AMERICAN UNIVERSITY BUSINESS LAW REVIEW

Volume 3 · 2014 · Issue 2

TABLE OF CONTENTS

* * *

* * *

AMERICAN UNIVERSITY BUSINESS LAW REVIEW

The AMERICAN UNIVERSITY BUSINESS LAW REVIEW is published three times a year by students of the Washington College of Law, American University, 4801 Massachusetts Avenue, N.W., Suite 615A, Washington, D.C. 20016. Manuscripts should be sent to the Executive Editor at the above listed address or electronically at blr-ee@wcl.american.edu.

Subscription rate per year: $45.00 domestic, $50.00 foreign, $30.00 alumni, $20.00 single issue. Periodicals postage paid at Washington, D.C., and additional mailing offices. Office of Publication: 4801 Massachusetts Avenue, N.W., Suite 615A, Washington, D.C. 20016. Printing Office: Joe Christensen, Inc., 1540 Adams Street, Lincoln, Nebraska 68521. POSTMASTER: Send address changes to the AMERICAN UNIVERSITY BUSINESS LAW REVIEW, 4801 Massachusetts Avenue, N.W., Suite 615A, Washington, D.C. 20016.

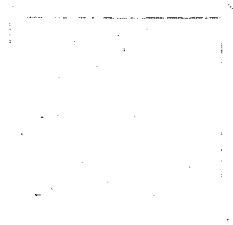
Subscriptions are renewed automatically on expiration unless cancellation is requested. It is our policy that unless a claim is made for nonreceipt of the AMERICAN UNIVERSITY BUSINESS LAW REVIEW issues within six months of the mailing date, the *American University Business Law Review* cannot be held responsible for supplying those issues without charge.

Citations conform generally to *The Bluebook: A Uniform System of Citation* (19th ed. 2010).
To be cited as: 3 AM. U. BUS. L. REV.

American University Business Law Review
Print ISSN 2168-6890
Online ISSN 2168-6904

AMERICAN UNIVERSITY BUSINESS LAW REVIEW

VOLUME 3 · 2014 · ISSUE 2



AMERICAN UNIVERSITY
WASHINGTON COLLEGE OF LAW FACULTY

Administration

Claudio M. Grossman, B.A., J.D., Doctor of Science of Law, *Dean*
Anthony E. Varona, A.B., J.D., LL.M., *Associate Dean of Faculty and Academic Affairs*
Mary L. Clark, A.B., J.D., LL.M., *Associate Dean of Faculty and Academic Affairs*
David B. Jaffe, B.A., J.D., *Associate Dean of Student Affairs*
Ruth Swanson, B.M., *Associate Dean of Development and Alumni Relations*
*Billie Jo Kaufman, B.S., M.S., J.D., *Associate Dean of Library and Information Resources*
Robert D. Dinerstein, A.B., J.D., *Associate Dean of Experiential Education and Director of Clinical Programs*
Stephen I. Vladeck, B.A., J.D., *Associate Dean of Scholarship*
Khalid R. O. Khalid, B.A., M.A., *Assistant Dean of Finance and Administration*
Rebecca T. Davis, B.S., M.A.T, *Assistant Dean of Academic Services and Registrar*
D. Akira Shiroma, B.A., J.D., *Assistant Dean of Admissions and Financial Aid*
Traci Mundy Jenkins, B.A., J.D., *Assistant Dean for Career and Professional Development*
Lia Epperson, B.A., J.D., *Director of the S.J.D. Program*
David Hunter, B.A., J.D., *Director of the International Legal Studies Program*
Jamin B. Raskin, B.A., J.D., *Director of the Law and Government Program*
David E. Aaronson, B.A., M.A., Ph.D., *Director of the Trial Advocacy Program*
Teresa Godwin Phelps, B.A., M.A., M.S.L, Ph.D., *Director of the Legal Rhetoric Program*
Ann Shalleck, A.B., J.D., *Director of the Women and the Law Program*

Full-Time Faculty

David E. Aaronson, B.A., M.A., Ph.D., The George Washington University; LL.B., Harvard University; LL.M., Georgetown University. *B. J. Tennery Professor of Law and Director of the Trial Advocacy Program*
Evelyn G. Abravanel, A.B., J.D., Case Western Reserve University. *Professor of Law*
Padideh Ala'i, B.A., University of Oregon; J.D., Harvard University. *Professor of Law*
Jonas Anderson, B.S., University of Utah; J.D., Harvard University. *Assistant Professor of Law*
*Kenneth Anderson, B.A., University of California–Los Angeles; J.D., Harvard University. *Professor of Law*
Jonathan B. Baker, A.B., J.D., Harvard University; M.A., Ph.D., Stanford University. *Professor of Law*
Susan D. Bennett, B.A., M.A., Yale University; J.D., Columbia University. *Professor of Law and Director of the Community & Economic Development Clinic*
Daniel Bradlow, B.A., University of Witwatersrand, South Africa; J.D., Northeastern University; LL.M., Georgetown University. *Professor of Law*
Pamela Bridgewater, B.S., Florida Agricultural and Mechanical University; J.D., Florida State University; LL.M., University of Wisconsin. *Professor of Law*
Barlow Burke Jr., A.B., Harvard University; LL.B., MCP, University of Pennsylvania; LL.M., S.J.D., Yale University. *Professor of Law and John S. Myers and Alvina Reckman Myers Scholar*
Susan D. Carle, A.B., Bryn Mawr College; J.D., Yale University. *Professor of Law*
Michael W. Carroll, A.B., University of Chicago; J.D., Georgetown University. *Professor of Law and Director of the Program on Information Justice and Intellectual Property*
David F. Chavkin, B.S., Michigan State University; J.D., University of California, Berkeley. *Professor of Law*
Janie Chuang, B.A., Yale University; J.D., Harvard University. *Associate Professor of Law*
Mary Clark, A.B., Bryn Mawr College; J.D., Harvard University, LL.M., Georgetown University. *Professor of Law and Associate Dean of Faculty and Academic Affairs*
Llezlie G. Coleman, B.A., Dartmouth College; J.D., Columbia University. *Assistant Professor of Law*
Jorge Contreras, B.S.EE, B.A., Rice University; J.D., Harvard University. *Associate Professor of Law*
John B. Corr, B.A., M.A., John Carroll University; Ph.D., Kent State University; J.D., Georgetown University. *Professor of Law*
Jennifer Daskal, B.A., Brown University; M.A., Cambridge University; J.D., Harvard University. *Assistant Professor of Law*
Angela Jordan Davis, B.A., Howard University; J.D., Harvard University. *Professor of Law*
Robert D. Dinerstein, A.B., Cornell University; J.D., Yale University. *Professor of Law, Associate Dean of Experiential Education, and Director of Clinical Programs*

N. Jeremi Duru, B.A., Brown University; M.P.P., J.D., Harvard University, *Professor of Law*

*Walter A. Effross, A.B., Princeton University; J.D., Harvard University.
Professor of Law and Director of the Program on Counseling Electronic Commerce Entrepreneurs

Lia Epperson, B.A., Harvard University; J.D., Stanford University.
Associate Professor of Law and Director of the S.J.D. Program

*Christine Haight Farley, B.A., State University of New York, Binghamton;
J.D., State University of New York, Buffalo; LL.M., J.S.D., Columbia University.
Professor of Law

Amanda Frost, B.A., J.D., Harvard University. *Professor of Law*

Robert K. Goldman, B.A., University of Pennsylvania; J.D., University of Virginia.
Professor of Law, Faculty Director, War Crimes Research Office, and Louis C. James Scholar

Claudio M. Grossman, Licenciado en Ciencias Juridicas y Sociales, Universidad de Chile, Santiago;
Doctor of Science of Law, University of Amsterdam. *Dean, Professor of Law, and Raymond I. Geraldson Scholar for International and Humanitarian Law*

Lewis A. Grossman, B.A., Ph.D., Yale University; J.D., Harvard University. *Professor of Law*

*Heather L. Hughes, B.A., University of Chicago; J.D., Harvard University. *Professor of Law*

David Hunter, B.A., University of Michigan; J.D., Harvard University.
Professor of Law and Director of the International Legal Studies Program

Peter A. Jaszi, A.B., J.D., Harvard University.
Professor of Law and Faculty Director of the Glushko-Samuelson Intellectual Property Clinic

Cynthia E. Jones, B.A., University of Delaware; J.D., American University. *Associate Professor of Law*

*Billie Jo Kaufman, B.S., M.S., University of Indiana–Bloomington; J.D., Nova Southeastern University.
Professor of Law and Associate Dean of Library and Information Resources

Nicholas N. Kittrie, M.A., LL.B., University of Kansas; LL.M., S.J.D., Georgetown University.
University Professor

Benjamin Leff, B.A., Oberlin College; A.M., University of Chicago; J.D., Harvard University.
Associate Professor of Law

Amanda Cohen Leiter, B.S., M.S., Stanford University; M.S., University of Washington; J.D., Harvard University.
Associate Professor of Law

James P. May, B.A., Carleton College; J.D., Harvard University. *Professor of Law*

Binny Miller, B.A., Carleton College; J.D., University of Chicago.
Professor of Law and Director of Criminal Justice Clinic

Elliott S. Milstein, B.A., University of Hartford; J.D., University of Connecticut; LL.M., Yale University.
Professor of Law

Fernanda Nicola, B.A., University of Turin; Ph.D., Trento University; LL.M., Harvard University.
Professor of Law

Mark Niles, B.A., Wesleyan University; J.D., Stanford University. *Professor of Law*

Diane F. Orentlicher, B.A., Yale University; J.D., Columbia University. *Professor of Law*

Teresa Godwin Phelps, B.A., M.A., Ph.D., University of Notre Dame; M.S.L., Yale University.
Professor of Law and Director of the Legal Rhetoric Program

*Andrew D. Pike, B.A., Swarthmore College; J.D., University of Pennsylvania. *Professor of Law*

Nancy D. Polikoff, B.A., University of Pennsylvania; M.A., The George Washington University;
J.D., Georgetown University. *Professor of Law*

Andrew F. Popper, B.A., Baldwin Wallace College; J.D., DePaul University;
LL.M., The George Washington University. *Professor of Law*

Jamin B. Raskin, B.A., J.D., Harvard University.
Professor of Law, Director of the Law and Government Program, and Director of the LL.M. Law in Government Program

Jayesh Rathod, A.B., Harvard University; J.D., Columbia University.
Associate Professor of Law and Director of the Immigrant Justice Clinic (on leave Spring 2014)

Ira P. Robbins, A.B., University of Pennsylvania; J.D., Harvard University.
Professor of Law and Justice, Director of the J.D./M.S. Dual Degree Program in Law and Justice, and Barnard T. Welsh Scholar

Jenny Roberts, B.A., Yale University; J.D., New York University. *Professor of Law*

Ezra Rosser, B.A., Yale University; J.D., Harvard University. *Professor of Law*

Herman Schwartz, A.B., J.D., Harvard University. *Professor of Law and Faculty Co-Director of the Center for Human Rights & Humanitarian Law*

Ann Shalleck, A.B., Bryn Mawr College; J.D., Harvard University.
Professor of Law, Director of the Women and the Law Program, and Carrington Shields Scholar

*Mary Siegel, A.B., Vassar College; J.D., Yale University. *Professor of Law*

Brenda V. Smith, B.A., Spelman College; J.D., Georgetown University. *Professor of Law*

*David Snyder, B.A., Yale University; J.D., Tulane University.
Professor of Law and Director of the Law and Business Program (on leave Spring 2014)

Andrew E. Taslitz, B.A., City University of New York; J.D., University of Pennsylvania. *Professor of Law and Director of the Criminal Justice Policy and Practice Institute*

Robert L. Tsai, B.A., University of California–Los Angeles; J.D., Yale University. *Professor of Law*

Anthony E. Varona, A.B., J.D., Boston College; LL.M., Georgetown University. *Professor of Law and Associate Dean of Faculty and Academic Affairs*

Robert G. Vaughn, B.A., J.D., University of Oklahoma; LL.M., Harvard University.
Professor of Law and A. Allen King Scholar

Stephen I. Vladeck, B.A., Amherst College; J.D., Yale University.
Professor of Law and Associate Dean of Scholarship

Perry Wallace Jr., B.S., Vanderbilt University; J.D., Columbia University.
Professor of Law and Director of the J.D./M.B.A. Dual Degree Program

Lindsay F. Wiley, A.B., J.D., Harvard University; M.P.H., Johns Hopkins University.
Associate Professor of Law and Director of the Health Law Program

Paul R. Williams, A.B., University of California–Davis; J.D., Stanford University.
Professor of International Service and Director of the J.D./M.A. Dual Degree Program

Richard J. Wilson, B.A., DePauw University; J.D., University of Illinois.
Professor of Law and Director of the International Human Rights Law Clinic

Law Library Administration

Christine K. Dulaney, B.A., State University of New York at Buffalo; M.A., University of Virginia; M.L.S., University of Chicago. *Associate Law Librarian*

John Q. Heywood, B.S., Northern Arizona University; J.D., American University. *Associate Law Librarian*

*Billie Jo Kaufman, B.S., M.S., University of Indiana–Bloomington; J.D., Nova Southeastern University.
Associate Dean of Library and Information Resources

Susan Lewis, B.A., University of California–Los Angeles; J.D., Southwestern University; M.Lbr., University of Washington. *Law Librarian and Associate Director of Public Service*

Sima Mirkin, B.S.c, Byelorussian Polytechnic Institute, Minsk, Belarus; M.L.S., University of Maryland.
Associate Law Librarian

Adeen Postar, A.B., J.D., Washington University; M.S.L.S., The Catholic University of America. *Law Librarian*

William T. Ryan, B.A., Boston University; J.D., American University; M.L.S., University of Maryland. *Law Librarian*

John A. Smith, B.A., St. Michaels College; M.S.L.S., The Catholic University of America. *Assistant Law Librarian*

Amy Taylor, B.A., Rhodes College; M.S.L.I.S., The Catholic University of America; J.D., The University of Alabama.
Associate Law Librarian

Bryan Thurmond, B.B.A., University of Georgia; M.Ed. George Mason University; J.D. American University.
Pence Legal Research Fellow

Ripple L. Weistling, B.A., Brandeis University; M.A., King's College, London, England; J.D., Georgetown University; M.S.L.S., The Catholic University of America. *Assistant Law Librarian*

Emeriti

Isaiah Baker, B.A., Yale University; J.D., M.B.A., Columbia University; LL.M., Harvard University; M.A. De Paul University. *Associate Professor of Law Emeritus*

Egon Guttman, LL.B., LL.M., University of London. *Professor of Law and Levitt Memorial Trust Scholar Emeritus*

Candace S. Kovacic-Fleischer, A.B., Wellesley College; J.D., Northeastern University. *Professor of Law Emeritus*

Patrick E. Kehoe, B.C.S., Seattle University; J.D., MLLibr, University of Washington. *Law Librarian Emeritus*

Robert B. Lubic, A.B., J.D., University Pittsburgh; MPL, Georgetown University. *Professor of Law Emeritus*

Anthony C. Morella, A.B., Boston University; J.D., American University. *Professor of Law Emeritus*

Michael E. Tigar, B.A., J.D., University of California, Berkeley. *Professor of Law Emeritus*

Special Faculty Appointments

Nancy S. Abramowitz, B.S., Cornell University; J.D., Georgetown University. *Professor of Practice of Law and Director of Janet R. Spragens Federal Tax Clinic*

Elizabeth Beske, B.A., Princeton University; J.D., Columbia University. *Legal Writing Instructor and Research Coordinator of Legal Writing*

Elizabeth Boals, B.S., Virginia Polytechnic Institute and State University; J.D., George Mason University.
Associate Director of the Trial Advocacy Program

Brandon Butler, B.A., University of Georgia; M.A., University of Texas; J.D., University of Virginia.
Practitioner in Residence

Paul Figley, B.A., Franklin and Marshall College; J.D., Southern Methodist University.
Legal Writing Instructor and Associate Director of Legal Writing

Sean Flynn, B.A., Pitzer College; J.D., Harvard University. *Professorial Lecturer in Residence*

Dorcas Gilmore, B.A., Rollins College; J.D., University of Maryland. *Practitioner in Residence* (Spring 2014)
Jasmine Harris, B.A., Dartmouth College; J.D., Yale University. *Practitioner in Residence*
Elizabeth A. Keith, B.A., University of North Carolina, Chapel Hill; J.D., George Mason University.
Legal Writing Instructor and Academic Coordinator of Legal Writing
Daniela Kraiem, B.A., University of California–Santa Barbara; J.D., University of California–Davis.
Associate Director of the Women and the Law Program
Jeffrey S. Lubbers, A.B., Cornell University; J.D., University of Chicago. *Professor of Practice in Administrative Law and Law and Government Program*
Daniel Marcus, B.A., Brandeis University; LL.B., Yale University. *Fellow in Law and Government*
Claudia Martin, J.D., Universidad de Buenos Aires; LL.M., American University. *Professorial Lecturer in Residence*
Juan E. Mendez, LL.B., Stella Maris Catholic University, Argentina. *Visiting Professor of Law*
Carl C. Monk, B.A., Oklahoma State University; J.D., Howard University. *Visiting Professor of Law* (Spring 2014)
Jennifer Mueller, B.A., University of North Carolina, Chapel Hill; J.D., Harvard University. *Practitioner in Residence*
Nantasa Nanasi, B.A. Brandeis University; J.D., Georgetown University. *Practitioner in Residence*
Horacio A. Grigera Naon, J.D., LLD, University of Buenos Aires; LL.M., S.J.D., Harvard University.
Distinguished Practitioner in Residence
Victoria Phillips, B.A., Smith College; J.D., American University. *Professor of Practice of Law and Director of the Glushko-Samuelson Intellectual Property Law Clinic*
Michele Pistone, B.S., New York University; J.D., St. John's University; LL.M., Georgetown University.
Visiting Professor (Spring 2014)
Heather E. Ridenour, BB.A., Texas Women's University; J.D., Texas Wesleyan University.
Legal Writing Instructor and Director of Academic Support
Diego Rodriguez-Pinzon, J.D., Universidad de los Andes; LL.M., American University;
S.J.D., The George Washington University. *Professorial Lecturer in Residence*
Macarena Saez, Licenciada en Ciencias Juridicas y Sociales, University of Chile; LL.M., Yale University.
Practitioner in Residence and Fellow in the International Legal Studies Program
Anita Sinha, B.A., Barnard College; J.D., New York University. *Practitioner in Residence*
Amme Smetak, B.A., Kenyon College; J.D., George Washington University. *Practitioner in Residence*
William Snape, B.A., University of California–Los Angeles; J.D., The George Washington University.
Fellow in Environmental Law and Director of Adjunct Faculty Development
David H. Spratt, B.A., The College of William and Mary; J.D., American University.
Legal Writing Instructor
Shana Tabak, B.A., Macalaster College; J.D., Georgetown University; LL.M., The George Washington University.
Practitioner in Residence
Richard S. Ugelow, B.A., Hobart College; J.D., American University; LL.M., Georgetown University.
Practitioner in Residence
Stephen Wermiel, B.A., Tufts University; J.D., American University. *Fellow in Law and Government*
William R. Yeomans, B.A., Trinity College, Connecticut; J.D., Boston University; LL.M., Harvard University.
Fellow in Law and Government

* *American University Business Law Review* Faculty Advisory Committee

ARTICLES

"RINGFENCING" U.S. BANK FOREIGN BRANCH DEPOSITS: WORKING TOWARD A CLEARER UNDERSTANDING OF WHERE DEPOSITS ARE PAYABLE IN THE MIDST OF CHAOS

BY V. GERARD COMIZIO* AND RYAN CHIACHIERE**

---

* V. Gerard Comizio is the chair of the Paul Hastings Global Banking and Payment Systems Practice, resident in the Washington, DC office. Prior to joining Paul Hastings, he was for many years the deputy general counsel and acting general counsel of the U.S. Department of the Treasury's Office of Thrift Supervision (and its predecessor, the Federal Home Loan Bank Board), and director of its Corporate and Securities Division. Mr. Comizio is also an adjunct professor of banking law at the Washington College of Law, American University, teaching courses on banking law, international banking law, and regulation of financial institutions.

** Ryan Chiachiere is an associate in the Global Banking and Payment Systems Practice at Paul Hastings, resident in the Washington, DC office. Mr. Chiachiere received his JD in 2011 from the Duke University School of Law and is a member of the New York and District of Columbia bars.

I. BANKING ABROAD – WHY AND HOW?

In the second half of the Twentieth Century, the investment of U.S. companies abroad grew dramatically as the United States emerged as a world economic power. The number of foreign offices of U.S. banks skyrocketed commensurate with new U.S. investment, and new challenges to the understanding and regulation of banking deposits abroad accompanied this growth.[1]

In 1960, eight U.S. banks maintained offices abroad; in 1984, there were 163; and by 1987, 902 U.S. banks had offices abroad.[2] In 1985, there were over 2,000 foreign offices of American banks, with Citibank and Chase Manhattan together accounting for nearly 1,200 offices at the end of 1983.[3] At that time, more than half of the total assets of both banks were foreign.[4] As of 2013, Citibank claims to operate over 4,000 branches overseas,[5] including offices in 160 countries across North and South America, Europe, the Middle East, and the Asia-Pacific region.[6] According to the Federal Deposit Insurance Corporation (FDIC), foreign branch deposits have doubled since 2001 alone, totaling approximately $1 trillion.[7]

---

1. *See* M. Ann Hannigan, *United States Home Bank Liability for Foreign Branch Deposits*, 1989 U. ILL. L. REV. 735, 737 (1989).

2. Adam Telanoff, Comment, *American Parent Bank Liability for Foreign Branch Deposits: Which Party Bears Sovereign Risk?*, 18 PEPP. L. REV. 561, 568 (1991).

3. Ethan W. Johnson, Comment, *Reducing Liability of American Banks for Expropriated Foreign Branch Deposits*, 34 EMORY L.J. 201, 201 (1985).

4. *Id.*

5. *Citibank Branches*, CITIGROUP, https://online.citibank.com/U.S./JRS/pands/detail.do?ID=FinancialCenters (last visited Mar. 3, 2014).

6. *See Citi Mission & Principles*, CITIGROUP, http://www.citigroup.com/citi/about/mission_principles.html (last visited Apr. 9, 2014); *see generally Citi Country Presence*, Citigroup, http://www.citigroup.com/citi/about/countrypresence/ (last visited Apr. 9, 2014).

7. FDIC Deposit Insurance Regulations; Definition of Insured Deposit, 78 Fed. Reg. 11604, 11605 (proposed Feb. 19, 2013) (to be codified at 12 C.F.R. pt. 330).

A U.S. bank may establish a foreign presence in a number of ways, including through representative offices, shell branches, correspondent banking relationships, affiliates, subsidiaries, or branches.[8] The Federal Reserve Act of 1913 grants banks the authority to open foreign branches,[9] and the branch office is the most common form of foreign involvement.[10] Nationally chartered banks operate the majority of foreign branches.[11] A foreign branch is subject to both American law[12] and the laws and regulations of the country in which it is located.[13] Host country law may apply to capital requirements, reserves, submission to local courts and laws, and assurances from the parent bank.[14]

As with U.S. banks, foreign banks can accept two broad types of deposits: special deposits and general deposits. In a special deposit, the deposited funds are kept separate from the bank's funds, and the same bills deposited must be returned.[15] They are, however, less common than the general deposit, in which the funds deposited become the property of the bank and the depositor can demand payment for general assets of the bank.[16]

The U.S. bank regulatory environment has generally been favorable for foreign branches.[17] For instance, Regulation D, which pertains to reserves that depository institutions are required to maintain for "the purpose of facilitating the implementation of monetary policy," does not apply to any deposit that is payable only at an office located outside the United States.[18] The rule's impact is significant—U.S. banks do not have to hold reserves against the large amount of deposits at foreign branches of their banks.

Further, the overwhelming majority of foreign deposits are not dually payable; that is, they are not payable at the U.S. home office in addition to being payable at the foreign branch.[19] Significantly, recent events have

---

8. *See* Telanoff, *supra* note 2, at 569; *see also* Johnson, *supra* note 3, at 206.

9. *See* 12 U.S.C. § 601 (2012).

10. Telanoff, *supra* note 2, at 570.

11. *See* Hannigan, *supra* note 1, at 758.

12. There are exemptions, as noted above.

13. Francis D. Logan & Mark A. Kantor, *Deposits at Expropriated Foreign Branches of U.S. Banks*, 1982 U. ILL. L. REV. 333, 334 (1982).

14. *See id.*

15. Johnson, *supra* note 3, at 209.

16. *Id.*

17. Telanoff, *supra* note 2, at 569.

18. *See* 12 C.F.R. § 204.1(c)(4)–(5) (2014). Furthermore, before its repeal, Regulation Q's establishment of a ceiling for interest paid on deposits did not apply to deposits payable only outside the United States. Telanoff, *supra* note 2, at 569 n.62.

19. *See* FDIC Deposit Insurance Regulations; Definition of Insured Deposit, 78 Fed. Reg. 11604, 11605 (proposed Feb. 19, 2013) (to be codified at 12 C.F.R. pt. 330).

made it less costly for banks to hold dually payable deposits.[20] The Dodd-Frank Act, as one such event, altered the deposit insurance assessment such that all liabilities are included, so dual-payability no longer increases the assessment base.[21] Additionally, the Federal Reserve now pays interest on reserves.[22] Nonetheless, banks have been hesitant to make deposits in foreign branches dually payable because they have concerns that dual-payability would mean they would no longer be protected from sovereign risk under Section 25(c) of the Federal Reserve Act.[23]

While domestic branches of U.S. banks are not considered separate legal entities, *foreign* branches of U.S. banks *have* been treated by courts as separate entities, and accordingly banks have traditionally not been compelled to incorporate as a subsidiary abroad to shield the parent from liability.[24] This is known as the "Separate Entity Doctrine," but courts have not treated it as an ironclad principle, resulting in a great deal of uncertainty regarding liability for foreign branch deposits.

Foreign branches provide many of the same kinds of services that a domestic branch would provide to its customers, including investment of funds brought in from outside the host country and the lending of local funds received as deposits.[25] Foreign offices of U.S. banks may also finance the importation of U.S. goods or the exportation of goods to the U.S.[26] U.S. banks often operate these branches "to provide banking, foreign currency, and payment services to multinational corporations."[27] Often, foreign branches of U.S. banks do not offer retail deposit or retail banking services, but rather accept deposits from large businesses seeking the convenience of the bank's international branch network.[28]

In general, foreign branch banking is beneficial to all parties involved, as foreign countries obtain investment capital and U.S. financial services and U.S. companies reap the profitable rewards of foreign operations. Further, corporations may use foreign bank deposits as a means of minimizing U.S. tax consequences. Problems can arise, however, when tumultuous social

---

20. *Id.*

21. *See id.* (citing Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301 (2012)).

22. *Id.*

23. *Id.*

24. *See* Hannigan, *supra* note 1, at 739.

25. Johnson, *supra* note 3, at 205.

26. *Id.*

27. FDIC Deposit Insurance Regulations; Definition of Insured Deposit, 78 Fed. Reg. at 11605.

28. *See id.* (explaining how banks take advantage of transferring from branch to branch in different countries based on deposit agreements not governed by U.S. law).

and political events in countries where U.S. bank branches are located result in questions as to whether risk of political upheaval ("political risk") is borne by depositors or by the U.S. offices of the branch. Accordingly, banks have attempted to "ringfence" foreign deposits; to wall them off so that they are not payable in the U.S. The U.S. government and state governments have sought, in various ways, to "ringfence" foreign deposits as well, either by attempting to ensure that banks are not liable for the deposits or by mandating that deposits payable outside the U.S. are not, unlike deposits payable exclusively in the U.S., backed by the full faith and credit of the U.S. government. Part II of this Article will review the cases that examine political risk and U.S. bank foreign branch deposits. Part III will review various solutions offered to this problem in the last three decades, including a rule issued by the FDIC in late 2013 aimed at addressing aspects of this very issue. Part IV will offer some conclusions regarding the allocation of political risk in foreign bank deposits.

II. CASES AND CONFLICTS: THE ROOT OF THE PROBLEM

The Russian Revolution, the Cuban Revolution, and the Vietnam War posed complex issues related to foreign deposits in U.S. banks, and resulted in case law that sought to develop an overarching theory of liability for foreign bank deposits. In general, the cases surrounding these political upheavals involve emerging regimes nationalizing the assets of private banks without expressly declaring their intentions regarding the banks' liabilities, leaving the banks with all of their obligations and none of their assets.[29] Upon analysis, the relevant cases do not reflect a clear and consistent approach by courts, and developing more consistent outcomes is indispensable to creating certainty for U.S. investors and those seeking funding for ventures abroad.

A. The Russian Revolution Cases

Boris N. Sokoloff was a Russian citizen residing in New York City following the overthrow of the Imperial Government in Russia in March 1917 and preceding the Bolshevik Revolution later that year.[30] In June of that year, Sokoloff deposited $31,108.50 in the New York branch of National City Bank to be transferred to the branch in Petrograd; in September, he departed New York and arrived in Petrograd.[31] Just prior to the Bolshevik Revolution, Sokoloff instructed the Petrograd branch to

29. *See* Johnson, *supra* note 3, at 213.

30. *See* Sokoloff v. Nat'l City Bank of N.Y., 130 Misc. 66, 68 (N.Y. Sup. Ct. 1927), *aff'd*, 227 N.Y.S. 907 (App. Div. 1928), *aff'd*, 164 N.E. 745 (N.Y. 1928).

31. *Id.* at 68–69.

transfer the bulk of his account, now denominated in rubles, to a bank in Kharkoff via the Russian State Bank.[32] Upon discovering that the new bank did not receive his funds, he instructed the Petrograd branch to cancel the transfer and hold his funds, which the branch told him it could not do, as it had already acted upon his transfer request.[33] The Petrograd branch inquired with the State Bank as to the status of the funds, and the State Bank replied that it was unsure of the status because of a failure of communication, presumably due to the revolution.[34] Ultimately, the State Bank confirmed that no transfer had been made to Kharkoff, and the Petrograd branch asked to be re-credited with the transfer amount.[35]

In December 1917, the Soviet Government issued a decree merging all existing banks into the State Bank, and on the same day soldiers occupied the Petrograd branch and took possession of it.[36] The State Bank limited the amount of rubles that the Petrograd branch could disperse in a given day,[37] but during the spring of 1918 the branch sent two letters to depositors encouraging them to withdraw any balance held at the branch.[38] In December 1918, the bank was nationalized and all assets were confiscated.[39]

Sokoloff sued the National City Bank branch in New York. In denial of a motion for re-argument before the New York Court of Appeals in 1924, Judge Cardozo noted the defendant's claim that the plaintiff "was fully aware of the probability of future political and governmental changes," and had therefore, in essence, assumed the risk of revolution.[40] Cardozo, and the court, held that neither the bank's attempt to terminate its existence nor the seizure of the bank's assets affected its" liability "because the Russian government "could not terminate [the bank's] existence . . . for it was a corporation formed under [U.S.] laws."[41] By simply "depriv[ing] it of the privilege of doing business upon Russian soil," the Russian government did not "end[] its duty to make restitution for benefits received without

32. *Id.* at 69.

33. *See id.* at 69–70 (having already debited Sokoloff the 120,000 rubles and credited that amount to the record of its account with the State Bank, the Petrograd branch claimed that it no longer possessed the funds Sokoloff now wished it to hold).

34. *See id.* at 70.

35. *Id.* (noting that the Petrograd branch chose not to inform Sokoloff of its receipt of this news from the State Bank).

36. *Id.* at 71.

37. Americans were permitted to withdraw 500 rubles per day; all others were permitted to withdraw 150 rubles per week. *See id.*

38. *See id.*

39. *See id.* at 72.

40. Sokoloff v. Nat'l City Bank of N.Y., 145 N.E. 917, 918 (N.Y. 1924).

41. *Id.* at 919.

requital."[42]

Most importantly, Cardozo explicitly tied the Petrograd branch to the assets of the home office in the U.S., asserting that Sokoloff "did not pay his money to the defendant, and become the owner of this chose in action, upon the security of the Russian assets," but rather "[h]e paid his money to a corporation organized under our laws upon the security of *all its assets*, here as well as elsewhere."[43] Indeed, Cardozo held that "[e]verything in Russia might have been destroyed by fire or flood, by war or revolution, and still the defendant would have remained bound by its engagement."[44]

The Supreme Court of New York County, hearing the case again in 1927, held that a contract was entered into between Sokoloff and National City, whereby the latter was to pay on demand in Petrograd.[45] Because payment could not be made elsewhere, the court asserted, there was an "implied obligation on the part of the defendant that it would maintain its branch in Petrograd.[46] The branches were separate entities, the court asserted, "as distinct from one another as any other bank."[47] However, it asserted:

> [W]hen considered with relation to the parent bank, [branches] are not independent agencies; they are, what their name imports, merely branches, and are subject to the supervision and control of the parent bank, and are instrumentalities whereby the parent bank carries on its business, and are established for its own particular purposes, and their business conduct and policies are controlled by the parent bank, and their property and assets belong to the parent bank, although nominally held in the names of the particular branches . . . . Ultimate liability for a debt of a branch would rest upon the parent bank.[48]

The court emphasized that it was not "concerned with questions of liability for transactions originating in Russia and wholly to be performed in Russia, but with a debt incurred in this State which the defendant agreed to pay on demand at its own branch in Petrograd."[49] The court also noted that the bank's loss was somewhat of a fiction: after all, the transfer was

---

42. *Id.*

43. *Id.* (emphasis added).

44. *Id.*

45. Sokoloff v. Nat'l City Bank of N.Y., 130 Misc. 66, 73 (N.Y. Sup. Ct. 1927), *aff'd*, 227 N.Y.S. 907 (App. Div. 1928), *aff'd*, 164 N.E. 745 (N.Y. 1928).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 73–74.

merely a "bookkeeping entry" that was not a loss until cash was paid.[50] National City Bank's Petrograd branch "parted with nothing" and the rubles it had promised through its bookkeeping entry "were [still] in its possession."[51] "To constitute payment of a debt payable in money," the court asserted, "there must be a delivery by the debtor or his representative to the creditor or his representative of money or some other valuable thing for the purpose of extinguishing the debt and which is received by the creditor for the same purpose."[52]

Addressing force majeure, the court asserted that the nationalization of the Petrograd branch and seizure of its assets "have no force and effects as acts of sovereignty," because the U.S. did not recognize the Soviet Republic as a legitimate government of Russia.[53] The confiscation by such a government "has no other effect, in law, than seizure by bandits or by other lawless bodies."[54]

B. The Vietnam War Cases: Fall of Saigon

Six days before the fall of the South Vietnamese government in Saigon in 1975, Chase Manhattan bank closed the doors of its Saigon branch without any prior notice to depositors.[55] Staffers "balanced the day's books, shut the vaults and the building itself, and delivered keys and financial records needed to operate the branch to personnel at the French Embassy in Saigon."[56] Shortly thereafter, the North Vietnamese government issued a confiscation decree that applied to established banks, and the French embassy turned over records from Chase to the new government.[57] Two plaintiffs—one a shareholder in ten corporations with deposits at Chase in Saigon and the other an individual depositor—fled South Vietnam for the United States just prior to the communist takeover, and upon arrival there, demanded payment from Chase on their Saigon accounts.[58] Chase refused to pay, and the depositors brought a breach of contract claim in the United States District Court for the Southern District of New York.[59]

---

50. *See id.* at 75.
51. *Id.*
52. *Id.* at 78.
53. *Id.* at 82–83.
54. *Id.* at 83.
55. *See* Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 857 (2d Cir. 1981).
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*

The court noted that "for purposes of the act of state doctrine, a debt is not 'located' within a foreign state unless that state has the power to enforce or collect it."[60] The court further elaborated that a state's jurisdiction over the debtor determines whether the state has "the power to enforce payment of a debt."[61] Chase departed from Vietnam a week before the North Vietnamese issued the confiscation decree, and, when Chase left, the court held that the deposits no longer had their situs in Saigon.[62] Here, the court endorsed the "springing situs" theory, which it credited to Patrick Heininger:

> The situs of a bank's debt on a deposit is considered to be at the branch where the deposit is carried, but if the branch is closed, . . . the depositor has a claim against the home office; thus, *the situs of the debt represented by the deposit would spring back and cling to the home office.* If the situs of the debt ceased to be within the territorial jurisdiction of (the confiscating state) from the time the branch was closed, then at the time the confiscatory decree was promulgated, (the confiscating state would) no longer (have) sufficient jurisdiction over it to affect it.[63]

"[I]mpossibility of performance in Vietnam," the court went on to hold, "did not relieve Chase of its obligation to perform elsewhere," because operating abroad "through a branch instead of a separate corporate entity" meant that Chase had "accepted the risk of liability in other jurisdictions for obligations sustained by its branch."[64] The court cited *Sokoloff* for the proposition that a branch's "utimate liability for a debt rests with the parent bank."[65] A bank accepting deposits at a foreign branch is "a debtor, not a bailee," the court held, before offering very specific instructions to banks doing business abroad:

> In the event that unsettled local conditions require it to cease operations, it should inform its depositors of the date when its branch will close and give them the opportunity to withdraw their deposits or, if conditions prevent such steps, enable them to obtain payment at an alternative location. In the rare event that such measures are either impossible or only partially successful, fairness dictates that the parent bank be liable

60. *Id.* at 862.

61. *Id.* at 862.

62. *Id.*

63. *Id.* at 862–63 (emphasis added); *see also* Patrick Heininger, *Liability of U.S. Banks for Deposits Placed in Their Foreign Branches*, 11 LAW & POL. INT'L BUS. 903, 975 (1979).

64. *Id.* at 863.

65. *Id.*

> for those deposits which it was unable to return abroad. To hold otherwise would be to undermine the seriousness of its obligations to its depositors and under some circumstances (not necessarily present here) to gain a windfall.[66]

Citibank's Saigon office suffered a similar fate when the South Vietnamese government fell. In 1974, Quang Quy Trinh, a former South Vietnamese government official, opened a joint bank account at Citibank's Saigon office in his name and his son's name, paying an annual interest rate of 19%.[67] Per the deposit agreement, withdrawals were only permitted at Citibank's Saigon branch and only in Vietnamese currency—piasters—and the agreement further included a provision attempting to insulate the bank from political risk: "Citibank does not accept responsibility for any loss or damage suffered or incurred by any depositor resulting from government orders, laws . . . or from any other cause beyond its control."[68]

On April 24, 1975, in conjunction with the U.S. embassy's plan to evacuate American citizens,[69] Citibank closed its branch, leaving all branch documents, files, records and books inside, and entrusting the cash, branch keys, vault combination, and official documents to U.S. embassy officials.[70] Trinh was sent to a reeducation camp, from which he did not emerge until 1980, at which time he inquired about his deposit with Citibank in New York and was told that the National Bank of Vietnam was responsible for it.[71]

The United States District Court for the the Eastern District of Michigan, in which Trinh filed suit for the deposit, found in his favor, relying heavily on *Vishipco* and the "springing situs" theory.[72] It also held that force majeure was not implicated, because Citibank closed its branch *voluntarily* and "not an act of God, act of government, or fortuitous cause beyond its control."[73] Additionally, the court held that Citibank failed to prove that the confiscation included an assumption of the liabilities as well as the assets of Citibank Saigon.[74]

On its review, the United States Court of Appeals for the Sixth Circuit

---

66. *Id.* at 864.

67. Trinh v. Citibank, N.A., 850 F.2d 1164, 1166 (6th Cir. 1988).

68. *Id.*

69. It is not coincidence, then, that this was the same date on which Chase Manhattan vacated its Saigon office, as noted in the above discussion of *Vishipco*.

70. *See Trinh*, 850 F.2d at 1166.

71. *Id.* at 1175.

72. *See id.*

73. *Id.* (quotations omitted).

74. *Id.*

noted the *Sokoloff* court's assertion that the home office is liable on a deposit placed at a branch if the branch closes or wrongfully returns it.[75] Citibank's liability in this circumstance was consistent with the separate entity doctrine, the court asserted, because closure of a branch is one of the special circumstances triggering home office liability.[76]

The court also addressed the assumption of political risk, asserting that, simply by the fact of the bank's operating a branch in Vietnam:

> Citibank indicated to its foreign depositors that it accepted the risk that, in at least some circumstances, it would be liable elsewhere for obligations incurred by its branch. In so doing, it reassured those depositors that their deposits would be safer with them than they would be in a locally incorporated bank. With the volatile situation in Vietnam in the early 1970's, this assurance of safety was undoubtedly one of the primary factors motivating Vietnamese depositors, like Trinh, to place their money in Citibank. Certainly, these depositors expected that Citibank, with its worldwide assets and international reputation, would be "good" for the deposits if, for *whatever reason* – whether it be financial mismanagement, insolvency, or political events – Citibank Saigon could not return them.[77]

In support of this proposition, the *Trinh* court cited to *Vishipco*'s assertion that "U.S. banks, by operating abroad through branches rather than through subsidiaries, reassure foreign depositors that their deposits will be safer with them than they would be in a locally incorporated bank."[78]

The *Trinh* court did not believe that Citibank had effectively dispelled Trinh's expectation that its worldwide assets would back the Saigon deposit.[79] The agreement absolved the branch office of political risk, but not the home office.[80] In order to effectively limit their exposure to such liability in deposit agreements, the court asserted, "limitation provisions must be explicit and must clearly and unmistakably inform depositors that

---

75. *See id.* at 1168 (pointing to the *Sokoloff* court's holding that the ultimate liability for a debt incurred by a branch rests with a parent bank).

76. *See id.* at 1168–69 (citing *Sokoloff* and similar cases dealing with home office liability when a bank closes a branch).

77. *Id.* at 1169 (citations omitted).

78. Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 863 (2d Cir. 1981).

79. *See Trinh*, 850 F.2d at 1169 (pointing to the fact that Citibank's decision to open a Saigon branch indicated to foreign depositors that Citibank was willing to accept the risk of potential liabilities for debts incurred by its branch).

80. *Id.* at 1169–70.

they have no right to proceed against the home office."[81]

C. The Cuban Revolution

Rosa Manas y Pineiro, the wife of a former cabinet minister in the pre-revolutionary Cuban government lead by Fulgencio Batista, deposited almost a quarter million dollars in a Cuban branch of Chase Manhattan Bank in 1958.[82] On January 1, 1959, Fidel Castro assumed control of Cuba, and the couple subsequently fled to the United States.[83] The newly formed Ministry of Recovery of Misappropriated Property ordered Chase to close the accounts of former government officials and their families, including Manas' accounts, and to hand the cash over to the new Castro government, which it did. All of Chase's Cuban branches were nationalized in September 1960.[84] When Manas sought to draw the funds in 1974 and was denied, she filed suit.[85]

The trial court noted favorably the plaintiff's citation to *Sokoloff* for the proposition that the parent bank is ultimately liable for the obligations of the branch.[86] However, it asserted, the "liability does not alter the situs of the debt," and when the branch's liability is *extinguished*, the parent is relieved of liability as well.[87] The court held that its ruling on the validity of the confiscation would violate the Act of State Doctrine, "which precludes the courts of [the U.S.] from adjudicating the legality of acts of foreign governments."[88]

The first appellate court disagreed, asserting that the doctrine would only apply if the obligation was payable solely in Cuba, and that the doctrine had never been applied "to relieve an American bank of obligations owed by its branches to depositors."[89] Citing *Vishipco*, the court held that the nationalization of its branch office did not extinguish Chase's liability for the deposit.[90]

The New York Court of Appeals disagreed, holding that the lower court had misapplied the Act of State Doctrine and distinguishing the *Vishipco*

---

81. *Id.* at 1170.

82. Perez v. Chase Manhattan Bank, N.A., 463 N.E.2d 5, 6 (N.Y. 1984).

83. *Id.* at 6.

84. *Id.* at 7.

85. *Id.*

86. *Id.*; *see* Sokoloff v. Nat'l City Bank of N.Y., 130 Misc. 66, 73 (N.Y. Sup. Ct. 1927), *aff'd*, 227 N.Y.S. 907 (App. Div. 1928), *aff'd*, 164 N.E. 745 (N.Y. 1928).

87. *Perez*, 463 N.E.2d at 8.

88. *See id.* at 8, 11.

89. *Id.*

90. *See id.* (reaching this result regardless of the fact that the Cuban government, through Banco Nacional de Cuba, assumed Chase's liabilities for its Cuban branches).

line of cases on the grounds that the government had specifically confiscated Manas' funds in advance of nationalization of the branches.[91]

For purposes of the Act of State Doctrine, the court asserted, "a debt is located within a foreign State when that State has the power to enforce or collect it," and the power to enforce a debt, in turn, depends on the presence of the debtor.[92] At the time of confiscation, Chase was present in Cuba and the debt was payable at any Chase bank in the world.[93] But the debt was nonetheless only a single obligation to pay, and once Cuba exercised its jurisdiction to collect and enforce that debt—through its confiscation—Chase's debt to Manas was satisfied.[94] The confiscation was an Act of State and, as such, was unreviewable by the Court of Appeals.[95]

In *Perez*, unlike the above cases, the court found for the debtor-Bank and against the creditor-depositor. Yet the court rather convincingly argued that its holding is consistent with both *Vishipco* and *Sokoloff*, because the "springing situs" theory espoused in those cases did not apply to Manas' deposit.[96] In the earlier cases, the courts asserted that confiscation orders directed at depositors had no effect because, where the bank's foreign branches had ceased operations before the confiscation orders, the situs of the debt was no longer in the foreign state—it had sprung back.[97] In Manas' case, the debt was "extinguished before the bank was nationalized, [so] there [was] no occasion to apply the rationale" of those earlier cases.[98]

A provocative dissent in *Perez* argued that the most appropriate way for judges to defer to the acts of foreign governments would be to ignore legal fictions such as "situs" regarding debt, which is an intangible, and focus on the actual bank assets seized.[99] The bank should not be permitted, the dissent asserted, to shift its loss to the depositor by refusing to pay an account.[100] The dissent then addressed political risk, making a point to emphasize the fact that Chase was not ignorant as to the identity of the people from whom it was accepting deposits:

> The essence of the relationship between the parties is that the bank agreed

---

91. *See id.* (going on to explain that the Act of State Doctrine would only be inapplicable if Manas' funds were not payable in Cuba at the time of confiscation).

92. *Id.*

93. *Id.* at 9.

94. *Id.*

95. *See id.*

96. *Id.* at 10.

97. *See id.*

98. *Id.* at 11.

99. *Id.* at 11–15.

100. *Id.* at 14–15.

> to safeguard the depositor's money. It did so in the midst of a revolution by accepting deposits from a person whose husband was an official in the government under attack. The bank specifically agreed that the certificates would be redeemed at any of its branches, most of which are in this country, and further agreed to pay in United States currency. Even after the revolution had succeeded, the bank remained in Cuba and maintained assets all of which could have been, and in fact ultimately were, confiscated by the Cuban government. Under these circumstances it could be said that the bank was fully aware of and accepted the risk of confiscation of its assets, and should not be permitted to refuse to honor its commitment to this depositor after her arrival in this country.[101]

Interestingly, in a case decided the same year, the United States Court of Appeals for the Second Circuit agreed with some of the reasoning in the dissent in *Perez* and held in favor of a depositor in a case with strikingly similar facts.[102] Juanita Gonzalez Garcia and her husband, Lorenzo Perez Dominguez, made two deposits totaling half a million pesos in a Cuban branch of Chase in 1958.[103] Dominguez, who had served in the Cuban Senate for the previous four years and, prior to that as a colonel in the Cuban Army, expressed to bank officers at the time of deposit that he was concerned about the safety of his money.[104] The officers expressed to him that depositing with Chase represented "insurance" and "security" for his funds, and that the home office guaranteed his deposit, which was redeemable at any Chase branch.[105] As in *Perez*, Dominguez's accounts were frozen and then seized by the Ministry of Recovery of Misappropriated Property, before Chase was later nationalized.[106] After failing to recover the funds from Chase, Garcia filed suit.[107]

The court did not focus on intangibles or legal fictions in its Act of State Doctrine analysis. It asserted that the "monies paid over to the Cuban government did not come from funds specifically earmarked to Dominguez's and Garcia's 'account,'" "but rather "from Chase's general funds in the branch bank."[108] The bank's debt to its depositors "was not extinguished merely because it was forced to pay an equivalent sum of its own money to a third party," the court said starkly, before comparing the

---

101. *Id.*

102. *See generally* Garcia v. Chase Manhattan Bank, N.A., 735 F.2d 645 (2d Cir. 1984).

103. *Id.* at 646.

104. *Id.*

105. *Id.*

106. *Id.* at 647.

107. *Id.* at 647–48.

108. *Id.* at 649.

confiscation rather bluntly to a bank robbery:

> Chase would not argue that its debt was extinguished if an armed gunman had entered its Vedado branch and demanded payment of a sum equal to the amount of its debt to Dominguez and Garcia. Yet in effect, this is what transpired. The Cuban government did nothing more than "enter" Chase's Vedado branch armed with [the confiscation law] and demand depositors' money. Chase turned over funds without requiring the surrender of the CDs, without notice to the holder of the CDs and without a fight. As in the case of a bank robbery, the bank itself must bear the consequences.[109]

The court took pains to play up the depositors' emphasis on the safety of their funds, and if there is any way to distinguish *Garcia* from *Perez*, perhaps that is it. "The purpose of the agreement between Chase and Dominguez and Garcia," the court held, "was to ensure that, no matter what happened in Cuba, including seizure of the debt, Chase would still have a contractual obligation to pay the depositors upon presentation of their CDs."[110] Chase's international reputation was integral in the couple's decision to deposit there, the court asserted, and the deposits would not have been made absent such security.[111]

The Act of State Doctrine, the court held, is not implicated in such a case.[112] The court's decision did not challenge the validity of a foreign government's actions and had "no international repercussions."[113] The decision was "simply resolving a private dispute between an American bank and one of its depositors."[114]

D. The Philippines Cases

In 1983, Wells Fargo Asia Limited ("WFAL") paid $2 million to Citibank's New York office with the understanding that the money would be deposited in Citibank's branch in Manila.[115] Two months before the deposits matured, the Philippine government issued an order asserting that "[a]ny remittance of foreign exchange for repayment of principal on all foreign obligations due to foreign banks and/or financial institutions,

---

109. *Id.*

110. *Id.* at 650.

111. *See id.* (explaining that Chase failed to notify the couple that it would not accept the risk of liability for obligations of its Cuban branch).

112. *Id.* at 651.

113. *Id.*

114. *Id.*

115. Wells Fargo Asia Ltd. v. Citibank, N.A., 936 F.2d 723, 724–25 (2d Cir. 1991).

irrespective of maturity, shall be submitted to the Central Bank [of the Philippines] thru the Management of External Debt and Investment Accounts Department (MEDIAD) for prior approval" ("the Order").[116] The Central Bank of the Philippines interpreted this as preventing Citibank's Manila branch from repaying the WFAL deposits with Philippine assets.[117] WFAL sued, and the Central Bank of the Philippines gave Citibank permission to repay foreign depositors with non-Philippine assets, after which Citibank repaid just under half of the $2 million deposit.[118]

The Southern District of New York held for WFAL, rejecting Citibank's impossibility defense and noting that the Order allowed repayment where permission was obtained and that Citibank had not made a good faith effort to obtain it.[119] Under New York Law, the court held that "Citibank's worldwide assets were available" to satisfy WFAL.[120]

The United States Court of Appeals for the Second Circuit affirmed, noting that a debt may be collected wherever repayable unless the parties have agreed otherwise.[121] Because there was no such restriction in this case, WFAL was entitled to collect in New York.[122] Reviewing that decision, the United States Supreme Court asserted that the question was whether, absent an agreement respecting collection from Citibank's New York assets, WFAL could collect based on "rights and duties implied by law."[123] It vacated and remanded the case to the Second Circuit to clarify whether New York or Philippine law applied and to determine the outcome accordingly.[124]

The Second Circuit quoted at length from the district court's analysis of choice of law issues:

> Jurisdiction in this action is asserted both on the basis of diversity and federal question involving 12 U.S.C. § 632. In diversity cases, of course,

---

116. *Id.* at 724–5.

117. *See id.* (interpreting the Order as preventing Citibank/Manilla from repaying WFAL with assets other than those deposited in banks elsewhere or invested in non-Philippine enterprises).

118. *Id.* at 725.

119. *Id.*

120. *Id.* (finding no evidence on the record of a separate agreement between the parties restricting where the deposits could be collected, the court held that WFAL was entitled to collect the deposits out of Citibank's New York assets).

121. *See id.*

122. *Id.*

123. *Id.*; *see generally* Citibank v. Wells Fargo Asia Ltd., 495 U.S. 660 (1990).

124. *See Wells Fargo Asia*, 936 F.2d at 725; *see also Citibank*, 495 U.S. at 668, 673–74 (ordering further that the Second Circuit also consider whether federal common law might apply).

> we must apply the conflict of law doctrine of the forum state .... In federal question cases, we are directed to apply a federal common law choice of law rule to determine which jurisdiction's substantive law should apply .... The rule in New York is that "the law of the jurisdiction having the greatest interest in the litigation will be applied and that the facts or contacts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict." ... Federal law invokes similar considerations ... and the place of performance is considered an important factor.[125]

Under either test, the district court held, New York law should be used to evaluate the claim.[126] Because the transaction was in U.S. dollars, settled through New York offices, and Citibank is headquartered in New York, both parties would be justified in an expectation that New York law applied.[127] The goal of promoting certainty in financial markets is achieved by applying New York law uniformly.[128] The "most recent pronouncement" from the New York Court of Appeals was, at that time, *Perez*, which the district court cited for the proposition that "the parent bank is ultimately liable for the obligations of the foreign branch."[129]

The district court acknowledged that it was "aware of no persuasive authority to tell us to what extent, if any, a New York court would defer to local law in the situation here presented, where the foreign sovereign did not extinguish the branch's debt either in whole or in part but merely conditioned repayment on the obtaining of approval from a government agency."[130] However, it asserted that this question need not be answered, as Citibank had not "satisfied its good faith obligation to seek the [Philippine] government's consent to use the assets booked at Citibank's non-Philippine office."[131]

The Second Circuit agreed, holding that Citibank was not excused from payment despite its reliance on federal regulations asserting that a "customer who makes a deposit that is payable solely at a foreign branch of the depository institution assumes whatever risk may exist that the foreign country in which a branch is located might impose restrictions on

125. *Id.* at 726.

126. *Id.*

127. *See id.*

128. *Id.*

129. *Id.*

130. *Id.* at 727.

131. *See id.* (citing Wells Fargo Asia Ltd. v. Citibank, N.A., 695 F. Supp. 1450, 1455 (S.D.N.Y. 1988), *aff'd*, 852 F.2d 657 (2d Cir. 1988), *vacated*, 495 U.S. 660 (1990)).

withdrawals."[132] The court noted that federal law "defines a deposit that is 'payable only at an office outside the United States' as 'a deposit . . . as to which the depositor is entitled, under the agreement with the institution, to demand payment only outside the United States.'"[133] Accordingly, there is no "policy allocating the risk to depositors as a matter of law where there is no such agreement."[134]

The Second Circuit concluded that, "unless the parties agree to the contrary, a creditor may collect a debt at a place where the parties have agreed that it is repayable," and, in the "absence of any agreement forbidding the collection in New York," it may be collected there.[135]

III. GOVERNMENTS REACT: RINGFENCING LAWS AND RULES

Various federal and state laws will have an impact on an analysis of the appropriate political risk calculation regarding foreign bank deposits. Typically, these laws and rules are a reaction to issues presented to legislators and regulators by the U.S. banking industry. A new rule finalized by the FDIC in late 2013, in reaction to a proposal by a foreign bank regulator, would make clear that deposits in foreign branches of U.S. banks are not FDIC insured but may be deposits for the purposes of so-called depositor preference regimes. All constitute attempts to ringfence foreign deposits.

A. Federal Banking Laws

Federal law contains a sweeping provision regarding payment on deposits in cases of emergency closure. 12 U.S.C. § 633 asserts that Federal Reserve member banks are not liable for deposits made at a foreign branch of a bank if they are unable to repay them as a result of either "an act of war, insurrection, or civil strife" or "an action by a foreign government or instrumentality (whether de jure or de facto) in the country in which the branch is located."[136] An exception is made if "the member bank has expressly agreed in writing to repay the deposit under those circumstances," leaving banks the option of explicitly insuring customer accounts against political risk, but taking from the courts the power to impose an insurance requirement upon them.[137]

The federal statute did not exist prior to its adoption as part of the Riegle

132. *Id.* (citing 12 C.F.R. § 204.128(c) (1990)).
133. *Id.* (citing 12 C.F.R. § 204.2(t)).
134. *Id.*
135. *Id.* at 727–28.
136. 12 U.S.C. § 633 (2012).
137. *Id.*

Community Development and Regulatory Improvement Act of 1994.[138] After *Vishipco*, the banking community sought an addition to 12 U.S.C. § 1828 that would have added a subsection (m) to read as follows:

> (m) In any action or proceeding brought in a state or Federal court in the United States or the District of Columbia, the terms and conditions adopted or made applicable by the parties to any deposit or other obligation of a foreign branch of an insured bank shall be conclusive to establish the place, currency and manner of performance of such deposit or other obligations and the law or custom governing such performance. Notwithstanding any other rules of law, where action or threats on the part of any authority at the place where a foreign branch of an insured bank is located prevents performance at the foreign branch of a deposit or other obligations, in accordance with its terms and conditions establishing the place, currency, and manner of such performance because of:
>
> (i) seizure, destruction, cancellation, or confiscation by governmental authorities of the branch's assets or business, or assumption of its liabilities;
>
> (ii) other similar governmental decrees or actions, or
>
> (iii) closure of the branch in order to prevent, in the reasonable judgment of the insured bank, harm to the bank's employees or property
>
> the deposit or other obligation of the foreign branch will not transfer to and may not be enforce against any other office of the insured bank located outside the country in which the foreign branch is located.[139]

The proposed subsection was never introduced in Congress, despite some evidence that regulators at the staff level favored it.[140]

B. State Banking Laws

Several states have passed legislation aimed at protecting the interests of domestic banks abroad. These might be quickly dismissed as giveaways to banking interests that are seeking to protect themselves from double liability arising as a result of political risk. There is some evidence, however, that these laws were drafted, in part, to protect local banks' capital from flowing out of the state to the aid of non-residents injured by

---

138. *See generally* Riegle Community and Regulatory Development Act of 1994, Pub. L. No. 103-325, 108 Stat. 2160 (1994).

139. *See* Peter S. Smedresman & Andreas F. Lowenfeld, *Eurodollars, Multinational Banks, and National Laws*, 64 N.Y.U. L. REV. 733, 795 n.258 (1989) (citing 12 U.S.C. § 1828).

140. *Id.*

actions undertaken by their very own governments.[141]

For example, New York banking law asserts that banks – including national banks – located in New York and operating a branch abroad "shall be liable for contracts to be performed at such branch office or offices and for deposits to be repaid at such branch office or offices to no greater extent than a bank . . . organized and existing under the laws" of the host country.[142] It also holds that if an authority that is not the de jure government of a foreign territory seizes assets of a bank operating in that territory, the liability of that bank "for any deposit theretofore received and thereafter to be repaid by it. . . shall be reduced pro tanto by the proportion" the seized assets bear to the bank's total deposit liabilities.[143] Finally, it asserts that a bank located in New York:

> shall not be required to repay any deposit made at a foreign branch of any such bank if the branch cannot repay the deposit due to (i) an act of war, insurrection, or civil strife; or (ii) an action by a foreign government or instrumentality, whether de jure or de facto, in the country in which the branch is located preventing such repayment, unless such bank has expressly agreed in writing to repay the deposit under such circumstances.[144]

New York's law did not cover national banks until the 1984 amendments; prior to that, it applied only to banks with state charters, which greatly limited its usefulness, as most banks operating abroad are nationally chartered.[145]

A portion of Nevada's banking law is dedicated to the emergency closure of banks. It defines "emergency" as "any condition or occurrence which may interfere physically with the conduct of normal business operations at one or more or all of the offices of a bank, or which poses an imminent or existing threat to the safety or security of persons or property."[146] According to the law, any day on which an office of a bank is closed for all or part of the day is treated as a bank holiday, and "[n]o liability or loss of rights of any kind on the part of any bank, or director, officer or employee thereof, shall accrue or result by virtue of any" such

---

141. *See* Johnson, *supra* note 3, at 234.

142. N.Y. BANKING LAW § 138 (McKinney 2013).

143. *Id.*

144. *Id.* Michigan has a similar statute. *See* MICH. COMP. LAWS ANN. § 487.13714 (West 2013).

145. Smedresman & Lowenfeld, *supra* note 139, at 795–96.

146. NEV. REV. STAT. ANN. § 662.265 (West 2013).

closing."[147]

C. FDIC Foreign Deposit Rules

One thing is certain, the FDIC, in its primary role as the U.S. deposit insurer, wants to make very clear that it is not responsible for the U.S. banks' foreign branch deposits. Earlier this year, the FDIC issued a notice of proposed rulemaking in which it proposed a new regulation to explicitly state that deposits payable in branches of U.S. insured depository institutions outside the U.S. are *not* FDIC insured.[148] This would apply to deposits even if they were considered dually payable, or payable in both the U.S. and the foreign country.[149] Under the rule, foreign deposits would still be considered deposit liabilities even though they are not insured, and would be on equal footing with domestic deposits under the depositor preference regime of the Federal Deposit Insurance Act.[150] Accordingly, these deposits would receive preferred status over general creditors in the event of a bank failure and FDIC receivership.[151]

The rule is not intended to stop U.S. banks from drafting deposit agreements in such a way as to protect themselves from sovereign risk liability.[152] Rather, it is designed to ensure that the FDIC does not take on the role of a worldwide insurer of deposits.[153]

The notice of proposed rulemaking comes in response to a Consultation paper issued by the United Kingdom's Financial Services Authority ("UK FSA"). This proposed to prohibit banks that are not based in the European Economic Area ("EEA") from operating deposit-taking branches in the UK unless UK depositors are put on an equal footing in the depositor preference regime with depositors from the bank's home country in the event of a resolution.[154] The UK FSA offered several options for the non-EEA banks that wish to continue deposit-taking: (1) use a UK-incorporated subsidiary instead of a branch, so that UK resolution and insolvency laws apply and UK depositors are not subordinated to home-country depositors; (2) segregate assets in the UK through a trust

147. NEV. REV. STAT. ANN. § 662.305.

148. *See* FDIC Deposit Insurance Regulations; Definition of Insured Deposit, 78 Fed. Reg. 11604, 11604 (proposed Feb. 19, 2013) (to be codified at 12 C.F.R. pt. 330).

149. *Id.* at 11604.

150. *Id.*

151. *Id.*

152. Indeed, the proposal makes clear that it is "not intended to preclude a United States bank from protecting itself against sovereign risk by excluding from its deposit agreements with foreign branch depositors liability for sovereign risk." *Id.* at 11605.

153. *Id.*

154. *Id.* at 11605–06.

arrangement and provide a legal opinion explaining how the arrangement prevents subordination of UK depositors; (3) make the deposits dually payable, such that under U.S. law, UK deposits would occupy the same priority as uninsured home country deposits.[155]

The FDIC, predicting that most U.S. banks will prefer the third option offered by the UK FSA, sought through this rulemaking to protect the Deposit Insurance Fund ("DIF") by clarifying that a foreign branch deposit, though it may be dually payable and on the same footing as a domestic deposit in terms of the depositor preference regime, is not insured by the DIF.[156] The FDIC believed that this rule will preserve confidence in the DIF by protecting it against the possibility of becoming a global deposit insurer.[157]

On September 13, 2013, the FDIC adopted a final rule to clarify that deposits in foreign branches of U.S. banks are not FDIC insured though they may be deposits for purposes of the depositor preference regime.[158] The comment period ended on April 22, 2013, and the FDIC received comments from only three industry groups and two individuals.[159] Commenters generally did not object to the concept that the DIF should not insure deposits in foreign branches, but suggested an alternative approach whereby the FDIC interpret "deposit liability" to include all deposits of a U.S. bank no matter where payable for the purposes of the depositor preference regime in Section 11(d)(11) of the Federal Deposit Insurance Act.[160] Such an approach, commenters argued, would "bolster[] international cooperation" and "eliminate[] the potential for inconsistent treatment of deposits in different foreign jurisdictions," in addition to saving the FDIC the expense of continued efforts at guidance to banks, foreign depositors, and foreign regulators regarding dual payability.[161] The FDIC rejected this approach as "inconsistent with current statutory language," and did so explicitly "[w]ithout expressing an opinion as to the merits" of the policy arguments commenters made in support of their approach.[162] Accordingly, the rule was ultimately adopted as proposed, with minor changes that did not impact the substance of the proposal.[163]

---

155. *Id.* at 11606.

156. *Id.*

157. *Id.* at 11604.

158. FDIC Deposit Insurance Regulations; Definition of Insured Deposit, 78 Fed. Reg. 56583, 56583 (Sept. 13, 2013) (to be codified at 12 C.F.R. pt. 330).

159. *Id.* at 56585.

160. *Id.* at 56585–86.

161. *Id.* at 56586.

162. *Id.* at 56586–87.

163. *Id.* at 56587–89.

IV. SOLUTIONS FOR BANKS

There have been various proposed solutions to the uncertainty faced by banks attempting to protect themselves against the political risk of operating branching abroad. Organizational practices[164] have not been successful in containing branch liabilities.[165] Several other proposed solutions are examined below.

A. "Partial Suspension of Operations" Theory

One author has suggested that the Federal Reserve Board adopt a regulation permitting U.S. banks to "partially suspend the operations of a foreign branch during periods of unrest in the host country."[166] This proposal was primarily a response to *Vishipco*, in which the closure of the branch resulted in the debts "springing back" to the home office, where courts held they were payable. As long as the branch stayed open, the debt would presumably remain at the branch office and the home office would not be liable.[167] If the political situation were to become untenable and result in expropriation, the author argued, the home office would not be liable because the debtor branch remained within the jurisdiction of the expropriating power.[168] Given the court's sweeping ruling in *Garcia*, it is not clear that such a regulation would protect banks from liability following expropriation. After all, if courts have made a policy decision that banks are offering political risk insurance to foreign branch deposits and the legal decision that Act of State Doctrine does not apply to adjudications of contract disputes between private parties, keeping the branch partially open will not save the bank.

To prevent the banks from obtaining a windfall if it is "relieved of liability yet permitted to retain assets that branch officials somehow removed from the host country" or if it is insured against expropriation, this author suggested that courts "require the home office to pass on to the foreign branch depositors the value of any branch assets that the home office recovers or any insurance payments received."[169] How this would work in practice is unclear; if courts follow *Vishipco* to the letter and determine that the home office is not liable for expropriated deposits under a partial suspension scenario, how would they have the authority to force

---

164. For example, banks creating subsidiaries rather than branches.

165. Johnson, *supra* note 3, at 212.

166. Francis X. Curci, *Foreign Branches of United State Banks—A Proposal for Partial Suspension During Periods of Unrest*, 7 FORDHAM INT'L L.J. 118, 131 (1983).

167. *Id.* at 134.

168. *Id.* at 135.

169. *Id.*

an accounting of bank losses and ensure that the depositors share them equally?

However, while courts would be ill suited to such an accounting, it is not entirely out of the realm of possibility that the FDIC would be able to undertake one. After all, the FDIC has the capabilities associated with taking banks into receivership and accounting for their assets and liabilities. Perhaps the appropriate regulation for the federal government to undertake is one that allows the FDIC or the Federal Reserve to demand an accounting from U.S. banks of the exact losses incurred as a result of nationalization or expropriation.

In some cases, the funds lost will simply be bookkeeping entries that never existed as cash reserves in the bank or were quickly moved to other foreign branches or to the U.S. upon deposit. In some cases, the bank will have made loans to locals that it is no longer able to enforce and collect upon and will need to write off its books. There will be hard assets lost, including real estate holdings, the bank office itself, certain repossessed collateral, and whatever cash reserves the bank held in the host country. But while the cases reviewed do not provide a dollar amount representing what the affected branch had actually lost, that amount should *not* be a mystery. Once this information is available, the FDIC or Federal Reserve—or whatever body is placed in charge of winding down expropriated foreign banks—could allocate the losses according to any number of algorithms. One could envision a scenario in which the regulator would simply divide them equally between the debtor-bank and creditor-depositors. Or perhaps each depositor's funds would be reduced pro rata according to the amount of its assets the bank lost, as envisioned by the New York statute.[170] In that case, for example, a deposit of 50,000 bolivars at a Citibank branch in Venezuela that demonstrated losses amounting to 20% of its assets would be reduced commensurately by 10,000 bolivars.

V. CONTRACT LANGUAGE

As discussed below, it is possible that risk can be appropriately distributed between banks and their depositors via the language in deposit agreements. There are legitimate questions to be raised, however, about the fairness of this approach given (1) the disparity in bargaining power between some depositors and the depository institutions; and (2) the expectations of depositors – particularly less sophisticated depositors – that their deposits are protected notwithstanding language in an agreement they may or may not have read.

170. *See supra*, notes 141–42.

A. Achieving Clearer Understandings of Risk through Contract Language

Whether banks can limit their liability and depositors can clarify their risk through the language of deposit agreements is an open question. Some courts have been unwilling to side against plaintiffs even where it means ignoring the language of the deposit agreement.

Banks may use deposit agreements to create various covenants and clauses spelling out which countries laws would govern disputes, a forum for litigation or restricting payment on the deposit to the issuing branch.[171] Courts have upheld such clauses in insurance policies and shipping contracts, and might be willing to do the same in deposit agreements assuming the bank could show that the limitation in the depositor's rights had been freely bargained for.[172]

One author has argued that the explicit terms of the agreement and the reasonable expectations of the parties ought to be the "fundamental issue" in determining whether a bank is required to pay on a deposit that is exposed to political risk.[173] She asserted that the *Trinh* court "rewrote the deposit agreement and awarded the plaintiffs something they never had under its terms – a deposit payable in the United States in the event of expropriation."[174] In *Vishipco*, too, it has been argued, the courts went out of their way to produce a recovery of some kind for the plaintiff.[175]

B. The Fairness Issue in Distribution of Political Risk through Contract

Perhaps the ultimate issue to resolve is the fairness of the ultimate distribution of political risk. Where contract language is used to determine that allocation, the parties with the greatest bargaining power will be allocated less risk and those with lesser bargaining power will be allocated more. That could mean that large, multinational corporations holding their money abroad are able to demand payment of their accounts at a bank's home office while the individual depositor is not. Perhaps this is as it should be; after all, large corporate investors are providing the bank with substantially more investment capital and, with that larger investment, they receive greater benefits. On the other hand, individual depositors at a commercial bank—when taken together—make up a sizable portion of total deposits, and should not be left unprotected merely because they cannot bargain collectively over deposit agreement language.

There is some disagreement about the appropriate distribution of political

171. Johnson, *supra* note 3, at 210.

172. *Id.*

173. Hannigan, *supra* note 1, at 753.

174. *Id.* at 754.

175. Johnson, *supra* note 3, at 232.

risk. In an article published several years before *Trinh*, for example, the authors asserted, "the parties to a deposit contract logically would expect the holder of an account at an overseas branch to accept the local legal and political risks which may affect the deposit in the location of the branch."[176] A U.S. bank operating overseas does not intend, they assert, "to offer the customers of that branch any greater or different protection against local legal, regulatory, or political risks than that afforded by a locally incorporated bank."[177] The authors cite to the Citibank's Amicus Curiae brief in *Vishipco* for the proposition that banks operating international branches have never understood their operations to provide political risk insurance to their customers.[178] They explain that the risk to the banks is two-fold: (1) there is the risk that the brick and mortar premises, cash-on-hand, deposits with other banks, investments, and right to repayment of loans will be confiscated without adequate compensation; and (2) there is a double-liability risk when "the host country expropriates a depositor's right to repayment of a deposit" while the depositor demands payment elsewhere.[179]

Another author, by contrast, agrees with the courts' thinking in *Vishipco* and *Trinh*, asserting that a foreign national would have no reason to bank with a local branch of an U.S. bank were it not for political risk protection.[180] But he goes even further, asserting that U.S. banks should be happy to take this tradeoff: "foreign branch banks like those of Bank of America may make more money providing de facto insurance against revolution than they ever will lose in double payments following expropriations."[181]

VI. CONCLUSIONS

It may seem as if this is a problem of the past; that the end of the spread of communism means that expropriation of bank assets is a worry relegated to the second half of the Twentieth Century. However, there is no reason to believe that asset seizure by a foreign country will not happen in the future. In resolving this complex problem, certainty on a going-forward basis is paramount. The current state of disarray is bad for investors seeking returns abroad and for those seeking U.S. funding for overseas ventures. Accordingly, the time to prepare a coherent theory of bank liability is not

176. Logan & Kantor, *supra* note 13, at 336.
177. *Id.*
178. *Id.* at 337.
179. *Id.*
180. Johnson, *supra* note 3, at 245.
181. *Id.*

after assets are seized, but right now.

Perhaps the best practical advice for banks regarding foreign deposits comes down to the analysis of an author mentioned above,[182] who points out that maintaining foreign deposits and investment is, at the end of the day, a profitable endeavor. Even if it means insuring a few unstable countries against political risks, banks will ultimately profit. It is almost certainly the case that a system in which banks guarantee foreign deposits at the home office would result in additional foreign deposits, driving up investment and profits. In exchange for that, banks would have to agree to be on the hook for the few cases in which funds are expropriated or frozen.

In light of the FDIC's recent notice of proposed rulemaking regarding foreign deposits and 12 U.S.C. § 633(a), banks should carefully and narrowly draft deposit agreements with depositors in foreign branches, such that there can be no confusion as to whether the home branch is liable for foreign deposits. This includes not only explicit instructions as to where deposits are payable, but perhaps also explicit instructions, in light of the *Wells Fargo* case, as to where deposits are *not payable*. In the past, as the cases summarized in Part II make clear, courts have not been inclined towards sympathy with banks that have accepted deposits without the most rigorous and express provisions regarding allocation of risk.

By the same token, depositors should keep in mind that, in spite of bank-friendly regulations, laws, and proposals to limit bank liability absent a deposit agreement to the contrary, there is still the possibility of allocating political risk to the bank by demanding that such allocation be included in the deposit agreement. This caveat may not be helpful to small individual depositors, but, as noted above, most depositors in foreign branches of U.S. banks are, in fact, corporations, and such large organizations should have the bargaining power to insist on certain terms in agreements in which they provide foreign branches the capital to invest in places where investment capital often sees far higher returns.

182. *See supra* notes 178–79 and accompanying text.

* * *

INTEGRATING LATIN AMERICAN STOCK MARKETS: THE *MERCADO INTEGRADO LATINOAMERICANO* (MILA): INNOVATIONS AND PERSPECTIVES

BY DANTE FIGUEROA*

* Dante Figueroa, Esq., is a Partner at Washington, D.C.-based Wöss & Partners, PPLC (http://www.woessetpartners.com/IATG/) in the areas of international arbitration and trade. He is a member of the Chile, New York, Washington, D.C., U.S. Supreme Court, and U.S. Court of International Trade bars, and is an Adjunct Professor at the Georgetown Law Center, and the Washington College of Law. His publications are available at: http://ssrn.com/author=1015723, and he can be reached at: dfigueroa@woessetpartners.com.

INTRODUCTION

This Article reviews the main aspects of the Latin American Integrated Market (*Mercado Integrado Latinoamericano*) ("MILA"), its principal characteristics, its structure, and the prospects for the development of the financial markets of MILA's signatory countries. The MILA initiative creates a genuine investment opportunity for U.S. investors to take advantage of the benefits generated by an integrated stock market in South America. As this Article will explain further, U.S. investors may benefit from larger economies of scale, more uniform and harmonized information, creation of new financial products, early notification of regulatory changes, multiple market exposure, and the singular position of trading in three financial systems at once. Accordingly, U.S. investors may find in MILA a "one-way street" for investing in securities of the three (and potentially four if Mexico were to join MILA) jurisdictions whose economies are sound, and who are jointly taking enormous strides toward strengthening, harmonizing, and expanding their securities markets.

MILA constitutes an authentic effort to deepen the connections and opportunities between the stock markets of Latin America's reputedly most prosperous and consistently open economies: Chile, Colombia, and Peru. The motivation for MILA's creation arises from a growing interest in the globalization of financial markets around the world.

In this context, this Article reviews the broader context of the rise of integrated stock markets around the world, and then provides a description

of the financial markets of Chile, Colombia, and Peru, explaining the context in which MILA emerged as an alternative created by the pro-market economies of these three prosperous countries of the southern cone of South America aimed at facilitating the functioning of their stock markets and the creation of wealth. To frame this development, Part I of this Article provides a discrete overview of the rise of integrated stock markets around the world. Specifically, it traces the development of Euronext and its integration with the New York Stock Exchange ("NYSE").

Part II of this Article examines the legal framework of the stock markets of each of MILA's signatory countries, providing a background for understanding the creation and prospects of MILA, and presenting a basic definition and explanation of MILA including the legal structure, practical advantages, and operational aspects of its mechanisms.

Part III of this Article discusses the main steps followed by the parties toward the signature of MILA's Framework Agreement ("MILA Agreement"), and the main advantages of this integration for MILA's members.

Part IV of this Article discusses the recent efforts undertaken by Mexico to join the MILA Agreement.

Finally, Part V of this Article presents a few closing thoughts on MILA's potential as the foundation for the integration of Latin American stock markets.

I. EURONEXT AND NYSE: THE RISE OF INTEGRATED STOCK MARKETS

During the last three decades, there has been a global trend in favor of market integration, and more specifically in favor of stock market integration.[1] One commentator identifies several factors as probable causes of this trend, including the need to improve national competitiveness in a world of multilateral trading systems;[2] the reduction of barriers on mobility triggered by globalization, market liberalization, and deregulation;[3] and the revolution in information technology that has facilitated transactions in the banking and financial sectors.[4] Consequently, stock market integration has found fertile grounds around the globe, and Latin America is not an exception to this global development.

---

1. *See* HOOY CHEE WOOI, STOCK MARKET INTEGRATION AND THE PRICING FOR REGIONALISM 1–10 (2010) (discussing stock market integration in the form of regional "trading-blocs").

2. *Id.* at 5.

3. *Id.* at 7.

4. *Id.* at 8.

The most relevant instances of stock market integration are found in the United States and the European Union. The leading initiatives in this field were the creation of Euronext in 2001; the integration of the New York Stock Exchange ("NYSE") and Euronext in 2007; and the recent efforts to integrate the NYSE Euronext group and the Tokyo Stock Exchange.[5] Euronext, which is the first massive experiment of stock market integration, was incorporated into the framework of the European Union's economic integration.[6] Euronext is a result of the initial merger of the Paris Bourse SBF SA, the Brussels Stock Exchange, and the Amsterdam Stock Exchange, which went public in July 2001.[7] After this initial merger, Euronext also integrated the Lisbon Stock Exchange, the London International Financial Futures and Options Exchange, and the Deutsche Börse.[8] A few years after the Euronext merger, on April 4, 2007, the NYSE Group, Inc. entered into a merger with the Euronext N.V., a private Dutch finance company,[9] creating one of the largest operators of the financial market in the world: NYSE Euronext group.[10] Today, NYSE Euronext represents "one-third of the world's equities trading [and is] the most liquid of any global exchange group."[11] Finally, the most recent initiative in stock market integration originates from the agreement signed in March 2011 between the world's two main stock market groups, NYSE Euronext and

5. In 2011, the Tokyo Stock Exchange and NYSE Euronext signed a "Master Agreement Regarding Mutual Network Connection," designed to provide "access to both exchange operators' markets using the existing network environments for trading participants, investors, service providers and other users of both networks." *Tokyo Stock Exchange and NYSE Euronext Sign Master Agreement Regarding Mutual Network Connection*, NYSE EURONEXT (Dec. 8, 2011), http://nyse.com/press/1323341327130.html.

6. *Markets*, EURONEXT, https://europeanequities.nyx.com/markets (last visited Apr. 12, 2014) (calling Euronext "Europe's first multi-class, fully-integrated exchange group").

7. *See* Lisa K. Kothari, Comment, *Global Regulation for Global Stock Exchanges: The NYSE-Euronext Merger*, 22 TEMP. INT'L & COMP. L.J. 499, 501 (2008).

8. *Id.*; *see also* R.D., *Deutsche Börse and NYSE Euronext: Why the Marriage Failed*, FREE EXCHANGE BLOG (Feb. 1, 2012, 5:55 PM), http://www.economist.com/blogs/freeexchange/2012/02/deutsche-b%c3%B6rse-and-nyse-euronext.

9. *Euronext N.V.*, NYSE Euronext, http://www.nyx.com/who-we-are/company-overview/euronext-nv (last visited Apr. 12, 2014).

10. *See Who We Are: Quick Facts*, NYSE EURONEXT, http://www.nyx.com/en/who-we-are/quick-facts (last visited Apr. 12, 2014); *see also NYSE Group and Euronext Announce Merger*, NYSE GROUP NEWSL. (NYSE Euronext, New York, N.Y.), June 2006, at 1, *available at* http://www.nyse.com/about/publication/1145959806931.html.

11. *Who We Are: Quick Facts*, *supra* note 10.

the Tokyo Stock Exchange, which created a mutual network of stock exchanges.[12]

These integrations have provided useful insight into detecting and understanding the main challenges that stakeholders face when implementing integration. Among these challenges, the most important have been the harmonization of conflicting, or at least divergent, regulatory frameworks and the costs of compliance thereof.[13] The NYSE Euronext experience clearly shows the difficulties of harmonizing divergent regulatory frameworks as each jurisdiction regulates its own financial markets differently.[14]

Much like MILA, the NYSE Euronext merger was the product of a Memorandum of Understanding signed by the regulatory agencies of the participating parties.[15] In the Memorandum, the parties committed to harmonize the legal frameworks of each country to promote the stock market integration.[16] The agreement, however, was non-binding in nature and prevented conflicts with the domestic laws or other bilateral or multilateral agreements existing between the signatory agencies' countries.[17] Consequently, many domestic regulations remained after integration, creating heavy burdens on non-local stakeholders.[18] The heaviest burdens were created by the obligation to comply with laws on accountability standards,[19] reporting and corporate governance requirements,[20] and disclosure systems.[21] Despite these challenges, the integration of the NYSE and Euronext has resulted in a successful experience that has facilitated the purchase and sale of foreign shares in the United States and Europe,[22] which is the main purpose of the stock integration system.

---

12. *See Tokyo Stock Exchange and NYSE Euronext Sign Master Agreement Regarding Mutual Network Connection*, TOKYO STOCK EXCHANGE (Dec. 6, 2011), http://www.tse.or.jp/english/news/48/111207_a.html.

13. Kothari, *supra* note 7, at 515–17.

14. *See id.* at 515–16 (2008) (discussing bilateral agreements that were created to avoid "conflicts that may arise from the application of differing regulatory practices").

15. *Id.* at 514.

16. *Id.* at 515.

17. *Id.*

18. *Id.* at 499 ("The greatest challenges are posed by the burdens that listed companies may face in meeting the different regulatory requirements of the European nations that list on Euronext and the United States, many of which are rigorous.").

19. *Id.* at 510–12.

20. *Id.* at 512–13.

21. *Id.* at 513–14.

22. *Id.* at 502.

II. DESCRIPTION OF THE LEGAL FRAMEWORK OF THE STOCK MARKETS OF CHILE, PERU, AND COLOMBIA

To understand the relevance of MILA as a crucial effort aimed at harmonizing Latin American financial markets, this Part will provide a description and general background information about the basic market structure and operations of MILA's signatory members. This general information will benefit U.S. businesses, and their attorneys, seeking to expand investment opportunities in the Latin American region.

1. Legal Framework of the Peruvian Financial Market

This Section will explore the legal framework of the Peruvian financial market by exploring its (A) history, (B) regulatory scheme, (C) main institutions, and (D) current performance. By understanding these elements, which underpin the Peruvian markets, U.S. businesses and their attorneys can explore the opportunities presented by MILA with a more keen understanding of the Latin American market on which it is based.

A. Brief History of the Peruvian Stock Market

The origins of the Peruvian Stock Market date back to 1857 with the creation of the Commerce Stock Market of Lima (*Bolsa de Comercio de Lima*).[23] In 1898, this institution was renamed the Commercial Stock Market of Lima (*Bolsa Comercial de Lima*).[24] Due to the catastrophic effects of the two World Wars and the American Great Depression during the twentieth century, this institution suffered several drastic changes that led to the creation of the New Commercial Stock Market of Lima in 1945.[25] In 1945, reforms were initiated and then in 1951, the new stock market of Lima was officially created. However, between 1951-1971, there were many difficulties, primarily educating people to actually negotiate on the trading floor. In 1971, conditions were finally ripe for the creation of the actual stock market of Lima. Between 1971-2002, many important changes occurred, which ultimately resulted in the electronic system of trading that Peru now has, CAVALI. Finally, in 2002, the Extraordinary General Assembly of Associates of the Lima Stock Market decided to convert this institution into a stock corporation.[26] Likely the most

23. *See Reseña Histórica* [*Historical Review*], BOLSA DE VALORES DE LIMA, http://www.bvl.com.pe/acerca_resenahistorica.html (last visited Apr. 12, 2014).

24. *Id.*

25. *Id.*

26. RONY SAAVEDRA, EL LEVANTAMIENTO DEL VELO SOCIETARIO: DOCTRINA, LEGISLACIÓN Y JURISPRUDENCIA [THE LIFTING OF THE SOCIETAL VEIL: DOCTRINE, LEGISLATION AND JURISPRUDENCE] 80–81 (2009) (explaining the most important differences amongst business entities in Peruvian law). *See generally* Dante Figueroa,

important legal and economic consideration behind the conversion into a stock corporation relates to the issue of limited liability enjoyed by such entities.

B. Regulatory Scheme

Peru's Stock Market Law of 1996 is the main body of legislation regulating the Peruvian Stock Market,[27] and its purpose is to regulate the creation and operation of stock markets in Peru.[28] The most relevant amendment to this law was passed in 2008 by Legislative Decree No. 1061, which was enacted to enhance the existing Peruvian financial regulations pursuant to the U.S.–Peru Commercial Promotion Agreement and its Amending Protocol (*Acuerdo de Promoción Comercial Perú - Estados Unidos de América y su Protocolo de Enmienda*).[29]

In addition to the Stock Market Law of 1996, the operation of the Peruvian stock market is governed by the subsidiary norms and statutes listed in Article 9 of Legislative Decree 861.[30] Among these norms and statutes, the most important are: the local and international financial and commercial customs (*usos bursátiles y mercantiles locales e internacionales*), the Law on General Administrative Proceedings (*Ley de Normas Generales de Procedimientos Administrativos*), the General Law on the Financial System and the Insurance System (*Ley General del Sistema Financiero y del Sistema de Seguros*), and the Organic Law on the Superintendence of Banks and Insurance Institutions (*Orgánica de la Superintendencia de Banca y Seguros*).[31]

Comparative Aspects of Piercing the Corporate Veil in the United States and Latin America, Duquesne Law Review, 50 DUQ. L. REV. 683, 704 (2012) (referring to the emergence of limited liability companies in the United States, where "society ultimately recognized the benefits of limited liability, which eventually resulted in the creation of a new form of business organization: the limited liability company.").

27. Ley de Mercado de Valores, Decreto Legislativo No. 861 [Stock Market Law, Legislative Decree No. 861], 21 de octubre de 1996 (Peru), *available at* http://www.congreso.gob.pe/ntley/Imagenes/DecretosLegislativos/00861.pdf.

28. HERNÁN FIGUEROA, DERECHO DEL MERCADO FINANCIERO [FINANCIAL MARKET LAW] 810 (Jurídica Grijley ed., 2010).

29. According to the heading of Legislative Decree No. 1061 of 2008, the Peruvian Congress enacted this Legislative Decree with the purpose of facilitating the implementation of these agreements and to promote economic competition for the enforcement of these agreements. Ley de Mercado de Valores, Decreto Legislativo No. 1061 [Stock Market Law, Legislative Decree No. 1061], 1 de enero de 2009 (Peru), *available at* http://www.congreso.gob.pe/ntley/Imagenes/DecretosLegislativos/01061.pdf.

30. Stock Market Law, Legislative Decree No. 861, *supra* note 27, art. 9.

31. *Id.*

Finally, several regulations control those aspects that do not contradict the contents of Legislative Decree No. 861 and the subsidiary norms and statutes listed in Article 9 of the Stock Markets Law of 1996.[32] In fact, Article 9 enumerates the legal instruments that apply to matters in which that law is silent.[33] Among the most important regulations are: the Regulation on the Operations of the Stock Exchange (*Reglamento de Operaciones de la Rueda de Bolsa*),[34] the Regulation on the Inscription and Exclusion of Securities in the Stock Exchange of Lima (*Reglamento de Inscripción y Exclusión de Valores Mobiliarios en la Rueda de Bolsa de la Bolsa de Valores de Lima*),[35] and the Regulation on the Surveillance of the Market by the Stock Exchange of Lima (*Reglamento para la Vigilancia del Mercado por parte de la Bolsa de Valores de Lima*).[36]

C. *Main Institutions of the Peruvian Stock Market*

The Peruvian Stock Market has three main institutions: the Lima Stock Market (*Bolsa de Valores de Lima*), the Central Registry of Securities and Liquidation (*Caja de Valores de Lima*) ("CAVALI"), and the Superintendence of the Securities Market (*Superintendencia del Mercado de Valores*) ("SMV"). CAVALI's main function is the creation, maintenance, and development of the national securities market.[37] CAVALI's tasks are the registration, transference, custody, offset, and liquidation of securities for operations performed at the Lima Stock Market.[38] The SMV, in turn, is a governmental agency ascribed to the Ministry of Economy and Finance, whose role is to guarantee the protection of investors, to ensure efficiency and transparency of financial markets, to enforce compliance with securities markets regulations, and to

---

32. FIGUEROA, *supra* note 28, at 810.

33. Stock Market Law, Legislative Decree No. 861, *supra* note 27 (mentioning the following legal instruments: (a) General Companies Law; (b) Commerce Code and the Securities Law; (c) local and international stock and commercial customs; (d) Law on General Norms on Administrative Procedures; and (e) the Civil and Civil Procedure Codes).

34. Comisión Nacional Supervisora de Empresas y Valores, Resolución No. 21-1999-EF/94.10 [National Supervisory Commission for Companies and Securities, Resolution No. 21-1999-EF/94.10], 27 de enero de 1999 (Peru).

35. Comisión Nacional Supervisora de Empresas y Valores, Resolución No. 125-98-EF/94.10, [CONASEV] [National Supervisory Commission for Companies and Securities], (11 de septembre de 1998) (Peru).

36. *Reglamento de Vigilancia del Mercado por Parte de la Bolsa de Valores de Lima* [*Regulation for Market Surveillance by the Lima Stock Exchange*], BOLSA DE VALORES DE LIMA (Aug. 1, 1998) (Peru).

37. *¿Qué es CAVALI?* [*What is CAVALI?*], CAVALI, http://www.cavali.com.pe/que_es_cavali.html (last visited Apr. 13, 2014).

38. *Id.*

oversee the activities of all individuals and institutions involved in Peruvian financial markets.[39]

i. The Lima Stock Market

On January 1, 2003, as a result of a decision by the Extraordinary General Assembly of its Associates,[40] the Lima Stock Market adopted a new structure and transformed into a special stock corporation.[41] By law, the shareholders of the Lima Stock Market became members of the stock market and its agents.[42]

According to its statute, the Lima Stock Market exercises five main functions: (a) providing the necessary structures and systems to obtain transparent information for the acquisition and sale of securities to market participants; (b) procuring the enlargement of the market through activities addressed to stimulate the negotiation of securities; (c) registering securities for their negotiation in the stock market; (d) offering information related to financial intermediaries and financial operations to the public; and (e) keeping the public informed about the value of securities and of any other relevant events that may affect the issuance of securities.[43]

ii. CAVALI

CAVALI acts as the repository of securities in Peru. Its main function is to keep the accounting record of securities admitted for trading in the stock market.[44] Also, CAVALI is charged with the exclusive management of the profits obtained from the trading of these financial instruments.[45] By law, CAVALI cannot engage in the intermediation of securities or in other activities related to the securities market other than managing profits and maintaining its accounting record.[46]

---

39. *Finalidad y Funciones* [*Purpose and Functions*], SUPERINTENDENCIA DEL MERCADO DE VALORES, http://www.smv.gob.pe/Frm_VerArticulo.aspx?data=BB59C7F473A6A3A7364E3D611A6E59708F2EC053FD3AD4533881D5B48E6C9458CAFA3A (last visited Apr. 13, 2014).

40. *See Historical Review*, *supra* note 23.

41. *See* Stock Market Law, Legislative Decree No. 861, *supra* note 27.

42. FIGUEROA, *supra* note 28, at 285–86.

43. *Funciones y Estructura* [*Functions and Structure*], BOLSA DE VALORES DE LIMA, http://www.bvl.com.pe/acerca_funciones.html (last visited Apr. 13, 2014).

44. *See What is CAVALI?*, *supra* note 37.

45. FIGUEROA, *supra* note 28, at 286.

46. *Id.*

iii. The SMV

The SMV is the entity in charge of supervising and controlling the enforcement of the Stock Market Law.[47] Historically, this institution was called CONASEV (*Comisión Nacional Supervisora de Empresas y Valores*) until 2011, when Law No. 29,782, On the Strengthening of the Oversight of the Securities Market changed its name to the current SMV.[48] Besides controlling and supervising the enforcement of the Stock Market Law, the SMV accomplishes several other functions; it serves as the official interpreter of the Law on the Stock Market,[49] enacts regulations related to the operation of the stock market,[50] and promotes the operation and study of the stock market.[51]

D. Current Information on the Peruvian Financial Markets

In recent years, the operation of the Lima Stock Market has shown a positive trend. According to a report produced by the Lima Stock Market in 2010, the Peruvian stock market was the most profitable of the South American region for that year.[52] Specifically, in 2010, the index of the Lima Stock Market closed at 23.374 points, which is the second highest index in Peruvian history, achieving an annual return of 64.99 percent.[53] Additionally, "the LSE Selective Index (ISBVL), which groups the 15 most traded stocks on the market, experienced a 42.86 percent yield in 2010."[54] Moreover, "[t]he total BVL Market Capitalization, which includes the shares issued in Peru as well as those foreign shares that operate in [Peru] at the end of [2010] reached a record high of US $160,867 million, which is the greatest historical value of this indicator."[55]

---

47. Ley del Mercado de Valores, Decreto Legislativo No. 00861-1996 art. 7 [Securities Market Law, Legislative Decree No. 00861-1996 art. 7], 22 de octubre de 1996 (Peru), *available at* http://www.smv.gob.pe/temp/SIL20140325134835046 9.pdf.

48. *See* Ley de Fortalecimiento de la Supervisión del Mercado de Valores, L. No. 29782 [Law on the Strengthening of the Oversight of the Securities Market, L. No. 29782], 28 de julio de 2011 (Peru), *available at* http://www2.congreso.gob.pe/Sicr/TraDocEstProc/Contdoc01_2011.nsf/d99575da99ebfbe305256f2e006d1cf0/753aed3e04ee5dee05257a0700507448/$FILE/29782.pdf.

49. Securities Market Law, Legislative Decree No. 00861-1996, *supra* note 47.

50. *See Purpose and Functions*, *supra* note 39.

51. *Id.*

52. *See* BOLSA DE VALORES DE LIMA, MEMORIA ANUAL 2010 [2010 ANNUAL REPORT] 6 (2010), *available at* http://www.bvl.com.pe/memorias/memoriaanual2010/MemoriaBVL.html.

53. *Id.* at 14–15.

54. *See id.* at 15.

55. *Id.*

This successful trend continued in 2011, a year whose "most relevant and transcendental achievement . . . was the integration of the stock markets of Peru, Colombia, and Chile, thus, commencing the joint operations of [MILA]."[56] Corroborating this tendency, in 2012 (year of the last publicly-available report on the performance of the Lima Stock Market), Peru's economy experienced the largest growth (6.29 percent) in the South American region.[57]

For more information on Peru's financial system see below.[58]

2. *Legal Framework of the Colombian Financial Market*

This Section will explore the legal framework of the Colombian Financial Market by exploring its history, regulatory scheme, main institutions, and current performance. By understanding these elements, which underpin the Colombian market, U.S. businesses and their attorneys can explore the opportunities presented by the MILA with a more keen understanding of the Latin American market on which it is based.

A. Brief History of the Colombian Stock Market

The expansion of the Colombian economy during the first two decades of the twentieth century fostered the incorporation of the first branches of foreign banks in that country, the creation of a national bank (*Banco de la República*), and the enactment of the first financial laws.[59] Due to this economic growth, Colombia created the Stock Market of Bogota (*Bolsa de Valores de Bogotá*) in 1928.[60] The creation of the Stock Market of Bogota was followed in 1961 by the foundation of the Stock Market of Medellin (*Bolsa de Valores de Medellín*), and the Stock Market of Occident (*Bolsa de Valores de Occidente*), in 1983.[61] Finally, in July 2001, these three stock

56. *See* BOLSA DE VALORES DE LIMA, MEMORIA ANUAL 2011 [2011 ANNUAL REPORT] 10 (2011), *available at* http://www.bvl.com.pe/memorias/memoria2011.pdf.

57. *See* BOLSA DE VALORES DE LIMA, MEMORIA ANUAL 2012 [2012 ANNUAL REPORT] 6 (2012), *available at* http://www.bvl.com.pe/memorias/memoriaanual2012/BVL-Memoria2012.html.

58. For more information on Peru please see these useful links: http://www.bvl.com.pe/; http://www.bvl.com.pe/acercamarcolegal.html; http://www.cavali.com.pe/; http://www.conasev.gob.pe/; http://www.congreso.gob.pe/ntley/Imagenes/DecretosLegislativos/00861.pdf; http://www.congreso.gob.pe/ntley/Imagenes/DecretosLegislativos/01061.pdf.

59. *See* Carlos Caballero Argáez, *Una Institución del Siglo XX. La Bolsa de Bogotá.* [*An Institution of the 20th Century. The Bogota Stock Exchange.*], CREDENCIAL HISTORIA, June 2002, *available at* http://www.banrepcultural.org/blaavirtual/revistas/credencial/junio2002/labolsa.htm.

60. *Id.*

markets merged into the current Stock Market of Colombia (*Bolsa de Valores de Colombia*).[62]

B. Regulatory Scheme

The Colombian financial system is mainly regulated by two bodies of laws: (1) Decree No. 663 of 1993, Organic Statute of the Financial System [Decreto No. 663 de 1993, *Estatuto Orgánico del Sistema Financiero*][63] and its amendments; and (2) Decree No. 2555 of 2010 for the Financial, Insurance and the Stock Market Sectors [Decreto No. 2555 de 2010, *Sobre los Sectores Financiero, Asegurador y del Mercado de Valores*].[64] Law No. 964 of 2005 on the Management and Investment of Resources Generated from Securities [*Ley 964 de 2005, Por La Cual Se Dictan Normas Generales y Se Señalan en Ellas los Objetivos y Criterios a los Cuales Debe Sujetarse el Gobierno Nacional para Regular las Actividades de Manejo, Aprovechamiento e Inversión de Recursos Captados del Público Que Se Efectúen Mediante Valores y Se Dictan Otras Disposiciones*] [65] and its amendments, along with Decree No. 2555 of 2010, are the primary regulations controlling the Colombian stock market.[66]

Other relevant laws closely related to the operation of the Colombian stock market include Law No. 1266 of 2008, on the management of financial information as part of the *habeas data* writ, and Law No. 1328 of 2009, on the protection regime for financial consumers.

---

61. *See* BOLSA DE VALORES DE COLOMBIA, 80 AÑOS DEL MERCADO DE VALORES EN COLOMBIA [80 YEARS OF THE STOCK MARKET IN COLOMBIA] 12 (2009), *available at* http://www.bvc.com.co/recursos/Files/Acerca_de_la_BVC/Ochenta_Anos_Mercado_de_Valores.pdf.

62. *Id.*

63. Decreto 663/1993, abril 5, 1993, DIARIO OFICIAL [D.O.] (Colom.), *available at* http://juriscol.banrep.gov.co:8080/contenidos.dll/Normas/Decretos/1993/decreto_663_1993?f=templates$fn=document-frameset.htm$q=%5BField%20fecha%3A1993%3F%3F%3F%3F%5D%26%5BField%20numero%3A663%5D$x=Advanced#LPHit1.

64. Decreto 2555/2010, julio 15, 2010, DIARIO OFICIAL [D.O.] (Colom.), *available at* http://juriscol.banrep.gov.co:8080/contenidos.dll/Normas/Decretos/2010/decreto_2555_2010%20-%20original?f=templates$fn=document-frameset.htm$q=%5BField%20fecha%3A2010%3F%3F%3F%3F%5D%26%5BField%20numero%3A2555%20%5D$x=Advanced#LPHit1.

65. L. 964/2005, julio 8, 2005, DIARIO OFICIAL [D.O.] (Colom.), *available at* http://juriscol.banrep.gov.co:8080/contenidos.dll/Normas/Leyes/2005/ley_964_2005?f=templates$fn=document-frameset.htm$q=%5BField%20fecha%3A2005%3F%3F%3F%3F%5D%26%5BField%20numero%3A964%5D$x=Advanced#LPHit1.

66. *See Leyes* [*Laws*], BOLSA DE VALORES DE COLOMBIA, http://www.bvc.com.co/pps/tibco/portalbvc/Home/Regulacion/Mercado_de_Valores/Leyes?action=dummy (last visited Apr. 13, 2014).

C. *Main Institutions of the Colombian Stock Market*

The three main institutions of the Colombian stock market are the Stock Market of Colombia, the Colombian Central Deposit of Financial Instruments (*Depósito Centralizado de Valores*) ("DECEVAL"), and the Financial Superintendence of Colombia.

i. *The Stock Market of Colombia*

The Stock Market of Colombia is organized as a stock corporation.[67] According to its regulations, the Stock Market of Colombia has thirteen basic functions.[68] Some of the most important functions are: (a) to stimulate the market of capital, stocks, derivatives, and other financial instruments; (b) to organize, regulate, and exploit the operation of commercial entities and electronic systems developed to trade securities; (c) to organize, regulate, and exploit the operation of bidding systems for the sale of goods; (d) to establish permanent services of information, diffusion, and sale of financial data; (e) to stimulate and protect investments on stocks and other financial instruments; (f) to organize arbitration and conciliation centers, and other institutions for the settlement of disputes originated from the trade of securities and other financial instruments.[69]

ii. *DECEVAL*

Like the Stock Market of Colombia, DECEVAL is organized as a stock corporation. Article 2 of its Operation Regulatory Statute authorizes DECEVAL to exercise two core administrative functions: to administer the custody and deposit of securities and to administer the compensation or liquidation of the deposited securities.[70]

iii. *The Financial Superintendence of Colombia*

The Financial Superintendence of Colombia is an administrative agency affiliated with the Ministry of Finance and Public Credit (*Ministerio de Hacienda y Crédito Público*), and it is in charge of the inspection, control, and supervision of the financial system.[71] The specific functions of this

---

67. *See* L. 45/1990 art. 1, diciembre 18, 1990, DIARIO OFICIAL [D.O.] (Colom.), *available at* http://www.sice.oas.org/investment/NatLeg/COL/L45_90_s.pdf.

68. *Id.* art. 5.

69. Estatutos Bolsa de Valores de Colombia [Bylaws Colombian Securities Exchange], Art. 5, 29 marzo, 2012 (Colom.), *available at* http://en.bvc.com.co/_onelink_/bvc/es2en/documents/Estatutos_BVC_Actualizados_AGA_20120329.pdf.

70. *See* DECEVAL S.A. OPERATING REGULATION art. 2 (2011), *available at* https://www.deceval.com.co/portal/page/portal/Home/English_Home/Legal_Framework/Regulations/Manual%20de%20Operaciones.pdf.

71. *See* L. 2555/2010 art. 11.2.1.3.1, julio 15, 2010, DIARIO OFICIAL [D.O.] (Colom.), *available at* http://juriscol.banrep.gov.co:8080/contenidos.dll/Normas/

agency are regulated in Decree No. 2739 of 1991 and its amendments; the Organic Statute of the Financial System and its amendments; and Law No. 964 of 2005 and its amendments.[72]

For more information on Colombia's financial system see below.[73]

3. *Legal Framework of the Chilean Financial Market*

This Section summarily reviews the history of the creation of the Chilean Stock Market in the late nineteenth century, as well as the principal institutions of that stock market, with the purpose of presenting its general framework and extraordinary evolution that led to play a leading role for the creation of MILA.

A. Brief History of the Chilean Stock Market

On November 27, 1893, Chile created the Commercial Stock Market of Santiago (*Bolsa de Comercio de Santiago*)[74] in response to the growth of the Chilean market and the increasing incorporation of new commercial companies in Chile during the first half of the nineteenth century.[75] During the 1930s, the trade of securities from the mining industry was the predominant activity in the Santiago Stock Exchange ("SSE") [*Bolsa*

Decretos/2010/decreto_2555_2010%20-%20original?f=templates$fn=document-frameset.htm$q=%5BField%20fecha%3A2010%3F%3F%3F%3F%5D%26%5BField%20numero%3A2555%20%5D$x=Advanced#LPHit1.

72. *Id.* art. 11.2.1.3.2.

73. For more information on Colombia please see these useful links: http://www.secretariasenado.gov.co/senado/basedoc/codigo/estatuto_organico_sistema_financiero.html; http://www.minhacienda.gov.co/portal/page/portal/MinHacienda/haciendapublica/normativa/regulacionfinanciera/DecretoUnico/09%20DU%20ACTUALIZADO%20MAYO%20 2012_2.pdf; http://www.secretariasenado.gov.co/senado/basedoc/ley/2005/ley_0964_2005.html; http://www.bvc.com.co/pps/tibco/portalbvc/Home/Regulacion/Mercado_de_Valores/Ley es?action=dummy; http://www.bvc.com.co/pps/tibco/portalbvc/Home/Regulacion/Mercado_de_Valores/Decretos?action=dummy; http://www.bvc.com.co/pps/tibco/portalbvc; http://www.deceval.com.co/portal/page/portal/Home; http://www.superfinanciera.gov.co/.

74. *See Bolsa de Comercio: La Empresa* [*Stock Market: The Company*], BOLSA COMERCIO SANTIAGO, http://www.bolsadesantiago.com/displayPages/Bolsa%20de%20Comercio/dispbolsacomercio.aspx?ID=28 (last visited Apr. 13, 2014).

75. *Reseña Histórica de la Bolsa de Comercio de Santiago* [*Historical Synopsis of the Santiago Stock Exchange*], BOLSA COMERCIO SANTIAGO, http://www.bolsadesantiago.com/displayPages/Bolsa%20de%20Comercio/dispbolsacomercio.aspx?ID=46 (last visited Apr. 13, 2014).

Comercio Santiago].[76] During recent decades, the SSE has seen rapid growth and diversification into multiple areas of the economy.[77]

B. Regulatory Scheme

The Chilean securities market is principally regulated by Law No. 18.045 and its subsequent amendments.[78] In addition, the General Norms (*Normas de Carácter General*) ("NCGs") issued by the Securities and Insurance Superintendence also play an important role in the regulation of this market. Some of the most relevant regulations of the Superintendence are: (a) NCG No. 216 of 2008, on the Definition and Registration of Foreign Investors and Securities;[79] and (b) NCG No. 240 of 2009, on the Public Offer of Foreign Securities.[80]

---

76. *See Historia de la Bolsa de Comercio de Santiago* [*History of the Santiago Stock Exchange*], BOLSA COMERCIO SANTIAGO (June 22, 2012), http://www.bolsadesantiago.com/Theme/videos/videosbolsa.aspx.

77. *Id.* (stating that "within the economic growth framework that has prevailed in the country since the 1980s, the Chilean stock market has experienced an extraordinary development characterized by a substantive growth in stock transactions, the issuance of securities, diversification of transacted instruments, and the opening of new markets.").

78. *See* Law No. 18045, Octubre 22, 1981, DIARIO OFICIAL [D.O.] (Chile), *available at* https://www.db.com/dsc/docs/Ley_de_Mercado_de_Valores_18.045.pdf. (describing the multi-faceted mechanisms used to regulate the Chilean stock market).

79. Norma de Carácter General No. 216 [General Character Norm No. 216], SUPERINTENDENCIA DE VALORES Y SEGUROS (June 12, 2008) ("NCG No. 216"), *available at* http://www.bolsadesantiago.com/Normativa%20Mercado%20de%20Valores/NCG%20N%C2%B0216%20-%20Define%20inversionistas%20calificados.pdf (identifying the individuals and entities that are considered as "Qualified Investors," including foreign investors and those who are authorized to operate in the Chilean stock market under certain more beneficial conditions). NCG No. 216 is relevant since it establishes clear and straightforward rules for the regulation of foreign investors in Chile, thus avoiding confusions and uncertainty on who are the stakeholders benefitted with the special rules established for foreign investors in that country.

80. Imparte Instrucciones Sobre la Oferta Pública de Valores Extranjeros en Bolsas de Valores Fuera de Ellas. Deroga Norma de Carácter General No. 83 y sus Modificaciones [Issues Instructions on the Public Offer of Foreign Securities Outside de National Stock Exchanges. Repeals NCG No. 83 and its Amendments] (Jan. 11, 2009), ("NCG No. 83"), http://www.bolsadesantiago.com/Biblioteca%20BCS/Norma%20del%20Carácter%20General%20240.pdf (providing that foreign securities may be transacted in Chile only if Registered in the Foreign Securities Registry maintained by the Superintendence of Securities and Insurance, and regulating the activities of brokers who participate in the transaction of foreign securities). NCG No. 83 is relevant because even though the Chilean stock market is free, it also contains regulations that are necessary to maintain fairness in the rules of the game.

C. *Main Institutions of the Chilean Stock Market*

The main institutions of the Chilean Stock Market are the SSE, the Central Deposit of Securities (*Depósito Central de* Valores) ("DCV"), and the Securities and Insurance Superintendence.

i. The Santiago Stock Exchange

The SSE is organized as a stock corporation and is governed by the Stock Markets Law of 1981,[81] the Bylaws of the Santiago Stock Exchange,[82] and the laws applicable to Chilean closed corporations.[83] According to its statutes, the main purpose of the Santiago Stock Exchange is to stimulate the formation of an open, competitive, ordered, and transparent stock market through its regulation and organization.[84]

ii. DCV

DCV is a stock corporation whose role is to receive and deposit securities offered to the public market, and to facilitate the transfer operations of these securities.[85] DCV is governed by Law No. 18.876 of 1989,[86] the Supreme Decree No. 734 of 1991,[87] and by its internal regulations.[88]

iii. The Securities and Insurance Superintendence

The Securities and Insurance Superintendence is an autonomous institution affiliated with the Chilean Ministry of Finance that is

---

81. Law No. 18045, Octubre 22, 1981, DIARIO OFICIAL [D.O.] (Chile).

82. Estatutos Bolsa de Comercio de Santiago Bolsa de Valores [Stock Exchange Statutes of Santiago Stock Exchange] (Jan. 5, 2012), http://www.bolsadesantiago.com/Normativas%20Bolsa%20de%20Comercio/1.-%20Estatutos%20de%20la%20Bolsa%20de%20Comercio%20de%20Santiago.pdf.

83. Law No. 18046 arts. 2, 21, Octubre 26, 1981, DIARIO OFICIAL [D.O.] (Chile).

84. *See id.* art. 2.

85. *See* Law No. 18876 art. 1, Diciembre 21, 1989, DIARIO OFICIAL [D.O.] (Chile).

86. Ley No. 18.876 de 1989, Establece el Marco Legal Para la Constitución y Operación de Entidades Privadas de Depósito y Custodia de Valores [Law No. 18,876 of 1989, Establishes the Legal Framework for the Constitution and Operation of Private Entities for the Deposit and Custody of Securities], http://www.leychile.cl/Navegar?idNorma=30249&idParte=&idVersion=2009-06-06.

87. Reglamento Sobre Depósitos de Valores: D.S.734, de Hacienda [Regulations on the Deposit of Securities: S.D. 734, of Finances], *available at* http://www.dcv.cl/images/stories/DOC/empresa/normativa/reglamento_ley_18.876_modificado.pdf (last visited Apr. 14, 2014).

88. *Statutes DCV & DCV Registros* [*DCV Statutes & DCV Records*], DESPÓSITO CENTRAL DE VALORES, http://www.dcv.cl/en/legal-regulatory/statutes-dcv-dcv-registros.html (last visted April 5, 2014) (providing DCV's internal governance bylaws).

responsible for the supervision of the securities and insurance markets.[89] Decree Law No. 3.538 of 1980 is the basic body of laws that controls the organization and functions of this entity.[90] Besides supervising the securities market, the Superintendence also issues regulations, absolves petitions, and imposes sanctions for the violation of the laws on the securities market.[91]

D. Current Information

The operational data of the Santiago Stock Exchange from the last ten years shows how this institution has played a fundamental role in the Chilean market. Specifically, during this period, the volume of securities traded in the Santiago Stock Exchange increased by 253 percent.[92] Also, in the last ten years, 164 new issuers of securities have joined this institution.[93]

For more information on Chile's financial system see below.[94]

III. LEGAL STRUCTURE AND OPERATIONAL ASPECTS OF MILA MECHANISMS

MILA is the first initiative for the integration of the stock exchanges of three Latin American countries: Chile, Colombia, and Peru.[95] MILA is the result of a series of agreements executed by these three stock exchanges

89. *Qué es la SVS* [*What is the SVS*], SUPERINTENDENCIA DE VALORES Y SEGUROS, http://www.svs.cl/portal/principal/605/w3-propertyvalue-18501.html (last visited April 13, 2014).

90. Decree Law No. 3538, Diciembre 23, 1980, DIARIO OFICIAL [D.O.] (Chile), *available at* http://www.svs.cl/portal/principal/605/articles-12401_doc_pdf.pdf.

91. EDUARDO TRUCCO BURROWS, LAS BOLSAS DE VALORES Y SU REGLAMENTACIÓN [THE STOCK MARKET AND ITS REGULATION] 69–72 (1989).

92. *See Principales Logros* [*Main Achievements*], BOLSA COMERCIO SANTIAGO (June 22, 2012), http://www.bolsadesantiago.com/Theme/videos/videosbolsa.aspx.

93. *Id.*

94. For more information on Chile please see these useful links: http://www.svs.cl/sitio/english/legislacion_normativa/marco_legal/ley18045_ingles_07122011.pdf; http://www.svs.cl/sitio/legislacion_normativa/marco_legal/ley18876_junio_2009.pdf; http://www.svs.cl/sitio/legislacion_normativa/marco_legal/ley18876_junio_2009.pdf; http://www.svs.cl/sitio/english/normativa/general/Organica%203538%20-%20ingles.pdf; http://www.svs.cl/sitio/english/legislacion_normativa/legislacion_valores.php; http://www.bolsadesantiago.com/index.aspx; http://www.dcv.cl/; http://www.svs.cl/sitio/english/index.php.

95. *Quienes Somos* [*Who We Are*], MERCADO INTEGRADO LATINOAMERICANO, http://www.mercadomila.com/QuienesSomos (last visited Apr. 14, 2014).

since 2009 for the purpose of creating a regional market for the transaction of equity securities.[96]

Consequently, this Part will review the history of the negotiation and implementation of MILA agreements, objectives, and operation, as well as MILA's perceived benefits for international investors.

1. History and Negotiation of MILA

The origins of MILA can be found in the Letter of Intent signed in Lima on September 8, 2009 (the "MILA Agreement") by the Lima Stock Market, the Colombia Stock Market, the Santiago Stock Exchange, CAVALI, DECEVAL, and DCV, respectively.[97] In this agreement, the parties expressed their desire to create and promote a model of market integration.[98]

The creation and implementation of MILA was carried out through a series of roundtables held between representatives of the stock exchanges of the three participating jurisdictions, who began meeting in 2009. During the First Roundtable held in Santiago on October 28, 2009, the supervising entities of each party to the Framework Agreement (the Peruvian CONASEV,[99] the Colombian Financial Superintendence, and the Chilean Securities and Insurance Superintendence) signed their First Memorandum of Understanding ("MOU I"). The purpose of this non-binding document[100] was to identify the necessary aspects[101] that had to be analyzed

---

96. *Id.*

97. *See* BOLSA COMERCIO SANTIAGO, GUIA DE MERCADO INTEGRADO MILA [MILA INTEGRATED MARKET GUIDE] 5 (10th version 2013), *available at* http://www.bolsadesantiago.com/Biblioteca%20BCS/Gu%C3%ADa%20de%20Mercado%20Integrado%20MILA.pdf; *see also* Memorando de Entendimiento Entre la Comisión Nacional Supervisora de Empresas y Valores del Perú, la Superintendencia de Valores y Seguros de Chile y la Superintendencia Financiera de Colombia [Memorandum of Understanding, Signed Between the Nat'l Comm'n of Peru for the Oversight of Cos. and Sec., the Superintendence of Sec. and Ins. of Chile, & the Fin. Superintendence of Colom.] (Oct. 28, 2009) [hereinafter MOU I], *available at* http://www.svs.cl/sitio/otra_informacion/doc/mou/memorando_superintendencia_colombia_peru_chile.pdf.

98. MOU I, *supra* note 97.

99. After the enactment of Law No. 29782 of 2011, this entity was renamed as "Superintendence of the Securities Market."

100. *See* MOU I, *supra* note 97, art. 3.

101. *See* Adenda al Memorando de Entendimiento de Fecha 15 de Enero del 2010 Suscrito Entre la Comisión Nacional Supervisora de Empresas y Valores del Perú, la Superintendencia Financiera de Colombia y la Superintendencia de Valores y Seguros de Chile [Addendum to the Memorandum of Understanding of January 15, 2010, Signed Between the Nat'l Comm'n of Peru for the Oversight of Cos. and Sec., the Fin. Superintendence of Colom., & the Superintendence of Sec. and Ins. of Chile] [hereinafter Addendum to MOU I] § 2.2, *available at* http://bit.ly/1ewmocw (explaining that MOU I's objective was for the parties to implement the main activities

prior to the establishment of an integrated stock market.[102] MOU I also identified two other areas that had to be addressed by the parties, including the creation of proper communication channels between them[103] and the establishment of mechanisms to guarantee the confidentiality of the information related to the project.[104] Annex No. 1 of the MOU I contained a list of the eighteen main aspects to be reviewed prior to the establishment of MILA, including, among other things: access to brokerage firms;[105] access to the integrated stock market;[106] supervision and vigilance of the integrated stock market;[107] creation of rules for the negotiation system;[108] and custody, compensation, and liquidation of securities operations.[109]

Pursuant to the agreements reached at the Second Roundtable held in Lima on January 14–15, 2010, the supervising entities signed the Second Memorandum of Understanding ("MOU II"), which is one of the fundamental milestones of MILA because, in this document, the parties established the model of market integration to be followed in the project and divided the implementation of the project into two stages.[110] For the first stage, the parties agreed to follow a scheme of intermediation beginning in November of 2010,[111] without the necessity of modifying the local laws.[112] Then, for the second stage, the parties agreed to follow a scheme of direct access to the intermediaries and to implement standard rules of negotiation by the end of 2011.[113] In addition, the supervising entities established the definitions[114] and guidelines[115] for the implementation of MILA within the MOU II.

---

and tasks aimed at facilitating the integration project between the securities markets of each of their jurisdictions through a negotiation mechanism for the securities transacted in the Stock Exchanges of each jurisdiction).

102. *Id.* art. 2, annex 1.

103. *Id.* arts. 4, 9, annex 2.

104. *Id.* art. 6.

105. *Id.* annex 1, item 1.

106. *Id.* annex 1, item 3.

107. *Id.* annex 1, item 5.

108. *Id.* annex 1, item 6.

109. *Id.* annex 1, item 4.

110. *See id.*

111. Francisco Silva Valdivieso, Integración de Bolsas Perú – Colombia – Chile 12 (Oct. 28, 2010), *available at* http://www.bolsadesantiago.com/Biblioteca%20BCS/Presentaci%C3%B3n%20Superintendencia%20de%20Valores%20y%20Seguros%20%28SVS%29.pdf.

112. *Id.*

113. *Id.*

114. Addendum to MOU I, *supra* note 101.

115. *Id.* art. 2.1.2–.1.8.

Before the start of MILA's first stage, the supervising entities conducted a Third Roundtable, on June 21–22, 2010, where they evaluated the potential benefits of the integrated market and agreed on the standards to be implemented in the local regulations to put MILA into operation.[116] This roundtable was followed by some visits of national brokerage firms to Colombia and Peru for the purpose of evaluating these markets.[117]

After these preliminary agreements and meetings, the main institutions of the project launched MILA in Lima during the "Launch Event of the Integrated Market" on November 9, 2010.[118] During this event, the institutions signed an agreement for the implementation of the first stage of MILA, as well as the covenants for the bidirectional link of their deposits.[119] Finally, on May 30, 2011, the commencement of the integration of the stock markets of Chile, Colombia, and Peru was celebrated.[120]

After the commencement of the integration, the supervising entities held two meetings to amend MOU II. In the first meeting, held in June 2011, these agencies signed the First Addendum[121] to MOU II to create a Supervisory Committee to oversee and control the activities related to the operation of MILA and to set the local competencies of the supervising entities in this field.[122] In the second meeting that took place in Lima, on June 15, 2012, the supervising entities signed the Second Addendum to MOU II to create the Executive Committee of Authorities.[123] This body was created for the purpose of establishing a supreme administrative coordinator for the implementation of MILA.[124]

---

116. *See* Marcela Seraylán, La Integración de Mercados y Depósitos Centrales: Experiencia del MILA [Market Integration and Central Depositories: MILA Experience], in ESTUDIO SOBRE LOS SISTEMAS DE REGISTRO, COMPENSACIÓN Y LIQUIDACIÓN DE VALORES IN IBEROAMÉRICA 215, 218 (2013), *available at* http://www.iimv.org/EstudioRCyL/CAPITULO%207.pdf; MERCADO INTEGRADO LATINOAMERICANO, http://www.mercadomila.com (last visited Apr. 14, 2014).

117. *See id.*

118. *See id.*; *see also* Seraylán, *supra* note 116, at 218.

119. *See* Marcela Seraylán Ormachea, Mercado Integrado Latinoamericano – MILA 2 (May 2012), *available at* http://www.iimv.org/actividades2/CostaRica2012/Dia%2010/MarcelaDia10.pdf.

120. *See* MERCADO INTEGRADO LATINOAMERICANO, *supra* note 116; *see also* Seraylán, *supra* note 116, at 218.

121. Addendum to the 2010 Memorandum of Understanding (2011), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCsQFjAA&url=https://www.superfinanciera.gov.co/descargas%3Fcom%3Dinstitucional%26name%3DpubFile30486%26downloadname%3Dmemoperuchile2010adenda1.pdf&ei=W6grU-CjNJTK0AHg1oHQBQ&usg=AFQjCNFJkNahckXoQHUrvuJ7oKfep6QxbA&sig2=rs5emmnXO0vt1aRKt8l_XQ (last visited Mar. 23, 2014).

122. *See* Memorandum of Understanding, 2d add., art. 3 (Jan. 15, 2010).

123. *Id.*

124. *Id.*

In 2011, the parties began discussing the potential incorporation of Mexico into the integrated market. On December 4 of that year,[125] the stock markets and deposits of Chile, Colombia, and Peru signed a Letter of Intent with the Mexican Stock Market in the city of Mérida, Mexico, to conduct viability studies to analyze the possible integration of the Mexican Stock Market (*Bolsa de Valores de Mexico*) into the MILA Agreement.[126]

2. *Purpose and Operation of MILA*

MILA's main aim is to allow local brokers from the signatory countries to directly negotiate financial instruments listed on foreign equity markets.[127] To that effect, brokers have to sign an intermediary routing agreement ("IRA") with a broker located in the country of origin, that is, the country where the securities were originally issued. IRAs must be executed according to the regulations of the country of destination, that is, the country where brokers desire to trade the securities or other financial instruments. Finally, brokers must submit IRAs to their respective stock exchanges for approval.

For example, if a Chilean broker wants to gain access to the Colombian stock market, the Chilean broker must sign an IRA with a Colombian intermediary, in accordance with the Colombian regulations. Next, the Chilean broker must submit the IRA to the Santiago Stock Exchange, and the Colombian broker must, in turn, submit the IRA to the Colombian Stock Exchange. Additionally, Chilean brokers must be depositories of the DCV and sign an agreement called the International Custody Annex (*Anexo de Custodia Internacional*) ("ICA"). The ICA requires brokers to register a current account from a bank in Peru or Colombia. Through that account, the broker will receive payments from capital events (*e.g.* profits generated from transactions, commissions, etc.) of the stocks he has on each MILA member. In the case of Chile, each intermediary directly enters market orders (buying or selling orders) over stocks listed on the Colombia or Lima stock markets. Those orders, which are expressed in local currency, are sent to the respective foreign exchange market. Once the

125. *See* Ormachea, *supra* note 119, at 2.

126. *See* Roberto Morales, *Integración de la BMV al MILA Iniciará a Fin de Año*, EL ECONOMISTA (Jul. 22, 2013, 9:54 PM), http://eleconomista.com.mx/mercados-estadisticas/2013/07/22/integracion-bmv-mila-iniciara-fin-ano.

127. *Id.* (citing the Undersecretary of Foreign Trade at the Mexican Ministry of Economy as saying, "we are working to have the four stock markets of [MILA] countries to work in line, to be connected, and to allow operations in each of them independently of the nationality [of the different stakeholders invoved].").

order is matched, notifications are sent to the DCV and to the respective foreign deposit: CAVALI or DECEVAL.

All transactions made by intermediaries of the integrated market must be settled in the place of the exchange, in local currency, and under the settlement regulations of the country of origin. The local broker settles bilaterally with the foreign broker. Clearing and settlement of the operations remain under the responsibility of the local broker. For example, operations made by a Colombian broker over stocks listed on the Santiago Stock Exchange—through Chilean brokers—must be settled under Chilean clearing and settlement regulations, and also under the name and responsibility of the Chilean broker. Negotiated stocks remain deposited in the deposit of the country of origin.[128] The DCV guarantees to Chilean brokers with activities on the Colombian or Peruvian markets the custody of the shares they have in other deposits, through a "local position account," through which the DCV can assign the shares to the local broker's account. Also, DCV allows the local broker to obtain reports and certificates of the stocks it has on international custodies.[129] In other words, in our example, the DCV is the custodian of Chilean brokers with activities on Colombian or Peruvian stock markets. The DCV has accounts on DECEVAL and CAVALI, which foreign intermediaries use to deposit the stocks purchased on behalf of the Chilean broker.[130]

Relevant activities are subject to the regulations of the country of origin.[131] For example, in Chile, the DCV receives the respective dividends paid outside the country and then pays them to the Chilean broker, using the respective foreign currency and depositing these payments in the account previously registered by the intermediate.

Finally, authorities from the country of origin retain supervisory powers over issuers.[132] MILA contemplates the execution of supervision and control agreements between regulators from the three signatory countries. Relevant information is also made available to both authorities and investors.

After reviewing the genesis and main aspects of MILA's operation, this Article will now spell out the benefits that MILA's integrated markets offer

---

128. *See* DCV, *Presentacion Corporativa*, 1, 6 (Oct. 28, 2010), http://www.jungleboxsolutions.com/mila/files/publicaciones/3presentacion-corporativa-dcv.pdf.

129. *See* DCV, Presentacion DVC Mercado Integrado, 1, 7-9 (Oct. 28, 2010), http://jungleboxsolutions.com/mila/files/publicaciones/4presentacion-a-corredores.pdf.

130. *See id.* at 4.

131. *See id.* at 5.

132. *See id.*

to the stakeholders already or potentially involved in the transactions of variable revenue securities (stocks) in Latin America.

3. *Principal Advantages Created by MILA for the Integration of the Financial Markets of the Parties*

MILA strives to achieve what is known as "MILA's Virtuous Cycle."[133] Namely, MILA involves more international capital flows and increases the liquidity of stock markets, which are factors that attract more investors and result in more issuers in the market. The Chilean, Peruvian, and Colombian stock exchanges present high levels of profitability. In addition, the economic performance of those countries has strong mid- to long-term prospects.[134]

The particular advantages created by MILA are as follows.

A. Benefits for Investors

The benefits for investors include: easy access to a much wider market; more investment alternatives in financial instruments; more liquidity allowing a higher diversification in the investments; a better risk-return balance; and a single access point to Latin American stock markets for foreign investors.[135]

B. Benefits for Issuers

The advantages for issuers include: access to a wider market; availability of three country-investors for new initial public offerings ("IPOs"); more access to capital; broader investor base for their financing needs; capturing the interest of new investors; and capital cost reductions.[136]

C. Benefits for Intermediaries

MILA's stock integration mechanisms cause stock markets to be more attractive and competitive because they increase the portfolio of products and new investment vehicles for investors and produce technology-strengthening implementation with international standards.[137]

---

133. Enrique Bascur, LATAM FUNDS PEOPLE (stating: "*Si el MILA funciona será un círculo virtuoso en términos de liquidez y tamaño de Mercado* [If MILA works, it will be a virtuous circle in terms of liquidity and size of the market"], *available at* http://www.fundspeople.cl/noticias/enrique-bascur-si-el-mila-funciona-sera-un-circulo-virtuoso-en-terminos-de-liquidez-y-tamano-de-mercado.

134. *Preguntas Más Frecuentes* [*Frequently Asked Questions*], MERCADO INTEGRADO LATINOAMERICANO, http://www.bvl.com.pe/mila/preguntas_frecuentes.pdf (last visited Apr. 14, 2014).

135. *Id.*

136. *Id.*

137. *Id.*

D. Benefits for Markets

Overall, MILA mechanisms enhance liquidity in the integrated markets, and trigger a broader international visibility of the region as an investment destination.[138]

4. MILA's Benefits for U.S. Investors

MILA offers real and prospectively significant benefits for U.S. investors seeking to broaden their stock portfolios in Latin America, throughout both the first and second phases of MILA's creation and expansion.

In effect, pursuant to MILA's stated purpose—to broaden and deepen the market of participating jurisdictions—MILA's first phase targeted "the creation of a single market for variable-yield securities that is diversified, broad, and attractive for domestic and foreign investors.[139] Furthermore, MILA's second phase seeks to:

> provide direct access of foreign intermediaries to domestic securities negotiations and operations; to obtain the recognition of foreign brokers to perform these transactions on their own . . . [and in general] the full recognition of foreign securities and issuers *as* domestic issuers; and the treatment of foreign institutional investments as domestic investments.[140]

Additionally, MILA created the S&P MILA 40 Index, which will serve as a "point of reference to international investors, so they may monitor and follow-up their investments in this region."[141] The synergy created by MILA in the region will probably increase with the potential addition of Mexico.[142] In fact, some forecast that "if Mexico were to join, MILA would outrank Brazil's BM&FBOVESPA[143] in terms of total listed companies and would rank second to Brazil in size.[144] Accordingly, foreign investors

---

138. *See id.*

139. Seraylán, *supra* note 116, at 218.

140. *Id.* at 219 n.5.

141. *Id.* at 226–27.

142. *See* Kieran Lonergan, *Mexico's Securities Legislation Prepares BMV for Mila Integration*, BNAMERICAS (Jan. 13, 2014), http://www.bnamericas.com/news/banking/mexicos-securities-legislation-prepares-bmv-for-mila-integration.

143. BM&FBOVESPA is the result of the merger that occurred in 2008 between Brazil's largest stock exchange –Sao Paulo Stock Exchange (Bovespa)— and the Brazilian Mercantile and Futures Exchange (BM&F).

144. David Reyes, GESTION (Dec. 4, 2012) (indicating that the MILA market occupies "the second place after Brazil in Latin America and the Caribbean"), *available at* http://gestion.pe/mercados/inteligo-sab-mexico-mila-segundo-mercado-mas-importante-region-2053290.

seeking to diversify their investment portfolios will look to gain unified access to the financial system of four countries' stock markets that are among the best performing in the Latin American region."[145]

Therefore, in this context, MILA would bring particular benefits to U.S. investors by allowing them to invest in shares registered at the Stock Exchange of Colombia, the Commerce Stock of Santiago, and the Stock Exchange of Lima, through the intervention of their three respective securities deposits: DECEVAL, CAVALI, and DCV.[146] To implement their investment strategies in MILA stock markets, U.S. investors must take into consideration a series of reasons related to the functioning of financial markets that are not universally present in non-integrated stock markets.

These factors are: (1) shareholding is the only investment in securities allowed; (2) trade in shares is performed at one of MILA participating jurisdictions, according to the place where the respective shares are originally registered; and (3) the securities broker hired at the jurisdiction of origin of the respective shares is authorized to trade in the other two jurisdictions—that is, no multiple brokers are required.[147]

Therefore, a U.S. investor would not only derive advantages related to lower transactional costs,[148] but also would gain access to multiple securities markets. Investments do not need to focus on one single area of the economy or issuer, but may flow through a cross-section of them.[149] Given the growing level of communication between MILA's stock markets, and the regulatory and procedural harmonization efforts currently underway, U.S. investors would also take advantage of economies of scale, greater information, development of new products, alerts on regulatory changes, innovative initiatives, visibility of new markets and exposure, as well as a privileged position in the coveted MILA markets.[150]

---

145. *Can Latin America's Stock Exchanges Successfully Integrate*, INTER-AM. DIALOGUE LATIN AM. ADVISOR 1 (Mar. 11, 2013) (providing an interview with Jairo Namur, Head of Latin America at SWIFT Americas).

146. MILA INTEGRATED MARKET GUIDE, *supra* note 97, at 12.

147. *Id.*

148. Transactional cost reduction would be achieved on a number of areas, *inter alia*: by retaining one broker in a MILA jurisdiction who would operate in three different jurisdictions; by eliminating duplication of forms and additional services germane to investing in multiple jurisdictions; and, by reducing brokerage commissions stemming from the streamlining multiple transactions in two or more jurisdictions.

149. MERCADO INTEGRADO LATINOAMERICANO, SEMINARIO: MERCADO INTEGRADO LATINOAMERICANO OPORTUNIDADES Y DESAFÍOS [SEMINAR: LATIN AMERICAN INTEGRATED MARKET OPPORTUNITIES AND CHALLENGES] 3 (2012), *available at* http://www.bolsadesantiago.com/Biblioteca%20BCS/Presentación%20Seminario%20MILA%20Oportunidades%20y%20Desaf%C3%ADos.pdf.

150. *Id.* at 5.

For example, in Chile, by becoming certified as "qualified investors"[151] according to the applicable legislation, U.S. investors can participate in the Chilean Stock Market, and also in the offers and tenders addressed to them.[152] Entities eligible to qualify as "qualified investors" include "banking, insurance, re-insurance, pension fund administrators or other securities brokers, incorporated *abroad*" (outside of Chile).[153] In addition, U.S. investors can become licensed as "qualified investors" if they enter into a "portfolio administration agreement" with a "qualified investor."[154] Hence, once a U.S. investor becomes a "qualified investor," it must register its shares in the local stock market,[155] and this registration makes the shares automatically available in the other two MILA stock markets.

CONCLUSION

The MILA Agreement serves as a blueprint for the real integration of Latin American financial markets through a combined mechanism that builds upon the individual legal and financial structures of each of the parties' stock markets. It further accomplishes this through the streamlining and harmonization of requirements, notification, and referral and certification procedures that strongly facilitates exchange amongst MILA parties.

As recently as March 19, 2014, a high level delegation from the Mexican Stock Exchange and INDEVAL (Central Deposit of Securities)[156] visited the Santiago Stock Exchange, with the purpose of defining a common action plan between MILA and its Mexican counterparts.[157] These efforts are well underway, and there is a sense of renewed energy among MILA

151. General Character Norm No. 216, *supra* note 79, art. 2(2).

152. U.S. investors looking at MILA would derive considerable benefits, among others: benefits of scale from investing in multiple jurisdictions; more efficient access to MILA's stock markets; regional investment portfolios which leads to risk diversification; development of new products; anticipation of regulatory changes; joint marketing of products; innovation.

153. General Character Norm No. 216, *supra* note 79, art. 2(2).

154. *Id.* art. 2(6).

155. Valdivieso, *supra* note 111, at 34.

156. INDEVAL, http://www.indeval.com.mx (last visited Apr. 14, 2014) (defining INDEVAL as "a private institution authorized by law to operate as a Central Deposit of Securities in Mexico).

157. *Delegación de la Bolsa de Valores de México Visita la Bolsa de Santiago para Avanzar en su Integración a MILA* [Delegation from the Mexican Stock Exchange visits the Santiago Stock Exchange], BOLSA COMERCIO SANTIAGO, http://www.bolsadesantiago.com/noticias/displayPages/noticias%20bcs/dispnoti.aspx?ID=1000 (last visited Apr. 14, 2014).

members for the further implementation of their ambitious financial integration goals.[158]

In turn, MILA's sustained growth is reflected in the statistics. In April 2013, MILA experienced a growth of 1.3 percent,[159] and the S&P Dow Jones created a specific Index titled, S&P MILA 40.[160] In this context, U.S. investors, who are broadly known by their entrepreneurship and skills on the world's financial markets, should be ahead of their peers coming from other areas of the world into Latin America's most coveted financial markets.

In sum, in a region where volatility is ever present, and where political risk is pervasive, the degree of confidence that the financial markets of three pioneering countries have put in their common undertaking—MILA—is praiseworthy and goes clearly in the right direction.

158. *See The Mexican Stock Exchange Signs Agreement to Join MILA*, WORLD FED'N OF EXCHANGES http://www.world-exchanges.org/news-views/mexican-stock-exchange-signs-agreement-join-mila (last visited Apr. 14, 2014).

159. *MILA: Fortaleciendo la Integración Financiera*, INTER-AMERICAN DEVELOPMENT BANK, http://www.iadb.org/es/temas/comercio/mila-fortaleciendo-la-integracion-financiera,6839.html (last visited Apr. 14, 2014).

160. *S&P MILA 40*, S&P DOW JONES INDICES, http://us.spindices.com/indices/equity/sp-mila-40-index (last visited Apr. 14, 2014).

* * *

COMMENTS

DISCOVERY WITHOUT LIMITS? OBLIGATION TO PROVIDE DISCOVERY FOR PRODUCTS UNDER DEVELOPMENT AT THE INTERNATIONAL TRADE COMMISSION

JULIA V. SVINTSOVA*

The United States International Trade Commission (the "ITC" or "Commission"), a quasi-judicial agency that has gradually become an increasingly popular forum for adjudicating intellectual property disputes involving foreign goods imported into the United States, allows for a very broad scope of discovery in its investigations. In particular, the ITC discovery scope may encompass products that are still under development. Anxious to avoid the potential obligation to turn highly confidential information on still unreleased products over to their competitors, companies frequently find themselves engaged in heated discovery battles focused on still undeveloped products. To further escalate the problem, there are currently at least five discovery standards governing the production of information on products under development before the ITC. Because it is nearly impossible to predict which standard an administrative law judge (an "ALJ") *will choose in a particular investigation, concerns over the abuse of production of information on products under development are growing at a rapid pace. This Comment analyzes the strengths and weaknesses of each standard by demonstrating how largely different and sometimes inconsistent outcomes result from an application of each standard to a hypothetical set of facts. This Comment also recommends that, in the interest of judicial economy and efficiency and to alleviate the burden placed on parties, the Commission endorse a standard that finds*

* Julia V. Svintsova is a J.D. candidate at American University, Washington College of Law, 2014. The author wishes to thank the entire staff of the *American University Business Law Review* for insightful feedback and helpful edits.

products under development discoverable if they are likely to enter the United States stream of commerce before an investigation ends.

INTRODUCTION

Discovery proceedings before the United States International Trade Commission, which adjudicates investigations brought under Section 337 of the Tariff Act of 1930 ("Section 337 investigations"), move forward at an extremely fast pace and allow for a very broad discovery scope.[1] Most information produced during discovery is highly confidential.[2] While the ITC has a number of mechanisms in place that safeguard the confidentiality of the information produced,[3] parties may still be wary of turning their proprietary data over to competitors.[4] Concerns over security of confidential information only increase when the scope of discovery includes products that are still under development.[5] To further complicate the production of information on products under development, there are several standards that the administrative law judges who preside over the ITC investigations apply when faced with this discovery issue.[6]

---

1. 19 U.S.C. § 1337 (2012); *see* A LAWYER'S GUIDE TO SECTION 337 INVESTIGATIONS BEFORE THE U.S. INTERNATIONAL TRADE COMMISSION 111 (Tom M. Schaumberg ed., 2d ed. 2012) [hereinafter A LAWYER'S GUIDE TO SECTION 337 INVESTIGATIONS] (explaining that the entire discovery process before the ITC normally takes from five to seven months); Taras M. Czebiniak, Comment, *When Congress Gives Two Hats, Which Do You Wear? Choosing Between Domestic Industry Protection and IP Enforcement in § 337 Investigations*, 26 BERKELEY TECH. L.J. 93, 107 (2011) (noting that there are fewer limits on discovery in the ITC proceedings than before district courts).

2. *See* Asim Bhansali, *ABC Guide to ITC*, INTELL. PROP. MAG., Oct. 2012, at 49 (pointing out that concerns about the confidential nature of information rarely justify withholding ITC production).

3. *See, e.g.*, Eileen Hintz Rumfelt, *Off to the Races: Litigating in the Fast-Paced International Trade Commission*, DRI TODAY (May 1, 2012), http://dritoday.org/feature.aspx?id=336 (observing that ITC parties have to abide by the terms of a protective order, which an ALJ issues in each investigation).

4. *See* Certain Shirts with Pucker-Free Seams, Inv. No. 337-TA-517, Order No. 7, at 4 (Dec. 9, 2004) (arguing against being forced to share an unredacted version of respondents' United States market construction protocol with their biggest competitor).

5. *See* Certain Auto. Multimedia Display & Navigation Sys., Components Thereof, & Prods. Containing Same [hereinafter *Auto. Multimedia Display & Navigation Sys.*], Inv. No. 337-TA-657, Order No. 22, at 1–2 (May 11, 2009) (resisting complainant's requests for information on products neither released commercially nor imported into the United States).

6. *See, e.g.*, Certain Video Game Sys. & Wireless Controllers & Components Thereof [hereinafter *Video Game Sys.*], Inv. No. 337-TA-770, Order No. 20, at 4–5

The lack of a single standard leads to a number of problems. First, it facilitates harassing practices where the party that brings an action before the ITC tries to define products that allegedly incorporate functionalities practicing that party's patents (the so-called products at issue or accused products) as broadly as possible, hoping for an application of a favorable standard.[7] Second, the unpredictability associated with the choice of a standard leads to uncertainty as to parties' discovery obligations.[8] Finally, the issue of discovery of products under development has been gaining widespread attention because third parties may also be ordered to produce this sensitive information.[9]

This Comment argues that the ITC should endorse one discovery standard, under which the information on products under development would have to be produced, and clearly define what proof is sufficient to satisfy that standard. Part I of this Comment describes the discovery process before the ITC and the five standards that currently govern the production of information on products under development. Part II demonstrates how various discovery obligations arise depending solely on a standard chosen. Part III recommends that the ITC adopt a standard that deems products under development discoverable if they are likely to enter the United States stream of commerce before an investigation concludes. This Comment concludes by emphasizing the need for a consistently applied standard, which would ensure a fair resolution of the discovery issue regarding products under development.

(Aug. 26, 2011) (ordering discovery of a prototype because the respondent imported the prototype into the United States); Certain Polyethylene Terephthalate Yarn & Prods. Containing Same [hereinafter *Polyethylene Terephthalate Yarn*], Inv. No. 337-TA-457, Order No. 43, at 3 (Dec. 19, 2001) (holding that no production was necessary because the complainant did not establish the likelihood of imminent importation).

7. *See* Certain Semiconductor Integrated Circuits & Prods. Containing Same [hereinafter *Semiconductor Integrated Circuits*], Inv. No. 337-TA-665, Order No. 8, at 2 (Mar. 5, 2009) (arguing that a complainant's definition of accused products lacked precision).

8. *See, e.g.*, Certain Flash Memory Chips & Prods. Containing the Same [hereinafter *Flash Memory Chips*], Inv. No. 337-TA-664, Order No. 48, at 3–4 (Mar. 23, 2010) (maintaining that the Commission had only permitted discovery of developing products in certain circumstances, none of which were present in the investigation).

9. *See* Non-Party Sprint Nextel's Motion to Quash Subpoena Duces Tecum and Ad Testificandum at 6, Certain Baseband Processor Chips & Chipsets, Transmitter & Receiver (Radio) Chips, Power Control Chips, & Prods. Containing Same, Including Cellular Tel. Handsets, Inv. No. 337-TA-543 (Nov. 30, 2005) ("Sprint Nextel has been dragged into somebody else's dispute and forced to comply with a virtually unlimited [s]ubpoena[.]").

I. OVERVIEW OF THE ITC PROCEEDINGS: THE BROAD SCOPE OF DISCOVERY BEFORE THE ITC

The ITC is an independent, quasi-judicial federal agency with exclusive authority to conduct Section 337 investigations.[10] These investigations involve allegations of intellectual property rights infringement that companies with domestic presence bring against imported goods.[11] The ITC investigations generally involve the same participants: the Commission, the Office of the General Counsel, ALJs, and attorneys from the Office of Unfair Import Investigations (the "OUII").[12] Additionally, each investigation involves a complainant,[13] a number of respondents,[14] and third parties.[15]

In recent years, the popularity of the ITC has increased because of a number of aspects that make the ITC uniquely attractive to IP rights holders.[16] First, because the ITC conducts *in rem* proceedings, ITC complainants do not have to establish personal jurisdiction over proposed respondents.[17] Second, the ALJs and commissioners are well versed in

---

10. *See* 19 U.S.C. § 1337(a)(1)(A) (2012) (setting forth that Section 337 can be invoked to address "[u]nfair methods of competition and unfair acts" in the importation of articles).

11. *See* C. Austin Ginnings, Article, *New Concerns About "Articles Concerned": Revisiting the Scope of ITC Exclusion Orders After Yingbin and Kyocera*, 20 FED. CIR. B.J. 503, 504 (2011) (noting that in Section 337 investigations United States intellectual property rights holders allege infringement based on importation, sale for importation, or sale in the United States after importation of foreign goods).

12. *See* Czebiniak, *supra* note 1, at 97 (explaining the roles that the six commissioners, the Office of General Counsel, and the OUII play during an investigation).

13. *See, e.g.*, Christopher A. Cotropia, *Strength of the ITC as a Patent Venue*, 20 TEX. INTELL. PROP. L.J. 1, 5 (2011) ("A patent holder files a complaint with the ITC, requesting that the ITC investigate the alleged infringement of a U.S. Patent, which harms a domestic industry.").

14. *See* A LAWYER'S GUIDE TO SECTION 337 INVESTIGATIONS, *supra* note 1, at 51 (providing a chart denoting what percentage of respondents came from various countries).

15. *See generally* Yuezhong Feng, Ph.D., Article, *Non-Party Discovery Involving a U.S. Entity and Its Foreign Affiliate: A Comparison of the Commission's Approach to Subpoenas and the Hague Evidence Convention*, XXIV 337 REP. 75, 75–82 (6th Ann. Summer Associate ed. 2008) (exploring certain issues associated with third-party discovery).

16. *See* Czebiniak, *supra* note 1, at 103 (quoting Peter S. Menell, *The International Trade Commission's Section 337 Authority*, 2010 PATENTLY-O PAT. L.J. 79, 79 (2010)) (asserting that the ITC adjudicates more patent cases each year than any district court in the United States).

17. *See* 19 U.S.C. § 1337(a)(1)(B) (2012) (stating that the ITC obtains jurisdiction over goods based on importation, sale for importation, or sale in the United States after importation).

intellectual property law and are accustomed to handling highly complex technological issues in the context of international trade.[18]

Third, because the ITC has one of the fastest dockets in the country, prevailing complainants can avail themselves of remedies quickly.[19] While the ITC cannot award monetary damages,[20] it can exclude products implementing the infringing technology from entering the country[21] and from being sold in the country.[22] Specifically, the ITC has the authority to issue several types of orders: general exclusion orders ("GEOs"),[23] limited exclusion orders ("LEOs"),[24] and cease and desist orders.[25]

There are several ways to enforce a final exclusion order. U.S. Customs and Border Protection ("Customs") is primarily responsible for enforcing ITC orders and preventing articles that fall under the definition of "articles that infringe" from entering the United States.[26] Additionally, any person can request that the ITC initiate proceedings to determine whether an ITC exclusion order or a cease and desist order is violated.[27]

---

18. *See* A LAWYER'S GUIDE TO SECTION 337 INVESTIGATIONS, *supra* note 1, at 223 (acknowledging that the Court of Appeals for the Federal Circuit defers to the Commission as to its interpretation of the statute).

19. *See* 19 U.S.C. § 1337(b)(1) (requiring that the ITC complete an investigation at the earliest possible time); *see also* Cotropia, *supra* note 13, at 5 (observing that patentees have always preferred fast track adjudication venues).

20. *See* 19 U.S.C. § 1337(d), (f) (setting forth the ITC's authority to issue injunctive relief only); Ginnings, *supra* note 11, at 505 (discussing types of relief available at the ITC).

21. *See* 19 U.S.C. § 1337(d) (granting the ITC authority to issue general and limited exclusion orders).

22. *See id.* § 1337(f) (setting forth the ITC authority to issue cease and desist orders).

23. *See id.* § 1337(d)(2) (listing conditions under which the Commission may issue a GEO).

24. *See id.* § 1337(d)(1) (directing the Commission to exclude the infringing articles of the parties named in the investigation from entering the country unless it is contrary to the public interest).

25. *Id.* § 1337(f); *see* A LAWYER'S GUIDE TO SECTION 337 INVESTIGATIONS, *supra* note 1, at 191 (noting that the Commission may issue a cease and desist order if the Commission finds that there exist commercially significant inventories of infringing products in the United States).

26. *See* Merritt R. Blakeslee, *Post-litigation Enforcement of Remedial Orders Issues by the U.S. International Trade Commission in Section 337 Investigations*, 8 J. MARSHALL REV. INTELL. PROP. L. 248, 252–61 (2009) (describing Customs' treatment of the ITC exclusion orders).

27. 19 C.F.R. § 210.79(a) (2013); *see also* Blakeslee, *supra* note 26, at 263–67 (providing an overview of the Commission's enforcement of its orders through initiating either informal or formal enforcement proceedings, or penalty actions).

A. The Broad Scope of the ITC Discovery Allows for Discovery of Products Under Development

The scope of ITC discovery, which the Commission defines in a public notice in the Federal Register,[28] is very broad.[29] In particular, complainants routinely define allegedly infringing products as including products under development that may incorporate the allegedly infringing technology.[30] Usually complainants, in attempts to obtain the broadest discovery possible, do not offer any limitations on the definition of products under development.[31] If respondents are confident that their products under development do not infringe the complainants' technology, the respondents may also try to produce information on those products during discovery.[32] Moreover, complainants and respondents may issue discovery requests to obtain information regarding products under development from third parties.[33]

A party requesting discovery of products under development must at a minimum establish two things. First, the products with respect to which the information is sought must be within the scope of the investigation.[34] Second, the information sought has to likely lead to admissible evidence.[35]

---

28. 19 C.F.R. § 210.10(b).

29. *See id.* § 210.27(b) (providing that a party can obtain discovery about any non-privileged matter which is reasonably calculated to lead to the discovery of relevant information).

30. *See, e.g.*, *Semiconductor Integrated Circuits*, Inv. No. 337-TA-665, Order No. 8, at 2 (Mar. 5, 2009) (specifying that accused products include products under development).

31. *But see* Certain Consumer Elecs. & Display Devices & Prods. Containing Same, Inv. No. 337-TA-836, Order No. 10, Ex. B, at 4 (Aug. 10, 2012) (limiting "new products" to those products that are likely to enter the United States before the close of discovery).

32. *See* Raquel C. Rodriquez, Article, *Strategic Considerations for Complainants and Respondents Considering to Include Products in Development in Section 337 Investigations*, XXVI 337 REP. 87, 92 (7th Ann. Summer Associate ed. 2009) (pointing out that some of the advantages of including non-infringing products under development into an investigation include increasing the chances of settlement between the parties and being able to obtain a non-infringement determination with respect to products under development in the proceeding that the complainant already started before the ITC, as opposed to having to start a new suit in a different forum).

33. *See* Patricia Larios, *The U.S. International Trade Commission's Growing Role in the Global Economy*, 8 J. MARSHALL REV. INTELL. PROP. L. 290, 305 (2009) (noting that although the Commission cannot compel a foreign company to produce discovery, the Commission can impose evidentiary sanctions if the foreign party refuses to cooperate).

34. *See* 19 C.F.R. § 210.10(b) (clarifying that a Federal Register notice, which the Commission issues, defines the scope of an investigation); *id.* § 210.27(b) (emphasizing that a party may obtain discovery of any non-privileged matter relevant, *inter alia*, to any claim or defense asserted in an investigation); *see also* Certain Integrated Repeaters, Switches, Transceivers, & Prods. Containing Same [hereinafter

The issue of discovery of products under development is usually very contentious and leads to heated motion practice, which consumes parties' and judicial resources.[36] Respondents and third parties strongly object to the production of this information because it is highly confidential.[37] Furthermore, allowing such discovery to proceed may enable complainants to go on a fishing expedition to acquire access to yet unreleased products.[38] This is a particular source of anxiety for those entities that may distrust the ITC's capabilities of safeguarding the confidentiality of the information.[39] Additionally, the obligation to produce information on products under development imposes increased production burdens on parties or non-parties, including rising production costs.[40] The production of information on products under development may also be entirely unnecessary because the products, in their final form, may not even implement the allegedly infringing technology.[41] This information may further be irrelevant

---

Integrated Repeaters], Inv. No. 337-TA-435, Order No. 7, at 11–16 (Dec. 21, 2000) (denying, in part, complainants' motion to compel with respect to products in development where the complainants failed to establish that those products were integrated repeaters).

35. *See* 19 C.F.R. § 210.27(b) ("It is not grounds for objection that the information sought will be inadmissible at the hearing if the information sought appears to be reasonably calculated to lead to the discovery of admissible evidence.").

36. *See, e.g.*, *Semiconductor Integrated Circuits*, Inv. No. 337-TA-665, Order No. 23, at 1–2 (Apr. 28, 2009) (discussing a number of filings submitted relating to a nonparty's efforts to quash or limit a complainant's subpoenas).

37. *See* Non-Party Sprint Nextel's Motion to Quash Subpoena Duces Tecum and Ad Testificandum, *supra* note 9, at 5 (vehemently opposing a "singularly inappropriate" request for production of information on products under development).

38. *See, e.g.*, *Semiconductor Integrated Circuits*, Inv. No. 337-TA-665, Order No. 23, at 2 ("[The complainant] has no idea whether any chips manufactured by . . . [a third party] have any relevance to th[e] investigation.").

39. *See* Non-Party Sprint Nextel's Motion to Quash Subpoena Duces Tecum and Ad Testificandum, *supra* note 9, at 5 ("[W]ith all due respect, Sprint Nextel does not believe that the Commission has the requisite power to punish or control the disposition of this most competitive and secretive of business information.").

40. *See* Certain Integrated Circuits, Processes for Making Same, & Prods. Containing Same, Inv. No. 337-TA-450, Order No. 6, at 1–3 (July 18, 2001) (ordering production of information relating to products under development despite the respondents' arguments that those requests were unduly burdensome because a physical inspection of a device would be less expensive than production of documents); *see also* Certain Memory Devices with Increased Capacitance & Prods. Containing Same [hereinafter *Memory Devices with Increased Capacitance*], Inv. No. 337-TA-371, Order No. 36, at 2–3 (May 31, 1995) (limiting a third-party subpoena duces tecum because, while requests seemed relevant, the scope of production requested appeared unduly burdensome considering the third party's size and broad scope of the requests).

41. *See* Certain Mobile Commc'ns & Computer Devices & Components Thereof [hereinafter *Mobile Commc'ns & Computer Devices*], Inv. No. 337-TA-704, Order No. 48, at 1 (Oct. 5, 2010) (mentioning the OUII attorney's position that products under development that the respondents imported may not implement allegedly infringing

because respondents or third parties may decide not to import the products into the United States or sell them for importation.[42]

B. There Are at Least Five Different Standards That Govern Production of Information on Products Under Development

Because there is no concisely articulated discovery standard to govern the production of information on products under development, the ALJs employ at least five inconsistent and sometimes outright contradictory discovery standards.[43] Doing so leads to unpredictable results and creates uncertainty for private and third parties as to the scope of their discovery obligations.[44]

1. The First Standard—the Scope of an Investigation and the Likelihood of the Discovery of Admissible Information

The first standard mandates that products under development are discoverable if a complainant establishes that the information sought is within the scope of an investigation and is likely to lead to the discovery of admissible information.[45] Notably, while the Commission has never outright endorsed any standards, it impliedly approved the first standard by pointing out in *Certain Flash Memory Circuits and Products Containing*

---

functionalities).

42. *See* Certain Hardware Logic Emulation Sys. & Components Thereof [hereinafter *Hardware Logic Emulation Sys.*], Inv. No. 337-TA-383, Order No. 48, at 7 (Oct. 1, 1996) (emphasizing that if the respondents decided to offer products under development on the United States market, they would move manufacturing to the United States).

43. *Compare id.* at 6, 9–11 (ordering discovery based upon a conclusion that even if products under development were never imported into the United States, the information sought was still within the scope of discovery and relevant), *with Memory Devices with Increased Capacitance*, Inv. No. 337-TA-371, Order No. 18, at 2 (Apr. 20, 1995) (imposing no obligation to produce discovery on products that the respondents had not sold unless the respondents intended to import them into the United States during the investigation).

44. *See Flash Memory Chips*, Inv. No. 337-TA-664, Order No. 48, at 2–3 (Mar. 23, 2010) (resisting complainants' efforts to obtain information on products under development by arguing that precedent required discovery of information under development only under certain circumstances, none of which were present in the investigation).

45. *See id.* at 2–4 (allowing discovery of the respondents' chips that were still in development based on the conclusion that the chips were sufficiently advanced so that information about the chips was reasonably calculated to lead to the discovery of admissible information and disregarding the respondents' arguments that the respondents neither imported prototypes or samples of their chips under development into the United States, nor showed them to customers, nor there was any reason to believe that they would make or import into the United States their chips under development before the evidentiary record closed).

the Same that because jurisdictional and factual issues regarding importation meshed, it was appropriate for the ALJ to assume jurisdiction to make an infringement determination even in the absence of any evidence of importation.[46]

In *Hardware Logic Emulation Systems*, the ALJ found that components of logic emulations systems that the respondents manufactured were within the scope of the investigation notice.[47] The ALJ further determined that the respondents' use in the developing logic emulation system of any components of those systems that the complainant identified as allegedly infringing would lead to the discovery of admissible evidence.[48] The ALJ then relied on the complainant's assertion that "it [was] possible" for the respondents to ship the components into the United States to assemble them into complete hardware emulation systems at the respondents' United States plant.[49] In *Certain Optical Disc Controller Chips and Chipsets and Products Containing Same, Including DVD Players and PC Optical Storage Devices* (*Optical Disk Controller Chips*), the ALJ granted complainants' motion to compel a respondent to produce documents or, alternatively, to provide a full update relating to the respondent's chip under development by explicitly relying on the Commission's decision stating the jurisdictional assumption may be appropriate to make the infringement determination with respect to new designs.[50]

---

46. *See* Certain Flash Memory Circuits & Prods. Containing Same [hereinafter *Flash Memory Circuits*], Inv. No. 337-TA-382, USITC Pub. 3046, Comm'n Op., at 12–13 & n.30, 16 (July 1997) (citing Amgen, Inc. v. U.S. Int'l Trade Comm'n, 902 F.2d 1532, 1536 (Fed. Cir. 1990)) (criticizing the ALJ for failing to determine whether products under development infringed complainants' patents despite the fact that there appeared to be no documentary evidence of importation of new designs, which, according to the Commission, would more appropriately lead to the determination of no violation by the new designs, rather than leading to the decision to not make any determination at all on the new designs).

47. *See Hardware Logic Emulation Sys.*, Inv. No. 337-TA-383, Order No. 48, at 9–11 (granting the complainant's motion to compel).

48. *See id.* at 10 (emphasizing that the discovery scope included not only complete products, but their components as well).

49. *See id.* at 7–11 (rejecting the respondents' arguments that the design of the new hardware emulation system was still unfinished and that if the respondents did ultimately offer the product on the United States market, the product would not be imported because the manufacturing activities would take place in the United States); *see also Hardware Logic Emulation Sys.*, Inv. No. 337-TA-383, Order No. 57, at 9 (Dec. 9, 1996) (denying the respondents' motion for reconsideration by stating that even assuming that the respondents would never import their developing hardware logic emulations systems into the United States, the information sought was still relevant to the investigation).

50. Certain Optical Disc Controller Chips & Chipsets & Prods. Containing Same, Including DVD Players & PC Optical Storage Devices [hereinafter *Optical Disk Controller Chips*], 337-TA-506, Order No. 32, at 1, 3–4 (Dec. 22, 2004) (citing *Flash Memory Circuits*, Inv. No. 337-TA-382, USITC Pub. 3046, Comm'n Op., at 19, 22–

2. The Second Standard—Importation

Under the second standard, if a prototype of products under development has entered the United States, the products under development are discoverable.[51] This standard was the basis for the ALJ's decision to grant the complainant's motion to compel the respondent to produce discovery of chips under development in *Certain GPS Chips, Associated Software and Systems, and Products Containing Same*.[52] The ALJ decided that the importation of a limited number of the respondent's chips, together with the fact that the respondent hoped to start distributing samples of the chips to customers within the next several months, was enough to allow discovery to proceed.[53] In *Automotive Multimedia Display and Navigation Systems*, the ALJ performed a similar analysis when he allowed a complainant to obtain discovery of respondents' products under development.[54] In that investigation, the complainant argued that the respondents' products were in the final stages of development leading to the products' commercial launch.[55] The respondents did not deny the fact of importation emphasizing, instead, that they did not have immediate plans to import the products under development for sale in the United States.[56] Similarly, in *Video Game Systems*, the ALJ rejected an argument that complainants were not entitled to discovery of the Wii U system still in

---

25).

51. *See, e.g., Video Game Sys.*, Inv. No. 337-TA-770, Order No. 20, at 4–5 (Aug. 26, 2011) (ordering discovery of the respondents' Wii U system, a prototype of which the respondents brought to a United States exhibition).

52. *See* Certain GPS Chips, Associated Software & Sys., & Prods. Containing Same [hereinafter *GPS Chips*], Inv. No. 337-TA-596, Order No. 16, at 2–4 (July 10, 2007) (rejecting the respondent's arguments that it would make changes to the products before the products were in their final form and ready for market placement, that the respondent was still working on software for the products, and that the respondent had not showed those products to any customers where the respondent conceded that it had shipped a small number of the chips to the United States for testing and evaluation).

53. *See id.* at 3–4 (recognizing that the respondent did not appear to be selling or marketing its chips in the United States, but emphasizing that the respondent anticipated that commercial production would start before the end of the investigation).

54. *See Auto. Multimedia Display & Navigation Sys.*, Inv. No. 337-TA-657, Order No. 22, at 2–4 (May 11, 2009) (concluding that products under development were discoverable and relevant because they were within the investigation scope since the respondents imported samples of prototypes of those products into the United States).

55. *See id.* at 4 (arguing that the respondents had imported and/or were importing products under development for testing preceding commercial release from the place outside of the United States where the products were manufactured to the respondents' United States facilities).

56. *See id.* (stressing that the respondents were not going to commercially release the product under development until sometime in the future).

development because the importation of the system would not take place before the close of discovery.[57]

3. *The Third Standard—the Likelihood of Imminent Importation*

Under the third standard, products under development are discoverable if their importation into the United States is likely to happen before the close of the evidentiary record or while an investigation is still pending.[58] Imminent importation generally can be established either when a respondent admits its plans to start importing its products under development soon[59] or if a complainant shows that a respondent held presentations relating to its products under development during which it demonstrated those products to customers or customers bought samples of the products.[60] In *Certain Memory Devices with Increased Capacitance and Products Containing Same*, the ALJ clarified one of his previous orders, reiterating that respondents did not have to produce any information on their dynamic random-access memories ("DRAMs") under development that were not sold anywhere unless the respondents planned to send samples of those DRAMs to the United States while the investigation was still pending.[61] In *Polyethylene Terephthalate Yarn*, the ALJ found one

---

57. *See Video Game Sys.*, Inv. No. 337-TA-770, Order No. 20, at 4–5 (Aug. 26, 2011) (granting the complainants' motion to compel discovery because the respondents imported a working prototype of the Wii U system, demonstrated the prototype at an exposition in the United States, and let the exposition visitors play with the prototype).

58. *See, e.g.*, Certain Elec. Devices for Capturing & Transmitting Images, & Components Thereof [hereinafter *Elec. Devices for Capturing & Transmitting Images*], Inv. No. 337-TA-831, Order No. 33, at 10 (Oct. 12, 2012) (ordering discovery of products under development likely to enter the United States before the close of the evidentiary record).

59. *See id.* (ordering the respondents to start immediate production of information relating to those products under development that the respondents reasonably anticipated to import while discovery was still ongoing); *see also Memory Devices with Increased Capacitance*, Inv. No. 337-TA-371, Order No. 18, at 3 (Apr. 20, 1995) (specifying that the respondent did not have to produce discovery unless the respondent planned to send samples to the United States while the investigation was still pending).

60. *See* Certain Optical Disk Controller Chips & Chipsets & Prods. Containing Same, Including DVD Players & PC Optical Storage Devices II [hereinafter *Optical Disk Controller Chips II*], Inv. No. 337-TA-523, Order No. 46, at 7 (May 2, 2005) (ordering discovery of two chips under development that the respondents showed to their customers despite the fact that one of those chips the respondents showed to foreign customers only).

61. *See Memory Devices with Increased Capacitance*, Inv. No. 337-TA-371, Order No. 18, at 2 ("[A]s long as [the respondent] has not sent and does not intend to send samples to anyone else for testing or evaluation while this case is pending, the [respondent's products] under development do not appear to be relevant to this case."); *see also Elec. Devices for Capturing & Transmitting Images*, Inv. No. 337-TA-831, Order No. 33, at 10 (compelling respondents to start immediately producing discovery with respect to those products under development that the respondents reasonably

type of yarn in fabric form discoverable because the respondent provided samples of that yarn to two Japanese customers who paid for the samples.[62] In contrast, the ALJ found that showing the second type of incomplete yarn to a company in Slovakia was insufficient to establish that the respondent was likely to import that type of yarn into the United States before the close of the evidentiary record.[63] Finally, the ALJ denied discovery with respect to the third type of yarn because the respondent's witness testified that the respondent did not expect to make samples of that yarn for about another year and because the respondent had only made a general presentation of that yarn to the respondent's customers without specifying prices and availability and without giving away any samples.[64] In *Optical Disk Controller Chips II*, the ALJ found that two chips, the samples of which respondents manufactured and showed to customers, were properly discoverable, despite the fact that the sample of one chip was shown to foreign customers only, because those chips were likely to be imported into the United States soon.[65]

4. *The Fourth Standard—the Likelihood of the Imminently Entering of the United States' Stream of Commerce*

The fourth standard holds that products under development are discoverable if they are likely to enter the United States stream of commerce during the investigation.[66] Products under development are likely to enter the United States stream of commerce if respondents are marketing them in the United States[67] or if the products are in the advanced

---

anticipated to start importing into the United States before the close of the evidentiary record).

62. *See Polyethylene Terephthalate Yarn*, Inv. No. 337-TA-457, Order No. 43, at 2–3 (Dec. 19, 2001) (ordering discovery of products under development that were within the scope of the investigation and that were likely to be made or brought to the United States before the evidentiary record closed).

63. *See id.* at 3 (pointing out that the respondent did not receive a payment for its sample).

64. *See id.* (finding that the complainant failed to establish that the products would enter the United States before the end of the evidentiary period).

65. *See Optical Disk Controller Chips II*, Inv. No. 337-TA-523, Order No. 46, at 7 (May 2, 2005) (declining to impose discovery obligations on the respondents with regard to the third chip that still appeared to be in the early stages of its development and that the respondents did not show to customers).

66. *See, e.g.*, Certain Audio Processing Integrated Circuits, & Prods. Containing Same [hereinafter *Audio Processing Integrated Circuits*], Inv. No. 337-TA-538, Order No. 7, at 1–3 (July 18, 2005) (granting a complainant's motion to compel).

67. *See* Certain Abrasive Prods. Made Using a Process for Making Powder Preforms, & Prods. Containing Same [hereinafter *Abrasive Prods.*], Inv. No. 337-TA-449, Order No. 37, at 1–3 (Oct. 10, 2001) (denying a respondent's motion to limit the scope of the investigation to fully commercialized products that would satisfy the

testing stage and the respondents have established avenues of importation of similar products into the United States.[68] In *Abrasive Products*, the ALJ determined that because the respondent was marketing its products under development in the United States, the products could enter the United States stream of commerce while the investigation was still pending.[69] In *Audio Processing Integrated Circuits*, the ALJ ordered discovery of the product under development, which had already entered the advanced testing stage, because the respondent produced the product's data sheet and appeared to have a large variety of other technical documents available.[70]

5. *The Fifth Standard—Commercial Availability*

Finally, under the fifth standard, the ALJs may deny discovery if products under development are not commercially available.[71] In *Memory Devices*, the ALJ expressly stated that a third party did not have to produce its DRAMs with textured polysilicon memory cells that were still in development and that the third party had not yet sold.[72]

C. *The Application of Each Standard to the Same Set of Facts Leads to Different Outcomes*

A party's obligations to produce information regarding products under development will differ vastly depending on which standard an ALJ decides to apply.[73] The application of each standard to the following

---

importation requirement).

68. *See Audio Processing Integrated Circuits*, Inv. No. 337-TA-538, Order No. 7, at 2–3 (stating that it seemed more than possible that a developing product of the type accused of infringement would enter the United States stream of commerce while the investigation was ongoing).

69. *See Abrasive Prods.*, Inv. No. 337-TA-449, Order No. 37, at 2 (determining that the complainants could present evidence on the respondent's DiaGrid prototype products because the products were within the scope of the investigation).

70. *See Audio Processing Integrated Circuits*, Inv. No. 337-TA-538, Order No. 7, at 2–3 (noting that the product under development allegedly was to be used in downstream products that the respondent brought into the United States through the same importation avenues that other respondent's accused products purportedly used).

71. *Memory Devices with Increased Capacitance*, Inv. No. 337-TA-371, Order No. 36, at 2 (May 31, 1995).

72. *See id.* at 3 (also noting that the complainants would have to purchase every sample of the third party's DRAMs that the complainants wished to retain).

73. *Compare Hardware Logic Emulation Sys.*, Inv. No. 337-TA-383, Order No. 57, at 9 (Dec. 9, 1996) (declining to reconsider the order compelling production by noting that even if products under development would not enter the United States, that information would still be relevant), *with Optical Disk Controller Chips II*, Inv. No. 337-TA-523, Order No. 46, at 7 (May 2, 2005) (declining to impose discovery obligations regarding one chip that the respondents were not likely to import into the United States soon).

hypothetical set of facts helps to illustrate this point. In this hypothetical, a respondent in an investigation that involves laptops is developing several new laptops. Laptop A is still in the early development stages. The respondent will not manufacture a prototype of laptop A until after the end of the investigation, and the respondent does not plan on importing laptop A into the United States. The respondent, on the other hand, has produced and imported into the United States for testing two preliminary prototypes of laptop B. The respondent, however, has not shown them to anybody outside the company and does not anticipate that laptop B will be finalized by the time discovery ends. Laptops C and D will be sufficiently finalized while the investigation is still pending. The respondent showed laptop C in its current, incomplete version to some of the respondent's customers in China. The respondent also gave several presentations relating to laptop C to some of the respondent's United States customers without showing prototypes of laptop C and without specifying when exactly laptop C will be available. Laptop C will not enter the United States stream of commerce—if at all—until after the investigation concludes. Laptop D has already entered the advanced testing stage. The respondent also had meetings with several of its United States customers during which the respondent indicated that laptop D would be available for sale soon. A limited number of units of laptop E are currently commercially available in the United States.

II. DIFFERENCES BETWEEN THE FIVE STANDARDS LEAD TO INCONSISTENT RESULTS AND CREATE UNCERTAINTY AS TO THE SCOPE OF DISCOVERY OBLIGATIONS

There is no way to predict with certainty which standard an ALJ will decide to use in any given investigation.[74] Often, a party requesting information relating to products under development is thoroughly convinced that it is entitled to this discovery based on some of the available precedent.[75] A party resisting the production can also identify quite a few investigations that seem to suggest that discovery may not be necessary.[76]

---

74. *Compare Flash Memory Chips*, Inv. No. 337-TA-664, Order No. 48, at 3–4 (Mar. 23, 2010) (evaluating whether information was reasonably calculated to lead to the discovery of admissible information), *with Optical Disk Controller Chips II*, Inv. No. 337-TA-523, Order No. 46, at 6–7 (focusing on whether imminent importation was likely to happen).

75. *See, e.g.*, *Integrated Repeaters*, Inv. No. 337-TA-435, Order No. 7, at 11–12 (Dec. 21, 2000) (arguing that the respondent was withholding relevant responsive information).

76. *See, e.g.*, *Flash Memory Chips*, Inv. No. 337-TA-664, Order No. 48, at 3 (emphasizing that none of the circumstances under which the Commission had previously found discovery of products under development warranted were present in

Thus, the lack of a consistently applied standard often forces parties to file multiple motions, which, in turn, takes up a lot of valuable time and increases litigation costs.[77]

A. Under the First Standard, the Respondent Will Likely Have to Produce Information on All Laptops Under Development

If the ALJ decides to apply the first standard to the hypothetical described above, the ALJ will most likely order the respondent to produce information on all laptops under development because that information is likely to lead to the discovery of relevant evidence and all laptops appear to be within the discovery scope.[78] In this case, the respondent will have to produce the information on laptops B, C, D, and E, all of which, while incomplete (save for laptop E), appear to be sufficiently finalized so that their production yields relevant information.[79] Provided that the complainant establishes that the information on laptop A is likely to lead to the discovery of admissible evidence, the respondent will further have to produce information on laptop A despite the fact that the respondent has no current plans of importing laptop A into the United States after its commercial manufacture starts because, as a laptop, laptop A also is within the discovery scope.[80]

The first standard, undoubtedly, is the broadest standard out of the five and leads to the highest volume of information produced.[81] The breadth of the standard simplifies its application because the ALJ does not have to

---

the investigation).

77. *See, e.g., Integrated Repeaters*, Inv. No. 337-TA-435, Order No. 7, at 1 (listing multiple filings that were submitted regarding products under development at issue).

78. *See Flash Memory Chips*, Inv. No. 337-TA-664, Order No. 48, at 3–4 (ordering production because information sought was reasonably calculated to lead to the discovery of admissible information); *Hardware Logic Emulation Sys.*, Inv. No. 337-TA-383, Order No. 48, at 7, 9–11 (Oct. 1, 1996) (finding developing hardware logic emulations systems not yet imported into the United States discoverable because they were within the scope of the investigation and their discovery was reasonably calculated to lead to the discovery of admissible evidence).

79. *See Flash Memory Chips*, Inv. No. 337-TA-664, Order No. 48, at 2–4 (ordering production based on the conclusion that chips in development were advanced enough to lead to the discovery of admissible evidence).

80. *See Hardware Logic Emulation Sys.*, Inv. No. 337-TA-383, Order No. 48, at 7–11 (ordering production despite the fact that the respondents had not fully designed the emulation system and had no plans to import the emulation system into the United States).

81. *Compare id.* (compelling production of information on the still unfinished emulation system which the respondents did not even intend to import into the United States), *with Memory Devices with Increased Capacitance*, Inv. No. 337-TA-371, Order No. 36, at 3 (May 31, 1995) (concluding that the third party did not have to discover its developing DRAMs which it had not yet sold).

perform a complicated analysis.[82] Instead, the ALJ will simply have to determine whether the discovery of information relating to each of the respondent's products under development is relevant and within the scope of the investigation.[83] If the Commission endorsed the first standard as its formal approach to handling discovery of products under development, motion practice associated with that issue would probably significantly decrease or even completely disappear.[84] The respondent would simply have to assume that it will be under obligation to produce information on all of its products under development which fall within the broad scope of the investigation and could lead to the discovery of relevant information.[85] Finally, the standard is extremely complainant-friendly. Not only would the complainant's burden of justifying the discovery of products under development substantially lessen,[86] but the complainant would also get a fairly complete production without having to litigate this issue in a piecemeal fashion.[87] As such, if the respondent sped up the production schedule for some of its products which it initially did not intend to offer on the United States market and decided to import those products, the complainant would not have to file new motions to compel based on the changed circumstances.[88]

The drawbacks of the first standard, however, are quite numerous. As an initial matter, because the threshold to satisfy the first standard is relatively

---

82. *See Optical Disk Controller Chips*, Inv. No. 337-TA-506, Order No. 32, at 3–4 (Dec. 22, 2004) (simply emphasizing the breadth of Section 337 discovery).

83. *See Hardware Logic Emulation Sys.*, Inv. No. 337-TA-383, Order No. 48, at 9–10 (noting that the investigation scope included not only the respondents' hardware emulation systems but also components of such systems).

84. *See* Certain Removable Elec. Cards & Elec. Card Reader Devices & Prods. Containing the Same [hereinafter *Removable Elec. Cards*], Inv. No. 337-TA-396, Order No. 12, at 6 (Aug. 27, 1997) (emphasizing preference for the broad discovery scope).

85. *See Hardware Logic Emulation Sys.*, Inv. No. 337-TA-383, Order No. 48, at 9–10 (ordering production of information because the scope of the investigation included hardware logic emulations systems).

86. *See id.* at 7–11 (granting the complainant's motion to compel despite no actual or impeding importation showing).

87. *Compare Optical Disk Controller Chips*, 337-TA-506, Order No. 32, at 3–4 (compelling the respondent to produce all information relating to its chip under development), *with Elec. Devices for Capturing & Transmitting Images*, Inv. No. 337-TA-831, Order No. 38, at 1–5 (Nov. 6, 2012) (granting the complainant's motion for reconsideration of its motion seeking judicial enforcement of a subpoena against a third party, Microsoft, where the initial motion was denied, in part, based on Microsoft's representation that it did not intend to imminently launch its Windows Phone 8).

88. *Cf. Elec. Devices for Capturing & Transmitting Images*, Inv. No. 337-TA-831, Order No. 38, at 1–5 (ruling on a motion for reconsideration, which the complainant had to file after the third party released its product, even though the third party had initially claimed it would not have released the product so soon).

low, the complainant can make the respondent expend resources on producing an exorbitant amount of information, which, in the end, may prove to be entirely unnecessary.[89] For example, the respondent may not even intend to sell its products under development in the United States, or the Commission may not have jurisdiction over the products.[90] Also, products in early development stages ultimately may not even incorporate the allegedly infringing functionalities.[91]

B. Under the Second Standard, the Respondent Will Only Have to Produce Information on Two Laptops, the Samples of Which Entered the United States

If the ALJ opts for the second standard, the respondent most likely will only have to produce information about laptops B and E because only these laptops already entered the United States.[92] Specifically, the shipment of two prototypes of laptop B will most likely be enough to satisfy the importation requirement under the second standard, even though the respondent did not show those two prototypes to anybody outside the company.[93] Information regarding laptop E will also be subject to discovery because a limited number of those laptops are already commercially available in the United States.[94]

The ALJ would probably deny a motion to compel with respect to laptop A because the respondent never shipped any samples of laptop A to the

---

89. *See, e.g.*, *Semiconductor Integrated Circuits*, Inv. No. 337-TA-665, Order No. 23, at 1–2 (Apr. 28, 2009) (seeking to quash and/or limit subpoenas by arguing that the complainant just went on a "fishing expedition" without knowing for sure whether the chips that the third party manufactured were relevant to the investigation).

90. *See Hardware Logic Emulation Sys.*, Inv. No. 337-TA-383, Order No. 48, at 7 (arguing that in case the respondents decided to sell their products under development in the United States, they would start manufacturing the products domestically).

91. *See, e.g.*, *Mobile Commc'ns & Computer Devices*, Inv. No. 337-TA-704, Order No. 48, at 1 (Oct. 5, 2010) (noting the OUII attorney's observation that the current prototype could be non-representative of the allegedly infringing functionalities of the final product).

92. *See, e.g.*, *Video Game Sys.*, Inv. No. 337-TA-770, Order No. 20, at 4–5 (Aug. 26, 2011) (ordering discovery of prototypes that the respondents brought to the United States exhibition).

93. *See Auto. Multimedia Display & Navigation Sys.*, Inv. No. 337-TA-657, Order No. 22, at 4 (May 11, 2009) (ordering production, although prototypes only entered the United States for testing purposes); *GPS Chips*, 337-TA-596, Order No. 16, at 2–4 (July 10, 2007) (compelling the respondent to produce information on its products under development shipped to the United States despite the respondent's objections that only a small number of prototypes were imported).

94. *See Auto. Multimedia Display & Navigation Sys.*, Inv. No. 337-TA-657, Order No. 22, at 4 (emphasizing that importation of itself is basis for exercising jurisdiction, even if it is not importation for sale).

United States.[95] The respondent will most likely not have to produce information on either laptop C or D because, while the respondent undertook certain marketing efforts in the United States with respect to those laptops, including conducting presentations during which the respondent discussed laptop C and D, no number of laptops C and D entered the United States.[96]

Some of the advantages that the second standard offers are similar to those available under the first standard. For example, the second standard is easy to apply because, by focusing on the act of importation, the standard evaluates whether something happened, as opposed to whether it is likely to happen.[97] The application of the second standard will further lead to fairly consistent outcomes because, contrary to the arguments that the parties often make trying to avoid discovery, the purpose of the importation under the second standard is not outcome-determinative.[98] Specifically, the complainant will be entitled to information on products under development regardless of whether the respondent brought the prototypes into the United States for commercial sale or for internal testing.[99] Consequently, if parties work with each other in good faith, there may be no need to argue the issue of production of information relating to products under development before the ALJ, which will save the parties time and costs.[100]

Furthermore, the second standard, in comparison to the first standard, tries to achieve a better balance between the interests of the complainant in obtaining complete discovery and the interests of the respondent in avoiding the burdens associated with voluminous and invasive production. For example, because prototypes that enter the United States are normally in more advanced development stages, the complainant will be in a better

95. *But cf. id.* (finding discovery appropriate because the respondents brought several products into the United States).

96. *But see Video Game Sys.*, Inv. No. 337-TA-770, Order No. 20, at 4 (emphasizing that the respondents showed the prototype of their new video game system with a wireless controller at the United States exhibition); *Auto. Multimedia Display & Navigation Sys.*, Inv. No. 337-TA-657, Order No. 22, at 4 (pointing out that the prototypes entered the United States for testing prior to commercial release).

97. *See Video Game Sys.*, Inv. No. 337-TA-770, Order No. 20, at 4 (deeming that importation was established because the respondents showed their prototype at the exhibition in the United States).

98. *See GPS Chips*, 337-TA-596, Order No. 16, at 2–4 (ordering production despite the respondents' explanation that the incomplete imported chips were not of commercial quality and were not even samples).

99. *See Auto. Multimedia Display & Navigation Sys.*, Inv. No. 337-TA-657, Order No. 22, at 4 (ordering discovery although the respondents only brought the prototypes to their United States testing facilities).

100. *See* A LAWYER'S GUIDE TO SECTION 337 INVESTIGATIONS, *supra* note 1, at 147 (noting that the ALJs normally have requirements with which parties have to comply prior to filing motions to compel).

position to determine whether these products incorporate infringing functionalities.[101] A more limited production, of course, also benefits the respondent by decreasing the respondent's production costs.[102] Additionally, a narrower discovery scope should, at least in theory, somewhat alleviate the respondent's apprehension over producing information on products which are in such early stages of development that the respondent has not even extensively tested them, let alone put them on the market.[103] Because of its fairly narrow scope, the second standard limits the complainant's ability to gain insight into the respondents' development plans.[104]

The second standard, on the other hand, also has a number of shortcomings. First, the second standard may be more restrictive than necessary because it may exclude from the scope of production even products in advanced development stages if those products did not enter the United States.[105] That is problematic because if the respondent's actions indicate its intent to start selling such products under development in the United States in the near future, the complainant would benefit from receiving information on those products to perform the infringement analysis.[106]

---

101. *See Video Game Sys.*, Inv. No. 337-TA-770, Order No. 20, at 2 (arguing that the respondents even allowed the exhibition goers to play with the prototype).

102. *Compare Auto. Multimedia Display & Navigation Sys.*, Inv. No. 337-TA-657, Order No. 22, at 4 (ordering discovery only of those products that the respondents imported into the Unites States), *with Hardware Logic Emulation Sys.*, Inv. No. 337-TA-383, Order No. 48, at 9–11 (Oct. 1, 1996) (ordering broad discovery based on the fact that certain components were within the discovery scope and their discovery could lead to admissible information).

103. *See Auto. Multimedia Display & Navigation Sys.*, Inv. No. 337-TA-657, Order No. 22, at 4 (admitting that prototypes entered the United States for testing prior to commercial release).

104. *Cf.* Non-Party Sprint Nextel's Motion to Quash Subpoena Duces Tecum and Ad Testificandum, *supra* note 9, at 5 (expressing concern that requests for production were inappropriately asking for the third party's highly confidential business plans).

105. *Compare Polyethylene Terephthalate Yarn*, Inv. No. 337-TA-457, Order No. 43, at 2–3 (Dec. 19, 2001) (ordering production of samples of one type of developing yarn, which, although appearing not have been imported, was likely to enter the United States before the close of the evidentiary record), *with Video Game Sys.*, Inv. No. 337-TA-770, Order No. 20, at 4 (focusing on the fact that the respondents imported a functioning prototype).

106. *Cf. Elec. Devices for Capturing & Transmitting Images*, Inv. No. 337-TA-831, Order No. 38, at 1–5 (Nov. 6, 2012) (granting the complainant's motion for reconsideration of the ALJ's initial order denying judicial enforcement of a subpoena against the third party, Microsoft, where Microsoft launched its Windows Phone 8, which Microsoft had previously asserted it would not have launched for some time, within several days from the day on which the initial order issued).

Furthermore, excluding such products from the production scope may not be in the best interest of judicial economy because if the respondent starts importing these products while the investigation is pending, the complainant will have to move to re-open discovery.[107] Additionally, if the importation occurs after the complainant obtains an exclusion order, the complainant may have to work with Customs to explain why any such exclusion order covers those products.[108] Finally, if the respondent decides to initiate post-investigation proceedings to establish that those products are non-infringing, the complainant may have to expend its time and resources to perform the same analysis that the complainant could have performed during the investigation.[109]

C. Under the Third Standard, the Respondent Will Have to Produce Information on Four Laptops Because They Either Entered the United States or Are Likely to Enter the United States Soon

Under the third standard, the respondent will probably have to produce information on all of its laptops, save for laptop A, because the respondent's activities indicate that those laptops are likely to enter the United States during the discovery period or while the investigation is still pending.[110] Specifically, the respondent will have to produce discovery on laptop B because the respondent already imported two prototypes of laptop B into the United States.[111] The fact that these are preliminary prototypes does not have much—if any—significance under the third standard.[112]

---

107. *See* Rodriquez, *supra* note 32, at 88 (explaining that the ALJs prefer to determine whether developing products are infringing in a single proceeding rather than in a piecemeal fashion because of considerations of fairness and judicial economy).

108. *See* A LAWYER'S GUIDE TO SECTION 337 INVESTIGATIONS, *supra* note 1, at 185–86 (noting that a LEO scope may be contentious).

109. *See* Merritt R. Blakeslee & Christopher V. Meservy, *Seeking Adjudication of Design-Around in Section 337 Patent Infringement Investigations: Procedural Context and Strategic Considerations*, 35:4 AIPLA Q.J. 385, 408–13 (2007) (examining options available to respondents interested in resolving the products under development issue after the investigation is over).

110. *See Optical Disk Controller Chips II*, Inv. No. 337-TA-523, Order No. 46, at 7 (May 2, 2005) (ordering discovery of two chips under development which the respondents showed to their customers but declining to impose discovery obligations with respect to the third chip which was in earlier stages of development).

111. *Cf. Polyethylene Terephthalate Yarn*, Inv. No. 337-TA-457, Order No. 43, at 3 (Dec. 19, 2001) (explaining that showing an incomplete yarn sample to a company in Slovakia was insufficient to establish that the product would likely enter the United States within the close of the evidentiary record).

112. *See Elec. Devices for Capturing & Transmitting Images*, Inv. No. 337-TA-831, Order No. 33, at 10 (Oct. 12, 2012) (compelling the respondents to produce discovery despite the assertions that the respondents were still writing source code).

Similarly, the complainant will be entitled to discovery with respect to the respondent's laptop E because a number of these laptops are already available in the United States for commercial purposes.[113]

The ALJ will probably compel the respondent to discover information with respect to laptop C because, while the respondent showed the laptop C prototype only to foreign customers and only gave general presentations about laptop C in the United States, laptop C is fairly advanced in its development schedule.[114] The respondent's discovery obligations with respect to laptop C are less clear under the third standard than its discovery obligations—or lack thereof—in connection with other laptops.[115] There were no commercial transactions that involved the prototype of laptop C and nothing suggests that the respondent intends to import the prototype into the United States while the investigation is underway.[116] While the respondent showed the incomplete prototype of laptop C to its customers in China, the Chinese customers did not acquire the prototype.[117] The respondent's United States activities, on the other hand, only include delivering several presentations during which the respondent did not demonstrate the prototype and did not divulge any specifics about the prototype's production schedule or anticipated pricing.[118] Generally, ALJs

---

113. *See id.* at 10–11 (holding that products under development which the respondents reasonably anticipated to import into the United States while the discovery period was still ongoing were discoverable).

114. *But see Polyethylene Terephthalate Yarn*, Inv. No. 337-TA-457, Order No. 43, at 3–4 (denying production on one type of yarn because the manufacturing of that yarn was not to take place for at least another nine months).

115. *Compare id.* (finding that showing one incomplete product to a foreign customer outside of the United States and giving general presentations to United States and foreign customers about another product under development was insufficient to determine that the respondents would bring those two products to the United States before the discovery cut-off), *with Optical Disk Controller Chips II*, Inv. No. 337-TA-523, Order No. 46, at 7 (ordering production of information on two products under development despite the fact that the respondents had never showed one of those products to United States customers).

116. *See Memory Devices with Increased Capacitance*, Inv. No. 337-TA-371, Order No. 18, at 2 (Apr. 20, 1995) (declining to order discovery of products that the respondents had not sold unless the respondents intended to import them during the investigation).

117. *See Polyethylene Terephthalate Yarn*, Inv. No. 337-TA-457, Order No. 43, at 2–4 (finding that discovery of one type of yarn which the respondent sold to two Japanese customers was reasonably calculated to lead to the discovery of admissible evidence but declining to compel discovery with respect to another type of yarn which the respondent simply demonstrated to its customers).

118. *See id.* at 3–4 (declining to compel discovery of a product because while the respondent had meetings with United States and foreign customers at which the respondent described the qualities of that product, the respondent did not show a prototype, discuss prices, or specify the product's availability).

found similar activities to be insufficient to establish that a respondent was likely to import a prototype into the United States while an investigation was still pending.[119] Here, however, the respondent's laptop C appears to be in an advanced stage of development and its prototype is ready.[120] Moreover, some ALJs held that showing a prototype to foreign customers was sufficient to indicate that importation to the United States was likely.[121]

Under the third standard, the respondent will most likely have to produce information on laptop D because the respondent's promotional campaign in the United States indicates that the respondent is highly likely to import laptop D into the United States while the investigation is still pending.[122] While the respondent did not indicate any specific dates as to when laptop D will be available, the respondent's message to its customers that laptop D is coming soon indicates that not only laptop D will be available for sale within a short period of time, but also that its importation—which necessarily precedes the sales—will happen even sooner.[123] The respondent, however, will not have to produce any information on laptop A under the third standard because the early development stage of laptop A, along with the respondent's lack of concrete plans to import laptop A to the United States, makes it unlikely that the respondent will import prototypes of laptop A into the United States while discovery is still ongoing or during the course of the investigation.[124]

The third standard is narrower than the first standard but broader than the second. In comparison to the first standard, which only requires a showing that the information is within the investigation scope and likely to lead to

---

119. *See id.* (no discovery necessary).

120. *Cf. id.* at 3–4 (noting that while the respondent discussed one of its developing products with the respondent's United States and foreign customers, the respondent was not going to manufacture a sample of the product for at least another nine months).

121. *See Optical Disk Controller Chips II*, Inv. No. 337-TA-523, Order No. 46, at 7 (May 2, 2005) (ordering production of information regarding a chip under development which the respondents had shown only to foreign customers).

122. *Cf. Polyethylene Terephthalate Yarn*, Inv. No. 337-TA-457, Order No. 43, at 3–4 (denying production because the respondent only had general meetings with its customers and would not be manufacturing samples of its yarn for at least nine months).

123. *Cf. Optical Disk Controller Chips II*, Inv. No. 337-TA-523, Order No. 46, at 6–7 (ordering no production where the chip was in early stages of development and had not been shown to customers).

124. *See id.* at 7 (concluding that a chip under development did not have to be discovered because it was unlikely to be imported soon); *cf. Elec. Devices for Capturing & Transmitting Images*, Inv. No. 337-TA-831, Order No. 33, at 10–11 (Oct. 12, 2012) (ordering immediate discovery of products under development which the respondents reasonably anticipated to import before the close of the evidentiary record).

the discovery of relevant information, the third standard has an additional step of establishing the likelihood of impending importation.[125] By narrowing down the scope of information that the complainant obtains, this additional requirement ensures that the complainant will not be able to go on a fishing expedition and helps to decrease the respondent's production costs.[126] Additionally, because the "likelihood of importation" is inherently broader than the fact of "importation," which the complainant has to prove under the second standard, the third standard provides a more balanced approach that helps to make certain that the complainant is not going to be deprived of relevant information because the respondent simply reschedules its importation date.[127] Additionally, a broader scope of discovery also ensures efficient distribution of judicial resources by reducing the need for post-investigation proceedings.[128]

The third standard, while avoiding some of the pitfalls of the first and second standards, is not without its own drawbacks. First, the flexibility of its application necessarily takes away some of the certainty that the previous two standards provide. Under the first two standards, parties may be able to fairly accurately predict an outcome of a motion to compel beforehand.[129] The third standard, however, is more vague so parties may feel compelled to engage in motion practice, thus increasing their respective litigation costs.[130] Additionally, as the case law indicates, some ALJs have contradictory requirements as to what kind of evidence shows

125. *Compare Polyethylene Terephthalate Yarn*, Inv. No. 337-TA-457, Order No. 43, at 3–4 (denying the motion to compel with respect to those yarns for which the complainant failed to establish that importation was likely to happen before the close of the evidentiary record), *with Hardware Logic Emulation Sys.*, Inv. No. 337-TA-383, Order No. 57, at 9–10 (Dec. 9, 1996) (stating that discovery could be ordered even if products under development would never be brought to the United States).

126. *See, e.g.*, *Optical Disk Controller Chips II*, Inv. No. 337-TA-523, Order No. 46, at 5–7 (declining to impose discovery with respect to one chip which was still in its early development stage).

127. *Compare Polyethylene Terephthalate Yarn*, Inv. No. 337-TA-457, Order No. 43, at 2–4 (evaluating the likelihood of imminent importation), *with Auto. Multimedia Display & Navigation Sys.*, Inv. No. 337-TA-657, Order No. 22, at 4 (May 11, 2009) (ordering discovery because the respondents brought several products into the United States).

128. *See* Certain Safety Eyewear & Components Thereof [hereinafter *Safety Eyewear*], Inv. No. 337-TA-433, Order No. 15, at 1–3 (Aug. 11, 2000) (granting a motion to compel complainants' infringement positions on developing eyeglasses at least in part because it would be fair to all parties and would save resources).

129. *See Flash Memory Chips*, Inv. No. 337-TA-664, Order No. 48, at 3 (Mar. 23, 2010) (focusing on the likelihood of discovery of admissible information); *GPS Chips*, 337-TA-596, Order No. 16, at 2–4 (July 10, 2007) (ordering discovery because a small number of chips under development entered the United States).

130. *See Polyethylene Terephthalate Yarn*, Inv. No. 337-TA-457, Order No. 43, at 2–4 (evaluating the likelihood of importation).

that the importation of products under development is likely to happen.[131] Moreover, the decision of some ALJs to condition the finding of a likelihood of importation solely on representations by respondents is sure to make at least some complainants feel uncomfortable.[132] Finally, some ALJs deem that the complainant has to establish that the importation will occur while discovery is still ongoing, while others extend the timeframe in which the products may enter the country until the end of the investigation.[133] Considering that this extension provides at least an extra nine months, it may make a significant difference in the outcome of the issue.[134]

D. Under the Fourth Standard, the Respondent Will Have to Produce Information on Three Laptops Because These Laptops Are Likely to Be Ready for Commercialization in the United States Soon

The application of the fourth standard will probably lead to the production of information on only three laptops because those laptops are likely to enter the United States stream of commerce while the investigation is still pending.[135] Information on laptops B, D, and E will be discoverable because: the respondent already brought samples of laptop B to the United States; laptop D already entered the advanced testing stage, and the respondent has been actively marketing laptop D in the United States; and laptop E is already commercially available in the United States.[136]

---

131. *Compare id.* at 3–4 (concluding that no likelihood of importation was shown where the respondent demonstrated the product to its foreign customer outside the United States), *with Optical Disk Controller Chips II*, Inv. No. 337-TA-523, Order No. 46, at 7 (finding the likelihood of importation established although the respondents showed the product to customers outside the United States only).

132. *See Elec. Devices for Capturing & Transmitting Images*, Inv. No. 337-TA-831, Order No. 33, at 10–11 (Oct. 12, 2012) (compelling the respondents to produce information relating to those products under development which the respondents reasonably anticipated to import while discovery was still ongoing while also noting that the respondents were not particularly forthcoming about sharing the information).

133. *Compare id.* at 10 (discovery cut-off), *with Memory Devices with Increased Capacitance*, Inv. No. 337-TA-371, Order No. 18, at 3 (Apr. 20, 1995) (end of the investigation cut-off).

134. *See* A LAWYER'S GUIDE TO SECTION 337 INVESTIGATIONS, *supra* note 1, at 4 (providing a chart indicating that discovery usually takes approximately seven months while an investigation, including the presidential review period, takes sixteen to eighteen months); *see also id.* at 111 (discussing the length of discovery as typically ranging from five to seven months).

135. *See Abrasive Prods.*, Inv. No. 337-TA-449, Order No. 37, at 2 (Oct. 10, 2001) (concluding that the respondent's prototypes were within the investigation scope because they would likely enter the United States market during the investigation).

136. *See Audio Processing Integrated Circuits*, Inv. No. 337-TA-538, Order No. 7, at 2–3 (July 18, 2005) (recognizing that advanced testing stage of the product under

The respondent will not have to produce information on laptop A because laptop A is still in such early stages of development that it will most likely not enter the United States stream of commerce before the end of the investigation.[137] Similarly, because laptop C is not undergoing advanced testing and the respondent does not intend to start selling laptop C in the United States until after the investigation concludes, the respondent will probably not have to produce information regarding laptop C.[138]

Although it is difficult to predict the exact outcome with respect to the production of information on laptop B under the fourth standard, the ALJ will be likely to compel the respondent to produce that information because the importation of prototypes of laptop B into the United States may be enough to suggest that laptop B is sufficiently advanced so that its placement in the United States stream of commerce before the investigation concludes is likely.[139] Notably, the ALJs who applied the fourth standard focused on the likelihood that a product under development would enter the United States stream of commerce before the end of the investigation as opposed to the end of discovery.[140] Similarly, Laptop D is likely to have to be produced because its advanced testing stage and respondent's promotional meetings suggest that it will probably enter the United States market before the investigation concludes.[141] Because laptop E is already available for sale in the United States, it will also be discoverable regardless of its current limited availability.[142]

---

development indicated it was near commercialization); *Abrasive Prods.*, Inv. No. 337-TA-449, Order No. 37, at 2 (noting that marketing efforts showed that the products were getting ready to enter the United States market during the investigation).

137. *Cf. Audio Processing Integrated Circuits*, Inv. No. 337-TA-538, Order No. 7, at 1–3 (ordering discovery of an audio processing integrated circuit because it reached an advanced testing stage and thus was likely to enter the marketplace while the investigation was still pending).

138. *Cf. id.* at 3 (concluding that it was more than plausible for the developing circuit to enter the marketplace while the investigation was pending).

139. *See id.* at 2–3 (emphasizing the likelihood of the product reaching the market while the investigation was still pending based, in part, on the product's advanced testing stage).

140. *See id.* at 3 ("It appears more than plausible that the [product under development] will enter the marketplace during the pendency of this investigation."); *Abrasive Prods.*, Inv. No. 337-TA-449, Order No. 37, at 2 ("Under these circumstances, the scope of this investigation includes [the respondent's] prototype products because they may enter the stream of commerce in the United States during the course of this investigation.").

141. *See Audio Processing Integrated Circuits*, Inv. No. 337-TA-538, Order No. 7, at 2 (compelling the respondent to answer interrogatories and produce documents relating to its developing audio processing integrated circuit).

142. *See id.* at 2–3 (focusing on whether the product may enter the stream of United States commerce during the investigation).

In comparison to the first three standards, the fourth standard is arguably the most limiting. Unlike the first standard, the fourth standard imposes burdens on the complainant, in addition to establishing that the discovery sought is within the scope of the investigation and is likely to lead to the discovery of relevant information.[143] Moreover, the fourth standard appears to seek the discovery of more finalized products.[144] Criteria commonly used to determine whether a product under development is about to enter the United States stream of commerce indicate that the design of any such product should be unlikely to change.[145] Because of that, the likelihood that the respondent will have to expend resources on producing any products that are far from completion and that in the end may not even implement accused functionalities greatly decreases.[146] Because of the reduced production volume, the complainant's analysis of information is also more efficient and focused.[147]

Another benefit of the fourth standard is that its consistent application with respect to the time frame allows for more predictability as to the standard administration.[148] Additionally, explicitly expanding the time frame to the end of the investigation ensures that the parties will produce all necessary information—including information on products the commercialization of which is likely to happen after discovery closes but before the end of the investigation—during the discovery period.[149] That

143. *Compare id.* (looking at whether the respondent's product was likely to get commercialized soon), *with Flash Memory Chips*, Inv. No. 337-TA-664, Order No. 48, at 3–4 (Mar. 23, 2010) (ordering production because it was likely to lead to admissible evidence).

144. *See Abrasive Prods.*, Inv. No. 337-TA-449, Order No. 37, at 2 (noting that the respondent's products were already marketed in the United States).

145. *See Audio Processing Integrated Circuits*, Inv. No. 337-TA-538, Order No. 7, at 2 (concentrating on the product's advanced testing and available channels of importation); *Abrasive Prods.*, Inv. No. 337-TA-449, Order No. 37, at 2 (mentioning the respondent's marketing efforts in the United States).

146. *Compare Audio Processing Integrated Circuits*, Inv. No. 337-TA-538, Order No. 7, at 2 (emphasizing that the product entered the advanced testing stage), *with Elec. Devices for Capturing & Transmitting Images*, Inv. No. 337-TA-831, Order No. 33, at 10–11 (Oct. 12, 2012) (ordering discovery despite the respondents' argument that they were still writing source code).

147. *Cf. Safety Eyewear*, Inv. No. 337-TA-433, Order No. 15, at 1–3 (Aug. 11, 2000) (arguing that the respondent was simply trying to waste the complainants' time and resources on articulating their infringement positions on products under development).

148. *See Audio Processing Integrated Circuits*, Inv. No. 337-TA-538, Order No. 7, at 2–3 (evaluating the plausibility of the product under development entering the United States marketplace during the pendency of the investigation); *Abrasive Prods.*, Inv. No. 337-TA-449, Order No. 37, at 2 (same).

149. *See Audio Processing Integrated Circuits*, Inv. No. 337-TA-538, Order No. 7, at 2–3 (quoting *Hardware Logic Emulation Sys.*, Inv. No. 337-TA-383, Order No. 57,

allows for a more efficient administration of the discovery process because the parties desiring to obtain information on products under development do not have to petition the ALJ to re-open discovery if those products come out after the discovery period closes.[150]

The downside of the fourth standard is that it may lead to extended motion practice by parties trying to determine whether certain facts indicate the likelihood of reasonably close commercialization.[151] Moreover, because the fourth standard was applied in a limited number of investigations, there is not enough guidance as to what facts are sufficient to show that products are likely to be put on the United States market before the investigation is over.[152]

E. Under the Fifth Standard, Only One Commercially Available Laptop Is Discoverable

Under the fifth standard, the respondent will not have to produce information on any laptops other than its laptop E because only laptop E is commercially available, albeit in limited quantities.[153] Other laptops are not within the production scope because the respondent is not selling any of them yet.[154]

Because not many products still under development are likely to be subject to sales agreements, the fifth standard is the most restrictive of all five standards and leads to the most limited production.[155] The ease of the

---

at 2–3 (Dec. 9, 1996)) (emphasizing the importance of fundamental fairness and judicial economy).

150. *Cf.* Certain Mobile Tels. & Wireless Commc'n Devices Featuring Digital Cameras, & Components Thereof, Inv. No. 337-TA-703 (Remand), Order No. 35, at 1–7 (Dec. 27, 2011) (denying the respondent's motion to supplement record by adding new products which allegedly fell into the category found to be non-infringing or to confirm that those products were outside the scope of the investigation).

151. *See, e.g.*, *Audio Processing Integrated Circuits*, Inv. No. 337-TA-538, Order No. 7, at 2–3 (evaluating the likelihood of a prompt market entry).

152. *See id.* (finding that evidence of advanced testing and established importation channels was sufficient to establish close commercialization); *Abrasive Prods.*, Inv. No. 337-TA-449, Order No. 37, at 2 (noting that United States marketing efforts evidenced close commercialization).

153. *Cf. Memory Devices with Increased Capacitance*, Inv. No. 337-TA-371, Order No. 36, at 3 (May 31, 1995) (deciding that no discovery of products under development that had not been sold yet was necessary).

154. *See id.* (focusing on sales only without examining other considerations).

155. *Compare, e.g.*, *Audio Processing Integrated Circuits*, Inv. No. 337-TA-538, Order No. 7, at 2–3 (noting the regularity of producing information on products under development in ITC investigations because of a possibility those products can enter the marketplace while the investigations are still pending), *with Memory Devices with Increased Capacitance*, Inv. No. 337-TA-371, Order No. 36, at 2–3 (limiting the "unduly burdensome" scope of certain complainant's request by deciding that the third party did not have to produce those products under development that it had not sold yet

fifth standard's application is somewhat similar to that of the second standard.[156] Additionally, the fifth standard is partial to the interests of the producing party, which will only have to produce a very limited subset of information.[157]

While the benefits of the fifth standard are few, its drawbacks are many. The limited production scope available under the fifth standard severely curtails the complainant's ability to develop a complete theory of the case with respect to products under development.[158] Additionally, the fifth standard is overly restrictive because a sale of products under development, which triggers production obligations under the fifth standard, may take place long after their importation into the United States, which is normally enough to confer the ITC jurisdiction over the products in question.[159] Further, the exclusion from the production scope of "models that are still under development and have not been sold"[160] may be plausibly interpreted as suggesting that the sales of prototypes will not count and the complainant actually has to produce evidence of commercial sales. The geographical scope of the territory where any such sale has to take place is also left undefined.[161] Finally, it is unclear whether the fifth standard would apply to any party under obligation to produce information on products under development or just third parties.[162]

---

without evaluating when such sales were likely to occur).

156. *See, e.g.*, *Video Game Sys.*, Inv. No. 337-TA-770, Order No. 20, at 4–5 (Aug. 26, 2011) (ordering discovery because the respondents imported a prototype into the United States).

157. *See Memory Devices with Increased Capacitance*, Inv. No. 337-TA-371, Order No. 36, at 3 (denying discovery on products under development unless the third party sold them).

158. *See id.* at 1–3 (recognizing that the information that the complainants sought could be relevant to certain issues that came up in the investigation, but excluding products under development not available for sale from production).

159. *Cf. Auto. Multimedia Display & Navigation Sys.*, Inv. No. 337-TA-657, Order No. 22, at 4 (May 11, 2009) (emphasizing that importation supporting a violation finding does not have to be importation for sale).

160. *Memory Devices with Increased Capacitance*, Inv. No. 337-TA-371, Order No. 36, at 3.

161. *See id.* (failing to specify whether sales have to take place in the United States or anywhere in the world).

162. *See id.* at 1–3 (emphasizing that the volume of discovery appeared to be unduly burdensome for the third party).

III. THE COMMISSION SHOULD ADOPT THE STANDARD UNDER WHICH DEVELOPING PRODUCTS ARE DISCOVERABLE IF THEY ARE EXPECTED TO SOON ENTER THE UNITED STATES MARKET

The Commission should end the practice of multiple standards governing the production of information on products under development by adopting the fourth standard under which products in development are subject to discovery if they are likely to enter the stream of the United States commerce before an investigation is over.[163] Crafting a single standard certainly is not easy because the Commission has to consider multiple issues. First, the Commission should weigh the competing interests of private parties where a requesting party (most often, the complainant) seeks to obtain the most complete discovery possible, while a producing party (most often, the respondent) often resists discovery to minimize the production costs and—most importantly—to protect the confidentiality of its information.[164] Second, the Commission has to evaluate the ease of the standard administration, expenses associated with the standard application, and whether the standard will provide a ready source of guidance.[165] The current existence of multiple standards governing the discovery of products under development can, at least to a certain degree, be attributed to the ALJs' attempts to accommodate these various interests.[166] While the desire to be flexible is understandable, the lack of consistency associated with a choice of standards makes it necessary to adopt one standard.[167]

---

163. *See Audio Processing Integrated Circuits*, Inv. No. 337-TA-538, Order No. 7, at 2–3 (July 18, 2005) (emphasizing that developing products are discoverable if they are likely to enter the United States stream of commerce during the investigation).

164. *See Removable Elec. Cards*, Inv. No. 337-TA-396, Order No. 12, at 6 (Aug. 27, 1997) (noting that parties had to be able to see all documents which later were to be used as trial exhibits); *see also Memory Devices with Increased Capacitance*, Inv. No. 337-TA-371, Order No. 36, at 2 (indicating that the volume of information requested was highly burdensome).

165. *See* Rodriquez, *supra* note 32, at 88 (mentioning that the ALJs often favor including products under development into investigations because of considerations of fairness and judicial economy).

166. *Compare Polyethylene Terephthalate Yarn*, Inv. No. 337-TA-457, Order No. 43, at 1–3 (Dec. 19, 2001) (ordering discovery only of one type of yarn because it was likely to be imported into the United States before the close of the evidentiary record, while ruling that other two types of yarn which were in earlier development stages did not have to be disclosed), *with Memory Devices with Increased Capacitance*, Inv. No. 337-TA-371, Order No. 36, at 2 (concluding that, because answering all discovery requests would subject the third party to an overly burdensome production, the third party was under no obligation to produce information on its developing products unless it had sold them before).

167. *See Flash Memory Chips*, Inv. No. 337-TA-664, Order No. 48, at 3–4 (Mar. 23, 2010) (ordering discovery despite the respondents' attempt to show that circumstances of that investigation were different from those investigations in which discovery was previously ordered).

Although deciding on a standard certainly is not easy, as all of them have benefits and drawbacks, the standard that appears to most successfully balance the competing considerations is the fourth standard.[168] While investigations in which ALJs applied this standard uniformly mentioned that the standard is met if a party requesting discovery establishes that commercialization is likely to take place before the end of the investigation, the Commission should also explicitly approve of this time frame to avoid arguments that commercialization has to happen before the end of discovery.[169] The fourth standard is the optimal compromise because its application yields almost the same benefits that the application of other standards brings while minimizing the other standards' drawbacks. As an initial matter, just like the fifth standard, the fourth standard focuses on nearly final products.[170] Examination of a nearly final product will likely result in a meaningful determination of whether the product includes infringing functionalities.[171] Consequently, the fourth standard protects interests of both parties by allowing the complainant to obtain fairly complete discovery, while ensuring that the discovery will be limited to products that are sufficiently final and that will likely go on sale in the United States.[172]

Moreover, because the fourth standard evaluates the likelihood of imminent United States commercialization, its application, unlike that of the first standard, will not call into question whether the Commission has jurisdiction over the product.[173] Unlike the fifth standard, the fourth

168. *See Audio Processing Integrated Circuits*, Inv. No. 337-TA-538, Order No. 7, at 1–3 (ordering discovery because the product under development was likely to become ready for commercialization in the United States soon).

169. *See id.* at 3 (focusing on the plausibility of commercialization before the end of the investigation).

170. *Compare Abrasive Prods.*, Inv. No. 337-TA-449, Order No. 37, at 2 (Oct. 10, 2001) (compelling production of information on products under development which the respondent already started to market in the United States), *with Memory Devices with Increased Capacitance*, Inv. No. 337-TA-371, Order No. 36, at 3 (ordering discovery of only those products under development which the third party had already sold).

171. *Cf. Hardware Logic Emulation Sys.*, Inv. No. 337-TA-383, Order No. 48, at 7–11 (Oct. 1, 1996) (ignoring the respondents' arguments that the design of the new hardware emulation system was still unfinished).

172. *Cf. Flash Memory Chips*, Inv. No. 337-TA-664, Order No. 48, at 2–4 (ordering discovery despite the respondents' arguments that the respondents neither imported their prototypes into the United States, nor showed them to customers, nor would make or import the prototypes into the United States before the evidentiary record closed).

173. *See* A LAWYER'S GUIDE TO SECTION 337 INVESTIGATIONS, *supra* note 1, at 55 (pointing out that importation is both a substantive and jurisdictional requirement); *see also Hardware Logic Emulation Sys.*, Inv. No. 337-TA-383, Order No. 57, at 9 (Dec. 9, 1996) (noting that discovery was appropriate even if the products would never enter the United States).

standard allows for a broader discovery because it does not require that a sale has already taken place.[174] Moreover, because the fourth standard evaluates the "likelihood" of imminent commercialization, it also incorporates the flexibility of the third standard.[175]

Furthermore, there are no easy ways to circumvent the fourth standard, unlike, for example, the second standard, which looks at whether the products under development were imported into the United States.[176] While simply rescheduling importation to avoid discovery of products under development may be enough to get around the production obligations under the second standard, no such easy maneuver is available under the fourth standard.[177]

However, to avoid inconsistency in the standard's application, which proceeds from its flexibility, the Commission should evaluate what evidence is sufficient to establish that a product will most likely be commercialized while an investigation is still pending.[178] Previously, the ALJs looked only at whether developing products underwent advanced testing and the marketing efforts in which the respondents engaged.[179] Simply conducting advanced testing on a particular product, however, does not necessarily mean that the product will be offered for sale in the United States.[180] As such, the proof required should be slightly elevated to also

---

174. *Compare Abrasive Prods.*, Inv. No. 337-TA-449, Order No. 37, at 2 (evaluating the likelihood of commercialization), *with Memory Devices with Increased Capacitance*, Inv. No. 337-TA-371, Order No. 36, at 3 (focusing on actual sales).

175. *Compare Abrasive Prods.*, Inv. No. 337-TA-449, Order No. 37, at 2 (ordering discovery because imminent commercialization was likely), *with Polyethylene Terephthalate Yarn*, Inv. No. 337-TA-457, Order No. 43, at 2–3 (Dec. 19, 2001) (ordering discovery because imminent importation was likely).

176. *See Video Game Sys.*, Inv. No. 337-TA-770, Order No. 20, at 4–5 (Aug. 26, 2011) (ordering discovery because the respondents' prototype entered the United States).

177. *See Abrasive Prods.*, Inv. No. 337-TA-449, Order No. 37, at 2 (discussing whether commercialization was likely).

178. *Cf. Optical Disk Controller Chips II*, Inv. No. 337-TA-523, Order No. 46, at 7 (May 2, 2005) (concluding that likelihood of importation was established although the respondents only showed the product to customers outside the United States); *Polyethylene Terephthalate Yarn*, Inv. No. 337-TA-457, Order No. 43, at 3–4 (deeming the demonstration of the prototype to a Slovakian customer insufficient to establish the likelihood of importation).

179. *See Audio Processing Integrated Circuits*, Inv. No. 337-TA-538, Order No. 7, at 2–3 (July 18, 2005) (finding the likelihood of imminent commercialization established largely because the product entered the advanced testing stage); *Abrasive Prods.*, Inv. No. 337-TA-449, Order No. 37, at 2 (noting that the United States marketing campaign indicated the likelihood of imminent commercialization).

180. *See, e.g.*, *Auto. Multimedia Display & Navigation Sys.*, Inv. No. 337-TA-657, Order No. 22, at 4 (May 11, 2009) (arguing that while the products entered the United States for testing, the respondents did not anticipate the products' imminent

include some actions by the respondent that would indicate its intention to put the products on the United States market.[181]

CONCLUSION

The multiple inconsistently applied standards governing discovery of information on products under development in Section 337 investigations fail to put the parties on notice as to the exact scope of their production obligations. Because of the parties' general reluctance to produce highly secretive information on still unreleased products, the parties, to determine their discovery obligations, often engage in time-consuming and costly motion battles. This appears to be particularly inefficient and wasteful considering the fast speed at which the ITC investigations proceed. To remedy the situation, the Commission should adopt one standard that, in addition to being easily applied, would balance the complainants' interest in obtaining complete discovery against the respondents' interest in avoiding disclosure of their sensitive business information on products under development to their competitors. Out of the five standards that the ALJ use when evaluating the issue of discovery of products under development, the standard that looks at the likelihood that products under development will be commercially available in the United States before the end of an investigation appears to be best suited for the task.[182] Specifically, this standard ensures that the complainants receive information on nearly final products, which, because of their advanced development stage, are almost certain to include allegedly infringing functionalities. The nearly final form of those products, along with the fact that the complainants will have to prove that the respondents will soon offer them for sale in the United States, further protects the respondents from overly broad production which may include those products that do not incorporate allegedly infringing functionalities or those products that the respondents do not plan to offer on the United States market.

---

commercial release).

181. *See, e.g.*, *Optical Disk Controller Chips II*, Inv. No. 337-TA-523, Order No. 46, at 7 (ordering discovery of two chips under development which the respondents demonstrated to their United States and foreign customers).

182. *See Abrasive Prods.*, Inv. No. 337-TA-449, Order No. 37, at 2 (concluding that the products were about to be offered on the United States market because of the respondent's United States marketing efforts).

* * *

"IT'S NOT YOU, IT'S ME" – WHEN ARE CLIENT COMPANIES LIABLE FOR STAFFING FIRMS' DISCRIMINATORY HIRING PRACTICES?

LARA SAMUELS*

The Equal Employment Opportunity Commission indicates that a client company may face liability if it knows or should know that a staffing firm uses discriminatory hiring practices but nonetheless maintains a contractual relationship with said firm. This Comment points out that Congress has not yet articulated a consistent standard for holding client companies liable for discriminatory hiring practices of a staffing firm. In determining whether Congress should establish such liability, this Comment unearths common discriminatory hiring practices by staffing firms and demonstrates that the current body of law does not adequately address who carries the responsibility to uncover and respond to discriminatory hiring practices in the modern workforce. This Comment emphasizes that the failure to consolidate different legal principles into a common duty of care, coupled with the prevalence of settlement agreements, causes undesirable results for workers and businesses. To resolve these issues, this Comment calls for a duty-based approach to discrimination cases involving staffing firms and client companies. It suggests a potential basis for an overarching duty by extrapolating a variety of legal principles that factor into court decisions and statutory interpretations.

* Many thanks to Sara Falk, Ernie Jolly, Daniel Fullerton, and the entire staff of the *American University Business Law Review* for their helpful comments and edits on this piece. I would especially like to thank my family (Axel, Leslie, and Adina) for their unwavering support and encouragement in everything I do.

INTRODUCTION

"It's not you, it's me." A defendant in a civil action will likely never utter this popular phrase from the dating world. Yet, businesses readily concede client company liability for the actions by staffing agencies in an effort to educate the workforce and prevent investigation and legal action by the Equal Employment Opportunity Commission ("EEOC").[1] This suggested liability is based primarily on the Commission's liberal interpretation of discrimination liability: the notion that liability based on employer-status should be assigned to non-employers.[2]

As employers increased their use of staffing agencies to hire workers, the EEOC, commentators, and the courts have paid much attention to staffing firm liability for employment discrimination by its clients.[3] The EEOC has explained that a staffing firm and its client may both be held liable for discrimination when the staffing firm follows its client's discriminatory orders with regard to hiring practices.[4] The EEOC has further clarified that in situations where the staffing agency has knowledge that its client discriminates against the agency's workers, but fails to take appropriate measures, the agency may also be held liable for discrimination.[5]

---

1. This Comment uses the terms "client companies" or "clients" interchangeably to refer to the entities that engage the services of a staffing firm. *See* Aaron Green, *Staffing firms: an overview of services offered*, HR CENTER ON STAFFING (Mar. 24, 2007), *available at* http://www.boston.com/jobs/on_staffing/042307.shtml. For some examples of websites that clarify employment relationships and potential liability for employers who engage the services of staffing agencies, *see, e.g.*, Michael Harris, *EEOC is Watching You: Recruitment Discrimination Comes to the Forefront*, ERE (May 30, 2006), http://www.ere.net/2006/05/30/eeoc-is-watching-you-recruitment-discrimination-comes-to-the-forefront/ (cautioning that the EEOC's compliance manual requires that recruitment and hiring can create legal liability for all parties, not just the employment agency or the employer, and that clients may be responsible for the discriminatory acts performed by another party); *Your Legal Obligation to Temporary Agency Workers*, PERSONNEL POL'Y SERV., INC., http://www.ppspublishers.com/articles/legal_temp_workers.htm (last visited Mar. 8, 2014) (acknowledging the EEOC's directive that even if the agency or the client is not the employer, both may still be liable under the antidiscrimination laws).

2. *See* Daniel P. O'Gorman, *Paying for the Sins of Their Clients: The EEOC's Position That Staffing Firms can be Liable When Their Clients Terminate an Assigned Employee for a Discriminatory Reason*, 112 PENN ST. L. REV. 425, 457 (2007) (demonstrating that the EEOC's view lacks firm support in the case law).

3. *See* John R. Merinar, Jr., *When Staffing Companies Discriminate: Is the Client Liable?*, 18.12 W. VA. EMP. L. LETTER 4, 1 (2013) (asserting that legal publications have devoted substantial attention to the liability incurred by a staffing company if a client discriminates against its employees).

4. EQUAL EMP'T OPPORTUNITY COMM'N, NOTICE NO. 915.002, ENFORCEMENT GUIDANCE: APPLICATION OF EEO LAWS TO CONTINGENT WORKERS PLACED BY TEMPORARY EMPLOYMENT AGENCIES AND OTHER STAFFING FIRMS 3 (1997) [hereinafter EEOC ENFORCEMENT GUIDANCE].

5. *See id.* at 33.

However, it remains unclear whether a client company similarly faces liability if it knows or should know of a staffing firm's discriminatory practice but nonetheless maintains a contractual relationship with said firm.[6] Even though common sense and morality dictate that a company should sever ties with an agency that discriminates against employees or job seekers, such liability assessment and assignment of responsibilities should be firmly rooted in the law.[7]

This Comment argues that Congress should clarify the principle and rationale underlying the liability for staffing firms whose clients discriminate, as well as for client companies who maintain relationships with discriminatory staffing agencies to preserve the uniform character of Title VII of the Civil Rights Act of 1964 ("Title VII").[8] Part II of this Comment describes the rules and guidelines that currently hold staffing firms and their clients liable for employment discrimination. Part III explains that the current body of law fails to establish an adequate standard of liability and causes uncertainty among client companies as to how far their liability extends. Part IV argues that the principles and rationales on which client company liability is based should be articulated in Title VII, so as to ensure uniformity and awareness, as well as to avoid costly litigation.

I. THE CURRENT LAW SURROUNDING STAFFING FIRMS' DISCRIMINATORY HIRING PRACTICES

The EEOC has issued a number of guidelines detailing the standard and scope of liability for staffing companies and client firms in a wide variety of circumstances.[9] Similarly, the common law suggests several theories of liability.[10] Taken together, these guidelines and court rulings establish liability for client companies who make discriminatory hiring requests and

---

6. *See* Merinar, *supra* note 3, at 2 (explaining that this question cannot be answered with certainty because it is hard to predict what courts will do).

7. *Cf.* O'Gorman, *supra* note 2, at 426 (arguing that an EEOC position which has no support in the statutes should be rejected).

8. *Cf.* McAdoo v. Toll, 591 F. Supp. 1399, 1402 (D. Md. 1984) (explaining that the procedures of Title VII were not intended to serve as a stumbling block to the accomplishment of the statutory objective).

9. *See* EEOC ENFORCEMENT GUIDANCE, *supra* note 4, at 2.

10. *See* Jason E. Pirruccello, Note, *Contingent Worker Protection from Client Company Discrimination: Statutory Coverage, Gaps, and the Role of the Common Law*, 84 TEX. L. REV. 191, 193 (2005) (arguing that workers have adequate protection from discrimination via judicial interpretations of Title VII, such as under a theory of discriminatory interference of an existing or prospective third-party employment relationship or by acknowledging indirect or de facto employment relationships between contingent employees and client companies).

staffing firms who honor such requests.[11] They further establish that both client companies and staffing firms may be liable to workers in cases where discrimination occurs at the client's workplace, even if the claimant is technically the employee of the staffing company but not of the client.[12]

On a few occasions, the EEOC suggested that client companies may face liability for maintaining a relationship with discriminatory staffing firms.[13] Furthermore, several states have recently passed legislation making it unlawful to discriminate against a job applicant based on his or her status as unemployed, a widespread practice among employment agencies.[14]

A. Parties who may be Involved in Employment Discrimination Litigation

The types of employment discrimination disputes discussed in this Comment generally involve workers, staffing firms, client companies, and the EEOC.

1. Workers, Staffing Firms, and Client Companies

To avoid drawing legal conclusions about the liability and coverage that an individual may receive,[15] this Comment frequently uses the term "worker" instead of "employee" (individuals who are engaged by an

---

11. *See, e.g.*, Williams v. G4S Secure Solutions (USA), Inc., No. ELH-10-3476, 2012 WL 1698282, at *24 (D. Md. May 11, 2012) (referring to the EEOC Guidance providing that a staffing firm is liable if it honors a client's discriminatory assignment request).

12. *See id.* (accepting the view that a staffing firm is liable for its discriminatory assignment decisions even when it is based on its client's requirements); *cf.* Koch v. Holder, 930 F. Supp. 2d 14, 17 (D.D.C. 2013) (acknowledging that under limited circumstances, a plaintiff may bring a discrimination claim against a non-employer defendant if the defendant controls and denies access to employment).

13. *See, e.g.*, Julia Mendez, *Use of Staffing Agencies: Things Companies Should Know*, THE NEW EEO SOURCE, http://www.eeosource.com/knowledgebase/equalopportunity/useofstaffingagencies.aspx (last visited Mar. 9, 2014) (suggesting that the BP Oil company avoided liability for discriminatory hiring decisions of staffing firms hired by BP's contractors by voluntarily entering into a settlement agreement).

14. *See, e.g.*, D.C. CODE § 32-1368 (2012); *see generally* Mary Price Birk, *New Employment Law Compliance Strategies and Concerns for Attorneys and Clients*, *in* THE IMPACT OF RECENT REGULATORY DEVELOPMENTS IN EMPLOYMENT LAW 21, (2013) (cautioning that employers should be increasingly aware of legislation enacted statewide around the country).

15. *See* Mitchell H. Rubinstein, *Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship*, 14 U. PA. J. BUS. L. 605, 628, 658 (2012) (explaining that, when dealing with any question of labor and employment law, one must first examine whether a private or public employer is involved and that, beyond this distinction, cases involving the definition of an employer and the definition of employee are somewhat elusive).

employer).[16] Staffing firms hire their own workers and either assign them to client companies according to the client companies' needs or connect job seekers with potential employers.[17] This Comment relies heavily on the terminology used in the EEOC Guidelines.[18]

2. The Equal Employment Opportunity Commission

The EEOC has the authority to investigate, administer, interpret, and enforce federal anti-discrimination laws.[19] The Commission may also bring action against employers who violate such laws.[20] Because of the EEOC's interpretive role, courts frequently adopt its proposed standards and guidelines, while employers similarly look to EEOC interpretations in order to determine when and under what circumstances they may be held liable for discrimination.[21]

---

16. Civil Rights Act of 1964 § 701(b), 42 U.S.C. § 2000e(b), (f) (2012) defining "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person."). Because the distinction between public and private sector employees reaches beyond the scope of this Comment, my discussion will focus primarily on employee definitions that are assigned independently of these classifications. *See* Rubinstein, *supra* note 15, at 605 (stating that in most cases, coverage of employment laws boils down to the question of whether the individuals in question are "employees" and whether the entity in question is an "employer").

17. *See Staffing Clients: Definition of Staffing Services*, AM. STAFFING ASS'N, http://www.americanstaffing.net/definitions.cfm (last visited Mar. 9, 2014) (stating that staffing firms bring qualified job candidates together with potential employers for the purpose of establishing a temporary or permanent employment relationship).

18. *See* EEOC ENFORCEMENT GUIDANCE, *supra* note 4, at 2 (using the term "staffing firm" interchangeably with temporary employment agencies, contract firms, and other firms that hire workers and place them in job assignments with the firm's clients).

19. *About EEOC: Overview*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/ (last visited Mar. 9, 2014); *see also* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 259–60 (1991) (Scalia, J., concurring) (arguing that EEOC is entitled to deference generally accorded to other administrative agencies).

20. *See* Rebecca H. White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51, 56 (1995) (mentioning that Congress granted the EEOC the power to bring enforcement suits in the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 706(f)(1), 86 Stat. 103, 105 (codified as amended at 42 U.S.C. § 2000e-5(f)(1) (1988))).

21. *See id.* at 62 n.69 (citing Hicks v. Crown Zellerbach Corp., 319 F. Supp. 314, 319 (E.D. La. 1970)) (giving great deference to EEOC Guidelines requiring "validated" employment tests under Title VII); *see also Title VII of the Civil Rights Act of 1964*, SOC'Y FOR HUM. RESOURCE MGMT., http://www.shrm.org/LegalIssues/FederalResources/FederalStatutesRegulationsandGuidanc/Pages/TitleVIIoftheCivilRightsActof1964.aspx (last visited Mar. 9, 2014).

B. Federal Anti-Discrimination Statutes

This Comment focuses on two federal anti-discrimination statutes that serve as vehicles for protected groups to enjoy equal opportunity for employment and workplace accommodation.

1. Title VII of the Civil Rights Act of 1964

Title VII provides that equal employment opportunities cannot be denied to any person on the basis of his or her race, color, national origin, sex, or religion.[22] In 1991, Congress expanded the coverage of Title VII to proscribe discrimination in employment and prohibit employers from retaliating against an employee for engaging in the enforcement of Title VII.[23]

2. Americans with Disabilities Act

The Americans with Disabilities Act ("ADA") provides protections to persons with disabilities that are like the civil right protections afforded to individuals covered by Title VII.[24] The ADA explicitly states that maintaining a contractual relationship with an employment or referral agency that has the effect of subjecting an otherwise qualified applicant to discrimination amounts to discrimination.[25]

C. Discriminatory and "Quasi-Discriminatory" Hiring Practices

Many companies use staffing agencies to hire temporary or permanent workers.[26] Where a staffing agency assigns workers to a client company, the worker will traditionally be considered an employee of the staffing company, rather than of the client.[27] Nonetheless, employees, as well as

---

22. *See* Americans with Disabilities Act, 42 U.S.C. § 12112(a) (2012).

23. Jana H. Carey, *General Overview of Employment Relationships Within the Framework of Title VII, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA)*, A.B.A. CONTINUING LEGAL EDUC. G-1, at 3 (1998) (providing an overview of governing regulatory schemes).

24. *See* 42 U.S.C. § 12112(b)(2); EEOC v. Olsten Staffing Servs. Corp., 657 F. Supp. 2d 1029, 1033 (W.D. Wis. 2009); *see also Americans with Disabilities Act (ADA)*, U.S. DEP'T OF EDUC., http://www2.ed.gov/about/offices/list/ocr/docs/hq9805.html (last visited Mar. 9, 2014) (explaining that the ADA guarantees individuals with disabilities equal opportunity in employment).

25. 42 U.S.C. § 12112(b)(2).

26. Buchanan Ingersoll, *EEOC Issues Guidance on Treatment of Contingent Workers*, 8.5 PA. EMP. L. LETTER 4, at 1 (1998) (recognizing that a growing number of employees are employed by temporary agencies).

27. *See* EEOC ENFORCEMENT GUIDANCE, *supra* note 4, at 7 (stating that the staffing firm generally qualifies as the worker's employer because it typically hires the worker, determines when and where the worker should report to work, pays the wages, is itself in business, withholds taxes and social security, provides workers'

non-employees, can find relief for discrimination.[28] Despite the current protections, staffing firms continue to discriminate and "quasi-discriminate" against current and prospective employees.[29]

1. "Quasi-Discrimination"

For purposes of this Comment, procedures that may adversely affect ethnic groups and women qualify as "quasi-discriminatory" hiring practices.[30] Some hiring procedures may have such an effect if they discourage certain groups from applying or if they systematically prevent qualified minorities from knowing about the opportunities.[31] Even though such practices are not inherently illegal, they can become illegal if they adversely impact protected groups.[32] Various reports point to situations in

---

compensation coverage, and has the right to discharge the worker).

28. *See* Pirruccello, *supra* note 10, at 222 (arguing that contingent workers have protection from unlawful discrimination similar to the protection afforded full-time care employees).

29. *See* Laura Bassett, *How Employers Weed Out Unemployed Job Applicants, Others, Behind The Scenes*, THE HUFFINGTON POST (Jan. 14, 2011), http://www.huffingtonpost.com/2011/01/14/unemployed-job-applicants-discrimination_n_809010.html (conceding that staffing firms recognize code words used by clients while regularly accommodating client demands such as finding someone of a particular gender or within a particular age bracket).

30. *See* George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1344–45 (1987) (arguing that disparate impact theory is an example of federal common law, resting on a practical need to prevent pretextual discrimination by institutional defendants).

31. *See* Russell Specter & Paul J. Spiegelman, *Employment Discrimination Action Under Federal Civil Rights Acts*, 21 AM. JUR. 1ST *Trials* §§ 24–26 (1974) (introducing examples such as word of mouth recruitment, sex-differentiated advertising, or exclusionary media and messages); *see also* Bassett, *supra* note 29 (discussing the widespread practice among employers and staffing agencies to exclude from consideration candidates who are not currently or recently employed); Brianna Lee, *'Unemployed Need Not Apply'*, PBS (Jul. 28, 2011), http://www.pbs.org/wnet/need-to-know/the-daily-need/unemployed-need-not-apply/10736/ (stating that a nonprofit organization surveying the labor market found nearly 150 ads from Careerbuilder, Monster, Indeed, and Craigslist that openly discriminated against potential candidates, asking them not to apply unless they were currently employed).

32. *See, e.g.*, Press Release, Office of Pub. Affairs, Dep't of Justice, Justice Department Settles Immigration-related Discrimination Claim Against Alabama Employment Agency (Jul. 3, 2013) [hereinafter DOJ Press Release], *available at* http://www.justice.gov/opa/pr/2013/July/13-crt-756.html (reporting on a settlement agreement between the Justice Department and a staffing agency who required specific documents issued by the Department of Homeland Security from non-U.S. citizens during the employment eligibility verification process, but accepted a variety of identity and work authorization documentation from U.S. citizens); *see also* Sheri Splichal, *Staffing Agencies, Your Company, and Background Checks*, 3RD DEGREE SCREENING (Jul. 2, 2013), http://www.3rddegreescreening.com/news/bid/313444/Staffing-agencies-your-company-and-background-checks (advising readers that client companies have a duty to inform themselves of staffing firms' background check

which staffing firms have independently and regularly used quasi-discriminatory practices that had such an adverse effect.[33] Nonetheless, neither federal law nor a majority of states' laws deem practices such as unemployment discrimination illegal, although a number of states and municipalities have started to prohibit them.[34]

2. Independent Discrimination by Staffing Firms

A couple of recent examples illustrate that staffing firms independently discriminate against prospective employees.[35] According to a recent decision in the Wisconsin District Court, *EEOC v. Olsten Staffing Servs. Corp.*, a reasonable jury could conclude that a staffing agency discriminated against a deaf job applicant on the basis of his disability.[36] The court noted that the agency specialist's deviation from the agency's general practice[37] reasonably suggests that she discriminated against the plaintiff.[38] The court pointed out that the specialist treated the plaintiff differently, although he was otherwise qualified for the position and the client company had given the specialist no information suggesting that a deaf person would be unable to perform the job's essential functions.[39] After the client indicated that it would not hire the plaintiff without providing an explicit reason, the specialist did not refer the plaintiff to the

---

policies because a client could face liability if the staffing firm refuses to hire individuals based solely on the fact that they have a criminal history).

33. *See, e.g.*, *EEOC to Examine Treatment of Unemployed Job Seekers* (2011) (written testimony of Algernon Austin, PhD, Director, Program on Race, Ethnicity, and the Economy, Economic Policy Institute) [hereinafter Austin Testimony], *available at* http://www1.eeoc.gov/eeoc/meetings/2-16-11/Austin.cfm.

34. *See, e.g.*, D.C. CODE § 32-1362 (2012) (prohibiting employers and employment agencies from discriminating against applicants because they are unemployed); Birk, *supra* note 14 (noting that New Jersey passed a similar law, which took effect in 2011, prohibiting unemployment discrimination in job advertisements); *see also* Rutherglen, *supra* note 30, at 1298 (observing that the principal prohibitions of Title VII do not refer to disparate impact at all).

35. *See, e.g.*, EEOC v. Olsten Staffing Servs. Corp., 657 F. Supp. 2d 1029, 1033 (W.D. Wis. 2009) (featuring a representative of a staffing firm who discriminated against a qualified disabled applicant on the basis of her belief that the client would not accommodate the applicant's disability).

36. *See id.* at 1038.

37. *See id.* at 1031 (providing that, as a general hiring practice, Olsten's staffing specialist sent a survey sheet to applicants whom she believed to be qualified and then sent the completed sheet back to its client and—unless the client objected within a day or so—the candidate would begin working).

38. *See id.* (explaining that the specialist used a different procedure in the plaintiff's case, which involved e-mailing the client, indicating that the candidate would like to work for the client, but that her only hesitation is that he is deaf and whether this would be too much of a concern for the client).

39. *See id.* at 1036.

client when another position opened up.[40] Furthermore, when the plaintiff requested a reason for why the client did not want to hire the plaintiff, the specialist appeared to invent a justification for the decision, telling him that the client was concerned about plaintiff's ability to hear the forklifts, which was false information, and she had no knowledge that the client had any such concerns.[41]

Another example arose in 2012, when BP Exploration and Production, Inc. ("BP") entered into a settlement agreement with the EEOC after a number of women complained that BP's contractors discriminated against female job applicants.[42] The class of affected women alleged that BP's contractors did not consider them to work on the cleanup effort following an oil spill in 2010, based solely on their gender.[43] While the EEOC never determined that BP violated anti-discrimination laws and BP argued that it did nothing wrong, the settlement agreement included a provision that BP provide training to its administrators who engage contractors.[44] Furthermore, the EEOC praised BP for resolving the matter outside of court action and for refusing to tolerate discriminatory hiring practices by any contractor who works for BP.[45]

Similarly, a recent action brought against Stellar Staffing agency offers another example of independent employment discrimination by staffing firms. In this case, the employment agency violated the anti-discrimination provision of the Immigration and Nationality Act by demanding more specific documents during the employment eligibility verification process from foreign nationals while being more flexible with documentation of U.S. citizens.[46] This action supports the notion that staffing companies

40. *See id.*

41. *See id.* at 1032 (demonstrating that, instead of remaining neutral, the specialist relied on her own belief of what caused her client to reject the applicant when she claimed that the client needed the plaintiff to be able to hear the forklifts).

42. *See* Press Release, Equal Emp't Opportunity Comm'n, EEOC and BP Resolve Claims Related to Contractor Hiring During Gulf Response (June 29, 2012) [hereinafter EEOC & BP Press Release], *available at* http://www.eeoc.gov/eeoc/newsroom/release/6-29-12.cfm; Mendez, *supra* note 13 (reporting that BP agreed to pay up to $5.4 million to the class of women who applied for jobs with the contractors during the emergency response).

43. *See* EEOC & BP Press Release, *supra* note 42 (reporting that the staffing agencies utilized by BP's contractors allegedly used discriminatory hiring practices).

44. *See id.*

45. *See id.*

46. *See* DOJ Press Release, *supra* note 32 (indicating that staffing firms treat applicants differently in the hiring process based on discriminatory assumptions about their citizenship status).

independently violate anti-discrimination provisions by treating applicants differently on the basis of national origin without a client's request.[47]

D. Common Law Remedies

The following common law tests serve as useful tools in determining whether liability can be assigned in cases of non-traditional employment.[48]

1. Joint Employer Liability and Control

Joint employment assigns liability to client companies in cases where a client discriminates against a worker or applicant who would otherwise be considered the employee of a staffing firm.[49] According to the EEOC, a staffing company and its client can be held liable as joint employers if both have the right to exercise control over the employee.[50] This concept seems to be consistent with the view of the Federal Courts and the Supreme Court.[51] Similarly, courts agree that staffing companies that honor their clients' demands, if they are based on discriminatory reasons, may face liability for discrimination.[52]

---

47. *See id.* (reporting that Stellar Staffing agency agreed to pay $2,250 in civil penalties and undergo training on anti-discrimination provisions).

48. *See* Pirruccello, *supra* note 10, at 192, 204.

49. *See* EEOC ENFORCEMENT GUIDANCE, *supra* note 4, ¶ 12, at 29.

50. *See id.* at 8.

51. *See, e.g.*, Moldenhauer v. Tazewell-Pekin Consol. Commc'n Ctr., 536 F.3d 640, 644–45 (7th Cir. 2008) ("[J]oint employment will ordinarily be found to exist when a temporary or leasing agency supplies employees to a second employer."); Carparts Distrib. Ctr. Inc. v. Auto. Wholesaler's Ass'n of New England Inc., 37 F.3d 12, 17 (1st Cir. 1994) (finding that defendants function as employers if they exercise significant control over an important aspect of his employment); Watson v. Adecco Emp't Servs. Inc., 252 F. Supp. 2d 1347, 1356 (M.D. Fla. 2003) (holding that a temporary employment agency was not an employer because it exercised no control over the plaintiffs' responsibilities or duties once on assignment); Stephanie Greene & Christine Neylon O'Brien, *Who Counts?: The United States Supreme Court Cites "Control" as the Key to Distinguishing Employers From Employees Under Federal Employment Antidiscrimination Laws*, 2003 COLUM. BUS. L. REV. 761, 780 (2003) (citing Clackamas Gastroenterology Assoc., P.C. v. Wells, 548 U.S. 440, 440 (2003) (looking to control as the deciding factor in determining whether an employment relationship exists)).

52. *See* Shah v. Littlefuse Inc., No. 12 CV 6845, 2013 WL 1828926, at *6 (N.D. Ill. Apr. 29, 2013) ("Courts addressing the liability of temporary employment agencies have held that a staffing or employment agency found to be a joint employer may be held liable under Title VII if the agency knew or should have known of the discriminatory conduct and failed to take prompt corrective measures within its control.").

2. Tortious Interference for Non-Employers

A person may be liable for tortiously interfering with a contract between two other parties if he intentionally induces or otherwise causes one party not to perform the contract.[53] A court could find a client company liable for tortious interference of the plaintiff's employment contract.[54] Though tests vary across jurisdictions,[55] tortious interference generally requires that the client company interfere with a direct employment relationship, such as that between a contingent worker and a staffing company.[56] Under these circumstances, even if the company does not exercise its control to turn the worker into an employee, the discrimination toward the worker could still damage the worker's relationship with the staffing company.[57]

Even though the common law provides some ways to afford protection to non-traditional employees and applicants, neither the common law nor the EEOC Guidelines have thus far pronounced a consistent underlying justification or rationale for holding staffing firms and their clients responsible for each other's wrongful acts.[58]

---

53. *See* RESTATEMENT (SECOND) OF TORTS § 766 (1979).

54. *See* EEOC ENFORCEMENT GUIDANCE, *supra* note 4, at 3.

55. *See* McGanty v. Staudenraus, 901 P.2d 841, 846–47 (Or. 1995) (holding that since the plaintiff employee admitted that the supervisor had been acting within his scope of employment at all times, the plaintiff had no claim for intentional interference with economic relations); Pirruccello, *supra* note 10, at 210 (citing George A. Fuller Co. v. Chi. Coll. of Osteopathic Med., 719 F.2d 1326, 1332–33 (7th Cir. 1983) (analyzing the necessary elements of malice and third-party status in a tortious interference case)); *see also* Christopher v. Stouder Mem'l Hosp., 936 F.2d 870, 875 (6th Cir. 1991) (proposing that the defendant may be liable if he significantly affects access of any individual to employment opportunities); Lyons v. Midwest Glazing, 265 F. Supp. 2d 1061, 1075 (N.D. Iowa 2003) (holding that tortious interference requires intent, knowledge of an existing relationship, causation, and damages).

56. *See* Pirruccello, *supra* note 10, at 195 (explaining that contingent employees may establish themselves as direct employees of a third party, typically a staffing agency, and allege that the defendant employer discriminatorily and harmfully interfered with the employment relationship).

57. *See* Sibley Mem'l Hosp. v. Wilson, 488 F.2d 1338, 1341 (D.C. Cir. 1973) (holding that the liability of an employer who affects the employee of another entity may depend on surrounding circumstances); Med. Indus. Inc. v. Maersk Med. Ltd., 230 F. Supp. 2d 857, 870–71 (N.D. Ill. 2002) (holding that a defendant interfered with the plaintiff's prospective economic relationship with a generically-defined third party is sufficient to survive a motion to dismiss when plaintiffs alleged that it had a reasonable expectation of entering into valid business relationships with thousands of customers).

58. *See* O'Gorman, *supra* note 2, at 441 ("The Commission does not disclose the basis for its conclusion that a staffing firm must take corrective action when it has reason to know a client terminated an employee's assignment for an unlawful reason.").

E. Statutory Remedies

Under federal anti-discrimination statutes, injured parties may establish a cause of action against employers who discriminate and quasi-discriminate.[59] Some states have enacted legislation prohibiting unemployment discrimination and statutes against aiding and abetting discrimination.[60]

1. Disparate Impact Theory under Title VII

Title VII explicitly forbids discrimination against individuals based on race, sex, religion, national origin, physical disability, and age.[61] Even though not all forms of discrimination are in themselves illegal,[62] a cause of action may arise if a quasi-discriminatory practice adversely affects protected groups.[63] It remains unclear whether client companies could be held liable in cases where staffing firms independently use such quasi-discriminatory practices.

2. Provisions of the ADA Provide Liability for Clients who Maintain a Contractual Relationship With Discriminatory Employment Agencies

In cases arising out of disability discrimination, an employer may face liability regardless of the source of the discrimination.[64] Furthermore, a company who is neither an employer nor a prospective employer of a discriminated party may still qualify as a "covered entity"[65] under the ADA if, for instance, the company maintains a contractual relationship with a

---

59. *See* 42 U.S.C. § 2000e-2 (2012).

60. *See, e.g.*, D.C. CODE § 32-1368 (2012); W. VA. CODE § 5-11-9(7) (1994).

61. 42 U.S.C. § 2000e-2.

62. *See, e.g.*, Donna Ballman, *8 Ways Employers Can Discriminate Against Workers—Legally*, AOL JOBS (Nov. 19, 2012), http://jobs.aol.com/articles/2012/11/19/8-ways-employers-can-discriminate-against-workers-legally/ (explaining that an employer can legally refuse to hire a person due to bad credit and physical appearance); *see also* Bassett, *supra* note 29 (illustrating that, though prohibited in a small number of states, there is no federal law prohibiting unemployment discrimination).

63. *See* George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1297 (1987) (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971)) (extending Title VII to facially neutral employment practices with an adverse impact on persons of a particular race, natural origin, sex, or religion).

64. *See* EEOC v. Olsten Staffing Servs. Corp., 657 F. Supp. 2d 1029, 1036 (W.D. Wis. 2009) (holding that an employer has a duty to protect its employees from discrimination by its clients, whether it comes from an employee, independent contractor, or even a customer).

65. 42 U.S.C. § 12112 (defining a "covered entity" as an employer, employment agency, labor organization, or joint labor-management committee).

discriminatory staffing agency.[66] The ADA provides that both a staffing firm and its client can be held liable if either one knows, or should have known, that the other discriminates against the agency's workers but fails to take appropriate measures.[67]

The EEOC has provided an explicit corresponding instruction in its ADA Guidelines for client company liability in situations where staffing firms fail to provide reasonable accommodations to the disabled during the hiring process. However, the Commission has not yet provided a similar guideline for other anti-discrimination statutes, although it has on occasion alluded to such standards.[68]

3. State Statutes on Aiding and Abetting Discrimination Legislation

A state's statute on aiding and abetting of discrimination may also expose client companies to liability.[69] For instance, West Virginia's Human Rights statute might lend support to claims implicating clients who continue a relationship with a discriminatory staffing agency.[70] A number of other states' human rights statutes include similar aiding-and-abetting provisions.[71] It is not clear, however, whether mere knowledge and inaction, such as maintaining a contractual relationship with a discriminatory staffing agency, is sufficient to find liability under the statutes.[72]

---

66. *See id.*; *Olsten Staffing Servs. Corp.*, 657 F. Supp. 2d at 1032–33 (carving out liability for participating in a contractual or other arrangement or relationship, including a relationship with an employment or referral agency, that has the effect of subjecting a qualified applicant or employee with a disability to discrimination).

67. *See* 42 U.S.C. § 12112(b)(2); *see also Olsten Staffing Servs. Corp.*, 657 F. Supp. 2d at 1032 (mentioning that employment agencies can be held accountable for discrimination even if they do not have unilateral authority to place or reject an applicant).

68. *See, e.g.*, Mendez, *supra* note 13 (suggesting that BP avoided liability for discriminatory hiring decisions of staffing firms hired by BP's contractors by voluntarily entering into a settlement agreement).

69. *See, e.g.*, CONN. GEN. STAT. § 46a–60(a)(5) (2011) (prohibiting any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any act declared to be a discriminatory employment practice or to attempt to do so); W. VA. CODE § 5-11-9(7) (1994) (making it illegal to aid or abet another in engaging in unlawful discriminatory practices).

70. *See* Holstein v. Norandex, Inc., 461 S.E.2d. 473, 478 (W. Va. 1995) (holding that a plaintiff may bring action not only against supervisors but also against another employee for aiding or abetting an employer engaging in unlawful discrimination practices).

71. *See, e.g.*, CONN. GEN. STAT. § 46a–60(a)(5); N.D. CENT. CODE § 14-02.4-18 (1995); N.Y. EXEC. LAW § 296(6) (McKinney 2010).

72. *See, e.g.*, Merinar, *supra* note 3, at 2 (claiming that neither West Virginia courts nor the Supreme Court have ruled on the matter).

4. States' Unemployment Discrimination Legislation

In response to increasing allegations of discrimination based on unemployment status, a number of districts, cities, and states have enacted legislation to prevent such practices. In March 2012, for instance, the District of Columbia enacted the Unemployed Anti-Discrimination Act of 2012.[73] Similarly, a number of other jurisdictions have enacted regulations to protect unemployed job applicants.[74]

II. EFFECTS OF STAFFING FIRMS' DISCRIMINATION ON PROTECTED GROUPS AND THE CHAOS OF LIABILITY

The increasing reliance on staffing firms in the wake of a changing job market[75] increasingly complicates employer-employee relationships.[76] Even though employment laws cover most individuals who are deemed employees, issues have arisen in situations where the employer-employment relationship is not so clearly defined.[77] Furthermore, there is no consistent principle justifying a finding of liability under either the statute or the common law.[78]

---

73. *See* D.C. CODE § 32-1362 (2012) (prohibiting employers and employment agencies from discriminating against applicants because they are unemployed); *see also* Birk, *supra* note 14 (noting that New Jersey passed a similar law, which took effect in 2011, prohibited unemployment discrimination in job advertisements).

74. *See* Birk, *supra* note 14 (demonstrating that Connecticut, Florida, Illinois, Michigan, New York, and Oregon have enacted such legislation).

75. New information technology has narrowed the importance of employees' specialized skills, whereas companies' flexibility and ability to respond to the changing dictates and demands of the marketplace has become increasingly important. *See* KENNETH G. DAU-SCHMIDT, ROBERT N. COVINGTON & MATTHEW W. FINKIN, LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE 46–52 (4th ed. 2010) (citing Kenneth G. Dau-Schmidt, *Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law*, 76 IND. L.J. 1, 10–14, 52 (2001)) (arguing further that the focus on reorganizing firms in leaner ways that are internally more subject to the machinations of the market makes large and costly human resource departments less desirable).

76. *See* Mark Crandley, Note, *The Failure of the Integrated Enterprise Test: Why Courts Need to Find New Answers to the Multiple-Employer Puzzle in Federal Discrimination Cases*, 75 IND. L.J. 1041, 1041 (2000) (observing that the increase in independent and temporary work, smaller technology-based firms, and new corporate forms, have permanently altered the world of work); *cf.* DAU-SCHMIDT, COVINGTON & FINKIN, *supra* note 75, at 45, 50 (describing employer/contractor distinctions as being drawn more woodenly in U.S. courts than in other countries, even though Dau-Schmidt suggests that employment relationships be adaptable to the changes in our economy).

77. *See* Pirruccello, *supra* note 10, at 192 (acknowledging that commentators have criticized the general failure of labor and employment laws to protect the contingent workforce).

78. *See* Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1, 17 (2010) (arguing that two or more contractual intermediaries often stand between unskilled workers and the companies for whom

While the EEOC does not have legislative powers, it does have the authority to interpret anti-discrimination legislation.[79] Courts have generally accepted these interpretations.[80] Particularly in the absence of statutorily defined employee-like entities,[81] the EEOC's Guidelines are an arguably useful resource to client companies because they illustrate the scope of employer liability.[82]

A. Inconsistency in Federal Statutes

Thus far, Congress has failed to establish whether a constructive knowledge standard applies to clients who engage staffing firms when they hire new workers. Furthermore, it fails to establish whether the ADA's duties not to enter into contractual relationships resulting in discrimination apply to both staffing firms and client companies or whether they apply only in the context of disability-related discrimination. Because of the uncertainty this creates, Congress should consider clarifying the scope of this liability or adopting a duty-based approach to create more uniformity in this area of law.

1. Issues with Definitions

Even though the threshold question to finding employer liability asks whether or not the defendant qualifies as an employer, certain situations may also permit liability for non-employers.[83] Although such non-employer liability should rest on an independent duty, much of the analysis provided by the courts and the EEOC guidelines derives the liability from

---

they ultimately perform work, emphasizing that "[t]hey are not 'employed' in any legal sense by those companies, frequently rendering them 'beyond the grasp or reach of employment law'.").

79. *See About EEOC: Overview*, *supra* note 19 (explaining the EEOC's authority and role).

80. *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63 (1986) (affirming the lower court's decision to consider the supervisor an employer—which relied chiefly on Title VII's definition of employer and on EEOC Guidelines).

81. *See* Rubinstein, *supra* note 15, at 629 & nn.127–28 (citing DAU-SCHMIDT, COVINGTON & FINKIN, *supra* note 75, at 45) (observing that some countries, such as Germany, have developed intermediate categories such as "parasubordinated" persons to cover employee-like persons in an effort to respond to the problem of defining employee status).

82. *See Vinson*, 477 U.S. at 63 (supporting the notion that client companies take the guidance seriously because the Supreme Court has relied heavily on the EEOC Guidelines in certain cases).

83. *See, e.g.*, Neal v. Manpower Int'l Inc., No. 3:00–CV–277/LAC, 2001 WL 1923127, at *8 (N.D. Fla. Sept. 17, 2001) (holding that an employer can be liable for harassment by a non-employee only if the employer knew or should have known of the harassment).

employer status.[84] However, this approach fails to explore the duties of third parties or non-employers who play a role in the hiring process, a question which has received varying treatment across jurisdictions.[85] The courts' disparate treatment in attempting to assign non-employer liability demonstrates a need for introducing a new classification of "quasi-employment" relationships, rather than applying existing statutory provisions to non-employers according to differing standards of employment characteristics.[86] It is important that legislative changes include a clarification of the duties and responsibilities for "employer-like"[87] persons and the principles shaping these duties.

2. *Differing Principles Underlying Title VII and the ADA*

Title VII's statutory character aims to achieve a national policy of nondiscrimination, which inherently requires a uniform body of law that clearly identifies the scope of obligations and responsibilities of companies

---

84. *See* Rubinstein, *supra* note 15, at 606 (shedding light on the "state of disarray" in the law "with regard to the definition of employee [and employer] . . . .").

85. *See, e.g.*, Carparts Distrib. Ctr. Inc. v. Auto. Wholesaler's Ass'n of New England Inc., 37 F.3d 12, 17 (1st Cir. 1994) (prohibiting holding an individual employee liable for violating a provision which, by its terms, restricts liability to employers but allowing it under provisions that specifically refer to persons in addition to employers, arguing that the statute intended it to apply to individuals other than employers). *But cf.* Johnson v. BE & K Constr. Co., 593 F. Supp. 2d 1044, 1050 (S.D. Iowa 2009) (implying that non-employer third parties may be held liable under certain circumstances and that, although the defendant alleged that it was merely a customer, the court allowed the inference that the defendant could still have supervisory authority over plaintiff's employment).

86. *See, e.g.*, EEOC v. Olsten Staffing Servs. Corp., 657 F. Supp. 2d 1029, 1033 (W.D. Wis. 2009) (noting that, as an employer, a staffing firm has a duty to protect its employees, regardless of the source); *see also* Rubinstein, *supra* note 15, at 657 (pointing out that the modern landscape of hiring procedures and employer-employee relationships calls for a major "overhaul" in anti-discrimination legislation and that much of the inconsistency surrounding employer liability arises from the struggle to arrive at a common definition for employer); *cf.* United States *ex rel.* Morgan v. Sci. Applications Int'l Co., 604 F. Supp. 2d 245, 250 (D.D.C. 2009) (arguing that if Congress had wanted to extend liability to non-employers, it would have done so by using the words "any person," but it merely used the words "any employee, contractor, or agent"). *But see* Leu v. Embraer Aircraft Maint. Servs., No. 3:10–0322, 2010 WL 1753616, at *3 (M.D. Tenn. Apr. 30, 2010) (noting that courts have recognized the theory of holding non-employers liable for third-party interference with employment contracts under Title VII).

87. *See* Rubinstein, *supra* note 15, at 629 (indicating that a consistent definition would be desirable); *see also* Esther Torres, *The Spanish Law on Dependent Self-Employed Workers: A New Evolution in Labor Law*, 31 COMP. LAB. L. & POL'Y J. 231, 234 (2010) (observing that Spain and other EU Member States have expanded the borders of traditional employment to new parameters, based on three elements: dependency, alienation from risks and benefits, and economic remuneration).

who wish to hire workers through staffing firms.[88] Such uniformity can only be achieved if the courts adopt or develop a consistent theory of liability for client companies or if Congress passes legislation that establishes the liability-parameters for staffing agencies, their clients, and the workers involved.[89]

While the ADA establishes that a contractual relationship between clients and staffing firms can result in liability,[90] Title VII remains silent on whether a similar standard applies to other types of discrimination as well.[91] It would be helpful for Congress to clarify whether the duties of the ADA standard arise specifically from a duty owed to persons with disabilities, because if it applied to all forms of discrimination, employers should be aware of such heightened duty.[92] The EEOC seems to believe that such a duty exists.[93] If we are to follow the EEOC's position, Congress should explain the basis of the non-employer duty owed to affected parties, and amend Title VII to include a provision similar to that of the ADA in order to ensure that the common law remains consistent with the statutory purpose of anti-discrimination legislation.[94]

---

88. *Cf.* McAdoo v. Toll, 591 F. Supp. 1399, 1406 (D. Md. 1984) ("An individual occupying a supervisory position could be held liable for the acts of his underlings when the employer of both can also be held liable, even where the supervisor has no personal involvement . . . because placing an affirmative [implying consistent] duty to prevent discriminatory acts on those who are charged with employment decisions appears to be consistent with the aims of Title VII.").

89. *Cf.* DAU-SCHMIDT, COVINGTON & FINKIN, *supra* note 75, at 46–52 (suggesting that the expansion of employer parameters in foreign jurisdictions may legitimate a more flexible and statutorily-focused analysis by the legislature).

90. 42 U.S.C. § 12112(b)(2) (2012) (stating that maintaining a contractual relationship with an employment or referral agency that has the effect of subjecting an otherwise qualified applicant to discrimination amounts to discrimination).

91. *See* Kevin W. Williams, Note, *The Reasonable Accommodation Difference: The Effect of Applying the Burden Shifting Frameworks Developed under Title VII in Disparate Treatment Cases to Claims Brought under Title I of the Americans with Disabilities Act*, 18 BERKELEY J. EMP. & LAB. L. 98, 98–99 (1997) (arguing that employment discrimination under the ADA should sometimes be treated differently than discrimination under Title VII).

92. *See McAdoo*, 591 F. Supp. at 1406 (calling for an affirmative duty on individuals who make employment decisions).

93. *See* Mendez, *supra* note 13 (indicating that a company or its clients may be liable for the discriminatory hiring practices of its staffing agencies, because it treated BP as responsible for the discrimination committed by its contractors which is similar to the ADA standard of imposing a heightened duty on clients who maintain contractual relationships that result in discrimination).

94. *See* O'Gorman, *supra* note 2, at 434–36 (indicating that there is not one single common law test but several, none of which are entirely consistent with the statutory purpose of Title VII); Rubinstein, *supra* note 15, at 627 (indicating that courts rely on common law tests as the default standard where Congress has not specified an appropriate standard).

Alternatively, if Congress explains that the ADA's duty to refrain from entering into a contractual relationship that results in discrimination against applicants is disability-specific, the liability articulated by the EEOC on staffing firms and clients may be questioned.[95] Because client companies frequently consider the Commission's Guidelines and prefer settlements over in-court litigation, the EEOC's statements likely affect the legal outcome of these employment discrimination matters.[96] It is therefore important that, when the EEOC uses the opportunity to educate and inform companies of liability, this information has a solid basis in the law.[97]

3. Inconsistent Application of the Statutes

The courts have not provided a coherent framework for determining whether client companies, who know or should know that a staffing firm discriminates, face liability if they enter into an agreement with that firm. In particular, they do not fully explain how they derive employer status from the tests used in non-traditional employment relationships.[98] While the Supreme Court looks to control as the deciding factor in determining whether an employer-employee relationship exists,[99] the ADA carves out potential liability for companies that do not have the authority to place or reject an applicant.[100]

As with the rationale governing the joint employment standard, the *Olsten* court's inclination to hold staffing companies and their clients liable seems to stem from the level of control that each party has over the hiring

95. *See, e.g.*, O'Gorman, *supra* note 2, at 432 (making the argument that common law tests should not merely be transplanted into statute, which allows for the inference that if Title VII's plain meaning actively excludes the ADA standard, the EEOC's statements or courts simply applying the ADA standard to Title VII would be inappropriate).

96. *See* Ray v. Henderson, 217 F.3d 1234, 1242–43 (9th Cir. 2000) (demonstrating that, because the EEOC has the authority to interpret federal anti-discrimination laws, litigants frequently look to the EEOC Guidelines to assess where liability can be found).

97. *See* O'Gorman, *supra* note 2, at 458 (arguing that the EEOC standards are not supported by the statutes' plain language).

98. *See* Rogers, *supra* note 78, at 22 (citing Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947)) (observing that the Court was not entirely clear why the factors it relied on—for instance, that the worker did a specialty job and that the work took place on the company's premise—established an employment relationship).

99. *See* Greene & O'Brien, *supra* note 51, at 798 (stating that, in filling the gaps of the sparse statutory language, the Court held that an individual's employment status depends on whether he has control within the organization).

100. *See* EEOC v. Olsten Staffing Servs. Corp., 657 F. Supp. 2d 1029, 1038 (W.D. Wis. 2009) (reasoning that the inclusion of employment agencies in the ADA inherently accepts that an agency can be held liable even in absence of authority to reject an applicant).

process.[101] It follows that, by maintaining such a relationship with a discriminatory staffing agency, the client's omissions facilitate the discrimination.[102] If companies seeking to hire new workers have a duty not to facilitate discrimination and to have reasonable knowledge of discrimination that occurs in the hiring and recruitment process, then such duties should apply to Title VII discrimination as well, rather than merely being inferred by EEOC statements.[103]

In applying the ADA, the Seventh Circuit suggests that the duty to protect workers from discrimination arises from a company's status as an employer.[104] At the same time, the court suggests imposing a duty on non-employers to refrain from engaging in agreements that negatively impact the employment opportunities of jobseekers.[105] This is problematic because the court freely assigns a duty that arises from employer status to non-employers. If there is, in fact, a similar duty for non-employers in these cases, this duty must find its basis in something other than employer status.[106]

B. Inconsistency of Legal Principles Call for Congressional Clarification

Certain common law rationales and statutes, prohibiting unemployment discrimination while imposing aid-and-abet liability, provide support for a client company's duty to avoid contractual relationships with staffing firms if they know or should know that such firms discriminate. However,

---

101. *See* Greene & O'Brien, *supra* note 51, at 780 (specifying that control is a decisive factor among the six-factor approach); *see also Olsten Staffing Servs. Corp.*, 657 F. Supp. 2d at 1038 (emphasizing that, where a client contracts to receive workers through a staffing agency, the client exercises a significant amount of control over the individuals who ultimately get hired).

102. The court reasoned that, if the specialist truly believed that the client would not hire the plaintiff because he could not hear the forklift, then her attempt to place the plaintiff at another job would be an accommodation of a discriminatory attitude rather than of the plaintiff's disability. *See Olsten Staffing Servs. Corp.*, 657 F. Supp. 2d at 1038.

103. *See* White, *supra* note 20, at 74 (stating that the EEOC Guidelines are not enforceable rules of law but should nonetheless be followed, particularly in cases of ambiguity).

104. *See Olsten Staffing Servs. Corp.*, 657 F. Supp. 2d at 1036 (emphasis added) ("*As Schaefer's employer*, Olsten had a duty under the ADA to protect Schaefer from discrimination by its clients.").

105. *See id.* at 1035 (emphasis added) ("[I]n a way that adversely affects the opportunities or status of such applicant *or* employee because of the disability of such applicant.").

106. *See, e.g.*, Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993) (concluding that the obvious purpose of including an agent provision is to incorporate respondeat superior liability into the statute, which could provide a rationale for holding a client company liable for torts arising from the company's business).

because these areas provide only bits and pieces, rather than articulating a consistent principle for finding this duty, Congress should provide clear guidance on the matter.

1. Chaos in the Common Law

Because the plain language of Title VII concerns intentional discrimination, an argument supporting vicarious liability for non-employers must support the statute's purpose.[107] Beyond the inconsistencies between the ADA and Title VII, the common law tests for determining liability for staffing firms and client companies further illustrate the need for Congress to identify governing principles for non-employer liability. However, it is important not to simply dismiss these tests, as they could provide some helpful rationales to piece together an employer-like duty.

a. Aid and Abet Liability

While one commentator argues that the standards issued by the EEOC are not firmly grounded in the common law,[108] another source suggests that a proper rationale may be found in state legislation on aiding and abetting discrimination for holding non-employers liable for discriminatory hiring practices.[109] Such legislation, however, does not specify whether an employer has a duty to take reasonable measures to find out whether discrimination has occurred.[110] Furthermore, there is no uniformity as to whether mere inaction is sufficient to find liability under such statutes, resulting in an inconsistent application of the law.[111]

---

107. *See* O'Gorman, *supra* note 2, at 436, 457 (noting that statutes only allow for liability when an employer or its agent engaged in intentional discrimination).

108. *See id.* at 464–65, 467–68 (arguing that acceptance of the "knows-or-should-have-known" standard for holding staffing firms liable for client discrimination is a form of vicarious liability, the rationale of which, is not applicable to these cases, as the client will already absorb and distribute the costs and instances of discrimination have not been deemed a risk of doing business).

109. *See* Merinar, *supra* note 3, at 2 (suggesting that West Virginia's Human Rights statute may be used to impose liability on a client who maintains a contractual relationship with a discriminatory staffing firm).

110. *Cf.* McGill v. Duckworth, 944 F.2d 344, 351 (7th Cir. 1991) ("Going out of your way to avoid acquiring unwelcome knowledge is a species of intent.").

111. *See, e.g.*, United States v. Sabhnani, 599 F.3d 215, 238 (2d Cir. 2010) (finding that failure to act can establish liability); *In re* Nat'l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig., 636 F. Supp. 1138, 1165 (C.D. Cal. 1986) (holding that active concealment or suppression of facts by a nonfiduciary equates to a false representation, rather than mere failure to disclose).

b. Joint Employers and the Control Factor

Within the joint employment relationship standard,[112] the extent to control the means and manner of the worker is considered the overriding factor for finding joint employment status.[113] Even though the joint employer standard does not fully explain the rationale for holding non-employers liable, it may provide a reason to examine more closely a client's ability to prevent or remedy the discrimination in cases where staffing companies discriminate.[114] However, tests for joint employer liability suggest that holding a party to the "knows-or-should-know" standard requires employer status, which the ADA does not appear to require.[115] Joint employer liability therefore does not fully explain what duty, if any, a non-employer owes to applicants and workers.

c. Tortious Interference

While the test for tortious interference establishes a duty not to interfere with a party's employment contract for a third party regardless of employment, this test can only justify holding a client company liable where it intentionally interfered with the worker's and staffing firm's agreement that no discrimination shall take place.[116] While intent, knowledge of an existing relationship, and damages may be present where a client company continues to provide business to a staffing firm it knows to have discriminated against applicants, such a claim would likely fail on account of the missing causal relationship between the client company's conduct and the rejection of the applicant by the staffing firm.[117]

---

112. *See* Shah v. Littlefuse, Inc., No. 12 CV 6845, 2013 WL 1828926, at *6 (N.D. Ill. Apr. 29, 2013) (providing that a joint employer would be required to take appropriate action if it knows or should know that the staffing firm has discriminated against the workers in its assignment).

113. *See* Greene & O'Brien, *supra* note 51, at 780 (stressing the importance of control in finding joint employer status).

114. *Cf.* EEOC ENFORCEMENT GUIDANCE, *supra* note 4, at 28–29 (indicating that the right to control the worker creates joint liability, implying that client companies that have the ultimate decision-making power over who is hired may satisfy the control requirement with regard to hiring discrimination).

115. *See* Rubinstein, *supra* note 15, at 640 (explaining that "controlling employers" under the Occupational Safety Health Act qualify as quasi-employers because they do not directly employ the subcontractors, yet they are subject to regulation, which emphasizes the importance of control and regulation in assessing employer or employer-like status).

116. *See* Pirruccello, *supra* note 10, at 207 (noting that the interfering party must actually possess intent and mere negligent interference is not enough).

117. *See, e.g.*, Lyons v. Midwest Glazing, 265 F. Supp. 2d 1061, 1075 (N.D. Iowa 2003) (holding that, although the employer lost some business since the employee's dismissal, the employer's claim of tortious interference failed on causation because it was not unusual that some customers felt loyal to the employee rather than the

Even though the common law tests point to certain duties for client companies and staffing agencies, courts lack a uniform principle to apply statutory anti-discrimination laws in a consistent way.

2. *National Inconsistency in Addressing Unemployment Discrimination*

Quasi-discriminatory practices, such as unemployment discrimination, further add to the problem of failing to consistently address employment discrimination because no federal law directly prohibits the practice.[118] Nonetheless, due to recently enacted state legislation,[119] quasi-discriminatory practices could result in additional claims that raise questions about client liability and might lead to even greater inconsistencies.[120]

In areas where state statutes do not prohibit quasi-discrimination or do not provide private rights of action, persons affected may still be able to bring action under a disparate impact claim.[121] Testimony provided by the National Women's Law Center and the Economic Policy Institute has acknowledged that unemployment discrimination may have a serious negative impact on women and people of color.[122] In jurisdictions that

---

company that employed him). *But cf.* Med. Indus. Inc. v. Maersk Med. Ltd., 230 F. Supp. 2d 857, 871 (N.D. Ill. 2002) (holding that a defendant interfered with the plaintiff's prospective economic relationship with a generically-defined third party is sufficient to survive a motion to dismiss where plaintiffs alleged that it had a reasonable expectation of entering into valid business relationships with thousands of customers).

118. *See* Ballman, *supra* note 62 (listing several ways in which an employer can legally discriminate against a worker).

119. *See* Birk, *supra* note 14 (illustrating that a number of states and municipalities have passed legislation that makes it illegal to discriminate against applicants based on their status as unemployed).

120. *See* Subadhra Sriram, *Background Check Guidelines Make a Murky Situation Murkier*, STAFFING INDUSTRY ANALYSTS (Apr. 23, 2013), http://www.staffingindustry.com/Research-Publications/Blogs/Subadhra-Sriram-s-Blog/Background-Check-Guidelines-Make-a-Murky-Situation-Murkier (stating that the lack of a federal anti-discrimination statute forbidding the practice could lead to stark differences between unemployment discrimination cases litigated under differing state statutes and under a disparate impact theory).

121. *See* Rutherglen, *supra* note 30, at 1297 (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971)) (explaining that a plaintiff has a reduced burden of proof, whereas a defendant has the burden of justifying employment practices with adverse impact).

122. *See EEOC to Examine Treatment of Unemployed Job Seekers* (2011) (written testimony of Fatima Goss Graves, Vice President for Education and Employment, National Women's Law Center) [hereinafter Graves Testimony], *available at* http://www1.eeoc.gov/eeoc/meetings/2-16-11/graves.cfm (citing *Current Employment Statistics—CES (National)*, DEP'T OF LABOR (Feb. 5, 2010), http://bls.gov/ces/cesbtabs.htm); *see also* Bassett, *supra* note 29 (pointing out that the use of code-words to mask a discriminatory request is common practice among staffing

have declared the practice illegal, the number of discrimination claims against staffing firms and their clients will likely increase.[123]

3. *Effects of "Quasi-Discrimination" on Protected Groups*

A substantial number of articles shed light on the quasi-discriminatory practices that staffing firms use to discriminate against protected groups.[124] Particularly, the discrimination against individuals who are unemployed has been a method openly used by staffing agencies.[125]

Several protected groups appear to be overrepresented in unemployment figures.[126] As the Economic Policy Institute's cited figures and common sense indicate, because the "unemployed population is disproportionately made up of people of color," policies and advertisements that actively exclude unemployed applicants from the selection process will probably have an adverse effect on people of color.[127]

Furthermore, a report by the National Women's Law Center, discussing unemployment rates for women, contends that restricting applications from unemployed job seekers likely has an impact on women in nontraditional fields and within certain age groups where women experience higher unemployment than men.[128]

---

agencies and their clients).

123. *See* Annie Karni, *Lawsuits Feared From New Unemployment Law*, CRAIN'S N.Y. BUS. (Mar. 14, 2013, 3:52 PM), http://www.crainsnewyork.com/article/20130314/LABOR_UNIONS/130319919 (predicting that the new law banning unemployment discrimination will result in fines and litigations that could ultimately motivate prospective employers to take their business elsewhere).

124. *See, e.g.*, Bassett, *supra* note 29 (discussing unemployment discrimination); J.T. O'Donnell, *Help! I'm Too Beautiful to get Hired*, CAREEREALISM (Apr. 11, 2011), http://www.careerealism.com/help-too-beautiful-get-hired/ (explaining that an employer may refuse to hire a woman based on her physical appearance, unless that hiring procedure is likely to have an adverse effect on women).

125. *See* Bassett, *supra* note 29 (showing that ads requiring applicants to be currently employed appear on job sites every day); *see also* Alice Gomstyn, *Faking Job References for a Price*, ABC NEWS (Aug. 26, 2009), http://abcnews.go.com/Business/fake-job-references-real-jobs/story?id=8401993 (featuring one company that has gone so far as to create a business masking as an applicant's former employer in order to help its clients secure the next paycheck).

126. *See, e.g.*, Austin Testimony, *supra* note 33 (demonstrating that African American and Hispanic applicants are 1.8 and 1.5 times more likely to be unemployed than similarly situated white applicants).

127. *See id.*

128. *See* Graves Testimony, *supra* note 122 (declaring that, in 2007, women made up only 2.2 percent of workers in positions like construction laborers, only 20.5 percent of workers in protective service occupations and also that—among the unemployed workers between the age of 45 and 54—women were unemployed over two months longer than men).

Because a finding of disparate impact does not require evidence of an employer's discriminatory intent or motivation, protected groups may still hold the employer liable under Title VII.[129] If a staffing agency discriminates against the unemployed and this identified practice has a disparate impact on minority applicants, then unless the staffing firm could demonstrate that employment was a necessary criterion for the position sought, the complaining parties would be able to state a cause of action.[130] This is important because disparate impact carves out a duty to refrain from unintentional discrimination, alluding to a negligence-like standard of liability under Title VII, which could help frame a proper duty for staffing firms and client companies.[131]

The recent reports describing an overrepresentation of certain protected groups in unemployment figures encourage the EEOC to vigorously enforce Title VII in cases where facially neutral practices adversely impact protected groups.[132] Therefore, even in jurisdictions where unemployment discrimination remains legal, the increased coverage and examination by the EEOC and several news sources will likely increase discrimination claims by affected workers and applicants against staffing firms and clients.[133] This could lead client companies to become more concerned about their liability for engaging staffing firms who use these methods.

C. Client Companies Remain Uninformed About Their Liability for Discrimination by Staffing Firms

The inconsistencies and hazy standards that stretch from federal and state statutes across the common law, which subsequently find a home in the EEOC's administrative guidelines, serve as guide posts for companies

---

129. *See* Tobin M. Nelson, Note, *Word-of-Mouth Recruiting: Why Small Businesses Using This Efficient Practice Should Survive Disparate Impact Challenges Under Title VII*, 68 U. PITT. L. REV. 449, 453 (2006) (explaining that disparate impact claims do not require any evidence of an employer's discriminatory intent or motivation).

130. *See id.* (describing that a plaintiff's prima facie case of disparate impact shifts the burden to the employer to demonstrate that the challenged practice is job-related and consistent with business necessity).

131. *See* Deborah M. Weiss, *A Grudging Defense of Wal-Mart v. Dukes*, 24 YALE J.L. & FEMINISM 119, 132 (2012) (arguing that the disparate impact doctrine already contains certain negligence-like themes).

132. *See, e.g.*, Craig Johnson, *EEOC Guidance Complicates Background Check Process*, STAFFING INDUSTRY ANALYSTS (Apr. 10, 2013), http://www.staffingindustry.com/Research-Publications/Publications/CWS-3.0/April-2013/April-10-2013/EEOC-Guidance-Complicates-Background-Check-Process (reporting that Pepsi's criminal background check policy disproportionately excluded black applicants from permanent employment, according to the EEOC).

133. *See* Karni, *supra* note 123 (estimating that newly passed unemployment legislation will give millions of rejected applicants "a potential new weapon to wield against any company who chooses not to hire them").

who seek to educate themselves and their staff on hiring policies.[134] These standards, however, are insufficient to provide client companies with the necessary framework to assess what duties they owe to prospective employees.[135]

As a result, companies are left to speculate and provide settlements to escape legal action without firm knowledge of their duties under the law.[136] The EEOC statements, the courts' interpretations of the ADA and Title VII, and the recent settlement agreement between BP and the EEOC carve out a duty for companies that includes accountability for facilitating discrimination through acts or omissions, regardless of their authority to place or reject an applicant.[137] The statutory language does not, however, clearly warrant the inference of a duty for non-employers. Client companies can reasonably assume that their knowledge about receiving a non-diverse applicant pool due to a staffing firm's discriminatory practice may expose them to litigation if they maintain a contractual relationship with the staffing firm.[138] Nonetheless, the outcome of such litigation remains hazy.[139] In light of recent legislation banning unemployment discrimination, clients will likely face the same issues of liability that arise in traditional employment discrimination litigation when maintaining a

---

134. *See, e.g.*, Ingersoll, *supra* note 26, (referencing the EEOC Guidelines and providing updates on EEOC standards).

135. *Cf.* Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1360–62 (2009) (pointing out that a large and unanimous body of case law and administrative guidance holds employers liable for third-party harassment, and that Title VII is capable of covering such cases, despite the common belief that an employer's duty to cover an employee's limitations—regardless of the origin of discrimination—is instead covered by the ADA).

136. *See* Jennifer Cerven, *Employers Should Use Care to Avoid Discrimination When Using Temporary Staffing Agencies*, LEXOLOGY (Jul. 8, 2013), http://www.lexology.com/library/detail.aspx?g=c4f8975b-1e13-4933-9eda-4c126b0623b8 (advising that an employer may be held liable if the actions of a temporary staffing agency resulted in discrimination against an applicant).

137. *See id.* (discussing a settlement following allegations by a female applicant that the defendant's temporary staffing firm discriminated against an applicant).

138. *See* 42 U.S.C. § 12112(b)(2) (2012) (allowing for liability in cases where employers participate in contractual relationships or arrangements that have the effect of discriminating against a disabled worker). *But see id.* (implying that a client company qualifies as an employer if it uses a temporary staffing agency to select applicants, even though it has not yet seemed to exercise control or supervisory authority over the applicant).

139. *Cf.* O'Gorman, *supra* note 2, at 441–42 (indicating that it remains unclear what legal standards provide the basis for the EEOC's position on related issues of liability for staffing firms and clients).

relationship with employment agencies that refuse to hire or consider unemployed applicants.[140]

1. *Risk of Increased Discrimination Litigation Amplifies the Need for Clarification and Consistency*

While it may seem unlikely – without any prior indication by a client – that a staffing agency would preemptively discriminate against the workers it sends to the client company, sources have indicated that staffing firms are generally well aware of the preferences that its clients have when hiring new workers.[141] It is therefore reasonable to assume that staffing firms carry such notions with them, even where no specific discriminatory request has been made.[142] Additionally, the use of code words and other illusive ways a client may convey a certain preference can result in a claim against the staffing firm while the client escapes liability.[143] Thus, the current body of law fails to provide consistent remedies for common forms of employment discrimination.

2. *Lack of Uniformity and Awareness Leads to Speculation and Preemptive Payouts*

Client companies are ultimately left to speculate as to their responsibilities in cases where staffing firms discriminate due to the uncertainty about governing legal standards.[144] As the BP settlement demonstrates, client companies agree to settle in response to discrimination allegations against their contractors with the EEOC, even if it was the staffing agency that made discriminatory hiring decisions.[145] The settlement agreement between the EEOC and BP included a provision that

---

140. *See* Karni, *supra* note 123 (emphasizing that unemployment legislation serves as a potential new weapon for millions of applicants against companies who chose not to hire them).

141. *See* Bassett, *supra* note 29 (reporting that an anonymous recruiter knows that when a company says "we want somebody with small hands" for an administrative position, it means they want an attractive woman).

142. *See, e.g.*, EEOC v. Olsten Staffing Servs. Corp., 657 F. Supp. 2d 1029, 1031 (W.D. Wis. 2009) (illustrating how a specialist at a staffing agency can pre-select in a discriminatory way based on her own assumptions about the client's preference).

143. *See* Nelson, *supra* note 129, at 452 (explaining how mouth recruitment in effect enlists existing employees to help screen new applicants conscientiously, which could lead to the inference that the screener would be the one to the discriminatory act, rather than the employer).

144. *See generally* Baker & Daniels, *When is an Employee not an Employee?*, 8.1 IND. EMP. L. LETTER 3 (1998) (applying a confused theory of liability, referring on one hand to an employer who may be powerless to stop the discrimination, but nonetheless sharing in control); *see also* Sriram, *supra* note 120 (indicating that client companies are unsure but are encouraged to err on the side of caution).

145. Mendez, *supra* note 13.

BP would provide training to its administrators who plan to hire contractors.[146] This supports an inference that the EEOC holds BP responsible for inadequate training of its administrators, allowing for the discriminatory practices by its contractors to continue.[147] It is unclear what the required training for BP administrators will be, and whether it will include taking reasonable steps to uncover discriminatory hiring practices and taking appropriate action.

It is clear, however, that companies, when entering into agreements in an effort to avoid litigation and bad publicity, may rely heavily on the EEOC's interpretations of liability that lack firm support in the law.[148] As a result, in this case, the EEOC may have seized an opportunity to declare an assumed liability on part of BP, even though BP merely sought to avoid further bad publicity following the oil spill, and it is not clear that the matter would have survived in court.[149] This suggests that the EEOC may in practice enforce a legal standard for client companies based primarily on the client's good faith effort to avoid litigation, rather than on legal principles and duties embedded in the statute.

III. CLIENT LIABILITY SHOULD BE UNIFORMLY ADDRESSED IN CASES OF INDEPENDENT DISCRIMINATION BY STAFFING FIRMS

In light of the economic downturn, workers and the unemployed have become increasingly aware of discriminatory hiring practices, leading to a rise in claims against former or prospective employers.[150] Furthermore,

---

146. *See* EEOC & BP Press Release, *supra* note 42.

147. *See id.* (reporting that the settlement agreement included contractual safeguards requiring contractors to abide by EEO laws and to offer training to BP administrators who engage contractors).

148. *See* Taylor Selcke, *Pepsi to pay $3.1 million in MN discrimination case*, THE BUS. JOURNALS (Jan. 11, 2012), http://www.bizjournals.com/twincities/news/2012/01/11/pepsi-settles-mn-discrimination-case.html?page=all (entering into one of the largest settlement agreements in Minneapolis after allegations of improper use of background checks during hiring, even though courts have not yet ruled favorably for the EEOC on the matter).

149. *See generally* Mendez, *supra* note 13 (reporting that resolving the matter outside of the court system reflects the EEOC's view that contractors are required to comply with federal employment laws, that the employer is responsible for EEO compliance by the staffing agency, and that an organization cannot claim unawareness about a staffing agency's violation of these laws as a defense).

150. *Cf.* Fulbright & Jaworski L.L.P., *Fulbright & Jaworski 2010 Litigation Trends Survey: Companies Expect More Litigation, Regulation; Continue Emphasis on Managing Legal Cost In Struggling Economy*, BUS. WIRE (Oct. 10, 2010, 9:00 AM), http://www.businesswire.com/news/home/20101013005343/en/Fulbright-Jaworski-2010-Litigation-Trends-Survey-Companies (predicting that, as a result of a lagging economy, corporate counsel expected legal disputes to increase, indicating that economic hardship could at least in part fuel litigation).

client companies in jurisdictions that have adopted anti-unemployment discrimination legislation will likely encounter similar claims by unemployed applicants who experienced discrimination by a staffing agency, similar to claims brought under the ADA or Title VII.[151] Meanwhile, these client companies will likely continue to settle claims to avoid costly and lengthy litigation for conventional discrimination by contractors or agencies without knowing how far their liability actually extends.[152]

If the ADA statute implies a pre-existing duty for non-employers to refrain from participating in relationships with employment agencies that have the effect of subjecting individuals to all types of discrimination, other anti-discrimination statutes should reflect this. More specifically, if the duty does not just apply to disability discrimination, such a duty should also be incorporated into Title VII, rather than leaving employers to fill in the gaps based on statements issued by the EEOC and other anti-discrimination statutes.[153] If duties were incorporated into the statute, employers would be clear on potential sources of liability and courts would be more consistent in applying the statute to employment discrimination cases.

Furthermore, to ensure greater consistency, statutory amendments should clarify the duties and principles for client companies who use staffing firms, rather than addressing the issues through the common law and EEOC interpretations.[154] The common law has filled in the gaps in the wake of increasingly complex issues of employer-employee relationships.[155] However, the case-by-case treatment has resulted in some confusion about the duties assigned to staffing firms and clients regarding both current and prospective employees.[156] This confusion arises because courts differ in providing justifications for assigning employer liability.

---

151. *Cf.* Karni, *supra* note 123 (expecting the legislation banning unemployment discrimination to be a new source of litigation).

152. *See* FED. R. CIV. P. 68 advisory committee's note (encouraging settlements and avoidance of protracted litigation); Bree Bernwanger, *How Settlement is Hurting Us All*, LIFE OF THE LAW (Sept. 21, 2013), http://www.lifeofthelaw.org/how-settlement-culture-is-hurting-us-all/ (discussing a recent case in which the National Football League sought to avoid potentially embarrassing litigation by reaching a tentative settlement in response to concussion-related allegations from former players and issuing a carefully-worded press release).

153. *See* Bernwanger, *supra* note 152 (arguing that even the most fairly bargained settlements come at the expense of failing to set legal precedent).

154. *Cf.* DAU-SCHMIDT, COVINGTON & FINKIN, *supra* note 75, at 45, 50 (providing the possibility of a statutorily-focused analysis by the legislature); Rubinstein, *supra* note 15, at 606.

155. *See* Pirruccello, *supra* note 10, at 222–23; Rubinstein, *supra* note 15, at 653.

156. *Cf.* Zatz, *supra* note 135 (making the argument that addressing employer

In addition to the unconsolidated areas of employment discrimination concerning staffing agencies, quasi-discriminatory practices that result in disparate impact for minority applicants, such as unemployment discrimination, are receiving increasing attention.[157] Experts recommend that the EEOC provide guidance on unemployment discrimination, which provides additional urgency to consolidate principles of employer liability because such new guidance will likely increase litigation against staffing firms who tend to use these methods.[158]

The prospect of increased litigation coupled with the current lack of clarity in the law about client company liability calls for statutory clarification. If Congress includes a provision which specifies the principle or legal theory that supports one clear standard of liability, this would likely result in more consistency in the courts.[159] Furthermore, companies can incorporate these principles into their employment manuals and newsletters, and combat discrimination through preventative measures rather than in the courts or settlement agreements.[160]

A clear principle justifying the issues of non-employer liability has become particularly important because employment relationships have become increasingly complex.[161] In the wake of a dramatic change in the workforce,[162] it is particularly important for businesses that use staffing

---

responsibility apart from a causal analysis using two different theories can establish employer responsibility, but merely does so in different ways).

157. *See* Press Release, Equal Emp't Opportunity Comm'n, *Out of Work? Out of Luck* (Feb. 16, 2011) [hereinafter EEOC Press Release], *available at* http://www.eeoc.gov/eeoc/newsroom/release/6-29-12.cfm (reporting on the EEOC's investigation of the impact of unemployment discrimination on protected groups).

158. *Cf.* Hans A. von Spakousky, *The Dangerous Impact of Barring Criminal Background Checks: Congress Needs to Overrule the EEOC's New Employment "Guidelines"*, THE HERITAGE FOUNDATION 1–2 (May 31, 2012), http://thf_media.s3.amazonaws.com/2012/pdf/lm81.pdf (comparing the EEOC issued Guidance to the decision of an Indiana court that pointed to a duty for landowners to protect their business invitees from foreseeable criminal attacks, resulting in a huge increase in lawsuits filed under the theory of negligent hiring).

159. *Cf.* Rogers, *supra* note 78, at 49 (arguing that a duty-based regime would lead more companies to invest in monitoring and deterrence efforts).

160. *See id.* at 39 (mentioning that scholars have therefore often endorsed duty-based regimes allowing mitigation of damages for good-faith preventative measures); *see, e.g.*, Cerven, *supra* note 136 (illustrating that the company preferred a settlement over continuing to litigate a gender discrimination case that arose from the actions taken by the company's temporary staffing agency).

161. *Cf. Your Legal Obligation to Temporary Agency Workers*, *supra* note 1 (emphasizing that clients must know of their obligations when utilizing staffing agencies).

162. *See* Rogers, *supra* note 78, at 17 (stating that even leading global firms are now subcontracting and outsourcing extensively, handling only essential functions in-house, and have cut back on long-term employment relationships).

firms to hire workers that know of the obligations and risks that arise from this relationship.[163] However, articulating these risks only by providing possible scenarios fails to define the purpose of assigning such liability.[164] If client liability for staffing firm discrimination, as provided by the ADA, rests on a duty for businesses that know or should know of a staffing firm's discrimination to prevent discrimination that arises from a contractual relationship with such a firm, Congress should affirm that this duty applies.[165]

Such a duty would definitively open up a liability to which the EEOC has thus far only alluded: a liability for non-employers who facilitate or fail to prevent discrimination when engaging staffing firms to hire their workers.[166] Articulating the broader principles for finding liability in unconventional employer-employee relationships will ensure more consistency in judicial interpretations, cause less confusion among employers who utilize staffing firms, and encourage preventative measures throughout the hiring process in place of costly litigation.

CONCLUSION

Because the principles underlying EEOC Guidelines, ADA duties, and common law interpretations are not firmly rooted in Title VII's plain meaning, companies are uncertain as to how far their liability extends in cases involving discrimination against protected groups and groups that are protected by state laws. To adapt the statute to the modern workforce and to ensure greater consistency and transparency of the legal standards governing litigation in this area, Congress should amend Title VII and address the duties staffing companies and their clients have to employees and non-employees.

---

163. *See* Baker & Daniels, *supra* note 144 (warning that many clients of staffing firms make expensive mistakes by remaining uninformed about EEO obligations).

164. *Cf.* O'Gorman, *supra* note 2, at 437 (eluding to a duty-based approach by describing co-worker harassment liability, and illustrating that prompt remedial action can deter future wrongdoing by sending the message that the employer does not tolerate harassment, and that this can be considered a limitation on liability that promotes the statutes' purposes).

165. *Cf. id.* (arguing that it is problematic that the EEOC does not disclose the basis for its conclusion).

166. *Cf.* Rubinstein, *supra* note 15, at 657–58 (concluding that third-party liability has articulated an employer-like duty on those who assume an important responsibility that effects the terms and conditions of workers).

* * *

NOTE

THE NSA'S PRISM PROGRAM AND THE NEW EU PRIVACY REGULATION: WHY U.S. COMPANIES WITH A PRESENCE IN THE EU COULD BE IN TROUBLE

JUHI TARIQ*

Recent revelations about a clandestine data surveillance program operated by the NSA, Planning Tool for Resource Integration, Synchronization, and Management ("PRISM"), and a stringent proposed European Union ("EU") data protection regulation, will place U.S. companies with a business presence in EU member states in a problematic juxtaposition. The EU Proposed General Data Protection Regulation stipulates that a company can be fined up to two percent of its global revenue for misuse of users' data and requires the consent of data subjects prior to access. U.S. company participation in the PRISM program, which conducts clandestine data-mining on a widespread scale, would directly violate several stipulations of the Proposed Regulation. U.S. companies with a business presence in the EU, caught in this juxtaposition, can push for governmental transparency to attenuate the economic repercussions, either through lobbying efforts or support for a security arrangement or treaty between the U.S. and EU.

"Consequently, since we are dealing with a situation in which the one who must tell the truth, whose function is to tell the truth, the one whom one consults to tell the truth, is the one who cannot tell the truth, since

---

* I want to give many thanks to the members of the American University Business Law Review for all of their hard work editing my piece, especially to my Note and Comment Editor Heba Tellawi for all of her time and effort during the writing process. I would also like to express heartfelt gratitude to my supportive parents who have earnestly provided encouragement throughout every step of this process. Finally, I would like to thank the legal department at Towers Watson for their support, particularly Paul Meyer for his invaluable expertise without which this note would not be possible.

the truth would be a confession concerning himself, how will the truth make its way, how will truth-telling be established and at the same time establish the possibility of a political structure within which one will be able to tell the truth in parrēsia? Well, it has to be through men."[1]

INTRODUCTION

On June 6, 2013, Edward Snowden, a former U.S. government contractor, publicly divulged a clandestine electronic surveillance program operated by the United States' National Security Agency ("NSA") called the "Planning Tool for Resource Integration, Synchronization, and Management" ("PRISM").[2] The documents detailed the program and identified several technology companies, such as Facebook, YouTube, Google, and Microsoft that participate in PRISM and allow the government

1. MICHEL FOUCAULT, THE GOVERNMENT OF SELF AND OTHERS: LECTURES AT THE COLLÈGE DE FRANCE, 1982–1983 89 (Arnold I. I. Davidson ed., Graham Burchell trans., 2011).

2. *See* Timothy B. Lee, *Here's Everything We Know about PRISM to Date*, WASH. POST (June 12, 2013, 3:43 PM), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/06/12/heres-everything-we-know-about-prism-to-date/ (demonstrating the lack of information the public has had of the intricacies of PRISM).

to gain access to user information.[3] U.S.-based companies operating in the European Union ("EU"), caught in the balance between security and privacy, could be liable for violating the stringent EU Proposed General Data Protection Regulation ("Proposed Regulation") if they continue to comply with the U.S. government's PRISM program.[4] A solution lies in the form of either political pressure by U.S. companies for U.S. government transparency, an adequate security arrangement, or a U.S.–EU treaty that would protect U.S. companies operating in the EU.

I. THE PROPOSED REGULATION

The EU Proposed Regulation, widely regarded as one of the most complex regulations considered by the EU, aims to both harmonize practices across a diverse region and to modernize the existing 1995 Data Protection Directive.[5] The Proposed Regulation marks an important policy shift from directives to regulations[6] because the latter establishes enforceable standards, becomes part of a national legal system, overrides contrary national laws, and has legal effect independent of national law.[7] The key changes include a "right to be forgotten,"[8] a consent requirement,[9] a single set of EU data protection rules across the EU,[10] a single national data protection authority ("DPA"),[11] jurisdictional reach outside of EU-established companies,[12] and overall increased responsibility and

3. *See* Glenn Greenwald & Ewen MacAskill, *NSA Prism Program Taps in to User Data of Apple, Google and Others*, THE GUARDIAN (June 6, 2013), http://www.guardian.co.uk/world/2013/jun/06/us-tech-giants-nsa-data.

4. Because the data is transmitted electronically from a company's servers to the U.S. government without judicial scrutiny of FISA information requests, and the U.S. government does not need "probable cause" to request information on a non-U.S. citizen, companies would be violating key provisions of the EU Proposed Regulation that stipulate certain requirements for the processing of personal data.

5. *See generally* Craig Timberg, *U.S. Firms, Officials Resisting Europe's Push for Stronger Digital Privacy Rules*, WASH. POST (Jan. 24, 2013), http://articles.washingtonpost.com/2013-01-24/business/36525323_1_privacy-advocates-data-protection-commissions-data-bill.

6. Directives must be enacted by EU member states to become enforceable, whereas regulations issued by the European Commission do not require individual member state enactment and have immediate force of law within the EU.

7. *See* Paul M. Schwartz, Note, *The EU-U.S. Privacy Collision: A Turn to Institutions and Procedures* 126 HARV. L. REV. 1966, 1992–93 (2013) (arguing modifications to the Proposed Regulation that would ease EU-U.S. collaboration on data protection matters).

8. *See id.* at 1994.

9. *See id.*

10. *See id.* at 1997–98.

11. *See id.* at 1999–2001.

12. *See id.*

accountability for companies processing personal data.[13] Articles 16 and 216 of the Treaty on the Functioning of the European Union permit the EU to implement rules that regulate the processing of personal data by EU institutions, bodies, offices, agencies, and member states when "the activities fall within the scope of EU law."[14] On March 2013, the European Commission's Legal Affairs Committee formally approved main aspects of the Proposed Regulation, demonstrating the strong likelihood that it will be adopted.[15]

II. THE PRISM PROBLEM

Governed by Section 702 of the U.S. Foreign Intelligence Surveillance Act ("FISA"),[16] the PRISM Program facilitates data collection directly from the servers of large technology companies such as Microsoft, Yahoo, Google, and Facebook.[17] A 41-slide PowerPoint presentation used to train intelligence operatives was leaked to several news sources and confirms the possibility that communications made entirely within the U.S. could be collected without warrants.[18] Prior to the PRISM revelation, a top-secret court order compelling Verizon to turn over telephone records of millions of U.S. customers was leaked to news sources.[19] A distinguishing factor of PRISM collection is that it can include the content of communications and not just metadata, unlike the Verizon court order.[20] Companies have

---

13. *See id.* at 2002.

14. *See* Consolidated Version of the Treaty on the Functioning of the European Union of 30 March 2010, arts. 16, 216, 2010 O.J. (C 83/47) 9, *available at* http://europa.eu/pol/pdf/qc3209190enc_002.pdf.

15. *See* Press Release, European Comm'n, EU Data Protection: European Parliament's Legal Affairs Committee Backs Uniform Data Protection Rules (Mar. 19, 2013), *available at* http://europa.eu/rapid/press-release_MEMO-13-233_en.htm. *But see* Cedric Burton, Christopher Kuner, & Anna Pateraki, *The Proposed EU Data Protection Regulation One Year Later: The Albrecht Report*, BLOOMBERG BNA 2 (Jan. 21, 2013), *available at* http://www.wsgr.com/publications/PDFSearch/proposed-EU-0113.pdf (discussing agreement among EU member states for the goals of the Proposed Regulation but further noting that cumbersome legislative and negotiation processes in the EU may postpone development, setting forth the Albrecht Report as an example of suggested modifications that may delay final adoption).

16. 50 U.S.C. § 1881(a) (2012).

17. *See* Lee, *supra* note 2 (demonstrating the lack of information the public has had of the intricacies of PRISM).

18. *See Verizon Forced to Hand Over Telephone Data—Full Court Ruling*, THE GUARDIAN (June 5, 2013, 7:04 PM), http://www.theguardian.com/world/interactive/2013/jun/06/verizon-telephone-data-court-order; *see also* Glenn Greenwald & Ewen MacAskill, *NSA Prism Program Taps in to User Data of Apple, Google and Others*, THE GUARDIAN (June 6, 2013), http://www.guardian.co.uk/world/2013/jun/06/us-tech-giants-nsa-data.

19. *See* Lee, *supra* note 2.

20. *See* Greenwald & MacAskill, *supra* note 18.

denied involvement, claiming that data is shared only after company lawyers have reviewed FISA requests.[21] The U.S. government used the Patriot Act[22] to justify obtaining records of every phone call on Verizon's network, demonstrating its willingness to adopt broad legal interpretations for its requests.[23]

A. Key Aspects of the Proposed Regulation that are Incompatible with U.S. Government Surveillance

The following provisions requiring a transparent processing of data would conflict with the broad access PRISM grants the U.S. government to the servers of the U.S. companies involved. Article 5 of the Proposed Regulation requires that the processing of personal data be "adequate, relevant, and limited to the minimum necessary in relation to the purposes for which they are processed."[24] Additionally, a temporal limitation on data processing manifests itself in the newfound "right to be forgotten."[25] The Proposed Regulation also gives the data subject the right to ascertain the "means of the processing of personal data, ask for the erasure of personal data relating to them, and abstention from further dissemination of such data" when certain conditions are met.[26] Under this provision, EU citizens would be able to ask that their data be deleted if they no longer want the data to be processed.[27] In an effort to encourage respect for individual privacy, the Proposed Regulation increases the size of monetary

---

21. *See* Lee, *supra* note 2 (noting that section 702 allows the NSA to obtain private communications of U.S. citizens as part of a request that officially targets a foreigner, and orders can range from inquiries about specific people to a broad sweep for intelligence, including logs of certain search terms). *See generally* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2011) (codified at 18 U.S.C. 1 (2012)).

22. *See generally* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001.

23. Lee, *supra* note 2.

24. *See Commission Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation)*, art. 5(c), COM (2012) 11 final (Jan. 25, 2012).

25. *Id.* art. 17(1)(a)–(d).

26. *Id.* (including the following conditions: the data is no longer necessary in relation to the purposes for which they were collected or otherwise processed, consent for the processing has been withdrawn, the authorized storage period has expired and, the concerned individual has objected to the processing of the information).

27. *Id.* (noting further that there must be no legitimate reasons for keeping the data).

sanctions for violations of these standards, permitting fines amounting to two percent of a company's global revenue.[28]

III. U.S. COMPANIES WILL UNDERMINE THE EU PROPOSED REGULATION THROUGH COMPLIANCE WITH THE PRISM PROGRAM

U.S. companies are accused of not only failing to adhere to the principles of EU data protection laws despite continuing to receive personal data from the EU, but also aiding the mass surveillance of EU citizens by granting the U.S. government access to their servers.[29] The widespread acknowledgement of the diminished capability these companies have to protect the data of EU citizens demonstrates the strong likelihood that continued compliance with the PRISM program jeopardizes the very purpose of the Proposed Regulation. U.S. companies operating in the EU are likely to be held in breach of EU law, and without more action, will face negative economic repercussions due to a loss of transatlantic trust.[30] Moreover, provisions that would punish breaching companies with hefty fines have been deemed a "necessity" and "irreversible" by the European Parliament, indicating that the heightened emphasis on stringent EU data protection reform is unlikely to abate.[31]

A. The EU Response to the Revelation of the PRISM Program

The European Commission voiced concern about PRISM as early as June 11th, 2013, a week after the PRISM documents were leaked.[32] The

---

28. *Id.* art. 79(2) (reiterating that the sanctions are meant to be "effective, proportionate, and dissuasive" and that a multifactor test to calculate administrative fines takes into account the nature, gravity, duration, and the intentional or negligent character of the breach; the degree of responsibility of the natural or legal person; the technical and organizational measures and procedures implemented; and the degree of cooperation with the supervisory authority).

29. *See* Claude Moraes, *The U.S. NSA Surveillance Programme, Surveillance Bodies in Various Member States and their Impact on EU Citizens Fundamental Rights and on Transatlantic Cooperation in Justice and Home Affairs* 11 (Comm. on Civil Liberties, Justice and Home Affairs, Eur. Parl., Draft Report 2013/2188(INI), 2014) [hereinafter *Draft Report*], *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML%2BCOMPARL%2BPE-526.085%2B02%2BDOC%2BPDF%2BV0//EN (pointing to the Federal Trade Commission's acknowledgement that the Safe-Harbor Agreement protecting U.S. companies needs to be reviewed).

30. *See id.* at 12, 24.

31. Allison Grande, *EU Parliament Backs Privacy Reform, Bashes NSA Spying*, LAW 360 (Mar. 12, 2014, 9:28 PM), http://www.law360.com/articles/517796/eu-parliament-backs-privacy-reform-bashes-nsa-spying-.

32. *See European Commission: European Union Position on PRISM,* YOUTUBE (June 11, 2013), http://www.youtube.com/watch?v=YMaSkMLVEgw; *see also* Andreas Geiger, *EU Will Ramp Up Data Protection in Wake of Snowden*, THE HILL (Aug. 14, 2013, 7:00 PM), http://thehill.com/blogs/congress-blog/foreign-

statement highlighted differences between U.S. and EU approaches to data protection, specifically that the U.S. only grants U.S. citizens privacy protections in the U.S. while EU citizens are not guaranteed constitutional safeguards or sufficient oversight of data collection, ensuring that it is within legal bounds.[33] The authoritative statement from the European Commission emphasized that the PRISM program must be limited to individual cases and based on concrete suspicions if it is for law enforcement purposes.[34] Specifically, data protection reform would need to address territorial scope to ensure non-EU companies would be subject to EU data protection law while operating in Europe.[35]

B. PRISM's Negative Economic Repercussions So Far and Further Predictions

The U.S. cloud-computing industry is likely to lose substantial amounts of revenue and become less competitive in the global cloud-computing market.[36] Companies storing electronic data with U.S. cloud-computing firms will suffer because of a loss of EU trust in the U.S. government, and may also lose revenue as a result of their use of U.S. cloud-computing firms.[37] Moreover, some European cloud providers have noted an increase in business after the PRISM scandal.[38] Switzerland's Artmotion

---

policy/317061-eu-will-ramp-up-data-protection-in-wake-of-snowden-.

33. *See European Commission: European Union Position on PRISM*, *supra* note 32.

34. *See id.*

35. *See id* (addressing the need for a territorial scope provision within EU data protection law that would require U.S. companies to apply EU law to any processing of EU citizens' personal data when operating in the EU).

36. *See* Juha Saarinen, *US Cloud-Computing Industry Faces US$35 Billion PRISM Fallout*, IT NEWS (Aug. 6, 2013, 8:00 AM), http://www.itnews.com.au/News/352419,us-cloud-computing-industry-faces-us35-billion-prism-fallout.aspx?goback=.gde_1243587_member_263605405. *But see* Charles Babcock, *NSA's Prism Could Cost Cloud Companies $45 Billion*, INFO. WEEK CLOUD (Aug. 14, 2013, 7:47 PM), http://www.informationweek.com/cloud-computing/infrastructure/nsas-prism-could-cost-us-cloud-companies/240159980 (making a bleaker prediction of a $45 billion loss, because the Information Technology and Information Institute's (ITIF) projected loss does not consider firms already planning on leaving U.S. providers regardless of the NSA surveillance program, and cloud users in the U.S. that may circumvent the U.S. cloud providing firms and may offshore some of their business to meet international demands).

37. *See* Babcock, *supra* note 36 (describing ITIF's findings that of the 207 non-U.S. respondents surveyed, 56% claimed that they were less likely to use U.S.-based cloud providers because of PRISM, and 10% even cancelled projects with U.S. based cloud providers).

38. *See Germans Look for Encrypted Emails in Wake of NSA Revelations*, UPI (Aug. 29, 2013, 11:12 AM), http://www.upi.com/Top_News/World-News/2013/08/29/Germans-look-for-encrypted-emails-in-wake-of-NSA-revelations/UPI-3402137

experienced a significant revenue increase of 45% the same month the details of the PRISM program were leaked by Snowden.[39] Although some conclude that data stored in the U.S. is still more protected than data stored in European countries, more information about PRISM is necessary to fully understand its economic repercussions for cloud-computing.[40]

If FISA requests are incompatible with the Proposed Regulation and companies are obliged to comply with them, U.S. companies will be subject to legal and financial penalties under EU law.[41] For example, Skype was under investigation by the DPA in Luxembourg for alleged contribution to the PRISM program.[42] Because the NSA only gains direct access to data after FISA orders are reviewed by a company's lawyers, and because the requests are not search warrants under the Fourth Amendment and do not require probable cause for authorization, it is likely that the EU will ask for more FISA transparency.[43] Furthermore, the NSA has defended FISA requests by emphasizing that the orders only target non-US citizens, making it more likely that the EU will be concerned about the

---

7789143/ (detailing the statements of the Managing director of Cloudsafe, indicating that the volume of traffic and customers of his company has increased by 20 percent); *see also* Elizabeth Dwoskin & Frances Robinson, *NSA Internet Spying Sparks Race to Create Offshore Havens for Data Privacy,* WALL ST. J. (Sept. 27, 2013, 12:15 PM), http://online.wsj.com/article/SB10001424052702303983904579096082938662594.html (reporting that several European countries are attempting to be the 'Cayman Islands' of privacy and on European leaders that are calling for a domestic 'Euro Cloud,' also noting that some have called such goals impractical due to the inherent widespread nature of the internet).

39. *See* Elizabeth MacDonald, *NSA Leaks Slam Cloud Computing Industry,* FOX BUS. (Aug. 9, 2013), http://www.foxbusiness.com/government/2013/08/09/nsa-leaks-slam-cloud-computing-industry/.

40. *See* Lee, *supra* note 2 (failing to note whether FISA requests, which have not been reviewed by the Supreme Court, can be considered legitimate court orders, given the unequal bargaining power between U.S. companies and the U.S. government).

41. *See* John Nugent, *Silicone Valley Could Become Collateral Damage in NSA Leaks*, FORBES (July 31, 2013, 12:42 PM), http://www.forbes.com/sites/riskmap/2013/07/31/silicon-valley-could-become-collateral-damage-in-nsa-leaks.

42. Ryan Gallahger, *Skype under Investigation in Luxembourg over Link to NSA*, THE GUARDIAN (Oct. 11, 2013, 6:30 AM), http://www.theguardian.com/technology/2013/oct/11/skype-ten-microsoft-nsa (detailing the revelations of Skype's involvement with the NSA which allegedly dates back to February 2011, and how Microsoft, which owns Skype, has been embroiled in legal disputes with the U.S. government to reveal the number of U.S. information requests it receives).

43. *See* Lee, *supra* note 2; *see also* Ian Brown, *Will NSA Revelations Lead to the Balkanisation of the Internet?*, THE GUARDIAN (Nov. 2, 2013, 2:05 PM), http://www.theguardian.com/world/2013/nov/01/nsa-revelations-balkanisation-internet (describing reports that EU member states are calling for greater U.N. participation in internet privacy after the PRISM revelations; Germany specifically has called for the U.N. Human Rights Council to create an optional protocol in the International Covenant on Civil and Political Rights regarding internet privacy).

flexibility afforded to U.S. government surveillance when it does not target a U.S. citizen.[44]

Data privacy compliance costs for U.S. companies with a presence in Europe will increase because of the expected rigorous enforcement of the Proposed Regulation.[45] Article 26 of the Proposed Regulation would build on Article 17(2) of Directive 95/46/EC[46] and increase the obligations of the data processors chosen by data controllers. Overall, increasing concerns about cloud security will push EU policy makers to prioritize security guarantees over open markets, further complicating EU compliance for U.S. companies.[47] The Proposed Regulation's stringent set of data privacy rules are not cost-effective for businesses that will, as a result, grapple with an increased and unfavorable compliance load.[48]

Jan-Phillip Albrecht, the European Parliament's chief negotiator on the Proposed Regulation, has indicated a desire to ensure that the data of EU citizens stays on servers in the EU and transfers of data are limited to certain places.[49] In September of 2013, the European Parliament began conducting an inquiry into the NSA's PRISM program.[50] The Civil Liberties, Justice and Home Affairs ("LIBE") Committee released its report evaluating U.S. surveillance on January 8th, 2014, strongly condemning the

---

44. *See* Behnam Dayanim, *Julie Brill, the Safe Harbor and the NSA: Unintended Consequences?*, LEXOLOGY, (August 26, 2013), http://www.lexology.com/library/detail.aspx?g=936b4385-d7c3-46a4-b46b-4e4061254767 (concluding that the Safe Harbor is likely to be upheld due to the economic stronghold between the U.S. and EU, but that U.S. dominance in the communications sector will suffer instead).

45. *See* Frances Robinson, *U.S. Surveillance Programs Spur Efforts to Tighten Data Protection Rules*, WALL ST. J. (Aug. 8, 2013, 5:23 PM), http://online.wsj.com/article/SB10001424127887324522504579000702411343532.html.

46. *E.g.*, Council Directive 95/46, art. 17(2), 1995 O.J. (L 281) 31-50 (EC), *available at* http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Directive&an_doc=1995&nu_doc=46 ("The Member States shall provide that the controller must, where processing is carried out on his behalf, choose a processor providing sufficient guarantees in respect of the technical security measures and organizational measures governing the processing to be carried out, and must ensure compliance with those measures.").

47. *See* David Meyer, *European PRISM Anger Gains Momentum with Fresh Cloud Warnings and Data Threats*, GIGAOM (July 4, 2013, 7:18 AM), http://gigaom.com/2013/07/04/european-prism-anger-gains-momentum-with-fresh-cloud-warnings-and-data-threats/.

48. *See* Kevin J. O'Brien, *Firms Brace for New European Data Privacy Law*, N.Y. TIMES (May 13, 2013), http://www.nytimes.com/2013/05/14/technology/firms-brace-for-new-european-data-privacy-law.html?_r=0.

49. *See id.*

50. Allison Grande, *EU Parliament Members Bash NSA Spying, Push Cos. to Talk*, LAW 360 (Sept. 6, 2013, 5:06 PM), http://www.law360.com.proxy.wcl.american.edu/articles/470674/eu-parliament-members-bash-nsa-spying-push-cos-to-talk.

PRISM program which, according to its findings, amounts to "political and economic espionage."[51]

C. *Recent Cases Demonstrate a Desire in EU Member States to Enforce Data Protection Standards against U.S. Companies*

Five recent cases in France and Germany involving Twitter, Facebook, and Apple demonstrate that EU member states enforce their individual data protection laws against U.S.-based companies. The Civil Court of Paris held that Twitter is not subject to French data protection law but remains obligated under the French Code of Civil Procedure to reveal the identity of its users in France posting racist tweets.[52] Because Twitter has not cooperated with the order, the Union of French Jewish Students that filed the claim is taking further legal action.[53]

Germany's state data protection regulators also issued an opinion arguing that Facebook's policy requiring users to register accounts under their real name violates Germany's data protection law, which allows anonymous use of social media.[54] However, since the relevant data is processed in Ireland, which does not have an identical data protection law, a German administrative court ruled that Facebook is not subject to German law.[55] Facebook was less successful in a 2012 case involving a regional German court that ruled that its "Friend Finder" method of soliciting new users via other users' email addresses, and its practice of forcing users to give access to their online material is illegal.[56] Facebook

---

51. *See Draft Report*, *supra* note 29, at 18, 20, 21 (detailing the investigation procedure and recommendations of the Committee which include: suspension of the Safe-Harbor agreement, redress for EU citizens in case of data transfers, and EU IT independence from the U.S.).

52. Cecile Martin, *Navigating the Patchwork: When is European Data Privacy Law Applicable to US Companies?*, PROSKAUER PRIVACY L. BLOG (Apr. 17, 2013), http://privacylaw.proskauer.com/2013/04/articles/online-privacy/navigating-the-patchwork-when-is-european-data-privacy-law-applicable-to-us-companies/ ("Article 145 of the French Code of Civil Procedure does not include . . . geographical limitations and allows parties . . . to seek evidence before a case has been formally instituted.").

53. *See Verwaltungsgericht gibt Eilanträgen von Facebook statt*, LANDESREGIERUNG SCHLESWIG-HOLSTEIN (Feb. 15, 2013), http://www.schleswig-holstein.de/OVG/DE/Service/Presse/Pressemitteilungen/15022013VG_facebook_anonym.html; *see also* Martin, *supra* note 47.

54. *See* Martin, *supra* note 52.

55. German data protection regulators have subsequently filed an appeal.

56. *See* Pressemitteilung [Press Release], Landgericht Berlin [Berlin District Court], Facebook unterliegt der Verbraucherzentrale in Wettbewerbsprozess [Facebook is Subject to the Consumer in the Competitive Process] (Mar. 6, 2012), *available at* http://www.berlin.de/sen/justiz/gerichte/kg/presse/archiv/20120306.1545.367067.html; Shayndi Race & Friedrich Gieger, *Facebook Loses Privacy Case in German Court Over Email*, WALL ST. J. (Mar. 6, 2012, 6:44 PM), http://online.wsj.com/news

was already amending its Friend Finder policy in 2011 after the Irish Data Protection Commission reported that Facebook needed to amend its policies regarding user privacy.[57] Further regulating data privacy, in May 2013, a court in Berlin voided eight contract clauses regarding data usage in Apple's contracts with German customers.[58] Apple requested "global consent" for the data of its customers, but the court denied the request, reasoning that Apple should be more transparent regarding details of how users' data are utilized.[59]

The controversy in Europe regarding Google's "Street View" helps distinguish the approaches among EU member states to data protection.[60] Member states use a national or regional DPA, which may either directly fine violators of data protection standards or submit a report to a prosecutor to bring the matter to a court of law.[61] Germany's regional Hamburg-based DPA previously enforced its data privacy standards against Google.[62] Between 2008 and 2010, Google Street View camera cars allegedly recorded and stored information, including emails, photos, and private passwords illegally from unsecure Wi-Fi networks.[63] Although the data was collected accidentally and criminal prosecution against Google was subsequently deemed unnecessary, German data regulators fined Google

---

/articles/SB10001424052970203458604577265764008504218.article/SB10001424052970203458604577265764008504218.html.

57. *See* Race & Gieger, *supra* note 56.

58. *See* Landgericht Berlin [Berlin District Court] Apr. 30, 2013 (Ger.), *available at* http://www.vzbv.de/cps/rde/xbcr/vzbv/Urteil_des_LG_Berlin_zur_Datenschutzrichtlinie_von_Apple.pdf; *see also* Karen H. Bromberg, *Berlin Court Rules that Apple's Privacy Policy Violates German Data Protection Laws*, COHEN & GRESSER LLP 1 (May 2013), *available at* http://www.cohengresser.com/assets/publications/Berlin_Court_Rules_that_Apples_Privacy_Policy_Violates_German_Data_Protection_Laws.pdf.

59. *See* Bromberg, *supra* note 58, at 1.

60. The existing privacy directive provides a framework that requires EU member states to enact legislation to implement the directive into its country's laws and has been described as setting the floor for EU member state legislation and, in some cases, may also set the ceiling, leading to great divergence among member states' interpretation and application of the directive.

61. *See* Andrea Ward & Paul Van den Bulck, *Differing Approaches to Data Protection/Privacy Enforcement and Fines, Through the Lens of Google Street View*, IAPP: INT'L ASS'N OF PRIVACY PROFESSIONALS (June 1, 2013), https://www.privacyassociation.org/publications/2013_06_01_differing_approaches_to_data_protection_privacy_enforcement_and.

62. It is worth noting that Article 35 of the Proposed Regulation, which requires the appointment of a data protection officer in companies employing at least 250 persons, is based on German data protection law.

63. *See* Ian Steadman, *Google Fined by German Regulator over Street View Privacy Breach*, WIRED (Apr. 22, 2013), http://www.wired.co.uk/news/archive/2013-04/22/google-germany-fine.

€145,000, the maximum under German law, even pushing to increase the fine.[64] Given that the personal information was deleted and never used by Google employees, and Google still incurred a fine, the actions of the German data regulators indicates the perception of unauthorized usage and storage of data in Germany.[65]

The decision by the DPA in Hamburg regarding Google Street View's unauthorized data storage was preceded by similar actions in the member states of France and Belgium. While France's national DPA did not find Google's actions to be in "bad faith," which would have resulted in a publication of the judicial decision in the media, it did fine Google €100,000, the highest fine given by the French DPA at the time.[66] In Belgium, Google avoided going to a criminal court and agreed to a €150,000 settlement with the Belgian national DPA.[67] Possibly because of political pressure resulting from EU member states taking action, the UK Information Commissioner's Office eventually required Google to agree to both improving its methods of collecting and protecting data and allowing the Office to audit Google.[68] Meanwhile, Google still faced penalties in the U.S.: 39 U.S. states' attorneys general required Google to agree to an "Assurance of Voluntary Compliance."[69]

IV. WHAT CAN COMPANIES DO TO ALLEVIATE LIABILITY?

Companies involved in the PRISM program should take immediate steps to demonstrate a desire to protect the data of EU citizens despite continued allegations of mass surveillance. Support for a security arrangement that guarantees information will be proportionate and necessary for law enforcement purposes, or a push for U.S. governmental transparency with

---

64. *See* Press Release, Hamburg Comm'r for Data Prot. and Freedom of Info., Fine Imposed Upon Google (Apr. 22, 2013), *available at* http://www.datenschutz-hamburg.de/fileadmin/user_upload/documents/PressRelease_2013-04-22_Google-Wifi-Scanning.pdf; *see also* Ian Steadman, *Google Fined by German Regulator over Street View Privacy Breach*, WIRED (Apr. 22, 2013), http://www.wired.co.uk/news/archive/2013-04/22/google-germany-fine.

65. *See* Ian Steadman, *supra* note 63.

66. *See generally* Letter from Christopher Graham, U.K. Info. Comm'r, to Peter Fleischer, Global Privacy Counsel, Google Fr. (Nov. 3, 2010), *available at* http://www.ico.org.uk/~/media/documents/library/Corporate/Notices/google_inc_gsv_letter_03112010.ashx; *see also* Ward & Bulck, *supra* note 61.

67. *See* Ward & Bulck, *supra* note 61.

68. *See id.*

69. *See Rhode Island v. Google, Assurance of Voluntary Compliance*, *available at* http://www.riag.ri.gov/documents/AVC-RIAG-Google.pdf; *see also* Ward & Bulck, *supra* note 61 (noting the requirement and agreement for companies to pay $7 million in fines to the states that had been subjected to the unauthorized data storage and to, *inter alia*, train its workforce about privacy protection).

FISA requests would help diminish the negative perception that U.S. companies are facing due to PRISM involvement.

A. U.S. Companies Should Lobby for Favorable Data Protection Legislation in Both the U.S. and EU to Decrease Their Potential Liability and Increased Compliance Loads Under the Proposed Regulation

U.S. companies can continue to lobby for legislation both in the EU and U.S., as many have done in the past, to eschew potential compliance costs under the Proposed Regulation. Google and Facebook successfully spent $5.03 million and $650,000 respectively to lobby the U.S. Congress in the first quarter of 2012, much of which went to legislation on data privacy issues.[70] Recently, President Obama announced support for key reforms to the FISA program, including a more adversarial court system in which privacy advocates would be able to voice their concerns in the FISA court.[71] Another proposal is to limit the scope of Section 215 of the Patriot Act, because it allows the U.S. government to maintain a national system of telephone metadata and has been criticized for a lack of judicial oversight.[72] The technology industry has been actively lobbying the White House for the adoption of policies that promote more transparency, privacy, and international free flow of information.[73] Specifically, the companies call for support for a bill sponsored by Senators Patrick Leahy and Mike Lee that would bring the Electronic Communications Privacy Act of 1986[74] up to date since it has had no significant revisions since its implementation.[75] Companies could also support a bill authored by U.S. Representative Rush D. Holt, who is sponsoring the "Surveillance State Repeal Act."[76] This Act would, *inter alia*, repeal the Patriot Act, significantly revise the FISA

---

70. *See* Leena Rao, *Google, Facebook Spent Record Amounts on D.C. Lobbying in Q1 2012*, TECH CRUNCH (Apr. 22, 2012), http://techcrunch.com/2012/04/22/google-facebook-spent-record-amounts-on-d-c-lobbying-in-q1-2012/.

71. *See* Daniel Klaidman, *Obama Says He'll Reform the NSA. Happy Now?*, THE DAILY BEAST (Aug. 9, 2013), http://www.thedailybeast.com/articles/2013/08/09/obama-says-he-ll-reform-the-nsa-happy-now.html.

72. *See id*; *see also* 50 U.S.C. § 1881(a) (2012).

73. *See* Andrew Ramonas, *Tech Groups Want Transparency in NSA Surveillance*, CORP. COUNS. (Aug. 21, 2013, 1:19 PM), http://www.corpcounsel.com/id=1202616426454/Tech-Groups-Want-Transparency-in-NSA-Surveillance?slreturn=20140210171452.

74. Electronic Communications Privacy Act, S. 607, 113th Cong. (2013).

75. *See id.*

76. *See* Scott Shane & Nicole Perlroth, *Legislation Seeks to Bar N.S.A Tactic in Encryption*, N.Y. TIMES (Sept. 6, 2013), http://www.nytimes.com/2013/09/07/us/politics/legislation-seeks-to-bar-nsa-tactic-in-encryption.html?pagewanted=all.

Amendments Act of 2008, and prohibit the federal government from requiring manufacturers of electronic devices or software to build a mechanism allowing the U.S. Government to bypass the encryption or privacy technology of such device or software.[77]

U.S. companies also put their efforts in lobbying the EU to reform its data protection laws to create a marketplace more favorable for U.S companies. Amazon's suggestions to reduce the responsibilities of non-EU cloud providers were incorporated into proposed amendments to the Proposed Regulation.[78] The European Parliament, however, recently voted to reintroduce a clause that was previously dropped due to U.S. lobbying efforts.[79] That clause would regulate transfer of data from Europe to the U.S., and the addition of the clause suggests that the EU may not be receptive to making concessions for its data protection laws.[80]

One notable attempt by a U.S. company to push for greater government transparency is Yahoo's order requesting the U.S. government to justify the legality of the PRISM program. After the documents leaked confirming the existence of PRISM, Yahoo's lawyers asked the FISA Court to declassify and publish decisions detailing the constitutionality of the PRISM program.[81] The court, siding with Yahoo, ordered the Obama Administration to declassify and publish a court decision justifying the PRISM program,[82] Companies including Microsoft, Google and Facebook, have also asked for U.S. government permission to publicly identify the number of national security related requests that each company receives, in an effort to contribute to the ongoing public debate surrounding user privacy.[83] An 85-page ruling recently released by the Obama

77. *See* Surveillance State Repeal Act, H.R. 2818, 113th Cong. (2013).

78. *See Forum Shopping for IT Companies*, http://www.europe-v-facebook.org/IMCO_pub_en_ON.pdf (last visited Sept. 4, 2013) (noting that suggestions include limiting the Proposed Regulation to setting uniform data protection aspects across member states, preserving future opportunities for collaborative policy-making, and limiting the power of the Commission).

79. Ian Traynor, *MEPs Tighten up Draft Data Privacy Rules After Snowden Revelations*, THE GUARDIAN (Oct. 22, 2013, 7:04 AM), http://www.theguardian.com /world/2013/oct/22/meps-data-privacy-rules-snowden-nsa-gchq.

80. *See id.*

81. *See* Spencer Ackerman, *Justice Department to Declassify Key Yahoo Surveillance Orders*, THE GUARDIAN (July 30, 2013, 10:34 AM), http://www.theguardian.com/world/2013/jul/30/justice-department-declassify-yahoo-surveillance-orders.

82. *See id.* (arguing that the Justice Department's review may declassify particular documents).

83. *See* Charles Arthur & Dominic Rushe, *NSA Scandal: Microsoft and Twitter Join Calls to Disclose Data Requests*, THE GUARDIAN (June 12, 2013, 5:50 PM), http://www.theguardian.com/world/2013/jun/12/microsoft-twitter-rivals-nsa-requests.

Administration could shed light on the nature of future decisions that may be released.[84] The opinion, authored by Judge John D. Bates, a former chief judge on the FISA court, focuses on a NSA program that searches the content of Internet communications of U.S. citizens without a warrant if it targets noncitizens outside of the U.S. [85] Bates expressed skepticism as to the scope of the government's surveillance, deeming the government's behavior a "substantial misrepresentation."[86] Bates additionally noted that the NSA had consistently violated a 2009 ruling regarding the standard of queries of metadata, and had done so consistently, causing the NSA to have never "functioned effectively."[87] Skeptics of the release note that the opinion is demonstrative of the limits of the FISA court.[88]

There is also evidence that the Department of Commerce is lobbying the EU as the latter plans to reform data privacy. The Department of Commerce has been explicitly concerned about the requirement the EU may impose on companies to report to the appropriate DPAs within 24 hours of data breaches, as well as the right to be forgotten.[89] The rule is problematic because many firms lack the appropriate technologies to recognize such data breaches in a timely manner.[90] Firms may also report inaccurate cases of breaches to the authorities because of fear of missing the 24-hour notification requirement and consequently being subject to a fine.[91]

---

84. *See Judge's Opinion on N.S.A. Program*, N.Y. TIMES (Aug. 21, 2013), http://www.nytimes.com/interactive/2013/08/22/us/22nsa-opinion-document.html (providing scanned images of the court documents).

85. *See id.*

86. *See id.*

87. *See id.*

88. *See* Charlie Savage & Scott Shane, *Secret Court Rebuked N.S.A. on Surveillance*, N.Y. TIMES (Aug. 21, 2013), http://www.nytimes.com/2013/08/22/us/2011-ruling-found-an-nsa-program-unconstitutional.html?pagewanted=all&_r=0 (expressing skepticism because the scrutiny is limited to what the NSA actually reveals to the court which has no independent ability to investigate the representations).

89. *See* Shelton Abramson, *TechWeek Europe: US Department of Commerce Involved in Lobbying to Change EU Data Protection Regulation*, INSIDE PRIVACY (Oct. 15, 2012), http://www.insideprivacy.com/united-states/techweek-europe-us-department-of-commerce-involved-in-lobbying-to-change-eu-data-protection-regulati/ (providing a broad overview of the Department of Commerce's lobbying efforts, and also noting that its specific proposals are unclear).

90. *See EU Businesses Prep for Regulations Requiring 24-Hour Data Breach Notification*, INFOSECURITY (Aug. 22, 2013), http://www.infosecurity-magazine.com/view/34102/eu-businesses-prep-for-regulations-requiring-24hour-data-breach-notification/ (discussing that processing network data inefficiently can lead to breaches).

91. *See id.* (noting that problems may arise for firms where data is inefficiently processed).

B. Companies Should Support an Agreement Modeled After the Passenger Names Record Agreement

Another possible solution would be to implement an agreement similar to the U.S. and EU agreement regarding the use and transfer of passenger name records to the Department of Homeland Security ("DHS").[92] The agreement requires European airlines to give the DHS data about trans-Atlantic travelers prior to departure. The information includes each passenger's name, address, reservation dates, number of bags, payment details, seat number, travel itinerary and, in some instances, racial or ethnic origin, religion, and health.[93] The agreement came to fruition as a result of both parties wanting to combat transnational crime and terrorism, while maintaining transatlantic travel and tourism, which accounts for $72.2 billion in trade each year.[94] Stipulations provide for the depersonalization of such information, which is the "masking out" of key information including names, contact information, general remarks, and collected Advance Passenger Information System data, after six months, after which the remaining data will be kept on an active database for five years and in a dormant database for another ten years.[95] Any data in the dormant database may be "repersonalised" for only a period of five years.[96] Data under the Passenger Name Records Agreement ("PNR") can be "repersonalised" only if it is "in connection with law enforcement operations and then only in connection with an identifiable case, threat or risk."[97]

Similarities can be drawn between the current PRISM problem and the enactment of the PNR. The Obama administration has defended the PRISM program, reiterating that it has led to the prevention of numerous terrorist attacks.[98] As an example, should the NSA wish to gain access to

---

92. *See generally* Agreement Between the United States of American and the European Union on the Use and Transfer of Passenger Name Records to the United States Department of Homeland Security, U.S.-EU, Nov. 8, 2012, 2012 O.J. (L 215) [hereinafter PNR agreement], *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:215:0005:0014:EN:PDF.

93. *See id.* Annex, at 10. (detailing the types of PNR data).

94. *See* Claire Davenport, *EU Agrees to Share Airline Passenger Data with U.S*, REUTERS (Apr. 19, 2012), http://www.reuters.com/article/2012/04/19/oukwd-uk-eu-usa-flights-idAFBRE83I0TG20120419.

95. *See* PNR agreement, *supra* note 92, at 4.

96. *See id.* at 4.

97. *See id.* at 4 (explaining that after the dormant period, the data must be "rendered fully anonymised" and cannot be "repersonalised" under any circumstance, and any individual, regardless of citizenship, can access his or her Passenger Name Record under the Freedom of Information Act).

98. *See* Sumi Somaskanda, *NSA Spying Rankles Privacy-Loving Germans*, THE ATLANTIC (July 25, 2013, 10:00 AM), http://www.theatlantic.com/international/archive/2013/07/nsa-spying-rankles-privacy-loving-germans/278090/.

the information of a phone call, it could request such information immediately, under the condition that the information be depersonalized after the call has transpired, while the remaining information on the call will be put on a dormant database after five years (only to be "repersonalised" in limited cases pertaining to global or national security) and fully deleted in another ten years.[99] Furthermore, the agreement would prove abundantly helpful for U.S. companies, like the PNR proved for European Airlines, because it would mitigate the difficult choice between complying with U.S. or EU law.[100] Finally, if U.S. companies publicly advocate for such an agreement, it would help demonstrate a commitment to abide by EU data protection standards, which could in turn afford them some leverage in lobbying efforts to amend the Proposed Regulation.

Unfortunately, the prospects for a PNR-like agreement may be waning given recent political developments. On July 4th, 2013, the European Parliament, in light of the U.S. surveillance programs, overwhelmingly adopted a resolution (483 supporting, 98 opposing, 65 abstaining) in support for ending, should the European Commission find it necessary, any sort of data sharing, including the PNR agreement.[101] Many of the critics of the PNR agreement believe that the agreement has not been useful in preventing terrorism.[102] For the EU's Home Affairs Commissioner Cecilia Malmström, a new PNR agreement would better secure EU citizens' right to privacy than the prior PNR agreement in 2007.[103] Specific improvements suggested to the 2007 PNR agreement include the clarification that EU citizens have a right to access their PNR information in a U.S. database, to ascertain how their information is processed, and to correct any inaccurate data.[104] The new PNR agreement would prohibit

---

99. *See* PNR agreement, *supra* note 92, art. 8, at 4.

100. *See id.* (suggesting that the plausibility of such an agreement in the data privacy context will depend on whether it limits the scope of U.S. government surveillance to specific and concrete claims, requires explicit EU approval before any surveillance is conducted, and requires disclosure of surveillance details).

101. *See* Zack Whittaker, *EU Votes to Support Suspending U.S. Data Sharing Agreements, Including Passenger Flight Data*, ZDNET (July 4, 2013), http://www.zdnet.com/eu-votes-to-support-suspending-u-s-data-sharing-agreements-including-passenger-flight-data-7000017677/ (reporting on a European Parliament resolution supporting the termination of the U.S.-EU PNR agreement, a significant shift from an April 2013 approval of an updated PNR agreement).

102. *See id.*

103. *See European Parliament Approves the Controversial EU/US PNR agreement*, INFOSECURITY (Apr. 20, 2013), http://www.infosecurity-magazine.com/view/25284/european-parliament-approves-the-controversial-euus-pnr-agreement/ (providing general background information on the PNR agreements and the rationale behind its passage).

104. *See id.*

government profiling for decisions that will affect passengers, which is especially significant since a vote earlier in the year in the LIBE rejected the modified PNR agreement, amidst concerns that the modified agreement does not respect the fundamental rights of Europeans.[105]

CONCLUSION

Under the Proposed Regulation, U.S. companies could face sanctions reaching two percent of their global revenue for failure to comply, and even a cursory look at the Proposed Regulation indicates that participation in the PRISM program would clearly violate its stipulations. U.S. companies likely to receive FISA requests need to continue demanding transparency from the U.S. government and demonstrating a desire to ensure compliance with EU data protection standards. Such demands can materialize in the form of lobbying efforts for favorable data protection legislation; a push for maintaining the existing Safe Harbor Agreement, which has protected U.S. companies in the past;[106] or support for an agreement similar to the PNR between the U.S. and EU. Continuing to monitor the EU reaction to PRISM and subsequent U.S.-EU talks will help U.S. companies gauge what necessary efforts they must make to avoid violating EU data protection laws. Given the EU response thus far, it is likely that an intensive review of the Safe Harbor Agreement and amendments to the Proposed Regulation will address limitations on the extent to which U.S. government surveillance is permissible.[107] The U.S. government response

---

105. *See Latest PNR agreement for the EU Thrown out by European Parliament*, SHOEMAN.EU (Mar. 24, 2013), http://www.shoeman.eu/latest-pnr-agreement-for-the-eu-thrown-out-by-european-parliament/ (explaining the reasons behind a lack of support for the latest draft of the PNR agreement: a failure to adhere to the terms of the agreement, and extension of the scope of U.S. data mining). *But see Moraes: EP Is Looking Not Only into NSA Allegations but Also at EU's Own Backyard*, EUR. PARLIAMENT (June 11, 2013), http://www.europarl.europa.eu/news/en/news-room/content/20131106STO23912/html/Moraes-EP-looks-not-only-into-NSA-allegations-but-also-at-EU's-own-backyard (describing an interview with Moraes, head of the LIBE committee, who contends that although commercial trust has been damaged, he expects that there will be an agreement reached between the U.S. and EU).

106. Although a renewal of the Safe Harbor Agreement would be ideal, revelations regarding PRISM have jeopardized the existing agreement. EU Commissioner Vivian Reding has repeatedly emphasized that the Safe Harbor "may not be so safe after all" even though it has been an adequate method for U.S. companies to self-certify conformance to EU data protection standards because the U.S. lacks a data protection law. Additionally, various MEPs have called for review of the Safe Harbor and characterize it as a loophole for U.S. companies, making it unlikely that it will be maintained in the same fashion in the future.

107. *Moraes: EP Is Looking Not Only into NSA Allegations but Also at EU's Own Backyard*, *supra* note 105 (describing a report released in 2014 by the European Parliament which attaches a new legal remedy for EU citizens when their data is used,

to the situation has included suggestions that the EU is not immune from conducting clandestine surveillance in their own region.[108] Companies should, at the same time, take precautions to ensure maximum data protection security, possibly in the form of internal policies or employee training to demonstrate that data protection, at least internally, is a high priority.

---

also increasing potential liability for U.S. companies).

108. Karen Kornbluh, *Could the Revelations Regarding the NSA PRISM Program Hinder U.S. Relations Around the World?*, COUNCIL ON FOREIGN REL. (Oct. 7, 2013), http://www.cfr.org/defense-and-security/could-revelations-regarding-nsa-prism-program-hinder-us-relations-around-world/p31566 (concluding that trade discussions between the EU and U.S. still seem to be going forward but implications remain for U.S.–EU data management, also referring to a comment made by President Obama regarding a seemingly hypocritical criticism in the EU because the EU allegedly engages in surveillance tactics similar to PRISM).

* * *

AMERICAN UNIVERSITY BUSINESS LAW REVIEW

SUBSCRIPTION ORDER FORM

Subscription Options (check one):

_____ $30.00 Alumni Subscription

_____ $45.00 Domestic Subscription

_____ $50.00 Foreign Subscription

_____ $20.00 Single-Issue Only

_____ **Please check here if you would like to enclose a check for the amount selected.**

Please complete the form below and send it with your check made payable to *American University Business Law Review* at:

American University Business Law Review
Washington College of Law
4801 Massachusetts Ave., N.W.
Suite 615A
Washington, D.C. 20016
Attn: Journal Coordinator

_____ **Please check here if you would like to receive an invoice for the amount selected.**

Please complete the form below and email it to Sharon Wolfe, the Journal Coordinator, at shuie@wcl.american.edu.

Please begin my subscription with Volume _____ Single-Issue only _____

Name:

_____

Institution:

_____

Address:

_____

City, State, Zip:

_____

*Subscriptions are automatically renewed unless cancellation is requested.

* * *

* * *