

## **SBF's Arrest Shows Feds Focused On Case, Not Congress**

By **Hannah Albarazi**

*Law360 (December 13, 2022, 10:29 PM EST)* -- The arrest of FTX founder Sam Bankman-Fried the day before he was slated to testify before Congress on the cryptocurrency exchange's collapse elicited suspicion among House members, but former federal prosecutors and others told Law360 the government likely had more pressing concerns than letting the disgraced ex-CEO take center stage yet again.

At Tuesday's hearing before the House Financial Services committee, Rep. Alexandria Ocasio-Cortez, D-N.Y., noted that Bankman-Fried's arrest Monday came immediately after FTX's new CEO, John J. Ray III, revealed "explosive" information in written testimony about an alleged deal Bankman-Fried made with Bahamian authorities that allowed 1,500 people to withdraw \$100 million from FTX accounts after the firm froze customer assets worldwide.

Rep. William Timmons, R-S.C., called the timing of the arrest "bizarre."

"I mean, I was a prosecutor for a number of years and prosecuted complex white collar cases. The thought of getting six hours of congressional grilling for a targeted investigation or a defendant, that would be great for my case. So I just don't understand," Timmons, who began his career prosecuting cases in South Carolina's Greenville and Pickens counties, said at the hearing.

A spokesperson for the U.S. Attorney's Office for the Southern District of New York denied any funny business around the timing of Bankman-Fried's arrest in the Bahamas.

"The timing of all of these matters was driven by law enforcement interests only," the spokesperson told Law360 on Tuesday evening.

The Manhattan U.S. Attorney's Office unsealed a brief, eight-count indictment Tuesday charging Bankman-Fried with a multiyear scheme to siphon money out of the now-collapsed crypto exchange. The U.S. Securities and Exchange Commission and Commodity Futures Trading Commission unveiled parallel civil complaints against Bankman-Fried.

The indictment charges Bankman-Fried, also known as "SBF," with two counts of wire fraud, two counts of wire fraud conspiracy, and one count each of commodities fraud conspiracy, securities fraud conspiracy, money laundering conspiracy and conspiracy to violate campaign finance laws.

Morgan Lewis & Bockius LLP partner Justin Weitz, who spent nearly a decade in the U.S. Department of

Justice's Criminal Division, said the Manhattan federal prosecutors may have sought the indictment when they did because of the frenzy of public attention focused on FTX's collapse.

"They want to begin the process of expediting Samuel Bankman-Fried and ultimately, bringing him to court and to trial and securing, if the evidence supports it, a conviction," Weitz told Law360 in an interview Tuesday.

Squire Patton Boggs partner Norman Kinel, a bankruptcy practitioner, told Law360 in an email Tuesday that the DOJ and financial regulators don't consult with Congress about such matters and that prosecutors may have had information that led them to believe that Bankman-Fried was a flight risk.

A judge in the Bahamas denied SBF's request to be released on bail after determining him to be a flight risk, according to media reports Tuesday.

### **Less Is More**

At 14 pages, the indictment against Bankman-Fried mostly recounts the charges he faces and is otherwise relatively sparse, especially compared to the detailed 28-page civil complaint laid out by the SEC and the 40-page complaint filed by the CFTC.

But legal experts said this brevity may be strategic.

Weitz said the lack of detail and evidence in the indictment suggests to him that "the DOJ doesn't want to tip their hand too much right now, whether to Bankman-Fried or to other people who might be under investigation."

"They won't be obligated to show all their evidence to Bankman-Fried until he arrives in the United States and subjects himself to U.S. jurisdiction," Weitz said.

Harry Sandick of Patterson Belknap Webb & Tyler LLP, a former assistant U.S. attorney for the Southern District of New York, also found the government's arrest of Bankman-Fried to be swift and the indictment relatively brief.

Sandick noted that if the government is confident in its documentary evidence and believes the alleged scheme can be explained easily to a grand jury, there's no reason the government can't move quickly.

Or, he suggested, prosecutors may have had other concerns.

"Prosecutors may also have worried about SBF leaving the Bahamas for a country with which we do not have an extradition treaty," Sandick said.

### **Conspiracy Charges**

Weitz of Morgan Lewis said the conspiracy charges against Bankman-Fried are also worth noting.

He said that while there may be evidentiary reasons for the government bringing conspiracy charges in the case, it also suggests that the government is investigating other people involved in the alleged scheme as well.

Dorsey & Whitney LLP partner Tom Gorman, who previously served as senior counsel in the SEC's enforcement division, noted that conspiracy charges can make trials much smoother for prosecutors.

"When criminal charges are filed, the prosecutors typically add a conspiracy count because it helps tie the charges and defendants together. At trial, it also makes evidence against one defendant admissible against others named in the conspiracy," Gorman said.

Kinel of Squire Patton added, "There is clearly more than a single individual with knowledge of what was going on and likely also responsible for this disaster."

It's also possible that other FTX executives will become cooperating witnesses in return for dropped or lesser charges.

Bankman-Fried's arrest comes just one month after FTX's spectacular collapse, which has led to multiple insolvency cases filed in three jurisdictions.

FTX commenced its Chapter 11 case in Delaware on Nov. 11 after more than a week of turmoil that saw its value drop from \$32 billion to effectively zero. The filing came after Bankman-Fried resigned in the early morning hours of Nov. 11 and was replaced by Ray, who previously oversaw the liquidation of Enron.

Prosecutors and regulators say that while Bankman-Fried touted FTX to customers and investors as a leader in crypto regulation and risk management, he was secretly diverting billions of dollars in customer deposits to his crypto hedge fund, Alameda Research.

According to the government, Bankman-Fried used those commingled funds to build a personal "crypto empire," pay "loans" to himself and other FTX executives, make political donations and buy lavish Bahamian real estate.

### **Incriminating Statements**

Even without testifying before Congress, legal experts who spoke with Law360 on Tuesday unanimously agreed that the copious public statements Bankman-Fried made on Twitter, to the media and elsewhere amid the collapse of his company will hurt his defense.

"Even statements that SBF might have thought were anodyne can be used by the government as evidence of an effort to promote a cover-up or a false exculpatory statement. Some false exculpatory statements are better than confessions for the government, and many of these were made voluntarily and have been recorded," Sandick of Patterson Belknap told Law360.

Gorman of Dorsey & Whitney agreed that "the public statements and interviews made by the FTX founder will be used against him and, in the criminal case, against others named in the conspiracy count."

"This is the reason most attorneys suggest not giving interviews," Gorman told Law360.

Weitz noted that public statements can be persuasive evidence of criminal intent and a way to show jurors that a defendant knew that what he or she was doing was wrong.

"When a jury hears the defendant saying one thing and doing something else, a jury understands why that's a bad thing and why that's consistent with someone committing a crime," Weitz said.

Kinel of Squire Patton said executives facing the scrutiny that SBF has faced over the last month tend to stay mum.

"Other than Bernie Madoff — who effectively turned himself in — it is extremely unusual for someone in SBF's situation to be giving interviews — both in print and in person — and to make statements that even a nonlawyer would find to be obviously incriminating," Kinel said, comparing Bankman-Fried to the now-deceased financier convicted of running the largest Ponzi scheme in U.S. history.

"He has made the government's job far easier than it had to be," Kinel said.

--Additional reporting by Jessica Corso, Rachel Scharf and Lauren Berg. Editing by Jay Jackson Jr. and Jill Coffey.