LJN LAW JOURNAL NEWSLETTERS

Business Crimes Bulletin ®

An ALM Publication

Volume 19, Number 3 • November 2011

Keeping an Eye on the Federal Civil Money Laundering Statute

By Gary Stein

After the adoption in 1986 of the Money Laundering Control Act (MLCA), 18 U.S.C. §§ 1956-1957, money laundering quickly became, to borrow Judge Learned Hand's phrase, another darling of the modern federal prosecutor's nursery. Every year, federal prosecutors file many hundreds of criminal money laundering cases. The charge can appear in a dizzyingly wide array of contexts, as the MLCA's definition of the necessary underlying "specified unlawful activity," or SUA, extends to literally hundreds of different crimes.

Given the intense focus on money laundering over the past 25 years, it is perhaps surprising that one enforcement tool handed to the Department of Justice (DOJ) by the original MLCA has lain virtually dormant. Under 18 U.S.C. § 1956(b), the United States is empowered to seek civil penalties for violations of the federal money laundering laws. Those penalties can be quite considerable. Yet, outside a few well-publicized settlements in the 1990s with financial institutions for allegedly laundering Mexican drug trafficking money, the DOJ historically has made little use of the MLCA's civil penalty provisions.

Recently, however, the DOJ — and in particular the U.S. Attorney's Office for the Southern District of New York (S.D.N.Y.) — has been pursuing civil money laundering penalties more aggressively. In 2007, the S.D.N.Y. filed civil money laundering actions under § 1956(b) seeking hundreds of millions of dollars in penalties against two foreign banks, Lloyds TSB Bank and Bank of Cyprus, for allegedly laundering the proceeds of a securities fraud scheme. And this year, as part of its crackdown on the Internet gambling industry, the S.D.N.Y. filed a civil forfeiture and money laundering action against several leading online poker sites, seeking a head-turning total of $3 billion in penalties under § 1956(b).

In light of the government's new-found interest in § 1956(b), it is worth taking a closer look at how the statute operates, and at some of the issues that can arise in a civil money laundering case.

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The Scope of § 1956(b)

Section 1956(b)(1) provides as follows: "Whoever conducts or attempts to conduct a transaction described in subsection (a)(1) or (a)(3), or section 1957, or a transportation, transmission, or transfer described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of (A) the value of the property, funds, or monetary instruments involved in the transaction; or (B) $10,000."

The statute thus covers all different forms of money laundering. It may be invoked for any violation of § 1956(a), including: 1) concealment money laundering under subsection (a)(1)(B); 2) promotion money laundering under subsection (a)(1)(A); 3) international money laundering under subsection (a)(2) (which notably, in the case of international transactions intended to promote SUA, does not require that the funds involved in the transaction be SUA proceeds themselves); and 4) violations resulting from sting operations under subsection (a)(3).

Significantly, as of 2001, § 1956(b) also applies to violations of § 1957. Sometimes referred to as the "spending" statute, § 1957 criminalizes any monetary transaction in excess of $10,000 conducted through a financial institution, with knowledge that the funds represent SUA proceeds. No intent to hide or conceal the funds, or to promote criminal activity, need be shown. Further, the requisite knowledge of the criminal origin of the funds may be proven on a conscious avoidance or willful blindness theory (as is also true under § 1956).

Section 1956(b) may not, however, apply to money laundering conspiracies. Conspiracies to launder money are prohibited under § 1956(h), a statutory subsection that is not mentioned in § 1956(b). Section 1956(h) provides that anyone who conspires to commit "any offense defined in this section or section 1957" is subject to the same penalties as those applicable to the substantive "offense." That phrasing suggests that § 1956(h) is limited to criminal "offenses," not civil violations. The government apparently believes otherwise; one of the causes of action in the *Lloyds* litigation was for conspiracy under § 1956(h).

Jurisdiction Over Foreign Defendants

Section 1956(b)(2) confers personal jurisdiction over foreign persons where, *inter alia*, the transaction occurs in whole or in part in the United States and violates § 1956(a), or the foreign person is a financial institution that maintains a bank account in the United States. The exercise of personal jurisdiction under this section must, however, also satisfy the requirements of due process. It is questionable whether due process would be satisfied if (for example) personal jurisdiction over a foreign financial institution were based solely on its maintenance of a U.S. bank account that bore no relationship to the alleged money laundering transactions.

Personal jurisdiction is separate and distinct from subject matter jurisdiction in § 1956(b) cases. Both §§ 1956 and 1957 provide for extraterritorial jurisdiction in certain circumstances. *See* 18 U.S.C. § 1956(f); 18 U.S.C. § 1957(d). Nevertheless, the government's complaint against Lloyds was dismissed for failure to establish subject-matter jurisdiction. The court there found that the transactions in question took place outside the United States; that the complaint did not adequately allege that the bank conspired with the perpetrators of the underlying securities fraud (who did act within the United States); and that the exercise of extraterritorial jurisdiction would be unreasonable. *United States v. Lloyds TSB Bank PLC*, 639 F. Supp. 2d 314 (S.D.N.Y. 2009). Notably, the court was unimpressed with the government's reliance on wire transfers that passed through U.S. correspondent bank accounts, deeming this "peripheral and transitory contact with the United States" that was insufficient to give rise to subject-matter jurisdiction. *Id*. at 324 n.4.

Pretrial Restraint of Assets and Appointment of Receiver

Section 1956(b)(3) contains an unusual feature that allows the government to obtain a pretrial restraining order if necessary to ensure that any bank account or other property held by the defendant in the United States is available to satisfy a judgment. While the government typically obtains pretrial seizure warrants or restraining orders in forfeiture cases, those restraints are limited to assets involved in the alleged illegal activity. But § 1956(b)(3), on its face, applies to unrelated assets as well.

In addition, § 1956(b)(4) authorizes the court to appoint a receiver to marshal and take custody of all of the defendant's assets, wherever located, to satisfy a civil money laundering judgment.

'Value' of the Property Involved

How to define "the value of the property, funds, or monetary instruments involved in the transaction" is likely to be a hotly contested issue in § 1956(b) cases. For example, when the same illegally obtained property is involved in multiple transactions, each of which could be charged as a separate money laundering violation, is the value of that property counted multiple times in calculating the civil penalty amount? Or should the penalty be limited to the value of the illegally obtained property, irrespective of the number of transactions conducted with that property?

No reported decisions address this issue under § 1956(b). Courts have, however, parsed virtually identical language in sentencing defendants convicted of money laundering offenses. Under the Sentencing Guidelines, the base offense level in money laundering cases is sometimes determined by the "value of the laundered funds." U.S.S.G. § 2S1.1(a)(2). The term "laundered funds" is defined as "the property, funds, or monetary instrument involved in the transaction, financial transaction, monetary transaction, transportation, transfer, or transmission in violation of" § 1956 or 1957. U.S.S.G. § 2S1.1, comment. (n.1).

In *United States v. Pizano*, 421 F.3d 707 (8th Cir. 2005), the Eighth Circuit rejected the government's position that, in money laundering offenses involving layering, the "value of the laundered funds" under § 2S1.1 is the aggregate total of the funds involved in each layer. Instead, the court held, "the 'value of the laundered funds' should be limited to funds originally injected or infused into the money laundering scheme." *Id*. at 727. Other courts, however, have permitted aggregation of multiple transfers involving the same illegally derived property. *See United States v. Martin*, 320 F.3d 1223, 1226 (11th Cir. 2003); *United States v. Li*, 973 F. Supp. 567, 574 (E.D. Va. 1997); *see also United States v. Barber*, 132 Fed. Appx. 891, 895 (2d Cir. 2005) (noting, but declining to resolve, this issue).

Some limitation on aggregation seems warranted, particularly where the government relies on § 1957 to multiply the penalty against a defendant who, without any intent to conceal his or her assets, happened to engage in more than one transfer of the same funds. Imposing multiple punishments in such circumstances would further no genuine interest promoted by the MCLA and would simply bestow an unwarranted windfall on the government.

Statute of Limitations

What is the applicable limitations period for claims under § 1956(b)? In the *Lloyds* litigation, the government took the somewhat surprising position that civil money laundering claims should be governed by the criminal statute of limitations set forth in 18 U.S.C. § 3282. The government argued by analogy to a criminal case in which, even though most of the alleged money laundering transactions took place more than five years previously, the transactions were part of a single unified scheme that brought all violations within the limitations period. *See United States v. Moloney*, 287 F.3d 236, 240-41 (2d Cir. 2002) (approving indictment that charged multiple transactions in a single money laundering count based on the "continuing offense" doctrine, so long as individual transactions are part of a single unified scheme); *but see United States v. Kramer*, 73 F.3d 1067, 1072 (11th Cir. 1996) (money laundering not a continuing offense).

However, there is no apparent reason why civil money-laundering claims would not be governed by 28 U.S.C. § 2462, the general catch-all statute of limitations for civil penalty actions. *See 3M Co. v. Browner*, 17 F.3d 1453, 1460 (D.C. Cir. 1994) (§ 2462 is applicable "to the entire federal government in all civil penalty cases, unless Congress specifically provides otherwise"). Moreover, the text of § 1956(b)(1) appears to dictate a transaction-by-transaction approach, such that transactions that pre-date the five-year limitations period in § 2462 should be time-barred. Courts have generally held that the § 2462 limitations period accrues from the date of violation, not the discovery of the violation, unless the conduct is inherently self-concealing. *See, e.g., SEC v. Gabelli*, 2011 WL 3250556, at *7 (2d Cir. Aug. 1, 2011); *Trawinski v. United Tech*., 313 F.3d 1295, 1298 (11th Cir. 2002). The district court in the *Lloyds* case never reached the statute of limitations question, so — as with virtually every other aspect of § 1956(b) — there remains no decisional law specifically on point.

Conclusion

Now that the DOJ is signaling a greater willingness to invoke the MLCA's civil penalty provisions, it is time for counsel to take note and prepare themselves and their clients for the possible consequences.