Ballard Spahr LLP

2016 YEAR IN REVIEW

Money Laundering

PART TWO

INTRODUCING MONEY LAUNDERING WATCH

Financial institutions are facing an unprecedented level of scrutiny and enforcement in the area of money laundering. To keep you informed of the latest developments, we have launched a new blog focused exclusively on money laundering issues. *Money Laundering Watch* provides news, analysis, and insight from lawyers who advise many of the world's leading financial institutions and have firsthand experience in business and government. Please visit us at www.moneylaunderingwatchblog.com.

In part two of our review of the 2016 developments in Anti-Money Laundering (AML), the Bank Secrecy Act (BSA), the criminal money laundering statutes, forfeiture, and related issues, we discuss four additional key topics:

- Federal banking regulators' efforts to ease industry concerns about overly aggressive AML/BSA enforcement and limit the practice of "de-risking"
- Virtual currency
- Court opinions of note under the money laundering statutes and the BSA
- Forfeiture policy and enforcement

Click here if you missed part one of our year in review.

BANKING REGULATORS TRY TO EASE CONCERNS OVER AGGRESSIVE AML/BSA ENFORCEMENT

On August 30, 2016, the U.S. Department of the Treasury and four U.S. federal banking regulators sought to correct a problem—at least in part, one of their own creation—by issuing a "Joint Fact Sheet on Foreign Correspondent Banking" to clarify enforcement priorities regarding AML/BSA and countering the financing of terrorism (CFT) regimes. The Fact Sheet highlighted the importance of maintaining correspondent banking relationships with foreign financial institutions and the value of the free flow of monies within and across global economies.

The Fact Sheet, in conjunction with a blog post by Treasury, attempts to allay concerns raised by industry and groups such as the International Monetary Fund about the trend of "de-risking" by U.S. banks as a result of fear of aggressive AML/BSA enforcement by U.S. regulators and law enforcement. In particular, the Fact Sheet suggests that U.S. banks have overreacted to concerns over AML/BSA enforcement by unnecessarily terminating correspondent banking relationships with foreign banks. It notes that these relationships are crucial to the global economy and reflexive "de-risking" could destabilize or disrupt access to U.S. financing; hinder international trade, cross-border business, and charitable activities; and make claim remittances harder to effectuate.

The blog post and Fact Sheet—which claims to "dispel certain myths about U.S. supervisory expectations"—make two main points:

1. **There is no expectation of perfection, and U.S. authorities do not employ a "zero tolerance" standard regarding AML/BSA and CFT compliance failures.** About 95 percent of AML/BSA and CFT compliance concerns and sanctions are resolved through cautionary

letters and negotiations with the authorities. Penalties and enforcement actions generally will be sought only where enforcement authorities perceive a pattern of reckless and willful violations over a period of years with no effort from senior management to recognize red flags.

2. **There is no general expectation that a U.S. depository institution must perform due diligence on the individual customers of foreign financial institutions.** Institutions should follow industry best practices to identify and manage the risk profiles of foreign financial institution clients. Due diligence is required regarding the types of customers served by a foreign financial institution, in order to assess specific risks posed by certain relationships, detect suspicious activity, and comply with U.S. economic sanctions.

The comments in the Fact Sheet and the blog post are welcome indicators that U.S. regulators and law enforcement authorities recognize that most AML/BSA and CFT compliance deficiencies do not merit enforcement actions or penalties. They also suggest that regulators and law enforcement authorities recognize that industry fears regarding enforcement—sometimes stoked by the government—can have unwanted and negative consequences, such as the unnecessary hindering of the international financial system. Ultimately, however, the Fact Sheet and the blog post merely offer a degree of clarification and insight by the government into its expectations for compliance. They do not have the force of law, nor can they predict precisely how individual regulators or enforcement personnel will act in specific cases.

VIRTUAL CURRENCY: DOJ AND IRS BROADLY SEEK VIRTUAL CURRENCY ACCOUNT USER INFORMATION

Under Internal Revenue Code section 7609(f), the IRS may issue a "John Doe" administrative summons to discover the identities of unknown taxpayers. A "John Doe" summons can be a powerful enforcement tool because it allows the government to force third parties, such as banks and credit card companies, to provide numerous records regarding suspected tax code violations by persons whose precise identities are unknown to the IRS but who, as a group, are suspected of tax evasion. The IRS may serve a "John Doe" summons on a third party only with federal court approval.

On November 30, 2016, a federal judge in the Northern District of California granted an IRS application to serve a "John Doe" summons on Coinbase, Inc., which operates a virtual currency wallet and exchange business headquartered in San Francisco. The court found that the summons "relates to the investigation of an ascertainable group or class of persons, that there is a reasonable basis for believing that such group or class of persons has failed or may have failed to comply with any provision of any internal revenue laws, and that the information sought to be obtained from the examination of the records or testimony (and the identities of the persons with respect to whose liability the summons is issued) are not readily available from other sources." The government has not alleged that Coinbase has violated any law.

In the memorandum and declaration supporting the petition to serve the summons, the government asserted that virtual currency represents not only a potential vehicle for tax evasion, but also a possible conduit for money laundering. The government's memorandum in part quoted a 2014 Government Accountability Office report, which found that because of "the higher degree of anonymity" offered by virtual currencies, they "may be attractive to parties seeking to…move or conceal money obtained by illegal means." The government is seeking records of Coinbase users who transferred virtual currency between December 31, 2013, and December 31, 2015, including their U.S. addresses, telephone numbers, email domains, and bank account information.

Coinbase is likely not the only virtual currency business that will receive a "John Doe" summons. In the ongoing enforcement campaign against more traditional, undisclosed foreign bank accounts held by U.S. taxpayers, the U.S. Department of Justice (DOJ) and the IRS have used this powerful weapon against several Swiss banks, with long-term and substantial results. Having tasted success, the U.S. government presumably will use this same playbook against multiple virtual currency exchanges to root out alleged tax evasion and other crime. Federal courts generally can be expected to approve the summonses.

Nonetheless, such enforcement tools should not curb significantly the use of virtual currency, which continues to expand. Virtual currency is not merely the tool of would-be tax cheats or money launderers; it typically is used for perfectly legal activities, as the government itself has stated. The current action directed against the users of Coinbase is merely a reminder that virtual currency is not truly anonymous, and that those who use it to hide income or illicit activity should not assume impunity.

COURT OPINIONS OF NOTE

The federal courts continued in 2016 to produce a stream of cases pertaining to money laundering. We focus on three below because they involve analysis of basic issues that frequently arise in money laundering litigation.

The first case tests the money laundering statute's reach in prosecution of an alleged international fraud perpetrated primarily outside of the United States—an increasingly common fact pattern as cross-border cases proliferate and DOJ prosecutes more conduct occurring largely overseas. The other two cases involve defense victories that focus on critical issues of mental state: the question of specific intent under the BSA, and the question, under the money laundering statutes, of knowledge by a third party that a transaction involved proceeds of another person's crime. The issue of third-party knowledge is often crucial in prosecutions of professionals.

United States v. Georgiadis, 819 F.3d 4 (1st Cir. 2016).

A case from the First Circuit underscores DOJ's global reach. In 2014, Evripides Georgiadis, of Greece, was convicted in the District of Massachusetts of conspiracy to commit wire fraud, 11 substantive counts of wire fraud, and conspiracy to commit money laundering. The indictment alleged that between 2007 and 2011, Mr. Georgiadis held himself out as a representative of a multibillion dollar private equity fund in Luxembourg to defraud developers seeking financing for, among other things, alternative energy projects.

Developers deposited substantial monies based on agreements with his company to receive financing. According to court documents, Mr. Georgiadis and his co-conspirators transferred the developers' deposited money out of the United States, never financed any projects, and stole more than $7 million. Mr. Georgiadis and his co-conspirators ran the conspiracy outside Massachusetts and indeed outside the United States. Nonetheless, Mr. Georgiadis was indicted in Massachusetts, arrested at a border crossing in Croatia, and extradited to the United States.

Mr. Georgiadis appealed his convictions, arguing that venue in the District of Massachusetts was improper because no overt act in furtherance of the conspiracy occurred in Massachusetts. His claim failed.

The First Circuit began by reasoning that an overt act, in the case of money laundering, could be an act of "concealment" because the money laundering was primarily a crime of concealment. Borrowing from mail fraud cases, the First Circuit held that a "lulling communication" that was "designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely," made in or into Massachusetts would qualify as an overt act in furtherance of the money laundering conspiracy.

Applying this reasoning, the First Circuit upheld the conviction. The court pointed to email communications made by co-conspirator Michael Zanetti, who assured a Massachusetts-based developer that funding issues were "in the process of being overcome." The developer then threatened to go to DOJ "to pursue any and all means of redress available to us, against you and your enterprises." Mr. Zanetti responded by stating that the "fund's appointed reps" would be contacting the developers shortly. The court reasoned that the purpose of these communications was to delay the date the aggrieved developer "went to the authorities." Thus, Mr. Zanetti's correspondence qualified as "lulling" communications and an overt act occurring in Massachusetts in furtherance of the conspiracy.

United States v. Taylor, 816 F.3d 12 (2d Cir. 2016).

In *Taylor*, the Second Circuit reversed the defendant's structuring convictions, holding that the transactions at issue did not demonstrate that the defendant intended to evade reporting requirements because they failed to show a "pattern of structured transactions."

This case implicates an evergreen issue in structuring cases under the BSA: how much evidence, if any, must the government introduce beyond the mere pattern of the financial transactions at issue to prove the required specific intent to defeat a government reporting requirement. The *Taylor* case also represents a rare example of an appellate court's willingness to truly parse and evaluate the trial evidence. Appellate courts are generally unwilling to take such steps, given the appeals standard that a guilty verdict should be upheld if a rational jury could have convicted the defendant after assessing the evidence in the light most favorable to the prosecution.

The defendant was convicted of conspiracy to distribute five kilograms or more of cocaine as well as 13 counts of structuring under 31 U.S.C. § 5324(a). Attempting to avoid filing a currency transaction report (CTR) or preventing a bank from acquiring the duty to file a CTR, by breaking up a larger deposit into a series of deposits under the $10,000 threshold, is known as "structuring." Among other things, a conviction for structuring requires proof that the defendant was acting with intent to evade currency reporting requirements—the filing of a CTR. The court first noted that proof of intent generally involves evidence in addition to the transactions themselves. Nevertheless, proof of intent may come from a "pattern of structured transactions" alone, according to the Second Circuit—*if* the transactions show a "willingness to sacrifice efficiency and convenience" through depositing a total sum of monies through multiple transactions less than $10,000. Under such circumstances, a pattern of structured transactions may allow an inference that the defendant intended to evade reporting requirements.

In *Taylor*, the government relied solely on evidence of the defendant's transaction history, specifically of so-called "split transactions," to prove the requisite intent. The record indicated that the defendant had conducted multiple separate cash deposits—split transactions each less than $10,000 but totaling more than $10,000—at the same time at the same credit union branch. Notably, however, the defendant also had made multiple single deposits *exceeding* $10,000 during the same period.

No evidence was introduced at trial indicating that the defendant believed that his split transaction method would evade the reporting requirement, and the government failed to argue that he had such a belief. In fact, evidence at trial demonstrated the opposite: that the credit union's policy was to aggregate and report split deposits even if those deposits were made into separate accounts. Nor was there evidence that credit union employees failed to follow these protocols or that the defendant had reason to believe that CTRs were not filed for the various split transactions.

Moreover, there was no indication that the defendant split his transactions across different banks on multiple days—traditional evidence of an intent to structure. Rather, the defendant deposited the split transactions on the same date and time, at the same bank. Finally, the defendant, during the period he was supposedly structuring his transactions, made twice as many deposits of $10,000 or more than transactions of less than $10,000.

The court reasoned that a pattern by definition requires "consistent behavior," which would allow a jury to conclude that the behavior was not a coincidence but rather demonstrated the defendant's intent to evade reporting requirements. As such, no pattern existed in the defendant's actions, given his transaction history, the court ruled. This final analysis is potentially important, because few structuring cases involve completely consistent conduct by the defendant, and/or no transactions of more than $10,000.

650 Fifth Avenue v. Alavi Foundation, 830 F.3d 66 (2d Cir. 2016).

A civil forfeiture case highlighted the key issue of knowledge that a transaction involved the dirty proceeds of an offense allegedly committed by a third person.

In *650 Fifth Avenue*, the United States brought a forfeiture action to seize a Midtown Manhattan office tower at 650 Fifth Ave., owned by the Alavi Foundation, a New York not-for-profit organization. The Bank of Melli, a bank owned and controlled by the government of Iran, financed the Alavi Foundation's purchase of the property. In 1989, due to business income liability and tax concerns, the Alavi Foundation entered into a partnership with Assa Company Limited and Assa Corporation—together known as Assa—both effectively owned by the Bank of Melli.

Alavi and Assa formed a partnership under New York state laws as the 650 Fifth Avenue Co. to alleviate Alavi's debt obligations to the Bank of Melli. It was undisputed that Assa functioned as an extension of the Bank of Melli until 1995.

In 1995, President Clinton issued sanctions pursuant to the International Emergency Economic Powers Act (IEEPA) against Iran, which prohibited U.S. entities such as 650 Fifth Avenue Co. and Alavi from conducting business with or providing services to any instrumentality owned or controlled by the government of Iran—including the Bank of Melli. The bank formally divested its ownership of Assa in 1995. The U.S. government contended that after 1995, the Bank of Melli continued to have control over Assa and, owing to its partnership in 650 Fifth Avenue Co., over Alavi.

The government filed an amended civil forfeiture action in 2009 seeking forfeiture of properties owned by Assa, the Bank of Melli, 650 Fifth Avenue Co., and Alavi due to violations of the IEEPA and as proceeds traceable to property involved in money laundering. Pursuant to the money laundering theory of forfeiture, the government argued that Alavi and 650 Fifth Avenue Co.—the claimants—committed three types of money laundering: promotion, concealment, and international—all "forfeitable offenses" pursuant to 18 U.S.C. § 981(a)(1)(A).

The government alleged that the claimants' specified unlawful activity was violating the Iranian sanctions under the IEEPA.

The district court had granted summary judgment in favor of the government on the claim of forfeiture of the properties held by the claimants. On appeal, however, the Second Circuit vacated the summary judgment, holding that the claimants did not necessarily have the requisite knowledge of the unlawful activity or intent to carry out the unlawful activity under the money laundering statutes. Indeed, as the court noted, to succeed on summary judgment, all money laundering offenses required that the claimants know that the property involved in the transaction represented the proceeds of some form of unlawful activity. Here, the claimants' knowledge depended on a disputed question of whether or not Alavi had knowledge of the Bank of Melli's control of Assa post-1995.

The grant of summary judgment therefore was inappropriate, the court ruled, because this factual dispute gave rise to triable issues as to Alavi's culpable intent in providing services to Assa pursuant to their partnership in 650 Fifth Avenue Co.

FORFEITURE

The field of forfeiture saw significant action in 2016. The IRS offered to return forfeited funds used in structuring, but Congress still may clip its ability to forfeit such funds. Meanwhile, DOJ renewed a controversial program that incentivizes local law enforcement to aggressively pursue forfeiture. It filed a major forfeiture action which reminds law firms of their own need to vet the source of funds flowing into firm bank accounts. Finally, the U.S. Supreme Court made it clear that "clean" funds cannot be restrained pretrial when a defendant needs those funds for his criminal defense, even if the government wants to restrain the money in order to pay for forfeiture or restitution if the defendant is convicted.

Seizure and Forfeiture Relating to Structuring Offenses: IRS Policy Change and Proposed Federal Legislative Reform

The IRS continues to face widespread hostility to its use of administrative forfeiture. Although the IRS has reacted by changing its policy and even offering in 2016 to return forfeited funds, these self-imposed steps still may not prevent Congress from enacting legislation that will formally cabin the ability of the IRS to pursue forfeiture.

Under the BSA, financial institutions are required to file a CTR for any deposit of more than $10,000. Structuring deposits, when done to evade the reporting requirement, is a felony punishable by prison. It also can lead to civil or criminal forfeiture of the structured funds under 31 U.S.C. §5317(c).

The CTR requirement and anti-structuring provision are designed to identify criminal conduct as well as "illegal source deposits," funds involved in or derived from criminal activity. Of course, structuring is not limited to illegal source deposits. It also can involve funds from legal activities, such as ordinary business operations or a legal sale or "legal source deposits." For this reason, the anti-structuring provision can and does ensnare people who aren't involved in underlying criminal conduct, such as ordinary business owners or banking customers whose behavior can either represent actual structuring (*i.e.*, the conduct occurs with the requisite mental state, perhaps to further a tax crime) or merely resembles structuring but otherwise is innocent.

Recently, concerns have been raised about the use of the forfeiture power by IRS Criminal Investigation (IRS CI) in situations involving legal source deposits where there is no indication that the person is otherwise engaged in criminal activity. Critics have alleged that it has become standard practice for the government to seize individuals' assets on the suspicion of structuring and then delaying, sometimes for years, any investigation or charges. According to these critics, these delays cause serious financial injury to small business owners and others who are never accused of a crime beyond the alleged underlying structuring and who are forced to battle the government for control of the seized funds. In response to these concerns, the Chief of IRS CI issued a statement in October 2014, explaining its decision to modify its policy on administrative forfeiture—the process by which property may be forfeited by the seizing investigative agency without judicial involvement—in "legal source" structuring cases. Under the policy, IRS CI no longer will pursue the seizure and forfeiture of funds associated solely with "legal source" structuring cases unless there are "exceptional circumstances" justifying the action and the case has been approved by the director of field operations. IRS CI special agents still will view structuring as an indicator that further illegal activity may be occurring, and the policy involving seizure and forfeiture in "illegal source" structuring cases was not changed.

In light of this new policy, the IRS announced a new procedure on June 16, 2016, for taxpayers who have had their property seized to request a return of their forfeited property or funds. These taxpayers can file a petition for remission or mitigation and must establish that the underlying funds came from a legal source, and that there is no evidence that the requesting taxpayer engaged in other criminal activity. While the procedure is open to any qualifying taxpayer, the IRS has notified more than 700 taxpayers it thinks might qualify. Any taxpayer receiving a letter from the IRS has 60 days from the receipt of the letter to file a petition.

Meanwhile, members of Congress are seeking to codify the IRS's internal policy in the Restraining Excessive Seizure of Property through the Exploitation of Civil Asset Forfeiture Tools Act (RESPECT Act) (H.R. 5523). The Act would amend the civil asset forfeiture provision of the BSA, section 5317(c)(2), in order to provide that the IRS may pursue civil forfeiture on the basis of structuring violations only "if the property to be seized was derived from an illegal source or the funds were structured for the purpose of concealing the violation of a criminal law or regulation other than section 5324." Accordingly, the IRS would be unable to pursue civil forfeiture based upon "pure" structuring activity not involving other criminal conduct. In addition, it would create a new post-seizure hearing where the government would have the burden of showing that there is probable cause to believe that there is a violation of section 5324 involving such property and to believe that the property to be seized was derived from an illegal source, or the funds were structured for the purpose of concealing the violation of a criminal law or regulation other than section 5324. The court would have 30 days to rule, with a 30-day extension available at the request of either party. The Act would take effect immediately if passed by Congress and signed by the President.

In a time when bipartisan action often seems elusive, the RESPECT Act appears to be on track. The U.S. House of Representatives unanimously passed the Act in September 2016. It now awaits action by the Senate. Nonetheless, the language of the RESPECT Act that forfeiture is permissible when "the funds were structured for the purpose of concealing the violation of a criminal law[,]" even if the funds themselves are not tainted, still provides the IRS with a potentially broad theory for forfeiture because much structuring activity is undertaken to further tax fraud. Thus, the ability of the IRS to administratively forfeit "clean" funds used in structuring likely will come down to the institutional willingness of the IRS to pursue forfeiture in cases involving "only" alleged tax fraud—a move that might be legal but still is controversial.

DOJ Revives Controversial Equitable Sharing Program

In late December 2015, DOJ temporarily suspended its Equitable Sharing Program due to budget constraints—a $1.2 billion reduction in Asset Forfeiture Program funding. Critics of the program and its incentives for law enforcement applauded the suspension and hoped that the program would not be revived. The federal Equitable Sharing Program is controversial because it allows state and local law enforcement to funnel state and local forfeiture proceeds through the federal program, and then receive up to 80 percent of those proceeds back from the federal government—at which point the forfeiting agency receives the proceeds directly. The funds do not feed the state or local general fund. Thus, the Equitable Sharing Program allows state and local forfeiting agencies to enhance their budgets and prevents forfeiture proceeds from funding general expenditures, such as schools and road repair. Critics have argued that the program creates a potentially pernicious profit motive for law enforcement officers and has resulted in state and local police departments amassing items such as expensive paramilitary equipment. Cases have even been cited in which departments have purchased frivolities like margarita makers.

The suspension was brief. Only a few months later, on March 28, 2016, DOJ announced that, effective immediately, equitable sharing payments would resume. According to the Chief of DOJ's Asset Forfeiture and Money Laundering Section, "it was always [DOJ's] intent to resume payments as soon as it becomes financially feasible," and after "keeping a close eye on incoming receipts" to the Asset Forfeiture Fund, the Department determined that it was again possible to make the payments. The resumption suggests that the suspension always rested on funding issues rather than concerns over perceived abuses of the program. It will be interesting to see how the program, and civil forfeiture in general, fare under the new administration, and whether the value of funding local law enforcement will overcome the value of protecting individual property rights—the latter value being supported by both the political right and left.

The U.S. Supreme Court Shoots Down Pretrial Restraint of a Criminal Defendant's Untainted, "Substitute" Assets When She Seeks to Use Assets to Retain Defense Counsel

In a 5-3 decision on March 30, 2016, the Supreme Court ruled in *Luis v. United States* that it is a violation of the Sixth Amendment for the government to obtain pretrial restraint of a criminal defendant's *untainted* assets when the defendant seeks to use those assets to retain counsel of her choice. This defense win came on the heels of a 2014 win for the government before the Court in *Kaley v. United States*. In that case, the Court held that a criminal defendant who has been indicted and who is challenging the legality of a pretrial asset seizure under 21 U.S.C. § 853(e)(1) is not constitutionally entitled to contest a grand jury's determination of probable cause to believe that he committed the crimes for which he has been accused. The holding in *Luis* is well-reasoned. As a practical matter, a contrary holding would have made it difficult, if not impossible, for many defendants charged with criminal forfeiture to use perfectly legal funds to hire counsel.

In 2012, Luis was charged with federal health care fraud, including paying kickbacks, conspiring to commit Medicare fraud, and "engaging in other crimes all related to health care." According to the government, Luis obtained roughly $45 million as a result of her illegal conduct, almost all of which she had already spent. However, at the time of indictment, Luis still had $2 million, which the government agreed were "untainted funds." Seeking to preserve the money for payment of restitution and other penalties, the government sought a pretrial order pursuant to 18 U.S.C. §1345(a)(2) to prevent Luis from dissipating her assets, which the district court granted.

Luis challenged the order, seeking modification to permit her to use the untainted funds to retain criminal defense counsel. The district court rejected her argument, ruling that "there is no Sixth Amendment right to use untainted, substitute assets to hire counsel." The 11th Circuit agreed, relying on the Court's prior decisions in *Kaley v. United States*, 571 U.S. ___, 134 S. Ct. 1090 (2014), *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989), and *United States v. Monsanto*, 491 U.S. 600 (1989).

The Supreme Court reversed, holding that "the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment." The plurality opinion, authored by Justice Breyer and joined by Chief Justice Roberts and Justices Ginsburg and Sotomayor, balanced the defendant's "fundamental" Sixth Amendment right to counsel against the government's "contingent interest in securing its punishment of choice (namely, criminal forfeiture) as well as the victims' interest in securing restitution (notably, from funds belonging to the defendant, not the victims)."

In support of its position, the government relied on the Court's prior decisions in *Caplin & Drysdale* and *Monsanto*. However, the Court held that those cases are materially distinguishable from the present case because they involved criminal proceeds or funds traceable to the defendant's alleged misconduct, while the funds at issue in *Luis* were untainted. Although the defendant does not have the superior interest in *tainted* property—either because title vests in the government at the time the crime is committed or because the victim's title is superior—the same cannot be said of property that is *untainted* and which "belongs to the defendant, pure and simple."

Justice Thomas concurred in judgment, but disagreed with the plurality's balancing approach. In Justice Thomas' view, the Sixth Amendment guarantee itself is sufficient to categorically preclude pretrial restraint of untainted funds. If there was no "constitutional protection for at least some of a defendant's assets, the government could nullify the right to counsel of choice" and thereby "eviscerate the Sixth Amendment's original meaning and purpose." Given the determination that a pretrial restraint of untainted assets would infringe on the Sixth Amendment right, Thomas wrote that there was "no room for balancing" left.

Law Firm Bank Accounts Implicated in Significant Civil Forfeiture Actions

A major civil forfeiture action with some eye-catching allegations highlighted how law firms can be dragged into the spotlight of forfeiture enforcement. On July 20, 2016, DOJ announced the filing of civil forfeiture complaints seeking the forfeiture of more than $1 billion in assets associated with an alleged international conspiracy to launder funds misappropriated from a Malaysian sovereign wealth fund. The complaints represent the most significant actions ever brought by DOJ's Kleptocracy Asset Recovery Initiative, which is led by DOJ Criminal Division's Asset Forfeiture and Money Laundering Section, which seeks to forfeit the proceeds of foreign official corruption. One of the complaints details how the alleged co-conspirators used the Interest on Lawyer Accounts (IOLA) held by a large international law firm based in the United States—not accused of any wrongdoing—to deposit illicit funds later used to acquire high-end assets.

According to the complaints, from 2009 through 2015, more than $3.5 billion in funds belonging to 1Malaysia Development Berhad (1MDB), which was created by the government of Malaysia to promote economic development through global partnerships and foreign direct investment, was allegedly misappropriated by high-level officials of 1MDB and their associates. The civil forfeiture complaints seek to recover more than $1 billion laundered through the United States and traceable to the conspiracy.

The conspirators allegedly diverted more than $3.5 billion in 1MDB funds through a series of complex transactions and fraudulent shell companies with bank accounts in Singapore, Switzerland, Luxembourg, and the United States. These transactions allegedly were intended to conceal the origin, source, and ownership of the funds, and ultimately were processed through U.S. financial institutions and used to acquire and invest in assets located in the United States. The complaints also allege that the co-conspirators misappropriated billions in funds raised through bond offerings and then laundered some of those funds by transferring them to the United States and using them to acquire and invest in various high-end assets. These assets allegedly included high-end real estate and hotel properties in New York and Los Angeles, a jet aircraft, art by Impressionist masters, an interest in music publishing rights, and the production of the 2013 film *The Wolf of Wall Street*, directed by Martin Scorsese and starring Leonardo DiCaprio. In regards to these latter asset acquisitions, one of the complaints alleges that the funds used to acquire these assets were moved through an IOLA held by a major U.S. law firm.

In addition to a sobering reminder of how lawyers may find themselves unpleasantly in the midst of the government's fact pattern when dealing with clients with questionable funds, these forfeiture actions are entirely consistent with one of the primary 2016 AML enforcement approaches: the focus on identifying and tracing true ownership to prevent the movement of potentially dirty money—particularly when coming from foreign sources—through the United States. As the DOJ press release accompanying the filing of these actions declared, DOJ officials seek to send the message that "[t]he United States will not be a safe haven for assets stolen by corrupt foreign officials."

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