CAN YOU COMMENT WHEN SARS COME UP?

Torn from the headlines: Managing risk when a private investigation goes public

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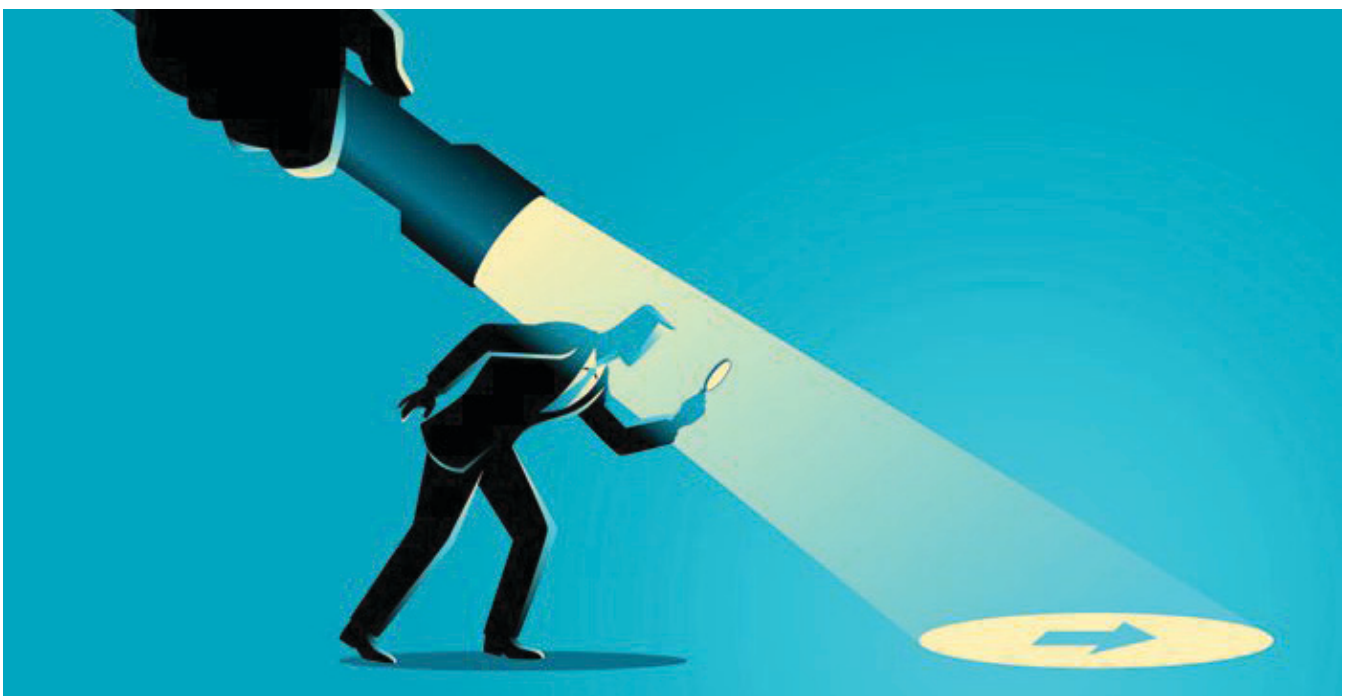

Recent news related to the investigation of Russian influence in the U.S. political process has drawn the public's attention to the Suspicious Activity Report (SAR) system and raised questions about its integrity.[1]

Financial institutions, among others, are required to file SARs with the Treasury Department's Financial Crimes Enforcement Network (FinCEN) reporting certain financial transactions that are suspicious or otherwise indicative of criminal activity. SARs reported to FinCEN are accessible by federal and state law enforcement and intelligence agencies, but their dissemination or disclosure to the press, and thereby to the public, or even the reporting institution's own customer is prohibited.

In the current highly politicized climate, however, leaks may be inevitable for high-profile investigations that happen to involve activity that has triggered the filing of a SAR. In such instances, too many people with diverse views and motivations have access to the information for it to remain a secret for long.

When leaks of this sort of information do occur, the resulting public revelation that a financial institution facilitated transactions of interest to law enforcement presents challenging reputational and legal risks for those institutions—notwithstanding that some or all of the institutions have likely already self-reported the activity in compliance with their legal obligations.

Companies implicated by these revelations may be afforded little to no time to balance and consider carefully these developments given the pace of the current news cycle. Thus, it is important for internal and external counsel for affected financial institutions to be mindful of the institution's legal obligations. Banks need to ensure that management has guidance from counsel in addition to the now pervasive crisis communications specialists, who are trained to minimize reputational harm in dealing with the media. The latter may lack familiarity with the governing legal obligations unique to financial institutions, and more particularly the inability of such institutions to comment on certain matters.

Institution response demands care

Financial institutions must be cognizant of a trio of federal laws that strictly curtail what, if any, information can be disclosed to the public at large or to specific customers regarding the financial institution's knowledge of and participation in criminal investigations or regulatory disclosures.

For example, suppose a financial institution receives a grand jury subpoena requesting all account records relating to financial institution customer X. In the course of responding to the subpoena, the financial institution learns that it has helped to facilitate customer X's criminal (or at least suspicious) activity, albeit unknowingly.

For example, the responsive

information may indicate that the financial institution has facilitated customer X's transaction that was part of a money laundering scheme. Or customer X may have funded activities that appear to be illegal or otherwise look suspicious. Armed with this new knowledge, the financial institution will not only produce responsive records to the grand jury but it will almost certainly also file a SAR.

In addition, a financial institution adhering to best practices will ensure that:

1. Its subpoena response is managed and directed by legal counsel;
2. Only the narrowest group of individuals within the institution are made aware of the subpoena and underlying criminal investigation; and
3. That those individuals who are aware of the investigation are reminded both of their obligation to keep the information confidential and of the strict consequences of their failure to do so.

In theory, these safeguards would be adequate to prevent disclosure to the press or the public and shield the financial institution from liability.

Problems arise when a rogue employee of the financial institution or a law enforcement entity with access to SARs leaks information about customer X, or when a person with knowledge of the investigation or underlying transactions perceives some personal or political benefit to publicly disclosing the behavior and decides to ignore the legal constraints attendant to the grand jury process or sensitive handling of SAR information and leaks the information to the media or an interested party.

Once the financial institution's involvement in a matter subject to investigation has been disclosed, conventional wisdom on reputational risk dictates that the financial institution should try to "get ahead" of the story. The hope is to control the narrative in a positive light with a strategic, and perhaps even proactive media campaign that disclaims the financial institution's witting role in any potentially illegal activities and underscores its cooperation with law enforcement.

Awareness of three key laws critical

While this approach may represent best practices for many corporations, financial institutions' ability to respond to such a scenario is more constrained by special provisions of the three laws referred to earlier: the federal obstruction of justice statute; the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA); and the Bank Secrecy Act.

Accordingly, it is imperative to consider whether any proposed media strategy is consistent with these three laws before any statements are approved.

First, consider the relevant provisions of the federal obstruction of justice criminal statute, 18 U.S.C. § 1510(b)(1) and (2). This prohibits financial institutions and their officers—which the statute defines broadly to include all employees or attorneys for the institution—from disclosing the existence of federal subpoenas for customer records relating to violations of various enumerated fraud and/or bribery-related crimes.[2]

Subsection (b)(1) is limited to situations where the institution or its officer directly or indirectly notifies any other person about the existence of a subpoena or records furnished in response, with an intent to obstruct a judicial proceeding.

However, subsection (b)(2), which bars financial institutions and their officers from directly or indirectly notifying customers or other persons named in such subpoenas about the subpoenas, does not include similar language requiring an intent to obstruct.

Although there is no precedent directly applying it, a plain reading suggests that subsection (b)(2) is effectively a strict liability provision with no intent requirement. In other words, there is an argument that the statute prohibits a financial institution or any of its employees from indirect disclosure of the existence of a subpoena to the targets of a subpoena, even if there is no intent to impede or obstruct the investigation. At least two courts have embraced this interpretation, although not in precedential holdings.[3] Violations of subsection (b)(2) are punishable as misdemeanor offenses subject to fines and imprisonment of up to one year.

FIRREA similarly makes it a crime for financial institutions and their officers and employees to directly or indirectly notify any persons named in a federal grand jury subpoena in connection with an investigation into a list of enumerated crimes.[4] Like subsection (b)(2) of the obstruction of justice statute, FIRREA's disclosure prohibition language does not include an explicit intent requirement. A financial institution that violates this prohibition could lose its status as an insured depository institution or be subject to substantial monetary fines.[5]

Finally, the Bank Secrecy Act[6] and its implementing regulations[7] prohibit financial institutions, and their current and former officers and employees, from disclosing a SAR or any information that would reveal the existence of a SAR, or notifying any person involved in the reported transaction about the filing. While the Bank Secrecy Act is a civil statute, criminal sanctions can and have been applied to individuals and institutions found to have violated it with criminal intent. In a well-publicized case from 2005, for example, Riggs Bank paid a $16 million fine after pleading guilty to a criminal charge for failing to file a SAR.[8]

So what can you say?

The combined thrust of the federal obstruction statute, FIRREA, and Bank Secrecy Act's disclosure prohibitions creates risk for financial institutions, like our hypothetical financial institution, that are considering making even the most vanilla and seemingly benign public statements.

In these types of situations, there is very little a financial institution can say to defend its reputation in the public domain without putting itself at some risk of criminal or civil liability.

The safest and most conservative course is to avoid commenting entirely. If that approach is untenable from a public relations standpoint, statements expressing a general institutional inclination or practice to cooperate with law enforcement should be compliant in most circumstances, although legal counsel should always be consulted given the overlay of the statutes discussed above. Any statements that reference or confirm specific investigations, subpoenas, or SAR reports, even where their existence has already been disclosed to the media and the public by third parties, however, bear substantial risk.

As such, even commenting on matters leaked to the public by others risks implicating these statutory provisions.

An actual prosecution of the institution or its associated individuals who have commented simply in response to someone else's inappropriate revelation of the subpoena or SAR may not be a

particularly compelling or likely scenario, but financial institutions should avoid taking unnecessary risks or damaging their relationships with prosecutors or regulators by compounding a leak situation with their own commentary.

About the authors

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Burton is a trial lawyer with more than two decades of criminal law experience and has tried more than 50 criminal cases to verdict, representing individual and corporate clients in complex federal white collar criminal cases, governmental and civil proceedings, and internal investigations.

Halliday represents financial services industry clients in a wide range of litigation matters, including class actions, government enforcement matters, regulatory examinations, and internal investigations.

Read also John Byrne's blog, "You Can't Always Get What You Want"

Footnotes

1. See sample of coverage here.

2. 18 U.S.C. § 1510(b)(3)(B). The subpoena must relate to an investigation of a violation or conspiracy to violate "(i) section 215, 656, 657, 1005, 1006, 1007, 1014, 1344, 1956, 1957, or chapter 53 of Title 31; or (ii) section 1341 or 1343 affecting a financial institution."

3. See In re: Mezvinsky, 2000 WL 33950697, at n. 7 (Bankr.E.D. Pa. Sept. 7, 2000) (noting in context of motion to compel production in a civil suit that disclosure of grand jury subpoena was a criminal violation absent intent under 1510(b)(2)); United States v. Grace, 264 F.Appx. 780, 782, n.2 (11th Cir. 2008).

4. 12 U.S.C. § 3420(b)(1).

5. 12 U.S.C. § 3420(b)(2).

6. 31 U.S.C. § 5318(g)(2)(A)(i). Subsection (g)(2)(A)(ii) similarly prohibits current and former government employees from disclosing SAR filings, except as necessary to fulfill official government duties.

7. 31 C.F.R. § 1020.320(e)(1)(i).

8. See Jan. 27, 2005 Department of Justice Press Release