

MONEY LAUNDERING AND CRIMINAL PROSECUTIONS OF BANKS: A FOCUS OF BANK ENFORCEMENT ACTIVITY IN RECENT YEARS

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Bank Secrecy Act and Anti-Money Laundering (BSA/AML) related enforcement actions have grown to become a significant focus of the federal bank regulators' enforcement activity over the course of the last few years. With the enactment of the USA PATRIOT Act,¹ the role of banks in combating terrorist financing has only sharpened this focus. In 2004, the bank regulators undertook 437 enforcement actions, 66 of which were BSA/AML related. The following year, bank enforcement actions totaled 410 of which 53 were BSA/AML related actions. The trend of BSA/AML related enforcement actions constituting approximately 15 percent of total bank enforcement actions continued last year when bank regulators undertook 56 BSA/AML enforcement actions out of a total of 369 enforcement actions. As a result of the focus on BSA/AML compliance, BSA/AML related enforcement actions have also led to record civil money penalties (CMPs) ranging from \$10 million to \$100 million. However, civil enforcement actions are not the only penalties banks may face for BSA/AML violations.

The BSA also provides for criminal sanctions² and the Department of Justice (DOJ) has been increasingly active in pursuing criminal enforcement actions involving banks over the past few years. Continued focus on BSA/AML compliance is virtually assured as the integral role banks play in identifying money laundering and terrorist financing is not likely to change. Although every case is different, banks may learn to improve upon their compliance programs and minimize their vulnerability to civil and criminal penalties by avoiding the pitfalls that have led to past enforcement actions.

BSA/AML ENFORCEMENT

Banks are required to maintain a BSA/AML compliance program comprised of: (i) a system of internal controls to ensure ongoing compliance; (ii) daily coordination and monitoring of compliance by a designated person (*e.g.*, a BSA/AML officer); (iii) adequate training for compliance and other appropriate personnel; and (iv) independent testing of the compliance function by internal auditors or an outside party.³ BSA/AML enforcement actions differ

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¹ President George W. Bush signed the USA PATRIOT Act (Act) into law on October 26, 2001. The Act established new rules and responsibilities affecting banks including, among others, establishing standards for customer identification at account opening (including requiring checks against government-provided lists of known or suspected terrorists) and requiring bank regulators to evaluate an institution's anti-money laundering record when considering bank mergers, acquisitions, and other applications for business combinations.

² See 12 U.S.C. § 5322 (2000).

³ See, *e.g.*, 12 C.F.R. § 21.21 (2007); 12 C.F.R. § 208.63 (2007); 12 C.F.R. § 326.8 (2007); 12 C.F.R. § 563.177 (2007).

depending in part on the existence and efficacy of a bank's BSA/AML compliance program. A deficiency in only one area of the compliance program may lead to a less significant enforcement action, a memorandum of understanding or a cease and desist order, for example, than the complete absence of BSA/AML compliance program.

In addition to the four core requirements described above, comprehensive customer due diligence programs and account opening procedures are further critical components of an effective BSA/AML program. Effective customer due diligence programs play a critical role in helping banks evaluate transactions and determine whether filing a suspicious activity report (SAR) is appropriate.

Finally, banks need to design and structure their BSA/AML programs to adequately address the risk posed by the products and services being offered to the bank's customers, as well as the geographic locations in which the bank does business. As noted above, the nature of the enforcement action and its impact will differ according to the type and severity of the issues raised.

For example, in the 2004 case against Riggs Bank, N.A., the Office of the Comptroller of the Currency (OCC) in conjunction with the Financial Crimes Enforcement Network (FinCEN) assessed a \$25 million CMP for failing to implement an effective BSA/AML program and, as a result, failing to detect and investigate numerous suspicious transactions.⁴ According to the OCC's consent order, Riggs' BSA/AML program failed to comply with all four core requirements.⁵ Riggs' internal controls system failed to adequately identify and address the risks attending various customer relationships as well certain high-risk products and services. Riggs lacked effective monitoring and compliance oversight by its BSA/AML office and failed to ensure adequate training of compliance personnel. With respect to independent testing of its BSA/AML compliance program, the OCC and FinCEN found that Riggs' audits did not adequately test the compliance function and suffered from flawed testing and sampling.

This case and the corresponding large CMP illustrate a severe BSA/AML enforcement action. The bank's total failure to implement a BSA/AML program commensurate with the risks attending its customers, products and services was only magnified by the fact that the bank's BSA/AML deficiencies led the bank to fail to properly detect and investigate numerous suspicious transactions and file the requisite SARs. BSA/AML program deficiencies coupled with evidence of money laundering or other suspicious activity are significantly more likely to lead to severe enforcement actions and significant CMPs than compliance deficiencies alone.

⁴ Press Release, Office of Comptroller of the Currency, OCC Assesses \$25 Million Penalty Against Riggs Bank N.A. (May 13, 2004), *available at* <http://www.occ.treas.gov/scripts/newsrelease.aspx?Doc=5A0FP8K.xml>; Press Release, Financial Crimes Enforcement Network, FinCEN Assesses \$25 million Civil Money Penalty Against Riggs Bank N.A. (May 13, 2004), *available at* <http://www.fincen.gov/riggs6.pdf>.

⁵ Office of Comptroller of the Currency Consent Order of Civil Money Penalty No. 2004-04, In the Matter of Riggs Bank N.A. (May 13, 2004), *available at* <http://www.occ.treas.gov/FTP/EAs/ea2004-44.pdf>.

In addition to the case against Riggs, the 2004 enforcement action by the Federal Reserve Board (FRB) and FinCEN against AmSouth Bank, of Birmingham, Alabama, further exhibits how compliance deficiencies, together with evidence of actual laundering or other illegal activity, can lead to severe sanctions. The action against AmSouth involved a \$10 million CMP and cited material deficiencies in three of the four main components of AmSouth's BSA/AML compliance program – internal controls, training and independent testing.⁶ AmSouth failed to tailor its policies, procedures and controls to the levels of risk presented by certain of its customers and a number of its products. For example, the bank failed to adequately identify and monitor certain customer accounts with cash-intensive activity to determine whether or not such activity warranted further inquiry or the filing of SAR.⁷ These deficiencies in AmSouth's compliance program further resulted in the failure to identify, analyze and report suspicious activity occurring at the bank.

Bank regulators have also focused on foreign banks doing business in the United States in addition to U.S. banks doing business abroad. In 2005, the OCC and FinCEN assessed a \$24 million CMP against the New York branch of Arab Bank PLC, Amman, Jordan.⁸ The OCC alleged that Arab Bank engaged in substantial funds transfer operations that included a large numbers of transactions for parties that did not have accounts at the bank but whose transactions were originated by, or received by, other Arab Bank offices or branches, its affiliates or by third party correspondent banks.⁹ In connection with these transfers, the bank failed to adequately implement a program to monitor for suspicious activity, failed to adequately obtain information on funds transfers sufficient to determine whether it was required to file SARs, and failed to adequately audit or manage the implementation of a program to monitor money transfers for suspicious activity. In light of the high-risk characteristics, *e.g.*, geographic locations of the parties, the BSA/AML deficiencies were deemed especially serious.

The Arab Bank case provides a good example of the type of activity regulators consider high-risk and therefore deem to require additional safeguards. Wire transfers, international correspondent banking, and private banking relationships are all examples of high-risk products or services. When banks provide such services to high-risk customers, *e.g.*, money services businesses, such as check cashing services and currency dealer, or cash intensive businesses, or provide such high-risk products or services to customers in high-risk geographic locations, *e.g.*,

⁶ Press Release, Federal Reserve Board, Civil money penalty against AmSouth Bank of Birmingham (Oct. 12, 2004), *available at* <http://www.federalreserve.gov/boarddocs/press/enforcement/2004/20041012/default.htm>.

⁷ Financial Crimes Enforcement Network Assessment of Civil Money Penalty No. 2004-2, In the Matter of AmSouth Bank (Oct. 12, 2004), *available at* <http://www.fincen.gov/amsouthassessmentcivilmoney.pdf>.

⁸ Joint Press Release, Financial Crimes Enforcement Network & Office of Comptroller of the Currency, FinCEN and OCC Assess \$24 Million Penalty against Arab Bank Branch (Aug. 17, 2005), *available at* <http://www.fincen.gov/pressrelease08172005.htm>.

⁹ Office of Comptroller of the Currency Consent Order for Civil Money Penalty No. 2005-101 (Aug. 17, 2005), *available at* <http://www.occ.gov/ftp/eas/ea2005-101.pdf>.

countries identified by the Office of Foreign Assets Control, regulators will expect enhanced due diligence procedures, as well as other policies and procedures designed to take into account any additional risks.

The April 2006 joint FinCEN and Office of Thrift Supervision (OTS) enforcement action¹⁰ against BankAtlantic, of Fort Lauderdale, for the alleged failure to report millions of dollars of suspicious transactions provides another good example of a failure to adequately address the risks attending high-risk customers and geographic regions.¹¹ The allegations included BankAtlantic's failure to implement an adequate BSA/AML program and internal controls designed to detect and report money laundering and other suspicious activity. According to FinCEN, BankAtlantic's primary market of South Florida is designated as a High Intensity Money Laundering and Related Financial Crime Area as well as a High Intensity Drug Trafficking Area. BankAtlantic's customers included high net worth individuals, many of whom were non-resident aliens, as well as offshore corporations, consulates and politically exposed persons.¹² The bank's business focused heavily on wire transfers and facilitated over 100,000 funds transfer per year. Despite the high levels of risk posed by the combination of the bank's funds transfer business, geographic location and high-risk customer base, Bank Atlantic conducted business without the appropriate systems or controls in place to identify suspicious activity.

According to the agencies, the systemic defects in BankAtlantic's BSA/AML program resulted in the failure to timely file numerous SARs. This enforcement action allegedly involved tens of millions of dollars in unreported suspicious financial transactions, including more than \$10 million in suspected drug proceeds.

Similarly, in this year's joint OCC and FinCEN enforcement action against Union Bank of San Francisco, California, the regulators cited Union Bank's failure to adequately manage the risk associated with a number of its accounts maintained by Mexican casas de cambio, or exchange offices, customers the bank knew presented a heightened risk of money laundering.¹³ While the

¹⁰ Joint Press Release, Financial Crimes Enforcement Network & Office of Thrift Supervision, FinCEN and OTS Issue Bank Secrecy Enforcement Orders Against Bank Atlantic (Aug. 17, 2005), *available at* http://www.fincen.gov/newsrelease_bankatlantic.pdf.

¹¹ DOJ and the bank entered into a deferred prosecution agreement the terms of which included, among others, forfeiting \$10 million, accepting and acknowledging responsibility for the DOJ alleged conduct, and cooperating with certain requests for documents and other information. DOJ agreed to defer prosecution of the bank for 12 months, and further agreed to dismiss the charges with prejudice pending full compliance with the agreement by the bank. *See* Deferred Prosecution Agreement, U.S. v. BankAtlantic (Apr. 2006), *available at* <http://www.usdoj.gov/usao/fls/PressReleases/Attachments/060426-02BankAtlanticDPA.pdf>.

¹² Financial Crimes Enforcement Network Assessment of Civil Money Penalty No. 2006-3, In the Matter of BankAtlantic (Apr. 26, 2006), *available at* http://www.fincen.gov/bankatlantic_assessment.pdf.

¹³ Joint Press Release, Financial Crimes Enforcement Network & Office of Comptroller of the Currency, FinCEN and OCC Assess Civil Money Penalties against Union Bank of California (Sept. 17, 2007), *available at* http://www.fincen.gov/union_bank.pdf.

Union Bank action involved a deficiency in only one of the four core BSA/AML program elements, *i.e.*, failing to implement an adequate BSA/AML compliance program designed to identify and report transactions indicative of money laundering or other illegal activity, Union Bank also failed to comply with a 2005 OCC memorandum of understanding that required the bank to improve its process for identifying and reporting suspicious transactions.¹⁴ The regulators assessed Union Bank a \$10 million CMP.

Bank regulators are not likely to shift their enforcement focus away from money laundering anytime soon. In evaluating their BSA/AML programs, institutions should focus on (i) the risks that their business profile and customers create and understand how to design and implement a compliance program to adequately address those risk; (ii) have strong customer identification programs in place and thoroughly documented account opening procedures; and (iii) encourage a culture and leadership dynamic that focuses on successful money laundering compliance.

CRIMINALIZATION OF BANKING

Over the course of the last two decades, a number of laws, including FIRREA, FDICIA, The Crime Control Act, The USA PATRIOT Act, Sarbanes-Oxley, *etc.*, have expanded on areas of criminal exposure for banks and bankers. Criminal authorities have, according to the evidence in the last decade, significantly increased their presence, investigations and prosecutions in the banking industry. In that regard, prosecutors have been pursuing criminal actions against a greater number of banks and have been entering into an increasing number of deferred-prosecution agreements (DPAs) with banks and other financial institutions. The greater number of DPAs likely supports an effort of seeking to impose a sense of criminal sanction but avoiding the stigma of indictment that could destroy a company. Under a DPA, a company avoids prosecution by agreeing to particular terms. DOJ will generally defer indictment for a period ranging from 18 months to several years. Commonly, the terms of DPAs include publicly acknowledging responsibility, paying a fine, agreeing to implement reform initiatives (usually monitored by an independent third party), as well as agreeing to cooperate with any ongoing investigation. After demonstrating compliance with the agreement and successful reform, DOJ will generally dismiss its charges when the term of the agreement expires. Violating the terms of an agreement will likely trigger prosecution.

While the BSA has included criminal sanction for more than thirty years, criminal penalties for banks, *e.g.*, for the failure to file SARs, were virtually non-existent until a number of years ago. In 2002, the first criminal case against a bank for the failure to file SARs involved Broadway National Bank of New York.¹⁵ The Broadway case involved over \$120 million in bulk cash and

¹⁴ Financial Crimes Enforcement Network Assessment of Civil Money Penalty No. 2007-2, In the Matter of Union Bank of California, N.A. (Apr. 26, 2006), *available at* http://www.fincen.gov/ASSESSMENT_In_the_Matter_of_Union_Bank_of_California.pdf.

¹⁵ Press Release, U.S. Attorney's Office for the Southern District of N.Y., Manhattan Bank Pleads Guilty to U.S. Criminal Charges for Failure to Report \$123 Million in Suspicious Cash Deposits (Nov. 27, 2002), *available at* http://www.cbp.gov/xp/cgov/newsroom/news_releases/archives/legacy/2002/112002/11272002.xml.

structured deposits¹⁶ made at the bank over a period of two years. Broadway pleaded guilty to three criminal counts: failing to file SARs, failing to establish or maintain an adequate BSA program, and assisting customers in structuring deposits to evade reporting requirements. In conjunction with the guilty plea, the bank also paid a \$4 million criminal fine.

Since the Broadway case, criminal authorities have sought criminal sanctions in an increasing number of cases against banks. For example, all but one of the cases discussed in the preceding section included a related action by DOJ. In the Riggs case, for example, the bank pleaded guilty to failing to timely file accurate SARs.¹⁷ Riggs also paid a \$16 million criminal fine in addition to the \$25 million CMP assessed by the OCC and FinCEN. The AmSouth case involved a DPA in connection with the bank's guilty plea for one count of failing to file SARs in a timely, complete and accurate manner.¹⁸ That case also involved a DPA and a \$40 million civil forfeiture. The more recent cases, BankAtlantic¹⁹ and Union Bank,²⁰ have also involved criminal sanctions.

While criminal penalties for banks have hardly become the norm, a greater number of enforcement actions include criminal sanctions. What seems clear from past example of criminal sanctions against banks in the money laundering context is that DOJ seeks to prosecute banks involved in money laundering that have systemic deficiencies in their BSA/AML compliance programs. Thus, in addition to facing significant CMPs imposed by bank regulators, banks with severe and far-reaching BSA/AML compliance deficiencies can also expect to have to deal with DOJ. Not to mention the stigma attached to corporate criminal indictments, criminal prosecution adds an additional significant layer of complexity and cost to enforcement actions. Banks that focus on the core elements of BSA/AML compliance, implement strong customer due diligence programs and understand how to tailor their compliance programs according to different levels of risk posed by their customers, products and services offered, and geographic regions served may be able to avoid the most severe enforcement actions in cases where compliance deficiencies do come to light.

¹⁶ Structuring deposits refers to the process of breaking a large sum of money intended for deposit into numerous smaller deposits in order to avoid triggering BSA-required reporting for cash transaction involving sums of over \$10,000.

¹⁷ Riggs pleaded guilty to one count of violating 31 U.S.C. § 5318(g) and § 5322. *See* Press Release, U.S. Department of Justice, Riggs Bank Enters Guilty Plea and Will Pay \$16 Million Fine for Criminal Failure to Report Numerous Suspicious Transactions (Jan. 27, 2005), *available at* http://www.usdoj.gov/usao/dc/Press_Releases/Jan_2005/0530.html.

¹⁸ Deferred Prosecution Agreement, U.S. v. AmSouth Bancorporation and AmSouth Bank (Oct. 2004), <http://www.usdoj.gov/usao/mss/documents/pressreleases/october2004/was15759061.pdf>.

¹⁹ Press Release, Department of Justice, BankAtlantic Enters Into Deferred Prosecution Agreement, Forfeits \$10 Million To Resolve Money Laundering And Bank Secrecy Act Violations (Apr. 26, 2006), *available at* http://www.usdoj.gov/opa/pr/2006/April/06_crm_248.html.

²⁰ Press Release, Department of Justice, Union Bank of California Enters into Deferred Prosecution Agreement and Forfeits \$21.6 Million to Resolve Bank Secrecy Act Violations (Sept. 17, 2007), *available at* http://www.usdoj.gov/opa/pr/2007/September/07_crm_726.html.