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Regulatory Cooperation In International E-Discovery

Law360, New York (December 02, 2009) -- The country of Switzerland made headlines in July when it threatened to seize data from UBS to prevent enforcement of a U.S. court order seeking names of account holders suspected of tax evasion, an order the Swiss government claimed would force UBS to violate Swiss privacy law.[1]

Indeed, for several years, the legal community has been debating the dilemma faced by companies when data subject to discovery is stored in a foreign country whose privacy laws prohibit or limit the export of data to the United States.[2]

In the civil context, this dilemma is real, and reconciling U.S. discovery obligations with EU privacy laws is quite a balancing act.

In the criminal or regulatory context, however, there may be some solutions. Indeed, there is a growing trend of cooperation among U.S. regulators and their foreign counterparts in facilitating navigation of the blocking statute maze.

In fact, such cooperation was what led to the disarming of the e-discovery battle troops in the UBS situation — the Internal Revenue Service reached an agreement with its Swiss counterpart, the Swiss Federal Tax Administration (SFTA), whereby the SFTA would review the UBS data at issue and provide the U.S. with the names of the account holders who met certain criteria outlined in a sealed IRS document.[3]

Though this deal was ad hoc, regulators, particularly the U.S. Securities and Exchange Commission and its foreign counterparts, have slowly begun to establish a legal framework for cooperation in international discovery.

This trend has broad implications, particularly in complex cases involving both litigation and regulatory investigations.

Legal Framework

The SEC's Web site touts its cooperation with foreign regulators, noting that in 2006, the SEC made 561 requests to foreign authorities to share information in an enforcement effort and responded to 353 requests from foreign authorities.[4]

The SEC's authority to gather information through foreign bodies stems from two places: the IOSCO Multilateral Memorandum of Understanding (MMOU) and bilateral agreements with other regulators.

These agreements may allow data to be exported from foreign countries to the U.S. despite privacy laws and blocking statutes that complicate discovery in civil litigation.

International Organization of Securities Commissions

The MMOU,[5] a cooperation agreement among regulators from across the globe, was enacted in 2002 and enables any signatory to request that another signatory conduct discovery on their behalf in that country.

Section 7(a) states that regulators who have signed the memorandum will "provide each other with the fullest assistance permissible to secure compliance with the respective laws and regulations" of those regulators.

"Assistance" includes "obtaining information and documents" and "taking or compelling a person's statement, or, where permissible, testimony under oath."

To make a request under the memorandum, a signatory must submit a detailed request to the contact person listed on the signatory page.

The requested authority must then "require the production of documents" or "seek responses to questions and/or a statement."

Bilateral Memoranda of Understanding

The SEC has established Memoranda of Understanding with over 20 different countries.[6]

While each agreement varies, the structure is largely the same.

For example, an agreement between the SEC and the Commission des Operations de Borse of France (now known as the Autorité des Marchés Financiers or AMF),[7] the U.S. may request that the AMF "take the evidence of persons" or "obtain documents from persons" located in France who may have been involved in the violation of U. S. security laws.[8]

The existence of this agreement is especially important in light of the fact that France is typically one of the strictest countries when it comes to discovery in civil litigation.

French Penal Law No. 80-538 (more commonly known as the “French Blocking Statute”) provides:

"Subject to international treaties or agreements and laws and regulations in force, it is forbidden for any person to request, seek or communicate, in writing, orally or in any other form, documents or information of an economic, commercial, industrial, financial or technical nature leading to the constitution of evidence with a view to foreign judicial or administrative procedures or in the context of such procedures."

The Commission Nationale de L’informatique et Des Libertés (“CNIL”) — the French data protection authority — unequivocally stated in its 2007 Annual Report that producing data located in France in response to an SEC subpoena “breach[es] the French legal provisions on data protection.”[9]

However, the same report found that The CNIL has stated that under French law “requests from foreign administrative authorities may be legally allowed only if covered under an international agreement or treaty.”[10]

Thus, it appears permissible under French law that the AMF can request and collect data from the subject of an investigation and share it with the SEC, whereas the party providing the data to the AMF might not be permitted to supply it directly to the SEC, from France.

Similarly, bilateral agreements provide an avenue for the export of data in England, a country that is frequently noted by commentators for the complications that its privacy laws pose for international e-discovery.

While the UK Data Protection Act of 1998 allows the processing of data to meet a “legal obligation” (which presumably includes a request from a regulator), [11] the eighth principle of the act states that “[p]ersonal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.”[12]

The U.S., as a whole, is not recognized as adequately protecting data under this act, though individual agencies such as the Department of Commerce and Bureau of Customs and Bureau Protections are.[13]

However, a Memorandum of Understanding between the SEC and the U.K. Financial Services Authority provides that authorities in both countries will provide each other with “the fullest level of mutual assistance” including “obtaining specified information and documents from persons” and “questioning or taking the testimony of persons designated by the requesting authority.”[14]

The MOU also specifies that a “representative of the requesting authority may be present at the questioning or testimony, may prescribe specific questions to be asked of

any witness and, pursuant to paragraph 14 of this memorandum, may otherwise participate in the examination of any witness."[15]

Other examples include:

- Argentina: The personal Data Protection Act of 2000 prohibits "[t]he transfer of any type of personal information to countries or international or supranational entities which do not provide adequate levels of protection"[16] but makes an exception if "the transfer is arranged within the framework of international treaties which the Argentine Republic is a signatory to."[17]

A Memorandum of Understanding between Comision Nacional Valores of Argentina and the SEC calls for cooperation in obtaining files for investigation, thus falling into the statute's exception.[18]

- Switzerland: The Federal Act on Data Protection Law of 1992[19] prohibits making information available abroad from within Switzerland without having ensured an adequate level of data protection on the recipient's side is prohibited.

However, a Memorandum of Understanding between the SEC and Swiss government calls for the parties to assist each other in obtaining records and witnesses in investigations regarding insider trading.[20]

This cooperation between the SEC and its foreign counterparts can be expected to increase in the upcoming year, as the SEC chairperson appointed by President Obama, Mary Schapiro, has significant ties with the International Organization of Securities Commissions (IOSCO), having served as chairwoman of the IOSCO SRO Consultative Committee from 2002 to 2006.[21]

Other Regulators

The SEC is not the only American regulator that has developed a legal framework for obtaining discovery assistance from its foreign counterpart.

The Commodities and Futures Trading Commission similarly has cooperative enforcement agreements with over 20 countries. Such agreements typically provide for signatories to "obtain documents and to take testimony of, or statements from, witnesses on behalf of a requesting authority".[22]

The CFTC is also a signatory to the IOSCO MMOU and an active participant in international commodities regulation efforts.[23]

According to a recent report regarding the CFTC's efforts with regarding the IOSCO principles, in the fiscal year 2008, the CFTC made 120 requests for assistance to authorities in 38 different foreign authorities and responded to 47 requests from 18 different authorities.[24]

Similarly, the Federal Trade Commission has entered into a series of agreements with international regulators, many of which contain provisions for information gathering and sharing.[25]

For example, the FTC has two agreements with U.K. regulators, one regarding consumer protection efforts and one regarding enforcement of anti-spam laws, both of which require the signatories to "cooperate on a reciprocal basis in providing or obtaining evidence ..."[26]

The FTC has also recently been given a mandate from Congress to further develop the framework for cooperation with foreign regulators.

The 2006 US SAFE WEB Act[27] amended the Federal Trade Commission Act[28] to authorize the FTC to conduct investigations and discovery for, and provide information to, foreign law enforcement agencies.[29]

In determining whether to provide assistance to the foreign government, the FTC is to consider "whether the requesting agency has agreed to provide or will provide reciprocal assistance" to the FTC.

To the extent that "a foreign law enforcement agency has set forth a legal basis for requiring execution of an international agreement as a condition for reciprocal assistance, or as a condition for provision of materials or information," the FTC "may negotiate and conclude an international agreement, in the name of either the United States or the commission, for the purpose of obtaining such assistance, materials or information."

The FTC's Web site notes numerous cases in recent years in which foreign regulators provided investigative assistance, including seven cases in 2008.[30]

Implications for Practitioners

In government enforcement actions, a litigant may be able to object to certain foreign discovery requests by pointing the opposing party to the applicable treaty/agreement.

If a party could be subjected to criminal penalties for violating a law, but the SEC can obtain the data through a pre-existing treaty, the burden argument may be more persuasive.

Even against a private litigant, a party facing a request for international ediscovery could suggest that its opposition work with the appropriate regulator to obtain the information.

Suggesting an alternative avenue, however, will not release a party from the burden of having to review and produce the documents.

Many of the foreign blocking statutes require data to be culled down to what is necessary to respond to the request prior to export from the foreign country, which the EU Data Protection Working Party has suggested requires in situ review as a good-faith effort to avoid "transfer" of personal information in electronic data.[31] Litigators, make sure your passports are renewed.

If a party does produce data to a foreign regulator, an interesting issue emerges: Can the party export the data to the U.S. for its own use in defending the litigation? In states that do not have a complete bar on export, the answer is likely yes, especially if the subject of the data consents.

However, if the data is in a country like France where exports are barred completely, nothing in the framework of treaties and MOUs specifically allows a party to transfer the data to itself in the event it is also given to a regulator.

Moreover, in a complex litigation, if a party does export the data to the U.S., the burden argument with regard to production to an opposing civil litigant is diminished — at least with respect to citing to foreign privacy laws as a bar to production.

In summary, civil litigants should look beyond the balancing of data privacy laws and U.S. discovery demands to the regulatory data-sharing framework. While it is difficult to navigate best practices in international e-discovery, there may be some solutions within the regulatory framework.

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The opinions expressed are those of the author and do not necessarily reflect the views of Portfolio Media, publisher of Law360.

[1] Swiss Vow to Block UBS From Giving Names to U.S., N.Y. Times, July 9, 2009 at B8.

[2] Notably, the Sedona Conference has focused much effort on the "'Catch-22' situation in which the need to gather relevant information from foreign jurisdictions often squarely conflicts with blocking statutes and data privacy regulations that prohibit or restrict such discovery — often upon threat of severe civil and criminal sanctions." Sedona Conference ® Framework for Analysis of Cross-Border Discovery Conflicts: A Practical Guide to Navigating the Competing Currents of International Data Privacy and e-Discovery" at 1 (August 2008 Public Comment Version). The many commentaries similarly discussing this dilemma include Ralph Losey, Are We Barbarians at the Gate, Sept. 1, 2009, available at ralphlosey.wordpress.com/2008/09/01/are-we-the-barbarians-at-the-gate/; Ryan Davis, European Privacy Laws An E-Discovery Stumbling Block, July 23, 2009, available at www.law360.com/articles/112287; Shannon Capone

Kirk, Emily Cobb and Michael Robotti, When U.S. E-Discovery Meets EU Roadblocks, National Law Journal, Dec. 22, 2008; Erica Davila, International E-Discovery: Navigating The Maze, 8 U. Pitt. J. Tech. L. Pol'y 5(2008); David J. Kessler, Torn Between Two Laws: The Demands of E-Discovery Set a Global Trap for IP Litigators, IP Supplement to Legal Times, Oct. 15, 2007.

[3] Swiss Don't See Defeat in Deal to Give U.S. Names, Wall Street Journal, Aug. 21, 2009, at A7.; Swiss Deal With I.R.S. May Hide Some Tax Cheats, N.Y. Times, Sept. 8, 2009, at B3.

[4] See Office of International Affairs, International Enforcement Cooperation, at www.sec.gov/about/offices/oia/oia_crossborder.htm#framework (last visited Nov. 7, 2009).

[5] International Organization of Securities Commissions Multilateral Memorandum of Understanding Concern Consultation and Cooperation And the Exchange of Information, May 2002, available at www.iosco.org/library/pubdocs/pdf/IOSCOPD126.pdf.

[6] Cooperative Arrangements with Foreign Regulators, at www.sec.gov/about/offices/oia/oia_cooparrangements.htm#enforce (last visited Nov. 7, 2009).

[7] See Understanding Regarding the Establishment of a Framework for Consultations and Administrative Agreement, signed by the United States Securities and Exchange Commission and the Commission des Operations de Borse of France (Dec. 14, 1989), available at www.sec.gov/about/offices/oia/oia_bilateral/france.pdf.

[8] Id. at Art. III § 1.

[9] Alex Turk, CNIL Chairman, CNIL 2007 Annual Activity Report, Commission Nationale de L'informatique et Des Libertés, at 30-31(2008), available at www.cnil.fr/fileadmin/documents/uk/CNIL-AnnualReport-2008.pdf.

[10] Id. at 31.

[11] United Kingdom's Data Protection Act, 1998, ch. 29., First Principle available at www.opsi.gov.uk/Acts/Acts1998/ukpga_19980029_en_1

[12] Id, Eighth Principle.

[13] These divisions are the Department of Commerce and the Bureau of Customs and Border Protection, only for the purpose of providing the names of airline passengers. See ec.europa.eu/justice_home/fsj/privacy/thridcountries/index_en.htm.

[14] Memorandum of Understanding on Mutual Assistance and the Exchange of Information between the United States Securities and Exchange Commission and Commodity and Futures Trading Commission and the United Kingdom Department of Trade and Industry and Securities and Investment Board (Sept. 25, 1991), Part II(6), available at www.fsa.gov.uk/pubs/mou/mou_sec.pdf.

[15] Id. It should also be noted that the Eighth Principle can be overcome if the subject of the data consents to the transfer. United Kingdom Data Protection Act, Schedule 4.

[16] Data Protection Act of 2000 §12(1), available at www.privacyinternational.org/article.shtml?cmd%5B347%5D=x-347-63297.

[17] Id. at 12(2)(d).

[18] Art. III(2)(a), available at www.sec.gov/about/offices/oia/oia_bilateral/argentina.pdf.

[19] Federal Act on Data Protection Law of 1992, Article 6, available at www.admin.ch/ch/e/rs/2/235.1.en.pdf.

[20] Memorandum of Understanding, the Untied States Securities and Exchange Commission and the Government of Switzerland (Aug. 31, 1982) Part II(3)(b), available at www.sec.gov/about/offices/oia/oia_bilateral/switzerland.pdf. A broader Mutual Legal Assistance Treaty between Switzerland and the U.S. calls for further cooperation. See Mutual Legal Assistance (MLAT) and Other Agreements, travel.state.gov/law/info/judicial/judicial_690.html.

[21] SEC News Release, Mary Schapiro Sworn in as Chairman of SEC, Jan. 27, 2009, S.E.C. 09-11, 2009 WL 181829 (S.E.C.)

[22] See CFTC Web site, www.cftc.gov/international/memorandaofunderstanding/index.htm#infosharetechasst.

[23] For example, on June 24-25, 2009, the CFTC co-chaired a conference regarding commodity market manipulation with the U.K. FSA. CFTC News release, Commodity Futures Trading Commission Holds Third Annual International Commodity Market Manipulation Conference, June 25, 2009.

[24] United States Futures and Commodities Commission Staff Self-Assessment of the IOSCO Objectives and Principles of Securities Regulation, August 2009, available at www.treas.gov/offices/international-affairs/standards/FSAP/docs/Securities%20CFTC%20Self%20Assessment%208-28-09.pdf

[25] FTC Office of International Affairs, Antitrust and Consumer Protection Cooperation Agreements, at www.ftc.gov/oia/agreements.shtm.

[26] See Memorandum of Understanding on Mutual Enforcement Assistance in Consumer Protection Matters between the Federal Trade Commission of the United States of America and Her Majesty's Secretary of State for Trade and Industry and the Director General of Fair Trading in the United Kingdom (Oct. 31, 2000), Part II.C, available at www.ftc.gov/oia/agreements.shtm; Memorandum of Understanding on Mutual Enforcement Assistance in Commercial Email Matters Among the Following Agencies of the United States, the United Kingdom, and Australia: the United States Federal Trade Commission, the United Kingdom's Office of Fair Trading, the United Kingdom's Information Commissioner, Her Majesty's Secretary of State for Trade and Industry, the Australian Competition and Consumer Commission, and the Australian Communications Authority (July 2004), Part II.C, available at www.ftc.gov/oia/agreements.shtm.

[27] Pub. L. No. 109-455 (Dec. 22, 2006).

[28] 15 U.S.C. §§ 41-58 (2008).

[29] Pub. L. No. 109-455 § 4 (Dec. 22, 2006).

[30] See FTC International Activities: Consumer Protection Federal Court Cases With Cross-Border Components, at www.ftc.gov/bc/international/fedcases.shtm (last visited Nov. 13, 2009).

[31] See European Union Data Protection Working Party, Working Document 1/2009 on Pre-Trial Discovery for Cross Border Civil Litigation, at 11, Feb. 11, 2009.