The (Too) Long Arm of the S.E.C.: When a Foreign Employee of a U.S.-Based Multinational Financial Services Client is Threatened with a Subpoena

Ronald S. Betman

Jonathan R. Law

Follow this and additional works at: https://scholarship.law.berkeley.edu/bblj

Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z38DC6T

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Business Law Journal by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
The (Too) Long Arm of the S.E.C.: When a Foreign Employee of a U.S.-Based Multinational Financial Services Client Is Threatened With a Subpoena

Ronald S. Betman1 and Jonathan R. Law2

As businesses and financial institutions engage in transactions with increasingly international scope, U.S. regulatory agencies are responsible for investigating potential violations of the securities and exchange laws. One of the Securities and Exchange Commission’s most powerful tools is the ability to issue administrative subpoenas. What is troubling, however, is the SEC’s recent foray into investigating possible misconduct across U.S. borders by subpoenaing foreign employees conducting business overseas. This article argues that in a broad spectrum of circumstances, the SEC does not have the authority to issue or enforce an extraterritorial administrative subpoena. In other situations, while the SEC may clearly exercise its subpoena power, there are certain precautions that may be implemented to minimize a financial services firm’s risk profile.

I. Introduction ................................................................. 2
II. Administrative Investigative Power ........................................ 3
III. Administrative Subpoena Enforced by Judicial Order ................ 6
      Subject-Matter Jurisdiction ........................................ 6
      Personal Jurisdiction ............................................. 8
      Location of Service .............................................. 8
      Minimum Contacts .............................................. 9
IV. Judicial Subpoena issued to U.S. National or Resident outside the
    U.S................................................................. 10
V. Alternatives to Formal Enforcement Proceedings .................... 12
VI. Conclusion .......................................................... 13
VII. Practice Tips .......................................................... 14

1. Partner, Winston & Strawn LLP. Mr. Betman focuses his practice on major class action and complex litigation, with an emphasis on securities litigation and regulatory investigations, involving the SEC and the CFTC.
2. Law Clerk, United States District Court for the Central District of Illinois (currently); Associate, Winston & Strawn LLP (during the authorship of this paper). While at Winston & Strawn, Mr. Law focused his practice on complex securities litigation and appellate litigation. The authors also acknowledge Chris Letkewicz for his useful insight.
berkeley business law journal vol. 10:1, 2013

i. introduction

a few months ago, a u.s.-based, multinational client came to us with an intriguing question. what if the u.s. securities and exchange commission were to request that one of their beijing-based analysts provide testimony under oath in the course of a formal investigation? how should the company respond? did the sec really have jurisdiction over conduct occurring in a foreign nation, or over foreign citizens? and, more to the point: where, exactly, were they planning on taking her testimony? china? or were they going to whisk her out from under the steely gaze of the china securities regulatory commission, the sec’s chinese counterpart?

as it turns out, we were right to be cautious. as business and financial institutions explore new opportunities across national borders, the various regulatory agencies are one small step behind. the sec, empowered by both the congress and the executive administration, has been attempting to broaden its extraterritorial jurisdiction. three examples demonstrate this progression.

first, in late 2010, the sec issued an administrative subpoena to a u.s.-based hedge fund, tiger asia, in cooperation with the hong kong securities and futures commission. that subpoena demanded documents relating to trades that tiger asia had conducted on the hong kong exchange. because the hedge fund was located in the u.s., the action was still clearly within the sec’s jurisdiction; the investigation was simply into conduct on an overseas exchange.

next, in early may 2012, the agency filed an action to enforce a subpoena against the shanghai affiliate of deloitte touche tohmatsu for refusing to provide audit work papers, as provided by section 106 of the sarbanes-oxley act. as the target corporation was based in shanghai, this subpoena was broader. however, as it was for work papers, it did not involve the same intrusiveness as a deposition under oath.

last, in late may 2012, the sec filed an action to compel compliance with an administrative subpoena for testimony and documents while investigating a potential pump-and-dump scheme. the subpoena recipient, the ceo of one of the microcaps under investigation, claimed that he was “unable to comply with the subpoena” because he currently resided in china and “would not return [to the u.s.] for some time.” notably, the sec only alleged that the subpoena


5. mem. of law in supp. of appl. for order to show cause and for an order compelling
The (Too) Long Arm of the S.E.C.

recipient had at one point maintained a home in the U.S., but not that he was currently a resident of the U.S. or that he was even a U.S. citizen. Further, the agency offered to take his testimony and receive documents at “a location of [the respondent’s] choice in the United States.” Like the Deloitte subpoena, this involved an overseas recipient. However, a deposition is arguably more invasive, especially when aimed at an individual who might not even be a U.S. national and who allegedly no longer lived in the U.S.

Under its current mandate, however, does the SEC even have the legal authority to investigate an individual’s conduct in foreign nations? If so, what authority does the federal judiciary have to enforce a subpoena for testimony against such an individual? Surely, it makes no sense for an administrative agency to obtain an order from a court compelling testimony, if that court cannot later enforce the order because the individual was a foreign citizen in a foreign nation. But the fundamental question underlying the entire proposition is whether there would even be any point to investigating potential financial wrongdoing if the SEC has no authority to subsequently prosecute those allegedly wrongful acts in a U.S. court.

In the wake of Morrison v. National Australia Bank7 and the Dodd-Frank Act, whether the SEC may issue extraterritorial subpoenas is a complex question.8 This article argues that in most situations, the SEC likely cannot compel a foreign employee to respond. In making this argument, this article analyzes four issues. First, this article discusses the SEC’s power to serve an administrative subpoena on a witness located outside the U.S. Second, it evaluates a district court’s power to enforce such a subpoena. Third, it explores the SEC’s power in the course of an ongoing litigation to subpoena a foreign employee pursuant to 28 U.S.C. § 1783. Finally, this article discusses alternatives available to the SEC outside the traditional channels of litigation and subpoenas.

II. ADMINISTRATIVE INVESTIGATIVE POWER

The issue here is whether the SEC’s authority extends to conduct or transactions beyond U.S. borders, and, if so, whether the agency may investigate expatriate U.S. citizens or foreign nationals for purportedly engaging in that conduct. As a federal administrative agency, the SEC has broad power to investigate and prosecute potential violations of the laws

---


7. 130 S.Ct. 2869 (2010).

governing the U.S. securities industry. Among those powers is the authority to subpoena witnesses. The SEC’s Office of International Affairs, which facilitates cross-border securities investigations, has a long history of international assistance. In the last five years, the office has aggressively expanded. Between 2006 and 2011, the number of employees in the office increased by half, and is on track to nearly double by 2013.

A close analysis suggests that the SEC’s extraterritorial authority has been curtailed recently. Before 2010, federal common law provided U.S. securities laws with extraterritorial reach in foreign-cubed cases, which are cases where foreign plaintiffs who bought shares in a foreign company on a foreign exchange bring suit in a U.S. court. Plaintiffs were permitted to do so if the wrongful conduct occurred within the U.S., or the wrongful conduct occurred outside the U.S. but had a substantial effect in the U.S.—the “conduct or effects” test. In 2010, the Supreme Court sharply restricted this expansive extraterritorial reach in Morrison v. National Australia Bank, reiterating the longstanding presumption that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.”

The next day, Congress passed the Dodd-Frank Act. Deeply embedded in the statute, under layers of financial regulations reform, was Section 929P. This hastily-drafted provision purported to “make clear that in actions and proceedings brought by the SEC. . . the specified provisions of the Securities


14. Morrison, 130 S.Ct. at 2878. Although this presumption is not new to Morrison, see, e.g., Blackmer v. United States, 284 U.S. 421, 437 (1932), for the sake of convenience this article refers to it as the Morrison presumption.

The (Too) Long Arm of the S.E.C.

Act [and] the Exchange Act . . . may have extraterritorial application” and that the “provisions concerning extraterritoriality . . . are intended to rebut [the] presumption [in Morrison] by clearly indicating that Congress intends extraterritorial application in cases brought by the SEC.”

There is a minor problem however: A close reading suggests that Section 929P accomplished nothing in particular. Morrison explicitly acknowledged that the federal district courts have subject-matter jurisdiction over extraterritorial cases, but that the substance of the antifraud provisions did not reach foreign transactions. As for Section 929P, the plain text only affords the Federal courts “jurisdiction” over actions and proceedings brought by the SEC. Accordingly, both courts and advocates are generally of the persuasion that Morrison effectively gutted the judge-made substantive extraterritorial reach of U.S. laws—not just for securities laws, but beyond. Since the Federal courts already had subject-matter jurisdiction, and Section 929P added only jurisdiction and not substantive reach, it is highly unlikely that the SEC has authority outside U.S. borders.

Assuming for the sake of argument that the SEC has extraterritorial authority, the administrative subpoena statute itself only authorizes the agency to demand the “attendance of witnesses and the production of any such records. . . from any place in the United States or any State at any designated place of hearing.” Although the provision perhaps could have been worded less vaguely, it seems clear that the SEC’s reach is restricted to U.S. territorial boundaries. Furthermore, that statute fails to provide a clear and positive grant of extraterritorial jurisdiction. In fact, the only mention of international concern is in a section permitting the SEC to assist foreign securities authorities. By analogy, the Morrison presumption should also bar the SEC

---

17. Morrison, 130 S. Ct. at 2877, 2888.
18. 15 U.S.C. § 77v(c) (“Extraterritorial jurisdiction. The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of section 77q(a) of this title involving—(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.”). See also 15 U.S.C. § 78aa(b).
from having any extraterritorial subpoena power.

Thus, the first step in resisting an SEC subpoena would be to decline on the ground that the agency does not have extraterritorial investigative power because its enabling statute does not explicitly mention it, and that its administrative subpoena powers are similarly limited to U.S. borders. In this way, the SEC has no inherent power to compel compliance with a subpoena. But this is not the end of the inquiry.

III. ADMINISTRATIVE SUBPOENA ENFORCED BY JUDICIAL ORDER

To give it some bite behind the bark, Congress afforded the SEC the ability to request that a district court enforce an SEC administrative subpoena. In order for a district court to enforce an agency subpoena, the court must have both subject-matter jurisdiction and personal jurisdiction over the proposed respondent. As discussed above, it is clear that the federal courts have subject-matter jurisdiction over extraterritorial actions in general. However, if the SEC chooses to litigate, a federal court’s power to enforce an SEC subpoena can be drastically restricted if the subpoena was served outside the U.S.

Subject-Matter Jurisdiction

Upon filing a civil action in district court, the SEC may apply for an order to show cause and, failing that, an order requiring obedience to the agency subpoena. The enabling statute empowers a federal court to “issue to such person an order requiring such person to appear before the Commission . . . there to give evidence touching the matter in question.” The failure to obey the order “may be punished by said court as a contempt thereof.” In domestic cases, the standard for whether the court orders compliance is highly deferential to the SEC. The SEC needs to only show that (1) the investigation will be conducted pursuant to a legitimate purpose; (2) the inquiry may be relevant to that purpose; (3) the agency does not already have the information; and (4) that all the administrative prerequisites have been followed. Generally, these

---

27. Id.
The (Too) Long Arm of the S.E.C.

factors are easily satisfied. However, if the defendant is outside U.S. borders, an examination of the text of the statute reveals that the court lacks subject-matter jurisdiction to enforce a subpoena served on her.

Because the court may enforce a subpoena only against “such persons” that had been served “at any place within the United States,” it is unlikely that the federal courts have the power to enforce an SEC subpoena if the order was served outside U.S. borders. In *Nahas*, the D.C. Circuit ruled that the Commodity Futures Trading Commission (CFTC), an administrative agency tasked with regulating the futures and options markets, did not have that power. There, the defendant, a citizen and resident of Brazil, was served by the CFTC in Brazil. When he failed to respond, the agency petitioned the district court for an enforcement order. The district court granted the request. On appeal, the D.C. Circuit ruled that because a district court possesses subject-matter jurisdiction only to the extent granted by Congress, and because the CFTC’s subpoena enforcement statute, as it existed at the time, only afforded the power to subpoena witnesses “from any place in the United States or any State,” the lower court consequently did not have subject-matter jurisdiction to enforce the extraterritorial subpoena and vacated the order. Two years later, Congress amended that section to give administrative subpoena power to the CFTC over foreign citizens in a foreign country, indicating that it intended to abrogate *Nahas*.

In contrast, Congress has made no such parallel amendment to the SEC’s equivalent subpoena enforcement statute. The critical language in the statute retains its limitation: “In any action or proceeding instituted by the Commission. . . a subpoena issued to compel the attendance of a witness or the production of documents or tangible things (or both) at a hearing or trial may be served at any place within the United States.” Furthermore, Section 929E of the Dodd-Frank Act endowed the district courts with the power to issue nationwide service of subpoenas in any action by the SEC. Conspicuously absent from this grant is worldwide service. These two factors, combined with *Morrison’s* presumption against extraterritoriality, strongly suggest that while the federal courts may have subject-matter jurisdiction over extraterritorial cases in general, they do not have the power to enforce an SEC investigative subpoena issued to an individual in a foreign nation.

31. *Nahas*, 738 F.2d at 489, 492-93, 496.
33. 15 U.S.C. §§ 77v(a), 78aa (emphasis added).
Personal Jurisdiction

In addition to the subject-matter jurisdiction requirement, a federal court must also have personal jurisdiction over a proposed subpoena respondent. In any suit over an alleged violation of the securities and exchange laws, process may be served “wherever the defendant may be found.” And personal jurisdiction may be exercised pursuant to a federal statute providing for nationwide service of process only if the respondent has sufficient minimum contacts with the jurisdiction.

Location of Service

The first personal jurisdiction issue relates to how a court interprets the phrase “wherever the defendant may be found”. In Knowles, the Tenth Circuit stated without discussion that “wherever” meant “worldwide.” There, the SEC was investigating whether U.S.-based brokers had been bribed into selling certain U.S. securities on a U.S. exchange. The agency served Knowles, a Bahamian citizen, with an administrative subpoena duces tecum on U.S. soil. When he objected, the SEC asked the district court for an order to compel compliance. The district court held that it had the power to enforce an administrative subpoena. The SEC then served the order to show cause on Knowles outside his home in Nassau, Bahamas.

On appeal, Knowles contested the district court’s holding that it did not need to have personal jurisdiction over him when the order to show cause was served on him in the Bahamas. Critically, he argued that the court could not exercise personal jurisdiction because he lacked sufficient contacts with the U.S. The opinion does not suggest that he challenged the court’s subject-
The (Too) Long Arm of the S.E.C.

matter jurisdiction, as discussed in the previous section, nor that he contested the court’s statutory authority to exercise personal jurisdiction to enforce an extraterritorial administrative subpoena. The latter omission might have been relevant, as the Tenth Circuit stated without discussion that the phrase “wherever the defendant may be found” in 15 U.S.C. § 77v(a) was intended to mean “worldwide service of process.” However, if a proposed subpoena recipient who had been served outside the U.S. were to raise the Morrison presumption in a challenge to the court’s personal jurisdiction, the court would need to explicitly affirm that Congress intended to make that determination. That court might, for example, interpret the extraterritorial subject-matter jurisdiction grant in § 77v(c) to also apply to the service of process clause in § 77v(a), or, perhaps, hold that Morrison applies only to substantive law rather than jurisdictional or procedural law.

Minimum Contacts

The second barrier to personal jurisdiction relies on traditional arguments relating to constitutional limits on jurisdiction. Knowles argued that the court did not have personal jurisdiction over him because he did not have sufficient personal contact with the U.S. The Tenth Circuit disagreed, holding that Knowles had sufficient minimum contacts with the U.S. to justify the district court exercising personal jurisdiction over him. The Tenth Circuit reaffirmed the principle that even a single purposeful contact may be sufficient to meet the minimum contacts standard when the underlying proceeding is directly related to that contact. It reasoned that the lower court had specific jurisdiction because Knowles himself had engaged in financial trading activities purposefully directed toward U.S. corporations and had used U.S. brokerage accounts for those trades. To contrast that analysis with the present discussion, if an employee in an overseas office did not purposefully direct her activities to the U.S. regarding the matter under investigation, a court would be hard pressed to justify exercising specific jurisdiction over her.

Therefore, if judicial enforcement of an SEC administrative subpoena is sought, an objection to the district court’s power may be made. If the agency

42. Id. at 415-16.
43. Id. at 417 (emphasis added); 15 U.S.C § 78u(c).
45. Knowles, 87 F.3d at 415.
46. Id. at 418-19.
47. Id. at 419 (citing McGee v. Int’l Life Ins. Co., 355 U.S. 220, 223 (1957)).
48. Id. at 418-19.
49. See id. at 418; see also Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985); Int’l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
moves the court to enforce an administrative subpoena issued to a client’s foreign employee while she was outside the country, it could be strongly argued that the court does not have the subject-matter jurisdiction to do so. Additionally, it could be argued that the court does not have personal jurisdiction because, first, the clause “wherever the defendant may be found” refers only to nationwide service of process to enforce an administrative subpoena. And second, because the employee did not engage in any purposeful contact with the U.S. If, however, the employee happens to be served within U.S. borders, an objection to personal jurisdiction may still be valid, depending on the purpose and extent of the employee’s presence and minimum contacts.

IV. JUDICIAL SUBPOENA ISSUED TO U.S. NATIONAL OR RESIDENT OUTSIDE THE U.S.

A third potential approach by the SEC would be to initiate a lawsuit and then, within those proceedings, file a motion to subpoena the foreign employee pursuant to 28 U.S.C. § 1783. As will be discussed below, the most significant limitation to this process is that a Section 1783 subpoena is effective only for an employee who is a U.S. national or resident, and is not applicable to a foreign citizen. For the purposes of the present hypothetical, there are four differences between a court enforcing an administrative subpoena and it issuing its own judicial subpoena.

First, the SEC must be concerned enough to initiate a civil lawsuit by filing a complaint. Unlike in an investigation, agency staff must have identified a defendant against whom it wishes to proceed and have already gathered sufficient evidence to file a complaint in district court. The kind of information sought at this stage is categorically different from that at the investigative stage. Second, the standard for a court to issue a foreign subpoena is different from the standard for enforcing an administrative subpoena. A subpoena may issue if (1) the testimony or document was necessary in the interest of justice and (2) it was not possible to obtain that information in an admissible form in any other manner. Third, the SEC would need to pay for


51. See, e.g., Def. Raj P. Sabhlok’s Unopposed Mot. for Administrative Relief (Civil Local Rule 7-11) Seeking an Order Issuing a Subpoena Pursuant to 28 USC § 1783 at 1-2, Sabhlok, No. C-08-4238.

52. 28 U.S.C § 1783(a) (2006). Incidentally, while Knowles requires personal jurisdiction to enforce an administrative subpoena, Knowles, 87 F.3d at 417, personal jurisdiction does not appear to be a requirement when the district court issues a subpoena to a U.S. citizen pursuant to its judicial power. Blackmer, 284 U.S. at 437. The Supreme Court has held that a predecessor statute to 28 U.S.C. § 1783 inherently provides personal jurisdiction over any U.S. citizen regardless of their geographic location. Id. (“Nor can it be doubted that the United States possesses the power inherent in sovereignty to require
The (Too) Long Arm of the S.E.C.

the employee’s travel and attendance expenses to return to U.S. soil, the amount of which would be decided by the court—and which might not necessarily be inconsequential.\textsuperscript{53} Last, and most important, a subpoena for an individual in a foreign country is restricted to “a national or resident of the United States who is in a foreign country.”\textsuperscript{54} Therefore, if the employee is not a U.S. national or resident, the plain text of 28 U.S.C. § 1783 does not permit a court to issue a judicial subpoena against foreign nationals when requested by an agency. If, however, the employee is a U.S. national or resident, it could be argued either that requiring her to return to the U.S. is not necessary in the interest of justice, or that the information might be obtained in an admissible form via a different manner.

A particularly vexing situation arises regarding the “necessary in the interest of justice” requirement when the country in which the subpoena recipient resides prohibits the taking of testimony within their boundaries that will be used in a foreign court, or the disclosure of the contents of any documents in the country that might constitute “state secrets.”\textsuperscript{55} An individual served with a subpoena would be placed between a rock and a hard place with the U.S. demanding testimony and the resident country forbidding it. An argument could be made that enforcing a subpoena in that situation would not equitably serve the interest of justice. Courts have noted that “[t]here is a surprising shortage of pertinent case law involving the issuance of a subpoena under § 1783.”\textsuperscript{56} While the “necessary in the interest of justice” element should comport with the relatively liberal standards of discovery,\textsuperscript{57} Congress clearly stated that the standard is intended to “guarantee. . . that burdens upon U.S. citizens\textsuperscript{58} and residents abroad will not be imposed without compelling

\textsuperscript{53} 28 U.S.C § 1783(b); see also SEC FY 2013 Congressional Justification, supra note 11 (estimated combined 2012 non-personnel-related budget of seven smaller SEC offices, including the Office of International Affairs, was only about $18 million).


\textsuperscript{57} Estate of Ungar., 412 F. Supp. 2d at 333 (citing Klesch & Co. Ltd. v. Liberty Media Corp., 217 F.R.D. 517 (D. Colo. 2003)).

\textsuperscript{58} The terms “U.S. national” and “U.S. citizen” are broadly coextensive for the present analysis. Perdomo-Padilla v. Ashcroft, 333 F.3d 964, 967 (9th Cir. 2003) (“All citizens of the United States are also nationals. However, some nationals are not citizens. Traditionally, only persons born in territories
reason.” In those situations, it might be argued that ordering a subpoena with a potential result of, as the Department of State warns, “the arrest, detention, deportation or imprisonment of participants, including American counsel,” weighs heavily against being “necessary in the interest of justice.”

Thus, once the SEC has initiated litigation, its options to subpoena testimony within the confines of the suit may become constrained. It is unlikely a court will allow the agency to subpoena foreign nationals under Section 1783. If the SEC instead seeks to subpoena U.S. nationals or residents currently living overseas, it could be argued that the cost outweighs the information, or that the information might be obtained from a different source. Finally, if the SEC seeks to compel the return of the employee, a final point of leverage is that it will be obliged, as discussed above, to cover all travel and attendance expenses.

V. ALTERNATIVES TO FORMAL ENFORCEMENT PROCEEDINGS

However, apart from the procedural and jurisdictional difficulties involved in enforcing a subpoena, the SEC has another avenue to possibly get the information it wants. Nominally, nonresponsiveness to an administrative subpoena is a misdemeanor and is punishable by a fine and imprisonment. Nonresponsiveness to a judicial subpoena served in a foreign country, in the form of a contempt order, is punishable by a fine and a seizure of the recipient’s property within the U.S. to enforce that fine. For a foreign citizen, or even an expatriate U.S. citizen in a foreign country, that might not amount to much. So on its own, the SEC has little reach over specific employees in foreign countries and might be unable to convincingly brandish the court’s subpoena power.

As an alternative to the traditional channels of litigation and subpoenas, the agency may rely on the soft law of international cooperation. The SEC is a signatory to the IOSCO Multilateral Memorandum of Understanding (MMOU), under which the securities regulators in 82 countries have agreed to cooperate

of the United States were non-citizen nationals.”); see also 8 U.S.C. § 1101 (defining the term “national of the United States” as “(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.”)


61. See supra note 52 and accompanying text.

62. See, e.g., FTC v. Compagnie De Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1323 (D.C. Cir. 1980) (“In view of the international interests at stake, we suggest that, at the time of service, the best reading of congressional intent with regard to permissible modes of subpoena service... [would] have further required that wherever possible, an agency attempting subpoena service on foreign citizens residing on foreign soil should make initial resort through established diplomatic channels or procedures authorized by international convention.”).

63. 15 U.S.C. § 78u(c).

64. 28 U.S.C. §§ 1784(b), (d).
and share information. One provision requires the foreign nation’s securities authority to take or compel a statement or testimony under oath of a foreign person, upon the request of an investigating nation. In fiscal years 2006 through 2011, the SEC made an average of 644 such formal requests to foreign securities authorities for enforcement assistance. Thus, through the MMOU, the SEC has one last alternative to acquire the information it seeks.

VI. CONCLUSION

For a corporation’s foreign employees, the SEC must thread the eye of a needle to be able to leverage a subpoena for testimony. First, under the recent developments in *Morrison*, it is questionable whether the SEC even has extraterritorial investigative power. Even if it does, it is unlikely that it can enforce an administrative subpoena served outside the U.S. And last, if the investigation is complete and litigation has commenced, a foreign national is likely protected from a subpoena. The bottom line is that if the company’s employee is not a U.S. national or resident, is located in a foreign country, and stays out of the U.S., the SEC will be hard pressed to enforce a subpoena regardless of whether it was issued during the course of an administrative investigation or pursuant to Section 1783 during the course of an ongoing federal suit.

The agency could very well persuade the foreign government to investigate, but its investigative discretion might be limited, and in any event, the foreign government might not be ready to share everything that a client’s employee is likely to disclose, especially if relations have been recently strained. And even if the employee is a U.S. national or resident, the SEC will still have to jump through a number of hoops to secure compliance, involving substantial investments of both time and money. Finally, needless to say, the employee

---


66. MMOU, supra note 59, at 4, 6 (allowing, in definitions 7(b)(iii) and 9(c), (d), the requesting authority to have a representative present). See generally, Michael D. Mann & Joseph G. Mari, Developments In International Securities Law Enforcement, C475 ALI-ABA 99 (November 16, 1989); 14B U.S. Sec. Law for Financial Trans. § 13:118 (2d ed.)

67. SEC, In Brief: FY 2011 Congressional Justification 24 (Feb. 2010), available at http://www.sec.gov/about/secfy11congbudgjust.pdf; SEC FY 2013 Congressional Justification, supra note 11. Curiously, the two documents have conflicting numbers for the same year. When there was a conflict, we used data from the newer source.

68. At least in the criminal context, the general rule is that evidence received from foreign officials in their own countries is admissible in United States courts, even if the foreign procedures would not otherwise comply with United States law or the law of the foreign country. United States v. Emmanuel, 565 F.3d 1324, 1330 (11th Cir. 2009); see also United States v. Valdivia, 680 F.3d 33, 51 (1st Cir. 2012) cert. denied, 12-6526, 2012 WL 4511064 (U.S. Oct. 29, 2012) (noting two exceptions to this rule are where 1) the conduct of foreign police shocks the judicial conscience, or 2) American agents participated in the foreign search, or the foreign officers acted as agents for their American counterparts.)
should always be represented by counsel to ensure that any potential exposure is contained.

VII. PRACTICE TIPS

- In the investigation phase, object to the lack of explicit cross-border subpoena authority in 15 U.S.C. § 78u(b), following the *Morrison* presumption.
- If the SEC brings an action in court to enforce its administrative subpoena...
  - ... and if the order to show cause and comply was served outside the U.S., object to...
    - ... the court’s lack of authority to enforce an SEC subpoena served outside of the U.S., pursuant to the plain language in 15 U.S.C. §§ 77v and 78aa and the *Morrison* presumption (*Nahas*)
    - ... and the court’s lack of personal jurisdiction because, first, the statute only provides for nationwide service of process, and second, because the employee did not have minimum contacts with the U.S.
  - ... or if the employee was served on U.S. soil, object to the court’s lack of personal jurisdiction despite the SEC’s service of the original subpoena in the U.S.
- If the SEC initiates a formal suit and later during the course of the litigation files a motion for the court to issue a subpoena pursuant to 28 U.S.C. § 1783...
  - ... and if the employee is not a U.S. national or resident, object to the court’s lack of subpoena power over foreign nationals
  - ... or if the employee is a U.S. national or resident, check that disclosure and cooperation would not violate any local laws
    - If local laws expose your client or the employee to liability, argue that the employee’s information is not necessary in the interest of justice and requiring her to provide testimony would be inequitable.
    - If compliance is not barred, request that the SEC cover the employee’s travel and attendance expenses to return to U.S. soil, pursuant to 28 U.S.C. § 1783(b).
- If the SEC has requested cooperation from the foreign nation, advise the employee to cooperate fully with the foreign securities regulation agency and retain local counsel to minimize exposure.