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Subpoenaing Records From Foreign Bank / Section 5318(k)

Court grants motion to compel compliance with Bank of Nova Scotia subpoenas served on branches of two foreign banks, demanding records of transactions occurring in the foreign country.

Court also grants motion to compel compliance with a § 5318(k) subpoena served on a foreign bank that has no US branches, but does maintain a correspondent account at a US bank.

In Re Grand Jury Investigation, ___ F. Supp.3d ___, 2019 WL 2170776 (D.D.C. Mar. 18, 2019) (Order Granting Motion to Compel) and 2019 WL 2182436 (D.D.C. Apr. 10, 2019) (Contempt Order).

D.D.C. * The FBI is investigating a Chinese entity that served as a front for an entity involved in North Korea's nuclear weapons program. The investigation concerns possible violations of the money laundering statute, the International Emergency Economic Powers Act (IEEPA), and the Bank Secrecy Act.

To obtain records of the Chinese entity's financial transactions, the Government served grand jury subpoenas on two Chinese banks that have branches in the United States ("*Bank of Nova Scotia* subpoenas") and an administrative subpoena issued pursuant to 31 U.S.C. § 5318(k) on a third Chinese bank that has no branches in the U.S. but does maintain a correspondent account at a U.S. bank ("the § 5318(k) subpoena"). All three subpoenas sought records of transactions occurring in China.

All three banks resisted the subpoenas, arguing that the proper procedure for requesting foreign bank records would be to make a request under the Mutual Legal Assistance Agreement (MLAA) between the U.S. and China. But after waiting nearly a year – during which time the Department of Justice sent two delegations to China in an unsuccessful attempt to gain China's compliance with numerous outstanding MLAA requests in other cases – the Government filed motions to compel compliance with the three subpoenas.

In ruling on the motions, the court had to determine two things: whether the subpoenas were enforceable, and whether the enforcement of the subpoenas would be proper as a matter of international comity.

Regarding enforceability, the court held that it had jurisdiction to enforce the subpoenas for two reasons: the banks with branches in the U.S. had agreed to submit to the jurisdiction of the U.S. courts as a condition of their being granted permission to open U.S. branches; and all three banks maintained the “minimum contacts” with the United States necessary to justify the exercise of jurisdiction in terms of the Due Process Clause of the Fifth Amendment.

On the latter point, the banks objected that the subpoenas were issued in the course of an investigation based in the District of Columbia, whereas the business they conducted in the United States consisted of the movement of funds through their correspondent accounts in New York. Jurisdiction, they argued, must be based on contacts with the forum in which the subpoena was issued. But the court held that the “minimum contacts” requirement concerns contacts with the United States as a whole, not with the district where the subpoena was issued. That each of the banks had moved millions of dollars through their correspondent accounts on behalf of the Chinese entity under investigation was sufficient to satisfy the “minimum contacts” requirement.

Beyond the question of jurisdiction, the bank that received the § 5318(k) subpoena had an additional objection to its enforceability. It argued that the subpoena exceeded the scope of the statute.

Under § 5318(k) – which was enacted in 2001 as part of the USA Patriot Act – any foreign bank maintaining a correspondent account in the United States must, as a condition of maintaining such an account, comply with a subpoena for records “maintained outside the United States relating to the deposit of funds into the foreign bank.” The bank argued that this meant it was required only to provide records of transactions occurring *in the correspondent account*. But the court held that a § 5318(k) subpoena may request *any records* pertaining to the customer whose money flowed through the correspondent account.

The purpose of a § 5318(k) subpoena, the court said, is to determine the source of the money that funded the later movement of money through the correspondent account in the U.S. That would include ledgers, account statements and records of cash deposits and wire transfers showing the source of the money deposited into the Chinese bank *in China*. Thus, the request that the bank produce such records fell within the scope of the statute.

Turning to the comity issue, the court acknowledged that just because a subpoena served on a foreign bank is enforceable does not mean that it should be enforced. Among other things, a court must consider the importance of the records to the investigation, the lack of alternative means of obtaining them, the competing national interests of the two countries involved, and the potential

hardship that might befall the record custodian if its compliance with the subpoena were contrary to local law.

Considering all of these factors, the court determined that “international comity is not a reason to refrain from compelling compliance with the subpoenas.” Most important, the court said, the investigation in question concerned the national security of the United States, but involved no competing national interest of equal importance to China. Moreover, the court determined, based in the Government’s past experience, that the MLAA process was unlikely to be a satisfactory alternative means of obtaining the records, and that while the Chinese banks might suffer sanctions at home if they complied with the subpoenas, such consequences were speculative.

Accordingly, the court granted the motions to compel, but the banks nevertheless refused to comply, and stated that they intended to appeal. Thus, in a separate order, the court granted the Government’s motion to hold all three banks in civil contempt, directing them to pay \$50,000 per day in penalties until they complied, but suspending the imposition of the penalties until the conclusion of the banks’ appeals. *SDC*

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Comment: A *Bank of Nova Scotia* subpoena is a subpoena for foreign bank records that is served on the US branch of a foreign bank that is holding the requested records abroad. While rarely used – because Government policy favors using mutual legal assistance agreements as a first resort – such subpoenas will be enforced if the foreign bank does enough business in the United States to satisfy the “minimum contacts” requirement, or, as in this case, if the bank has consented to the jurisdiction of the US courts as a condition of being granted permission by the Federal Reserve to open branches in the US.

Two of the subpoenas in this case were *Bank of Nova Scotia* subpoenas. The third subpoena was different: a *Bank of Nova Scotia* subpoena can only be served on a bank that has at least one branch in the US. The third bank, however, had no such branches. It was to close that gap that Section 5318(k) was enacted.

The rationale for § 5318(k) is that even if a foreign bank does not have a US branch, it is nevertheless availing itself of access to the US financial system by maintaining a correspondent account at a US bank. Thus, the US may, as a condition of allowing a foreign bank to have such access, require it to comply with a subpoena for foreign bank records. Indeed, the penalty for non-

compliance includes barring the foreign bank from maintaining any such correspondent account, thus freezing the bank out of the US financial system.

Section 5318(k) subpoenas are rarely used; the Justice, Treasury and State Departments are quite skittish about what they consider the option of last resort, and do not readily grant requests by law enforcement agencies to issue such subpoenas. But this case illustrates that permission can be obtained in some cases.

Note: The *Washington Post* published a lengthy news article on this case on June 25, 2019. Here is the link: “Chinese bank involved in probe on North Korean sanctions and money laundering faces financial ‘death penalty’”, https://www.washingtonpost.com/local/legal-issues/chinese-bank-involved-in-probe-on-north-korean-sanctions-and-money-laundering-faces-financial-death-penalty/2019/06/22/0ccef3ba-81be-11e9-bce7-40b4105f7ca0_story.html?utm_term=.0dee79dfc5a0. *SDC*

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