Banking Law

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Banks at Risk: Foreign Corrupt Practices Act Allows Seizure of Customer Bank Accounts

Authors: Harold P. Reichwald | Jacqueline C. Wolff | Jeremy R. Lacks

Banks are vulnerable to seizures of customer assets by the U.S. Government. This article describes the law and procedure surrounding the U.S. government's asset forfeiture mechanism, an enforcement tool being deployed more frequently in the context of Foreign Corrupt Practices Act prosecutions, and the threat asset forfeiture poses to the interests of U.S. banks. Banks doing business with and lending money to multinational corporations face increased risks that customer accounts and assets could be seized as part of a forfeiture proceeding. This article recommends steps banks can take to minimize those risks, including:

- understanding the forfeiture process
- ensuring that agreements contain precise language securing the bank's interest in specific customer property
- conducting due diligence on prospective customers, and
- initiating a cooperative dialogue with government lawyers in the event of an investigation.

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The Foreign Corrupt Practices Act (FCPA), makes it illegal to corruptly offer or provide anything of value to a foreign official with the intent to obtain or retain business. The Department of Justice's enforcement focus on prosecuting violations of the FCPA has taken on new dimensions with significant implications for U.S. banks. Asset forfeiture actions, an enforcement tool once reserved for drug dealers and money launderers, are increasingly being brought against legitimate companies. This poses a new risk to banks making loans to legitimate corporate entities conducting business abroad.

For example, in the last few years the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have not only obtained criminal and civil FCPA settlements from companies like Daimler and IBM, but have sought to seize the accounts and assets of companies like Lindsey Manufacturing and Cinergy Telecommunications, Inc., which have refused to settle.

How is a bank to protect itself when accounts and assets, being held as security for large business loans, are being seized by the U.S. government?

Understand the Process

It is important for banks to understand the procedures involved in different types of asset forfeiture actions to ensure that they take the steps necessary to protect their rights.

Newsletter Editors

Katerina H. Bohannon
Partner
Email
650.812.1364

Harold P. Reichwald
Partner
Email
310.312.4148

Practice Area Links

Practice Overview
Members

Authors

Harold P. Reichwald
Partner
Email
310.312.4148

Jacqueline C. Wolff
Partner
Email
212.790.4620

Jeremy R. Lacks
Associate
Email
212.790.4572

To enforce the FCPA's anti-bribery provisions, the federal government is authorized to pursue forfeiture – administratively, civilly or criminally – of the proceeds traceable to criminal violations of the FCPA. "Proceeds" includes any property, real or personal, tangible or intangible, that the wrongdoer would not have obtained or retained but for the crime. For example, a company's profits from its contract with a foreign government agency, allegedly obtained as a result of corruptly "wining and dining" the contract procurement official or by virtue of the company having given a lucrative job to that official's spouse, could be subject to forfeiture.

When the government seeks forfeiture in a criminal proceeding, it can also pursue "substitute" assets – meaning any of the defendant's property, not just the specific assets tied to the crime. This means that banks may be vulnerable to having assets seized from their customers' accounts even if the actual proceeds of the allegedly criminal conduct do not reside in the wrongdoer's account.

Administrative Forfeiture

A U.S. government agency, can seek an administrative forfeiture with no court involvement. Notice of the forfeiture is provided by a letter or via general publication but since the property being seized most often is the account itself the bank will be aware of the seizure immediately. The bank then has a window of thirty or thirty-five days, depending on the method of notice, in which to make its claim. Unless a claim is filed by the bank challenging the seizure, the government can effect forfeiture of the property without undertaking a full forfeiture court proceeding. If the bank files its claim with the agency effectuating the seizure, the government must pursue a criminal or civil forfeiture proceeding in court.

Civil Forfeiture

The civil forfeiture process is the one most likely to be used when monies in a bank account are being seized. The process begins with service on the bank of a Court-ordered warrant to seize the monies in the customer's bank account. If the money is released to the agent executing the court-ordered warrant, the bank will have no recourse until it receives the Complaint drafted by the Department of Justice attorneys or the Assistant U.S. Attorney in the district where either the conduct took place, the account is located or the investigation is pending.

Although civil forfeiture statutes provide that the Complaint must be served within a fairly short window of time or the funds in the seized account must be released, the same statutes provide the government with the opportunity to request necessary extensions from the court that issued the warrant.

Once the civil Complaint is filed, any party with an interest in the property is permitted to contest the forfeiture by filing a claim and answering the government's Complaint. The government is required to prove, by a preponderance of the evidence, that the property in issue was derived from a violation, or used to violate, the FCPA. If the government cannot make this showing, the property is released. If the government makes the showing, claimants, such as a bank lienholder, have the opportunity to assert an "innocent owner" defense. The

innocent owner defense applies if the bank's interest was secured *prior* to the crime being committed. Alternatively, if the bank's interest in the account arose *after* the crime was committed, the bank can assert its innocence as a "bona fide purchaser for value" that did not know or was reasonably without cause to believe that the property was subject to forfeiture at the time the bank's lien interest was acquired.

Whether the bank argues it is an innocent owner or a bona fide purchaser for value, it will have to establish by a preponderance of the evidence (1) its innocence in the conduct constituting the FCPA violation; and (2) that its loan documents *clearly* include the seized property as security. Banks should consider including precise, rather than general, language describing the property in order to prevent surprises later.

Criminal Forfeiture

Because criminal forfeiture proceedings are directed at the convicted defendant, rather than at the property to be forfeited, contesting the forfeiture determination is more difficult, and substitute assets – rather than only traceable proceeds – could be subject to forfeiture. Following a conviction, once notice of the government's intent to seize and dispose of the property is published and provided to any person or entity known to the government to reasonably have an interest in the property, third parties have thirty days to file a petition asserting an interest in the property. Once the bank files the petition, the court will conduct a post-conviction ancillary proceeding over ownership of the property that is similar to a civil litigation.

The ancillary proceeding is the exclusive means for the bank to challenge a criminal forfeiture. It may not intervene in the criminal case, appeal a forfeiture ruling or bring an independent lawsuit on account of a property interest. In addition, assets forfeited pursuant to a money judgment against the convicted defendant for the amount of the proceeds derived from the criminal conduct do not require an ancillary proceeding and therefore typically cannot be challenged by any third party.

The grounds for the bank to challenge a criminal forfeiture are also more difficult to meet than those to challenge a civil forfeiture. The bank will be able to challenge the forfeiture only if it can prove that (a) it has a *superior* interest, (rather than *any* interest) in the property that vested before the crime was committed; or (b) it is a bona fide purchaser for value of an interest in the property and was reasonably without cause to believe that the property was subject to forfeiture at the time of the purchase.

The first basis for claiming ownership – a superior interest vesting before the crime – may be unavailable to a bank in FCPA cases, because the forfeiture provisions also provide that the *government's* interest in the proceeds arises "upon the commission of the criminal act giving rise to forfeiture." Courts have determined that the "proceeds" of a crime by definition do not exist – and therefore an interest in them cannot vest – until after the crime is committed. Consequently, there generally can be no superior interest in the proceeds that vests before the moment of the crime, at which point the government's interest in the proceeds vests. In an FCPA matter,

therefore, because the bribe need not even be successful or accepted to be a violation, the government's interest in the profits vests at the moment the bribe is offered. Profits enter the secured bank account only *after* that offer, arguably providing the United States with priority over the bank. Due to different language used in the criminal vs. civil forfeiture statutes, this issue has not arisen in civil forfeiture cases. When a bank account is the security for a loan existing at the time the bribe is offered, a bank can successfully argue that it has a prior interest in the proceeds of the malfeasor's account even though these proceeds did not exist at the time the interest was secured. Finally, note that in a deposit structuring case, the crime is not committed and, hence, the government's interest does not vest, until the structured deposits under $10,000 are put into the bank account. Under such a fact scenario, a bank could make the argument that its interest is superior, if not identical, to that of the United States.

The second basis – bona fide purchaser for value – may be easier to prove since the secured interest can arise *after* the crime was committed; to wit, long after the bribe was made. Note that an interest in *specific* property is more likely to be considered a bona fide purchaser for purposes of establishing a valid property interest, and unsecured creditors generally will not meet the bona fide purchaser standard. Again, the clarity of the loan documents securing the particular account will be key to whether the bank can establish itself as a bona fide purchaser.

Assuming a bank petitioner can establish that it was a bona fide purchaser for value, it must also show that it was "reasonably without cause" to believe that the property was subject to forfeiture at the time the bank's lien was created. This is an objective test in which the court weighs whether the bank should have known, when it acquired the lien, that the assets may include proceeds of a crime. Courts will consider a bank's relative sophistication and due diligence undertaken in this analysis. For a sophisticated bank, it is assumed that a certain "know your customer" due diligence has been conducted and documented before opening an account or lending money. If this was done and no red flags suggesting criminal conduct were found, the bank should be able to assert a bona fide purchaser for value claim. Banks should consider implementing procedures and training their loan officers to be able to detect red flags indicating potential FCPA, money-laundering and other violations that could result in forfeiture.

In addition to challenges regarding ownership interest, some courts have permitted third parties to challenge the threshold question of whether there is a nexus between the property to be forfeited and the underlying crime where the criminal defendant has no motivation or incentive to contest the forfeiture, such as where the forfeiture is part of a plea agreement. However, this rule has not been universally adopted, and these cases are the exception the general rule.

Engage the Assistant U.S. Attorney Early On

Many Assistant U.S. Attorneys (AUSA) will be open to discussing a bank's argument that it is an innocent owner or bona fide purchaser for value during the time period between the seizure and the filing of the Complaint in a civil forfeiture. Similarly, as soon as a bank learns that a corporate account holder is under investigation – which could be upon

the bank's receipt of a grand jury subpoena for that company's records – a dialogue can begin with the AUSA regarding the bank's security interest. Such a dialogue may save the bank aggravation down the road should there be a deferred or non-prosecution agreement with the account holder, often coupled with an agreed-upon civil forfeiture, or a criminal conviction following a trial resulting in a criminal forfeiture. Also, as soon as the bank files a claim in an administrative forfeiture, it should, at the same time, determine the identity of the AUSA who will be filing the Complaint and provide that AUSA with the documentation establishing the bank as an innocent owner or bona fide purchaser. The AUSA will be appreciative of having this information prior to going to the trouble of filing a Complaint. The government can be fairly receptive to well-documented prior security interests, especially where the potential harm to the bank following a seizure could be significant.

Increased FCPA focus means increased risks to banks holding assets of multinational corporations to which they have provided significant funding. By understanding their rights and being diligent about the company they keep, banks can lessen the risk posed by this powerful government tool.