



Who Is Responsible for Corporate Misconduct?

Individual Liability and the Role of the Chief Compliance Officer

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1. Introduction

With You Today



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2. Overview

II. Overview

Key Questions

Individual Liability for Corporate Wrongdoing

Individual liability for corporate wrongdoing has been a topic of interest for years, particularly after powerful messages on the topic from both the U.S. Department of Justice (“DOJ”) and Securities and Exchange Commission (“SEC”) in 2015. Changes in the Anti-Money Laundering Act of 2020 (“AMLA”) have brought these topics to light once more, along with important resulting questions.

Key Questions

- What is the standard for finding an individual liable and has it changed?
- When should a Chief Compliance Officer (“CCO”) be liable?
- What factors inform the decision of whether to hold a CCO personally liable?
- What can CCOs do to protect themselves from personal liability?
- What guidance is available to CCOs?

II. Overview

Compliance Officer Risk Factors

Pressure	Description
Increasing Risk of Individual Liability	Recently, numerous prominent enforcement actions have been brought against compliance officers
Increased Regulatory Requirements	<ul style="list-style-type: none">• State and Federal regulators are heightening regulatory requirements on compliance officers and programs• Increased burden on firms' compliance functions is straining already limited compliance resources and focuses enforcement attention onto individuals
Structural Obstacles	<ul style="list-style-type: none">• Limited compliance resources and conflict between profitability and regulatory compliance• Exclusion of compliance officers from strategic decision-making groups, based on firms' structure and culture
Must Make Decisions in Real Time with Limited Guidance	Serious concern about regulators' enforcement decisions based on hindsight bias

II. Overview

AMLA Bars for BSA Violations

► Background

- Part of Division F of the National Defense Authorization Act, which was signed into law on Jan. 1, 2021

► Purpose

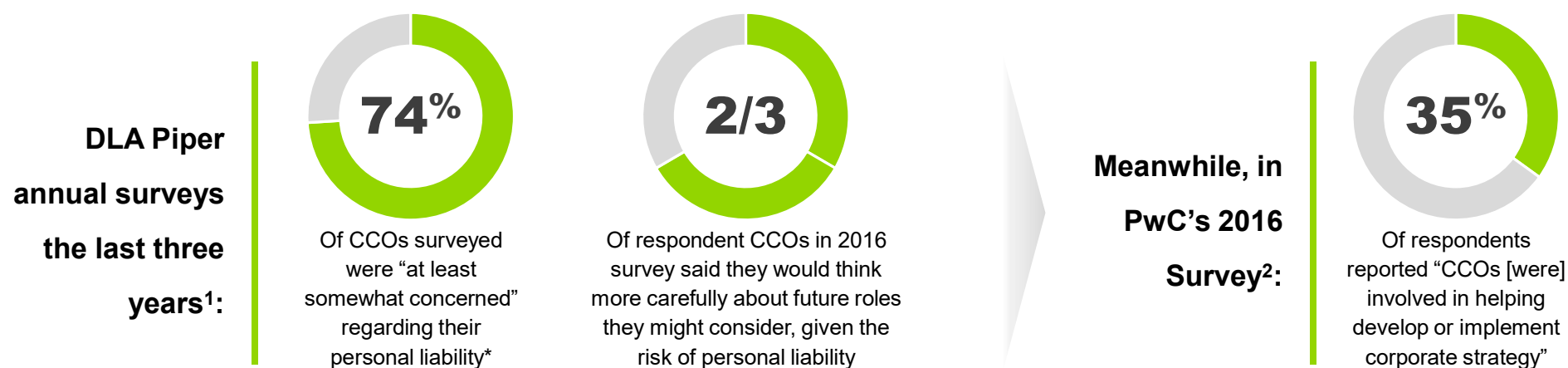
- Clarifies and streamlines certain Anti-Money Laundering (“AML”) and Bank Secrecy Act (“BSA”) obligations and establishes new regulatory requirements to strengthen, modernize, and improve compliance programs

► AMLA/NDAA Section 6310:

- “Certain violators barred from serving on boards of US financial institutions”
- Allows imposition of bar from serving on corporate board for 10 years, beginning from the date of conviction for BSA violations
- Effective January 1, 2021, this new guidance highlights regulators’ commitment to holding individuals accountable with long-term repercussions

II. Overview

Results of Increased Pressure on CCOs



► Rising concerns that the negative effects of uncertainties and risks of career-ending liability will cause more people to leave or forego the profession entirely

► CCOs are receiving increased regulatory scrutiny, while often still being excluded from key decision-making groups in their workplace

¹ See 2018 Compliance and Risk Report: Compliance Settles In, Personal Liability Concerns Persist and Technology Emerges as the Next Frontier, DLA PIPER (Nov 15, 2018), <https://www.dlapiper.com/en/us/news/2018/11/2018-compliance-risk-report> (last visited Jan. 15, 2020); DLA Piper's 2017 Compliance & Risk Report: Compliance Grows Up, DLA PIPER (May 22, 2017), <https://www.dlapiper.com/en/us/news/2017/05/dla-pipers-2017-compliance-and-risk-report> (last visited Jan. 15, 2020); DLA Piper's 2016 Compliance & Risk Report: CCOs Under Scrutiny, DLA PIPER (Apr. 19, 2016), <https://www.dlapiper.com/en/us/news/2016/04/2016-compliance-and-risk-report> (last visited Jan. 15, 2020).
² See PwC State of Compliance Study 2016, PRICEWATERHOUSECOOPERS (2016), https://cgx3j41r03fwkmmtdtoy3l6aq-wpengine.netdna-ssl.com/wpcontent/uploads/2017/11/PWC_State_of_Compliance_Study_2016.pdf (last visited Jan. 15, 2020).

3. Guidance for CCOs

III. Guidance for CCOs

Overview

**Helpful guidance
CCOs may reference**



- ▶ Evaluation of Corporate Compliance Programs
- ▶ Yates Memo
- ▶ Deputy AG Rosenstein's Statement
- ▶ SEC Guidance
- ▶ Federal Banking Agencies
- ▶ Commodity Futures Trading Commission ("CFTC")
- ▶ Financial Crimes Enforcement Network ("FinCEN")

III. Guidance for CCOs

DOJ's Evaluation of Corporate Compliance Program



On April 30, 2019, the DOJ released a guidance document, "Evaluation of Corporate Compliance Programs," an update to similar guidance published by the Fraud Section of the DOJ's Criminal Division in 2017.

The guidance provides prosecutors applying the DOJ's Justice Manual with a framework for investigating and prosecuting corporations by organizing key considerations into three separate, but related questions:

1. Is the corporation's compliance program well designed?
2. Is the program being applied earnestly and in good faith?
3. Does the corporation's compliance program work?

The guidance was updated once again in June 2020, emphasizing a functional and continual approach to assessing the effectiveness of corporate compliance programs. Updates stated that a program should be dynamic, and include risks faced by, and misconduct of, comparable companies as well as the company's own risks. Effective program implementation requires adequate resourcing, including use of analytics, and tone "in the middle" as well as "at the top."

III. Guidance for CCOs

DOJ Statements



The following statements, while technically aimed at prosecutors, can be helpful resources for CCOs.

► 2015 Yates Memo: Individual Accountability for Corporate Wrongdoing:

- Focus on seeking accountability from individuals responsible for illegal corporate conduct
- Put forth six key steps to strengthen pursuit of individual corporate wrongdoing

► 2018 Rosenstein Statement:

- “The most effective deterrent to corporate criminal misconduct is identifying and punishing the people who committed the crimes”
- New focus on the individuals who “play significant roles in setting a company on a course of criminal misconduct”

III. Guidance for CCOs

DOJ's Hiring Focus



On March 8, 2021, the Wall Street Journal reported that the DOJ's Fraud Department, which handles Foreign Corrupt Practices Act ("FCPA") investigations, appears to be focusing on corporate compliance with renewed vigor.

Their foreign bribery unit has grown to record size, having recently hired additional prosecutors and an attorney with private sector compliance expertise (including corporate monitorships).

The Fraud Department's key focus is encouraging companies to proactively build compliance programs with the ability to catch and prevent wrongdoing.

Last year, the FCPA Unit helped to levy a record \$7.84 billion in global penalties for corruption-related misconduct, and this growth is expected to continue.

³ Tokar, D. (2021) "Justice Department's Foreign Bribery Unit Adds Prosecutors, Compliance Expertise," Wall Street Journal, <https://www.wsj.com/articles/justice-departments-foreign-bribery-unit-adds-prosecutors-compliance-expertise-11615199402>.

III. Guidance for CCOs

SEC



- In 2015, then-Director of the SEC Division of Enforcement Andrew Ceresney stated that the SEC “take[s] the question of whether to charge a CCO very seriously and consider[s] it carefully.”
- SEC charges individual CCOs in three circumstances:
 1. When the CCO is affirmatively involved in misconduct;
 2. When the CCO engages in efforts to obstruct or mislead the Commission; and
 3. When the CCO exhibits “a wholesale failure to carry out his or her responsibilities.”
- In 2018, SEC upheld FINRA disciplinary ruling, citing the obligation of a CCO to “**meaningfully**” implement compliance programs, policies, and procedures.
- In 2020, Director of Office of Compliance Inspections and Examinations Peter Driscoll gave a speech emphasizing empowerment, seniority, and authority of CCOs, and acknowledging that the critical function of compliance should not all fall on the shoulders of the CCO.

III. Guidance for CCOs

SEC (cont'd)



SEC Commissioner Pierce's October 19, 2020 Speech:

- While compliance officers' responsibilities increase, the liability they face in executing those responsibilities remains ultimately unclear
- "Who is responsible when the nail fails?"
 - An overly-aggressive approach to charging CCOs for compliance failures shifts responsibility for compliance from the business to the individual
- Conflicting messages between speeches and enforcement actions

OCIE Risk Alert on November 19, 2020:

Provides an overview of notable compliance deficiencies and weaknesses identified related to the Compliance Rule, including:

- Inadequate compliance resources
- Insufficient authority of CCOs
- Annual review deficiencies
- Implementing actions required by written policies and procedures
- Maintaining accurate and complete information in policies and procedures
- Maintaining or establishing reasonably designed written policies and procedures

III. Guidance for CCOs Federal Banking Agencies



On August 13, 2020, the Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union Administration, and the Office of the Comptroller of the Currency issued a joint statement updating 2007 guidance on how they evaluate enforcement actions when financial institutions violate or fail to meet BSA/AML requirements.

FinCEN followed with its own statement on August 18, 2020, outlining its approach to enforcing the BSA.

These statements provided further transparency into regulators' decision making, highlighting the following:

- Assurance that "isolated or technical deficiencies" in compliance programs will not typically result in cease and desist orders;
- Descriptions of circumstances that would likely result in a cease and desist;
- More detailed descriptions and examples of compliance program pillars;
- Explanation from FinCEN that it will base enforcement actions on "violations of law, not standards of conduct contained solely in guidance documents;" and
- Detailed factors FinCEN will consider when determining disposition of BSA violation.

III. Guidance for CCOs

CFTC



In September 2020, the CFTC announced new first of its kind guidance by the Division of Enforcement outlining factors used in evaluation of corporate compliance programs in connection with enforcement matters.

According to Division of Enforcement Director James McDonald:

“This guidance will help both Division staff in evaluating a corporate compliance program and companies seeking to cultivate a culture of compliance for their businesses.”

Guidance considers whether a compliance program was reasonably designed and implemented to:

- Prevent the underlying misconduct at issue;
- Detect the misconduct; and
- Remediate the misconduct.

III. Guidance for CCOs

FinCEN



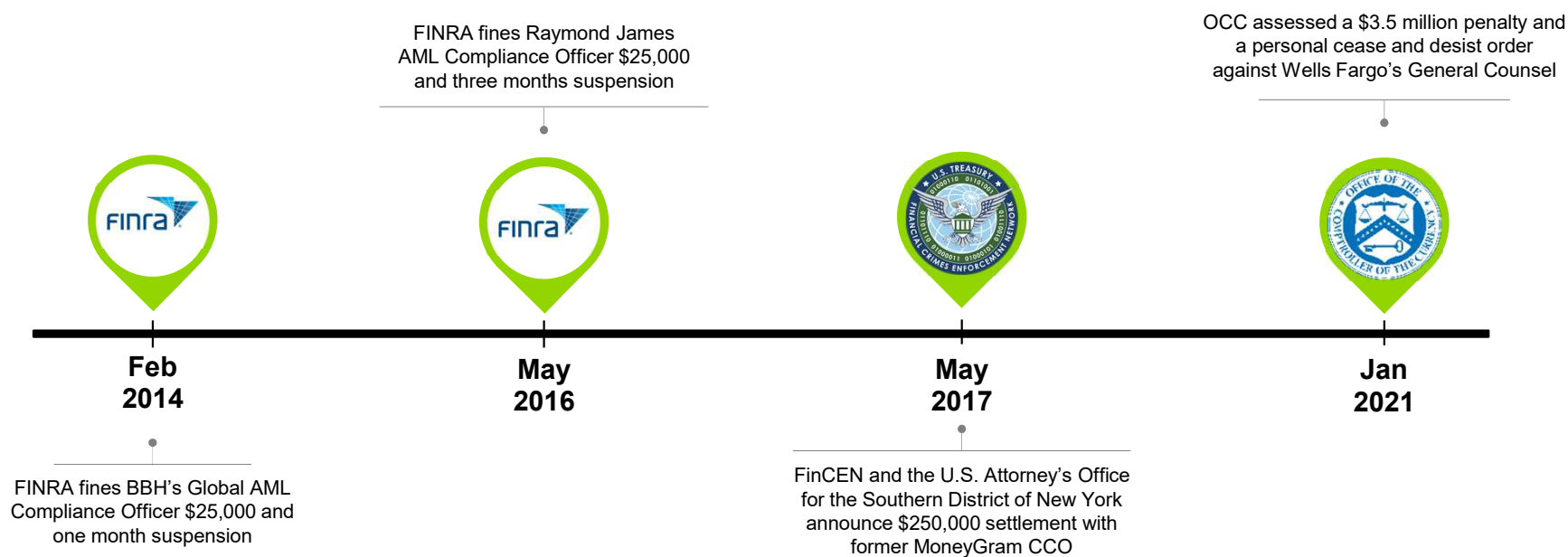
In September 2020, FinCEN released an Advanced Notice of Proposed Rulemaking (“ANPRM”) on AML Program Effectiveness, seeking public comment on a wide range of questions on regulatory amendments under the BSA, including:

- ▶ Should there be regulatory requirements for institutions with AML programs to conduct risk assessments in order to achieve an “effective and reasonably designed” program?
 - Formal risk assessment would have to take into account the government’s AML priorities, which will be announced approximately every two years
- ▶ Proposed changing the definition of an “effective and reasonably designed” AML compliance program to require that it:
 - Assesses and manages risk as informed by its own risk assessment process, and considers AML priorities issued by FinCEN
 - Provides for compliance with BSA requirements
 - Information provided to government officials have a high degree of usefulness to those officials who investigate financial crime

4. Enforcement Actions and Trends

IV. Enforcement Actions and Trends

Overview



IV. Enforcement Actions and Trends

Brown Brothers Harriman

In February 2014, FINRA fined BBH a record \$8,000,000, and former Global AML Compliance Officer was fined \$25,000 and suspended for one month for substantial AML Compliance failures, including:

- Failure to have an adequate AML program in place to monitor and detect suspicious penny stock transactions
- Failure to “sufficiently investigate” potentially suspicious penny stock activity brought to the firm’s attention
- Not fulfilling SAR filing requirements



IV. Enforcement Actions and Trends

Raymond James

In May 2016, FINRA fined Raymond James \$17,000,000 and former AML Compliance Officer was also fined \$25,000 and suspended for three months for “Systemic AML Compliance Failures,” including:

- Failing to establish and implement adequate AML procedures resulting in the firm’s failure to properly prevent or detect, investigate, and report suspicious activity for several years
- Failure to conduct required due diligence and periodic risk reviews for foreign financial institutions
- AML Compliance Officer’s failure to ensure the reviews were conducted



IV. Enforcement Actions and Trends

MoneyGram

In 2017, FinCEN and the U.S. Attorney's Office for the Southern District of New York announced its settlement of \$250,000 with the former Chief Compliance Officer of MoneyGram International Inc., who:

- Failed to terminate agents and outlets that were participating in fraudulent schemes, including money laundering
- Structured MoneyGram's AML program to restrict compliance analysts' access to information needed to support the filing of SARs
- Failed to conduct adequate due diligence on prospective agents or outlets





IV. Enforcement Actions and Trends

Wells Fargo

In January 2020, the OCC announced civil charges against five (5) high-level ex-officials at Wells Fargo and settlements with three (3) former top executives at the bank for their roles in the bank's sales practices misconduct.

Settlements:

1. Chairman and CEO - **prohibition from the banking industry and a \$17,500,000 civil penalty.**
2. Chief Administrative Officer and Director of Corporate HR - **personal cease & desist order and a \$2,250,000 civil penalty.**
3. Chief Risk Officer - **personal cease & desist order and a \$1,250,000 civil penalty.**

Outstanding Charges and Relief Sought:

Head of the Community Bank	Prohibition from banking industry & \$25,000,000 civil penalty
Community Bank Group Risk Officer	Prohibition from banking industry & \$5,000,000 civil penalty
General Counsel***	Cease & Desist Order & \$5,000,000 Civil Penalty
Chief Auditor	Cease & Desist Order & \$2,000,000 Civil Penalty
Executive Audit Director	Cease & Desist Order & \$250,000 Civil Penalty

***On January 15, 2021 OCC announced a settlement reached with GC for \$3,500,000

Resources

https://s3.amazonaws.com/documents.nycbar.org/files/Report_CCO_Liability_vF.pdf - NYC Bar Report on CCO Liability.

<https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0> - Rosenstein Statement

<https://www.justice.gov/archives/dag/file/769036/download> - Yates Memo

<https://www.finra.org/media-center/news-releases/2014/finra-fines-brown-brothers-harriman-record-8-million-substantial-anti> - FINRA BBH News Release

<https://www.finra.org/media-center/news-releases/2016/finra-fines-raymond-james-17-million-systemic-anti-money-laundering> - FINRA Raymond James News Release

<https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-10.html> - OCC Wells Fargo General Counsel 2021 News Release

https://wp.nyu.edu/compliance_enforcement/2020/12/17/the-sec-sort-of-weighs-in-on-how-personal-liability-for-chief-compliance-officers-may-undercut-effective-compliance-programs/ - SEC guidance over the years.

<https://www.fincen.gov/news/news-releases/fincen-and-manhattan-us-attorney-announce-settlement-former-moneygram-executive> - FINCEN MoneyGram News Release

<https://www.occ.gov/news-issuances/news-releases/2020/nr-occ-2020-6.html> - OCC Wells Fargo 2020 News Release

<https://www.whitecase.com/publications/alert/doj-updates-guidance-evaluation-corporate-compliance> - Corporate Compliance Program 2020 Updated Guidance Article

<https://www.justice.gov/criminal-fraud/page/file/937501/download> - Justice Department Evaluation of Corporate Compliance Programs 2020

<https://www.wsj.com/articles/justice-departments-foreign-bribery-unit-adds-prosecutors-compliance-expertise-11615199402> – WSJ on new DOJ hiring

<https://www.consumerfinancemonitor.com/2020/08/26/federal-banking-agencies-issue-joint-statement-on-enforcement-of-bsa-aml-requirements-fincen-follows-with-its-own-statement/> - Joint Statement on BSA/AML requirements

<https://www.sec.gov/news/speech/peirce-nscp-2020-10-19> - When the Nail Fails Speech

https://www.sec.gov/files/Risk%20Alert%20A%20Compliance%20Programs_0.pdf – OCIE Risk Alert

<https://www.fincen.gov/news/news-releases/fincen-seeks-comments-enhancing-effectiveness-anti-money-laundering-programs> - FinCEN ANPRM

<https://www.cftc.gov/PressRoom/PressReleases/8235-20> - CFTC Press Release

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