ChinaLat Law BUSINESS AND LEGAL ISSUES AFFECTING CHINA LATIN AMERICA AND THE UNITED STATES

Asset Hunting and Anti-Money Laundering: Justice on the Trail of Tears

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I. Introduction

On March 3, 2009, a group of scorned investors filed suit in the United States District Court for the Southern District of Florida after being burned by a $170 million offshore Ponzi scheme. These investors sued to get their hands on the assets of two Canadian "real estate developers" who used investor funds to finance their lavish lifestyles, purchasing among other things a private plane, a multi-million dollar luxury yacht, and various land holdings around the world. The Defendants, Frederick C. Elliot and his son, Derek, hid the spoils of their criminal exploits throughout Latin America – making the reclaiming of these assets a daunting task for even the most hardened, seasoned asset hunters. Using intricate and creative methods of asset forfeiture – the process of lawfully confiscating assets which are proceeds or instrumentalities of a crime –

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more than $100 million of illicitly obtained cash and property were subsequently seized, including the Elliots' 54-foot yacht.

In recent years, the terms "Ponzi Scheme" and "Financial Fraud" have become unfortunate household idioms. Fraudsters such as Bernard Madoff and Allen Stanford have given new meaning to the term "financial fraud," leaving behind them a trail of tears. This new wave of criminal audacity has prompted both the government and private citizens into action. Victims, many of whom were forced into bankruptcy, have filed suit against either the "plotters" themselves or financial institutions that, neglecting proper fiduciary oversight, have authorized transactions that facilitated these schemes. Asset hunters have teamed up with former FBI, customs, and DEA agents to assist in tracing and recovering assets for these victims. The U.S. government has also instituted significant reforms, including a comprehensive overhaul of its existing asset forfeiture program. The goal – to form a united front against common foes.

II. The U.S. Government's Asset Forfeiture Program

Today's asset seizure laws stem from the U.S. Department of Justice's Asset Forfeiture Program, which Congress created in 1984 as part of the Comprehensive Crime Control Act. These laws permit the federal government to seize and acquire title to forfeited assets such as real estate, cars, boats, and other personal property. Proceeds from the sale of seized assets, which are funneled into the DOJ's Assets Forfeiture Fund (AFF), are used to recompense fraud victims and to recoup the high costs of law enforcement initiatives against a rising epidemic of economic crimes. The U.S. Marshals Service administers the Asset Forfeiture Program through close collaboration with other federal law enforcement agencies in the asset forfeiture community, including the FBI, DEA, ATF, the Treasury Department's Financial Crimes Enforcement Network (FinCEN), and the Department of Homeland Security.

Many reasons support the existence of a government-run asset forfeiture program. First, it serves as a form of incapacitation, eliminating the economic infrastructure of crime groups and effectively depriving wrongdoers of their "tools of the trade." Asset forfeiture prevents the circulation and redistribution of illicitly-obtained assets to fund future criminal enterprises, and helps dismantle existing crime rings by removing the tools, cash and products that they need to continue their exploits. Second, in any case where the offense has harmed innocent victims, such as in a Ponzi scheme, asset forfeiture can be the most effective means of recovering property to provide the victims with just compensation. Indeed, law enforcement's top priority when it comes to disbursing forfeited property is to attempt to make the victims whole. See 18 U.S.C. § 981(e)(6) (authorizing the government to use forfeited property to provide victims with restitution in civil forfeiture cases); 21 U.S.C. § 853(i) (same, for criminal cases). Third, depriving wrongdoers of their ill-gotten gains serves

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as a form of deterrence, hampering the incentive to commit economic crime by raising the likelihood that such crime will simply not pay. Finally, asset forfeiture also serves as a form of retributive punishment, depriving wrongdoers of the accoutrements of an expensive lifestyle, and the material goods that had given them leverage, prestige, and audacity to continue to exploit unwary investors.

One asset forfeiture statute worthy of particular emphasis is one permitting the forfeiture of all property involved in a money laundering offense. See 18 U.S.C. §§ 981(a)(1)(A) (civil forfeiture); 982(a)(1) (criminal forfeiture). These statutory provisions highlight the singular importance of strict compliance with U.S. anti-money laundering ("AML") laws. Under these provisions, all comingled proceeds – regardless of whether they comprise the part of the proceeds intended to be laundered – are subject to forfeiture. See, e.g., United States v. Puche, 350 F.3d 1137, 1153-54 (11th Cir. 2003) (affirming that "facilitating property" is subject to forfeiture under § 982(a)(1) to the same extent as the assets being laundered). For example, when one attempts to launder the proceeds from a Ponzi scheme by comingling those assets with "clean money" from another source, or hides the money by investing it in land or in a business, all of the property involved in the offense, not just the proceeds being laundered, can be forfeited under these laws. Prosecutors tend to make heavy use of these provisions, primarily because they virtually eliminate the need to distinguish between the portion of the property traceable to the underlying offense, and the portion derived from other sources.

III. Ensuring Compliance with U.S. Anti-Money Laundering Legislation

The heightened risks of forfeiture for violating AML laws, as well as the greater monetary sums at stake, bring to focus the importance of strict compliance with such laws. Moreover, U.S. regulators have also been tightening their grip. Recently, for example, FinCEN enacted several new regulations that will substantially increase one's risk of prosecution for non-compliance under U.S. anti-money laundering laws.

First, FinCEN has broadened the definition of what constitutes a regulated "money services business" (or "MSB") to include foreign money services businesses, even if they do not putatively maintain any U.S. presence. This was done to ensure "that [MSB] activity within the United States that does not involve physical presence in the United States of an MSB's agent, agency, branch or office is directly regulated." Fed. Reg. 74:90 (May 12, 2009) p. 22132 (emphasis added); codified at 31 C.F.R. §§ 103.11(uu) (1)-(6). Hence, an MSB is now "regulated [both] by its activity and the context in which the activity occurs and not simply by its status." Id. (emphasis in the original) (also stating that this has "the effect of capturing national and multinational MSB operations as well as the small enterprises that competed with them," as well as "businesses that exclusively provided MSB services [and those] that provided both financial

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services and unrelated products or services.”). Consequently, companies that conduct money services activities in the United States, “whether or not on a regular basis or as an organized business concern,” can now be prosecuted, and have legitimate operating assets forfeited, for non-compliance with strict U.S. anti-money laundering laws under the Bank Secrecy Act (“BSA”). 31 C.F.R. §§ 103.11(uu) (defining a “money services business”); see also 31 U.S.C. §§ 5311-5314e (the BSA’s anti-money laundering provisions); 18 U.S.C. §§ 981(a)(1)(A), 982(a)(1) (providing for the forfeiture of comingled assets for AML violations).

Second, pursuant to its rulemaking authority under the BSA, FinCEN has enacted regulations that require MSBs to file reports of suspicious transactions (known under the umbrella term “Suspicious Activities Reports,” or “SARs”) within 30 days of initial detection. Under these stringent reporting requirements, a regulated MSB – including companies conducting nominal money services businesses within the U.S. without a physical presence in the country – must report any transaction that it “knows, suspects, or has reason to suspect:” (i) involves funds derived from illegal activities or is conducted to disguise funds derived from illegal activities; (ii) is designed to evade the reporting or recordkeeping requirements of the BSA (e.g. structuring transactions to avoid currency reporting); or (iii) “has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage . . . .” 31 C.F.R. 103.18-20; see also In re Matter of Western Union Financial Services Inc., FinCEN Assessment No. 2003-02, at 3 (Mar. 6, 2003).

Third, under a newly proposed FinCEN rule, regulated MSBs conducting cross-border electronic fund transmittals ("CBEFTs") will be required to report all transactions equal to or in excess of $1,000. See Fed. Reg. 75:189 (Sept. 30, 2010) pp. 60377-97. This is a swift departure from the current threshold amount of $10,000. If implemented, this new rule is projected to raise the number of annually reported transactions from 14 million to 750 million. By comparison, the Internal Revenue Service processed a "mere" 115 million tax returns in 2009. The increased burdens associated with the need to sort, analyze, and make sense of this voluminous data will make MSBs' identification of truly suspect transactions more difficult, undermine operational efficiency, and substantially raise transactional costs for companies involved in this line of business. Such an arduous reporting requirement may also force enterprises that currently conduct CBEFT businesses in the U.S. to move away from use of the dollar in favor of other currencies, increase their use of cover payments, and create other significant competitive disadvantages.

Finally, the recently passed Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") has further exacerbated companies' risks of non-compliance with U.S. anti-money laundering laws. Dodd-Frank's whistleblower provisions significantly expand incentives for whistleblowers to report suspected

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AML violations by promising them a substantial cash bounty. They guarantee qualified whistleblowers a 10 to 30 percent share of any monetary sanctions over $1 million, made possible by their voluntary disclosure of “original information” in furtherance of certain “covered judicial or administrative action[s]” and “related actions.” Securities Exchange Act of 1934 (“SEA”), as amended by Pub. L. No. 11-203 § 922(a) (Dodd-Frank), at § 21F(a)(3)(A). Dodd-Frank very broadly defines the scope of a “covered judicial or administrative action” and “related action” so as to authorize awards for individuals who provide information in connection with successful enforcement actions brought under U.S. anti-money laundering laws. See id., as amended by Dodd-Frank, at § 21F(a)(5) (stating that “any appropriate department or agency of the Federal Government, acting within the scope of its jurisdiction” can institute a “related action” that is covered by the whistleblower provisions).

Dodd-Frank will undoubtedly increase the sheer number of whistleblower reports, as it promotes a “lottery mentality” that transforms a company’s own employees into bounty hunters, giving them incentive to be constantly on the prowl for the potential of scoring an elusive but lucrative award. More importantly, however, companies should assess Dodd-Frank’s impact on their existing AML compliance mechanisms, as the statute’s “original information” requirement precludes whistleblower awards for information for which the company already has knowledge. See id., as amended by Dodd-Frank, at § 21F(a)(3)(A). This gives award-seeking whistleblowers an irresistible incentive to bypass their company's internal compliance and ethics program and make direct reports to FinCEN and other U.S. federal regulators.

IV. Conclusion

Latin American companies seeking to continue expansion of their businesses abroad must adopt a comprehensive global vision in order to adequately address both existing and looming corporate compliance challenges. Understanding the nuances and complexities of various anti-corruption, anti-bribery, and AML laws is only the tip of the iceberg. Throughout this difficult process, it is imperative for Latin American multinationals to retain legal counsel that not only understands the applicable laws, but has a keen presence in and awareness of the cultures that have fostered these laws. Then, and only then, can critical compliance issues be anticipated before they take root.

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