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The Rise of the Civil Money Laundering Prosecution

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Commentators have widely cited S.A.C. Capital's $1.8 billion settlement as an example of the recent increase in enforcement actions targeting insider trading. However, it also is part of a less obvious emerging trend: a surge in claims filed under the federal civil money laundering statute. The extent of this escalation is apparent from the fact that over the past three years, the U.S. Attorney's Office in the Southern District of New York (SDNY USAO) filed more civil money laundering cases seeking penalties in excess of $100 million than all U.S. Attorney's Offices combined had filed in the preceding 25 years.

This upswing in civil money laundering actions is partially due to an expansion in prosecutors' focus beyond banks. Banks are the traditional targets of money laundering investigations due to their role in the financial system. In recent civil money laundering cases, however, the government has increasingly used the civil money laundering statute against entities outside the banking industry and even against individuals. Federal prosecutors clearly have recognized the power of the civil money laundering statute as an enforcement tool, and there is good reason to think that their use of this statute will increase in the future.

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The Statute

18 U.S.C. §§1956(a) and 1957 set forth the substantive federal money laundering offenses and the criminal penalties for these crimes. Section 1956(a) makes it a crime to engage in certain financial transactions involving proceeds of any crime identified in 1956(c)(7) as a specified unlawful activity (SUA). The financial transactions involving SUA proceeds that are criminal offenses under §1956(a) include transactions designed to conceal proceeds of an SUA ("concealment money laundering") and transactions intended to promote an SUA ("promotional money laundering").[1] Section 1956(a) also makes it a crime to engage in international transfers with the intent to conceal SUA proceeds or to promote an SUA, even

if the transferred funds are not themselves SUA proceeds ("international money laundering"). Section 1957 criminalizes certain monetary transactions in property that is derived from an SUA and is worth more than $10,000 ("bulk money laundering").

Section 1956(b)(1) creates a civil penalty for engaging in transactions that violate sections 1956(a) or 1957. The maximum penalty is "the value of the property, funds, or monetary instruments involved in the transaction" or $10,000, whichever is greater.

Prosecutors have made frequent use of the criminal provisions in sections 1956(a) and 1957 ever since Congress first enacted these laws in 1986. Until the past few years, however, prosecutors largely ignored §1956(b) and rarely pursued civil money laundering penalties.

Banks

In the handful of civil money laundering cases filed in the first 25 years after 1956(b) was enacted, the most common defendants were banks. For example, in 1999 federal prosecutors brought a civil money laundering case against Banco Internacional/Bital S.A., a Mexican bank, alleging that the bank laundered money that it had received from undercover government agents who had represented to the bank, in the course of a sting operation, that the funds were drug proceeds.[2] Similarly, in 2007, the SDNY USAO filed a civil money laundering action against Lloyds TSB Bank and Bank of Cyprus, alleging that the banks laundered the proceeds of a securities fraud scheme.[3]

Prosecutors' historical use of civil money laundering claims against banks is understandable. Schemes to launder the proceeds of criminal activity usually involve banks because the banks create and maintain accounts through which funds are laundered and process the money laundering transactions. However, the banks rarely are directly involved in the underlying SUA. This can make it difficult for the government to prove beyond a reasonable doubt that the banks knew the criminal origin of proceeds involved in a given financial transaction or knew that the proceeds were being transferred to further a crime. Prosecutors therefore often view a civil money laundering claim, which requires only proof by the preponderance of the evidence, as a natural fit for a bank involved in money laundering.

Given the government's record of bringing money laundering claims against banks, it is unsurprising that the recent flurry of civil money laundering actions has included claims against banks. For example, in 2012, the SDNY USAO settled *United States v. Lebanese Canadian Bank*, No. 11 Civ. 9186 (PAE). The settlement resolved civil money laundering claims against the Lebanese Canadian Bank and other financial entities, primarily two Lebanese money exchange houses, and also resolved related asset forfeiture claims. The civil money laundering claims were based on allegations that Lebanese Canadian Bank and the other financial institution defendants used the U.S. financial system to launder narcotics trafficking proceeds and other criminal proceeds. The government based its civil money laundering claim on allegations of promotional money laundering, concealment money laundering, international money laundering, and bulk money laundering. Lebanese Canadian Bank ultimately agreed to forfeit $102 million to settle the action.

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Non-Banking Entities

The majority of the defendants in recent civil money laundering cases are not banks. The expansion in focus from banks to entities outside the banking industry is significant in part because banks tend to have sophisticated anti-money laundering procedures in place in order to comply with the Bank Secrecy Act, the Money Laundering Control Act, the USA PATRIOT Act, and other laws and regulatory requirements that apply to banks. By contrast, entities outside the banking industry often have limited familiarity with money laundering laws. They therefore are often less prepared to respond to allegations of money laundering and more likely to violate a money laundering statute without knowing that they are engaging in criminal conduct. The risk of unintentionally violating a money laundering statute is greatest in the case of 18 U.S.C. §1957 (bulk money laundering), because it applies to transfers of SUA proceeds that are not for the purpose of concealment or crime promotion.

United States v. S.A.C. Capital Advisors, No. 13 Civ. 5182 (RJS), is the most prominent example of a recent civil money laundering action brought against non-banking entities. In July 2013, the SDNY USAO filed civil money laundering claims based on the SUAs of wire fraud and securities fraud against four affiliated S.A.C. entities. The complaint also included civil forfeiture claims against "any and all assets" of those entities and the assets of various investment funds that held assets of the four S.A.C. entities. The government asserted claims of promotional money laundering and bulk money laundering, but no allegation of the core money laundering offense of concealment money laundering. In November 2013, the S.A.C. entities agreed to forfeit $900 million to resolve the civil forfeiture and civil money laundering claims and also agreed to pay a fine of $900 million in a related criminal action.

Less than two months after filing civil money laundering claims against S.A.C. Capital, the SDNY USAO brought civil money laundering claims against 11 companies alleged to have laundered proceeds of a Russian tax refund fraud scheme that was alleged to involve corrupt Russian officials. That action, *United States v. Prevezon Holdings*, 13 Civ. 6326 (TPG), includes civil money laundering claims based on promotional money laundering, concealment money laundering, international money laundering, and bulk money laundering. In this ongoing litigation, the SDNY USAO is seeking at least $230 million in civil money laundering penalties in addition to the forfeiture of various assets of the companies.

Individual Defendants

While the increasing use of civil money laundering claims against non-banking entities is significant, probably the most important expansion in the scope of civil money laundering prosecutions is the application of the civil money laundering statute to individuals. The decision to use civil money laundering claims against individuals has the potential to dramatically increase the use of the civil money laundering statute even beyond the heightened level that we have seen in the past few years.

The trend of bringing civil money laundering claims against individuals began in 2011, when the SDNY USAO asserted civil money laundering claims related to online gambling in *United States v. Pokerstars*, 11 Civ.

2564 (LBS). In that case, the government initially brought civil money laundering claims against several poker companies, including Pokerstars, Full Tilt Poker, Absolute Poker, Ultimate Bet, and various entities that operated those companies. The complaint also included civil forfeiture claims seeking various assets of the companies. The government previously had indicted owners of the poker companies, including Raymond Bitar, but did not name these individuals as defendants in the civil action. The government then amended the civil complaint to add civil money laundering claims against Bitar and three other individuals alleged to be founders of Full Tilt Poker. The amended complaint included claims of promotional money laundering, concealment money laundering, international money laundering, and bulk money laundering. Bitar ultimately pled guilty to criminal charges in April 2013 and, as part of his plea agreement, agreed to forfeit $40 million in assets, which was approximately the amount that the government had sought from Bitar as a civil money laundering penalty. The government's civil money laundering claims against Full Tilt Poker and Pokerstars were resolved when Pokerstars agreed to forfeit $547 million and to assume Full Tilt Poker's liability for $184 million owed to players.

The SDNY USAO also filed one major action in 2013 that included civil money laundering claims against an individual without naming any entity defendant. The government alleged in *United States v. Ulbricht*, 13 Civ. 6919 (JPO), that the defendant Ross Ulbricht controlled Silk Road, which the government described as "the most sophisticated and extensive criminal marketplace on the Internet."[iv] The SUAs underlying the civil money laundering claims were narcotics and computer hacking crimes. The complaint requested penalties in an unspecified amount based on concealment and promotional money laundering and sought civil forfeiture of all assets of Silk Road. These assets included approximately $28 million in the virtual currency Bitcoin that had been seized from the Silk Road server and over $130 million in Bitcoins seized from Ulbricht's computer hardware. Ulbricht also was criminally indicted in 2013 based on the same alleged conduct. The Bitcoins seized from the Silk Road server were forfeited in January 2014, but the civil and criminal actions against Ulbricht are otherwise unresolved.

Strategic Considerations

Defending against civil money laundering claims is difficult for a variety of reasons. First, the law in this area is largely unsettled due to the small number of actions that have been fully litigated. This makes it difficult for defendants facing civil money laundering claims to assess litigation risk. One primary source of uncertainty is the language in §1956(b)(1)(A) that imposes liability for the "value of the property, funds, or monetary instruments *involved in the transaction*." It is unclear whether this authorizes the government to collect civil penalties in excess of the value of the criminal proceeds. For example, if a defendant launders $100 in crime proceeds using property worth $200, is the government entitled to $100 or $200? Similarly, if the defendant launders $100 by transferring it through several different accounts, is the government entitled to $100 total or $100 for each transfer? There is very little law on these issues in civil cases, and it is easy to see how the most aggressive interpretations of these ambiguities can quickly expand a defendant's potential liability. In the action against the S.A.C. Capital entities, for example, the government broadly alleged that all of the entities' assets were "involved in" the money laundering transactions even though the value of the proceeds identified in the complaint was far less than the value of the entities' assets.

The complexity of litigating civil money laundering claims is compounded when these claims are brought in conjunction with civil forfeiture claims, as was the case in all of the recent cases described above. Civil forfeiture claims are in rem claims against property, not in personam claims against individuals. Thus, a court may have jurisdiction over property against which the government asserts a forfeiture claim, but no jurisdiction over the person against whom the government brings a money laundering claim, even if both claims arise from the same conduct. In addition, forfeiture claims are governed by a unique set of procedural rules laid out in 18 U.S.C. §983 and Supplemental Rule G of the Federal Rules of Civil Procedure. This means that in civil actions involving both forfeiture and money laundering claims there are two different sets of service provisions, pleading requirements, deadlines, and motions that are simultaneously applicable.

Civil money laundering actions also are often brought in conjunction with other parallel actions, including criminal actions, as occurred in the *Pokerstars*, *Ulbricht*, and *S.A.C. Capital Advisors* cases. This creates further tactical complexity. A defendant may want to actively litigate a civil money laundering claim, but prefer to negotiate a plea to the pending criminal charges. Similarly, a defendant may need to weigh the benefits of obtaining accelerated discovery in a civil money laundering case, against the risk of providing the government with discovery to which it would not be entitled in the criminal case. These concerns sometimes are even greater when a civil money laundering case is brought without an accompanying criminal action, because there is a risk that the government will obtain discovery in the civil case that it can later use to obtain a criminal indictment.

Prosecutors often have compelling strategic reasons to bring civil money laundering claims. Where prosecutors are concerned about their ability to prove criminal money laundering charges, a civil money laundering claim allows them to proceed with a lower standard of proof. Where prosecutors are concerned about their ability to locate or seize proceeds of a crime, a civil money laundering claim allows them to pursue money damages that can be satisfied with any assets of the defendant rather than just those specific assets identified in the complaint. In light of these strategic benefits, it is likely that the government's increased use of civil money laundering claims will continue. It is therefore important for defense attorneys advising a target of a federal criminal investigation to be conscious of potential civil money laundering claims, and how litigating these claims can affect potential criminal charges and other potential civil claims.

1. 18 U.S.C. §1956(a)(1)(A)(i) and (a)(1)(B)(i).

2. See *United States v. Banco Internacional/Bital S.A.*, 110 F. Supp. 2d 1272 (C.D. Cal. 2000) (granting defendant's motion for summary judgment dismissing civil money laundering claim because the claim was barred under doctrine of claim preclusion based on settlement of related civil forfeiture action and, alternatively, government failed to show that employee conduct could be imputed to bank).

3. See *United States v. Lloyds TSB Bank PLC*, 639 F. Supp. 2d 314 (S.D.N.Y. 2009) (granting defendants' motion to dismiss for lack of subject-matter jurisdiction). The author worked on this case while working as an Assistant U.S. Attorney in the Southern District of New York.

4. Complaint ¶ 7, *United States v. Ulbricht*, 13 Civ. 6919 (JPO).