

## Will Wall Street Executives Seek the Protection of the Fifth Amendment?

**AFTER THE WORST FINANCIAL COLLAPSE** since the Great Depression, the finger-pointing has escalated in earnest. Major financial institutions that participated in the subprime market or failed to accurately price or rate the risks involved with mortgage-backed securities are now scrambling to protect themselves from the outrage observed in the recent congressional hearings and evidenced by many civil lawsuits. So far, Wall Street executives have not asserted the Fifth Amendment, but as multiple civil and possible criminal proceedings loom, will they?

The Fifth Amendment privilege may be raised in any proceeding by a witness who reasonably fears an answer may incriminate him or her. While a corporation cannot claim the privilege, its officers, directors, and employees can. In addition, a witness may invoke the Fifth Amendment protection if disclosure would serve as a link in the chain of evidence tending to establish criminal liability. Although documentary evidence is generally not protected, exceptions may apply if the production itself is testimonial and incriminating.

The recently televised congressional hearings involving Goldman Sachs allowed us to observe how Wall Street executives handled the hot seat. I can only imagine the hours they spent with legal counsel preparing to testify. They did not assert the Fifth Amendment, which is one means of giving the appearance of cooperation and transparency. Perhaps some of the public were even persuaded. After the testimony of Lloyd Blankfein, chief executive of Goldman Sachs, the firm's shares rose while the broader market fell.

As a lawyer, I found many of their answers to be calculated, evasive, and deceptive. They took advantage of the less rigorous demands of a congressional hearing, particularly given that most, if not all, of the senators are less sophisticated than the executives when it comes to complicated financial transactions. But even easy questions were side-stepped. For example, Senator Susan Collins asked multiple Goldman Sachs witnesses if they had a duty to act in the best interests of their clients, not their firm. The query elicited some impressive verbal contortions: "I believe we have a duty to serve our clients well," one witness replied. Each refused to say yes. Goldman Sachs executives were paid millions while leading the country into the meltdown. It calls to mind the term "bankster," a term coined in 1929 in connection with the stock market crash of that year. It combines "banker" and "gangster" to label bankers as criminally irresponsible.

While we can hope congressional hearings will lead to legislative reform, the more likely means of shining some light on the financial practices of the big banks may be multiple civil lawsuits, including the civil fraud charges recently filed by the SEC against Goldman Sachs. In that case, the SEC alleges that Goldman did not tell investors that a security the bank was selling had been designed by someone betting against it. Perhaps, away from the cameras and grandstanding politicians, we may get some real answers from Wall Street executives once the plaintiffs engage in discovery and trial. Plaintiffs' lawyers will

have more time and skill to challenge evasive answers and spin control. Judges will also be more likely to keep the defendants on a short leash. Civil litigation will force Wall Street executives to provide answers that Congress simply did not have the time, ability, or inclination to obtain.

At the same time, Wall Street executives must be warily eyeing the threat of criminal prosecution. So far, criminal prosecutions for fraud have been brought against mostly lower-level players rather than senior-level Wall Street executives. Yet at a congressional hearing in December, when asked why no criminal cases had yet been brought

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against CEOs, the assistant attorney general for the Criminal Division of the U.S. Department of Justice, Lanny Breuer, commented, "It takes a long time in hatching them and developing them. But they will be brought."

In mid-May, New York's top prosecutor, Attorney General Andrew Cuomo, subpoenaed eight banks and three ratings firms seeking information on how the financial institutions may have tried to influence the ratings of mortgage-backed securities that lost value with the housing market collapse. About that same time, it was disclosed that federal investigators were expanding their inquiry into potential criminal activities at a number of the biggest banks.

With the likelihood that criminal prosecutions will follow the many civil cases, Wall Street executives must certainly be considering whether they need Fifth Amendment protection against self-incrimination. If so, the investment banking firms, the ratings agencies, and other financial institutions involved in the meltdown could certainly suffer consequences in the civil suits. Because blanket invocations of the privilege are not allowed, Wall Street executives must invoke the Fifth in response to each question that threatens them with criminal prosecution. That could result in those witnesses being precluded from testifying at trial. Invocation of the Fifth Amendment privilege may be treated as a vicarious admission.

The legal consequences to the firms and organizations involved—particularly the criminal exposure—will keep their civil and criminal attorneys busy for some time. That also will surely aggravate a public relations nightmare for the defendant companies by enhancing the bankster image. ■

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