

WHITE-COLLAR CRIME

Expert Analysis

Bank Secrecy Act Prosecutions: Why Few Individuals Are Charged

Clarification: The authors, in May 2015, reported a clarification to the Sept. 2, 2014, column, "Bank Secrecy Act Prosecutions: Why Few Individuals Are Charged," in one section that stated: "According to the government, Miller controlled all operations at the bank and failed to establish an effective AML program, which included the appointment of a compliance officer and the implementation of AML policies and procedures." The government, in fact, claimed that Miller did not appoint a competent BSA compliance officer and failed to implement policies and procedures to protect against money laundering.

In recent years white-collar criminal enforcement has been marked by a string of high-profile prosecutions of banks for violations of the Bank Secrecy Act, the most recent against BNP Paribas.¹ The BSA, enacted in 1970, requires domestic financial institutions to establish and maintain effective anti-money laundering (AML) programs. The law has been amended over time, notably following the 9/11 attacks, to enhance AML requirements and widen the range of institutions required to have AML programs.

Notwithstanding a series of multi-billion dollar settlements, the government's enforcement efforts have met with criticism.² In addition to claiming that the banks themselves have not been sufficiently punished, critics have lamented that individuals are not being held accountable for criminal conduct—a common complaint about government enforcement efforts since the 2007-08 financial crisis.³ In fact, individuals have been prosecuted for BSA violations, but not in the recent cases against global financial institutions that have captured media headlines.

In this article, we suggest that the relative dearth of individual prosecutions lies, quite appropriately, in the



By
**Elkan
Abramowitz**

And
**Jonathan
Sack**

nature of the criminal violations at issue—in essence, the BSA imposes obligations on organizations to take certain actions, rather than prohibiting individuals from taking certain actions—and lies further in the practicalities of investigating the extrajurisdictional conduct of global financial institutions. We should not be surprised, therefore, that civil penalties have begun to receive heightened interest among enforcement authorities as a means of sanctioning and deterring individual misconduct—a development seen in other areas of white-collar enforcement since the financial crisis.⁴

BSA and Institutional Cases

The particular obligations imposed by the BSA, as originally enacted and amended over time, help explain why charges against institutions, not individuals, are most common. The law requires financial institutions to establish and maintain effective money laundering programs.⁵ Intended to "ensure that financial institutions...implement programs to combat their vulnerabilities to

those who would seek to use them to transfer or launder illegal funds,"⁶ the law calls on financial institutions to establish and maintain systems to detect irregularities and patterns of transactions that may be indicators of money laundering.

In furtherance of institutional obligations, bank employees must be trained to detect suspicious activity, and compliance officers are tasked with reviewing the information generated under the required monitoring system.⁷ A financial institution is required to file a Suspicious Activity Report (SAR) when it "knows, suspects, or has reason to suspect" that a transaction involves funds derived from illegal activities or has no apparent business or lawful purpose.⁸

Criminal liability arises under 31 U.S.C. §5322 when a person—an entity or individual—willfully violates the requirement that financial institutions establish and maintain an adequate AML system. Willfulness requires adequate proof that the defendant acted with knowledge of the legal requirements and a purpose to disobey the law.⁹

Against this background, the prevalence of criminal charges against institutions rather than individuals is not surprising. BSA violations are largely institutional in nature. Although individuals play roles in creating and implementing the required systems, their responsibilities tend to be discrete and widely

ELKAN ABRAMOWITZ and JONATHAN SACK are members of Morvillo Abramowitz Grand Iason & Anello. GRETCHAN R. OHLIG, an attorney, assisted in the preparation of this article.

distributed. Rarely would an individual be responsible for preventing such a system from being created or failing to maintain such a system. The failure to have adequate AML systems is typically the collective responsibility of an institution as a whole. As a matter of logic and fairness, criminal liability would tend to be institutional in nature.

In the BSA context, common notions of corporate criminal liability are turned on their head. In fraud and other white-collar prosecutions, the primary violator is typically the individual, and corporate criminal liability is vicarious. With the BSA, in contrast, the primary violation is institutional—the institution's failure to have adequate systems.

Recent high-profile prosecutions have generally reflected the logic of institutional as distinct from individual liability. As an example, in December 2012, HSBC entered into a deferred prosecution agreement with the Eastern District of New York's U.S. Attorney's Office and related agreements with the Office of the Comptroller of the Currency and the Federal Reserve. Although the bank terminated most of its senior management, "clawed back" deferred compensation bonuses given to its most senior AML and compliance officers, and agreed to partially defer bonus compensation for its most senior executives during the period of the five-year deferred prosecution,¹⁰ no individual prosecutions were brought.

Prosecutions of Individuals

The BSA prosecutions that have been brought against individuals involve defendants who had a senior and/or sensitive position with direct responsibility for AML compliance, particularly those who might have a financial or job-related incentive to violate the law. Such circumstances are more likely to be found in institutions considerably smaller than those that have recently been in

the news.

In September 2013, H. Jack Miller, the president and CEO of Public Savings Bank, was charged in the Eastern District of Pennsylvania with one count of willful failure to maintain an effective AML program and one count of willful failure to file a SAR (Suspicious Activity Report).¹¹ Miller pleaded guilty and was sentenced in July 2014 to three years of probation and a fine of \$5,000.¹² According to the government, Miller controlled all operations at the bank and failed to establish an effective AML program, which included the appointment of a compliance officer and the implementation of AML policies and procedures. Further, Miller failed to file a SAR in connection with an \$86,400 wire transfer into the account of a foreign account holder whom Miller suspected was operating an unlicensed money transmission business.¹³

The failure to have adequate AML systems is typically the collective responsibility of an institution as a whole. Criminal liability would tend to be institutional in nature.

Similarly, in June 2012, the owner of a Flushing, N.Y., check cashing company was charged with failing to follow reporting and AML requirements for more than \$19 million in transactions. According to court records, the defendant oversaw a system by which the company accepted checks in excess of \$10,000 written on behalf of shell corporations that appeared to be health-care related, but in fact did no legitimate business. Currency transaction reports filed by the company falsely stated that the checks were cashed by foreign nationals, when in fact no identification documents were presented

by said individuals. The owner of the company was sentenced in June 2014 to three years of probation and restitution of almost \$1 million.¹⁴

These cases stand in contrast to violations by large global banks in which many individuals have responsibilities for AML systems, and it is difficult to say that any one of them, rather than the banks as a whole, willfully violated the law.

Practical Realities

As these prosecutions suggest, individuals who play a critical role in BSA violations—even in large global banks—can sometimes be identified. In the January 2014 information charging JPMorgan Chase Bank, N.A., with BSA violations involving Bernard Madoff's Ponzi scheme, the government alleged that at least one individual, Madoff's "relationship manager," was central to causing the violations.¹⁵ In general, individuals might be involved in falsifying records, concealing or ignoring red flags, failing to file SARs or otherwise failing to take obvious steps to detect and fight money laundering.¹⁶ In cases where evidence is found implicating individuals, the barriers to prosecution may turn more on practical considerations than on an absence of substantive liability.

Notably, the investigations that have led to recent high-profile prosecutions have taken many years to complete. The underlying conduct often took place many years earlier, when different individuals were in positions of authority. For example, in the case against HSBC, filed in 2012, the misconduct occurred from 2006 to 2010, and in the case against BNP Paribas, filed in 2014, the underlying misconduct occurred over a number of years dating back to 2004. While law enforcement authorities have considerable leverage to compel production of documents from global financial institutions,¹⁷ the process of producing and analyzing documents typically takes

many years. Similarly, while such institutions can often cause current employees to meet with government investigators, former employees may lie beyond the compulsion of the government or persuasion of former employers.

The practical effect is that the five-year statute of limitations runs out in many cases before prosecutors can identify and consider charging individuals. In long-running investigations, heavily regulated banks will typically toll the running of the statute in order to maintain a dialogue with prosecutors and regulators and for fear of adverse action if tolling is refused. In contrast, individuals often have little or no incentive to toll the running of the statute. And in many instances, a government investigation might not even ripen sufficiently for the government to identify and seek tolling agreements in time to be able to prosecute an individual.

The calls for holding individuals responsible are understandable. In April 2014, the Senate Caucus on International Narcotics Control published a report titled "The Buck Stops Here: Improving U.S. Anti-Money Laundering Practices," which urges enhanced enforcement of the AML laws, including criminal sanctions "against both the financial institutions and individuals knowingly and intentionally responsible for the criminal activity more forcefully."¹⁸ But practical realities as well as substantive legal constraints may limit the government's ability to prosecute individuals for AML violations

Civil Liability

Given these limitations, civil enforcement may come to the fore. Federal banking regulators are authorized to bring civil money penalty actions against individuals as well as banks for violations of the BSA, and may seek to remove an individual from employment in the banking industry for violating AML

requirements.¹⁹ Treasury Undersecretary David Cohen recently testified before the Senate Banking Committee that FinCEN, the agency charged with enforcing BSA compliance, was looking for more opportunities to issue civil penalties against individual employees.²⁰ A recent instance of civil enforcement involves potential charges threatened against Thomas Haider, the former chief compliance officer of MoneyGram International Inc., for the money-transfer company's AML failures.²¹

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Conclusion

When companies, especially financial institutions, and not individuals are charged with serious offenses, criticism is now common. Yet such criticism may be particularly unwarranted in the high-profile BSA prosecutions of recent years, where criminal liability rests on an institutional failure to maintain appropriate systems and controls. And even in those cases when culpable individuals can be identified, they may be beyond the reach of prosecution—for reasons of timing or jurisdiction. As the BSA cases suggest, before passing judgment it is important to understand the particular factual, legal and practical considerations that give rise to the government's charging decisions.

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1. Press Release, Department of Justice, "BNP Paribas Agrees to Plead Guilty and to Pay \$8.9 Billion for Illegally Processing Financial Transactions for Countries Subject to U.S.

Economic Sanctions" (June 30, 2014). See also United States Attorneys' Bulletin, "Prosecuting Financial Institutions and Title 31 Offenses," Vol. 61, No. 5 at p. 19 (Sept. 2013) (listing banks that have been prosecuted).

2. Yves Smith, "Opinion: Punish Bankers Not Banks for Crimes," CNN.com (July 11, 2014); John Schults, "BNP Paribas Agrees to Record \$8.8bn Settlement for US Sanctions Violations," Reuters (June 30, 2014).

3. Elkan Abramowitz and Jonathan Sack, "Why So Few Individuals? Government's Prosecution of Corporate Misconduct," NYLJ (March 5, 2013).

4. Elkan Abramowitz and Jonathan Sack, "The 'Civilizing' of White-Collar Criminal Enforcement," NYLJ (May 7, 2013).

5. 31 U.S.C. §5318(h).

6. 147 Cong. Rec. H7129, H7204 (daily ed. Oct. 23, 2001).

7. 31 U.S.C. §5318(h)(1); 12 C.F.R. §21.21.

8. 31 U.S.C. §5318(g); 12 C.F.R. §21.11.

9. *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994).

10. *United States v. HSBC Bank USA*, No. 12cr00763, DPA ¶5b (E.D.N.Y. Dec. 11, 2012).

11. Press Release, Department of Justice, "Bank President Charged with Failure to Comply With Requirements of the Bank Secrecy Act" (Sept. 11, 2013).

12. *United States v. H. Jack Miller*, 13-cr-445 (E.D.Pa.).

13. See Justice Department Press Release.

14. *United States v. Panzera*, 11-cr-591 (E.D.N.Y.). See also Press Release, Department of Justice, "Los Angeles Check Cashing Store, Head Manager and Compliance Officer Sentenced for Violating Anti-Money Laundering Laws" (Jan. 14, 2013) (the head manager and compliance officer of check cashing store sentenced for AML non-compliance for allowing individuals to anonymously cash large numbers of checks without filing required forms; manager received sentence of five years imprisonment; compliance officer sentenced to eight months).

15. Press Release, Department of Justice, "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" (Jan. 7, 2014).

16. The BNP Paribas, HSBC, and JPMorgan Chase prosecutions in particular identified individual wrongdoing.

17. See 31 U.S.C. §5318(k)(3) (provision of Patriot Act authorizing federal government to subpoena records from foreign bank that maintains a correspondent account with a U.S. bank).

18. United States Senate Caucus on International Narcotics Control, "The Buck Stops Here: Improving U.S. Anti-Money Laundering Practices" at pp. 3-4 (April 2013) (available at: http://www.feinstein.senate.gov/public/index.cfm/files/serve/?File_id=311e974a-feb6-48e6-b302-0769f16185ee).

19. 12 U.S.C. §1818(i); 1786(k); 31 U.S.C. §5321.

20. Testimony of David S. Cohen before the Senate Committee on Banking, Housing, and Urban Affairs (March 7, 2013).

21. Brett Wolf, "Ex-MoneyGram Compliance Chief Put on Leave as U.S. Fine Looms," Reuters.com (May 2, 2014).