

[Securities Regulation Daily Wrap Up, ENFORCEMENT—M.D. Ala.: CFTC beats forex fraudster at trial, \(Feb. 24, 2020\)](#)

Securities Regulation Daily Wrap Up

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Because a "poor man's option contract" on Iraqi dinar didn't perform well, most customers were spared additional losses and "dodged a bullet they never saw coming."

After a bench trial, the CFTC obtained a final judgment imposing \$22.6 million in disgorgement and civil monetary penalties against an individual and his two companies in connection with a fraudulent foreign currency (forex) scheme. The disgorgement amount reflected the amount requested by the CFTC. However, as to the civil monetary penalty, the court granted only a tiny fraction of the amount sought, because the CFTC did not prove the defendants had harmed any particular consumer, among other factors ([CFTC v. Dinar Corp., Inc.](#), February 14, 2020, Brasher, A.).

Forex fraud. The CFTC [charged](#) Husam Tayeh and his companies, Dinar Corp., Inc. and My Monex, Inc., with fraudulently soliciting customers to engage in financed retail forex transactions mainly involving Iraqi Dinar and Vietnamese Dong, as well as misappropriating customer funds and various registration violations. In a parallel criminal case, Tayeh pleaded guilty in 2016 to one count of wire fraud and was sentenced to prison for one year and one day, and was ordered to forfeit more than \$8 million and pay \$151,517 in restitution to identified victims.

In 2018, the court in the civil action found Tayeh and his companies liable on the four counts alleged in the complaint and imposed a permanent injunction. The defendants consented to liability but left the issues of disgorgement and civil monetary penalties to be determined by the court. The parties proceeded to trial.

Disgorgement: deductions allowed? Although the parties stipulated to a total amount of overall gain of \$22,559,153 from Tayeh's scheme, they disagreed whether Tayeh should be allowed to deduct business expenses. The CFTC argued he should not be allowed to deduct any expenses, even the cost of actual foreign currency he provided to customers. Tayeh countered that a defendant cannot be ordered to disgorge money that he spent on legitimate business expenses, even if the business itself was illegitimate.

The court noted that the Eleventh Circuit has agreed with the Second Circuit's view that "defendants in a disgorgement action are not entitled to deduct costs associated with committing their illegal acts." This view was potentially contradicted by the Supreme Court's decision in *Kokesh v. SEC*, which said that an order of disgorgement that fails to account for legitimate expenses "does not simply restore the status quo; it leaves the defendant worse off." However, the ruling in *Kokesh* was expressly limited to the issue of whether disgorgement, as applied in SEC enforcement actions, was subject to Section 2462's limitations period, so *Kokesh* did not explicitly overrule the Second Circuit's interpretation.

As a practical matter, the unsettled law in this area did not come into play. Ultimately, Tayeh's evidence of his expenses was too hazy and uncertain to allow the court to consider reducing the stipulated total gain amount by his legitimate business expenses. Accordingly, the court ordered disgorgement in the amount requested by the CFTC.

Civil monetary penalty. The CFTC sought a massive civil monetary penalty of triple Tayeh's monetary gain: \$77,355,000. But the court came back with a penalty of just \$140,000 after taking into account the following factors:

- Tayeh lacked the assets to pay a fine in the range of \$70 million. However, he did not show that he was destitute and unable to pay *any* fine, particularly as there was evidence he had transferred assets to his family.

- Although Tayeh admitted to knowingly defrauding customers, the CFTC did not provide any evidence of actual harm to customers or to the market. Tayeh essentially provided a "poor man's option contract" in which customers paid a small amount of money up front with the intent to pay future installments if the Iraqi dinar became more valuable. Because dinar never experienced the massive upswing these speculators anticipated, many customers apparently never made additional payments to receive the dinar that Tayeh had promised to provide.
- Tayeh violated court restraining orders by cashing customer checks and money orders. However, he returned the money and the CFTC withdrew its motions for contempt.
- According to the sentencing findings in the criminal case, Tayeh had extremely strong family and community ties, was very remorseful, and had little or no risk of recidivism.

Accordingly, the court found that a penalty in the amount of \$140,000 was appropriate for the magnitude of the offense and enough to act as a deterrent, especially considering the related criminal conviction and substantial disgorgement amount.

In a separate order, the court released to the CFTC a pallet of Iraqi Dinar and Vietnamese Dong that had been seized from the defendants as an offset against the final judgment. At the time of seizure, the currency was valued at more than \$2.5 million USD.

The case is [No. 1:15-cv-538-ALB](#).

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