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DUTY OF DIRECTORS WITH RESPECT TO POTENTIAL VIOLATIONS OF U.S. LAW BY FOREIGN SUBSIDIARIES

*Stephanie M. Phillips**

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I. INTRODUCTION AND BACKGROUND

This article considers whether the directors of a parent corporation breach their fiduciary duty to the shareholders and the corporation when they fail to obtain information concerning the business affairs and activities of a foreign subsidiary or to investigate fully the activities of a subsidiary, when those directors have in-

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formation that the subsidiary may be violating United States law. These issues were originally raised in connection with alleged violations of the Rhodesian Sanctions Regulations[1] and United States restrictions concerning sales to South Africa and Namibia by the wholly owned foreign subsidiaries of United States corporations. In response to allegations that their subsidiaries have carried on business in contravention of some of these requirements, several United States corporations have argued that foreign law provisions preclude control over their subsidiaries' operations and that certain business information regarding these entities is completely unavailable to parent corporations. Relying on assurances often given by the subsidiary's management, parent corporations have represented that their subsidiaries are in compliance with United States law.

Concerned shareholders have asked whether the directors of the parent corporation in execution of their fiduciary duties to the the parent corporation and its shareholders, have a legally enforceable obligation to *know* what the foreign subsidiary is doing. Furthermore, they have asked whether and to what extent the board of directors has a duty to investigate concrete allegations that its subsidiary may be operating in violation of United States law.

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1. After Rhodesia unilaterally declared itself an independent nation in 1965, the United Nations Security Council imposed mandatory economic sanctions prohibiting the sale of all goods other than humanitarian supplies to Rhodesia. Pursuant to the authority vested in him by the United Nations Participation Act of 1945, *as amended*, 22 U.S.C.A. § 287c(a) (Supp. 1978), President Johnson issued Executive Order No. 11,419 in July 1968, which adopted the essential language of the U.N. resolution banning trade with Rhodesia. *See* Exec. Order No. 11,419, *reprinted in* 22 U.S.C.A. § 287c app. (1979), *as amended by* Exec. Order No. 11,978, 3 C.F.R. § 110 (1978). The Office of Foreign Assets Control, Department of the Treasury, has issued "Rhodesian Sanctions Regulations" designed to implement that Executive Order. The Sanctions Regulations prohibit the following transactions, among others, by "person[s] subject to the jurisdiction of the United States," except as authorized by the Secretary of the Treasury:

> (3) Transfers of property which involve merchandise destined to Southern Rhodesia or to or for the account of business national thereof;
>
> (4) Other transfers of property to or on behalf of or for the benefit of any person in Southern Rhodesia (including the authorities thereof) . . .;
>
> (b) Any transaction for the purpose of which has the effect of evading or avoiding any of the prohibitions set forth in paragraph (a) of this section is prohibited.

The full text of the Rhodesian Sanctions Regulations is attached as Appendix A.

Current law imposes on directors an obligation to both know and investigate violations of United States law. In addition, it appears that directors' duties to know and to investigate extend to situations in which domestic subsidiaries may have violated United States law. For example, the principles outlined in this article oblige a director of a corporation to take concrete action, once the board has received specific and realistic allegations that its subsidiary may be engaging in activities in violation of civil rights laws, environmental protection laws, or occupational safety laws.

The following points are developed throughout this article:

1. It may be argued that corporate directors have a duty to remain informed about significant corporate activities. This duty necessarily implies a correlative obligation to obtain detailed information about the business activities of a foreign subsidiary.
2. The board of directors, having notice of circumstances which would raise the suspicions of a prudent man, has a duty both to investigate those circumstances and to take corrective action commensurate with the resulting findings.
3. A director should not be able to avoid fiduciary duties by taking the position that foreign law prevents the disclosure of information relating to to the activities of the subsidiary in question.
4. At common law, a director is personally liable only for losses suffered by the corporation that result from neglect of board duties.
5. At common law, shareholders may be able to obtain a mandatory injunction to compel directors to undertake an investigation of the activities of subsidiaries. Courts, however, are reluctant to interfere with matters of internal management entrusted to the discretion of the board of directors.
6. In regard to controlling the activities of subsidiaries operating in countries such as South Africa, additional new federal statutes and regulatory requirements should be imposed (a) restricting the sales activities of these subsidiaries, (b) requiring United States parent corporations to obtain and make available to the public full reports on the activities of these subsidiaries, and (c) creating rights of actions for shareholders when these obligations are not met.

II. Discussion of Case Law

With the increasing complexity of modern corporate structure, the nature of the duty that a director owes to a corporation and its shareholders has changed over time. Today it is generally recognized that directors may delegate responsibility for day-to-day management decisions to appropriate corporate officers. To reflect the realities of modern corporate life, the Commission on Uniform Laws revised the Model Business Corporation Act in 1974 to provide that "the business and affairs of a corporation shall be managed *under the direction* of "a board of directors."[2] Delaware has adopted similar statutory language.[3] Although a board may delegate everyday management responsibilities, the company's directors are not relieved of "ultimate managerial responsibility,"[4] or of their duty to oversee the activities of delegates.[5]

In the discharge of his duty to direct the management of a corporation and supervise the activities of the board's delegates, a director must exercise the same ordinary care and diligence a prudent man in similar circumstances would exercise.[6] A director of a parent corporation must exercise the same degree of prudence with respect to the affairs of a wholly owned subsidiary as to the affairs of the parent. The leading case of *General Rubber Co. v. Benedict*[7] affirmed this principle. Judge Cardozo upheld the right of a corporation to sue its directors for failure to inform the corporation that the manager of a wholly owned subsidiary was embezzling money from the subsidiary. The value of the subsidiary's shares held by the parent corporation plummeted as a result of the embezzlement. Analogizing the duty of a director of a parent to that of a trustee, Judge Cardozo reasoned:

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2. The italicized language was added by the 1974 revision to the Model Bus. Corp. Act Ann. § 35, para. 1 (2d ed. 1977 Supp.) (emphasis added).

3. *See* Del. Code Ann., Subch. IV, § 141(a) (1976).

4. *See, e.g.*, University Computing Co. v. Lykes-Youngstown Corp., 504 F.2d 518, 532 (5th Cir. 1974).

5. "A corporate director . . . may delegate his investment responsibility to fellow directors, corporate officers, or even outsiders, but he must continue to exercise general supervision over the activities of his delegates." Stern v. Lucy Webb Hayes Nat'l Training School for Deaconesses and Missionaries, 381 F. Supp. 1003, 1013 (D.D.C. 1974); *see also* Briggs v. Spaulding, 141 U.S. 132, 165 (1891) (directors "are entitled under the law to commit the banking business, as defined, to their duly-authorized officers, but this does not absolve them from the duty of reasonable supervision. . . .")

6. *See, e.g.*, Briggs v. Spaulding, 141 U.S. at 152; Harman v. Willbern, 374 F. Supp. 1149, 1161 (D. Kan. 1974), *aff'd*, 520 F.2d 1333 (10th Cir. 1975); Graham v. Allis-Chalmers Mfg. Co., 41 Del. Ch. 78, 84, 188 A.2d 125, 130 (1963); Neese v. Brown, 218 Tenn. 686, 694, 405 S.W.2d 577, 581 (1964).

7. 215 N.Y. 18, 109 N.E. 96, 174 N.Y.S. 7 (1915).

> Here the stockholder is not suing the agent of another company; it is suing its own agent. The stockholder happens to be itself a corporation; the defendant happens to be a director; but the legal problem would be the same if the plaintiff were a natural person, and the defendant an executor or trustee . . . . If the trustee of an estate, holding shares in a bank, should learn that the cashier was looting it, and with that knowledge should keep silent, the defendant would have us say that the beneficiaries under the will would have no remedy for the ensuing loss . . . . Yet his duty to preserve the estâte, the breach of that duty, and the resulting damage, would seem to call for the application of the principle that there is no wrong without a remedy. The case supposed does not differ in its essence from the case presented.
>
> The defendant, as a director of a corporation, should have taken the same care of its property that men of average prudence take of their own property.[8]

Clearly directors of the parent have certain fiduciary obligations with respect to minority shareholders of the subsidiary.[9] While directors of a parent corporation owe fiduciary duties to minority shareholders of the subsidiary, those directors also owe their own shareholders fiduciary duties with respect to the management of the affairs of the subsidiary. Indeed, the fiduciary duties of a parent corporation to its shareholders may limit the duty of a parent to its subsidiary.[10] The common thread that runs through the relevant case law is that a corporation owning a controlling interest in another corporation is not merely another shareholder. The directors of the controlling corporation have fidiciary obligations to minority shareholders of the subsidiary. Most importantly, however, the directors have fiduciary obligations to their own shareholders which may not be avoided because of the parent corporation's status as a shareholder of the subsidiary.

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8. *Id.* at 22, 109 N.E. at 97, 174 N.Y.S. at 8. *See also* Piccard v. Sperry Corp., 30 F. Supp. 171 (S.D.N.Y. 1939), where the court held that a shareholder of the parent could maintain a derivative suit against the directors of the parent for breach of duty in connection with a sale by the subsidiary of stock owned by the parent.

9. *E.g.*, Zahn v. Transamerica Corp., 162 F.2d 36 (3d Cir. 1947). *See also* 13 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 5766, 5811 (rev. perm. ed. 1970 & 1978 Supp.) [hereinafter cited as FLETCHER].

10. *See, e.g.*, Getty Oil Co. v. Skelly Oil Co., 267 A.2d 883, 888 (Del. 1970) (holding that a parent corporation need not share its oil import quotas with its subsidiary).

A. *Duty to Remain Informed of Corporate Affairs*

Several jurisdictions have held that a prudent director is obliged to remain informed about corporate affairs. As one court has stated,

> It is the obvious duty of directors to know what is transpiring in the business affairs of their corporation. They cannot assume the responsibilities of their fiduciary position, then simply close their eyes to what is going on around them and thereby avoid the consequences by the mere failure to act. While corporate directors are not liable for errors of judgment, nevertheless, the law holds them accountable for that which they reasonably should have known or discovered in the discharge of their duties . . . . Mere passivity and disavowal of knowledge alone do not and should not constitute a pass to freedom from responsibility . . . .[11]

A director's duty to be knowledgeable about the corporation's practices was emphasized in a special report recently issued by the Securities and Exchange Commission in connection with an investigation of the fraudulent activities of a large modular home building corporation.[12] The SEC filed a complaint against Stirling Homex charging that the corporation had issued materially false registration statements, press releases, and periodic reports to the Commission. On the basis of information obtained from its official

11. Platt Corp. v. Platt, 249 N.Y.S.2d 1, 6 (Sup. Ct. 1964), *aff'd mem.*, 258 N.Y.S.2d 629 (App. Div. 1965), *rev'd on other grounds*, 270 N.Y.S.2d 408 (N.Y. 1966) (citations omitted). *Accord*, Atherton v. Anderson, 99 F.2d 883, 888 (6th Cir. 1938) ("directors should retain and maintain a reasonable control and supervision over the affairs of the Bank, especially its larger and more important ones, to the end that they may keep themselves informed of its condition"); McGinnis v. Corp. Funding & Finance Co., 8 F.2d 532, 538 (M.D. Pa. 1925) (" 'it is the duty of directors to acquaint themselves with the affairs of the company so far as it is possible to do so, to learn of its methods, to be diligent, to know of its condition . . . .' " (quoting the special master's report summarizing the law); Barnes v. Andrews, 298 F. 614, 615 (S.D.N.Y. 1924) (director has a duty to keep himself informed in some detail of the corporation's affairs and conduct of business); Van Schaick v. Aron, 170 Misc. 520, 534-35, 10 N.Y.S.2d 550, 563 (Sup. Ct. 1938) (directors " 'should know of and give direction to the general affairs of the institution and its business policy, and have a general knowledge of the manner in which the business is conducted, the character of the investments and the employment of the resources' ") (*quoting* Kavanaugh v. Commonwealth Trust Co. of New York, 223 N.Y. 103, 106, 119 N.E. 237, 238 (N.Y. 1918)).

12. "Report of Investigation in the Matter of Stirling Homex Corporation Relating to Activities of the Board of Directors of Stirling Homex Corporation," [1975-76 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 80,219 (July 16, 1975).

investigation of the corporation's alleged fraudulent activities, the SEC issued a special public report commenting on the two outside directors with considerable business experience who failed to take the time to understand the corporation's accounting practices or to question management practices and decisions. After noting that it was the Commission's view that these directors had performed inadequately in protecting the interests of shareholders, the Commission concluded:

> There existed no internal system by which they [the outside directors] were regularly provided with significant information concerning corporate affairs and to some extent the [*sic*] recognized this deficiency. For example, Kheel and Castellucci [the outside directors] were not normally provided with financial projections, corporate development plans or the status of corporate contracts and agreements. In the Commission's opinion, they did not obtain a sufficiently firm grasp of the company's accounting practices and other aspects of the company's business related thereto to enable them to make an informed judgment of its more important affairs or the abilities and integrity of its officers. Kheel and Castellucci relied upon the fact that Stirling Homex's independent accountants had accepted these accounting practices as being in conformity with generally accepted accounting principles. While this reliance was understandable, it resulted in their making no significant effort to analyze or familiarize themselves generally with these accounting practices, and in the opinion of the Commission, it resulted in their failure to understand the implications of these accounting practices and their susceptibility to abuse. While they periodically asked general and conclusory questions, they frequently obtained only superficial answers which they accepted without further inquiry.[13]

The SEC condemned similar conduct by corporate directors in a recent report concerning the obligations of outside directors to inform shareholders about the basic operations of a company.[14] According to the report, the outside directors permitted the company to issue favorable reports and press releases which omitted information about the company's impaired financial condition. The directors also "did nothing effective to ensure that they be

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13. *Id.* at ¶¶ 85,462-63.

14. "Report of Investigation in the Matter of National Telephone Co., Inc., Relating to Activities of the Outside Directors of National Telephone Co., Inc.," [1977-78 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 81,410 (Jan. 16, 1978).

provided accurate, current information."[15] In response to the directors' assertion that they relied in good faith on management and company counsel's advice concerning the need for disclosure, the Commission stated: "[D]irectors have a responsibility affirmatively to keep themselves informed of developments within the company and to seek out the nature of corporate disclosures to determine if adequate disclosures are being made."[16]

A failure by outside directors to control and to supervise adequately the company's officers and managers was the basis for injunctive relief in *SEC v. Shiell.*[17] According to a description of the complaint,[18] the SEC alleged that the directors relied solely on information supplied by the chief officer of the company and failed to request other information relating to that part of the business that had generated increased earnings.[19] The complaint further alleged that the directors did not question the accuracy of the information they received from the chief officer, nor did they seek information from other officers of the company.[20] As reported by CCH, the court stated that all but two of the former officers and directors consented to a permanent injunction.[21] The two remaining defendants, whose position the court did not identify, were unsuccessful in having the complaint dismissed for failure to state a claim on which relief could be granted.[22] The complaint in *Shiell* and the statements in recent SEC reports support the conclusion that a director has an obligation to obtain information about significant corporate matters, particularly when that information is not forthcoming from management.

B. *Duty to Investigate When Put on Notice of Potential Wrongdoing*

In determining whether a director has performed prudently, courts have consistently recognized that a director is on notice of

15. *Id.* at ¶ 88,880.
16. *Id.*
17. [1977-78 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,190 (N.D. Fla. 1977).
18. *See generally* 383 SEC. REG. & L. REP. (BNA) A-8-11 (Dec. 22, 1976).
19. *Id.* at A-10.
20. *Id.*
21. SEC v. Shiell, [1977-78 Transfer Binder] FED. SEC. L. REP. (CCH) at ¶ 92,384.
22. *Id.* at ¶ 92,387.

facts sufficient to raise the suspicisons of a prudent man who has a clear duty to take corrective action appropriate to the circumstances. The Supreme Court acknowledged this principle in the leading case of *Briggs v. Spaulding*:[23]

> If nothing has come to [the directors'] knowledge, to awaken suspicion of the fidelity of the president and cashier, ordinary attention to the affairs of the institution is sufficient. If [the directors] become acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is required, and a want of that care certainly makes them responsible.[24]

In *Graham v. Allis-Chalmers Mfg. Co.*,[25] the court set forth the standard of care required of directors as follows:

> [I]t appears that directors are entitled to rely on the honesty and integrity of their subordinates until something occurs to put them on suspicion that something is wrong. If such occurs and goes unheeded, then liability of the directors might well follow, but absent cause for suspicion there is no duty upon the directors to install and operate a corporate system of espionage to ferret out wrongdoing which they have no reason to suspect exists . . . .
> If he has recklessly reposed confidence in an obviously untrustworthy employee, has refused or neglected cavalierly to perform his duty as a director, or has ignored either willfully or through inattention obvious danger signs of employee wrongdoing, the law will cast the burden of liability upon him.[26]

The shareholders in this case brought suit alleging that the company's directors had a duty to take action to learn of the antitrust violations of its employees. The director-defendants were found not liable because they established that as soon as they had "grounds for suspicion [of antitrust activity], the Board acted promptly to end it and prevent its recurrence."[27]

In *DePinto v. Provident Security Life Insurance Company*,[28] a case involving the "looting" of a corporation after sale of control, the court upheld a jury verdict imposing liability on a former director who failed to keep informed of certain corporate affairs

23. 141 U.S. 132 (1891).
24. *Id.* at 148.
25. 41 Del. Ch. 78, 188 A.2d 125 (1963).
26. *Id.* at 85, 188 A.2d at 130.
27. *Id.*
28. 374 F.2d 37 (9th Cir.), *cert. denied*, 389 U.S. 822 (1967).

and to investigate whether the sale of control was in the best interest of the corporation.[29] The court determined that there was sufficient evidence to support the lower court's conclusion that the director should have (1) remained on the board, (2) actively opposed the plan for sale of control, and (3) if necessary, brought the matter to the attention of the shareholders and state regulatory officials.[30] The court held that the director in *DePinto* was given sufficient warning signals that the transaction merited further investigation.[31]

A similar situation arose in *Prudential Trust Company v. Brown*,[32] in which bank directors were held negligent for failure to take effective action to correct mismanagement practices brought to their attention by a bank commissioner's report.[33] The court held that in light of specific mismanagement allegations, the bank directors were not justified to rely on assurances by bank officers that the claims were groundless. It stated further that:

> The conditions reported by the Bank Commissioner should have put [the directors] upon inquiry as to the true state of affairs, and makes them chargeable with the knowledge which such inquiry would have disclosed. The statements of condition submitted to them by their officers, in the absence of information to the contrary, could have been relied upon by them and acted upon without negligence, but with information at hand from an independent and impartial source that things were not as they appeared on the surface, this to my mind charged them with the duty of further inquiry and investigation, and reliance upon the officers under those circumstances was not sufficient.[34]

The court charged the directors with knowledge of the contents of the commissioner's report as well as with knowledge of facts which would have been gained from a comlete investigation.

An affirmative obligation to take corrective action was also recognized in *Walker v. Man*,[35] in which the court stated,

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29. *Id.* at 44.

30. The court emphasized the following facts: the target company itself was in a deficit condition; the plan to transfer was executed in a hasty manner; the director was aware of complaints about the target company's management; and the director was not told the details of the transaction. *Id.* at 43.

31. *Id.* at 43-44.

32. 271 Mass. 132, 171 N.E. 42 (1930).

33. *Id.* at 151, 171 N.E. at 50.

34. *Id.*, 171 N.E. at 50 (quoting the findings of the master).

35. 142 Misc. 277, 253 N.Y.S. 458 (Sup. Ct. 1931).

> As directors, these defendants were not only obligated to do nothing wrongful themselves, but to attempt to prevent wrongdoing by their fellow directors, and, if wrong be committed, to seek to rectify it. Passivity and disavowal of knowledge alone do not constitute a pass to freedom from responsibility. A director may not shut off liability by shutting off his hearing and sight. It is his duty to know what is transpiring. The company's stockholders and creditors, as well as the public, have a right to rely upon the performance by him of the duties of a director.[36]

The foregoing cases suggest that if a director has knowledge of specific allegations that his company may be violating U.S. law, it is incumbent upon that director to take some affirmative action to investigate those allegations. What the cases do not make clear, however, is whether the prudent director must investigate claims himself or whether he may rely on management's efforts to review the corporation's compliance with United States law. Arguably, a director may rely in good faith on the business records of the corporation and reports of corporate officers as long as there is no indication that the officers are untrustworthy or the corporate records and reports are inaccurate.[37] Nevertheless, the Securities and Exchange Commission's Report on the Stirling Homex directors clearly suggests that a director may not rely on "self-serving" reassurances from management or refuse to scrutinize corporate affairs.[38] In short, perfunctory and general answers by management will not suffice; nor will an exculpatory report by a corporate officer involved in the conduct under investigation.[39]

Where directors are faced with specific charges that a subsidiary is violating United States law, can a prudent director simply rely on management to ferret out the facts? The *Graham* case suggests that a prudent director may rely on management as long

36. *Id.* at 278-79, 253 N.Y.S. at 462. *See also* Platt Corp. v. Platt, 249 N.Y.S.2d at 5-7.

37. *See* Cheff v. Mathes, 41 Del. Ch. 494, 506, 199 A.2d 548, 555-56 (1964); Graham v. Allis-Chalmers Mfg. Co., 41 Del. Ch. at 85, 188 A.2d at 130; Model Bus. Corp. Act. Ann., § 35, para. 1, ¶ 2.

38. *See generally* Stirling Homex, [1975-76 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 80,219 at ¶¶ 85,461, 85,462-63.

39. In several cases involving the judgment of a board of directors not to pursue claims seeking recovery from the board, courts have required that the board's decision not to sue must have been made by independent directors who did not participate in or approve the transactions on which the claims are based. *See* Nussbacher v. Chase Manhattan Bank, 444 F. Supp. 973, 977 (S.D.N.Y. 1977); Gall v. Exxon Corp., 418 F. Supp. 508, 519 (S.D.N.Y. 1976).

as there is no indication that management might have participated in, or had knowledge of, the alleged conduct or that it would not conduct a thorough, good-faith investigation of the alleged conduct.[40] However, if a director has or should have had reason to believe that something less than a complete and objective report would be provided, he must take steps to obtain adequate information.[41] If further steps are not taken, it would seem that a director's decision, based on a report which he knew or should have known was incomplete, would be tainted with the bias and bad faith of the report.

Closely related to the issue of the directors' good-faith reliance on reports issued by internal management is the question of whether a decision based on these reports would be insulated from judicial review by the "sound business judgment" rule. The rule provides that absent allegations of directors' bad faith or misconduct, courts should refrain from interfering in directors' decisions relating to the internal management of a corporation.[42] It has generally been applied to deny standing to shareholders asserting derivative claims based on issues relating to internal corporate affairs. However, this author submits that where the directors' decision may result in continuation of illegal activity, the business judgment rule no longer affords protection to the board.

In several cases involving allegations of illegality, courts have not invoked the business judgment rule to protect the directors. For example, in *Miller v. American Telephone & Telegraph Company*,[43] the business judgment rule did not bar suit by the shareholders of AT&T who alleged that the directors' decision not to collect a debt owed to the corporation violated the federal campaign contribution laws and thereby resulted in a breach of fiduciary duty. In reversing the lower court's dismissal of the

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40. 41 Del. Ch. at 85, 188 A.2d at 130.

41. Atherton v. Anderson, 99 F.2d at 889-91 (directors of bank held negligent for not maintaining a system of supervision that would have alerted the directors to the president's omission of material information from reports read to the board); Prudential Trust Co. v. Brown, 171 N.E. at 50 (directors, who had been informed of possible mismanagement practices by officers, held negligent in relying on statements of officers and in not investigating the charges further). (For a brief discussion of *Prudential*, see text accompanying notes 33-35 *supra*.)

42. United Copper Securities Co. v. Amalgamated Copper Co., 244 U.S. 261, 263-64 (1917); Ash v. Int'l Business Machines, Inc., 353 F.2d 491, 492-93 (3d Cir. 1965), *cert. denied*, 384 U.S. 927 (1966); 5 FLETCHER, *supra* note 9 at § 2104.

43. 507 F.2d 759 (3d Cir. 1974).

shareholders' suit, the court stated that "even though committed to benefit the corporation, illegal acts may amount to a breach of fiduciary duty in New York."[44] Citing *Abrams v. Allen,* it concluded that "directors must be restrained from engaging in activities which are against public policy."[45]

In *Ashwander v. Tennessee Valley Authority,*[46] the Supreme Court affirmed the right of shareholders to bring a derivative action alleging that the directors had entered into an illegal transaction. Charging that TVA had acted beyond its statutory powers, the shareholders challenged a contract between their corporation and TVA "as injurious to the interests of the corporation and as an illegal transaction."[47] Recognizing the right of the shareholders to bring a derivative action under such circumstances, Chief Justice Hughes stated in an opinion joined by three other Justices:

> In such a case it is not necessary for stockholders—when their corporation refused to take suitable measures for its protection—to show that the managing board or trustees have acted with fraudulent intent or under legal duress. To entitle the complainants to equitable relief, in the absence of an adequate legal remedy, it is enough for them to show the breach of trust or duty involved in the injurious and illegal action. Nor is it necessary to show that the transaction was *ultra vires* of the corporation. The illegality may be found in the lack of lawful authority on the part of those with whom the corporation is attempting to deal. Thus, the breach of duty may consist in yielding, without appropriate resistance, to governmental demands which are without warrant of law or are in violation of constitutional restrictions . . . . The fact that the directors in the exercise of their judgment, either because they were disinclined to undertake a burdensome litigation or for other reasons which they regarded as substantial, resolved to comply with the legislative or administrative demands, has not been deemed an adequate ground for denying to the stockholders an opportunity to contest the validity of the governmental requirements to which the directors were submitting.[48]

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44. *Id.* at 762 (*interpreting* Roth v. Robertson, 118 N.Y.S. 351 (Sup. Ct. 1909), and Abrams v. Allen, 74 N.E.2d 305 (N.Y. 1947)).
45. *Id.*
46. 297 U.S. 288 (1936).
47. *Id.* at 318-19.
48. *Id.* at 319-20.

In *Gall v. Exxon Corp.*[49] a case subsequent to *Ashwander,* the court rejected an argument that shareholders may challenge a decision not to pursue a claim involving *past* corporate conduct. The court pointed out that Exxon had *discontinued* the conduct in question and that the directors' decision was "not itself a violation of law and *does not result in the continuation of the alleged violation.*[50] Unlike the situation in *Gall,* a director's decision not to investigate allegations of illegal activity by subsidiaries would result in the continuation of that illegal activity. Just as the shareholders in *Miller* and *Ashwander* were able to challenge decisions of the boards of directors that might have resulted in unlawful action, shareholders of United States corporations should be permitted to challenge a board's decision effectively allowing a subsidiary to continue violating United States statutory or regulatory requirements.

C. *Duty to Investigate in the Context of Foreign Secrecy Laws*

Another complex question that must be addressed is whether corporate officials should be exonerated where foreign law allegedly prohibits disclosure of information enabling them to determine whether a subsidiary is violating United States law. This issue is particularly important where foreign subsidiaries are located in South Africa or Rhodesia.

The leading Supreme Court case on the impact of foreign disclosure laws on United States legal obligations is *Société Internationale v. Rogers.*[51] In that case, a Swiss holding corporation, Interhandel, sought to recover United States assets seized pursuant to the Trading with the Enemy Act.[52] Swiss banking secrecy laws prohibited Interhandel from complying with lower court orders to produce documents subpoenaed by the United States government.[53] After reviewing the policy underlying enactment of the Trading with the Enemy Act, the Court reaffirmed the authority of the lower court to require Interhandel to obtain release of the records from the Swiss authorities:

49. 418 F. Supp. 508 (S.D.N.Y. 1976).
50. *Id.* at 518 (emphasis added).
51. 357 U.S. 197 (1958).
52. 50 U.S.C. App. § 1 *et seq.* (1976).
53. 357 U.S. at 205.

> [T]o hold broadly that petitioner's failure to produce the . . . records because of fear of punishment under the laws of its sovereign precludes a court from finding that petitioner had "control" over them, and thereby from ordering their production, would undermine congressional policies made explicit in the 1941 amendments, and invite efforts to place ownership of American assets in persons or firms whose sovereign assures secrecy of records.[54]

The Court, however, refused on due process grounds to dismiss Interhandel's suit, noting that the evidence showed the corporation's "extensive efforts at compliance" and the "fear of criminal prosecution constitutes a weighty excuse . . . not weakened because the laws preventing compliance are those of a foreign sovereign."[55] The Court also emphasized that Interhandel claimed no immunity from United States law, only "its *inability* to comply because of foreign law."[56] In remanding the case, the Court allowed the district court considerable discretion to explore alternative methods of compliance and to draw adverse inferences from the fact of the missing documents:

> It may be that in a trial on the merits, petitioner's inability to produce specific information will prove a serious handicap in dispelling doubt the Government might be able to inject into the case. It may be that in the absence of complete disclosure by petitioner, the District Court would be justified in drawing inferences unfavorable to petitioner as to particular events. So much indeed petitioner concedes. But these problems go to the adequacy of petitioner's proof and should not on this record preclude petitioner from being able to contest on the merits.[57]

In sum, the Court's decision struck the following compromise: while Interhandel was allowed to proceed with its suit, the district court also had the right to draw adverse inferences as a result of Interhandel's inability to produce records because of Swiss law.

Later courts presented with similar questions concerning the effect of foreign disclosure laws on the production of documents have uniformly required a showing of good-faith effort to produce the documents.[58] If a party who is claiming inability to produce

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54. *Id.* at 211.
55. *Id.* at 212.
56. *Id.* at 212-13 (emphasis in original).
57. *Id.*
58. *See, e.g., In re* Westinghouse Elec. Corp. Uranium Contracts Litigation,

documents because of foreign secrecy laws acts in bad faith, a court may properly impose monetary sanctions for noncompliance with court-ordered discovery.[59]

Apart from the question of good-faith efforts to comply with discovery orders, post-*Sociètè Internationale* cases do not agree on whether a court may order the production of documents held in a foreign country if such production would require conduct violating the laws of that country. Several cases have suggested that a court has no power to issue a decree mandating violations of foreign law.[60]

Criticizing these cases, the Tenth Circuit in *Arthur Andersen & Co. v. Finesilver,*[61] distinguished between the power to impose sanctions for noncompliance with a court order and the power to issue an order compelling discovery.[62] The court commented as follows on *Sociètè Internationale:*

> *Sociètè* does not say that a discovery order mandating violation of foreign law is invalid. It only indicates that the foreign law question goes to the imposition of a sanction for noncompliance with local law . . . .
>
> An anomalous situation with great potential effect would result from recognition of the right of a litigant to avoid discovery permitted by local law through the assertion of violation of foreign law. Foreign law may not control local law. It cannot invalidate an order which local law authorizes.[63]

The *Finesilver* court appears to uphold the validity of a discovery order irrespective of whether compliance would result in violation of foreign law. Foreign law restrictions should be considered only where a court is considering holding a party in contempt for failure to produce documents allegedly protected from disclosure by foreign law.[64] In this author's judgment, the *Finesilver* approach

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563 F.2d 992 (10th Cir. 1977); Application of Chase Manhattan Bank, 297 F.2d 611 (2d Cir. 1962).

59. Ohio v. Arthur Andersen & Co., 570 F.2d 1370, 1373-76 (10th Cir.), *cert. denied,* 99 S. Ct. 114 (1978).

60. *See, e.g.,* Application of Chase Manhattan Bank, 297 F.2d at 613; Ings v. Ferguson, 282 F.2d 149, 152 (2d Cir. 1960); First Nat'l City Bank of N.Y. v. IRS, 271 F.2d 616, 619 (2d Cir. 1959), *cert. denied,* 361 U.S. 948 (1960).

61. 546 F.2d 338 (10th Cir. 1976), *cert. denied,* 429 U.S. 1096 (1977).

62. *Id.* at 341.

63. *Id.* at 342.

64. It is interesting to note that the same court which decided *Finesilver* subsequently held that good-faith efforts at compliance prevent the imposition

seems correct since the Supreme Court in *Interhandel* expressly affirmed the right of the lower court to issue the discovery order.[65]

The court in *Finesilver* relied in part on principles set forth in the Restatement (Second) of Foreign Relations Law of the United States. Section 39 of the Restatement expressly provides that a state with jurisdiction to enforce a rule of law is not prevented from exercising that enforcement power simply because resulting conduct might subject a person to liability under the laws of a foreign state.[66] In an effort to avoid the conflict that would inevitably result if every state disregarded the legal and policy formulations of other sovereigns, however, the Restatement § 40 stipulates that the following factors should be considered prior to exercise of enforcement powers:

> (a) vital national interests of each of the states,
> (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
> (c) the extent to which the required conduct is to take place in the territory of the other state,
> (d) the nationality of the person, and
> (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.[67]

Although the Restatement recognizes that a state may exercise its enforcement authority in such a way that it creates conflicting legal obligations for a person, the commentary on this section explains that a court should avoid enforcing an order which would

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of sanctions for noncompliance resulting from the operation of foreign law. *In re* Westinghouse Electric Corp. Uranium Contracts Litigation, 563 F.2d at 998-99.

65. 357 U.S. at 205.

66. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 39 (1965) [hereinafter cited as RESTATEMENT]. *See also In re* Westinghouse Electric Corp. Uranium Litigation, 563 F.2d at 997; United States v. Imperial Chemical Indus., 105 F. Supp. 215, 228-32 (S.D.N.Y. 1952). In *Imperial Chemical* the court, having determined that the defendant had engaged in an unlawful conspiracy to divide territories by means of worldwide exclusive patenting arrangements, ordered the co-conspirators in effect to violate British patent law and public policy. The court recognized that its order might not be enforced by British courts, as indeed it was not. *Id.* at 229-30. *See* Note, *Limitations on the Federal Judicial Power to Compel Acts Violating Foreign Law,* 63 COLUM. L. REV. 1441, 1443-45 (1963).

67. RESTATEMENT, *supra* note 66 at § 40.

require violation of foreign law.[68]

The reasoning in *Sociètè Internationale, Finesilver,* and the Restatement leads one to conclude that a court may issue an order compelling discovery even where the effect of that order may be to cause a violation of foreign law. In an action to impose sanctions for noncompliance with the court order, however, the court must adopt a balancing approach, weighing the defendant's good-faith efforts to comply against the competing interests of the plaintiff and the sovereign states involved.

In light of the case law examined thus far, the author submits that where directors of a parent corporation have knowledge or reason to know that its subsidiary is operating in violation of United States law, a defense based on foreign law will probably not prevail. First, it is clear that a court could properly order a United States corporation to produce documents relating to the activities of its foreign subsidiaries even though it alleges that foreign law prohibits disclosure. Moreover, even where obligations imposed by United States courts are inconsistent with foreign law, enforcement of the order may be appropriate in some cases. Second, it should be noted that this author is describing the liabilities of United States corporations, whose directors are in most cases United States citizens with fiduciary obligations to United States shareholders. These fiduciary obligations are governed by long-established principles of statutory and common law. In light of shareholders' substantial interest in requiring directors to fulfill their fiduciary duties and in light of express United States policies which prohibit corporations subject to its jurisdiction from engaging in certain types of foriegn trade operations, directors of United States corporations should not be exonerated on grounds that foreign disclosure laws prohibit them from investigating the activities of their subsidiaries. To hold otherwise would allow circumvention of United States law and encourage domestic corporations to locate foreign subsidiaries in countries which clothe corporate activities in a shroud of secrecy. Such precedents

68. *See id.* §§ 39, 40, Comment a. There is an analogous principle in the antitrust field that "corporate conduct which is compelled by a foreign sovereign is . . . protected from antitrust liability, as if it were an act of the state itself." Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597, 606 (9th Cir. 1976). *See also* United States v. Watchmakers of Switz. Information Center, Inc., [1963] TRADE CAS. ¶ 70,600, at ¶ 77,456 (S.D.N.Y. 1962), *order modified,* [1965] TRADE CAS. ¶ 70,352 (S.D.N.Y. 1965).

would undermine the regulatory framework in which domestic corporations are currently required to operate.[69]

Assuming that directors or management could successfully raise the defense of foreign disclosure laws,[70] at the very least a court should be allowed to draw adverse inferences from the directors' inability to obtain information relating to the affairs of a subsidiary. This "choice of evils" approach derives from the Court's theory in *Société Internationale* in which the plaintiff was allowed to pursue its claim, but the district court was allowed to draw "unfavorable inferences" from the lack of evidence.[71]

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69. For example, the Securities and Exchange Commission, pursuant to authority granted to it by Section 13 of the Securities and Exchange Act of 1934, 15 U.S.C. § 78m (1976), has promulgated regulations imposing extensive periodic reporting requirements on corporations having registered securities. *See* 17 C.F.R. §§ 240.13a-1 - 13e-1 (1978). The purpose of such periodic reports is to insure "proper protection of investors and . . . fair dealing in the security." 15 U.S.C. § 78m (1976). The omission of material facts from periodic reports required to be filed with the Commission may, in certain circumstances, create liability for the corporation and certain other persons who may have filed, prepared, or signed the mandatory reports. *See, e.g.,* Section 18 of the 1934 Act, 15 U.S.C. § 78r (1976). The United States investor would stand substantial risk of losing the protection afforded by such disclosure requirements if corporate management or directors were allowed to evade liability for the omission of material facts by asserting that foreign laws prevented disclosure. *See generally* Comment, *Control of Multinational Corporations' Foreign Activities,* 15 WASHBURN L.J. 435 (1976).

70. Of course, before the directors could successfully invoke a foreign law defense, the directors would have to meet the requirements set forth in the cases discussed above in the text, namely, proof of good-faith efforts to obtain a waiver of foreign disclosure laws and to explore alternative means of securing the information without running afoul of foreign laws and proof that there is indeed a conflict presented under foreign law. *See* text accompanying notes 60-70 *supra.*

71. 357 U.S. at 212-13. This approach also resembles an interesting theory suggested by an article discussing ways in which the United States could require multinational enterprises to order South African subsidiaries to implement nondiscriminatory racial policies. *See* Dehner, *Multinational Enterprise and Racial Non-Discrimination: United States Enforcement of an International Human Right,* 15 HARV. INT'L L.J. 71 (1974). The article proposed that the United States levy fines on multinational enterprises (MNE's) that have subsidiaries practicing discrimination pursuant to South African law. As Dehner notes, such provisions of U.S. law should not simply be viewed as conflict-oriented and aimed at creating inconsistent legal obligations. Rather, they should be perceived as imposing reasonable conditions on doing business in South Africa:

> While an MNE would technically be caught in a legal squeeze as to operations in a country which required a racially discriminatory employment

D. *Relief Available to Shareholders*

The cause of action normally asserted by shareholders in a derivative suit involving possible violations of United States law by a foreign subsidiary is based on directors' negligence in the discharge of their duties to the corporation. Shareholders may seek other damages from the directors or a court order requiring them to supervise and investigate the business affairs of the subsidiary.

Case law indicates that, absent allegations of personal profit, directors are personally liable *only* for losses that result from the negligent performance of their duties.[72] Unless evidence that the corporation suffered actual loss as a result of the directors' negligence is presented, it appears that damages will not be awarded. If a penalty is assessed against the corporation for violation of United States law and it is shown that the illegal activity in question was proximately caused by the directors' negligence, however, the penalty should be recoverable from the directors.[73]

> policy, the United States penalty would constitute an appropriate disincentive for operating in such an environment and practicing discrimination therein. By viewing such a penalty as a condition placed by the United States on an MNE's establishing operations in countries which require racially discriminatory employment policies, it is evident that no due process problem would arise from the existence of superficially conflicting legal obligations. The issue is not whether an MNE is forced to comply with two conflicting standards, but whether the United States may penalize an MNE for implementing certain policies which derive from a foreign legal obligation.

Id. at 105 (footnotes omitted). The court in *First Nat'l City Bank v. IRS*, 271 F.2d 616 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960), explained that if a corporation "cannot . . . comply with the lawful requirements both of the United States and of [South Africa], perhaps it should surrender to one sovereign or the other the privileges received therefrom." *Id.* at 620.

72. Hoehn v. Crews, 144 F.2d 665, 673 (10th Cir.), *cert. denied*, 323 U.S. 772 (1944) (a director "is liable only for loss that results from his negligence"); Michelsen v. Penney, 135 F.2d 409, 419 (2d Cir. 1943); Jersawit v. Kaltenbach, 256 A.D. 580, 581, 10 N.Y.S.2d 689, 691 (App. Div.), *aff'd*, 24 N.E.2d 23 (N.Y. 1939) (a director "should not be required to account merely upon proof that he was negligent in the supervision of its affairs . . . without proof that the negligence has resulted in some loss or injury to the corporation"); 3 FLETCHER, *supra* note 9, at § 992; 3A *id.*, at § 1087.1.

73. For example, the Rhodesian Sanctions Regulations specify that pursuant to the U.N. Participation Act of 1945, 22 U.S.C. § 287(c) (1976), any person who "willfully violates or evades or attempts to violate or evade" any provisions of the Sanctions is subject to a fine of not more than $10,000. *See* 31 C.F.R. § 530.701 (1978). *See also* 3A FLETCHER, *supra* note 9, at §§ 1087, 1179.

In some cases, shareholders have been allowed equitable relief although the corporation suffered no loss. One plaintiff-shareholder obtained an injunction against the unlawful acts of a corporation even though these acts did not result in any loss to the corporation.[74] As one commentator has noted, a court of equity has jurisdiction to enjoin illegal or *ultra vires* acts at the suit of a stockholder even when there is no loss to the corporation.[75]

In order to compel the board of directors to investigate the affairs of a subsidiary, shareholders must seek affirmative relief in the form of a mandatory injunction. Generally, courts have refused to issue injunctions that interfere with the internal affairs of a corporation, since management of the corporation is entrusted to the board of directors.[76] This policy of noninterference is another manifestation of the business judgment rule.[77] For the same reasons that the business judgment rule does not bar initiation of a derivative action, however, the noninterference rule probably does not prevent issuance of a mandatory injunction where directors of the parent corporation have knowledge or notice of its subsidiary's illegal activity. As Fletcher has noted in his authoritative treatise on corporate law,

> [C]ourts of equity will not hesitate to grant relief to protect the property of the corporation and the rights of stockholders where the corporate powers are being illegally or unconscientiously executed. Equity will restrain acts authorized by the directors in violation of the agreement under which the corporation was organized, and it will restrain the commission of acts which are contrary to law and tend to the destruction of the franchises as well as the improper management of the business of the company or a wrongful diversion of its funds.[78]

Courts have allowed shareholders' suits seeking injunctive relief

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74. Whitehead v. Farmers' Fire & Lightning Mut. Ins. Co., 227 Mo. App. 891, 900, 60 S.W.2d 65, 70 (1933) (shareholder entitled to injunctive relief against conduct of unlawful business which the evidence showed was profitable to the corporation).

75. 13 FLETCHER, *supra* note 9, at § 5823. *See also* Runcie v. Bankers Trust Co., 6 N.Y.S.2d 623, 624 (Sup. Ct. 1938) (the court rejected the defense that the illegal corporate action complained of resulted in no loss and actually benefitted the corporation).

76. 10 FLETCHER, *supra* note 9, at § 4860.

77. For a discussion of the business judgment rule, see text accompanying note 44 *supra*.

78. 10 FLETCHER, *supra* note 9, at § 4860.

against directors who decided not to pursue a claim against themselves.[79] The Supreme Court has indicated that where shareholders allege that a transaction is illegal and injurious to the corporation, they are entitled to equitable relief: "[W]hen their corporation refuses to take suitable measures for its protection . . . it is enough to show the breach of trust or duty involved in the injurious and illegal action."[80] Equitable relief is particularly appropriate in cases where there are no other remedies for breach of fiduciary duties, *i.e.*, where a United States subsidiary might continue to participate in activity illegal under United States law.

To ensure that shareholders have a right not only to require the directors to take reasonable steps in compliance with United States law but also to recover damages from the directors for penalties assessed against the corporation because of the foreign subsidiary's activities, the author recommends enactment of a new federal statute that expressly provides for derivative suits. Such a statute should require United States corporations to submit to the government information relating to certain subsidiary activities and impose penalties for a failure to submit the required data. The statute should also contain provisions authorizing shareholders: (1) to seek affirmative relief where necessary to ensure that the required corporate investigations and reports are made; and (2) to bring an action, in the name of the corporation, to recover damages from the directors for reckless or intentional failures to comply with the reporting requirements of the statute and to recover penalties assessed against the corporation. In addition, a provision authorizing shareholder remedies should create a private right of action in the name of the corporation against directors who recklessly or intentionally make or cause to be made any false or misleading statements regarding subsidiary activities to the United States government.[81]

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79. *See* Nussbacher v. Chase Manhattan Bank, 444 F. Supp. 973, 977 (S.D.N.Y. 1977); Gall v. Exxon Corp., 418 F. Supp. 508, 519-20 (S.D.N.Y. 1976).

80. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 319 (1936).

81. A discussion of the measure of damages available in a derivative action under this provision of the proposed statute is not within the scope of this article. However, several considerations that bear on the availability of relief should be noted. Just as the directors' breach of duty must have *caused a loss* to the corporation in order for shareholders to recover for mismanagement in a derivative suit (*see* text accompanying notes 74-75 *supra*), a prerequisite to recovery under the proposed statute should be that the false and misleading statements made or caused to be made by the director resulted in a loss to the corporation.

Parent corporations are best able to discover whether their foreign subsidiaries are acting contrary to United States law, thereby undermining its policy objectives. Shareholders concerned about their corporation's compliance with United States law may currently be inhibited by the "business judgment rule;" consequently, their ability to force directors to perform their fiduciary duties to the corporation and determine what these subsidiaries are doing is negligible. While there are strong arguments against application of the business judgment rule under the circumstances described in this article, a statute such as the one proposed would resolve doubt in favor of the shareholders and give effect to United States foreign policy objectives manifested in foreign trade restrictions.

III. CONCLUSION

Although numerous cases contain general language supporting the theory that boards of directors have a duty to remain informed only about significant corporate matters, it appears that a stronger argument can be made establishing an overriding duty to investigate where they have notice of circumstances that would raise the suspicions of reasonably prudent men. The extent to which a board of directors must undertake an investigation independent of corporate management rather than rely upon reviews made in the ordinary course of business is not clear. Despite this lack of clarity, however, a strong argument can be made that directors should not be able to rely simply on general assurances from management that a foreign subsidiary is operating in compliance with United States law. Where clear evidence exists that the subsidiary may be involved in illegal activity, the sharehold-

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For example, if the directors issued reports containing materially false and misleading statements and thereby rendered the stock of less value, the shareholders should be able to recover in a derivative suit the loss in value attributable to the misleading statements. *See* 3A FLETCHER, *supra* note 9, at § 1282. Similarly, if public knowledge of the misleading statement can be shown to have led to a loss of business—*e.g.*, a valuable government contract or a right to establish a facility in a foreign country—the statute should allow shareholders remedy for this loss. Of course, if a shareholder purchased or sold a security in reliance on any false or misleading statement in a report available to the public, and was damaged thereby, such purchaser or seller might also be able to obtain relief under Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b) (1976), and Rule 10b-5, 17 C.F.R. § 240.10b-5 (1978), which prohibit false and misleading statements in connection with the purchase or sale of a security.

ers should have standing to bring a derivative action seeking an investigation of the subsidiary's activities.

While the extent to which directors may rely on internal corporate reports may be unclear, we believe that neither directors nor management should be able to prevail because they allege that foreign law prevents them from investigating or obtaining information about the activities of a subsidiary alleged to be violating United States law. To recognize such a defense undermines long-established corporate law principles and, with respect to the Rhodesian or South African sanctions, the expressed foreign policy of the United States.

Where managers of either the subsidiary or its parent corporation have breached their fiduciary duties, it does not appear that under common law a board of directors may be held personally liable, unless the corporation has suffered resulting loss. Relying upon general equity principles and arguing that there is no other adequate remedy, shareholders may, however, be able to obtain a mandatory injunction to require directors to investigate the business activities of the subsidiary in question.

In order to enforce foreign trade restrictions and provide shareholders with a clear legal remedy for breaches of fiduciary duty, a new federal statute should be enacted which imposes penalties on United States corporations for failure to submit regular and accurate reports on the activities of their subsidiaries in countries such as South Africa. This statute should also authorize the corporation to recover from its directors penalties or other damages assessed against the corporation as a result of the directors' negligent or intentional failure to mandate complete investigations and adequate reports of certain subsidiaries' activities. By taking such steps, the Congress could create a set of prohibitions *and* enforcement procedures which would limit drastically the opportunities available to United States companies to foster foreign government policies clearly violative of United States law.