LEGAL REPRESENTATION IN THE INTERNATIONAL SECURITIES MARKET: REPRESENTING A PARTY OR WITNESS IN AN SEC OR SRO PROCEEDING

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I. Introduction

The recent internationalization of securities markets has challenged extant national regulatory structures. Regulations designed to maintain the integrity of national markets are stretched to fit new demanding situations created by international securities transactions. Additionally, the ease with which securities trade around the world can impact national markets. In the wake of several highly publicized insider trading cases involving foreign participants, the application of United States securities laws to the international market is of increasing interest to United States regulators.

Accordingly, private practitioners also have a growing interest in an emerging body of law that may well determine how United States securities laws, and laws of other jurisdictions, will be applied to the international environment. To provide a brief overview of the type of enforcement issues often encountered by a United States practitioner, this discussion will focus on the Securities and Exchange Commission (SEC or Commission), as the principal regulator of the


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United States market. In addition, this discussion will look at enforcement issues raised by American securities exchanges, in particular the New York Stock Exchange (NYSE or Exchange), which, by virtue of its status as a self-regulatory organization (SRO), has an ability to investigate and discipline violations of United States securities laws by certain parties.

II. Overview of SEC and NYSE Investigatory and Enforcement Procedures

A. Broad Scope of the SEC’s Investigative Powers and Complexity of the United States Securities Laws

Particularly with foreign clients, United States practitioners are faced with having to explain the somewhat unique workings of the SEC as well as its ability to investigate securities transactions without necessarily having to disclose the focus and scope of the inquiry. This issue is most likely to arise in the informal investigation process where a formal order is not available to describe or limit the staff’s inquiry.

Another aspect of SEC investigations that often concerns foreign clients is the scope of the staff’s requests for documentation and other information. In jurisdictions where extensive pre-trial discovery is not the rule, a United States practitioner may have to educate the client as to the American system to avoid possibly negative responses that could adversely affect the investigation. If the client is unprepared for the breadth of likely SEC information requests, the practitioner could be placed in the awkward position of having to justify the SEC staff’s request in an effort to mollify the client and avoid needlessly disrupting the investigation.

Foreign clients also may be troubled by the complexity of the legal framework governing United States securities regulation. Concepts such as distinctions between civil and administrative proceedings, availability of private rights of action, express and implied remedies, and criminal referral often require extensive counseling with foreign clients.

1. Scope of SEC Investigative Authority

The SEC enjoys investigative authority that includes the ability to issue investigative subpoenas. By virtue of its broad subpoena power, the SEC can investigate actual or suspected violations. The
breadth of its investigative power is reflected in its expansive statutory grant of authority that enables it to subpoena witnesses from "any place in the United States." United States courts have construed this language in a broad manner, mandating the production of evidence from anywhere in the world—providing that service of process has been properly executed. This far-reaching grant of investigative authority is limited only by constitutional concerns, such as minimum contacts required for personal jurisdiction.

To facilitate service of process, the SEC requires foreign brokers and investment advisers registered with the SEC to appoint the Commission as their agent for service in matters arising under the federal securities laws. This may also be true for specific securities offerings made by foreign issuers, such as those registered under Regulation A. For these offerings, the foreign issuer must designate the SEC as its agent for service of process. This enables the SEC to make effective service of process on foreign parties without leaving the United States.

Non-resident broker-dealers registered in the United States are also within easy reach of the SEC, because such broker-dealers have to maintain their records in the United States according to SEC standards, or agree to provide these records to the SEC on demand.

B. Scope of NYSE Investigatory Authority

1. Information Requests

In its capacity as an SRO, the NYSE derives its authority from, and is subjected to SEC oversight by, the Securities Exchange Act

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3. See infra text accompanying notes 21-25 (discussion of personal jurisdiction).
5. 17 C.F.R. § 230.262(b) (1988).
of 1934. To enforce its statutory obligations and ensure that its members conform with applicable United States securities laws, the NYSE enjoys broad investigatory and disciplinary authority.

Through investigations and subsequent disciplinary proceedings, the NYSE can sanction a variety of offenses including:

i. violations of the Securities Exchange Act of 1934 and rules promulgated thereunder;

ii. violations of agreements with the NYSE;

iii. violations of NYSE Constitution or Rules;

iv. the making of a material misstatement to the NYSE;

v. fraud;

vi. "conduct or proceeding inconsistent with just and equitable principles of trade;"

vii. "acts detrimental to the interest or welfare" of the NYSE;

viii. "making a fictitious bid, offer, or transaction;"

ix. engaging in, or aiding, a scheme of transactions designed to upset market "equilibrium" or bring about "a condition in which prices will not fairly reflect market values;"

x. the making of a misstatement on an application, financial statement, or other submission filed with the NYSE; and

xi. failing to comply with an NYSE request for documents or testimony.8

As part of its investigatory authority, NYSE Hearing Panels can request members of the exchange and certain other persons9 to submit books and records, or appear and testify, as it deems appropriate.10 The scope of this authority is not clarified by NYSE rules; however, it is apparent that the NYSE reads its authority in the broadest possible manner. For example, Rule 477, governing retention of NYSE jurisdiction over terminated members and other persons, lists "books, records, papers, or tangible objects" as within the range of material subject to an NYSE request for information.11

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9. See infra text accompanying notes 26-32 (discussion on limit of NYSE jurisdiction).

10. NYSE DR, supra note 8, at rule 476(a)(11).

11. Id. at rule 477.
This demonstrates that while less formal than the SEC subpoena procedure, NYSE requests for information may be as broad and may carry similar ramifications.\textsuperscript{12}

2. NYSE Disciplinary Procedure

Disciplinary proceedings are initiated by the NYSE Market Surveillance or Enforcement Divisions. Either office may investigate allegations of improper conduct and refer matters to a Hearing Panel for further action. Hearing Panels are drawn from a Hearing Board, which is named by the Chairman of the NYSE Board of Directors. Through diverse membership of the Hearing Board, Hearing Panels are designed to provide the respondent with an approximate jury of peers.\textsuperscript{13} During Hearing Panel proceedings, the Enforcement Division operates as the prosecuting attorney. A respondent has a right to counsel or other representation throughout the hearing process and during any preliminary investigation by the Market Surveillance or Enforcement Divisions.\textsuperscript{14} Prior to being examined by a Hearing Panel, a respondent is also given notice of specific charges brought by the Exchange through a "Charge Memorandum." During the Hearing Panel's consideration of the matter, the respondent may present evidence, offer direct testimony and cross-examine witnesses.\textsuperscript{15}

A majority of the Hearing Panel is required to take disciplinary action. Upon final decision of the Hearing Panel, either the NYSE Enforcement Division or the respondent may appeal the Hearing Panel decision to the NYSE Board of Directors.\textsuperscript{16}

It is notable that NYSE rules do not permit interlocutory appeals on evidentiary or procedural matters from the Hearing Panel to the Board of Directors. Within the Panel, the Hearing Officer, or another

\textsuperscript{12} See infra text accompanying notes 33-38 (discussion on the legal and practical impact of such an investigation). In addition to document requests and taking of testimony at NYSE offices in New York, the NYSE may conduct telephonic interviews with witnesses and parties.

\textsuperscript{13} Members on the Hearing Board are drawn from NYSE members, allied members, and registered and non-registered employees of members and member organizations. Each Hearing Panel has a Hearing Officer who is an officer or employee of the NYSE named by the chairman. N.Y. Stock Exchange Const. art. IX, §§ 2-3, reprinted in NYSE Guide (CCH) § 1402-03 (1988); NYSE DR, supra note 8, at rule 476(b).

\textsuperscript{14} NYSE DR, supra note 8, at rule 476(h).

\textsuperscript{15} Id. at rule 476(d).

\textsuperscript{16} Id. at rule 476(f).
designated Panel member is charged with resolving such issues. It would appear from the language of the NYSE rule, however, that—but for evidentiary and procedural issues—interlocutory appeals on all other issues are available.

After final action of the Hearing Panel, the Board of Directors, by majority vote, may reverse, modify, remand, or sustain the Hearing Panel’s decision. The Board of Director’s determination is then subject to SEC, and eventually, judicial review.

C. International Securities Transactions and United States Subject-Matter Jurisdiction

United States securities statutes begin with the premise that they apply to all securities traded in international and interstate commerce or through United States mails. This assertion of jurisdiction is limited by constitutional considerations of due process.

1. Minimum Contacts and Due Process

a. General Limitation on United States Jurisdiction

Issues of personal jurisdiction concern a federal court’s power to adjudicate rights of a defendant who claims to be outside the reach of the court’s process. The limitations on the court’s power are contained in the due process clause of the fourteenth amendment which limits the authority of state courts to adjudicate rights of out-of-state defendants and the due process clause of the fifth amendment which limits the authority of federal courts to compel defendants to litigate in the United States courts.

17. Id. at rule 476(c). According to the NYSE Enforcement Division, this lack of interlocutory appeal would be maintained even if a respondent asserted an attorney-client or other privilege and, as a consequence, faced failure to cooperate sanctions. In such a case, the privilege issues would be considered on appeal by the Board of Directors. See infra text accompanying notes 126-39 (discussion on SEC review of NYSE disciplinary actions).

18. NYSE DR, supra note 8, at rule 476(f).


As explained by Pennoyer v. Neff,21 International Shoe Co. v. Washington,22 World-Wide Volkswagen Corp. v. Woodson,23 and their progeny, due process is met only if the party at issue has requisite minimum contacts with the jurisdiction.

The requisite minimum contacts can take a variety of forms and may be presented by indirect corporate relationships. For example, in In re Grand Jury Subpoena to Marc Rich & Co., A.G.,24 a district court’s assertion of personal jurisdiction was upheld—over protests of a Swiss commodities trader who argued that the court lacked personal jurisdiction—on the grounds that the subpoena had been properly served on the trader’s officers within the United States and the district court’s personal jurisdiction over Marc Rich & Co., A.G., the Swiss parent, through activities of its wholly owned American subsidiary. In addition, the district court’s subject matter jurisdiction was affirmed on two grounds: (a) the formation and furtherance of the alleged conspiracy to evade United States tax laws necessarily required some acts in the United States, and (b) the acts had an injurious effect on the United States.25

b. Limits on NYSE Jurisdiction

NYSE jurisdiction is limited both by the requisite minimum contacts considerations that constrain the SEC and federal courts, as well as by a more limited statutory grant of jurisdiction. As a security exchange, the NYSE’s authority is restricted, in theory, to that required for proper maintenance of the exchange and compliance with applicable laws. In many respects, the jurisdiction of the NYSE is confined to those certain parties that benefit from access to the exchange or employment with exchange members or their controlling companies. Accordingly, the jurisdiction of the exchange is limited to “members, member organizations, allied members, approved per-

21. 95 U.S. 714 (1877) (constructive service of process held ineffectual in cases of pure in personam jurisdiction).
22. 326 U.S. 310 (1945) (minimal business activities of defendant’s agents in the forum state constituted sufficient presence for in personam jurisdiction).
23. 444 U.S. 286 (1980) (in personam jurisdiction is established where a defendant’s conduct and connection with the forum are such that there is a reasonable expectation of being haled into that forum’s court).
25. Id. at 666-68.
sons, and registered and non-registered employees of members and member organizations . . . .”

The term “allied member” refers to any natural person who is not a member of the NYSE, but controls a member company. This includes general partners, principal executive officers of member corporations, and other controlling employees of a member firm.

The category of “approved person” subsumes entities, other than natural persons, which control a member organization. “Approved person” can also include any person who “engages in a securities or kindred business and is controlled by or under common control with a member or member organization but is not a member or allied member or an employee of a member organization” and has applied for and received “approved person” status from the NYSE.

As these provisions illustrate, NYSE jurisdiction can extend beyond members and their controlling entities, reaching firms under common control with a member or member organization. Issues regarding the reach of these provisions often involve the degree to which the NYSE can compel information from, and discipline, employees of these firms.

For example, the jurisdictional provisions unambiguously reach employees of members or member organizations. Employees of “allied members” or “approved persons,” however, are not included by these provisions. With such employees outside the literal scope of NYSE jurisdictional provisions, the NYSE faces the anomalous situation in which it has authority to request information from, and discipline, “allied members” or “approved persons,” without the authority to take disciplinary actions against these entities’ individual employees.

A hypothetical situation may illustrate the type of issues presented by these jurisdictional provisions. Consider the position of a foreign bank that is an “approved person,” by virtue of its controlling

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26. N.Y. Stock Exchange Const. art. IX, § 1, reprinted in NYSE Guide (CCH) § 1401 (1988); NYSE DR, supra note 8, at rule 476(a).
29. N.Y. Stock Exchange Const. art. IX, § 1, reprinted in NYSE Guide (CCH) § 1401 (1988); NYSE DR, supra note 8, at rule 476(a).
interest in a member firm. Imagine that the bank has facilitated a securities transaction that has sparked an investigation by the Market Surveillance or Enforcement Divisions. As part of this investigation, the NYSE has requested documents from the bank and documents and testimony from individual bank employees. If a bank employee were unable to respond to the information request, could the NYSE assert jurisdiction over the individual and pursue disciplinary sanctions?

As an "approved person," the bank is clearly within the scope of NYSE investigatory and disciplinary authority. It is not evident, however, that NYSE requests for information and disciplinary proceedings could be legitimately directed against individual bank employees. Read literally, one could argue that the NYSE jurisdictional mandate would not reach the individual employee. Nevertheless, the Exchange may claim jurisdiction over the employee and threaten disciplinary action to compel cooperation.

Apart from the legitimacy of its claim of jurisdiction, the mere threat of NYSE sanctions against an individual in the financial services or securities industry is often sufficient to produce compliance. In practical terms, therefore, practitioners may find that the reach of the NYSE may extend beyond its actual authority.

D. The Legal and Practical Impact of Any Investigation on the Ability of a Foreign Person to do Business or Conduct Professional Activities in the United States

Aside from jurisdictional issues, other legal issues and their impact must be considered at the outset of any representation. If the foreign client has substantial business involvement in the United States, the collateral implications of an investigation must be carefully considered and addressed by United States counsel.

1. Disclosure Requirements

Disclosure obligations that arise out of a foreign person being subject to an SEC investigation can have a direct and far-reaching

30. Various considerations may preclude compliance with a request for information. For example, the party may have attorney-client or other privileges protecting the information, or the party may be constrained by foreign law from complying with the request. See infra text accompanying notes 66-79 (discussion of blocking and secrecy laws).


32. See NYSE DR, supra note 8, at rule 476.
impact on that person's business activities in the United States. For example, a foreign individual subject to an SEC investigation who also serves as an officer or director of a publicly-held United States company, may be required to disclose the investigation. In turn, this disclosure could implicate information well beyond that ordinarily disclosed, requiring, for instance, disclosure of the person's involvement with other United States or foreign entities or ventures. Similarly, efforts by the foreign person to raise capital in the United States may be hampered by the disclosure requirements attendant to that person's involvement in an SEC investigation.

As serious as the collateral legal effects of an SEC investigation can be, the practical impact may be even more troublesome. A foreign person often will find that his/her ability to do business in the United States is severely restricted if United States business associates learn that he/she is the subject of an SEC investigation. Even if the SEC's interest in a foreign person is only to obtain information regarding the activities of another party, the "taint" of involvement with an SEC investigation is likely to be far more damaging to non-United States persons than to American residents.

2. NYSE Sanctions

An NYSE investigation may have similar deleterious effects for the client. Subject to SEC discretion, the NYSE has broad discretion to adopt disciplinary rules to enforce its rules and applicable securities laws. Pursuant to this authority, the NYSE has promulgated a list of sanctions that includes: "expulsion; suspension; limitation as to activities, functions, and operations, including the suspension or cancellation of a registration in, or assignment of, one or more stocks; fine; censure; suspension or bar from being associated with any member or member organization or any other fitting sanction."

These penalties are predictably applicable to persons violating securities laws and regulations. As indicated above, however, the NYSE can also apply any of these sanctions against an individual who refuses or fails to comply with a request for documents or testimony.

34. See N.Y. Stock Exchange Const. art. IX, § 1, reprinted in NYSE Guide (CCH) § 1401 (1988).
35. NYSE DR, supra note 8, at rule 476(a)(11).
36. Id.
The ability of the NYSE to bring such "failure to cooperate" actions, raises critical questions for practitioners representing foreign clients who might be constrained by foreign law from complying with an NYSE request for information.37 Were the NYSE to bring a "failure to cooperate" action against such an individual, the person could face the equivalent of "black listing" within the securities industry.38

3. Due Process Considerations and NYSE Disciplinary Proceedings

Such "failure to cooperate" sanctions may raise due process issues, as the individual may well invoke his privilege against self-incrimination under the fifth amendment. Whether based on the possibility of criminal liability in the United States or the effect of blocking and secrecy laws abroad, an assertion of fifth amendment privileges is, nonetheless, fairly certain to provoke a "failure to cooperate" action.39 In practical terms, consideration of fifth amendment issues will be deferred for SEC or judicial review. The most probable scenario would be that the NYSE would take the position that the asserted fifth amendment privilege did not apply and would proceed with its disciplinary hearings on the "failure to cooperate" allegations. The Exchange would most likely sanction the individual if the requested information were not received.40 A stay of the sanction pending final administrative or judicial review may be available,

37. See infra text accompanying notes 66-79 (discussion of foreign blocking and secrecy laws).

38. See NYSE DR, supra note 8, at rule 476(a)(11) (providing for suspension or bar from being associated with any NYSE member or member organization).

39. For a discussion of due process and SRO disciplinary procedures, see First Jersey Sec., Inc. v. Bergen, 605 F.2d 690, 695 (3d Cir. 1979) (referring to comprehensiveness of SRO review procedure); Allan v. SEC, 577 F.2d 388, 392 (7th Cir. 1978) (due process safeguards governing national security exchanges and opportunity for SEC review satisfied due process requirements of fifth amendment).

40. For example, when faced with a respondent's assertion that foreign blocking or secrecy laws prevent cooperation with an NYSE investigation, the Exchange will likely request an opinion as to the applicability of the laws from an attorney in the country in question. The respondent should request an independent assessment of the same laws. As in other litigation, there is always the probability that the opinion letters will serve to cancel each other, in lieu of providing a clear indication of the state of the foreign law. In the final analysis, the NYSE may continue its investigation and bring a failure to cooperate action against the respondent, leaving a final determination as to the applicability of the foreign law to the SEC or a court of appeals. See infra text accompanying notes 123-39 (discussion regarding appellate and interlocutory procedures).
however, stays are not mandatory and the individual may have to bear the sanctions until another forum can decide the issue.\textsuperscript{41}

\textbf{E. Extraterritorial Application of United States Securities Laws}

1. The Conduct Test

The effect of an SEC or NYSE investigation on a foreign client, turns on the applicability of United States law. On their face, the Securities Act of 1933 and the Securities Exchange Act of 1934 seem to provide that these laws may be applied to any international securities transaction having some connection to the United States. For example, section 10 of the Exchange Act provides that it is unlawful for any person "by the use of any means or instrumentality of interstate commerce . . . to use or employ, in connection with the purchase or sale of any security . . . in contravention of such rules" promulgated by the SEC.\textsuperscript{42} Section 3(a)(17) of the Exchange Act defines interstate commerce as including "‘commerce, transportation or communication . . . between any foreign country and any state . . .’."\textsuperscript{43}

Thus, the language of the statute appears to provide that any contact with the United States in connection with a foreign securities transaction arguably brings the transaction within the jurisdiction of the Securities Exchange Act of 1934. Nevertheless, federal courts generally have held that Congress intends the securities acts to apply extraterritorially only when there has been some "‘conduct’ within the United States.\textsuperscript{44}

Under the conduct test, the antifraud provisions of the 1934 Act have been applied to foreign transactions taking place abroad when fraudulent conduct, such as misrepresentation, inducing a pur-

\textsuperscript{41} See infra text accompanying notes 123-39 (discussion of appellate procedure).


\textsuperscript{44} See Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir.) (congressional intent behind promulgation of Act was to provide protection to investors in securities market), aff’d as to one, rev’d as to all other defendants, 405 F.2d 215 (2d Cir. 1968), cert. denied, Manley v. Schoenbaum, 395 U.S. 906 (1969).
chase or sale of a security, or conduct in preparation of a fraud, has taken place within the United States.45

III. Production of Evidence From Foreign Jurisdictions

A. Initial Comments

Whether pursuant to an SEC investigation or an NYSE request for information, the provision of testimony, documents, or other materials from foreign persons presents unique problems. The threshold non-legal issue that United States counsel often confronts is that of language. If the foreign records sought by the SEC or SRO are not in English, the services of a translator may be required. This obstacle usually can be overcome by utilizing the assistance of company officials (if the foreign client is a business) or by obtaining local counsel. Special arrangements with the SEC or SRO staff may be required, however, to facilitate production of translated materials. Another problem frequently encountered when producing documents from foreign persons is that methods of recordkeeping may differ dramatically from that which United States counsel is accustomed. Again, this problem is best addressed by enlisting the assistance of local counsel.

B. International Agreements and Treaties with Foreign Jurisdictions

1. Overview of Bilateral Agreements for the Production of Evidence

Generally, national laws are subordinate to any international agreements controlling a particular issue. Therefore, an initial inquiry

45. See, e.g., Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir.) (in class action, securities laws apply to transactions involving American residents living in the United States regardless of situs of wrongdoings; securities laws apply to United States residents living abroad only if wrongdoings occurred within the United States; securities laws do not apply to foreign investors where wrongdoings committed in the United States did not directly cause the foreign investors' losses), cert. denied, Bersch v. Arthur Andersen & Co., 423 U.S. 1018 (1975). Under the effects test, courts have applied the antifraud provisions of the 1934 Act where foreign securities transactions have had a substantial injurious effect in the United States, such as decreasing the value of stock listed on a stock exchange in the United States, even though no conduct or preparatory conduct occurred in the United States. See, e.g., IIT, Int'l Inv. Trust v. Cornfeld, 619 F.2d 909 (2d Cir. 1980) (antifraud provisions of federal securities laws applicable because of American nationality of issuer and consummation of transactions in United States; antifraud provisions applicable to sale of foreign debentures because debentures were American in substance and financing).
should be whether the United States has a treaty, executive agreement, or Memorandum of Understanding (MOU) with the country involved.

a. *International Treaties and Agreements*

The United States has three treaties for Mutual Assistance in Criminal Matters and is making substantial efforts to negotiate with many other countries. Current treaties include the treaty between the United States and the Swiss Confederation on Mutual Assistance in Criminal Matters;\(^{46}\) Treaty on Mutual Legal Assistance with the Republic of the Netherlands and the United States;\(^{47}\) and the Treaty with the Republic of Turkey on Extradition and Mutual Assistance in Criminal Matters.\(^{48}\) The United States also recently concluded negotiations of mutual assistance treaties in criminal matters with Colombia, Italy, Morocco, Canada, and Cayman Islands.\(^{49}\)

In addition, the United States has entered other agreements designed to promote international cooperation in securities matters. On August 31, 1982, the governments of Switzerland and the United States announced the signing of an MOU with respect to problems of insider trading.\(^{50}\) The MOU recognizes the availability of the 1977 Mutual Assistance Treaty for insider trading litigation and investigations. For those cases in which necessary information cannot be obtained under the 1977 Mutual Assistance Treaty, the MOU refers to a private agreement among members of the Swiss Bankers' Association who trade on United States securities markets concluded under the aegis of the Swiss Bankers' Association.\(^{51}\) The signatory banks, under certain circumstances, may disclose the identity of a customer and furnish information to the Commission, working through the Swiss Federal Office for Police Matters, without violating Swiss law. The private agreement will remain in effect until the Swiss


\(^{48}\) Treaty on Extradition and Mutual Assistance in Criminal Matters, June 7, 1979, United States-Turkey, 32 U.S.T. 3111, T.I.A.S. No. 9891.

\(^{49}\) The treaties have yet to be ratified.

\(^{50}\) Memorandum of Understanding to Establish Mutually Acceptable Means for Improving International Law Enforcement Cooperation in the Field of Insider Trading, Aug. 31, 1982, United States-Switzerland, 22 I.L.M. 1.

\(^{51}\) Id. at 2-4.
government revises its Penal and Civil laws to include insider trading.

On September 23, 1986, the SEC and the United Kingdom Department of Trade and Industry entered into an MOU which, on a reciprocal basis, provides assistance in obtaining records which are in the hands of the other agency or which can be obtained through the best efforts of the parties to the MOU.\footnote{52} It makes assistance available in matters involving insider trading, market manipulation, and misrepresentations relating to market transactions. The MOU also provides for exchange of information in matters relating to the oversight of the operational and financial qualifications of investment businesses and brokerage firms.\footnote{53} The MOU will provide the United States Commodity Futures Trading Commission with similar assistance.

The memorandum is the first accord negotiated by the Commission which provides assistance for a broad range of matters relating to market conduct and regulation of investment businesses. Use of the information received under the agreement is generally limited to prosecuting securities offenses or to a general charge, i.e., mail and wire fraud, related to an underlying securities law violation.\footnote{54}

As a harbinger of future developments, the MOU provides special safeguards to ensure that assistance is not abused by either party. Requests must be made with particularity. When questions arise as to the MOU’s operation, consultations between the parties are mandated by the agreement.\footnote{55} Finally, at the conclusion of the matter in question and to the extent permitted by law, all documents not previously made public will be returned to the other authority.

The MOU is viewed as an interim arrangement for the establishment of a comprehensive understanding which would provide bilateral cooperation relating to securities regulation. Indeed, it expressly provides for the initiation of such negotiations.

b. Recent Legislative Developments

Responding to the expressed need of the SEC to coordinate enforcement activities with securities regulators in other countries,
the 100th Congress considered two legislative proposals to broaden the Commission’s effectiveness in the international arena and work to expand the reach of United States securities laws.

The Senate bill, the International Securities Enforcement Co-operation Act of 1988 (the Cooperation Act),\(^5^6\) among other things, would facilitate the SEC’s gathering of evidence by enhancing international cooperation among national securities authorities. To enhance international cooperation by developing a structure of reciprocal assistance through MOUs and informal arrangements, the Cooperation Act would authorize the SEC to require United States persons or entities to produce evidence requested by a foreign securities authority. The SEC—at its discretion—would be able to provide this assistance to foreign administrations, without regard to whether the alleged improper activity investigated by the foreign authority would have constituted an offense under United States law.\(^5^7\)

Authors of the Cooperation Act recognized that several national authorities might be reluctant to provide the SEC with confidential information that the SEC might be obliged to disclose under the Freedom of Information Act (FOIA).\(^5^8\) Accordingly, the Cooperation Act provides an exemption to FOIA disclosure requirements, permitting the SEC to refuse to disclose information obtained from a foreign securities authority, if the foreign authority “has in good faith represented” that disclosure of the information would violate that country’s laws.\(^5^9\)

In addition, the Cooperation Act would expand SEC jurisdiction, enabling the Commission to sanction brokers, dealers, investment advisers and other securities professionals for acts committed abroad that otherwise would not be within the reach of United States securities laws.\(^6^0\) Under the Cooperation Act, the SEC could sanction such professionals, if a foreign court or securities authority found that the individual made false or misleading statements regarding material facts in a registration statement or report filed with the

\(^5^6\) S. 2544, 100th Cong., 2d Sess. § 101 (1988).
\(^5^7\) Id. The Cooperation Act would allow, and also make explicit, the Commission’s rulemaking authority to provide foreign and domestic authorities with certain nonpublic information, the disclosure of which may be prohibited by current regulations. Id. § 102. See also S. Res. No. 461, 100th Cong., 2d Sess. 2 (1988).
\(^5^9\) S. 2544, 100th Cong., 2d Sess. § 102 (1988).
\(^6^0\) Id. § 101.
foreign authority; violated any applicable foreign statute or regulation
governing securities or commodities transactions; aided, abetted, or
otherwise caused another person to commit such a violation of foreign
law; or failed to adequately supervise a person who committed such a
violation.61

The House of Representatives has developed a similar legislative
proposal within its more encompassing Insider Trading and Securities
Fraud Enforcement Act of 1988 (the Enforcement Act).62 While
largely mirroring the Cooperation Act’s provisions, the Enforcement
Act would require the foreign authority requesting SEC assistance
to file a request stating the facts that constitute the alleged violation
of foreign law. According to the Enforcement Act’s accompanying
legislative history, upon receipt of this request—but prior to rendering
assistance to the foreign authority—the SEC would be required to
“carefully examine” the request to prevent the SEC from assisting in
“unfocused or unbounded foreign investigation[s].”63

The legislative history also provides that parties directed by the
SEC to produce information under the Enforcement Act will enjoy
the same protections and remedies available to witnesses in domestic
SEC investigations. With these protections, the authors of the En-
forcement Act believe it will meet constitutional challenges based on
due process or fourth amendment issues. While not a part of the
statutory language, the legislative history adds that a witness in an
investigatory proceeding brought by the SEC on behalf of a foreign
authority would be entitled to assert all rights and privileges available
under United States law, as well as privileges provided by the laws
of the country seeking the information—even if such privileges are
not recognized under United States law.64

C. Production of Documents From Foreign Jurisdictions:
Blocking and Secrecy Statutes

When representing a foreign party or witness, counsel should
consider the applicability and effect of foreign law on the foreign

61. Id. § 201.
62. On October 21, 1988, the Senate of the 100th Congress passed H.R.
5133, sending the legislation to President Reagan. H.R. 5133, 100th Cong., 2d
102 Stat. 4677.
4681.
64. H.R. REP. No. 910, 100th Cong., 2d Sess. 30 n.24.
party's ability to respond to an SEC or NYSE investigation. Specific provisions of foreign blocking and secrecy laws differ by country, even though they all share a common characteristic. Conceptually, all blocking statutes represent the expressed interest of a foreign country in preventing the dissemination of certain information outside its borders. Secrecy statutes, on the other hand, are more tailored, representing the state's recognition that information provided by individuals to certain professionals must be kept confidential. In addition, the effect of either law could be to prohibit the foreign client from complying with a request for information from the SEC or the NYSE.

Specific provisions of blocking statutes accordingly differ, reflecting each state's assessment of the national interest that would be affected by disclosure. For example, Canadian law authorizes the Attorney General of Canada to prohibit disclosure of information from Canada, seize records, require a person in Canada to give notice of foreign court compulsion, and prohibit that person from complying with foreign courts. Violators face criminal sanctions. In order to invoke the act, the Canadian Attorney General must determine that

a foreign state or a foreign tribunal has taken or is proposing or is likely to take measures affecting international trade or commerce of a kind or in a manner that has adversely affected or is likely to adversely affect significant Canadian interests in relation to international trade or commerce involving business carried on in whole or in part in Canada, or that otherwise has infringed or is likely to infringe Canadian sovereignty . . . .

The SEC has received assurances regarding the Canadian blocking statute in a letter from the Director of the Ontario Securities Commission (OSC) endorsed by the Commission itself, dated September 24, 1985, and addressed to the Directors of the SEC's Divisions of Enforcement and Market Regulation. In light of this

67. In an exchange of letters, the SEC and OSC agreed to assist each other in investigations and oversight of the Toronto Stock Exchange and the United States markets. The OSC letter provided assurances that it was "extremely unlikely" that the Canadian blocking statute would ever be invoked to hinder an SEC
letter, it is unlikely that an order will be issued to prohibit the exchange of information between the OSC and SEC. As insider trading and market manipulation are offenses under Canadian law, it is also unlikely that the Canadian Government would have any interest in protecting those who have engaged in such trading.63

Similarly, a person doing business in England may be required to notify the government of foreign action taken to compel discovery, and the government may direct the party how to respond to the foreign action.69 As in Canada, British courts cannot comply with violative foreign discovery orders, and the government may seek criminal penalties. Unlike the Canadian law, the British statute specifies which actions are prohibited; however, both acts share a similar standard by which to measure objectionable foreign conduct. As with the Canadian act, a foreign request for information would be objectionable if it infringed the receiving country’s jurisdiction or was otherwise prejudicial to the country’s sovereignty. It would also be objectionable if compliance would prejudice national security or foreign relations.70

As explained by Mann and Mari,

[t]he effect of the English blocking statute was extended by Parliament in the Financial Services Act of 1986, which provides that the Secretary of State may block the production of documents where such documents are being provided on a voluntary basis. This provision appears to be a direct response to agreements approved by the SEC between stock exchanges in which, as a matter of contract, they would provide each other with access to their files,

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63. Seven of ten Canadian provinces regulate insider trading pursuant to authority under the Canadian Business Corporation Act §§ 121-125. As the primary Canadian markets are in Toronto, the principal prohibition of insider trading in Canada is the Ontario Securities Act § 131(1).


70. Id. § 1(I)-(6).
understanding that this information could be passed on to regulatory authorities.\textsuperscript{71}

Perhaps more broad than the others, the French blocking statute prohibits French nationals, and certain others with ties to France,\textsuperscript{72} from communicating economic, commercial, industrial, financial, or technical matters to foreign authorities except as provided by treaty or international agreement. This prohibition extends to requests for economic, commercial, industrial, financial, or technical information or documents to be used directly or indirectly for proof in court or administrative tribunals, unless such requests are allowed under a treaty or international agreement.\textsuperscript{73}

In addition to blocking statutes, many countries have professional secrecy laws governing a variety of professional services. Like blocking statutes, secrecy laws take a variety of forms. For example, Switzerland, reflecting the interest placed in its banking industry, has enacted civil—in the form of restrictions on bankers—and criminal secrecy laws.\textsuperscript{74} Under its civil law, bank secrecy is a reflection of the professional relationship between a banker and its client—extending to any information shared by the client with the banking professional. The bank may disclose information, however, if the customer waives its secrecy privilege.\textsuperscript{75}

Banking professionals violating the secrecy statute face criminal sanctions that generally reflect the state’s view that the violation is a violation suffered by the individual client. However, article 273 of the Swiss Penal Code provides that it may be also a violation of national interests to disclose certain banking or industrial information. This latter provision may be waived by the court and is otherwise not applicable to non-Swiss principals.\textsuperscript{76}

In many respects, France’s Secrecy law mirrors that of Switzerland, by proscribing disclosure of information received during the provision of professional services. It carries both civil and criminal

\textsuperscript{71} Mann & Mari, \textit{supra} note 3, at 52. \textit{See also} Financial Services Act, 1986, ch. 60, § 177(3), in conjunction with The Protection of Trading Interests Act, 1980, ch. II, § 2(1)(a) & (b).

\textsuperscript{72} This may include United States citizens that permanently reside in France.

\textsuperscript{73} \textit{See infra} text accompanying notes 108-13 (discussion of French blocking law).

\textsuperscript{74} Swiss Federal Banking Law, art. 47; Swiss Penal Code, art. 273.

\textsuperscript{75} \textit{See} Mann & Mari, \textit{supra} note 3, at 53.

\textsuperscript{76} Swiss Penal Code, art. 273.
sanctions. The Cayman Islands also have a law controlling bank secrecy. The Cayman secrecy law, however, does not prohibit inquiries made by a government, court, or another bank. As with the Swiss law, the principal or the government can waive its application. The Bahamas also have similar legislation, with its Banks and Trust Companies Regulation (Amendment) Act, 1980, providing for banking secrecy.

D. Taking Testimony Abroad

For United States citizens, the SEC generally prefers to take testimony abroad at United States embassies so that witnesses can be "sworn in" on United States soil, thereby ensuring applicability of United States perjury and false swearing laws. For testimony of foreign nationals, the SEC generally seeks the assistance of local officials. In some instances, such as the taking of testimony in England, United States government officials are often required to have a representative of the local government present during any examination.

In general, the first inquiry facing a practitioner whose foreign client is the subject of a request for testimonial evidence should be to determine if any international or bi-lateral agreements govern the taking of testimony in the foreign state. Second, the practitioner should determine if the inquiring agency can compel the testimony through the foreign state, or if the agency will have to depend on the willingness of the witness to procure testimony. This will be a function of international or bi-lateral agreements to which the foreign state is a party. If the inquiring agency cannot compel testimony, the practitioner may be able to define the terms and applicable law to govern any testimony.

The most widely applied international agreement is the Hague Convention of 1970 that applies to all "civil or commercial" cases in which a party transmits a judicial or extrajudicial document

77. See infra text accompanying notes 114-20 (detailed discussion of the French secrecy law).
79. The Banks and Trust Companies Regulation (Amendment) Act, 1980, No. 3.
80. The procedure by which foreign authorities are required to coordinate the taking of testimony in Great Britain with local police authorities is colloquially referred to as the "Whitehall Rules" an unwritten, informal set of rules.
abroad. The Convention, however, does not define the terms "civil," "commercial," "judicial," or "extrajudicial." Signatory nations attach different meanings to these terms. An attorney wishing to use the Convention must first determine whether the case is within its scope by referring to the different interpretations used by the participating signatory nations. For example, the United States and the United Kingdom define "civil" and "commercial" matters as all proceedings which are not criminal. Japan, unlike the United States and the United Kingdom, also excludes all administrative matters. West Germany excludes criminal and "public law" matters from its definition.

Letters rogatory and discovery assisted by consular officials and private commissioners are discovery avenues made available by the Hague Convention. Limited by the restriction that it can only be used in connection with actual litigation, the effectiveness of the Convention is also circumscribed by the fact that, under article 23, many countries have refused to issue letters rogatory to compel pre-trial document discovery. The Convention remains useful for obtaining pre-trial testimonial discovery, if such testimony is "relevant" to trial. United States practitioners may find this showing difficult to make, particularly at the outset of discovery that is itself designed to find evidence that may be relevant.

If the Hague Convention or other international agreement does not provide the requesting agency access to official assistance in the foreign country, the agency has other means of obtaining testimony. Under the Federal Rules of Civil Procedure, there are several accepted means of taking deposition testimony abroad. In light of possible sanctions against the uncooperative party or witness, the party or witness may agree to provide testimony under one of these


82. Letters rogatory have been defined as:
formal communications in writing sent by a court in which an action is pending to a court or judge of a foreign country requesting that the testimony of a witness resident within the jurisdiction of the latter court may be there formally taken under its direction and transmitted to the first court for use in the pending action. Typically, the letter rogatory will be channelled through the United States State Department and the Ministry of Justice of the foreign country.

methods. The first, deposition by written stipulation, may provide the private practitioner with important strategic options. Under this method, the parties stipulate as to the conditions under which the statement will be given. The parties may stipulate that the deponent will be sworn by a United States official, thereby triggering United States perjury and false swearing laws, but avoiding similar laws that might exist in the foreign jurisdiction. This may be an important consideration for foreign clients wishing to avoid possible exposure under their own laws.

Depositions may also be taken by "Notice before a person authorized to administer oaths" under the laws of the venue or of the United States. In addition to raising local law issues, depositions before foreign officials inevitably cost more money and can present difficulties depending on the legal character of the foreign official. Some foreign notaries, for example, take a far more active role in depositions than do United States notaries. Under the stipulation or Notice method, depositions may be taken by United States consular officials, although many foreign countries do not permit such consular depositions.

IV. United States Treatment of Blocking and Bank Secrecy Laws

Throughout any deposition or interview, the foreign client or United States national living abroad may be questioned as to matters covered by an applicable blocking statute or secrecy law. The degree to which such laws are given credence in United States courts is a function of a multi-faceted balancing test.

A. International Comity and the Judicially-Created Balancing Test

While the nature of blocking and secrecy laws differ, United States courts generally treat the laws in a similar fashion. Neither category of laws is considered an absolute bar to discovery.

86. See Ristau, supra note 84, at § 3-29 2.
87. See id.
88. See, e.g., Societe Nationale Industrielle Aeropatiale v. U.S. District Court, (S.D. Iowa), 107 S. Ct. 2542, 2556 n.29 (1987) (French blocking statute was not absolute bar to discovery).
determine when to compel discovery that might impinge on foreign blocking or secrecy statutes, United States courts have developed an analysis designed to weigh the relative national interests involved. In general terms, the balancing test works to strike a compromise between international comity—with its concomitant requirement that United States courts respect laws of foreign sovereigns—and legitimate discovery requests issued by United States authorities.89

The Supreme Court endorsed a balancing test analysis in Societe Nationale. While approving a balancing test to address issues of international comity, the Court failed to identify with precision what factors comprised such a test. Stating that international comity required an analysis of the interests of the foreign nation and the requesting party, the Court identified the following five factors as relevant to any such analysis:

(1) the importance to the ... litigation of the documents or other information requested;
(2) the degree of specificity of the request;
(3) whether the information originated in the United States;
(4) the availability of alternative means of securing the information; and
(5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.90

In approving the application of these factors, the Court made it clear that the French blocking statute does not present an insurmountable barrier to discovery.91

89. See id. at 2555 & nn. 27-28 (endorsing application of balancing test to determine if French company could be compelled to comply with United States discovery order, notwithstanding company's claim that French blocking statute precluded compliance).
90. Id. at 2556 n.28 (citing Restatement of the Foreign Relations Law of the United States § 437(1)(c) (Tent. Draft No. 7, 1986) (approved May 14, 1987)).
91. The Court explained that "such statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute." Id. at 2556 n.29 (citing Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 204-06 (1958)).
B. Issues Facing the Practitioner

Even with the factors identified by the Court, the question remains, however, to what degree United States courts would be obliged to defer to the French blocking statute or other blocking statutes or secrecy laws. For example, Societe Nationale does not make it clear what factors in addition to the five listed above may be considered. Nor does the decision give guidance as to the relative weight of particular factors. As a result, the balancing test provides only a rough outline of the appropriate analysis, with the substance of the test apparently left to \textit{ad hoc} judicial discretion.

From the practitioner’s point of view, it is often important to be able to forecast what effect a particular tribunal, administrative agency, or self-regulating organization might give a foreign blocking statute or secrecy law. It may also be important in preliminary negotiations with an agency or an SRO to have a clear indication of the appropriate balancing test that might be applied and the likelihood that discovery would be compelled notwithstanding the foreign proscription. Ambiguities in the balancing test make this forecasting problematic, at best.

C. Lower Court Applications

Numerous lower court decisions treating foreign blocking and secrecy laws do little to clarify the situation. In broad terms, they confirm a wide use of a balancing analysis. At the same time, they illustrate how various jurisdictions have considered factors other than those identified in Societe Nationale and that the balancing test may vary from jurisdiction to jurisdiction.

For example, the Second Circuit Court of Appeals and several other jurisdictions have applied a balancing analysis contained in the Restatement (Second), Foreign Relations Law of the United States, section 40 (1965). The section 40 analysis considers the following five factors:

(1) vital national interests of each of the states;
(2) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person;
(3) the extent to which the required conduct is required to take place in the territory of the other state;
(4) the nationality of the person; and
(5) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.\textsuperscript{93}

In addition to these factors, the Second Circuit has two other considerations. It may consider the relative importance or unimportance of the information sought by the discovery request as an additional factor,\textsuperscript{94} as well as good faith efforts taken by the party in the foreign jurisdiction to obtain a waiver from local restrictions and comply with the discovery request.\textsuperscript{95}

The Second Circuit balancing test may also be marked by greater significance given to the first two factors in section 40 than to the other three. As noted in SEC v. Banca Della Svizzera Italiana,\textsuperscript{96} compelling discovery notwithstanding possible criminal sanctions under

\textsuperscript{93} Restatement (Second) Foreign Relations Law of the United States § 40 (1965), cited in United States v. Davis, 767 F.2d 1025, 1033-34 (2d Cir. 1985). See also United States v. Vetco, 691 F.2d 1281, 1288-89 (9th Cir.) (applying balancing test supplied by § 40 of the Restatement to uphold sanctions for corporation's refusal to comply with United States Internal Revenue summonses despite possible criminal liability for such compliance under Swiss law), cert. denied, 454 U.S. 1098 (1981); In re Westinghouse Elec. Corp. Uranium Contracts Litig., 563 F.2d 992 (10th Cir. 1977) (employing § 40 factors to relieve petitioner of contempt sanctions where Canadian law proscribed productions of documents), cert. denied, 108 S. Ct. 451 (1987); In re Grand Jury Proceedings, 532 F.2d 404 (5th Cir.) (§ 40 factors used to enforce Grand Jury subpoena served on nonresident alien, notwithstanding Cayman Island law that forbade compliance), cert. denied, 97 S. Ct. 429 U.S. 940 (1976).


\textsuperscript{96} 92 F.R.D. 111 (S.D.N.Y. 1981).
a Swiss nondisclosure law, the remaining three factors "appear to be less important in this Circuit."97 Despite the Second Circuit's emphasis on the vital national interest and hardship factors, the relative weight of section 40 factors in other Circuits remains largely an open question.

A sampling of cases interpreting the factors that may dominate the balancing analysis, at least in the Second Circuit, demonstrates the difficulty facing practitioners who attempt to counsel clients as to the likely reception a particular foreign statute might receive in a United States court.

1. Vital National Interests

Theoretically the most persuasive factor, consideration of vital national interests, presents several interpretive problems. First, the factor is broad and consequently hard to define. On one level, it appears to beg the fundamental question underlying the comity analysis, i.e., what are the national interests at stake? It also leaves the reviewing court significant discretion as to what variables to consider within the category of vital national interest, and which are superfluous to the analysis.

Nevertheless, several components of this factor have been identified. Protection of economic interests, such as those reified in securities markets98 and confidential business information99 have been recognized as vital national interests, as have been the enforcement of United States tax,100 commodities, and antitrust laws,101 and safeguarding the integrity of United States patent rights.102

97. Id. at 119.
98. See id. at 117-18 (compelling discovery, despite potential violation of Swiss secrecy law, to preserve integrity of United States security markets); United States v. First Nat'l City Bank, 396 F.2d 897, 902-03 (2d Cir. 1968) (finding potential civil liability under German law insufficient to excuse noncompliance in light of importance of United States antitrust laws).
99. See Minpeco, 116 F.R.D. at 524 (finding that Swiss banking secrecy laws had legitimate purpose of protecting commercial privacy inside and outside of Switzerland, but the balance of factors did not compel discovery).
100. See Garpeg Ltd. v. United States, 583 F. Supp. 789, 796 (S.D.N.Y. 1984) (interest of United States in enforcing its tax laws significantly outweighed Hong Kong's interest in preserving bank secrecy); Pelco, 691 F.2d at 1289 (recognizing strong United States interest in collecting taxes and prosecuting tax fraud).
Some authorities suggest that the likelihood of enforcement of, and indications of legislative intent underlying, a particular foreign statute will determine the degree to which United States courts will defer to the foreign law. In *Compagnie Francaise D'Assurance*, the court ruled against the noncomplying parties, determining that there was little chance that French authorities would prosecute the French parties for producing the requested documents and that the French blocking statute, therefore, was designed more to impede United States discovery than protect any legitimate interests.\(^{103}\)

2. Extent of Hardship Faced by Party Complying with the Discovery Request

While a possibility of criminal liability is a recognized excuse for noncompliance with a U.S. discovery order,\(^{104}\) courts will not accept at face value criminal provisions of a particular statute. For example, in *Compagnie Francaise D'Assurance* and *Graco*, the criminal liability presented by the French blocking statute was not deemed an adequate justification for not complying with a U.S. discovery order. Both courts determined that there was insufficient evidence that the statute was or would be enforced.\(^{105}\)

Accordingly, the degree to which United States courts give deference to a particular statute may well be a function of the degree to which the foreign administration enforces the provisions of the statute. Even if the United States court accepts the possibility of criminal sanctions as real, it may require compliance. As in *Soletanche*, the court may find that the United States interests at stake overshadow the potential penalties faced by the French parties.\(^{106}\)

D. Ambiguities and Interpretative Issues Presented by Statutory Language and Foreign Enforcement of Blocking or Secrecy Laws

Apart from issues raised by United States treatment of foreign blocking and secrecy laws, the laws themselves and their pattern of


\(^{104}\) See *Societe Internationale Pour Participations Industrielles et Commerciales, S.A.*, 357 U.S. at 211.

\(^{105}\) *Compagnie Francaise D'Assurance*, 105 F.R.D. at 30; *Graco*, 101 F.R.D. at 514.

\(^{106}\) *Soletanche*, 99 F.R.D. at 271-72. See United States v. Bank of Nova Scotia, 691 F.2d 1384, 1388-89 (11th Cir. 1982) (court rejected argument that criminal liability in Bahamas excused compliance); *Vetco*, 691 F.2d at 1291 (possible criminal liability under Swiss secrecy statute did not preclude enforcement and sanctions).
enforcement can impact the deference given such laws by United States courts. In practice, ambiguities within the foreign law and the foreign administration's record of enforcement often exacerbate uncertainties presented by the balancing analysis.

An examination of the French blocking statute—generally not well-favored in American jurisprudence107—and France's bank secrecy law illustrates the nature of issues that may be encountered.

1. The French Blocking Statute

In broad terms, the French blocking statute (Blocking Statute) prohibits French nationals, and other persons subject to French jurisdiction, from disclosing information leading to (or tending toward) "establishing proofs for use directly or indirectly in foreign judicial or administrative proceedings."109 Sanctions for violations can include imprisonment and fines.

Despite the Blocking Statute's almost twenty years in force, no French judicial interpretations clarify the scope and meaning of the statute. It is unclear, therefore, if the prohibition would apply to transactions that only minimally implicate French interests.

In the international securities context, would any participation in a securities deal by a French resident bring information relevant to the transaction within the provisions of the Blocking Statute? For example, if a French bank played a minor role in arranging financing for a securities transaction, would the bank or its officers be precluded

107. See Minpeco, 116 F.R.D. at 524 (in contrast to Swiss law, French blocking statute does not warrant deference); Compagnie Francaise D'Assurance, 105 F.R.D. at 30 (finding that French blocking statute not intended to be enforced against French subjects, designed merely to provide French subjects with "tactical weapons" and "bargaining chips"); and Graco, 101 F.R.D. at 508 (French blocking statute "manifestation of French displeasure with American pre-trial discovery procedures"). See also Batista, Confronting Foreign "Blocking" Legislation: A Guide to Securing Disclosure from Non-resident Parties to American Litigation, 17 INT'L LAW. 61, 65-67 (1983).


109. Blocking Statute, art. 1A. Article 1A prohibits:
all persons [from] communicat[ing] by writing, orally or under any other form, documents or information on economical, commercial, industrial, financial or technical matters leading to establishing proofs for use directly or indirectly in foreign judicial or administrative proceedings.

Id.

110. Id. art. 3.
from providing the SEC or the NYSE with any information regarding the transaction? Or, would the degree of involvement impact the applicability of the Blocking Statute?

The Blocking Statute’s legislative history appears to indicate that the legislation was intended to have a restricted scope; however, the issue is not clarified by French case law.\textsuperscript{111}

Another fundamental interpretive issue is the definition of “administrative or judicial proceedings” and whether an investigation conducted by an SRO, such as the NYSE, would constitute such a proceeding. Alternatively, if the investigation, itself, would not constitute a proceeding subsumed by this provision, would the possibility of an NYSE disciplinary hearing or resultant SEC investigation\textsuperscript{112} bring the NYSE discovery request within the Blocking Statute’s prohibitions?\textsuperscript{113}

2. The French Professional Secrecy Law

The French secrecy law prohibits disclosure of secrets or confidential information received from clients. This general prohibition is part of the French criminal code and applies to a wide range of professionals, including doctors, nurses, health officers, or “any other person who, because of his position, occupation or because of his temporary or permanent activities” receives secrets from clients. Violators face civil and criminal penalties.\textsuperscript{114}

\begin{itemize}
  \item \textsuperscript{112} An adverse determination in an NYSE disciplinary proceeding is subject to SEC review, pursuant to the Securities Exchange Act of 1934, 15 U.S.C. §§ 78f(d)(3), 78s(d) & (3). Accordingly, the SEC is likely to review any information disclosed in an NYSE proceeding.
  \item \textsuperscript{113} Recent French decisions indicate that an NYSE disciplinary hearing would probably qualify as an “administrative” proceeding under the terms of the Blocking Statute. See \textit{Conseil d’Etat} Nov. 16, 1984 \textit{Woetglin}, D. 1985, at 57 [et seq.] [BB p. 160 - cite to Lebon (if therein); otherwise cite to Dalloz or Sirey] (disciplinary hearing of private, self-regulatory body responsible for overseeing activities of Paris stock exchange members (Chambre Syndicale de la Compagnie des Agents de change) constituted “administrative proceedings”); and \textit{Conseil d’Etat} June 10, 1983 \textit{Charbit et Autres}, Rec. at 239 (disciplinary proceedings of private, self-regulatory body governing activities of Paris commodities exchange members (Conseil de Direction de la Compagnie des Commissaires agreees pres de la Bourse de commerce de Paris) was “judicial” in nature).
  \item \textsuperscript{114} Criminal Code, \textit{Juris Classeur Penal}, art. 378, Fasc. 1, at 17-18 (May 1987).
\end{itemize}
Article 57 of the Banking Law extends this prohibition to officers, directors, and employees of banks.\textsuperscript{115} As with the Blocking Statute, a shortage of judicial precedent prevents the practitioner from clearly understanding the scope and effect of the secrecy law.

a. \textit{Definition of “Clients”}

While the law is designed to protect confidences provided by “clients,” it does not indicate what this term includes. Keeping in mind the hypothetical situation mentioned above, regarding an international securities transaction involving two non-French parties and a facilitating French bank, would a party’s mere participation in an investment transaction orchestrated by a French bank bring the party within the secrecy law’s provisions? Would the bank then be prevented from disclosing any information regarding the transaction that was supplied by the party?

Analysts once considered that such a party would have to have a contractual relationship with the bank to trigger the law’s provisions.\textsuperscript{116} Recently, however, commentators have posited that parties having a “business relation” with a bank ought to be covered by the secrecy law.\textsuperscript{117}

b. \textit{Definition of Protected Information}

Just as the Criminal Code refers to “clients,” without providing direction as to the meaning of the term, the secrecy law does not indicate what information might be categorized as a “secret” or “confidential” for purposes of the law. French case law has developed a seemingly broad definition of “secret,” with cases applying the secrecy law to all information given by a client to a professional, or learned by the professional, during the provision of professional services.\textsuperscript{118} This broad interpretation may encompass information

\textsuperscript{115} Banking Law No. 84-46 of Jan. 24, 1984, art. 57.

\textsuperscript{116} See Houin, \textit{Revue Trimestrielle de Droit Commercial} 349 (1949); Cabrillac, \textit{Le Cheque et la Virement} (1962) (No. 128).


\textsuperscript{118} See Crim. Jan. 12, 1951, D. 51.363 (applying secrecy law to professional whose position imposes confidentiality obligation whether information is specifically disclosed or comes to the professional’s knowledge during provision of professional services); Crim. Jan. 24, 1957, B. no. 86, Crim. Oct. 9, 1978, B. no. 263; Merle
confided to a professional by clients or third parties, including statistics, analyses, plans, projections, and similar data generated by the professional during the course of professional activities.

Turning to the example of a French bank facilitating an international securities transaction between non-French parties, the secrecy law could be interpreted to cover all information received by the bank in the process of servicing such a transaction. The secrecy law might apply, notwithstanding the secondary role of the bank.119

In many instances, information on investor groups, etc., would be subject to public disclosure under United States securities laws. While it would appear that a bank or other professional service provider could confirm otherwise confidential information that is in the public domain, the professional could violate the secrecy law by disclosing additional information or confirming public information that otherwise might have been in doubt.120 Therefore, information regarding negotiations leading to the publicly disclosed activity or other related information would remain secret.

V. Practice Points

A. Unique Conflicts and Cultural Considerations

A primary concern of any practitioner is the ability to settle a dispute short of litigation. In the international securities context, the desirability of settlement takes on added impetus. Settlement may be difficult, however, as the SEC or the NYSE might have concerns over continuing jurisdiction over the foreign person to enforce settlement agreements. Moreover, consideration has to be given to the

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119. See Gavalde & Stoufflet, Le Secret Bancaire en France, reprinted in Le Secret Bancaire dans la CEE et en Suisse, Collège d'Economie Bancaire Internationale 88-89 (1973) (professional banking activities covered by provisions of the secrecy law include “particular business affairs in which the banker intervenes or of which he has knowledge, such as the making of an investment, sale of a business [or] sales of shares on the stock market, particularly when such matters are being planned or under negotiation”).

120. This would include confirming information contained in a 13D or other filing.
collateral consequences of any settlement on the foreign person’s ability to do business in the United States and abroad.

Negotiated settlements, nevertheless, are often more desirable when representing foreign clients than when representing domestic clients because of the difficulties involved in litigating on behalf of foreign clients in the United States courts and, in many cases, the aversion of foreign persons to becoming entangled in United States litigation.

As illustrated above, blocking and professional secrecy laws also pose unique legal issues, with the application of such laws in the international context producing unexpected conflicts. Take, for example, the case of an employee of a French bank that facilitated a securities transaction involving non-United States participants. Through ownership of a subsidiary, the bank is an “approved person” with the NYSE.121 The employee, however, is not registered in any manner with the Exchange. If the securities transaction becomes the subject of an NYSE investigation—based on the employee’s alleged illegal activities in the transaction—and the Exchange requests information from the bank and the employee, in light of the blocking and secrecy statutes, what unusual conflicts confront the employee and his counsel?

Counsel first will encounter the inherent conflict between the interests of the individual and the bank, a conflict that may carry special cross-cultural twists. With the subsidiary’s position as a NYSE member and the bank’s status as an “approved person,” the institution may be willing to provide information to the NYSE, notwithstanding possible liability under the blocking and secrecy statutes. The bank may have additional impetus to provide all available information if it has obtained even a partial waiver from the French government and any clients about which the NYSE has sought information. On the other hand, the employee may not have the same incentives to risk liability under French law, as he may face individual civil and criminal liability under United States law if it is determined he was not acting pursuant to the bank’s directives. Moreover, the employee may argue that, while the Exchange may have jurisdiction over his employer, as an employee of an “approved person,” he is not individually within NYSE’s jurisdiction.122

121. See supra note 29 and accompanying text (defining “approved person”).
122. See supra notes 21-32 and accompanying text (outlining United States jurisdiction over international securities claims).
At the outset, therefore, counsel for the employee will have to define the degree to which the employee is willing to distance himself from the position of the institution. This may raise troubling cross-cultural issues. In contrast to many segments of the United States business culture, several foreign business cultures emphasize employee loyalty and the reciprocal willingness of employers to maintain loyal employees or, at least, ensure that discharged employees find another position within the industry sector. Accordingly, the bank employee in this example may be reluctant to isolate himself from his institution. This may be the case whether or not the institution’s likely legal defense will be to avoid *respondeat superior* liability by asserting that the employee was acting on his own, contrary to bank policy. For the employee, the cultural rules under which he plays may dominate any legal considerations his American attorney may offer.

**B. Procedures for Review of SRO Disciplinary Actions**

1. **SEC Review of an SRO Proceeding**

Failing a settlement or other resolution of the matter before the NYSE, appeal can be taken to the SEC. Prior to the 1975 amendments, the 1934 Act did not provide SEC review of NYSE disciplinary proceedings.\(^{123}\) However, section 19(d)(2) of the 1934 Act,\(^{124}\) now provides SEC review of SRO proceedings. Under this section, the SEC can move on its own to review an SRO final order, or any person aggrieved by an SRO final order can file a motion with the SEC for review. Application for review does not automatically stay the SRO’s determination, however, the SEC may issue a stay after appropriate and expedited proceedings on that question.\(^{125}\)


Judicial review of SEC action, including SEC consideration of disciplinary actions taken by SRO’s subject to SEC review, is provided by section 25(a)(1) of the 1934 Act.\(^{126}\) This section permits

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\(^{123}\) See Allan v. SEC, 577 F.2d 388, 391 (7th Cir. 1978).


\(^{125}\) Id.

appeal from the SEC to the United States court of appeals for the circuit in which the appellant resides.127

While providing appeals from final SEC orders, the doctrine requiring exhaustion of administrative remedies may not permit aggrieved parties to bring interlocutory appeals.128 For example, the Seventh Circuit concluded that section 25(a)(1) did not provide an avenue for appealing the SEC’s decision not to issue a stay of an NYSE final decision pending SEC consideration.129 According to the court, the statute did not grant the United States court of appeals "jurisdiction to review an interlocutory order of the SEC denying a request for a stay pending its consideration of a case on the merits."130 The Allan court went on to note that the SEC’s denial of appellant’s petition for a stay of the NYSE disciplinary sanction was not reviewable at this stage of the proceedings, absent extraordinary circumstances that would warrant judicial review prior to exhaustion of administrative remedies.131

Reaching a similar conclusion, the Fifth Circuit overturned a district court injunction that had barred the National Association of Securities Dealers, Inc. (NASD) from proceeding with disciplinary hearings against a member corporation. The member corporation had sought an injunction of the disciplinary proceedings on the basis that the SRO had refused to sequester the complaining witness at the disciplinary hearing and that this would result in "irreparable injury," as it would provide the witness with a "dress rehearsal" for a civil suit against the member corporation.132

Concluding that NASD’s refusal to sequester the complaining witness amounted to "a non-final procedural ruling," the Court applied the general rule that prohibits immediate review of such non-

127. Id.
129. Allan, 577 F.2d at 393.
131. Allan, 577 F.2d at 393.
132. Merrill Lynch, 616 F.2d at 1366.
final rulings. Absent extraordinary circumstances, the Court found, such non-final rulings by administrative tribunals are not subject to review by federal district courts. The Court underscored that "[o]nly rarely . . . will "preliminary [or] procedural . . . agency action" threaten so irreparable an injury as to justify interlocutory resort to corrective judicial process." 

Ironically, the very administrative procedure that a respondent may find inadequate may preclude intermediate judicial review. In First Jersey Securities, Inc. v. Bergen, the court determined that section 25(a)(1), providing review of SEC action, did not "explicitly preclude an aggrieved party from seeking relief in a federal district court" prior to final SEC action. The court noted, however, that the "comprehensiveness of the [administrative] review procedure suggests that the doctrine of exhaustion of remedies should be applied to prevent circumvention of the established procedures." 

Notwithstanding this requirement to exhaust administrative remedies prior to seeking judicial relief, there are exceptions available and the issues and ramifications presented by foreign blocking or secrecy laws may create extraordinary circumstances sufficient to warrant intermediate judicial intervention. As stated in Bristol-Myers, "where 'an immediate appeal is necessary to give realistic protection to the claimed right,' . . . a court may properly carve an exception to the [exhaustion] doctrine." In Merrill Lynch, the Fifth Circuit highlighted exceptions to the exhaustion doctrine, including "when the administrative procedure is clearly shown to be inadequate to prevent irreparable injury." The circumstances presented by a party facing "failure to cooperate" sanctions because of constraints imposed by foreign blocking and secrecy laws may constitute such a situation. On the one hand, the party could face censure by the SRO and lose his means of making a living while the disciplinary action is appealed. On the other hand, the party could face criminal and civil penalties if he provides the Exchange with the requested

133. Id. at 1368.
134. Id. at 1368, 1370 (quoting Bristol-Myers Co. v. FTC, 469 F.2d 1116, 1118 (2d Cir. 1972)).
135. Id. at 1370.
136. 605 F.2d 690 (3d Cir. 1979).
137. Id. at 695.
138. Bristol-Myers, 469 F.2d at 1118 (citing L. Jaffe, Judicial Control of Administrative Action 429 (1965), quoted in Merrill Lynch, 616 F.2d. at 1370).
139. Merrill Lynch, 616 F.2d at 1370-71.
information. Either way the party loses. Whether such losses could be termed "irreparable," however, is another issue.

In opposition to the party’s motion for interlocutory judicial review, the SRO could challenge the speculative nature of the party’s injury, arguing that until the SRO hearing and review procedure is completed, any injury is uncertain. Moreover, after SRO consideration, the party would have the ability to petition the SEC for a stay pending further review. Appreciating this argument, courts might be reluctant to confront an issue that may well be moot depending on the SEC’s final determination.

VI. Conclusion

As United States regulators respond to demands of the international market, they will increasingly test the outer reaches of their ability to investigate and prosecute securities laws violations. From the perspective of the practitioner, this will require an awareness of jurisdictional limits; the effect of international agreements; the impact of foreign law; and strategic issues presented by the unique nature of SEC and NYSE proceedings.