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A SPECIAL REPORT

The U.S. Department of Justice remains committed to enforcement of the Foreign Corrupt Practices Act—despite a sharp drop last year in the number of cases—and increasingly to the Bank Secrecy Act, with a focus on anti-money laundering compliance. The feds have shown an interest in pursuing ever more actions against individuals—raising new questions about the liability of compliance officials and forcing general counsel to navigate uncharted waters.

The Government's Making AML Enforcement Personal

Compliance professionals and senior executives are increasingly in focus.

BY ROBERTO J. GONZALEZ AND JESSICA S. CAREY

As the government has increasingly turned its eye towards punishing individuals for corporate wrongdoing, so too has it stepped up its enforcement of the Bank Secrecy Act, targeting not only banks but other companies for failures to maintain adequate anti-money laundering (AML) controls. Key questions, then, include whether there will be an appreciable increase in enforcement against individuals with AML compliance responsibilities, and how far up the chain of command will the government probe for culpable individuals? And what role should a company's general counsel play in navigating this new environment?

The recent focus on individuals in the AML arena is best seen in *Treasury v. Haider*, the Financial Crimes Enforcement Network's unprecedented action to enforce a $1 million civil money penalty against an individual for Bank Secrecy Act violations—namely, willfully failing to maintain an effective AML program and failing to timely file Suspicious Activity Reports.

Haider was the chief compliance officer (CCO) and senior vice president of MoneyGram, a money services business that entered into a 2012 deferred-prosecution agreement with the U.S. Department of Justice in which it admitted to willful Bank Secrecy Act violations. Among other things, Haider is alleged to have failed to terminate numerous MoneyGram outlets identified by MoneyGram's fraud department as involved in fraud. He also allegedly failed to ensure that information collected by MoneyGram's fraud department, which he oversaw, was shared with compliance analysts responsible for filing Suspicious Activity Reports with the government. In January, a federal district court denied Haider's motion to dismiss, rejecting the argument that only financial institutions themselves could be liable for failing to maintain an effective AML program.

In a similar vein, in December 2015, New York's Department of Financial Services issued a proposal to impose new transaction monitoring and filtering requirements on financial institutions to improve AML and sanctions compliance, and to require that chief compliance officers certify annually that their financial institutions comply with these requirements. Chief compliance officers who


SALLY YATES

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file an incorrect or false certification may personally be subject to criminal penalties. This certification requirement is modeled on the Sarbanes-Oxley Act of 2002, but may be broader in that it does not explicitly contain a materiality element.

In addition, last year the DOJ announced in the "Yates Memorandum" a renewed focus on holding individuals criminally and civilly responsible for corporate misconduct, including by requiring that companies, in order to receive any cooperation credit at all, provide "all" relevant facts about "all" individuals involved in the wrongdoing, regardless of their "position, status, or seniority."

Emphasizing this last point, Deputy Attorney General Sally Yates memorably said, "We're not going to be accepting a company's cooperation when they just offer up the vice president in charge of going to jail."

The Bank Secrecy Act, in requiring the maintenance of an effective AML program and the appointment of a compliance officer, provides a natural candidate for the "vice president in charge of going to jail."

ENHANCED SCRUTINY OF INDIVIDUALS

Although financial institutions have long been required to designate a Bank Secrecy Act officer—often the CCO or someone who reports to the CCO—the government has infrequently pursued AML enforcement actions against individuals, focusing on actual instances of money laundering rather than AML program violations. However, after *Haider*, that may be about to change.

This new enforcement environment has not gone unnoticed by compliance professionals, who are likely to be a focus of any investigation into individual culpability for AML program failings, particularly in light of the DOJ's requirement that companies identify individuals in exchange for cooperation credit.

Such professionals face the possibility of monetary penalties, debarment orders and even criminal prosecution. Given these concerns, compliance officers may have an increased sense of "skin in the game," which, coupled with the increasingly aggressive AML enforcement agenda and the uncertainty about what constitutes sufficient AML controls, may lead companies and compliance officers to redouble their AML compliance efforts. Chief compliance officers may ask senior executives for additional authority and resources in order to do their jobs effectively, and they could have a greater incentive to escalate and document AML risks that are not receiving sufficient attention at lower levels of the company. As before, CCOs should ensure that they periodically reassess, test and adjust their companies' compliance programs.

Yates' statement, however, indicates that the government will not simply settle for the CCO (or a lower-level compliance officer) in its search for individuals who bear culpability for AML violations.

Although each situation will turn on its own facts, the Yates Memorandum certainly suggests that the government will want to probe the culpability of senior executives who supervise the CCO. This will be particularly true if documentary evidence indicates that the CCO's requests and concerns regarding AML compliance were ignored up the chain.

Relatedly, the Financial Crimes Enforcement Network has recently emphasized the key role of a company's senior leadership and board in AML compliance, including the importance of listening to the concerns of compliance professionals. In discussing individual liability in a speech last year, a top agency official pointedly said that the agency would consider "an institution as a whole" and hold those on the "business side" accountable for willful participation in AML failures.

In light of these developments, general counsels face difficult challenges.

On the one hand, under the adage that the "best defense is a good offense," the general counsel, senior executives and the CCO share a renewed interest in bolstering the company's AML compliance efforts, including by ensuring that the compliance function has the necessary resources and appropriate line-of-sight and voice in all aspects of the company's business.

On the other hand, in situations when senior executives decline to accept a CCO's recommendations, the general counsel should ensure that these decisions are sufficiently vetted from a process and substantive perspective and are well documented.

The general counsel will face particular challenges when an AML breakdown occurs and an internal investigation is necessary. In addition to identifying the nature and scope of suspected violations, given DOJ's new policy, there will be a greater pressure to probe the role of individuals, potentially in different parts of the company.

Against this enforcement background, it is notable that the Financial Crimes Enforcement Network continues to expand the scope of AML requirements. For example, the agency has a pending proposal to impose AML program and suspicious activity reporting requirements on Securities and Exchange Commission-registered investment advisers, as well as a pending proposal to bolster AML due diligence duties by requiring that covered financial institutions identify the beneficial owners (i.e. natural persons) of their corporate customers.

This increased regulation, as well as the uptick in AML enforcement actions in recent years, means that the government's focus on holding individuals liable for AML failings is not likely to abate soon.

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