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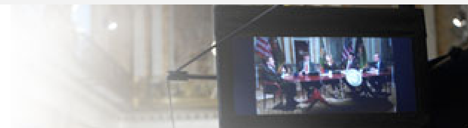

Remarks of Under Secretary Cohen at the ABA/ABA Money Laundering Enforcement Conference

11/10/2014

As prepared for delivery

WASHINGTON – Thank you to the American Bankers Association and the American Bar Association for inviting me here.

Tomorrow is Veteran's Day, so before I begin, I'd like to take a moment to recognize those brave women and men who have served our country in uniform. To all of our veterans – and I am sure we have some with us in this room today – and to the families who support them, thank you.

This is my third appearance at this conference in the past five years. I've come back again and again – not just because, a long time ago, Rick Small was the first person who explained to me what a SAR was. I've come back because this conference is one of the premier gatherings of experts and practitioners of what, in the club, we call AML/CFT, but what is really best described as financial integrity.

We all share the goal of ensuring that the U.S. and global financial systems are convenient, efficient, safe, secure, and economical for legitimate customers and are hardened against abuse by those who would either engage in or facilitate criminal activity. The topics covered in this conference, and the work you do day-in and day-out, are all geared toward advancing financial integrity, and I thank you for that.

When I was here two years ago, I announced our efforts to bring together policymakers, regulators, and enforcement agencies to take a top-to-bottom look at our anti-money laundering (AML) regime. We've been busy since then, so I'd like to begin by giving you an update on the AML Task Force.

AML Task Force Update

In 2012, together with the Federal Reserve, FDIC, OCC, NCUA, SEC, CFTC, IRS, and DOJ, we formed an AML Task Force and undertook a review of our AML regime. The Task Force's mandate was to take a close look at what was working well and what areas might need some improvement, leveraging input from the private sector through the Bank Secrecy Act Advisory Group (BSAAG).

We broke our work into four areas.

First, we looked at current and emerging illicit finance risks. Working closely with law enforcement, we reviewed how we identify, evaluate, and communicate developing threats and trends. This work forms part of an ongoing interagency project to produce our national money laundering risk assessment, which will be published next year.

Second, we examined our posture to address those risks – the statutory and regulatory framework designed to help financial institutions identify potentially illicit activity and respond appropriately. We focused in particular on whether the scope of existing laws and regulations should be modified in light of the current illicit risk environment and to meet new threats.

Third, we analyzed our supervisory and enforcement framework, reviewing the structure and means by which the regulators and enforcement agencies ensure that financial institutions comply with relevant legal and regulatory obligations.

And finally, because good communication is critical to all that we do, we took a hard look at how information is shared across government agencies, between the U.S. government and industry, and among financial institutions.

So where do we stand?

Well, I'm happy to report that we found the anti-money laundering regime to be generally strong, effective, and responsive. But it is not perfect – on that, I think we can all agree. Indeed, many in this room have offered ideas on how to improve things, and these ideas helped inform the Task Force's work.

So let me share with you some of the recommendations for improving the AML regime that resulted from the Task Force.

For starters, we believe that the existing statutory safe harbor from civil liability for filing a suspicious activity report should be clarified and expanded. As you know, courts have diverged on the question whether, to claim the protection of the safe harbor, a financial institution or its officers must have a "good faith" belief that a violation occurred. As Comptroller Curry foreshadowed at this Conference last year, we think the Bank Secrecy Act (BSA) should be amended to clarify that financial institutions and their officers may enjoy the protection of the SAR safe harbor without having to demonstrate that a SAR was filed in good faith. This would ensure that financial institutions could comply with their obligation to file SARs without fear of civil litigation, and would thus facilitate the continued flow of critically important suspicious activity reporting.

We also favor amending the safe harbor provided by Section 314(b) of the USA PATRIOT Act to provide financial institutions with greater comfort to share information with one another on illicit activity. In our view, financial institutions should be able to share information for the purposes of identifying and reporting any suspicious transaction relevant to a possible violation of law or regulation, regardless of whether the financial institution connects the activity directly to money laundering or terrorist financing. This change would lead to a financial system more resistant to abuse by enabling more effective and collaborative risk management.

These BSA amendments, of course, require legislative changes. We have been discussing these issues with Congress, and we will continue working with Congress to have them enacted into law.

The Task Force also highlighted the expanding universe of entities that play important roles in the financial sector. If we are to be as effective as possible in countering illicit finance, we must begin applying appropriate record-keeping, reporting, and program requirements to those entities.

This effort is already underway. FinCEN, in consultation with the SEC, is working to define SEC-registered investment advisers as financial institutions and, because of their unique insight into customer and transaction information, to extend AML program and suspicious activity reporting requirements to them.

The Task Force also underscored the need to make this regulatory change, as well as to extend the primary AML regulatory requirements to CFTC-registered Retail Foreign Exchange Dealers (RFEDs) and Commodity Pool Operators.

Another Task Force recommendation concerns operators of credit card systems, which are currently required to establish AML compliance programs, but not to report suspicious transactions. Operators of credit card systems, however, have access to information regarding suspicious activity that could prove invaluable to regulatory and law enforcement efforts to combat financial crime. This is a gap that we believe should be filled by expanding their BSA regulatory obligations to include SAR filing requirements.

Finally, the Task Force recommended improving the quality and consistency of supervision across the money services businesses (MSB) sector. To that end, we intend to impose SAR and additional recordkeeping requirements on check cashers.

The AML Task Force has proven to be very valuable. And its work is ongoing. It will continue to explore important issues regarding the effectiveness of the AML regime, including "de-risking" and the role of technology in identifying and addressing illicit finance risks. The Task Force also recommended establishing a permanent working group within the BSAAG to help identify the key illicit finance risks that confront regulators, law enforcement, and industry. The BSAAG has established an Illicit Finance Committee to help with this work.

While the AML Task Force continues its work, we at the Treasury Department are also pursuing a number of key policy objectives. Let me spend a few minutes describing two that are at the top of our agenda – our efforts to improve insight into the beneficial ownership of legal entities and our concerns about "de-risking."

Beneficial Ownership

We have been focused for years on the threat to financial integrity posed by opaque legal entities, which make it difficult for financial institutions to apply effective, risk-based anti-money laundering programs and for law enforcement to pursue investigative leads. Enhancing access to accurate information on the beneficial owners of legal entities and the accounts they open at financial institutions has been a key objective, one that we have pursued in three principal ways.

First, I'm sure you are all aware that for several years we have been working on a customer due diligence rule to clarify and strengthen due diligence requirements with respect to the beneficial ownership of legal entity accountholders. After extensive consultation with industry, law enforcement, civil society, and other stakeholders, in August of this year we published a proposed rule that aims to strengthen and clarify customer due diligence requirements. We are now analyzing the more than 120 letters that we received during the public comment period, which closed last month.

Because our rulemaking process is ongoing, I won't speak to the specifics of these comments – more to the point, my lawyers won't let me. I do think, however, that it is worth reviewing briefly why we believe a well-crafted rule addressing customer due diligence requirements is so important – not just for the regulatory and law enforcement community, but also for the financial institutions you represent and serve.

Put simply, criminals continue to make their way into our financial system. They establish shell and front companies, and then open accounts in the names of those companies, without ever having to reveal who ultimately stands to benefit. With other countries taking steps to prevent the abuse of shell companies in their jurisdictions, it is simply untenable for the United States to allow this risk to go unaddressed.

And even if the rest of the world were not making progress, combating this vulnerability would still be critical to protecting the integrity of the U.S. financial system. Effective customer due diligence, including obtaining beneficial ownership information, is essential to financial transparency. The collection of accurate customer information enables financial institutions to identify and manage risks and helps law

enforcement trace, freeze, and seize illicit proceeds. Accurate customer information also enables financial institutions to comply with our sanctions programs, allowing us to apply pressure on those who threaten our national security.

In my conversations with financial institutions here in the United States and abroad, I am repeatedly reminded that our interests in financial integrity are almost perfectly aligned. Just as the government seeks to keep illicit actors out of the financial system, banks and other financial institutions have no interest in criminals and terrorist financiers abusing their services. What financial institutions want – and what I hope a final customer due diligence rule will deliver – is a level playing field that requires all financial institutions to employ reasonable efforts to enhance the integrity of their institutions and the financial system as a whole.

Beyond a new customer due diligence rule, we can foster better corporate transparency by requiring the collection of beneficial ownership information when a company is created. Addressing this issue remains a high priority for the Administration. That is why, in March, the White House announced a legislative proposal that would require newly formed legal entities to provide the IRS with information on the entities' beneficial owners, and would provide law enforcement a means to access that information to pursue money laundering and terrorist financing investigations. The IRS already collects this information for the overwhelming majority of companies formed in the United States, and so unlike previous legislative efforts, this proposal leverages existing legal authorities to make beneficial ownership information available to law enforcement.

The third component to our beneficial ownership strategy is our international engagement, which is centered on our active participation in the Financial Action Task Force (FATF). In 2012, the FATF revised and clarified its recommendations for combating money laundering and terrorist financing, including with respect to beneficial ownership. What's more, last month, the FATF, at our urging, published a comprehensive guidance paper on beneficial ownership that will help countries design and implement measures to deter and prevent the misuse of corporate entities for illicit purposes.

Suffice it to say, improving the customer due diligence legal, regulatory and policy framework remains one of Treasury's key financial transparency objectives.

"De-Risking"

I'd like to turn now, for a few minutes, to the issue of "de-risking."

If you are following along on my written remarks, you will see that I have put the term "de-risking" in quotes. I've done that not because we are cavalier about the issue. Not at all. We are keenly engaged with this issue because we recognize that "de-risking" can undermine financial inclusion, financial transparency and financial activity, with associated political, regulatory, economic and social consequences.

I have put "de-risking" in quotes because there does not appear to be either a uniform understanding about what the term means or a consensus that a serious "de-risking" trend is underway. I don't expect to definitively resolve either issue this morning, but I want to offer my thoughts in the hope that it will advance this important conversation.

First, what is "de-risking?" Let me begin by describing what it is not. It is not the closing or restricting of an account because a financial institution, applying an appropriately designed risk-based analysis, determines that it cannot manage the risk of illicit activity associated with a particular client.

When that happens, a financial institution is doing precisely what the BSA and the FATF standards demand – applying a risk-based approach to its decision-making and saying "no" to some customers. A financial institution that refuses to do business with customers that present a risk profile that the institution cannot manage is doing the right thing. That is not "de-risking." And it is not a problem. In fact, we have seen the termination of some customer relationships – as well as the threat of termination – spur jurisdictions and institutions to step up their AML/CFT practices.

"De-risking" is the antithesis of an appropriate risk-based approach. The FATF recently put it well: "De-risking refers to the phenomenon of financial institutions terminating or restricting business relationships with clients or categories of clients to avoid, rather than manage, risk in line with the FATF's risk-based approach." Put another way, "de-risking" occurs when a financial institution terminates or restricts business relationships simply to avoid perceived regulatory risk, not in response to an assessment of the actual risk of illicit activity.

Now, perceived regulatory risk and actual illicit finance risk usually overlap – one key purpose of regulatory supervision and enforcement is to ensure that regulated institutions appropriately address actual illicit finance risk.

I know there are concerns that there may be a gap between regulatory risk and illicit finance risk, and that the BSA's risk-based regime has, in practice, become a zero-tolerance regulatory regime.

Let me be clear: We recognize that it is not possible or practical for a financial institution to detect and report every single potentially illicit transaction that flows through the institution. The BSA and its regulations require financial institutions to, among other things, establish and implement anti-money laundering programs reasonably designed to detect, prevent and report suspicious activity. As the FATF recently put it, "[t]his does not imply a 'zero failure' approach." But it does demand that financial institutions take seriously the variety of illicit finance risks that different clients present, and design and implement effective AML/CFT programs that assess and address risk on a client-by-client basis.

So, is "de-risking" actually occurring? The evidence is decidedly mixed.

We have heard, of course, that some banks have terminated some customer relationships, some have trimmed their correspondent account networks, and some have exited product lines. A discussion paper prepared for use at last month's FATF Plenary Meeting by the BBA and several other prominent international financial organizations details some of the business relationships that have been scaled back.

While some have described this retrenchment as de-risking, it is not certain that these moves have been driven by a desire to avoid AML risk altogether, rather than manage it in line with the risk-based approach. Many factors come into play when a financial institution decides whether to take on or retain a customer, or offer or terminate a product line. These include profitability, the overall economic climate, capital requirements, and risk appetite, to name just a few. And, as I noted earlier, a bank that restricts or terminates a customer relationship because it reasonably determines that it cannot responsibly mitigate the customer's illicit finance risk is to be applauded, not condemned.

Still, we hear that recent, high-profile AML-based enforcement actions prove that there is a gap between regulatory risk and actual illicit finance risk, and thus justify de-risking to avoid unfair treatment. I don't agree.

These enforcement actions were not taken because of minor mistakes. To the contrary, as the FATF put it in its recent statement on de-risking, "[r]ecent supervisory and enforcement actions … were [in response to] extremely egregious cases involving banks [that] deliberately broke the law, in some cases for more than a decade, and had significant fundamental AML/CFT failings." So even as we promote financial integrity through regulatory and enforcement actions, financial institutions need not "de-risk" to protect themselves.

This is, to be a sure, a complex issue that calls for careful monitoring and continued dialogue, which we are committed to fostering. To the extent that de-risking occurs, it undermines important economic and financial transparency objectives, and reveals a misalignment between regulatory risk and actual risk that serves no one's interests.

With that in mind, let me speak briefly about remittances.

Both here in the United States and abroad, money transmitters provide important financial services, particularly to the unbanked and under-banked. They also play a significant role in global economic development. The World Bank estimates that in 2014 alone, remittance payments worldwide will add up to $436 billion.

But we also know that money transmitters can be vulnerable to abuse by money launderers and terrorist financiers. The source of remittance payments is often cash provided by individuals with whom the remitters' agent may have no ongoing relationship. And remittance payments typically flow across borders and often involve developing economies, where regulations may be imperfect and mechanisms for identifying customers may be weak. This presents real money laundering and terrorist financing risk.

So to reach our objective of having compliant money transmitters with access to the regulated financial system, we need to strike the right balance between the complementary goals of financial inclusion and financial transparency.

Toward that end, Treasury is pursuing a four-part strategy.

First, we aim to improve the clarity of our expectations for banks that have, or are considering taking on, MSBs as clients. This morning, FinCEN, the agency primarily responsible for administering the BSA, is issuing a statement on providing banking services to MSBs. The statement is meant to set the tone for both industry and FinCEN's delegated examiners regarding the relationships between the banking and MSB sectors. It reinforces the point that banks should not, and need not, engage in the wholesale termination of categories of customer accounts without regard to risk. To the contrary, the statement emphasizes that banks should assess the risks posed by individual MSB customers on a case-by-case basis, and that with appropriate risk-based controls, banks can manage the risks of MSB accountholders, even those deemed high-risk.

Second, we intend to deepen our engagement with industry on strengthening controls and compliance for money transmitters. To kick this off, we will convene a public forum on the topic of banking access and MSBs. This event, which we plan to hold at Treasury on January 13, 2015, will provide an opportunity for industry stakeholders and government representatives to discuss challenges and best practices on this important issue.

Third, to promote compliance, we continue to enhance our oversight of money transmitters. FinCEN is partnering with states to more effectively allocate resources for MSB examinations. This coordination will be enhanced by the Money Remittances Improvement Act of 2014, which President Obama signed into law in August. By authorizing Treasury to rely on financial institution examinations conducted by state supervisory agencies, this Act will improve our ability to focus on higher-risk MSBs.

Finally, in all this work, we will remain continuously in contact with money transmitters, the communities they serve, and the banks that provide them access to the regulated financial system. We are also working with our international partners that have a stake in this issue, including bilaterally with Mexico and the United Kingdom, and multilaterally with the World Bank, the G-20, and our FATF counterparts.

Conclusion

I'd like to close by thanking you for your time and attention this morning, and especially for your ongoing collaboration toward our common objective – promoting financial integrity, combating illicit finance, and ensuring that the U.S. financial system remains the envy of the world.

Thank you.

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