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Ex-FinCEN Heads Ask Justices To Restrain SEC

By **Dean Seal**

Law360 (August 23, 2021, 9:13 PM EDT) -- Former officials of the Financial Crimes Enforcement Network have thrown their support behind a bid for the U.S. Supreme Court to find that the U.S. Securities and Exchange Commission does not have the power to enforce a key federal anti-money-laundering law.

James H. Freis Jr. and Charles M. Steele filed a brief Friday asking the high court to take up a penny-stock brokerage firm's petition claiming that the SEC has **brazenly usurped** FinCEN's authority to enforce violations of the Bank Secrecy Act.

According to Freis, the director of the U.S. Treasury Department's financial crimes unit from 2007 to 2012, and Steele, a deputy FinCEN director from 2009 to 2011, allowing the SEC to **continue going after brokers** for shoddy reporting of suspicious activity will lead to confusion among financial institutions, diminish the value of Bank Secrecy Act data and "create multiple, conflicting" regulatory regimes.

"Supervisory agencies should not be able to unilaterally take BSA enforcement authority for themselves," Freis and Steele said.

Libertarian think tank the CATO Institute filed its own amicus brief on Friday supporting the high court petition from Alpine Securities Corp., a Utah brokerage firm that has challenged a **2017 SEC enforcement action** accusing it of Securities Exchange Act violations tied to serious lapses in its reporting of suspicious transactions.

The SEC claimed that Alpine's shoddy filings allowed "illicit actors" to escape regulatory scrutiny and maintain their market access, and that the firm violated the agency's Exchange Act recordkeeping and reporting rules, which require compliance with Bank Secrecy Act standards set by FinCEN.

Alpine was eventually found liable for more than 2,700 deficient reports of suspicious transactions and **fined $12 million** in 2019. The firm now argues that the SEC was never given authority by Congress to enforce violations of the Bank Secrecy Act. The SEC has stricter standards and higher penalties for such violations than FinCEN does.

According to Alpine, the SEC's "far more stringent" view of the reporting lapses has also led to "dueling enforcement schemes" that burden the financial industry with uncertainty, weaken accountability and are counterproductive for the purpose of rooting out money laundering.

A three-judge Second Circuit panel ruled last year that the SEC's enforcement action was properly **within the agency's authority** and not a thinly veiled attempt to enforce the Bank Secrecy Act, leading Alpine to take its case to the high court.

On Friday, Freis and Steele said the Second Circuit had erred in its review of the case because FinCEN has delegated the authority to examine financial firms for compliance with the Bank Secrecy Act, but not the authority to enforce violations.

"Indeed, although FinCEN has been directed to delegate its enforcement authority to bank regulators, the BSA does not similarly direct FinCEN to delegate its enforcement power to the SEC or other non-federal bank regulators," the two former FinCEN leaders said. "The Second Circuit's opinion missed these distinctions."

Besides lacking authority to enforce the law, the SEC also imposed an enforcement framework upon Alpine that is materially different from the framework FinCEN has "carefully constructed," with harsher monetary penalties and an "inflexible and harmful position as to what constitutes an actionable" violation of the rules for suspicious-activity reports, they said.

Unlike FinCEN, the SEC can also rely on internal administrative proceedings to pursue violators, which can result in severe sanctions, like broker license revocations and prohibitions on associating with the securities industry, the brief argued.

Faced with those prospects, broker-dealers and financial institutions are likely to react to the Second Circuit's ruling with a "better safe than sorry" approach to suspicious-activity reporting, which will result in more reports being filed defensively, even when the underlying conduct doesn't reach FinCEN's standard for reporting, "out of fear that if they do not, the [SEC] later will unreasonably second-guess their decisions," Freis and Steele said.

"Extracting useful intelligence from the more than two million [suspicious-activity reports] filed each year can at times be like looking for needles in a haystack — but with too much hay and too few needles," their brief said. "A SEC-driven infusion of low-value [reports] into FinCEN's database would only exacerbate this phenomenon and harm law enforcement and national security efforts."

Allowing the SEC or any other regulator to enforce the Bank Secrecy Act also undermines FinCEN's role as a shaper of global standards and practices for enforcement against money laundering, the two former officials said, adding that no other case presents a better opportunity for clarifying the limits of such enforcement.

Most enforcement actions related to suspicious-activity reports are resolved without heading to federal court, since most firms would prefer to "maintain harmonious relationships with regulators instead of turning to the courts," according to the brief. And most SEC actions allege Bank Secrecy Act violations as just one of multiple reporting deficiencies — as opposed to the Alpine case, where falling short on reporting was the only accusation.

"The question presented is therefore outcome-determinative," Freis and Steele said. "The court should take this unique opportunity to make clear to the courts, regulators and industry alike that absent express authorization from Congress, FinCEN has exclusive authority to enforce the BSA and its regulations."

In its brief, the Cato Institute similarly argued that the SEC is "flexing its ever-expanding prosecutorial muscle to enforce" the rules of another agency, which it has incorporated into its own rules without "further notice or opportunity for public comment."

According to the think tank, although the SEC has a duty to regulate broker-dealer recordkeeping and reporting requirements, it is violating the Administrative Procedure Act by effectively subdelegating that responsibility to FinCEN.

"These abdications of congressionally delegated responsibility, through dynamic incorporation by reference of FinCEN's rules, are inconsistent with Congress's directives and should not be permitted," according to the Cato brief.

The Cato Institute also argued that the enforcement tools available to the SEC "dwarf those available to FinCEN or the Treasury Department under the Bank Secrecy Act," leading to "wildly inconsistent positions enforcing the same legal requirement, as well as wildly inconsistent sanctions being imposed depending on which agency takes enforcement action."

"As the petition explains, these parallel enforcement regimes are a recipe for arbitrary law enforcement outcomes," the think tank told the high court.

The government has until Sept. 20 to file a response, according to court records. A spokesperson for the SEC told Law360 on Monday that the agency would "not comment beyond the public filing."

Robert Loeb, an attorney for Alpine, told Law360 on Monday that it was "extraordinary to have former heads of FinCEN file a Supreme Court brief explaining how the SEC is improperly asserting

BSA enforcement powers reserved to FinCEN,"

"The former FinCEN leaders' brief not only validates the unlawful SEC power grab discussed in our cert petition, but also details why the standards and penalties being applied by the SEC are improper as well," Loeb said in an email.

"We are very pleased to have their validation of the seriousness of the issue and the urgent need for Supreme Court intervention," he continued. "And, likewise, we are gratified to have the support of the Cato, which powerfully detailed in its amicus brief why the SEC's assertion of BSA enforcement powers violates fundamental principles of administrative law."

Cato attorney Jennifer Schulp said in an email that the SEC "cannot put its rule-making on autopilot by prospectively incorporating rules that another agency has yet to write."

"This is particularly problematic in the context of the Bank Secrecy Act, at issue here, where the SEC's own enforcement powers for books and records violations exceed FinCEN's enforcement powers, but the Second Circuit's blessing of the SEC's practice could encourage the Commission to skirt more notice and comment rulemaking to expand its own authority," Schulp said Monday. "Because these types of cases are rarely litigated, the Supreme Court should not pass on this opportunity to ensure that the SEC's authority is exercised consistent with Congressional intent."

Counsel for Freis did not respond to a request for comment.

Alpine is represented by Robert M. Loeb, Daniel Nathan and Lauren A. Weber of Orrick Herrington & Sutcliffe LLP; Maranda Fritz of Maranda E. Fritz PC; and Brent R. Baker, Jonathan D. Bletzacker and Aaron D. Lebenta of Parsons Behle & Latimer.

The SEC is represented by acting Solicitor General Brian Fletcher.

Freis and Steele are represented by Sean Marotta of Hogan Lovells US LLP.

The Cato Institute is represented by its own counsel — Ilya Shapiro, Jennifer J. Schulp and William M. Yeatman — and Russell G. Ryan, Ashley C. Parrish and Christine M. Carletta of King & Spalding LLP.

The case is Alpine Securities Corp. v. U.S. Securities and Exchange Commission, case number 21-82, before the Supreme Court of the United States.

--Additional reporting by Jon Hill. Editing by Karin Roberts.
