American University Business Law Review

Volume 7 | Issue 2 Article 2

2018

SEC Regulation of Foreign-Domiciled Investment Advisers: A Study of the Policy Vision Inspiring the *Unibanco* Letter

John H. Walsh
Eversheds Sutherland (US) LLP, johnwalsh@eversheds-sutherland.com

Follow this and additional works at: https://digitalcommons.wcl.american.edu/aublr

Part of the Antitrust and Trade Regulation Commons, and the Banking and Finance Law Commons

Recommended Citation

Walsh, John H. "SEC Regulation of Foreign-Domiciled Investment Advisers: A Study of the Policy Vision Inspiring the *Unibanco* Letter," American University Business Law Review, Vol. 7, No. 2 (2018) .
Available at: https://digitalcommons.wcl.american.edu/aublr/vol7/iss2/2

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University Business Law Review by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.

SEC REGULATION OF FOREIGN-DOMICILED INVESTMENT ADVISERS: A STUDY OF THE POLICY VISION INSPIRING THE *UNIBANCO* LETTER

JOHN H. WALSH*

I. Regulation of Investment Advisers and the Early Regulatory Border 235
II. The Challenge of Globalization in the 1980s 240
III. The Red Book Study and Its Implementation in the *Unibanco* Letter 249
IV. After the Study: 1993 to 2017 262
V. Conclusion 265

Investment advisers ("advisers") registered with the Securities and Exchange Commission ("SEC") now manage more than $70 trillion in assets for more than 35 million clients.[1] Growing numbers of foreign-domiciled advisers are seeking access to this expansive market. Over the last two years, the number of foreign asset managers registering with the SEC has grown by an annual rate of 7.7-8.5%.[2] This trend is not new. As early as the 1980s, foreign-domiciled advisers began to seek access to the market for U.S. advisory services.[3] These advisers pose a difficult regulatory problem. Pursuant to the Investment Advisers Act of 1940 ("Advisers Act" or "Act") the SEC regulates advisers.[4] However, when foreign-domiciled advisers register with the SEC, they straddle the international border. While the SEC

* John H. Walsh is a partner with Eversheds Sutherland (US) LLP. He has a J.D. from Georgetown University and a Ph.D. in History from Boston College. He has published widely on securities regulation and compliance.

1. *Evolution Revolution: A Profile of the Investment Adviser Profession,* INV. ADVISER ASS'N 2, 5 (2017), https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/publications/Evolution_Revolution_2017.pdf.

2. *Id.* at 34.

3. *See infra* Section II.

4. Investment Advisers Act of 1940, 15 U.S.C. § 80b-1 *et seq.* (2018).

regulates them, they can also have significant foreign operations and client relationships. How should the SEC account for these advisers' foreign activities in its regulation and oversight? This Article studies the policy-making process in which the SEC set out to answer that question.

As described more fully below, the fundamental regulatory policy that eventually emerged in this area was set out in an informal staff position issued in 1992 known as the *Unibanco* letter.[5] Over the years the *Unibanco* letter and its progeny[6] have drawn considerable attention from commentators, regulators, and practitioners. During the 1990s, a key period in this process, commentators recognized that the regulation of foreign-domiciled advisers played a role in the SEC's adaption to the global market.[7] More recently, the foreign reach of the Advisers Act has again drawn commentary as both the Supreme Court and Congress have addressed relevant legal doctrines.[8] Further, based on the Dodd-Frank Act of 2010,[9] the SEC engaged in rulemaking that cited to and relied upon the *Unibanco* letter's policy.[10] In March 2017 the SEC staff issued an information update for advisers relying on the *Unibanco* letters with suggestions on how they could document their compliance.[11] Finally, practitioners' guides have offered hands-on practical advice to advisers, both upon the initial issuance of the *Unibanco* letter,[12] and upon new developments.[13]

This Article takes a different approach. It focuses on the policy vision that inspired the *Unibanco* letter, and continues to be reflected in its progeny. The

5. Uniao de Bancos de Brasileiros S.A., SEC No-Action Letter, Ref. No. 92-273-CC, File No. 132-3 (July 28, 1992) [hereinafter Unibanco letter], https://www.sec.gov/divisions/investment/noaction/1992/uniaodebancos072892.pdf.

6. For a discussion of the Unibanco letter's progeny, *see infra* Section IV.

7. *See, e.g.*, Bevis Longstreth, *A Look at The SEC's Adaption to Global Market Pressures*, 33 COLUM. J. TRANSNAT'L L. 319, 327-28 (1995).

8. *See, e.g.*, Arthur Laby, *Regulation of Global Financial Firms After* Morrison v. Australia National Bank, 87 ST. JOHN'S L. REV. 561, 588-90 (2013) (discussing the impact of the United States Supreme Court's 2010 decision in *Morrison v. Australia National Bank* and Congress's response by way of the Dodd-Frank Act of 2010).

9. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).

10. *See infra* Section IV.

11. *Information Update for Advisers Relying on the Unibanco No-Action Letters*, SEC DIVISION INV. MGMT. (Mar. 2017) [hereinafter *Update for Advisers*], https://www.sec.gov/investment/im-info-2017-03.pdf.

12. *See, e.g.*, Robert Mollen & Rachel Arfa, *Investment Advisers Caught in SEC Net*, 11 INT'L FIN. L. REV. 25 (1992) (discussing the practical requirements of the SEC staff's initial position).

13. *See, e.g.*, Gary Grandik et al., *Unibanco After Dodd-Frank: The Extraterritorial Reach of the Investment Advisers Act*, 20 INV. LAW. 1 (2013) (discussing the practical impact of the Dodd-Frank Act in this area).

Unibanco letter, this Article suggests, was motivated by a multi-faceted policy vision that appeared unevenly in the public record. Some of its elements were made explicit, some appeared only as tantalizing hints that require further explanation to be understood, and some were practically invisible. To explore the SEC's development of this policy vision this Article relies on interviews with the leading SEC participants.[14] With interviews it has been possible to more fully identify the pressures working on the agency and the vision that inspired its response. Beyond the worthy goal of adding to our understanding of this important area of international regulation, understanding the policy vision inspiring the *Unibanco* letter will enhance our ability to interpret and apply it, and its progeny, as developments in the wider world continue to unfold.

After this Introduction, Part I of this Article summarizes the Act, the SEC's regulatory regime for advisers, and how the agency established an early border regime that was consistent with the primary contemporary mode of communication, i.e., the mails. Part II discusses the challenges to this regime that arose in the 1980s, in the wake of new technologies and internationalization, the efforts of the SEC staff to respond through an informal staff position known as the *Richard Ellis* letter,[15] and the pressures that built against that position through the need for foreign enforcement cooperation, the threat of foreign multi-lateral intervention during the Uruguay Round of trade negotiations, and business pressures from foreign advisers that wished to enter the U.S. market. Part III discusses the critical moment in this narrative, when the SEC staff reconsidered its policy and issued the *Unibanco* letter. Part IV discusses the continuing relevance of the policy vision of the *Unibanco* letter, up to and including the new regulatory information issued in March 2017. The Article concludes that the *Unibanco* letter and its progeny should be understood and applied in light of the policy vision that inspired the agency action.

I. REGULATION OF INVESTMENT ADVISERS AND THE EARLY REGULATORY BORDER

The Advisers Act applies to persons who, for compensation, engage in the business of advising others, either directly or through publications and writings, as to the advisability of investing in, purchasing, or selling

14. Notes of interviews cited in this history are on file with the author. The author wishes to express his gratitude to the officials who agreed to be interviewed. Nonetheless, the author alone is responsible for all statements and conclusions herein.

15. Richard Ellis, SEC No-Action Letter, Ref. No. 80-401-CC, File No. 132-3, (Aug. 8, 1981) [hereinafter Ellis Letter], https://www.sec.gov/divisions/investment/noaction/1981/richardellis031981.pdf.

securities.[16] The essential purpose of the legislation was to protect the public from "the frauds and misrepresentations of unscrupulous tipsters and touts and to safeguard the honest investment adviser from the stigma" of those activities.[17] The SEC was given statutory responsibility for administering this regime.[18]

The SEC is an independent regulatory commission, composed of five Commissioners appointed by the President with the advice and consent of the Senate.[19] A Chairman named by the President from among the Commissioners leads the agency.[20] The Commissioners are supported by a professional staff, which has remained relatively small, numbering somewhat less than 3,000 employees in the early 1990s,[21] and approximately 4,600 today.[22] Division Directors are the most senior members of the staff, and Associate Directors report to Directors.[23]

As an independent regulatory commission, the SEC performs all three of the federal government's functions. The SEC has a legislative function, in the sense that it adopts rules that have the force of law.[24] Specialized divisions administer this work, such as the Division of Investment Management, which administers the statute and rules governing investment advisers.[25] The SEC has an executive function, in the sense that it enforces

---

16. Investment Advisers Act of 1940, 15 U.S.C. § 80b-2(a)(11) (2018).

17. H.R. REP. NO. 76-2639, at 28 (1940).

18. 15 U.S.C. § 80b-2(a)(4) (defining "Commission" as the SEC); *id.* passim (assigning authorities and responsibilities to the "Commission").

19. Securities Exchange Act of 1934, 15 U.S.C. § 78d (2018).

20. Reorganization Plan No. 10 of 1950, 15 Fed. Reg. 3175 (May 24, 1950), *reprinted in* 5 U.S.C. app. at 901 (2006), *and in* 64 Stat. 1265 (1950).

21. *1993 Annual Report*, SEC 150 (1993), https://www.sec.gov/about/annual_report/1993.pdf.

22. Chairman Jay Clayton, *Fiscal Year 2017 Agency Financial Report*, SEC (Nov. 14. 2017), https://www.sec.gov/reports-and-publications/annual-reports/sec-2017-agency-financial-report.

23. In the 1990s, both ranks required admission into the United States Senior Executive Service. Members of the Senior Executive Service ("SES") "serve in the key positions just below the top Presidential appointees." *Senior Executive Service, Leading America's Workforce*, OFF. PROF. MGMT., https://www.opm.gov/policy-data-oversight/senior-executive-service (last visited Apr. 10, 2018) [hereinafter *Senior Executive Service*]. Following legislation in 2002 intended to achieve pay parity between the SEC staff and other financial regulators, the SEC withdrew from the SES and now designates SES-level staff as Senior Officers. *See* Investor and Capital Market Fee Relief Act, Pub. L. 107-123, 115 Stat. 2390 (2002) (often called the "Pay Parity Act").

24. 15 U.S.C. § 78w(a) (2018). Additional rulemaking authority is scattered throughout the statutes administered by the SEC.

25. *See Seventh Annual Report of the Securities and Exchange Commission*, SEC 3 (1941), https://www.sec.gov/about/annual_report/1941.pdf.

the securities laws and its own rules.[26] The Division of Enforcement administers this work.[27] Finally, the agency has a judicial function, in the sense that it interprets the securities laws and its own rules. At the SEC, the Chief Counsels, or senior lawyers of the specialized divisions, administer this work.[28] The Chief Counsels' interpretations often take a form known as "no-action" letters - so called because the staff indicates it will not recommend enforcement action to the Commission if its interpretative guidance is followed.[29]

Through these means—rules, enforcement actions, and interpretations—the SEC has created a regulatory regime for investment advisers. Perhaps most importantly, under U.S. law, advisers are fiduciaries.[30] This requires them to adhere to a rigorous standard of professional conduct, known as the fiduciary duty.[31] In addition, advisers are required to register with the SEC.[32] They are required to provide disclosure information to clients and potential clients.[33] They are prohibited from charging performance fees—that is, sharing in their clients' profits—unless certain conditions are met.[34] Moreover, the SEC tests advisers' compliance through regulatory examinations[35] and brings enforcement actions against advisers when violations are found.[36]

Where then is the international border for this regulatory regime? When Congress enacted the Advisers Act, it defined the conduct that brought one within its scope. The Act applies to investment advisers who "make use of the mails or any means or instrumentality of interstate commerce" in

---

26. *See, e.g.*, 15 U.S.C. § 78u.

27. *See, e.g.*, *1993 Annual* Report, *supra* note 21, at 1-17.

28. When a Chief Counsel is given the title "Associate Director-Chief Counsel," he or she has been admitted to the Senior Executive Service, or after 2002, made a Senior Officer of the SEC. S*ee Senior Executive Service*, *supra* note 23.

29. Informal & Other Procedures, 17 C.F.R. § 202.1(d) (2018).

30. SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 291 (1963) (demonstrating an instance whereby the Supreme Court upheld advisers' fiduciary status following an enforcement action brought by the SEC).

31. *See, e.g.*, *Information for Newly-Registered Investment Advisers*, SEC DIVISION INV. MGMT. AND COMPLIANCE INSPECTIONS AND EXAMINATIONS (Nov. 23, 2010), www.sec.gov/divisions/investment/advoverview.htm (stating that as fiduciaries advisers "have a fundamental obligation to act in the best interest of [their] clients and to provide investment advice in [their] clients' best interests"). They also owe their clients a duty of undivided loyalty and utmost good faith. *Id.*

32. Investment Advisers Act of 1940, 15 U.S.C. § 80b-3(a) (2018).

33. 17 C.F.R. § 275.204-3(a).

34. 15 U.S.C. § 80b-5.

35. *Id.* § 80b-4(a).

36. *Id.* § 80b-9(d).

connection with their business as investment advisers.[37] As a matter of U.S. Constitutional Law, this provision identifies the "means" by which the federal government is exercising jurisdiction, here by means of the Commerce Clause.[38] Further, this provision is given additional reach by another section of the Act, section 208(d), which makes it unlawful "for any person indirectly, or through or by any other person, to do any act or thing which it would be unlawful for such person to do directly under the provisions" of the Act or any rule thereunder.[39] In other words, if an adviser (as defined by the Act) uses the U.S. mail or another means of U.S. interstate commerce, either directly or indirectly, in connection with its advisory business, it is subject to the regulatory regime.[40] At first glance, this seems to be a straightforward and sufficient answer to the jurisdictional question. Indeed, when the law was enacted in 1940, it probably was. At the time, U.S. investment advisers appear to have been small businesses that were located and operating solely within the U.S. As one Representative said on the floor of the House during debate on the Act, the legislation would apply to "hundreds of small partnerships and thousands of individuals."[41]

Nonetheless, at a relatively early date in the regulatory regime, the SEC became concerned about its ability to oversee advisers whose principal offices were located outside of the U.S. As early as the 1950s, the SEC worried that it would be unable to take enforcement action if a foreign-domiciled adviser engaged in violations.[42] To give itself the same opportunity to enforce rights and duties that it had in regards to domestic advisers, as part of the registration process, the SEC required non-domestic advisers to provide written irrevocable consents and powers of attorney naming the SEC as an agent for service of any process, pleadings or other papers in regards to relevant civil suits or actions.[43] This provision remains in place today.[44]

In this environment, foreign advisers who sought to do business in the U.S. without registration posed the primary foreign threat to the regulatory regime. Given the technological state of communications in which the

---

37. *See, e.g.*, *id.* § 80b-3(a).

38. U.S. CONST. art I, § 8, cl. 3.

39. 15 U.S.C. § 80b-8(d).

40. Exceptions to the statutory and regulatory positions set out in the text will be mentioned only when pertinent to the relevant policy developments.

41. 86 CONG. REC. 9811, 9813-14 (1940) (statement of Rep. Hinshaw).

42. *21st Annual Report of the Securities and Exchange Commission*, SEC 104 (1955), https://www.sec.gov/about/annual_report/1955.pdf.

43. *Id.*

44. The modern signature requirements are contained in Form ADV, the adviser registration form.

Advisers Act had been enacted, one could expect this threat to manifest itself through the use of the U.S. mails. In the late 1960s the SEC brought an enforcement case that epitomized this era. C.V. Myers, a resident of Calgary, Canada, published a newsletter called *Myers' Finance Review*.[45] He deposited multiple copies of his newsletter bearing U.S. addresses, as well as solicitations to subscribe, into the Canadian mails. In the ordinary course, the items were delivered to the U.S. addressees. When the SEC accused him of operating as an unregistered U.S. adviser, Myers responded that he had lawfully deposited the items at the Canadian Post Office Building, and had not made use of the U.S. mails. A U.S. federal court rejected his argument.[46] The court found that Myers had engaged in the business of investment advising in the U.S., because, while he had deposited the envelopes in a Canadian post office, the addresses on the envelopes were within the U.S..[47] The court issued an injunction against him, despite Myer's objection to its assertion of personal jurisdiction over him.[48] Of course, one should note, Myers' threat to continue to "infiltrate from the north" by sending thousands of letters into the U.S. without SEC registration did not help his case.[49]

Once an adviser was registered in the U.S., the SEC staff took an expansive view of its jurisdiction over the adviser's activities. A no-action letter issued in 1973 is illustrative. A U.S. citizen informed the Chief Counsel of the Division of Investment Management that he was considering registering as an investment adviser, and asked whether he could handle foreign clients and set up a subsidiary to deal with foreign clients without complying with SEC regulations.[50] The SEC staff responded that he must comply with the U.S. regulatory regime in both regards.[51] As a registered adviser, the SEC staff said, he could not violate SEC regulations in advice to foreign clients, and his foreign subsidiary would be required to register and be subject to the Act.[52] Similarly, in a no-action letter issued in 1975, the Chief Counsel took the view that an SEC-registered adviser must comply with applicable U.S. standards for clients both "within and without of the United States."[53] Eventually, the staff did recognize some slight flexibility,

45. SEC v. Myers, 285 F. Supp. 743, 745 (D. Md. 1968).
46. *Id.* at 745-46.
47. *Id.* at 747.
48. *Id.* at 747-48.
49. *See id.* at 747.
50. Hany Kamal, SEC No-Action Letter, 1973 WL 11796 (May 2, 1973).
51. *Id.*
52. *Id.*
53. S&R Management Co., SEC No-Action Letter, 1975 WL 10884 (Jan. 31, 1975).

such as allowing a foreign adviser serving only foreign clients to use the U.S. jurisdictional means to obtain information about U.S. stock prices and to instruct a U.S. broker-dealer to buy or sell such securities on behalf of the foreign clients.[54] However, the fundamental policy position remained: other than these minimal contacts from abroad, once a foreign adviser had entered the U.S. market and registered with the SEC, all of its advisory activities, affiliates, and clients, both domestic and foreign, were subject to the U.S. regulatory regime.

II. THE CHALLENGE OF GLOBALIZATION IN THE 1980S

In the 1980s, new technology and enhanced communications began to break down the barriers between previously isolated national financial markets. As an SEC Commissioner put it, technological and telecommunications developments that had "accumulated gradually below the surface" suddenly began to have a substantial impact.[55] Investment advisers participated in these developments as U.S. investors developed an appetite for foreign advice. Specifically, U.S. managed funds containing foreign securities grew, and foreign investing became both practical and popular.[56] Foreign advisers were interested in meeting this demand and they increasingly sought to enter the U.S. market, including by serving as sub-advisers to U.S. advisers who were managing mutual funds.[57]

In early 1981 the Office of Chief Counsel of the Division of Investment Management issued the no-action letter that came to define this era. In March of 1981, Richard Ellis, a partnership organized under the laws of the United Kingdom, wrote to the staff requesting a no-action letter.[58] Richard Ellis had an indirect subsidiary in the United States—owned through an intervening holding company—that wanted to register as an investment adviser. The U.S. subsidiary wanted to advise both domestic and foreign clients regarding investments in securities. As the subsidiary's corporate parent, Richard Ellis wanted to know if it would also be required to register as an investment adviser.

54. *See, e.g.*, Forty Four Management, SEC No-Action Letter, 1983 WL 30741 (Jan. 31, 1983).

55. Edward Fleischman, Comm'r, SEC, Address to the First General Plenary Session of the U.S./Japan Bilateral Session: A New Era in Legal and Economic Relations (Aug. 29, 1988), https://www.sec.gov/news/speech/1988/082988fleischman.pdf.

56. *See* David Ruder, Chairman, SEC, Address Before the 1988 Mutual Funds and Investment Advisers Conference: A Changing Environment for Investment Companies, Speech (Mar. 21, 1988) [hereinafter Ruder Address], https://www.sec.gov/news/speech/1988/032188ruder.pdf.

57. *Id.*

58. *See* Ellis Letter, *supra* note 15.

In August 1981, the SEC staff replied by granting Richard Ellis the requested no-action relief.[59] The letter sets out the regulatory problem, as well as the staff's solution. First, after noting the definition of an investment adviser, the staff said: "an unregistered foreign company engaged in investment advisory business which does not make use of jurisdictional means in connection with its investment advisory business is not in violation" of the Act's registration provision.[60] However, the staff continued, the question remained whether Richard Ellis would be doing indirectly, through its subsidiary, what it could not do directly without registering, which could be in violation of section 208(d) of the Act. In short, the question was: if an unregistered foreign company creates and owns a subsidiary that uses the U.S. jurisdictional means in connection with an advisory business, would that subject the foreign parent to the U.S. regulatory regime?

This question presented itself to the staff as a matter of regulatory interpretation: what is the meaning of indirect action pursuant to section 208(d) of the Act?[61] The effect, however, was to decide the location of the U.S. regulatory border. In 1981, the staff decided that if a subsidiary functioned independently and had an existence independent of the parent, the mere fact of its creation and continued ownership by the parent would not bring the parent within the scope of the prohibition on indirect action.[62] In other words, if the subsidiary was truly independent, the regulatory border would run between the U.S. registered adviser and its foreign parent.

In the no-action letter to Richard Ellis, the staff also set out a series of steps the subsidiary should take to assure its independence. These steps were similar to those set out in an earlier rule proposal. In 1972, the SEC proposed a rule that would have established the factors to be considered when determining whether the corporate parent of a registered investment adviser must itself register with the SEC.[63] The rulemaking process only considered domestic relationships, and the rule was never adopted, but the Commission's explanation at the time for considering the rule is

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 8.

63. Notice of Proposals to (1) Adopt New Rule 202-1 Under the Investment Advisers Act of 1940, as Amended ("Advisers Act"), with Respect to Exemption from the Definition of "Investment Adviser", and (2) Amend Rule 204-2(A) Under the Advisers Act by Amending Paragraph (12) and Adopting New Paragraphs (13) and (14) Thereunder with Respect to Record-Keeping Requirements for Certain Investment Advisers Registered Under the Advisers Act, Investment Advisers Act Release No. 353, 1972 WL 128952 (Dec. 18, 1972).

illuminating. It was concerned, the SEC said, that registered advisers would be used as conduits for advice from entities that were not registered and would remain beyond the scope of its jurisdiction.[64] The same problem presented itself in Richard Ellis's request for no-action relief, and the SEC staff set out similar factors.[65] The SEC staff said: One, the subsidiary should be adequately capitalized. Two, it should have a buffer between its personnel and the parent, such as a board of directors a majority of whose members were independent of the parent. Three, employees who were engaged in providing day-to-day advice should not be otherwise engaged in an investment advisory business of the parent. Four, the subsidiary should decide what investment advice is to be communicated to its clients and have sources of information not limited to its parent. Five, the subsidiary should keep its investment advice confidential until communicated to its clients.[66]

Reception of the *Richard Ellis* letter was mixed. On the one hand, foreign advisers availed themselves of the opportunity to enter the U.S. market. Within a few years, the SEC later noted, many foreign advisers had created separate and independent registered subsidiaries or affiliates to service U.S. clients, in reliance upon this no-action letter and the factors it had set out.[67] Separately, in early 1988 the SEC Chairman indicated that the number of foreign advisers registered with the SEC had reached more than 200.[68] However, in practice, many observers believed the letter was not particularly helpful.[69] Thomas Harman ("Harman") joined the Division of Investment Management in 1982, rose through the ranks to become Chief Counsel in 1988, and then became the Associate Director-Chief Counsel in 1992, a position in which he continued to serve until he left the agency in 1994. He recalls that under the *Richard Ellis* letter any sharing of employees between the U.S. entity and the foreign enterprise subjected the entire enterprise to registration under the Advisers Act.[70] All institutions, he noted, roll up to some small number of executives, so it was difficult to avoid subjecting the entire enterprise to U.S. jurisdiction.[71] Nor could the different entities share

64. *Id.*

65. *See* Ellis Letter, *supra* note 15, at 2.

66. *Id.*

67. Request for Comments on Reform of the Regulation of Investment Companies, 55 Fed. Reg. 25,322, 25,325 (proposed June 21, 1990) (to be codified at 17 C.F.R. pt. 270).

68. *See* Ruder Address, *supra* note 56.

69. *See* Telephone Interview with Thomas Harman (Apr. 28, 2017) [hereinafter Harman Interview].

70. *Id.*

71. *Id.*

affiliates.[72] Finally, the staff would not say much about how the letter applied in different factual circumstances.[73] People in the regulated community, Harman recalls, were frustrated because the factors were difficult to apply and the staff did not provide a lot of guidance for particular fact patterns.[74] Further, from an international perspective, the *Richard Ellis* letter had staked out a lot of territory.[75] Michael Mann ("Mann") was an Associate Director in the SEC's Division of Enforcement in the 1980s, where he led the division's international efforts, until in 1989 became the first Director of the SEC's Office of International Affairs ("OIA"), in which position he served until he left the agency in 1996. By reaching into foreign jurisdictions, Mann said, the SEC was "trying to protect people who [had not] signed up for our protection."[76] The *Richard Ellis* letter, he says, "drove everyone crazy."[77]

In the years after issuance of the *Richard Ellis* letter, the pace of internationalization began to accelerate. Through technological and telecommunications developments, a regulatory environment predicated on the use of the mails was being transformed. By the mid-1980s, the pressures of internationalization were becoming apparent. In 1986, an SEC Commissioner gave a speech in which she said: "[a] few years ago we used to speak of capital markets as <u>becoming</u> international. Globalization was denominated 'a trend.' Currently available information shows that tomorrow has become today. The markets <u>are</u> internationalized and are becoming increasingly global."[78]

Not surprisingly, given the increasing internationalization of the markets, the SEC announced it was giving new attention to international issues. Its efforts included working with the International Organization of Securities Commissions ("IOSCO"), then a thirty-nation association of securities regulators, to form multinational committees on a variety of issues, including

72. *Id.*

73. *Id.*

74. *Id.*

75. *See* Interview with Michael Mann (Apr. 13, 2017) [hereinafter April 13 Mann Interview].

76. *Id.*

77. *Id.*

78. Aulana L. Peters, Comm'r, SEC, Remarks to North American Securities Administrators Association, Inc. at the 69th Annual Conference in Honolul, Hawaii: Internationalization: A Prediction Has Become Reality (Nov. 17, 1986), www.sec.gov/news/speech/1986/111786peters.pdf. The Commissioner went on to identify the twenty-four-hour global trading market in securities, multi-national linkages among exchanges, and the regulatory issues these developments raised. *Id.*

international transactions and access to foreign markets.[79] In addition to the IOSCO initiatives, internationalization was producing three specific forms of pressure on the SEC, all of which would play a role in the agency's actions regarding foreign-domiciled advisers. One, internationalization was challenging the SEC's ability to police the securities markets in the U.S. Two, foreign de-regulatory initiatives were challenging the SEC's regulatory regime. Three, increasing numbers of foreign advisory businesses wished to enter the U.S. market.

The first pressure felt by the SEC was its growing need for foreign cooperation in its enforcement activities.[80] In the 1980s, the SEC recognized that "cooperation from abroad" was an increasingly important element in its enforcement activities.[81] In many cases, SEC officials noted, information was needed from foreign jurisdictions to police the U.S. markets.[82] In a speech given in London, in late 1986, the Director of the Division of Enforcement noted that after an unsuccessful effort to assert direct jurisdiction over foreign sources of information, the agency had instead pursued the negotiation of bilateral information sharing agreements.[83] These agreements, known as Memoranda of Understanding, or "MOUs," were negotiated with other financial regulators.[84] They were not treaties, and merely stated the parties' intent to cooperate, including, in some cases, intent to seek authority for cooperation that was currently beyond the signatory's authority.[85] The first breakthrough MOU was between the SEC and Swiss regulators.[86] In 1986 the Director of Enforcement said: "mutual assistance is becoming the norm rather than the exception."[87]

In 1988, this program was codified in an Act of Congress. When members of Congress expressed concern that foreign regulators were not helping the SEC fight frauds launched at the U.S. from abroad, the SEC staff recommended that the SEC be given authority to reciprocate such

79. *Fifty-Second Annual Report*, SEC 3 (1986), https://www.sec.gov/about/annual_report/1986.pdf. Today, IOSCO has more than 120 Ordinary Members, as well as multiple Associated and Affiliated Members.

80. *Id.*

81. *Id.* at 15-16.

82. Gary Lynch, Dir., SEC Div. of Enforcement, Address to the Financial Times International Conference: Developing the Global Market for Equities 9-10 (Oct. 21, 1986), www.sec.gov/news/speech/1986/102186lynch.pdf.

83. *Id.*

84. Interview by Wayne Carroll with Michael Mann, SEC Historical Soc'y (June 13, 2005) [hereinafter June 13 Mann Interview].

85. *Id.*

86. *Id.*

87. Lynch, *supra* note 82, at 13.

assistance.[88] Congress responded by amending the Securities and Exchange Act to authorize the SEC, in its discretion, to assist foreign regulators, even when the conduct under investigation did not violate U.S. law.[89] The SEC then entered into agreements with the Departments of Justice and State regarding how it would use this new power.[90]

This trend toward cooperation was institutionalized within the SEC in 1989, when OIA was created as a stand-alone office to focus on international issues.[91] OIA was given primary responsibility for negotiating international information sharing agreements and developing initiatives to facilitate international cooperation.[92] It was a small office, initially having only two attorneys and two support staff.[93] Nonetheless, OIA created an institutional presence within the agency focusing on international cooperation. Mann recalls: "[w]e needed incentives for cooperation."[94] Creating regulatory incentives for foreign regulators to cooperate with the SEC, Mann said, would work to both parties' advantage.[95]

The second pressure felt by the SEC was from the growing appeal of foreign de-regulation. U.S. regulators felt they were being pressured to de-regulate a market that was, in their view, already well functioning.[96] London's 1986 de-regulatory Big Bang drew attention around the world, including at the SEC.[97] Those favoring less regulated foreign regimes began to challenge U.S. regulators, sometimes directly. For example, in a 1986 meeting in the Netherlands, SEC Commissioner Aulana Peters was called

---

88. April 13 Mann Interview, *supra* note 75. Mann recalls in particular the concerns raised by Representatives Dingell of Michigan and Markey of Massachusetts.

89. *See* Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, §6(b), 102 Stat. 4677 (1988) (enacting the Securities Exchange Act, 15 U.S.C. §78u(a)(2)).

90. *See* Joseph A. Grundfest, Comm'r, SEC, Address at King's College: International Cooperation in Securities Enforcement: A New United States Initiative (Nov. 9, 1988), www.sec.gov/news/speech/1988/110988grundfest.pdf.

91. *1990 Annual Report*, SEC (1990), https://www.sec.gov/about/annual_report/1990.pdf.

92. *Id.*

93. Interview by Wayne Carroll with Robert Strahota, SEC Historical Soc'y (Apr. 18, 2006).

94. April 13 Mann Interview, *supra* note 75.

95. *Id.*

96. *Id.*

97. *Id.* In the Big Bang, the United Kingdom deregulated its securities markets. It was nicknamed "Big Bang" because many of the changes took place on a single day, October 27, 1986. For a discussion of the changes from the perspective of a respected American academician, *see* Norman S. Poser, *Big Bang and the Financial Services Act Seen Through American Eyes*, 14 BROOK. J. INT'L L. 317 n.1, 319 (1988).

upon to give a point-by-point response to foreign claims that U.S. finance was over-regulated and that U.S. standards, such as corporate disclosure, should be lowered.[98]

Moreover, in 1986, those favoring international deregulation were given a means to realize their goals. The Uruguay Round of trade negotiations opened in 1986 and included bargaining over trade in services.[99] Even though financial services were included in the talks, which implicated the SEC's jurisdiction, no one had asked the SEC to participate.[100] Indeed, when representatives of the SEC sought a seat at the table, the Treasury Department told them no.[101] There was a lot of concern at the SEC about the possible breadth of an agreement and its impact on the SEC's regulations.[102] Mann recalls that the SEC did not want securities regulations used as bargaining chips in the negotiations.[103] Indeed, Mann recalls: "[e]normous pressures were building for rethinking the whole exercise of jurisdiction from a more business-friendly point of view."[104]

The third pressure felt by the SEC was from foreign advisory businesses that wished to enter the U.S. market. As one senior U.S. regulator recalls: the SEC had foreign advisers "at our doors" who wanted to do business in the U.S.[105] The SEC had to decide what to do about them, she said: "business pressures were pushing us."[106] This can be seen in an episode from the mid-1980s. Stanley B. Judd was the SEC attorney who had signed the 1981 *Richard Ellis* letter.[107] In 1986 he published an article about "international investment advisers."[108] These advisers, he said, could be residents in one country and giving advice in another, or nationals of one country and

98. *See* Aulana L. Peters, Comm'r, SEC, Remarks to Representative of the Dutch Financial Community: "Peters vs. Peters" Internationalization: Are the Regulators Ready? (Oct. 15, 1986), www.sec.gov/news/speech/1986/101586peters.pdf. Commissioner Peters was responding to Jaap F.M. Peters, President of AEGON, a Dutch company.

99. *See* ERNEST H. PREEG, TRADERS IN A BRAVE NEW WORLD: THE URUGUAY ROUND AND THE FUTURE OF THE INTERNATIONAL TRADING SYSTEM 26-45 (1995).

100. June 13 Mann Interview, *supra* note 84.

101. *Id.*

102. *Id.*

103. April 13 Mann Interview, *supra* note 75.

104. *Id.*

105. Telephone Interview with Marianne Smythe (Mar. 16, 2017) [hereinafter Smythe Interview].

106. *Id.*

107. *See* Ellis Letter, *supra* note 15.

108. Stanley B. Judd, *International Investment Advisers*, 19 REV. SEC. & COMM. REG. 1 (1986).

offering advice from offices located in another.[109] Contemporary members of the staff in the Division of Investment Management recall that Judd's article had a strong impact on their thinking.[110] Indeed, in at least one case, Judd's article was cited by the staff as authority.[111] International advisers posed problems under the Advisers Act, Judd said, including how to resolve them being subject to both SEC and foreign regulation.[112] Perhaps most importantly, for purposes of this study, Judd questioned whether the SEC intended to apply the securities laws to actions arising exclusively outside of U.S. jurisdiction, including to the "wholly foreign activities of a registered, non-resident adviser."[113]

The growing tension between internationalization and the SEC's regulatory policy toward advisers came to a head in 1986. The law firm, Reavis & McGrath, requested a no-action letter on behalf of several investment advisers that were domiciled within the U.S. and registered with the SEC.[114] The advisers managed offshore funds domiciled in the Cayman Islands and Netherlands Antilles, and investors in the funds were primarily from Western Europe, including France, the United Kingdom, Switzerland, the Netherlands, and Italy. Reavis & McGrath presented a memorandum to the SEC staff, which was treated as a no-action request, arguing that the SEC's jurisdiction should not extend to foreign investors in the offshore funds. Specifically, it argued, a provision of the Advisers Act, and SEC rule thereunder, limiting an adviser's ability to charge performance fees—that is, share in its clients' profits—should not apply to foreign clients.[115]

In essence, the rule governing performance fees provided that an adviser could not charge such fees unless certain conditions were met, generally going to the clients' resources and invested assets.[116] In its memorandum, Reavis & McGrath conceded that the advisers would comply with the rule in

109. *Id.*

110. Author's Telephone Interview of Robert Plaze (conducted by telephone on May 19, 2017) [hereinafter Plaze Interview].

111. *See, e.g.*, Gim-Seong Seow, SEC No-Action Letter, Response of the Office of Chief Counsel, Division of Investment Management, 1987 WL 755518 (Oct. 30, 1987).

112. Judd, *supra* note 108, at 1-2.

113. *Id.* at 6.

114. Memorandum from Reavis & McGrath to Thomas P. Lemke, Chief Counsel, Div. of Inv. Mgmt. and John Banks-Brooks, Attorney, Office of Disclosure Review, Div. of Inv. Mgmt. (Aug. 14, 1986) [hereinafter Reavis & McGrath Memo.] (seeking clarification about investment advisers acting under the authority of various foreign jurisdictions).

115. *Id.*

116. *See* § 275.205-3 Exemption from the Compensation Prohibition of Section 205(a)(1) for Investment Advisers, 17 C.F.R. § 275.205-3 (2018).

regards to the small number of U.S. clients who invested in the funds.[117] However, in arguing against the rule's applicability to foreign clients, the law firm made three points.[118] First, the securities laws do not favor transnational application.[119] The law firm pointed to several statutory provisions and rules (none from the Advisers Act) that explicitly provided that they did not apply to foreign activity.[120] Second, even if the SEC believed it should retain jurisdiction over fraudulent behavior, other provisions need not apply.[121] Fraud, the law firm argued, was wrong wherever it occurred, while the substantive (or non-fraud) provisions were conditioned by the regulatory regime in which they took place.[122] Third, the law firm argued: "[t]he staff's concurrence in the position expressed in this Memorandum would be conducive to sound foreign policy because that position would reconcile the divergent interests of the various jurisdictions involved."[123] Specifically, the law firm argued, the nations in which the foreign funds maintained their places of business (Cayman Islands and Netherlands Antilles), and the nations of the non-U.S. investors (France, United Kingdom, Switzerland, Netherlands and Italy) would be able to assert their own jurisdiction, without being preempted by the United States and the SEC's rule.

The SEC staff rejected these arguments.[124] In response to the argument that the securities laws disfavored a transnational reach, the staff indicated that the absence of comparable limitations with respect to the Advisers Act could argue against the law firm's position. Further, the staff stated, as a general proposition it did not concur with the position that the rule at issue, or other substantive provisions of the Act and rules, were designed solely for U.S. clients. In general, the staff said, the provisions of the Advisers Act applied to an adviser's "non-U.S. clients, as well as U.S. clients."[125] Finally, while no specific mention was made in the staff's response to the law firm's argument based on foreign policy, the staff denied Reavis & McGrath's request for no-action relief. This letter was probably clearest expression of the policy underlying the *Richard Ellis* no-action letter. The staff explicitly recognized the transnational consequences of their policy, rejected the

117. Reavis & McGrath Memo., *supra* note 114.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*

suggestion that their focus should be on U.S. clients, and ignored arguments arising from international relations. In the late 1980s, the pressures building against this policy became increasingly powerful.

III. THE RED BOOK STUDY AND ITS IMPLEMENTATION IN THE *UNIBANCO* LETTER

The Advisers Act, along with the Investment Company Act, had been enacted in 1940. Thus, as the 1980s drew to a close, their 50th Anniversary was looming. David Ruder, SEC Chairman from 1987 to 1989, believed some recognition of the anniversary date would be appropriate.[126] An industry group, the Investment Company Institute ("ICI"), was of the same view.[127] As a result, work began on an anniversary study.[128] In 1990, Marianne Smythe ("Smythe") was Executive Assistant to the SEC's Chairman (a position now known as Chief of Staff), and from November 1990, Director of the Division of Investment Management, a position in which she continued to serve until she left the agency in 1993. She recalls that the creation of the anniversary study was largely fortuitous, when viewed in relation to the issues at stake in the foreign reach of the Advisers Act.[129] The initial goal was simply to recognize the Act's anniversary, perhaps with the idea of issuing a report on the anniversary itself, that is, in 1990.[130]

In March 1990, the Division of Investment Management established a Task Force to conduct the study.[131] The SEC reported that the Task Force would reexamine the agency's regulatory approach on a variety of issues.[132] In the Chairman's Office, Smythe was busy with a number of issues and had only slight contact with the study's early development.[133] Nonetheless, she recalls that the selection of topics for the study took account of the small size of the Division of Investment Management.[134] Given its constraints, Smythe said, it made sense to focus on practical issues that could lead to specific agency actions. In her words, that is how the foreign reach of the Advisers Act "made the cut."[135]

---

126. Smythe Interview, *supra* note 105.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *1990 Annual Report*, *supra* note 91, at 48.
132. *Id.*
133. Smythe Interview, *supra* note 105.
134. *Id.*
135. *Id.*

In June 1990, the Commission issued a Concept Release, setting out the ideas the Task Force was considering.[136] The Concept Release was a formal statement of the Commission that asked for public comments.[137] In the course of its discussion the Commission identified two motivating factors for reforming the foreign reach of the Advisers Act.

The first factor sounded in economic efficiency and client service. The need to establish a separate and independent subsidiary to enter the U.S. market, the SEC said, could divide scarce personnel within an advisory firm and reduce the capital resources available to both the parent and subsidiary, thus diminishing the services provided to both foreign and U.S. advisory clients.[138] In raising these concerns, the Concept Release cited to the staff position taken in the *Richard Ellis* letter.[139] The question for the Task Force, Smythe recalls, was how to allow foreign advisers to have a business presence in the U.S., and how to give U.S. regulators the ability to deal with that presence.[140]

The second factor set out in the Concept Release was a classic concern of foreign relations: fear of retaliation. "[F]oreign governments [the Commission said] may perceive application of the [U.S.] Advisers Act to their investment advisers' activities with respect to non-United States clients as contrary to principles of international comity and might react by reciprocating the treatment."[141] Thus, the SEC continued, U.S. investment advisers might find their overseas operations subject to increased restrictions and their U.S. operations subject to the laws and regulations of foreign countries.[142] Mann recalls that this concern was driven by events in the Uruguay Round of trade negotiations, which, as noted above, was ongoing at the time and threatened to encompass SEC regulations in negotiations over market access.[143] In June 1990, the risk of foreign intervention in the SEC's regulatory regime was at its height.

The SEC's Concept Release was issued on June 15, and just a few days before, from June 11 to 13, the Uruguay Round's Working Group on Financial Services had held its first meeting.[144] At the meeting, "financial

136. Request for Comments on Reform of the Regulation of Investment Companies, 55 Fed. Reg. 25,322 (proposed June 21, 1990) (to be codified at 17 C.F.R. pt. 270).

137. *Id.*

138. *Id.* at 25,325.

139. *Id.*

140. Smythe Interview, *supra* note 105.

141. Request for Comments on Reform of the Regulation of Investment Companies, 55 Fed. Reg. at 25,325.

142. *Id.*

143. April 13 Mann Interview, *supra* note 75.

144. *Working Group on Financial Services Including Insurance*, *Note on the Meeting*

advising" was identified as among the "services that offered possibilities for multilateral liberalization."[145] Moreover, market access was defined as encompassing licensing and certification.[146] For his part, the representative of the U.S. indicated that reciprocity was a problem.[147] A few weeks later the U.S. representative would warn that "[r]eciprocity in the financial area would guarantee chaos."[148]

At the June meeting, the Working Group's Chairman recognized that domestic regulations may continue to have a role, through a prudential carve-out from the trade agreements.[149] However, the Chairman also recognized several options for the carve-out, including that it could be narrow, broad, or limited to certain approved examples of regulatory action.[150] Given the SEC's status and history as an independent regulatory agency, one can understand why it would take a negative view of the possibility that trade negotiations might limit it to certain multi-laterally-approved examples of regulatory action.

In its Concept Release, the SEC asked for suggestions on how it could best provide for cross-border and international sales of adviser services, consistent with the protection of investors and its own enforcement capability.[151] Specific possible policy approaches identified by the SEC included: amending or reinterpreting domestic law, entering into multi-national or bilateral treaties, harmonizing conflicting regulation, or applying concepts of comity and mutual recognition.[152] In response to the Concept Release, several comments were filed with the SEC, including eight addressing the foreign reach of the Advisers Act.[153]

---

of 11-13 June 1990, WTO: GATT GROUP NEGOTIATIONS ON SERVICES (July 5, 1990) [hereinafter *Working Group June 1990*], https://www.wto.org/gatt_docs/English/SULPDF/92100236.pdf.

145. *Id.* ¶ 20, at 5 (statement of the Representative from Canada).

146. *Id.* ¶ 22, at 5-6 (statement of the Representative from Japan).

147. *Id.* ¶¶ 59, 72, at 19 (statement of the Representative from the United States).

148. *Working Group on Financial Services Including Insurance, Note on the Meeting of 12-13 July 1990*, WTO: GATT GROUP NEGOTIATIONS ON SERVICES ¶ 50, at 14 (Aug. 10, 1990) [hereinafter *Working Group July 1990*], https://www.wto.org/gatt_docs/English/SULPDF/92110082.pdf.

149. *Working Group June 1990*, *supra* note 144, ¶ 78, at 23 (statement of the Chairman).

150. *Id.*

151. Request for Comments on Reform of the Regulation of Investment Companies, 55 Fed. Reg. 25,322, 25,326 (proposed June 21, 1990) (to be codified at 17 C.F.R. pt. 270).

152. *Id.*

153. *See Protecting Investors: A Half Century of Investment Company Regulation*, SEC DIVISION INV. MGMT. 221 n.14 (May 1992) [hereinafter *Protecting Investors*

The Division of Investment Management provided the Task Force with a full-time staff of ten.[154] Moreover, fifty other members of the Division staff assisted the full-time staff.[155] This was a substantial commitment in such a small division. In the early 1990s the division operated with less than 160 staff years.[156] The Office of Chief Counsel made an especially large contribution to the study, and at the time it had a total of only five or six attorneys.[157] As a result the study was a "huge drain" on its resources.[158] Attorneys in the Office were responsible for drafting several chapters and Harman, the Chief Counsel, both drafted a chapter and consulted with those drafting others, including the one relating to the foreign reach of the Advisers Act.[159] Harman also recalls that the staff assigned to the study were the "best and the brightest," so the diversion of resources had a bigger impact than numbers alone would suggest.[160] Moreover, other policy issues continued to press on the attention of the staff, and had to be addressed.[161] Smythe recalls that whatever the original intent for the schedule, when she became the Division's Director in November 1990, the study was still underway.[162] In fact, the Task Force released its report in May 1992.

The Task Force entitled its report: *Protecting Investors: A Half Century of Investment Company Regulation* ("*Protecting Investors Report*" or "Report").[163] While the Report generally focused on investment companies, as shown by its title, Chapter 5 addressed the international reach of the Advisers Act.[164] The Task Force explained its recommendations in regards

Report], https://www.sec.gov/divisions/investment/guidance/icreg50-92.pdf. The author filed a Freedom of Information Act ("FOIA") request with the SEC seeking access to these eight comments and was told they could not be found.

154. *See* Letter from Marianne K. Smythe, Dir. SEC Div. Inv. Mgmt., to Richard C. Breeden, Chairmen, SEC (May 1, 1992) [hereinafter Smythe Letter], https://www.sec.gov/divisions/investment/guidance/icreg50-92.pdf (published in *Protecting Investors Report*, *supra* note 153).

155. *Id.*

156. *See, e.g.*, *In Brief Budget Estimate Fiscal 1996*, SEC 3 (Feb. 1995), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1990/1995_0201_SECBudget.pdf (providing "Investment Management Regulation" figures for 1994 (actual) and 1995 (estimate) and noting that staff years may differ from a head count of employees).

157. Harman Interview, *supra* note 69.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. Smythe Interview, *supra* note 105.

163. *Protecting Investors Report*, *supra* note 153.

164. *Id.* at 221-36.

to foreign-domiciled advisers as motivated by three considerations.[165] First, the study said, foreign advisers may be reluctant to register with the SEC and advise U.S. clients, because doing so subjects all of their clients to the U.S. regulatory regime.[166] The Report continued: this avoidance had the unfortunate effect of limiting U.S. investors' access to foreign advisory expertise.[167] Second, the Report identified "general principles of comity," under which "nations recognize legislative and judicial acts of other nations, having due regard for the rights of their own citizens."[168] The Report continued:

> Comity suggests that the Advisers Act should not apply to a foreign registered adviser's relationship with its non-United States clients outside the United States, just as the Commission would not expect the laws and regulations of a foreign country to apply to a United States adviser's relationship with its United States clients.[169]

The Report went on to note that the laws of other countries were consistent with principles of comity, in terms of their extraterritorial reach or enforcement, and cited to the regulatory regimes of the United Kingdom, Brazil, Japan, and France.[170] Third, the Report said, foreign clients of foreign advisers do not expect "and may not desire" their adviser to be subject to the Advisers Act.[171] Assuming, the Report continued, "a foreign adviser does not hold itself out as being registered under the Advisers Act, there would be no apparent reason for a foreign investor to expect to be protected by United States law."[172]

Based on this analysis—maximizing the availability of advice, international comity, and the expectations of foreign investors—the Task Force team concluded that the approach set out in the *Richard Ellis* no-action letter should be changed.[173] Some new means of addressing the foreign reach of the regulatory regime should be found. The Task Force team considered several alternatives.[174] A "nationality" approach would have applied the U.S. regulatory regime to U.S. citizens, "wherever they are located," and regardless of where any conduct or the effects of any conduct might have

165. *Id.* at 228-30.
166. *Id.* at 231.
167. *Id.*
168. *Id.* at 229.
169. *Id.*
170. *Id.* at n.26.
171. *Id.* at 229.
172. *Id.*
173. *Id.* at 221.
174. *Id.* at 234-36.

occurred. The Report stated that this approach was "generally disfavored," had not been extensively applied by the courts, and was not recommended.[175] A "local law for local clients" approach would have excused from the U.S. regulatory regime any dealings between a U.S. adviser and clients residing outside the U.S., even when the advice was formulated and provided by persons residing in the U.S.[176] This approach would have enhanced U.S. advisers' ability to compete abroad by allowing them to meet more lenient foreign standards, but the United States and the SEC, the Report stated: "have a strong interest in preventing this country from being used as a base for fraudulent or abusive practices by investment advisers."[177] This approach was not recommended. An antifraud-only approach would have applied the Act's anti-fraud provisions, "but not its regulatory provisions" to the dealings of U.S. advisers and foreign clients.[178] Here the Task Force team observed that many of the regulatory requirements were intended as prophylactic means to prevent fraud, and picking and choosing among them would be a difficult and probably fruitless task.[179] This approach was not recommended. Finally, a "territorial" approach would focus on conduct and the effects of conduct.[180] The U.S. regulatory regime would apply when "a sizeable amount of advisory services takes place *in the United States*[,] or where the advisory services have effects *in the United States*."[181] This is the approach that the Report recommended.

The cited legal standard—the conduct and effects test—had already been the subject of extensive adjudication when the *Protecting Investors Report* was issued.[182] Moreover, the standard has continued to draw attention, including in recent litigation before the Supreme Court and in legislation by Congress.[183] As discussed above, however, this article is less concerned with the articulated legal standard, and more with the policy choices being made by the agency. Those choices necessarily required the agency to consider what it would, and would not seek to regulate. In this regard, the Report said, when a foreign adviser registered with the SEC deals with U.S. clients,

175. *Id.* at 234.

176. *Id.* at 235.

177. *Id.*

178. *Id.* at 234-36.

179. *Id.* at 236.

180. *Id.* at 222.

181. *Id.*

182. *See id.* at 227 n.18. In addition, for a roughly contemporaneous discussion of the test, *see, e.g.*, Dennis R. Dumas, *United States Antifraud Jurisdiction over Transnational Securities Transactions: Merger of the Conduct and Effects Tests*, 16 U. PA. J. INT'L BUS. L. 721 (1995) (collecting cases).

183. *See* Laby, *supra* note 8, at 561-62.

it can be assumed that advisory services will take place in the U.S., and the Act will apply.[184] On the other hand, the Report continued, when the same adviser deals with its foreign clients, advisory services will not take place in the U.S. and the Act will not apply.[185] In other words, in a fundamental policy shift, the SEC staff was willing to forgo regulation of a foreign-domiciled adviser's dealings with foreign clients, even when that adviser was registered with the SEC.

The Task Force described this new policy as one of comity with foreign regulatory regimes.[186] That is, as noted above, pursuant to a policy of comity, SEC regulations should not apply to a foreign domiciled adviser's relationship with its foreign clients, just as the SEC would not expect the laws and regulations of a foreign jurisdiction to apply to a U.S domiciled adviser's relationship with its U.S. clients.[187] This was consistent with the Commission's statement in the 1990 Concept Release that the study staff would consider the concept of comity.[188] However, several aspects of this policy choice warrant further attention.

First, comity was not reciprocity. In its 1990 Concept Release, the Commission appeared to link together the concepts of comity and mutual recognition.[189] However, the approach recommended by the Report was inconsistent with reciprocity. Harman recalls meetings with British regulators, in which they pressed the SEC representatives for a policy of mutual reciprocity.[190] The British, Harman recalls, took the view that each regulator should oversee advisers in its own jurisdiction, and then share the results with each other.[191] Of course, this was inconsistent with the Report's recommendation that the SEC should assert jurisdiction over foreign—meaning here British—advisers' advice to clients in the U.S.[192] In the event, Harman recalls, whatever the recommendations in the Report, finite regulatory budgets eventually made mutual reciprocity the practical or *de facto* result.[193]

---

184. *Protecting Investors Report*, *supra* note 153, at 222.

185. *Id.*

186. *Id.* at 229.

187. *Id.*

188. *Compare id.* at 221-36, *with* Request for Comments on Reform of the Regulation of Investment Companies, 55 Fed. Reg. 25,322, 25,326 (proposed June 21, 1990) (to be codified at 17 C.F.R. pt. 270).

189. *Id.* at 25,326.

190. Harman Interview, *supra* note 69.

191. *Id.*

192. *Id.*

193. *Id.*

Second, while comity was not reciprocity, it relied to a considerable degree on international regulatory cooperation. As Mann describes it, due to international regulatory cooperation the whole concept of jurisdiction had changed.[194] So long as the SEC could cooperate with a foreign entity's home regulator, and obtain the information it needed, all the foreign entity had to do was cooperate with the oversight.[195] To facilitate this type of oversight, the Report recommended that foreign advisers registered with the SEC should be required to keep certain records about their foreign operations, so the SEC could monitor and enforce compliance issues implicating U.S. clients.[196] For example, the Report suggested, trading records would show if U.S. clients were being disadvantaged.[197]

Third, choosing comity as a policy required the SEC staff to forego certain previously held views. Most important was its view of performance fees. Through the years, performance fees had raised recurring issues regarding the foreign reach of the Advisers Act. As discussed above, U.S. advisers' ability to charge performance fees was subject to regulation, while in many foreign jurisdictions such fees were an accepted practice.[198] For example, the offshore funds represented by Reavis & McGrath in 1986 had been seeking a no-action letter primarily so they could charge performance fees.[199] Their request was denied.[200] However, in Chapter 6 of the Report, the Task Force adopted a new policy.[201] Robert Plaze ("Plaze") drafted the chapter describing the new policy. Plaze joined the Division of Investment Management in 1983, rose through the ranks to become Associate Director for Regulation in February 1996, a position in which he continued to serve until he was made Deputy Director of the Division in 2011, after which he left the agency in 2012. In Plaze's words, as a matter of regulatory policy: "What do we care if a Brit pays a performance fee?"[202] In light of this new thinking, the Report recommended legislation that would authorize the SEC to exempt from its performance fee requirements those clients of U.S. advisers who do not reside in the U.S.[203] The Task Force reasoned that under

194. April 13 Mann Interview, *supra* note 75.

195. *Id.*

196. *Protecting Investors Report*, *supra* note 153, at 230.

197. *Id.*

198. *Id.* at 246-47.

199. *See* Reavis & McGrath Memo., *supra* note 114.

200. *Id.*

201. *Protecting Investors Report*, *supra* note 153, at 238 (recommending the concept of performance fee exemptions).

202. Plaze Interview, *supra* note 110.

203. *See Protecting Investors Report*, supra note 153, at 246-48.

the conduct and effects test recommended elsewhere in the Report, foreign advisers would be permitted to charge such fees to their foreign clients, even when registered with the SEC.[204] Through the recommended legislation, U.S. advisers would be permitted to do so as well, with regards to their foreign clients.[205]

In short, by recommending a policy of comity the study team was withdrawing from the agency's prior expansive reading of its jurisdiction. One should also note, by selecting comity and not reciprocity, the SEC would retain its freedom of unilateral action, since there would be no binding bilateral commitments to reciprocate, only the general statements of intent to cooperate set out in MOUs. Finally, by foregoing oversight of foreign performance fees, the agency was conceding what had been, up to that point, a significant point of frustration with its regulatory regime. All of these measures would seem to be directed at one of the key concerns identified by the agency in its Concept Release: the danger that an overreaching regulatory posture could lead to foreign reciprocation. Yet, this leads to something of a mystery in the historical narrative: the agency's earlier fear of reciprocation seems to have disappeared.

The Report was silent on the threat of foreign reciprocation. Moreover, neither Smythe nor Plaze recall that concern playing any role.[206] Harman, for his part, recalls foreign concerns arising primarily in response to the policy of comity.[207] Only Mann recalls the threat posed by potential reciprocation.[208] While puzzling at first glance, the inconsistency could be explained by the officials' respective duties. Mann was, after all, Director of the office charged with managing the agency's foreign relations. Moreover, at a more substantive level, the threat posed by the Uruguay Round appears to have passed rather quickly.

Shortly after the SEC released its Concept Release, the U.S. trade delegation in the Uruguay Round circulated a communication to the Working Group on Financial Services in which it argued that any agreement should "respect the traditional duties, rights, and responsibilities of finance ministers, central bank governors, and other regulators and officials in the financial services sector."[209] The agreement must contain a provision, the

---

204. *Id.* at 247.

205. *Id.* at 247-48.

206. Smythe Interview, *supra* note 105; Plaze Interview, *supra* note 110.

207. Harman Interview, *supra* note 69.

208. June 13 Mann Interview, *supra* note 84.

209. *Submission by the United States on Financial Services*, WORKING GROUP ON FIN. SERVICES (July 12, 1990), https://www.wto.org/gatt_docs/English/SULPDF/92100258.pdf.

United States said, which permits a party: "[To take] reasonable actions necessary for prudential reasons, for the protection of . . . persons to whom a fiduciary duty is owed by a financial service provider."[210] As noted above, one of the defining characteristics of an adviser under U.S. law is its status as a fiduciary.[211] Furthermore, while the SEC had been denied membership on the trade delegation, it was able to insert representatives into the process, who could monitor developments and advocate for a prudential carve-out that would respect the agency's traditional powers.[212] The Working Group held further meetings in July and September 1990 and various drafts were circulated of a prudential carve-out for domestic regulators.[213] Then, in November 1990, the Chairman of the Working Group submitted his report to the Brussels Ministerial Meeting, and it identified a carve-out for inclusion in an annex or annotation that was largely consistent with the U.S. position.[214] In 1991, there would be further dickering over the carve-out, and compromise language would be added to the effect that it could not be used to avoid a member's obligations under the agreement.[215] Nonetheless, the submission of a favorable carve-out to the Ministerial level in November 1990 seems to be an important moment. Smythe became Director of the Division of Investment Management in that month, and she does not recall reciprocal or *quid pro quo* concerns having any impact on how the Report was completed.[216] This suggests that the danger of reciprocation had largely passed.

To implement its recommendations the Task Force recommended the use of no-action letters.[217] Smythe recalls that this approach was selected

---

210. *Id.*

211. *See supra* text accompanying notes 31-32*; see also* SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 191 (1963) (reinforcing the idea that "[t]he Investment Advisers Act of 1940 . . . reflects a congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship'").

212. June 13 Mann Interview, *supra* note 84.

213. *See generally Working Group July 1990*, *supra* note 148, at 1; *Working Group on Financial Services Including Insurance, Note on the Meeting of 13-15 September 1990*, WTO: GATT GROUP NEGOTIATIONS ON SERVICES 1 (Oct. 16, 1990), https://docs.wto.org/gattdocs/q/UR/GNSFIN/3.PDF.

214. *Report by the Chairman of the Sectoral Ad Hoc Working Group to the GNS*, WTO: GATT GROUP NEGOTIATIONS ON SERVICES 1 (Nov. 6, 1990), https://docs.wto.org/gattdocs/q/UR/GNS/W110.PDF.

215. *See* Marrakesh Agreement Establishing the World Trade Organization, *Annex* on Financial Services, Apr. 15, 1994, 1869 U.N.T.S. 183.

216. Smythe Interview, *supra* note 105.

217. *Protecting Investors Report*, *supra* note 153, at 230-34 (suggesting several possible approaches, including: the possibility of amending or reinterpreting domestic law, entering into multi-national or bilateral treaties, or harmonizing conflicting regulations); *see* Request for Comments on Reform of the Regulation of Investment

because each foreign adviser's facts were sufficiently unique that the process did not lend itself to a "cookie-cutter" rule-based approach.[218] Plus she recalls, the simple press of time and the need to wrap up the study and publish the Report worked against an effort to formulate the new policy in the text of a rule.[219] Moreover, Mann recalls: "[w]e were incrementalists, and we had a vision for it."[220] By being incrementalists, he added, the staff was trying to learn.[221] They also avoided extraordinary risks by working on incremental changes.[222] Smythe agrees, stating that implementing the Task Force's recommendations through no-action letters gave the staff "an opportunity to make sure they did it right."[223]

In the spring of 1992, the work of the Task Force was concluded. Smythe recalls that the Report was released in May of 1992 for two reasons.[224] The President, George H.W. Bush, launched an initiative in which federal agencies were asked to review their regulations and consider how to modernize them.[225] Smythe met with the SEC's Chairman, Richard Breeden, and they discussed the relationship of the Task Force to the President's initiative.[226] The Chairman then asked Smythe to wrap up the work of the Task Force so the Report could be released in a timely fashion.[227] Also, given the interest of the ICI in the project, it was decided to schedule its issuance to coincide with the ICI's annual membership meeting in May.[228] Smythe recalls that while the Report was not presented to the Commission for a vote—it was a staff report—she and the members of the Task Force had extensive meetings with the Commissioners and the Commissioners' Counsels, to brief them on its conclusions.[229] She recalls no controversy with the Commissioners.[230] Following these consultations, Smythe signed the

Companies, 55 Fed. Reg. 25,322, 25,326 (proposed June 21, 1990) (to be codified at 17 C.F.R. pt. 270).

218. Smythe Interview, *supra* note 105.

219. *Id.*

220. June 13 Mann Interview, *supra* note 84.

221. *Id.*

222. *Id.*

223. Smythe Interview, *supra* note 105.

224. *Id.*

225. *See* Memorandum from President George H.W. Bush on Implementing Regulatory Reforms to Certain Department and Agency Heads (Apr. 29, 1992), http://www.presidency.ucsb.edu/ws/index.php?pid=20894.

226. Smythe Interview, *supra* note 105.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

Report's cover letter on May 1, 1992.[231] The Report was then issued with a red cover, giving it the common nickname: the "Red Book."

Ten days later, on May 11, 1992, the Division of Investment Management received a request for a no-action letter to implement the Report.[232] The request was made by Uniao de Bancos de Brasileiros S.A., known as Unibanco.[233] At the time, Unibanco was the third largest non-governmental bank in Brazil, and it provided a variety of financial services, including investment management, commercial banking, and investment banking.[234] It also had a wholly owned subsidiary: Unibanco Consultoria de Investimentos, S/C Ltda ("Consultoria"), which had registered with the SEC as an investment adviser.[235] Consultoria advised institutional investors in the U.S., including an investment company, the Brazilian Investment Fund, Inc.[236] Unibanco asked, must it register with the SEC, and Consultoria asked: may it provide advice to non-U.S. clients solely in accordance with Brazilian law?

Smythe, as Division Director, was personally involved in identifying Unibanco as the "right candidate" for implementing the new policy.[237] Indeed, Smythe recalls that Unibanco made its interest known while the Task Force was still at work, and its situation had been considered as a test case against which the recommendations in the Report were formulated.[238] The Task Force wrote the language of the Report, she said, with the Unibanco facts in front of them.[239] As Smythe recalls: Unibanco was the patient "on whom the various experimental procedures were being tried out."[240] Harman, as the Division's Chief Counsel led the effort to respond.[241] Mann on behalf of OIA also played an active role in working out the terms of the staff's response.[242] Unibanco received a speedy response.

On July 13, 1992, the Office of Chief Counsel issued a no-action letter

231. Smythe Letter, *supra* note 150.

232. Letter from Marcia L. MacHarg, Debevoise & Plimpton, to Thomas S. Harman, Assoc. Dir. and Chief Counsel, Div. of Inv. Mgmt. (July 13, 1992), https://www.sec.gov/divisions/investment/noaction/1992/uniaodebancos072892.pdf (citing the Firm's prior letter, dated May 11, 1992, sent on behalf of Unibanco).

233. Unibanco Letter, *supra* note 5.

234. *Id.*

235. *Id.*

236. *Id.*

237. Harman Interview, *supra* note 69.

238. Smythe Interview, *supra* note 105.

239. *Id.*

240. *Id.*

241. Harman Interview, *supra* note 69.

242. *Id.*

that showed the impact of the new policy.[243] As the Report suggested, the Division of Investment Management indicated that a "more flexible interpretation" of the agency's jurisdictional reach was appropriate.[244] In place of the strict institutional segregation of parent and subsidiary set out in the *Richard Ellis* letter, the SEC staff told Unibanco it need not register so long as it met significantly less intrusive conditions.[245] The separation of parent and subsidiary would be recognized, the staff said, so long as the two affiliated companies were separately organized (i.e., two legal entities); the SEC-registered entity was staffed with personnel in the U.S. or abroad who were capable of providing investment advice; all persons involved in U.S. advisory activities would be supervised by the SEC-registered entity; and the SEC would have sufficient access to the books and records of unregistered affiliates involved in U.S. advisory activities to allow the SEC to monitor and police conduct that might harm U.S. clients or markets. In the last regard, Unibanco agreed to designate a U.S. agent for service of SEC subpoenas and other process relating to any action arising out of Consultoria's advisory services.[246] It agreed to keep books and records in English for Consultoria, consistent with the Adviser's Act requirements, and separate from Unibanco's other books and records.[247] It agreed to keep certain records for Unibanco itself, generally relating to its financial status, brokerage orders, discretionary authority, and client agreements.[248] Both its own and Consultoria's books and records would be made available for inspection by the SEC.[249] All Unibanco employees involved in Consultoria's U.S. advisory activities, such as research analysts, would be produced to the SEC for testimony.[250] The SEC staff agreed that Unibanco need not necessarily identify its customers, but Unibanco agreed it would not contest the validity of an SEC subpoena, except under the laws of the United States.[251]

Further, in place of the far-reaching assertion of jurisdiction over all clients of registered firms that had been set out in previous no-action letters, the SEC staff told Consultoria that it could provide advice to non-U.S. clients solely in accordance with Brazilian (or other applicable) law, and without

243. *See* Unibanco Letter, *supra* note 5, at 3-5.
244. *Id.* at 3-4.
245. *Id.* at 5-7.
246. *Id.* at 5-6.
247. *Id.* at 6-7.
248. *Id.*
249. *Id.*
250. *Id.* at 7.
251. *Id.* at 5-7.

necessarily complying with the Advisers Act.[252] On the other hand, Consultoria would keep records relating to all of its activities, including those relating to foreign clients.[253] This would enable the SEC to monitor and enforce the adviser's performance of its obligations to its U.S. clients and the integrity of U.S. markets, including how Consultoria was treating its U.S. clients in comparison to its foreign clients.[254]

The no-action letter to Unibanco and its subsidiary Consultoria shows the immediate impact of the new policy. In a fitting indication of the seriousness of the new policy, it was presented to the Commission for a vote.[255] Harman recalls that it was rare to send a proposed no-action letter to the Commission for a vote.[256] In this case, however, a vote of the Commission was deemed appropriate. Harman does not recall any negativity or controversy at the Commission level.[257] The study, he recalls: "had paved the way."[258] Finally, Harman signed the Unibanco letter himself, which was unusual. Typically, more junior attorneys in the Office of Chief Counsel sign no-action letters. Harman recalls that as he signed it, he was thinking: "[t]his is what the study had intended."[259]

IV. AFTER THE STUDY: 1993 TO 2017

The Task Force had recognized that a policy of comity would involve fact-specific determinations, and they began to arise almost immediately. Over the next several years, the Office of Chief Counsel in the Division of Investment Management issued a series of no-action letters addressing questions arising under the new policy. For example, did the new policy apply to the relationship between an SEC-registered adviser and an affiliate under common control? The SEC staff answered yes, so long as the names of participating affiliates were disclosed to U.S. clients and their activities were supervised consistently with the *Unibanco* letter.[260] Could an SEC-registered firm obtain research reports from a foreign affiliate, without

252. *Id.* at 4-5.

253. *Id.* at 6-7.

254. *Id.* at 4-5.

255. Harman Interview, *supra* note 69. The author made a Freedom of Information Act request to the SEC for a record of the vote the SEC responded that all records regarding the vote were privileged.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. Mercury Asset Management. Plc, SEC No-Action Letter, 1993 WL 136967 (Apr. 16, 1993), https://www.sec.gov/divisions/investment/noaction/1993/mercuryasset041693.pdf.

requiring the SEC-registered firm to supervise the research staff? The SEC staff responded yes, so long as ethical barriers separated the advisory personnel serving U.S clients from the researchers drafting the reports.[261] Could an SEC-registered firm and its foreign affiliates share office space, records, telephone lines, other facilities, and personnel, including directors, officers and employees? Again, the SEC staff answered yes.[262] Would the new policy apply to a foreign universal bank that could not provide the SEC with the access required in other no-action letters, due to the law of the bank's domicile preventing it from requiring employees to cooperate in a foreign (*i.e.,* SEC) regulatory inquiry? The SEC staff answered yes, so long as the bank agreed to certain practical measures, such as making a good faith effort to obtain employees' consent, providing records to the SEC with a non-consenting employee's name redacted, and if necessary, helping the SEC enlist the assistance of the bank's home nation regulators.[263] This last condition is notable as one of the few places where the new role of international regulatory cooperation slipped into the agency's public deliberations regarding foreign-domiciled advisers. In the event, implementing the new policy through no-action letters led to a large body of fact-specific letters that advisers had to master in detail to understand the agency's position.[264] On the other hand, as a matter of regulatory policy, this produced the type of incrementalist case-by-case decision-making envisioned by the staff.[265]

In 1996, Congress consummated the SEC's change in policy. In the National Securities Markets Improvement Act of 1996 ("NSMIA"), Congress amended the Advisers Act so the regulations governing performance fees would no longer apply to an advisory client "who is not a resident of the United States."[266] Plaze played a key role in the legislative process and recalls that it added "the final pieces" to the SEC's new policy.[267] With Congressional authorization regarding performance fees, the SEC

261. Kleinwort Benson Investment Management Limited, SEC No-Action Letter, 1993 WL 530060 (Dec. 15, 1993), https://www.sec.gov/divisions/investment/noaction/kleinwort121593.htm.

262. Murray Johnstone Holdings Limited, SEC No-Action Letter, 1994 WL 570699 (Oct. 7, 1994), https://www.sec.gov/divisions/investment/noaction/1994/murrayjohnstone072194.pdf.

263. ABN AMRO Bank N.V, SEC No-Action Letter, 1997 WL 1038179 (July 1, 1997), https://www.sec.gov/divisions/investment/noaction/1997/abnamro070197.pdf.

264. *See supra* text accompanying notes 256-259.

265. *See supra* text accompanying notes 214-219.

266. National Securities Markets Improvement Act of 1996, Pub. L. 104-290, § 210, 110 Stat. 3416 (1996).

267. Plaze Interview, *supra* note 110.

could withdraw from this long-running source of international regulatory conflict. The 1996 NSMIA legislation put this final piece in place.[268]

In the years after the NSMIA legislation, the SEC has had several opportunities to reiterate its adherence to the policy set out in the *Protecting Investors Report* and implemented in the *Unibanco* letter. The most important occasion arose in the aftermath of the Dodd-Frank Act, when the SEC was called upon to extend registration and regulatory oversight to several types of previously unregulated investment advisers.[269] In a formal release voted upon and approved by the Commission, the SEC availed itself of the opportunity to restate its: "long-held view that non-U.S. activities of non-U.S. advisers are less likely to implicate U.S. regulatory interests and that this territorial approach is in keeping with general principals of international comity."[270] Indeed, the Commission made this point more than once,[271] and in doing so, it cited to the Report.[272] The cascading effects of this policy on the specific registration and reporting requirements set out in the Dodd-Frank Rules are beyond the scope of this Article, but one can see that the SEC believed its actions were fundamentally consistent with the policy it had chosen in the early 1990s.

Further, during the Dodd-Frank rulemaking the SEC stated that nothing it said was intended to withdraw any prior statement of the Commission or the views of the staff as expressed in the *Unibanco* letters.[273] Moreover, the continuing life of those letters was reiterated as recently as in March 2017

268. *Id.* Plaze also recalls that the SEC's new policy was reflected in Congress's decision in the NSMIA legislation to assign regulatory responsibility for foreign-domiciled advisers to the SEC, even when they failed to meet the standards that domestic advisers were required to meet for federal registration (generally based on the amount of assets they had under management). In Plaze's view this facilitated internationalization by shielding foreign advisers from the burden of regulation by multiple states.

269. *See generally* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 408, 124 Stat. 1376 (2010) (repealing the private adviser exemption that permitted unregistered advisers to manage private funds).

270. Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers with Less Than $150 Million in Assets Under Management, and Foreign Private Advisers, 76 Fed. Reg. 39,646, 39,667 (July 6, 2011) (to be codified at 17 C.F.R pt. 275).

271. *See* 17 C.F.R. § 275 (2018).

272. *See, e.g.*, *id.*

273. *Id.* at 39,681. While the SEC stated that it was not overruling the *Unibanco* letters, it also stated that the Dodd-Frank Act had changed the regulatory context in which those letters had been issued, most importantly, by repealing the exemption for private advisers. Going forward, it said, it expected that the staff would "provide guidance, as appropriate, based on facts that may be presented to the staff regarding the application of the letters in the context" of the new Dodd-Frank provisions. While this may have suggested some ambivalence about the on-going validity of the letters, later developments, as set forth in the following text, seem to have laid such concerns to rest.

when the SEC staff issued an *Information Update for Advisers Relying on the Unibanco No-Action Letters*.[274] The update recites the assurances provided in the letters, states that multi-national financial firms rely upon them, and then describes various documents that the firms may provide to the SEC staff to demonstrate their compliance.[275] Twenty-five years after issuance of the *Unibanco* letter, a formal process was established for relying on its terms, and those of its progeny.

V. CONCLUSION

Reading the *Unibanco* letter today, twenty-five years after its issuance, it is easy to view its spare language as a series of discrete requirements imposed on a specific factual scenario. However, this falls well short of its full importance. A long history of shifting policies lay behind the letter, and a range of new policy considerations inspired its terms. This context must be understood, if the letter and its policies are to be correctly applied in a changing world.

In the history behind the *Unibanco* letter, one can see steadily building pressures as the SEC staff's view of its jurisdiction came increasingly into conflict with international developments. Initially, the SEC sought a regulatory border that would encompass all actions by advisers that touched the U.S. jurisdictional means, wherever the conduct took place. Further, once an adviser entered the U.S., by registering with the SEC, the agency's staff purported to regulate all the adviser's activities, wherever they took place. Then, in the early 1980s, in a first response to internationalization, the SEC staff issued the *Richard Ellis* letter, which had allowed a certain degree of foreign affiliation. However, the conditions it imposed were difficult to meet and provided little satisfaction. Finally, in the early 1990s, pressured by the need for foreign enforcement cooperation, the threat posed by multi-lateral trade negotiations, and businesses seeking to enter the U.S. market, the SEC staff developed a new policy: comity with foreign regulatory regimes. Through this new policy of comity, as implemented in the *Unibanco* letter, foreign-domiciled advisers could register with the SEC, provide services in the U.S., and be subject to SEC regulation within the U.S., without subjecting all their foreign operations and clients to SEC regulation.[276] Moreover, in the following twenty-five years, the SEC and its staff have reiterated their attachment to this policy.

Of course, the durability of the policy implemented in the *Unibanco* letter

274. *See generally Update for Advisers*, *supra* note 11.

275. *Id.*

276. *See* Unibanco Letter, *supra* note 5.

has provided ample opportunities for its interpretation. What was comity, one could ask, beyond passive deference to foreign regulators? Stated another way, were there positive values in the SEC's new policy that could be used to understand and apply the letter and its progeny? Having reviewed the process in which the SEC adopted this new policy, including the pressures that were working on it and the policy vision that was adopted in response, one can see that comity embodied several positive values. Three, in particular, stand out.

First, the *Unibanco* letter reflected a new regulatory flexibility regarding border-straddling firms. Indeed, where the *Protecting Investors Report* spoke of 'comity,' the *Unibanco* letter spoke of 'flexibility.'[277] Because of this flexibility, one could not say with precision where the regulatory border fell, at least not—to use Smythe's words—in a cookie cutter rules-based approach. Rather, it would depend on individual facts and circumstances. Lawyers and regulators who prefer the precision of bright lines and clear binary choices might find this flexibility uncomfortable. Nonetheless, it was a serious policy. In the context of the time, Plaze notes, as foreign markets were opening to U.S. interests, how could the SEC continue to follow restrictive policies at home?[278]

Second, the new policy of comity also addressed the concern raised in the SEC's 1990 Concept Release that the agency's then-expansive assertion of jurisdiction over foreign-domiciled advisers could lead to foreign reciprocation. In 1990, the U.S. Representative to the Uruguay Round's Working Group on Financial Services had also highlighted the danger of reciprocity. It would, he said, "guarantee chaos."[279] The threat of reciprocation, however, has not received the attention it deserves, probably because it appears to have been at its height for only a few months. A few days before the SEC issued its Concept Release, in June 1990, the session of the Uruguay Round's Working Group on Finance which considered possible multilateral intervention in the regulation of advisory services. Then, only about five months later, in November, a proposed prudential carve-out favorable to the SEC had reached the Brussels Ministerial Meeting. Perhaps not surprisingly, given that the danger passed so quickly, several members of the staff involved in the study, in the *Unibanco* letter, and in later legislation do not recall this concern. Nonetheless, in Mann's view, in responding to the challenge of internationalization, the greatest liberalization may have taken place in regards to the foreign reach of the Advisers Act, but

277. *See* Unibanco Letter, *supra* note 5, at 4.

278. Plaze Interview, *supra* note 110.

279. *Working Group July 1990*, *supra* note 148, ¶ 50, at 14 (statement of the Representative of the United States).

that was simply because the *Richard Ellis* no-action letter had previously staked out such a large amount of territory.[280] Further, while Smythe does not recall the threat of reciprocation, she concurs that the Richard Ellis policy had become anachronistic, because it "just didn't make any sense" that foreign advisers had to obey U.S. law "in all the countries where they operated."[281]

Third, the new policy of comity reflected a positive vision for the future of international regulatory cooperation. As Mann put it, in pursuing a policy of voluntary MOUs, the SEC's goal was to find ways through problems and develop a level of trust with foreign regulators.[282] Further, he says, because of the newly cooperative international regulatory environment established by the MOUs, the nature of jurisdiction could be reconsidered.[283] The SEC need not assert its own jurisdiction over an adviser's foreign operations and relationships when it could obtain whatever assistance it might need through voluntary collaboration with a firm's foreign regulator (backed, one must add, by the recordkeeping requirements in the *Unibanco* letters). This hope for cooperation was nearly invisible in the SEC's policy-making process regarding foreign-domiciled advisers. Yet, as Mann indicates, it was a serious policy consideration. Moreover, as Harman noted, in the event, even comity eventually gave way to something closer to *de facto* reciprocity.[284]

In sum, to understand and apply the *Unibanco* letter and its progeny one must read them as the result of a long policy process and as expressing a new policy vision of comity that embodied several affirmative values: flexibility, restraint, and international cooperation. It is beyond the scope of this article to attempt to trace those values through the letter's progeny, or how they might apply to the interpretative questions that could arise going forward. Nonetheless, based on the letter's durability, one could conclude that the policies had been well chosen. Perhaps, though, in a study based on interviews, the final concluding word should be given to the SEC official who signed the *Unibanco* letter. As Harman recalls, when the SEC embarked on its new policy, it "did not give up much."[285]

280. Plaze Interview, *supra* note 110.

281. Smythe Interview, *supra* note 105.

282. June 13 Mann Interview, *supra* note 84.

283. *Id.*

284. Harman Interview, *supra* note 69.

285. *Id.*

* * *