SIGNIFICANT DEVELOPMENTS REGARDING MONETARY VIOLATIONS AND FORFEITURES

Joseph A. Rillotta
Drinker Biddle & Reath LLP
Washington, D.C.

Legislation and Congressional Oversight

1. **House Financial Services Committee Chairwoman Suggests Potential Reform of Bank Secrecy Act, Anti-Money Laundering Laws (Apr. 2, 2019):** The *ABA Banking Journal* reports on Representative Maxine Waters’ remarks to the American Bankers Association Washington Summit, where she placed BSA/AML reform on a shortlist of initiatives the House Financial Services Committee will take up this Congress. Per Representative Waters, the Committee is considering “beneficial ownership legislation”, and is receiving feedback from FinCEN on potential measures to improve the effectiveness of Title 31 reporting.

Legislation has thus far been introduced to establish the “Financial Crimes Enforcement Network Exchange” program, a voluntary information-sharing partnership to include law enforcement, financial institutions, and FinCEN, and to encourage “technology-based BSA compliance innovation”.

2. **House Financial Services Committee Ranking Member Voices Support for Document Requests to Deutsche Bank, in Furtherance of AML Oversight (Jan. 24, 2019):** The Financial Services Committee’s top Republican, Representative Patrick McHenry, wrote a letter to Deutsche Bank CEO Christian Sewing, urging the bank to produce documents concerning its AML compliance efforts. The letter gives a markedly more bipartisan flavor to the Committee’s oversight of Deutsche Bank, which had previously been spearheaded by Democrats (and linked, to some extent, to the bank’s business ties to President Donald Trump). Representative McHenry’s letter states, “It is critically important for the American public to have confidence Deutsche Bank is adequately addressing vulnerabilities that allowed billions of dollars tied to criminal activities to move through the international banking system.” Representative McHenry’s letter references the bank’s 2017 consent order with the New York State Department of Financial Services, which stems from various prior AML deficiencies, and seeks in part to assess Deutsche Bank’s compliance with the 2017 order.
Case Law

1. In *Timbs v. Indiana*, U.S. Supreme Court Rules that the Excessive Fines Clause of the Eighth Amendment Applies to the States, May Restrict Asset Forfeitures (Feb. 25, 2019): Tyson Timbs was prosecuted under Indiana law on drug charges. Timbs pleaded guilty, but challenged Indiana’s seizure of his Land Rover, which was purchased for $42,000 a few months prior to seizure (admittedly with clean money), and which Timbs admittedly used to transport $225 worth of heroin that he sold to undercover officers. The State sought to seize the vehicle on the ground that it was an instrumentality of Timbs’ criminal offenses, but the trial court denied the seizure, holding that it would violate the Excessive Fines Clause and constitute a forfeiture grossly disproportionate to the seriousness of the offense. An appellate court confirmed, but the Indiana Supreme Court reversed, holding that the U.S. Supreme Court had never clearly incorporated the Excessive Fines Clause against the states under the Fourteenth Amendment’s Due Process Clause.

The U.S. Supreme Court vacated and remanded, ruling unanimously that the Excessive Fines Clause was incorporated to apply to the states, and directing the Indiana Supreme Court to determine whether the forfeiture of Timbs’ vehicle violated the clause. Writing for the Court, Justice Ginsburg traces the “venerable lineage” of the Excessive Fines Clause to the Magna Carta and to the colonial constitutions, deeming the prohibition against excessive fines to be a fundamental right and appropriately incorporated provision. Justice Ginsburg further notes that the Excessive Fines Clause has been held to apply to federal *in rem* forfeitures that “are at least partially punitive” in nature, and holds that this broad construction should apply similarly to the states. Justices Gorsuch and Thomas submitted concurring opinions, disagreeing as to the specific reasons why the Excessive Fines Clause should be incorporated under the Fourteenth Amendment, but otherwise agreeing with the majority.

Questions remain as to how this precedent will be applied. The State of Indiana’s Supreme Court briefs contended that, even if the Excessive Fines Clause were deemed to apply, the forfeiture of Timbs’ Land Rover would not be excessive in light of the drug trafficking offense of conviction.

Enforcement

1. European Union Waivers on Blacklist for Countries Posing Money Laundering Risk (Mar. 7, 2019): E.U. institutions are at odds as to proposed legislation that would require banks to carry out enhanced due diligence on business involving customers and financial institutions from countries on an expanded blacklist of 23 “high risk” jurisdictions. The list was drafted by the E.U.’s executive organ, the European Commission, and it was particularly controversial because it included four U.S. territories (Puerto Rico, U.S. Virgin Islands, Guam, and American Samoa), in addition to Saudi Arabia, Nigeria, and other jurisdictions.
For obvious reasons, the U.S. Treasury opposed the expanded blacklist, and instructed U.S. banks to disregard it.

On March 7, 2019, the E.U. Council unanimously declined to ratify the proposed legislation. However, within a week, the E.U. Parliament passed a resolution disapproving of the Council’s actions, and Members of Parliament voiced support for renewed efforts to expand the blacklist. For now, a prior version of the E.U. blacklist remains in effect. The countries affected are The Bahamas, Botswana, Ethiopia, Ghana, Iran, North Korea, Pakistan, Sri Lanka, Syria, Trinidad and Tobago, Tunisia, and Yemen.

2. **OCC Issues Cease-and-Desist Order Against Japan-Based MUFG Bank (Feb. 22, 2019):** The Office of Comptroller of the Currency found that U.S. branches of MUFG, a Mitsubishi affiliate, “failed to adopt and implement a compliance program that adequately covered the required BSA/AML program elements,… failed to timely file SARs related to suspicious customer activity, and… failed to implement appropriate BSA/AML due diligence programs for correspondent accounts of foreign financial institutions.” MUFG had been the subject of a prior OCC cease-and-desist order in 2017, and of similar orders issued by the New York State Department of Financial Services in 2013 and 2014.

   MUFG consented to the latest order, though it neither admitted nor denied the predicate findings of fact. Pursuant to the order, MUFG agreed to enhance its SAR reporting and correspondent banking due diligence programs, among other controls, and to implement enhanced BSA/AML internal auditing. OCC expressly reserved the right to take additional enforcement actions based on its findings of fact.

3. **FinCEN Announces Enhanced Cooperation with Europol (Feb. 21, 2019):** FinCEN Director Kenneth Blanco announced a new initiative to coordinate information gathering and cooperation between FinCEN, Europol (the European Union’s law enforcement agency), and E.U. member states. The initiative includes FinCEN’s commitment to deploy a liaison officer to Europol headquarters at The Hague. Per FinCEN’s statement:

   This agreement strengthens the already excellent partnership between FinCEN and Europol and will help facilitate the exchange of vital financial information in a more effective and efficient way in order to better protect our financial system and citizens from harm. We are fortunate to be able to provide a dedicated and talented liaison who is committed to our mutual mission of keeping our nations and families safer on both sides of the Atlantic and beyond.
4. **HSBC Announces a $626 Million Earmark for Investigations Regarding Tax Fraud, Money Laundering Allegations (Feb. 19, 2019):** According to its Report of Foreign Issuer filed with the SEC, HSBC Holdings PLC set aside $626 million to cover aggregate penalties estimated to exceed $800 million, in connection with several ongoing investigations, including:

- an investigation by “the DoJ and the US Internal Revenue Service regarding whether certain HSBC companies and employees, including those associated with HSBC Swiss Private Bank and an HSBC company in India, acted appropriately in relation to certain customers who may have had US tax reporting obligations”;

- a “formal criminal examination in Belgium for alleged tax-related offences” by HSBC Swiss Private Bank; and

- an investigation by Argentina’s tax authority concerning “allegations of tax evasion, conspiracy to launder undeclared funds and an unlawful association among HSBC Swiss Private Bank, HSBC Bank Argentina, HSBC Bank USA and certain HSBC employees”.

The report further stated that “HSBC is cooperating with all relevant authorities in these matters.”

5. **British Banker Sentenced to Time Served in EDNY Following Sting, First FATCA Guilty Plea (Jan. 24, 2019):** Adrian Baron, a U.K. citizen and former CEO of the now-defunct, St. Vincent and the Grenadines-based Loyal Bank Ltd., was arrested in Hungary in March 2018, following a sting where he offered to set up a corporation and bank account for an undercover federal agent. According to court filings, the agent posed as a U.S. resident involved in stock manipulation schemes, who sought to open a corporate account that he could control but that could not be traced back to him.

Baron was charged in the Eastern District of New York for conspiring to defraud the United States and violating the FATCA. He was extradited and pleaded guilty in what was reportedly the first FATCA violation plea since the statute’s enactment in 2010. Judge Kiyo Matsumoto of the Eastern District sentenced Baron to time served (which totaled nearly 11 months), a downward variance from Baron’s 18-24 month Guidelines range. In support of the variance, Judge Matsumoto cited Baron’s age (64 years), non-violent offender status, and the “extreme” conditions of Baron’s four-month detention in Hungary prior to his extradition.

The case is docketed in EDNY as United States v. Kyriacou et al., case no. 1:18-cr-00102-KAM. Loyal Bank Ltd. was dissolved by order of the St. Vincentian High Court of Justice on August 24, 2018.
Regulatory Guidance

1. FinCEN Director Clarifies Position on Financial Institutions’ Sharing of BSA Compliance Resources (Feb. 4, 2019): In an address to the Securities Industry and Financial Markets Association (SIFMA), FinCEN Director Kenneth Blanco elaborated on a previously issued FinCEN statement on Sharing BSA Resources. Per Director Blanco:

[W]e clarify that banks may enter into certain collaborative arrangements to meet their individual BSA obligations through the sharing of human, technological, and other resources, in order to better protect against illicit actors seeking to abuse those types of institutions.

We recognize that banks, particularly smaller institutions that often face greater resource challenges, can share certain resources to reduce costs associated with BSA compliance, while also enhancing their ability to monitor for and defend against money laundering or terrorist financing threats to their institutions. FinCEN would like to hear from other industries… as to how a similar statement might be useful outside the banking industry.