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BANK RESPONSE TO DISCOVERY REQUESTS FOR PRIVILEGED MATERIALS

Banks often receive discovery requests or third-party subpoenas seeking production of information subject to privileges uniquely applicable in the banking industry and which the bank has no power to waive. The author discusses the scope, rationale, ownership, and response to abusive requests for the bank examination privilege, the SAR privilege, and the non-US bank secrecy privileges. He includes practice tips on spotting and dealing with abusive requests.

By Alex C. Lakatos *

Much ink has been spilled to address the persistent problem of discovery abuse and how best to prevent it. Discovery abuse includes misuse of the discovery process by making unnecessary overbroad requests for information, conducting discovery for an improper purpose, or engaging in gamesmanship to avoid honoring obligations. One example of discovery abuse that many scholars and commentators have discussed occurs when parties assert overbroad and unsubstantiated claims of privilege.¹ But a reciprocal and equally pernicious problem that has garnered less attention is overreaching attempts by litigants to obtain privileged material.

¹ See, e.g., Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a) – ‘Much Ado About Nothing?’*, 46 Hastings L.J. 679, 699 (1995) (“Among the more commonly mentioned activities used to resist legitimate discovery are . . . raising frivolous privilege claims.”).

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Unwarranted attempts to pierce privilege are particularly of concern for banks, because banks often possess information subject to one or more privileges specific to the banking industry, and as to which banks do not themselves have authority to waive the applicable privilege. For example, banks may have confidential supervisory information from their regulators — such as the Office of the Comptroller of the Currency (“OCC”), the Federal Reserve Board (“FRB”), or Federal Deposit Insurance Corporation (“FDIC”) — that is subject to the bank examination privilege that only the regulators may waive. Similarly, banks may have suspicious activity reports (“SARs”) and related documents that are subject to the SAR privilege that banks cannot waive, and indeed that banks are criminally prohibited from disclosing. In some instances, international banks may have customer data maintained in non-US jurisdictions, such as Switzerland or Hong Kong, that is subject to non-US bank secrecy laws that afford the banks’ customers, not the banks, ownership of the privilege. In

other words, banks — like lawyers, health care providers, and clergy — are stewards of data that they are obligated to keep privileged on behalf of others.

Litigants, through document requests and third-party subpoenas, may attempt to discover privileged information in a bank's possession, custody, or control, for myriad reasons. In some instances, litigants may be motivated by a bona fide desire to understand the facts underlying a dispute. But requests for materials subject to the bank examination privilege, the SAR privilege, and non-US bank secrecy laws, pose a high potential for abuse, and bank counsel and courts alike should review such requests with a skeptical eye.

First, litigants often will lack any compelling need for privileged material. Frequently, litigants can discover the information they need to support their claims or defenses without impinging on privilege. For example, the bank examination privilege does not protect underlying operative documents that show what occurred or did not occur at a bank. Rather, the bank examination privilege covers the banking regulator's analysis, the bank's related communications with its regulator, and may also extend to internal bank communications implementing the regulator's advice — none of which is typically a historical fact or necessary to assess historical facts. The same is true for SAR-privileged materials; that is, the privilege does not preclude discovery of underlying facts or transactions. And in the case of non-US bank secrecy, litigants may have available to them paths to obtain protected materials in a manner consistent with the laws of the country where the information is kept. For example, when materials are protected by Swiss bank secrecy, U.S. litigants who seek discovery from Swiss banks by means of the Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (the "Hague Evidence Convention") may, in appropriate cases, obtain discovery of documents by order of the Swiss courts.

Second, by seeking privileged materials, litigants may hope to gain unwarranted strategic advantages. For example, by making overreaching demands, litigants can impose an economic and managerial burden on their financial services entity adversaries. Similarly, demands for privileged materials may have an *in terrorem* effect on financial institutions wholly unrelated to the merits of a case. Privileged confidential supervisory materials, for

example, may discuss lapses in procedures that a regulator views as modest, but that if publicly aired could needlessly tarnish the institution's reputation and, more broadly, pointlessly shake public confidence in the banking system. Another improper motivation that drives some litigants is the hope to use privileged materials to conceal or distract from evidentiary deficiencies in their claims. For example, SARs (by definition) may be filed based on mere *suspicious* of unlawful conduct, and because "suspicion" is intrinsically a gray standard, banks may file SARs out of an abundance of caution when the existence of wrongdoing is uncertain. In practice, therefore, certain SARs may be akin to a police officer's "hunch." Yet, especially if taken out of context, SARs may lend themselves to being misconstrued as providing evidence of misconduct.

Another tactical advantage that litigants may hope to win is a court order that a bank cannot honor, such as a directive requiring that the bank produce materials from its home country that would cause it to violate its home country's bank secrecy laws. The bank's inability to produce such materials may coerce a settlement of a claim that is not meritorious, or may result in the imposition of sanctions against the bank:

Litigants increasingly use court orders to trap opponents between conflicting laws, thereby forcing an unwarranted settlement. For example, litigants will demand unneeded documents that cannot be produced without violating foreign law. This litigation strategy traps the other party between violating the laws of its home nation and a U.S. court order. In this way, crafty litigants can force the other side to settle in order to avoid violating the laws of one nation.²

At bottom, if litigants cannot clearly articulate why discoverable *non*-privileged documents are insufficient to allow them to understand the relevant facts, then their requests to go beyond such documents and obtain privileged materials are likely abusive. Similarly, if litigants fail to provide a compelling reason for eschewing available mechanisms, like the Hague Evidence Convention, to obtain non-US materials in a

² Geoffrey Sant, *Court Ordered Law Breaking*, 81 Brook L. Rev. 181, 183 (2015).

manner consistent non-US laws, their demands can fairly be characterized as abusive.

By understanding the privileges discussed above, and how litigants sometimes seek to abuse them, banks can better protect themselves. Accordingly, this article discusses the parameters of the bank examination privilege, the SAR privilege, and non-US bank secrecy privileges; explains how litigants abusively challenge them; and offers some thoughts on how banks may respond.

THE BANK EXAMINATION PRIVILEGE

Scope of the Privilege

The bank examination privilege covers “confidential supervisory information” of, among others, the OCC, the FRB, the FDIC, the Consumer Financial Protection Bureau (“CFPB”), and state banking regulators. “Confidential supervisory information” generally includes documents or information reflecting the opinions, deliberations, or recommendations of the bank supervisory agencies. For example, courts have protected bank examination reports, internal agency analysis, and supervisory letters.³ Also covered are related communications from the regulator to the bank and from the bank back to the regulator.⁴ And some courts have recognized the privilege as extending to internal bank documents implementing or discussing a regulator’s advice.⁵ On the other hand, purely factual

documents are not covered. Determining which documents are covered may be a fact-intensive inquiry. In many cases, opinions and deliberations that are subject to the privilege, versus pure facts that are not, may be inextricably intertwined or hard to distinguish.⁶ If the factual material cannot be segregated, the privilege should apply.⁷

The bank examination privilege is qualified and may be overridden when the party seeking disclosure demonstrates good cause, i.e., that the public interest in disclosure outweighs the agencies’ interest in confidentiality. In making this assessment, courts consider (1) the relevance of the evidence sought to be protected; (2) the availability of other evidence; (3) the seriousness of the litigation and the issues involved; (4) the role of the government in the litigation; and (5) the possibility of future timidity by government employees (i.e., chilling effect).⁸

Rationale for the Privilege

Much like the attorney-client privilege, the rationale for the bank examination privilege is to promote open and honest communications between banks and their regulators. Ensuring that regulators enjoy transparent communications with banks is essential to successful bank examination and supervision. That, in turn, is essential to ensuring the integrity of the financial system. As the United States Court of Appeals for the District of Columbia Circuit has explained:

Bank safety and soundness supervision is an iterative process of comment by the regulators and response by the bank. The success of the supervision therefore depends vitally upon the quality of communication between the

³ *In re Subpoena Served Upon Comptroller of Currency*, 967 F.2d 630, 633-34 (D.C. Cir. 1992) (holding that “bank examination reports and related communications” are covered by the bank examination privilege); *Shirk v. Fifth Third Bancorp*, No. 05-cv-00049, 2008 WL 2661955 at *2 (S.D. Ohio July 2, 2008) (holding that “plans and recommendations which [the bank] provided to its regulators” are privileged); *Raffa v. Wachovia Corp.*, No. 02-CV-01443, 2003 WL 21517778, at *5 (M.D. Fla. May 15, 2003) (OCC supervisory letter is privileged).

⁴ *Syron v. Fed. Hous. Fin. Agency*, No. 1:14-MC-359, 2014 WL 12623047, at *4 (D.D.C. Dec. 31, 2014) (“the protection extends both to bank examiner’s recommendations, opinions, and inquiries, and a bank’s response thereto.”).

⁵ See Eric B. Epstein, David A. Scheffel, and Nicholas A.J. Vlietstra, *Ten Key Points about the Bank Examination Privilege*, Business Law Today (Feb. 2017), http://www.americanbar.org/publications/blt/2017/02/08_epstein.html (“For example, the privilege can encompass . . . [i]nternal bank communications that are not shared with regulators, such as internal bank e-mails discussing communications with an examiner”); *In re Countrywide Fin. Corp. Sec. Litig.*, No. 07-CV-5295, 2009 WL 5125089, at *2 (C.D. Cal. Dec. 28, 2009) (noting factual

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question as to whether internal e-mails discussing the examination reports are privileged).

⁶ *Wultz v. Bank of China Ltd.*, 61 F. Supp. 3d 272, 288 (S.D.N.Y. 2013) (holding that “the factual portions of the OCC’s bank examination reports . . . by definition fall outside the scope of the bank examination privilege”).

⁷ *Fed. Hous. Fin. Agency v. HSBC N. Am. Holdings Inc.*, No. 11 Civ. 6189, 2014 WL 1909446, at *3 (S.D.N.Y. May 13, 2014) (holding that “[d]ocuments that contain factual material that cannot practically be segregated and released fall within the privilege’s ambit” (internal quotation and alteration omitted)).

⁸ *In re Subpoena Served Upon Comptroller of Currency*, 967 F.2d at 634.

regulated banking firm and the bank regulatory agency. . . . Because bank supervision is relatively informal and more or less continuous, so too must be the flow of communication between the bank and the regulatory agency. Bank management must be open and forthcoming in response to the inquiries of bank examiners, and the examiners must in turn be frank in expressing their concerns about the bank. These conditions simply could not be met as well if communications between the bank and its regulators were not privileged.⁹

“In addition to this rationale rooted in effective practical regulation, a less cited but undoubtedly important justification for the privilege is the financial system’s sensitivity to public questioning of bank soundness.”¹⁰ In other words, airing bank examiners’ concerns — demonstrating how the proverbial “sausage” of ensuring bank safety and soundness is made — may undermine public trust in financial institutions and have a destabilizing effect on the economy.

Ownership of the Privilege

The bank examination privilege belongs to the bank regulator. That is, the bank regulator has standing to assert or waive the privilege.¹¹ Indeed, documents themselves that are covered by the bank examination privilege typically are deemed to belong to the regulator, even when such documents are in the possession, custody, or control of a regulated bank. If a bank or branch that is regulated by the OCC, FDIC, or FRB is served with a subpoena or a request for production of documents seeking materials that are covered by the bank examination privilege, the bank must, under most applicable regulations, notify its regulator of the subpoena or request.¹² The bank should refrain from producing documents covered by the privilege until its

regulator has had an opportunity to assert objections based upon the privilege in the litigation from which the request arose. In fact, banks alerting their regulators to a request for bank examination materials should expect to receive a letter back from their regulator, advising the bank that the bank must not produce the materials at issue.

Moreover, OCC and FRB regulations also set forth procedures that those seeking bank-examination-privileged materials must follow. For example, under the OCC’s regulations, “[a] person seeking non-public OCC information must submit a request in writing to the OCC. The requester must explain, in as detailed a description as is necessary under the circumstances, the bases for the request and how the requested non-public OCC information relates to the issues in the lawsuit or matter.”¹³

Responding to Abusive Requests

Some litigants, perhaps due to failure to adequately understand the law (or in some instances, in an attempt to run roughshod over it), seek documents that are clearly within the ambit of the bank examination privilege without first involving the regulator.

- ***Practice Tip.*** Such cases actually afford banks a valuable opening to take the lead in educating their regulator about the case, describing the request for bank-examination-privileged materials, and providing input on how the regulator may wish to respond to the request. A bank may wish to communicate with its regulator both by letter and telephonically to discuss the case and documents sought.

Courts differ in how they remedy attempts to do an end run around the regulators in pursuit of bank-examination-privileged materials. A court’s response will often be driven by the regulator’s own request to the court. Courts have permitted regulators to intervene in the litigation to assert their objections.¹⁴ In other cases,

⁹ *In re Subpoena Served Upon the Comptroller of the Currency*, 967 F.2d at 633, 634; *Wultz*, 61 F. Supp. 3d at 282-82 (“[The privilege] arises out of the practical need for openness and honesty between bank examiners and the banks they regulate, and is intended to protect the integrity of the regulatory process by privileging such communications.” (internal quotation omitted)).

¹⁰ *Fed. Hous. Fin. Agency v. JPMorgan Chase & Co.*, 978 F. Supp. 2d 267, 273 (S.D.N.Y. 2013).

¹¹ *In re Bankers Trust Co.*, 61 F.3d 465, 471-72(6th Cir. 1995).

¹² 12 C.F.R. § 4.37(b)(3) (OCC regulation); 12 C.F.R. § 261.23 (FRB regulation); 12 C.F.R. 309.7(b) (FDIC regulation).

¹³ 12 CFR § 4.33(a); *see also* 12 C.F.R. § 261.22(b) (FRB regulation).

¹⁴ *See, e.g., Bankers Trust*, 61 F.3d at 472 (holding that “the district court on remand must provide the Federal Reserve with notice and allow the Federal Reserve the opportunity to intervene. The bank examination privilege belongs to the Federal Reserve, and therefore, where a claim of the privilege is appropriate, the Federal Reserve must be allowed the opportunity to assert the privilege and the opportunity to defend its assertion”); *Local 295/Local 851 IBT Employer Grp.*

courts will direct litigants seeking bank secrecy materials to apply directly to the regulator, in accordance with its regulations, for the privileged materials.¹⁵ In some instances, bank regulators may choose to waive the privilege and allow production of the documents.

Another type of abusive conduct in which some litigants engage is attempting to override the bank examination privilege on a blanket or global basis. Litigants seeking bank-examination-privileged materials may seek production of hundreds, or even thousands, of privileged documents on an omnibus one-size-fits-all motion.¹⁶ Banks can push back against these tactics. Courts should require that privileged materials be examined on an individualized basis, often *in camera*.¹⁷ *In camera* review is a labor-intensive process for the court, a reality to which banks should be sensitive, even if their opponents are not.

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Pension Trust v. Fifth Third Bancorp, No. 1:08cv00421, 2012 WL 346658 (S.D. Ohio Feb. 2, 2012) (affording FRB the right to intervene, holding that given “[b]oth the substance and purpose of the bank examination privilege, as well as the Federal Reserve’s goal of stabilizing and building the national economy, the Federal Reserve has established its substantial legal interest determining whether the bank examination privilege applies before any of the requested documents are produced.”) (internal citation omitted).

¹⁵ See, e.g., *Lutzeier v. Citigroup, Inc.*, Case No. 4:14CV183, 2015 WL 7306443 (E.D. Mo. Nov. 12, 2015) (holding that “Plaintiff’s Motion to Compel Documents Withheld Under Bank Examiner’s Privilege . . . is [denied] without prejudice. Plaintiff shall request the information through the administrative procedures set forth in the regulations within 20 days of the date of this order.”).

¹⁶ *Campidoglio LLC v. Wells Fargo Bank, N.A.*, No. C12–949, 2014 WL 4748246, at *4 n.13 (W.D. Wa. Sept 24, 2014) (explaining that OCC “denied plaintiffs’ request that OCC waive its bank examination privilege as to over 900 documents, [and] indicated that OCC ‘has authorized the release of the documents and information that are most relevant to this case’”).

¹⁷ *In re Subpoena Served Upon Comptroller of Currency*, 967 F.2d at 634 (challenges to bank examination privilege “frequently require [the court] to examine the disputed documents *in camera*”); cf. *Fed. Deposit Ins. Corp. v. Appleton*, No. CV 11-476-JAK (PLAX), 2012 WL 12887400, at *5 (C.D. Cal. Aug. 27, 2012) (“Whether the deliberative process privilege applies is an individualized inquiry.”) (quoting *Anderson v. Marion County Sheriff’s Dept.*, 220 F.R.D. 555, 6=562 (S.D. Ind. 2004).

- **Practice Tip.** Banks thus are well served to position the dispute to demonstrate that the litigants who are seeking privileged materials are overreaching. That may mean coordinating closely with regulators to help ensure that purely factual documents (or documents that reasonably can be redacted to include only facts) are produced.

Finally, banks should be wary of requests that seek privileged documents that are not relevant or that are unnecessary in light of the documents already produced. In some cases, litigants have sought bank examination materials not even related to their claims.¹⁸ In others, litigants have sought to override the bank examination privilege despite having a wealth of other materials from which they can adequately assess the relevant facts.¹⁹

- **Practice Tip.** Banks, as parties to the litigation, may be better positioned than their regulators to evaluate these tactics, and to inform their regulators accordingly.

THE SAR PRIVILEGE

Scope of the Privilege

The Bank Secrecy Act expressly prohibits a financial institution from disclosing to persons involved in the reported transaction either the contents of a SAR or even its existence. The SAR Confidentiality Provision, 31 U.S.C. Section 5318(g), provides in relevant part:

2) Notification prohibited. —

(A) In general. — If a financial institution or any director, officer, employee, or agent of any financial institution, voluntarily or

¹⁸ *FDIC, as Receiver for Peninsula Bank v. Simon Portnoy*, Case No. 8:13-cv-1124-T-27, 2015 WL 12838859, at *1 (M.D. Fla. June 19, 2015) (denying motion to compel documents protected by bank examination privilege where “discovery from the FDIC concerning its awareness and evaluation of the bank’s practices, policies and procedures, and assessments of its officers is not relevant to the specific loan transactions at issue in this litigation”).

Fed. Housing Finance Agency v. HSBC N. America Holdings, Inc., 2014 WL 1909446, at *4 (S.D.N.Y. May 13, 2014) (declining to override bank examination privilege where, among other things, “[t]he documents subject to the privileges have marginal relevance to the litigation and the defendants have already obtained voluminous discovery from the GSEs. FHFA has produced over 1.5 million documents and GSE employees have been deposed for days.”).

pursuant to this section or any other authority, reports a suspicious transaction to a government agency —

(i) neither the financial institution, director, officer, employee, or agent of such institution (whether or not any such person is still employed by the institution), nor any other current or former director, officer, or employee of, or contractor for, the financial institution or other reporting person, may notify any person involved in the transaction that the transaction has been reported.²⁰

Regulations promulgated by bank regulators implement and clarify this requirement. Such regulations reiterate that SARs are confidential and set forth, for example, that “any national bank or person subpoenaed or otherwise requested to disclose a [SAR] or the information contained in a [SAR] shall decline to produce the [SAR] or to provide any information that would disclose that a [SAR] has been prepared or filed.”²¹

Relying on the Bank Secrecy Act, the foregoing regulations, and myriad policy considerations, courts have held that SARs, and documents revealing the existence of a SAR, are privileged, that the privilege is not qualified, and that financial institutions cannot waive the privilege.²²

Some courts have extended the SAR privilege even more broadly, to cover “a SAR itself; communications pertaining to a SAR or its contents; communications preceding the filing of a SAR and preparatory or preliminary to it; communications that follow the filing of a SAR and are explanations or follow-up discussions; or oral communications, or suspected or possible violations that did not culminate in the filing of a SAR.”²³ The Department of Treasury’s Financial

Crimes Enforcement Network (“FinCEN”) suggests that the SAR privilege should be applied “in appropriate circumstances to material prepared by the financial institution as part of its process to detect and report suspicious activity, regardless of whether a SAR ultimately was filed or not.”²⁴ The OCC agrees.²⁵

Similarly, another court relied on the SAR privilege to deny movant “disclosure of what kinds of transactions trigger internal ‘red flag’ alerts” and “the names of bank personnel involved in internal investigations.”²⁶ In appropriate circumstances, communications between financial institutions also may be protected: “As for the last category of documents — communications between another financial institution and the bank — the Court finds that these communications are covered by the SAR privilege as the comments on those documents, the regulatory authority cited in the communications, and the evaluative content, as a whole, reflect material that could be considered as a report of an evaluative nature intended to comply with federal reporting requirements.”²⁷ Courts have differed on whether general SAR-related documents, such as policies and procedures for filing a SAR, are protected.²⁸

Rationale for the Privilege

Congress explained that in enacting the SAR Confidentiality Provision, it intended “to advance a number of policy objectives,” including

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with the disputed business transactions and which were not prepared for the purpose of investigating or drafting a possible SAR.”).

²⁴ Confidentiality of Suspicious Activity Reports, 75 Fed. Reg. 75593, 75595 (Dec. 3, 2010).

²⁵ Confidentiality of Suspicious Activity Reports, 75 Fed. Reg. 75576, 75579 (Dec. 3, 2010).

²⁶ *Norton v. U.S. Bank Nat. Ass’n*, 324 P.3d 693, 699 (Wash. Ct. App. 2014).

²⁷ *Wiand v. Wells Fargo Bank, N.A.*, 981 F. Supp. 2d 1214, 1218 (M.D. Fla. 2013).

²⁸ *Compare Freedman & Gersten, LLP v. Bank of Am., N.A.*, No. 2:09-cv-05351, 2010 WL 5139874, at *4 (D.N.J. Dec. 8, 2010) (*holding* that the defendant bank need not produce its policies and procedures for filing a SAR because such production would allow the Plaintiff to infer whether a SAR was filed) *with Wultz*, 61 F. Supp. 3d at 295-96 (*holding* that “general information related to [the defendant bank’s] SAR filing practices” was not covered by the SAR privilege).

²⁰ 31 U.S.C. § 5318(g)(2)(A).

²¹ 12 C.F.R. § 353.3(g) (FDIC); *see also* 12 C.F.R. § 21.11(k) (OCC); 12 C.F.R. § 208.62(j) (FRB).

²² *Whitney Nat’l Bank v. Karam*, 306 F. Supp. 2d 678, 682 (S.D. Tex. 2004); *Cotton v. PrivateBank & Trust Co.*, 235 F. Supp. 2d 809, 814 (N.D. Ill. 2002); *Weil v. Long Island Sav. Bank*, 195 F. Supp. 2d 383, 389 (E.D.N.Y. 2001) (“[T]he plain language of the regulation requires this court to deny the production of the SAR itself.”).

²³ *Whitney Nat’l Bank*, 306 F. Supp. 2d at 682-83; *see also Cotton*, 235 F. Supp. 2d at 816 (“CIBC shall produce any handwritten notes which were prepared contemporaneously

facilitating the law enforcement community's access to accurate and complete information regarding possible money laundering, and encouraging safe and sound practices at Federally insured depository institutions, while at the same time protecting the free flow of legitimate commerce and the privacy interests of bank customers.²⁹

Relying in large part on the legislative history of the SAR Confidentiality Provision, courts and regulators have identified three primary rationales underlying the SAR privilege.³⁰ First, the privilege is motivated by a desire to avoid tipping off the specific wrongdoers who are the subject of the SAR or otherwise interfering with an ongoing law enforcement investigation. Second, the privilege is underpinned by a more general objective of not affording wrongdoers a window into the methods that financial institutions use to flag money laundering and other criminal behavior. As one court summarized, “[p]ermitting the release of any SAR through civil discovery could harm the law enforcement interests the [Bank Secrecy] Act was intended to promote. Release of a SAR could compromise an ongoing law enforcement investigation, tip off a criminal wishing to evade detection, or reveal the methods by which banks are able to detect suspicious activity.”³¹ Third, the privilege promotes frank and honest SAR reporting — “[a bank] may be reluctant to prepare a SAR if it believes that its cooperation may cause its customers to retaliate”³² — which in turn assists regulators to do their jobs.

Ownership of the Privilege

The bank regulator is the owner of the privilege. Nevertheless, a bank has standing to assert the privilege and must do so.³³ Indeed, even if a bank wishes to waive SAR privilege and offer a SAR in its own

defense, it will not be permitted to do so.³⁴ In the event that a bank receives a request for SAR-privileged materials, it must notify both its own regulator and FinCEN.

Responding to Abusive Requests

Litigants will often make allegations in their complaints, or assertions in their briefs, concerning whether or not a financial institution has filed a SAR, and if so, what, in their view, that fact may suggest, e.g., that the bank did in fact file a SAR and therefore knew of wrongdoing, or that the bank in fact failed to file a SAR and therefore was negligent or willfully ignorant of ongoing wrongdoing. Because the financial institution is bound by the SAR privilege, it cannot respond directly.

- **Practice Tip.** Under many state laws “[t]he claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom. . . . In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.”³⁵ This rule is particularly important in the SAR privilege context, where the bank does not even control the decision whether to assert the privilege. If opposing litigants are particularly aggressive in pursuing this type of abuse, banks may wish to move to strike the improper allegations or *in limine* to exclude the improper and insidious attempts to encourage adverse inferences.³⁶

Second, some litigants may try to evade the privilege by relying on arguments that may make sense in the context of other privileges, but that given the sensitivity of SAR materials, the government interest in protecting them, and the statutory language in the SAR

²⁹ H.R. REP. NO. 105-611, pt. 1, at 10 (1998).

³⁰ See 75 Fed. Reg. at 75578 (“The confidentiality of SARs must be maintained for a number of compelling reasons.”).

³¹ *Cotton*, 235 F. Supp. 2d at 815.

³² *Id.*

³³ *Union Bank of California, N.A. v. Superior Court*, 130 Cal. App. 4th 378, 399, 29 Cal. Rptr. 3d 894, 908–09 (2005) (holding that “the fact Union Bank is compelled by federal law to resist disclosure of documents covered by the SAR privilege gives it a sufficient beneficial interest in the subject matter of this action to enforce the privilege in a writ proceeding”).

³⁴ *Gregory v. Bank One Corp.*, 200 F. Supp. 2d 1000, 1003-1004 (S.D. Ind. 2002); see also *Lee v. Bankers Trust Co.*, 166 F.3d 540, 544 (2d Cir. 1999) (“even in a suit for damages based on disclosures allegedly made in a SAR, a financial institution cannot reveal what disclosures it made in a SAR, or even whether it filed a SAR at all”).

³⁵ N.H. R. Evid. 512; see also e.g., Idaho R. Evid. 512 (same); Or. R. Evid. 513 (same); La. Code Evid. Ann. art. 503 (same).

³⁶ *Anderson v. U.S. Bank Nat'l Ass'n*, No. A13-0677, 2014 WL 502955, at *10 (Minn. Ct. App. Feb. 10, 2014) (“[W]e affirm the district court’s grant of respondent’s motion to strike all references in appellants’ complaint to the filing or non-filing of one or more SAR.”).

Confidentiality Provision, should not be applicable in the SAR context. For example, litigants may try to get at SAR materials by urging production of redacted SARs and SAR preparation materials.

- **Practice Tip.** The bank need not, and ought not, agree to redaction of SAR materials in most circumstances. “[R]edaction will not be adequate to protect the confidentiality of a SAR investigation or the fact of a SAR’s preparation. Redaction of a document does not change its character.”³⁷

Litigants have also argued that the SAR privilege should be waived, e.g., if the government does not timely assert its objections, or if a bank regulator shares SAR materials with other agencies.³⁸ Courts should reject these arguments.³⁹ “[N]o federal provision ‘allow[s] a court order exception to the unqualified [SAR] privilege.’”⁴⁰

Third, some litigants have brought *Chevron* challenges against the SAR Confidentiality Provision.⁴¹ Such challenges, although unfounded, were not abusive when raised for the first, second, or third times. But now that courts have repeatedly addressed the question by rejecting these challenges,⁴² and now that Congress has amended the Bank Secrecy Act without altering the bank

regulators’ interpretation of the SAR privilege it creates,⁴³ repeated challenges do little more than needlessly multiply litigation. The gravamen of these challenges is that the SAR Confidentiality Provision specifically precludes notifying the *subject* of a SAR that a SAR has been filed, whereas regulations implementing the SAR Confidentiality Provision prohibit sharing SAR materials with *anyone*, and therefore, go too far. The simple and pragmatic answer is that this is how secrets are kept. For example, to keep national security secrets from that subset of persons who wish to harm the nation, the whole of the public is denied access.⁴⁴

In the context of a *Chevron* challenge, the answer is similar. Under the Supreme Court’s decision in *Chevron*, courts afford agencies broad discretion to interpret statutes within their area of regulatory expertise, provided that Congress has left ambiguities or gaps for the agencies to clarify or fill. For challengers to argue that the SAR Confidentiality Provision leaves no ambiguities or gaps, they must stake out the position that what Congress meant when it prohibited tipping SAR subjects was: “please ensure that the entire world has open and transparent access to SAR materials, with the exception of SAR subjects, who are the *only* parties that regulators may prohibit from seeing such materials.” By contrast, defenders have an easier and more plausible position, that Congress meant “all we want is to ensure that SAR subjects are not tipped off, and regulators can achieve that objective however they would like, which might include keeping others from seeing SARs — a point we do not care about and are not addressing.” Unfortunately for challengers, their position does not make sense, because it would utterly fail to prevent SAR subjects from learning about the SARs against them.

³⁷ *Regions Bank v. Allen*, 33 So. 3d 72, 77 (Fla. Dist. Ct. App. 2010).

³⁸ See, e.g., *Weil v. Long Island Sav. Bank*, 195 F. Supp. 2d 383, 389 (E.D.N.Y. 2001) (“The plaintiffs argue that even if some privilege attaches to the SAR, such privilege is qualified and has been waived.”); *Hasie v. Office of Comptroller of Currency of U.S.*, 633 F.3d 361, 366 (5th Cir. 2011) (“The gravamen of Hasie’s argument is that the USAO’s production of SARs to him and the other defendants in his criminal prosecution waived their classification as non-public information.”).

³⁹ *Weill*, 195 F. Supp. 2d at 389 (“The plaintiffs argue that even if some privilege attaches to the SAR, such privilege is qualified and has been waived. . . . [T]he court does not agree.”).

⁴⁰ *Anderson*, 2014 WL 502955, at *10.

⁴¹ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

⁴² See, e.g., *Cotton*, 235 F. Supp. 2d at 814 (citing *Chevron* and explaining that “12 C.F.R. § 21.11(k) [i.e., the OCC regulation that Receiver challenges here] has been held to be valid and consistent with [the SAR statute], U.S.C. § 5318(g)(2)”; *Weil*, 195 F. Supp. 2d at 388 (holding that “the confidentiality regulation [in 31 C.F.R. § 21.11(k), which Receiver challenges in his motion] did not exceed, nor was it inconsistent with, [the SAR statute] 31 U.S.C. § 5318(g)(2).”)).

⁴³ After several banking agencies promulgated their SAR non-disclosure regulations, Congress, in 2001, amended the SAR non-disclosure statute to clarify that no government officer or employee who knows a SAR was filed may disclose the same, “other than as necessary to fulfill the official duties of such officer or employee.” 31 U.S.C. § 5318(g)(2)(A)(ii). But Congress did not make any changes to the SAR confidentiality statute that would contradict or limit the banking agencies’ earlier regulations limiting SAR disclosure. As the Supreme Court explained in *Barnhart v. Walton*, 535 U.S. 212, 220 (2002), where Congress amends the law but, in so doing, does not make changes to alter the agency’s interpretation of the law, that “provide[s] further evidence — if more is needed — that Congress intended the Agency’s interpretation, or at least understood the interpretation as statutorily permissible.”

⁴⁴ This is less draconian than the alternative approach implied by Benjamin Franklin’s observation that “three people can keep a secret, if two of them are dead.”

Moreover, the challenger position does outright violence to Congress's other stated goals, such as encouraging open communications between banks and their regulators.

NON-US BANK SECRECY PRIVILEGES

Scope of the Privilege

The scope of the non-US bank secrecy privileges in US litigation depends on both the provisions of the applicable non-US law and the extent to which US courts will honor the non-US law.

First, with regard to the scope of the privilege under non-US law, the strength and contours of bank secrecy privilege can vary from nation to nation. Features of the financial privacy privilege in Switzerland, which remains one of the strongest and most well-known, include: (1) Swiss financial privacy law prohibits Swiss banks from revealing any information about the bank's customers, or customers' accounts, or transactions related thereto; (2) bank officers and employees who violate Swiss financial privacy laws are subject to criminal prosecution under Article 47 of the Swiss Banking Act that provides for imprisonment of up to three years or for monetary fines; (3) banks that violate Swiss financial privacy laws are exposed to serious administrative sanctions by the Swiss bank supervisor, the Swiss Financial Market Supervisory Authority; (4) as a practical matter, Swiss authorities routinely prosecute such violations when they occur; (5) respect for Swiss bank privacy is a fundamental Swiss national interest; (6) the privilege is controlled by the bank's customer, and can be waived by the customer, but not the bank; and (7) the Hague Evidence Convention provides a procedure through which litigants may, in certain circumstances, obtain information that is maintained in Switzerland and that otherwise would be protected by Swiss financial privacy.⁴⁵ By contrast, some courts have held — whether or not correctly, this article expresses no opinion — that certain countries enforce their bank secrecy laws laxly,⁴⁶ do not treat bank

secrecy as an important public policy,⁴⁷ provide for only civil enforcement,⁴⁸ or apply numerous exceptions to bank secrecy that swallow much of the rule.⁴⁹

Second, whether a US court will respect the privilege of a non-US nation is a determination that a US court makes based upon consideration of comity. Comity is “the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to the international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.”⁵⁰ In determining whether to defer to non-US privilege law as a matter of comity, US courts consider factors including: (1) the interests of the two nations; (2) the hardship that inconsistent application of the two nations' laws would impose upon the party from which discovery is sought; (3) the importance to the litigation of the documents requested; (4) the good faith of the party from which discovery is sought; (5) the availability of alternative means of securing the information; (6) the degree of specificity of the request; (7) whether the information originated in the United States; and (8) the extent to which enforcement can be reasonably expected.⁵¹ As a general matter, the

footnote continued from previous column...

demonstrate that . . . the French government would likely seek to prosecute or otherwise sanction [it] for complying with a United States court order compelling disclosure of documents [in violation of French bank secrecy laws].”)

⁴⁷ *First Nat'l City Bank*, 396 F.2d at 903 (noting that “[German] legislature did not value the public interest in bank secrecy as highly as it did the duty of secrecy of doctors and attorneys.”).

⁴⁸ *Id.* (holding that “it is surely of considerable significance that Germany . . . is content to leave the matter of enforcement to the vagaries of private litigation”); *Garpeg, Ltd. v. United States*, 583 F. Supp. 789, 796 (S.D.N.Y. 1984) (same).

⁴⁹ *United States v. Chase Manhattan Bank, N.A.*, 584 F. Supp. 1080, 1086 (S.D.N.Y. 1984) (noting that if Chase were required to violate Hong Kong bank secrecy “the potential for real harm is much less than it might first appear because Chase could raise as a defense . . . the order of the [US] court”).

⁵⁰ *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

⁵¹ *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 544 (1987) (factors 1, 2, 4, 5, 7); Restatement (Third) of Foreign Relations Law, § 442(1)(c) (1987) (factors 1, 3, 4, 7); Restatement (Second) of Foreign Relations Law § 40 (1965) (factors 2, 3, 5, 6); *Trade Dev. Bank v. Cont'l Ins. Co.*, 469 F.2d 35, 41 (2d Cir. 1972) (factors 2, 4, 7, 8).

⁴⁵ Declaration of Professor Dr. Isabelle Romy on Swiss Law at 2-3, *Goldberg v. UBS AG*, No. 1:08-civ-00375 (E.D.N.Y. Apr. 16, 2010), ECF No. 115.

⁴⁶ E.g., *United States v. First Nat'l City Bank*, 396 F.2d 897, 905 (2d Cir. 1968) (examining likelihood that the German bank would suffer significant civil penalties for a bank secrecy violation and concluding that the chance was “slight and speculative” and that the bank had “a number of valid defenses”); *Strauss v. Credit Lyonnais, S.A.*, 249 F.R.D. 429, 455 (E.D.N.Y. 2008) (holding that “the bank has failed to

stronger a non-US nation's bank secrecy law is (e.g., the fewer exceptions, the more aggressively violations are prosecuted, the more serious the sanctions imposed on violators), the more likely courts are to respect the law as a matter of comity. Switzerland, therefore, appears to be the country whose bank secrecy laws most frequently are afforded deference,⁵² and courts have respected the bank secrecy laws of other nations as well.⁵³

Rationale for the Privilege

There are various rationales given for the imposition of bank secrecy by various nations. These include protecting individual privacy, avoiding the flight of capital from developing nations where public disclosure of wealth can facilitate crime (e.g., extortion, kidnapping, and theft), attracting business, and maintaining public trust in the banking system.⁵⁴

⁵² See, e.g., *Motorola Credit Corp. v. Uzan*, No. 02 Civ. 666, 2003 WL 203011, at *7 (S.D.N.Y. Jan. 29, 2003) (ordering plaintiffs to seek the documents through the Hague Convention because "an order compelling UBS to produce documents from Switzerland would raise serious questions of international comity [and] UBS and its Swiss employees might face criminal sanctions if they were to respond to the plaintiffs' subpoena without the authorization of a Swiss court"); *Minpeco v. Conticommodity Services, Inc.*, 116 F.R.D. 517, 529-30 (S.D.N.Y. 1987) (denying motion to compel document production that would violate Swiss financial privacy laws and subject defendant bank to criminal penalties); *Luzzi v. ATP Tour, Inc.*, No. 3:09-cv-1155, 2010 WL 746493, at *1 (M.D. Fla. Mar. 2, 2010) (ordering discovery under the Hague Convention); *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 348, 362 (S.D.N.Y. 2002) ("The international implications of this litigation are unavoidable and, therefore, the Hague Convention . . . is an adequate means to compel documents and witness testimony from abroad.").

⁵³ See, e.g., *Linde v. Arab Bank, PLC*, 262 F.R.D. 136, 151 (E.D.N.Y. 2009) (denying motion to compel production of confidential Israeli bank documents in ATA case, holding that compliance "would undermine important Israeli interests" including "maintaining public trust in the security and confidentiality of the banking system").

⁵⁴ See, e.g., C. Todd Jones, *Compulsion Over Comity: The United States' Assault on Foreign Bank Secrecy*, 12 NW. J. Int'l L. & Bus. 454, 455 (1992) ("Many small nations, given . . . currency flight and their own lack of hard currency, catered to such customers with favorable bank secrecy laws"); Jennifer A. Mencken, Note, *Supervising Secrecy: Preventing Abuses Within Bank Secrecy and Financial Privacy Systems*, 21 B.C. Int'l & Comp. L. Rev. 461, 467-71 (1998) (describing history and evolution of bank secrecy laws).

As to why (and when) US courts should rely upon comity as a ground to defer to non-US bank secrecy privileges, the Supreme Court admonished the judiciary to be particularly wary of discovery abuse, and to wield comity as a cudgel to curb such abuses:

American courts, in supervising pretrial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position. Judicial supervision of discovery should always seek to minimize its costs and inconvenience, and to prevent improper uses of discovery requests. When it is necessary to seek evidence abroad, however, the district court must supervise pretrial proceedings particularly closely to prevent discovery abuses.⁵⁵

Ownership of the Privilege

As a general matter, the bank secrecy privileges of non-US nations belong to the banks' customers, and not to the banks. Bank customers may waive the privilege. Typically, banks may not waive the privilege, subject to certain exceptions in some countries (e.g., a dispute between the customer and the bank). Although the non-US government does not own the privilege, the non-US government's participation in a litigation concerning whether its privilege laws will be enforced can be critical, as discussed further below.

Responding to Abusive Requests

Responding to abusive requests for documents protected by non-US secrecy laws is becoming increasingly challenging, as US courts are increasingly comfortable with ordering litigants to produce documents notwithstanding that their home-country laws prohibit it:

[U]ntil fairly recently, it was virtually unheard of for a U.S. court to order the violation of foreign laws. . . . Over the past decade, however, the phenomenon of court-ordered law breaking has increased at an exponential rate. Sixty percent of all instances of courts ordering the violation of foreign laws have occurred in the last five years.⁵⁶

⁵⁵ *Aérospatiale*, 482 U.S. at 546.

⁵⁶ *Court Ordered Law Breaking*, *supra* note 2, at 181.

This US-centric attitude is unfortunate: it is inconsistent with maintaining harmony with US friends and allies, and imperils US businesses that depend on reciprocal recognitions of comity from courts in non-US nations where they conduct business. The fact that US courts are more likely to afford judicial deference to the laws of Western nations further opens the courts to criticism that they are motivated, perhaps unknowingly, by pro-forum bias.⁵⁷ This trend makes it all the more important for banks subject to overreaching discovery requests for material protected by non-US bank secrecy to develop an early, proactive strategy.

- **Practice Tip.** Banks should look for ways to provide plaintiffs with bank secrecy materials in a manner consistent with non-US laws. This may include the bank proactively asking its customers for bank secrecy waivers, and doing so in a manner that leverages the bank's good will with its customers to help acquire such waivers. This may also include identifying materials that are not subject to applicable bank secrecy laws (perhaps wire transfers that cleared through the United States) and producing those materials. In some nations, it may be possible to obtain permission from governmental authorities to produce otherwise privileged materials.

There are several advantages to making efforts like those described above. To begin, if the bank can find a workaround on its own initiative, then the dispute may be mooted entirely. Further, as noted above, the bank's good faith is a factor the US court will consider as part of its comity analysis. Making (and documenting) efforts to produce documents notwithstanding non-US bank secrecy, and doing so at the outset, helps to show good faith.⁵⁸

A similar approach, but one that requires more cooperation from the bank's adversaries, is for the bank

to offer to help the requesting party to make a Hague Evidence Convention request for the overseas documents protected by non-US bank secrecy (at least if the country imposing the bank's secrecy privilege is a signatory to the Hague Evidence Convention and may lift the privilege in response to a Hague Evidence Convention request).

- **Practice Tip.** An offer to assist an adversary to proceed through the Hague Evidence Convention should be as meaningful as practicable, and might include, for example, legal assistance, translation assistance, and bank support for the Hague Evidence Convention process by appropriate interventions with the relevant authorities in the bank's home country.

In addition to the advantages discussed above (showing good faith, providing a means to avoid dispute), the response of the opposing party to such offers of help with a Hague Evidence Convention request may unmask the opposing party's true motives. Those more interested in obtaining a court order that the bank cannot honor and less interested in actually obtaining documents relevant to their case, can be expected to spurn such offers.

- **Practice Tip.** It is important that the bank solicit the views, and enlist the assistance, of its home country (or another country, if applicable) authorities promptly upon receiving a request for materials covered by bank secrecy.

If the bank's home country does not inform the US court of its views, the US court may well assume that the bank's home country has no interest to be weighed in the comity analysis.⁵⁹ Conversely, the bank's home country can play a critical role in the bank obtaining a favorable decision — if the home country contacts the court directly, expresses that it understands that discretion lies with the US court in conducting the comity analysis, and urges the US court to defer to its bank secrecy laws

⁵⁷ *Id.* at 183 (“Not only does there seem to be pro-forum bias in favor of U.S. discovery, but an analysis of all results in the United States suggests that courts might have an additional, deeper bias against non-Western nations. U.S. courts were over 50% more likely to find that any given factor weighed in favor of the laws of a Western nation as compared to a non-Western nation.”).

⁵⁸ *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 208 (1958) (defendant “in good faith made diligent efforts” to provide requested discovery by seeking bank secrecy waivers from trading customers); *Minpeco*, 116 F.R.D. at 528 (defendant acted in “good faith” by trying to secure waivers).

⁵⁹ *Weiss v. Nat'l Westminster Bank, PLC*, 242 F.R.D. 33, 51 (E.D.N.Y. 2007) (holding that because, *inter alia*, the British did not appear to assert an interest in protecting documents pursuant to British bank secrecy “the court need not consider those interests here”); *First Nat'l City Bank*, 396 F.2d at 904 (ordering production of bank records despite the application of German bank secrecy laws in part because the German government did not object); *see also Strauss*, 249 F.R.D. at 449 (denying motion for protective order in part because, *inter alia*, “the French Ministry Letter . . . [did] not mention France's interest in its bank secrecy laws”).

because those laws are a key policy, and violations are taken very seriously.⁶⁰

CONCLUSION

Absent judicial intervention, litigants will continue to make improper requests to obtain privileged materials in

the possession of banks. Accordingly, banks should not only be prepared to resist overreaching requests, but moreover, should look for opportunities to educate the courts about the prevalence and nature of this particular species of discovery abuse. Judicial recognition of the problem is likely the first step on the path toward a meaningful solution. ■

⁶⁰ *Minpeco*, 116 F.R.D. at 523 ([A]lthough “the Court of Appeals has twice indicated that a foreign government’s failure to express a view in such a context militates against finding that strong national interests of the foreign country are at stake,” the court denied plaintiffs’ motion to compel where “the Swiss government has submitted to the court two official statements in this case which express its general position as to the importance of Swiss banking secrecy laws to the interests of Switzerland.”).