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AML Litigation and Individual Liability: FinCEN's Landmark Haider Case Moves Forward

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A federal district court in Minnesota recently held that the Bank Secrecy Act (BSA) permits the Financial Crimes Enforcement Network (FinCEN) to bring suit against individuals for willfully violating the BSA's AML program requirement. The decision is significant not only because it appears to be the first court decision in a FinCEN civil action, but also because the opinion addresses important aspects of FinCEN's enforcement authority

The January 8, 2016 decision denied a motion to dismiss a civil money penalty action by FinCEN against former MoneyGram Chief Compliance Officer Thomas Haider. After MoneyGram entered into a deferred prosecution agreement with the Department of Justice (DOJ) for admitted AML program failures, FinCEN sought in December 2014 to hold Haider individually liable on the ground that he was responsible for designing and overseeing MoneyGram's AML program. In addition to seeking a $1 million civil money penalty, FinCEN sought to bar Haider from the financial industry.

FinCEN actions are almost always resolved by consensual agreement, so the action against Haider is being watched closely by both financial institutions and their compliance officers. FinCEN's action against Haider continues recent efforts by regulators to hold individuals liable for compliance errors at their companies. In September 2015, DOJ released the so-called Yates Memo, announcing its redoubled efforts to hold individuals accountable for corporate wrongdoing, and the New York State Department of Financial Services proposed a rule in December 2015 that contemplates criminal penalties for senior officers making “incorrect or false” certifications regarding the rule's AML and sanctions monitoring requirements.

Individual Liability

Haider's principal argument in his motion to dismiss was that he could not be held liable under § 5318(h) of the BSA because that section-which requires each regulated “financial institution” to establish AML programs-applies only to financial institutions, rather than individuals. The court rejected Haider's argument, concluding that his focus on the text of § 5318(h) was misplaced. Instead, the court looked to the BSA's general civil penalty provision in § 5321(a), which permits

FinCEN to assess civil penalties against a “partner, director, officer, or employee” of a financial institution for willful violations of the BSA, with the exception of two BSA sections.[1] The court held that because § 5318(h) is not one of those two exceptions, FinCEN can assess civil money penalties against financial institution officers or employees who violate § 5318(h). The court's analysis of this issue is not expansive, and its reasoning-which arguably expands the substantive requirements of the BSA based on the civil penalty provision-is not free from doubt. The *Haider* opinion is unlikely to be the last word on the issue.

A Full Trial on the Merits

Also significant is what the court said about trial. In rejecting Haider's due process challenge, the court made clear that FinCEN's allegations would be subject to de novo review at trial (a point FinCEN did not contest), with discovery available to both sides. Thus, while the case was framed by the government as a request to “reduc[e] the [penalty] assessment to judgment,” the court treated FinCEN's “assessment” as functionally equivalent to the initiation of a civil suit against Haider. The government now must prove its allegations in a full civil trial. Although FinCEN's penalty assessment has the veneer of an administrative proceeding, its liability determination will evidently not be accorded the deferential judicial review, based on the agency record, that is typical in agency actions. One possible exception may be the penalty amount, as to which the court indicated it may accord some deference to FinCEN. The court cited a 2015 federal court decision applying abuse of discretion review to the penalty amount in an IRS civil enforcement of a BSA tax provision.[2]

Remedies

As is typical in a civil trial, the court deferred several issues related to remedies for later in the proceeding. In particular, the court concluded:

- FinCEN's complaint need not identify the specific individual suspicious activity report (SAR) violations that support its penalty assessment. Instead, the court will wait until liability has been established to consider whether the evidence supports the penalty amount.
- Whether the injunctive relief sought by FinCEN (the ban from the US financial industry) is barred by the five-year statute of limitations under 28 § U.S.C. 2462 depends on whether the injunction is penal in nature. That question depends on the factual record to be developed through discovery.

Finally, the court said that it would not question FinCEN's use of criminal grand jury materials in its civil complaint because FinCEN had obtained an order permitting use of such materials from another federal court. The court's conclusion should further serve to put companies on notice that grand jury information can be used by FinCEN to pursue its own civil enforcement actions against institutions and individuals

Many of the issues deferred by the court may have to be addressed directly once the factual record is developed. Unless the parties reach a settlement, the *Haider* case will likely continue to address more questions of first impression regarding FinCEN's enforcement powers and its ability to hold individuals liable for the AML failures of their financial institutions.

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[1] FinCEN has long interpreted "willfully" in the civil context to include conduct where a person acts "recklessly or with willful blindness." *See In re B.A.K. Precious Metals, Inc.*, (No. 2015-12) (Dec. 30, 2015) at 3 n. 3. ("In civil enforcement of the Bank Secrecy Act under 31 U.S.C. § 5321(a)(1), 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.").

[2] *Moore v. United States*, No. 13-2063, 2015 WL 1510007 (W.D. Wash. Apr. 1, 2015).

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