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International Sharing of Evidence: A 2-Way Street

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As much as United States regulators and prosecutors have expanded their focus to the international sphere in recent years, other countries have intensified their scrutiny of US companies and individuals as well. As the D.C. Circuit explained as far back as 1989, the United States has welcomed those efforts with the "hope ... that by making assistance generously available through the good offices of the United States officials and courts, our country would set an example foreign courts and authorities could follow when asked to render aid to United States courts, authorities, and litigators." *In re Letter of Request from Crown Prosecution Serv. of United Kingdom*, 870 F.2d 686, 690 (D.C.Cir. 1989).

That policy has continued to this day with the United States now a signatory to mutual legal assistance treaties ("MLATs") with 56 other countries, in addition to multilateral treaties and mutual legal assistance agreements. In short, any evidence collected by United States law enforcement that touches on international issues has a very good chance of ending up in the hands of one or more foreign prosecutors.

There are some restrictions on information that is turned over to foreign prosecutors pursuant to an MLAT or, if there is no treaty with the foreign country, a letter rogatory, which is simply a written request from a foreign entity that does not rely on an existing treaty. See 28 U.S.C. § 1782. Each MLAT is separately negotiated and most contain some language restricting certain disclosures of evidence depending on the sensitivities of the respective countries. See, e.g., Supplemental Treaty Between the United States of America and the Federal Republic of Germany on Mutual Legal Assistance in Criminal Matters, Treaty Doc. 109-13, Art. 9 (Oct. 18, 2009)[1] (request for banking information must contain sufficient information to reasonably suspect that the person investigated engaged in a criminal offense); Treaty Between the United States of America and the Government of the Republic of India on Mutual Legal Assistance in Criminal Matters, Treaty Doc. 107-3, Art. 3 (Oct. 3, 2005)[2] (request may be denied if it is a political offense or relates to military law).

There are also restrictions if the sharing of evidence may infringe a constitutionally protected right. For example, in *In re Premises Located at 180 140th Ave. NE*, 634 F.3d 557 (11th Cir. 2011), the Russian government had issued an MLAT request for records from a fishing company in furtherance of their prosecution of an individual for illegal crabbing. The fishing company objected, arguing generally that the Russian system of justice was corrupt and specifically that the foreign prosecutors had violated statute of limitations restrictions under Russian law. *Id.* at 573.

The Eleventh Circuit acknowledged that an MLAT request must "not be honored if the sought-after information would be used in a foreign judicial proceeding that departs from our concepts of fundamental due process and fairness," although they ultimately rejected the complaints as too general and technical to quash the subpoena. *Id.* at 572. Nevertheless, the court was clear that with the right set of facts, such an objection could succeed.

In one interesting case now percolating before the US Supreme Court, a New York journalist and a researcher who had worked on an oral history project at Boston College moved to quash a subpoena pursuant to the US-UK MLAT demanding interviews the research team had done of former members of the Irish Republican Army. See *In re Request from the United Kingdom*, 685 F.3d 1 (1st Cir. 2012). The British government wanted the taped interviews to aid in their investigation of the 1972 death of a British informant. *Id.* The interviews were conducted to ensure the anonymity of the interviewees with confidentiality agreements in place, and the researcher and journalist objected on the grounds that turning over the interviews would violate their First Amendment Rights. *Id.* at 4.

[1] http://www.state.gov/documents/organization/188786.pdf

[2] http://www.gpo.gov/fdsys/pkg/CDOC-107tdoc3/pdf/CDOC-107tdoc3.pdf

The First Circuit rejected the challenge, weighing their First Amendment rights against what they characterized as an extremely strong public interest where "two branches of the federal Government, the Executive and the Senate, have expressly decided to assume these treaty obligations [in exchange for] valuable reciprocal rights." *Id.* at 18. However, that did not end the matter. The litigants are seeking a writ of certiorari to the United States Supreme Court, and on Oct. 17, Justice Stephen Breyer issued an order staying the First Circuit's mandate while the writ is pending.[3]

Whatever small chinks may exist in the MLAT armor, however, the truth of the matter is that foreign prosecutors and foreign regulators obtain evidence from United States law enforcement in a host of other ways that typically escape any kind of judicial review.

When there are parallel criminal prosecutions in the United States and in a foreign country, Federal Rule of Criminal Procedure 6(e)(3)(E) allows a federal prosecutor to share grand jury materials with a foreign court or prosecutor for use in their official criminal investigation through an application to the court. Notably absent from the rule is any standard by which a court is to judge whether disclosure is proper, and thus the requests are routinely granted. Moreover, because there are ongoing criminal investigations, such requests are typically made under seal with no notice to any party that their information is going to be shared with a foreign entity.

Additionally, regulators such as the US Securities and Exchange Commission have signed bilateral cooperative arrangements with a host of foreign governments[4] and are also signatories to broader multilateral agreements—the most prominent being the Multilateral Memorandum of Understanding Concerning the Consultation and Cooperation and the Exchange of Information sponsored by the International Organization of Securities Commissions, where unsolicited cooperation is encouraged.[5]

Commissioner Elisse B. Walter testified in March of this year that nearly 30 percent of the SEC's enforcement cases had an international element to them.[6] In 2011, the SEC made a record 772 formal requests to foreign authorities for enforcement assistance and responded to 492 requests from foreign regulators and law enforcement, and already by March the SEC was on track to meet or surpass those numbers.

In sum, anyone giving evidence or testimony to United States prosecutors, law enforcement or regulators must assume that the evidence will be turned over to foreign officials with little fanfare. Increased international cooperation has led not only to more domestic prosecutions, but has strengthened foreign investigations and prosecutions as well. As Commissioner Walter testified, the United States' cooperation with foreign powers is not "one-way,"[7] and if one is lucky enough to receive notice that evidence is being shared, it is important to act quickly and be ready for a long, uphill battle.

–By Michael M. Rosensaft, Katten Muchin Rosenman LLP

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[3] http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12a310.htm

[4] http://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml

[5] http://www.iosco.org/library/pubdocs/pdf/IOSCOPD386.pdf

[6] http://www.sec.gov/news/testimony/2012/ts032212ebw.htm

[7] http://www.sec.gov/news/testimony/2012/ts032212ebw.htm