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**Someone that works for a bank is going to be prosecuted for criminal violation of the Bank Secrecy Act. The questions that remain are: Who will it be and how soon will it take place?**

**By David B. Caruso, CEO**

A key group of U.S. Senators is asking the Department of Justice why when banks fail to comply with the BSA are employees of those financial institutions not prosecuted?



Financial institutions are not highly regarded by the American public. When these same institutions, in the eyes of the public - and the public's elected representatives - allow money to be laundered, calls for strong enforcement and consequences get loud.

Notable in DOJ's public statements about HSBC and UBS's involvement in the LIBOR rigging case, is that the nation's top

prosecutors are hesitant to press criminal charges against banks, fearing such a move could destabilize those banks as well as the worldwide banking system.

Is this ominous then for individuals? Yes - If prosecutors are reluctant to charge institutions and the call for more severe penalties is heard, that means it is people - bank managers, executives and AML officers that are going to become the focus of law enforcement's attention.

### **Becoming a Target for Prosecution**

So what is it a BSA/AML Officer, a bank manager, or an executive needs to do to become an attractive prosecution target? Let's dispense with the obvious - if an AML officer or banker willingly and knowingly decides to launder money for himself or a customer that is a clear criminal act, and that is *not* what this article discusses.

What we are discussing here is the application of the legal concept known as "willful blindness."

It is highly unlikely the DOJ will uncover evidence of an AML officer saying on a recording or writing in an email "I am laundering money and I know it's illegal." Instead prosecutors must prove that when serious AML compliance failures occur the AML officer or banker was "willfully blind" of the facts.

An easy way to understand "willful blindness" is to think of it this way (and the way federal courts think of it):

*There are many things BSA Officers and bankers "should know" about AML compliance. In instances when a bank fails to comply with the BSA, prosecutors will assert AML officers and bankers "should have known" about the failures and taken corrective action.*

### **The BSA is a LAW**

Many in the BSA/AML field think of themselves as someone that implements and oversees "compliance" or "regulation." True, but the BSA is not just a compliance regulation, it is a federal law and when federal laws are broken there are consequences. Up to this point, those consequences, mainly in the form of fines or Consent Orders, have been borne by financial institutions. BSA Officers and other bankers have lost their jobs at some of these institutions (although amazingly those same BSA Officers

typically turn up at another bank as a new BSA Officer), but there have not been any individuals prosecuted.

### **What a BSA/AML Officer and Banker Should Know**

Understanding that there is a strong desire by Congress and the public to see individuals pay a price for serious violations of the law and understanding that prosecutors have an extremely powerful tool in "willful blindness" let's look at some of the obvious things a BSA officer and banker "should know" about AML compliance.

- The purpose of the BSA is for financial institutions to identify and report suspicious activity.
- All serious enforcement actions, all DOJ Deferred Prosecution Agreements, and all fines for failure to comply with the BSA are based on an institution's failure to file SARs.

The U.S. Government takes the position that information about BSA/AML risks is frequently and publicly provided to financial institutions and that this information makes up much of the vast body of details AML officers and bankers "should know."

The DOJ Deferred Prosecution Agreement Statements of Facts for HSBC and Wachovia as well as the FinCEN Civil Money Penalty Order against Wachovia are [three documents](#) that are clear in establishing what BSA Officers and bank management "should know" about their AML compliance responsibilities, some of which include the following:

- How to establish adequate transaction monitoring programs that
  - Properly calibrate monitoring software to identify suspicious activity
  - Thoroughly document changes to monitoring scenarios and thresholds
  - Ensure all products, services, customers and operating locations are monitored
- How to properly investigate suspicious activity and complete SARs accurately and within the correct time frame
- The total number of staff that are needed to resolve alerts, investigate cases and file SARs
- That adequate funds to hire the correct number of AML staff are allocated
- Whether monthly transaction monitoring alerts numbers are arbitrarily established ("capping" alerts)

- How to properly train BSA/AML department analysts and investigators
- To elevate issues of AML risk, including inadequate staffing levels to executive management and the Board of Directors if necessary
- The details of information contained in government issued reports including FinCEN Advisory's and SAR Activity Reviews, DOJ DPAs, State Department reports and Congressional reports about money laundering, transnational crime, and terrorist financing
- The types of customers, transactions, products and geographic locations that are High Risk
- How international narcotics trafficking and fraud schemes work (if you don't know how criminals do what they do, how are you going to detect suspicious activity?)
- That suspicious activity must be reported in all instances even if it's the customer's first instance and even if is deemed to be a "one time event"
- How to conduct proper Customer Due Diligence and Enhanced Due Diligence
- How to design and perform an effective BSA/AML program audit
- How to share information between AML departments, lines of business and office locations outside of headquarters

So *according to the U.S. Government* this is a short list of just some of the things AML officers, bank management and the Board of Directors should know. This list is the foundation on which to build an institution's AML compliance program and to protect you against prosecution. Is your AML program on solid footing...and are you?