Expanding personal liability for chief compliance officers: MN federal court decision, proposed NY regulation continue the trend

Compliance Update

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A recent decision from a federal district court and a proposed regulation from the New York State Department of Financial Services provide even more reason for compliance officers at financial institutions to install robust anti-money laundering compliance programs.

Under the district court decision and proposed regulation, **chief compliance officers would be personally subject to both civil and criminal liability** if their institution's anti-money laundering compliance programs are incapable of detecting and stopping illicit transactions.

In January, a federal district court held that the compliance officers of financial institutions can be held civilly liable for failing to ensure their institution's compliance with the Bank Secrecy Act's anti-money laundering provisions. In *U.S. Dep't of Treasury v. Haider*, No. 0:15-cv-01518 (D. Minn.), the Treasury Department's Financial Crimes Enforcement Network (FinCEN) alleged that MoneyGram's former chief compliance officer − Thomas Haider − failed to take sufficient action to terminate, and failed to file Suspicious Activity Reports (SARs) related to transactions he had reason to believe were related to money laundering, fraud, or other illegal activity. FinCEN fined him $1 million and brought action in federal court to collect the fine.

Haider sought dismissal of the fine, arguing that the Bank Secrecy Act applies to institutions, not individuals. The court disagreed and denied his motion, reasoning that the Bank Secrecy Act's civil penalties provision applies to "partners, directors, officers, and employees" of financial institutions. No final disposition has been reached in the case, but the district court's decision **makes clear that FinCEN is empowered to impose personal liability** on compliance officers. In addition to a $1 million fine, Haider faces a permanent ban from employment in the financial industry.

The District Court's decision followed closely on the heels of New York Governor Andrew Cuomo's issuance of a proposed regulation that would require the chief compliance officers (or their functional equivalent) of financial institutions to annually certify that their anti-money laundering compliance programs are effective at identifying and preventing illicit transactions. If a compliance officer's certification is later found to be false, the officer would be subject to criminal liability. Governor Cuomo's proposal was motivated by concerns that terrorist organizations are using American banks as pass-throughs for illicit funds.

A final rule has not yet been issued (though one is expected in the coming weeks), but, under the proposed regulation, compliance officers would be required to certify that their anti-money laundering compliance programs include, among other things, the following:

- A satisfactory monitoring program that identifies transactions that potentially violate the Bank Secrecy Act or other anti-money laundering laws and regulations, or which give rise to Suspicious Activity Reporting obligations. What constitutes a satisfactory monitory program will be dependent upon the risk profile of the institution, as well as its businesses, products, services, and customers
- A Watch List filtering program that prevents the execution of any transactions prohibited by sanctions, including OFAC and other sanctions lists, politically exposed persons lists, and internal watch lists
- Sufficient oversight to ensure that both the Watch List filtering program and transaction monitoring program are operated by qualified and well-trained personnel or vendors and
- Periodic auditing and testing of the anti-money laundering programs efficacy.

The imposition of personal liability on chief compliance officers is part of the regulators' broader interest in compliance failures at the highest levels of financial institutions. Last Thursday, the Financial Industry Regulatory Authority (FINRA) sent letters to a dozen financial firms, inquiring about the methods by which the firms establish and maintain a culture of compliance. In addition to requesting general information on the firms' practices, FINRA specifically requested information on how the firms established a "tone from the top." FINRA characterized the request letters as an attempt to better understand how culture affects compliance, but the focus on the "tone from the top" suggests FINRA perceives or is at least particularly concerned about deficiencies among the highest ranking executives of financial firms.

DLA Piper's Compliance lawyers have extensive experience helping businesses build, implement, monitor, and test anti-money laundering compliance programs and internal controls. Find out more on this page and by contacting the authors.

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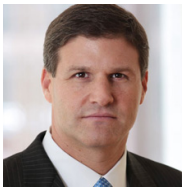

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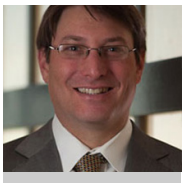

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