

Webinar: Individual Liability and Anti-Money Laundering

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Roadmap

- I. Brave New World – How Did We Get Here?
- II. Civil and Criminal Legal Framework For Actions Against Individuals
- III. Highlights from Recent Enforcement Cases
- IV. Practical Issues and Implications for Legal and Compliance Professionals
- V. Looking Ahead: US and UK Perspectives



I. Brave New World: How Did We Get Here?

- Why the more recent focus on individuals?
 - AML legal framework has not changed
 - High-profile enforcement actions against financial institutions
 - Part of the larger post-financial crisis focus on individuals across the board, not just in AML
 - More regulators in the mix with different authorities
 - Interplay between Examination/Supervision and Enforcement



II. Civil and Criminal Legal Framework For Actions Against Individuals

- Agencies in the mix:
 - DOJ
 - Financial Crimes Enforcement Network (FinCEN)
 - SEC, FINRA
 - Bank Regulators
 - New York Department of Financial Services (NYDFS)
 - UK Financial Conduct Authority (FCA), Prudential Regulation (PRA) Authority



II. Civil and Criminal Legal Framework For Actions Against Individuals

- FinCEN has explained **the standard for willfulness** set forth under 31 U.S.C. § 5321 in recent enforcement actions:

“To establish that a financial institution or individual acted willfully, the government need only show that the financial institution or individual acted with either reckless disregard or willful blindness. The government need not show that the entity or individual had knowledge that the conduct violated the Bank Secrecy Act, or that the entity or individual otherwise acted with an improper motive or bad purpose.”

See, e.g., In re Oppenheimer & Co., Inc. No. 2015-01 (Jan. 26, 2015) at 3-4 n.3.



II. Civil and Criminal Legal Framework For Actions Against Individuals

- Requiring admissions
 - SEC position shifted beginning in 2012/2013
 - FinCEN announced a change in policy in 2014
- Statute of limitations
 - Varies across agencies and particular authorities
 - Increased use of tolling agreements



II. Civil and Criminal Legal Framework For Actions Against Individuals

- Standard for DOJ civil litigation on behalf of FinCEN:
 - FinCEN may commence a civil action to recover an assessed penalty “at any time before the end of the 2-year period beginning on . . . the date the penalty was assessed.” §5321(b)(2).
 - In addition to seeking a civil money penalty, when FinCEN believes a person has violated, is violating, or will violate [the BSA or its implementing regulations],” it “may bring a civil action . . . to enjoin the violation or to enforce compliance with the [BSA or its implementing regulations].” § 5320.
- FinCEN’s theory of individual liability has not yet been tested in court.
- FinCEN has not litigated an enforcement action against an individual of prominence until this action against Haider.

III. Highlights from Recent Enforcement Cases – *MoneyGram*

The U.S. Department of the Treasury v. Thomas E. Haider

“Mr. Haider’s failures are an affront to his peers and to his profession. With his willful violations, he created an environment where fraud and money laundering thrived and dirty money rampaged through the very system he was charged with protecting. His inaction led to personal savings lost and dreams ruined for thousands of victims.”

– *FinCEN Director Jennifer Shasky Calvery, Haider Press Release (Dec. 18, 2014).*

III. Highlights from Recent Enforcement Cases – *MoneyGram*

- The case against the company:
 - In 2009, after Mr. Haider had left MoneyGram, the Federal Trade Commission filed a complaint against MoneyGram alleging that between 2004 and 2008, MoneyGram agents in the United States and Canada aided fraudulent telemarketers and other perpetrators of telephone and internet scams who misled US consumers into wiring tens of millions of dollars to participants in fraudulent schemes.
 - In 2012, MoneyGram entered into a deferred prosecution agreement (“DPA”) with the US Department of Justice’s Asset Forfeiture and Money Laundering Section and the US Attorney’s Office for the Middle District of Pennsylvania on charges of aiding and abetting wire fraud and willfully failing to implement an effective AML program.

III. Highlights from Recent Enforcement Cases – *MoneyGram*

- The case against the individual:
 - FinCEN determined that Thomas Haider, former Chief Compliance Officer and Senior Vice President of MoneyGram, willfully violated the BSA and its implementing regulations finding Mr. Haider personally responsible for programmatic violations and failure to report suspicious activity.
 - On December 18, 2014, FinCEN assessed a \$1 million dollar civil money penalty against Mr. Haider.
 - Concurrently, the U.S. Attorney’s Office for the Southern District of New York filed a complaint in U.S. District Court seeking to enforce the penalty and to enjoin Mr. Haider from employment in the financial industry.
 - The case recently was transferred to the District of Minnesota.



III. Highlights from Recent Enforcement Cases – *MoneyGram*

- Key Takeaways:
 - Individual liability for institutional failures?
 - Challenging the Government’s reading of the “willfulness” requirement
 - Role of the line of business?
 - Impact on hiring and retaining qualified professionals

III. Highlights from Recent Enforcement Cases – *Brown Brothers*

- In January 2014, FINRA fined Harold A. Crawford, former global AML Chief Compliance Officer for Brown Brothers Harriman (“BBH”), \$25,000 for substantial anti-money laundering compliance failures (BBH was also fined \$8 million).
- FINRA appeared to find Crawford individually liable based on evidence indicating that Crawford had **personal knowledge** of heightened AML risk in penny stock transactions and actual improper client activity or red flags indicating such improper activity.

III. Highlights from Recent Enforcement Cases – *Brown Brothers*

- Key Takeaways
 - This case did not require admissions
 - Elevation of identified risks
 - Role of line of business
 - Registration status vs. “associated person”

III. Highlights from Recent Enforcement Cases

- FINRA stated publicly last year that it will take action against individuals if the conduct rises to a certain level and fits into one of the following:
 - AML Officer was actually involved in the misconduct
 - AML Officer turned a blind eye to the misconduct
 - The AML program was so deficient that at the end of the day the liability rested with the AML Officer

III. Highlights from Recent Enforcement Cases

- Overtly charging individuals is not the only means to take action
- Actions against individuals include other measures:
 - Required resignations
 - Compensation issues
 - Clawbacks
 - Tying to compliance

IV. Practical Issues and Implications for Legal and Compliance Professionals

- Implementing and *maintaining* a comprehensive AML program and controls
 - Back to basics – looking at your building blocks
 - Understanding your business and where the risks are in light of current regulatory climate
- Following through on “red flags”
 - All three lines of defense
 - Issues flagged by supervisory and/or enforcement staff
 - Awareness of suspicious activity should lead to prompt, effective action through appropriate channels with robust Governance.
 - Thorough documentation of escalations and decision-making is critical



IV. Practical Issues and Implications for Legal and Compliance Professionals

- Information sharing
 - Maintaining open communications with other departments (e.g., Transaction Surveillance, Fraud/AML/Sanctions, branch operation managers, Legal, etc.)
 - Follow up
- Statistics matter: budget, headcount
- Director & Officer Liability Insurance
- New shareholder proposals



V. Looking Ahead: US and UK Perspectives

- US Regime
 - Increase in individual liability actions
 - Evolution of the “willful violation” standard
 - FinCEN and DOJ litigation
 - Private litigation
- UK Regulatory Regime
 - The UK Financial Conduct Authority’s (“FCA”) thematic review of small banks focusing on AML systems and controls
 - FCA proposals to change the existing financial crime guidance
 - New senior management regulations



Questions?

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