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D.C. Circuit Expands U.S. Prosecutors' Reach Over Foreign Bank Documents

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In a recent decision, the U.S. Court of Appeals for the D.C. Circuit unanimously affirmed a district court order compelling three Chinese banks (not currently identified) to produce financial records in response to subpoenas issued by U.S. federal prosecutors, including records that were unrelated to the banks' U.S. operations or U.S. correspondent accounts.

According to the U.S. government, a front company controlled by the North Korean government had used the Chinese banks to facilitate transactions involving hundreds of millions of U.S. dollars through the Chinese banks' correspondent accounts at U.S. financial institutions. The government alleged that by doing so, North Korea circumvented U.S. economic sanctions intended to prevent North Korea from financing its nuclear weapons program.

The government issued grand jury subpoenas to the two Chinese banks with U.S. branches, and a Patriot Act subpoena (based on the Attorney General and the Treasury Department's special investigatory powers under the Bank Secrecy Act) to a third Chinese bank that had no U.S. branch. All three Chinese banks objected, claiming that U.S. courts had no personal jurisdiction over them and could not force them to comply with the subpoenas. They further claimed that forcing them to produce documents would violate Chinese criminal laws and undermine longstanding principles of international comity. Finally, the bank that received the Patriot Act subpoena argued that the subpoena exceeded the Attorney General’s authority.

The D.C. Circuit rejected each of these arguments and required the banks to produce foreign documents.

The decision is significant for several reasons:

- The Court held that where a foreign bank has a U.S. branch and executes an agreement with the Federal Reserve Bank to comply with American law, it consents

to federal court jurisdiction on matters arising under U.S. Banking Law. This means that any foreign bank with a U.S. branch may be compelled to comply with a grand jury subpoena issued to investigate a broad range of crimes, including money laundering, sanctions violations, or Bank Secrecy Act violations.

- The Court held that the Attorney General's power under the Bank Secrecy Act to compel a foreign bank to produce documents "related" to the foreign bank's correspondent account is not limited to records of transactions that actually passed through the correspondent account, and includes any foreign records that arguably have "a connection with" the U.S. correspondent account. This means that any foreign bank that maintains a U.S. correspondent account, even where the foreign bank has no other U.S. operations, could be compelled to produce purely foreign records.
- As a practical matter, the decision greatly expands the ability of the U.S. federal prosecutors to investigate financial crimes abroad and subpoena records from foreign banks. In the past, data privacy laws have made it difficult for U.S. federal prosecutors to pursue investigations against foreign banks without the banks' cooperation. But here, the Court rejected the Chinese banks' claim that producing foreign documents would violate Chinese laws, signaling that other U.S. courts may similarly find the U.S. government’s interest in investigating financial crimes to be more important than a foreign bank's obligation to comply with its own country's laws.
- The decision increases foreign banks’ criminal and regulatory exposure in the United States for financial crimes committed overseas. For example, in this case, if the U.S. government eventually finds evidence that the Chinese banks willfully facilitated the North Korean government in its effort to evade sanctions, the banks could face billions of dollars of forfeiture, fines, and other penalties in the United States.

Accordingly, foreign banks should make sure that they have effective safeguards, including anti-money laundering and sanctions controls, to ensure that all transactions conducted in U.S. dollars, or will be processed through a U.S. correspondent bank account, comply with U.S. laws.

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