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Navigating Global, Multi-Agency AML Investigations


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I Introduction

This chapter provides an overview of multi-agency and multi-jurisdictional investigations that focus on financial institutions' compliance with anti-money laundering ("AML") obligations. These investigations are often factually and legally complex, given the breadth of AML laws and the number of regulatory bodies with jurisdiction to enforce them. We will address how these regulatory investigations are initiated, best practices for responding to such an investigation – including through an institution's own investigative efforts – and how the institution can work to resolve these matters.

II Events Triggering Investigations

AML investigations arise from numerous sources, including supervisory reviews, internal complaints, referrals from one authority to another, and other sources. We discuss these dynamics below.

a. Examinations and supervisory assessments

Financial institutions are subject to supervision and examination by state and federal regulatory agencies in the U.S. and national and other authorities outside the U.S. These supervisory assessments regularly include detailed reviews of the institutions' Bank Secrecy Act ("BSA")/AML policies and procedures. In the course of conducting these examinations, regulators will review and issue findings on issues that they determine require remediation, including in connection with the institutions' BSA/AML compliance efforts. In the U.S., such feedback may be presented in exam reports or supervisory letters, which may identify Matters Requiring Immediate Attention ("MRIAs") or Matters Requiring Attention ("MRAs"). Depending on the issue or the institution's response, these reviews may lead to an investigation by the agency.[1]

Even if these reviews do not give rise to an investigation immediately, they may provide a roadmap for findings in a future enforcement action. For instance, the Industrial and Commercial Bank of China ("ICBC") entered into settlement agreements in early 2024 with the Federal Reserve Board ("FRB") and the New York State Department of Financial Services ("NYSDFS") predicated in part on previously identified issues relating to ICBC's BSA/AML and sanctions screening compliance. In describing these issues, the NYSDFS referenced findings from examinations conducted by the New York Federal Reserve Bank ("NYFRB") and the NYSDFS in 2022 and 2023. Both the NYSDFS and FRB required BSA/AML control enhancements and imposed a monetary penalty.[2] Financial institutions should be aware that supervisory reviews may lead to regulatory investigations and are well advised to take robust steps to address findings from supervisory exams.

b. Internal and other complaints

Complaints from employees, customers or other sources may raise questions or concerns about an institution's compliance with its BSA/AML obligations. Financial institutions generally should review and respond to these concerns as part of a process for receiving, triaging and addressing internal and other complaints. This process should include assessing the BSA/AML risk presented by relevant complaints and scoping a reasonable investigation.

Financial institutions may see an uptick in AML-related complaints, given that Congress recently increased awards and protections for many AML whistleblowers. With the Anti-Money Laundering Whistleblower Improvement Act, which President Biden signed into law in late 2022, whistleblowers who provide information to their employer, the Treasury Secretary or Attorney General leading to successful enforcement actions will receive from 10% to 30% of total penalties imposed in certain cases.[3] The Act also confirms protections against retaliation.[4] These measures are intended to lead to further scrutiny of financial institutions' compliance with BSA/AML laws.

Employee and customer complaints can give rise to large-scale investigations and enforcement actions. For example, the multibillion-dollar case that the U.S. Justice Department, the Securities and Exchange Commission ("SEC") and Danish enforcement authorities brought against Danske Bank in 2022 relied significantly on information from a whistleblower – a senior employee at Danske Bank's Estonian unit – who raised concerns that the Estonian unit "may […] have committed a criminal offence" related to allegations that, among other things, bank customers were engaging in potential money laundering.[5] This example underscores the importance of responding to complaints in a reasonable and expeditious manner.

c. Referrals

AML investigations may also begin with a referral from one regulator, who either is currently investigating the entity or serves in a supervisory role over the entity, to the enforcement division of the same or another agency. In the U.S., such referrals may arise from reviews conducted by supervisory authorities, as discussed above. The Financial Crimes Enforcement Network ("FinCEN"), a bureau of the U.S. Treasury Department and the administrator and coordinator of BSA enforcement and

compliance,[6] may also refer matters to other agencies, such as the Department of Justice or the SEC.

In addition, referrals may stem from investigations that do not initially appear to be related to BSA/AML compliance. For example, an investigation that initially focuses on the conduct of a banking customer may raise questions about the bank's systems for detecting and preventing fraud, which may lead to a further review of its BSA/AML compliance programme. Similarly, given the close relationship between sanctions screening and AML compliance efforts, allegations of sanctions screening non-compliance can quickly morph into a review of potential BSA/AML compliance infractions more generally. In this regard, it is important to assess risk holistically when conducting investigations that may have implications for the financial institution's compliance with its BSA/AML obligations.

d. Relationship with civil litigation

Civil litigation may also raise issues that implicate AML compliance. For example, civil claims that customers of a bank or money transmitter were defrauded by third parties may lead to scrutiny of the financial institution's BSA/AML programme. When the company is addressing BSA/AML risks in the context of overlapping matters, it should seek to execute its review and remediation efforts with an eye towards addressing both civil litigation and enforcement-related risks.

III Investigating BSA/AML-related Allegations

When faced with allegations of potential BSA/AML infractions, financial institutions are well advised to conduct a reasonably scoped investigation of relevant facts, either to support an internal investigation or respond to multi-agency or multi-jurisdictional regulatory queries. In the case of an internal review, the investigation informs the company's evaluation of risk and its efforts to remediate any potential misconduct or control deficiencies. In addition to these goals, in a regulatory matter, the investigation supports the company's efforts to engage in effective advocacy and cooperation with regulators, including by responding to regulatory requests for documents and information.

In this section, we discuss best practices for conducting such an internal or regulatory investigation relating to BSA/AML compliance.

a. Governance and investigation team

As an initial step, the institution should establish who will lead and conduct the investigation. For multi-national or multi-agency AML investigations, the investigation will often be led by in-house counsel, supported by external counsel. The investigation lead may identify a cross-functional set of stakeholders to involve in the investigation on a privileged basis, which may include members of the compliance team and management.

The investigation team should consider whether the allegations at issue create a conflict of interest for any individual involved in conducting or supervising the investigation. If that is the case, the company should recuse the person who is subject to a potential conflict of interest from the role giving rise to the conflict. This may be done by creating a specific reporting line to supervise work on the investigation that excludes the potentially conflicted individual and putting in place information barriers. These efforts should be documented, and it should be clear that those involved in the investigation will receive full credit for their work on it even if their ordinary course manager is recused.

The fact that allegations may create a potential conflict of interest should not be taken as an indication that a member of management has engaged in misconduct. However, it is advisable to address the governance of the investigation to mitigate the risk of even a potential conflict of interest or the appearance of one where appropriate.

b. Identifying relevant witnesses and documents

Fundamentally, each investigation should start with the identification of individuals who may possess information or documents relevant to the allegations at hand ("custodians"). For an AML investigation, this may include members of the financial institution's financial crime unit and compliance department, as well as those involved in processing transactions, interacting with customers, and others.

As the investigation progresses, the investigation team should update and revise its determination of who constitutes a relevant custodian and document this understanding. As individuals are identified, the company should take steps to preserve relevant information, including placing holds on email accounts and other sources of documents so that they are not deleted pursuant to ordinary course policies.

A company must consider custodial and non-custodial sources. Custodial sources are those that a particular custodian maintains or uses, such as an email account. By contrast, non-custodial sources are not particular to individual custodians (e.g., shared drives, shared workspaces and logs from a companywide messaging "channel"). For AML investigations, the company should consider whether there are document and data sources that are "non-custodial", in that they may live in an AML case management system or other application used to assist with client onboarding, sanctions screening or transaction monitoring. Such systems may require additional preservation steps, if they do not fall within established processes for preserving data. These steps also supplement any BSA or related regulation record retention requirements to which a financial institution may be subject.[7]

The company may also send litigation hold notices to relevant document custodians, taking into account the nature of the allegations and the manner in which they have been raised. The company should also consider the relevant time period for which to retain documents in light of the allegations raised.

Companies are well served to devote time and attention to analysing these fundamental questions at the outset of any investigation. This work may take place concurrently with initial interviews or other investigative steps, given the ordinary desire to learn as much about the allegations as quickly as possible. Even if the investigation has commenced in this manner, it is important to systematically evaluate the data sources that will form the basis for the investigation going forward.

c. Analysing the documentary record and producing documents

Once potentially relevant documents have been identified from the processes described above, the next step will often involve collecting and reviewing all or a subset of these documents. For AML investigations, for example, a financial institution may review communications, records and reports relating to transaction monitoring, customer identification or suspicious activity reports ("SARs") filings. Depending on the nature of the allegations and the status of any regulatory requests, it may

be possible to proceed in stages in order to reduce the burden of collecting and reviewing a large volume of data. By proceeding in this way, the investigation team may be able to refine and narrow their approach as they conduct the review. For example, a company investigating possible deficiencies in its processes for customer identification or transaction monitoring may – after taking steps to preserve relevant data – proceed with a review of a subset of custodians or by using narrowly tailored search criteria as a starting point.

After a company has identified documents that are responsive to discovery requests, but before it has produced documents in response to regulatory requests, the company must evaluate relevant legal privilege and potentially applicable restrictions on production. These include obligations under data privacy and bank secrecy laws, restrictions relating to the unauthorised disclosure of confidential supervisory information ("CSI"), and the strict limits on disclosures of SARs.

SARs only can be produced to federal, state or local law enforcement agencies and as long as no person involved in any reported suspicious transaction is notified that the transaction has been reported. In multi-jurisdictional investigations, it is essential to protect SARs from disclosure in jurisdictions outside the U.S., which may require their production to other parties if SARs are in the jurisdiction. In addition, for AML investigations that implicate branches, subsidiaries or affiliates in other jurisdictions, financial institutions should take steps to prevent unauthorised disclosure of CSI in response to document requests. The definition of CSI encompasses communications with supervisory authorities and reports from inspections and examinations as well as any information derived therefrom.[8]

With respect to legally privileged documents, 12 U.S.C. § 1828(x) provides that a financial institution can submit privileged information to a federal banking agency, state bank supervisor or foreign banking authority in the course of the supervisory or regulatory process without waiver of any applicable privilege under federal or state law. However, section 1828(x) does not cover production to other regulators. While U.S. enforcement authorities generally will not seek the production of privileged documents, financial institutions cannot assume that this approach holds true across all jurisdictions. For example, non-U.S. regulators may expect privileged materials to be produced, particularly where local law allows for such production on a limited-waiver basis. As a result, an entity must balance potential privilege waiver in the U.S. with a perceived failure to cooperate in other countries.

For multi-jurisdictional AML investigation, financial institutions must also consider the lawfulness of transferring personal or sensitive data across borders. The company's need to comply with a legal obligation may be a lawful basis to transfer such information to another jurisdiction under applicable data privacy laws. If it is not, the conflict of another jurisdiction's privacy law with U.S. law may not be a valid basis to avoid complying with a document request. For example, under the Anti-Money Laundering Act ("AMLA"), a bank's "assertion" that compliance with U.S. subpoenas would fall afoul of a foreign jurisdiction's law on bank secrecy or confidentiality cannot be the "sole basis" to argue that the subpoena be modified or quashed.[9] U.S. courts have a well-established authority to order a company to comply with discovery requests, even when doing so would cause the company to violate a foreign law. However, courts balance a decision to order compliance against the possible hardship a company could face – including, for instance, in potential fines in another jurisdiction. When conducting a multi-jurisdictional review, it is advisable to analyse the application of data privacy laws and the implications of moving documents across borders.

d. Developing facts from interviews

Interviews with employees and other witnesses serve as an important source of information in AML investigations. Counsel conducting such interviews are well advised to begin them with the familiar *Upjohn* warning. This warning is designed to put interviewees on notice that counsel represents the company and not its individual employees, that conversations between company counsel and employees are privileged, and that the company rather than the employee holds the privilege.

Interviews in AML investigations are likely to involve reviews of the technical aspects of a company's AML policies, procedures and compliance programmes. To ensure that interviews are productive, both interviewing attorneys and witnesses may find it beneficial to do "walkthroughs" of relevant processes. Such walkthroughs may be conducted with employees who were not involved in the allegations at issue, as a way to evaluate controls and inform interviews with those who may be directly involved in relevant conduct.

In multi-jurisdictional investigations, special consideration should be given to legal privilege, including the protections that apply to interview notes, and whether employment law concerns may impact interviews.

IV Navigating and Resolving AML Investigations

a. Navigating the investigation and engaging in advocacy

As the investigation progresses, the financial institution should take opportunities to advocate before investigating authorities and put the conduct at issue in context, as well as explain what remedial actions are already in place or are being instituted. This advocacy can take the form of written submissions in response to requests, or alternatively presentations that address allegations and describe the entity's diligence and responsiveness in addressing any potential issues. The facts developed and remediation efforts initiated through the investigation will form the foundation for this advocacy, along with counsel's understanding of the applicable legal standards and regulatory expectations.

While the institution should ensure through its advocacy that the regulator is operating from a full and fair understanding of the underlying facts and remediation efforts already underway, cooperation is an essential part of demonstrating that the financial institution is committed to working with the regulator to resolve the matter. For most financial institutions, cooperation is a key element of any regulatory investigation, given the important relationships that financial institutions maintain with their primary and other regulators. The ability of a financial institution to effectively cooperate will be based, in large part, on the extent to which it has conducted a thorough and effective investigation of the conduct at issue and taken reasonable steps to remediate any control deficiencies. It is therefore all the more important that financial institutions conduct reasonably scoped and well-executed investigations of BSA/AML-related allegations.

b. Resolution

The resolution of a BSA/AML regulatory investigation may take a number of forms, ranging from no action to a non-public memorandum of understanding ("MOU") to a public resolution that requires admissions of misconduct. Resolutions that result in a written resolution, even if non-public, will often

include remedial commitments and contain factual allegations or admissions. How a regulator and company resolve an investigation will depend on, among other things, the level of cooperation, the facts at issue and whether the issues have occurred *de novo* or have been the subject of prior findings. It is therefore important for financial institutions to demonstrate throughout the investigation that they have made sufficient efforts to remediate the issues that gave rise to the investigation, as appropriate.

Any resolution must take into account the collateral consequences that may stem from factual or legal admissions. In the case of a public settlement, it is essential to evaluate and address the impact that any factual statements may have on existing or potential civil litigation. Where appropriate, it may be possible to mitigate these risks by making clear that the factual findings are limited in time or scope. Further, where the settlement documents reflect allegations without any admission of fact or liability, it is essential to make that explicit.

Given their focus on remedial terms, AML resolutions may also involve the imposition of a corporate monitor for a specified term. The monitor may go by different names (e.g., "independent monitor", "independent examiner", "compliance auditor", "special representative"). The monitor's role is to review and report on whether a financial institution has met commitments in its settlement documents relating to remediation and compliance. Whether a monitorship will be imposed, and the precise scope and length of the monitorship, often will be driven by the nature of the underlying conduct, the scope of the required remediation and the extent to which the financial institution has developed credibility with the regulator during the investigation.

Once imposed, monitorships generally require the institution to spend significant efforts and resources to support the monitorship and respond to monitor requests. As a result, if a monitorship is a possible outcome, it is all the more important that the institution demonstrate that it has conducted a sufficiently robust investigation, put in place adequate remedial efforts and has cooperated with the regulator throughout the investigation in an effort to demonstrate that a monitorship is not required. If the settlement does result in the imposition of a monitorship, it is essential that the financial institution manages its response to the monitorship with care, given the important role the monitor plays in assessing whether the institution has met settlement requirements.

Last, following a resolution, the institution may come under continued scrutiny for conduct that gave rise to the matter, as regulators with supervisory authority will likely test whether the conduct has been adequately addressed. It is therefore important to ensure that remedial efforts are implemented and that reasonable steps are taken to prevent the recurrence of the issues that gave rise to any prior settlement.

V Conclusion

Companies face numerous decision points when navigating multi-agency and multi-jurisdictional AML investigations. It is important to assess risks as they arise, whether in the form of MRAs, complaints or other sources, conduct a reasonably scoped investigation if needed and engage productively with any regulatory investigation in order to put the company in the best position possible to resolve any allegations. This is particularly the case in BSA/AML investigation, which may turn on fact-intensive reviews of a financial institution's AML compliance programme.

Endnotes

1. Scope and Planning—Overview, Fed. Fin. Insts. Examination Council, https://bsaaml.ffiec.gov/manual/ScopingAndPlanning/01
2. Consent Order, *In the Matter of Industrial and Commercial Bank of China Ltd. and Industrial and Commercial Bank of China Ltd.*, New York Branch (DFS Jan. 17, 2024), para. 7.
3. 31 U.S.C. § 5323(b).
4. 31 U.S.C. § 5323(g).
5. Plea Agreement, *United States v. Danske Bank A/S* (Dec. 12, 2022), at 37, https://www.justice.gov/media/1264681/dl
6. *Financial Crimes Enforcement Network (FinCEN) Statement on Enforcement of the Bank Secrecy Act*, FinCEN (Aug. 18, 2020), at 2, https://www.fincen.gov/sites/default/files/shared/FinCEN%20Enforcement%20Statement_FINAL%20508.pdf; 31 C.F.R. § 1010.810(a) ("Overall authority for enforcement and compliance, including coordination and direction of procedures and activities of all other agencies exercising delegated authority under this chapter, is delegated to the Director, FinCEN.").
7. Appendix P: BSA Record Retention Requirements, Fed. Fin. Insts. Examination Council, https://bsaaml.ffiec.gov/manual/Appendices/17 (last visited Sep. 9, 2022) (discussing independent record retention requirements under the BSA).
8. 12 CFR § 261.2(b)(1).
9. 31 U.S.C. § 5318(k)(3)(A)(iv).

Matthew Biben brings an invaluable client-side approach to problem-solving, drawing on his own experience as EVP and General Counsel for Chase Consumer & Community Banking at JP Morgan Chase and EVP and Deputy General Counsel of BNY Mellon, as well as spending the first 12 years of his career in government, serving in the U.S. Attorney's Office for the Southern District of New York ("SDNY"). Matthew routinely acts as counsel in matters involving, among others, the Department of Justice ("DOJ"), SEC, FRB, Office of Comptroller of the Currency ("OCC"), Consumer Financial Protection Bureau ("CFPB"), NYSDFS, state attorneys general and foreign regulators. While serving in the SDNY, Matthew prosecuted cases involving, racketeering, money laundering, tax evasion, bank, securities, mail and wire fraud and received the Attorney General's Director Award for superior performance. As Deputy General Counsel at BNY Mellon, he personally negotiated the settlement of two distinct DOJ investigations conducted by the SDNY and the United States Attorney's Office for the Eastern District of New York into systemic failures in the bank's SAR and AML programme and procedures. After those settlements, he was responsible for implementing and supervising BNY's compliance with those comprehensive BSA agreements. Matthew is widely published on AML issues and has a track record of success in private practice defending BSA/AML investigations on behalf of all size banks as well as counselling money transmitters, payments service providers, non-bank lenders and cryptocurrency businesses in bank regulatory inquires, investigations, supervision and rulemaking. Matthew is nationally recognised, including by: *Chambers* for his "standout expertise"; *Benchmark Litigation* as a "Litigation Star"; and *The Legal 500* as a "tenacious but balanced litigator".

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