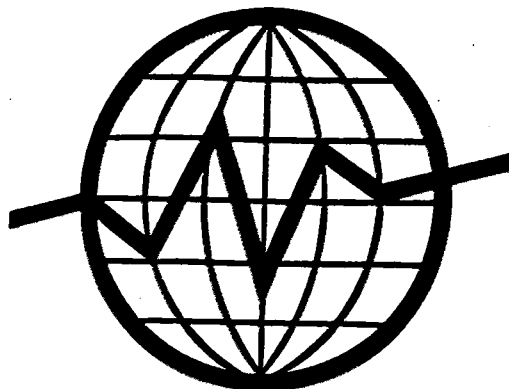


**REPORT ON ISSUES RAISED FOR SECURITIES AND
FUTURES REGULATORS BY UNDER-REGULATED AND
UNCOOPERATIVE JURISDICTIONS**



**Technical Committee
of the
INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS**

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INTRODUCTION

It is well established that the world's securities and futures markets have not only grown individually in terms of size and sophistication, but also have grown more closely together through various means, including cross-border trading activity. The resulting development of internationalized markets has raised both regulatory and enforcement concerns that IOSCO has addressed by various means. In the enforcement context, IOSCO has made great progress in identifying means by which regulators can cooperate and assist one another in detecting and deterring cross-border misconduct (1). Among those means are memoranda of understanding (MOUs) pursuant to which a regulator can undertake to make available to its foreign counterpart information that is located within its jurisdiction relevant to an investigation being conducted by the foreign counterpart. The resulting assistance, in the form of exchanges of information, provides regulators with the ability to effectively investigate cross-border activities.

These cooperative international enforcement mechanisms have not addressed, however, the problems that result when relevant information is located in jurisdictions to which foreign securities and futures regulators have difficulty in gaining access. The purpose of this study is to consider the problems raised by, and possible approaches to, such jurisdictions. This report will focus primarily on jurisdictions that allow legal entities to be established without sufficient requirements that ownership information concerning these entities be recorded and maintained ; and jurisdictions where local laws, including blocking and secrecy laws, do not permit the information, if it exists, to be provided to foreign regulators. Such jurisdictions are referred to in this report as "under-regulated" and "uncooperative" jurisdictions.

Part one of the report will review the information needed for enforcement purposes and the difficulties encountered in obtaining it from under-regulated and uncooperative jurisdictions. Part two will discuss the various approaches adopted by IOSCO Working Party members to obtain assistance from these jurisdictions. Last, part three will develop options likely, in the group's view, to contribute to the improvement of the situation.

(1) - Cf. IOSCO Working Party n° 4 Report "addressing difficulties encountered while negotiating and implementing Memoranda of Understanding" released by the Technical Committee in July 1990, and "IOSCO principles for MOUs" released by Technical Committee in July, 1991.

PART I :
**INFORMATION NEEDED FOR ENFORCEMENT
PURPOSES AND OBSTACLES EXPERIENCED IN OBTAINING IT
FROM UNDER-REGULATED AND UNCOOPERATIVE
JURISDICTIONS**

The information and assistance that a securities and futures authority may need from a foreign counterpart in the course of an investigation varies depending on many factors, including the nature of the suspected violation, the powers vested in the requesting authority and the contemplated enforcement action. Typically, information concerning ownership and control of entities and accounts, location of assets derived from illegal activities, and transaction data is necessary to pursue an investigation and successfully prosecute securities and futures violations. When such information is unavailable because it is located in an uncooperative and under-regulated jurisdiction, enforcement efforts can be compromised. In fact, it is because of the potential to thwart investigations, that some wrongdoers purposely locate their illegal operations in under-regulated and uncooperative jurisdictions.

There are two principal obstacles that may be encountered while trying to obtain information from under-regulated and uncooperative jurisdictions :

- they have no requirement or insufficient requirements to create records of beneficial ownership and controlling persons (under-regulation) ;
- they impose obstacles upon or do not provide sufficient means for foreign securities and futures authorities to obtain such information (uncooperativeness).

A. NEEDS FOR INFORMATION

In the course of their investigations, securities and futures regulators may need information concerning the beneficial ownership or controlling persons of :

1. Entities or accounts of entities that engage, directly or indirectly, in securities or futures transactions

This refers mainly to persons or entities who choose to trade on regulated markets through entities or accounts opened with a financial institution located in an under-regulated and uncooperative jurisdiction. Obtaining information about the true identity of market participants is important in many types of investigations including : insider trading ; and failures to report ownership information at the prescribed threshold ; market manipulation.

2. Entities or accounts of entities that are used to hold and/or conceal the holding of securities and futures contracts or proceeds from their sale

In many instances, wrongdoers will use entities or accounts located in under-regulated and uncooperative jurisdictions to hold or conceal the proceeds of illegal securities or futures activity. Identifying the true ownership and control of entities or accounts suspected of sheltering such proceeds is critical to securities and futures regulators in their efforts to trace and repatriate fraudulently obtained funds that have been deposited in or channeled through such jurisdictions.

3. Entities that engage in transactions that have or will materially affect the value of public companies or the price of a commodity for future delivery

Information about actual principals is particularly critical in situations where it appears that entities or accounts are being traded according to a common plan or scheme or are engaging in suspicious transactions among themselves. Transactions between entities of the same group or transactions designed to misrepresent the financial situation of a public company are often conducted through entities or accounts located in an under-regulated and uncooperative jurisdiction, to conceal the fact that the entities are owned or controlled by the same principals. Whether the suspicious transactions are performed on or off a regulated market, or involve publicly traded securities, they have the effect of altering the appearance of the financial picture of an issuer. Similarly, for futures transactions, trading activity designed to affect the price of futures contracts may be more difficult to detect when the traders use multiple accounts or entities located in an under-regulated and uncooperative jurisdictions to accomplish their scheme.

4. Entities that market securities and futures products and services (2)

Entities that make fraudulent misrepresentations and employ high pressure sales techniques to induce the investing public to buy securities and futures products have attempted to evade securities and futures regulators by locating their operations in under-regulated and uncooperative jurisdictions. Because they operate from such jurisdictions, information about the principals of the entities and the nature of the products they are selling is difficult to obtain.

B. OBSTACLES IN OBTAINING SUCH INFORMATION

1. Insufficient requirements to create or maintain records

Enforcement difficulties may arise because a jurisdiction has no requirement or insufficient requirements to maintain records identifying the beneficial ownership and controlling persons of entities or entities' accounts at financial institutions. In particular, the absence of a requirement that the bona fide initial shareholders and managers of a company be identified and that any subsequent transfer of ownership and control be recorded, may create substantial difficulties for investigations by securities and futures regulators.

(2) - This part of the mandate has, to a large extent, already been addressed within the IOSCO report issued in October 1993 entitled "Protecting the small investor : combatting transnational retail securities and futures fraud" (the "boiler room" report). The Working Party does not intend to duplicate here the work done in the boiler room report.

Arrangements, such as the use of a series of legal entities, that are designed to conceal the identity of principals can be established in regulated as well as in under-regulated jurisdictions. In a regulated jurisdiction, generally, the identifying information is required to be recorded and maintained within the system, and securities and futures regulators have the authority to obtain such information. In under-regulated jurisdictions, however, this information may not be available to regulators, so it often is easier for persons to conceal their identities ⁽³⁾. Securities and futures regulators have identified a variety of methods used by wrongdoers to conceal their identity, including ⁽⁴⁾ :

- *Operating through a shell company that has no legitimate business purpose other than to conceal the beneficial identity of its owner* ; wrongdoers can operate either through an existing shell company or one specifically created to accomplish an illegal scheme. In some under-regulated jurisdictions, there are businesses that have developed to create shell corporations for sale to "customers". Using an existing shell corporation has the advantage of disguising the true nature of the business operation and giving the impression that the business pre-dated the illegal activity.
- *Using nominee shareholders to establish a corporation whose ownership is in bearer form, then transferring ownership of the bearer shares from the nominees to the true beneficial owners*. Usually, the transfer of ownership is conducted through an intermediary, such as an attorney or a banker, so that the nominees themselves have never been in contact with and do not know the identity of the true beneficial owner of the corporation.
- *Establishing a trust for the beneficial owner and directing transactions through a trustee who is not the beneficial owner but who has a fiduciary obligation to protect the identity of the beneficial owner*. In jurisdictions where records of the beneficial ownership of the trust are not required to be established or made available to regulators, the trustee may be the only source of identifying information.
- *Using an attorney to conduct transactions on behalf of the account, and then relying on claims of attorney-client privilege to protect the identity of the account holder*. A similar scheme may be organized with auditors who, in some jurisdictions, can assert a similar privilege based on fiduciary obligations.

In jurisdictions where there is no requirement to provide beneficial ownership information to the bank or brokers with which the account is established, or where secrecy or blocking laws prevent transmission of such information to regulators, assertion of the privilege may thwart regulator's investigative efforts.

The problems associated with such entities can be compounded when wrongdoers combine the various approaches to protect themselves from being identified. In addition, by establishing the entities and accounts in several under-regulated and uncooperative jurisdictions, principals can further complicate the investigative efforts of regulators.

(3) - In addition to this IOSCO mandate, we are aware that the Financial Action Task Force has considered issues raised by the use of some of the forms described below in the context of its recommendations concerning customer identification requirements for financial institutions to combat money laundering.

(4) - The Working Party recognizes that many transactions through under-regulated and uncooperative jurisdictions using these forms, do not violate securities and futures statutory or regulatory provisions.

2. Obstacles to the transmission of information to a foreign securities and futures regulator

Enforcement difficulties may also arise from the fact that uncooperative jurisdictions impose obstacles on or do not provide sufficient means for foreign securities or futures authorities to obtain information about ownership and control of entities and accounts. The difficulties may result (a) from a lack of ability of the local authorities to obtain records and/or information or (b) from a lack of reliable channels for information sharing.

a. Lack of ability of the local authorities to obtain records and/or information

The inability of local authorities to obtain information and records may result from the existence of professional or financial secrecy laws that do not allow information to be obtained and used for securities and futures enforcement purposes by the local authority.

Most jurisdictions, including highly regulated ones, have established legal provisions protecting privacy and individual rights, which inter alia, prohibit banks from disclosing information about their customers' accounts. However, in many regulated jurisdictions, securities and futures authorities have been granted legal authority to obtain information otherwise protected by secrecy laws. In under-regulated and uncooperative jurisdictions, securities and futures authorities, where they exist, do not have the authority to obtain such information.

Local authorities in uncooperative and under-regulated jurisdictions may also be restricted in their ability to obtain records and information in securities and futures investigations because of their lack of power to compel testimony or the production of documents. Such authorities may be forced to rely on voluntary cooperation which may not be forthcoming, particularly where the suspicious activity involves potential violations of foreign laws and regulations.

Last, the local authority may lack the necessary resources, in terms of staff, money and expertise, to conduct investigations on behalf of a foreign authority. This may constitute a hurdle to the establishment of a regular cooperative relationship with the jurisdiction involved.

b. Lack of reliable channels for information sharing

Even where a local authority has been granted the authority to compel the production of documents and testimony, and to obtain information otherwise protected by secrecy laws for use in its own domestic investigations, enforcement difficulties still may occur if the local authority is not empowered to obtain the information on behalf of, or provide it to, a foreign securities or futures regulator.

In such jurisdictions, mechanisms for international cooperation in securities and futures enforcement either may not exist, or may be inadequate to provide the assistance needed by the foreign regulator.

PART II :

VARIOUS APPROACHES ADOPTED BY IOSCO WORKING PARTY MEMBERS TO OBTAIN INFORMATION FROM UNDER-REGULATED AND UNCOOPERATIVE JURISDICTIONS

IOSCO Working Party members have adopted a variety of approaches to obtain information for securities and futures enforcement purposes from uncooperative and under-regulated jurisdictions. Some methods require the involvement of local authorities ; others may be used without their involvement.

The approaches listed below are being discussed in the context of under-regulated and uncooperative jurisdictions where no formal route for obtaining information exists. The list is intended only to reflect the experience of one or more IOSCO Working Party n° 4 members. It is not intended to be either comprehensive or evaluative. In using these approaches, securities and futures regulators operate within the scope of their own legal authority, including rights and obligations derived from international treaties, and in consideration of existing agreements, arrangements and applicable laws.

Furthermore, the use of such approaches by securities and futures regulators is not in itself an indication that the requested jurisdiction is either under-regulated or uncooperative. Indeed, some of these methods are also used to obtain information from highly regulated and fully cooperative jurisdictions. In addition, we note that although certain otherwise under-regulated and uncooperative jurisdictions have agreed to regulate and cooperate in the area of money laundering enforcement, they have not extended such cooperation to the enforcement of securities and futures fraud.

A. APPROACHES REQUIRING THE INVOLVEMENT OF LOCAL AUTHORITIES

Even in under-regulated and uncooperative jurisdictions, certain information may be available from the local authorities. As discussed below, securities and futures authorities may be able to obtain information from the local registrar of companies and through the use of judicial or criminal channels.

1. Access to Local Registrar of Companies

Certain information about corporate entities and their owners is available from the registrar of companies in the relevant jurisdiction. However, such information generally is limited to information in the public record and frequently identifies only the names of nominee owners and management companies or professional incorporators.

Therefore, it is often of limited utility in identifying the persons who actually own or control the company, although it may be a link in the investigative chain.

2. Criminal and Judicial Channels

In some jurisdictions, the only available gateway for information is a criminal or a judicial authority ; information in possession of or gathered by such authorities is not always available to securities and futures regulators. However, criminal authorities in some jurisdictions, recognizing that they are the only accessible route for obtaining assistance in the securities and futures area, are willing to provide assistance to foreign securities and futures regulators.

The use of criminal and judicial channels may follow different patterns, including (a) using existing Mutual Legal Assistance Treaties (b), issuing letters rogatory and (c) developing informal cooperation.

a. Criminal mutual legal assistance treaties

In certain instances, securities and futures regulators have been able to use a mutual legal assistance treaty ("MLAT") to ask the criminal authorities of a foreign jurisdiction to compel the production of documents and testimony of witnesses. MLATs can provide a means for overcoming blocking or secrecy laws. However, their usefulness is limited to those instances where the scope of the MLAT includes securities and futures violations ; the offence is also an offence in the country from whom assistance is requested (unless provided otherwise in the MLAT) ; and the regulator requesting assistance is a criminal authority or the MLAT extends to civil and administrative as well as criminal investigations.

b. Other means for judicial assistance

With respect to jurisdictions without a foreign securities or futures regulatory authority or a sufficiently broad MLAT, or where the regulatory authorities cannot or will not themselves obtain and transmit the information, those seeking information may be able to use judicial letters rogatory or other instruments to request that the appropriate authority in the foreign jurisdiction compel the production of documents or the testimony of witnesses. This can be very effective but time-consuming ; it also can be expensive because the requesting authority often will need to hire counsel in the foreign country.

c. Informal cooperation with criminal authorities

In the absence of an MLAT or other formal criminal channel, it is possible to seek assistance directly from foreign criminal authorities, who may have the authority to provide at their discretion information in their possession, or even be authorized to gather information in appropriate cases. This type of cooperation has in some cases proved very helpful, because the local criminal authorities generally are granted sufficient powers to be in a position to provide timely and effective assistance. The degree of cooperation by the criminal authorities, however, varies from jurisdiction to jurisdiction. In addition, legal or other restrictions may preclude the use of information thus informally obtained in subsequent judicial or administrative proceedings.

B. APPROACHES BASED ON DIRECT CONTACTS WITH THE PERSONS OR ENTITIES FROM WHICH INFORMATION IS SOUGHT

In some cases, members of the group have obtained information directly from the persons or entities involved in the investigation.

Depending upon the facts and circumstances of the particular situation, the "direct contact" may take various forms, including : (1) voluntary cooperation, (2) contacts in the home jurisdiction, (3) freeze of illegally obtained funds or assets, and (4) legal action against persons or entities who obstruct investigation.

1. Voluntary cooperation

The cooperation provided may include informal discussions with the witness, communication of information or documents, and taking of testimonies. It may or may not involve representatives of the requesting authority entering the jurisdiction of the witness.

The usefulness of seeking voluntary cooperation is limited, however, not only by the willingness of the person or entity to cooperate, but also by professional secrecy and other legal requirements which may restrict the ability of such persons or entities to disclose information. In addition, financial institutions or professionals may have a fiduciary obligation to their clients to maintain confidentiality that prevents them from disclosing client information voluntarily. In such cases, however, the difficulty has sometimes been overcome by asking the professional to request its client to waive secrecy, if permitted by law.

2. Contacts in the home jurisdiction

A foreign financial institution may have an affiliate, branch or representative located in the country of the securities or futures regulator seeking the information that can provide a conduit for voluntary cooperation. The foreign institution may refuse to provide the information by asserting secrecy obligations governing its activities in its own jurisdiction.

Similarly, when an individual who possesses relevant information travels voluntarily to the regulator's country, he may then come within the reach of compulsory process available to that regulator. The regulator may then obtain information from such a person in the same manner and to the same extent as from a citizen or resident of the regulator's own country.

3. Freezing of funds derived from illegal activities

A regulator investigating a violation of its own securities or futures laws may be able to obtain a freeze of funds derived from illegal activities. Under such circumstances, the account holder may choose to come forward and cooperate with the regulator.

4. Taking legal action against the persons or entities who obstruct investigations

In the event that a person or entity from an under-regulated and uncooperative jurisdiction who is lawfully served with a subpoena or other request for compulsory process refuses to comply, some securities or futures regulators can bring a charge of obstruction of justice or contempt of court before the judicial authorities. In addition, in some countries, when property of the person or entity is located in the regulator's jurisdiction, it may be available to satisfy any fines imposed.

PART III :

IMPROVING THE SITUATION

The Working Party views its work on the current mandate as furthering IOSCO's commitment to improving the international regulatory environment for securities and futures markets through, among other things, enhanced enforcement cooperation. In that regard, identifiable progress has been made in fostering cooperative relationships, often embodied in MOUs, among many of the members of IOSCO. There are areas, however, such as the international enforcement problems created by under-regulated and uncooperative jurisdictions, in which there are obstacles of a long-standing and continuing nature. These problems do not lend themselves to easy or universally applicable solutions. The suggestions set forth below are made with the view toward encouraging improvements in this area.

Through analyzing both the nature of the obstacles and the experience of Working Party members, the Working Party has identified means for expanding the ability of securities and futures regulators to get information and assistance from under-regulated and uncooperative jurisdictions. The Working Party recognizes that the usefulness of virtually any approach may depend on legal and regulatory structures of the countries involved. Therefore the suggestions below provide general approaches that can be adapted to best suit individual situations. Working Party n° 4 encourages IOSCO members to share their experiences with using these approaches.

1. Implementing IOSCO basic principles

The development of high regulatory standards and of mutual cooperation and assistance among IOSCO members is clearly stated as a major goal in IOSCO's by-laws. The preamble of IOSCO's by-laws states :

"Securities authorities resolve :

- *to cooperate together to ensure a better regulation of the markets, on the domestic as well as on the international level in order to maintain just and efficient markets ;*
- *to exchange information on their respective experiences in order to promote the development of domestic markets ;*
- *to unite their efforts to establish standards and an effective surveillance of international securities transactions ;*
- *to provide mutual assistance to ensure the integrity of the markets by a vigorous application of the standards and by effective enforcement against offences".*

Working Party N° 4 strongly believes that all IOSCO members should work toward achieving the goals set forth in the by-laws by, among other things, developing or improving their ability to collect and provide information to foreign securities and futures regulators.

2. Encouraging greater cooperation and regulation

Based on the Working Party 's observations, it appears that the under-regulation and uncooperativeness that characterize some jurisdictions may arise, at least in part, in an effort to attract certain types of business. However, it is the Working Party's experience that most jurisdictions do not wish to be viewed by the international community as havens for fraud. In this regard, it should be noted that some jurisdictions already have increased, or at least maintained, their attractiveness to business through strengthening their regulatory standards and entering into information-sharing relationships with other countries. Members of the Working Party have noted that a well-developed regulatory structure may tend to attract, rather than deter, business.

It may be worthwhile for members of IOSCO to approach under-regulated and uncooperative jurisdictions with a view to increasing their awareness about problems that arise from under-regulation and uncooperativeness ; encouraging the strengthening of regulatory standards ; and enhancing cooperation with foreign regulators through the exchange of information. In that regard, IOSCO members should be encouraged to ensure that this report is widely disseminated. In addition, where appropriate, IOSCO members could work with these jurisdictions to identify and find ways to resolve or overcome existing deficiencies in regulation and obstacles to cooperation.

3. Developing alternate routes for assistance

The Working Party recognizes that many jurisdictions are unlikely to create functionally equivalent counterparts for foreign securities and futures regulators, and therefore foreign regulators seeking assistance will need to develop other routes for getting assistance. It has been the experience of some members of the Working Party that, especially in matters involving serious frauds, assistance may be available from criminal or judicial authorities. One practical consideration which may encourage cooperation in such matters is whether the alleged fraud may involve a breach of the statutory or regulatory requirements in the jurisdiction receiving the request. Moreover, the implementation of the speciality principle may influence positively the readiness of the requested party to exchange information.

The development of criminal channels for securing assistance in securities and futures matters also may be promoted through appropriate international agreements. Consistent with the legal framework of each jurisdiction, securities and futures authorities may benefit from the development of such agreements, provided that they are sufficiently broad in scope.

4. Addressing confidentiality concerns

As the Working Party has noted in its previous reports concerning "*Principles for MOUs*" and "*Addressing Difficulties Encountered While Negotiating and Implementing Memoranda of Understanding*", the potential uses or disclosure of information requested by a foreign securities or futures authority may raise issues that need to be addressed before information can be provided, even by a highly regulated and cooperative jurisdiction. It is the experience of members of the Working Party that under-regulated and uncooperative jurisdictions have articulated such concerns.

Responding to such concerns at an early stage may facilitate receiving information from under-regulated and uncooperative jurisdictions. Accordingly, in seeking assistance in obtaining information from such jurisdictions, securities and futures regulators should consider providing an explanation of any laws or regulations governing the confidentiality of information obtained, as well as information about the purposes for which the requested information may be used. To the extent that some jurisdictions may be reluctant to cooperate because of confidentiality concerns, efforts should be made to understand and address these concerns in order to pave the way for cooperation.

CONCLUSION

In this report, IOSCO Working Party n° 4 attempted to address the issues confronted by securities and futures regulators when trying to obtain information from under-regulated and uncooperative jurisdictions. The Working Party believes that such issues are of the utmost importance to the maintenance of market integrity and investor protection around the world, and therefore considers that its report should be followed by effective action to promote mutual cooperation and assistance in the securities and futures field.

The Working Party therefore prepared a Resolution on this subject, calling upon IOSCO members and applicants for membership to affirm their commitment to the principles of maintaining high regulatory standards and providing the fullest mutual assistance and cooperation, as expressed in the preamble of the by-laws set forth above and in the 1986 and 1989 Resolutions, and to assess their own ability to provide assistance to foreign securities and futures regulators. The Resolution further states IOSCO's intention to closely monitor the ability of its members to obtain information from other jurisdictions in light of the obstacles identified in the Report and to take such steps as may be appropriate. Finally, the Resolution declares IOSCO's support and encouragement of the efforts of its members to draw the attention of under-regulated and uncooperative jurisdictions to the benefits of maintaining high regulatory standards and the principles of mutual assistance and cooperation expressed in the by-laws and resolutions, and the desirability of adopting and promoting such principles in their own regulatory structures.

It is hoped that this report and the Resolution will lead to constructive action in addressing enforcement issues raised by under-regulated and uncooperative jurisdictions.

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