

MONEY LAUNDERING INVESTIGATIONS

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I. INTRODUCTION

My topic concerns the role that financial institutions play in criminal investigations of money laundering and related crimes.

I was a federal prosecutor in the United States for 30 and handled many criminal financial investigations

- So my perspective is that of the prosecutor who is attempting to obtain financial information from a financial institution,
- Or is attempting to seize or restrain assets held by that institution

I have only 20 minutes, so I will a few general comments about the requests that are made by prosecutors to financial institutions and how they might respond

- And then will focus on recent cases where the thrust of the investigation was on the use of a correspondent bank account

Victims, perpetrators, and holders of records/assets

A bank or other financial institution can be involved in a criminal investigation in various ways

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- It might be the victim of an offense, such as a false loan application or an embezzlement by an insider

It might be the perpetrator of an offense:

- early in my career I was involved in the prosecution of the Bank of Credit and Commerce International (BCCI) which was convicted of fraud and laundering money for drug cartels (Bob Mazur's book)
- And was ordered to forfeit all of its assets in the United States, which came to \$1.2 billion -- which in 1991 was real money

Crimes for which a bank might be investigated are not always so colorful, however

- The failure to maintain an adequate AML program is a criminal offense in the U.S.
- Such cases often result in Deferred Prosecution Agreements where the parties agree that the bank could be charged with a criminal offense, but the Government agrees not to do so in return for the bank's agreement to pay a hefty fine and submit to monitoring of its AML program going forward

But most contacts between prosecutors and financial institutions involve requests for records and orders to freeze assets, when it is the bank's customer, not the bank, that is the subject of an investigation

Subpoenas

The way in which prosecutors in the U.S. request records from a bank is by issuing a grand jury subpoena

Sending out such subpoenas is a daily occurrence for prosecutors in the U.S.

- They don't require any judicial action based on a finding by a judge
- To the contrary, federal prosecutors are authorized to issue subpoenas on their own authority, requesting records maintained by the bank

- And requiring the bank not to disclose the fact that a subpoena has been issued

The records may only be used for law enforcement purposes

- And can only be disclosed publicly in a criminal case or a related civil forfeiture action
- And when the case is over, they must be destroyed

You might be interested in what the prosecutor is thinking when he or she drafts the subpoena

- Well aware that the bank will not provide anything that is not specifically requested, the prosecutor will ask for everything in the bank's possession that could conceivably be of interest in the investigation
- Not just monthly account statements but canceled checks, deposited items, wire transfer instructions, signature cards, correspondence, etc.
- And well aware that the prosecutor doesn't really need all of this – at least not right away – the bank's response generally is, "OK, but tell us what you really need"

So there is this dance:

- The prosecutor says, "we need it all in 2 weeks;" the bank says, "it will take us months"
- The prosecutor says, "we do need it all, but how about A and B now and the rest later"
- Then the prosecutor says, "and we need it in electronic, machine readable form," and the bank says, "we only have paper records and need to charge you for making copies"
- And so it goes

Now, criminal investigations fall into two categories:

- Historical investigations into crimes that occurred in the past
- And active investigations into criminal activity – including terrorist financing – that is ongoing and occurring in real time

In historical investigations, prosecutors can put up with a fair amount of delay and are not inclined to press the bank for a faster response

- In active investigation, however, the situation is much different
- The prosecutor is not engaged in forensic archaeology; he or she needs the records *right now*
- So, in such cases, it's important to work out an arrangement whereby the subpoena is read to require additional records on an ongoing basis
- so that the Government does not have to issue a new subpoena and start the process over every two weeks

Contempt

Unfortunately, sometimes the only way to force a financial institution to comply with a subpoena is to go to court and ask a judge to find the bank in contempt

- I never had to do that with respect to a request for records
- But it did come up with respect to a request to freeze assets

If the Government believes that assets held by a bank were criminally derived (and therefore subject to forfeiture) – and that they therefore might disappear

- It may request the bank to freeze the assets

A formal request to seize or freeze assets – unlike a request to produced records – requires judicial action

- A finding by a judge that there is probable cause to believe that the assets are criminally derived or intended for an unlawful purpose
- This takes time

- So a law enforcement agent will typically ask the compliance officer at a bank with whom he has a relationship to see to it that the funds don't leave while the Government obtains the necessary warrant or restraining order
- Then, once the appropriate order is issued, it is served on the bank
- Directing the bank, on penalty of contempt, to freeze the funds or to turn them over to the law enforcement agent serving the court order

In my experience, problems can arise in two ways:

- Sometimes someone in the bank doesn't get the word that an account is frozen and lets the money walk
- And sometimes the bank takes the view that it will comply with the court order only after taking a setoff from the customer's account to satisfy a debt that the customer owes to the bank

Neither event is likely to endear the bank to the prosecutor conducting the investigation

- The prosecutor's view is that the bank failure to obey a court order is ground for finding the bank in contempt if the bank refuses to restore the funds
- In the case of taking a setoff in particular, the Government takes the view that the bank is just another creditor and cannot put itself ahead of the Government or other third parties claiming the funds by exercising a right of setoff before complying with a warrant or restraining order.

Correspondent bank accounts

In the time remaining, I want to talk about cases involving the seizure or restraint of funds that are passing through a correspondent account in which a bank holds funds on behalf of another bank