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More Securities Fraud Cases Now Involve Foreign Regulators

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There has been much focus on the amount of cooperation between the U.S. Department of Justice and foreign law enforcement in the prosecution of white collar crime. Obviously Foreign Corrupt Practices Act investigations invoke international cooperation by their very nature, but whether it be subprime mortgage fraud or the massive London interbank offered rate investigations, it is clear that the DOJ is aggressively pursuing white collar crime wherever it occurs in the world.

Regulators, too, have been just as busy forging international coalitions amongst themselves, and it has shown in recent insider trading cases. The U.S. Securities and Exchange Commission in particular has heralded this effort and signed bilateral cooperative arrangements with a host of foreign governments and regulators.[1]

They are also a prominent member of the International Organization of Securities Commissions ("IOSC"), which includes over 120 securities regulators throughout the world, covering 95 percent of the world's securities markets.[2] Surrounding the organization's 10th annual conference, which was held in Beijing, multiple regulators stressed that the Multinational Memorandum of Understanding ("MMOU"), which provides for cooperation amongst regulators, enhanced their ability in particular to identify and prosecute fraud and insider trading.[3] Ethiopis Tafara, former director of international affairs of the SEC, mused: "Like a fine wine, the power of the MMOU to benefit investors grows better with age."

And grown it has. The SEC recently announced charges against and a settlement with Richard Bruce Moore, a Canadian investment banker. The complaint alleges that Moore traded on insider information when purchasing Tomkins American Depository Receipts, which traded on the New York Stock Exchange. It was alleged in the complaint that Moore gained insider information through one of his clients and then, from that information, was able to piece together that Tomkins was soon going to be acquired. Announcing the complaint with the Ontario Securities Commission ("OSC"), Scott W. Friestad, associate director of the SEC Division of Enforcement, stated: "In today's interconnected markets, the cooperative relationship among securities regulators mean that those who choose to engage in international insider trading should expect to face consequences across the globe."[4]

The OSC filed its own complaint against Moore that cited the Tomkins trades and also included an allegation that Moore inadvertently received additional insider information about the acquisition of HOMEQ Corporation, and thereafter took immediate steps to purchase shares of HOMEQ.[5] According to the allegations in the OSC complaint, Moore received the insider information about HOMEQ when another client of his unintentionally emailed him the information. By misusing confidential information Moore gained from his client's accidental email, Moore was charged with a violation of Section 76(1) of the Securities Act of Canada. The OSC complaint also contained the Tomkins conduct, although it

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

[2] http://www.iosco.org/about/

[3] http://www.iosco.org/news/pdf/IOSCONEWS234.pdf

[4] http://www.sec.gov/news/press/2013/2013-62.htm

[5] http://www.osc.gov.on.ca/en/Proceedings_soa_20130411_moorerb.htm

seemingly was not a violation of the Securities Act as Tomkins was not a reporting issuer in Ontario. Nevertheless, Moore was also charged with the Tomkins conduct as "against the public interest."

The dual-jurisdictional nature of the Moore complaint is not unique. In the last two quarters, more than 20 percent of the SEC's insider trading cases have involved the cooperation of foreign regulators and have spanned at least four continents with cooperating regulators from the Ontario Securities Commission, Britain's Financial Services Authority, the Hong Kong Securities and Futures Commission, and the Comissao de Valores Mobliliarios (Brazil), to name a few.

International cooperation amongst regulators in particular has increased for two main reasons.

First, the SEC has specifically heralded efforts to promote international cooperation through organizations such as the IOSC. In fact, Commissioner Elisse B. Walter recently noted that nearly 30 percent of the SEC's enforcement cases had an international element to them.[6]

Second, foreign regulators are facing increased public criticism for inaction. As one recent example, the British Financial Services Authority faced severe attacks from the public and other governmental entities over its lack of attentiveness to the Libor rate rigging.[7] The increased willingness to cooperate by United States regulators combined with public criticism of inactive foreign regulators have created a powder keg for companies facing regulator inquiries.

Thus, with international cooperation among regulators at an all-time high, any company facing a regulator inquiry must ask itself what other international regulators may be involved (or may want to become involved). It should be assumed that every regulator who can investigate a matter will want a piece of the pie. Obvious candidates are regulators to whom the company reports or who regulate the security at issue, but, as Richard Bruce Moore found out, that isn't necessarily required — simply being a Canadian citizen and making trades "against the public interest" was seemingly enough for the OSC to include the Tomkins trades in their complaint. Be it your citizenship, the company's place of business, or where the alleged insider information was communicated, regulators are increasingly using any jurisdictional hook available to them.

In the past, a company could with some confidence develop an enforcement strategy around a primary regulator without worrying that other jurisdictions may join the fight. Now, though, in order not to get blindsided, a company must consider any geographic ties to the investigation and pay very close attention to all regulators that may have jurisdiction as part of their legal strategy.

–By Michael M. Rosensaft, Katten Muchin Rosenman LLP

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

[7] http://www.moneymarketing.co.uk/politics/tsc-slams-fsa-over-role-in-libor-scandal/1056501.article