US fights crime by seizing funds from foreign banks' interbank accounts

UNITED STATES

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Using expanded statutory powers, the United States Department of Justice (DOJ) has the authority to seize foreign bank assets in US accounts even where the account was not involved in any wrongdoing. Many foreign banks have been caught off guard by the scope of the DOJ's authority.

Gone are the days when criminals were limited by national borders. In today's interconnected world, a single individual acting from the safety of an internet café in Lagos or Kiev can defraud victims thousands of miles away in Ohio. To combat this, the DOJ has used its broad anti-terrorism seizure powers under the Patriot Act to seize funds from accounts held in the US by foreign banks even where the accounts themselves have not been involved in the illegal activity. Foreign banks have been surprised to find themselves on the receiving end of such seizures from their interbank accounts.

Before passage of the Patriot Act in 2001, the DOJ could not seize funds from a foreign bank's US account unless it could show that the account was somehow involved in or facilitated certain illegal conduct. The bank could defeat the seizure by showing that it was merely an 'innocent owner'. But the Patriot Act changed all that.

By way of example, assume that a criminal living in Korea tricks investors in the US into sending funds, say US$100,000, to an account held at a bank in Korea, all as part of a bogus investment scheme. Assume also that the Korean bank has an account with Bank of America in New York. Under US law, the DOJ can seize US$100,000 directly out of the Korean bank's account at Bank of America, even if the $100,000 never went through that account, and even if the Korean bank had no knowledge of the allegedly illegal activity on the part of its account holder. US law deems the funds

in the interbank account to be the same as those on deposit in Korea. The goal here of US law is to put the onus on foreign banks to recover the funds from their own account holders after the DOJ has seized the funds.

However, foreign banks can recover the seized funds if they can show that the criminal did not have any funds in his account at the foreign bank at the time of the seizure. Thus, returning to the example above, if the criminal had withdrawn the entire US$100,000 from his account in Korea before the DOJ seized funds from the Korean bank's account at Bank of America in New York, the Korean bank would be able to recover the entire US$100,000 from the DOJ. The theory is that the Korean bank has no way of recovering the funds from its account holder once they have withdrawn the US$100,000. And if the criminal had only made a partial withdrawal, say US$40,000, the Korean bank would only be able to recover that amount from the DOJ. Or put another way, the DOJ can seize US$60,000 from the Korean bank's Bank of America account in New York because that is what was on deposit in Korea at the time of the seizure.

Two other points are worth mentioning:

- First, it is irrelevant that the fraudulent proceeds in the account in Korea may have been withdrawn from the account and replaced with new, 'clean' money. To the extent the criminal had any funds in the account at the time of the seizure, the bank will not be able to recover the seized funds from the DOJ.
- Secondly, the DOJ will aggregate all of the alleged wrongdoer's accounts at the foreign bank to determine the amount available at the time of the seizure, not just the account that received the fraudulent proceeds.

Although the DOJ's broad power to seize funds from interbank accounts was enacted to fight suspected terrorism, this seizure authority has been used for many kinds of crime in many different countries. In the first year and a half of the amended statute's existence, the DOJ seized tainted funds from 15 foreign banks' US interbank accounts, including banks in Israel, Oman, Taiwan, India, Belize, and elsewhere. More recently, Korean banks have found themselves the target of interbank seizures. The government tightly protects information about seizures, but has acknowledged at least two cases in which it seized a total of over US$2m in assets from interbank accounts belonging to foreign banks.

Because the power to seize funds from interbank accounts can implicate important foreign policy concerns, designated officials at the DOJ, in consultation with the Departments of Treasury and State, must formally authorise a given seizure. Approval will be given only in 'extraordinary cases where the foreign government is unable or unwilling to provide assistance', and the DOJ officials purportedly consider seizure of funds from interbank accounts to be a measure of last resort. State Department officials have reportedly expressed concern about the impact of such broad seizure authority and worry that it may be seen as the improper application of US law to actions taking place entirely in other countries. Nevertheless, the DOJ has authorised, and the State Department has consented to, numerous such seizures.

Because US seizure laws are complex and often are complicated by bank privacy laws in the foreign bank's home country, foreign banks should strongly consider obtaining advice from knowledgeable US counsel if they learn that their assets have been seized. If the bank ends up successfully obtaining the return of the seized funds, it may even be possible under US law to recover attorney's fees and costs.