THE GUIDE TO INTERNATIONAL ENFORCEMENT OF THE SECURITIES LAWS

THIRD EDITION

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Published in the United Kingdom by Law Business Research Ltd
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK

www.globalinvestigationsreview.com

Enquiries concerning reproduction should be sent to: insight@globalinvestigationsreview.com.
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david.samuels@lbresearch.com

ISBN 978-1-80449-272-7

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following for their learned assistance throughout the preparation of this book:

Bougartchev Moyne Associés AARPI

Cravath, Swaine & Moore LLP

DLA Piper

Fangda Partners

Forensic Risk Alliance

Gleiss Lutz

Herbert Smith Freehills New York LLP

Kirkland & Ellis LLP

Lenz & Staehelin

Miller & Chevalier Chartered

Shardul Amarchand Mangaldas & Co

Publisher's Note

Global Investigations Review (GIR) is delighted to publish the third edition of *The Guide to International Enforcement of the Securities Laws*. For newcomers, GIR is the online home for everyone who specialises in investigating and resolving suspected corporate wrongdoing. We tell them all they need to know about everything that matters in their chosen professional niche.

GIR is famous for its daily news, but we also create various types of in-depth content. This allows us to go deeper into important matters than the exigencies of journalism allow. On the GIR website you will also find a technical library (the guides); reports from our lively worldwide conference series, GIR Live (motto: 'less talk, more conversation'); regional reviews; and unique data sets and related workflow tools to make daily life easier.

Being at the heart of the corporate investigations world, we often become aware of gaps in the literature first – topics that are ripe for an in-depth, practical treatment. Recently, the enforcement of securities laws emerged as one such area. Capital these days knows no borders; on the other hand, securities law enforcement regimes very much do. That mismatch can give rise to various questions, to which the guide aims to provide some answers. It is a practical, know-how text for investigations whose consequences may be in breach of national securities law. Part I addresses overarching themes and Part II tackles specifics.

If you find it helpful, you may also enjoy some of the other titles in our series. *The Practitioner's Guide to Global Investigations* walks the reader through what to do, and consider, at every stage in the life cycle of a corporate investigation, from discovery of a possible problem to its resolution. Its success has inspired a series of companion volumes that address monitorships, sanctions, cyber-related investigations, compliance and, now, securities laws.

We would like to thank the editors of *The Guide to International Enforcement of the Securities Laws* for helping us to shape the idea. It is always a privilege to work with Cravath, Swaine & Moore. We would also like to thank our authors and our colleagues for the elan with which they have brought the vision to life.

We hope you find it an enjoyable and useful book. If you have comments or suggestions please write to us at insight@globalinvestigationsreview.com. We are always keen to hear how we could make the guides series better.

Global Investigations Review
London
November 2023

CHAPTER 2

How to Represent Individuals in Multi-Jurisdictional Investigations

Katherine E Pappas, Paul A Leder and Maria E Lapetina[1]

Introduction

The representation of individuals in cross-border investigations demands attention to a host of issues and concerns that are not present when representing an entity. Unlike an entity, which likely has experience navigating the differences among legal systems as it pursues business internationally, an individual may be less likely to be prepared to address the expectations and requirements of foreign legal systems. While a legal entity will ultimately assess its way forward, including possible resolutions, through a largely financial prism, an individual faces unique risks, including concerning liberty, reputation and future employability. Further, for current employees in particular, the potential conflict between the employer's interest in currying favour with government regulatory agencies through expansive cooperation might conflict with the employee's rights and interests. Counsel for the individual client must balance these interests and anticipate challenges from regulators, employers and other third parties.

Cross-border securities investigations and enforcement actions frequently require expert legal advice in multiple jurisdictions. Mutual legal assistance and cooperation arrangements among regulators from different countries can limit the client's options for interacting, or not, with regulators while increasing the client's risk at the same time. In the securities space, the US Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) can bring civil cases and coordinate with the US Department of Justice (DOJ),

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which can initiate criminal prosecutions. With respect to both civil and criminal cases, the client's actual location during the events in question may have an impact on what charges can be brought and, in the criminal context, whether a prosecution can proceed. As a result, counsel must understand and monitor the facts in the case at issue, as well as developments in the client's life. International travel during a period of investigation or after a case has been filed can have significant ramifications for the client's freedom and exposure to legal process.

Representing individuals in cross-border, multi-jurisdictional matters is becoming more the norm than the exception as authorities in Europe, Latin America and Asia increasingly conduct investigations and bring prosecutions in matters involving securities fraud, anti-corruption and money laundering. Counsel must develop and execute a coordinated, multi-jurisdictional strategy that capitalises on the differences in legal powers, jurisdiction and approach among relevant government authorities in a way that maximises the client's options and leverage while minimising any potential adverse effects on the client.

Just as no two individual clients are identical, the same is true for the representation of any two individuals. As discussed below, when representing individuals in cross-border securities matters, consideration must be given to a range of issues, including invocation of individual privileges and evaluation of jurisdictional exposure, as well as a host of decisions related to the client's personal objectives.

Invocation of individual privileges

Individuals contending with cross-border investigations may invoke a number of privileges against the compelled production of testimony or documentary evidence, including privileges designed to maintain confidentiality, as well as the constitutional right against self-incrimination. These privileges and rights can be invoked during the course of criminal or civil investigations, in response to subpoenas or interrogatories, or during testimony, including in a deposition or at trial. Individuals should promptly raise objections to testimony based on privilege to avoid a potential waiver.

And while both corporations and individuals may invoke certain privileges, such as attorney–client privilege, only individuals can invoke the Fifth Amendment right under the US Constitution against self-incrimination.[2]

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2 See *Braswell v. United States*, 487 U.S. 99, 104–05 (1988) (*Braswell*) (noting that 'we have long recognized that, for purposes of the Fifth Amendment, corporations and other collective entities are treated differently from individuals' and that 'the State may . . . demand the production of corporate records').

When evaluating the availability of a given privilege, in the federal system, '[t]he common law – as interpreted by United States courts in the light of reason and experience – governs a claim of privilege unless' that law is contravened by the federal Constitution, statute or Supreme Court rules.[3] And '[f]ederal common law recognizes many privileges, and the traditional ones are available even though a federal agency invokes a broad statutory power to gather evidence.'[4] In civil matters, 'state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.'[5] The specific rules governing privilege may vary across jurisdictions, and individuals facing a cross-border investigation should consider the applicability of relevant state and federal law.

In a cross-border investigation, another country's privilege law may apply, and courts use multiple approaches to answer the question of whether foreign law governs the matter. Some courts apply 'traditional principles of comity' and ask whether communications 'touch base' with the United States or with the foreign country, and then apply the laws of the country with the 'most compelling or predominant interest in whether the communications should remain confidential'.[6] But 'several other approaches to the choice of law analysis have been suggested, including a "territorial" analysis . . . several "functional" analyses . . . and a "better law" approach'.[7]

Attorney–client privilege

Attorney–client privilege is a common law privilege that protects communications between an attorney and client, made in confidence, for the purpose of seeking, obtaining or providing legal assistance to the client. It 'is the oldest of the privileges for confidential communications known to the common law' and has the purpose of 'encourag[ing] full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and administration of justice'.[8]

The privilege does not protect every communication between lawyers and their clients, and communications regarding non-legal topics, including business advice, are not protected. Moreover, communications with a non-US-based attorney or adviser may require additional scrutiny. That said, courts have applied

3 Fed. R. Evid. 501.

4 *EEOC v. Illinois Dep't of Emp. Sec.*, 995 F.2d 106, 107 (7th Cir. 1993).

5 Fed. R. Evid. 501.

6 *Gucci America, Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 64–65 (S.D.N.Y. 2010).

7 *VLT Corp. v. Unitrode Corp.*, 194 F.R.D. 8, 16 n. 4 (D. Mass. 2000) (citations omitted).

8 *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (*Upjohn*).

the privilege to foreign attorneys and even to practitioners who are not attorneys in their home country. Some courts inquire into whether the practitioner is 'functionally' a lawyer in their home country, while others have required a bar membership.

In the United States, the client holds the privilege and has the ultimate right to decide whether it is asserted or waived. However, the client should guard the privilege carefully, as it can be waived unknowingly, carelessly or inadvertently. Moreover, individuals generally cannot selectively choose communications to disclose without waiving the privilege over the subject matter.

Other common law privileges

Individuals may have other privileges available to them depending on the individual's relationship to the investigation and the nature of the compelled testimony. For example, individuals holding certain occupations, including accountants, clergy, physicians, psychotherapists, journalists and government employees, may have other common law or constitutional privileges available to them.

In addition, state courts have recognised the common interest privileges. These privileges, which are an extension of the attorney–client privilege, allow individuals who have common legal interests and their counsel to communicate without the risk of waiver. Notably, however, the common interest privilege is an issue of state law, and courts in different states have applied different standards of 'common' when determining whether the common interest privilege applies. Some courts require that the interests of the individuals be identical, or close to identical.[9] Courts in other states have found that the common interest privilege can apply even where the parties have potentially adverse interests, in some respects.[10]

Individuals implicated in a cross-border investigation may want to consider whether to engage in common interest communications with other implicated individuals. In addition, it may be prudent to enter into a similar arrangement

9 See, e.g., *In re JP Morgan Chase & Co. Sec. Litig.*, No. 1783, 2007 WL 2363311, at *4 (N.D. Ill. Aug. 13, 2007) (finding that companies seeking to merge did not have identical interests; therefore, pre-merger discussions were not privileged); *Union Carbide Corp. v. Dow Chem. Co.*, 619 F. Supp. 1036, 1047 (D. Del. 1985) ('identical, not similar' interests required in patent litigation).

10 *Andritz Sprout-Bauer, Inc. v. Beazer E., Inc.*, 174 F.R.D. 609, 634 (M.D. Pa. 1997) ('The interests of the parties need not be identical, and may even be adverse in some respects.').

with counsel for the company in order to gain access to documents and information available to the company, though again, the privilege only applies to the extent the interests of the individuals and the company do not diverge.

Moreover, '[t]he Supreme Court has recognized two privileges that arise from the marital relationship."[11] First, a witness may 'refuse to testify against his or her spouse'.[12] In the case of this privilege, '[t]he witness spouse alone holds the privilege and may choose to waive it.'[13] Second, private communications between spouses may be privileged.[14] This 'communications privilege belongs to both spouses, so either spouse may invoke the privilege to avoid testifying or to prevent the other from testifying about the privileged communication'.[15] Courts have found waiver where a spouse voluntarily reveals a confidential communication in pretrial testimony, even where the spouse did not realise the impact of that disclosure on the privilege,[16] or where a spouse uses a workplace computer to effect the communication.[17]

Fifth Amendment privilege against self-incrimination

Unlike the common law privileges, the privilege against self-incrimination is grounded in the Fifth Amendment of the US Constitution. It provides that '[n]o person . . . shall be compelled in any criminal case to be a witness against himself.'[18] The privilege:

> *not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.*[19]

11 *United States v. Montgomery*, 384 F.3d 1050, 1056 (9th Cir. 2004).
12 ibid.
13 ibid.
14 ibid.
15 *United States v. Brock*, 724 F.3d 817, 820 (7th Cir. 2013).
16 See id., at 822.
17 See *United States v. Hamilton*, 701 F.3d 404, 408–09 (5th Cir. 2012).
18 *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (*Lefkowitz*).
19 ibid.

In addition:

> *The Fifth Amendment permits a witness to refuse to answer any question put to him 'unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant'.*[20]

Generally, the protection offered by the Fifth Amendment 'is not self-executing'.[21] An individual must promptly invoke the privilege 'at the time he relies on it'.[22] The privilege must be expressly invoked and 'a defendant normally does not invoke the privilege by remaining silent'.[23] Further, 'a witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details'.[24]

However, to be effective, a waiver of the privilege must be voluntary. For example, when a public employee is questioned under 'threats of removal from office the act of responding to interrogation [is] not voluntary and [is] not an effective waiver of the privilege against self-incrimination'.[25] Further, where the state demands a waiver of the privilege by threatening to disqualify contractors from public contracts, it is not voluntary.[26] 'A waiver secured under threat of substantial economic sanction cannot be termed voluntary.'[27] Moreover, in the context of cooperating with the government to avoid indictment, a private entity's conduct may be attributable to the state under the Fifth Amendment.[28]

The privilege is personal: 'it adheres basically to the person, not to information that may incriminate him'.[29] And it 'does not extend to the testimony or statements of third parties called as witnesses at trial'.[30] As noted above, it is well established that corporations cannot assert a right against self-incrimination.

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20 *United States v. Vangates*, 287 F.3d 1315, 1320 (11th Cir. 2002) (quoting *Lefkowitz*, 414 U.S. at 78).

21 ibid.

22 *Salinas v. Texas*, 570 U.S. 178, 183 (2013).

23 id., at 186.

24 *Mitchell v. United States*, 526 U.S. 314, 321 (1999).

25 *Lefkowitz*, 414 U.S. at 80.

26 id., at 82.

27 id., at 82–83.

28 See *United States v. Stein*, 541 F.3d 130 (2d. Cir. 2008) (concluding that a private company's 'adoption and enforcement' of a policy conditioning payment of legal fees on an employee's cooperation with the government 'amounted to state action' where the policy was adopted under threat of the entity's indictment).

29 *Couch v. United States*, 409 U.S. 322, 328 (1973).

30 *United States v. Nobles*, 422 U.S. 225, 234 (1975).

Only 'testimonial' communications are protected by the Fifth Amendment. An individual therefore 'may be required to produce specific documents even though they contain incriminating assertions of fact or belief because the creation of those documents was not "compelled" within the meaning of the privilege'.[31] But 'the act of producing documents in response to a subpoena may have a compelled testimonial aspect', and answers to questions regarding the subpoena, 'as well as the act of production itself, may certainly communicate information about the existence, custody, and authenticity of the documents'.[32] The Supreme Court has further held that 'a corporate custodian is not entitled to resist a subpoena on the ground that his act of production will be personally incriminating . . . Because the custodian acts as a representative, the act is deemed one of the corporation and not the individual.'[33] By contrast, in the context of a non-collective entity, such as a sole proprietorship, a custodian may 'be provided the opportunity to show that his act of production would entail testimonial self-incrimination'.[34]

In the context of cross-border investigations, to invoke the Fifth Amendment, an individual must fear self-incrimination under US rather than foreign law. Even where an individual faces 'a real and substantial danger of prosecution' by a foreign nation, that concern has been held to be 'beyond the scope of the Self-Incrimination Clause'.[35]

Jurisdictional considerations for individuals

When representing an individual in a cross-border securities enforcement matter, counsel should carefully analyse factors affecting extraterritorial application of the US securities laws and jurisdiction over the client. Such an analysis often forms the foundation for the overall legal strategy and guides counsel in evaluating how best to engage, or not, with US authorities.

After arriving at a view with respect to the potential assertion of jurisdiction over the client, counsel should discuss with the client the potential ramifications of a decision not to cooperate with US regulators. Such a decision can have important consequences for the client's employment, future opportunities and ability to travel generally, as well as to or through the United States. There have been many instances in which a carefully crafted legal strategy was compromised

31 *United States v. Hubbell*, 530 U.S. 27, 36–37 (2000).

32 id., at 36–37.

33 *Braswell*, at 117–18.

34 id., at 104.

35 *United States v. Balsys*, 524 U.S. 666, 669–70 (1998).

due to a client's decision to travel outside their home jurisdiction, including to or through the United States for holiday or business purposes, only for the client to be detained or subjected to legal process in the United States.

Evaluating the extraterritorial application of US law to a foreign client

In the first instance, counsel should evaluate whether the statutes under which the SEC, the CFTC, the DOJ or other US authorities might proceed contemplate enforcement actions against non-US defendants in the absence of conduct by those persons in the United States.

'It is a basic premise of [the US] legal system that, in general, "United States law governs domestically but does not rule the world."'[36] While this presumption against extraterritoriality is difficult to reconcile with the increase in cross-border investigations and prosecutions involving foreign corporations and individuals, it is nevertheless the starting point for an analysis of extraterritoriality. The Supreme Court in *RJR Nabisco Inc v. European Community* articulated a two-step test to evaluate the extraterritorial application of US law. The first step is to determine whether the statute gives a clear, affirmative indication that it applies extraterritorially, thereby rebutting the presumption.[37] If the statute does not clearly indicate that it is intended to apply extraterritorially, the second step involves looking to the statute's 'focus' to determine whether the matter involves a domestic application of the statute.[38]

In considering the second prong of the test, the Supreme Court noted that:

> *[i]f the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.*[39]

Certain oft-used statutes, such as the Foreign Corrupt Practices Act, have explicit provisions for extraterritorial application, allowing DOJ prosecutors and SEC enforcement staff to bring cases against non-US persons for conduct undertaken

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36 *RJR Nabisco Inc. v. European Community*, 136 S. Ct. 2090, 2100 (2016) (quoting *Microsoft Corp v. AT&T*, 550 U.S. 427, 454 (2007)).

37 id., at 2101.

38 ibid.

39 ibid.

outside the United States.[40] However, US courts have taken differing approaches to analysing the extraterritorial application of the anti-fraud provisions of the federal securities laws.

Prior to 2010, US courts applied the conduct and effects test to evaluate the extraterritorial application of federal securities laws claims. Essentially, this test involved assessing two different scenarios: (1) whether wrongful conduct occurred in the United States in connection with transactions involving non-US securities; or (2) whether wrongful conduct outside the United States had a substantial effect on US investors or the US market. In 2010, the Supreme Court articulated a different approach in *Morrison v. National Bank of Australia*.[41] In evaluating the extraterritorial application of Section 10(b) of the Exchange Act,[42] *Morrison* applied a transactional test, focusing on whether the alleged misstatement or omission was made in connection with a security listed on a domestic securities exchange or, if not, whether it related to a domestic transaction involving any other security in the United States.

In response to *Morrison*, Congress sought to reinstitute the conduct and effects test in connection with cases brought by the United States or the SEC, but not for private litigants. Section 929P(b) of the Dodd–Frank Act granted the SEC the authority to enforce US securities laws abroad where there is sufficient conduct or effects in the United States. The response of US courts to these amendments is discussed further below.

In assessing whether a transaction is a domestic transaction under *Morrison*, courts have looked to whether 'irrevocable liability' occurs in the United States (e.g., when a seller is required to deliver a security or a buyer is required to take and pay for the security). However, the Second Circuit has held that irrevocable liability in the United States 'is not alone sufficient to state a properly domestic claim under the statute'.[43] In *Parkcentral Global Hub Ltd v. Porsche Auto Holdings SE*, the court stated that even when irrevocable liability is established in the United States, the federal securities laws do not apply when 'the claims . . . are so predominantly foreign as to be impermissibly extraterritorial'.[44]

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40 Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1, et seq. (as amended).

41 *Morrison v. Nat'l Bank of Australia Ltd.*, 561 U.S. 247 (2010).

42 Section 10(b) makes it unlawful to 'use or employ, in connection with the purchase or sale of any security' a 'manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe'. 15 U.S.C. § 78j(b).

43 *Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198, 215 (2d Cir. 2014).

44 id., at 216.

Both the First and Tenth Circuits have rejected the Second Circuit's approach in *Parkcentral*, at least in connection with SEC enforcement matters. In *SEC v. Scoville*, the Tenth Circuit held that the steps Congress took to amend the federal securities laws through Dodd–Frank made clear that Congress intended for the federal securities laws to apply extraterritorially when the conduct and effects test is met.[45] The court found that Congress intended for the SEC's enforcement authority under Section 17(a) of the Securities Act of 1933 and the antifraud provisions of the Securities and Exchange Act of 1934 to apply extraterritorially.

More recently, the First Circuit applied the irrevocable liability test in connection with an SEC enforcement matter. *SEC v. Morrone* involved an SEC enforcement action in which a company and its senior officers were sued in the District of Massachusetts. The SEC alleged securities fraud under Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder.[46] The lower court applied the transaction test articulated in *Morrison*, but rejected the Second Circuit approach of looking beyond irrevocable liability to determine whether the transaction was otherwise predominantly foreign as to be impermissibly extraterritorial. It is important to note that the court in *Morrone* cited *SEC v. Scoville*, and noted that the amendments to Dodd–Frank apply only to conduct occurring on or after 22 July 2010, the date the amendments became effective.[47]

Based on these recent cases, it appears likely that courts assessing the extraterritorial application of the federal securities laws will apply the conduct and effects test in SEC enforcement matters and the *Morrison* test in private litigation.

Evaluating due process and other considerations

In addition to considering theories of extraterritoriality as described above, counsel should consider the client's fundamental right to due process. Counsel should analyse, regardless of the purported reach of the relevant statute, whether there is a sufficient nexus to validate the court's exercise of jurisdiction over the specific client.[48] Practical due process considerations in connection with securities enforcement actions include:

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45 *SEC v. Scoville*, 913 F.3d 1204, 1218 (10th Cir. 2019) ('it is clear to us that Congress undoubtedly intended that the substantive antifraud provisions should apply extraterritorially when the statutory conduct-and-effects test is satisfied').

46 *SEC v. Morrone*, 997 F.3d 52 (1st Cir. 2021).

47 id., at 60 No. 7.

48 *United States v. Hayes*, 99 F. Supp. 3d 409, 422 (S.D.N.Y. 2015).

- Is there a sufficient nexus between the defendant and the United States, such that application of the statute would not be arbitrary or fundamentally unfair?[49]
- In the event there is evidence of misconduct on the part of the client, is there evidence that the aim of the activity in which the client participated was to cause harm inside the United States or to US citizens or interests?[50]
- Is there evidence that the client lived in, worked in or directed any conduct at the United States?[51]
- Assuming the relevant statute contemplates extraterritorial application and the client has minimum contacts with the United States, would the exercise of jurisdiction otherwise be reasonable, when considering the burden imposed on the defendants, the interests of the forum state and the plaintiff's interest in obtaining convenient and effective relief?[52]
- Would exercise of jurisdiction over the foreign defendant be consistent with principles of international law?[53]

When the client's location may be an obstacle to prosecution: extradition

In those matters where a foreign authority is considering charging an individual, the complexity of securing extradition in a criminal case can derail a criminal prosecution or at least provide a negotiating chip to the client and the client's legal team. Both the risk of extradition and the rules relating to it are largely jurisdiction-specific and often governed by a treaty or other formal mechanism.[54] Another consideration is that there are a number of jurisdictions in which individuals can be tried criminally despite being located outside the jurisdiction, which can moot the issue of extradition. And, of course, the physical presence of a defendant is generally not an issue for non-criminal charges, when the only issue may be serving documents on a foreign individual.

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49 *United States v. Hoskins*, 902 F.3d 69, 72 (2d Cir. 2018); see also *United States v. Hoskins*, 44 F.4th 140 (2d. Cir. 2022).

50 *United States v. Al Kassar*, 660 F.3d 108, 118 (2d Cir. 2011).

51 *United States v. Sidorenko*, 102 F. Supp. 3d 1124, (N.D. Cal. 2015).

52 *SEC v. Straub*, No. 11 Civ 9645, 2016 WL 5793398 (S.D.N.Y. 30 September 2016).

53 *In re Hijazi*, 589 F.3d 401, 412 (7th Cir. 2009).

54 For a more detailed discussion of extradition-related issues, see Jeffrey A Lehtman and Margot Laporte, 'Individuals in Cross-Border Investigations or Proceedings: The US Perspective', in Judith Seddon et al. (eds), *The Practitioner's Guide to Global Investigations*, Volume I, 'Global Investigations in the United Kingdom and the United States' (Third edition, Global Investigations Review, 2019).

One factor affecting extradition is that a number of countries specifically prohibit the extradition of their own citizens, which provides extraordinary protections against a client while they remain in their home country. That protection ends, however, should the client travel to any other jurisdiction due to the home country's ability to secure an arrest warrant – a Red Notice – through Interpol. For some clients, the limitation on travel may be an acceptable trade-off for avoiding criminal prosecution, but for others such a limitation would be unworkable. Regardless of the client's willingness to accept limitations on their freedom to travel, the absolute prohibition against extradition, or even just the time and cost of securing extradition, may serve as negotiating tools for securing cooperation agreements or reduced charges for a client who is not subject to extradition. From the perspective of the relevant criminal authority, extradition can be a costly and time-consuming process and therefore a client's willingness to consider alternatives can provide leverage in negotiations.

Another issue that can affect the cross-border prosecution of individuals is the right to avoid double jeopardy, which is widely recognised internationally, although applied differently from jurisdiction to jurisdiction. In cross-border investigations of potential securities law violations, which frequently involve the potential for multiple jurisdictions prosecuting individuals for the same underlying conduct, strategic consideration needs to be given to avoiding extradition by pleading guilty to a charge in the jurisdiction where the individual resides.

Recent decisions have further illuminated the extent to which foreign defendants can contest an indictment without appearing in the relevant US proceeding. In *United States v. Bescond*, the Second Circuit reversed a lower court decision applying the fugitive disentitlement doctrine, noting that the defendant had not exhibited the characteristics of a fugitive. The Second Circuit noted that Bescond (1) had not fled the court's jurisdiction, (2) had no reason to travel to the United States, (3) was not exhibiting disrespect for US law by remaining in France, and (4) would be prejudiced by being coerced to appear in court, imposing 'financial, reputational, and family hardship regardless of her guilt or innocence, and regardless of whether the indictment charges violations of a statute that applies extraterritorially'.[55] The court also noted that the adjudication of Bescond's motions would not inspire others to evade the court's jurisdiction.

55 *United States v. Bescond*, 7 F.4th 127, 143 (2d Cir. 2021), amended by 24 F.4th 759 (2d Cir. 2022).

Conflicts of interest for counsel representing both entities and individuals

During the course of a cross-border investigation, company counsel may be put in the position of representing not only the entity under investigation but also its employees. In those circumstances, counsel should remain alert to potential conflicts of interest that risk disqualification. Where counsel sees the potential for the interests of the entity and the individuals to diverge, they should exercise caution in taking on individual employees as clients. Counsel should consider whether employees may be viewed by regulators as witnesses, subjects or targets of the investigation.

Still, counsel conducting an investigation on behalf of an entity will inevitably need to speak with individual employees. For these communications to remain privileged, they must be made for the purpose of providing legal advice to the entity and 'concern[] matters within the scope of the employees' corporate duties'. The employees must be 'aware that they were being questioned in order that the corporation could provide legal advice'.[56]

The concern regarding disqualification may be heightened where regulators expect cooperating entities to produce materials and set out facts relevant to individuals involved in or responsible for the alleged misconduct. This dynamic can be very challenging. In *United States v. Gregoire Tourant*, Mr Tourant argued that joint representation of the company and individuals ultimately resulted in a conflict. The joint representation allowed counsel to relieve the company of liability while making scapegoats of individuals. As a result, the US authorities indicted him. He moved to dismiss the indictment, but was ultimately unsuccessful. The court noted that Mr Tourant had been advised, in writing, of the risks of joint representation.[57] An entity may nonetheless provide counsel to individuals and indemnify legal fees without risking being penalised by regulators or disqualification from serving as counsel, but even so, individuals should be mindful of the risk presented by joint representation and should raise potential concerns or conflicts.

56 *Upjohn*, 449 U.S. at 394.

57 *United States v. Gregoire Tournant*, No. 22-CR-276-LTS 2023 WL 5276776 (S.D.N.Y. Aug. 15, 2023).