A RESPONSE TO FEDDERS’ “WAIVER BY CONDUCT”

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Mr. Fedders’ remarkable article “Waiver by Conduct” deserves the close attention of securities regulators and governments primarily affected by the internationalization of the securities markets. We, at the Commission des Opérations de Bourse (C.O.B.), share the view that national markets, whether those of the United States or others, are becoming increasingly affected by events initiated outside their borders.

In cases involving transnational securities transactions, secrecy laws and blocking statutes of other countries have hampered investigations and attempts to prosecute individuals involved in fraud. Yet, to attain our common objective of maintaining the highest degree of market integrity, an increasingly efficient form of cooperation among countries is required.

The idea developed in Mr. Fedders’ article, leading him to call for the international recognition of the principle of “waiver by conduct”, is very exciting. It deems the very act of effecting a transaction outside the jurisdiction in which an operator is located, a willful waiver of the secrecy provisions that the operator, his agent, or institution might claim. Thus, it brings a simple and elegant solution to most of the problems encountered in international securities markets. The solution, of course, assumes that the operator was properly informed by his broker or banker of the alternatives: he submits to the full jurisdiction of the stock market in which he is operating or refrains from operating there altogether.

Although problems may result from the implementation of Mr. Fedders’ idea, nevertheless, we think it is an idea whose time has come. It should be welcomed by the international community.

To explain our acceptance of the idea, let us look at our experience. Between 1970 and 1982, the C.O.B. undertook three hundred investigations in which major buyers were identified. In more than forty, orders coming from a foreign country were considered questionable. So, the C.O.B. sees the problem of investigating transnational securities transactions as a real one. To address it, a three-pronged approach was adopted. First, the C.O.B. has asked foreign

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control authorities for their informal cooperation in these matters, offering reciprocity in exchange. Second, it has set specific rules to govern activities such as takeover bids. Finally, new provisions have been introduced into French law enabling the C.O.B. to devise new forms of cooperation with its foreign counterparts.

Applying the first part of this approach, the C.O.B. has asked for such help from agencies like the Take-over Panel in London, and the Belgian Banking Commission. The request was based on the recommendations of the Commission of the European Community dated July 15, 1977. These recommendations provide that any person who, by his profession or function, gets price-sensitive information, should refrain from engaging in any transaction before it becomes public. In some cases the contacted agencies have contributed by providing useful insights.

In cases where orders originated in Switzerland, the C.O.B. usually informed the Bankers' Association there, while also directly notifying the Swiss banks involved. This has led to a better understanding between the C.O.B. and the banking institutions in Switzerland, a recent development which we regard as very positive.

Attempts to gain Swiss cooperation formally through judiciary channels, where the request is usually based on a mutual assistance treaty like the Hague Convention, however, have failed to result in a waiver of bank secrecy. This is due to the fact that insider trading is not a criminal offense in Switzerland.

The second part of the approach has resulted in the adoption of certain regulations designed to deny market access to those intending to trade secretly. The takeover bid regulation is a case in point. It requires the bidder, target, their directors, 5% shareholders, and other persons acting “in concert” to make a daily declaration of any purchase or sale of the offeree's shares. A similar requirement applies to trading in offerors' shares if those involve an exchange of securities. Since 1978, these requirements were extended to any person who acquires at least 0.5% of the offeree's shares at the beginning of the bid. The transactions are all published in the *Official Bulletin of the Stock Exchange*.

In order to prevent buyers from concealing their purchases by using a foreign bank, French banks and brokers executing purchase orders during a tender offer must be willing to disclose to the C.O.B., if asked, the identity of the buyer. If the buyer is not acting for his own account, the bank or broker must notify the buyer that this identity must be revealed, if it is requested by the C.O.B. However, extending this special tender offer procedure to all orders from foreign banks would, as noted by Mr. Fedders, drive securities business off-shore and place undue burdens on brokers and dealers.

The last part of this approach involves suggesting to the government new provisions that would allow specific exceptions to the blocking law of 1980, and asserting the C.O.B.'s ability to cooperate with other supervisory bodies. This was achieved through law no. 83-1 of January 3, 1983 (article 33).
allows the C.O.B. to share its information with other supervisory authorities, whether in the EEC or outside, so long as they satisfy certain conditions including reciprocity, co-extensive authority, and confidentiality.

These provisions imply a recognition of the investigative powers of administrative agencies and of the possibilities of exchanging information in ways other than through judiciary channels. But they preserve the C.O.B.’s duty of confidentiality; it exchanges information only with agencies that observe that duty. Furthermore, the provisions could also supply an appropriate basis for the C.O.B. to enter international mutual assistance agreements.

The “waiver by conduct” principle is certainly a promising and far-reaching one, and the C.O.B. welcomes it. But this is only the easiest step in a long process. An effective implementation of that principle requires going further and organizing the enforcement instruments. This step is likely to be more difficult. But if the condition of reciprocity is met, the C.O.B. would be willing to participate with the other major interested countries in an international effort, aimed at setting an agreement on the basis of this principle and the organized enforcement instruments.

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