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Clearing Broker Continues to Take Aim at SEC's Ability to Enforce the BSA

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On December 11, Judge Denise Cote of the Southern District of New York granted, in part, the Securities and Exchange Commission's ("SEC") motion for summary judgement in its action against Alpine Securities, Inc. ("Alpine"), finding that the clearing broker was liable for thousands of violations of Rule 17a-8 of the Securities Exchange Act of 1934 ("Exchange Act"), which requires broker-dealers to report potentially illegal trading activity under the Bank Secrecy Act ("BSA"). This enforcement action is significant in numerous respects, including the question raised repeatedly by Alpine – and what appears to be one of first impression – as to whether, in the absence of explicit authority, the SEC may file suit to enforce alleged violations of the BSA.

Court: The SEC May Enforce Directly BSA Compliance

In 2017, the SEC charged Alpine, a Salt Lake City-based brokerage firm, for (among other things) its alleged practice of clearing transactions for microcap stocks that were used in several manipulative schemes (see our previous post on the civil action here). In its complaint, the SEC alleges that Alpine systematically failed to file required suspicious activity reports ("SARs") for stock transactions that it flagged as suspicious. When it did file SARs, Alpine allegedly omitted the level of

detail that formed the bases for it knowing, suspecting, or having reason to suspect that a transaction was suspicious.

The SEC asserts jurisdiction against Alpine through the use of Exchange Act Section 17(a), which allows the agency to require that broker-dealers "make and keep for prescribed periods such records." Pursuant to that provision, the SEC promulgated Exchange Act Rule 17a-8, which incorporates the regulations promulgated by the Treasury Department under the BSA and requires broker-dealers to comply with them. *See* 17 C.F.R. § 240.17a-8. Put another way, the SEC has made use of its books-and-records authority as a means to enforce the requirements of the BSA.

Alpine has argued vociferously that the SEC's interpretation of the "books and record" provision as giving it the power to enforce the BSA runs contrary to legislative intent, and that the SEC is improperly attempting to "bootstrap" itself into an area where it should not be. In that regard, Alpine's argument hinges upon a strict reading of the BSA, which *expressly* delegates authority to bring such actions to the Treasury Secretary. Although the Treasury Secretary has delegated authority to *examine* BSA compliance to various other agencies, it has nonetheless retained enforcement authority for itself.

To be sure, the district court has now rejected Alpine's argument on three separate occasions. For one, the court disagrees with the clearing broker's general proposition that the present action is one seeking to enforce the BSA, as Alpine is charged with violations of Section 17(a) of the Exchange Act and Rule 17a-8 thereunder. Moreover, in its December 11 order, the court observed:

Alpine is correct that FinCEN has not expressly delegated BSA enforcement authority to the SEC. But, that ignores the separate statutory authority at issue here. The SEC has its own independent authority to require broker-dealers to make reports, and has enforcement authority over those broker-dealer reporting obligations. . . . The Exchange Act requires broker-dealers to 'make . . . such reports as the Commission . . . prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of [the Exchange Act].' One of the rules the SEC has promulgated pursuant to this statute is Rule 17a-8. . . . Rule 17a-8 is a valid exercise of the broad authority Congress conferred on the SEC . . . [it] incorporates the reporting obligations imposed on broker-dealers in that section of the Code of Federal Regulations in which the SAR regime is contained.

(internal citations omitted). Judge Cote went on to find Alpine liable for thousands of violations of Rule 17a-8; for many of the SARs at issue, the court noted that "the failures in Alpine's SAR-reporting regime were stark."

Key Takeaways

The SEC and FINRA have become increasingly active in bringing enforcement actions based on broker-dealers' alleged failures to comply with the BSA's requirements, and in particular the requirement that they file SARs (see here, here, here, here, here and here). The SEC's authority to bring such actions, however, does not appear to have ever been established by statute or judicial decision and its authority to do so is only now being challenged. Although it may be the case that its action against Alpine will not resolve this question, it

stands to reason that, so long as the SEC continues to enforce the BSA, and in the absence of an appellate court ruling on this issue, it may be wise for counsel to properly preserve the argument.