

# BNA Insights

## Enforcement

*The expansion of the role and the responsibilities of bank compliance officers in the last decade has been dramatic. Compliance officers today now more often have a seat at the boardroom table and the ears of the CEO and other members of senior management. But the authors argue that while the position of compliance officer has become more burdensome and complex, and often much more highly compensated, it also now comes with increased pressure from regulators.*

### **BNA INSIGHTS: Bank Compliance Officer, a Tough Job in a Tough Environment**



BY T. J. GRASMICK AND HAROLD REICHWALD

**T**oday's bank compliance officers may feel as if they have a Hobson's choice: serve at the pleasure of senior management and the board of directors or at the behest of government regulators and prosecutors.

Last year, the Treasury Department's Financial Crimes and Enforcement Network (FinCEN) published

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an advisory<sup>1</sup> to U.S. financial institutions to help promote what FinCEN believed were serious shortcomings in the observance of the rules relating to the Bank Secrecy Act (BSA) and its anti-money laundering (AML) directives. In its advisory, FinCEN called upon financial institutions to promote a "culture of compliance" regardless of size or industry sector.

According to FinCEN, a culture of compliance requires vigorous leadership from the top, no compromises in favor of "revenue interests," a well-functioning system of sharing information within the institution, an adequate human and technological resource allocation sufficient to the required task and an independent and competent party safeguarding the integrity of the institution's compliance. The latter person is the key to the expectations of the bank regulatory agencies and FinCEN.

To emphasize the point, Deputy Attorney General Sally Quillian Yates recently made it clear that the Department of Justice wants to hold individuals responsible for business wrongdoing and the price for any

<sup>1</sup> See FinCEN Advisory FIN-2014-A007 (Aug. 11, 2014), available at [www.fincen.gov/statutes\\_regs/guidance/pdf](http://www.fincen.gov/statutes_regs/guidance/pdf).

settlement of charges will be the “naming of names” within the organization of persons responsible for the identified failings, with an announced goal of holding the individual wrongdoers accountable in cases where a corporation may be criminally or civilly liable. In a September 2015 speech, Yates said that compliance officers are a “crucial partner in the fight against white-collar crime.”<sup>2</sup> Thus have bank compliance officers risen to a position of extraordinary responsibility and risk, recognizing that doing the best they can may not be good enough for bank examiners and prosecutors.

**Expansion of Duties.** The expansion of the role and the responsibilities of bank compliance officers in the last decade has been dramatic. Compliance officers today more often have a seat at the boardroom table and the ears of the CEO and other members of senior management. But while the position of compliance officer has become more burdensome and complex, and often much more highly compensated, it also now comes with increased pressure from regulators.

If a bank is found lacking in a compliance area, it is the compliance officer who will be asked first why he or she let that happen and why the noncompliance wasn't discovered, reported up to the top and fixed before the regulators came in. For example, FinCEN's associate director for enforcement, Stephanie Brooker, made it clear in a June 2015 speech<sup>3</sup> when she said enforcement actions will be considered “against individuals responsible for a financial institution's BSA/AML failures, including, in appropriate cases, barring individuals from working in the industry.”

Historically, compliance has received more low key examinations and is still examined separately from the otherwise all-encompassing “CAMELS” safety and soundness examinations. Now, however, while BSA/AML compliance issues still have a primacy of importance, lapses in compliance with the “alphabet regulations” of the Federal Reserve like B, O and Z or Real Estate Settlement Procedures Act (RESPA) have returned as triggers for enforcement actions with teeth.<sup>4</sup> Pointedly, acquisitions and other bank expansion plans must be placed on indefinite hold if a bank has significant BSA/AML or other compliance shortcomings.<sup>5</sup>

BSA officers (often an add-on responsibility for the compliance officer) rose in importance, first internally in the estimation of management and then externally to the regulators and law enforcement. While the financial

regulators may have thought that “deputizing” compliance officers would help them ferret out suspicious activity and potential criminal wrongdoing, the effect often was to put the compliance officer at odds with executives in charge of revenue production and customer relationships. A compliance officer may be viewed as an “auxiliary deputy” in the governmental BSA/AML process, but he or she is not a police officer.

**Enterprise Risk Management.** Beyond the world of BSA/AML, the concept of enterprise risk management has made compliance across all sectors of the bank and its holding company an all-consuming task, particularly in larger institutions. Incomplete or ineffective enterprise risk management can have disastrous effects on the regulatory judgment of the bank's governance and call into question the capability of its management.<sup>6</sup> An independent and competent compliance officer is a bulwark against regulatory criticism. That independence requirement should allow a compliance officer (and cohorts in internal audit) the opportunity to focus on nearly every business decision and all of the bank's products, services, operations and practices.

When bank leadership fails to recognize the importance of the compliance function and its need for independence, those leaders risk “whistleblower” claims by disaffected compliance officers. A frustrated compliance officer who believes that he or she is not given the requisite power and authority or is being ignored (against good judgment and applicable standards) can lead to severe regulatory criticism, mandated internal investigations and enforcement actions. By contrast, compliance officers who acquiesce to dominating senior management risk being targeted as individuals for civil money penalties and even threatened criminal prosecutions.

A recent proposal by the New York Department of Financial Services<sup>7</sup> could portend compliance officers being required to certify the effectiveness of their bank's compliance system, including BSA/AML, annually in writing. This is similar to the requirement that executives attest under the Sarbanes-Oxley Act to the accuracy of annual reports with possible civil and criminal liability if their certification is proven incorrect or false.

<sup>2</sup> Deputy Attorney General Sally Quillian Yates, Remarks at New York University School of Law (Sept. 10, 2015), available at [www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school](http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school).

<sup>3</sup> Stephanie Brooker, Associate Director for Enforcement, FinCEN, Remarks at Bank Secrecy Act Conference (June 18, 2015), available at [www.fincen.gov/news\\_room/speech/html/20150618](http://www.fincen.gov/news_room/speech/html/20150618).

<sup>4</sup> See, e.g., Farmers' and Traders' State Bank, FDIC-11-308b, 2011-DB-46; an extremely encompassing enforcement order against both the bank's board and management for compliance failures, particularly in the consumer area. The bank was subsequently closed in 2012.

<sup>5</sup> M&T Bank Corporation's proposed acquisition of Hudson City Bancorp announced in August 2012 was held up for three years by the Federal Reserve Board because of what was determined to be insufficiently strong AML controls discovered in a previous regulatory examination of the acquirer. The acquisition was approved in September 2015. See FRB Order 2015-27.

<sup>6</sup> For the most part, these types of regulatory criticisms arise in the context of the bank examination process and the message from regulators that any type of expansion, by acquisition or otherwise, will not be received favorably until the bank's board and its management correct the identified deficiencies and this is confirmed in subsequent examinations. We have seen this process include special visitations and consultation among the state and federal regulators involved. Also, note the analysis of the Federal Reserve Board expressed in its M&T Bancorp Order cited in footnote 5, at pp. 9-14, especially the cited examples of consumer compliance criticism.

<sup>7</sup> See, Proposal by New York State Department of Financial Institutions to adopt Part 504 of the Superintendent's Regulations, announced Dec. 1, 2015, for transaction monitoring and filtering program requirements and certifications. This proposal mandates the maintenance of a monitoring program for BSA/AML violations that has eight specific attributes listed in the regulation that require the maintenance of a watch list with six attributes and an overall program schematic that mandates another eight requirements including governance and management oversight.

**IT Concerns Prevail.** With the upsurge in privacy data breaches, expected new cybersecurity regulations, and efforts to track terrorist financing, IT has become a new wing of compliance. Regardless of actual fault, the bank's reputation and customer base could be diminished fast and with ugly press coverage if the bank's compliance effort in these areas fails. In these unfortunate incidents, the compliance officer can bear the brunt of early criticism and even enforcement action. The result in the current enforcement environment can be that the compliance and BSA officers become the scapegoats who can be publicly named, fined and possibly barred from banking while the bank and its board and senior management carry on.

If you, as the compliance officer, are responsible for the bank's compliance with everything, you may every day and often get pushback from those on the "revenue" side of the bank. Senior management may lose interest in your compliance nagging and its costs when business is booming and the regulatory waters seem calm but may be tempted to let you hang from the yard-arm if the bank sails into rough compliance and governance seas. And if the regulatory agencies and the Department of Justice expect you to be a "snitch" if necessary and might come back and fine or prosecute you for your performance, the question could be asked: What's a nice person like you doing in a position like this?