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Expert Analysis

Justice Department Flexes Muscle In Anti-Money Laundering by Banks


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At a public hearing on July 31, 2012, Assistant Attorney General Lanny Breuer asserted that "financial institutions are often law enforcement's first line of defense" in the war against money laundering.[1] Despite this sentiment, a recent trend seems to be to treat financial institutions less like the Justice Department's ally and more like public enemy number one when it comes to prosecutions involving international financial transactions. In connection with a series of high-profile cases against financial institutions, federal prosecutors have turned their attention to the efficacy of institutional anti-money laundering programs, announcing their intention to pursue non-compliance cases traditionally policed by federal regulators "whose punishments usually amount to a strong slap on the wrist."[2] Recent prosecutions and investigations of global financial institutions prove the point, demonstrating nascent attempts by federal prosecutors to criminalize regulatory non-compliance.

Historically, federal money laundering cases typically grew out of the investigation of underlying crimes, such as mail, wire or securities fraud, drugs, or corruption, and the discovery that the proceeds of these crimes had been laundered through the U.S. financial system. Money laundering charges often were added on to the substantive criminal charges and financial institutions were sometimes implicated for aiding and abetting the laundering of funds.

The money laundering prosecutions and investigations recently undertaken by federal prosecutors look quite different. Often, such cases do not arise out of substantive criminal violations, but instead focus on what the government believes are improper banking procedures or weaknesses in the institution's compliance procedures.

Trends in Investigations

"Sanctions Busting." One recent development in the Justice Department's efforts is its focus on activity known as "sanctions busting." This entails a financial institution engaging in transactions with a sanctioned foreign country deemed to pose a threat to national security, foreign policy, or the economy of the United States without properly identifying the transactions' connection with the sanctioned country.[3] In June 2012, the government reached a settlement of its money laundering case against ING in which the bank agreed to forfeit $619 million to settle allegations of violating the International Emergency Economic Powers Act (IEEPA), the Trading with the Enemy Act (TWEA), and applicable New York state law.

The federal and state prosecutors charged that from the early 1990s through 2007, the bank allowed the movement of billions of dollars through the U.S. financial system in more than 20,000 transactions involving sanctioned governments in which "ING eliminated payment data from financial transactions that would have revealed the involvement of sanctioned countries and entities, including Cuba and Iran; advised sanctioned clients on how to conceal their involvement in U.S. dollar transactions; fabricated ING Bank endorsement stamps for two Cuban banks to fraudulently process U.S. dollar travelers' checks; and threatened to punish certain employees if they failed to take specified steps to remove references to sanctioned entities in payment messages."[4]

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In another case, British bank Standard Chartered was accused of similarly permitting more than 60,000 banking transfers involving $250 billion utilizing records that omitted information that would have revealed the connection to Iranian business transactions.[5] Although no specific instances of improper business transactions were identified, in August 2012, the bank agreed to pay $340 million to the New York state regulator, the Department of Financial Services, to settle claims that the bank's alleged illicit dealings had left the U.S. financial system "vulnerable to terrorists, weapons dealers, drug kingpins and corrupt regimes."[6] Media reports indicate that "[s]ome federal authorities worry the deal has the potential to undercut a sweeping settlement between the bank and federal regulators, including the Federal Reserve and the Treasury Department."[7]

Deficient Anti-Money Laundering Programs. Like the traditional money laundering cases, the sanctions busting cases focus on historical conduct. The Justice Department's latest shift to prosecuting banks and other financial institutions for failing to comply with anti-money laundering laws enables the government to focus on broad programmatic processes rather than specific underlying criminal conduct.

The Bank Secrecy Act (BSA) imposes specific anti-money laundering obligations on banks and other defined financial businesses[8] operating in the United States. For instance, financial institutions are required to file a "Currency Transaction Report" (CTR) for any transaction involving more than $10,000 in currency.[9] The institutions also must file a "Suspicious Activity Report" (SAR) whenever they detect a "known or suspected violation of Federal law or a suspicious transaction related to a money laundering activity or a violation of the [BSA]."[10] CTRs and SARs are filed with the Treasury Department's Financial Crimes Enforcement Network (FinCEN), which investigates possible violations of anti-money laundering laws. Finally, the BSA requires financial institutions to develop, implement, and maintain an effective anti-money laundering program reasonably designed to prevent the institution from being used to facilitate money laundering.[11]

When it comes to BSA non-compliance, federal prosecutors have long relied on deferred prosecution agreements which "present a more palatable option when large companies are under scrutiny, allowing wrongdoers the chance to reform without causing collateral damage to innocent shareholders and employees."[12] Pursuant to these agreements, the government will recommend the dismissal of charges against the institution "provided the company fully implements the significant anti-money laundering and Bank Secrecy Act measures required by the agreement."

Although the company neither admits nor denies wrongdoing under the agreement, it frequently forfeits millions of dollars to the government pursuant to the BSA's forfeiture provisions. At the same time, the institution may settle with other federal regulators, agreeing to pay an assessed

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penalty which may or may not run concurrently with amounts paid to the Justice Department.[13]

The use of deferred prosecution agreements to resolve non-compliance issues may be coming to an end. This past June, the Justice Department brought four separate criminal cases against check-cashing businesses and their owners for failing to implement an effective anti-money laundering program and failing to file CTRs.[14] These cases are remarkable for a number of reasons. First, they are among the first BSA prosecutions brought against a financial institution other than a bank. They also are the first where individuals were indicted for failing to implement an effective anti-money laundering program.[15] Finally, instead of focusing on specific historical transactions that skirt the law, these cases focus on ongoing conduct and overall compliance.

An even bigger prosecution for the failure to maintain an anti-money laundering program may be on the horizon. For more than two years, the global bank HSBC has been under investigation by federal regulators and the Senate Permanent Subcommittee on Investigation as a result of widespread and long-standing deficiencies in the bank's anti-money laundering program, including a backlog of more than 17,000 unreviewed alerts of possible suspicious activity, a failure to file timely Suspicious Activity Reports with law enforcement, and inadequate staffing and resources for the program.[16]

On July 16, 2012, the subcommittee issued a report focusing on five anti-money laundering program deficits within HSBC's key U.S. affiliate, HBSC Bank USA, N.A., (HBUS). Much of the report focuses on the correspondent banking services that HBUS provided to more than 1,200 other banks and HSBC affiliates worldwide. Correspondent banking services are those provided by one bank to another, such as the movement of funds, currencies exchange, cashing of monetary instruments, and carrying out other financial transactions. These services "can become a major conduit for illicit money flows unless U.S. laws to prevent money laundering are followed."[17]

Observers believe the cases based on a federal institution's failure to comply with the requirements of the BSA appeal to federal prosecutors because, in addition to the hefty financial penalties that can be imposed, the government is able to bring charges against "a range of financial institutions, from commercial banks and credit unions, to broker-dealers and insurers, to casinos and pawnbrokers."[18]

Regulatory Oversight

The Senate Subcommittee's HSBC report was extremely critical of the Office of the Comptroller of Currency, the federal regulator responsible for supervising HBUS, opining that the OCC should have taken stronger action against the bank. "[U] nlike other U.S. bank regulators, the OCC does not treat [anti-money laundering program] deficiencies as a matter of bank safety and soundness or a management problem. Instead, it treats AML deficiencies as a consumer compliance matter, even though AML laws and consumer protection laws have virtually nothing in common."[19]

This conclusion echoes "a rising chorus of complaints that wrongdoing in the banking industry has become merely the cost of doing business with little criminal risk or brand-killing ramifications."[20] Perhaps it is this sentiment that has spurred the Justice Department to invade an area that has always been perceived to be under the supervision of state and federal financial regulators. Others believe that these investigations have been a long time coming and were simply "put on hold during the financial crisis" of 2008.[21]

A number of federal and state regulators have responsibility for monitoring financial institution compliance with the anti-money laundering provisions of the BSA. These agencies conduct examinations of an institution's anti-money laundering program on a periodic basis as part of their mission to ensure the "safety and soundness" of the financial institutions they supervise.[22] Federal regulators have a number of informal and formal enforcement tools at their disposal should they find a financial institution to be out of compliance with anti-money laundering statutes.

Informal actions may include a request for a commitment letter from the institution pledging specific corrective action. Generally, these actions are nonpublic and unenforceable in court. Formal enforcement actions, such as the issuance of a cease and desist order, the imposition of a civil money penalty, or the revocation of a bank's charter, are public and enforceable in court.[23] Often, civil money penalties imposed on banks for failure to maintain an effective anti-money laundering program may reach the tens or hundreds of million dollars, driven in part by the sheer number of regulators that seek to recover under the anti-money laundering laws.[24]

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A federal regulator also may refer a matter related to a non-compliant financial institution to the Justice Department for criminal prosecution. Criminal penalties associated with a violation of the BSA's anti-money laundering provisions provide for fines up to $500,000 and/or 10 years imprisonment for willful violations. In addition, with respect to the violation of the provision requiring a financial institution to maintain an anti-money laundering program, the statute states that "a separate violation occurs for each day the violation continues and at each office, branch, or place of business at which a violation occurs or continues."[25]

Conclusion

Although no criminal case has been filed against HSBC, last month the bank set aside $700 million for anticipated fines associated with the U.S. investigation.[26] Banks long used to measuring the effectiveness of their anti-money laundering program against the standards set forth by bank regulators will now have to consider whether their programs measure up to Justice Department standards, especially in situations where federal regulators are more lax in enforcement. Financial institutions have estimated that they spend in excess of $100 million annually in order to comply with the BSA's anti-money laundering laws.[27] Though the cost of compliance is high, the cost of defending criminal charges is likely to be higher.

1. Remarks as Prepared for Delivery by Assistant Attorney General Lanny A. Breuer at Public Hearing on Potential Regulation to Strengthen Anti-Money Laundering Safeguards, Department of Justice (July 13, 2012).

2. Aruna Viswanatha and Brett Wolf, "U.S. Justice Department Eyes Compliance Lapses in Next Era of Money-Laundering Cases," Reuters (Sept. 4, 2012).

3. One of the authors was involved in representations in connection with the investigation resulting in the ING and Standard Chartered sanctions busting cases discussed in this article. The information provided in this article is based only on publicly available documents and media reports.

4. Information, *United States v. ING Bank*, 12Cr136 (D.D.C. June 12, 2012); Department of Justice Press Release, "ING Bank N.V. Agrees to Forfeit $619 Million for Illegal Transactions With Cuban and Iranian Entities" (June 12, 2012).

5. Jessica Silver-Greenberg, "British Bank in $340 Million Settlement for Laundering," *New York Times* (Aug. 14, 2012).

6. Harvey Morris, "British Bank Fights U.S. Charges of Dealing With Iran," *The New York Times* (Aug. 7, 2012).

7. Silver-Greenberg, "British Bank in $340 Million Settlement for Laundering."

8. The lengthy list of businesses that qualify as "financial institutions" is set forth in 31 U.S.C. §5312(a)(2).

9. 31 U.S.C. §5313(a); 31 C.F.R. §103.22.

10. 31 U.S.C. §5318(g)(3); 12 C.F.R. §21.11. The BSA prohibits the financial institution and its directors, officers, agents and employees from disclosing the existence of a SAR to any person involved in the transaction. 31 U.S.C. §5318(g)(2)(A)(i). This prohibition presents challenges for banks, especially in the context of discovery in civil actions based on a financial institution's obligation to file SARs, as well as for counsel representing individuals who may be the subject of a SAR.

11. 31 U.S.C. §5318(h); 31 C.F.R. §1022.210(a). Anti-money laundering programs must meet four minimum requirements under the BSA: 1) the AML program must have a system of internal controls to ensure ongoing compliance; 2) an individual within the institution must be designated responsible for managing AML compliance; 3) AML training must be provided for appropriate personnel; and 4) the program must allow for independent testing of AML compliance.

12. Jessica Dye, "U.S. Official Defends Use of Deferred-Prosecution Deals," Thompson Reuters (Sept. 14. 2012).

13. See, e.g., Press Release, United States Attorney's Office in the Southern District of Florida, "Wachovia Enters into Deferred Prosecution Agreement" (March 7, 2010); Department of Justice, "Sigue Corporation and Sigue LLC Enter into Deferred Prosecution Agreement and Forfeit $15 Million to Resolve Bank Secrecy Act Violations" (Jan. 28, 2008).

14. See Indictment, *United States v. Bargain Island*, 12Cr396 (E.D.N.Y. June 12, 2012); Superseding Indictment, *United States v. Belair Payroll Services*, 11Cr591 (E.D.N.Y. June 12, 2012); Indictment, *United States v. AAA Cash Advance*, 12Cr559 (C.D.Cal. June 12, 2012); Indictment, *United States v. G&A Check Cashing*, 12Cr560 (C.D.Cal. June 12, 2012).

15. Viswanatha and Wolf, "U.S. Justice Department Eyes Compliance Lapses in Next Era of Money-Laundering Cases."

16. United States Senate Permanent Subcommittee on Investigations, Majority and Minority Staff Report, "U.S. Vulnerabilities to Money Laundering, Drugs, and Terrorist Financing: HSBC Case History" ("HSBC Report") at p. 3 (July 17, 2012).

17. United States Senate Permanent Subcommittee on Investigations, Press Release, "HSBC Exposed U.S. Financial System to Money Laundering, Drug, Terrorist Financing Risk" (July 16, 2012).

18. Viswanatha and Wolf, "U.S. Justice Department Eyes Compliance Lapses in Next Era of Money-Laundering Cases."

19. HSBC Report at p. 8.

20. Kevin Voigt, "Banks: Too Big to Prosecute?" CNN.com (Aug. 15, 2012).

21. Jessica Silver-Greenberg and Ben Protess, "Money-Laundering Inquiry is Said to Aim at U.S. Banks," *The New York Times* (Sept. 14, 2012).

22. HSBC Report at p. 287.

23. Id. at p. 291-92.

24. See, e.g., Press Release, Federal Reserve, "Civil Money Penalties Assessed against American Express Bank International and American Express Travel Related Services Company, Inc." (Aug. 6, 2007) (American Express paid $55 million pursuant to a deferred prosecution agreement with the Justice Department, $20 million concurrent with the Justice Department penalty to the Federal Reserve and $25 million, $15 million of which was concurrent with the Justice Department penalty to FinCEN).

25. 31 U.S.C. §5322(c).

26. Viswanatha and Wolf, "U.S. Justice Department Eyes Compliance Lapses in Next Era of Money-Laundering Cases."

27. David Zaring, "Administration by Treasury," 95 Minn. L. Rev. 187, 222-223 (November 2010).