decision a été rendue en violation
des principes essentiels de la procédure.

(3) the decision was rendered in contra-
vention of the fundamental principles of
procedure;

4. Un litige entre les mêmes parties,
fondé sur les mêmes faits et ayant le même
objet, a donné lieu au Québec à une deci-
sion passée ou non en force de chose ju-
gée ou est pendante devant une autorité
québécoise, première saisi, ou a été jugé
dans un Etat tiers et la decision remplit les
conditions nécessaires pour sa reconnais-
sance au Québec.

(4) a dispute between the same parties,
based on the same facts and having the
same object has given rise to a decision
rendered in Quebec, whether it has ac-
quired the authority of a final judgment (*res
judicata*) or not, or is pending before a
Quebec authority in first instance, or has
been decided in a third country and the de-
cision meets the necessary conditions for
recognition in Quebec.

5. Le résultat de la decision étrangère
est manifestement incompatible avec
l'ordre public tel qu'il est entendu dans les
relations internationales.

(5) the outcome of a foreign decision is
manifestly inconsistent with public order as
understood in international relations;

6. La decision sanctionne des obliga-
tions découlant des lois fiscales d'un Etat
étranger.

(6) the decision enforces obligations
arising from the taxation laws of a foreign
country

1991, c. 64, a. 3155

(P.L.38, a. 170)

Art. 3156: Une decision rendue par de-
faut ne sera reconnue et déclarée exécutoire
que si le demandeur prouve que l'acte
procédural d'instance a été régulièrement
notifié à la partie défaillante, selon la loi du
lieu où elle a été rendue.

Art. 3156. A decision rendered by de-
fault may not be recognized or declared en-
forceable unless the plaintiff proves that the
act of procedure initiating the proceedings
was duly served on the defaulting party in
accordance with the law of the place where
the decision was rendered.

Toutefois, l'autorité pourra refuser la re-
connaissance ou l'exécution si la partie de-
faillante prouve que, compte tenu des
circonstances, elle n'a pu prendre connais-
sance de l'acte introductif d'instance ou n'a
disposé d'un délai suffisant pour pré-
senter sa défense.

However, the authority may refuse rec-
ognition or enforcement if the defaulting
party proves that, owing to the circumstan-
ces, he was unable to learn of the act of
procedure initiating the proceedings or was
not given sufficient time to offer his de-
fence.

1991, c. 64, a. 3156

Art. 3157. La reconnaissance ou l'exé-
cution peut être refusée pour la seule
raison que l'autorité d'origine a appliqué
une loi autre que celle qui serait applicable
selon les règles du présent titre.

Art. 3157. Recognition or enforcement
may not be refused on the sole ground that
the original authority applied a law differ-
ent from the law that would be applicable under
the rules contained in this Book.

1991, c. 64, a. 3157

RECOGNITION AND ENFORCEMENT OF FOREIGN DECISIONS

Art. 3158. L'autorité québécoise se limite à vérifier si la décision dont la reconnaissance ou l'exécution est demandée remplit les conditions prévues au présent titre, sans procéder à l'examen au fond de cette décision.

1991, c. 64, a. 3158

Art. 3159. Si la décision statue sur plusieurs demandes qui sont dissociables, la reconnaissance ou l'exécution peut être accordée partiellement.

1991, c. 64, a. 3159

Art. 3160. La décision rendue hors du Québec qui accorde des arrêts ou versements périodiques peut être reconnue et déclarée exécutoire pour les versements échus et à échoir.

1991, c. 64, a. 3160

Art. 3161. Lorsqu'une décision étrangère condamne le débiteur au paiement d'une somme d'argent exprimée dans une monnaie étrangère, l'autorité québécoise convertit cette somme en monnaie canadienne, au cours du jour où la décision est devenue exécutoire au lieu où elle a été rendue.

La détermination des intérêts due peut porter une décision étrangère est réglée par la loi de l'autorité où la rendue jusqu'à sa conversion.

1991, c. 64, a. 3161

Art. 3162. L'autorité du Québec reconnaît et sanctionne les obligations découlant des lois fiscales d'un État qui reconnaît et sanctionne les obligations découlant des lois fiscales du Québec.

1991, c. 64, a. 3162

Art. 3163. Les transactions exécutoires au lieu d'origine sont reconnues et, le cas échéant, déclarées exécutoires au Québec aux mêmes conditions que les décisions judiciaires pour autant que ces conditions leur sont applicables.

1991, c. 64, a. 3163

Art. 3158. A Québec authority confines itself to verifying whether the decision in respect of which recognition or enforcement is sought meets the requirements prescribed in this Title, without entering into any examination of the merits of the decision.

Art. 3159. Recognition or enforcement may be granted partially if the decision deals with several claims that can be dissociated.

Art. 3160. A decision rendered out of Québec awarding periodic payments or support may be recognized and declared enforceable in respect of both payments due and payments to become due.

Art. 3161. Where a foreign decision orders a debtor to pay a sum of money expressed in foreign currency, a Québec authority converts the sum into Canadian currency at the rate of exchange prevailing on the day the decision became enforceable at the place where it was rendered.

The determination of interest payable under a foreign decision is governed by the law of the authority that rendered the decision until its conversion.

Art. 3162. A Québec authority recognizes and enforces the obligations resulting from the taxation laws of foreign countries in which the obligations resulting from the taxation laws of Québec are recognized and enforced.

Art. 3163. A transaction enforceable at the place of origin is enforceable and, as the case may be, declared to be enforceable in Québec on the same conditions as a judicial decision, to the extent that those conditions apply to the transaction.

1

.....



CHAPITRE III
DE LA RECONNAISSANCE
ET DE L'EXECUTION
DES DECISIONS ETRANGERES

785. La demande de reconnaissance et d'exécution d'une décision rendue hors du Québec est introduite par requête.

Toutefois, elle peut se faire également de manière incidente, même en défense, si le tribunal québécois est compétent pour l'entendre.

1965 (1^{re} sess.), c. 50, a. 785; 1973, c. 38, a. 88; 1992, c. 57, a. 367.

C.C.Q. 3153 ss.

786. La partie qui invoque la reconnaissance ou qui demande l'exécution d'une décision étrangère joint à sa demande une copie de la décision et une attestation émanant d'un officier public étranger compétent affirmant que la décision n'est plus, dans l'Etat où elle a été rendue, susceptible de recours ordinaire, qu'elle est définitive ou exécutoire.

Si la décision a été rendue, par défaut, il est joint une copie certifiée des documents permettant d'établir que l'acte introductif d'instance a été régulièrement signifié à la partie défaillante.

Les documents rédigés dans une autre langue que le français ou l'anglais doivent être accompagnés d'une traduction vidimée au Québec.

1965 (1^{re} sess.), c. 50, a. 786; 1973, c. 38, a. 88; 1992, c. 57, a. 367.

CHAPTER III
RECOGNITION
AND ENFORCEMENT OF
FOREIGN DECISIONS

785. An application for recognition and enforcement of a decision rendered outside Quebec is made by way of a motion.

It may also be made incidentally, even in defence, if it comes within the jurisdiction of the Quebec court.

786. A party seeking recognition or enforcement of a foreign decision attaches to his application a copy of the decision and an attestation emanating from a competent foreign public officer stating that the decision is no longer, in the State in which it was rendered, subject to ordinary remedy and that it is final or enforceable.

If the decision was rendered by default, a certified copy of the documents establishing that the procedure which instituted the proceedings was duly served on the defaulting party is attached to the application.

All documents drafted in a language other than French or English must be accompanied with a translation authenticated in Quebec.



Canada

Ontario Securities Commission



**ONTARIO SECURITIES COMMISSION
ENFORCEMENT BRANCH**

IOSCO Paper

**OSC Response to IOSCO Working Party No. 4 Questionnaire
Respecting
Provisions Available on a Cross Border Basis
to
Protect Defrauded Investors' Interests and Assets**

November 30, 1995
Toronto, Canada

**Ontario Securities Commission
Enforcement Branch
20 Queen Street West
Suite 800, Box 55
Toronto, Ontario
M5H 3S8**

Executive Summary

There are a number of ways to freeze the assets of a person or company in Ontario:

1. The OSC can freeze assets itself pursuant to section 126 of the *Securities Act* (Ontario) (the "Act"), provided it brings an application before the Ontario Court (General Division) (the "Court") to continue the freeze within seven days.
2. Where the Court is satisfied that Ontario securities law has not been complied with, the OSC may request the Court to exercise its remedial powers to make orders under section 128 of the Act. Among these powers, the Court can order an interim freeze of assets.
3. In the case of an Ontario public corporation, the OSC has standing to bring an application before the Court for an order remedying "oppressive" conduct by the directors and officers of the corporation against its security holders. In exercising its discretion, the Court may make an interlocutory freeze order.
4. The Court has general power to freeze assets pursuant to section 101 of the *Courts of Justice Act*.

Persons affected by a freeze order may not appeal from the order without leave of the Court.

Assets which are frozen, such as tangible and intangible personal property, may only be used in the manner specified in the freeze order.

Where the Court is satisfied that Ontario securities law has not been complied with, the OSC may request the Court to exercise its powers under section 128 of the Act to order restitution to or compensation for any person affected by the breach of Ontario securities law.

The OSC may, pursuant to section 129 of the Act, apply to the Court for the appointment of a receiver or receiver-manager over the assets and undertaking of any person or company.

Section 126 of the Act specifically contemplates its use by the OSC at the behest of a foreign regulatory authority.

Judgments obtained abroad can be enforced against a party having assets in Ontario by commencing an action on the judgment in Ontario. Reciprocal enforcement of judgment legislation is available for judgments obtained in the other common law provinces of Canada and the United Kingdom. Generally, foreign authorities must retain their own local counsel to pursue remedies in Ontario.

A. Measures Available for Use Domestically

1. Freeze Orders

Pursuant to subsection 126 of the *Securities Act* (Ontario) (the "Act"), the Ontario Securities Commission (the "OSC") has power to freeze assets held by any person or company. This power can be exercised if the OSC considers a freeze order expedient:

- (a) for the due administration of Ontario securities law or the regulation of the capital markets in Ontario; or
- (b) to assist in the due administration of the securities laws or the regulation of the capital markets in another jurisdiction.

Tangible and intangible personal property may be frozen (such as funds on deposit in a bank account or securities held in a trading account with a securities dealer) as well as real property. The OSC may direct any person or company to hold these assets until the direction is revoked by the OSC or the Ontario Court (General Division) (the highest court of original jurisdiction in Ontario, hereinafter referred to as the "Court") orders otherwise.

The OSC's power to freeze assets is subject to an important limitation. An application must be made to the Court to continue the direction to freeze assets no later than seven days after the direction is made. In this regard, it is important to note that a division of the Court - specialized in commercial matters, including securities law issues, and known as the "Commercial List" - has recently been established. In the context of freeze directions, it is likely that staff of the OSC, or other interested parties, would bring securities law applications and actions before a judge presiding over the Commercial List.

In addition, the OSC may, pursuant to subsection 126(4) of the Act, order that a freeze direction be certified to a land registrar or mining recorder and that it be registered against real property or mining claims in Ontario. This registration or recording, which has the same effect as a "certificate of pending litigation", is deemed to provide actual notice to any subsequent purchaser or encumbrancer of the real property or mining claim that an interest in the subject property is in question in a proceeding. An order to continue the registration or recording must be obtained from the Court no later than seven days after the date of the initial order by the OSC.

Section 128 of the Act provides broad remedial powers to the Court if a finding is made that a person or company has not complied, or is not complying, with Ontario securities law. In this context, the Court may make interim orders pending the ultimate disposition of the section 128 proceeding. The interim orders can include freeze orders over assets in Ontario. The Court must exercise its discretion under section 128 in accordance with equitable principles for the due administration of Ontario securities law.

Ontario corporate law offers scope for making an application to preserve assets of companies incorporated in Ontario. In the case of a corporation which is an "offering corporation" (meaning, generally, a corporation that is offering its securities to the public) under the *Business*

Corporations Act, 1990 (Ontario) (the "OBCA"), the OSC has standing to apply to the Court for much the same relief as is available under section 128 of the Act. The application would be made pursuant to section 248 of the OBCA, which provides for what is known as the "oppression remedy". In this context, the Court has power to make a freeze order if it finds the directors or officers of the offering corporation have acted in a manner which is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation. It should be noted that in the case of a corporation that is not an "offering corporation", the OSC does not have *prima facie* standing to bring an application before the Court under the oppression remedy. In this setting, the only way for the OSC to pursue an oppression remedy and request a freeze order would be to demonstrate to the Court that the OSC is a proper person to make an application for relief.

Companies incorporated federally in Canada pursuant to the *Canada Business Corporations Act* (the "CBCA"), but which carry on business in Ontario, are governed by the provisions of the CBCA. The oppression remedy under the CBCA is substantially similar to that in the OBCA; except that there is no concept of an "offering corporation". Accordingly, if the OSC wished to seek a freeze order from the Court pursuant to the oppression remedy of the CBCA, it would have to demonstrate that it was a proper party to make an application for relief.

There are other avenues available to freeze assets in Ontario. For example, section 101 of the *Courts of Justice Act* (the "CJA") affirms the general jurisdiction to the Court to impose injunctions where circumstances warrant. A form of injunction known in English law as the "Mareva Injunction" restrains the disposition or movement of assets in or out of Ontario. A motion for a Mareva Injunction may be brought before the Court by any person claiming an interest in the subject assets. The person bringing such a motion could be a foreign agency that has commenced proceedings against a person or company having assets in Ontario. Injunctions may also be obtained by a foreign agency that has obtained judgment against a person or company.

Federal and provincial legislation governing other government and public agencies in Canada and the Province of Ontario may contain enforcement remedies similar to those outlined above with respect to regulatory matters falling within their jurisdiction.

- Tactically, persons seeking to obtain a freeze order might wish to proceed without providing notice to the person or company whose assets are sought to be affected by the order. An order obtained on this basis is known as an "ex parte" order. Subsection 126(6) of the Act provides that a direction freezing assets may be made by the OSC without notice. But once the direction freezing the assets has been made, copies of the direction must be sent to all affected persons forthwith. Furthermore, as noted above, an application must be made to the Court within seven days to review the freeze order. Such an application would be made on notice to affected persons.

An interim freeze order can also be obtained from the Court for a 10-day period on an "ex parte" basis pursuant to subrule 40.02 of the Rules. The evidence used to obtain such an order

must contain full and fair disclosure of all material facts relating to the order sought.

2. Rights of Appeal for Freeze Orders

The measures outlined above can be used for:

- (a) the preservation of assets pending the disposition of a proceeding;
- (b) where the ownership of assets is in dispute; or
- (c) the prevention of dissipation of assets or movement of assets outside Ontario pending enforcement of a judgment that has previously been obtained inside or outside Ontario.

All orders relating to the preservation of assets are, by their nature, interlocutory orders; that is, orders pending final disposition. Rights of appeal from such orders are only available if leave to appeal is granted by another judge of the Court. Pursuant to subrule 62.02(4), leave will only be granted in extraordinary circumstances. These are:

- (a) where there is a conflicting decision of another judge of the Court on a legal issue upon which the decision is made; or
- (b) where there is good reason to doubt the correctness of the order and the order appealed from is a matter of general precedential importance beyond its relevance to the affected parties.

These conditions are generally difficult to meet in the context of a freeze order. If leave to appeal is granted, the appeal lies to a panel of three judges of the Court.

3. Use of Frozen Assets

Assets which are frozen may only be used in the manner specified in the freeze order. Typically, an order freezing liquid assets (such as cash) may permit their investment in fully guaranteed instruments issued by specified financial institutions in Canada. Such instruments are usually held in a bank or the trust account of the solicitor of record for a party or another suitable depository. Monies may also be paid into Court. There they will be invested in Government of Ontario securities by the Minister of Finance. Apart from subsequent disposition or encumbrance, there are no restrictions on the use of land or buildings against the title to which a certificate of pending litigation has been registered.

Judges presiding over the Commercial List are very experienced in dealing, on an urgent basis, with complicated commercial matters relating to the safekeeping, treatment and disposition of assets. The practice direction governing proceedings on the Commercial List strongly encourages

parties to work together to resolve problems that necessarily arise in ongoing complex commercial litigation. Thus, parties have considerable latitude to resolve issues relating to assets subject to freeze orders. For example, some assets subject to a freeze order may decline in value (such as shares in public companies) pending the ultimate disposition of litigation regarding the rights to those shares. The parties therefore may be expected by a Commercial List judge to work together to design amendments to the relevant order to address such problems - such as instructing the sale of securities and the substitution of assets therefor, or the exercise or non-exercise of options. It should be noted, however, that in any case, judges presiding over the Commercial Court will generally be very reluctant to substitute their own business judgment for that of the parties themselves.

4. Return of Frozen Assets to Investors

In order to coordinate the return of frozen assets to investors, the OSC may seek judicial intervention under section 128 of the Act. If the Court determines that Ontario securities law has not been complied with, its broad remedial powers include the ability to order that any transaction be unwound and that any funds raised pursuant thereto be returned to investors. In addition, the Court may order restitution to or compensation for any person affected by a breach of Ontario securities law.

The OBCA, in subsection 248(3), provides for the return of funds raised from investors, compensation in appropriate circumstances and any other order to rectify the "oppressive" conduct complained of in the application. Furthermore, pursuant to Section 246 of the OBCA, any security holder may apply to Court for leave to bring an action in the name of the corporation against its officers and directors if such directors and officers have acted not in the best interests of the subject corporation. In the case of corporations governed by the CBCA, similar provisions are contained in subsection 241(3) of the CBCA.

5. Investor Representatives

Pursuant to Rule 13 of the Rules, a person who is not a party to a proceeding, may bring a motion for leave to intervene as added party if that person claims an interest in the subject matter of the proceeding. Under this Rule, investors may seek to participate directly in an application made pursuant to section 128 of the Act through their own counsel. Also, in certain circumstances, a party or the Court may seek to appoint independent advisory counsel for investors where the investors are not in a position to retain their own solicitors. Furthermore, there is legislation in Ontario - the *Class Proceedings Act* - permitting a representative plaintiff to commence a class action law suit.

6. Enforcement of Judgments

Judgments obtained for the payment of money may be enforced pursuant to the *Executions Act* (Ontario) and Rule 60 of the Rules. These provisions permit judgment-debtor examinations to determine the existence and location assets owned by a judgment debtor, garnishment, and the seizure and sale of any real and personal property that may be available to satisfy the judgment. If the assets are subject to a freeze order, these steps may not be necessary. In this case, the judgment could simply direct the delivery or payment of assets subject to the freeze order to the person(s) found to be entitled to them.

7. Appointment of a Receiver or a Receiver-Manager

In addition to "freeze orders", pursuant to Section 129 of the Act, the OSC can apply to the Court for the appointment of a receiver or a receiver-manager over the assets and undertaking of any person or company. It should be noted, however, that the expenses incurred in pursuing this remedy are often prohibitive. An order for the appointment of a receiver or a receiver-manager may be made if such appointment would be in the best interests of the creditors or the security holders of the person or company. Alternatively, the order may be made if the Court feels it would be appropriate for the due administration of the Act.

An order for the appointment of a receiver or a receiver and manager may also be made by the Court on an interim or permanent basis pursuant the oppression remedy provisions in Subsection 248(3) of the OBCA. And generally, the Court has authority to appoint a receiver or receiver and manager in any proceeding when it is just and convenient to do so, pursuant to Section 101 of the CJA.

B. Measures Available for Use by Foreign Authorities

Section 126 of the Act (discussed above) which provides for the interim preservation of assets, specifically contemplates its use by the OSC at the behest of a foreign regulatory authority.

Foreign authorities can seek to enforce foreign judgments against defendants having assets in Ontario. Local counsel should, however, be retained for this purpose. Ontario has enacted reciprocal enforcement of judgment legislation, but this legislation only applies to the judgments of the other provinces of Canada (excluding Quebec) and the United Kingdom. Judgments obtained in all other jurisdictions may be enforced in Ontario by the commencement of a civil action on the judgment obtained abroad against a defendant having assets in Ontario.

If it appears that assets currently situate in Ontario might be dissipated or taken out of the jurisdiction before commencement or completion of the action to enforce a foreign judgment, then a Mareva Injunction may be sought by the foreign authority through local counsel to freeze

these assets.

There are limited defences available to a defendant in Ontario in an action on a foreign judgment. These could include:

- (a) an allegation that the original foreign judgment was obtained by fraud; or
- (b) an allegation that the foreign law under which the judgment was obtained offends the public policy of Ontario.

There are no special rules under Ontario law respecting the transfer of funds to foreign persons. There are no restrictions on the transfer of funds out of Canada. However, it should be noted that in the event that a court order is obtained for the return of assets to a foreign authority, these assets may be subject to applicable Canadian withholding and other taxes.

Finally, it should be noted that, additional assistance is available to foreign regulatory authorities in the form of gathering or providing access to non-public information pursuant to either a formal Memorandum of Understanding for those jurisdictions that have entered into one with the OSC or, alternatively, on an informal basis depending on the particular circumstances. In addition, foreign authorities might have recourse to provisions of any applicable Mutual legal Assistance Treaty which may have been entered into between their respective governments and the Government of Canada.

November, 1995
Toronto, Canada



Chilí

Superintendencia de Valores y Seguros



SUPERINTENDENCIA DE VALORES Y SEGUROS

-Mandate on measures available on a cross-border basis to protect interests and assets of defrauded investors-

Guidelines for contributionsDescription of the available measures to preserve that may lead directly or indirectly to preservation of the assets or interests of defrauded investors

The Superintendencia de Valores y Seguros (SVS) cannot administratively freeze assets nor demand judicially this action. The SVS has no information about other authorities or public organizations empowered to do so. Likewise, the SVS has no power to take other actions whose effect would be equal to those of freezing the assets.

In the case of corporations which are registered with the SVS, there are indirect actions that the SVS can take. For example the SVS can request a compulsory stockholders' meeting so that shareholders can make a decision about removing the Board of Directors. In the case of the operator of a pooled investment vehicle, when there has been a serious breach of the law, the SVS may cancel its license, and proceed with the termination of the corporation. For legal breaches related to public offerings of securities, the SVS can suspend on- and off- exchange transactions, or cancel the securities' registration so that they can no longer be publicly offered. Regarding securities brokers/dealers, in the case of a serious breach, the SVS can order the suspension of transactions up to one year, or even cancel the broker/dealer's registration with the SVS, thereby impeding them from operating in the market.

Notice of the penalty must be given to the firm, which can argue that the notification may damage the future success of the actions ordered, and can obtain judicial approval to suspend the notification. The corporation has a variety of rights of appeal.

In the aforementioned cases, the SVS will act solely if the law has been severely breached.

According to Chilean legislation, only defrauded investors can file judicial action in order to receive compensation, or get assets returned.

The defrauded investor can obtain an interim or provisional judicial order to freeze assets (articles 279, 280 and 290 of the Chilean Civil Procedures Code). However, any action must be previously reported to the punished party.

Frozen assets cannot be used by any means, except for the prudent preservation of the assets while the trial last. The return of assets can be requested if the defendant wins in court.

SUPERINTENDENCIA DE VALORES Y SEGUROS

Repatriation of funds

In Chile there are mechanisms to repatriate assets to a foreign investor. The mechanism will depend on the investment's legal framework and the court order issued. The procedure is to directly petition the judge handling the case. Once the proceedings ordered by the judge have been completed, the party goes to the Central Bank and registers the funds to be repatriated.

Experience of delegations in the preservation and returns of assets located in foreign jurisdictions

This organization has no experience in this matter.

FINAL NOTE: There is no discrimination between nationals and foreigners in the Chilean securities legislation in relation to their rights and duties when participating in the securities market as: investor, intermediary or receiver of investment. The SVS acknowledges any accusation of irregularities related to contracts or compliance with the law. The powers possessed by the SVS are administrative, and provide the SVS with the capacity to investigate, take testimony of directors, administrators or related persons, audit and inspect accounting and financial statements, apply censorship, fines or revocation of the registration to operate in serious cases. Those cases identified as involving criminal activity are reported to a judge by the SVS. In those suits that develop through an allegation by the SVS, the SVS does not act as party to the trial but collaborates with the investigation. Therefore, the direct involvement of the defrauded investor is vital to obtaining an order to freeze assets and the return and expatriation of those assets once the case is closed.

China Tapei

Securities and Exchange



Answers to the IOSCO Working Party N.4
Questionnaire Concerning
"Mandate on Measures Available on a
Cross-Border Basis to Protect Interests
and Assets of Defrauded Investors"

I. MEASURES AVAILABLE FOR USE DOMESTICALLY

A. Description of the available measures to preserve that may lead directly or indirectly to preservation of the assets or interests of defrauded investors

1. Can you administratively freeze assets located in bank or brokerage accounts without recourse to the Courts?

Answer:

In accordance with Article 15 of the Constitution, people's property rights should be protected. Therefore, private properties can not be seized or confiscated unless through due process of law, as provided by the "Civil Enforcement Code" or the "Administrative Enforcement Code". As an administrative agency, the SEC can neither freeze assets located in bank or brokerage accounts for defrauded investors nor represent investors in judicial proceedings. However, defrauded investors can recover their loses by seizure of the offenders' properties if the court issues a property arrest order in accordance with the "Civil Enforcement Code".

2. Can you ask for such measures through the judicial channel? In particular, can you obtain an interim or provisional judicial order freezing assets?

Answer:

Pursuant to Article 522, 532 of the "Civil Proceedings Code" and Article 132 of the "Civil Enforcement Code", defrauded investors are entitled to file applications with courts for provisional compulsory

execution orders to freeze the alleged offenders' properties before obtaining the courts' final judgements, whereas the SEC can not request such measures for the investors through the judicial channel as explained in aforementioned "Introduction".

3. What other government or public authority in your jurisdiction can either freeze assets administratively or obtain such measure through the judicial channel?

Answer:

Since fraud is a penal crime in the "Criminal Law", the alleged suspect may be indicted as the suspected case is referred to and investigated by the "District Prosecutor's Office" in compliance with the "Criminal Proceedings Code". Nevertheless, investors' losses incurred by to fraud may be compensated through civil proceedings and the civil enforcement actions which can only be taken by investors rather than government or public authority.

4. What alternate measures can you use or ask for that could have a similar impact on the preservation of assets? (e.g. (temporary) bars of activities, management of a company under the close control of an appointed trustee, replacement of a company manager by an appointed trustee, insolvency proceedings).

Answer:

The SEC has been vested with the power to impose administrative sanctions on securities dealers, futures brokerage firms, securities investment advisory enterprises and securities investment trust enterprises who violate the "Securities and Exchange Law" or the "Foreign Futures Trading Law" respectively. These sanctions which have a similar impact on the preservation of assets include: discharging directors or managers, suspension of business for a specific period, and revocation of business license, etc. In addition, based on Article 2 of the "Securities and Exchange Law", and Article 1 of the "Foreign Futures Trading Law", the related matters if not provided for in this law shall be governed by the "Company Law" and/or other relevant laws, for example, the "Insolvency Act".

5. On what basis can the measures be taken?

Answer:

The foregoing measures can be taken on the following legal bases:

(1) Article 66, Securities and Exchange Law.

Which reads: Should a securities dealer or securities investment trust enterpriss have violated this Law or rules and regulations adopted thereunder, the Competent Authority may impose, in addition to the punishment under this Law, any of the following punishments proportionate to the seriousness of the offense:

1. warning;
2. ordering the securities dealer to discharge its director(s), supervisor(s), or manager(s) involved;
3. suspension of business for a period up to six months;
4. revocation of business license.

(2) Article 23, Foreign Futures Trading Law--

Which reads:

Any futures brokerage firm who violates this Law or any rules promulgated under this Law shall be subject to the penalties specified in the Law. In addition, the Competent Authority may, depending upon the seriousness of such violation, impose some or all of the following sanctions:

1. ordering the futures brokerage firm to correct the violation within a given period;
2. ordering the futures brokerage firm to discharge its director, supervisor, litigious or non-litigious representative in the Republic of China, managerial officer or associated person;
3. ordering the futures brokerage firm to suspend its business operations for a period not more than six months; or
4. revoking the business license of the futures brokerage firm.

(3) Article 2, Securities and Exchange Law& Article 1, Foreign Future Trading Law--

Which reads: The regulation and the supervision of public offering, issuing, and trading of securities & foreign futures shall be governed by these two laws; such matters not provided for in these two laws shall be governed by the provision of the Company Law and/or other relevant laws.

(4) Company Law

(5) Insolvency Act

6. What are the effects and consequences of the measures: What (funds, securities, futures contracts...) and whose assets may be frozen? For how long? Can such measures be renewed? What kind of allegations must be made to freeze the assets (e.g. criminal conduct?)

Answer:

According to the "Civil Enforcement Code", most of the offender's private properties can be seized except relating to his/her clothing, bedding, tableware, other personal necessities and religious instruments. Therefore, the offender's funds, securities and futures contracts may be seized. Either a provisional or a final compulsory execution order of the court is available for a defrauded investor to attach the offender's properties promptly, thus helping the investor to get compensation without delay. Such measures can be renewed as long as the legal causes are good. Although fraud is a crime which can be prosecuted against, a defrauded investor has to bring a civil action against the offender in order to get compensation on losses.

7. Must there be notice given to the person whose assets have been frozen? What sort of appeal rights are available?

Answer:

The person whose properties are to be seized by court should be noticed to appear at the site where the compulsory execution order is implemented, according to Article 48 of the "Civil Enforcement Code". If this person does not appear, the court should ask his family, neighbor or the police in this specific precinct to appear. This provision keeps people well informed of the action to be taken by the court. In addition, Articles 12 and 14 of the "Civil Enforcement Code" grant people the appeal rights when they contend the compulsory execution order unjustified.

8. What uses can be made of assets that have been frozen?

Answer:

The properties seized by the court should be used to compensate investors' losses incurred to by fraud activities. To this end, the court can

respectively auction off the seized chattel and real properties according to Articles 57 and 81 of the "Civil Enforcement Code".

9. What difficulties may be encountered while the measure is implemented? How and by whom are the frozen assets? (e.g. when assets are composed of open positions on futures trading contracts)

Answer:

Since the obligor imposed by a compulsory execution order has appeal right to contend if there are justifications for extinguishing or impeding this order, the court might accordingly decide to stop implementing it. According to the Foreign Futures Trading Law, local investors can only trade specific foreign futures, as for the time being the domestic futures exchange has not yet been established. Therefore, compulsory execution order issued by the court to seize open positions on futures contracts has to be referred to the obligor's account in a domestic futures brokerage firm or in a branch office of a foreign futures brokerage firm.

B. Description of the measures used to return assets to defrauded investors

1. What procedures are available to you, in order to have assets returned to defrauded investors?

Answer:

Pursuant to the "Securities and Exchange Law" and the "Foreign Futures Trading Law", people who commit a fraud should be held liable for losses sustained by investors. The "Civil proceedings Code" and the "Civil Enforcement Code" also provide the defrauded investors with sufficient measures to have assets returned.

2. Can you bring a judicial action on behalf of defrauded investors? On what basis? Can a trustee, receiver or other third party be designated to represent the defrauded investors? On what basis can defrauded investors bring an action on their own behalf?

Answer:

There is not any related provision allowing the SEC to represent an investor in any judicial proceeding. According to article 47 of the "Civil Proceedings Code", the related matters concerning a legal representative in a lawsuit shall be governed by the "Civil Law" and other relevant laws. That is to say, a third party might be designated to represent the defrauded investors who can seek compensation on their own behalf by bringing law suits on various legal bases as provided by articles 20, 32, 155, 157-1 of the "Securities and Exchange Law" and Articles 16, 21 of the "Foreign Futures Trading Law".

3. Can you obtain a court order for return of assets after a final judgement? Who else can obtain it? On what basis?

Answer:

A final judgement is a legal basis for the defrauded investor to file an application with the court for issuing of a compulsory order to seize the obligor's assets as stipulated by Articles 4 and 5 of the "Civil Enforcement Code".

4. What other means can you use to assist in returning assets to defrauded investors?

Answer:

Under the supervision of the SEC, the "Institute of Securities and Futures Markets Development" provides investors with legal services including consultation of legal problems and litigation for the public interest, thus assisting defrauded investors to recover their losses. To achieve this goal, the Institute has set out the "Guidelines for Protection of Securities Investors".

5. Are assets that have been frozen also available to pay penalties imposed by a securities or futures regulator or by a court?

Answer:

The frozen assets are available not only to compensate investors' losses but also to pay the fine upon conviction or upon administrative sanction.

For instance, Article 180 of the "Securities and Exchange Law" explicitly prescribes the following:

"If a person refuses to pay the fine specified in this Law, the case shall be referred to the court for compulsory execution."

II. MEASURES AVAILABLE FOR USE BY FOREIGN AUTHORITIES

A. Measures available for use by foreign authorities

1. Preservation of assets

a. Powers to assist

(1) can you freeze assets administratively on behalf of a foreign authority without recourse to the courts?

Answer:

The SEC is not entitled to undertake this case on the same ground, as elaborated upon in the answer to the first question of the preceding section.

(2) Are you authorized to request such measures through the judicial channel? can you obtain a judicial freeze enforcing a foreign order on behalf of a foreign authority? If so, what procedure should the foreign authority follow in making its request? For example, can the foreign authority make its request pursuant to a mutual legal assistance law or treaty? What conditions should be met?

Answer:

In principle, a civil enforcement may be proceeded when a creditor applies to the court, as per the provision of Article 5 of the "Civil Enforcement Code". The application, based on a foreign court's final judgement, for a civil enforcement shall be approved provided that none of the conditions specified in Article 402 of the "Civil Proceedings Code" applies to this judgement and the Republic of China's court affirms in a judgement that permits the same enforcement. If a foreign government is a legal representative of foreign investors, it can accordingly obtain legal remedy for them through the foregoing judicial channel as provided in the

Article 5 and 43 of the "Civil Enforcement Code" as well as Article 402 of the "Civil Proceedings Code". In addition, the offender of fraud activities might be extradited according to an extradition treaty or other similar mutual legal assistance arrangement between governments.

- (3) Is there any other government or public entity in your jurisdiction that can either freeze assets administratively or obtain a judicial freeze order on behalf of a foreign securities or futures authority? What procedure should the foreign authority follow in making its request? What conditions should be met?

Answer:

Based on the judicial system, a civil remedy and a criminal penalty in connection with a fraud can be imposed concurrently. However, the SEC and other administrative agencies can not represent a foreign securities or futures authority to freeze assets.

- (4) What other measures can you use or ask for and on what basis, on behalf of a foreign authority that could have a similar impact on the preservation of assets? How can they be used? What are their consequences on the assets?

Answer:

There are no other measures than the above-said ones for the SEC to use or ask for, representing or on behalf of a foreign authority that could have a similar impact on the preservation of assets.

b. Direct access by foreign authority

- (1) Whether a foreign authority can have standing in the courts in your jurisdiction in order to request a judicial freeze order enforcing a foreign judgement, order or other decision?

Answer:

A foreign authority can request a judicial freeze order pursuant to Article 5 and 43 of the "Civil Enforcement Code" and Article 402 of the "Civil Proceedings Code" as described in the answer to the foregoing second question in section II, A, 1,a.

- (2) What are the obstacles that the foreign authority may encounter in seeking judicial enforcement of a foreign judgement, order or other decision (such as, for example, domestic unwillingness to enforce a foreign penal order)?

Answer:

There is not any obstacle if the foreign authority follows the rules pursuant of Articles 5 and 43 of the "Civil Enforcement Code" and Article 402 of "Civil Proceedings Code".

- (3) What other means are available to a foreign authority that would have a similar impact on the preservation of assets?

Answer:

In line with the trend toward internationalizing securities and futures markets has prevailed among IOSCO members, the SEC has made efforts to sign Memorandums of Understanding for sharing information with the regulatory authorities of United States, United Kingdom, Singapore, Japan, France, Argentina and Australia. Under the framework of MOUs, the SEC will provide supervisory, surveillance and investigative information in order to assist the foreign regulatory authorities of respective jurisdictions in obtaining legal remedies through the SEC's domestic judicial systems which adequately protect foreign investors. Should there be any request for the said assistance, the SEC is pleased to step up international cooperation with foreign authorities.

c. Procedures

- (1) Whether the measures available to the foreign authority depend on the purpose for which they are sought (e.g. : sanctioning violators);

Answer:

Article 171 of the "Securities and Exchange Law" provides that any person who violates the prohibition of frauds shall be sentenced to imprisonment for not exceeding seven years, detention and/or a fine not exceeding NT\$250,000 dollars. In addition, the Law also provides the defrauded investors with the provision to obtain compensation for their losses. When a foreign authority requests anti-fraud assistance, there are complete systems to be used.

- (2) Whether the type of decision affects its enforcement, (e.g., does it matter whether the foreign decision is civil, administrative, criminal or disciplinary?).

Answer:

According to Article 402 of the "Civil Proceedings Code", the legal effect of a final judgement made by a foreign court can be recognized and accordingly be implemented as provided in the "Civil Enforcement Code". This recognition of civil judgement is a prevailing international practice, whereas a criminal judgement made by a foreign court will not be similarly dealt with owing to the involvement of sovereignty impact. Nevertheless, legal assistance such as the signing of extradition treaty between governments can strengthen the judicial cooperation about the crackdown on fugitives. As for foreign administrative decision and foreign disciplinary decision, due to the different nature of legal effect, they can not be implemented as a recognized civil judgement for the reason similar to that of the criminal judgement.

- (3) What sort of notice and appeal rights are available to the person whose assets have been frozen? Can a freeze be put into place without prior notice to the party holding the assets?

Answer:

In accordance with Article 14 of the "Civil Enforcement Code", the obligor has an appeal right to contend if there are justifications for extinguishing or impeding the compulsory execution order. Article 48 of the Code also provides that a person whose properties are to be seized by court should be notified to appear at the site where the compulsory execution order is implemented.

2. Repatriation of funds

- (1) Whether mechanisms exist for assets to be expatriated for return to foreign investors?

Answer:

Since the foreign exchange control has been progressively eased, the banking system has provided foreign investors with sufficient mechanisms for repatriation of funds.

- (2) If so, what are these mechanisms, which channels and what procedures should be followed (direct request through judiciary channels, through the securities and futures counterpart or through other administrative or public authorities)?

Answer:

According to the "Guidelines For Banking To Deal With Foreign Exchange Business" set out by the Central Bank, in order to remit foreign exchange, a foreign individual should go to a bank with his/her identification card in person while a foreign juridical person should designate a representative or an agent for remittance. Furthermore, each remittance not exceeding US\$100,000 or equivalent amount of other foreign exchange can be made without the Central Bank's prior approval. The Banking system is under the supervision of "Central Bank" and Bureau of "Monetary Affairs of Ministry of Finance".

- (3) Can foreign investors recover assets lost as a result of violations of foreign securities and futures laws through a private cause of action in your jurisdiction?

Answer:

According to the "Conflicts Law", foreigners can bring civil law-suits in our jurisdiction even though their losses were incurred to by violations of foreign securities and futures laws. As long as the applicable law is decided by the court pursuant to the "Conflicts Law", the judgement will be made in accordance with this applicable law. Therefore, the compensation for foreign investors will depend on the provision of the said applicable law.

B. Experience of delegations in the preservation and returns of assets located in foreign jurisdictions

Please describe your experience in seeking to obtain, by any mean, whether successful or not a freeze of assets in a foreign jurisdiction

and/or the repatriation of assets located abroad for return to defrauded investors.

Each delegation should explain in detail, what measures were used, where they were used, what procedures were followed and what difficulties or advantages were encountered.

Answer:

Up to now, the SEC has not yet experienced any case concerning the international legal cooperation in the field of preservation and returns of interests and assets to defrauded investors. However, since international participation in securities and futures markets continues to grow, it becomes increasingly important to establish arrangements to exchange securities and futures information among regulatory authorities. To reach this goal, the SEC will continuously establish substantial cooperation relationship with major countries by signing bilateral "Memorandums of Understanding" or similar arrangements in order to prevent cross-border fraudulent practices and hence protect investors.

A Brief Introduction to Anti-Fraud Provisions and Liability Provisions

According to the "Securities and Exchange Law", the Securities and Exchange Commission (SEC) is the regulatory authority of securities market. Furthermore, based on the mandate of the "Foreign Futures Trading Law" promulgated on July 10, 1992, the Commission is also responsible for the development, regulation and supervision of the futures industry. Because of the fact that the Commission has no judicial investigative power, the Commission has to actively coordinate with law enforcement agencies such as the "District Prosecutor's Office " and "Investigation Bureau" of the Ministry of Justice to investigate the alleged offences in connection with securities and futures trading. The following categories of securities fraud and futures fraud are widely recognized and are respectively proscribed by the "Securities and Exchange Law" and " Foreign Futures Trading Law".

- a. Insider trading (§ 157-1, Securities and Exchange Law)
- b. Disclosure of confidential information/professional secrecy (§ 157-1, Securities and Exchange Law)
- c. Market manipulation (§ 155, Securities and Exchange Law)
- d. Providing false information to investors in disclosure documents (§ 20, Securities and Exchange Law)
- e. Non-disclosure of material information (§ 32, Securities and Exchange Law).
- f. Bucketing activities (§ 18, Foreign Futures Trading Law)
- g. Misrepresentation or fraud or any other acts which would mislead futures customers (§ 18, Foreign Futures Trading Law)
- h. Violations of the customers' segregated accounts (§ 16, foreign Futures Trading Law)
- i. Exaggerated advertisement or dissemination of false information (§ 21, Foreign Futures Trading Law)

Despite that the SEC has no judicial investigative power, it has been authorized to impose administrative sanctions (i.e., fines) or professional sanctions (i.e., suspension, withdrawal of license), without having judiciary authorities involved, on market professionals, other persons or institutions involved in the securities market. Similarly, under the "Foreign Futures Trading Law", futures brokerage firms and their

associated persons are subject to the administrative sanctions proportionate to the seriousness of their violations. (§ 56, 66, 18, 18-1, 123, 137, Securities and Exchange Law; § 23, 27, Foreign Futures Trading Law)

With respect to the liabilities for losses caused by securities and futures frauds, persons who violate the foregoing provisions shall be held liable for losses sustained by investors. However, there is not any related provision allowing the SEC to represent a defrauded investor in any judicial proceeding either in a domestic jurisdiction or a foreign jurisdiction. Nevertheless, the SEC has promoted the establishment of "Securities Investors Protection Fund" which has begun its operation on January 1, 1994. The protection Fund is used to subsidize the investors' losses incurred to by unsettled securities transactions which the investors entrust securities firms to trade on the centralized market. The subsidy is limited up to one million New Taiwan Dollars for each investor and the maximum subsidy for each securities firm is limited to one hundred million New Taiwan Dollars.

Currently, foreign institutional investors are allowed to invest directly in Taiwan securities market. As for foreign individual investors, the "Regulations Governing Securities Investment by Overseas Chinese and Foreign Investors and Remittance Procedures" has not lifted the restriction for them to make direct investment in Taiwan listed securities. Foreign institutional investors are protected by the anti-fraud provisions under the "Securities and Exchange Law" as well.

Despite that the SEC doesn't have the judicial access to represent either a domestic/foreign investor or a foreign government in court, according to article 402 of the "Civil Proceedings Code", a final judgement made by a foreign court may be enforced in our country if it meets with the conditions set out in the article. The article 402 provides as follows:

A final judgement made by a foreign court shall not be recognized its effect under any of the following circumstances:

- (1) Pursuant to the relevant statutes of the Republic of China, a foreign court has no jurisdiction;
- (2) A person who, due to the lack of proper notice or order, loses a lawsuit
at a foreign court is a national of the Republic of China; Provided, however, that the notice or order needed for commencement of the

lawsuit has been delivered to the said person in that foreign country or has been duly delivered through the legal assistance by the Republic of China, the preceding condition shall not be applicable;

- (3) A judgement made by a foreign court contradicts the public policy or good customs of the Republic China; and
- (4) Without international mutual recognition of judicial judgement.



APPENDIX:**Securities and Exchange Law**

Article 18:

Approval from the Competent Authority is required for the operation of any securities investment trust enterprise, securities financing enterprise, securities investment consulting enterprise, securities depository enterprise, or any other enterprise who operates securities-related services.

Rules governing the regulation and the supervision of securities enterprises referred to in the preceding paragraph shall be prescribed by the Executive Yuan.

Article 18-1:

The provisions of Articles 38,39, and 66 of this Law shall apply mutatis mutandis to enterprises referred to in the preceding article.

Article 20:

Misrepresentation, frauds, or any other acts which might mislead other persons during the cause of public offering, issuing, or trading of securities are prohibited.

Misrepresentation or omission in the financial reports or any other relevant business documents filed or disclosed by an issuer are prohibited.

Persons who violate the provisions of the preceding two paragraphs shall be held liable for damages sustained by bona fide buyers or sellers of the said securities.

The principal who commissions a securities broker to buy or sell securities as a broker shall be deemed as a "buyer" or "seller" for the purpose of the preceding paragraph.

Article 32:

Should a prospectus referred to in the preceding paragraph contain false information or omission in its material contents, the following persons, confined to the scope of their functional responsibilities, shall be held liable jointly with the issuer to any bona fide counterpart for damages resulted therefrom:

1. issuer and its responsible persons;
2. every employee of the issuer who has signed and affixed his/her seal on the prospectus to certify its accuracy in whole or in part;
3. every underwriter with respect to such security;
4. every accountant, lawyer, engineer, or any person whose profession gives authority to a statement made by him/her, who has signed and affixed his/her seal to certify in whole or in part, or to present his/her opinion of the correctness of the prospectus.

With the exception of the issuer, the persons referred to in the preceding paragraph shall not be held liable if he/she can prove that reasonable care has been exercised, and that he/she has just causes to believe that the material contents contain no false information nor omission, or that he/she has just causes to believe that the portion he/she certified was accurate; the persons referred to in item 4 of the preceding paragraph also shall not be held liable if he/she can prove that reasonable investigation has been exercised and the he/she has just causes to believe that the certification or the opinions rendered were accurate.

Article 56:

If any director, supervisor, or employee of a securities firm is to be found to have committed any act which violates this Law or other related laws and regulations, and that such violation may affect the normal operation of the said securities firm, the Competent Authority, in addition to ordering the said securities firm to discharge such person at any time, it may also impose sanctions in accordance with Article 66 depending on the seriousness of the violation.

A securities firm shall file a report with the Competent Authority following its discharge of the persons referred to in the preceding paragraph.

Article 66:

Should a securities dealer has violated this Law or rules and regulations adopted thereunder, the Competent Authority may impose, in addition to the punishment under this Law, any of the following punishments proportionate to the seriousness of the offense:

1. warning;
2. ordering the securities dealer to discharge its director(s), supervisor(s), or manager(s) involved;

3. suspension of business for a period of less than six months;
4. revocation of business license.

Article 123:

The qualifications and dismissal of associated business persons employed by a membership stock exchange shall be governed mutatis mutandis by the provisions of Articles 54 and 56.

Article 137: (amended)

The provisions of Articles 41 and 48, items 1 to 4 and 6 of Article 53, Articles 58, 59, 115, 117, 119, 121 and 123 shall apply mutatis mutandis to a company type stock exchange.

Article 155:

The engagement in following practices with regard to securities publicly listed on a stock exchange is prohibited:

1. to quote on a centralized securities exchange market and failed to deliver or fail to settle the transaction after such quotation has been accepted; and that such nonfeasance was sufficient to affect the market orders;
2. to falsify securities transactions on a centralized securities exchange market without actual transfer of the said securities;
3. to conspire with other persons with intent to inflate or deflate the trading prices of certain securities on the centralized securities exchange market that when one buys or sells the said securities at the agreed price, the other acts oppositely, either selling or buying at the same time;
4. to buy or to sell continuously for his own account or under the names of the third parties with intent to inflate or deflate the trading prices on certain securities traded on the centralized securities exchange market;
5. to spread rumors of false information with intent to influence the trading prices of certain securities traded on the centralized securities exchange market; or

6. to perform any other manipulative acts directly or indirectly to influence the trading prices of certain securities traded on the centralized securities exchange market.

The provisions of the preceding paragraph shall apply mutatis mutandis to transactions conducted in the over-the-counter markets.

Persons who violate the preceding two paragraphs shall be held liable to the bona fide buyers or sellers of the said securities.

The provisions of Paragraph 4, Article 20 of this Law shall apply mutatis mutandis to the preceding paragraph.

Article 157-1:

The trading on information which may materially affect the price of an issuer's securities prior to the disclosure of such information either on a centralized securities exchange market or in the over-the-counter markets by following persons is prohibited:

1. directors, supervisors and managers of the said issuer;
2. shareholders of more than ten percent equity shares;
3. any person who has learned the information due to occupational or controlling relationship; or
4. any person who has learned the information from any of the persons described in the preceding items.

Persons who violated the provisions of the preceding paragraph shall be held liable to bona fide counterparts who have traded oppositely for damages to the extent of the difference between the buying and selling prices prior to the disclosure and the average of the last reported selling price for ten business days after disclosure. The court may also, upon the request from the bona fide counterpart, treble the limits of the liabilities of the said persons should the seriousness of the violation warrant.

Foreign Futures Trading Law

Article 16:

Except in any of the following situations, a futures brokerage firm shall not withdraw any fund from segregated bank accounts exclusively for customer margins and/or premiums:

(1) to be instructed by customers to pay for the excess of margins and premiums.

(2) to pay on behalf of the futures customer the required margins, premium and/or settlement balance; or

(3) to pay on behalf of the futures customer the commission, interest, or other transaction fees to the futures brokerage firm.

A futures customer may make a claim against a futures brokerage firm for damages incurred to him as result of violation of any of the preceding Sections of this Article by the futures brokerage firm.

Article 18:

A futures brokerage firm shall provide trading information and execute the trading with honest and in good faith.

In no event shall a futures brokerage firm engage in any bucketing activities or commit any misrepresentation or fraud or any other acts which would mislead futures customers or other third parties.

Each and every futures trade shall be separately and explicitly authorized by the futures customer and no discretionary account shall be allowed.

The futures brokerage firm shall be held liable for its futures customer's losses resulting from the futures brokerage firm's violation of any of the preceding three sections hereof.

Article 21:

No responsible person, associated person, or any other employee of a futures brokerage firm may in any way:

- (1) divulge the instructions of his customers or any secrets with regard to all matters coming to his knowledge in the course of performing his duties;
- (2) guarantee futures customers a profit;
- (3) make a contract with customers to share profit or loss;
- (4) use the account or name of his customer for proprietary trading;
- (5) offer the use of the name of his own or any other such person to a customer for futures trading;
- (6) make exaggerated advertisements or disseminate false information;
- (7) conduct futures trading for any customer who has not yet had an account;
- (8) conduct futures trading without conforming to the instructions or terms received from his customers.

Article 23:

Any futures brokerage firm who violates this Law or any rules promulgated under this Law shall be subject to the penalties specified in the Law. In addition, the Competent Authority may, depending upon the seriousness of such violation, impose some or all of the following sanctions:

- (1) ordering the futures brokerage firm to correct the violation within a given period;
- (2) ordering the futures brokerage firm to discharge its director, supervisor, litigious or non-litigious representative in the Republic of China, managerial officer or associated person;
- (3) ordering the futures brokerage firm to suspend its business operations for a period not more than six months; or
- (4) revoking the business license of the futures brokerage firm.

Article 27:

Should any associated person violate this Law or any order promulgated and prescribed thereunder, the Competent Authority may impose a sanction by order, in addition to the penalty imposed pursuant to this Law, for the suspension of his/her business operations for a period not more than six months, or revocation of his/her qualification, depending on the seriousness of the violation.

The said associated person will not be eligible for being licensed for a period of five years from the time of such revocation.



France

Commission des Opérations de Bourse



Le 8 janvier 1996.

Service
de l'Inspection

- *Questionnaire on "Provisions available on a cross-border basis to protect defrauded investors' interests and assets" -*

COB's answers

EXECUTIVE SUMMARY

In France, different measures are available to ensure the protection of interests and assets of defrauded investors.

Although the French administrative authority, the COB -Commission des Opérations de Bourse- is not empowered as such, to directly take protective measures to protect the interests and assets of defrauded investors, it is able, however, *domestically*, to resort to the judicial routes and ask for *protective measures*, such as the freezing of assets -section 8.1 of the Ordinance of September 28, 1967 - ; the President of the COB is moreover entitled to request the judicial authorities to order the person to comply with the law or regulations, to put an end to the irregularity or to suppress its effects - injunctive power provided in section 12.2 of the Ordinance -. Apart from these proceedings, a request by defrauded investors themselves, before the Civil or Commercial Courts to take provisional measures on the one hand, or the seizure procedure decided by the Examining Magistrate, are two other alternatives. Lastly, other measures may have a similar impact on the preservation of defrauded investors' assets : as examples can be mentioned the direct power, vested in the COB, to

grant, limit and withdraw authorization to individual portfolio management companies, or the power, through the judicial channels, to edict, under certain circumstances, a temporary bar of professional activity.

As to the return of assets to defrauded investors, the COB is not empowered to order such a step ; however, from a practical point of view it does provide assistance in such a field by serving as a mediator and an advisor. The only route available to investors is thus to ask for compensation before the civil or criminal courts.

With respect to the measures available for use by foreign authorities for preservation of assets, it seems conceivable that, pursuant to Section 8.1 of the 1967 Ordinance, provisional measures could be requested by the COB on behalf of a foreign authority, through the judicial channel ; however such a legal procedure has not been experienced yet by the COB . With regard to the direct access, by foreign authorities, in France, to request a judicial freeze or the enforcement of a foreign judgement, the specific procedure to follow is that of "exequatur", which aims at recognizing the enforceability of a foreign judgement. However, the exequatur channel could not be resorted to in a criminal or administrative case .

These specificities have not created an obstacle for practical measures, that could have a similar impact on the preservation of assets, be taken ; they were once taken since the creation of the COB.

If we focus on *the repatriation of funds on a cross border side*, no specific mechanism does apply to expatriating funds for return to foreign investors. The judicial channels are the only possibility to be used in the French system apart from the return on a voluntary basis.

However, foreign investors willing to recover their assets lost as a result of violations of foreign securities and futures laws may resort to the exequatur procedure but may also have a private cause of action in France, under certain circumstances.

I. MEASURES AVAILABLE FOR USE DOMESTICALLY

A. Description of the available measures to preserve that may lead directly or indirectly to preservation of the assets or interests of defrauded investors

1. Power of the COB to administratively freeze assets located in bank or brokerage accounts without recourse to the Courts

The COB as a French administrative authority is not empowered to directly freeze assets. However, it can either refer to the Courts (see §2 below) or take measures which indirectly lead to the investors' funds protection (see §4 below).

2. Power of the COB to ask for protective measures through the judicial channel

The COB has different possibilities to ask for protective measures through the judicial channels (sections 8.1 and 12.2 of the Ordinance of September 28, 1967).

a. Freezing of assets (Article 8.1 of the September 28, 1967 Ordinance)

Upon a formal request within which the COB must show sufficient grounds, the COB can request ("requête") the President of the Civil High Court (Tribunal de Grande Instance, hereafter TGI) to grant an order freezing any funds, sums of money, stocks and shares, securities or rights, belonging to persons in whose ever hands they may be. Such an order is an ex parte decision ("Ordonnance sur requête").

The competent Court is either that of the residence of the party against whom the measure is requested or that where the measure is to be executed.

Such measures may be taken before any proceedings and irrespective of whether or not these proceedings will be of a civil or a criminal nature.

The request must be motivated and justified by precise supporting evidence and/or documents (Cf. sections 493 to 495 of the Civil Proceedings Code (Nouveau Code de Procedure Civile) - section 8.1 § 1 of the 1967 Ordinance).

The assets to be frozen must belong to a party implicated in enquiries and/or proceedings envisaged or instituted by the COB.

- Effects and consequences of the measure

Such an interim freezing order being provisional, only renders the assets unavailable per se. Its length is determined by the Judge. It is immediately enforceable without any further application.

Failure to comply with a freezing order by any party having control of the assets renders them liable to criminal proceedings (section 10 of the 1967 Ordinance).

- Notice to the person concerned and appeal rights

The validity of such an order is subject to the condition that the party whose assets are frozen has been formally notified thereof and/or proceedings are instituted within a certain period of time following the issue of the order.

Notice is also given to the third party holding the assets.

This provisional measure may be contested by way of "référé" (emergency interim proceedings) before the Judge that has issued the order or by appeal, after its notification, before the Court in which the civil or criminal action is brought.

b. Injunctions (Section 12.2 of the 1967 Ordinance)

Another channel is available to the COB. The protective measures (which may include seizure) asked for will then accompany other injunctions.

In the event that a practice contrary to the laws or regulations is of such nature as to undermine the rights of the investors, the President of the COB (and only the President) may ask the President of the TGI of Paris to order the person to comply with the law or regulations, to put an end to the irregularity or to suppress its effects.

Furthermore, the President of the TGI may grant or decide on his own behalf any other protective measure he thinks appropriate, including freezing of assets, sequestration of funds...

This decision is taken by the President of the TGI of Paris after both parties have been able to appear at a hearing and to put forward their arguments. It is immediately enforceable.

- Prerequisite conditions

Other than the conditions referred to in article 12.2 herein above, specific conditions must be met :

- urgency ;
- no serious arguments on the substance of the case.

- Effects and consequences of the measures

The President of the Tribunal de Grande Instance will determine the length and exact terms and conditions of such measures.

- Notice to the person concerned - Appeal rights

Formal notice of the decision must be made (section 675 of Nouveau Code de Procédure Civile).

Appeal lies before the Court of Appeal and must be lodged within 15 days of the date the decision "en référé" has been taken.

3. Other channels

No other government or public authority can either freeze administratively or obtain such measures through the judicial channel for the purpose of protecting investors' assets.

a. Request by defrauded investors themselves

Apart from these proceedings launched by the COB or its President, any person who can establish a prima facie case may ask a civil or commercial Court to take provisional steps on the assets of its debtor before any action is brought to the Courts, something singularly difficult in most financial frauds.

However such applications have very little chance of success, as in most financial frauds, there is a lack of evidence.

Moreover, since a recent legislative change, a registered association of investors (see I.B.1.a.) may, where malpractices endanger the interests of the investors, ask for an injunction. The request is made to the President of TGI (Law of January 5, 1988 section 12 as modified by the Law of August 8, 1994)

b. Seizure decided by the examining magistrate

Having decided to prosecute criminally, the Public Prosecutor may request an Examining magistrate to undergo additional avenues of enquiries and to determine if there are sufficient grounds to place someone on trial.

Should he think it useful, the Examining magistrate may order seizure of the assets of the person under examination, in particular to protect the rights of the victims.

The magistrate decides the terms and conditions of the measures.

The interim decisions are immediately executable ; they may only be revoked by this magistrate or by the Criminal Court (Tribunal Correctionnel) which will deal with the issue going to the root of the case.

It is the duty of the Examining magistrate to notify any party to the order of his decision.

Appeal against this decision lies before the Criminal Division of the Court of Appeal.

4. Alternate measures

a. By the COB

The COB may also take or ask for alternate measures that are likely to have an impact on the preservation of defrauded investors' assets.

The following measures may prevent any further dissipation of investors' funds.

- Direct powers

The COB is empowered to grant, limit and withdraw authorization to individual portfolio management companies (section 12 COB's regulation n° 89.04 ; Law n° 89.53 of August 2, 1989).

- Powers through the judicial channel

The COB may also obtain a temporary bar from professional activity (section 8.1 of the 1967 Ordinance) by formulating a motivated request to the President of the Higher Court (TGI) (Cf. same conditions as herein before).

A person implicated in enquiries and/or proceedings envisaged or instituted by the COB, may also be placed under an restraint order to lodge a specified sum of money by the President of the Higher Court (TGI) upon request of the COB (Section 8.1). The President decides the amount, the delay for lodging this sum and its allocation. In the event that the person lodging funds is being criminally investigated, the Examining Magistrate ("Juge d'Instruction") in charge of those investigations, may decide to release totally or partially, retain or increase the sums lodged.

Failure to comply with the decisions taken in accordance with section 8.1 by any concerned person renders him liable to criminal proceedings (Ordinance of 1967, section 10).

b. By other authorities

The Conseil des Bourses de Valeurs (CBV) (Stock Exchange Commission) and the Conseil des Marchés à Terme (CMT) (Futures Professional Authority), as the COB, have been granted regulatory and injunctive powers over regulated entities, which may indirectly lead to the freezing of assets.

The CBV has the power to suspend, totally or partially, the activities of a brokerage firm when it considers that such activities are likely to affect the security or the integrity of the market.

Similarly, the CMT may engage in disciplinary proceedings against members of the Futures Market.

Obviously, these disciplinary powers help protect investors' funds and may lead to the protection of investors assets, insofar as CBV and/or the CMT would entrust the assets deposited with the concerned broker to another broker's care.

c. Insolvency proceedings

Insolvency proceedings are a separate question ; the COB is not competent to move the Court with a request of insolvency proceedings. However, according to the insolvency law, an official receiver may be designated by the Court to replace the managers of a company and thus decide the use of the investors assets.

Insolvency proceedings were engaged against a brokerage firm which had been ordered by the CBV to cease all activity..

The outcome was not very satisfactory as all accounts and current transactions were suspended pending outcome of the proceedings. It took more than two years and a very cumbersome procedure before all accounts could be settled. This example illustrates that such a freezing order might not always be beneficiary to the investors.

5. Difficulties that may be encountered

Assets freezing or seizing orders may in some situations raise difficulties.

This would be the case where assets are composed of futures contracts. An official receiver would then need to be appointed to manage and liquidate the positions in the best interest of investors. Such a receiver have to have some skill and expertise in the financial field.

Where assets of French defrauded investors are located abroad the main problem will concern the validity and enforceability of the French decision abroad.

B. Description of the measures used to return assets to defrauded investors

The COB does not intervene in the procedure that leads to returning assets to defrauded investors, this is a matter for the Courts.

Indeed the Commission is not empowered to order any return of assets. It is not entitled either to bring any action on behalf of defrauded investors, in accordance with the locus standi principle ("Nul ne plaide par Procureur") which precludes any third party from bringing an action to Court on behalf of the interested party.

Consequently investors would have to individually sue for damages to obtain compensation before the civil or criminal Courts, and will only have locus standi if they show they have personally suffered a loss.

Nonetheless it should be stressed that the COB plays an important part in the return of assets since it often serves as a mediator between investors and wrongdoers in their negotiations, and by providing advisory services.

However, two recent legislative modifications, that constitute an exception to this principle facilitate the faculty for investors to institute proceedings.

1. Judicial action brought by investors

It is now possible for the shareholders of a company or investors to join together in "associations" to exercise certain rights in favor of their members.

a. Section 12 of the law of January 5, 1988 modified by the Law of August 8, 1994

Associations that are regularly authorized by different Ministries and whose object consists in the protection of the investors of securities or/and financial products, have the right to bring a case before any competent jurisdiction and may be a civil party to a criminal case, where a damage is caused to the collective interest of investors or to some of them. Since the law of August 8, 1994, these associations may also bring an action on behalf of at least two investors who have individually suffered damage. This damage must have

been occasioned by a single person and common events and facts. The association must have been appointed by at least two investors.

b. The Companies Law of July 1966 modified by the law of August 8, 1994

Shareholders of a company having held registered shares for more than two years and whose voting rights in the company represent a certain percentage of the total voting rights have the possibility to join in an association. These associations have been granted various rights including the right to bring a civil action for damages against the company's directors and/or its managers.

2. Return of assets in cases where a freeze/seizure order has been issued

Either the Judge delivering the asset freezing/seizing order or the Court before which the action is instituted (whether it be a civil, or criminal court) may decide that the assets frozen be returned ; on condition that the defrauded investors have claimed damages in a criminal case or in a civil proceedings.

If no proceedings have been instituted within certain time limits after the date of the freezing order, the order becomes null and void. Only a settlement on a voluntary basis would then make restitution of the assets possible.

II. MEASURES AVAILABLE FOR USE BY FOREIGN AUTHORITIES FOR PRESERVATION OF ASSETS

A. Preservation of assets

1. Powers to assist

a. Powers of the COB to freeze administratively

The COB has no power to freeze administratively (See I-A-1 herein above).

b. Powers of the COB to ask for protective measures through judicial channels

Although such procedure has never been used, it seems conceivable that pursuant to section 8.1 of 1967 Ordinance provisional measures could be requested by the COB on behalf of a foreign authority through the judicial channel.

The COB's powers to open investigation and secure protective measures are provided by the September 28, 1967 Ordinance as stated herein above. Specifically, the COB is vested by section 5bis with the authority to conduct investigations at the request of and on behalf of its foreign counterparts.

Since no restriction to international mutual assistance is contained in the Ordinance, other than those included in section 5b and more specifically given the wording of that section which states that "*the COB may, under the same conditions and according to the same procedures and penalties as those provided under the Ordinance for the execution of its mission...*", the COB should be entitled to use in the course of its investigations all the powers it is vested with, including those to be exercised under the control of the judicial authorities (e.g. section 8.1.).

However it could not be completely excluded that the Courts only grant leave to freeze where the alleged securities and futures violations would have been committed within the jurisdiction of the COB and refuse to do so when the COB acts as a mere agent of its foreign counterparts in connection to violations committed abroad.

In accordance with the French legislative provisions, the existence of memoranda of Understanding would not be a prerequisite condition for the COB to assist foreign authorities but could only specify the ways and conditions of assistance vis à vis foreign authorities. Mutual legal assistance treaties deal with the judiciary authorities in the criminal field and therefore would not apply to the COB.

c. Other channels

In the securities and futures field, no administrative authority other than the COB is empowered to obtain a judicial freeze order on behalf of foreign securities or futures authorities.

It appears that the alternate measures described in A.4. would not be relevant in most cases to preserve investors' assets.

2. Direct access by foreign authority

a. Request from a foreign authority to French Courts to obtain a judicial freeze order enforcing a foreign judgement, order, or other decisions.

- Standing of the foreign authority

Generally, in order to enforce a foreign judgement or order in France, the beneficiary of such judgement or order will have to go through a specific procedure called "exequatur" solely and exclusively aimed at recognizing enforceability to a foreign judgement. The competent court (the Civil High Court) will verify that the foreign judgement fulfils the following conditions : (1) the foreign court had jurisdiction over the case, (2) the judgement was rendered by relevant legal authorities, (3) the judgement is final and self operative, (4) the judgement complies with French public order, (5) the foreign court applied the relevant rule according to French rules of conflict of laws, (6) there is no fraud with respect either to the law or to the forum (Cf. Munster Case, January 7, 1964).

The procedure should be carried as follows: the party wishing to obtain exequatur should serve a writ on the other party. Each party should present its arguments at the hearing before a single judge. Usually the burden of proof will be borne by the plaintiff. It should be noted, without emphasis, that there are some rather complicated issues respective to possible conflicts between various procedures or decisions.

Due to the third condition mentioned above (the foreign judgement must be final and self-operative), it is unlikely that a foreign authority or national could obtain enforcement in France of a foreign judgement containing a mere interim freezing order, a freezing order being by nature an interim measure and hence unlikely to be treated as self-operative.

Foreign judgements that would grant a foreign authority the right to collect some moneys against the other party would probably allow this authority to attempt to seek an ex parte court decision for an attachment (saisie arrêt) of the moneys located in France.

In some very limited cases, a foreign judgement may receive consideration from the French courts, without exequatur; some foreign judgements may, for instance, be considered as a title and be the subject-matter of an interim execution (a foreign judgement ordering a defendant owning assets in France to pay its debt may be executed directly through the use of article 68 of Law of July 9, 1991.) Arguably, the plaintiff should demonstrate that the foreign judgement is final, but he may have some difficulties in doing so since a French bailiff (Huissier) may not be familiar with foreign judgements and foreign law. He may then require exequatur, although in theory such exequatur may not be necessary.

Some treaties or international agreements to which France is party alleviate the difficulties of enforcement of foreign judgements. The Brussels Convention of September 27, 1968 provides that one can avail oneself of any judgement rendered by a member party's court in another member country. The Convention does not apply to legal decisions authorizing interim measures applicable prior to any notice to the other party. The benefits of the Brussels Convention have been almost entirely extended to EFTA country-members by the signing of the Lugano's convention (September 16, 1988). France has also concluded various bilateral treaties.

- Obstacles the foreign authority may encounter

The exequatur procedure here above described is impossible where a criminal or administrative issue is at stake.

b. Other channels available to a foreign authority

Other measures, that could have a similar impact on the preservation of the assets were once taken, at the end of 1992, on behalf of the American authorities, the Securities and Exchange Commission .

- Summary of the facts

In July 1992, the SEC requested, the assistance from the COB in order to identify, assess, and to the extent possible, freeze any assets, funds of money held by Mr X or any related party to him. These assets, funds, sums of money were supposedly lodged with accounts in a financial institution located on the French territory.

Some of these funds had been obtained in contravention of the American federal securities laws by Mr X and its company Y.

The request was made to the COB, following an order taken by an American Court, freezing all assets owned or controlled by Mr X.

The investigation conducted by the COB on behalf of the SEC showed that, on the French territory, several bank accounts along with two safes were held, not in the name of Mr X, but of his spouse.

The next step consisted in determining the best procedure to achieve efficient cooperation for the return of the assets and the contents of the said safes.

- The practical cooperation procedure adopted in this case

As a first stage, the SEC asked the COB to resort to the provisions contained in article 5 ter and 8-1 of the 1967 Ordinance, in order to open the safe and freeze any funds or assets held by Mr X's spouse.

However, the implementation of such a procedure remained uncertain, the main problem laying in the fact that the coercitive measures were aimed at Mrs X's spouse, and not Mr X himself.

The SEC's efforts resulted in Mr X's spouse's agreement to turn over to the Court appointed receiver all the assets in her name.

As part of the settlement, Mr X's spouse agreed to meet in France with the Receiver and a representative of the SEC to facilitate the return of the funds in her name and the contents of the safe deposit boxes.

At the same time, the Receiver gave instructions to the banks to wire transfer the funds to one of the Receiver's accounts in the US.

The COB pointed out that, should the safe contents documents, article 1 bis of the French law of July, 26, 1968 ("French blocking statute") would forbid their direct transmitting both to the trustee/receiver and to the SEC.

The COB thought that, as a way to overcome this obstacle, the alternative would be that the COB be given the documents and that the COB transmit them to the SEC pursuant to the Administrative Agreement. The implementation of such a procedure required nonetheless that a written agreement both from the SEC and from Mr X's spouse be forwarded to the COB. Mr X's spouse's written consent was indeed of paramount importance, as the COB could not take possession of the contents of the safes in her name, insofar as such a measure might be interpreted as a search, which could not be performed by the COB without a court order.

This mechanism of cooperation was very efficient and led to the wire transfer of the concerned sums of money into an account opened in the name of the Trustee/Receiver in a US financial institution, along with the opening of the safes.

The documents deposited in these safes, as they apparently did not have any link with the French territory, were subsequently forwarded to the SEC, in compliance with the terms of the Administrative Agreement between the two Commissions.

3. Procedures

a. Restriction to the availability of the protective measures

As mentioned in II.A.1.b above, criminal, administrative or professional decisions are not subject to exequatur in France.

- Notice to the persons concerned and appeal rights

The appeal rights applicable with respect to freezing orders or other provisional measures that would be asked for on behalf of a foreign authority or person are similar to those applicable in a pure domestic case (see I.).

With respect to notices, the French Civil Procedure Code provides for specific rules applicable to persons domiciled abroad. The bailiff (huissier) forwards its notice to the prosecutor who is then responsible for sending the notice through the diplomatic channel to the defendant. Time limits run from the remittance of the notice by the bailiff to the prosecutor; this principle is subject to various adaptations in favor of the foreign defendant, designed to preserve his appeal rights.

B. Repatriation of funds

1. Mechanisms for assets to be expatriated for return

In this respect, French nationals and foreigners are treated equally, as long as there is no exchange control.

Only the judiciary channels can be used ; no other administrative authority have any direct power in that matter.

The exequatur of a foreign judgement could be requested. An action could also be brought to the French Courts provided there is a acceptable cause of action in France.

Naturally, the COB would be more than ready to provide any advice and information that might facilitate the return of the funds.

2. Private action of foreign investors to recover their assets before the French Courts

- Can foreign investors recover assets lost as a result of violations of foreign securities and futures laws through a private cause of action in your jurisdiction ?

Foreign investors willing to recover their assets lost as a result of violations of foreign securities and futures laws may have a private cause of action in France, if the assets are physically located in France, if the defendant is domiciled in France, or if either the plaintiff or the defendant is of French nationality. In addition, once an interim measure has been performed in France, French courts will generally have subject-matter jurisdiction over the issues related to the existence of the claim even though foreign courts would otherwise have jurisdiction.

Moreover, foreign investors could, if the conditions of such an action are met, sue for damages in France and attempt to recover their losses. They should contact a French lawyer to identify the possibilities in each specific case.

C. Experience in the preservation and returns of assets located in foreign jurisdictions

In 1993, the COB had to deal with a case which is interesting from the point of view of securing defrauded investors funds on a cross-border basis.

A registered commodity futures intermediary operating both on French and on foreign markets had performed, in violation of several French laws and regulations, operations on behalf of customers on financial futures contracts and had ended up by losing considerable amounts of money.

Part of the money given to this company by its customers was deposited on an account opened in the name of the company with an U.K. broker. The Commission was anxious to avoid that this money be dissipated or transferred abroad by the company's principal, who, as a manager, was authorized to operate on this account.

However, the freezing of these assets by the U.K. authorities on behalf of the COB seemed difficult to achieve in this case. After discussions with the S.I.B., the Commission therefore chose to adopt a alternate course of action.

On the basis of article 8-1 of the ordinance dated September 28, 1967, the COB requested the President of the TGI to pronounce a temporary bar from professional activities against this company. This 6 month bar was related to all aspects of its activities except those relating to commodities. It thus prevented the manager and the other employees of the company from giving orders in relation with the account opened with the UK broker.

With a view to limit the risks involved by the positions taken by the company on future markets, the Public Prosecutor obtained from the President of the Commercial Court that a receiver be appointed to ensure the daily running of the company and liquidate the positions to the best of the customers interests. The money was thus preserved pending the issuing of a final decision against the company and its manager.

The resort to this proceeding thus permitted the COB to obtain results equivalent to those which would have been obtained through a cross - border freezing of assets while avoiding the difficulties raised both by the implementation of such a measure and by subsequent repatriation of funds.

The cooperation of the UK authorities in this affair greatly facilitated the handling of the case and the timely processing of the Court decisions. Indeed, besides providing detailed information as to the operation of the account, the UK authorities were of great assistance in preventing the manager of the company from taking advantage of the lapse of time (two days) between the decision of the court to bar the company from professional activities and its notification through the receiver to the UK broker. Warned by the UK authorities as soon as the decision was known, the latter agreed to suspend the execution of the orders from the company's manager until the reception of the formal notification.

This measure, used for the first time in an international context, proved a very useful tool in the sense that it was efficient and did not raise any problems in terms of jurisdictional conflicts.

An appeal of this decision in the form of "référé" was lodged before the President of the TGI. On that occasion the latter recognized that the conditions were met to take such a decision :

- the COB was entitled to request such a measure ;
- the company was under investigation ;
- given the elements collected by the COB could be considered as directly implicated by the COB's enquiries the material facts were not contested by the company.



Germany

*Bundesaufsichtsamt für
den Wertpapierhandel*



Mandate on „Measures to protect defrauded investors' interests and assets“

One Page Summary:

- I. Explanation of the possibilities for the BAWe or another German authority to**
A. take measures to preserve that may lead directly or indirectly to preservation of the assets or interests of defrauded domestic investors and to
B. return assets to defrauded domestic investors.

I.A. The German Federal Securities Supervisory Office can neither by way of administrative or legal action nor by means of a motion for provisional measures have the assets of a defrauded investor frozen in a German civil or administrative court.

Therefore, the BAWe can also not act on behalf of a foreign investor, for example by taking measures to return their assets, neither by administrative nor legal action.

Thus, freezing assets of a defrauded investor by an authority is only possible if undertaken by a German public prosecutor's office or in a criminal procedure by a court. Even though the public prosecutor's office does normally not take action on behalf of a defrauded investor it can nevertheless freeze assets if this serves the indemnification of the defrauded investor only. This will generally be done when indemnification of the party affected is endangered. In this case suspicion of an offence must not necessarily be directed against a specific person. The person affected will only be informed about the freezing of the assets afterwards. The defrauded investor also has the possibility to execute against these frozen assets in a civil procedure.

The defrauded investor can always assert his claim in a civil court and can have parts of his monetary claim secured by such a court on the same day by means of seizure.

II. Description of the measures which can be taken by foreign authorities.

Under the conditions of §§ 66,67 of the Law on International Assistance in Criminal Matters (IRG), the German public prosecutor's office can freeze assets on request of a foreign prosecuting authority. The foreign state needs to request the return of the objects or payment for such objects that the person affected has obtained by committing the underlying offence. If these objects can also serve as evidence in a procedure abroad they can be frozen in reply to such a request which may not necessarily aim at the return of such objects. In any case, the offence must be unlawful and punishable or be subject to prosecution as an administrative offence also in Germany (see II.A.a.cc.).

A foreign authority can only gain access to a defrauded investor's assets in Germany following a foreign (civil or criminal) decision if the foreign decision does also comply with German law and can be accepted by German courts.

The defrauded foreign investor can request the freezing of assets in a civil court in Germany according to the provisions of the German international law relating to civil proceedings and German private law in order to secure the execution of a judgement relating to his claims for damages and/or the return of his assets which has also to be obtained in Germany. Following such a request, which can be granted before any legal proceedings have been instituted, the court will generally issue a decision enabling the investor to freeze the assets without having heard the person affected beforehand.

I. MEASURES AVAILABLE FOR USE DOMESTICALLY

A. Description of the available measures to preserve that may lead directly or indirectly to preservation of the assets or interests of defrauded investors

I.A.1. Can you administratively freeze assets located in bank or brokerage accounts without recourse to the Courts?

The Federal Securities Supervisory Office (BAWe) is not authorized to take such measures which in Germany can only be taken either by a public prosecutor on judicial order by means of a criminal procedure („Beschlagnahme“) or in a civil court by means of a civil procedure („Arrest“).

As a rule, the BAWe is not authorized to take any actions if the main object is to secure or pursue private claims or to prosecute a criminal offence because it assumes its tasks and responsibilities only in the public interest.

I.A.2. Can you ask for such measures through the judicial channel? In particular, can you obtain an interim or provisional judicial order freezing assets?

Under German law, this is reserved to the defrauded investor or to the prosecuting authorities. Administrative authorities, thus also the BAWe, are however required to inform the prosecuting authorities about circumstances that give grounds for suspicion of a criminal offence.

I.A.3. What other government or public authority in your jurisdiction can either

- a) freeze assets administratively or**
- b) obtain such measures through the judicial channel?**

1) Prosecuting authorities

If there is strong suspicion that an offence has been committed and that the person who committed it or participated in it has gained a pecuniary benefit for or out of the deed (§ 73 (1) of the German Criminal Code, StGB), the public prosecutor's office can demand a judicial order to freeze such assets. In case of imminent danger it can freeze the assets itself in order to secure access of the party having suffered loss to the benefit obtained through the deed (§ 111b (3), § 111c of the German Code of Criminal Procedure, StPO).

The freezing of assets as a means of „assistance for regain“ for the party having suffered loss can be carried out within the period from the beginning of the preliminary investigations until the final judgement is delivered.

If receivables or property rights are involved assets are frozen in a criminal procedure by means of seizure („Pfändung“) - e.g. by freezing an account (§ 111c (3) StGB) - leading to a restraint on alienation which includes all orders that could result in a decrease in value. According to § 111i StPO, assets can be frozen until up to three months after a sentence has been passed on this matter.

The party having suffered loss can execute against the property seized (§ 111g StPO): in this case it does, however, need a judgement by a civil court.

At the request of the party having suffered loss, such a judgement can also be passed by a criminal judge in a criminal procedure (§ 403 StPO and following). However, such a proceeding is not common practice if higher amounts of money (more than 10.000 German marks) are involved, so that recourse to a procedure under civil law is advisable.

2. Civil courts

Apart from a criminal procedure being instituted, the party having suffered loss can bring the case before a civil court and demand the freezing of certain assets of the debtor in a provisional legal protection procedure (§§ 916 and following of the German Code of Civil Procedure, ZPO). This is being done by means of seizure („Pfändung“) (§ 930 (1) ZPO). For instance, the freezing of accounts is carried out through seizure of the accounts. In this procedure the opponent must not necessarily be heard if this could interfere with the purpose of the procedure.

A judicial order to freeze assets is passed if otherwise a judgement obtained in an ordinary civil procedure could not or only with difficulties be executed (§ 917 (1) ZPO).

Therefore, the party having suffered loss has to provide (a) facts which justify a claim for return and/or for damages against its opponent and (b) facts which state plausible reasons that the execution of the judgement is endangered.

If investment is fraudulently marketed - in most cases organised as whole series of frauds - it is not difficult to provide evidence for this plausibility.

If the party having suffered loss has not yet claimed damages or the return of assets in an ordinary civil procedure this has to be done within a certain period of time after the freezing of assets has been ordered.

Experience shows, the examination of a request to freeze assets and the order to do so can be effected quite quickly (within one day).

I.A.4. What alternative measures can you use or ask for that could have a similar impact on the preservation of assets (e.g. (temporary) bars of activities, management of a company under the close control of an appointed trustee, replacement of a company manager by an appointed trustee, insolvency proceedings)?

I.A.5. On what basis can the measures be taken?

The BAWe is not in the position to take such measures. Though the Federal Banking Supervisory Office (BAKred) has the authority for some measures that have a similar impact on the preservation of assets:

The Federal Banking Supervisory Office (BAKred) is authorized to revoke the licence to carry out banking activities of companies engaged in banking activities, in particular those buying or selling securities on behalf of others (securities business) or acting as a depositary and administering them (custody business), as well as investment funds (§ 2 of the German Law on Capital Investment Companies, KAGG) if there are facts revealing that the proprietor or the managers are not trustworthy or are not qualified for their job (§ 35 (2) No. 3a, § 33 (1) No. 2, 1 (2) sentence 1 of the German Banking Act, KWG).

If the BAKred revokes the licence of a partnership or legal entity it can take action to dissolve the company. It can also request the appointment of liquidators at the registration court who

shall liquidate the company if it cannot be guaranteed that the persons normally appointed for liquidation carry out their job properly, § 38 (1), 2 KWG. Instead of revoking the licence, the BAKred can demand that untrustworthy managers be removed from office, or can, in case of credit institutions having the structure of a legal entity, prohibit the managers from exercising their profession (§ 36 KWG).

If the risk arises that a credit institution cannot meet its obligation vis-à-vis its creditors, in particular if the risk relates to the safety of assets entrusted to the credit institution, the BAKred can, pursuant to § 46, § 46a, § 49 KWG, take immediate provisional measures, such as giving instructions to the management of the credit institution, or prohibiting proprietors or managers from exercising their job or limiting their business activity, or appointing supervisors. Decisions concerning dividend payouts are void in so far as they stand in contrast to such an instruction. Furthermore the BAKred may, to avert insolvency, inter alia temporarily issue a ban on sales and payments by the credit institution or order the credit institution to be closed for business with customers. Pursuant to § 46b KWG only the BAKred may file a petition for the institution of liquidation proceedings in the event of insolvency or overindebtedness of the credit institution.

I.A.6. What are the effects and consequences of the measures: what (funds, securities, futures contracts ...) and whose assets may be frozen? For how long? Can such measures be renewed? What kind of allegations must be made to freeze the assets (e.g. criminal conduct)?.

Both in a criminal and a civil procedure any kind of assets can be frozen, i.e. objects, rights, accounts, shares, futures contracts, other capital. Additionally, the debtor can be requested for or prohibited from carrying out certain activities.

In the provisional legal protection procedure instituted under civil law only those assets of a person can be frozen against whom the party having suffered loss has a claim under civil law. The judicial freeze order has to be executed within one month.

In a criminal procedure pecuniary benefits arising from the commitment of an offence can also be frozen in case of a strong suspicion of a criminal act but without a specific person being charged with an offence. Assets can be frozen until up to three months after the judgement has been passed; repetition is not possible.

For the preconditions of such provisional measures see above I.A.3.

I.A.7. Must there be notice given to the person whose assets have been frozen? What sort of appeal rights are available?

The person whose assets have been frozen always obtains notice of this fact afterwards.

In a civil procedure the respective person must be served the court decision one week after execution of the judicial order concerning the freezing of the assets at the latest, § 929 (3) ZPO.

In a criminal procedure the respective person will be notified of the freezing of the assets after it has been executed.

In case of a civil procedure the respective person can object to the ruling to freeze the assets pursuant to § 924 ZPO. The following judgement can be contested by means of appeal.

In a criminal procedure the respective person may at any time ask for a decision of the court after a freeze has been ordered by the public prosecutor, § 111e StPO. The court order or

decision can be contested by means of appeal to the Higher Regional Court in criminal matters (§§ 304 and following StPO).

I.A.8. What uses can be made of assets that have been frozen?

Only after a civil judgement has been delivered in favour of a person having suffered loss can the latter obtain compensation from the frozen assets. He cannot dispose of the assets before. Only if there is risk of a material decrease in value (e.g. of securities) during the period of the freezing of the assets can they be sold by auction or otherwise on request and the proceeds thereof be deposited, § 930 (3) ZPO, § 1111 (1) StPO.

I.A.9. What difficulties may be encountered while the measure is implemented? How and by whom are the frozen assets (e.g. when assets are composed of open positions on future contracts)?

At the moment, the BAWe does not have any information about cases in which open futures contracts or similar rights were frozen. Thus, we are not aware of possible difficulties.

B. Description of the measures used to return assets to defrauded investors

I.B.1. What procedures are available to you, in order to have assets returned to defrauded investors?

The BAWe only takes action in the public interest but not in the interest of individual investors. It lies within the responsibility of the defrauded investor to take action to have assets returned directly or by taking recourse to a civil court.

I.B.2. Can you bring a judicial action on behalf of defrauded investors? On what basis? Can a trustee, receiver or other third party be designated to represent the defrauded investors? On what basis can defrauded investors bring an action on their own behalf?

The BAWe can neither institute a judicial action on behalf of defrauded investors nor designate an authorized trustee who acts on behalf of the defrauded investors. Under German law the defrauded investor can claim the return of property and/or damages in legal action. Defrauded investors can join together in order to recover their assets; they can designate a representative who shall recover the assets due to them (so-called „Inkassozeession“) or can jointly assert claims as an entity in a civil procedure, § 59 ZPO.

I.B.3. Could you obtain a final judgement by a court that would include an order for return of assets? Could you obtain a court order for return of assets after a final judgement?

The BAWe is not authorized to obtain such an order for which it is also not responsible. The investor can levy execution against the assets of the debtor after the judgement has been passed (§ 704 and following, § 803 and following ZPO). In order to secure this execution the investor can enforce the freezing of assets, see above I.A.3. The execution is carried out either with the

assistance of a bailiff or the courts. It should be entrusted to a German lawyer to go through the necessary formalities.

In case the investor has waived his claims to an authorized representative who shall recover the assets due to him, the latter can levy the execution.

LB.4. What other means can you use to assist in returning assets to defrauded investors?

None.

I.B.5. Are assets that have been frozen also available to pay penalties imposed by a securities or futures regulator or by a court?

No, they are not. Frozen assets cannot serve for the payment of administrative fines or penalties. Even when the pecuniary benefits obtained through the administrative or criminal offence fall on the state (Verfall, § 73 and following, StGB), state receivables arising from fines and penalties are not paid for.

II. MEASURES AVAILABLE FOR USE BY FOREIGN AUTHORITIES

II.A. Measures available for use by foreign authorities

II.A.1. Preservation of assets

II.A.1.a. Powers to assist

a.aa Can you freeze assets administratively on behalf of a foreign authority without recourse to the courts?

No, we cannot, as it is also not possible to do so in domestic cases, see above I.A.

a.bb. Are you authorized to request such measures through the judicial channel? Can you obtain a judicial freeze enforcing a foreign order on behalf of a foreign authority? If so, what procedure should the foreign authority follow in making its request? For example, can the foreign authority make its request pursuant to a mutual legal assistance law or treaty? What conditions should be met?

As the BAWe cannot request to freeze assets on its own behalf, it can also not request it on behalf of a foreign authority through legal or administrative assistance.

a.cc. Is there any other government or public entity in your jurisdiction that can either freeze assets administratively or obtain a judicial freeze order on behalf of a foreign securities or futures authority? What procedure should the foreign authority follow in making its request? What conditions should be met?

In Germany, the public prosecutor's office can freeze assets at the request of a foreign prosecuting authority pursuant to § 66 and § 67 of the Law on International Assistance in Criminal Matters, IRG. Under these provisions the German public prosecutor's office is

authorized to seize under certain conditions objects (amongst others bank deposits, for instance) which the person involved or a participant has obtained as a result of the offence or as a remuneration in exchange for such objects at the request for return of the appropriate authority of a foreign state even before the return of the objects has been requested. If these objects can at the same time serve as evidence in foreign proceedings they can also be frozen in order to satisfy a request that is not based on the return of the objects. However, the offence must be unlawful and liable to prosecution or be suitable for prosecution as an administrative offence also under German law.¹

The respective judicial authorities of another state are responsible for making the request. In so far as a securities supervisory authority of a foreign state has far-reaching prosecution powers it can be recognized by Germany as an appropriate authority and thus can make a request to the German public prosecutor's office itself.

Provided that no special multilateral or bilateral agreements between the respective other state and Germany exist, this request is to be transmitted to the public prosecutor's office through diplomatic channels, i.e. via the government of the requesting state. After the request has been permitted - normally by German judicial authorities - the authority designated under § 66 and § 67 IRG executes the request.

Within the EU assistance is granted by means of the freezing and returning of objects in accordance with the European Convention on Mutual Assistance in Criminal Matters.

Depending on the additional protocols of the individual states the request can also be made between the higher judicial authorities or directly between the requesting foreign authority and the requested German authority.

¹ § 66 and § 67 IRG read as follows:

Section 66

Surrender of Property

- (1) At the request of an appropriate of a foreign state, objects may be surrendered
 1. which may serve as evidence in foreign proceedings; or
 2. which the person involved or a participant has obtained as a result of the offence forming the basis for the request, or which he obtained in exchange for such objects.
- (2) Surrender shall be allowed only
 1. if the act forming the basis for the request contains the elements of a criminal offence or of an offence allowing the imposition of a fine under German law or if, after analogous conversion of the facts, it would also contain them under German law;
 2. if a seizure order of an appropriate authority of the requesting state is submitted or if a declaration of such an authority shows that the requirements for a seizure would exist if the objects were located in the requesting state; and
 3. if assurances are given that the rights of third parties will not be impaired, with the reservation that objects surrendered will be returned immediately upon request.
- (3) The public prosecutor at the district court shall prepare the decision about the surrender and shall carry out the surrender granted. The public prosecutor at the district court in whose district the objects is located shall have local jurisdiction. Sec. 61, para. 2, sentence 2, shall apply correspondingly.

Section 67

Search and Seizure

- (1) Objects that may become the subject of surrender to a foreign state may be seized or otherwise secured even prior to the receipt of the request for surrender. A search may also be conducted.
- (2) If the conditions specified in Sec. 66, para. 1 and para. 2, no. 1, are met, objects may also be seized or otherwise secured if such is necessary for the execution of a request which is not directed towards the surrender of the objects. Para.1, sentence 2, shall apply correspondingly.
- (3) The county court in whose district the acts are to be performed shall order the search and seizure. Sec. 61, para. 2, sentence 2, shall apply correspondingly.
- (4) If delay would have an adverse effect, the public prosecutor and his auxiliary officials (Sec.152 of the Judicature Act) shall be empowered to order the search and seizure.

Provided that the German prosecuting authorities have their own interest in the prosecution, the statements of I.A.3 apply.

a.dd. What other measures can you use or ask for and on what basis, on behalf of a foreign authority that could have a similar impact on the preservation of assets? How can they be used? What are their consequences on the assets?

None.

What additional assistance in matters relating to securities and futures violations can your organization provide to assist a foreign authority (including regulatory, criminal and judicial authorities) in its efforts to freeze or repatriate assets located in your jurisdiction, including gathering or providing access to non public information?

Within the range of its competences the BAWe can, as a rule, pass on non-public information to a foreign authority responsible for the supervision of stock exchanges or other securities markets, securities trading, credit institutions, financial institutions or insurance companies or of the associated administrative or judicial proceedings in so far as it disposes of such information itself. As to matters of insider dealing the BAWe can conduct investigations at the request of a foreign supervisory authority. However, there must not be any reason to believe that the transmission of the information violates the principle of a German law or is detrimental to the interests worthy of protection of the person affected (e.g. personal data), especially if an appropriate data protection standard would not be guaranteed in the recipient country.

IIA.1.b Direct access by foreign authority

b.aa. Whether a foreign authority can have standing in the courts in your jurisdiction in order to request a judicial freeze order enforcing a foreign judgement, order or other decision?

According to the general principles of the German law of civil procedure such proceedings would probably fail because in Germany only the person who has a legitimate interest itself to take legal action can do so. According to German understanding an authority can only assert claims of the state - unless it acts as a subject under civil law and asserts its own claims. Thus, as a rule a foreign authority can not be party to a civil procedure dealing with the return or preservation of the assets of foreign investors.

Similarly, it is not without any problem possible for a foreign administrative authority to enforce a foreign administrative judgement in Germany.

Within the EU, however, legal assistance is being granted under the European Convention on the Service Abroad of Documents Relating to Administrative Matters (of November 11, 1977) and under the European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters (of March 15, 1978).

Outside the EU the Hague Convention of Civil Procedure (of March 1, 1954) and the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (of November 15, 1964) and on the Taking of Evidence Abroad in Civil or Commercial Matters (of March 18, 1970) may be applied.

In criminal procedures, too, a foreign authority can only take recourse to international legal assistance.

b.bb. What are the obstacles that the foreign authority may encounter in seeking judicial enforcement of a foreign judgement, order or other decision (such as, for example, domestic unwillingness to enforce a foreign penal order)?

The enforcement of foreign judgements firstly requires the recognition of the foreign judgement by German courts. Only then will the foreign judgement be recognized if it is consistent with the German law.

b.cc. What other means are available to a foreign authority that would have a similar impact on the preservation of assets?

Currently, no other means are available.

II.A.1.c. Procedures

c.aa. Whether the measures available to the foreign authority depend on the purpose for which they are sought (e.g.: sanctioning violators)

c.bb. Whether the type of decision affects its enforcement, (e.g. does it matter whether the foreign decision is civil, administrative, criminal or disciplinary)?

The German law makes a difference between administrative, criminal and civil procedures also in the case of legal assistance.

- An administrative procedure is instituted if the relevant German rules of law that apply for this special case contain provisions for the public administration becoming active as sovereign (generally with respect to the citizens who are subordinated to the public authority; this normally includes the imposition of fines or penalties).

- A civil procedure is instituted if rules of law apply which regulate the legal relations between different private legal entities according to the principle of equalization.

- A criminal procedure is instituted if rules of law apply which determine the nature and extent of the state's authority to impose punishment.

Legal assistance in criminal matters is provided in accordance with the International Convention on Mutual Assistance in Criminal Matters, as described under II.A.a.cc. Legal assistance in administrative matters will be granted, as described under II.A.1.b.aa, according to regulations set up for the assistance in civil matters, but do fall under the jurisdiction of administrative courts. In civil procedures the civil courts are competent.

c.cc What sort of notice and appeal rights are available to the person whose assets have been frozen? Can a freeze be put into place without prior notice to the party holding the assets?

Yes, asset freezes are possible without the party affected having been given notice beforehand. The person whose assets have been frozen has to be informed afterwards and has the right to appeal.

II.2. Repatriation of funds

- a. Whether mechanism exist for assets to be expatriated for return to foreign investors?
- b. If so, what are these mechanisms, which channels and what procedures should be followed (direct request through judiciary channels, through the securities and futures counterpart or through other administrative or public authorities)?
- c. Can foreign investors recover assets lost as a result of violations of foreign securities and futures laws through a private cause of action in your jurisdiction?

Apart from the criminal assistance procedure described under II.A.1.a.cc the investor himself must endeavour to recover his assets before a civil court.

Foreign investors can institute a private cause of action in Germany if the competence of a German court is wellfounded and the foreign securities laws are relevant according to German international private law.

Pursuant to §§ 12 ZPO and following or Art. 2-4,5 and following of the European Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters, German courts are generally competent if the parties to the procedure are persons domiciled in a contracting state of the European Union with one of them domiciled in Germany.

But a German court is also competent for a non-European foreign complainant if the defendant or legal person is domiciled in Germany, § 12 and following, § 17 ZPO.

Foreign securities laws are as a rule to be applied before a German court if the offence was not committed in Germany. Both the place where the act which has caused damage was committed and the place where the law was violated count as place of the commitment of the offence. If these two places differ, the law in favour of the party having suffered loss is to be applied.

Under § 38 of the Introductory Law of the Civil Code it is not possible to assert a farer reaching claim against a German national for an offence committed abroad than is reasonable under German law.

It is of the advantage of the defrauded investors to take legal action in Germany because assets of the opponents can be frozen by way of a provisional legal protection procedure without the opposing party having to be heard in court or be informed of this provisional measure beforehand.

If a provisional measure is ordered by a foreign court it shall only be executed in Germany if the party affected was given the opportunity to be heard in this procedure. This applies to judgements issued by non-EU member courts pursuant to Art. 722 and 328 ZPO as well as for the judgements or decisions issued by a court of a EU member state pursuant to Art. 24,26,31 and following of the European Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters (of September 27, 1968) as well as according to the court rulings of the European Court of Justice provided that the party affected has been heard in this procedure.

B. Experience of delegations in the preservation and returns of assets located in foreign jurisdictions

C. SUMMARY REPORT

The legal protection which the German legal system provides for a defrauded (foreign) investor in general and in particular in order to preserve his assets is based on the idea that the investor generally constitutes the most appropriate „institution“ for asserting his claims. Normally, the investor himself disposes of the decisive information that have to be available to a German court before it orders the freezing of assets in a civil procedure without having heard the opposing party. This order to freeze assets which is the result of a separate procedure independent from the action for payment creates a writ of execution and thus constitutes the basis for the execution of the civil freeze order. Frequently, it is therefore possible to start the execution of the civil freeze order on the day following the request.

However, where criminal laws have been violated or administrative offences been committed the prosecuting authorities may have to take action if necessary beside or even, as an exception, in the interest of the defrauded investor.

The fundamental right to possess property and to have this property protected against trespass, even if this right is only „provisional“, constitutes a basic foundation of the German polity. Violations of this fundamental right should thus be left to the courts only and, if necessary, to the prosecuting authorities.

On the one hand, under civil law the defrauded investor generally can dispose of relatively efficient means in order to preserve and receive back his assets; on the other hand, the willingness of the German authorities to co-operate in criminal matters makes it possible that assets can also be preserved internationally by way of a criminal procedure. These mechanisms aimed at the subsequent correction of an illegally achieved cross-border displacement of an investor's assets are therefore sufficient.



Guernsey

Guernsey Financial Services Commission



QUESTIONNAIRE - SUMMARY**A. Description of the available measures that may lead directly or indirectly to preservation of the assets or interests of defrauded investors.**

There is no power in the criminal courts of the Bailiwick of Guernsey to directly preserve the assets or interests of defrauded investors.

Indirectly, orders for compensation may be made for loss occasioned by criminal offences, and such orders are enforceable as if they were judgements of the civil court.

Under Guernsey law there are wide powers for the Royal Court, in its civil jurisdiction, to grant arrest orders pending the determination of a civil action to prevent a defendant dealing with assets the subject of such action.

The Guernsey Financial Services Commission ("the Commission") co-operates fully with overseas regulators in the light of its general duty to protect investors and the Bailiwick's reputation.

B. Description of the measures used to return assets to defrauded investors.

The Commission has no direct role in returning assets to defrauded investors. Investors can take civil action which can lead to payment of damages, freezing of assets, etc.

C. Measures available for use by foreign authorities.

Foreign authorities can take civil action in the Guernsey Courts and make requests for disclosure of information under The Criminal Justice (Fraud Investigation) Bailiwick of Guernsey) Law, 1991.

QUESTIONNAIRE - NARRATIVE DESCRIPTION

A. Description of the available measures that may lead directly or indirectly to preservation of the assets or interests of defrauded investors.

The Guernsey Financial Services Commission ("the Commission") has no administrative powers to freeze assets, but has limited powers under its statutory functions to apply to the Courts for restitution orders e.g. in the case of deposits accepted in contravention of The Banking Supervision (Bailiwick of Guernsey) Law 1994 or losses incurred by investors as a result of a contravention of The Protection of Investors (Bailiwick of Guernsey) Law 1987. No other government or public authority has power to freeze assets administratively.

However, the Commission has a general duty to protect the public against financial loss due to dishonesty, incompetence or malpractice by persons carrying on finance business, and to protect and enhance the reputation of the Bailiwick as a financial centre. It interprets this role broadly and is always willing to assist overseas regulators (if satisfactory evidence of malpractice is provided), whether or not the Guernsey company which is the subject of the enquiry/complaint is subject to the Commission's statutory functions.

The effects and consequences of these measures (whether formal or informal) can result in de facto freezing of assets, the winding-up of the company, etc.

There are wide powers for the Royal Court, in its civil jurisdiction, to grant arrest orders, pending the determination of a civil action, to prevent a defendant dealing with assets the subject of such an action. Such orders are normally granted ex parte on affidavit evidence in Chambers. Failure to comply would be punishable as a contempt of the Royal Court. After such an order is made the respondent(s) may apply to have it varied or discharged. The procedure would approximate that in the English courts dealing with Mareva injunctions.

B. Description of the measures used to return assets to defrauded investors.

The Commission has no direct role in returning assets to defrauded investors. A defrauded investor is entitled to sue in the Royal Court on the basis of conversion, breach of trust or breach of fiduciary duty. If successful, he can obtain damages and may also get injunctions preventing the defendant from dissipating the assets.

In breaches of trust cases the Law Officers of the Crown have the right to bring actions against defaulting trustees, including orders for their removal from the Royal Court. This is provided for by the Guernsey Trusts legislation.

C. Measures available for use by foreign authorities.

As described at A above, the Commission has no powers to freeze assets administratively, but it does assist foreign authorities where satisfactory evidence of malpractice is provided.

A foreign authority would have locus standi in the Guernsey Court to seek the preservation and repatriation of assets. This would be achieved by a normal civil action before the Royal Court of Guernsey (in Alderney, the Court of Alderney, in Sark, the Court of the Seneschal).

The only instances where specific procedures for the freezing of assets exist is in drug-trafficking and terrorist cases, where a statutory framework allows the Law Offices of the Crown to seek "restraint" and "confiscation" orders.

An important measure for assisting foreign authorities is contained in The Criminal Justice (Fraud Investigation) (Bailiwick of Guernsey) Law 1991, which empowers Her Majesty's Procureur (Attorney General) to require the production of documents, their copying and the provision of explanations regarding them by the persons producing where

- (i) there are reasonable grounds to suspect an offence involving serious or complex fraud, wherever committed; and
- (ii) there is good reason to do so.

It should be noted that requests for a disclosure order under this Law are not restricted to cases arising in Guernsey. A Guidance Note which provides procedural details is attached.

It is not possible to conjecture whether obstacles would be encountered by foreign authorities in seeking judicial enforcement. The decision of the Royal Court would be based on the facts of the case. However, I have no doubt that the Royal Court would give full weight to the desirability of protecting Guernsey's reputation as a finance centre.

It is not possible for the Court to freeze assets without notice to the person whose assets have been frozen, and that person would have normal rights of appeal. Any requests for the repatriation of funds would have to be made directly through judiciary channels. Foreign investors are able to recover assets lost as a result of violations of foreign laws through private civil action.

The Commission has no experience of seeking the return of assets located in foreign jurisdictions. However, an example of a successful cross-border civil action brought by foreign authorities in Guernsey is recorded in the SEC's Annual Report for 1993 (page 20) under the heading "Enforcement Matters" -

“Of particular importance to the SEC’s international program are the SEC’s recent efforts to freeze and obtain repatriation of funds from abroad In another example of extraordinary co-operation, Pacific Waste Management, the SEC obtained key information through the assistance of criminal authorities in Guernsey which led to the discovery of a bank account in Guernsey holding some of the defendants’ ill-gotten profits. The SEC successfully froze that money through an ancillary proceeding filed in the Royal Court of Guernsey”.

A recent example of the Commission’s response to concerns expressed by foreign authorities is the case of Global Energy Technologies Limited (“GET”); following approaches in the first half of 1995 by the Commission des Operations de Bourse and the Australian Securities Commission which suggested that GET had, either intentionally or inadvertently, breached local laws by making unsolicited/illegal offerings of securities, the Commission commenced enquiries with the Guernsey company responsible for the incorporation and administration of GET. The local administrator co-operated fully with the GFSC, and this has culminated with a recent application to the Royal Court of Guernsey for the winding up of GET and the appointment of a liquidator (see attached article from the Guernsey Evening Press).

Requests under the Criminal Justice (Fraud Investigation)
(Bailiwick of Guernsey) Law, 1991

NOTES FOR GUIDANCE

1. This Law gives power to H.M. Attorney General (H.M. Procureur) to require the production of documents, their copying and the provision of explanations regarding them by the person producing, where:
 - (i) there are reasonable grounds to suspect an offence involving "serious or complex fraud wherever committed", and
 - (ii) there is good reason to do so.

The Law is therefore not restricted to cases arising in the Bailiwick of Guernsey or the U.K., but anywhere in the world. What the Law does not do is to compel the person producing the documents to produce a witness statement or deposition. He can, however, be compelled to answer questions or to furnish an "explanation" of the documents. In practice this may suffice for the purposes of the foreign jurisdiction making the request and also many reputable financial institutions often may make a witness statement voluntarily.

2. The request should come from the Prosecuting Authority (in England - Serious Fraud Office, Crown Prosecution Service, etc.) not the Investigating Officer. It should be made by a person of some seniority - for example at least a Principal Crown Prosecutor in the C.P.S. or an equivalent Grade in the S.F.O. Normally it would be expected that undertakings (see paragraph 4 below) are signed by at least an Assistant Director/or U.K. Civil Service Grade 5 or 6 Officer. Unless the request itself is made by a senior official of a foreign country then the undertaking should be signed by a supervisor of that person. If the person making the request is obviously senior then he can also sign the undertaking.
3. It is important to give the following details:
 - (i) FULL NAMES OF PERSONS UNDER INVESTIGATION.
 - (ii) A SUMMARY OF THE ALLEGATIONS AND DETAILS OF PROCEEDINGS TO DATE, INCLUDING THE STAGE REACHED IN THE CASE.
 - (iii) PERSONS (OR OFFICERS OF COMPANY, ETC.) WHO ARE ASKED TO PRODUCE.
 - (iv) FULL DESCRIPTION OF COMPANY AGAINST WHOM THE ORDER SHOULD BE MADE, INCLUDING FULL ADDRESS.

- (v) FULL DETAILS OF DOCUMENTS TO BE PRODUCED, INCLUDING ACCURATE A/C NUMBERS, ALSO DATES NEED TO BE SPECIFIED, TO AVOID "OPEN-ENDED" REQUESTS WHERE POSSIBLE.
- (vi) FULL DETAILS OF PERSONS WHOM IT IS SOUGHT TO INCLUDE AS ATTENDING WHEN ORDER EXECUTED. (Including full names and titles).
- (vii) WHETHER A NOTICE OF REQUEST SHOULD BE SERVED (AS IS CUSTOMARY) OR IF A "FORTHWITH" ORDER IS NECESSARY AND WHY. (Normally only in exceptional circumstances will we issue a "forthwith" order).

It should be noted that many financial institutions have subsidiaries in Guernsey which are different companies from the main one - the correct company name is essential to avoid technical objections. The Guernsey Police can assist (see below).

4. It is the invariable practice of H.M. Attorney-General to require an undertaking from the Authority making the request not to disclose the material obtained to any other body, directly or indirectly, without his consent and to use it only for the purposes of the investigation or prosecution in question (see paragraph 2 above). A form which is acceptable is appended.
5. As a general rule it would help if countries that have police etc. representation in London ensure that the request came through them. Liaison with the Guernsey Island Police Commercial Branch on matters of detail is encouraged and the officers thereof are able to give advice. (Police Headquarters, Guernsey, Tel: (0)1481 719470/4) .
6. There is no objection to a preliminary enquiry being made at these Chambers to see if a request is likely to be entertained. It is emphasised that a "serious or complex fraud" is required, but this definition is not restricted to multi-million pound matters; as certain frauds may be serious without necessarily being large-scale. When a request is made it should provide as much detail as possible. On occasions the presence of officers involved in the enquiry is helpful as they know what is wanted and can save time. However, a properly detailed, specific request can be dealt with by the Island Police or States Customs.
7. The effective and efficient operation of the Law depends on the goodwill of the Guernsey institutions to whom requests are directed. It is therefore the Law officers' firm policy that every effort must be made to limit disruption caused by execution of requests. It should be pointed out that the investigating authority is liable for copying and postal charges, as sometimes many hundreds of documents must be produced. (It is always expected that investigations are carried out in a civilised way so that any suspicions are minimised, as are legitimate complaints by persons whose work may be disrupted or time wasted - which can be avoided by tact and common sense). A follow-up on the eventual results is appreciated.

FORM OF UNDERTAKING

(Name of Case)

I (name and description) hereby UNDERTAKE that any information or material obtained in pursuance of an Order under the Criminal Justice (Fraud Investigation) (Bailiwick of Guernsey) Law, 1991 in respect of (names of persons under investigation) shall only be used for the purposes of the investigation into the affairs of the above persons or any prosecution arising therefrom, and shall not be disclosed, directly or indirectly, to any other agency or person without the consent of Her Majesty's Attorney-General for Guernsey.

Signature

Date

Co-operation with Dutch growers will benefit Guernsey

Page 12



League to increase and split

Page 21

Page 11

fresh force live to strong force 6. Outlook: cloudy with occasional showers.

Details: back page



Guernsey

Evening Press

and Star

6.40%
Fixed for Two years

For more information on the best fixed rate mortgages available from an Island 'High Street' bank, please call 720609, today.

BRISTOL & WEST INTERNATIONAL

Liquidator is to probe suspect oil, gas project

A COMPANY involved in oil and gas exploration could be at the centre of fraud and mismanagement allegations, the Royal Court has heard.

Global Energy Technologies Ltd has been wound up at the request of its directors. Top level liquidator Stephen Morris, who acted in the BCCI crash in London, has been appointed to investigate. Jointly appointed is Richard Garrard. Both work for Touche Ross.

An initial report is expected to cost £60,000 with another £40,000 for expenses. Around US\$800,000 held in Guernsey accounts has been frozen and creditors from all over the world have continued to come forward since proceedings began earlier this month.

Global Energy Technologies was set up through Bachmann Trust Co. Ltd with Frenchman Alan Simon managing it. The Guernsey directors became concerned

about the way business was being conducted and sought the company's liquidation.

Mr Simon was allegedly inviting people outside the island to invest money in connection with oil wells in America and Australia.

Deputy Bailiff de Vic Carey said that Mr Morris was well known as a liquidator in big cases. It was a difficult case and there might be some element of fraud, he said.

The company, which was registered in December 1993, undertook oil and gas

exploration. It bought a number of oil wells in the US which were too small for economic development by major oil companies.

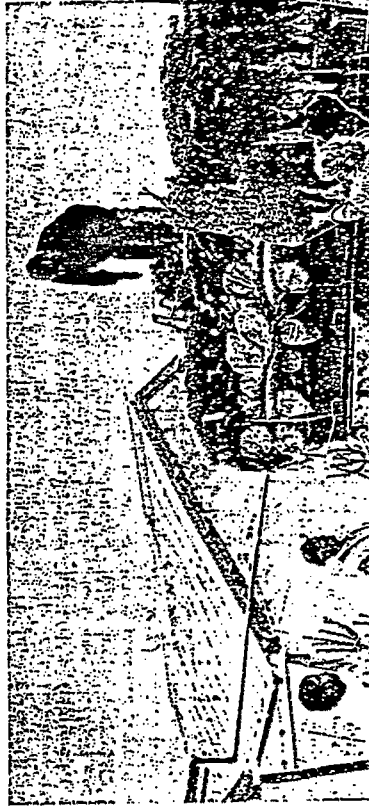
Mr Simon is alleged to have approached the public, inviting people to become partners, prompting concern about regulatory issues.

Deputy Bailiff de Vic Carey said at last week's hearing that the allegation was that Mr Simon had exceeded his powers of attorney.

Advocate Roger Dadd represents people who invested money before 30 June, 1990. Advocate Nick Barnes appearing for those who gave money after that date. Those funds were allegedly placed in a separate account. The liquidators appeared in court yesterday and took oaths of office to investigate the company.

The Greffe Office, it is understood, has received many claims from investors all over the world, although the total amount involved is not yet known.

Health scheme ruins nil growth



Don't get needed this Christmas

THE good news for those traditionalists who want a real Christmas Tree this year is that they will be plentiful and should be available at prices little different

THE BAILIWICK OF GUERNSEY AND ITS LAWS RELATING TO FINANCE BUSINESS

The constitutional position of the Bailiwick is that it is an appendage of the Crown associated within the United Kingdom and The Commonwealth through the Sovereign as successor to the Dukes of Normandy and over which the Sovereign in Council exercises supreme legislative and judicial powers.

The following legislation is pertinent in relation to finance business:

- The Guernsey Financial Services Commission (Bailiwick of Guernsey) Law, 1987
- Criminal Justice (Fraud Investigation (Bailiwick of Guernsey) Law, 1991
- Banking Supervision (Bailiwick of Guernsey) Law, 1994
- Insurance Business (Guernsey) Law, 1986
- Protection of Investors (Bailiwick of Guernsey) Law, 1987*
- The Trusts (Guernsey) Law, 1989 as amended
- The Companies (Guernsey) Law, 1994**
- The Companies (Alderney) Law, 1994
- The Company Securities (Insider Dealing) (Bailiwick of Guernsey) Law, 1995***

NOTES:

*Proposal to extend the POI Law to include other controlled investments, not only collective investment schemes, has been agreed and consultation with the local finance industry will commence shortly.

**Proposal to update this Law is pending.

***This is a draft law which has been approved by the States of Guernsey in October 1995. It will replace the previous law on insider dealing, bringing local legislation again in line with that in force in the UK.

In addition to the above, the Commission has also issued the following Guidance Notes:

- Money Laundering Avoidance
- Large Exposure Policy (Deposit-Taking Institutions)
- Principles of Conduct of Derivatives Business

• OTHER RELEVANT GUERNSEY LAWS

- The Drugs Trafficking Offences (Bailiwick of Guernsey) Law, 1988
- The Prevention of Terrorism (Bailiwick of Guernsey) Law, 1990
- The Money Laundering (Disclosure of Information) (Bailiwick of Guernsey) Law, 1995
- The UK Insolvency Act, 1986

This Act has been extended, in part, to Guernsey the effect of which is to give the Guernsey Courts exercising jurisdiction in relation to Insolvency Law power to assist a court having the corresponding jurisdiction in any “relevant country or territory”.

Hong Kong

Securities and Futures Commission



I. MEASURES AVAILABLE FOR USE DOMESTICALLY**A. Description of the Available Measures to Preserve That May Lead Directly or Indirectly to Preservation of the Assets or Interests of Defrauded Investors**

1. Can you administratively freeze assets located in bank or brokerage accounts without recourse to the Courts? What alternate administrative measures can you use that could have a similar impact on the preservation of assets? What notification and appeal rights are available?

The Securities and Futures Commission ("SFC") can only freeze assets administratively in respect of natural or legal persons registered with the SFC as securities dealers or representatives, investment advisers or representatives, commodity traders or representatives or commodity advisers or commodity advising representatives. The SFC may, pursuant to section 40 of the Securities and Futures Commission Ordinance (the "SFCO"), issue notices to such registered persons prohibiting them from disposing of any assets or requiring them to deal with such assets in any manner specified in the notice.

Alternatively, in the same circumstances, the SFC may by notice in writing pursuant to section 41 of the SFCO, require a registered person to maintain in Hong Kong or elsewhere, assets as appear to the SFC to be desirable with a view to ensuring that the person will be able to meet his liabilities in respect of the business carried on by him as a registered person. Sections 51 and 52 of the Leveraged Foreign Exchange Trading Ordinance ("LFETO") apply to licensed leveraged foreign exchange traders in the same manner as sections 40 and 41 of the SFCO operate for other registered persons.

Pursuant to section 60 of the SFCO and section 53 of the LFETO the powers of the SFC to issue notices requiring persons to do or refrain from doing something are

exercisable by written notice served on the person concerned, which come into effect whether or not the person upon whom the notice is served appeals the notice.

Under section 19 of the SFCO and section 57 of the LFETO, any person or business affected by a decision of the SFC to issue such a notice may appeal to the Securities and Futures Appeals Panel, established under Part III of the SFCO. Once the Panel has issued a determination, the person appealing to the Panel may apply to have the case referred by case stated to the Court of Appeal (section 21 SFCO). The Panel then determines whether or not to refer to the case to the Court of Appeal and its decision is not appealable.

However, decisions of the Securities and Futures Appeals Panel are judicially reviewable by the High Court on administrative law grounds such as unreasonableness, irrelevant considerations or acting ultra vires. Decisions of the High Court are subject to appeal to the Court of Appeal and the Privy Council (until 1 July 1997 after which it will be the Court of Final Appeal).

2. Can you ask for such measures through the judicial channel? In particular, can you obtain an interim or provisional judicial order freezing assets? What alternate judicial measures can you use or ask for that could have a similar impact on the preservation of assets? (e.g. bars of activities, management of a company under the close control of an appointed trustee, replacement of a company manager by an appointed trustee, insolvency proceedings) What are the notification requirements and what appeal rights are available?

(a) Statutory Judicial Orders Preserving or Freezing Assets

Action in Respect of Securities or Other Investment Transactions

When a person has or is likely to have contravened the SO or any conditions of registration thereunder, the SFC may apply to the court under section 144 of the SO

for an order restraining that person from dealing in securities; an order declaring a securities transaction void or voidable; or any ancillary order which the court considers necessary (including freezing of asset or the appointment of an administrator or receiver).

In one particular case the SFC was successful in using section 144 of the SO to apply to the High Court for the freezing of the funds of a firm operating a boiler-room operation from Hong Kong and then appointing an administrator who repatriated the frozen funds to defrauded investors, who were mostly located outside Hong Kong.

Action in Respect of Companies

Under section 45 of the SFCO the SFC may apply to the High Court for the winding up of any company if it appears just and equitable to do so. Section 59 of the LFETO applies in the same way to companies which are leveraged foreign exchange traders. For registered or licensed persons, the SFC can apply to the court for a receiving order against a registered or licensed person if that registered or licensed person has committed an act of bankruptcy (section 46 SFCO).

Pursuant to section 37A(1) of the SFCO, the SFC may if, on the basis of information obtained under section 29A of the SFCO, it appears that the affairs of the listed company are being or have been conducted in a manner unfairly prejudicial to the interests of its members generally or some part of the members and after consultation with the Financial Secretary, apply to the High Court by petition for an order:

Pursuant to section 37A(2) of the SFCO, the court, if it is of the opinion that the affairs of the listed company are being or have been conducted in a manner unfairly prejudicial to the interests of its members generally or some part of the members, may:

- (a) make orders restraining the commission of any act or conduct.

- (b) order that such proceedings as it thinks fit be brought in the name of the company; and
- (c) appoint a receiver or manager for the whole or a part of the company's property or business and specify the powers and duties of the receiver or manager and fix his remuneration.

When there is a reasonable likelihood that any person will fail to comply with the SFCO or LFETO financial resources rules or any SFC requirements published by notice pursuant to sections 40-41 of the SFCO or sections 50-52 of the LFETO, the SFC may apply to the Court for an injunction restraining any person from any act in that respect (s55 of the SFCO and s55 LFETO)

(b) Common Law Injunctive Relief

In respect of any civil proceedings, whether instituted by the SFC or a defrauded investor personally, the plaintiff may apply to the High Court for a Mareva injunction, which is an interlocutory injunction restraining a party to the proceedings from removing from, or otherwise dealing with, assets located within Hong Kong (s19 of the Supreme Court Ordinance ("SCO")). The Mareva injunction has the effect of 'freezing' assets so that an existing judgment, an anticipated judgment, or an arbitration award may be satisfied from those assets. In addition the court may order discovery or interrogatories to require the defendant to disclose the whereabouts of his assets and in some cases may appoint a receiver to take control of some of the defendant's assets.

The court may grant a Mareva injunction in any case where it appears just and convenient to do so (section 19 SCO). The court is likely to conclude that it is just and convenient to grant the injunction if the plaintiff can show, on the evidence as a whole, that :

- (a) there is at least a good arguable case that he will succeed at trial; and

- (b) that refusal of an injunction would involve a real risk that the judgment or award in his favour would remain unsatisfied

Usually an undertaking is required stating that the plaintiff will pay the reasonable costs and expenses incurred by any third party to whom notice of the injunction is given in ascertaining whether they have in their possession any assets to which the order applies or otherwise in complying with the terms of the order.

One limitation of the Mareva injunction is that the plaintiff will only become an unsecured creditor of the defendant in the event the defendant becomes insolvent. Another limitation is that the court will not freeze the business activities of the defendant even if they are loss-making.

(c) Jurisdiction, Notice Requirements and Appeal Rights

The court's jurisdiction to grant interlocutory injunctions only applies in respect of matters which can be tried in Hong Kong or which are subject to arbitration in Hong Kong. The power of the court to grant an interlocutory injunction restraining a person from removing or dealing with assets located within the jurisdiction shall be exercisable whether or not the person is domiciled, resident or present within the jurisdiction (section 21L of the SCO). On the other hand, in respect of Mareva injunctions, where a defendant has assets abroad and assets within the jurisdiction are insufficient to satisfy the potential judgment, the court will grant an injunction preventing the defendant from dissipating any assets wherever they are located.

In respect of ex parte injunctions, such as Mareva injunctions, it is not necessary and generally not desirable to give the defendant notice of an application to the court for the grant of the injunction. However, once the injunction has been obtained, the order should be served on the defendant, his bankers, and anyone else who may be holding assets of the defendant and should be endorsed with a penal

notice stating that failure to obey the order in the time period specified will render him liable to process of execution to compel him to obey. In respect of individuals personal service is effected by leaving a copy of the document to be served, or in the case of a company, by leaving a copy of the document with a director or secretary of the company or by leaving a copy of the document at the company's registered office or by posting it to the registered office.

Upon being given notice of the injunction the defendant may apply to the High Court to discharge the order. Decisions of the High Court are subject to appeal to the Court of Appeal and the Privy Council (until 1 July 1997, after which it will be the Court of Final Appeal).

In respect of other legal proceedings which may be brought by the SFC or defrauded investors the notification requirement is personal service, which is effected for individuals by leaving a copy of the document to be served with that person, or in the case of a company, by leaving a copy of the document with a director or secretary of the company or by leaving a copy of the document at the company's registered office or by posting it to the registered office. As for interim orders, for other proceedings brought before the High Court, the parties have the right to appeal to the Court of Appeal and the Privy Council (until 1 July 1997, after which it will be the Court of Final Appeal).

3. What other government or public authority in your jurisdiction can freeze assets administratively or obtain such measures through the judicial channel?

The Financial Secretary

Under sections 41 and 44 of the Securities (Disclosures of Interests) Ordinance ("the SDIO"), the Financial Secretary may in connection with an investigation into securities for which it is difficult to find the relevant facts concerning beneficial ownership, by order deem void:

- any transfer of those securities;
- in the case of unissued securities, any issue of such securities or any transfer of any right to be issued with them;
- any cancellation of the certificates for those securities or for those rights; and
- any removal of those securities to a register other than the Hong Kong register.¹

Any person aggrieved by the decision of the Financial Secretary to make such an order may apply to the High Court under section 46 of the SDIO for the relaxation or removal of such an order.

The Financial Secretary may under section 168A(1) of the Companies Ordinance (“the CO”) apply to the High Court by petition for an order in respect of the management of any company. Pursuant to section 168A(2) of the CO, the court, if it is of the opinion that the affairs of the company are being or have been conducted in a manner unfairly prejudicial to the interests of its members generally or some part of the members, may:

- (a) make orders restraining the commission of any act or conduct;
- (b) order that such proceedings as it thinks fit be brought in the name of the company; and
- (c) make such other orders as it thinks fit.

The Attorney General

The Attorney-General can, pursuant to section 15 of the Organised and Serious Crimes Ordinance, apply to the High Court for a restraint order (freezing order) against the realisable property or, under section 16, a charging order against the securities or real property, of a person who is convicted of an organised or serious crime. The Drug Trafficking (Recovery of Proceeds) Ordinance authorises the

¹ A company may apply to the High Court for the restrictions available under section 44 to be applied in respect of any shares for which the company has not been provided with accurate information in compliance with a notice under section 18 of the SDIO (section 24 of the SDIO).

Attorney-General to take equivalent action against persons convicted of drug trafficking. The Attorney-General may only make such an application in respect of assets in excess of the \$100,000 derived from the proceeds of crime

B. Description of the Measures Used to Return Assets to Defrauded Investors

Can you bring a judicial action on behalf of defrauded investors? On what basis? Can a trustee, receiver or other third party be designated to represent the defrauded investors? On what basis can defrauded investors bring an action on their own behalf? Can you obtain a final judgment by a court that would include an order for return of assets? Who else can obtain a similar type of order? On what basis?

SFC Initiated Action

The SFC is not empowered by statute to institute civil court proceedings on behalf of defrauded investors, however in certain circumstances action by the SFC may result in the return of assets to defrauded investors. As outlined above, the SFC may enforce the statutes it administers by bringing civil injunctive actions in the court. These actions may, through the court's imposition of equitable relief, directly benefit defrauded investors. The relief available in such actions may include appointment of an equity receiver or manager

Compensation and Deposit Funds

Section 109 of the SO provides for persons having claims against stock brokers to seek reimbursement from a compensation fund, established under Part X of the SO and administered by the SFC. Although the Compensation Fund is principally aimed at compensating clients in cases of default by brokers in the event of bankruptcy or insolvency, the wording of section 109 is broad enough to encompass cases of fraud and misfeasance and the fund has been used once to compensate a defrauded investor.

Claims against the Compensation Fund are submitted to the committee of the Stock Exchange of Hong Kong Limited (s112 of the SO), if it allows the claim, it shall deliver a copy of a notice to that effect to the SFC and the SFC shall pay the amount notified to the claimant (s113 SO). The total amount of compensation that may be paid shall not exceed HK\$2,000,000 in respect of each stockbroker concerned in or connected with the default unless the extra payment out of the fund would be reimbursed by that stockbroker. Having made a payment out of the Fund the SFC then assumes the rights of the claimant against the stock broker in question in respect of the claim (s118 of the SO) and may institute proceedings against the stock broker in the amount of the claim or may petition for the broker to be wound up. Similar provisions apply in respect of futures brokers under Part VIII of the Commodities Trading Ordinance.

In addition, section 52 of the SO and section 31 of the CTO require that applicants for registration, who are not members of the SEHK or the HKFE, deposit \$50,000 in the case of securities dealers and \$100,000 in the case of commodity dealers into funds administered by the SFC

If, after registration, the dealer, being an individual, becomes bankrupt, the deposit of that dealer may be paid to the trustee in bankruptcy for distribution to the clients of the dealer as if they were the only creditors of the dealer (section 52(2)(a) of the SO and rule 4 of the Securities (Miscellaneous) Rules (the "S(M)R") and section 31(2)(a) of the CTO and rule 13 of the Commodities Trading (Dealers, Commodity Trading Advisers and Representatives) Rules (the CT(DCTAR)R))

If the registered dealer, being a corporation, becomes insolvent, then the deposit may be paid to the receiver for the company for distribution to the clients of the company as if they were the only creditors of the company (section 52(2)(b) of the SO and rule 5 of the S(M)R and section 31(2)(b) of the CTO and rule 14 of the CT(DCTAR)R).

In the event that dealer's registration is revoked, or the dealer or any of the dealers directors, partners or officers are convicted of an offence involving breach of trust, defalcation, fraud or misfeasance in respect of any money or securities of a person who is a client of the dealer then the SFC may direct that all or any part of the deposit be defaulted (section 52(2)(c) of the SO and section 31(2)(c) of the CTO). The SFC shall then apply the forfeited funds to compensate defrauded investors, either on receipt of an unsolicited claim or after publishing a notice inviting defrauded investors to make claims for compensation in respect of a deposit forfeited by a dealer (rule 6 of the S(M)R and rule 15 of the CT(DCTAR)R).

Defrauded Investors Legal Action

Alternatively, defrauded investors can themselves take some civil action.

Section 26(6) of the Commodities Trading Ordinance ("the CTO") and section 71 of the LFETO provide that any person who enters into futures contracts or leveraged foreign exchange trading contracts with persons not registered or licensed to engage in such activity, may rescind such contract and shall be entitled to recovery of any money or assets paid or delivered under the contract. Such persons, if the unlicensed or unregistered persons refuse to return such money or assets, could take legal action for recovery and could apply to the court for the granting of interim injunctions, such as a Mareva injunction, as outlined in section I.A.2.(c) above, to freeze the assets.

Furthermore, in respect of any contraventions of Part XII of the SO (Improper Trading Practices), section 141 of the SO provides for an action in tort by which the injured party may recover damages as compensation for any losses sustained from such contravention. Similarly, any person who is induced by the fraudulent, reckless or negligent misrepresentation of another to enter into a securities or securities based investment agreement or take part in any investment arrangement shall be entitled to

bring an action for compensation for any losses sustained by reason of reliance on such misrepresentation (section 8 of the Protection of Investors Ordinance ("PIO")).

Shareholders in a company may apply to the court to wind up the company on the ground of unfair prejudice (s168A CO) or they may apply to be compensated for pecuniary loss as a result of having purchased or sold securities at a price resulting from improper trading practices in contravention of the SO(s141 SO).

Subscribers in a securities issue can also bring an action under s40 of the CO against the directors or purported directors of the company, or promoters or persons authorising the issue, for compensation for loss or damage arising from any untrue statement contained in a prospectus.

Compensation in Respect of Criminal Violations of Securities and Futures Laws

In respect of criminal convictions, the court may order compensation be paid to any aggrieved person as it thinks reasonable (s73(1)(b) Criminal Procedure Ordinance ("PIO")) or it may order restitution of property (s84(1) CPO). In general, the court has jurisdiction to grant any relief that it thinks appropriate to the facts as proved.

IIA. MEASURES AVAILABLE FOR USE BY FOREIGN AUTHORITIES
FOR FREEZING OR PRESERVATION OF ASSETS IN HONG KONG

1. **Action by the SFC or Other Public Entity on Behalf of foreign Authorities
to Preserve Assets**

(a) Can you freeze or preserve assets administratively on behalf of a foreign authority without recourse to the courts?

The powers of the SFC to assist foreign regulators, contained in sections 59 and 59A of the SFCO and 63 and 63A of the LFETO, do not extend to the SFC's abilities in respect of freezing and preservation of assets. However, if as a result of an investigation by a foreign authority it was found that persons in Hong Kong registered or licensed with the SFC had defrauded clients located in the jurisdiction of the foreign authority in violation of Hong Kong's securities, futures or leveraged foreign exchange trading legislation then the SFC may be able to freeze or preserve the assets of such licensed persons pursuant to sections 40 and 41 of the SFCO and Sections 51 and 52 of the LFETO, as outlined in section I.A.1. above.

(b) Are you authorized to request such measures through the judicial court? Can you obtain a judicial freeze or an order in respect of the preservation of assets enforcing a foreign order on behalf of a foreign authority? If so, what procedure should the foreign authority follow in making its request?

At present, there is no specific authority - statutory or otherwise - for the SFC to go before a domestic court for the sole purpose of seeking to enforce a foreign order on behalf of a foreign authority. It is possible, however, for the SFC to issue a restraint order or obtain an injunction from the court based on information provided by a foreign authority, if such information presented evidence of a violation of the Hong Kong securities or futures laws sufficient to warrant the SFC seeking a freeze order. As noted above, in order to obtain such a freeze order pursuant to section 37A of the

SFCO, amongst other things, the SFC would have to demonstrate to the court that the interests of the investing public in Hong Kong was being jeopardized.

(c) Is there any other government or public entity in your jurisdiction that can either freeze or preserve assets administratively or obtain a judicial freeze or preservation order on behalf of a foreign securities or futures authority? What procedure should the foreign authority follow in making its request? For example, can the foreign authority make its request pursuant to a mutual legal assistance law or treaty? What conditions should be met?

There are no governmental or public entities in Hong Kong that can freeze or preserve assets administratively on behalf of a foreign securities or futures authority. Hong Kong has not yet enacted legislation concerning mutual assistance in criminal matters, however it is under consideration.

(d) What additional assistance in matters relating to securities and futures violations can your organization provide to assist a foreign authority (including regulatory, criminal and judicial authorities), in its efforts to freeze or repatriate assets located in your jurisdiction, including gathering or providing access to non-public information? Whether the measures available to the foreign authority depend on the purpose for which they are sought?

We are not aware of any instance in which a foreign authority has attempted to enforce a foreign freeze order or a repatriation order in Hong Kong.

The SFC has the power pursuant to sections 59(2)(g) of the SFCO and section 63(2)(f) of the LFETO to provide foreign securities or futures regulators with non-public information to assist the foreign regulator to perform its functions. In order for the SFC to disclose non-public information to a foreign authority the foreign authority must be gazetted for this purpose in accordance with section 59(2A) of the SFCO or section 63(3) of the LFETO, before or immediately after such disclosure. The SFC

requires that confidentiality understandings be exchanged or an MOU be concluded with the foreign authority as a condition for gazettal

Furthermore 59A of the SFCO and section 63A of the LFETO grant the SFC power to assist foreign regulatory authorities in the conduct of investigations into suspected violations of the securities and/or futures laws administered by that regulator by exercising the SFC's investigation powers under sections 29A, 31 and 33 of the SFCO and sections 42 and 44 of the LFETO on behalf of the foreign regulator. These investigation powers include the power to compel production of bank records when there are grounds to believe that the account holder has information relevant to the investigation and production is necessary for the purpose of the investigation. In order for the SFC to exercise these powers on behalf of a foreign authority, the foreign authority must be gazetted either before or immediately after the provision of the assistance (section 59A(4) of the SFCO and section 63A(4) of the LFETO). The SFC requires as a precondition to gazettal, in order to satisfy the reciprocity requirement in section 59A(3) of the SFCO and section 63A(3) of the LFETO, that the foreign authority has concluded an Memoranda of Understanding ("MOUs") with the SFC which expresses the intention to provide mutual investigatory assistance.

In the event that a foreign authority was seeking, as a part of an investigation into possible violations of the securities and futures laws of that jurisdiction, to assist defrauded investors to recover assets, the foreign authority could request information or assistance from the SFC pursuant to an MOU and in accordance with the relevant provisions of the SFCO or LFETO. In the CFTC's investigation of the Pundi Forsten Group² in which the CFTC was able to obtain a freeze order in the United States which was acknowledged by the Hong Kong High Court, the SFC assisted the CFTC by providing public and non-public information and a declaration for use in the U.S. proceedings.

² refer to Part IIB of the joint SEC/CFTC Submissions

2. Direct Access by Foreign Authorities or Defrauded Investors to Hong Kong Courts for the Freezing, Preservation or Repatriation of Defrauded Investors Monies

Whether a foreign authority or defrauded foreign investors can have standing in the courts in your jurisdiction in order to request a judicial freeze or preservation order enforcing a foreign judgment, order or other decision? What are the obstacles that the foreign authority or defrauded foreign investors may encounter in seeking judicial enforcement of a foreign judgment, order or other decision? Whether the type of decision affects its enforcement? What sort of notice and appeal rights are available to the person whose assets have been frozen? Can a freeze be put into place without prior notice to the party holding the assets? Whether mechanisms exist for assets to be expatriated for return to foreign investors? If so, what are these mechanisms, which channels and what procedures should be followed (direct request through judiciary channels, through the securities and futures counterpart or through other administrative or public authorities)? Can foreign investors recover assets lost as a result of violations of foreign securities and futures laws through a private cause of action in your jurisdiction?

A foreign authority may have standing in a Hong Kong court to seek to recover assets lost as a result of a contravention of foreign securities or futures laws or regulations. Alternatively, the defrauded investors themselves would have standing to apply to a Hong Kong court for the enforcement of judgments obtained in their own names for the recovery of assets lost as a result of a contraventions of foreign securities or futures laws or regulations

Registration and Enforcement of Foreign Judgments

A foreign judgment may be enforced in Hong Kong pursuant to statute or at common law. However, pursuant to the Foreign Judgments (Restrictions on

Recognition and Enforcement) Ordinance, foreign judgments which can be enforced by statute are not capable of being enforced at common law.

There are two statutes that provide for enforcement of foreign judgments. The Judgments (Facilities for Enforcement) Ordinance ("JFEO") is restricted to the enforcement of a money judgment in civil proceedings obtained in a superior court in the United Kingdom, in order that such a judgment may be enforced in Hong Kong.

The Foreign Judgments (Reciprocal Enforcement) Ordinance ("FJREO") provides that final judgments or orders made by superior courts of some foreign countries³ in criminal or civil proceedings for the payment of compensation or damages to an injured party, are capable of registration for enforcement in Hong Kong. The FJREO applies only to judgments which are final and conclusive as between the parties; and in respect of a sum of money not being a sum payable in respect of taxes or fines or penalty, and does not apply to liquidation proceedings.

At common law it is possible to bring an action in Hong Kong by suing on a foreign judgment as a cause of action on the basis that the judgment created a legal obligation upon which a new action could be founded. However such a cause of action is only available for final judgments for fixed sums of money not being of a penal or revenue nature.

³ Judgments of the superior courts of the following countries or territories qualify for registration pursuant to the Foreign Judgments (Reciprocal Enforcement) Ordinance:

the States and Territories of Australia	Israel
Austria	Italy
Belgium	Malaysia
Bermuda	The Netherlands
Brunei	New Zealand
France	Pakistan
Germany	Singapore
India	Sri Lanka

Procedure for Registration

The procedure for registration pursuant to the FJREO is governed by Order 71 of the Rules of the Supreme Court. In brief, an application is made to the Supreme Court, supported by affidavit which must contain details and the addresses of the judgment creditor and judgment debtor. The affidavit must:

- verify that the judgment creditor is still entitled to enforce a judgment, the amount of which remain unsatisfied;
- verify that in the country of the foreign court, the judgment is capable of enforcement by execution.
- verify that there is no provision of the FJREO which precludes registration; and
- specify the amount of interest, if any, which is available pursuant to the laws of the foreign court.

The court will also examine the jurisdiction of the foreign court in relation to the proceedings which it has tried. Unless it can demonstrate that the foreign court had jurisdiction under the rules of private international law, as recognized in Hong Kong, the overseas judgment will not be capable of enforcement at common law. A second restriction requires the demonstration of the finality of the overseas judgment, in the sense of *res judicata*. If an appeal is underway, enforcement proceedings might be subject to a stay pending the result of the appeal

Defences and Rights of Appeal of the Judgment Debtor

Although the judgment debtor may not call into question the validity of the overseas judgment on substantive grounds or raises defences which were available in

the overseas proceedings, he may still raise a defence that the judgment was obtained by fraud or without giving the defendant adequate opportunity to make an appearance, that enforcement would be contrary to public policy, or that there was a lack of natural justice in the overseas forum. Any decision of the High Court with respect to the registration and enforcement of a foreign judgment is appealable to the Court of Appeal and the Privy Council (until 31 June 1997, after which time the Court of Final Appeal).

Recovery of Monies of Defrauded Investors: By the Defrauded Investors...

The Hong Kong statutory and common law rules in respect of enforcement of foreign judgments allows for foreign defrauded investors to enforce a judgment of a foreign jurisdiction for the recovery of money lost as a consequence of a violation of the securities or futures laws of the foreign jurisdiction

By a Foreign Authority

The position in respect of a foreign authority which obtained a judgment in its name from a foreign jurisdiction for the recovery of monies to be subsequently redistributed to defrauded investors will depend on whether the court characterises the judgment as one for the recovery of monies or the imposition of a penalty. In *Namis Asia Co. Inc. v. Standard Chartered Bank*⁴ ("Namis Asia") the Hong Kong High Court held that an order obtained by the SEC, being the sole plaintiff in New York court proceedings, for the disgorgement of profits from insider dealing transactions was a penal order because:

- the proceedings amounted to the enforcement of a sanction, public power or right at the instance of the state in its sovereign capacity;
- the disgorgement order was not severable from the penal order; and

⁴ [1988] HKC 377. See also *SEC v. Wang and Lee*, No. PN 89-1923 (D. Md. 1989).

- no investor or private party could intervene in the proceedings to recover the money in their own names, only after the SEC had concluded its enforcement proceedings could private investors make claims from the receiver.

On the basis of this judgment, the only circumstances in which it is conceivable that a foreign authority might be able to register a judgment in its own name on behalf of defrauded investors is if the proceedings were purely civil proceedings and the monies to be recovered were to be distributed directly to the defrauded investors. In practice these circumstances are unlikely to arise.

Obtaining Freezing Orders

It is not possible to register and enforce in Hong Kong an interim order of a foreign court such as an injunction or other order freezing or preserving assets, however it would be possible in respect of a registrable money judgment to obtain a Mareva injunction or other interim order in Hong Kong freezing or preserving assets of the judgment debtor located in Hong Kong on the grounds that the existence of a judgment capable of registration in Hong Kong means that there is an issue to be tried between the parties.

Furthermore, as the SEC demonstrated in *Nanus Asia*, it is possible to persuade the Hong Kong High Court to acknowledge an order of a foreign court directing a bank in Hong Kong to freeze funds in an account in respect of proceedings in that foreign jurisdiction by establishing that a constructive trust may exist in respect of such assets and thereby raising a legal issue as to whether the account holder is legally entitled to direct the bank to transfer the funds.

In *Nanus Asia* the Hong Kong High Court refused the application by the Nanus companies, of which Fred Lee, a tippee in respect of an insider dealing case brought by the SEC in New York, was the president, against Standard Chartered Bank in Hong

Kong for the bank to transfer funds in their account as per their instructions in defiance of a freezing order of the New York court. The grounds for the decision were that Wang, the tipper, in disclosing the information was in breach of a trust in relation to his employer and its customers, and therefore Lee as the tippee was under a duty of confidentiality and an obligation not to trade. By electing to trade he held the resulting profits as constructive trustee and the bank, having knowledge of the constructive trust, was released of its legal obligation to comply with the account holder's instructions. The court commented that:

"This court will always take whatever effective steps are legally available to it under Hong Kong law to deal with illegal or morally reprehensible moral conduct."

It is likely that the decision in the *Namus Asia* case is applicable to a wider range of contraventions of foreign securities and futures laws than insider trading, as in many cases in which defrauded investors may have a claim for the recovery of assets in respect of violations of securities and futures laws constructive or implied trusts are likely to arise. The Hong Kong Court acknowledged a freeze order against a Hong Kong bank obtained by the CFTC in U.S. proceedings in respect of allegations of unlicensed futures trading in the U.S. by the Hong Kong based Pundi Forsten Group.⁵

The Future Legal Position

The current legal regime in Hong Kong with respect to reciprocal enforcement of judgments is expected to continue after the People's Republic of China assumes sovereignty in 1997. Article 96 of the Basic Law of the Special Administrative Region ("SAR") of Hong Kong, which will be the constitutional basis for law in Hong Kong after 1 July 1997, provides that Hong Kong may make appropriate arrangements with foreign states for reciprocal judicial assistance. This is understood to mean that the Ordinances referred to above will remain in force after 1997.

⁵ See discussion *supra* at note 2.

IIB. SFC's EXPERIENCE IN SEEKING TO OBTAIN A FREEZE OR REPATRIATION OF ASSETS FROM A FOREIGN JURISDICTION

Please describe your experience in seeking to obtain, by any means, whether successful or not, a freeze of assets in a foreign jurisdiction and/or the repatriation of assets located abroad for return to defrauded investors.

The SFC has only sought to obtain a freeze of assets in a foreign jurisdiction and the repatriation of assets located abroad for return to defrauded investors on one occasion. As described in section I.A.2(a) above, in 1990 the SFC, under section 144 of the SO, successfully applied to the High Court for a freeze of the assets of a firm which had engaged in boiler-room activities in Hong Kong and the court appointed an administrator to redistribute the frozen assets to the defrauded investors, who were mostly located outside Hong Kong.

The SFC learnt that funds of the firm were held in a bank account on the Isle of Jersey and notified the bank in Jersey of the freeze order in Hong Kong. The bank froze the funds in Jersey without making inquiries as to the validity of such a freeze order under Jersey law.

(L:\EN\PGM\96\IOSCO4-3)



Italy

*Commissione Nazionale per
le Società e la Borsa*



Response to the questionnaire on measures available on a cross-border basis to protect interests and assets of defrauded investors

I MEASURES AVAILABLE FOR USE DOMESTICALLY

A. Description of the available measures (to preserve) that may lead directly or indirectly to a preservation of the assets or interest of defrauded investors

1. Can you administratively freeze assets located in bank or brokerage accounts without recourse to the Courts?

Consob cannot freeze the assets located in a bank or brokerage accounts by way of administrative or legal action, since only the Judicial Authorities have such a power.

2. Can you ask for such measures through the judicial channel? In particular, can you obtain an interim or provisional judicial order freezing assets?

Consob cannot ask for such a measure through the judicial channel, since, normally it is not a party in a trial. Parties with invested interest (i.e. the defrauded investor) or the public prosecutor, (in its capacity as judicial Authority, i.e. a judge and a public prosecutor are both judicial Authorities) may ask for freezing.

Consob, nevertheless, may formulate general remarks in reporting to the judicial Authorities whenever it detects a criminal offence or events which may lead to a violation of investors interest. Consob may also take administrative measures as mentioned further on.

3. What other government or public authority in your jurisdiction can either freeze assets administratively or obtain such a measure through the judicial channel?

No public Authority can freeze the assets in Italy as a conservative measure i.e. to secure access of the party. Freezing of the assets may be decided by administrative Authorities under certain circumstances. In particular, administrative freezing of the assets, may be applied in cases of infringements, punishable by administrative sanctions or, in the interest of public health or public order.

4. What alternative measures can you use or ask for that could have a similar impact on the preservation of assets? (e.g. temporary bars of activities, management of a company under the close control of an appointed trustee, replacement of a company manager by an appointed trustee, insolvency proceedings).

In Italy, Consob and other public Authorities may utilize almost all the measures described in the question above. For the sake of the clarity of this report, each intermediary will be individually described.

- a) SIMS (securities firms) and trustee companies authorized to carry out investment management activity. Consob has the authority to adopt (or propose) the following measures in the event of violation of regulations governing investment business activity:

- i) suspension from the activity as a precautional measure. Consob's Chairman may suspend by a motivated decision, and also under a proposal from the Bank of Italy, a securities firm. Such a suspension is precautional and last for a period not exceeding 60 days in case of suspected violation of laws and regulations or supervisory's Authorities prescriptions concerning the investment business activities. The decision is self-operating; nevertheless, it must be sent to the Minister of Treasury, who has to approve it within three days. Consob, in its collegiality, whenever material violations of laws and regulations, or, of the prescriptions made by the supervisory Authorities, having regard to managing of a Securities firm and, at any rate, in case of risk for the investors protection, after consultation with the Bank of Italy, may suspend the firm for a period not exceeding 60 days.

In both of the previous cases, the Minister of Treasury, upon proposal of the Consob or the Bank of Italy may:

- appoint another Securities firm to carry on a specific activity in the interest of the firm's customers or appoint an administrator, who, in accordance with Consob's instructions, replaces the board of Directors;
- dissolve the board of directors appointing at the same time an administrator who is entrusted to manage the company.

- ii) radiation from the register of authorized firms. It is not a measure aimed at preserving the assets because the infringements involved must be ascertained

and not simply presumed. However it may have, in a broad sense, preservative functions.

In case of material infringements, entailing risks on market stability or investors protection, the Minister of Treasury, upon proposal of the Consob and the Bank of Italy, each one within its sphere of competence, may decide the radiation of a firm from the register. By the same decision an administrator is appointed. He has the duty to protect and reconstitute the assets to the firm's customers. In carrying out his task, an administrator may propose to the Court to take action against the Directors and the statutory auditors of the firm. If the Court takes the view that there is sufficient evidence, it may decide to adopt preservative measures, including the freezing of the assets.

- b) Banks (when they carry out investment services in securities or derivatives products). The same provisions, applicable to the Securities firms, may also be applied to the banks.
- c) Investment management companies.
When irregularities or losses are ascertained the Minister of the Treasury, upon proposal by the Bank of Italy, may decide to dissolve the investment company, appointing, at the same time, a liquidator acting under the instructions of the Bank of Italy, or encharging another investment company to manage the assets belonging to the collective investment scheme.

5. On what basis can the measures be taken? (and questions 6 and 7)

In the preceding paragraph a description was provided on the conservative measures which may be taken administratively.

In this paragraph, we refer to the preservative measures decided by the judicial Authorities which are provided for by the procedural criminal and civil codes. Moreover, the administrative Courts may take measures in order to preserve the assets which normally follow the procedure set up by the procedural civil code.

- a) Freezing of the assets pursuant to the procedural civil code.

Freezing which is carried out by means of seizures may be classified as a judicial or provisional legal protection measure:

i) judicial freezing

It is decided by the Court in circumstances where property or possession of assets is controversial and/or where, when waiting for the decision by the Court, it is advisable to secure or to ensure temporary management of the assets, or when an evidence is controversial and must be preserved;

ii) as a preservative measure

A freezing, with a purpose as to secure the assets is decided by the Court upon request of the party suffering the loss and on the assumption that there is a fear that the party may lose the asset representing a guarantee of its claim.

Assets which may be frozen include real estate properties, accounts, brokerage accounts, etc.

Freezing is based on "fumus boni iuris" of the claimer and it is aimed at securing that the subsequent decisions are executed.

Freezing may be asked either before the merit of the claims is examined by the Court or during the ordinary Judicial procedure.

The Court, which is competent for freezing, may require that a guarantee be delivered by the party seeking the freezing in order to compensate potential damages.

The Court may take the decision to freeze the assets, having heard the parties, or, in case of urgency when the opponent may not be heard, the Court may take the decision issuing a motivated "decree" (order) and setting the date for the following decision on the merit.

When opposition is proposed before the civil procedure concerning the merit has already started, the Court establishes a term of not more than 30 days to start the judgement, in the absence of it the order loses its effects.

Special provisions are envisaged where the judgement is conducted by a foreign Court.

The opponent may claim the Court's decision but, normally, this does not suspend the Court's order.

b) Freezing of the assets pursuant to the criminal procedure code.

Seizure conducted in accordance with criminal procedure may be a seizure of an evidence or a means intended to secure the asset.

In the latter case it may be either the seizure of an evidence for the trial or a preservative measure.

Preservative seizure may be decided when:

- it is feared that payment of the penalty or of judicial expenses or of any other sum due to the administration may not be done because of insufficient or vanishing guarantees:

- there are insufficient or vanishing guarantees in order to secure the settlement of any amount due as a result of a condemnation.

Seizure may be asked by the public prosecutor in the first hypothesis, mentioned hereabove, or by the party having suffered a loss in the latter.

The asset belonging to the defendant (e.g. properties, accounts, credits etc.) may be seized.

The seizure is decided by the Court during the trial or by the Court which has issued the judgement.

Anyone who has an interest is entitled to ask for a re-examination.

Preventive seizure may be decided when it is feared that possession of an item, related to a criminal offence, may aggravate the criminal offence or enable the person involved to perpetrate other criminal offences.

The decision may be taken by the Court in the course of the trial or by the judge for preliminary investigations.

The defendants or other persons having a right to the assets seized may ask the Court to re-examine the decision.

The decision of freezing may be appealed.

When the defendant is declared not guilty or the trial ceases, the freeze loses its effect.

8. What uses can be made of assets that have been frozen?

Assets frozen are given to a trustee. The Court, however, may decide to sell or to appoint "ad hoc" a person to manage the assets.

9. What difficulties may be encountered while the measure is implemented? How and by whom are the frozen assets?

There are no special remarks. The definition of assets which may be frozen is large and the amount of the assets frozen is considered in deciding on the freezing. In futures contracts the amounts which are going to belong to the defendant (e.g. at the maturity date of the contracts) may be frozen.

B. Description of the measures used to return assets to defrauded investors

1. What procedures are available to you, in order to have assets returned to defrauded investors?

There are no specific procedures involving the Consob in returning the assets to defrauded investors but the provisions mentioned under point A paragraph 4 concerning the appointment of a trustee.

2. Can you bring a judicial action on behalf of defrauded investors? On what basis? Can a trustee, receiver or other third party be designated to represent the defrauded investors? On what basis can defrauded investors bring an action on their own behalf?

Consob may take judicial action in the following cases:

- to annul audited financial statements of a listed company or companies making a public offer;
- to annul the decisions taken at the shareholders meetings with the vote, determining the majority, of a shareholder whose holding was not disclosed.

Moreover, in the course of an insider trading trial,

Consob may exert the rights belonging to the "victims" of such a criminal offence.

Consob may cooperate with the judicial authority.

3. Can you obtain a court order for return of assets after final judgement? Who else can obtain it? On what basis?

The Court may decide it as a consequence of the judgement.

4. What other means can you use to assist in returning assets to defrauded investors?

There are no specific provisions other than those mentioned under A paragraph 4

5. Are assets that have been frozen also available to pay penalties imposed by a securities or futures regulator or by a Court?

As previously described, seizure under criminal proceedings code, as a preservative measure, is intended to secure the payment of a penalty. Analogously, administrative freezing may be decided in order to secure the payment of administrative sanctions.

II MEASURES AVAILABLE FOR USE BY FOREIGN AUTHORITIES

A. Measures available for use by foreign Authorities

1. Preservation of assets

a. Powers to assist

1. Can you freeze assets administratively on behalf of a foreign Authority without recourse to the Courts?

Such a possibility is not envisaged under the Italian legal system.

2. Are you authorized to request such measures through the judicial channel? Can you obtain a judicial freeze enforcing a foreign order on behalf of a foreign authority? If so, what procedure should the foreign authority follow in making its request?

There are no provisions which may envisage any sort of assistance by the Consob. However, anyone who has a right, if considered by the Court as a person as such, may obtain the freezing in Italy.

3. Is there any other Government or public entity in your jurisdiction that can either freeze assets administratively or obtain a judicial freeze order on behalf of a foreign securities or futures Authority?

There are no special provisions applicable to a foreign Authority. The procedure to be followed by a person claiming a right, when recognized by the Court as having title, is described under point b below. Having regard to the administrative measures which may be taken by Consob and the other administrative Authorities we refer to the description hereabove.

5. What other measures can you use or ask for and on what basis, on behalf of a foreign authority that could have a similar impact on the preservation of assets?

Within the framework of cooperation agreements and to the extent permitted by the law, Consob may provide non public information to a foreign Authority, related to the violation of its domestic legislation.

b. Direct access by foreign Authority

1. Whether a foreign authority can have standing in the courts in your jurisdiction in order to request a judicial freeze order enforcing a foreign judgement, order or other decision?

These cases are dealt with pursuant to the International Law provisions.

Italian procedural civil code provides expressly the recognition and enforcement of foreign judgements.

Having regard to civil and commercial law matters the new Italian Law on private international law provides that anyone who has an interest may ask the Appeal Court for recognition of a foreign judgement or any order of seizure decided by a judicial Authority.

Having regard to the preservative measures any request concerning those measures may be made to the Italian Judicial Authority, pursuant to the Italian procedures and should be followed by the request of recognition and execution of a foreign judgement.

Any preservation measure decided in Italy loses its effect, if a foreign judgement recognizes that the claimer does not have the right for which the preservative measure was taken in Italy.

With respect to the seizure decided within a criminal procedure it should be noted that, according to the penal code, upon request of the Chief public prosecutor of the Appeal Court, competent for the recognition and execution of a foreign judgement, the Court may order the freezing of the assets.

However, assets frozen may be transferred to the foreign State whose Court has passed a guilty judgement. This is only when reciprocity is applicable.

In more general terms, in the matter of the execution of a judgement, or, of an order by a foreign Authority, the relevant International Conventions are applicable. Italy applies the Hague Convention of Civil Procedure and the Brussels Convention of 27 September, 1968 on the Enforcement of Judgements in Civil and Commercial matters, within the EU.

Italy also applies the European Convention on Judicial Criminal Cooperation of 20 April, 1959 as well as the European Convention on Criminal Matters of 28 May, 1970.

2. What are the obstacles that the foreign Authority may encounter in seeking judicial enforcement of a foreign judgement, order or other decision?

Having regard to civil and commercial matters, a foreign judgement may be recognized in Italy without any need of a special proceeding when such a judgement is in compliance with some basic criteria such as the respect of public order in Italy; the Court which issued the judgement must be competent, pursuant to the Italian Law; the proceedings have been conducted respecting the defendant's rights and in accordance with the relevant foreign laws; the judgement must be final and not contrary to any or other final judgement issued by an Italian Court; a trial having the same object and the same parties involved should not be initiated in Italy before the foreign trial starts.

With respect to criminal matters, recognition of foreign judgements is required also with the aim of damages claims. Such a decision should not be contrary to the fundamental principles of the Italian State, it should be final and the proceedings must have been properly conducted and the defendants rights should have been guaranteed.

Furthermore, the fact considered in the judgement must be viewed as a criminal offence in both Italian Law and the foreign jurisdiction.

Moreover, no judgement should have been passed or a proceeding should have been currently carried out in Italy against the same person and on the same fact.

3. What other means are available to a foreign authority that would have a similar impact on the preservation of assets?

Reference should be made to the preservative measures above mentioned that Consob may take. Moreover, Consob may provide non public information under the conditions set up within the cooperation agreements.

c. Procedures

1. Whether the measures available to the foreign authority depend on the purpose for which they are sought

See the previous replies.

2. Whether the type of decision affects its enforcement

See the previous replies.

3. What sort of notice and appeal rights are available to the person whose assets have been frozen? Can a freeze be put into place without prior notice to the party holding the assets?

See the previous replies.

2. Repatriation of funds

1. Whether mechanisms exist for assets to be expatriated for return to foreign investors?

The return of the assets to foreign investors implies that the proceedings have been concluded or a provisional decision has been taken (see previous replies).

2. What are these mechanisms?

The return of the assets to the foreign investors requires a final decision by the relevant foreign Court and therefore the matter is covered by the judicial cooperation, as previously described.

3. Can foreign investor recover assets lost as a result of violations of foreign securities and futures laws through a private cause of action in your jurisdiction?

As a constitutional principle, anyone may apply to the Courts in order to protect his rights.

- B. Experience of delegations in the preservation and returns of assets located in foreign jurisdictions

Not applicable.



Korea

Securities and Exchange Commission



Summary

I. Measures Available for Use Domestically

- Only the defrauded investors may obtain an order from a court to freeze assets in bank or brokerage accounts.
- The third party such as the Securities and Exchange Commission(SEC) has no authority to administratively freeze assets in bank or brokerage accounts with or without judicial order. However, with respect to the profits from short-swing trading, the SEC has the right to request the 'Profit Taker' to return the profit to the company under the Securities and Exchange Law and authorized to apply for a preservation order from a court in connection with such request.
- Under the Criminal Code and the Code of Criminal Procedures, if the securities fraud constitutes a criminal offence, the Prosecutor's Office would have the power to seize the assets of the accused and thereby, preserve such assets.
- Defrauded investors may bring a civil action on the general principle of tort law, in which case the plaintiff will have the burden of establishing existence of fraudulent activities of the defendant, damage and causation.

II. Measures Available for Use by Foreign Authorities

- Neither SEC nor the other authority has the power to freeze assets administratively on behalf of a foreign authority with or without judicial order.
- Pursuant to the International Criminal Prosecution Cooperation Law, upon the request of the governmental authority of a foreign country made through diplomatic channel, assets acquired through criminal conducts may be seized and transferred. if the requesting country has entered into a mutual agreement with Korea with respect to cooperation in criminal prosecution and has established that such transfer of assets is necessary for investigation or prosecution of the crime.
- A foreign authority has standing to request a Korean court to render an enforcement judgment enforcing a foreign civil judgment if such authority is the prevailing party in the foreign legal action.
- If the defrauded investors' investment has complied with the requirements under the Foreign Exchange Management Law and regulations thereunder, such investors may obtain a court judgment against the wrongdoers and, with the requisite foreign exchange authorization, enforce the judgment, convert and repatriate the proceeds of such enforcement.

THE REPUBLIC OF KOREA

MEASURES AVAILABLE ON A CROSS-BORDER BASIS TO PROTECT INTERESTS AND ASSETS OF DEFRAUDED INVESTORS

I. Measures Available for Use Domestically

A. Description of the available measures that may lead directly or indirectly to preservation of the assets or interests of defrauded investors.

Administrative Freeze by SEC

Under Korean law, in principle, only the defrauded investors may obtain an order from a court to freeze assets in bank or brokerage accounts. Accordingly, a third party such as the Securities and Exchange Commission ("SEC") or the Securities Supervisory Board ("SSB"), which is the executive body of the SEC, has no authority to administratively freeze assets located in bank or brokerage accounts with or without judicial order.

However, with respect to profits from short-swing trading of securities of a listed or registered company, which are made by (i) insiders including the company's directors, employees or major shareholders and (ii) a securities company, that has arranged or underwritten such issuance, within a certain prescribed period, respectively, the SEC has the right to request the insider or the securities company ("Profit Taker") to return the profit to the company under the Securities and Exchange Law ("SEL"); moreover, the SEC is authorized to apply for a preservation order from a court in connection with such request.

The preservation order would apply to funds, securities, real property, claims or any other assets owned by the Profit Taker. The assets subject to the preservation order will be frozen during the duration of the order. The preservation order has no definite termination date and thus, there is no need to renew it.

In order to obtain a preservation order from the court, the following allegations must be made: (i) the existence of grounds for requesting the profit to be returned, i.e., that the Profit Taker has made profits from the short-swing trading and (ii) the necessity of preservation, i.e., that the Profit Taker may dispose of or dissipate his/her assets unless the preservation order is issued.

The preservation order may be made in the form of (i) a judgment (after judicial hearings with both parties being represented) or (ii) an ex parte court order without a judicial hearing. The court's process will be served on the affected party in the event that full judicial hearings take place; in addition, the order will be mailed to the person whose assets are

ordered to be frozen.

A preservation order in the form of a judgment as well as an ex parte court order may be appealed to a higher court. The Profit Taker whose assets are frozen under the order may lodge with the court an objection to the preservation order. In addition, the Profit Taker whose assets are frozen may bring a legal action against the SEC to litigate his/her obligation to return the profits. Alternatively, the Profit Taker may request the court to issue an order for the SEC to bring an action by a certain date against the Profit Taker for the judicial review and determination of the lawfulness of the SEC's right. Upon failure of the SEC's bringing such an action by the prescribed date, the Profit Taker will be entitled to request the court to revoke the preservation order.

Upon the court's final determination in the main litigation (between the Profit Taker and the SEC) that the issuer company is entitled to the return of profit, the frozen assets may be disposed of and the proceeds in the amount of the profit made through short-swing trading will be returned to the company. In the case where the frozen assets consist of claims, the claims may be collected through a court order or alternatively, the claims may be transferred to the company directly through a court order. Due to lack of precedents, it is not clear as to whether the preservation order would also apply to futures contracts and, if applied, how the preservation order would be enforced with respect to open positions on futures contracts.

Administrative Freeze by Other Governmental Authority

Assets may be frozen or seized by the Prosecutor's Office in connection with investigation and prosecution of crimes. Under the Criminal Code and the Code of Criminal Procedures ("CCP"), any property acquired through criminal conducts may be seized by a prosecutor pursuant to a court order. Accordingly, if the securities fraud (e.g., insider trading) constitutes a criminal offence, the Prosecutor's Office would have the power to seize the assets of the accused and thereby, preserve such assets.

In general, personal property including securities are subject to the prosecutor's power to seize. In addition, real property may also be seized. However, claims including bank deposits and contractual rights such as futures contracts cannot be subject to such seizure.

The seizure by the Prosecutor's Office will terminate when the criminal case is finally adjudicated and the seized property is disposed of in accordance with the court's decision. The seized assets of the defendant will be confiscated by the government in the event that the defendant is convicted of the criminal offence and the assets are determined to be owned by the defendant.

In the event that the seized assets are in fact owned by a person other than the defendant, the owner may request the Prosecutor's Office or the court to release the assets. Thus, defrauded investors may be entitled to share the seized assets if the court determines that such assets should be returned to the investors who have suffered losses as a result of the

criminal offence.

Alternative Measures Similar to Preservation Order

Under the SEL, the SEC has statutory authority to conduct investigations, in order to determine whether there has been a violation of the SEL, any regulations thereunder or any order issued by the SEC or if deemed necessary to protect investors' interest. This authority includes power to summon witnesses, to compel the production of books and records and to require submission of affidavits. Any person who does not comply with such order is subject to imprisonment of up to 3 years or penalty not exceeding 20 million Won.

In addition, the SEC is entitled to assistance from other government agencies and authorities if necessary for exercising its statutory authorities.

Under the SEL, the SSB has the authority to conduct investigations on the business and management of securities companies when deemed necessary. If in the course of such investigation a securities company is found to have violated relevant laws or regulations, the SSB submits to the SEC a report on the finding together with its opinion regarding sanctions, which include revocation of the securities business license, an order to cease business activities and/or to terminate employment of responsible directors or employees.

Under the SEL, the SEC has the authority to issue orders with respect to securities companies as measures to protect investors' interest or to prevent excessive speculative activities. The SEC's order may cover areas such as the securities company's management of its own assets, money or securities deposited by customers, management of business, or any other matters as approved by the Minister of Finance and Economy.

A plaintiff in a civil action may request the court to order the SEC to provide the court with information obtained through its investigation pursuant to the provisions described above. Therefore, a defrauded investor may gain access to the results of the SEC's investigation.

B. Description of the measures used to return assets to defrauded investors

In principle, the SEC has no power to have the assets returned to the defrauded investors nor the authority to bring a judicial action on behalf of the defrauded investors, except in the case of the short-swing trading. As described above, the SEC may obtain a preservation order from a court in order to force the Profit Taker to return the profit from short-swing trading to the company.

Under Korean law, defrauded investors may not be represented in a legal action by any third party other than an attorney. In the event that defrauded investors are large in number and bring a suit against the Profit Taker, one or several of the plaintiffs may be appointed by the other plaintiffs to represent all specified plaintiffs in the legal action. The judgment obtained in such a legal action would be effective with all such plaintiffs. However,

the judgment will not be effective with any defrauded investor who did not participate in the suit as a plaintiff. A trustee or a receiver in insolvency proceeding of a defrauded investor may bring an action on behalf of the insolvent party.

Defrauded investors may bring a civil action on the following grounds:

- Articles 105 and 106 of the SEL: Any person who manipulates market prices on the stock exchange or engages in certain fraudulent activities is liable for losses suffered by other investors in the securities with respect to which such price manipulation or fraudulent activities have been undertaken.

- Articles 14, 15 and 17 of the SEL: Making any false statement or omitting to state a material fact in the prospectus would subject the issuer, its directors, the public accountant who certified the financial statements included in the prospectus or any person who prepared or circulated such prospectus, to civil liability for any losses suffered by investors in the securities.

- Article 188-3 of the SEL: Any "insider" (as defined in the SEL) who violates the prohibition against "insider trading," i.e., purchase or sale of listed securities without disclosure of material information about the issuer's affairs is liable for losses suffered by other investors in the securities.

- Article 197 of the SEL: Making any false statement or omitting to state a material fact in the auditor's report on the company would subject the auditor to civil liability to investors in the company who relied on the report.

Defrauded investors may bring a civil action on the general principle of tort law, in which case the plaintiff will have the burden of establishing existence of fraudulent activities of the defendant, damage and causation.

In the event that the fraudulent activities that have caused injuries to the investors are under investigation by the SEC or the SSB pursuant to the SEL (see above), the evidence obtained by the SEC or the SSB may be made available to the defrauded investors in their civil litigation through the court's order.

In addition, a defrauded investor may request the court to issue a preservation order prior to and in preparation of his civil action against the relevant party. The procedures, defence, appeals and requirements for allegations are similar to those described with respect to the preservation order that the SEC is authorized to obtain from a court in connection with the short-swing profit.

II. MEASURES AVAILABLE FOR USE BY FOREIGN AUTHORITIES

A. Measures available for use by foreign authorities

1. Preservation of Assets

a. Power to Assist

Neither the SEC nor the SSB has the power to freeze assets administratively on behalf of a foreign authority with or without judicial order.

It would not be possible to obtain a judicial preservation order for purposes of enforcing a foreign order on behalf of a foreign authority because such order (which is not a final judgment of a court) cannot be enforced by a Korean court.

Pursuant to the International Criminal Prosecution Cooperation Law, upon the request of the governmental authority of a foreign country made through diplomatic channel, assets evidencing criminal conducts may be seized and delivered, if the requesting country accords the similar treatment to the request by the Korean government and has established that such transfer of assets is necessary for investigation or prosecution of the crime. Korea entered into several bilateral treaties for the similar purpose. Thus, in the event that the foreign government is in the process of prosecuting a criminal charge relating to securities fraud, the assets located in Korea of the accused may be delivered to such foreign government at the request of such foreign government.

There is no governmental authority or agency in Korea that can either freeze assets administratively or obtain a judicial preservation order on behalf of a foreign securities or futures authority. Nor any measures (other than described above) are available for a governmental agency acting on behalf of a foreign authority that would have a similar impact on the preservation of assets.

b. Direct Access by Foreign Authority

A foreign authority has standing to request a Korean court to render an enforcement judgment enforcing a foreign civil judgment if such authority is the prevailing party in the foreign legal action. However, a Korean court is not permitted to enforce a foreign order or decisions other than a final judgment rendered by a foreign court in a civil action. Although there exists no precedent, we believe that a foreign authority would also be able to obtain a court's preservation order in connection with the enforcement of a foreign civil judgment if the foreign authority has standing in obtaining enforcement judgment.

A foreign judgment will be enforced by a Korean court without a further review of the merits, provided that (i) such judgment is final and rendered by a court having valid jurisdiction, (ii) the party against whom such judgment is awarded received service of process

in conformity with the laws of the relevant jurisdiction other than by publication or responded to the action without being served with process. (iii) such judgment is not contrary to the public policy of Korea and (iv) judgments of the Korean courts are accorded similar treatment under the laws of the jurisdiction where the rendering court is located.

No other measures are available to a foreign authority that would have a similar impact on the preservation of assets.

c. Procedures

As indicated above, a Korean court will enforce only a foreign civil judgment, thus, a criminal sanction issued by a foreign court cannot be enforced in Korea. Nor an administrative order or disciplinary order issued by a foreign authority other than a court will be enforceable in Korea. A punitive damage ordered by a foreign court may not be enforced in Korea because such damage award is considered to be against public policy of Korea.

2. Repatriation of funds

The Foreign Exchange Management Law ("FEML") and regulations thereunder ("FEMR") provide for mechanisms for assets to be expatriated for return to foreign investors.

If the defrauded investors' investment has complied with the requirements under the FEML and the FEMR, such investors may obtain a court judgment against the wrongdoers and, with the requisite foreign exchange authorization, enforce the judgment, convert and repatriate the proceeds of such enforcement. To date there exists no precedent on point.

3. Private Cause of Action for Violations of Foreign Laws

A Korean court will have jurisdiction over a private cause of action for torts (including securities frauds) under the following circumstances: (i) in personam jurisdiction based on the tortfeasor's presence in Korea; (ii) in rem jurisdiction based on the tortfeasor's assets located in Korea; or (iii) subject matter jurisdiction based on the wrongful conduct taking place in Korea.

A violation of foreign securities laws will be a ground for a private cause of action in Korean courts if the conduct that violated the relevant laws constitutes a wrongful conduct under Korean laws. It is not clear whether a violation of foreign securities laws that is not recognized as a wrongful conduct under Korean laws would be actionable in Korea; there is no authority or court precedent on point.

B. Experience of delegations in the preservation and returns of assets located in foreign jurisdiction

To date there exist no precedents where the Korean government or its agencies (including the SEC) have sought to obtain a freeze of assets located in a foreign jurisdiction or the repatriation of assets located outside Korea for return to defrauded investors.

Luxembourg

Commissariat aux Bourses



Ministère des Finances

LUXEMBOURG, 13 December 1995

COMMISSARIAT AUX BOURSES

Vos réf.:

Nos réf.: CAB-279/95

Mr. Jean-Pierre Michau
Service de l'Inspection
C O B
39/43 Quai André Citroën
F - 75739 Paris Cedex 15

Dear Mr. Michau,

I refer to your letters dated September 8 and November 8, 1995 concerning the work of IOSCO Technical Committee Working Party N° 4 on enforcement and exchange of information currently dealing with « Provisions available on a cross border basis, to protect defrauded investors' interest and assets ».

The situation in Luxembourg is following. Pursuant to our jurisdiction the Commissariat aux Bourses (« CAB ») as well as the Luxembourg Monetary Institute (« IML ») are unable to enforce provisional and final judgements and other decisions obtained by foreign authorities (including in particular orders freezing and repatriating assets of defrauded investors) and other measures available for attaining similar results.

This means that neither the CAB nor the IML will be able to take administrative action to preserve assets of defrauded investors. Both are unable to act through judicial process to pursue such measures on behalf of defrauded investors or on behalf of a foreign authority.

In compliance with Luxembourg law defrauded investors have to go to court on behalf of themselves in order to have their assets which have been defrauded preserved and to get a decision concerning their return.

I. Measures available for use domestically.

A. Description of the available measures to preserve that may lead directly or indirectly to preservation of interests of defrauded investors.

1) The CAB cannot administratively freeze assets located in bank or brokerage accounts. Such a measure has to be requested by the defrauded investors themselves by way of recourse to the courts.

Adresse postale: L - 2931 Luxembourg

Bureaux: 3, rue de la Congrégation

Téléphone: (352) 478 - 2616

Téléfax: (352) 46 62 13

Télex: 2790 etafin lu

- 2) We have no powers by ourselves to obtain such measures through the judicial channels. This power belongs exclusively to the defrauded investors.
- 3) /
- 4) The IML can use eventually alternate measures that could have an impact on the preservation of assets (e.g. temporary bars of activity, insolvency proceedings, ...).

B. Description of the measures used to return assets to defrauded investors.

No direct procedure is available to the CAB to have assets returned to defrauded investors.

The CAB cannot bring a judicial action on behalf of defrauded investors. This action must be taken by the defrauded investors themselves or in case of receivership by the receiver or the trustee.

II. Measures available for use by foreign authorities.

1. Preservation of assets.

a. Powers to assist.

- The CAB is unable to freeze assets administratively on behalf of a foreign authority.
- We are unable by ourselves to request such measures through the judicial channel. Judicial freeze enforcing a foreign order on behalf of a foreign authority can only be obtained by way of a « commission rogatoire ».

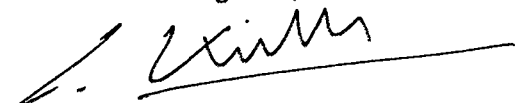
b. Direct access by foreign authority.

A foreign authority has no direct access in the courts in our jurisdiction in order to request a judicial freeze order enforcing a foreign judgement.

2. Repatriation of funds.

In our jurisdiction repatriation of funds can only be obtained through judicial channels.

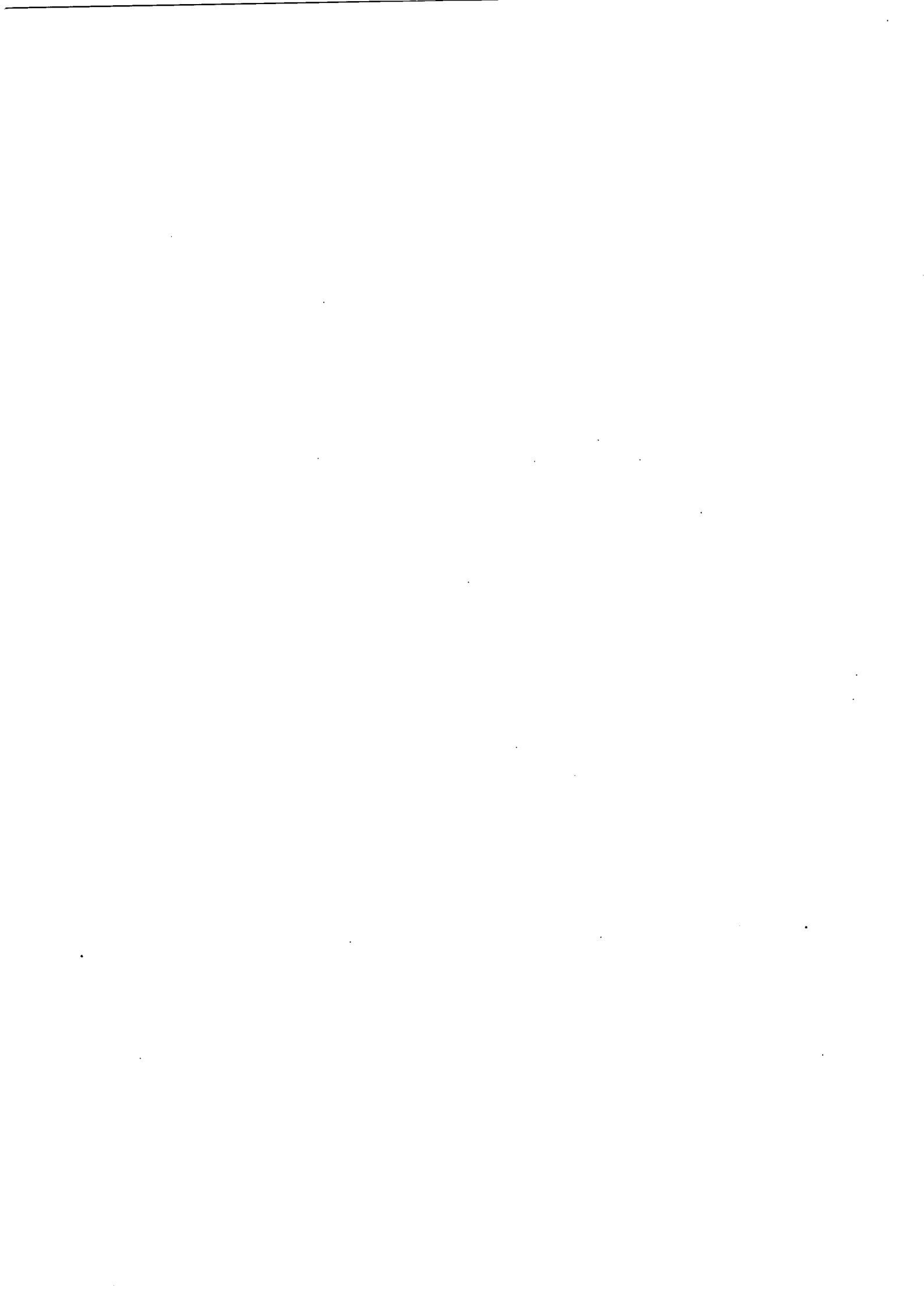
Best regards,



Charles KIEFFER

Malaysia

Securities Commission



Response to Questionnaire On "Measures Available On A Cross Border Basis To Protect Defrauded Investors' Interest and Assets".

Part I

A Measures Available For Use Domestically.

1. Question: Can you administratively freeze assets located in bank or brokerage accounts without recourse to the Courts?

The Securities Commission is not conferred with the power to administratively freeze assets located in bank or brokerage accounts without recourse to the Court.

2. Question: Can you ask for such measures through the judicial channel? In particular, can you obtain an interim or provisional judicial order freezing assets? What alternate measures can you use or ask for that could have a similar impact on the preservation of assets? (e.g. temporary bars of activities, management of a company under the close control of an appointed trustee, replacement of a company manager by an appointed trustee, insolvency proceedings.) On what basis can the measures be taken? What are the effects and consequences of the measures: what (funds, securities, futures contract) and whose assets may be frozen? For how long? Can such measures be renewed?

In Malaysia, the Securities Industry Act, 1983 is the principal legislation on the regulation of securities industry with 2 agencies jointly assuming the role of administering the Act: the Securities Commission and the Registrar of Companies. Presently, there is no provision in the Act empowering either of the agencies to freeze assets either administratively or via judicial means.

However, in this respect, section 100 of the Act allows the Commission to apply to the High Court against any person who has committed an offence relating to the dealing in securities or is about to do an act with respect to dealing in securities that, if done, would be such an offence, for the following orders:

- in the case of persistent or continuing breaches of the Act, or of any law in Malaysia relating to dealing in securities, of the conditions or restrictions of a licence, or of the rules or listing requirements of a stock exchange, an order restraining a person from carrying on a business of dealing in securities, acting as a fund manager or an investment adviser or as a dealer's representative, a fund manager's representative or an investment representative, or from holding himself out as carrying on business or so acting;
- an order restraining a person from acquiring, disposing of or otherwise dealing with any securities that are specified in the order;

- an order appointing a receiver of the property of a dealer or a fund manager or of property that is held by a dealer or a fund manager for or on behalf for another person whether on trust or otherwise;
- an order declaring a contract relating to securities to be void or voidable;
- where a person has refused or failed, in refusing or failing, or is proposing to refuse or fail, to do any act or thing that he is required to do under the Act, an order requiring such person to do such act or thing;
- for the purpose of securing compliance with any other order made under this section, an order directing a person to do or refrain from doing a specified act; and
- any ancillary order deemed to be desirable in consequence of the making of an order under any of the preceding provisions.

The word 'property' is defined to include "monies securities and documents of title to securities or other property entrusted to or received on behalf of any other person by the dealer or fund manager in the course of the business of dealing in securities."

The penalty for non-compliance of the order issued by the High Court or a requirement of a receiver appointed by the High Court under the said section 100 is severe: any person who contravenes or fails to comply with an order under this provision commits an offence and is liable on conviction to a fine not exceeding RM1 million or to imprisonment for a term not exceeding 10 years or to both. This penalty is over and above the powers of the High Court in relation to the castigation for contempt of court.

In relation to futures contracts, section 106(C) of the Futures Industry Act 1993 contain similar and corresponding provisions to deal with similar situation.

3. Question : Must there be notice given to the person whose assets have been frozen? What sort of appeal rights are available?

Section 100 provides that the High court may before making any of the above orders, direct that notice of the application be given to such persons as it thinks fit, or direct that notice of the application be published in such manner as it thinks fit, or both.

Though section 100 is silent on matters on appeal, the general right of an aggrieved persons to appeal against a decision is available under the general civil procedure practised in this country. In this aspect, an appeal lies with the Court of Appeal ex debito justitia, and if any of the parties is dissatisfied with the decision of the Court of Appeal, then, the appeal lies with the Federal Court, which is the highest tribunal of the land. Before an appeal may be filed in the Federal Court, the appellant must seek leave for appeal either from the Court of Appeal or the Federal Court itself.

4. Question: What other governmental or public authority in your jurisdiction can either freeze assets administratively or obtain such measures through the judicial channel?

The other governmental or public authority that are empowered to freeze assets administratively are:

The Registrar of Companies & the stock exchange:

The Registrar of Companies and the Stock Exchange may likewise invoke the provision of section 100. The circumstances when the Registrar of Companies may invoke section 100 is similar with that of the Securities Commission, namely:

- that a person has committed an offence under the Securities Industry Act, or under any other law in operation in Malaysia relating to dealing in securities;
- that a person has contravened the conditions or restrictions of a licence or the rules or listing requirements of a stock exchange; or a person is about to do an act with respect to dealing in securities that, if done, would be such an offence or contravention; or
- that a person has engaged in, is engaging in, or is proposing to engage in, any conduct that constitutes or would constitute a contravention of the Securities Industry Act.

The stock exchange may invoke section 100 on the ground that a person has contravened the rules or listing requirements of the stock exchange.

The Public Prosecutor:

The Public Prosecutor is empowered under certain written laws to order a freeze of assets or bank accounts. For example, under section 7 of the Kidnapping Act 1961, the Public Prosecutor may, if he is satisfied that it is likely that money for the payment of ransom be paid out of any bank account, by order direct any bank in Malaysia not to pay any money out of nor to pay cheques drawn on such bank account for a specified period not exceeding one month. Similar power is also given to the Public Prosecutor under section 3 of the Emergency (Essential Powers) Ordinance No. 22/1970. In addition, the said Ordinance also empowers the Public Prosecutor to make such order to seize any movable articles, bonds, share certificates or other valuable documents which he has reason to believe have been purchased or otherwise acquired as a result of or in connection with corrupt practices committed by a Member of administration or certain other persons within the purview of the Act.

Bank Negara Malaysia:

Bank Negara which is the central bank of Malaysia is empowered to publish an order in the Gazette requesting, among other things, the surrender to the central bank all monies properties and assets by any person in relation to the activities of deposit taking.

5. Question: What uses can be made of assets that have been frozen?

Besides allowing the receiver appointed to take possession and deal with any property that he has taken possession of, the aforementioned section 100 further allows the receiver appointed to require the dealer or fund manager to deliver to the receiver all properties or give to the receiver all information concerning that property that may reasonably be required. The receiver may also acquire and take possession of such property and deal with the said property in any manner which the dealer or fund manager might lawfully have dealt with the property.

B Description of the measures used to return assets to defrauded investors.

1. Question: Can you bring a judicial action on behalf of defrauded investors? On what basis and what are the procedures available to you in order to have assets returned to defrauded investors? Can you obtain a court order for return of assets after a final judgement?

The Securities Commission is not empowered to institute judicial proceedings on behalf of defrauded investors for any order. However, section 407 of the Criminal Procedure Code allows the Court during or at the conclusion of any inquiry or criminal trial, to make such orders as it thinks fit for the custody or disposal of any property or document whatsoever produced before it or in its custody or the custody of the police or of any public servant regarding which an offence appears to have been committed or which has been used for the commission of any offence. This power conferred upon the Court under the said section 407 of the Criminal Procedure Code includes also the power to make an order for the forfeiture of confiscation or for the destruction or for the delivery to any person of such property. However, this power of the Court is subject to any special provisions relating to forfeiture, confiscation, destruction or delivery contained in the written law under which the conviction was had.

2. Question: Can a trustee, receiver or other third party be designated to represent the defrauded investors?

The Securities Commission does not have the power to designate a third party to represent defrauded investors. There is at the moment no provision for "class action" under the present regulatory regime of this country in the securities laws.

3. Question: On what basis can defrauded investors bring an action on their behalf?

Defrauded investors can themselves commence civil action against the defrauder based on the general principle of the laws of contract and tort applicable in the common law jurisdiction.

For example, any person who wishes to apply for an order to freeze property may proceed to do so by applying for a mareva injunction under the civil procedure practised in this country. Amongst other things, the "guidelines" discerned from the cases decided thus far revealed the following pre-requisites:

- the affidavit in support of the application must contain full and frank disclosure of all matters which are material
- the applicant must state the grounds and particulars and amount of the claim

- the applicant should give some grounds or proof for believing that the defendants have assets in the jurisdiction
- the applicant must give some grounds for believing that there is a risk of the assets being removed before satisfaction of the final judgement
- the applicant must give indemnity in damages in case he fails in his claim or the injunction turns out to be unjustified, and in a suitable case this should be supported by a bond or security.

The other means which may be of help to defrauded investors is the recourse against the Compensation Fund set up by the stock exchange if the defrauded investors suffer pecuniary losses from the following :

- a defalcation
- fraudulent misuse of monies or other property by a director, officer, employee or representative of a licensed dealer which at that time is a member company of the Exchange

The Compensation Fund is also available to any person who suffers monetary loss because of an insolvency of a member company of a stock exchange.

Similarly, section 58 of the Futures Industry Act provides for the establishment of the Fidelity Fund to serve similar purposes vis-à-vis investors who suffer losses in trading futures contracts.

4. Question: What other means can you use to assist in returning assets to defrauded investors?

The Securities Commission may assist by relying on the provision of Criminal Procedure Code (FMS Cap 6), which applies generally to all criminal proceedings conducted in Malaysia. It is provided under Section 426 of the Criminal Procedure Code that on the conviction of a person of any offence, the court may make an order for the payment by the accused of a sum to be fixed by the court by way of compensation to any person or to the representatives of any person injured in respect of his property by the offence for which the sentence is passed.

Since the Criminal Procedure Code is of general application, section 426 is available to the Securities Commission for any prosecution which the Commission may conduct for any offence under any securities law which comes within the purview of the Commission.

In addition, section 98 of the Futures Industry Act and section 125 of the Securities Industry Act provides that a person who is convicted of an offence under the respective Acts is liable to pay such compensation as may be determined by the Court to any person who has suffered damages as a result of the offended act.

Part IIA: Measures Available For Use By Foreign Authorities.1 Preservation of assets(a) Power to assist

Question: Can you freeze assets administratively on behalf of a foreign authority without recourse to the courts?

The Securities Commission is not empowered to freeze assets administrative on behalf of any party.

Question: Are you authorised to request such measures through the judicial channel? Can you obtain a judicial freeze enforcing a foreign order on behalf of a foreign authority? If so, what procedure should the foreign authority follow in making its request? What other measures can you use or ask for and on what basis, on behalf of a foreign authority that could have a similar impact on the preservation of assets?

The Securities Commission is not authorised to request such measures through judicial channel, neither can the Commission obtain a judicial freeze enforcing a foreign order on behalf of a foreign authority, or through any other means..

Question: Is there any other government or public entity in your jurisdiction that can either freeze assets administratively or obtain a judicial freeze order on behalf of a foreign securities or futures authority? What procedure should the foreign authority follow in making its request/ What conditions should be met?

We are not aware of the existence of such public bodies who are given the power to freeze assets administratively or through judicial means on behalf of a foreign authority.

(b) Direct access by foreign authority

Question: Does a foreign authority have standing in the courts in your jurisdiction in order to request a judicial freeze order enforcing a foreign judgment, order or other decision? What are the obstacles that the foreign authority may encounter in seeking judicial enforcement of a foreign judgement, order or other decisions (such as, for example, domestic unwillingness to enforce a foreign penal order)?

In Malaysia, all matters regarding the enforcement of foreign judgements are governed by the Reciprocal Enforcement of Judgments Act 1958. This Act only

applies to judgments given in the superior courts of reciprocating countries named in the Schedule to the Act.

The registration of a foreign judgment may be set aside on the following grounds:

- that the courts of the country of the original court had no jurisdiction in the circumstances of the case;
- that the judgement debtor, being the defendant in the proceedings in the original court, did not (notwithstanding that process may have been duly served on him in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear;
- that the judgment was obtained by fraud;
- that the enforcement of the judgment would be contrary to public policy in Malaysia; or
- that the rights under the judgment are not vested in the person by whom the application for registration was made.

Question: What other means are available to a foreign authority that would have a similar impact on the preservation of assets?

The remedy of a mereva injunction which have the effect of preservation of defendant's assets as discussed in Part I Section B Question 3 is also available to a foreign authority. The conditions as to the procedure which is laid out therein would similarly apply.

C. Procedures

Question: Whether the measures available to the foreign authority depend on the purpose for which they are sought (sanctioning violators)? Whether the type of decisions affects its enforcement, (e.g. does it matter whether the foreign decision is civil, administrative, criminal or disciplinary?)

The judgments which come within the scope of the Reciprocal Enforcement of Judgments Act are judgments or orders given by a court in any civil proceedings, or in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party, including an arbitration award which has become enforceable in the same manner as a judgement given by a court in that country

Question: What sort of notice and appeal rights are available to the person whose assets have been frozen? Can a freeze be put into place without prior notice to the party holding the assets?

Unless it is a case involving an application for an ex-parte order, all applications, regardless of its nature and purpose, must be served on the defendant, and such other persons which would be affected by the order, as may be directed by the court.

2. Repatriation of funds.

Question: Whether any mechanisms exist for assets to be expatriated for return to foreign investors? If so, what are these mechanisms, which channels and what procedures should be followed (direct request through judiciary channel, through the securities and futures counterpart or through other administrative or public authorities)?

A foreign investor may have to commence legal action in this country praying for the return of assets, damages or any other orders he deems necessary in the circumstances of the case. If he is able to convince the court that there is no triable issues and neither is there any defence to the claim, he may be able to obtain a summary judgment by proving the case by way of affidavits without having to have the case gone for trial, which may turn out to be a long and protracted process.

In addition to the above, the foreign investor may also apply for an order for mereva injunction. In this regard, he has first to satisfy the prerequisites as discussed in Part I Section B Question 3 above.

Question: Can foreign investors recover assets lost as a result of violations of foreign securities and future laws through a private cause of action in your jurisdiction?

In order for foreign investors to recover assets lost through a private cause of action in this country, they must submit to the jurisdiction of local courts which only have jurisdiction to interpret and decide upon local laws. Malaysian Courts do not have jurisdiction to interpret foreign laws.

B Experience of delegations in the preservation and returns of assets located in foreign jurisdictions.

The Securities Commission has not, thus far, had the experience in seeking to obtain a freeze of assets in a foreign jurisdiction and/or the repatriation of assets located abroad for return to defrauded investors.



Mexico

Comisión Nacional Bancaria y de Valores



**COMISION NACIONAL BANCARIA Y DE VALORES OF MEXICO (CNBV)
RESPONSES TO IOSCO's WORKING PARTY N° 4 QUESTIONNAIRE ON
MEASURES AVAILABLE ON A CROSS-BORDER BASIS TO PROTECT
INTERESTS AND ASSETS OF DEFRAUDED INVESTORS**

I. MEASURES AVAILABLE FOR USE DOMESTICALLY

A. Description of the available measures to preserve that may lead directly or indirectly to preservation of the assets or interests of defrauded investors

- **Can you administratively freeze assets located in bank or brokerage accounts without recourse to the Courts?**

According to the faculties conferred upon the CNBV, this organism is not legally empowered to administratively freeze assets located in bank or brokerage accounts, neither can it resort to judges (judicial power) to obtain the freezing of assets located in accounts.

- **Can you ask for such measures through the judicial channel? In particular, can you obtain an interim or provisional judicial order freezing assets?**

As established in the previous point, the CNBV cannot request the freezing of accounts, even through the judicial channel. According to Mexican legislation, solely the judge, during a judicial proceeding, can order the freezing of assets located in bank or brokerage accounts of any individual or legal entity.

On the other hand, provided the existence of a judicial proceeding already initiated, the CNBV, as a preventive measure, could request the freezing of assets located in bank or brokerage accounts, which would only be determined by a court resolution.

- **What other government or public authority in your jurisdiction can either freeze assets administratively or obtain such measure through the judicial channel?**

In tax matter, the Ministry of Finance and Public Credit (SHCP)¹ can, according to article 145 of the Tax Code, carry on an interim freezing of assets, in order to secure the fiscal interest. When the SHCP considers it appropriate and when according to its assessment, there is the likelihood that the obligee becomes absent, sells or occults his assets or carries on any maneuver which tends to evade his compliance with fiscal obligations, with the assets subjected to the

¹ "Secretaría de Hacienda y Crédito Público", SHCP

securing procedure, which in this case are those which are deposited in bank or brokerage accounts.

- **What alternate measures can you use or ask for that could have a similar impact on the preservation of assets? (e.g., (temporary) bars of activities, management of a company under the close control of an appointed trustee, replacement of a company manager by an appointed trustee, insolvency proceedings).**

Due to the fact that the CNBV lacks faculties to freeze assets, it cannot request any similar procedure or action to preserve them. However, the CNBV, within the exercise of its inspection and surveillance powers, can bring for the attention of the relevant authorities, any irregular behavior that may require said authorities to determine, according to their own procedures, the preservation of assets.

- **On what basis can the measures be taken?**

There are no other legal measures that the CNBV can undertake to freeze assets, since it does not have the power to do so.

- **What are the effects and consequences of the measures: what (funds, securities, futures contracts...) and whose assets may be frozen? For how long? Can such measures be renewed? What kind of allegations must be made to freeze the assets (e.g. criminal conduct)?**

There are no effects or consequences since, as previously established, the CNBV cannot carry out these measures.

- **Must there be notice given to the person whose assets have been frozen? What sort of appeal rights are available?**

The CNBV does not give notice to the person or legal entity whose assets have been frozen.

According to Mexican legislation, the person or legal entities whose assets have been frozen, may appeal against the authority's decision to freeze the assets, by filing a proceeding to guarantee constitutional rights ("juicio de amparo").

- **What uses can be made of assets that have been frozen?**

The CNBV cannot dispose or use the frozen assets.

- What difficulties may be encountered while the measure is implemented? How and by whom are the assets frozen (e.g. when assets are composed of open positions on future contracts)?

A difficulty that may be encountered would be deciding upon an appropriate mechanism to manage the assets while they are being preserved.

B. Description of the measures used to return assets to defrauded investors

- What procedures are available to you, in order to have assets returned to defrauded investors?

The CNBV is not empowered to intervene in any procedure to return assets to defrauded investors. These procedures are solely responsibility of the relevant authorities.

- Can you bring a judicial action on behalf of defrauded investors? On what basis? Can a trustee, receiver or other third party be designated to represent the defrauded investors? On what basis can defrauded investors bring an action on their own behalf?

According to Mexican Law the CNBV cannot initiate a judicial proceeding on behalf of defrauded investors. This can only be attained through a judicial action, being it of a civil or criminal character, which the defrauded investors must present. The action must be initiated by the defrauded investor or by a person empowered by him to represent him before the courts.

- Can you obtain a final judgment by a court that would include an order for return of assets? Who else can obtain it? On what basis?

The CNBV is not authorized to obtain a court order to return assets to a defrauded investor, not even when a standing decision has been granted by a court.

- What other means can you use to assist in returning assets to defrauded investors?

According to Mexican Law only a judge and after a judicial proceeding, can order an award, determining the return of assets to defrauded investors.

In a judicial procedure in which the judge, according to the law, has decreed or ordered the freezing of assets, the owner of these cannot dispose of them until their status has been determined by a final sentence or award.

- Are assets that have been frozen also available to pay penalties imposed by a securities or futures regulator or by a court?

According to the applicable statutes and codes, the frozen assets are not available to cover the penalties imposed by an administrative authority, as would be the CNBV.

II. MEASURES AVAILABLE FOR USE BY FOREIGN AUTHORITIES

A. Measures available for use by foreign authorities

1. Preservation of assets

a. Powers to assist

- Can you freeze assets administratively on behalf of a foreign authority without recourse to the courts?

The CNBV, according to Mexican legislation, cannot freeze assets administratively on behalf of a foreign authority, nor can it recourse to courts in order to request the freeze of assets for said authority.

- Are you authorized to request such measures through the judicial channel? Can you obtain a judicial freeze enforcing a foreign order on behalf of a foreign authority? If so, what procedure should the foreign authority follow in making its request? For example can the foreign authority make its request pursuant to a mutual assistance law or treaty? What conditions should be met?

As previously ascertained, the CNBV is not empowered to request an assets freezing through the judicial channel, therefore, it cannot obtain a judicial freeze to enforce a foreign order on behalf of a foreign authority.

Mexican Law, regarding international cooperation, only accepts rogatory letters, issued by foreign judicial authorities. This procedure is subject to certain conditions and international conventions signed by the Mexican government and ratified by its Legislative Branch, specifically by the Senate.

- Is there any other government or public entity in your jurisdiction that can either freeze assets administratively or obtain a judicial freeze order on behalf of a foreign securities or futures authority? What procedure should the foreign authority follow in making its request? What conditions should be met?

In Mexico there is no government or public entity which can freeze assets administratively or obtain a judicial freeze order on behalf of a foreign securities or futures authority.

- What other measures can you use or ask for and on what basis, on behalf of a foreign authority that could have a similar impact on the

preservation of assets? How can they be used? What are their consequences on the assets?

There is no measure which the CNBV can pursue to preserve said assets.

- What additional assistance in matters relating to securities and futures violations can your organization provide to assist a foreign authority (including regulatory, criminal and judicial authorities) in its efforts to freeze or repatriate assets located in your jurisdiction, including gathering or providing access to non public information?

Within the exercise of its inspection and surveillance powers the CNBV can provide the assistance requested by a foreign securities or futures authority, to the extent and scope necessary to obtain from any person the information requested. The exercise of this power is subject to the applicable domestic legislation and to the existence of a Memorandum of Understanding on the exchange of information.

b. Direct access by foreign authority

- Whether a foreign authority can have standing in the courts in your jurisdiction in order to request a judicial freeze order enforcing a foreign judgment, order or other decision?

As previously ascertained, and according to Mexican Law, a judicial freeze of assets can only be obtained by a foreign tribunal and solely in compliance or enforcement of an award issued by a Mexican court; therefore the foreign authority has no privilege or *locus standi*.

- What are the obstacles that the foreign authority may encounter in seeking judicial enforcement of a foreign judgement, order or other decision (such as, for example, domestic unwillingness to enforce a foreign penal order)?

The recognition and enforcement of a foreign award can be requested by a foreign court. According to article 571 and 572 of the Federal Statute of Civil Proceedings², a foreign award can only be recognized and enforced if the conditions and documents required within these articles are duly complied with.

² "Código Federal de Procedimientos Civiles"

- What other means are available to a foreign authority that would have a similar impact on the preservation of assets?

There are no other means available to a foreign authority in order to preserve assets.

c. Procedures

- Whether the measures available to the foreign authority depend on the purpose for which they are sought (e.g.: sanctioning violators)?

According to Mexican Law, concerning the recognition and enforcement of foreign awards, the Mexican judge must examine the authenticity of the foreign resolution and the purposes for which the preservation of assets is sought and if the resolution must, or must not be enforced.

With respect to the enforcement of awards, which imply liquidation's and coercive enforcement (freezing, securing of assets, etc.) they must be homologated by the national judge in order for them to have effect.

- Whether the type of decision affects its enforcement, (e.g., does it matter whether the foreign decision is civil, administrative, criminal or disciplinary)?

The national tribunal can deny recognition and enforcement of a foreign award, when it is proved that in the country of origin similar awards are not recognized and enforced, or if it is against *ordre public*.

Mexico has signed several international agreements regarding the effectiveness, recognition and enforcement of foreign awards, including those of arbitral kind, of commercial, labor and civil character.

- What sort of notice and appeal rights are available to the person whose assets have been frozen? Can freeze be put into place without prior notice to the party holding the assets?

Regarding the enforcement of foreign awards, these must be homologated according to internal law, through the decision of a judge, which is subject to appeal.

On the other hand it is necessary to give notice to the party holding the assets to put freeze in place.

1. Repatriation of funds

- **Whether mechanisms exist for assets to be expatriated for return to foreign investors?**

Mexican legislation establishes a sole mechanism for the expatriation of funds. The expatriation is carried out through the enforcement of an award which should place the assets under the control of a foreign judge.

- **If so, what are these mechanisms, which channels and what procedures should be followed (direct request through judiciary channels, through the securities and futures counterpart or through other administrative or public authorities)?**

The only mechanism is the enforcement of an award, which cannot be attained through any other means or public or administrative authority, than a judicial authority.

- **Can foreign investors recover assets lost as a result of violations of foreign securities and futures laws through a private cause of action in your jurisdiction?**

Foreign investors cannot file an action before the Mexican courts as a result of violations to the securities and futures laws of their country. The foreign investor would have to promote an action before the courts of his country, and then obtain its recognition and enforcement through the procedure previously described.



The Netherlands

Stichting Toezicht Effectenverkeer



Introduction/Summary

The securities supervisors in the Netherlands, the Dutch Central Bank and the Securities Board of the Netherlands (STE) are strictly administrative authorities. Consequently, if confronted with cases of securities fraud, the STE is only authorized to take administrative measures (such as the withdrawal of a license). The STE does not have the authority to freeze assets. Neither does the STE have this authority upon request of one of their foreign counterparts. However, there are three channels through which securities supervisors can seek asset freezing in the Netherlands.

- 1: permission for execution of a foreign court-order;
- 2: conservatory attachment under a local court-order and
- 3: the criminal channel.

1st Channel: permission for execution of a foreign court-order

A foreign civil court-order to freeze assets can be executed in the Netherlands on the basis of the Dutch Law or a bilateral or multilateral execution treaty, provided permission for execution in the Netherlands is granted by a Dutch civil court (the so-called "exequatur" procedure). For instance an EU civil court-order to freeze assets can be executed in the Netherlands on the basis of the EU Execution Treaty of 1968. Mention should also be made of the continuing attempts to agree upon a world-wide multilateral execution treaty (the Hague convention).

A request for permission should be addressed to the President of the county-court ('arrondissementsrechtbank") where the natural person involved lives or the legal person involved is incorporated, or, if not applicable, where the execution takes place. Permission may only be denied if specified (legal) grounds for denial are applicable; the President of the county-court may not look into the merits of the case. The President must make the decision whether or not to give his permission without delay.

The natural or legal person involved must be heard, or at least be given the opportunity to be heard, before a permission is granted.

2nd Channel: conservatory attachment under a local court-order.

A foreign securities supervisor may have assets in the Netherlands frozen under a Dutch civil court-order on the basis of the Dutch Code of Civil Procedure mostly without a prior hearing (a so-called conservatory attachment or ex parte asset freezing. In order to accomplish this result, a foreign securities supervisor should turn to a Dutch lawyer ("advocaat") to present the case in court. A request to allow for a conservatory attachment should be addressed to the President of the county-court. The President may require the requesting party to provide for sufficient security for the costs and possible damage caused. The President may only allow for a conservatory attachment in case a creditor submits prima facie evidence of his claim and of the fact that there is a threat of embezzlement. In other words, if a securities supervisor requests to allow for a conservatory attachment, this request will be denied if the securities supervisor cannot prove that he is acting on his own behalf or is authorized by one or more of the creditors to initiate legal action in the name of these creditors.

3rd Channel: the criminal channel.

A foreign securities supervisor who wants to have assets frozen in the Netherlands in a criminal case (e.g. securities fraud) may achieve this goal indirectly through the criminal channel, on the basis of international conventions providing for asset freezing in criminal cases. Reference is made to the UN convention of 20 december 1988 (only for drugs related crimes) and the Council of Europe Convention of 8 November 1990. Asset freezing in the Netherlands is executed in accordance with the Dutch Penal Laws and procedures. New legislation came into force in the Netherlands especially to facilitate the confiscation of the proceeds of crime in an international context (the so-called "squeeze 'em international"-legislation), including new opportunities for international emergency asset freezing. Requests for asset freezing by the competent (criminal) authorities should be addressed to the International Legal Assistance Department of the Dutch Ministry of Justice (Ministerie van Justitie, Bureau Internationale Rechtshulp, postbus 20301, 2500 EH Den Haag, telefoonnummer 0703706913). Requests for freezing of assets, on the basis of - and in accordance with - the conventions mentioned above, will be executed in the Netherlands, provided it is made plausible that eventually the assets will be confiscated. If the assets are confiscated, the assets may be shared with the requesting party, if an agreement or protocol providing for asset sharing is applicable.

I. MEASURES AVAILABLE FOR USE DOMESTICALLYA. Description of the available measures to preserve that may lead directly or indirectly to preservation of the assets or interests of defrauded investors

1

No. The Securities Board of the Netherlands (STE) is strictly a administrative authority. Consequently, if confronted with cases of securities fraud, the STE is only authorized to take administrative measures based upon the Securities Trade Supervision Act (the Act) such as the withdrawal of a license or the demand for a new management of the registered broker or portfolio manager. Unlike The Dutch Central Bank the STE can not place a registered broker or portfolio manager under guardianship. The STE can file a petition for bankruptcy but only regarding to outstanding annual fees levied by the STE. The STE however does not have the authority to seek freezing of assets. Neither does the STE have this authority upon request of one of its foreign counterparts or on behalf of defrauded investors.

2

The STE can not ask for measures to freeze assets through the judicial channel other than ask for an investigation of the Dutch Economic Affairs Ministry Inspectorate (ECD) and finally fill a complaint with the Public Prosecutor in case of an alleged violation of the Act. A violation of the Act is a criminal offence and with this complaint the criminal procedure is initiated. The Public Prosecutor will be in charge. See our remarks under 3.

3

There are possibilities for the Public Prosecutor to act upon a complaint from the STE, defrauded investors or on his own initiative and to freeze assets (a criminal conservatory attachment), to close down companies and to file a claim for actio Pauliana.

A foreign securities supervisor who wants to have assets frozen in the Netherlands in a criminal case (e.g. securities fraud) may achieve this goal indirectly through the criminal channel mentioned above, page 2 "3rd Channel: the criminal channel".

4

There are no measures for the STE that have an impact on the preservation of assets. The available measures for defrauded investors have to be found in the Civil or Penal Law. The defrauded investors either individually or in a class action have to use one of these possibilities. The STE can - apart from e.g. the withdrawal of a license - give an opinion whether certain activities constitute a violation of the Act. In several criminal cases the STE has been asked for a expert opinion.

5

The Public Prosecutor can take measures in the case of a criminal investigation or a criminal verdict. For this it is important that a complaint is filled of a criminal offence to a Public Prosecutor by the STE or any other person/entity so that a criminal investigation can be commenced. Relevant criminal offences are fraud, forgery, and defalcation. In case there are more than one defrauded investor it is important that the filing of the complaint is coordinated e.g. by one lawyer who represents the defrauded investors.

6

- The effect of a criminal conservatory attachment is that the attached goods are frozen.
- A criminal conservatory attachment is possible for all sorts of funds, securities and futures contracts. Goods belonging to defrauded investors and all the goods belonging to the suspected person (company or persons actual in charge) can be subject of a criminal conservatory attachment. In his turn the lawyer of the defrauded investor(s) can ask for a conservatory attachment of the goods under the criminal conservatory attachment to secure the claim(s) of his client(s).
- Until the final judgement of a criminal judge the criminal conservatory attachment is in place. There is no need for a renewed criminal conservatory attachment pending the criminal procedure (in court).
- Before a criminal conservatory attachment is possible there must be a criminal allegation.

7

- A criminal conservatory attachment is placed and is ended by a written notice to the debtor.
- A debtor can raise objections regarding a criminal conservatory attachment, but only after the attachment is a fact. The lawyer of the defrauded investor(s) can help the Public Prosecutor by giving a statement of the defrauded clients, which statement can be handed over by the Public Prosecutor to the Judge.

8

The frozen assets can not be used as long as the criminal conservatory attachment is in effect. There is a possibility to place the assets in safe-keeping.

9

- It may be difficult to locate all the goods of the person who violated the securities and futures laws and once a criminal conservatory attachment is in place this attachment will be in effect until there is a final judgement. In fraud cases this may take many years. A Public Prosecutor will - because of his responsibility for the assets - not easily be persuaded to give a part of the assets to defrauded investors before the final judgement.
- The question how and by whom the assets are frozen is being studied. A trustee can be appointed, e.g. a bank or broker. How this will be effected is not yet clear.

I. MEASURES AVAILABLE FOR USE DOMESTICALLYB. Description of the measures used to return to defrauded investors

1

None. As mentioned under section I subsection A 1 the STE is strictly a administrative authority and there are no measures available for the STE to return assets to defrauded investors.

2

No. The STE can not bring a judicial action on behalf of defrauded investors. The STE can ask the ECD for an investigation and can fill a complaint with the Public Prosecutor in the case of an alleged violation of the Act. With this the interference of the STE is ended except possible expert opinions. Defrauded investors can cooperate and ask a lawyer to represent them in a civil and/or criminal procedure. Also see the detailed information under section I subsection A regarding the criminal channel.

3

No. The STE itself can not obtain a final judgement by a court that would include an order for return of assets. This has to be done via one of the channels mentioned on page 1 and 2 and the civil (defrauded investors) or penal channel (defrauded investors or the Public Prosecutor).

4

The STE can ask the ECD for an investigation and can fill a complaint with the Public Prosecutor in case of an alleged violation of the Act. With this the interference of the STE is ended except possible expert opinions.

5

The assets under criminal conservatory attachment are available to pay penalties imposed by a court. The STE does not have any power to impose any penalty.

II. MEASURES AVAILABLE FOR USE BY FOREIGN AUTHORITIESA. Measures available for use by foreign authorities1. Preservation of assetsa. Powers to assist

1

No. The STE does not have the authority to seek freezing of assets upon request of one of its foreign counterparts.

2

No. The STE is not authorized to request such measures through judicial measures other than mentioned under section I subsection A 2. The foreign authority itself has to obtain a judicial freeze enforcing order. We refer to page 1 and 2 concerning "permission for execution of a foreign court-order", "conservatory attachment under a local court-order" and "the criminal channel".

3

The Public Prosecutor acts only in case there is an international request concerning a criminal investigation or execution of a criminal verdict. Whether any action can be taken by the Public Prosecutor depends on the question whether or not there is a bilateral or multilateral execution treaty. If no treaty exists a request must satisfy certain requirements articles 552h-552q Dutch Criminal Procedure Code. Under articles 552h-552q Dutch Criminal Procedure Code there are means of coercion.

4 and the additional question 5

The STE stresses that it will cooperate within the legal framework with foreign securities and futures authorities. We refer to the enclosed articles 24, 24a, 24b and 24c of the Act.

b. Direct access by foreign authority

- We refer to page 1 and 2 concerning "permission for execution of a foreign court-order" and "conservatory attachment under a local court-order".

- We refer to page 1 and 2.

A obstacle with a "permission for execution of a foreign court-order" can be the fact that a permission for execution in the Netherlands must be granted by a Dutch civil court and the natural or legal person involved must be heard, or at least be given the opportunity to be heard, before a permission is granted.

A obstacle with "conservatory attachment under a local court-order" may be the fact that the foreign authority must submit prima facie evidence of his claim and of the fact that there is a threat of embezzlement. The securities supervisor has to prove that it is acting on its own behalf or is authorized by one or more of the creditors to initiate legal action in the name of these creditors.

A obstacle with "the criminal channel" may be the fact that there must be a bilateral or multilateral execution treaty. If there is no treaty for

a request this request must satisfy certain requirements (articles 552h-552q Dutch Criminal Procedure Code).

- We refer to section I subsection A 3.

c. Procedures

- (Questions 1 and 2 together)

We refer to the enclosed articles 24, 24a, 24b and 24c of the Act. The Public Prosecutor can only take action on the basis of an international request from an foreign justice authority concerning a criminal investigation or a criminal verdict. Whether or not a request is accepted depends on the bilateral or multilateral treaty covering the request or whether the request meets the requirements of articles 552h-552q Dutch Criminal Procedure Code.

- We refer to page 1 "permission for execution of a foreign court-order" last sentence "The natural or legal person involved must be heard, or at least be given the opportunity to be heard, before a permission is granted" and section I subsection A 7 "A debtor can raise objections regarding a criminal conservatory attachment, but only after the attachment is a fact".

II. MEASURES AVAILABLE FOR USE BY FOREIGN AUTHORITIES

A. Measures available for use by foreign authorities

2. Repatriation of funds

- We refer to page 1 and 2.

- We refer to page 1 and 2.

- The foreign investor should contact a dutch lawyer to investigate the possibilities for recovering assets lost as a result of violations of foreign securities and futures laws through a private cause of action in The Netherlands.

2. MEASURES AVAILABLE FOR USE BY FOREIGN AUTHORITIES

B. Experience of delegations in the preservation and returns of assets located in foreign jurisdiction

- The STE does not have any experience in the preservation and returns of assets located in foreign jurisdiction.

III. SUMMARY REPORT

- We refer to page 1 and 2.

Enc. Articles 24, 24a, 24b and 24c of the Act.

Section 24

1. Notwithstanding the provisions of Section 21(7) and Section 22, Our Minister shall be empowered to supply data or information obtained in the course of executing his task under the present Act to foreign or Netherlands' authorities appointed on behalf of the government to supervise financial markets or natural persons and legal entities active in such markets, unless:
 - (a) the purpose for which the data or information is sought, cannot be adequately determined;
 - (b) the contemplated use of the data or information does not parallel the supervision of financial markets or natural persons or legal entities active in such markets;
 - (c) the supplying of the data or information would be contrary to the Netherlands' law or public interest;
 - (d) the confidentiality of the data or information is not adequately guaranteed;
 - (e) the supplying of the data or information is or could reasonably become contrary with the interest the present act purports to protect; or
 - (f) there are insufficient guarantees that the data or information will not be used for purposes other than supplied for.
2. If a foreign authority referred in the first subsection requests the person who supplied the data or information under that subsection, to use the data or information for purposes other than supplied for, such request may only be accepted;
 - (a) provided the contemplated use is not contrary to the first subsection;
 - (b) provided the foreign authority could, by other means than provided for in this act, obtain with due regard to the prevailing procedures the data or information for that other purpose from the Netherlands; and
 - (c) after consulting Our Minister of Justice in case the above request relates to a criminal investigation.

Section 24a

1. Our Minister or a legal entity to which responsibilities and powers have been delegated under Section 25, shall cooperate, in so far as necessary for the execution of the supervision on securities brokers and portfolio managers belonging to a group, with the authorities under the Credit System Supervision Act of 1992 (Bulletin 1992, 722), Insurance Industry Supervision Act (Bulletin 1992, 442) and the Investment Institution Supervision Act (Bulletin 1990, 380) responsible for the supervision on credit institutions, insurers, respectively investment institutions belonging to such group.
2. Our Minister or a legal entity to which responsibilities and powers have been delegated under Section 25, will, in case the first subsections applies, communicate where necessary with an authority referred to in the first subsection.
3. Our Minister or a legal entity to which responsibilities and powers have been delegated under Section 25, shall cooperate, in case the

first subsection applies, where necessary, with an authority referred to in the first subsection on the basis of one or more arrangements entered into. Such arrangements will at least include agreements with regard to putting forward mutual requirements, the coordination of the execution of their respective powers and the exchange of data and information.

4. Our Minister or a legal entity to which responsibilities and powers have been delegated under Section 25, will supply to an authority referred to in the first subsection, the data or information obtained in the execution of his tasks under or pursuant this act, relating to the expertise and integrity of persons referred to in the decree implementing Section 6(2)a and 10(2)a, provided that Our Minister or the legal entity mentioned above considers that the data or information is or may be relevant for the supervision executed by the other authority.
5. The obligation referred to in the fourth subsection does not apply in case the data or information has been obtained from a foreign authority as referred to in Section 24(1).

Section 24b

1. In order to execute treaties on the exchange of data or information or the execution of binding resolutions of international public organisations on the supervision of financial markets or natural persons or legal entities active in such markets, Our Minister shall be empowered, on behalf of an authority active in a State party to a treaty with the Netherlands or subject to the same binding resolution of an international public organisation as The Netherlands and responsible for the execution of legislation relating to the supervision on the securities industry, to request information from, investigate the activities of, or order an investigation to be made into the activities of any person falling under his supervision pursuant this act or any other persons who can be reasonably suspected to hold data or information relevant for the execution of the legislation mentioned before.
2. Any person requested to provide information under the terms of the first subsection, shall be obliged to provide this information within a time limit to be set by Our Minister.
3. Any person subject to an investigation referred to in the first subsection, shall provide the person carrying out the investigation with all assistance necessary to ensure that the investigation can be carried out properly, on the understanding that any person whose activities are investigated may be compelled to have his books, documents or other information carriers inspected only insofar as these relate to the conduct of his business or profession.

Section 24c

1. Our Minister may accept that a representative of a foreign authority referred to in article 24b(1), participates to the execution of a

request in that subsection.

2. The obligation, described in section 24b(3), will also exist for the representative referred to in the first subsection.
3. The representative referred to in the first subsection will follow the instructions of the person responsible for the execution of the request.

Section 25

1. Any responsibilities and powers vested in Our Minister under the present Act may, with the exception of the provisions of Sections 16, 19, 20, 26, 28 and 31 and with the exception of the granting of an exemption as referred to in Sections 4, 5, 9 and 13, be delegated to one or more legal entities under an order in council. In such an event, all obligations created by the present Act towards Our Minister shall be deemed to be obligations towards the legal entity or legal entities in question.
2. Any delegation such as referred to in subsection 1 may be effected only if the legal entity in question meets the following requirements:
 - (a) it should be capable of exercising in a proper manner the responsibilities and powers referred to in subsection 1;
 - (b) the regulations relating to decision-making procedures within the legal entity in question should be such as to provide as many safeguards as possible that the responsibilities and powers referred to in subsection 1 will be exercised independently;
 - (c) the legal entity's articles of association should stipulate that Our Minister shall be responsible for appointing, suspending and dismissing the legal entity's directors.
3. Restrictions may be imposed on, and conditions attached to, a delegation as referred to in subsection 1.
4. Our Minister may issue instructions to a legal entity as referred to in subsection 1 in order to implement the directives of the Council of the European Communities on securities trading.
5. The legal entity or entities shall submit a report to Our Minister no later than on 1 May of each year setting out the way in which the delegated responsibilities and powers have been exercised in the preceding calendar year. Our Minister shall ensure that this report, with the exception of the passage concerning the implementation of Sections 4, 5(2), 5(3), 6(3), 7(2), 10(3) and 11(2), shall be made public, on the understanding that information on individual businesses and institutions shall not be made public without the written consent of those whom the report concerns.

New Zealand

Securities Commission



9 December 1995

RE: QUESTIONNAIRE FROM IOSCO WORKING PARTY NO. 4 ON
PROVISIONS AVAILABLE ON A CROSS-BORDER BASIS TO PROTECT
DEFRAUDED INVESTORS' INTERESTS AND ASSETS

THE RESPONSE FROM THE NEW ZEALAND SECURITIES COMMISSION
RELATING TO THE NEW ZEALAND JURISDICTION.

I MEASURES AVAILABLE FOR USE DOMESTICALLY

- A. Description of the available measures to preserve that may lead directly or indirectly to preservation of the assets or interests of defrauded investors.
1. Administrative powers of the Securities Commission to freeze assets without recourse to the Courts
- 1.1 The only power possessed by the Securities Commission by way of administrative order to direct the freezing of assets is the Commission's power under the Securities Act 1978 s.44. Under this section the Commission, may, by notice to the issuer, suspend or cancel the registration of a registered prospectus where at any time the Commission is of the opinion that a registered prospectus is false or misleading as to a material particular or omits any material particular or does not comply with the Securities Act and Regulations. The effect of suspending a prospectus is that no allotment may be made of any securities subscribed for under the prospectus and all subscriptions received for the securities which have not already been allotted are to be held in trust for the subscribers. A prospectus may not be suspended for a longer period than 14 days.
- 1.2 Where the Commission cancels the registration of a registered prospectus no allotment may be made of any securities subscribed for whether before or after the cancellation of the registration of the prospectus and all subscriptions are to be held in trust for immediate repayment to the subscribers entitled thereto.
- 1.3 Section 44(7) requires the directors of the issuer to effect the repayment of subscriptions to subscribers within one month after the date of the cancellation of the registration of the prospectus and if the subscriptions are not repaid within one month the directors are personally liable to repay the subscriptions with interest at the rate of 10% per annum.

1.4 The Commission's administrative order is directed to the issuer. The Commission has no power to direct banks or brokers to freeze accounts of the issuer held by them. If however the issuer, in breach of the notice given by the Commission pays out funds held in a bank or broker's account, the directors of the issuer will be personally liable to subscribers under s.44(7) to repay the amount of the subscriptions.

1.5 The above is the extent of the Commission's administrative power to direct funds to be held for the benefit of subscribers. The Commission otherwise has no administrative power to freeze assets.

2. Powers of Securities Commission to seek preservation order through Judicial Channels

2.1 The Securities Commission has the power to seek orders through the Court to restrain dealing with assets in only one circumstance, namely, under Part II of the Companies Amendment Act 1988 dealing with the disclosure of relevant interests. Where there are reasonable grounds to suspect that a substantial security holder has not disclosed a relevant interest, the Commission may apply for various orders including orders restraining the substantial security holder from disposing of all or any voting securities or an order directing the public issuer concerned not to make a payment or to defer making a payment for such period as the Court thinks fit of any sum or sums due from the public issuer in respect of the voting securities in question.

2.2 Although the making of interim orders is not expressly provided for in s.32, orders of an interim character have been made by the Court on the application of the Commission in cases concerning City Realties Ltd (later Gulf Resources Pacific Ltd) in 1990 (Securities Commission v. Gulf Resources and Chemical Corporation (1990) 5 NZCLC 66324). Euronational Corporation Ltd in 1991 (Securities Commission v. Honor Friend Investment Ltd (1990) 5 NZCLC 67512) and R J I Investment Ltd in 1993 (Securities Commission v. Robert Jones (1993) 6 NZCLC 68547).

3. Powers to freeze assets available under Corporation (Investigation and Management Act 1989

3.1 The Registrar of Companies has extensive powers to give administrative directions where a corporation is declared by the Registrar to be a "corporation at risk" under Part II of the Corporation (Investigation and Management) Act 1989. The Registrar may give written notice to a corporation that the Registrar considers the corporation to be a "corporation at risk". A "corporation" is defined widely in the Act as meaning a body of persons whether incorporated or not and whether incorporated or established in New Zealand or elsewhere. Any company, partnership, trust or unincorporated body wherever it is established, if it conducts any activity in New Zealand will be a "corporation" for the purposes

of the Act. The Registrar may declare a corporation to be a corporation at risk where the Registrar has reasonable grounds to believe that it is or may be a corporation to which the Act applies namely:-

- a corporation that is operating fraudulently or recklessly, or
- where it is desirable that the Act apply in order to preserve the interests of the corporation's members or creditors or to protect a beneficiary under a trust or
- for any other reason in the public interest provided those members or creditors or the public interest cannot be adequately protected under the Companies legislation or in any other lawful way.

3.2 The Registrar may under s.33 of the Corporations (Investigation and Management) Act, with the prior consent of the Securities Commission, give a direction in writing to any corporation declared to be a corporation at risk, requiring it not to move from New Zealand, transfer, charge or otherwise deal with any of its property or funds except with the prior approval of the Registrar and subject to such terms and conditions as the Registrar may specify. The Registrar may require the corporation to place in a trust account any money received for investment and may take such other action as is specified in the notice to preserve the interests of the corporation's members and creditors. With the consent of the Securities Commission the Registrar may from time to time amend any direction given under this section. A direction given under s.33 may not apply for a period exceeding 21 days.

4. Statutory Management

4.1 Under Part III of the Corporations (Investigation and Management) Act 1989 any corporation or any associated person of that corporation may be placed in statutory management by the Governor-General by Order in Council on the advice of the Minister of Commerce given in accordance with a recommendation of the Securities Commission. This is in effect an executive act of Government on the advice of the Securities Commission. No application to the Court is required for a corporation to be placed in statutory management.

4.2 The grounds on which a corporation may be placed in statutory management are the same as those relating to a "corporation at risk". Such a power may be exercised where -

- (a) A corporation is or may be operating fraudulently or recklessly: or
- (b) It is desirable that this power should be exercised for the purpose of preserving the interests of the corporation's members or creditors or of any beneficiary under any trust administered by the corporation or for any other reason in the public interest.

The Act requires that this power in the case of paragraph (b) above be exercised only where the members or creditors or beneficiaries or the public interest cannot be adequately protected under the company's legislation or in any other lawful way. Experience with the legislation has indicated that this power is unlikely to be used except in cases of complexity where there are a large number of interlocking companies and there is no single security instrument under which a receiver or manager of the group can be appointed.

- 4.3 The affairs of a registered bank may not be administered under this legislation without consultation with the Reserve Bank.
- 4.4 Statutory management vests the management of the corporation in the statutory manager. A moratorium is declared in relation to all proceedings in relation to the corporation and no person may, except with the consent of the statutory manager, transfer or remove from New Zealand any property or assets of the corporation.
- 4.5 Similar powers of statutory management exist under the Reserve Bank of New Zealand Act 1989. In that case the Governor-General acts on the advice of the Minister of Finance given in accordance with a recommendation from the Reserve Bank.
- 4.6 Prominent cases in which New Zealand companies have been placed in statutory management are those involving the Equiticorp Group of Companies (extensive network of companies conducting investment and finance business), the Richmond Smart Group (extensive network of companies holding and administering commercial property), the Chase Group of Companies in relation to their commercial property holdings and Development Finance Corporation (an extensive group of investment banking and finance companies placed into statutory management under the Reserve Bank of New Zealand Act): In the case of the Equiticorp Group certain companies in the group administering off-shore business but conducting bank accounts and other activities in New Zealand were added into the statutory management in order particularly to enable statutory managers to complete investigations on money-flows through a complex web of companies.

5. Proceeds of Crime Act 1991

- 5.1 Extensive powers are available under this Act, on application to the Court, for the making of orders for the preservation of assets, where a person (including a corporation) has been convicted in New Zealand of a serious offence.
- 5.2 A "serious offence" is an offence punishable by imprisonment for a term of five years or more. Where a person is convicted of a serious offence application may be made to the Court for:

- (a) a forfeiture order against tainted property

- (b) a pecuniary penalty order in respect of any benefits derived from the offence. Under this form of order the Court assesses the value of any benefit derived from the offence and may order the offender to pay an amount equal to the value of those benefits.

"Tainted property" is property used to commit or facilitate the Commission of an offence or the proceeds of the offence.

In assessing the value of any benefit derived from an offence the Court can lift the corporate veil and treat as property of the offender any property the Court is satisfied is subject to the effective control of that person. In this respect the Court may have regard to any trust that has a relationship to the property.

- 5.3 The Court may under s.22 of the Criminal Justice Act 1985 direct a person who is convicted of an offence to make reparation for any loss or damage to property. If a reparation order is made in favour of defrauded investors, the provisions of the Proceeds of Crime Act can be used to enforce recovery of the reparations.
- 5.4 Extensive powers are conferred under the Act for search warrants to be issued for the search and seizure of tainted property and for the making of restraining orders directing that the property is not to be disposed of or dealt with by any person except as provided in the order. The Court may under a restraining order direct the Official Assignee to take custody and control of the property. "Dealing with the property" includes the making of a payment in reduction of any debt, removing the property from New Zealand, or receiving or making a gift of the property. A receiving order may be made ex parte, ie. without notice to the offending party, if the Court is satisfied that proceeding without notice is necessary to prevent the destruction, concealment or disposal of property.
6. Alternative measures which would have a similar impact on the preservation of assets
- 6.1 The Registrar of Companies has the power to institute insolvency proceedings against a company incorporated in New Zealand. An application to wind up the company may be brought by the Registrar under s.241(2)(c) of the Companies Act 1993. The Registrar may bring such an application upon the grounds that the company is unable to pay its debts or upon the ground that the company or the board has persistently or seriously failed to comply with the Companies Act. Pending the hearing of the application the Registrar may apply for the appointment of a provisional liquidator and for orders freezing accounts and assets of the Company. Action of this kind was taken by the Registrar in the case of Morgan Roche Limited (a leveraged foreign currency dealer) in 1987.
- B. Description of the measures used to return assets to defrauded investors.

1. Procedures available to the Commission to have assets returned to defrauded investors
 - 1.1 As indicated above the only area in which the Commission has jurisdiction through the exercise of administrative action to initiate the recovery of assets on behalf of defrauded investors is where the Commission gives notice of the cancellation of a registered prospectus. In the event of a registered prospectus being cancelled s.44(6) requires the issuer to hold subscriptions in trust for immediate repayment to the subscribers under the prospectus. Under s.44(7) if subscriptions are not repaid within one month after the date of cancellation of registration of the registered prospectus, the issuer and all directors are jointly and severally liable to repay the subscriptions with interest at the rate of 10% per annum from the date the subscriptions were received by or on behalf of the issuer. Legal action for the recovery of those subscriptions may be brought by the subscribers. The Commission has no jurisdiction to bring such proceedings to enforce the return of the subscriptions.
2. Procedures available for bringing of proceedings by a third party on behalf of defrauded investors
 - 2.1 The Trustee in the case of debt holders and the Statutory Supervisor in the case of the holders of participatory securities may institute proceedings on behalf of the defrauded security holders. An equity shareholder may, under s.165 Companies Act 1993, with the leave of the Court, bring derivative proceedings in the name of and on behalf of the company in order to enforce the rights which the company may have against its directors or some third party. A representative action may also be brought under s.173 whereby the Court may appoint one shareholder to represent all or some of the shareholders having the same interest in the subject matter of the proceedings.
 - 2.2 Defrauded investors can generally take action on their own behalf alleging breach of contract or tortious misconduct such as fraud or breach of trust on the part of the defendant.
 - 2.3 Proceedings brought by or on behalf of defrauded investors may result in final judgment being obtained that includes an order for the return of assets. The Courts in New Zealand have a broad jurisdiction as to the orders which may be made in successful proceedings for breach of contract or tort or breach of trust.
3. Are assets which have been frozen available to meet penalties?
 - 3.1 The question whether assets which have been frozen are available to meet penalties imposed by the Court has not been tested in New Zealand. The only circumstance in which this issue is likely to arise is where assets are held under moratorium by a statutory manager where a corporation has been placed in statutory management. The assets held under moratorium are held for the benefit of the creditors or members of a company and the Court is likely to be

reluctant to sanction the application of those assets towards meeting penalties imposed against former directors or managers of the corporation.

- 3.2 The Securities Commission in New Zealand has no power itself to impose penalties.

II MEASURES AVAILABLE FOR USE BY FOREIGN AUTHORITIES

A. Measures available for use by foreign authorities.

1. Preservation of assets

- 1.1 The Securities Commission has no power to freeze assets administratively on behalf of a foreign authority. Neither are there any procedures available in New Zealand whereby the Securities Commission could make application to the Court on behalf of a foreign authority for orders to be made against assets in New Zealand.

- 1.2 A foreign authority which wishes to take action against assets in New Zealand has a number of alternative procedures available to it:

- (a) Where investors have been defrauded as a result of a criminal offence the procedures of the Mutual Assistance in Criminal Matters Act 1992 are available.
- (b) Where a judgment has been obtained in civil proceedings before a foreign Court the judgment may, in some circumstances, be enforced in New Zealand under:
 - the Reciprocal Enforcement of Judgments Act 1934
 - the rules of the common law
 - s.56 of the Judicature Act 1908.

Each of these procedures is dealt with briefly below.

1.3 Mutual Assistance in Criminal Matters Act 1992

- 1.3.1 The procedures of this Act are available to a foreign authority where:

- a foreign forfeiture order has been made.
- a foreign pecuniary penalty order has been made.

- 1.3.2 A foreign forfeiture order is an order made under the law of a foreign country by any Court or judicial authority for the forfeiture of tainted property (as

described in paragraph 5.2) in respect of an offence against the law of that country.

- 1.3.3 A foreign pecuniary penalty order is an order made under the law of a foreign country by any court or other judicial authority imposing a pecuniary penalty in respect of benefits derived by a person from the commission of an offence against the law of that country, but does not include an order for payment of compensation, restitution or damages to an injured person. A foreign authority cannot therefore use this procedure to enforce payment of compensation or damages to defrauded persons but if the foreign authority has power to order proceeds or benefits of crime to be forfeited, along with procedures for payment of reparations to defrauded investors, the procedure could be used.
- 1.3.4 A foreign "judicial authority" is not defined but would appear to include an authority such as a Securities Commission which exercises judicial functions.
- 1.3.5 Any request for assistance under the Act by a foreign authority must be made to the New Zealand Attorney-General. This request must be accompanied by a certificate from the Central Authority of the foreign country (ie. Ministry of Justice or Attorney-General or comparable authority) that the request is made in respect of a criminal investigation or criminal proceedings.

There are a number of grounds on which the Attorney-General can decline assistance including the ground that the offence is of a political character or should not be received on public policy grounds or the offence would not constitute an offence under New Zealand law.

- 1.3.6 The request must be made by a "prescribed foreign country". At the present time Australia and the United Kingdom are the only prescribed countries.
- 1.3.7 If the request is accepted the foreign forfeiture order or foreign pecuniary penalty order will need to be registered in the High Court and the order may then be enforced in New Zealand in accordance with the provisions of the Proceeds of Crime Act 1991.

A foreign restraining order may also be registered in the High Court of New Zealand. The order will then have the same force as a restraining order made in New Zealand under the Proceeds of Crime Act 1991 as described in paragraph 5.4 above.

1.4 Reciprocal Enforcement of Judgments Act 1934

- 1.4.1 A foreign authority which wished to take action against assets in New Zealand in relation to proceedings of a civil character to recover compensation or damages on behalf of defrauded investors, would first need to obtain a Court judgment in the Courts of the foreign jurisdiction. It could then seek to enforce that judgment in New Zealand under the Reciprocal Enforcement of Judgments Act 1934. That Act provides for the enforcement of foreign judgments by the

Courts in New Zealand in relation to those jurisdictions which are recognised by Order in Council made under the Act. Those Orders in Council relate to, France, Belgium, The United Kingdom, Australia and most Commonwealth jurisdictions. The foreign jurisdiction which seeks to enforce a judgment in New Zealand under this Act is required to register the foreign judgment in the High Court of New Zealand and that judgment may then be enforced in New Zealand as the judgment of a New Zealand Court.

1.4.2 There are certain grounds however under s.6 of the Act on which a party may apply to the Court in New Zealand to have the registration of the judgment in New Zealand set aside. The grounds include the ground that the judgment which the party is seeking to enforce in New Zealand is one the enforcement of which would be contrary to public policy in New Zealand. There is an exemption in relation to the judgment of an Australian Court for the payment of tax, but otherwise the Courts in New Zealand will treat it as being contrary to public policy to enforce in New Zealand a foreign judgment for the payment of tax or the payment of a penalty. In this respect the New Zealand Courts will apply the leading UK cases of Huntington v. Attrill [1893] AC 150, Peter Buchanan Ltd v. McVey [1955] AC 516n and Government of India, Ministry of Finance (Revenue Division) v. Taylor [1955] AC 491, 510-511. A judgment entered in favour of a regulatory authority which secures the payment of a sum of money for benefit of investors will not generally be affected by this rule of public policy as the judgment in this respect will be remedial and not penal in character.

1.5 Enforcement of judgments under the rules of common law

1.5.1 The judgment of a foreign Court may also be enforced in New Zealand under the rules of common law. In this respect the position in New Zealand will be the same as that in the United Kingdom and in common law jurisdictions such as Australia and Canada. The following general rules apply to the enforcement at common law of a foreign judgment:

- (a) The common law will not generally permit the enforcement in New Zealand of a foreign judgment if the Courts in New Zealand have had jurisdiction in the matter and the proceedings could have been brought in New Zealand.
- (b) The judgment must be for a debt or definite sum of money.
- (c) The judgment must not relate to the enforcement of the revenue laws or penal laws of the foreign jurisdiction.
- (d) The judgment must be final and conclusive.
- (e) The Courts will decline to enforce the judgment of a foreign court if that judgment has been obtained by fraud or its enforcement would be contrary to public policy or was obtained in breach of the rules of natural justice.

1.6 Statutory enforcement of Commonwealth judgments under s.56 of the Judicature Act 1908

1.6.1 Where a judgment cannot be enforced under the Reciprocal Enforcement of Judgments Act a procedure is available under s.56 of the Judicature Act 1908 for registration of judgments obtained "in any Court of Her Majesty's Dominions". It has been held in Austin v. Nicholson (unreported, Christchurch Registry A 203/83, 14 September 1984, Holland J) that the phrase "Her Majesty's Dominions" refers to all territories under the sovereignty of the Crown including the United Kingdom. The section would, therefore, be limited to those Commonwealth jurisdictions which recognise the Queen as the head of state. A memorial of the judgment must be filed in the High Court and application may then be made for execution on the judgment. The common law rules under which the Courts may deny enforcement in New Zealand would apply to the enforcement of judgments under this section.

1.7 Procedures in relation to non-criminal proceedings

1.7.1 Where on any of the above grounds (other than the Mutual Assistance in Criminal Matters Act) a foreign judgment can be enforced in the New Zealand Courts the procedures under the New Zealand High Court Rules will be available in relation to the execution and enforcement of the foreign judgment. In particular an order, including an interim order for preservation of any property or fund may be made under Rule 331 of the High Court Rules, a receiver of a particular fund or property may be appointed under r.336 and the various forms of execution or enforcement of a Court judgment will be available such as a charging order on a fund or particular property, a writ of possession, a writ of sale or a writ of sequestration. These orders are available as of right and may be made without notice to the party against whom judgment has been registered.

1.7.2 An interim preservation order may be made without notice to the affected party, but with that party then having the right to apply to the Court to have the order discharged.

1.8 Repatriation of funds

1.8.1 Once a judgment in the course of civil proceedings has been enforced in New Zealand the party obtaining the proceeds of its judgment may repatriate those proceeds to investors in a foreign jurisdiction without further restraint. There are no regulatory or exchange controls in New Zealand on the remittance overseas of pecuniary funds or personal property lawfully secured in New Zealand.

Norway

Kredittilsynet



Norwegian contribution to
IOSCO working party no. 4 project
on

*measures available on a cross border basis to protect defrauded
investors' interests and assets*

Oslo, December 1995



EXECUTIVE SUMMARY

This paper has been prepared by the staff of Kredittilsynet (The Banking, Insurance and Securities Commission) as a part of a project by IOSCO's Working Party No. 4 on freezing and repatriating funds located in foreign jurisdictions. This paper describes the legal framework in Norway for the freezing of assets at the request of foreign regulators, and the enforcement of judgements and other decisions obtained by foreign authorities.

- *Part I: discusses the measures available for Kredittilsynet in domestic civil and administrative proceedings to preserve investors' assets obtained by violation of the Norwegian law. According to Norwegian legislation will the parties pursue all civil claims themselves, by bringing actions through the judicial channel. Violation of penal codes will be pursued by the police authorities.

- *Part II A: discusses the measures available for use by foreign authorities. There is no statutory provision in Norwegian law allowing for recognition and enforcement of a judgement obtained by a foreign court, government or securities and futures regulator. Whether such decisions will be recognised and enforced in Norway will depend on mutual treaties and agreements.

- *Part II B: is not relevant for Kredittilsynet . According to Norwegian law the police is the competent authority to obtain a freeze of assets in a foreign jurisdiction when there is a fraud investigation.

Kredittilsynet would like to emphasise that our organisation through supervision work will be able to influence entities which show non-compliance with the provisions of the Act on Securities Trading. We would therefore appreciate to be informed of any observed irregularities. Kredittilsynet will be glad to assist foreign securities regulators by giving information on the courses available in respect of freezing and repatriation of assets located in our jurisdiction.

I. MEASURES AVAILABLE FOR USE DOMESTICALLY

A. Description of the available measures to preserve that may lead directly or indirectly to preservation of the assets or interests of defrauded investors.

Kredittilsynet (The Banking, Insurance, and Securities Commission) has no authority to take part in any concrete civil dispute between the supervised entities and the investors, and has no authority to freeze assets administratively to secure the interests of defrauded investors without recourse to the courts. Nor do we have authority to ask for such measures through the judicial channel on behalf of defrauded investors. Kredittilsynet has neither adequate alternate measures to secure the preservation of assets on behalf of defrauded investors. According to the Act on Securities Trading section 37, third paragraph, the Ministry of Finances «may instruct the broking firm to cease stockbroking if the board or the administration are guilty of gross or persistent contravention of their duties pursuant to law or regulations issued pursuant thereto. The same applies if irregularities obtain which give reason to fear that continuation of the activity may jeopardise the public interest». Such authority is delegated to Kredittilsynet. By this means Kredittilsynet can hold, or prevent repetition of the illegal actions.

No other government or civil public authority has the ability to freeze assets administratively or to obtain such measures through the judicial channel on behalf of defrauded investors. The Norwegian legislation give the courts exclusive competence to apply coercive measures in civil disputes.

However, this does not imply that no measures are available to secure the interests of defrauded investors. The investors may, without assistance from the authorities, seek a provisional or final judgement through the judicial channel by bringing civil enforcement actions in the district court.

To obtain a provisional court order to freeze assets, the investor must produce presumptive evidence of his claim against the defendant. The investor will also have to produce presumptive evidence that the conduct of the defendant gives reason to fear that execution of the claim will be forfeited or seriously impeded- or that execution must be effected out of the jurisdiction of Norwegian courts- if the decision is delayed until a final judgement.

A provisional court order to freeze assets can be obtained without prior notice to the defendants of the application for the order, if there is reason to fear that notifying may lead to dissipation of the assets.

If the investor obtains a provisional court order to freeze assets, in anticipation of a final judgement. notice must be given to the defendant. Both parties in the case can make use of appeal rights which are the High court and subsequently the Supreme Court.

Assets frozen by a provisional court decision, will not be available for any purpose of the defendant unless both parties in the case agree.

As a principal rule, the assets will be frozen until there is a final judgement in the case.

If the fraud is investigated as a criminal case, the public prosecutor will be able to impound assets until there is a final judgement if it is assumed that the assets can be confiscated for the benefit of the public treasury or shall be returned to the aggrieved party. Anyone affected by the impoundment, may submit the question of the legality of the impoundment to the court.

B. Description of the measures used to return assets to defrauded investors

There are no procedures available to Kredittilsynet in order to have assets returned to defrauded investors. Nor can we bring a judicial action on behalf of defrauded investors. There are no other means available for our organisation to assist in returning assets to the investors. If a broking firm is proceeding in bankruptcy the trustee will be authorised to return assets, or distribute what is left, among the creditors. He will also be authorised to bring an action on behalf of the bankrupt estate. According to the Act on Securities Trading section 30, broking firms and enterprises engaged in activities in connection with options trading or futures shall furnish security against the liability incurred in the performance of their activity. If a broking firm is proceeding in bankruptcy, or is incapable of paying, a defrauded investor may demand for satisfaction of his claim through recourse to the firm's security when the claim and the falling due of the claim are established in a binding manner. According to Act on Securities Trading section 33, will the probate court employ that portion of the security which is needed to satisfy those claims which are not contested or which have been decided with final effect by a court of law. It will allocate funds for the satisfaction of claims which are contested or have not fallen due.

A defrauded investor can also bring an action on his own to obtain a court order for return of assets after a final and enforceable judgement, by asking for a distraint on assets belonging to the defendant. Assets that have been frozen by a provisional judicial order will be available for a distraint within a month after the judgement is final.

— In a criminal case the aggrieved party will be legally entitled to have the prosecuting authority to conduct the claim for restitution on his behalf. If the judgement finds in favour of the aggrieved, assets that have been impounded will be returned directly to the aggrieved when the judgement is final.

Assets that have been frozen in a civil case are not available to pay any kind of penalties imposed by a securities or futures regulator or by a court. If assets are impounded in a criminal case, the counsel may ask for confiscation for the benefit of the public purse. If the final sentence provides confiscation, the assets will not be returned to the convicted person. The assets will not be available to pay penalties imposed by a securities or futures regulator.

II. MEASURES AVAILABLE FOR USE BY FOREIGN AUTHORITIES

A. Measures available for use by foreign authorities

1. Preservation of assets

a. Power to assist:

As discussed in section I.A. above, the Banking, Insurance and Securities Commission does not have the power to freeze assets on its own behalf. Therefore, it would not be possible for Kredittilsynet to freeze assets administratively on behalf of a foreign authority without recourse to the courts. Nor do we have the authority to request such measures through the judicial channel, or obtain a judicial freeze enforcing a foreign order on behalf of a foreign authority.

Kredittilsynet has no other available measures which can be used or asked for on behalf of a foreign authority that could have a similar impact on the preservation of assets.

There is no other government or public entity in our jurisdiction that can either freeze assets administratively or obtain a judicial freeze order on behalf of a foreign securities or futures authority. However, if the information from the foreign securities and futures authority presents evidence of violation of Norwegian penal codes, the police may investigate the fraud as a criminal case, and will be able to impound assets on the terms mentioned above. Norway has also entered various assisting treaties on criminal law, among others The European Convention on the Transfer of Proceedings in Criminal Matters (15.05.1972). We are also attached to INTERPOL. According to international treaty obligations, the criminal authorities may impound assets on behalf of foreign criminal authorities. In the majority of cases the Norwegian Ministry of Justice will be the authority which provides preliminary assistance to the requesting country. In such a situation, the Ministry of Justice would deal with the criminal authorities in the requesting country, rather than securities and futures regulators.

Regarding to Kredittilsynet's ability to assist a foreign authority in gathering or providing access to non public information, the members of the board and officials of Kredittilsynet are bound to observe professional secrecy in relation to unauthorised persons in respect of matters which come to their knowledge in connection with their work, concerning a customer's circumstances, (act of December 1956 relating to the Banking, Insurance and Securities Commission, section 7). Foreign securities and future authorities are not necessarily reckoned as «unauthorised persons». To such a degree that it accords with international public law, bilateral or multilateral treaties, Kredittilsynet will be able to give access to non public information. According to the act of December 1956, section 3, second paragraph, the subjects to supervision are under obligation to provide any information which Kredittilsynet may demand. We will therefore to a certain extent be able to assist in providing non public information concerning these subjects.

According to Act of June 1985 on Securities Trading section 37, second paragraph, the person concerned may be furnished with such information about the circumstances as is necessary to enable him to protect his rights vis-a-vis the broking firm, if inspection gives reason to suspect that unlawful conduct has been shown in connection with securities trading

as a result of which someone has sustained a loss. The same applies if there is otherwise reason to suppose that losses have been inflicted on someone as a result of non-compliance with the provision of this act. On these terms Kredittilsynet will thus also be able to give the investor, or someone acting on behalf of the investor, access to non- public information.

Institutions and persons out of our supervision have no obligation to provide information to Kredittilsynet. Therefore, our organisation will not be able to assist in seeking information from these subjects. However, this do not imply that foreign authorities will be unable to receive the requested information. Norway has entered various mutual assistance treaties providing foreign authorities opportunity to request taking of evidence through the Norwegian courts, among others Convention Concerning the Civil Procedure (01.03.1954) and Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (18.03.1970). Letters rogatory should be issued directly to the court or to the Ministry of Justice.

b. Direct access by foreign authority

There are no provisions in Norwegian laws that confer upon a foreign authority to appear in court to request a judicial freeze order enforcing a foreign judgement, order or other decision. If a foreign securities or futures regulator according to the laws of its country is authorised to act on behalf of defrauded investors in a civil case, it is possible that the authority can appear as party to the case, and thereby ask for a freeze of assets according to Norwegian law. The investors themselves, will have the same opportunity as Norwegian citizens to appear in court asking for a freeze of assets according to Norwegian law. There are no other means available to a foreign authority that could have a similar impact on the preservation of assets.

Regarding the obstacles that a foreign authority may encounter in seeking judicial enforcement of a foreign judgement, order or other decision, there is no statutory provision in Norwegian law allowing for recognition and enforcement of a judgement obtained by a foreign court, government or securities and futures regulator. Whether such decisions will be recognised and enforced in Norway will therefore only depend on mutual treaties and agreements.

There are no treaties allowing for the recognition and enforcement of any decisions obtained by a foreign government or regulator. As a result, such decisions would not be enforced in Norway.

Referring to recognition and enforcement of civil judgements, orders and other decisions by a foreign court, Norway has entered various treaties and agreements. The most important ones are Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (16.09.1988) which applies within the territory of The European Economic Agreement; and Convention Regarding the Recognition and enforcement of Judgments (10.06.1971) which applies within the Nordic territory. To the extent that it accords with treaty obligations, Norwegian courts will recognise and enforce foreign courts' judgements and other decisions (for instance judicial freeze orders) correspondingly with judgements and other decisions given by a Norwegian court.

In accordance with general principles of international law, Norwegian courts would not enforce penal judgements or judgements for the collection of fines of another country, except as provided by a treaty or other international agreement.

c. Procedures

As discussed in the section above, both the type of decision and the deciding authority affect the enforceability of a foreign decision. However, it is important to be aware of that the legal framework according to Norwegian law, is that judgements, orders or other decisions by a foreign authority not will be recognised and enforced in our jurisdiction except as provided in a treaty or other international agreement.

The notice and appeal rights of the person whose assets has been frozen, will be the same whether the freeze of assets is based on a foreign or a Norwegian court decision.

2. Repatriation of funds

A foreign investor has the same opportunity to recover assets by bringing a legal action based on Norwegian law as a Norwegian citizen. He will thus have the measures available as discussed in part I, B above, including a legal claim that the prosecuting authority conduct his claim for restitution in the course of the criminal case.

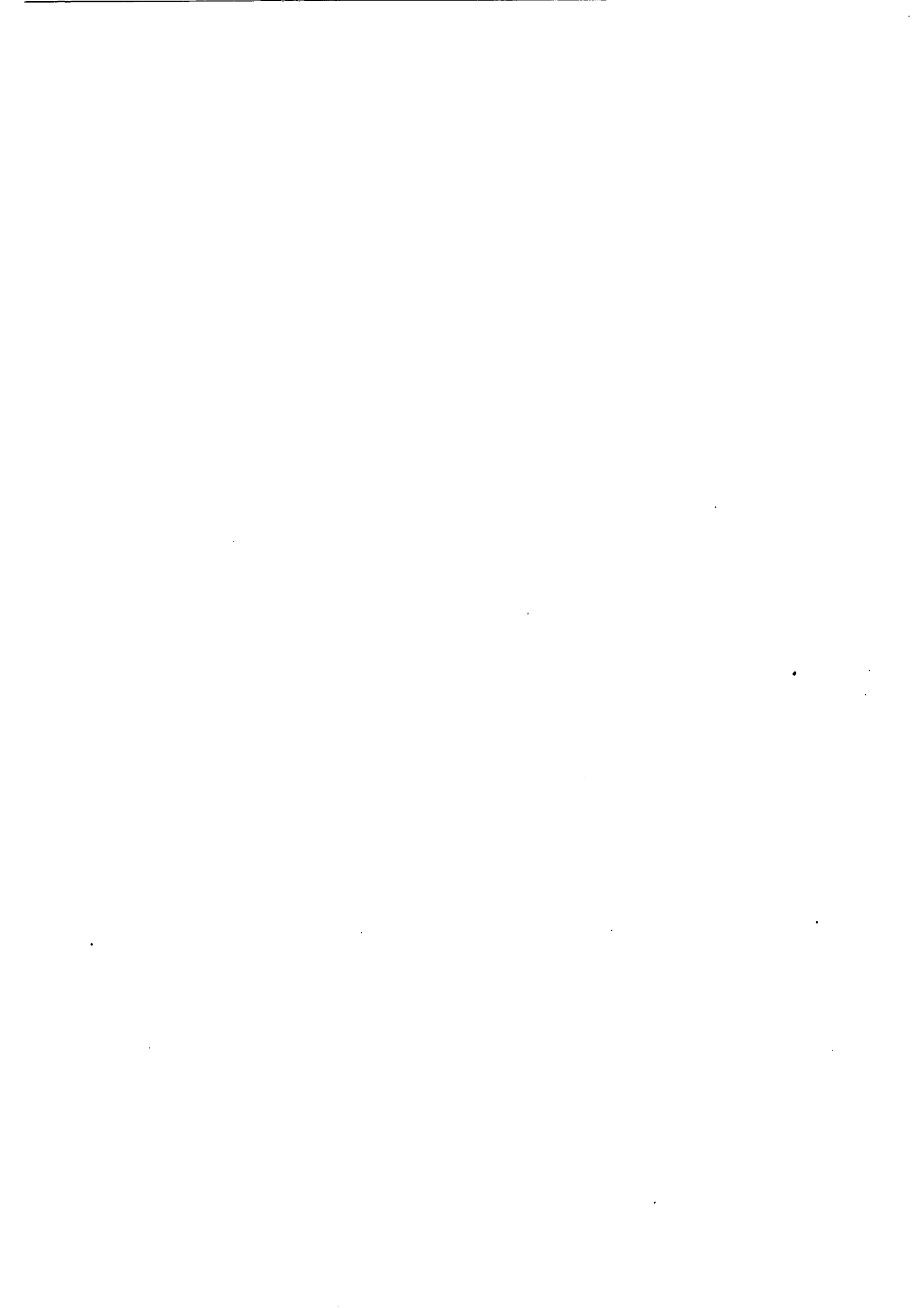
If the repatriation is based on a foreign judgement which is enforceable in Norwegian jurisdiction according to a treaty or other international agreement, it will depend on the provisions of the treaty which channels and what procedures that should be followed. Therefore, it is impossible to describe these mechanisms in general. The requesting country will in most cases send a letters rogatory directly to the court, or to the Ministry of Justice.

B. Experience of delegations in the preservation and returns of assets located in foreign jurisdictions

According to the fact that Kredittilsynet has no authority to freeze assets on behalf of defrauded investors, we are neither authorised to seek such measures abroad. According to Norwegian law the police will be the competent authority seeking to obtain a freeze of assets in a foreign jurisdiction when there is a fraud investigation. We are therefore without experience in the field.

Poland

Polish Securities Commission



I. Measures available in Poland

A. Description of the available measures of protection that may lead directly or indirectly to preservation of assets or interests of defrauded investors.

1. Can you administratively freeze assets located in bank or brokerage accounts without recourse to Courts?

Under the Polish legislation, it is not possible to administratively freeze assets located in bank or brokerage accounts.

A similar possibility, however, is provided for in article 25 of the Act of 22 March 1991 - Act on Public Trading in Securities and Trust Funds (hereinafter referred to as "Securities Act"), under which the Commission may issue a decision to suspend the operation or withdraw the permit to operate a brokerage house which violates the law and the interests of investors. When issuing such a decision, the Commission may also order a transfer of assets to another brokerage house. Certainly, this right of the Commission is of exceptional nature and may be exercised only in cases of serious incorrectness in the operations of the brokerage house.

2. Can you ask for such measures through the judicial channel? In particular, can you obtain an interim or provisional judicial order freezing assets?

a) Under article 13 of the Public Trading Law, the Chairman of the Securities Commission is vested with the rights of a prosecutor in civil cases within the scope of public trading in securities. This means that the Chairman may file in Court statements of property claims for a particular persons, under article 187.2 of the Code of Civil Proceedings, including claims for preserving assets under article 730 of the Code of Civil Proceedings. It is to be underlined that this may happen only when the claims are based on the public securities market regulation.

b) In the event of penal proceedings, the prosecutor in the stage of preparatory proceedings or the Court in court proceedings may issue, under articles 248 to 252 of the Code Penal Proceedings, a decision to preserve the assets of the defendant. under article 747 of the Code of Civil Proceedings, to be defrayed against the fine and the claim for redressing damage. Claims, money and securities are secured by a seizure and depositing with Court. In order to preserve assets of an enterprise owned by the defendant, the Court establishes an administrator, under article 249.2 of the Code of Penal Proceedings. In penal proceedings, the Court may adjudicate a civil claim resulting directly from the committed offence if there is sufficient evidence (the so-called adhesive proceedings).

c) In civil proceedings, under article 730.1 of the Code of Civil Proceedings, in order to secure a claim, the Court may issue an interim ruling, if the claim is reliable and lack of preservation could deprive the creditor of the satisfaction. Interim rulings

may be also issued when this is necessary to secure execution of the judgement in a given case. Such preservation may consist in ordering to deposit money/securities with the Court or to transfer them to a blocked bank account or a brokerage account.

3. *What other government or public authority in your jurisdiction can either freeze assets administratively or obtain such measure through the judicial channel?*

Except for the cases described above in points 1 and 2, no other authority or public entity may freeze assets administratively or with recourse to the Court.

4. *What alternate measures can you use or ask for that could have similar impact on the preservation of assets? (e.g. (temporary) bars of activities, management of a company under the close control of an appointed trustee, replacement of a company manager by an appointed trustee, insolvency proceedings).*

a) Proceedings concerning banks

Under the Banking Law, it is possible to establish an official receiver (article 105) and a trustee (article 105.1) or to suspend the activities of the bank while requesting the Court to declare bankruptcy of the bank (article 108; bankruptcy proceedings are described below in point b). Such steps may be taken only by the Bank Supervision (acting within the frame of the National Bank of Poland) and only in situations of significant losses or insolvency of a given bank. Bank bankruptcy proceedings are conducted in the same way as concerning other entities.

b) Bankruptcy proceedings

Under the Ordinance of the President of the Republic of Poland of 24 October 1934 - Bankruptcy Law, when an economic entity ceases to pay its debts (becomes insolvent), additional measures that have an impact on preservation on assets may be applied:

- i. the debtor, the creditor, persons that may represent a company and the liquidator may demand declaration of bankruptcy (article 4). In the cases of a bank, such a motion can also be filed by the National Bank of Poland;
- ii. on request of the creditor, the Court may issue an interim ruling to preserve assets of the debtor, prior to deciding on the filed motion for declaration of bankruptcy. In urgent cases, such a ruling may be issued by the Chairman of the Court (article 12.1);
- iii. having examined the motion for declaration of bankruptcy, the Court issues a decision appointing the Judge - Commissioner and the trustee (article 14);
- iv. the entity (the debtor) is required to indicate and hand over all its assets to the trustee (article 18.1);
- v. the bankrupt entity loses the right to the management and must not use or dispose it assets, by operation of law (article 20.1);
- vi. objects that do not constitute property of the bankrupt are excluded from the bankruptcy estate and are handed over to the entity entitled to them;

- if the bankrupt has sold the object that was not its property and received a mutual benefit, this benefit is conferred on the entity entitled to the object, provided that it separated from other assets within the bankruptcy estate;
 - if such an object has been sold by the trustee, the entity which is entitled thereto may demand conferring a mutual benefit, which has been included in the bankruptcy estate. Moreover, it may also demand damages if the trustee sold the object although he knew that it was to be excluded (article 28);
- vii. pecuniary liabilities of the bankrupt which are not mature yet become payable on the day of declaration of bankruptcy (article 32.1);
 - vii. the seller may demand a return of movable objects, including securities, which have been sent to the bankrupt entity and for which no payment has been received, if these objects had not been seized prior to declaration of bankruptcy by the bankrupt (article 41.1.);
 - ix. acts in law free of consideration, performed by the bankrupt during the year preceding the motion for declaration of bankruptcy, are ineffective towards the bankruptcy estate. Preservation and payment of debt that is not mature by the bankrupt, during two months preceding the above-mentioned motion, are also ineffective (article 53);
 - x. the trustee may replace the plaintiff who sues the activities of the bankrupt (article 57).
5. *On what basis can the measures be taken?*
- a) Proceedings against banks are instituted and conducted by the Bank Supervision, at its discretion, when the prerequisites described above in point 4a) are fulfilled. The management of the bank may file a request to suspend the bank to the Bank Supervision (NBP) and a motion to the Court for declaration of bankruptcy. The Securities Commission has no right to order the Bank Supervision to initiate any activities. However, it may suggest such activities.
 - b) In bankruptcy proceedings, the motion for declaration of bankruptcy is to be filed in a district court (articles 8 and 9).
6. *What are the effects and consequences of the measures: what (funds, securities, futures contracts...) and whose assets may be frozen? For how long? Can such measures be renewed? What kind of allegations must be made to freeze the assets (of criminal conduct?).*
- a) The result of the above-mentioned (in point 1) sanctions against the brokerage house may be only freezing of assets of this house and, in cases of suspected crime, freezing of assets of other persons, provided that the Court or the prosecutor takes the steps described in point 2.
 - b) The effect of the measures mentioned in point 2 is preserving the property of the debtor (freezing of assets) for the period of the proceedings, until a final settlement

by a valid civil or penal judgement is pronounced. In the event of lack of grounds for the claim, the preservation in the proceedings may be repealed. If new prerequisites for the preservation arise, it may be re-adjudicated. Penal charges should concern crimes against property or acting to the detriment of the company.

c) In proceedings against bank, except for bankruptcy proceedings, assets must not be frozen. The rules of bankruptcy proceedings are described above.

7. *Must there be notice given to the person whose assets have been frozen? What sort of appeal rights are available?*

a) In civil proceedings, the adjudicating court which orders a temporary preservation notifies the party of this fact. Notice can be also given by the executive authority at the time of initiating the execution if the temporary ruling had been issued at a secret session (article 740 of the Code of Civil Proceedings). The party may lodge the appeal to the court of second instance (the court of appeal).

b) In penal proceedings, the Court or the prosecutor ordering the preservation notifies the party of the preservation. The party may appeal against the decision of the prosecutor to a superior prosecutor (article 413.2 of the Code of Penal Proceedings) and may appeal against the decision of the Court to a Court of second instance (article 412 of the Code of Penal Proceedings).

B. Description of the measures used to return assets to defrauded investors

1. *What procedures are available to you in order to have assets returned to defrauded investors?*

The Commission may use the measures described in point 2, i.e. it may exercise the proceedings rights of a prosecutor in civil proceedings. It is possible to vindicate claims in independent civil proceedings, which is a rule, or in civil proceedings conducted before a penal court, in connection with a penal case.

2. *Can you bring a judicial action on behalf defrauded investors? On what basis? Can a trustee, receiver or other third party be designated to represent the defrauded investors? On what basis can defrauded investors bring an action on their own behalf?*

a) Under article 13 of Securities Act, the Chairman of the Securities Commission has the right to bring civil action on behalf of defrauded persons or entities (see point A.2.a). He also notifies the prosecuting authorities of a committed offence.

b) Under article 69 the Code of Civil Proceedings, upon the request of the opposed party the Court designates a trustee for the person/entity without the capacity to be a party in the proceedings or which cannot be represented by any authority in a situation when this party undertakes urgent proceedings steps against the other party.

Under article 42 of the Civil Code, the Court designates a trustee for the juridical person which cannot be represented by any authority. In such event, the

trustee should immediately try to have the authorities of the juridical person established or to have this person liquidated, if necessary.

c) The defrauded investors may bring civil action before the Court if they have the right to claim redressing the damage. They may demand interim preservation of the claim (see A.2.c). Each defrauded investor may vindicate his claims independently or jointly with other investors as a participant, provided that their rights have the same actual or legal grounds (article 72 of the Code of Civil Proceedings). The defrauded investor may also enter the case as intervening third party (article 76 of the Code of Civil Proceedings). These investors may be represented by attorneys, in court and outside court (article 96 of the Civil Code and article 87 of the Code of Civil Proceedings). The attorney may be an advocate, a counsel, a participant or another person. All defrauded investors may designate a common attorney.

Companies of commercial law may be represented by a commercial attorney (proctor) (article 60 of the Commercial Code).

d) The investors specified in letter c) have the right to demand penal prosecution by prosecution authorities, preservation of the claims and bringing civil action in penal proceedings (see A.2.b.).

3. *How can you execute the final decision of the Court?*

The final decision of the Court can be executed under article 758 of the Code of Civil Proceedings by competent district court, acting through its executive officers. The basis for the execution conducted under article 776 the Code of Civil Proceedings is the executory document (with a writ of execution), provided with the executory formula.

Under article 777 of the Code of Civil Proceedings, the executory documents are:

- i. valid decisions of the Court or decisions to be executed immediately, as well as agreements concluded before the Court;
- ii. judgement of conciliatory court or agreement concluded before such court;
- iii. other decisions, agreements and deeds which are subject to court execution by virtue of law;
- iv. notarial deed in which the debtor confirms its debt and surrenders to execution, in the case of failure to observe the time limit for bestowal of the benefit.

4. *What other measures can you use to assist in returning assets to defrauded investors?*

The defrauded investors have no other possibility to have their assets returned apart from judicial measures.

5. *Are assets that have been frozen also available to pay penalties imposed by a securities or futures regulator or by court?*

a) The assets may be used for these purposes only after a valid court judgement is pronounced and the execution if conducted.

b) In the case of initiation of bankruptcy proceedings against a commercial law company, it is not possible to use its assets to cover the notified (existing) debts until the bankruptcy is declared by the Court and the liquidation is completed. On the basis of notified debts (article 150 of the Bankruptcy Law), the judge - commissioner compiles a list of debts and distributes funds obtained from the liquidation of the assets of the company (the bankruptcy estate), so as to satisfy the notified (accepted) debts in the order set in article 204.1 of the Bankruptcy Law.

II. Measures available for use by foreign authorities

A. Powers to assist

A.a. Protection of assets

1. *Can you freeze assets administratively without recourse to the courts?*

Without an approval of the Court, it is not possible to freeze assets. In exceptional situations, however, the Securities Commission may decide to transfer assets from one the brokerage house to another when the permit for the activities of the house is withdrawn or suspended (see A.1.a). According to the regulations, in no event assets can be frozen on behalf of a foreign authority.

2. *Are you authorized to request measures through the judicial channel? Can you obtain a judicial freeze enforcing a foreign order on behalf of a foreign authority? If so, what procedure should the foreign authority follow in making its request? For example, can the foreign authority make its request pursuant to a mutual legal assistance law or treaty? What conditions should be met?*

3. *Is there any other government or public entity in your jurisdiction that can either freeze assets administratively or obtain a judicial freeze order on behalf of a foreign securities or future authority? What procedure should the foreign authority follow in making its request? What conditions should be met?*

Neither the Securities Commission, nor any other authority has the formal right to apply to the Court for assistance, nor to freeze assets administratively on behalf of foreign authorities.

A.b. Direct access by foreign authorities

1. *Can a foreign authority have standing in the courts of your jurisdiction in order to request a judicial freeze order enforcing a foreign judgement, order or other decision? What are the obstacles that the foreign authority may encounter in seeking*

judicial enforcement of a foreign judgement, order or other decision (such as, for example, domestic unwillingness to enforce a foreign penal order)?

The best solution would be standing by the foreign authority as an attorney of the defrauded investors and performing the proceedings activities described in Part I.

a) Unless any provisions of an international agreement in which Poland is a party provide otherwise, the following provisions on international civil proceedings are used (Third Part of the Code of Civil Proceedings):

i. Polish courts are vested with domestic jurisdiction specified in the Code of Civil Proceedings, even if in the same case the same parties conduct proceedings before a foreign court (article 1098 of the Code of Civil Proceedings);

ii. domestic courts are competent when:

- the defendant stays, lives or has a corporate seat in Poland when the statement is served;
- the defendant has property or enjoys property rights in Poland;
- the case concerns an object located in Poland or an obligation which arose or is to be fulfilled in Poland (article 1103 of the Code of Civil Proceedings).

b) The parties of an indicated legal relationship may agree in writing to surrender the pending or possible property cases to jurisdiction of Polish courts (article 1104) or to abandon this jurisdiction in favour of foreign courts, provided that such a change is effective according to the law of this foreign state and is not governed exclusively by the Polish jurisdiction (article 1105.1 of the Code of Civil Proceedings), or abandon in favour of a foreign conciliatory court. The latter situation is possible if at least one of the parties lives or has a corporate seat abroad or runs an interested enterprise abroad and if the above agreement is effective under the law applicable in state in which the conciliatory court is to act (article 1105.1 of the Code of Civil Proceedings).

c) Legal assistance and delivery

i. In the cases of legal assistance the courts communicate with foreign courts and authorities and with Polish diplomatic delegations and consular offices via the Minister of Justice (article 1130 of the Code of Civil Proceedings).

ii. Polish courts grant legal assistance if requested by foreign courts or authorities. Such assistance may be refused when:

- the requested activity would contradict the underlying rules of legal order of the Republic of Poland or would infringe its independence;
- the requested activity is not within the scope of competence of Polish courts;

- the state requesting the legal assistance refuses such an assistance to Polish courts (article 1131 of the Code of Civil Proceedings).

d) Securing the evidence

Polish courts may secure evidence located in Poland if this is necessary to vindicate claim abroad. Requests to secure a claim are filed in a district court in whose district the proving is to take place. The requesting party is notified of the date for the proving, unless the case is urgent (article 1137 of the Code of Civil Proceedings).

e) Foreign official document

The force of the evidence of foreign official documents is the same as of Polish official documents. However, if the authenticity of a document is ambiguous, it has to be certified by Polish diplomatic delegation or consular office (article 1138 of the Code of Civil Proceedings).

f) Recognition of decisions of foreign courts

Recognition of a decision of a foreign court may be requested by any person with a legal interest. Apart from the official copy of the judgement, the request should be appended with a certified translation of the judgement and the statement that the decision is valid; in the case of judgement by default - with a certificate of delivery to the defendant (article 1147 of the Code of Civil Proceedings).

g) Executability of decisions of foreign courts and settlements concluded before such courts

Decisions of foreign courts in civil cases which are in Poland subject to court action, enforceable by means of execution, constitute executory documents if their executability is provided in an international agreement (article 1150 of the Code of Civil Proceedings). Unless the agreement provides for no other terms of execution, the decisions are executable in Poland when:

- i. the decision was issued after the international agreement took effect;
- ii. the decision is executable in the state in which it has been issued;
- iii. the conditions set in article 1146.1, points 1 to 6 of the Code of Civil Proceedings are fulfilled:

- the decision is valid in the state in which it has been issued;
- under the Polish law or an international agreement, the case is not subject to exclusive jurisdiction of Polish courts or courts of a third state;
- the party was not deprived of a possibility of defence; and in the case of inability to be a party in proceedings - proper representation;
- the case had not been judged by a Polish court and had not been initiated by a Polish court before the decision of a foreign court became valid;
- the decision does not contradict the underlying rules of legal order of the Republic of Poland;

- in issuing the decision in the case to which the Polish law should have been applied, this law has been applied or the applied foreign law does not differ substantially from the Polish law.

The above rules are also applicable to decisions of conciliatory courts issued abroad.

h) The executability of the foreign court is decided by a Voivodship Court with three professional judges, competent over the residence or corporate seat of the debtor; or, in the event of lack of such a court, the Voivodship court in whose district the execution is to take place. The court issues its decision after the trial. The decision on execution may be appealed against. Claims for re-initiation of proceedings may be lodged against valid decisions in this aspect. When the decision become valid, the same Voivodship court grants the executory formula to the decision of the foreign court (article 1151 of the Code of Civil Proceedings).

i) Settlements concluded before foreign courts constitute executory documents if they are executable in the state in which they were concluded, do not contradict the underlying rules of legal order of the Republic of Poland and their executability in Poland is provided by an international agreement (article 1152 of the Code of Civil Proceedings).

j) The request for granting the executory formula to the foreign executory document should be appended by the creditor with the documents specified in article 1147 of the Code of Civil Proceedings and the certificate that this document is executable in the state in which it was issued (article 1153 of the Code of Civil Proceedings).

2. *What other means are available to a foreign authority that would have similar impact on the preservation of assets?*

Apart from the judicial channel described in point 1 above, there are no other legal measures.

A.c. Procedures

1. *Do the measures available to the foreign authority depend on the purpose for which they are sought (e.g. sanctioning violators)? Does the type of decision affect its enforcement (e.g. does it matter whether the foreign decision is civil, administrative, criminal or disciplinary?)*

Only vindication of civil claims and enforcement of decisions of foreign courts are possible according to the above-mentioned rules.

2. *What sort of notice and appeal rights are available to the person whose assets have been frozen? Can a freeze be put into place without prior notice to the party holding the assets?*

The method of delivery and the types of appellate rights are described in point I.A.7.

A.d. Repatriation of funds

1. *Do any mechanisms exist for assets to be expatriated for return to foreign investors? If so, what are these mechanisms, which channels and what procedures should be followed (direct request through judiciary channels, through the securities and futures counterpart or through other administrative or public authorities)?*

The only mechanism in the Polish law is vindication of claims by civil proceedings or possibly penal proceedings, as described in point I.A.2.b and c.

2. *Can foreign investors recover assets lost as a result of violation of foreign securities and futures laws through a private cause or action in your jurisdiction?*

Yes. Foreign investors may recover assets lost as a result of violation of foreign securities and futures laws through a private cause or action in Polish courts, especially by civil proceedings, when a given case is subject to the Polish jurisdiction. The method to be applied is described in point I, especially B.2.c. If in the proceedings the Polish court has to apply foreign laws, the court may request the Minister of Justice for the text and explanation of the foreign judicial practice and for the confirmation of mutuality of the foreign state (article 1143 of the Code of Civil Proceedings).

B. Experience in the preservation and returns of assets located in foreign jurisdictions

The Securities Commission has not requested its counterparts in other states and has not tried to obtain preservation or return of assets located in foreign jurisdictions, achieved by a breach of regulations and principles of securities or futures markets. We are not aware of any activities of Polish investors in this aspect.

Additional information.

Polish jurisprudence has already experience of claims and sentences in the cases brought by investors against various entities operating on the Polish securities market. However, with the exception of two cases (first, when the Chairman of the Polish Securities Commission has exercised his rights of a prosecutor in civil proceeding on behalf of clients of a brokerage house, and second, when one attorney is representing numerous investors in their action against a manager of a collective investment scheme), we have no practical experience of actions of numerous investors against one entity. This may mean that the first actions on behalf of foreign defrauded investors (part. II of the Questionnaire) would probably be lengthy and complicated due to their pioneer character.

We would also like to inform that under the draft amendments to the Securities Act, a special Guarantee Fund for the civil liability of insolvent brokerage businesses towards their client would be established. The amendments are expected to be in force by the end of 1996.



Spain

Comisión Nacional del Mercado de Valores

**MEASURES AVAILABLE ON A CROSS-BORDER BASIS TO
PROTECT INTERESTS AND ASSETS OF DEFRAUDED INVESTORS**

I- MEASURES AVAILABLE FOR USE DOMESTICALLY

A.- Description of the available measures to preserve that may lead directly or indirectly to preservation of the assets or interests of defrauded investors.

a) Administratively available measures. The role of the CNMV.

The CNMV is not allowed to freeze assets "strictu sensu". Nevertheless, and depending on each particular situation, the CNMV can take certain measures tending to preserve investors' assets or, at least, to pave the way for their recovery. It is important to point out that the success of these measures depends, to some extent, on the nature of the problem (e.g. solvency or liquidity problems, breach of standart of conduct rules or, on the contrary, cases with criminal pieces of evidence), and on the status of the company involved in the situation (company registered and supervised by the CNMV or non registered company).

As a starting point, it must be firstly mentioned the possibility of presenting complaints at the CNMV Attention to the Public Service, which is allowed to act as an intermediary between the investor affected and the entity which has provoked the damage. This situation tends to reach an agreement between the parties involved trying to elucidate the responsables for the problem and to amend the economic effects of the situation without opening any administrative proceeding to sanction the companies or principals involved.

This sort of "arbitration" is very frequently used with satisfactory and fast results in those cases -generally- where the investment firm involved in the matter is registered with the CNMV.

On the contrary, in some situations this arrangement is not possible, specially in the presence of non registered companies or individuals. In those cases, the matter is referred to the Enforcement Division of the CNMV for sanctioning purposes but, at the end, this measure does not repair the damage caused to the investor insofar as, unfortunately, it do not help the investor to recover his assets or funds.

The CNMV is not allowed to freeze assets derived from illegal activities and it never has the authority to freeze bank accounts. However, concerning registered firms, there is a possible measure available for attaining similar results.

The Spanish Securities Market Act (Ley 24/1988, de 28 de julio, del Mercado de Valores -LMV-) provides that provisions contained in Part III of the Spanish Discipline and Intervention Law for Credit Institutions (Ley 26/1988, de 29 de julio, de Disciplina e Intervención de las Entidades de Crédito -LDIEC-) shall be applicable to registered intermediaries (Investment Firms and Collective Investment Institutions).

Under the LDIEC, the CNMV is allowed to intervene investment firms or collective investment institutions; meanwhile, said capacity corresponds to the Bank of Spain in the case of banks or other credit institutions.

According to the LDIEC, the CNMV is allowed to intervene registered investment firms or to replace provisionally its managerial or executive body in each of the following situations:

- registered investment firm in "an exceptional and serious situation that would put in danger the efficiency of its economic resources or its stability, liquidity or solvency";
- or "existing pieces of evidence of an exceptional and serious situation ..., the real situation of the intermediary could not be deduced starting from its accountings".

With reference to the cessation of both decisions, the legal provisions state that both measures will be in force "until surmounting the mentioned situation".

It is as well to remember that in the matter of an administrative proceeding, the LDIEC states that a proceeding could end with the suspension from office or removal from office and disqualification from holding managerial or executive offices upon those offenders responsible for the infringement. Besides, during the proceeding, it is possible to adopt a temporal suspension of those holding managerial or executives

offices in the investment firm. By this means, although the consequences of an administrative proceeding could be similar to the result of the "measures of intervention and replacement", it is not essential to perpetrate any infringement so that the CNMV could adopt the decision to intervene an investment firm or the substitution of the managerial body of it.

Regarding the commencement of these measures, they could be, firstly, adopted officially. The CNMV could have knowledge of the situation described in the LDIEC by means of an investigation, through an accusation or, during an administrative proceeding. In addition, these measures could be implemented "further to a well-founded claim of the own investment firm". The law establishes that the claim could be formulated by the managers of the company, the internal audit staff and also, by a shareholders' minority at least equal to which the provisions state to call for a meeting of shareholders (5%).

The CNMV decision shall appoint the person or persons "that would perform the intervention functions or would act as temporary managers".

In the case of intervention, the administration of the investment firm is shared between the old and new managers. "The acts and agreements of any body of the company could not be adopted without specific consent of the designated interventors". In the case of removal, the managers of the investment firm are replaced by new administrators. With reference to the sovereign body -Shareholders' meeting or Assembly- its decisions remain intervened, being subject to the ratification of the new managers.

From our experience point of view, in these cases of intervention, the investment firm is put under the direct supervision of CNMV staff, who will authorize all the firm's transactions with economic impact for it or its clients. This measure is aimed at preserving the assets under the firm's control given that all the transactions have necessarily to be approved and signed by the CNMV interventors, and all the banks, markets and investment firms are informed about the situation and the need for CNMV approval of each operation.

In this sense, the intervention does not usually imply the removal of the principals of the investment firm who will remain taking decisions although its execution -as explained- shall need the CNMV's interventors approval. Only, in those cases where there are evidences which demonstrate a personal responsibility of the principals of the registered firm, they can be removed by means a decision of the CNMV Board, and be replaced by either CNMV staff or appointed trustees. In this case, there is a total control over the assets of the company because the decisions are taken by individuals appointed by a Public body.

Finally, under the next amendments to the Spanish Market Act (which are expected to be in force in 1996) the CNMV would obtain additional competences in the

case of the cancellation of the public authorization of an investment firm. In this situation, the CNMV may resolve to dissolve the company. With the view to protect investors and the adequate performance of the markets, the CNMV may adopt preventive measures such as the transfer of securities or funds to any other investment firm or the appointment of liquidators. Whether the cancellation of the approval of the intermediary would not imply the dissolution of the company, the CNMV would have to liquidate, in an orderly way, the open positions or to transfer them to any other investment firm.

In the case of the performance of the activities included in the LMV by institutions or persons not qualified, the CNMV can only undertake investigations with a view to be aware of the real activity developed by the individual or company. Generally, the investigation will lead the CNMV to bring an administrative proceeding against the involved individual or entity. Under the next amendments to the Spanish Market Act, the CNMV will be embodied to take additional measures with regard to this kind of entities, including the power to request, repeatedly, for such information as it may deem necessary along with the imposition of a coercive fine up to 2.000.000 pesetas upon the company and its administrators; to adopt the seizure of books, files, accountancy archives, as any other document; to close the establishment of the offender; finally, to warn the public about the activity and to inform about the measures taken to stop it.

b) Available measures through the judicial channel.

Beside these competences under the scope of the CNMV (and Bank of Spain) as administrative bodies, the only gateway is the judiciary authority which is able both to freeze bank accounts and to stop illegal activities, but always in presence of pieces of evidence. In this sense, the CNMV has suggested in certain occasions (by means of reports) the judiciary authority, to take certain actions. The CNMV is compelled by the LMV to render such cooperation as it may be requested for by the Judiciary or by the Office of the State Attorney, in order to elucidate events relating to the securities markets which could be of criminal nature. Therefore, the CNMV can inform the Public Prosecutor about those situations detected that could imply the violation of criminal provisions; in such cases the CNMV acts as an advisor to the Public Prosecutor.

In this field, the judicial authority has very wide capacities; the power of the judges reaches not only CNMV registered firms but also any other sort of company, office or individual supposedly involved in fraudulent activities.

At this point, this approach leads us to an interesting question of the mandate for the majority of WP4 members: operational measures available to the preservation of assets in case of fraudulent activities relating to non registered corporate bodies or

individuals.

The Spanish Criminal Law (Ley de Enjuiciamiento Criminal -LECr-) confers powers on the judicial body to carry out certain measures tending to secure those goods that could generate patrimonial responsibility. The Spanish LECr (article 13) do not impose any restrictions to those goods or things that could be the target of these kind of measures. These measures could fall on any sort of things in relation with the fraud, independently of their location.

These sort of preventive measures are instructed in a separate piece, in which the judge has to quantify the amount to secure. The purpose of this separation is to not interfere with the summary proceedings relating to the criminal responsibility; thus, it could be possible to reach the end of the summary while existing pending proceedings in a separate piece. In addition, the purpose is to adopt real preventive measures tending to satisfy, in the future, civil responsibilities even if the criminal responsible would be declared insolvent.

Once these preventive measures have been adopted, in those cases in which the fraudulent activity would amount to a small importance, such measures could imply the complete stoppage of the activity. On the contrary, in the presence of a significant activity, the judge could designate a trustee who, in any case, would need the judicial permission to dispose of assets or funds.

These measures could be taken not only against the criminal responsible and third parties that would be subject to civil responsibility, but also against any person that, by means of lucrative title, would have benefit from the effects of the fraud.

Basically, we could describe the two following measures:

a) Judicial bond.- It is a direct preservation measure that search for cash disponibility or through the allocation of goods.

Due to the difficulty to obtain cash, the LECr defines this measure in a way that it allows to avoid the seizure of goods. For this reason, the law gives a very short period of time (24 hours) for its fulfilment.

Although the judicial bond could be advanced directly by the obligee, it could be advanced by a third party acting on his behalf, in the way that the law forsees: guaranty bond (article 591) which includes not only securities but also cash.

b) Seizure.- It is, as it has been said, a subsidiary measure to the judicial bond; only when the judicial bond has not been advanced in the period of 24 hours, the judge proceeds to seize the goods belonging to the responsible.

In the terms of article 589 of the LECr, when it would be possible to find out, starting

from the summary, criminal pieces of evidence against a person, the judge may order the responsible to advance a judicial bond to guarantee pecuniary responsibilities, ordering, at the same time, the seizure of enough goods to cover these responsibilities whether the judicial bond would not be advanced.

In this field, the judge could take the decision leading to the seizure of a company involved in fraudulent activities. In such case, the Decree-Law of October 20th, 1969, states that the judge, officially or pursuant to a Public Prosecutor's request, paying attention to the holder's circumstances of the seized goods and the nature of those goods, could decide, considering the public interest, that the management of the company shall continue or that it be replaced by an appointed trustee -Judicial Management-. Whether the existing management would go on, the judge shall design an interventor.

In the case that the management of the company would be replaced by a Judicial Management, the new managers will have the same functions that those corresponding to the replaced management. The Judicial Management would have to account to the judge for its management in the periods of time that the judge would establish, and also for its management at the end of it. In both cases, the trustee would have to report to the judge a supporting memory of all the taken decisions and achieved transactions.

The CNMV staff could be appointed by the Judiciary either to run a particular company or to advise other trustees to do it properly in order to protect the interests of the investors.

B.- Description of the measures used to return assets to defrauded investors

a) Administratively available measures. The role of the CNMV.

From the administrative point of view, the CNMV (or the Bank of Spain) can only have the possibility to return the assets to the defrauded investors when the company responsible is a registered one which has been intervened and the information contained in said company and other intermediaries, depositaries or markets ensures the actual ownership of particular funds or assets.

Additionally, during insolvency proceedings (bankruptcy or stoppage of payments) relating to investment firms which are members of the Spanish Securities Settlement and Liquidation Service (Servicio de Compensación y Liquidación de Valores), the CNMV could order immediately, without any cost for the investors, the transfer of all the securities to any other entity authorized to carry out such activity.

Beyond that situation, the CNMV (or the Bank of Spain) itself has no power to distribute the remaining assets of a company among defrauded investors. This can be only obtained through judicial channels and by means of each particular victim's complaint; the CNMV is not allowed to bring a judicial action on behalf of defrauded investors with said purpose. The only possible role to be played by the CNMV to help the investors in the recovery of their investments is to encourage the clients to bring forward an accusation.

b) Available measures through the judicial channel.

The Spanish LECr only lays down the return of goods target of a fraud to the corresponding defrauded investors in case of enforcement of a final judicial sentence. Under the Spanish Law, it is only possible to reach such measure before a judicial sentence, in cases related to traffic and drug activities, but never in cases of economic offense.

Thereby, bank accounts as any other assets that would have been "freezed" previously, would have to remain under deposit until reaching a sentence laying down, among other things, the amount corresponding to each defrauded investor.

Finally, it is interesting to point out a special problem that may come into sight at the time the sentence would be enforced: in those cases where the seized goods do not only consist of cash or quasi liquid assets, it would be possible that those goods will not have any value.

II.- MEASURES AVAILABLE FOR USE BY FOREIGN AUTHORITIES

A.- Measures available for use by foreign authorities

Under article 90 of the LMV, the CNMV shall cooperate with similar agencies of surveillance in other countries, exchanging the pertinent information or providing any assistance in response to requests from overseas authorities. However, the CNMV could not go beyond its competences for use domestically (see Part I).

On the other hand, the Spanish Judiciary Law (Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial) foresees in articles 276 and followings, the international co-operation, establishing the conditions under which any Court and Tribunal could render

their co-operation to foreign judicial authorities to perform their jurisdictional function. This co-operation would be rendered in the terms of the International Treaties and Agreements in which Spain takes part or, for lack of any, under the application of the reciprocity principle.

The concrete provisions regarding the proceeding for enforcing foreign final sentences in Spain are contained in articles 951 and followings of the Spanish Civil Law (Ley de Enjuiciamiento Civil -LECv-). In addition, the Spanish judicial bodies could also carry out legal proceedings in cooperation with foreign judicial bodies to tackle particular judicial measures, in accordance with articles 300 of the LECr and 194 of the LECv.

In this field, there are many international treaties in which Spain takes part, on a bilateral or multilateral basis. Among others, it can be mentioned:

- Treaty with reference to the communication or transfer abroad of judicial or extrajudicial documents in a civil or commercial matter, done at The Hague on November 15th, 1965;
- Treaty for obtaining supporting evidence abroad in a civil or commercial matter, done at The Hague on March 18th, 1970;
- Treaty with reference to jurisdiction and enforcement of sentences in civil or commercial matters, done at Brussels on September 27th, 1968;
- Treaty of September 16th, 1988, done at Lugano, regarding the judicial competence and enforcement of judicial resolutions in civil and commercial matters.

B.- Experience of delegations in the preservation and return of assets located in foreign jurisdictions

We can describe two different types of situations depending on whether the company involved is an intermediary registered with the CNMV or not.

In case of a registered intermediary the only tool to get certain control over assets located in foreign countries has been the prior intervention by the CNMV (or Bank of Spain in case of banks) of such a company in order to study its accountancy and thus, to make clear the ownership, amount, kind and location of the mentioned assets.

Upon said clarification, there is no particular problem in working together with the principals of the company (if they remain) in recovering the foreign assets or, in case of new appointments, to allow the new principals to do this work, given that in

both cases the persons running the company have the legal power to do so.

Nevertheless, the CNMV experience has shown serious difficulties in getting this type of control over the assets managed by non registered intermediaries due to the absence so far of legal powers for its administrative intervention and the difficulties encountered in assessing their actual activity. We may say that, in these cases, it has been always necessary to foster the participation of the Judiciary to adopt the corresponding measures to have access to the control of the company.

In these cases, apart from the judicial assistance obtained by the judges pursuant to the corresponding treaties, we can briefly comment at least one case where, although within the framework of a judicial action, the advisors appointed by the Judge among the CNMV staff, in fact obtained the preservation and recovery of the assets (in this case open positions in derivative markets) located in a foreign country, even without the need of seeking the assistance of the corresponding foreign supervisory or judicial authority.

The mentioned case involved a non registered Spanish intermediary who obtained Spanish clients to invest in foreign options markets, through a sole and properly registered foreign broker, and by means of a unique omnibus account on the name of the Spanish intermediary.

In opinion of the Judge, the wording of the intermediary's contracts signed with its clients was misleading enough to be considered a swindle; therefore the Judge suddenly decided to close the company, put the principals in jail and appointed some advisors from the CNMV to look after the open positions. Meanwhile, the foreign broker was about to close all the positions because it was obviously unable to contact the principals of the closed company to clear the pending operations and to receive instructions concerning the open positions.

The role of the CNMV staff in this case was:

- Firstly, to get in touch with the above mentioned foreign broker to explain the situation and to formally identify the CNMV staff as new contact point.
- Secondly, to make clear the actual owners of the positions among the list of clients of the company, and to match this information with the positions held in the omnibus account according to the internal information of the company.
- Thirdly, to check up the information of the Spanish company with the information held in the foreign broker.
- Finally, to appoint a judicial administrator (in this case a registered

Spanish broker), to assume the management of the positions while in close contact with all and each particular affected investor.

Summarizing, in this special case the outcome obtained (preservation and recovery of investments) was reached without the need of a final decision of a court, due to the logical urgency derived from the particular circumstances of the options markets and the need to take an active action to protect the investors beyond the simple bar of activities.

SWISS

Federal Banking Commission

&

Ministry of Finance



"Measures available on a cross-border basis to protect interests and assets of defrauded investors" in SWITZERLAND (5.1.96)

fulfilled as long as the institution is not formally bankrupt. After a bankruptcy order all open positions are marked to market and no party may claim real execution⁷.

B. Description of the measures used to return assets to defrauded investors

10 What procedures are available to you, in order to have assets returned to defrauded investors ?

In proceedings described in the answer to the questions 1 and 4 the liquidator appointed by the SFBC has the charge to return the assets to the investors. If the entity to be wound-up is insolvent insolvency procedures apply.

11 Can you bring a judicial action on behalf of defrauded investors? On what basis? Can a trustee, receiver or other third party be designated to represent the defrauded investors? On what basis can defrauded investors bring an action on their own behalf?

The SFBC has no power to formally represent defrauded investors in a judicial action and no other institutionalised representation for defrauded investors exists under Swiss law. However if the SFBC orders the winding-up of an unauthorized or a supervised institution and appoints a liquidator, no judicial action is necessary. If the SFBC informs the competent criminal authority about an unauthorized activity as a bank, investment fund manager or (in future) as a securities dealer or if the SFBC informs this authority about a fraud, the criminal judge may decide on the confiscation⁸ and restitution of funds⁹. In practice the criminal courts used to be rather reluctant to deal with civil claims of defrauded investors and rather preferred to refer the defrauded investors to the civil courts. However a 1991 amendment of the Criminal Justice Act 1937¹⁰ has considerably limited this possibility. Also a change in the approach of the criminal courts to claims of damaged investors may be established.

"Measures available on a cross-border basis to protect interests and assets of defrauded investors" in SWITZERLAND (5.1.96)

12 Can you obtain a court order for return of assets after a final judgment? Who also can obtain it? On what basis?

Principally only the defrauded investors themselves can obtain such court orders. However in winding-up proceedings described in our answers to the questions 1 and 4 above the liquidator appointed by the SFBC has the charge to return the assets.

13 What other means can you use to assist in returning assets to defrauded investors?

14 Are assets that have been frozen also available to pay penalties imposed by a securities regulator or by a court ?

Neither the SFBC nor the civil courts have the power to impose fines or civil penalties. The criminal courts may use frozen assets to pay penalties or proceedings fees. However if defrauded investors act as parties in the criminal proceedings and claim damages (what is possible) they have a preferential right on all assets whose forfeiture has been ordered by the court¹¹.

II. MEASURES AVAILABLE FOR USE BY FOREIGN AUTHORITIES

1. Preservation of assets
 - a. Powers to assist

15 Can you freeze assets administratively on behalf of a foreign authority without recourse to the courts?

The SFBC has no legal power to freeze assets on behalf of a foreign authority. The only exception is if the request of the foreign supervisor indicates also an unauthorized activity falling under the scope of the Federal Banking Act 1934 (BankG), the Federal Act on Investment Funds 1994 (AFG) or (in future) the Federal Act on Stock Exchanges and Securities Dealing 1995 (BEHG) by an unauthorized activity as a bank, as investment fund manager or (in future) as a securities dealer (see explanations to question 1).

"Measures available on a cross-border basis to protect interests and assets of defrauded investors" in SWITZERLAND (5.1.96)

16 Are you authorized to request such measures through the judicial channel? Can you obtain a judicial freeze enforcing a foreign order in behalf of a foreign authority? If so, what procedure should the foreign authority follow in making its request? For example, can the foreign authority make its request pursuant to a mutual legal assistance law or treaty? What conditions should be met?

The SFBC has no ability to request that assets are frozen on behalf of a foreign supervisor. The SFBC could only transfer a request of the foreign authority to the Swiss Federal Office for Police Matters (SFOP). This authority is competent to receive requests concerning the international assistance in criminal matters (see answer to question 17).

17 Is there any other government or public entity in your jurisdiction that can either freeze assets administratively or obtain a judicial freeze order on behalf of a foreign securities or futures authority? What procedures should the foreign authority follow in making its request? What conditions should be met?

Under certain circumstances assets can be frozen on behalf of a foreign supervisor by means of the international assistance in criminal matters. Switzerland has concluded formal treaties in this respect with various countries. In practice the most important treaties are the U.S.-Swiss treaty of 1973 and the European Convention of 20 April, 1959 on legal assistance in criminal matters. The absence of an applicable treaty does not exclude legal assistance. In this case the Federal Act on international legal assistance in criminal matters 1981 (IRSG) is applied by the Swiss authorities.

The request has to be addressed to the SFOP. In most cases¹², this office transfers the request to the cantonal criminal authority in whose jurisdiction the requested measures have to be enforced¹³. In cases of an unauthorized activity as a bank, an investment fund manager or (in future) as a securities dealer, the SFOP could transfer the execution of the request to the Federal Department of Finance (EFD)¹⁴.

Requests to freeze assets situated in Switzerland made by a foreign securities supervisor are accepted if his investigations may lead to a criminal prosecution. Furthermore the foreign supervisor may not ask for measures which the supervisor wouldn't

"Measures available on a cross-border basis to protect interests and assets of defrauded investors" in SWITZERLAND (5.1.96)

have the power to order domestically¹⁵. Also, the requests have to comply with some formal requirements¹⁶. Requests have to mention the criminal provision which may be breached. The incriminated action, if it had taken place in Switzerland, must be a criminal offence in Switzerland as well (double-incrimination requirement)¹⁷.

The internal proceedings in Switzerland following a request for assistance in criminal matters may unfortunately be quite lengthy. In 1996 the Swiss Parliament will probably adopt a bill presented by the Swiss Government in March 1995¹⁸ with the aim to speed up the possible appeal procedures.

The requests must be filed in writing in German, French or Italian and must fulfil certain formal criteria. Provisional freezings can be executed on informal request. The formal request has to follow in due course.

Before making a request to freeze assets on the channel of international mutual assistance in criminal matters the foreign authority may have to follow some constraints of its domestic law. Thus a California federal district court recently held that SEC officials must notify a U.S. national when they make a request for asset freezing under the U.S.-Swiss Treaty and must provide the national with a prompt hearing after Switzerland takes any action to affect the national's property. The court also held that the treaty's reasonable suspicion standard for freezing a U.S. citizen's assets in Switzerland violated the constitutional requirement that a seizure occur only upon probable cause¹⁹.

So far only two foreign supervisory authorities have their ability to address requests for international legal assistance in criminal matters recognised by the Swiss Federal Court: the U.S. SEC and the French COB²⁰. The U.S. CFTC, the British DTI²¹ and the Austrian supervisory authority²² may be competent to make requests as well due to specific international treaties²³. The CONSOB's petition to be recognised as such an authority is pending.

18 What other measures can you use or ask for and on what basis, on behalf of a foreign authority that could have a similar impact on the preservation of assets? How can they be used? What are their consequences on the assets?

In cases of an unauthorized activity as a bank, as an investment

"Measures available on a cross-border basis to protect interests and assets of defrauded investors" in SWITZERLAND (5.1.96)

fund manager or (in future) as a securities dealer, the SFBC may order different measures that have an similar impact on the preservation of assets²⁴.

b. Direct access by foreign authority

19 Whether a foreign authority can have standing in the courts in your jurisdiction in order to request a judicial freeze order enforcing a foreign judgment, order or other decision.

Principally the foreign supervisor is not involved in the Swiss domestic proceedings executing the request of international legal assistance in criminal matters and has no rights to appeal unless the foreign state is itself damaged by the offence²⁵.

20 What are the obstacles, that the foreign authority may encounter in seeking judicial enforcement for a foreign judgment, order or other decisions (such as, for example, domestic unwillingness to enforce a foreign penal order)?

Unlike decisions of a foreign criminal or civil court foreign administrative decisions may, principally²⁶, not be enforced in Switzerland. Decisions of a foreign criminal court can be enforced by means of the legal international assistance in criminal matters²⁷. Decisions of foreign courts may be enforced in Switzerland based either on international treaties²⁸ or on the Federal Act on International Private Law 1987 (IPRG)²⁹. Unlike the Lugano Convention 1988 on jurisdiction and the enforcement of judgements in civil and commercial matters the IPRG does not allow the execution of provisional orders³⁰. The execution of provisional (e.g. freezing) orders is possible under the law of international legal assistance in criminal matters 1981 (IRSG)³¹.

21 What other means are available to a foreign authority that would have a similar impact on the preservation of assets?

c. Procedures

"Measures available on a cross-border basis to protect interests and assets of defrauded investors" in SWITZERLAND (5.1.96)

- 22 Whether the measures available to the foreign authority depend on the purpose for which they are sought (e.g., sanctioning violators).
- 23 Whether the type of decision affects its enforcement, (e.g., does it matter whether the foreign decision is civil, administrative, criminal or disciplinary?).

The purpose of a measure is an element to consider the type of decision whose enforcement is requested. This consideration may effect the way of enforcement (see above question 20).

- 24 What sort of notice and appeal rights are available to the person whose assets have been frozen? Can a freeze be put into place without prior notice to the party holding the assets?

In the course of legal assistance in criminal matters (see above question 17) the freezing of assets on behalf of a foreign authority can be ordered as a provisional³² or an ordinary³³ measure. No prior notice has to be given to the party holding the assets (e.g. a bank) or to the party concerned (e.g. the account holder or a beneficial owner). Rather extensive appeal rights are available to the persons who are personally and directly affected by the freezing order, i.e. a bank's client or (in specific cases) the bank holding the frozen accounts but not beneficial owners of a shell company³⁴.

2. Repatriation of funds

- 25 Whether mechanisms exist for assets to be expatriated for return to foreign investors?
- 26 If so, what are these mechanisms, which channels and what procedures should be followed (direct request through judiciary channels, through the securities and futures counterpart or through other administrative or public authorities)?

Assets can be returned to foreign investors by means of the inter-

"Measures available on a cross-border basis to protect interests and assets of defrauded investors" in SWITZERLAND (5.1.96)

national assistance in criminal matters. The procedure of the international legal assistance in criminal matters has to be followed³⁵. In particular proceeds of crime or substitutes can be returned to allow a confiscation by the foreign requesting state or e.g. the restitution to defrauded investors. The assets may be transferred only at the end of the Swiss proceedings for legal assistance. However the foreign criminal proceedings must not be terminated. The transfer may take place at any stage of the foreign proceeding but must be based on a enforceable and legally valid decision by a foreign criminal or civil court or even a administrative authority. The assets may not be transferred, if e.g. persons not involved in the offence have valid claims on the assets³⁶.

27 Can foreign investors recover assets lost as a result of violations of foreign securities and futures laws through a private cause of action in Switzerland ?

It depends how close the case is linked to Switzerland. If the only link consists in the fact that proceeds of the illegal activity are hold in Switzerland a foreign resident may establish a Swiss jurisdiction only under very limited conditions³⁷ and only if the defendant is resident in a country which has not signed the Lugano Convention 1988 on jurisdiction and the enforcement of judgements in civil and commercial matters. This convention does exclude exorbitant jurisdictions like the place of mareva injunctions³⁸.

ala/uz/5.1.96

"Measures available on a cross-border basis to protect interests and assets of defrauded investors" in SWITZERLAND (5.1.96)

Notes

Abbreviations

(all the abbreviations concerning Swiss legal documents including those introduced in the text and the following notes refer to the German text)

- AS Amtliche Sammlung des Bundesrechts (publication of the Swiss Federal Law in chronological order)
- BB1 Bundesblatt (official publications of the Swiss Federal Stationary Office)
- SR Systematische Sammlung des Bundesrechts (publication of the Swiss Federal Law in systematical order)

- 1 SFBC Bulletin Nr. 17 (1987), 11.
- 2 The Federal Act on Stock Exchanges and Securities Dealing 1995 (BEHG, BB1 1995 II 419) will probably enter into force at 1 January, 1997.
- 3 Art. 23ter Federal Banking Act 1934 (BankG, SR 952.0); Art. 35 Federal Act on Stock Exchanges and Securities Dealing 1994 (BEHG, BB1 1995 II 419); Art. 58 Federal Act on Investment Funds 1994 (AFG, SR 351.31).
- 4 Art. 46 Federal Act on Administrative Criminal Justice 1974 (VStrR, SR 313.0).
- 5 Art. 23quater Federal Banking Act 1934 (BankG, SR 952.0).

"Measures available on a cross-border basis to protect interests and assets of defrauded investors" in SWITZERLAND (5.1.96)

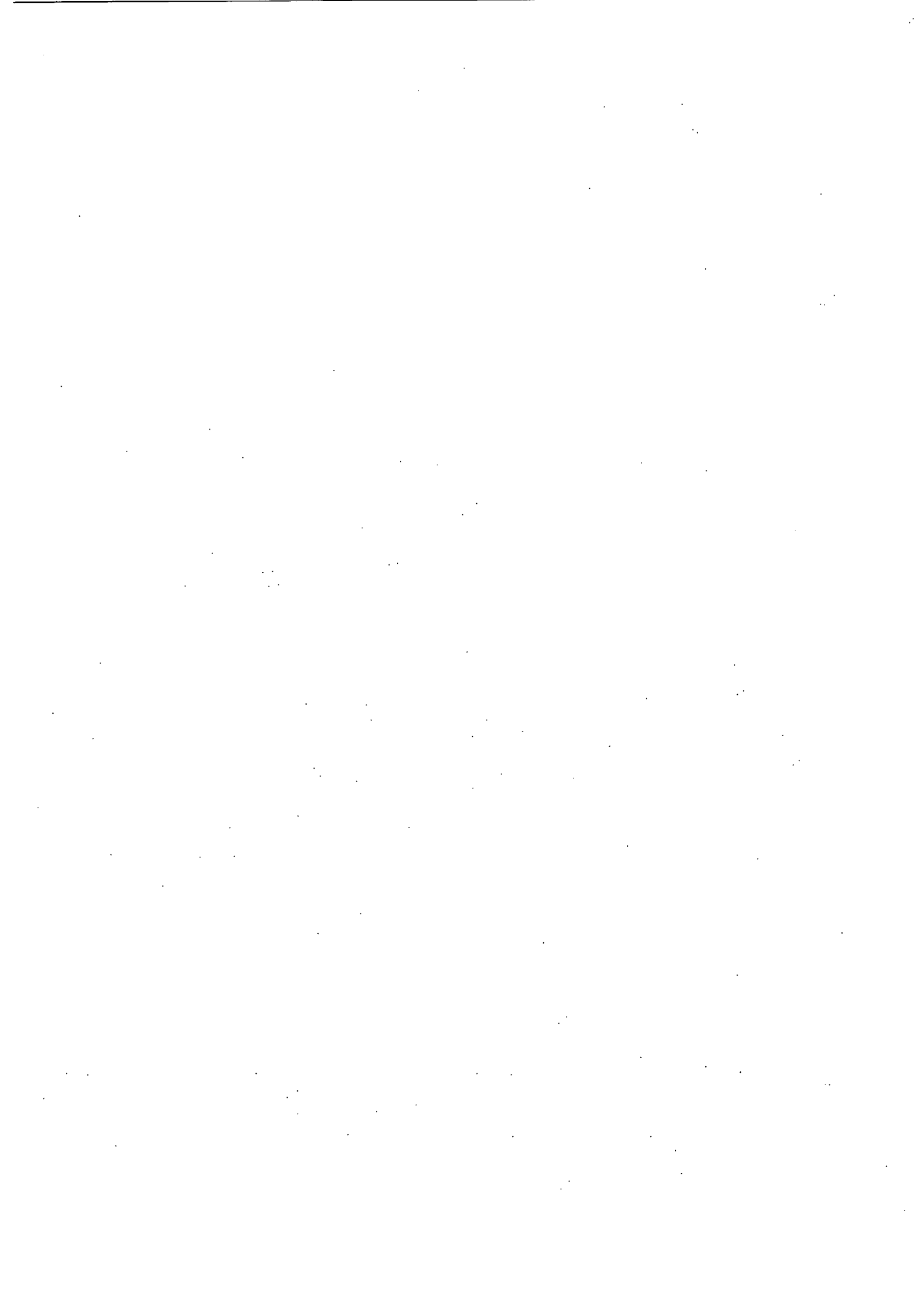
- 6 Art. 35 para 3 lit. a Federal Act on Stock Exchanges and Securities Dealing 1994 (BEHG, BBl 1995 II 419).
- 7 See Art. 211 para 2bis of the Insolvency Act 1889 (SchKG, SR 281.1 as amended in 1994, AS 1995 1313, in force at 1 January, 1997). Art. 211 was amended in order to guarantee the legal validity of bilateral close-out netting agreements.
- 8 Art. 59 of the Criminal Justice Act 1937 (StGB, SR 311.0, as amended 1991, AS 1992 2465).
- 9 Art. 60 of the Criminal Justice Act 1937 (StGB, SR 311.0, as amended 1991, AS 1992 2465).
- 10 Concerning Art. 60 (AS 1992 2465, BBl 1990 II 961, in force since 1 January, 1993).
- 11 Art. 60 Criminal Justice Act 1937 (StGB, SR 311.0, as amended 1991, AS 1992 2465).
- 12 Under the Swiss-American Treaty of 23 May, 1973 on Mutual Legal Assistance in Criminal Matters (SR 0.351.933.6) the SFOP is exclusively competent to order all measures of execution inside Switzerland.
- 13 Art. 16 of the Federal Act on International Legal Assistance in Criminal Matters 1981 (SR 351.1, IRSG).
- 14 Art. 17 para 4 of the Federal Act on International Legal Assistance in Criminal Matters (IRSG, SR 351.1).
- 15 Decisions of the Swiss Federal Court of 26 January, 1983 (case "Santa Fe", BGE 109 Ib 47) and of 18 July, 1994 (case "Alto Computer Systems", BGE 120 Ib 251) both concerning the SEC; of 3 December, 1992 (BGE 118 Ib 457) and of 10 May, 1995 (BGE 121 Ib 153) both concerning the COB.
- 16 Art. 28 of the Federal Act on International Legal Assistance in Criminal Matters (IRSG, SR 351.1).
- 17 Art. 64 para 1 Federal Act on International Legal Assistance in Criminal Matters (IRSG, SR 351.1).
- 18 BBl 1995 III 1.
- 19 Colello v. SEC, No. CV 94-6022 RAP (C.D. Cal. September 26, 1995).

"Measures available on a cross-border basis to protect interests and assets of defrauded investors" in SWITZERLAND (5.1.96)

- 20 See note 15 above.
- 21 See under the European Convention of 20 April, 1959 on Legal Assistance in Criminal Matters (SR 0.351.1) the declaration of the UK (art. 24, AS 1993 2061);
- 22 See under the Austro-Swiss treaty of 13 June, 1972 annex to the European convention art. 1/2 (AS 1974 2004).
- 23 See under Swiss-American Treaty of 23 May, 1973 on Mutual Legal Assistance in Criminal Matters (SR 0.351.933.6) the exchange of letters of 3 November 1993 between Switzerland and the U.S., AS 1994 197.
- 24 See the answers to the questions 1, 4 and 15 above.
- 25 See the Swiss Federal Court's decisions of 8 March, 1993 (Heirs of F. Marcos vs. Republic of the Philippines and SFOP, BGE 119 Ib 56) and of 29 March, 1993 (U.S. vs. SFOP and Hakim Secord et cons., BGE 119 Ib 64). However it is possible that the Federal Court will have to restrict the appeal rights of foreign states victim of an offence after the planned amendment of the Federal Act on International Legal Assistance in Criminal Matters (IRSG, SR 351.1, BBl 1995 III 30, see answer to question 17).
- 26 For a possible exception see the answer to question 26 below.
- 27 See e.g. art. 94 of the Federal Act of International Legal Assistance in Criminal Matters 1981 (IRSG, SR 351.0).
- 28 For European Countries the Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters done at Lugano on 16 September, 1988 (SR 0.275.11).
- 29 SR 291.
- 30 Art. 25 let. b of the Federal Act of International Private Law 1989 (IPRG, SR 291).
- 31 See e.g. art. 18 of the Federal Act of International Legal Assistance in Criminal Matters 1981 (IRSG, SR 351.0).
- 32 Art. 18 of the Federal Act of International Legal Assistance in Criminal Matters 1981 (IRSG, SR 351.0).

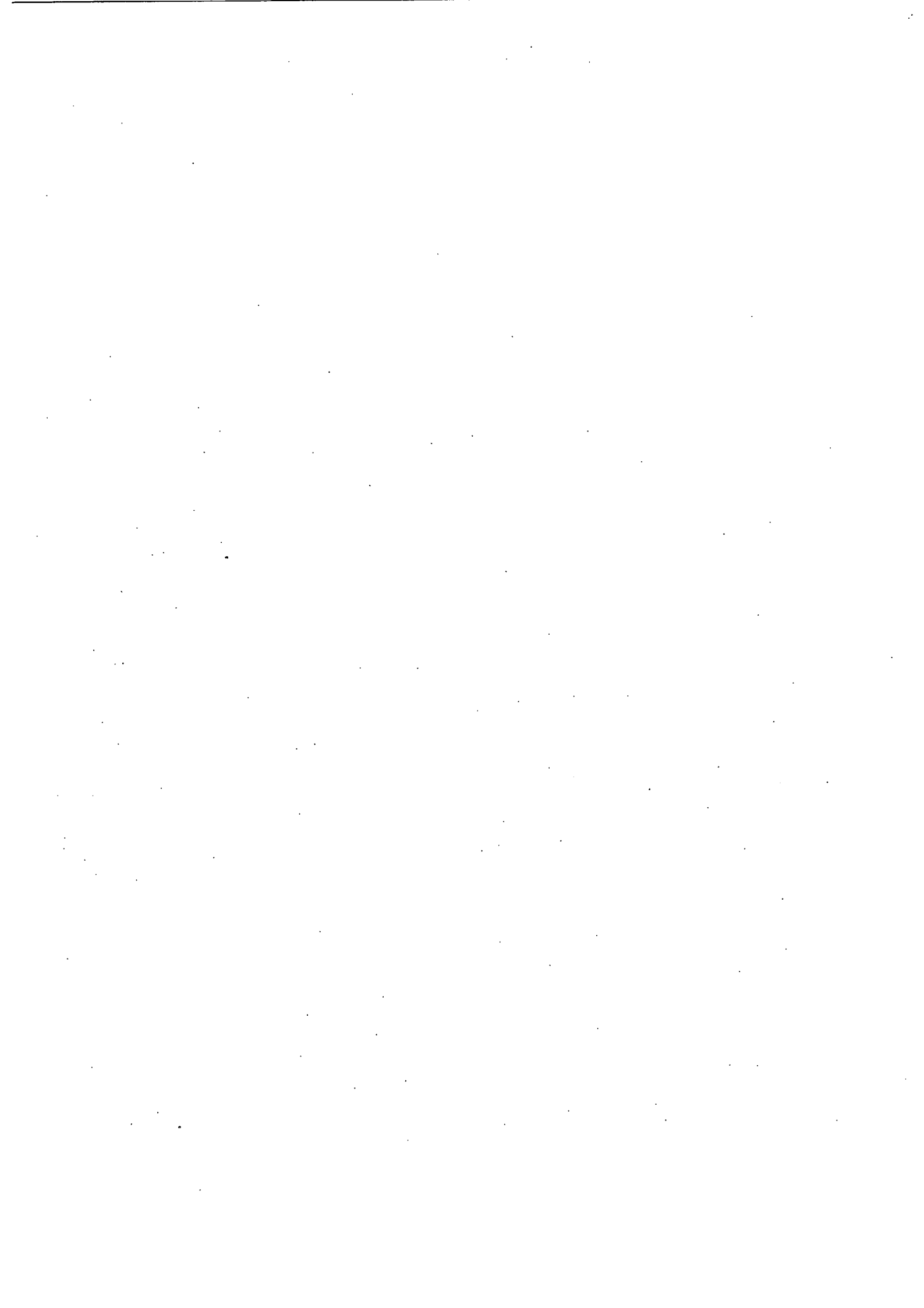
"Measures available on a cross-border basis to protect interests and assets of defrauded investors" in SWITZERLAND (5.1.96)

- 33 Art. 64 of the Federal Act on International Legal Assistance in Criminal Matters (IRSG, SR 351.0).
- 34 The jurisprudence concerning the appeal rights of beneficial owner is not entirely clear and controversial.
- 35 See explanations to question 17.
- 36 See art. 74a of the project to amend the the Federal Act on International Legal Assistance in Criminal Matters (IRSG, SR 351.0, BBl 1995 III 1) which resumes the actual case law.
- 37 See art. 271 para 1 chiff. 4 of the Insolvency Act 1889 (as amended by 16 December, 1994, in force at 1 January, 1997).
- 38 Art. 3 of the Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters done at Lugano on 16 September, 1988 (SR 0.275.11).



Thailand

Securities and Exchange Commission



Mandate on measures available on a cross-border basis to protect interests and assets of defrauded investors

Guidelines for contributions

I. Measures Available for Use Domestically

A. Description of the available measures to preserve that may lead directly or indirectly to preservation of the assets or interests of defrauded investors

B. Description of the measures used to return assets to defrauded investors

Stating hereinafter are the laws which are applicable in our domestic jurisdiction to preserve the assets of investors, who have been allegedly or effectively defrauded through securities violations, and to return the assets to the defrauded investors : the Securities and Exchange Act 1992, the Act Promulgating the Criminal Procedure Code, and the Penal Code.

The Securities and Exchange Act 1992 (the SEC Act)

According to Section 267 of the SEC Act, in cases where there is evidence that any person has committed an offence under this Act which may cause damage to the interests of the public and the Office of the SEC (the Office) has reasonable grounds to believe that the wrongdoer would remove or dispose of his properties, the Office with the approval of the SEC shall have the power to order seizure or attachment of such person's properties or the properties for which there is reasonable evidence to believe that they belong to such person. However, the period of seizure or attachment may not exceed one hundred and eighty days unless an action is brought in court, and such seizure or attachment order shall still be effective until court orders otherwise. Furthermore, where circumstances render it impossible to bring the cases into court within one hundred and eighty days, the court having jurisdiction may extend the period of seizure or attachment as requested by the Office, but it may not extend the period beyond another one hundred and eighty days.

The Office shall have the power to authorize the competent officer who is appointed by the Minister of Finance to proceed with the seizure or attachment of the properties as stated above.

The provisions of the Revenue Code shall apply to the seizure or attachment of the properties as stated above.

The Act Promulgating the Criminal Procedure Code and the Penal Code
(in case where there is a criminal offence)

Under the Act Promulgating the Criminal Procedure Code (the Act), the Act empowers an administrative or police official to search for facts and evidence and an inquiry official to collect evidence for the purpose of ascertaining the facts or establishing the guilt and securing the punishment of the offender. In addition, the Act empowers such official, in the course of an investigation or inquiry, to seize or attach any article the possession of which is an offence or which has been unlawfully obtained or which is reasonably suspected to have been used or intended to be used for committing an offence. Moreover, under the Penal Code (the Code), the Code prescribes that any property as stated by the law that any person makes or possesses to be an offence shall be forfeited wholly, whether it belongs to the offender and has been inflicted with the punishment according to the judgement or not. For the forfeiture of a property, the court shall have the power to forfeit a property used or possessed for use in the commission of an offence by a person or a property acquired by a person through the commission of an offence, unless such property belongs to the other person who does not connive at the commission of the offence.

The properties forfeited by the judgment of the court shall become the properties of the State, but the court may pass judgement for such properties to be rendered useless or to be destroyed. However, in the case where the court has already given order for the forfeiture of the properties, if it appears afterwards by the submission of the real owner that he has not connived at the commission of such offence, the court shall give order for the return of the properties if such person ties are still in the possession of the official. But the submission of the real owner shall be made to the court within one year reckoning from the day of the final judgment. In case of a civil case in connection with an offence, the court is empowered to give an order to compensate the injured person as determined by the court according to its actual value or to return property to the real owner.

II. Measures Available for Use by Foreign Authorities

A. Measures available for use by foreign authorities

Stating hereinafter are the laws which are applicable in this matter: the Securities and Exchange Act 1992 and the Act on Mutual Assistance in Criminal Matters.

The Securities and Exchange Act 1992 (concerning request for confidential information with regard to securities matters)

According to Section 316 (6) of the SEC Act 1992, it is empowered any person, in the performance of his duty under the powers and duties provided in accordance with this Act having acquired confidential information of any person can disclose such information to the authorities or domestic and international agencies which are responsible for the

supervision of securities, the Securities Exchange, or the supervision and examination of financial institutions. However, whether the Office can perform inspections relating to securities matters on behalf of foreign securities regulators, it is subject to the content prescribed in the Memorandum of Understanding signed between two authorities.

The Act on Mutual Assistance in Criminal Matters (the Act)

The Act was enacted to prescribe available measures provided for foreign state on mutual assistance in criminal matters.

Generally, in case where there is a request for assistance from foreign state which has a mutual assistance treaty with Thailand, it shall submit its request for assistance directly to the Central Authority which is the Attorney General or the person designated by him. However, for the foreign state which has no such treaty with Thailand, it shall submit its request through diplomatic channel.

For further details on procedures of seeking for assistance, the Act on Mutual Assistance in Criminal Matters is attached.

B. Experience of delegations in the preservation and returns of assets located in foreign jurisdictions

Not available.



United Kingdom

HM Treasury



UK CONTRIBUTION TO IOSCO PAPER ON MEASURES AVAILABLE ON A CROSS-BORDER BASIS TO PROTECT INTERESTS AND ASSETS OF DEFRAUDED INVESTORS

Introduction

This paper describes the legal framework and measures that are available within the United Kingdom to preserve assets and return them to investors who have been defrauded through the violation of securities and futures laws.

A number of UK organisations have an interest in the financial markets and financial fraud and this paper seeks to reflect those interests. It therefore incorporates contributions from the **Home Office**, the **Department of Trade and Industry** and **Securities and Investments Services Board**.

The **Home Office** is the government department with responsibilities for international mutual legal assistance in criminal matters. Its functions include responsibility for the criminal law within England and Wales. It has policy responsibility for a number to a number of international treaties to which the UK is a party including the European Convention on Mutual Assistance in Criminal Matters and the Vienna Convention against the illicit traffic in drugs. Requests for assistance that involve criminal proceedings should be submitted through the UK Central Authority for Mutual Legal Assistance which is situated within the Home Office.

The Secretary of State for the **Department of Trade and Industry** ("DTI") has powers of investigation where fraud or other misconduct is suspected, where shareholders have been denied reasonable information, or where he considers it to be in the public interest. Such investigations can involve companies, insurance and financial services matters. The Secretary of State also has wide powers available for the purpose of assisting an overseas regulatory authority which has requested assistance in connection with enquiries being carried out by it or on its behalf.

The **Securities and Investments Services Board** ("SIB") is the regulatory authority designated by the Treasury, the government department responsible for the Financial Services Act, to oversee the operation of the UK's financial services markets, including securities and futures matters, in order to protect investors. The SIB establishes high-level principles and standards by which investment firms conduct their business and exercises a number of statutory enforcement powers.

HOME OFFICE CONTRIBUTION TO HM TREASURY PAPER ON MEASURES AVAILABLE ON A CROSS-BORDER BASIS TO PROTECT THE INTERESTS AND ASSETS OF DEFRAUDED INVESTORS

I MEASURES AVAILABLE FOR USE DOMESTICALLY

A Description of the available measures to preserve that may lead directly or indirectly to preservation of assets or interests of defrauded investors

General

1. Provisions in Part VI of the Criminal Justice Act 1988 (as amended by Part III of the Criminal Justice Act 1993 and the Proceeds of Crime Act 1995) enable the courts to make orders concerning the restraint and confiscation of the proceeds of criminal activity. Restraint orders are normally made at an early stage in a criminal investigation in order to preserve assets; confiscation orders can only be made where an offender is found guilty of an offence from which he has derived benefit. In certain cases, the court can also order the confiscation of the benefit from offences of which the offender has not been convicted (see paragraph 7 below).

2. The restraint and confiscation provisions apply to all offences tried in the Crown Court from which an offender has derived benefit and certain highly lucrative offences listed in Schedule 4 to the 1988 Act which are normally tried only by magistrates' courts. Details of the offences currently included in Schedule 4 are annexed to this paper.

Restraint

3. A prosecutor may apply to the High Court for an order restraining assets provided he can satisfy the judge that criminal proceedings have been, or are about to be, instituted against an individual for an offence to which Part VI of the 1988 Act applies (see paragraph 2 above). The purpose of a restraint order is to preserve assets pending conviction and the making of a confiscation order. The 1988 Act, as amended by the Proceeds of Crime Act 1995, therefore provides that an application for a restraint order may be made ex parte to a judge in chambers.

4. Once made, a restraint order prohibits any person from dealing with any realisable property subject to any conditions or exceptions as may be specified in the order, for example, as regards living or legal expenses. It also provides for written notice to be given to any person affected by the order. There is no right of appeal against the making of a restraint order. However, any person affected by the order can make application for it to be discharged or varied.

5. Where the High Court has made a restraint order, a constable may seize any realisable property to prevent it being removed from the jurisdiction. The 1988 Act also makes provision for the High court to appoint a receiver to take possession of any realisable property, for example a farm or business, and to direct the receiver to manage it or otherwise deal with it.

Confiscation

6. Where a person is convicted of a criminal offence from which he has derived benefit, the prosecutor may submit a written notice to the court requiring it to consider making a confiscation order. The court may also make a confiscation order of its own volition. In assessing a person's benefit from crime, the court is able to take account of indirect benefit such as interest on investments, and the assets which are available to satisfy any confiscation order it might make.

7. In certain cases, the courts can also assume that any property which has passed through an offender's hands in the six years prior to the institution of proceedings was derived from criminal activity even though these proceeds might not relate to the offence which is the subject of the conviction.

8. The UK operates a value based confiscation system. This means that assets which are realised in satisfaction of a confiscation order do not have to be connected with, or in any way tainted by, the proceeds of any particular crime.

B Description of the measures used to return assets to defrauded investors

9. Part VI of the 1988 Act provides for both a confiscation order and a compensation order under section 35 of the Powers of Criminal Courts Act 1973 to

be made against the same person in the same proceedings. Section 72 further provides that where a court makes both a confiscation order and a compensation order and the offender has insufficient means to satisfy both orders in full, the compensation shall be paid out of the sums recovered under the confiscation order.

II MEASURES AVAILABLE FOR USE BY FOREIGN AUTHORITIES

A Measures available for use by foreign authorities regarding preservation of assets and repatriation of funds

10. The provisions described in paragraphs 3 to 8 above can be modified and applied to other countries provided the country concerned has been formally designated under Part VI of the Criminal Justice Act 1988 by means of secondary legislation. A country is designated on the basis of ratification of a relevant multilateral Convention of which the United Kingdom is also a party, or on the basis of the conclusion of a bilateral confiscation agreement. Overseas 'in rem' forfeiture orders regarding 'tainted property' can also be enforced on behalf of designated countries in cases where there has not been any criminal conviction in the overseas jurisdiction.

11. The correct procedure for submitting requests for the restraint or confiscation of criminal proceeds is described below:

(a) General

All requests must be submitted through the UK Central Authority for Mutual Legal Assistance which is situated within the Home Office.

(b) Restraint

Requests for the restraint of assets should be accompanied by a certificate stating that the subject of the request has been or is about to be charged with a relevant offence (ie an offence from which he has derived financial benefit) and a summary of the facts of the case. The UKCA will then pass the request to the relevant prosecuting authority (normally the Crown Prosecution Service) who will apply to the High Court for a restraint order on behalf of the requesting country.

(c) Confiscation

Requests for assistance in enforcing overseas confiscation or forfeiture orders should be accompanied by a copy of the order, certified by an officer of the court that made the order or by the overseas central authority, and should contain information indicating that:

- neither the order nor any conviction to which it relates is subject to appeal;
- the order is enforceable in the territory of the requesting party;

and describing, where appropriate and where known:

- the property available for enforcement or the property in respect of which assistance is sought;
- the interests in the property of any person other than the person against whom the order has been made;
- the amount which it is desired to realise as a result of such assistance.

As with requests for restraint, the UKCA will then pass the overseas confiscation or forfeiture order to the relevant prosecuting authority (normally the Crown Prosecution Service) who will make an application to the High Court for the order to be enforced on behalf of the requesting country.

(d) Repatriation

Any assets confiscated in the UK following the enforcement of an overseas confiscation or forfeiture order would be paid into the Consolidated Fund. However, arrangements exist whereby, in certain circumstances, such assets may be shared with the Requesting State. There is no provision in UK law for the enforcement of overseas compensation orders.

B Experience of delegations in the preservation and return of assets located in foreign jurisdictions

12. None - all our outgoing requests have been made under UK drug trafficking legislation in respect of drugs proceeds located abroad.

DEPARTMENT OF TRADE AND INDUSTRY CONTRIBUTION TO THE IOSCO
PAPER ON MEASURES AVAILABLE ON A CROSS-BORDER BASIS TO PROTECT
THE INTERESTS AND ASSETS OF DEFRAUDED INVESTORS

I MEASURES AVAILABLE FOR USE DOMESTICALLY

A Description of the available measures to preserve that may lead directly or indirectly to preservation of assets or interests of defrauded investors.

(i) Live Companies

The Secretary of State has a number of powers that enable him to investigate the activities of live companies, that is companies that have not been wound up. The principal powers are contained in s432 and s447 of the Companies Act. In each instance the reasons for which an investigation may be begun by the Secretary of State are wide. Under s432 an investigation may be begun for a variety of reasons, including if it appears to him that:

- a. the company's affairs are being conducted with intent to defraud creditors or otherwise for a fraudulent or unlawful purpose;
- b. the company's affairs are being conducted in a manner which is unfairly prejudicial to some part of its members;
- c. persons concerned with the company's formation or management have been guilty of fraud, misfeasance or other misconduct towards it or its members;
- d. the company's members have not been given all the information which they might reasonably expect.

Under s447 an investigation can be begun if there is "good reason".

In each instance the Secretary of State is given power, following a report made or information obtained under these provisions, to seek the winding up of a company if he considers that it is expedient in the public interest. (s.124A, Insolvency Act 1986). That in turn brings in the provisions of the Insolvency Act as to the preservation and disposal of company assets in a compulsory winding up. These points are dealt with below.

(ii) Dead Companies

(a) Compulsory Winding Up

The circumstances in which a company may be wound up compulsorily are set out in s122 of the Insolvency Act 1986. They include the situation in which a company is unable to pay its debts or the court is of the opinion that it is just and equitable that the company should be wound up. A petition may be presented by the company, its directors, any creditor or contributory. In a company that is being compulsorily wound up a liquidator is appointed, and his functions are to secure that the assets of the company are got in, realised and distributed to the company's creditors (s143). When a winding up order has been made, or where a provisional liquidator has been appointed, the liquidator takes into his custody or under his control all property and things in action to which the company is entitled. A provisional liquidator may be appointed at any time after the presentation of the winding up petition and he is able to preserve assets pending the determination of the petition (s135).

It is quite common for the Secretary of State in public at risk cases to seek the winding up of a company under s124A (see above) and then obtain the appointment of a provisional liquidator to preserve assets of investors and creditors who appear to have been defrauded.

It is also notable that on a compulsory winding up it is the duty of the Official Receiver to investigate the causes of failure of the company and generally the promotion, formation, business, dealings and affairs of the company. In appropriate cases he will make a report which can lead in turn to a criminal investigation. He is also able to bring proceedings in respect of malpractice before and during the liquidation (see below).

(b) Voluntary Winding up

The main features of the above regime apply but where a company is wound up voluntarily there are two key differences in approach for the purposes of this paper. First, the property remains vested in the company although the liquidator in exercise of his powers can dispose of the property (see s165), and secondly there is no general investigation of the affairs of the company as in the case of a compulsory winding up. Nevertheless the liquidator has a duty under s7 of the Company Directors Disqualification Act 1986 (CDDA) to report on the conduct of the directors for

disqualification purposes, and under s218(4) of the Insolvency Act 1986 to report to the prosecuting authority if he considers that an officer of the company has been guilty of an offence.

(iii) Administrative receivership

An administrative receiver is a receiver or manager of at least the substantial part of a company's property appointed for the debenture holders of a company. He has wide powers to sell or otherwise deal with the company's property once appointed, and he too has reporting duties under s7 of the CDDA.

(iv) Bankruptcy

When a person is made bankrupt the bankrupt's estate vests in the trustee in bankruptcy (s306), and it is the function of the trustee to get in, realise and distribute the bankrupt's estate (s305). An interim receiver may be appointed at any time after the presentation of a bankruptcy petition and before the making of a bankruptcy order, and between the making of a bankruptcy order and the vesting of the estate in the trustee the Official Receiver becomes the receiver (during which time it is his responsibility to protect the estate) (s287).

Interim and full receivers are empowered to take all such steps as they think fit for protecting property. They do not, however, have powers in respect of property belonging to someone else. Bankrupts are obliged to give the trustee in bankruptcy all such information as he may reasonably require.

(v) General

There are a number of provisions which apply whether a company is wound up compulsorily or voluntary. There are criminal offences in respect of fraud in anticipation of winding up, transactions in fraud of creditors, misconduct in course of winding up and false representation to creditors, amongst others, and there are civil sanctions for fraudulent or wrongful trading which can be sought by the liquidator (see Part IV, Chapter X of the Insolvency Act 1986). There are a number of broadly similar criminal offences which may be committed by a bankrupt before and after bankruptcy (see Part IX, Chapter VI of the Insolvency Act 1986). The court also has powers to set aside transactions at an undervalue and preferences, both in respect of individuals (s339,s340 IA), and companies (s238,239 IA).

There is nothing to prevent a foreign authority or individual petitioning for the winding up of a company or seeking the bankruptcy of an individual as long as they are in the position of being a creditor. They would not however be allowed by the courts to petition in respect of penalties or revenue matters. The definition of creditor can include creditor by assignment, so a foreign authority can petition on the basis that it has had a creditor's debts assigned to it (in the Barlow Clowes case the government had investors' rights assigned to it in return for compensating investors).

B Description of the measures used to return assets to defrauded investors

The powers to distribute assets in respect of the liquidation of companies or the bankruptcy of individuals are set out in the Insolvency Rules.

In carrying out his duties the liquidator/receiver/trustee makes no distinction between foreign and domestic creditors. They will all be able to prove their debts in the United Kingdom.

It will be seen from the above account that under the law of insolvency in relation to companies and individuals there are extensive powers to preserve and then distribute assets. One caveat has to be made however in the context of this paper. That is that the powers of liquidators and receivers or trustees do not extend to property which identifiably belongs to someone other than the bankrupt or the company itself. If, for instance, money is kept separately in a client account or can clearly be identified in some other way as belonging to another then the liquidator or receiver/trustee has no power to deal with the property. In all likelihood he will apply to the court for directions and the court may then appoint a trustee to deal with the money.

(vi) Other courses of action open to the Secretary of State

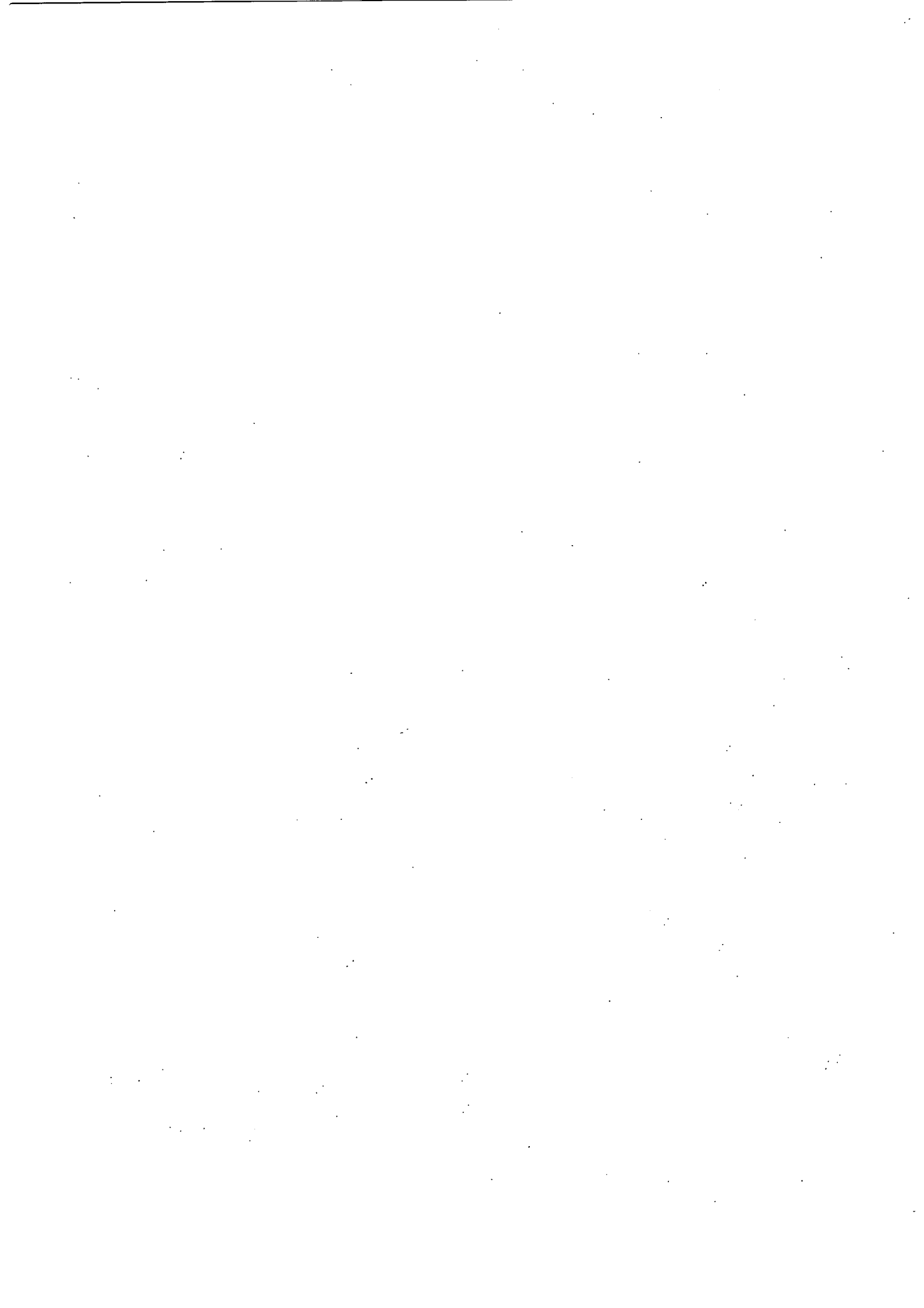
(a) Under s438 of the Companies Act the Secretary of State may on the basis of any report made or information obtained under his powers of investigation bring civil proceedings in the name and on behalf of a company if he concludes that he ought to do so in the public interest. This provision would enable the Secretary of State to act to help creditors or investors whose interests were not adequately being protected by the company itself.

(b) Section 6, 61 and 72 of the Financial Services Act. These powers are the subject of the SIB paper. The powers under section 6 and 72 are exercised concurrently with the Secretary of State (ie the DTI) while all functions under s61(1) which are exercisable by virtue of s61(1)(a)(ii) or (iii) (injunctions relating to contravention of s47, 56, 57 or 59 or of requirements imposed under s58(3)) are exercisable concurrently with SIB.

II MEASURES AVAILABLE FOR USE BY FOREIGN AUTHORITIES

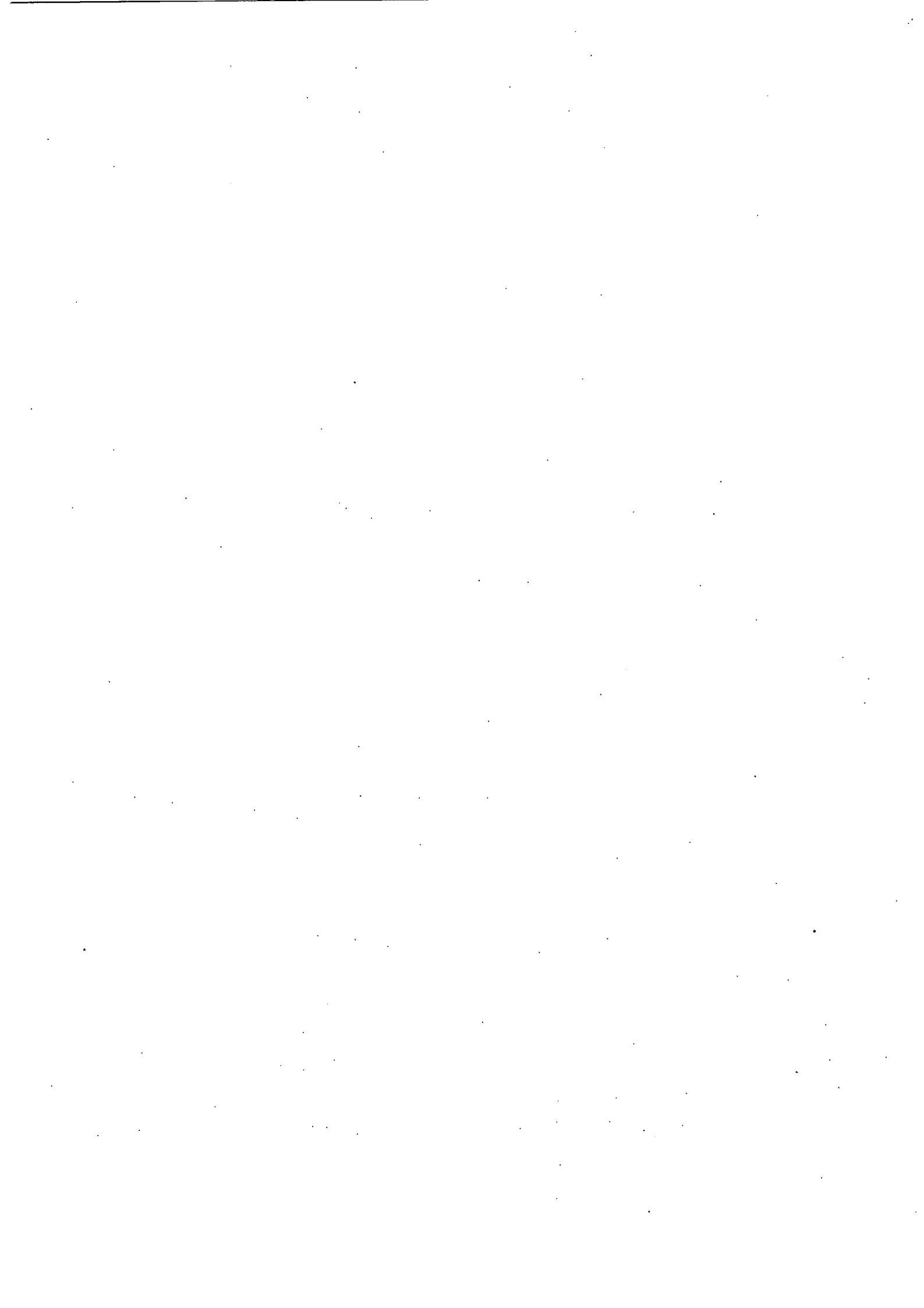
Part III of the Companies Act 1989 enables an overseas regulatory authority to request assistance in connection with enquiries being carried out by or on its behalf. Under s87 disclosure of information gathered in the exercise of these powers can be made to an overseas regulatory authority. It is also possible for the Secretary of State to seek to wind up a company on the basis of information obtained under Part III of the Companies Act (see s124A Insolvency Act 1986.) This in turn brings in the provisions of the Insolvency Act which enable assets to be preserved and distributed.

Section 426 Insolvency Act provides for co-operation between courts and provides for requests for assistance from "relevant countries" to be made to UK courts in connection with insolvency matters. Some 19 countries have now been designated "relevant countries".



United Kingdom

Securities and Futures Authority



24 Janvier 1996.

SFA

- Where it appears to SFA's Enforcement Committee that it is desirable, for instance, for the protection of investors, the Committee may make an "Intervention Order".
- An "Intervention Order" require a firm to take specified steps or forbid it in order to insure a better protection of investors assets.
- SFA has a statutory power to seek formal insolvency powers and may apply to the courts for the appointment of an Administrator whose function is to protect creditors and to consider the prospect of the business continuing.





THE SECURITIES AND FUTURES AUTHORITY

The Securities and Futures Authority Limited
Cottons Centre
Cottons Lane
London SE1 2QB

5 January 1996

10 JAN. 1996

Switchboard 0171-378 9000
Main Fax 0171-403 7569

M Bruno Gizard
SBF - Bourse de Paris
39 Rue Cambon
75001 Paris
France

Direct Line 071-378 5773
Direct Fax 071-403 7275

Dear Bruno

IOSCO - Consultative Committee
The Protection of Defrauded Investors Interests and Assets

We have received, from Eudald Canadell in Montreal, your request that members of the Consultative Committee comment upon this subject, particularly the measures available to us to protect investors interests and assets. Firstly may I apologise for the delay in coming back to you.

Prior to the formal insolvency of a firm or a registered person, which brings with it certain statutory protections for creditors, SFA has the power under its rules to issue an "Intervention Order". I attach the relevant extracts from our rules which I believe are self-explanatory.

In addition, SFA has a statutory power to seek formal insolvency powers and may apply to the courts for the appointment of an Administrator whose function is to protect creditors and to consider the prospect of the business continuing.

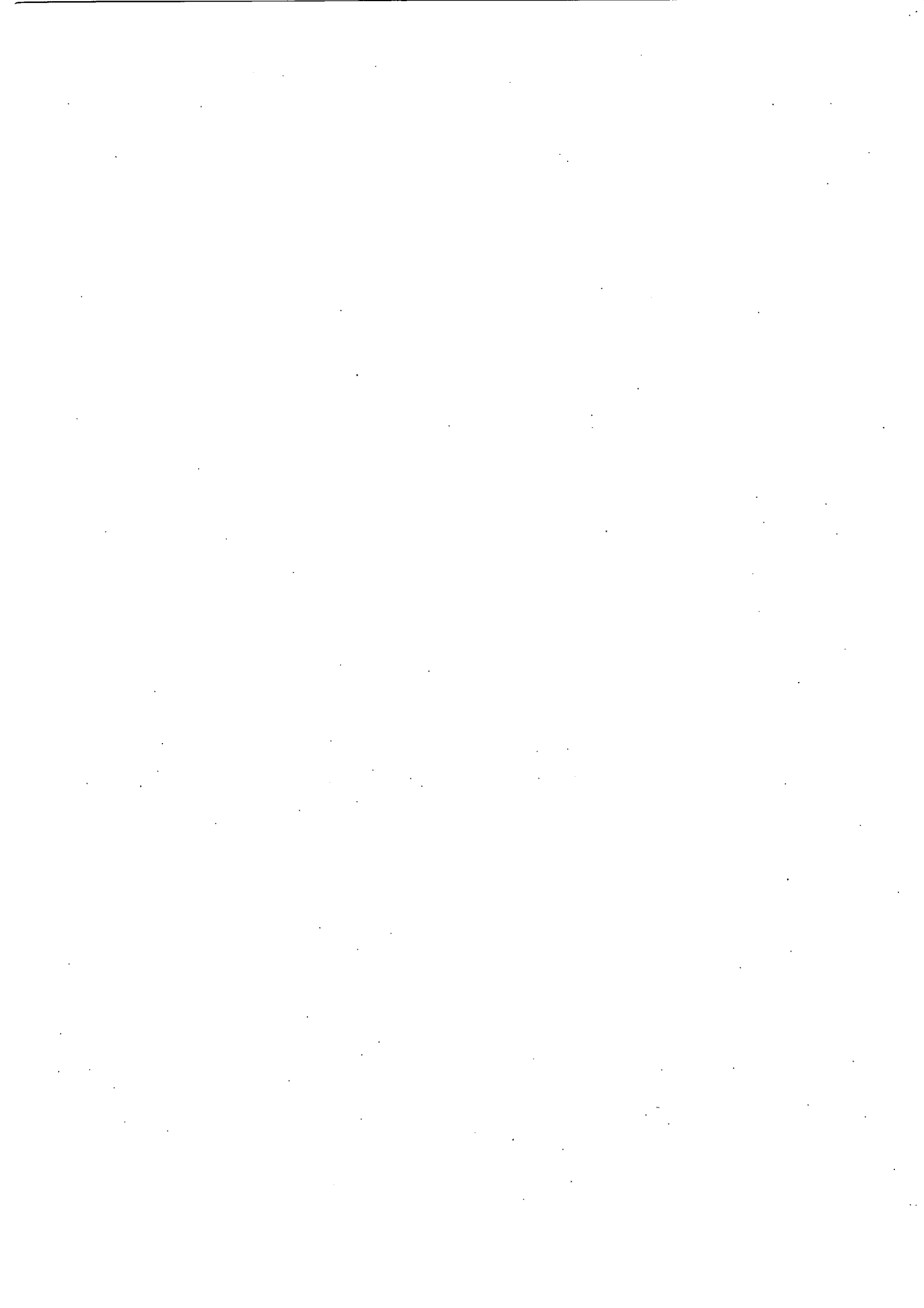
We believe that our contractual powers over the firms we authorise and (to a lesser extent) or ability to seek the appointment of an Administrator, are important and contribute significantly to the protection of investors.

I hope this is of some help.

Best wishes

A handwritten signature in cursive script, appearing to read 'C H Woodburn'.

C H Woodburn
Financial Risk Division



INTERVENTION POWERS

Intervention Orders

7-12 (1) Where it appears to the Enforcement Committee that there are grounds for believing that -

- (a) a *firm* may not be fit and proper to carry on *investment business* either generally or of a particular kind or to the extent to which it is carrying on or is intending to carry on that business;
- (b) a *registered person* may not be fit and proper to act as a *registered person*;
- (c) a *firm* or a *registered person* has committed or intends or is likely to commit an act of misconduct; or
- (d) the exercise of these intervention powers is desirable for the protection of investors,

the committee may make an Intervention Order.

(2) SFA shall serve the Intervention Order on the *firm* or *registered person* concerned and, where the recipient is a *registered person*, shall serve a copy on his employer.

7-13 An Intervention Order shall be in writing and shall specify -

- (a) the reasons for its issue;
- (b) the date and time at which it shall take effect;
- (c) the period for which the Intervention Order shall operate;
- (d) in regard to an Intervention Order to which rule 7-12(1)(c) applies, the act or omission which constitutes or would constitute an act of misconduct;
- (e) in regard to an Intervention Order to which rules 7-12(1)(a), (b) or (d) apply, the matter or matters which are relied on by SFA; and
- (f) that a request may be made to SFA for a stay of the Intervention Order or any part of it.

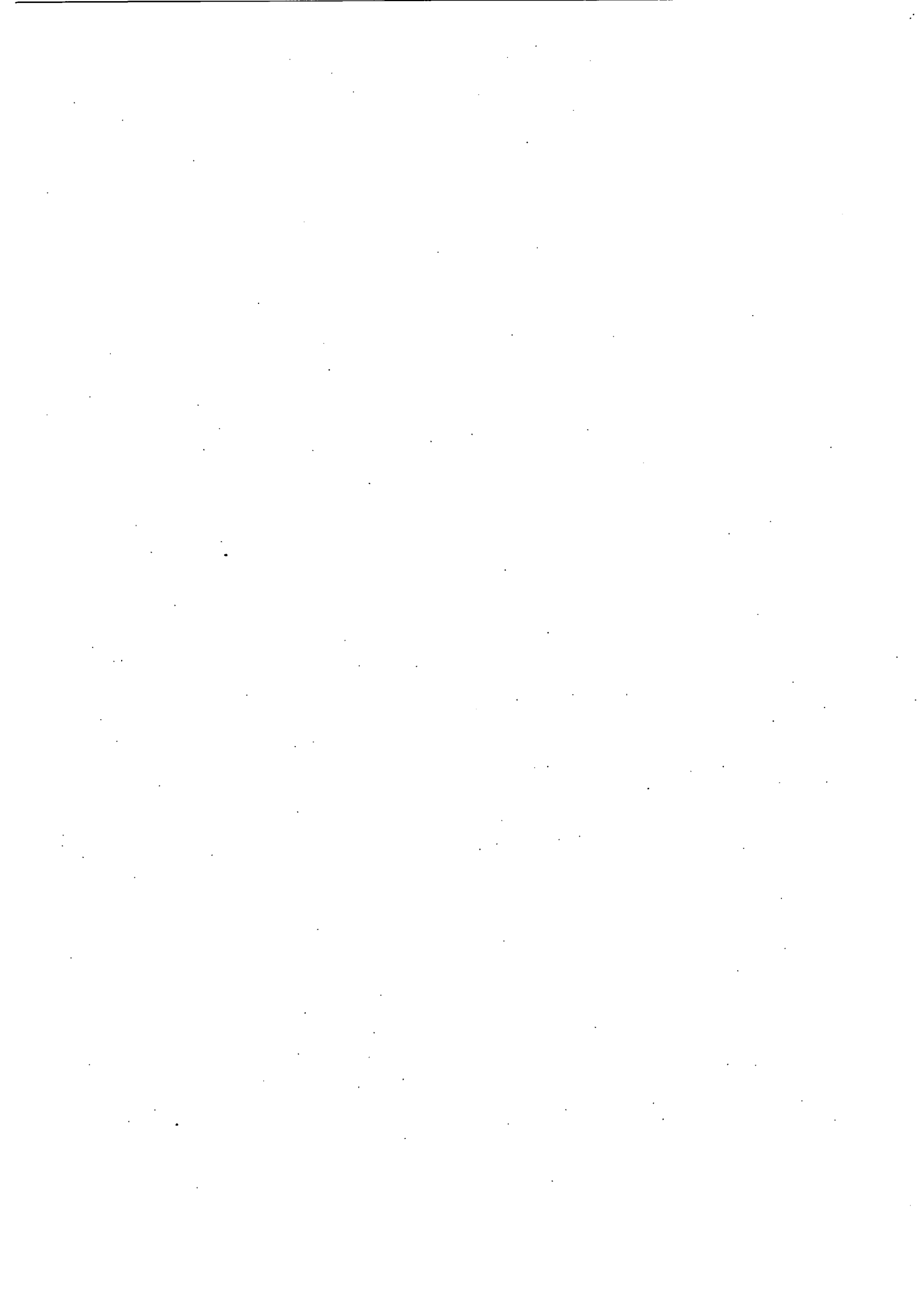
Enforcement Rules

- 7-14 An Intervention Order may, at the Enforcement Committee's discretion, come into effect immediately on service or at such later time as the committee may determine and shall operate -
- (a) for a specified period;
 - (b) until the occurrence of a specified event; or
 - (c) until the *firm* or *registered person* complies with specified conditions.
- 7-15 An Intervention Order may require a *firm* to take specified steps or forbid it -
- (a) in whole or in part, to carry on *investment business*;
 - (b) to dispose of or otherwise deal with any assets or any specified assets, whether held in or outside the United Kingdom;
 - (c) to enter into transactions of a specified kind or enter into them except in specified circumstances or to a specified extent;
 - (d) to solicit business from persons of a specified kind or otherwise than from such persons or in a specified country or territory; or
 - (e) to carry on business in a specified manner or otherwise than in a specified manner or to act otherwise than in the manner specified in the order.
- 7-16 An Intervention Order may require a *registered person* to take specified steps or may forbid him to act -
- (a) as a *registered person*;
 - (b) otherwise than in the manner specified in the order; or
 - (c) as servant or agent of any person, or any specified person, in carrying on *investment business*.

- 7-17 (1) An Intervention Order may require that all assets or assets of any specified class or description, whether within the United Kingdom or elsewhere, belonging to a *firm* or *registered person* at any time while the requirement is in force, shall be transferred to and held by a trustee appointed by SFA.
- (2) Such transfer shall be effected by the *firm* or *registered person* entering into a deed of transfer with SFA and the trustee.
- (3) Assets held by a trustee in accordance with an Intervention Order shall not be released or dealt with except in accordance with instructions given by SFA.
- 7-18 An Intervention Order may require the *firm* or *registered person* to maintain in the United Kingdom assets of a specified class or description or otherwise which appear to SFA to be of a value sufficient to enable the *firm* or *registered person* to meet its liabilities in respect of *regulated business*.
- 7-19 The Enforcement Committee may, at any time before or after an Intervention Order comes into effect, revoke it or vary its terms; and where the terms of an Intervention Order are varied, the variation shall be effected by a new Intervention Order being served on the *firm* or *registered person* concerned and where the recipient is a *registered person*, a copy shall be served on his employer.

Notice of appeal and application for stay

- 7-20 (1) Upon service of the Intervention Order or at any time thereafter, the recipient may serve on SFA -
- (a) a notice of appeal; and
- (b) if he so wishes, an application for a stay of the Intervention Order or any part of it, pending appeal.
- (2) SFA shall refer an appeal against an Intervention Order and any application for a stay of an Intervention Order to the chairman or a deputy chairman of the Tribunal Panel.



United Kingdom

Securities and Investment Board

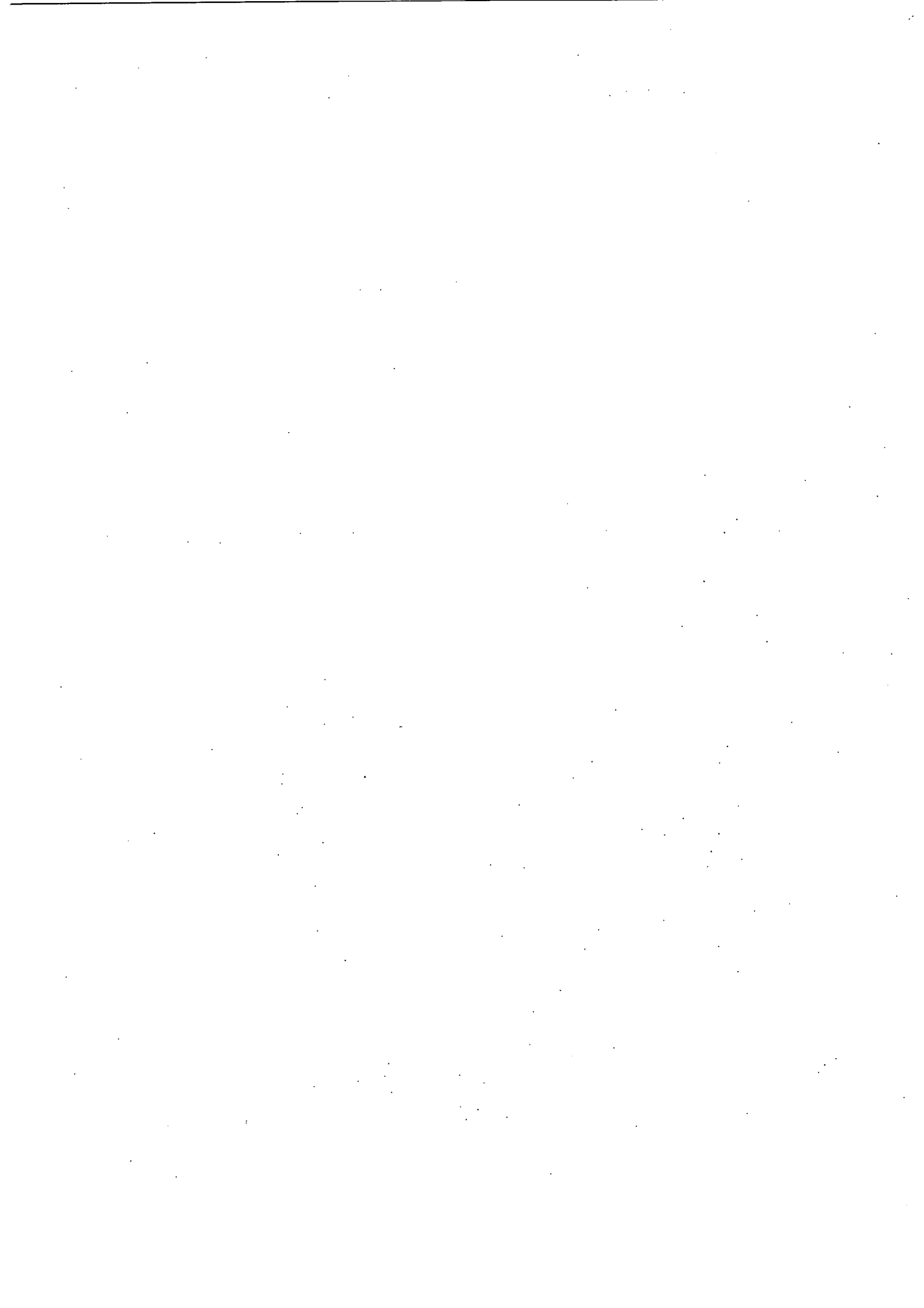


IOSCO Working Party No. 4

**Mandate on measures available on a cross-border basis to protect interests
and assets of defrauded investors**

**MEASURES AVAILABLE TO THE UNITED KINGDOM
SECURITIES AND INVESTMENTS BOARD TO PRESERVE
AND RETURN ASSETS TO DEFRAUDED INVESTORS**

May 1996



Introduction

1. The purpose of this paper is to set out: the measures available to The Securities and Investments Board ("SIB") to preserve the assets of investors who have been, or who are alleged to have been, defrauded through securities and futures laws violations; the measures used upon resolution of a matter to return assets to defrauded investors; and the measures available to SIB to assist foreign authorities in such matters.

I. MEASURES AVAILABLE FOR USE DOMESTICALLY

2. The Securities and Investments Board ("SIB") exercises statutory powers delegated by H M Treasury under the Financial Services Act 1986 ("the Act") and other relevant legislation. These powers include the power to prosecute a limited range of criminal offences, including the offence of conducting investment business in the UK without authorisation or exemption under the Act (section 4). SIB also has a wide range of powers to commence civil proceedings, which are set out in more detail below.

A. Description of the measures available that may lead directly or indirectly to preservation of the assets or interests of defrauded investors

Administrative measures

3. Under sections 66, 67 and 68 of the Act SIB may take three measures against authorised firms or appointed representatives which may be used to preserve the assets or interest of defrauded investors. The powers are exercisable only in relation to firms who are regulated directly by the SIB. SIB is generally precluded from using these powers in respect of firms who are members of Recognised Professional Bodies ("RPBs") or Self Regulating Organisations ("SROs") (including non-UK Investment Services Directive ("ISD"), 2nd Banking Co-ordination Directive ("2BCD") and 3rd Life Directive ("3LD") members). However, under their rules, these bodies have similar powers over their members. The powers are exercisable against domestic regulated insurance companies (whose prudential regulation is the responsibility of the Department of Trade and Industry) and 3LD EC companies, subject to the limitations contained in Schedule 10 para 6 FSA and Regulation 59 Insurance Companies (Third Insurance Directives) Regulations 1994.
4. The statutory powers available to SIB are as follows:
 - i. Under section 66 of the Act SIB may prohibit an authorised firm, 2BCD credit institution or non-UK ISD firm or appointed representative from disposing or otherwise dealing with any assets *of that firm* or appointed representative in any specified manner or otherwise than in a specified manner. This power enables SIB to freeze the assets of an authorised firm pending the resolution of legal claims. The prohibition may extend to assets outside the United Kingdom. A prohibition

under this section may not, however, relate to *investors' assets* held by or to the order of an authorised firm (e.g. money in a client's trust account). A restriction under this provision may not be imposed on an insurance company. A restriction under this provision may not be imposed on a non-UK 2BCD credit institution unless the relevant supervisory authority in the home state has requested that measures be taken to ensure that the institution has sufficient assets to cover risks arising from open positions on financial markets in the UK.

- ii. Under section 67 of the Act SIB also has power to impose, administratively, a requirement that the assets of an authorised firm, ISD firm or 2BCD credit institution, *and/or the assets of investors held by them*, be transferred to and held by a trustee approved by SIB. Once such a requirement is imposed, the firm is duty bound to transfer the assets to the trustee and to cooperate with him. Assets held by the trustee cannot be released or dealt with except in accordance with instructions given by SIB. SIB may exercise this power to vest assets belonging to investors and held by or to the order of an SRO or RPB member firm *if* the RPB or SRO requests SIB to do so. This power may not be used in relation to assets belonging to an insurance company. A requirement under this provision may not be imposed on a non-UK 2BCD institution unless the relevant supervisory authority in the home state has requested that measures be taken to ensure that the institution has sufficient assets to cover risks arising from open positions on financial markets in the UK.
 - iii. Under section 68 SIB may seek to prevent an authorised firm, ISD firm or 2BCD credit institution transferring assets out of the jurisdiction by requiring an authorised firm or appointed representative to maintain in the United Kingdom assets of such value as appears to SIB to be desirable with a view to ensuring that the firm or appointed representative will be able to meet his liabilities in respect of investment business carried on by him in the UK. This power may not be used in relation to assets belonging to an insurance company.
5. Under section 65 of the Act SIB may also restrict the business of an authorised firm, non-UK ISD firm, 2BCD credit institution or 3LD EC insurance company by prohibiting the firm from entering specified transactions, soliciting business from persons of a specified kind or carrying on business in a specified manner.
 6. All these measures are designed as temporary measures to allow SIB to protect the position of investors whilst considering what further substantive action needs to be taken against the firm concerned.
 7. Under regulations 15 of the 2BCD Regulations and regulation 9 of the ISD Regulations SIB can prohibit investment business by 2BCD and ISD firms.
 8. SIB's powers under sections 65, 66, 67 and 68 of the Act and regulation 15 2BCD Regulations and regulation 9 ISD Regulations may be exercised in any circumstances where it appears to SIB that-

- a. (except for reasons relating to the ability of an insurance company to meet its liabilities to policy holders) the exercise of the power is desirable for the protection of investors (and in the case of non-UK 2BCD and ISD firms, that the firm has contravened or is likely to contravene any prohibition or requirement imposed under the FSA or failed to comply with any Statement of Principle issued under the Act); or
 - b. (in the case of UK authorised firms only) the authorised person is not fit to carry on investment business of a particular kind; or
 - c. the authorised person (non-UK ISD firm, 2BCD credit institution or 3LD insurance company) has contravened the Act or any rules or regulations made under it.
9. Each of these powers is exercisable administratively by the issue of written notice giving reasons for the imposition of the prohibition or requirement. The firm against whom a notice is issued has the right to have its case referred to an independent statutory tribunal (the Financial Services Tribunal) which sits in a quasi-judicial capacity and will consider the case *de novo*.
10. Where it is sought to exercise the powers in relation to non-UK ISD firms (by virtue of any contravention of any provision made pursuant to any provision of the ISD conferring power on host States) or (in relation to requirements to furnish statistical information under the Act) 2BCD firms, or to exercise section 65 powers in relation to a 3LD EC insurance company, SIB is required first to require the firm in writing to remedy the situation. If the firm fails to comply within a reasonable time, SIB must notify the relevant supervisory authority in the firm's home state, requesting that authority to take action. SIB may not then exercise the powers unless satisfied that the authority has failed or refused to take measures to ensure that the firm remedies the situation or that the measures taken by that authority have proved inadequate. This is subject to the proviso that SIB may take action as a matter of urgency in order to protect the interests of investors.
11. Breach of such a prohibition or requirement may result in public censure (under section 60). Such measures may also be enforced at the instance of individual private investors who have suffered loss as a result of any breach under section 62. SIB also has power under section 61 to seek an injunction in the civil courts to restrain a breach or threatened breach of a requirement or prohibition and to seek restitution if profits have accrued, or loss suffered, as a result of the contravention of the requirement or prohibition (but not here directly to remedy the underlying problem (as to which see below)).
12. Often some form of restitution or compensation is required and not merely preservation of what remains of the assets. In these circumstances, other measures can be used to address all these objectives.

Measures available to SIB through the civil courts

Freezing orders

13. SIB's statutory right of action under sections 6 and 61 (see below) is sufficient to found a claim for a *Mareva* injunction. *Mareva* injunctions may be granted by the High Court, under its common law jurisdiction, to restrain the anticipated dissipation of assets which would otherwise satisfy claims enforceable by the courts. Thus, if it is anticipated that a firm may seek to dissipate assets which would otherwise satisfy claims made by SIB under sections 6 or 61, the court may make an interlocutory order freezing those assets, pending the ultimate determination of SIB's claim.
14. The injunction may extend to assets outside the UK. Such an order only prevents dissipation of assets. It does not give SIB (or investors) any priority over any other claims against the defendant in the event of insolvency. Pending trial, even a *Mareva* does not prevent a defendant from using the assets towards legal costs and living expenses. Investors themselves who may have separate *proprietary* claims against the firm, which would take priority if the firm is insolvent, cannot therefore always rely on SIB to protect their interests but may apply separately for an injunction freezing specific assets in the hands of the firm.
15. An application for a *Mareva* injunction may be made to a High Court Judge without notice. The grant of a *Mareva* injunction is, however, at the discretion of the court. SIB neither has to lodge any security nor is it liable for any damage caused by the injunction.

Insolvency proceedings

16. There is power under sections 72-74 of the Act to petition for the winding up or administration of authorised firms that are insolvent. Under these provisions, SIB may institute insolvency proceedings against an authorised firm, in England, Wales and Scotland, on the grounds that it is unable to pay its debts (for the purposes of the insolvency legislation) or the court is satisfied that it is just and equitable to do so, or, in the case of a petition for administration, on the same grounds as may other creditors. SIB's power to petition for winding up is confined to legal persons who are not individuals and are authorised under the Act. The power to apply for an administration order is confined to firms regulated directly by SIB.
17. In every case, the powers do not extend to insurance companies, non-UK ISD and 2BCD firms, or (in the case of administration orders) UK banks.

Measures available in criminal proceedings

18. As noted at paragraph 3 above, SIB has limited powers to prosecute criminal offences under the Act. In the exercise of these powers, SIB liaises closely with other prosecuting authorities with wider jurisdiction.
19. The measures available to prosecutors in criminal proceedings under Part VI of the Criminal Justice Act 1988, as described in the Home Office contribution, are available to SIB when acting as a prosecutor.

B. Description of the measures used to return assets to defrauded investors**SIB's powers under the Act**

20. Under sections 6 and 61 of the Act, SIB has power to apply to the High Court (or, in Scotland, the Court of Session) for injunctions and/or restitution orders against firms who have acted in breach of certain provisions of the Act, rules or regulations made under the Act, or the rules of an SRO, RPB, Recognised Investment Exchange ("RIE") or Recognised Clearing House ("RCH") which relate to the carrying on of investment business.
21. The power under section 6 is exercisable in respect of firms who have conducted, or threaten to conduct, investment business in the UK without the requisite authorisation or exemption under the Act. Such violations are also a criminal offence (section 4). The power under section 61 is exercisable against authorised firms (and non-UK ISD firms, 2BCD credit institutions or 3LD EC insurance companies) who have breached provisions of the Act or rules or regulations. Where the firm is a member of an SRO, RPB, RIE or RCH, SIB may not make an application for an injunction under section 61(1) unless the recognised body is unable or unwilling to take appropriate steps to deal with the contravention. There is no such restriction for obtaining compensation or disgorgement of profits.
22. The powers under section 61 may also be used against *any* person who acts, or threatens to act, in breach of the provisions of the Act which prohibit false or misleading statements relating to investment services and market manipulation (section 47). Such contraventions are also a criminal offence (for which SIB is *not* the prosecuting authority).
23. Applications under section 61 must be made by SIB in the Chancery Division of the High Court. The proceedings are by writ and notice must therefore be served on the defendant, who may then enter a defence.

24. The court may grant an injunction to restrain the contravention or an order requiring the firm (and/or any other person knowingly concerned in the contravention) to take such steps as the court may direct to remedy the breach.
25. Where profits have accrued to the firm, or investors have suffered loss or been adversely affected as a result of the contravention, the court may order the firm to pay into court, or may appoint a receiver to recover from him, such sum as appears just. The sum will then be distributed amongst investors who have entered transactions which resulted in the profit, loss or adverse affect.
26. Either party may appeal to the Court of Appeal.

Distribution on insolvency

27. The powers available to liquidators include powers to institute proceedings in foreign jurisdictions to realise the firm's assets.
28. The assets of an insolvent firm may be applied to satisfy the legal claims of investors during the course of the insolvency. Unless the investor can establish some proprietary claim, the available assets will be distributed amongst the investors and any other creditors *pari passu*. However, SIB's Client Money Regulations seek to ensure that client monies held by authorised firms in the UK in respect of UK investment business are impressed with a statutory trust which will found a proprietary claim. The rules governing holding of client money now extend to client money held by UK ISD firms (excluding credit institutions) anywhere in the EC, in order to afford as much protection as possible to funds in host States. However, the statutory trust cannot extend to monies held outside the UK.

II. MEASURES AVAILABLE FOR USE BY FOREIGN AUTHORITIES

A. Measures available for use by foreign authorities

Preservation of assets - Powers to assist

29. Under section 128C of the Act SIB may exercise its powers under sections 65-68 (and, in relation to non-UK 2BCD and ISD firms, regulation 15 2BCD Regulations and regulation 9 ISD Regulations) (described above), and its power to apply for an injunction under section 61(1) at the request of, or for the purpose of assisting, an overseas regulatory authority.
30. In deciding whether to exercise such powers at the request of a non-EEA regulatory authority SIB may take into account, in particular-

- ◆ whether corresponding assistance would be given in that country to UK regulatory authorities;
 - ◆ whether the case concerns the breach of a law or other requirement which has no close parallel in the UK or involves the assertion of a jurisdiction not recognised by the UK;
 - ◆ the seriousness of the case and its importance to persons in the UK; and
 - ◆ whether it is otherwise appropriate in the public interest to give the assistance sought.
31. SIB may decline to assist the overseas regulatory authority unless that authority undertakes to make an appropriate contribution towards the costs of exercising the powers.
32. In a case where a request is received from the relevant supervisory authorities in another EEA member State and the exercise of the powers is necessary for the purposes of complying with 2BCD or ISD, SIB is required to comply and to notify the action taken to the requesting authority. No contribution towards the costs of exercising the powers may be required in such cases.
33. SIB has no power to obtain a freezing order *in the UK courts* with a view to enforcing a foreign judgement or order on behalf of a foreign authority. As indicated above, it could use its section 66 power to freeze assets for this purpose, or have require the assets of a firm to be vested in a trustee under section 67: these are administrative powers.

Repatriation of funds

34. SIB has no power to require a firm or other person to expatriate funds for return to foreign investors unless the firm has acted in breach of requirements imposed by the Act or rules or regulations made under it. In such circumstances the powers outlined above (e.g. the power to seek a restitution order) may be used by SIB, regardless of whether the investors concerned were within or without the UK.
35. However, the exercise of SIB's powers under sections 66 and 67 could, by virtue of section 128C of the Act, be used to assist an overseas authority in securing the expatriation of funds.
36. SIB is not aware of any specific private cause of action which would permit foreign investors (or indeed overseas authorities) to recover in the UK assets solely on the grounds of violations of foreign securities and futures laws.

Provisions for direct access by foreign authorities

37. Certain foreign authorities can make use of the UK provisions for the reciprocal enforcement of judgements and orders of overseas courts. These could, in certain circumstances, be used to enforce freezing orders and to secure the repatriation of funds.

B. Experience of the SIB in the preservation and return of assets located in foreign jurisdictions

38. In taking action to secure the enforcement of orders abroad SIB has tended to rely upon-
- ◆ the co-operation of investors abroad in assigning their rights to SIB in order to enable proceedings to be brought in foreign courts; and
 - ◆ SIB obtaining direct orders against defendants in the UK compelling them to take the necessary steps to bring assets within the UK jurisdiction.

United States

Commodity Futures Trading Commission

&

Securities and Exchange Commission



EXECUTIVE SUMMARY

This paper has been prepared jointly by the staffs of the United States Securities and Exchange Commission ("SEC") and the Commodity Futures Trading Commission ("CFTC") as part of a project by IOSCO's Working Party No. 4 on freezing and repatriating funds located in foreign jurisdictions. This paper describes the current legal framework in the U.S. for the freezing of assets at the request of foreign regulators, and the enforcement of judgments and other decisions obtained by foreign authorities.

- Part I: discusses the measures available for use by the SEC and the CFTC in domestic civil and administrative proceedings to preserve investors' assets obtained through violations of U.S. securities and futures laws. The SEC and the CFTC can seek many types of civil remedies in U.S. courts, including injunctions and disgorgement of ill-gotten gains and the appointment of trustees.
- Part II.A: addresses assistance that may be provided to a foreign authority in freezing assets identified in the U.S. and the measures that a foreign authority could take in order to have a judgment or decision of a foreign court enforced in the U.S. The SEC and the CFTC do not currently have the express power to provide comprehensive assistance in this area, but the SEC and the CFTC may assist their foreign counterparts in determining how best to secure proceeds of foreign based securities and futures law violations which are located in the U.S. In addition, foreign authorities may be able to secure proceeds of fraud in the U.S. either by seeking the assistance of the U.S. Department of Justice or by attempting to enforce a foreign order in a U.S. court.
- Part II.B: discusses the SEC's and the CFTC's experiences in having assets frozen on their behalf in foreign jurisdictions and the repatriation of those assets to compensate defrauded investors. The SEC and the CFTC have been successful in overcoming some of the legal obstacles raised in these proceedings, particularly in cases where a foreign court has been asked to enforce a final judgment so that funds may be returned to defrauded U.S. investors.

I. MEASURES AVAILABLE FOR USE DOMESTICALLY

A. Description of the Available Measures That May Lead Directly or Indirectly to Preservation of the Assets or Interests of Defrauded Investors¹

- 1. Can you administratively freeze assets located in bank or brokerage accounts without recourse to the Courts?

The SEC and the CFTC have only limited ability to freeze assets administratively in domestic cases.

The SEC's ability to freeze assets administratively, for example, applies only to regulated entities and associated persons, as specified in Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"). That provision authorizes the SEC in cease and desist proceedings to enter a temporary order requiring a respondent, among other things, "to prevent dissipation or conversion of assets . . . as the [SEC] deems appropriate pending completion of such proceedings."

The CFTC has no clear power to freeze assets administratively. However, under Section 6(c) of the Commodity Exchange Act ("CEA"), the CFTC in administrative proceedings may order respondents to make "restitution to customers of damages proximately caused by violations of such persons," thereby effecting the protection and return of assets to defrauded investors. Under Section 6(c), notice of an order of restitution must be sent to the offending person, and any person against whom such an order is issued may obtain review of the order "or such other equitable relief as the court may deem just" in the United States court of appeals for the circuit in which the petitioner does business. Written petitions for review must be filed within fifteen days after notice of the order is given to the offending person. (In its administrative actions, the SEC does not have the ability to order restitution.)

- 2. Can you ask for such measures through the judicial channel? In particular, can you obtain an interim or provisional judicial order freezing assets?²

a. Statutory Authority

When a defendant's assets are clearly related to an alleged illegal scheme and there is a concern that the assets may be transferred out of the jurisdiction of U.S. courts or otherwise dissipated, those assets may be frozen by order of a federal court. The SEC and the CFTC may seek asset freezes through the judicial channel by bringing civil enforcement actions in federal court against defendants alleged to have violated U.S. securities and

futures statutes. Once in federal court, the CFTC and SEC have the ability to seek a variety of equitable remedies.

Section 6c of the CEA, for example, authorizes the CFTC to bring an action in federal district court to enjoin violations or seek compliance with the CEA. In bringing such a civil injunctive action, the CFTC may secure temporary and permanent injunctive relief, including a freeze of assets.³ Similarly, the SEC is statutorily authorized to ask a court to use its equitable powers in order to freeze assets in danger of dissipation or diversion. See Exchange Act Section 21(d).⁴

In addition to authorizing temporary and permanent injunctive relief upon "a proper showing," the SEC and CFTC are authorized to seek certain orders, including asset freezes, on an ex parte basis (i.e., without prior notice to the defendants of the application for the order). See CEA Section 6c (allowing orders prohibiting "any person from withdrawing, transferring, removing, dissipating or disposing of any funds, assets, or other property" to be issued ex parte). Once secured, an ex parte freeze order goes into effect immediately and remains in effect -- with no right to appeal -- until the date of a hearing. The orders are served on defendants, as well as on banks and other financial institutions that are believed to hold funds or other assets of defendants.

The ability to secure asset freeze orders on an ex parte basis permits the CFTC and the SEC to immobilize assets before defendants are aware of an enforcement action, thereby, at least temporarily, preventing defendants from removing assets to another jurisdiction. For example, in a recent SEC insider-trading case, assets of individuals residing in the United Kingdom were frozen within four business days of the sale of the securities, thereby immobilizing the proceeds of the securities transactions in the U.S. SEC v. Morris, Civ. Act. No. 94-8518 (S.D.N.Y.). In cases where a defendant is successful in transferring funds out of the U.S., the courts may order that the funds be repatriated, although they may be more difficult to trace and recover. See U.S. v. First National City Bank, 379 U.S. 378, 384 (1965); SEC v. Antar, Slip op. No. 89 Civ. 3773, at 5 (D.N.J. Jan 24, 1990).

b. Notice and Appeal: Orders of Preliminary and Permanent Injunction

As interlocutory decisions, district court orders granting or denying preliminary injunctive relief under Section 6c of the CEA or Section 21(d) of the Exchange Act are appealable immediately pursuant to 28 U.S.C. § 1292(a)(1). Final decisions of district courts granting or denying permanent injunctive relief also are appealable to the United States court of appeals for the circuit embracing the district court. 28 U.S.C. § 1291.⁵ To appeal an order involving either preliminary or permanent injunctive relief, a notice of appeal must be filed within 60 days after entry of the

order (when the United States or an officer or agency thereof is a party). Fed. R. App. P. 4(a)(1).

c. Entitlement to Injunctive Relief

To determine the CFTC's or the SEC's entitlement to equitable relief, including asset freezes, federal courts examine a number of factors. Injunctive relief under the CEA, for example, may issue upon a showing that a defendant has engaged in, is engaging in, or is about to engage in any act or practice which violates any provision of the CEA. See, e.g., CFTC v. American Metal Exchange Corp., 693 F. Supp. 168, 172 (D. N.J. 1988). In deciding whether to issue injunctive relief under the CEA, courts also consider "past violations as well as whether or not there is a reasonable likelihood of continued and future violations." Id. The "reasonable likelihood" of continued and future violations, in turn, depends on a "consideration of the totality of the circumstances and may be inferred, or even presumed, from past unlawful conduct, and the absence of proof to the contrary." Id. (citations omitted).

As proof of irreparable harm is not required, see id., the burden of securing such statutorily provided injunctive relief is less stringent than that of private litigants seeking injunctive relief. See, e.g., SEC v. Unifund SAL, 910 F.2d 1028, 1036 (2d Cir. 1990). The Second Circuit in SEC v. Unifund SAL distinguished the showing needed for the SEC to secure an asset freeze from the standard governing a prohibition against future violations. As "a freeze order does not place appellants at risk of contempt . . . [and] simply assures that any funds that may become due can be collected," the court held, such ancillary relief may be granted "even in circumstances where the elements required to support a traditional SEC injunction have not been established." Id. at 1041.

The proper scope and duration of an asset freeze order depend on the facts and circumstances of a particular case. Because asset freezes are "designed to preserve the status quo by preventing the dissipation and diversion of assets," a broad freeze may in some cases be allowed to remain in effect usually together with the grant of a preliminary injunction until a district court has made a final determination on the merits, including the amount of the unlawful proceeds retained by a defendant. CFTC v. American Metals Exchange Corp., 991 F.2d 71, 79 (3d Cir. 1993) (citations omitted). Of course, a higher standard -- a "preponderance of the evidence" -- is required to be met for a court to find that securities and futures laws have been violated and order funds disgorged and returned to investors.

- 3. What other government or public authority in your jurisdiction can freeze assets administratively or obtain such measure through the judicial channel?

While no other government or public authorities regulating securities or futures activities in the United States may freeze assets administratively, states and other public authorities may secure asset freezes through the judicial channel in certain circumstances. States, for example, are authorized under the CEA to prosecute in federal court any violation of the CEA except those concerning contract markets, clearinghouses, floor traders, or floor brokers. See Section 6d of the CEA. The CEA also allows states to use their own antifraud statutes for ancillary relief in such federal court actions.

The CEA also authorizes states to bring certain state court actions. Under Section 6d(8) of the CEA, for example, states may proceed in state court against CFTC registrants (other than floor brokers, floor traders, or registered futures associations) for violations of any antifraud provision of the CEA or regulations thereunder. In addition, Section 12(e) of the CEA, allows state officials to proceed in state court against persons engaging in unlawful "off-exchange" transactions. In CFTC et al. v. Topworth International Ltd., CV 94-1256 AAH (C.D. Cal 1994), for example, both the CFTC and the California Commissioner of Corporations charged the defendants with offering and selling illegal, off-exchange commodity futures contracts in precious metals and foreign currency to members of the general public in violation of the CEA. In both federal and state court actions, states may seek injunctive and other equitable relief, including orders to freeze assets of defrauded investors.

As provided in Section 18 of the Securities Act of 1933 ("Securities Act"), the SEC and the states have concurrent jurisdiction with respect to certain securities matters. See, e.g., Exchange Act Section 28(a). In appropriate cases the SEC and the states have cooperated in bringing major enforcement cases. For example, a number of states joined with the SEC in reaching a settlement agreement with Prudential Securities concerning limited partnership interests sold by the firm in the 1980's. In the Matter of Prudential Securities, Lit. Rel. No. 13840 (1993).

In addition, both the CFTC and the SEC may refer matters to the United States Attorney General. CEA Sections 8(e) and 12(a) allow the CFTC to cooperate with any department or agency of the U.S. government. Such cooperation can include referral of matters to the U.S. Attorney General for criminal prosecution. Section 21(d) of the Exchange Act authorizes the SEC to "transmit such evidence as may be available concerning such acts or practices as may constitute a violation of any provision of [the Exchange Act] or the rules or regulations thereunder to the Attorney General, who

may, in his discretion, institute the necessary criminal proceedings."

- 4. What alternate measures can you use or ask for that could have a similar impact on the preservation of assets? (e.g., [temporary] bars of activities, management of a company under the close control of an appointed trustee, replacement of a company manager by an appointed trustee, insolvency proceedings).

When the CFTC and the SEC bring civil enforcement actions in federal court, a number of equitable measures in addition to asset freezes may be available. These include appointment of a receiver or trustee, orders of disgorgement, orders of restitution, and other ancillary equitable relief such as the appointment of independent boards of directors, orders of corporate restructuring, formation of audit or other oversight committees, and the appointment of independent consultants to perform investigatory and accounting work.

a. Appointment of Receivers

In SEC and CFTC civil injunctive actions, a trustee or receiver may be appointed to administer defrauded investors' assets until such time as a court renders an adjudication on the merits. In the event that final judgment is rendered against defendants, a trustee or receiver, working on behalf of the court, may assist in compiling an accounting and distributing assets to defrauded investors.

Appointment of receiver or trustee -- like an order freezing assets -- may be secured by the SEC or CFTC on an ex parte basis. If secured ex parte, the appointment of a receiver or trustee would remain in effect and would not be appealable before the scheduled hearing date for the preliminary injunction.

b. Orders of Disgorgement and Restitution

The CFTC and the SEC also may seek orders of disgorgement in civil injunctive actions. See, e.g., SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082 (2d Cir. 1972). See also CFTC v. Co-Petro Marketing Corp., 680 F. Supp. 573, 584 (9th Cir. 1982) (as nothing in Section 6c specifically prohibits orders of disgorgement and since "it would frustrate the regulatory purposes of the Act to allow a violator to retain his ill gotten gains," such ancillary relief is proper). Federal courts have broad equitable powers enabling them to prevent violators of the federal securities laws from enjoying the financial rewards of their illegal activities. SEC v. Blatt, 583 F.2d 1325, 1335 (5th Cir. 1978). Effective enforcement of the federal securities and futures laws requires that violators be forced to disgorge monies unlawfully obtained.

See, e.g., SEC v. Manor Nursing Centers, Inc., 458 F.2d at 1103-04. See also CFTC v. Co-Petro Marketing Corp., 680 F. Supp. at 584. When an order of disgorgement is entered, defendants are compelled to return ill-gotten funds to the registry of the court or to a trustee authorized to collect such funds. The court then has the authority to enter a separate order of restitution to return funds to defrauded investors, usually via a trustee or an equity receiver on behalf of the court.

c. Ancillary and Other Equitable Relief

Other forms of ancillary and equitable relief also may be secured by the CFTC and the SEC. Examples of such relief -- all of which may help to protect investors' interests and assets -- include the appointment of independent directors to oversee a corporation; orders of corporate restructuring; formation of audit or other committees; the appointment of independent consultants to perform investigations, compile accountings, and/or complete reports; and orders protecting books and records from destruction and granting the CFTC or the SEC access to such books and records. The CFTC and the SEC frequently secure these forms of relief through the consent settlement process, with defendants neither admitting nor denying allegations contained in a complaint, but also may secure them as a result of enforcement actions in federal court.

B. Description of the Measures Used to Return Assets to Defrauded Investors⁶

1. Judicial Action

-- Can you bring a judicial action on behalf of defrauded investors? On what basis? Can a trustee, receiver or other third party be designated to represent the defrauded investors? On what basis can defrauded investors bring an action on their own behalf?

As discussed above, both the CFTC and the SEC may enforce the statutes they administer by bringing civil injunctive actions in federal district court. These actions may, through the court's imposition of equitable relief, directly benefit defrauded investors. As discussed above, the relief available in such actions may include appointment of an equity receiver or trustee. Court-appointed receivers are authorized to bring ancillary actions to ensure restitution of funds to defrauded investors once an order of disgorgement is entered. See, e.g., CFTC v. American Commodity Corp., 753 F.2d 862, 866 n.6 (11th Cir. 1984) (equity receiver had power to bring ancillary action in the form of an application for an order to show cause why certain individuals should not be ordered to return funds). See also Scholes v. Lehmann, et al., 56 F.3d 750, remanded in part on other grounds, (7th Cir. 1995)

(receiver appointed pursuant to an action brought by the SEC, sued certain persons who had received proceeds of a Ponzi scheme from the scheme's perpetrator, or corporations he controlled.) In addition, certain provisions of the U.S. federal securities and futures laws have been construed by courts to give investors a private cause of action for compensation for their losses due to securities and futures law violations.

2. Court Order After Final Judgment

-- Can you obtain a final judgment by a court that would include an order for return of assets?

A court can issue a final judgment in an SEC or CFTC civil action that may include, among other things, an order for disgorgement, thereby requiring the defendant to pay a certain sum of money to the court or the court's authorized agent. If a defendant fails to comply with court-ordered disgorgement, the CFTC or the SEC may seek an order of civil contempt from the district court which has the inherent power to enforce compliance with lawful orders and compensate parties for any damages sustained as a result of noncompliance through orders of civil contempt. CFTC v. Commonwealth Financial Group, Inc., 874 F. Supp. 1345, 1348 (S.D. Fla. 1994).

In issuing an order of civil contempt, a court may grant whatever remedial relief it deems necessary to effect compliance. Id. at 1349. Contempt proceedings, for example, may result in the incarceration of defendants who fail to comply with court-ordered remedial measures. See, e.g., CFTC v. Wellington Precious Metals, Inc., et al., Civ. No. 85-3565 (D. Fl. 1985) (given defendant's transfer of funds to a Swiss bank account in his name and failure to present satisfactory evidence to the court on the accounting of these funds, he was incarcerated for contempt for over three years, until reaching a payment schedule with the court to make restitution to defrauded investors); SEC v. InterLink Data Network of Los Angeles, Inc. et al., Lit. Rel. No. 14005 (defendant incarcerated for failing to pay \$12,000,000 in disgorgement). The CFTC and the SEC also may refer matters to the Department of Justice for criminal contempt prosecution.

3. Other Methods

-- What other means can you use to assist in returning assets to defrauded investors?

In addition to the measures available to United States securities and futures regulators in civil injunctive actions (including asset freezes, appointment of a receiver, disgorgement, restitution and other ancillary relief), Section 14 of the CEA allows persons alleging a violation of the CEA or regulations by any person registered under the CEA to bring a reparations

proceeding before the CFTC. Reparations claims, in turn, may result in actual damages being paid by CFTC registrants to the persons who have alleged the violation.

II.A. MEASURES AVAILABLE FOR USE BY FOREIGN AUTHORITIES FOR PRESERVATION OF ASSETS IN THE UNITED STATES

1. Preservation of Assets

a. Powers to assist

- (i) Can you freeze assets administratively on behalf of a foreign authority without recourse to the courts?

The SEC has limited ability administratively to freeze assets in domestic cases. The SEC's ability to administratively freeze assets applies only to regulated entities and associated persons. It is unlikely that these powers could be construed to provide the SEC with the authority to freeze assets administratively on behalf of foreign authorities. The CFTC does not presently have the statutory power to freeze assets in administrative proceedings on its own behalf; therefore, it would not be possible for the CFTC to freeze assets on behalf of a foreign authority. As discussed in Section I.A.1. above, the CFTC does have the power to order restitution to customers who themselves have initiated an administrative proceeding, when the administrative law judge has made a final determination that the CEA is being violated.

- (ii) Are you authorized to request such measures through the judicial channel? Can you obtain a judicial freeze enforcing a foreign order on behalf of a foreign authority? If so, what procedure should the foreign authority follow in making its request? For example, can the foreign authority make its request pursuant to a mutual legal assistance law or treaty? What conditions should be met?

At present, there is no specific authority -- statutory or otherwise -- for the SEC or the CFTC to go before a U.S. court for the sole purpose of seeking to enforce a foreign order on behalf of a foreign authority. It is possible, however, for the SEC or the CFTC to obtain an asset freeze based on information provided by a foreign authority, if such information presented evidence of a violation of the U.S. federal securities or futures laws sufficient to warrant the SEC or the CFTC seeking a freeze order. In order to obtain such a freeze order, the SEC or the CFTC, as the case may be, would have to demonstrate to the relevant U.S. District Court that a possible violation of the U.S. federal securities or futures laws justified the freeze.

- (iii) Is there any other government or public entity in your jurisdiction that can either freeze assets administratively or obtain a judicial freeze order on behalf of a foreign securities or futures authority? What procedures should the foreign authority follow in making its request? What conditions should be met?

Administrative Actions by Other Governmental Agencies

There are no other governmental or public entities in the U.S. that can freeze assets administratively on behalf of a foreign securities or futures authority.

Judicial Orders that Other Governmental Agencies Can Seek

Mutual legal assistance treaties and other treaties and agreements provide a basis to make and receive requests for assistance in accordance with domestic laws. The U.S. Department of Justice ("DOJ") may provide assistance in seeking a judicial freeze order on behalf of a foreign securities or futures authority through such treaties. In such a situation, the DOJ would deal with the criminal authorities in the requesting country rather than the securities and futures regulators. In addition, as discussed below, U.S. money laundering and forfeiture statutes may provide a basis for allowing the DOJ to seek civil forfeiture of the proceeds of fraud, theft or conversion committed in violation of foreign law. Apart from the seizure of assets pursuant to a U.S. civil forfeiture action, the U.S. does not have the ability to seize or restrain assets on behalf of a foreign jurisdiction.

Mutual Legal Assistance Treaties and Other Multilateral or Bilateral Treaties and Agreements

U.S. criminal authorities may provide assistance in securing the proceeds of crime through treaties on mutual legal assistance in criminal matters ("MLATs") or through other multinational or bilateral treaties and agreements.

Many MLATs contemplate assistance for a broad enough range of financial crimes to include securities and futures fraud. Moreover, most recent MLATs explicitly address forfeiture issues, thereby facilitating the means through which a country may request the U.S. to: immobilize or freeze forfeitable assets; initiate a forfeiture action against the property in question; repatriate assets so that they can be forfeited in the requesting country; or enforce a foreign forfeiture judgment. MLATs may also address other measures that would serve to provide restitution to the victims of crime. In addition, MLATs could facilitate a foreign authority's request to the DOJ to initiate an ex parte freeze of assets, thus giving the requesting authority the advantage of surprise and the possibility of immobilizing illegally obtained

funds before they can be further dissipated or moved to other jurisdictions.

Although the principal purpose of MLATs is to provide an avenue for cooperation and assistance between criminal authorities of different countries, certain MLATs may also allow for assistance to be provided to civil or administrative authorities in certain ancillary matters, since those authorities have the ability to refer a matter to criminal authorities for prosecution. For example, through exchanges of diplomatic notes, assistance can now be obtained under the Treaty Between the United States and the Swiss Confederation on Mutual Assistance in Criminal Matters for use in SEC and CFTC cases involving any violations of the securities or futures laws that are covered by the treaty. The procedures that the foreign authority should follow and the conditions that should be met in making its request are usually set forth in the MLAT.

In addition, other multinational or bilateral treaties and agreements to which the United States is a party may provide a basis for the United States providing assistance to another country by giving effect to such country's forfeiture orders. For example, the United States has an agreement with The Netherlands whereby both nations have agreed to assist one another in forfeiture proceedings and to take action to give effect to one another's forfeiture decrees. However, unlike The Netherlands, the U.S. does not yet have an ability to register foreign forfeiture orders and have them accorded full faith and credit. Rather, the U.S. presently gives effect to foreign based forfeiture judgments by initiating a domestic forfeiture action against proceeds of crime located here that resulted from the violations of the criminal laws of the foreign country based on violation of the foreign country's domestic law. See II.A.1.b(ii) below regarding conditions for recognition of a foreign judgment.

U.S. Money Laundering and Forfeiture Statutes

Another possible mechanism by which U.S. authorities may be able to provide assistance to foreign authorities in freezing assets located in the U.S. is pursuant to U.S. money laundering and forfeiture statutes. This approach may be viable for foreign authorities seeking assistance in a criminal case where the U.S. assets are the proceeds of foreign securities and futures laws violations.

U.S. forfeiture law provides a basis for the return of the proceeds of fraud, theft, or conversion committed in violation of foreign law. Under 18 U.S.C. §§ 2314-15, 1961 and 1956, it is a violation of U.S. criminal law to launder the proceeds of foreign fraud, theft or conversion when such proceeds are brought into the U.S.⁷ Under 18 U.S.C. §981, the U.S. government can seek civil forfeiture of the proceeds of these violations of law.

To commence a civil forfeiture proceeding to confiscate the foreign fraud proceeds, U.S. prosecutors would seek from the foreign authorities witnesses and other evidence necessary to establish the fraud. Under Section 981, a certified copy of a foreign forfeiture order or judgment encompassing the property is admissible into evidence and constitutes "probable cause that the property forfeited by such order or judgment of forfeiture is subject to forfeiture under this section and creates a rebuttable presumption of the forfeitability of such property."⁸ A request for the commencement of forfeiture proceedings may be made by letter rogatory, pursuant to an MLAT request or through informal law enforcement channels. A discussion of letters rogatory is included in Part II.A.1(b)(iii). With respect to provisional measures, the DOJ is currently seeking legislation which would authorize a 30-day restraint of property located in the U.S. when the owner is arrested or charged in a foreign country with an offense (not limited to drug related offenses), the nature of which indicates that the property would be subject to forfeiture under U.S. law.

- (iv) What other measures can you use or ask for and on what basis, on behalf of a foreign authority that could have a similar impact on the preservation of assets? How can they be used? What are their consequences on the assets?

Freezes of funds in the U.S. may also be possible in cases in which either the SEC or the CFTC may have its own interest in the matter, and determines that it is appropriate to pursue an asset freeze in U.S. court. See Part I.A.

b. Direct access by foreign authority

We have endeavored to provide a careful analysis of the legal issues that a foreign authority would be confronted with in the event that it attempts to enforce a foreign freeze order or foreign securities or futures judgment in the U.S. Nonetheless, before taking legal action in the U.S., it may be prudent for a foreign authority to consult on the facts of a particular case with the SEC and/or the CFTC and to consider obtaining the advice of private counsel.

- (i) Whether a foreign authority can have standing in the courts in your jurisdiction in order to request a judicial freeze order enforcing a foreign judgment, order or other decision.

There are no provisions in the U.S. federal securities or futures laws that confer standing upon a foreign regulator to request a judicial freeze order enforcing a foreign judgment, order or other decision. In addition, we are not aware of any instance

in which a foreign securities or futures regulator has attempted to directly enforce a foreign freeze order or judgment in the U.S. If a foreign securities or futures regulator is authorized to pursue violations of the securities and futures laws of its country, it is possible that if the authority instituted an action in U.S. court in furtherance of its statutory obligations, a U.S. court would deem the regulator to have standing to bring the action. Foreign private investors may also have standing in U.S. courts to pursue claims for compensation for their losses.

- (ii) What are the obstacles that the foreign authority may encounter in seeking judicial enforcement of a foreign judgment, order or other decision (such as, for example, domestic unwillingness to enforce a foreign penal order)?

Final Judgments

There is no U.S. federal statutory provision or treaty allowing for the recognition or enforcement of a judgment obtained by a foreign government or regulator. As a result, the analysis of whether a judgment of a foreign government or regulator would be enforced in the U.S. is done on the basis of general principles. The extent to which U.S. courts recognize and enforce foreign courts' decisions is based upon a comity analysis. In particular, in Hilton v. Guyot, 159 U.S. 113 (1895), the U.S. Supreme Court held that judgments of courts in foreign countries should be enforced without an independent examination of the merits if the U.S. court is satisfied that (a) the foreign court had personal jurisdiction over the defendant and subject matter jurisdiction over the dispute; (b) the defendant received sufficient notice of the proceeding; (c) the judgment was not obtained by fraud; and (d) recognition or enforcement would not contravene the public policy of the U.S. In addition, proof of reciprocity may be an issue in the granting of judicial recognition of a foreign judgment.

The U.S. is receptive to recognition and enforcement of foreign country judgments. The recognition and enforcement of foreign judgments is governed by state common law, even in federal courts. In addition, twenty-five states and the Virgin Islands have adopted the Uniform Foreign Money-Judgments Recognition Act (UFMJRA). Most other states apply the principles of the UFMJRA without having formally adopted it. The UFMJRA defines a foreign judgment as "any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty." In addition, final judgments "granting or denying recovery of a sum of money, establishing or confirming the status of a person, or determining interests in property" should be enforced according to the Restatement (Third) of the Foreign Relations Law of the U.S. ("Restatement"). (The Restatements of Law, prepared by the American Law Institute, are compilations of

common law and statutory interpretation by the state courts and also include trends in the law. The Restatements are not a primary authority, such as a statute, but are instead a secondary authority.)

Pursuant to the UFMJRA and the Restatement, in order for a U.S. court to recognize a foreign judgment, (i) the foreign judgment has to have been rendered by an impartial court with procedures compatible to due process of law and (ii) the foreign court that issued the judgment has to have had jurisdiction over the parties. With respect to the first criteria, the recognizing court must determine, for example, whether the defendant had an opportunity for a full and fair trial. According to the Restatement, the recognizing court may determine the essential fairness of the foreign judicial system. With respect to the second criteria, U.S. courts again look to the concept of due process. In this regard, the Restatement (Second) Conflict of Laws § 117, Comment c (1971), states that enforcement of a foreign judgment will usually be accorded "except in situations where the original claim is repugnant to fundamental notions of what is decent and just in the State where enforcement is sought."

In addition, pursuant to the UFMJRA and the Restatement, there are other bases for non-recognition of the foreign judgment at the discretion of the court, including, the court that rendered the judgment did not have jurisdiction of the subject matter of the action; inadequate notice to the defendant; the judgment was obtained by fraud; the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the U.S. or of the state where recognition is sought; conflict of the judgment with another final judgment entitled to recognition; and the proceeding in the foreign court was contrary to an agreement between the parties to submit the controversy to a different forum.

It is possible that a U.S. court would enforce a judgment obtained by a foreign government or regulator that was deemed to be primarily remedial in nature, such as a judgment which included an order of disgorgement and restitution. As a general precept of international law, however, courts will not enforce penal judgments, or judgments for the collection of taxes or fines of another country, except as provided by a treaty, other international agreement, or as authorized by the court's own domestic laws.

Provisional Orders

Although it appears to be relatively uncommon for U.S. courts to be called upon to issue interlocutory orders in connection with provisional orders issued in foreign judicial proceedings, such orders may be available upon a proper showing. For example, in Republic of the Philippines v. Marcos, 806 F.2d 344 (2d Cir. 1986),

cert. denied, 481 U.S. 1048 (1987), the Second Circuit Court of Appeals upheld a preliminary injunction against the transfer or encumbrance of real property located in New York pending adjudication in the Philippines as to whether the property had been acquired with stolen government funds. The district court had granted relief upon a showing by the Philippine government of sufficiently serious questions going to the merits to make them fair grounds for litigation, together with irreparable harm and a balance of hardships tipping in the Philippine government's favor. The Court of Appeals agreed that there was sufficient evidence to support the grant of the preliminary injunction and noted that, "[t]here thus appears to be no bar to the grant of a preliminary injunction and the district court may either itself determine ownership [of the property] or defer to Philippine proceedings, assuming they proceed with sufficient dispatch to avoid raising problems of due process as to the property here." The court also pointed out that whether any final confiscatory action by the Philippines would be entitled to recognition in the U.S. was a question for another day.

(iii) What other means are available to a foreign authority that would have a similar impact on the preservation of assets?

Letters Rogatory - 28 U.S.C. § 1781

A foreign authority pursuing an asset freeze in the U.S. may seek assistance via letters rogatory, especially to obtain information. This route, however, is potentially time consuming because transmission through diplomatic channels may be required. It should be noted that in the U.S. there is no statutory obligation to comply with another country's request pursuant to letters rogatory, although U.S. federal courts have the authority to grant such assistance. See the discussion of 28 U.S.C. § 1782 below.

The Department of State is empowered by 28 U.S.C. § 1781(a) (1) to either directly or through suitable channels "receive a letter rogatory, issued, or request made, by a foreign or international tribunal, to transmit it to the tribunal, officer, or agency in the United States to whom it is addressed, and to receive and return it after execution." In general, this process includes receipt of a letter rogatory by the U.S. Embassy in the requesting country which is forwarded to the U.S. Department of State. The Department of State then forwards the letter to the DOJ. The DOJ then forwards the letter to the appropriate U.S. Attorney for execution. Alternatively, 28 U.S.C. § 1781(b) provides that direct transmittal of letters rogatory "to the tribunal, officer, or agency in the United States to whom it is addressed and its return in the same manner" is not precluded.

28 U.S.C. § 1782

In the absence of a treaty, 28 U.S.C. § 1782 is the only federal statute which confers on the U.S. federal judiciary the authority to provide assistance to foreign courts and tribunals. This statute authorizes the district court to issue an order, pursuant to a letter rogatory or other foreign request, directing that a person residing or found within the court's jurisdiction "give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal." Section 1782 provides that the court can appoint a "commissioner" who "has the power to administer any necessary oath and take the testimony or statement," which includes the power to issue subpoenas. To the extent that assets could be characterized as evidence, the subpoena power of this section could be utilized to secure them.

- (iv) What additional assistance in matters relating to securities and futures violations can your organization provide to assist a foreign authority (including regulatory, criminal and judicial authorities) in its efforts to freeze or repatriate assets located in your jurisdiction, including gathering or providing access to non-public information?

As stated above, we are not aware of any instance in which a foreign securities or futures regulator has directly attempted to enforce a foreign freeze order or a foreign securities or futures judgment in the U.S. However, in the event that such a situation arises, we encourage the authority to contact the SEC or the CFTC, as the case may be, in order to obtain guidance and assistance.

In 1988, with the adoption of Section 21(a)(2) of the Exchange Act, the SEC was authorized by the U.S. Congress to compel the production of evidence and testimony at the request of a foreign authority, without regard to whether the matter under investigation by that authority would constitute a violation of U.S. securities laws. The SEC has also entered into Memoranda of Understanding ("MOUs") with foreign securities authorities which facilitate the exchange of information between authorities. This information may be contained in existing files or may be gathered through compulsory steps taken by the SEC at the request of the foreign securities authority. Therefore, the SEC has the power to provide foreign regulators with information vital for investigations and judicial proceedings, including information necessary to locate the proceeds of foreign securities law violations.

Similarly, Section 12(f) of the CEA authorizes the CFTC to compel the production of documents and the giving of statements upon request from a foreign counterpart. The CFTC also has

entered into numerous MOUs with foreign regulators whereby it can provide information for investigations and foreign proceedings.

In addition to the types of assistance described above, the SEC and the CFTC may be able to suggest alternative strategies as to the most effective means of securing proceeds. As part of the assistance that can be offered, the SEC and the CFTC may be able to contact persons or entities in the U.S. who may have information regarding assets that were potentially illicitly obtained.

The SEC and the CFTC also are available to discuss their experiences in their own investigations and cases. The strategies utilized therein may be relevant to foreign regulators in pursuing an action in a U.S. court or may provide alternative methods for securing assets.

c. Procedures

- (i) Whether the nature of the judgment which a foreign authority is seeking to enforce (e.g., penal, remedial or disciplinary) or the forum which issued it (e.g., civil, administrative or criminal) will affect the foreign authority's ability to enforce the judgment?

Both the type of decision and the forum rendering it are likely to affect the likelihood of enforceability of a decision in the U.S. There is a possibility that a civil court decision or administrative decision of a foreign regulator that was deemed by a U.S. court to be remedial, rather than penal, could be enforced. It is far less likely that a criminal or disciplinary decision could be enforced, due to the historical reluctance of U.S. courts to enforce foreign penal judgments. See also Section II.A.1(b)(ii).

- (ii) What sort of notice and appeal rights are available to the person whose assets have been frozen? Can a freeze be put into place without prior notice to the party holding the assets?

Assuming that a foreign authority initiates an action in U.S. federal court, the same procedural protections, including notice and appeal rights, would apply to such action as would apply to an SEC or CFTC action. See I.A.2.b. Additionally, assuming that a foreign authority has a cause of action in U.S. federal court, an ex parte asset freeze (without prior notice to the defendants of the application for the order) may be available. See Section I.A.2.a.

2. Repatriation of funds

- a. Whether mechanisms exist for assets to be expatriated for return to foreign investors?

The mechanisms described in (b) below exist for assets to be expatriated for return to foreign investors.

- b. If so, what are these mechanisms, which channels and what procedures should be followed (direct request through judiciary channels, through the securities and futures counterpart or through other administrative or public authorities)?

SEC and CFTC Cases

The SEC and the CFTC have the authority to seek freezes of assets, as well as other injunctive relief, and the appointment of a temporary receiver to administer such restraining orders and to perform such other duties as the court may consider appropriate until a final adjudication on the merits of the case. The appointment of a receiver is considered essential to protect the interests of defrauded investors and to ensure that the assets of defendants are available upon a resolution on the merits of the case for disgorgement and restitution to investors. Following an adjudication on the merits, the U.S. court-appointed receiver has the authority to make disbursements to foreign investors who have been defrauded in the action which is the subject of his receivership, just as he would to U.S. investors. See also Section I.A.2.

Civil Actions Commenced by Investors

Upon the issuance of a final judgment in a civil action, the judgment debtor has a certain period of time in which to comply with the judgment. If the judgment debtor fails to comply, the judgment creditor could petition the court to issue a writ of execution directing a court officer to seize the assets of the judgment debtor and pay the judgment creditor out of the proceeds.

Forfeiture Actions

The DOJ has had some success in obtaining repatriation orders from courts in criminal forfeiture action relying on the authority of the court to issue restraining orders to preserve the assets. If the defendant failed to return the property within the control of the court, the DOJ has sought contempt sanctions. See United States v. Sellers, 848 F. Supp. 73 (E.D. La. 1994) (court issued restraining order pursuant to 21 U.S.C. § 853(e)(1)(A) directing the defendant to repatriate funds on deposit in the Cayman Islands); United States v. Lopez, 688 F. Supp. 92 (E.D.N.Y. 1988)

(court has authority to issue pre-trial order to defendant to transfer money to the U.S. for forfeiture).

Once property is forfeited under U.S. law, designated U.S. government officials may authorize the transfer of such property to foreign countries or foreign victims. There are two avenues for return of forfeited proceeds -- (i) petitions for remission and mitigation, and (ii) pursuant to a statutory provision for sharing assets.

Petitions for Remission and Mitigation

As stated above, a foreign victim or his or her representative may file petitions for remission and mitigation with the Asset Forfeiture Office of the U.S. Department of Justice. These petitions are ruled upon by the Director of the Asset Forfeiture Office. Once property is forfeited, the DOJ may grant such petitions and return the forfeited property to the foreign victims.⁹

Sharing Forfeited Assets with Other Countries

It is the policy of the U.S. to share proceeds of successful forfeiture actions with countries that facilitate the forfeiture of assets under U.S. law. Title 18, U.S.C. Section 981(i)(1), authorizes the Attorney General or Secretary of the Treasury, with the concurrence of the Secretary of State, to transfer property forfeited under 18 U.S.C. § 981 (a)(1) to a foreign country that participated directly or indirectly in acts leading to the seizure and forfeiture of the property. Although there are three subsections of Section 981 (a)(1), subsection (A) is most relevant to securities and futures frauds as it provides for the forfeiture of assets traceable to, or involved in, money laundering violations.

- b. Can foreign investors recover assets lost as a result of violations of foreign securities and futures laws through a private cause of action in the U.S.?

Foreign investors may have the ability to bring a private cause of action in the U.S. to recover lost assets as a result of violations of foreign securities and futures laws. Foreign investors would face the same burdens in bringing their actions that domestic investors would face. For example, the investors would have the burden of showing that the court has subject matter jurisdiction with respect to the claims. As the assets would be located in the U.S., there may be sufficient basis for a finding of subject matter jurisdiction. A more difficult issue may exist, however, with respect to establishing personal jurisdiction over the defendant for enforcement purposes if the defendant is not located within the U.S.

A discussion of the appointment of receivers is included in Part I.A.4.a.

II.B. EXPERIENCE OBTAINING ASSET FREEZES AND REPATRIATION

Overview

The CFTC and the SEC have found it critical to attempt to freeze assets while they remain in the United States rather than trying to trace and secure assets that have been moved offshore. The successful immobilization of assets at such an early stage not only precludes their dissipation pending the resolution of court proceedings, but also often motivates defendants to become engaged in proceedings and thus facilitates resolution of matters.

In deciding whether to freeze assets or take other action, authorities first need to gather information as to the location of assets, frequently on an expedited basis.¹⁰ Authorities then must assess information gathered to determine the existence of any relationship between the defendant and the bank. If the assessment indicates that proceeds of a fraud may have been transferred offshore or otherwise hidden from recovery, authorities should act promptly to secure such funds.

Because securing assets in foreign jurisdictions is problematic at best, the SEC and the CFTC usually seek to freeze assets in U.S. courts, employing varying methods, depending on the circumstances. First, if money remains in the U.S., the agencies immediately seek an asset freeze, sometimes on an *ex parte* basis. Second, if money has been transferred to a foreign bank branch of a U.S. bank, they may seek an order from a U.S. court directing the bank to freeze the money. Third, if assets have been transferred to a bank offshore (including foreign subsidiaries of a U.S. bank), authorities may seek an asset freeze on the theory that the foreign bank is holding the proceeds as a constructive trustee.¹¹ Fourth, authorities may seek a U.S. court order against a person controlling assets requiring that the proceeds be repatriated, including, if necessary, that the person sign a directive requiring the transfer of proceeds.¹² While the SEC also has initiated substantive actions abroad and sought enforcement of final civil judgments, these actions have proven both more costly and difficult than pursuing domestic remedies.

As any of the approaches described above may involve the assertion of jurisdiction over foreign institutions, such approaches may create tension between governments, raise difficult legal issues, and/or create uncertainty as to prosecuting authorities' ability to freeze assets. IOSCO can make a valuable contribution toward resolving these issues by considering and

developing mechanisms to provide regulators greater certainty as they attempt to secure assets transferred offshore.

CFTC Cases

In CFTC v. Eurogold Exchange, Gerald Rogers, et al., Civ. No. 90-03321 H (C.D. Cal. 1990), the CFTC and the State of California alleged that Eurogold and its principals offered and sold illegal commodity option contracts. The complaint, brought in the federal court for the Central District of California, sought equitable relief, including the imposition of a freeze on the defendants' assets, and the appointment of an equity receiver. The preliminary injunction subsequently entered by the court authorized and directed the equity receiver to be vested with all the powers of the corporate defendants' officers, to take into his immediate possession and control all the assets and property belonging to Eurogold, whether in the possession of defendants or others, and to administer such assets and property, in order to ensure against their loss, damage, and dissipation.

At about the same time the preliminary injunction was entered into in the United States in Eurogold, a request for assistance was made under the Treaty Between the United States and the Swiss Confederation on Mutual Assistance in Criminal Matters¹³ through the United States Department of Justice by the U.S. Attorney for the Central District of California, who had been cooperating with both the CFTC and the SEC in investigating Eurogold Exchange, Eurobond Exchange, Ltd. and Gerald L. Rogers. (The SEC also filed an action against Eurobond Exchange, another Rogers' operation in the United States, involving allegations of fraud in the sale of unregistered securities. SEC v. Eurobond Exchange Ltd. et al., Civ. No. CV90-378 DT (GHKX) (C.D. Cal. 1991)). Pursuant to the MLAT procedures, assets of Eurogold, Eurobond, and Rogers at various bank accounts in Switzerland were frozen by Swiss authorities. The receiver in the CFTC and SEC actions then made an initially unsuccessful attempt through civil court actions in Switzerland to obtain control of the frozen funds on behalf of defrauded customers.

Assistance initially was denied by the Swiss courts on the ground that the receiver was an arm of the United States court and therefore unable to receive the funds under Swiss law. The receiver, working in coordination with the CFTC, the SEC, and the United States Department of Justice, then hired local counsel in Switzerland who convinced Swiss authorities that the receiver was the legal successor to the Eurogold corporation and not an arm of the U.S. court. The Swiss court then released the frozen Swiss-held assets to the U.S. equity receiver, who in turn repatriated the money to the United States for distribution to the defrauded U.S. investors.

In CFTC v. William C. Dunn, Delta Consultants, Inc., Delta Options Ltd. and Nopkine Co. Ltd., Civ. No. 94-2403 (TPG) (S.D.N.Y. 1994), the CFTC filed a single-count civil complaint against William C. Dunn, a New Jersey resident, and three business entities through which he had acted: Delta Consultants, Inc., a New Jersey corporation; Delta Options, Ltd., a Bahamian corporation; and Nopkine Co. Ltd., a British Virgin Islands corporation. The defendants were charged with defrauding investors in the United States and overseas in connection with commodity options transactions on various foreign currencies in violation of the CEA. The CFTC simultaneously secured an ex parte restraining order in the District Court that, among other things, froze the defendants' assets. The court, at the CFTC's request, entered an order which appointed a temporary equity receiver to locate, preserve, and take control of all four defendants' property for the benefit of their customers. The CFTC applied for this order based on the serious allegations of fraud against the defendants, the fact that millions of dollars of customer funds remain unaccounted for, and the apparent transfer of large sums of money by defendants from New York to Switzerland shortly before the scheme unraveled.

Following the transfer of the funds to Switzerland, the CFTC, through the United States Department of Justice, requested assistance from the Swiss Central Authority pursuant to the Treaty Between the United States and the Swiss Confederation on Mutual Assistance in Criminal Matters.¹⁴ As a result of the MLAT request, the Swiss authorities froze certain of the defendants' assets held in bank accounts in Switzerland. Discovery in this case is ongoing. The CFTC hopes to repatriate the funds held in Switzerland via the court-appointed equity receiver following an adjudication on the merits, so that restitution can be made to the defrauded investors via the U.S. court-appointed receiver.

In CFTC v. Pundi-Forsten International (Holdings) Ltd., et al., Civ. No. 93-0067 RMT(SHX) (C.D. Cal. 1993), the CFTC and the State of California joined in alleging that Pundi-Forsten International (Holdings), Ltd., a Hong Kong corporation, (also known as the Standard Group and the Pundi-Forsten Group), four related California corporations, and nine individual officers, directors, and controlling persons of the corporate defendants, violated the off-exchange provisions of the CEA, as well as various provisions of California commodities laws, by offering and selling illegal off-exchange commodity futures contracts in foreign currencies and precious metals to members of the general public. The U.S. District Court entered an ex parte restraining order, freezing the assets of the named defendants, prohibiting the destruction or alteration of corporate records, and granting the CFTC access to those records. The District Court's order freezing the bank accounts of various defendants was then served on the U.S. and Hong Kong branches of Dah Sing Bank of Hong Kong. Dah Sing, having received notice of the freeze, then froze accounts in Hong Kong maintained in the name of, or under control of, various

defendants in the CFTC case. The defendants, whose accounts had been frozen by Dah Sing, then filed suit in the Supreme Court of Hong Kong, seeking payment to them of the funds in their accounts.

The CFTC promptly obtained an order from the U.S. District Court, directing Dah Sing to pay funds in the Hong Kong accounts of the defendants to the court-appointed equity receiver in the United States. Dah Sing declined to comply. Within hours of the U.S. court order, the Hong Kong Supreme Court, hearing of the action by the Dah Sing customers, entered its own order prohibiting Dah Sing from paying the funds to anyone, until such time as the Hong Kong Court made its ruling on the merits of the Dah Sing customers' claims. At the same time, however, the Hong Kong Court concluded that it was reasonable to acknowledge the U.S. freeze to the extent that it formed a basis for Dah Sing to decline to pay the funds to its Hong Kong customers. The Hong Kong Court thought it arguable that the freeze had the effect under Hong Kong law of creating a constructive trust over the funds for the U.S. customers, who were the victims of Pundi-Forsten's alleged illegal activities.

The CFTC and the court-appointed receiver in Pundi then pressed for the return of the approximately \$4 million that had been frozen in Hong Kong. The defendants entered a settlement agreement with the CFTC which returned a portion of the money that was frozen in Hong Kong to the United States. Of the approximately \$4 million that was frozen in Hong Kong, \$1.6 million was repatriated to the United States for distribution to defrauded investors by court-appointed equity receivers. For a discussion of the SEC's experience in Hong Kong, see SEC v. Wang and Lee, No. 88-4461 (RO) (S.D.N.Y. July 9, 1988).

In CFTC v. South African Controlled Investments (Pty) Ltd., Civ. No. PN 89-1923 (D. Md. 1989), funds of U.S. investors were solicited by South African Controlled Investments Ltd. ("SACI"), a boiler room located in Johannesburg, South Africa. SACI represented to its U.S. customers that all funds received would be held in SACI bank accounts located in the United States, to which customers were directed to send investment funds. In fact, the funds were transferred out of the United States almost immediately upon receipt, either to South Africa or to other foreign jurisdictions. A South African banking regulator entered a temporary asset freeze, based upon a concern about possible currency law violations by SACI. Unfortunately, the freeze did not succeed in immobilizing substantial assets, most of which had already been removed to other jurisdictions. Nonetheless, the CFTC's experience in SACI illustrates the principle that, in some instances, regulators may be able to coordinate actions in appropriate cases in order to effect simultaneous freezes in more than one jurisdiction. Obtaining such a freeze has the advantage of preserving investor assets, pending further judicial action on whether to repatriate such assets.

SEC Cases

SEC v. Eddie Antar, No. 89-CV-03773 (NHP) (D.N.J. Jan. 24, 1990), aff'd, 54 F.3d 770 (3d Cir. 1995); Litigation Release No. 12548, Fed. Sec. L. Rep. ¶ 95,341 (July 18, 1990) (Crazy Eddie case): The SEC initiated efforts in seven countries to secure the return of illegally obtained assets to defrauded investors in this insider trading and false financial reporting case, which resulted in a final judgment for over \$73 million. Antar fled the U.S. during the pendency of the SEC's civil action against him. At the time he fled, there was an outstanding order requiring him to repatriate assets, and the SEC subsequently obtained a default judgment against him. In addition, private civil actions were commenced against him by Crazy Eddie shareholders and a bankruptcy trustee was also appointed for the company. In connection with the SEC's case, the court appointed a trustee/receiver to marshal Antar's assets, and in effect precluded the private shareholders or others from pursuing Antar's assets abroad, instead charging the trustee/receiver with primary responsibility in this regard. Antar remained at large for over two years, until June 24, 1992, when he was arrested by Israeli authorities based on an extradition request from the U.S.

At a U.S. criminal trial during 1993, he was found guilty on all 17 counts of a fraud indictment charging securities fraud, mail fraud, conspiracy to commit securities fraud and conspiracy to commit racketeering. This past spring, the SEC's final civil judgment against Antar was upheld on appeal to the Third Circuit, but his criminal convictions were reversed and remanded on grounds of the appearance of judicial bias. U.S. criminal authorities are currently appealing this decision. As part of the U.S. criminal proceedings, a restitution order which would be enforceable as a civil money judgment was also issued.

Switzerland: The SEC, through the U.S. Department of Justice, used the U.S. - Swiss MLAT to obtain information and requested a freeze of illegally obtained assets. This approach resulted in the securing of over \$40 million of illegally obtained assets.

Money was frozen in response to this request, and alternatives were available through both civil and criminal channels to ensure the return of the illegally obtained proceeds to the U.S. for distribution to defrauded investors. Swiss mutual legal assistance law (Article 74) provides for the repatriation of such proceeds. In addition, a U.S. court appointed trustee/receiver initiated civil proceedings to enforce the civil judgment issued in the SEC's case. Thus, a dual civil and criminal approach was taken, with the view being that recovery under either method would be used to offset one another. In Geneva, the cantonal courts ruled favorably upon the trustee/receivers' suit to enforce the SEC's civil judgment although the funds -- approximately \$32 million -- ultimately were repatriated with Antar's counsel. The cantonal court ruled that

the fact that the SEC had requested assistance in criminal matters would have no effect on the civil judgment, and that the interests the trustee/receiver was pursuing were of a private (and not public) nature since the purpose of the judgment was to recover the assets of the defendant with a view toward compensating victims of Antar's securities law violations. A district court in Zurich, however, has ruled against the trustee/receiver on this same issue, and that ruling is being appealed. An additional \$8 million of proceeds are located in Zurich.

Israel: The SEC filed suit, jointly with the trustee/receiver, to enforce the U.S. court's final judgment and received an injunction freezing approximately \$13 million. Antar eventually decided to repatriate the funds in Israel in connection with his criminal sentencing.

Quebec, Canada: At the SEC's request, the Commission des Valuers Mobilieres du Quebec, which had no independent interest in the matter, used its administrative authority to freeze approximately \$1.2 million in bank accounts located in Montreal. This money was repatriated to the U.S. in connection with an action commenced by the trustee/receiver in Quebec to enforce the U.S. court's final judgment.

U.K.: The SEC filed suit against Antar to enforce the U.S. court's final judgment, and succeeded in freezing approximately \$1.3 million. In January 1994, the High Court of Justice, London, England, entered a judgment in favor of the SEC that requires Antar to pay these amounts and any other assets he may have in the U.K. In April 1995, Antar was granted leave by the English Court of Appeals to oppose the SEC's action on the ground that the final judgment is penal and therefore unenforceable in England. The litigation is continuing.

Liechtenstein: The trustee/receiver filed suit to enforce the judgment. Antar filed an opposition, and on December 12, 1994, the trial court in Liechtenstein ruled that the judgment was a public interest matter and thus was unenforceable. The trustee/receiver appealed this ruling, and the matter was referred to the Swiss Institute for Comparative Law ("Institute"). The Institute issued an opinion on October 23, 1995, based on which the Higher Court of the Principality of Liechtenstein ruled on November 16, 1995 that the claims made by the trustee/receiver were founded on private law principles and thus constitutes a civil action (as compared to administrative or penal action). Antar has appealed this ruling to the Liechtenstein Supreme Court of Justice.

In addition, a dual track approach has been taken in that the U.S. court has requested assistance in obtaining information and repatriation of the proceeds from judicial authorities in Liechtenstein via letters rogatory.

France: Pursuant to an MOU request, the Commission des Operations de Bourse ("COB") provided the SEC with information about Antar's assets that were held at two French banks in the name of his wife. Based on that information, the SEC obtained an order requiring Mrs. Antar to show cause as to why she should not be held in contempt for violating the U.S. court's repatriation order and freeze orders against Antar, and to repatriate those assets. Consequently, with the assistance of the COB, over \$300,000 of Antar's assets were repatriated to the U.S.

In United States Securities and Exchange Commission v. Pacific Waste Management, Inc. et al., No. CV-N-93-232-DWH (D. Nev. May 26, 1994), Litigation Release No. 13617, Int'l Series Release No. 535 (Apr. 21, 1993), an action was filed on behalf of the SEC in the Royal Court of Guernsey (Ordinary Division) (Channel Islands) ("Royal Court"). This was the first action ever brought by the SEC in the Channel Islands. The complaint in the U.S. action alleged that the defendants violated the registration and antifraud provisions of U.S. federal securities laws in connection with the sale of Pacific Waste Management, Inc. securities through an unregistered distribution and the making of false and misleading statements. The U.S. action also named as a relief defendant Dunne Finance, Ltd. ("Dunne"), a British Virgin Islands corporation controlled by one of the key defendants in the U.S. action, Mr. Bruno Victor de Vincentiis. In its complaint in Guernsey, the SEC alleged fraud on facts similar to the U.S. proceeding, but the action in Guernsey was filed against Dunne for the purpose of freezing Dunne's assets at a bank in Guernsey which represented a portion of the proceeds from de Vincentiis' fraudulent activities. The Royal Court issued an order on April 15, 1993, which, among other things, froze all monies and assets up to the sum of \$536,000 in the hands of the Guernsey bank and held in the name of Dunne. The Royal Court extended the freeze order in both 1994 and 1995. Efforts to repatriate the assets are ongoing.

ENDNOTES

1. In addition to answering the questions below, this section addresses the following issues also identified in the Guidelines for contribution: the basis on which a measure may be taken; the effects and consequences; any notice or appeal rights; potential difficulties; and renewability of the measure.

2. This section addresses the CFTC and SEC's respective authority for securing asset freezes via the judicial channel and briefly describes each agency's experience using such authority. In doing so, this section also addresses the following specific issues identified in the Guidelines for Contribution: what and whose assets may be frozen and for how long; allegations required to secure an asset freeze; how and by whom assets are frozen; and permissible uses of frozen assets (including whether frozen assets are available to pay penalties imposed by a securities or futures regulator or by a court).

3. Section 6c of the CEA provides, in relevant part, that:

Whenever it appears to the [CFTC] that any contract market or other person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of [the CEA] or any rule, regulation, or order thereunder, or is restraining trading in any commodity for future delivery, the [CFTC] may bring an action in the proper district court of the United States . . . to enjoin such act or practice, or to enforce compliance with this Act, or any rule, regulation or order thereunder, and said courts shall have jurisdiction to entertain such actions.

4. Section 21(d) provides, in relevant part, that:

Whenever it shall appear to the [SEC] that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter, the rules or regulations thereunder, [or rules of exchanges and other designated entities], it may in its discretion bring an action in the proper district court . . . to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond.

5. Pending appeal, parties also may apply for a stay of a judgment or order of a district court, or for an order "suspending, modifying, restoring or granting an injunction during the pendency of an appeal." Fed. R. App. P. 8(a). Such an application ordinarily must be made first to the district court, although it may be made to the court of appeals upon a showing that application to the district court is not practicable or that the district court denied an application or failed to afford the relief requested.

6. As requested by the Guidelines for Contribution, this section describes procedures available for returning assets to defrauded investors, discusses the benefits and disadvantages of available measures, and describes the role of the CFTC and the SEC in using these measures.

7. In addition, under 18 U.S.C. § 1956(a)(1)(B) and (c)(7)(B), it is a violation of U.S. law to conduct any financial transaction with respect to the proceeds of foreign bank fraud knowing the transaction is designed to conceal the nature, location, source, ownership or control of the proceeds of such fraud.

8. The U.S. may still proceed with the forfeiture of assets resulting from a foreign drug felony even if the foreign proceedings have not yet resulted in a final order of forfeiture so long as there is sufficient evidence connecting the property with foreign drug trafficking, and to establish that a foreign drug felony has in fact occurred.

9. There is express statutory authority to use forfeited assets to make restitution to victims under the major criminal forfeiture statutes. But, with the exception of the civil Financial Institution Reform, Recovery, and Enforcement Act of 1989 (FIRREA) (financial institution fraud) forfeiture law, civil forfeiture statutes do not contain that same authority. Thus, the DOJ has proposed both legislative and regulatory revisions to permit all victims of an offense underlying a forfeiture, as well as victims of related offenses, to file petitions for remission of the forfeited property, even though they lack a present or traceable ownership interest in such property.

10. This process often requires obtaining the records of any foreign financial institutions to which assets may have been transferred. Several methods may be used to obtain this information. For example, the SEC and CFTC frequently make requests to foreign authorities for investigative assistance to obtain information about foreign bank accounts. Information secured through such requests often becomes the key to tracing the transfer and location of assets, and may prove of critical importance in pursuing assets through court actions. In addition, in some situations letters rogatory are used to obtain such information.

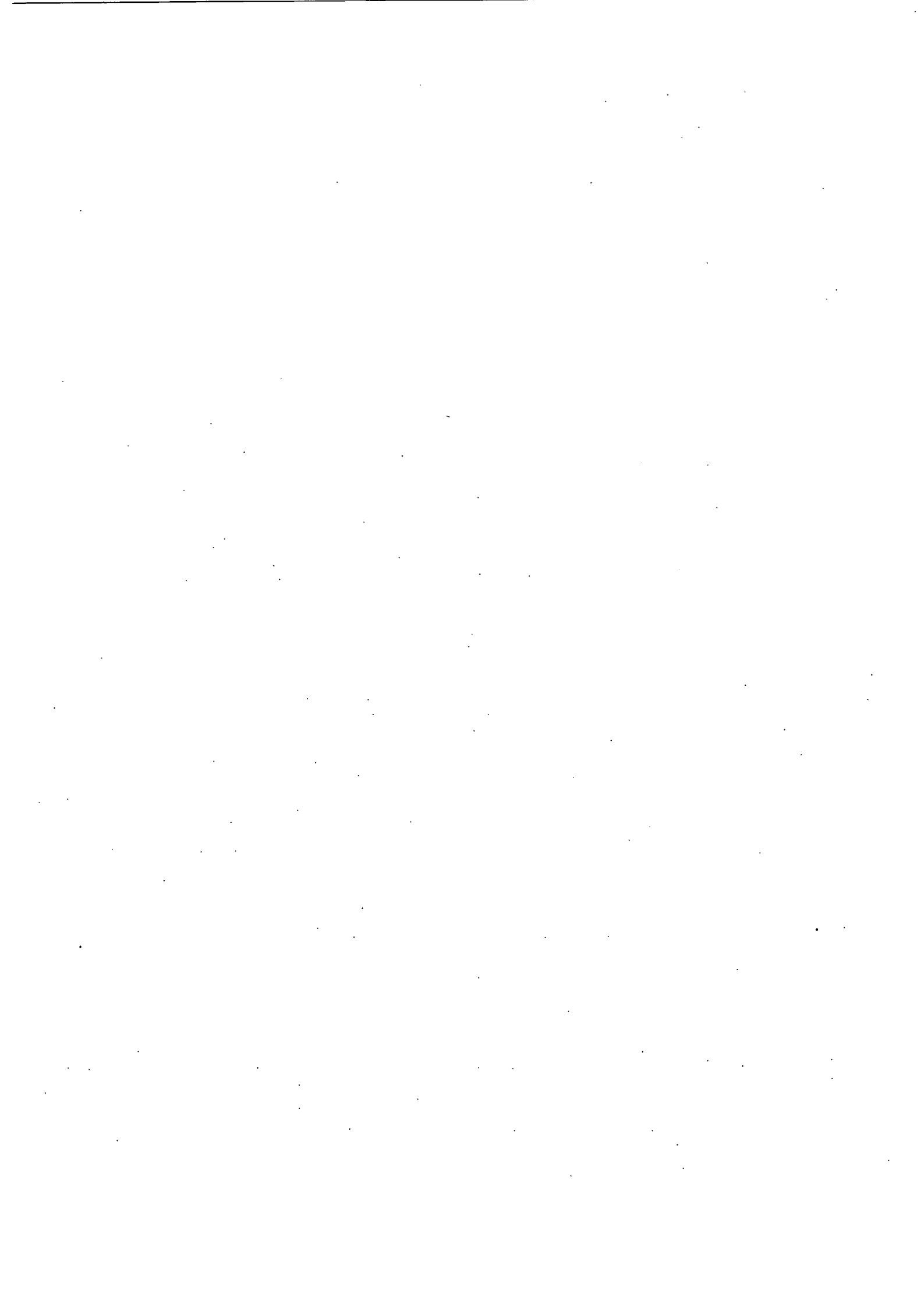
In certain circumstances, the SEC and CFTC also utilize "consent directives," written authorizations by a holder of a financial account administered by another party, directing the administering party to disclose account records to specified persons. U.S. courts may compel account holders to sign consent directives authorizing the release of foreign bank records.

11. In addition, the SEC and the CFTC may contact a foreign financial institution and notify the institution of its potential liability to defrauded investors should it fail to make inquiries to determine whether funds were fraudulently obtained or if it knowingly assists the perpetrators of a fraud.

12. This approach may be of limited utility when persons are located outside of the United States or have fled the jurisdiction after a proceeding has been instituted.

13. Treaty Between the United States of America and the Swiss Confederation on Mutual Assistance in Criminal Matters, January 23, 1977, 27 U.S.T. 2021. Article 1, paragraph 3 of the Treaty provides that: "The competent parties of the Contracting Parties may agree that assistance as provided by this Treaty will also be granted in certain ancillary administrative proceedings in respect of measures which may be taken against the perpetrator of an offense falling within the purview of this Treaty. Agreements to this effect shall be concluded by the exchange of diplomatic notes." At the time the asset freeze in Eurogold took place, the CFTC was not the beneficiary of such a diplomatic note; however, it now is.

14. The CFTC has been able to request such assistance in civil and administrative matters since November 3, 1993, when Diplomatic Notes to this effect were exchanged between the United States and the Swiss Confederation to expand the coverage of Article 1, Paragraph 3 of the Treaty.



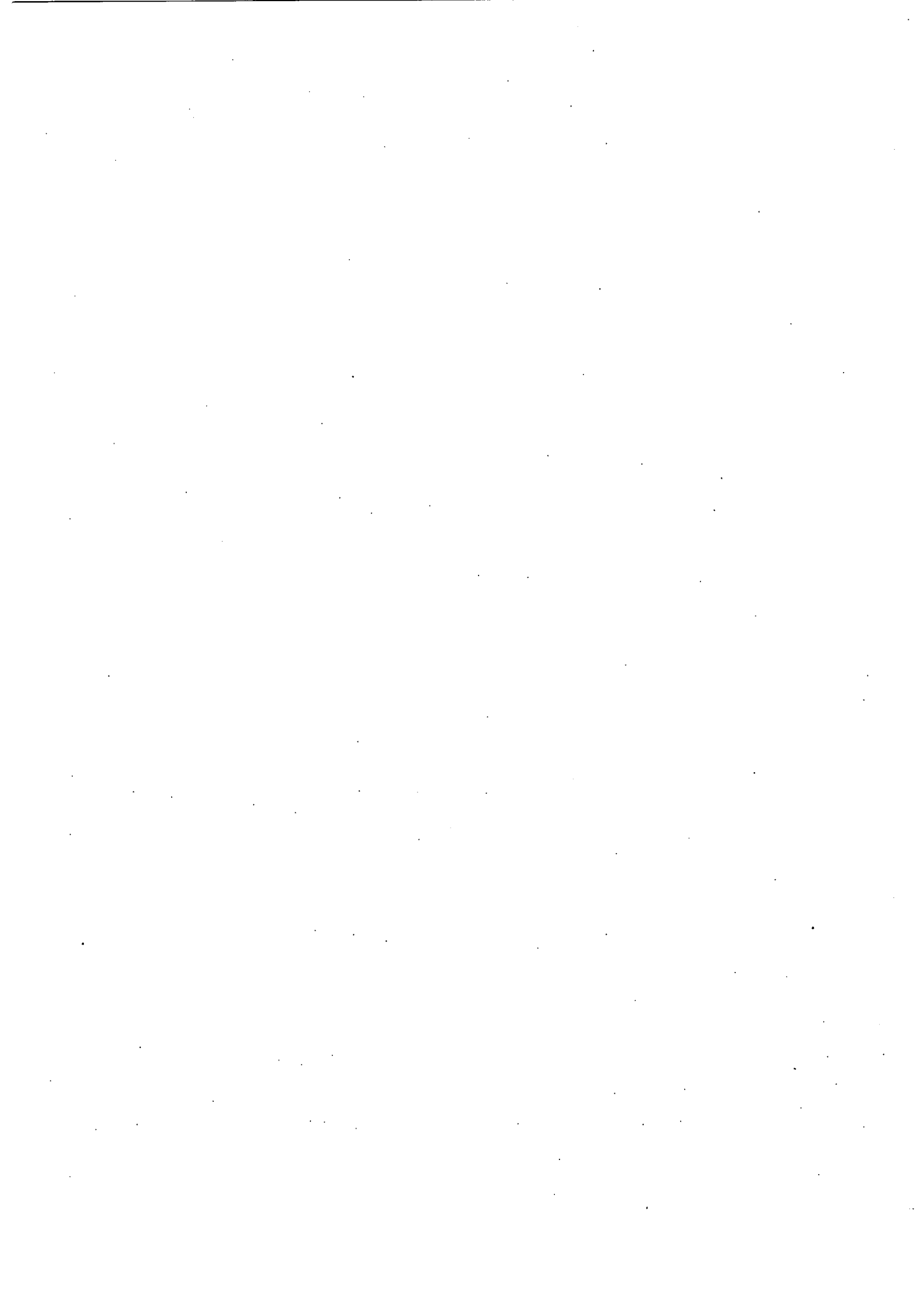
United States

National Futures Association



SummaryNFA

- When NFA's President, with the concurrence of its Board of Directors or Executive Committee has reason to believe that customer funds or assets are not properly safeguarded by a member, he may institute a Member Responsibility Action (MRA) in order to suspend member, freeze customer assets, order the transfer of customer accounts or restrict trading and solicitation activities.
- When it is necessary to file in injunctive action seeking the appointment of a receiver, NFA refer to the CFTC ;
- Concerning the measures available on a cross border basis to protect interests and assets defrauded investors, NFA would rely upon this ability to institute an MRA. If a foreign regulatory body presented NFA with its findings that an NFA member defrauded foreign investors, then NFA could institute an MRA to freeze customer assets. If an NFA member was not involved in the fraudulent activity but carried customer accounts controlled by a foreign entity directly involved, NFA could seek a Member's cooperation in an investigation and utilize a less formal measure (a Notice to Member) to require its member firms to identify the accounts at issue. But NFA would not require a Member firm to freeze customer assets or disburse funds to anyone other than the account owner without a judicial order.



ROBERT K. WILMOUTH
PRESIDENT

December 7, 1995

Mr. Bruno Gizard
Le Directeur General Adjoint
SBF-Bourse De Paris
Siege Administratif
39, Rue Cambon
73001 Paris

Re: Protection of Customer Assets

Dear Bruno:

As a member of IOSCO's Consultive Committee, I received a copy of your letter dated November 24, 1995 to Eudald Canadell. Your letter requests comments relating to the measures available on a cross-border basis to protect the interests and assets of defrauded investors. I appreciate the opportunity to offer my comments in response to the issues contained in your letter.

As you are aware, I am president of National Futures Association ("NFA"), a private not-for-profit membership corporation registered as a futures industry self-regulatory organization ("SRO") under the United States Commodity Exchange Act. NFA Member firms and Associates are required to adhere to all NFA requirements relating to the protection of customer funds and assets, including its financial requirements and compliance rules. If a reason exists to believe that a Member or Associate is not properly safeguarding customer funds and assets, then NFA may summarily suspend the Member or Associate from membership, require them to restrict their operations or direct them to take other remedial action. This summary action, referred to as a Member Responsibility Action ("MRA"), may be instituted at any time when NFA's President, with the concurrence of its Board of Directors or Executive Committee, has reason to believe that the action is necessary to protect the commodity futures markets, customers or other Members or Associates. Since NFA's inception in 1982, NFA has used this stringent remedial measure in numerous cases to suspend Members, freeze customer assets, order the transfer of customer accounts and restrict trading and solicitation activities. Typical circumstances in which NFA has instituted MRAs include:

- NFA instituted an MRA against a commodity pool operator ("CPO") and commodity trading advisor Member because it refused to allow NFA access to its books and records during an NFA investigation relating to the conversion of customer funds. This MRA prohibited the firm from: (1) soliciting customers; (2) placing any futures or options orders except for liquidation purposes; and (3) distributing or disbursing any funds from customer accounts except to benefit customers.

Mr. Bruno Gizard

December 7, 1995

- NFA has instituted several MRAs against futures commission merchant ("FCM") Members because they failed to demonstrate compliance with minimum net capital and segregation requirements and to maintain current books and records. These MRAs generally prohibited the firms from: (1) soliciting or accepting any additional customer accounts or customer funds other than to maintain performance margin; (2) placing trades for customer accounts except for liquidation purposes; and (3) distributing, disbursing or transferring any funds from customer accounts except to benefit customers.
- NFA instituted an MRA against a CPO Member because it failed to honor redemption requests made by pool participants. In this instance, both the funds and the person controlling the CPO were located offshore. Additionally, the CPO transferred funds offshore without providing notice to its customers and explaining the regulatory implications. This MRA suspended the firm from NFA membership and prohibited it from distributing or transferring any pool funds. The MRA also ordered the firm to cease all trading in its pool accounts except for liquidation purposes, honor all redemption requests and cease any solicitation activities.
- NFA instituted an MRA against an introducing broker ("IB") and CPO Member because it converted its pool's assets. This MRA prohibited the firm from acting in any manner requiring registration as an IB and from trading any pool except for liquidation purposes. The MRA also required the firm to transfer any and all pool assets to an FCM Member.
- NFA has instituted several MRAs against IB and FCM Members because they committed sales practice fraud. These MRAs generally prohibited the firms from using any promotional material unless approved by NFA and required the firms to provide certain enhanced risk disclosure statements and tape record all sales solicitations. In various instances, these MRAs have also suspended the firms from membership.

Although the aforementioned cases are not exhaustive, they hopefully provide guidance relating to the types of circumstances in which NFA may initiate a summary action when it believes that customer assets are in danger. Additionally, NFA referred several of the aforementioned cases to the U.S. Commodity Futures Trading Commission ("CFTC") which then filed an injunctive action seeking the appointment of a receiver against these firms. In

Mr. Bruno Gizard

December 7, 1995


these actions, a federal receiver may freeze assets and order disgorgement to compensate defrauded investors.

For your information, the CFTC has reviewed several NFA MRA actions and has questioned the appropriateness of instituting a summary proceeding to combat sales practice fraud. However, in instances involving activities such as conversion where there is an immediate danger that the Member or Associate may abscond with customer funds, the CFTC has not questioned NFA's ability to institute an MRA proceeding. Additionally, NFA is hopeful that recent cases pending review before the CFTC will clarify NFA's ability to institute MRAs in sales practice fraud cases.

In addressing the measures available on a cross-border basis to protect the interests and assets of defrauded investors, NFA would primarily rely upon its ability to institute a summary action, as described above. For example, if a foreign regulatory body presented NFA with its findings that an NFA Member or Associate defrauded foreign investors, then NFA could institute an MRA against the Member or Associate to freeze customer assets based upon the foreign regulator's information. Additionally, if an NFA Member was not involved in the fraudulent activity but rather carried customer accounts controlled by a foreign entity directly involved, then NFA could seek a Member's cooperation in an investigation and utilize a less formal measure, a Notice to Members, to require its Member firms to identify the accounts at issue. However, the innocent firms carrying the accounts could be liable to the wrongdoer if they refuse, upon request, to return funds. Therefore, NFA would not require a Member firm to freeze customer assets or disburse funds to anyone other than the account owner without a judicial order.

In sum, NFA has found its MRA procedures very effective to cease fraudulent activity endangering customer funds. As always, NFA is willing to offer and commit its resources to foreign regulatory bodies to protect the interests and assets of defrauded investors.

Sincerely,



Robert K. Wilmouth
President