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BOOK REVIEW

INTERNATIONAL SECURITIES REGULATION: LONDON'S "BIG BANG" AND THE EUROPEAN SECURITIES MARKETS, Norman S. Poser, Boston, Massachusetts: Little, Brown and Company 1991. pp. 779, with 1991 Supplement, 143 pp.

*John J. Slain**

About a dozen years ago I was privileged to hear Professor Norman Poser make a presentation of a work in progress, his appraisal of the Securities and Exchange Commission's then recently enacted national market initiative.[1] The thrust of Poser's analysis was that the national market initiative was flawed in two fundamental ways, which in combination would defeat the Commission's goals. What had motivated the Commission was a concern about "best execution," a term then on everybody's lips.

In the latter days of fixed commissions the market in exchange-listed securities had bifurcated. All public investors traded on the exchange; institutions traded to a great extent in the third market, a dealer market in exchange securities which developed because a dealer's reasonable markup on a large transaction was far less than the brokerage commissions an exchange member was required to charge on an exchange transaction. The result was that the third market prices available to institutions were consistently better than the exchange prices to which public investors were relegated. The national market system is a legally mandated electronic linking of markets: the goal

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[1] The national market initiative was enacted as Section 7 of the Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97, 111 (1975). It is codified as Section 11A of the Securities Exchange Act of 1934 (15 U.S.C. § 78k-1 (1988)).

was price competition among all markets in which a particular security was traded. The idea was that since all buyers and sellers would have equal access to every market, major exchange, regional exchange and OTC, public investors would be in no way disadvantaged vis-à-vis institutions and would, therefore, be assured of "best execution." Professor Poser's completed work on the subject was published in 1981 in New York University Law Review as the lead article in a Festschrift for my former colleague, Homer Kripke.[2]

Contemporary law review articles about unfolding events are a literary form very like investment advisory letters. Both are subsets of a genre which might be called Delphic literature. The conventions of the form call for a brief description of the events, followed by an analysis of a very theoretical nature, the less accessible to a general reader the better. The analysis is spiced with interesting *aperçus*, which the writer hopes the reader will remember even if nothing else sticks. The resolution consists of a series of predictions formulated—and this is critical—so that they can plausibly be said to have presaged any possible outcome.

Within the Delphic form the market letter and law review have somewhat different requirements. The market letter has a narrow topic, how to make some money out of what's going on. Erudition is helpful but not critical. The most onerous demand is sprightly writing; you can't sell the stuff if it's not interesting. The requirements of the law review piece are, oddly enough, almost exactly opposite. The topic is often very broad indeed. Since the aim of such a writing is to win the respect of other people who do the same kind of writing, erudition is critical and, to give the devil his due, often quite real. There is, however, no requirement that the piece be interesting to (or even understandable by) anybody other than the handful of peers whose good opinion is the object of the exercise. One requirement, however, is common to both the law review article and market letter and is immutable: any predictions must be so stated that they cannot later be said to have been plainly wrong.

Poser's article, which sets out his analysis, misgivings and predictions about the national market initiative, is a literary

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[2] Norman S. Poser, *Reconstructing the Stock Markets: A Critical Look at the S.E.C.'s National Market System*, 56 N.Y.U. L. REV. 883 (1981).

oddity because it wholly disregards the conventions of the form. First, it describes the situation with which he is dealing in precise (and understandable) detail. Next, it lacks any Gnostic reference; the national market is not discussed in terms of some metaphor or discipline which the draftsmen of the national market initiative would never have considered (or understood), but in terms of the precise factors on which they had focused. The piece concludes with predictions whose accuracy would necessarily be proved or disproved by later events. For these reasons the article continues, even now over a decade later, to be interesting as an exercise in iconoclasm. More importantly, it was right.

Poser made two predictions. First, he said that the third market existed solely as a result of the exchanges' fixed commission system. Since the fixed commission rules had been rescinded, the third market would shrink to relative insignificance. Second, Poser predicted that the price of a security traded in multiple markets would always be set in the primary market for the security and that the secondary markets would operate derivatively off the prices set in the primary market. People who traded in secondary markets would do so for some nonprice-related reason, for example, convenience of location.

In the event, these predictions turned out to be right on the money. A decade later the third market has dropped below the horizon of public interest, and securities continue to be priced in their primary markets.[3] What has the mandated market linkage achieved? To date exactly what Poser predicted it would achieve: nothing much.

Among the academic bar, Professor Poser has the franchise on issues relating to the structure and operations of securities markets. Drawing, as in the N.Y.U. piece, on his pre-academic experience as counsel to and senior executive of the American Stock Exchange, Poser has focused his scholarship on market issues that academic securities lawyers usually avoid like the

[3] *See* Memorandum from William H. Heyman, Director, Division of Market Regulation, to Richard C. Breeden, Chairman, SEC, "Response to Letter from Chairman Markey concerning Computerized Trading Systems" (July 3, 1991) (attachment to letter from Chairman Breeden to Congressman Edward J. Markey, Chairman, Subcommittee on Telecommunications and Finance, House of Representatives Comm. on Energy and Commerce (July 11, 1991)).

plague, mostly because we find it too hard to gather the facts.[4] *International Securities Regulation* is a book which only somebody with this author's interests and background could have done successfully, a book about the massive transformation of securities markets and securities law in the United Kingdom during the 1980s, the transformation commonly called "Big Bang."[5]

The changes in the U.K. securities markets in the 1980s were remarkable. In the decade in which investment became genuinely international, London became the primary world market, differing from the other great markets, New York and Tokyo, in that a greater amount of the money invested came from abroad and relatively more of it was invested in securities of foreign issuers. This vast development of the London market coincided with vast changes in the structure of that market. In addition, 1986 legislation imposed a newly conceived regulatory system of great reach and mind-numbing complexity. It is as though almost the entire American regulatory regimen developed between 1933 and the 1980s—the 1933 and 1934 Acts, the Investment Company Act, the Advisors' Act, and the Securities Investor Protection Act—had been imposed at a single stroke. The Financial Services Act of 1986 (FSA) does all of this and more, since FSA also regulates life insurance sales, the business of "Friendly Societies," which are pension arrangements, and some commodity transactions to boot.[6]

At its first level, *International Securities Regulation* is a description of all this: the market, the participants, the law, and the trade practices. The book is a formidable achievement. The description is thorough, logical, and pellucid. Any reader who brings to the book a general familiarity with securities markets and the concepts of securities law—the only reader who could

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[4] *See, e.g.*, Norman S. Poser, *Options Account Fraud: Securities Churning in a New Context*, 39 Bus. Law. 571 (1984); Norman S. Poser, *Stock Market Manipulation and Corporate Control Transactions*, 40 U. Miami L. Rev. 671 (1986); Norman S. Poser, *Arbitrability of International Securities Disputes*, 12 Brook. J. Int'l L. 675 (1986); Norman S. Poser, *Conflicts of Interest Within Securities Firms*, 16 Brook. J. Int'l L. 112 (1990).

[5] Norman S. Poser, International Securities Regulation: London's "Big Bang" and the European Securities Markets (1991) [hereinafter International Securities Regulation].

[6] Financial Services Act 1986 (FSA), ch. 60 (Eng.). The text of the FSA and its schedules are provided in the Appendix to Professor Poser's book.

possibly be interested—will find this account of the U.K. situation entirely understandable.

It is a fascinating story, well told. Depending on their interests and primary concerns, different readers will focus on different parts of the account—the regulatory options and the reasons for making them, and technical commentary on FSA are two areas of obvious value. One should not, however, overlook the historiography of Poser's account. The events he is describing are extraordinary. To this reader what seems most remarkable is the way in which the various players in London events, public sector and private, seized an opportunity.

In the 1960s the London financial business was pretty much a cottage industry. The London Stock Exchange's single capacity rule limited member professionals to either the role of a "jobber" (i.e., dealer), or the role of a broker. Because almost all securities of U.K. private issuers were traded on the Exchange, as were "gilts" (U.K. government securities), the single capacity rule covered almost all market professionals. In the United States, where most debt securities and many equities are traded off the exchange, there has always been a sizeable body of nonmember firms operating outside exchange rules. Indeed, the third market came into existence because these nonmember firms saw an opportunity to make markets in listed securities and thus to provide institutional investors with a means of avoiding the fixed commission system.

There was no U.K. analog to any of this because there were virtually no securities traded outside the Exchange, and virtually no nonmember professionals. The result was an industry mostly comprised of small, often very small, firms, each conducting a narrow and specialized business. It was not a notably efficient industry; if every aspect of a securities transaction is handled by a separate firm, transactions will be expensive and slow. Indeed, Poser notes that one practice of those days continues still: settlement time for a securities transaction in London may stretch to sixteen days, which seems an eternity to anybody accustomed to the five-day American period.

If the industry was inefficient, it was also a monopoly operating almost entirely without public oversight or intervention. The Exchange ran very much like a private club, largely without formal rules and with the conduct of members being constrained mostly by a shared sense of what was not done. Since these ar-

rangements were not under financial pressure, were largely scandal-free, and since there were no outraged public investors demanding reform, it must have seemed a very stable and comfortable situation to those in it.

The engine of change was chugging in Washington, not London. U.S. prosperity in the 1950s permitted Americans to cultivate a taste for foreign—at that time, almost entirely European—goods; Americans travelled, mainly to Europe, in numbers earlier unimaginable; Americans in large numbers concluded that people in Wolfsburg and Böblingen made better cars than people in Detroit. The result of all this getting and spending was the accumulation in foreign hands of very large dollar balances available for investment. Prima facie you would suppose that if foreign investors had dollars to invest, they would invest them through U.S. financial intermediaries in New York. No doubt it would have worked that way except for a complicated piece of fiscal and tax foolishness called the Interest Equalization Tax.[7] Proposed in the Kennedy administration and enacted in the Johnson administration, this tax was intended to address the U.S. balance of payments (even then a matter of concern), by imposing an excise tax which would make it uneconomic for U.S. investors to buy foreign issuers' stock or debt securities. Like so many of the schemes of the best and brightest, the Interest Equalization Tax turned out to be subject to the law of unintended effects; in the event, it created the Eurobond market and also exported the investment of foreign-held dollar balances to London. As Professor Poser demonstrates, the Eurobond business tolled the death knell of the comfortable London market. It was rather like Henry Ford dropping the first assembly line among the bicycle makers who had branched out into making cars. A new industry was at hand, capital intensive and competitive. The single capacity system was doomed.

While it took some years for the U.K. government and securities industry fully to face the facts, they can not be accused of taking half measures when they acted. They leapt almost in a single bound from Anthony Trollope's world to that of Mr.

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[7] Pub. L. No. 88-563, 78 Stat. 809 (1964) (repealed), adding sections 4911-4920 to the Internal Revenue Code of 1954. The Interest Equalization Tax was repealed by section 1904(a)(21) of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520, 1814 (1976).

Michael Lewis.[8] An American reader can note how remarkable this was by contrasting the current American paralysis in dealing with the need for revision of U.S. banking laws, a need universally agreed to be urgent.

One reasonable criticism is that the Thatcher government may have overshot the mark in crafting a regulatory scheme for the restructured market. Even to American readers, by no means unaccustomed to regulation both complex and pervasive, some aspects are likely to seem unreasonable. A complex statute like FSA cries out for simplification at the adminstrative level; American readers will think of the role of the Securities and Exchange Commission in cutting many tricky knots of our Securities Acts by adopting simplifying rules.[9] This need not have been done by a government agency; I infer from Professor Poser's discussion that U.K. law would not bar the delegation of governmental regulation to a private, or semi-private, organization. Indeed, that is largely what has been done. The difficulty is that the resulting administrative arrangements seem to be anything but simple.

Section 3 of FSA provides that "no person shall carry on . . . investment business in the United Kingdom unless he is an authorized person . . . ." "Investment business" is defined in Schedule 1 to FSA, a definitional section which prints out to 18 pages in the Appendix to the book. To achieve authorization and ongoing regulation, FSA creates a three-tier hierarchy. At the top is a government agency, the Department of Trade and Industry (DTI). DTI is authorized by section 114 of FSA to delegate most of its functions to the Securities and Investment Board (SIB), a semi-private entity whose members are jointly appointed by the Secretary of State (i.e., Minister of Trade) and the Governor of the Bank of England. SIB is itself empowered to authorize, i.e., license, industry participants, and, more importantly, to approve self-regulatory organizations (SROs), which also license and regulate market professionals. Four such

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[8] *See* MICHAEL LEWIS, LIAR'S POKER 152-205 (1989). A good deal of Mr. Lewis's delightful book relates to the London market at the time of the Big Bang.

[9] Often the Commission creates problems, but sometimes it solves them. Regulation D (Rules 501-508) has gone far to rationalize an uncertain and confused body of law relating to private placements. 17 C.F.R. §§ 230.501 to .508 (1991). Rule 144 (17 C.F.R. § 230.144 (1991)) has very substantially solved the problems of the "locked in stockholder."

SROs have been authorized and these have licensed and directly regulate the vast majority of authorized persons.[10] SIB thus regulates a few market professionals directly and the others indirectly through its supervisory authority over the SROs. Certain areas of regulation, however, are nondelegable; DTI, for example, retains direct jurisdiction over stabilization transactions. A complication in all this is that the SROs license activities, rather than persons. Therefore, a given multi-capacity firm may be regulated by DTI, SBI, and several SROs. Poser plainly thinks the regulatory burden excessive.[11] He recounts that SIB and all of the SROs have generated regulations, called rule books, which are voluminous and opaque. If one rule book example quoted, relating to cold calling, is fairly representative, the reading burden on authorized persons and their advisors must be heavy indeed. The text, which is barely intelligible, appears to be the product of a draftsman only marginally literate.[12]

In one area the British have kept the single capacity system. Sellers of insurance and unit trusts (mutual funds) who have a primary relationship with a particular life issuer or unit trust must sell only that issuer's insurance or mutual fund products. Offerings of multiple issuers may be made only by sellers independent of all issuers. The concern which led to this is that consumers rely for advice on the sellers of these products, and it is thought that sellers who offer a range of products should not be acting as principals as to one of the products advised upon. The polarisation rules are criticized as anticompetitive and as primarily supportive of the major life insurers; Poser plainly agrees with the criticism. The case does not seem compelling. The products covered by the polarisation rules are much more likely than other financial products to be sold to unsophisticated buyers; it might reasonably be believed that these buyers are pecu-

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[10] INTERNATIONAL SECURITIES REGULATION, *supra* note 5, at 91-97.

[11] Mr. Michael Lewis, no uncritical apologist for the securities industry, makes the same judgment:

> [T]he tendency of those writing the new laws has been to assume that every conceivable ripoff is worth preventing no matter what the cost. Therefore, the cost of FSA is going to be huge, far greater than the sum of the ripoffs that have happened to date in the City. The known cost is £100 million a year . . . The unknown cost could be much greater than £100 million a year. For the Act introduces subtle but insidious inefficiencies into the financial markets.

MICHAEL LEWIS, THE MONEY CULTURE 196-97 (1991).

[12] INTERNATIONAL SECURITIES REGULATION, *supra* note 5, at 121-22.

liarly vulnerable to the kind of imposition that the polarisation rules are intended to bar. The concern of the Thatcher government was, obviously, that some buyers of these products would be misled to their detriment and lessened competition was thought to be an acceptable price for avoiding losses which were, after all, likely to concentrate in the hands of the people who could least afford them. Obviously consumers will pay a price for the protection afforded; the issue, as always, is whether the race is worth the candle. Polarisation is a judgment call that the critics would not have made. It does not seem to me as obviously wrong as it does to Poser.

Of particular interest to an American reader are Professor Poser's discussions of two related issues, insider trading and Chinese Walls. Poser notes that British common law did not make insider trading by a director (or, by necessary inference, other corporate insiders) actionable because British fiduciary duties of directors were conceived as running only to the corporation, and not to its shareholders.[13] Absent some conduct implicating the tort of deceit or some additional relationship between insider and investors, the insider owed no *Texas Gulf Sulphur* duty to "disclose or abstain."[14] Insider trading was criminalized in the U.K. only in 1980.[15] The U.K. prohibitions are much narrower than those imposed by U.S. courts under Rule 10b-5 or Rule 14e-3 and make an interesting contrast to American law developed under those rules. First, the British restrictions are applicable only to market transactions; transactions in close corporation securities and face-to-face transactions in marketable securities are left to the law of torts or fiduciary obligation, if applicable. Second, the statutory prohibitions in the U.K. are much more precise. The class of persons inhibited is specific and fairly narrow. There is also a definition of inside information, the most important part of which limits coverage to "price-sensitive" information. Lastly, and most importantly, the consequences of violative conduct in the U.K. do not seem to amount to very much.

Until the 1986 enactment of FSA, the only sanction for insider trading was criminal. The deterrence value of criminaliza-

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[13] Percival v. Wright, [1902] 2 L.R.-Ch. 421.

[14] S.E.C. v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968).

[15] *See* Companies Act 1980, §§ 68-73.

tion is sharply limited because British juries seem very reluctant to convict those accused; in the unusual case of a conviction, judges sentence with a light touch. In 1986 FSA added a private remedy, but, Poser points out, it is by no means clear that there could ever be either a cause of action or a plaintiff with standing to assert it. FSA imposes liability in favor of a "private investor" who suffered loss.[16] It is not obvious that any such case could ever arise. The private investor who is a counterparty in an insider's market transaction is, by hypothesis, somebody who was going to trade anyhow. The insider's entry into the market on the other side cannot have caused the private investor to pay more or sell for less; indeed, if there is any measurable effect of the insider's activity, it necessarily is an improvement in the price at which the private investor trades. It would seem that the only way this can be described as a "loss" is if one conceives of every transaction as a zero sum game: if it is good for you, it must be bad for me. As a legal argument this, however, suffers from the infirmity of being obviously untrue. Indeed it is precisely because of the difficulty of finding a counterparty with a loss that Congress in 1988 added Section 20A to the 1934 Act, a punitive provision which deprives the inside trader of his profit and confers the windfall on counterparties generally. There is no comparable provision in the British scheme.

The only market participant who could plausibly claim to suffer a loss from the insider's activity is somebody who would otherwise not have bought or sold, i.e., a market maker. But because a market maker is, presumably, not a private investor, the statutory liability would not run in his favor.

In some ways the present U.K. situation is reminiscent of the American situation twenty-five years ago. While the contemporary American ethical sensibility seems to be that there was an Eleventh Commandment on the back of one of the Tablets, "Thou Shalt Not Trade on Inside Information," it is, in fact, only recently that this conduct came to be regarded as either unlawful or an ethical impropriety. My memory is that most of the lawyers I knew were surprised by the SEC's disciplinary holding in *Cady Roberts*;[17] many lawyers and practically all cli-

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[16] § 62A. The term "private investor" is undefined in the statute, but, presumably, however defined would exclude financial institutions and market professionals.

[17] *In re* Cady, Roberts & Co., 40 S.E.C. 907 (1961).

ents were astounded by *Texas Gulf Sulphur*, which held that civil liability could ensue.[18] Outside the United States, the United Kingdom's 1980 adoption was among the first insider trading bans of a general nature. At the time of this writing (December 1991), many countries, including some members of the European Community, still have no such laws.

It is still early days in U.K. insider trading law. It is possible that the ethical consensus which developed here in the last twenty-five years may be replicated in the U.K.; if so, more rigorous laws and more rigorous enforcement may develop. Then again, they may not.

Closely related to insider trading is the topic of Chinese Walls, which is extensively discussed. Indeed, the Chinese Walls section makes interesting reading for an American observer of the securities world apart from the balance of the book.

The Chinese Wall is the solution to a problem which regularly arises in multi-capacity firms. An early American 10b-5 case, *Merrill Lynch*, is the classic presentation of the problem.[19] A multi-capacity firm had both investment banking and retail functions. The investment banking end of the firm was working as lead underwriter on a proposed offering by Douglas Aircraft. During due diligence, the investment bankers learned of a precipitous downturn in Douglas's business, not yet publicly announced. The information was passed to people in the retail end who selectively advised firm clients to sell the company's stock.

The issue is not one with which the British would have historical experience. Although a securities firm that has no retail business but is engaged in underwriting might trade for its own account on inside information, the situation is unlikely to create public outcry in a single-capacity industry structure because the counterparties who bought from or sold to the firm were not induced to trade. Once, however, the British abolished the single-capacity system, the problem of use of information obtained as a confidential advisor to an issuer presented itself. Retail customers would eventually become aware that they had received trading advice inconsistent with facts later learned to have been earlier known to the firm. This would not go unremarked.

The Chinese Wall in the U.K. is a borrowing of a develop-

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[18] *Texas Gulf Sulphur Co.*, 401 F.2d at 833.

[19] *In re* Merrill Lynch, Pierce, Fenner & Smith, Inc., 43 S.E.C. 933 (1968).

ment by American multi-capacity firms seeking to avoid *Merrill Lynch* outcomes. The idea is that the section of the firm which may learn inside information is to be isolated, physically and functionally, from the trading and retail sections which might misuse the information. FSA section 48(2)(h) specifically authorizes the DTI (and thus authorizes SIB and the various SROs) to adopt business conduct rules "enabling or requiring persons employed in one part of [the] business to withhold information from those employed in another part." Implementing rules have also been adopted by SIB.

Poser's discussions of Chinese Walls and conflicts of interest generally are very interesting. In the first place, he expresses real scepticism about the likelihood of a Chinese Wall's working. This is important. Anybody can express doubts about the effectiveness of Chinese Walls; for example, I have said for years that only people who believe in human perfectibility are likely to have confidence in them. My doubts, however, are speculative and have no evidentiary value for anybody, except, of course, me. Norman Poser's doubts are a different matter. Poser's scholarship about markets and his own extended and high-level experience in securities markets give his doubts a weight that cannot be ignored.

One of Poser's points is that proponents of Chinese Walls tend to have an unrealistically simple conception of how they might be made to work. The usual assumption is that if the line operating people in investment banking can be isolated from the line operating people in trading and retail, the problem is solved. However, all these line operating groups report to a common management and are served by a common staff, securities analysts, lawyers, researchers, computer operators, secretaries, and so on. To make the isolation effective, the Chinese Wall must jut here and jog there, immuring people throughout the firm. He quotes approvingly the observation of a financial journalist that you do not need a Chinese Wall in the typical firm, you need about fifty Chinese Walls.[20] There is also the problem of inadvertent disclosure; achieving the kind of isolation which would prevent it "would turn securities firms into small police

[20] INTERNATIONAL SECURITIES REGULATION, *supra* note 5, at 233 (quoting Herman, *Two Basic Rules for the Big Bang*, FIN. TIMES, Mar. 20, 1986, at 29).

states."[21]

Poser makes other strong points. The entire thrust of Big Bang and FSA is to legitimate multi-capacity financial services firms because of their undoubted efficiency. The Chinese Wall, however, cuts against this efficiency, which derives importantly from shared information.[22]

Poser makes a further point which is oddly neglected in most Chinese Wall discussions. If I am a retail customer who depends upon my broker for investment advice, my reasonable assumption is that the advice I am given on the securities of a particular issuer is based on all the information known to the firm. Certainly, I would not assume that some people in the firm know things which are being carefully kept from the people who are advising me. Poser notes that neither here nor in the U.K. is there any serious effort to deal with this discontinuity between fact and expectation.

Poser sees no simple or complete solution to these conflicts of securities firms, in the U.K. or elsewhere. He acknowledges that inside information will continue to exist because rules requiring immediate disclosure of all material corporate information would often seriously disserve the interests of corporations in the successful conduct of their affairs. Corporations, it should always be remembered, do not exist for the sole purpose of providing perfect information for people betting on or against their success. They have products to make, customers to cosset, employees to manage and pay. The very value with which investors are concerned depends entirely on these responsibilities being well met. Meeting them, like most of life's serious business, often requires confidentiality. Indeed, both U.S. courts and the London Exchange have, in different ways, acknowledged this reality.[23] Because some such information will in the nature of things be disclosed to financial advisors, conflicts of interest will

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[21] *Id.* at 235.

[22] In the United States two Securities and Exchange Commission studies, forty years apart, one in the Roosevelt administration and one in the Ford administration, rejected the single-capacity concept for the United States because a single-capacity industry would have an unacceptably low capital-raising capacity. *See id.* at 243-44.

[23] The London Stock Exchange disclosure rules for listed companies permit a dispensation if "the directors consider that disclosure of information to the public might prejudice the company's business interests." *Id.* at 247. Compare the grudging acknowledgement of the necessity of some confidentiality in Justice Blackmun's opinion in Basic, Inc. v. Levinson, 485 U.S. 224, 239 n.17 (1988).

be unavoidable in a multi-capacity environment.

Poser would rely heavily on an idea that originated with the S.E.C., the restricted list. Here the idea is that once the firm begins receiving material nonpublic information (normally in its investment banking capacity), it will exclude the issuer's securities from those with which its trading and retail people can deal. Coupled with a well-guarded Chinese Wall, a restricted list, Poser thinks, comes about as close to complete protection against the misuse of inside information as is practical. But, he notes, the restricted list solves a problem by creating one. Consider me as a retail customer of Nasty, Poor, Brutish and Short, a multi-capacity firm which has just placed XYZ, Inc., securities on its restricted list because it is acting as a financial advisor to the company. XYZ, quite aside from the inside information, might be a good buy (or short sale) recommendation for somebody in my circumstances, a recommendation which would have been made to me were there no restricted list. It is here that the discontinuity between what Nasty, Poor will do for me, and what I expect them to do for me, kicks in. Poser is plainly right that I am entitled to clear and effective disclosure that the firm may know important things which it cannot tell me. Poser is also plainly right that these various conflicts of interest simply inhere in the situation and that any proposal to eliminate them entirely is a nonstarter.

A lingering question with which a reader of Professor Poser's book is left is whether the present U.K. arrangements will prove stable. The last hundred pages of the book describe the European Community securities environment and, in a much more summary fashion, the securities laws of the major member nations of the Community, plus those of Switzerland and Sweden. Poser observes that FSA was drafted apparently without consideration of its international, and specifically its European, implications.

In 1986, the year that saw enactment of FSA, the United Kingdom ratified the Single European Act (SEA) which became effective throughout the Community in 1987, after ratification by all Community members. It is SEA which makes 1992 an *annum mirabilem*. By December 31, 1992, the Community is committed to creating an internal market, "an area without internal frontiers in which the free market of goods, persons, services and

capital is ensured . . . ."[24] The overall legal effect of SEA and the various implementing directives is to make it possible for a person authorized to conduct business by any Community member to do business everywhere in the Community. My colleagues who are professionally concerned with the European Community tell me that the analogy to the Commerce Clause of our Constitution is too facile; that, however, seems to be the easiest way for a nonspecialist to think about the situation.

The Community Directive with the greatest potential impact on the U.K. securities industry appears to be the Investment Services Directive (ISD), which Poser discusses at length. Here, the difficulty for the U.K. is the mandated "single passport" system under which any Community member, after complying with the minimum standard of the relevant Community Directive, can authorize a person incorporated and headquartered within it to carry on a local business in any other member country. ISD divides regulatory authority over the authorized person's operations in other Community countries between the country of origin and the host country. While the ISD formulation as described by Poser is sufficiently imprecise to suggest that one growth industry within the Community will be conflict of laws scholarship, the tilt is plainly in favor of the country of origin.

Poser notes that the jeopardy for U.K. securities firms is not merely that in moving into other member countries these firms will be at a considerable disadvantage as against local firms regulated with a lighter hand; much more seriously, U.K. firms will be at a similar disadvantage in London. Over time, obviously, something will have to give, and Poser observes that it seems more likely that the U.K. system will be attracted by less rigorous regulation in other member countries than that these systems will be attracted by FSA.

Big Bang, it seems, is an ongoing process.

[24] INTERNATIONAL SECURITIES REGULATION, *supra* note 5, at 345.