Chapter 12. Multinational Aspects of SEC Investigations

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Multinational Aspects of SEC Investigations

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The SEC's enforcement program has increasingly involved multinational actors. These include foreign companies and their agents who are suspected of having engaged in securities law violations within the United States, along with domestic companies and their officers who are believed to have engaged in securities law violations outside the United States, but which nonetheless implicate U.S. jurisdiction. The SEC's investigation of these matters often involves complex issues of jurisdiction, privilege, privacy, and reliance on corporate actors, international securities regulators, and law enforcement agencies to conduct fact-gathering beyond the territorial reach of the United States.

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This chapter provides an overview of multinational investigations and answers questions regarding the ways in which the SEC is able to obtain documents and to investigate across borders. In addition, it addresses some of the major pitfalls individuals and businesses face when responding to an SEC enforcement inquiry or performing an internal investigation that spans the globe.

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Methods of Conducting Multinational Investigations

Q 12.1 What is the SEC's subpoena power in multinational investigations, at home and abroad?

By virtue of section 21(a) of the Exchange Act,[1] the SEC has broad and general power to "make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate" the federal securities laws. In domestic investigations, the SEC is given broad subpoena powers to command the "attendance of witnesses and the production of any such records . . . from any place in the United States or any State at any designated place of hearing."[2]

Outside the United States, however, the SEC's direct ability to compel production of evidence by subpoena is severely limited. The SEC does not have power to compel the production of documents or other evidence from persons who do not reside in and have no

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jurisdictional ties to the United States.[3] In addition, unlike the DOJ, the SEC is unable to issue *Bank of Nova Scotia* or PATRIOT Act subpoenas to obtain information or testimony of individuals located outside of the United States.[4]

Q 12.2 How do regulatory agencies typically gather evidence when conducting multinational investigations?

There are a number of tools available to the SEC when seeking to gather evidence abroad. Today, the most popular such vehicle is a Memorandum of Understanding (MOU). An MOU is a mutually beneficial agreement entered by two or more jurisdictions establishing a commitment to assist each other in the collection of evidence in jurisdictions beyond each party's regulatory reach. An MOU sets forth the terms pursuant to which evidence may be shared between its signatories, thereby facilitating multinational cooperation with compliance and enforcement efforts. Because MOUs are typically executed between regulatory agencies (as opposed to diplomatic entities), they can often be used to gather evidence for civil, as well as criminal, investigations. The SEC is party to over thirty MOUs with its foreign counterparts.[5]

In 2002, the International Organization of Securities Commissions (IOSCO) issued the "IOSCO MOU," which established guidelines for multinational information gathering.[6] The IOSCO MOU allows its signatories to (1) obtain materials relating to transactions in both brokerage and bank accounts, as well as information pertaining to the corresponding account holders and beneficial owners; (2) compel testimony and/or official statements from individuals; and (3) share regulatory agency files across borders.[7] The IOSCO MOU further provides that the parties that collect such information may use it directly in both administrative and civil venues, as well as provide it to criminal authorities, such as the DOJ.[8] The IOSCO MOU has over 125 signatories, making it a significant and useful document in facilitating and expediting international investigations.[9]

In May 2019, the SEC and CFTC became signatories to the "Enhanced MOU," which expanded the powers available under the IOSCO MOU.[10] The Enhanced MOU allows signatories to obtain and share materials

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related to audits, to compel the physical attendance of individuals for testimony, and to freeze assets where possible, as well as to share internet service provider and telephone records.[11] As of the end of 2024, there were twenty-six signatories to the Enhanced MOU.[12]

Notably, the terms of MOUs often restrict a regulatory agency from withholding requested information on grounds of bank secrecy or other privacy laws. As such, caution should be exercised when relying on an MOU, as its terms may reflect or incorporate the policy concerns and regulatory schemes of a foreign jurisdiction—such as data privacy laws—that contradict or are incompatible with U.S. law and practices.

Q 12.3 What other types of international agreements assist regulatory agencies in gathering evidence in multinational investigations?

Mutual Legal Assistance Treaties (MLATs) are also commonly used to obtain evidence located in foreign countries. MLATs permit the Department of Justice (DOJ) and its foreign counterparts to request each other's assistance in gathering evidence in criminal investigations.

Traditionally, MLATs included a dual criminality requirement, which required the conduct under investigation to constitute criminal activity under the laws of both the country requesting assistance and the country providing it.[13] In a recent trend, however, MLATs have been read to permit criminal authorities to obtain and share information obtained pursuant to an MLAT request with other regulatory enforcement authorities—including the SEC—irrespective of whether the "dual criminality" requirement is satisfied, so long as a criminal prosecution or referral is contemplated by the investigation.[14]

In addition to MLATs, the United States is a signatory to the Hague Convention on the Taking of Evidence Abroad (the "Hague Evidence Convention").[15] The Hague Evidence Convention is designed to facilitate cooperation between judicial authorities of different jurisdictions to enable cross-border evidence collection by bypassing traditional consular and diplomatic channels. For securities investigations, the Hague Evidence Convention is likely to play a marginal

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role because (1) it applies only to "civil or commercial matters," not to administrative investigations;[16] and (2) evidence requests must be issued by a court, implying the need for judicial proceedings to have been initiated.[17]

Q 12.4 How can a regulatory agency obtain evidence in the absence of a treaty?

In the absence of an MOU or a treaty, the primary means for obtaining evidence in a foreign country is a letter rogatory, or a formal request by a domestic court to a foreign court, which requests that the foreign court compel a person within its jurisdiction to provide testimony or produce documents.[18] U.S. statutes and case law permit U.S. federal courts to issue letters rogatory.[19]

Once a letter rogatory is issued, it is often transmitted directly by the requesting court to the receiving court.[20] Some governments, however, require that the letter rogatory pass through a diplomatic channel, such as the ministry of foreign affairs of the country where the evidence resides.[21] Other foreign governments permit a letter rogatory to be transmitted by counsel admitted in the foreign court.[22]

Foreign courts are under no obligation to execute letters rogatory,[23] and those that do may place restrictions on the scope of the evidence requested.[24] Furthermore, obtaining discovery pursuant to a letter rogatory will normally involve following the procedures of the foreign court, which may diminish the usefulness of the evidence obtained.[25]

Obtaining evidence through letters rogatory may pose other issues specific to regulators. First, letters rogatory can generally only be used for gathering evidence in the course of litigation and likely will not have much utility in the investigative stage of a case.[26] For example, a letter rogatory may only be issued in connection with a judicial proceeding, and may not be available to assist a regulator where only an agency investigation or internal administrative proceeding is pending.[27] In addition, a letter rogatory generally cannot supersede foreign bank secrecy laws, and bank information is often essential to regulatory investigations.[28] It is also important to consider that the issuance of a letter rogatory is often a time-consuming process that can take up to a year or more to complete.[29]

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Privilege Considerations When Conducting Cross-Border Investigations

Q 12.5 What protection do privileged communications receive in cross-border investigations?

While the concept of attorney-client privilege is embedded in U.S. common law, many civil law jurisdictions across the world do not recognize this privilege. For example, in China, attorney-client communications are within the scope of a lawyer's duty to maintain client information confidentiality, but lawyers could be compelled to disclose information that is required by law or a court order. In South Korea, the law does not recognize the attorney-client privilege, but relies on lawyers' ethical obligations of confidentiality. There may be "testimonial immunity" that may protect attorneys from being compelled to reveal client secrets, but clients cannot invoke this immunity.

The "joint defense" or "common interest" privilege—which "serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel"[30]—may be asserted in cross-border investigations that commonly focus on similarly situated employees or entities. Other common law countries, like the U.K., broadly interpret the common interest privilege, as well as the attorney-client privilege. Countries outside the Anglo-American legal tradition, however, including countries with civil law traditions, often take a narrower view of these ancillary or derivative privilege claims. For example, some civil law jurisdictions within the EU would refuse to extend the privilege to communications between a corporate employee and in-house counsel—a significant issue for corporations that face investigation in those countries.[31]

In light of the varied treatment that attorney-client communications receive globally, attorneys should familiarize themselves with the privilege rules of any relevant foreign jurisdiction. Practitioners should also consult with and, if necessary, retain local lawyers in the foreign jurisdiction to navigate privilege issues safely.

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Q 12.6 When does U.S. privilege law apply to a foreign communication involving an attorney admitted or located in a foreign jurisdiction?

To determine whether to apply U.S. privilege law to a communication with an attorney admitted or located in a foreign jurisdiction, many U.S. federal courts have adopted the "touch base" approach. Under this conflict-of-law "contacts" analysis, a court applies the law of the foreign jurisdiction if the foreign jurisdiction "has the most compelling or predominant interest in whether the communications should remain confidential," unless the court finds the law of the foreign jurisdiction contrary to public policy.[32] As articulated by courts in the Second Circuit, "[t]he jurisdiction with the predominant interest is either the place where the allegedly privileged relationship was entered into or the place in which that relationship was centered at the time the communication was sent."[33] As a rule, "[c]ommunications concerning legal proceedings in the United States or advice regarding United States law are typically governed by United States privilege law, while communications relating to foreign legal proceedings or foreign law are generally governed by foreign privilege law."[34]

Many EU Member States refuse to extend the attorney-client privilege to communications with in-house counsel, a conflict with the law in the United States. Therefore, whether a U.S. court would recognize a privilege claim for communications with foreign in-house counsel depends on the identity of the participants, where the communications occurred, and whether they were directed to the merits of a U.S. legal proceeding.



CASE STUDY: *Claims of Privilege over Communications with Foreign In-House Counsel*

In the *AstraZeneca LP v. Breath Ltd.* case, a court in the District of New Jersey ordered a Swedish company to produce correspondence between the company's in-house attorneys and employees, all of whom worked in Sweden.[35] The court reached this decision

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after it found the communications did not "touch" the United States, because the documents at issue neither involved U.S. proceedings nor communications with U.S. attorneys.[36] The court noted that, under Swedish law, the legal bar does not include in-house counsel; therefore, the communications with in-house counsel in Sweden were not privileged under Swedish law and could not be withheld.[37]

In *Veleron Holding, B.V. v. BNP Paribas SA*, the Southern District of New York was confronted with an argument by the parties that the privilege law of four different countries applied—Russian, Dutch, British, and Canadian.[38] The court found that "the touch base analysis" favored application of Russian or Dutch attorney-privilege law as the communications at issue occurred in those countries.[39] The parties did not dispute that "Russian law does not recognize attorney-client privilege or work product immunity for communications between or work product by 1) in-house counsel; or 2) 'outside' counsel who are not licensed 'advocates' registered with the Russian Ministry of Justice."[40] The Netherlands does not recognize any privilege between a client and an unlicensed lawyer.[41] Because the plaintiff did not provide information establishing that the Russian attorneys were registered with the Ministry of Justice nor any information that the Dutch attorneys were licensed, the court held that the plaintiff had not met its burden of demonstrating that the communications were protected under either nation's privilege law.[42]

A court in the District of Delaware reached a different result in *Renfield Corp. v. E. Remy Martin & Co.*[43] There, it was U.S. employees who sought legal advice from in-house counsel located in France, which, under its law, does not recognize communications with in-house counsel as privileged.[44] Because the employees seeking legal advice were based in the United States, the court found the United States had "the most significant relationship with the communication."[45] Therefore, the court applied U.S. law and refused to compel production of the communications with in-house counsel.[46]

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Q 12.7 Would courts in the EU apply the attorney-client privilege to communications between a U.S. attorney and a client in the EU?

With respect to communications between a U.S. attorney and a client in the EU, the scope of the privilege from the perspective of a court within the EU would depend on the nature of the action. For an action brought in the national court of a Member State or an enforcement action initiated by the authorities of a Member State, the privilege rules of the relevant Member State would apply. On the other hand, if the European Commission initiated the enforcement action, then the privilege law of the EU applies. To understand the distinction, one can think of the EU privilege law as akin to the federal common law on privileges, which applies to federal actions. Compared to courts in the United States, courts in the EU take a narrow view of the attorney-client privilege, and a U.S. attorney who seeks to offer legal advice to a client in the EU must guard against inadvertent disclosure or waiver of the privilege.

The attorney-client privilege under EU law, called the legal professional privilege, has some significant distinctions from U.S. privilege law[47] and stems, in large part, from two key decisions of the European Court of Justice. In the first decision, *AM & S Europe Limited v. Commission of the European Communities*, the court established legal professional privilege under EU law.[48] As defined by the court, the privilege applies to communications that satisfy two elements: (1) the communication must be "made for the purposes . . . of the client's rights of defen[s]e"; and (2) the communication must "emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment."[49] The second element excludes in-house lawyers from the privilege.[50]

In addition to the exclusion for in-house counsel, the court found that the privilege applied only to communications between a client and a "lawyer entitled to practi[c]e his profession in one of the Member States" and would not extend beyond those limits.[51]

In the second key decision, *Akzo Nobel Chemicals Ltd. & Akcros Chemicals Ltd. v. European Commission*, the European Court of Justice affirmed the holding in *AM & S* and confirmed that communications between in-house counsel and their corporate clients fall outside the

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scope of the attorney-client privilege.[52] Specifically, the court found that emails between corporate executives and their in-house counsel would not receive the benefit of the attorney-client privilege.[53] The European Commission had seized the emails during a "dawn raid," which permits the European Commission to enter a business or residential premises to seize documents located on-site and to question the occupants.[54]

In *Akzo Nobel*, the court did not revisit whether the privilege would extend to communications with attorneys not admitted in the EU. Based on the foregoing authority; however, a U.S. attorney should assume that, by virtue of his/her status as a foreign lawyer, an EU court would find that his or her communications with a client in the EU fall outside EU privilege law. This is true even if the U.S. attorney offers the client advice on U.S. law. Therefore, a U.S. attorney should confer with and channel all legal advice through the client's external counsel in the EU.

Q 12.8 Would a U.S. court consider the privilege waived for documents produced in response to a request from the European Commission or from some other foreign enforcement agency?

Under U.S. law, "involuntary or compelled disclosure does not give rise to a waiver" of the attorney-client privilege.[55] Therefore, the question of whether a U.S. court would consider the privilege waived for documents disclosed to the European Commission or to some other foreign enforcement agency depends on whether the court finds the disclosure voluntary or involuntary. This again raises the issue of whether a privilege is even recognized under local law. In the absence of a subpoena or judicially compelled disclosure, it becomes less clear whether a court would find a disclosure to a foreign enforcement agency voluntary or involuntary.[56]

In the EU and many of its Member States, a dawn raid does not require a warrant or any other form of judicial intervention. Because a dawn raid results in the disclosure of potentially privileged documents that was not judicially compelled, a court would likely look at the steps taken to contest the disclosure, as well as the consequences

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