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Trends in Bank Secrecy Act/Anti-Money Laundering Enforcement

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Summary

This report provides an overview of recent trends in the enforcement of the Bank Secrecy Act (BSA), the principal U.S. anti-money laundering law regulating financial institutions.

The report begins by providing general background information on BSA penalties and enforcement. The report concludes by discussing three recent trends that commentators have observed in BSA enforcement: (1) an increase in the frequency with which BSA enforcement actions involve an assessment of money penalties, and an increase in the size of those penalties, (2) an increased emphasis by regulators on the acceptance of responsibility by institutions entering into settlement agreements for BSA violations, and (3) an increased risk of individual liability for BSA violations.

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Background

The BSA is “the primary U.S. anti-money laundering (AML) law” regulating financial institutions.¹ Among other things, the Act and related regulations impose certain reporting and recordkeeping requirements² and require certain institutions to establish AML programs that meet specified minimum standards.³ The BSA and related regulations provide for civil and criminal penalties for violations of their provisions, as well as the forfeiture of assets involved in a violation.⁴ The level of BSA penalties varies based on the type of entity charged with a violation, the type of violation, and the defendant’s level of intent.⁵

The Financial Crimes Enforcement Network (FinCEN), a bureau within the Department of the Treasury primarily charged with administering the BSA, has enforcement authority to bring administrative actions for failure to meet BSA requirements.⁶ The Office of the Comptroller of the Currency (OCC),⁷ the Federal Deposit Insurance Corporation,⁸ the Federal Reserve,⁹ the Securities and Exchange Commission,¹⁰ the Financial Industry Regulatory Authority,¹¹ and the National Credit Union Administration¹² also have authority to enforce the BSA’s requirements against the institutions they regulate. Moreover, the Department of Justice (DOJ) regularly brings criminal charges for BSA violations.¹³

BSA Enforcement Trends

Increases in Penalty Frequency and Size

Commentators have noted an increase in the frequency with which BSA enforcement actions have involved an assessment by federal regulators of monetary penalties, and an increase in the

¹ *BSA and Related Regulations*, OFFICE OF THE COMPTROLLER OF THE CURRENCY, <https://www.occ.treas.gov/topics/compliance-bsa/bsa/bsa-regulations/index-bsa-regulations.html>.

² See 31 U.S.C. §§ 5313-5316; 31 C.F.R. §§ 1010.300-1010.370, 1010.400-1010.440.

³ See 31 U.S.C. § 5318(h); 31 C.F.R. §§ 1010.200-1010.230.

⁴ 31 U.S.C. §§ 5321-5322; 31 C.F.R. §§ 1010.820-1010.840 (listing penalties).

⁵ See *supra* note 4.

⁶ See 31 U.S.C. § 310; 31 C.F.R. § 1010.810(a).

⁷ See 12 U.S.C. § 1818(i)(2); 12 C.F.R. §§ 21.11, 21.21, 163.180.

⁸ See 12 U.S.C. § 1818(i)(2); 12 C.F.R. § 326.8.

⁹ See 12 U.S.C. § 1818(i)(2); 12 C.F.R. § 208.63.

¹⁰ See 15 U.S.C. § 78u; 17 C.F.R. § 240.17a-8.

¹¹ See 31 C.F.R. § 1023.220.

¹² See 12 U.S.C. § 1786; 12 C.F.R. § 748.2.

¹³ See, e.g., *Banamex USA Agrees to Forfeit \$97 Million in Connection with Bank Secrecy Act Violations*, U.S. DEP’T OF JUSTICE (May 22, 2017), <https://www.justice.gov/opa/pr/banamex-usa-agrees-forfeit-97-million-connection-bank-secrecy-act-violations>; *Western Union Admits Anti-Money Laundering and Consumer Fraud Violations, Forfeits \$586 Million in Settlement with Department of Justice and Federal Trade Commission*, U.S. DEP’T OF JUSTICE (Jan. 19, 2017), <https://www.justice.gov/opa/pr/western-union-admits-anti-money-laundering-and-consumer-fraud-violations-forfeits-586-million>; *Commerzbank AG Admits to Sanctions and Bank Secrecy Act Violations, Agrees to Forfeit \$563 Million and Pay \$79 Million Fine*, U.S. DEP’T OF JUSTICE (Mar. 12, 2015), <https://www.justice.gov/opa/pr/commerzbank-ag-admits-sanctions-and-bank-secrecy-violations-agrees-forfeit-563-million-and>. See also 5 U.S.C. §§ 510, 515-519; 28 C.F.R. § 0.55.

size of those penalties.¹⁴ According to a June 2016 study conducted by National Economic Research Associates, Inc. (NERA), nearly 90% of BSA/AML enforcement actions from 2012 through 2015 involved an assessment of money penalties, compared to less than half of such enforcement actions from 2002 through 2011.¹⁵ NERA also observed that BSA/AML penalties “have grown substantially in both absolute terms and as a proportion of firm capital.”¹⁶ Specifically, NERA found that more than 80% of the total money penalties imposed for BSA/AML violations since 2002 have been levied after 2012.¹⁷ Moreover, according to that same report, since October 2009, nearly one-third of BSA/AML penalties have exceeded 10% of a defendant institution’s capital.¹⁸ By contrast, no penalty imposed before 2007 exceeded 9% of a defendant institution’s capital.¹⁹

Two recent BSA/AML enforcement actions stand out for their size. In 2012, HSBC Holdings plc and HSBC Bank USA N.A. (together, HSBC) were assessed a \$665 million civil money penalty, forfeited roughly \$1.2 billion, and entered into a deferred prosecution agreement (DPA) based on, among other things, their failure to maintain an effective AML program and conduct appropriate due diligence on foreign correspondent account holders.²⁰ The HSBC enforcement action was pursued concurrently by the DOJ, the OCC, the Federal Reserve, and the Department of the Treasury.²¹ Pursuant to the DPA, HSBC admitted responsibility for violating the BSA and associated regulations from 2006 to 2010.²² Specifically, HSBC admitted that during the relevant time period, it “ignored the money laundering risks associated with doing business with certain Mexican customers and failed to implement a BSA/AML program that was adequate to monitor suspicious transactions from Mexico.”²³ According to the DPA, as a result of HSBC’s failures, at

¹⁴ Sharon Brown-Hruska, *Developments in Bank Secrecy Act and Anti-Money Laundering Enforcement and Litigation*, NERA ECONOMIC CONSULTING (June 2016) at 12, http://www.nera.com/content/dam/nera/publications/2016/PUB_Developments_BSA_AML_Lit-06.16.pdf. See also *2015 Year-End Review of BSA/AML and Sanctions Developments and Their Importance to Financial Institutions*, SULLIVAN & CROMWELL LLP at 2 (Mar. 3, 2016), https://www.sullcrom.com/siteFiles/Publications/SC_Publication_2015_Year_End_Review_of_BSA_AML_3_3_16.pdf (noting that “[i]n 2015, we continued to see record-setting fines ... against financial institutions for violations of BSA/AML ... laws.”).

¹⁵ Brown-Hruska, *supra* note 14 at 12.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 7.

¹⁹ *Id.*

²⁰ United States v. HSBC Bank USA, N.A., No. 1:12-cr-00763, 2013 WL 3306161 (E.D.N.Y. July 1, 2013); Statement of Facts, United States v. HSBC Bank USA, N.A., No. 1:12-cr-00763 (E.D.N.Y., filed on Dec. 11, 2012) [hereinafter “Statement of Facts”], <https://www.justice.gov/sites/default/files/opa/legacy/2012/12/11/dpa-attachment-a.pdf>; *HSBC Holdings Plc. and HSBC Bank N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit \$1.256 Billion in Deferred Prosecution Agreement*, U.S. DEP’T OF JUSTICE (Dec. 11, 2012), <https://www.justice.gov/opa/pr/hsbc-holdings-plc-and-hsbc-bank-usa-na-admit-anti-money-laundering-and-sanctions-violations>. A “correspondent account” is an account established by a foreign bank or financial institution “to receive deposits from, or to make payments or other disbursements on behalf of” the foreign bank or financial institution, “or to handle other financial transactions related to” the foreign bank or financial institution. 31 C.F.R. § 1010.605(c)(1). BSA regulations require certain institutions to establish due diligence programs for foreign correspondent accounts that meet specified minimum standards. *Id.* § 1010.610.

²¹ See *HSBC Holdings Plc. and HSBC Bank N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit \$1.256 Billion in Deferred Prosecution Agreement*, *supra* note 20.

²² Statement of Facts at 3.

²³ *Id.*

least \$881 million in drug trafficking proceeds were laundered through HSBC Bank USA without being detected.²⁴

In a series of other BSA enforcement actions, a number of federal regulators assessed large penalties against JPMorgan Chase Bank, N.A. (JPMorgan) in January 2014 for its role in the Bernard L. Madoff Ponzi scheme. JPMorgan entered into a DPA with the U.S. Attorney's Office for the Southern District of New York concerning Madoff-related BSA violations.²⁵ Pursuant to the DPA, JPMorgan admitted that it violated the BSA by failing to maintain an effective AML compliance program and failing to file suspicious activity reports (SARs) concerning transactions related to the Madoff scheme.²⁶ JPMorgan further agreed to forfeit \$1.7 billion to compensate victims of the Madoff fraud—the largest-ever penalty for a BSA violation.²⁷ Separately, the OCC and FinCEN assessed civil money penalties of \$350 million and \$461 million, respectively, against JPMorgan for its Madoff-related BSA violations.²⁸

Emphasis on Acceptance of Responsibility

A second recent trend in BSA/AML enforcement is an increased emphasis by regulators on the acceptance of responsibility by institutions charged with BSA violations.²⁹ In 2013, FinCEN Director Jennifer Shasky Calvery indicated that FinCEN had changed its approach of generally allowing financial institutions charged with BSA violations to enter into settlements “without admitting or denying” the facts alleged in a penalty assessment.³⁰ Shasky Calvery noted that in FinCEN's most recent enforcement actions, defendant institutions had been required to stipulate to a statement of facts, reflecting the agency's new position that “[a]cceptance of responsibility and acknowledgment of the facts is a critical component of corporate responsibility.”³¹ Two years

²⁴ *Id.* As part of the DPA, HSBC also agreed to oversight by a corporate monitor to ensure the effectiveness of its AML reforms. HSBC announced last month that the DOJ agreed to release HSBC from the monitorship after finding that it had made sufficient improvements. *HSBC Holdings plc Expiration of 2012 Deferred Prosecution Agreement*, HSBC (Dec. 11, 2017), <http://www.hsbc.com/news-and-insight/media-resources/media-releases/2017/hsbc-holdings-plc-expiration-of-2012-deferred-prosecution-agreement>.

²⁵ *Manhattan U.S. Attorney and FBI Assistant Director-in-Charge Announce Filing of Criminal Charges Against and Deferred Prosecution Agreement With JPMorgan Chase Bank, N.A., In Connection With Bernard L. Madoff's Multi-Billion Dollar Ponzi Scheme*, U.S. DEP'T OF JUSTICE (Jan. 7, 2014), <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-and-fbi-assistant-director-charge-announce-filing-criminal>.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Consent Order for the Assessment of a Civil Money Penalty, In the Matter of JPMorgan Chase Bank, N.A., JPMorgan Bank and Trust Company, N.A., Chase Bank USA, N.A., AA-EC-13-109, OFFICE OF THE COMPTROLLER OF THE CURRENCY (Jan. 7, 2014), <https://www.occ.treas.gov/topics/laws-regulations/enforcement-actions/bank-enforcement-actions/ea-2014-001.pdf>; *JPMorgan Admits Violation of the Bank Secrecy Act for Failed Madoff Oversight; Fined \$461 Million by FinCEN*, FINANCIAL CRIMES ENFORCEMENT NETWORK (Jan. 7, 2014), <https://www.fincen.gov/news/news-releases/jpmorgan-admits-violation-bank-secrecy-act-failed-madoff-oversight-fined-461>. Note that FinCEN deemed its penalty satisfied by JPMorgan's payment to the U.S. Attorney's Office for the Southern District of New York. *Id.*

²⁹ See Brown-Hruska, *supra* note 14 at 2-3; *Remarks of Stephanie Brooker, Associate Director of Enforcement, Financial Crimes Enforcement Network (FinCEN)*, 2015 Bank Secrecy Act Conference (June 18, 2015), <https://www.fincen.gov/news/speeches/remarks-stephanie-brooker-associate-director-enforcement-financial-crimes-0> [hereinafter “Remarks of Stephanie Brooker”]; *Remarks of Jennifer Shasky Calvery, Director, Financial Crimes Enforcement Network*, American Bankers Association/American Bar Association Money Laundering Enforcement Conference (Nov. 19, 2013) [hereinafter “Remarks of Jennifer Shasky Calvery”], https://www.fincen.gov/sites/default/files/shared/20131119_ABA_ABA.pdf.

³⁰ Remarks of Jennifer Shasky Calvery at 4.

³¹ *Id.*

later, FinCEN's Director of Enforcement confirmed the agency's changed approach when she indicated that FinCEN operates under a "presumption" that "a settlement of an enforcement action will include an admission to the facts, as well as the violation of law."³² Along these lines, NERA's 2016 study found that four of the six largest BSA/AML violations charged between 2010 and 2015 "required the [defendant] financial institution to admit the accuracy of government claims and accept responsibility for the actions of its officers, agents, and employees who violated BSA/AML regulations."³³

Increased Risk of Individual Liability

Finally, commentators have noted an increased risk of individual liability for BSA violations.³⁴ In December 2014, FinCEN assessed a \$1 million civil money penalty against Thomas Haider, the former Chief Compliance Officer of MoneyGram International for willful violations of the BSA's program requirements and failure to timely file SARs concerning fraudulent telemarketing operations and other schemes.³⁵ FinCEN's enforcement action led to litigation over the application of the BSA to individuals. In January 2016, a federal district court held in *U.S. Department of Treasury v. Haider* that individuals can be liable for violations of the BSA's AML program requirements.³⁶ In that case, Haider argued that individuals cannot be liable for violations of the BSA's program requirements because the relevant BSA provision provides that "financial institution[s] shall establish anti-money laundering programs,"³⁷ in contrast to the BSA's provision requiring the filing of SARs, which provides that "any financial institution, and any director, officer, employee, or agent of any financial institution, [may be required] to report suspicious transactions relevant to a possible violation of law or regulation."³⁸ The court rejected this argument, reasoning that because the BSA's general civil penalty provision authorizes the imposition of money penalties against, among other individuals, "officer[s]" of financial institutions,³⁹ Haider could be held liable for violations of the BSA's AML program requirements.⁴⁰ Regulators have recently pursued a number of other BSA enforcement actions against individual compliance officers.⁴¹

³² Remarks of Stephanie Brooker.

³³ Brown-Hruska, *supra* note 14 at 4.

³⁴ *Id.* at 3; 2015 Year-End Review of BSA/AML and Sanctions Developments and Their Importance to Financial Institutions, *supra* note 14 at 7-10.

³⁵ *FinCEN Assesses \$1 Million Penalty and Seeks to Bar Former MoneyGram Executive from Financial Industry*, FINANCIAL CRIMES ENFORCEMENT NETWORK (Dec. 8, 2014), <https://www.fincen.gov/news/news-releases/fincen-assesses-1-million-penalty-and-seeks-bar-former-moneygram-executive>.

³⁶ See *U.S. Dep't of Treasury v. Haider*, No. 15-1518, 2016 WL 107940 at *3 (D. Minn. Jan. 8, 2016).

³⁷ 31 U.S.C. § 5318(h).

³⁸ *Haider*, 2016 WL 107940 at *2; 31 U.S.C. § 5318(g) (emphasis added).

³⁹ 31 U.S.C. § 5321(a)(1).

⁴⁰ *Haider*, 2016 WL 107940 at *2-3.

⁴¹ See Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order, In the Matter of Lia Yaffar-Pena, Release No. 79124, SECURITIES AND EXCHANGE COMMISSION (Oct. 19, 2016), <https://www.sec.gov/litigation/admin/2016/34-79124.pdf>; *FINRA Fines Raymond James \$17 Million for Systemic Anti-Money Laundering Compliance Failures, Former AML Compliance Officer Fined and Suspended*, FINANCIAL INDUSTRY REGULATORY AUTHORITY (May 18, 2016), <http://www.finra.org/newsroom/2016/finra-fines-raymond-james-17-million-systemic-anti-money-laundering-compliance>; Consent Order, In the Matter of Charles Sanders, AA-EC-2015-92, OFFICE OF THE COMPTROLLER OF THE CURRENCY (Mar. 15, 2016), <https://www.occ.gov/static/enforcement-actions/ea2016-038.pdf>. While these enforcement actions were not based on violations of the statutory provision at

This increased emphasis on individual prosecutions is broadly consistent with the approach outlined by the DOJ in the September 2015 “Yates Memo,” which emphasized the importance of individual accountability for corporate wrongdoing.⁴² Current Deputy Attorney General Rod Rosenstein has indicated that while he “generally agree[s] with the critique that motivated” the Yates Memo, the memo is currently under review.⁴³ Accordingly, it remains to be seen whether the DOJ under President Trump will maintain the previous Administration’s emphasis on individual responsibility in white-collar enforcement actions and prosecutions.

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issue in *Haider*, they are consistent with a broader trend of increased risk of individual liability for BSA violations.

⁴² Memorandum from Sally Quillian Yates, Deputy Att’y Gen., U.S. Dep’t of Justice to All U.S. Att’ys et al., Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), <https://www.justice.gov/archives/dag/file/769036/download>.

⁴³ *Deputy Attorney General Rod Rosenstein Keynote Address on Corporate Enforcement Policy*, NYU PROGRAM ON CORPORATE COMPLIANCE & ENFORCEMENT (Oct. 6, 2017), https://wp.nyu.edu/compliance_enforcement/2017/10/06/nyu-program-on-corporate-compliance-enforcement-keynote-address-october-6-2017/.

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