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WHITE COLLAR


Part 1: As a matter OFAC

What every company should know about complying with the agency's complicated sanctions programs

BY HARRY SANDICK AND DANIEL S. RUZUMNA[1]

You are sitting at your desk when you are handed an envelope that just arrived in the mail. It bears the return address of the Department of Treasury's Office of Foreign Assets Control ("OFAC") and it contains an administrative subpoena seeking information and documents relating to a particular transaction in which your company participated. It asks you to make this discovery production to OFAC's Office of Enforcement within 30 days.

You may have seen news stories about extremely large civil penalties imposed on financial institutions and manufacturing companies for violations of OFAC's sanctions programs, but if you have not dealt with OFAC before, there are several important questions that you are probably asking yourself. What is OFAC? What should you do in response to the subpoena? What are the potential consequences for your company as a result of an investigation? What can you do to ensure compliance with OFAC's regulations or to avoid an investigation in the first place? This article answers these questions and offers a brief introduction to the subject of OFAC enforcement actions.

What is OFAC?

The Office of Foreign Assets Control – commonly known as OFAC – is a component of the Department of Treasury that administers and enforces economic sanctions imposed by the U.S. against various countries and individuals. OFAC supervises a host of sanctions programs, which fall into one of two basic categories. First, there are comprehensive sanctions programs that broadly prohibit transactions with all individuals and companies in particular countries: Cuba, Iran, Myanmar, Sudan, and Syria. Second, there are non-comprehensive programs that prohibit transactions with specifically named individuals and entities who are in certain countries (such as North Korea or the Ivory Coast) or who are engaged in terrorism, proliferation of weapons of mass destruction, or international narcotics trafficking. These individuals and entities are included in a list maintained by OFAC that is formally known as the "Specially Designated Nationals and Blocked Persons" -- usually referred to simply as the "SDN List." The various sanctions programs are authorized by two principal federal statutes – typically either the Trading With The Enemy Act ("TWEA") or the International Emergency Economic Power Act ("IEEPA").

All U.S. persons – meaning U.S. citizens and permanent residents – are required to comply with OFAC regulations. This is true regardless of where the U.S. person currently resides. OFAC sanctions programs also apply to all persons and businesses within the United States, and the foreign branches of U.S. companies. The Cuba sanctions program also applies to foreign subsidiaries that are owned or controlled by U.S. companies (which can create a conflict of laws in some countries, including Canada, that prohibit adherence to the Cuba sanctions programs).

What types of transactions can give rise to a violation of an OFAC sanctions program?

OFAC sanctions programs have a broad reach. Most obviously (and with certain exceptions), a U.S. company cannot engage in financial transactions with, sell goods to, or provide services to anyone on the SDN List or to nationals of the countries that are the subjects of the comprehensive sanctions programs. But not all violations of the OFAC programs are quite so obvious. The following facts, under certain circumstances and in the absence of a license or other permission, could give rise to a violation of OFAC sanctions programs:

- A U.S. company acquires a Europe bank that has customers who are Cuban nationals and now is faced with providing banking services in violation of the Cuba sanctions.
- A U.S. parent company provides back office services for its overseas subsidiar ies, which may do business with entities or individuals on the SDN list.
- A financial institution makes a loan in support of an underlying sale of goods which are shipped on a vessel affiliated with an Iranian shipping company.
- Employees of a financial institution "strip" out accurate information in order to disguise transactions involving a Sudanese business.
- A food manufacturer sells its products to wholesalers knowing that the product will be sold to Iranian supermarkets.

Also, to the extent that a U.S. company re-structures its business or reporting lines in order use a foreign subsidiary or non-U.S. personnel to engage in a transaction that otherwise would be prohibited by sanctions, the company may be liable for facilitation of a prohibited transaction. The sanctions programs are complicated and can be easily

overlooked, even by well-intentioned businesses.

You also might want to ask for additional time to reply to the subpoena, as it is possible that the one apparent violation that is the subject of the subpoena may only be the tip of the iceberg of your company's OFAC problems. Given the incentives for voluntary reporting of violations and for cooperation with OFAC, you might want to take advantage of this opportunity to conduct an internal investigation so that your company can provide not only the information that OFAC is requesting, but also information about other potential violations.

What can be done to ensure compliance with OFAC's regulations in the future?

Finally, some types of international trade with countries that are subject to OFAC sanctions still can be conducted in a manner that is permitted by law. For example, there often are licenses available for selling U.S. agricultural products or providing humanitarian services in countries that are subject to comprehensive sanctions programs. Experienced OFAC and export controls practitioners can assist a company in obtaining such licenses or permissions so that such transactions can be carried out.

Additionally, companies that have any involvement in international trade or finance would be wise to have an OFAC compliance program that has been reviewed and approved by experienced counsel. The program should require the routine screening of customers, suppliers and other business partners against the SDN list. These steps hopefully will allow you never to receive a subpoena from OFAC in the first place.

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BUSINESS INSIGHTS FOR LAW DEPARTMENT LEADERS

WHITE COLLAR

Part 2: As a matter OFAC

What every company should know about complying with the agency's complicated sanctions programs

BY HARRY SANDICK AND DANIEL S. RUZUMNA

What are the potential consequences arising out of an OFAC investigation?

OFAC views itself as playing an integral party in protecting U.S. national security and it therefore takes its sanctions programs very seriously. It punishes violations that are intentional and those that are merely accidental. When its enforcement office believes it appropriate, it will make criminal referrals to the Department of Justice. The Department of Justice has authority to prosecute criminally certain violations of sanctions programs, and often does so through its local U.S. Attorney's Offices. One notable OFAC investigation resulting in criminal prosecutions involved the United Nations' Oil-For-Food Program in Iraq. Therefore, the receipt of an OFAC subpoena should be treated as a potential white-collar criminal matter and with an appropriate level of care.

The criminal and civil penalties for violating the terms of an OFAC sanctions program can be harsh. In recent years, some OFAC sanctions violators have faced tens of millions of dollars in penalties. Even in smaller cases, the penalties may far exceed the value of the prohibited transaction, as OFAC views its penalties as serving a deterrent purpose. Depending on the statute that underlies the particular sanctions program, violators can face maximum criminal penalties of 20 years' imprisonment and a fine of $1 million, as well as asset forfeiture provisions that can allow the government to claim property involved in the violation. Civil penalties can be as high as $250,000 or an amount equal to twice the amount of the transaction that is the basis of the violation. Also, these civil penalties are per violation, so if there are multiple transactions, the maximum penalty can be quite high.

How does OFAC determine what penalties to impose?

OFAC assesses different potential violations in accordance with its Economic Sanctions Enforcement Guidelines, which became effective in November 2009. OFAC has broad discretion to take different types of enforcement actions depending on the particular facts involved, including sending a cautionary letter, imposing a civil monetary penalty, or issuing a cease and desist order. OFAC's exercise of discretion is informed by many "general factors" including whether the violation was willful or reckless, the harm to the underlying sanctions goals, the existence of an OFAC compliance program, the company's remedial response to the violation, and the company's cooperation with OFAC during the investigation. If OFAC imposes a civil penalty, the amount of the base penalty is calculated primarily based on two key determinations: First, was the violation "egregious"? This term is not defined by OFAC. Second, was there a voluntary self-disclosure of the violation? A voluntary disclosure will result in a 50% decrease in the base penalty imposed by OFAC. Once the base penalty is determined, OFAC will then consider mitigating and aggravating factors in increasing or decreasing the amount before a final penalty determination is made. Parties are permitted to submit letters identifying mitigating factors and advocating for a lower penalty.

How should you handle an OFAC subpoena?

An OFAC subpoena should be treated with the utmost seriousness, much as one would treat a grand jury subpoena or a subpoena from the Securities and Exchange Commission. Perhaps even more so than in these other contexts, the recipient should consider retaining an attorney with specialized knowledge of the various OFAC sanctions programs, the exceptions to the programs, and the art of making a mitigation submission to OFAC in advance of an assessment of a civil penalty. After receipt of the subpoena, your company's attorney should contact the OFAC Enforcement personnel who issued the subpoena in order to find out as much information about the nature of the investigation as they are willing to provide.

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BUSINESS INSIGHTS FOR LAW DEPARTMENT LEADERS

WHITE COLLAR

You'd Better Watch What You Say: The Fifth Amendment's Role In Cross-Border Investigations

BY HARRY SANDICK AND JOSHUA A. GOLDBERG[1]

The government increasingly has turned its focus abroad, to cross-border investigations and prosecutions, garnering major headlines in cases involving the Foreign Corrupt Practices Act and global antitrust conspiracies. The United States often gathers evidence and seeks to take testimony in tandem with law enforcement personnel in other countries. When a corporate employee faces a request for a voluntary interview or even compelled testimony in one country, there is a fear that the testimony will be made available to prosecutors or regulators in other countries.

Such a situation creates hard choices for institutions and individuals in the United States. Space does not permit a full assessment of the many complicated issues related to cross-border investigations, but it is useful to review a few basic rules about the application of the Fifth Amendment's privilege against self-incrimination in the context of international criminal and regulatory investigations, as a window into this broader and timely subject.

First, the privilege against self-incrimination cannot be invoked in the United States based on a fear of prosecution by a foreign nation, as the Supreme Court held in *United States v. Balsys,* 524 U.S. 666 (1998). The United States may cooperate with other nations, but the Court rejected an analogy to the state/federal context, where a compelled and immunized statement given to state prosecutors cannot be used by federal prosecutors (and vice-versa).

The Court rejected the notion that "cooperative internationalism" offered the Government "new incentives . . . to facilitate foreign criminal prosecutions." However, in a forward-looking concluding section, Justice Souter prophesized that "cooperative conduct between the United States and foreign nations" might develop to a point "at which a claim could be made for recognizing fear of foreign prosecution under the Self-Incrimination Clause as traditionally understood." If the United States and its allies enacted similar laws and the United States granted immunity to compel people to provide testimony that then could be delivered to other nations, then the prosecution would be "as much on behalf of the United States as of the prosecuting nation[.]" But "mere support of one nation for the prosecutorial efforts of another does not transform the prosecution of the one into the prosecution of the other."

Second, the Fifth Amendment privilege against self-incrimination generally does not prevent United States prosecutors from offering a statement that was compelled by foreign law enforcement personnel in a foreign jurisdiction. United States courts have "declined to suppress un-warned statements obtained overseas by foreign officials" that might have violated *Miranda* if taken by U.S. agents.[2] Courts have held that suppression would not deter future unlawful conduct by U.S. officials; foreign officials are not limited by the Fifth Amendment.[3]

There are two exceptions to this general rule. First, the statements must have been made voluntarily in light of the totality of the circumstances, and cannot have been obtained through means that shock the conscience.[4] Second, the inculpatory statements must not have been made to foreign investigators as part of a "joint venture" between U.S. and foreign law enforcement, or to foreign investigators who functioned as mere "agents" of U.S. law enforcement.[5] In those circumstances, the traditional deterrence rationale animating our Fifth Amendment jurisprudence applies.

Nevertheless, it is difficult to prove that a confession was involuntary,[6] and such claims typically require a showing of state action.[7] Likewise, the "joint venture" doctrine is rarely applied and is of uncertain scope. Although the doctrine has been applied where U.S. agents substantially participated in an arrest and were present during the subsequent interrogation,[8] no "joint venture" was found in the following circumstances:

- U.S. agents submitted questions to be asked by Saudi authorities and then observed the interview;[9]
- U.S. officials requested the arrest of a fugitive living in Jordan, who was then interrogated by Jordanian authorities;[10]
- U.S. agent with a visible pistol was present in the same room in which the defendant was questioned by Mexican officials;[11]
- U.S. agent questioned a defendant arrested and detained by British officials, but prosecutors offered state ments from a separate un-warned interrogation by British officials; and
- U.S. agent served as an interpreter in an interview conducted by foreign law enforcement and thereby assisted in obtaining incriminating statements.

In short, the legal landscape puts few constraints on the U.S. government's collection of testimonial evidence that might be useful in foreign criminal prosecutions, or on its receipt of testimonial evidence from foreign

criminal prosecutions, or on its receipt of testimonial evidence from foreign law enforcement. Accordingly, counsel involved in cross-border investigations should explore the possibility of entering into agreements with prosecutors that will limit the use in one jurisdiction of statements made in another jurisdiction. Such agreements may be obtained when a witness has sufficient leverage – perhaps because of the federal government's desire to obtain the witness's cooperation. A negotiated approach will be advisable until the Supreme Court revisits the issue raised in Balsys and recognizes that we may have reached a point at which the "cooperative conduct" between the U.S. and foreign jurisdictions supports an expansion of the current interpretation of the Fifth Amendment.

[1] *The authors are both in the White Collar Defense and Investigations practice group at Patterson Belknap Webb & Tyler LLP. The authors also both served previously as Assistant U.S. Attorneys in the Southern District of New York. In private practice, both have represented clients in cross-border investigations conducted jointly by U.S. and foreign authorities. The authors thank Alicia Tallbe, an associate at their firm, for her assistance in writing this article.*

[2] *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 177, 202 (2d Cir. 2008). Police coercion is strongly presumed in the absence of *Miranda* warnings during a custodial interrogation. *See United States v. Patane*, 542 U.S. 630, 639 (2004).

[3] *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d at 202.

[4] *See, e.g., id.* at 203 & n.18.

[5] *United States v. Ali*, 528 F.3d 210, 228 (4th Cir. 2008).

[6] *See, e.g., Brown v. Mississippi*, 297 U.S. 278 (1936) (suppressing a confession extracted through brutal torture).

[7] *See Colorado v. Connelly*, 479 U.S. 157, 166 (1986) ("The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause.").

[8] *See, e.g., United States v. Emery*, 591 F.2d 1266, 1268 (9th Cir. 1978).

[9] *Ali*, 528 F.3d at 230.

[10] *United States v. Yousef*, 327 F.3d 56, 145 (2d Cir. 2003).

[11] *Pfeifer v. United States Bureau of Prisons*, 615 F.2d 873, 877 (9th Cir. 1980).

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Washington's Increased Counterfeiting Prosecutions May Signal It's Time to Reconsider Your Company's IP Enforcement Strategy

BY MICHAEL BUCHANAN AND FRANK CAVANAGH

Introduction

Intellectual property crimes are on the rise because they are highly lucrative and historically there has been little criminal enforcement activity.[1] Recently, however, federal agencies have begun to increase their efforts to investigate and prosecute IP violators. From the IP holder's perspective, stepped up enforcement raises the question: is it better to pursue civil remedies or actively work with law enforcement to protect products and brands?

Shifting Perceptions of Counterfeiting

Once regarded as "victimless" crimes that involved selling cheap knockoff sunglasses and watches, counterfeiting is increasingly viewed as a serious threat to the public health. The FDA estimates that counterfeit drugs account for approximately 10% -15% of all pharmaceuticals sold in the world. Drugs in developing countries are a staggering 50%-60% counterfeit.[2] Other dangerous counterfeit consumer products that are also commonly seized in U.S. ports include infant formula, toothpaste, automobile parts, batteries, and electronic products. Counterfeit goods have even infiltrated military supply chains.[3]

Counterfeiting also presents a serious threat to the economic well being of American innovators. Based on 2005 estimates, counterfeiting costs the U.S. economy approximately $200-$250 billion per year, and according to the FBI, Interpol, and the World Customs Organization (WCO), approximately 5% to 7% of world trade ($512 billion) is in counterfeit goods.[4] IP holders suffer lost sales, downward pressure on prices, damage to brand equity and consumer confidence, and incur costs associated with anti-counterfeiting and anti-piracy efforts.

The President, Congress, and federal law enforcement agencies are responding to these threats. In October 2008, Congress enacted legislation creating a new U.S. Intellectual Property Enforcement Coordinator (IPEC). The IPEC is charged with harmonizing the efforts of the U.S. government agencies that have a stake in IP enforcement[5] and is responsible for coordinating international enforcement efforts. Additionally, Attorney General Holder reestablished the DOJ's Task Force on Intellectual Property, which coordinates international law enforcement investigations, and deployed two federal prosecutors to manage IP protection efforts in Southeast Asia and Eastern Europe.

Statistics from recent years show that these efforts are now beginning to show real results: an increasing number of intellectual property investigations, arrests, and seizures,[6] and joint U.S./WCO and INTERPOL investigative operations.[7] All evidence points to future increases in these enforcement efforts.

Cause to Reevaluate the Current Strategy?

While civil remedies are important tools for enforcing IP rights, is it time for IP holders to consider referring cases to the National Intellectual Property Rights Coordination Center (IPR Center) or to the appropriate U.S. Attorney's Office? Such referrals carry significant advantages:

- Investigative techniques that are not available to private litigants, like undercover operations, wiretaps and other electronic surveillance.

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[1] U.S. Customs and Border Protection and U.S. Immigration and Customs Enforcement, *Intellectual Property Rights: Fiscal Year 2010 Seizure Statistics — Final Report*, 9 (January 2011), http://www.ice.gov/doclib/news/releases/2011/110316washington.pdf

[2] Robert Cockburn, Paul N. Newton, E. Kyerematenge Agyarko, Dora Akunyili & Nicholas J. White, *The Global Threat of Counterfeit Drugs: Why Industry and Governments Must Communicate the Dangers*, PLoS MEDICINE (2005), http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.0020100; see U.S. Chamber of Com., *What Are Piracy and Counterfeiting Costing the American Economy?*, 2 (2005), http://www.uschamber.com/ncf/initiatives/counterfeiting.htm (citing U.S. Customs and Border Protection, press release, May 29, 2002, "Fighting the Fakers," The Engineer, April 16, 2002 and Philip Broussard, "Dangerous Fakes," World Press Review, January 1999).

[3] *See, e.g.*, Office of the U.S. Intellectual Property Enforcement Coordinator, 2011 U.S. Intellectual Property Enforcement Coordinator Joint Strategic Plan, 50 (June 2011), *available at* http://www.whitehouse.gov/sites/default/files/omb/IPEC/ipec_anniversary_report.pdf (hereinafter "Joint Strategic Plan").

[4] *See* U.S. Chamber of Commerce, *supra* note 2, at 2.

[5] *See* 2011 Joint Strategic Plan, *supra* note 3 at 1. the Fakers," The Engineer, April 16, 2002 and Philip Broussard, "Dangerous Fakes," World Press Review, January 1999).

[6] *See id.* at 3; Global Intellectual Property Center, Getting More Than You Bargained For, 1 (June 2010), http://www.theglobalipcenter.com/sites/default/files/documents/15653_GIPCcounterfiet_Fin.pdf (hereinafter "Getting More Than You Bargained For").

[7] *See* Getting More Than You Bargained For at 9.

- Criminal and civil forfeiture of ill-gotten assets.
- International investigations conducted by law enforcement, thus avoiding the legal roadblocks and ethical pitfalls facing private litigants when gathering evidence abroad.[8]
- Greater deterrent effect than private enforcement, especially given the increasing criminal penalties associated with IP crimes.[9]
- Leveraging government resources to protect IP rights.

Federal agencies and prosecutors are actively looking to partner with IP holders to identify potential targets for prosecution.[10] They will rely on IP holders to explain, for example, the product and the relevant market, the distribution channels, how the counterfeit product differs from the genuine article, how to detect a counterfeit product, and how the counterfeiting activity harms the innovator and the public. Absent cooperation, law enforcement will be hard-pressed to independently develop the necessary evidence or an appreciation of the harm the counterfeit product presents.

It would behoove the savvy IP holder to examine its current strategy for protecting its intellectual property rights and consider whether a partnership with law enforcement makes sense.

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[8] For example, blocking statutes in France and Britain impose penalties upon nationals for complying with a foreign court's discovery request. *See In re Anschuetz & Co.*, 754 F. 2d 602, 614 n.29 (5th Cir. 1985). European data and privacy protection laws often require notice to potential targets and may limit the ability of a private litigant to gather and export evidence from abroad.

[9] *See* Victoria Espinel, *Concrete Steps Congress Can Take to Protect America's Intellectual Property* (Mar. 15, 2011), http://www.whitehouse.gov/blog/2011/03/15/concrete-steps-congress-can-take-protect-americas-intellectual-property (recommending stiffer penalties for IP violators).

[10] *See, e.g.*, Dep't of Justice, Reporting Intellectual Property Crime: A Guide for Victims of Counterfeiting, Copyright Infringement, and Theft of Trade Secrets, *available at* http://www.justice.gov/criminal/cybercrime/AppC-ReportingGuide.pdf

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BUSINESS INSIGHTS FOR LAW DEPARTMENT LEADERS

WHITE COLLAR

Part 1: Relief for Victims and Third Parties Through Asset Forfeiture

BY HARRY SANDICK AND DANIEL S. RUZUMNA[1]

As the recent economic crisis has shown, individuals are not the only victims of financial crimes. Corporations, hedge funds, private equity companies, pension funds, nonprofit organizations, and other entities can stand to lose millions of dollars through fraud, embezzlement, and other criminal acts. The proceeds of financial crimes are often long gone or, where they have not yet been spent, the government increasingly seeks to "forfeit" these proceeds as ill-gotten gains.

Civil litigation against the wrongdoer may be an option, but litigation is a long, costly process that is not effective when the perpetrator of a crime will be stripped of all assets as part of a criminal sentence. Restitution, whereby a person convicted of a crime is ordered to return any stolen or fraudulently obtained property to victims, is mandatory in criminal cases, but where determining restitution is too complex and burdensome, the requirement to determine and award restitution to victims may be excused. In such instances, victims of crime and innocent third parties may have a means of seeking relief through the forfeiture process. But because such relief may be subject to prosecutorial discretion, individuals or companies seeking recovery through forfeiture must be prepared to act quickly and make a compelling case.

What is Asset Forfeiture?

Forfeiture is a procedure by which a governmental entity seeks to obtain property that constitutes the proceeds of a crime or is traceable to such proceeds, or property that was involved in certain crimes. Investigative agencies can seek forfeiture of property through administrative proceedings, and the U.S. Department of Justice can bring forfeiture actions civilly or as part of a criminal action. State agencies can also bring forfeiture actions.

"Proceeds" of a crime simply means money or property that an individual obtained directly or indirectly through criminal conduct or that is traceable to such money or property. Proceeds are generally not limited to the net gain or profit from an offense, but include all things gained as a result of the offense. Property "involved in" a crime is broadly interpreted to mean any property that was used in or facilitated the commission of a crime.

The government uses forfeiture to deprive an individual or corporate entity of the spoils of a crime. Criminal forfeiture is conducted as part of a criminal proceeding and results only if a defendant is convicted. Forfeiture in a criminal case is independent of and not exclusive of restitution; accordingly, at sentencing, a defendant can be ordered to pay double what it gained through the commission of a crime. Civil forfeiture, on the other hand, is not tied to a criminal case and can be brought in addition to or instead of a criminal action. Though civil forfeiture actions are considered "quasi-criminal" in nature (because they seek to deprive an individual of property and therefore are a form of penalty), the government's burden of proof is the far lower "preponderance of the evidence" standard rather than the "beyond a reasonable doubt" standard used in criminal proceedings.

In the criminal forfeiture context, the court or a jury determines whether property is subject to forfeiture, and only a defendant can challenge the government's efforts. Unfortunately, because most criminal defendants are more concerned with staying out of prison than preserving the alleged proceeds of a crime, the determination of a property's forfeitability is often not vigorously challenged. This is especially true where a defendant pleads guilty. Once a property is determined to be subject to forfeiture, a third party's claim to all or a part of the property is notably weaker. Therefore, a third party victim of a financial crime must understand and properly utilize the avenues to relief from forfeiture set forth in the law.

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BUSINESS INSIGHTS FOR LAW DEPARTMENT LEADERS

Part 2: Relief for Victims and Third Parties Through Asset Forfeiture

BY HARRY SANDICK AND DANIEL S. RUZUMNA[1]

How Can a Victim Obtain Relief Through Forfeiture?

Forfeited property generally goes to the government to spend in whatever manner it sees fit. However there are means by which victims or third parties can challenge a forfeiture if they believe the property, in full or in part, rightfully belongs to them, or to seek relief based on losses resulting from the criminal acts that gave rise to the forfeiture. The first avenue of relief is the assertion of a claim to property sought to be forfeited, and this can be done by filing a claim and an answer in a civil forfeiture proceeding or through a petition for an ancillary hearing in a criminal case. The second avenue of relief involves the filing of a petition for remission or mitigation with the Department of Justice.

Any time the government intends to forfeit property, it is required to give notice to potentially interested third parties and to publish its intent on a government website. Any interested third party, including a victim of a crime, may then file a claim to the property in court within a specified time period. A claim must set forth the nature and extent of a party's "right, title, or interest" in the property, explain the circumstances in which the property was acquired, and be signed under penalty of perjury. Succeeding on a third party claim is difficult, however, because the claimant must prove either that it (1) has a right, title, or interest in the property superior to the government's, or (2) is a bona fide purchaser for value and, at the time of purchase, was reasonably without cause to believe the property was subject to forfeiture.

Under the "relation back" doctrine, the government is assumed to have acquired title to the proceeds of a crime or property involved in a crime at the time the crime was committed. Therefore, to have a superior right, title, or interest in property, a third party must have had an interest in the property before the crime occurred. Bona fide purchasers are those who provided something of value in exchange for an interest in property subject to forfeiture, such as financial institutions that provided a mortgage to buy a home later deemed to be subject to forfeiture.

Petitions for mitigation or remission are intended to alleviate some of the harsh consequences of a crime by allowing victims to gain financial relief even if they cannot meet all of the strict requirements for filing a successful claim. As a matter of prosecutorial discretion, the Department of Justice can grant petitions for remission or mitigation from victims of crime. Increasingly, in complex fraud cases (such as the Madoff prosecution) the Department of Justice (sometimes in tandem with a trustee appointed under the Securities Investor Protection Act) will use the funds received in a criminal forfeiture proceeding to make victims whole. This can be particularly important to victims in those cases in which criminal restitution is not possible due to the complexity of determining what victims are entitled to receive, or where the sheer number of victims makes restitution not feasible. Because petitions are subject to the discretion of the government, however, and are not subject to judicial review, it is critical to present a compelling case for relief. Given recent trends, it seems likely that the government will continue to rely on forfeiture proceedings to recover the proceeds of financial crimes and, accordingly, that the avenues of relief from forfeiture will become increasingly important for businesses that have been victimized or otherwise affected by such crimes. Businesses should be aware of these avenues and, if victimized by financial crime, should contact counsel with specialized experience in forfeiture matters to help navigate the process.

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