

2024 AND MORE

Hot Topics in Financial Law and Regulation

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Overview

- Overview of the Fragmented Web
- AML Overview
- Hot Topics
- A Look Towards 2025
- Discussion and Questions

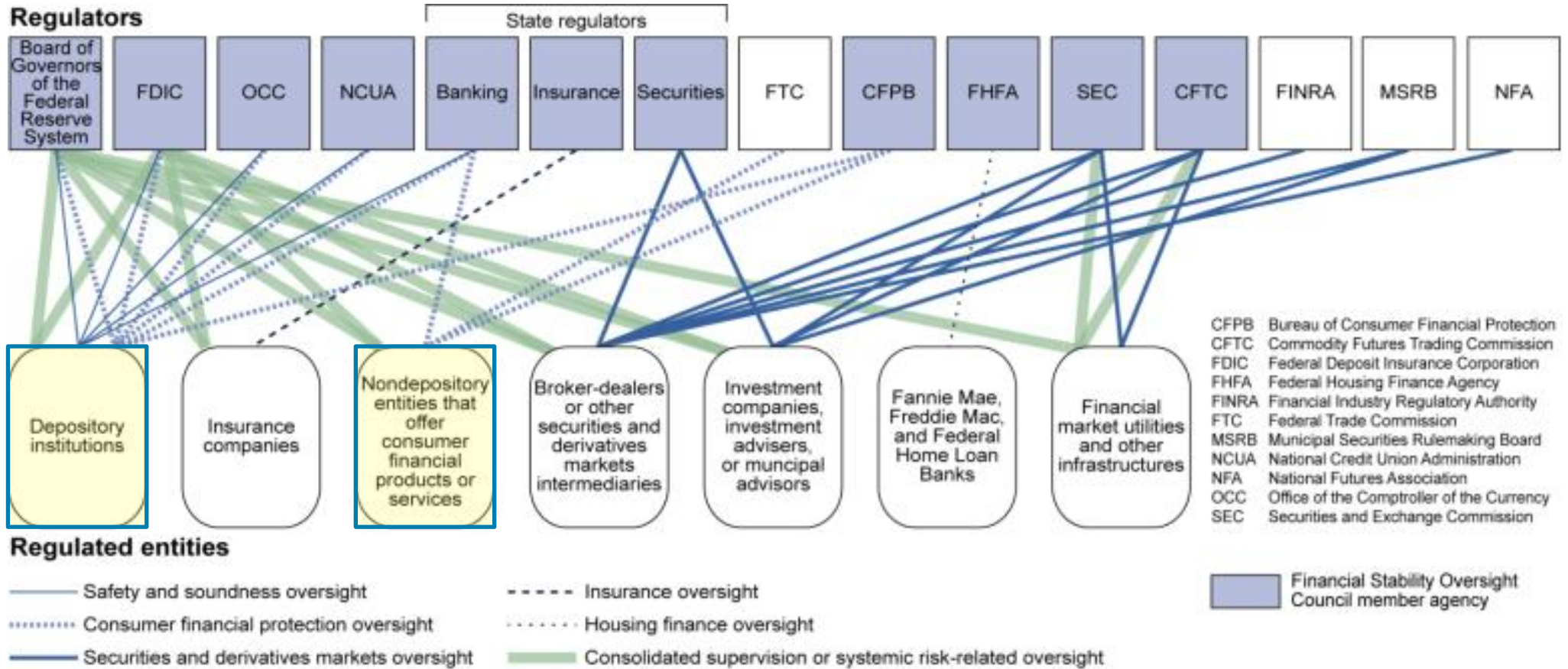


Polling Question 1

Do you know your regulators?

1. I'm not sure.
2. I can name most of them.
3. I'm on first name basis with my regulators!
4. What regulators?

The Web of Regulation



Source: GAO. | GAO-16-175

Nacha Operating Rules and Card Network Rules also apply.

FI's Regulatory Position

- FinCEN: BSA/AML
 - SAR Filing
 - Subject to IRS-lead Examinations
 - Fines and Corrective Measures
- CFPB and FTC partners with DOJ on Fraud/AML investigations
 - Regulation E (CFPB)
 - Unfair, Deceptive and Abusive Practices (e.g., UDAAP)
- State Financial Institution and Banking Departments
 - Licensing, Oversight and Examinations
 - Compliance with Federal Regulations satisfies State Requirements in most cases (e.g., SAR filing)
 - Fines, MOUs and Consent Orders
 - Networked Supervision and “One Company, One Exam”



General Jurisdiction: Law Enforcement and State Entities

- Office of Foreign Assets Control – applies to every “U.S. person”
- Department of Justice and U.S. Attorney’s Offices
 - Specialized divisions (e.g., MLARS and antitrust)
 - Certain U.S. Attorney’s Offices may focus on certain areas (e.g., consumer fraud or public corruption)
- State Attorney General’s Offices: Civil and Criminal Divisions
 - Specialized divisions (e.g., consumer protection or organized crime)
 - Broad authority (e.g., UDAAP)
- District Attorney Offices
 - Focused on local issues, but, may investigate issues that are “national” in scope (e.g., Manhattan District Attorney’s Office)



Polling Question 2

When was the last time your ACH Origination Agreement was updated?

1. I'm not sure.
2. Handshake agreements are fine.
3. It's perfect! We've been using the same agreement for years.
4. We update it when the Nacha Operating Rules change.

Regulation Through Relationships

- Regulation through Banking Relationships (FFIEC Group)
 - Board of Governors of the Federal Reserve
 - FDIC
 - OCC
- Focus on Systemic Risk
 - Third parties submit transactions through banks
 - Banks will down-stream regulatory requirements (AML and CDD)
- Also subject to Card Network Rules and Nacha Operating Rules
 - Contractual and network access controls
 - Fines may be passed-through by Card Acquirers and Originating Depository Financial Institutions (ODFIs)



Renewed Focus on Money Laundering

- Typical case: exchanging dirty money for clean money through a flow of funds that hides the illegal source of the money (e.g., drug money through a pizza parlor's bank account as fake catering orders).
- Less typical: legitimate money used to promote unlawful activity within the U.S. (e.g., funding terrorism through not-for-profit front entity).
- As much as 5% of global GDP or \$2 trillion is laundered money.
- Money movement is faster and more complex.
 - More companies moving money (In 2023, there were 298,165 business entities formed in Delaware alone).
 - Increased consumer options and payment rails.
 - Challenges with multiple payment channels and wallets.
 - FedNow, Real Time Payments, push-to-card present unique challenges.

Compliance = Crime Prevention + Customer Service

Polling Question 3

Who's responsibility are anti-money laundering controls?

1. The BSA Officer
2. The Board of Directors
3. Everyone's responsibility
4. The Compliance Department

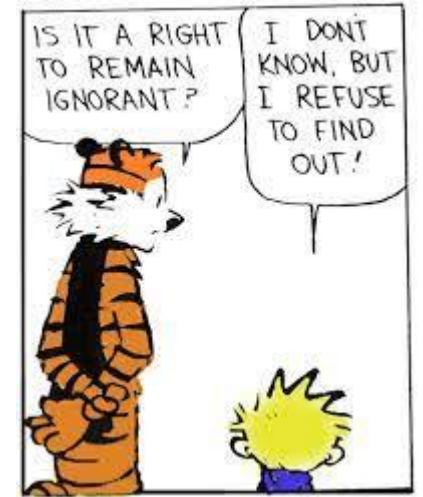
Money Laundering Basics: Bank Secrecy Act (BSA)

- The BSA requires financial institutions to:
 - Maintain an AML program that includes KYC and transaction monitoring
 - Train employees and review program
 - File Suspicious Activity Reports (SARs) and Cash Transaction Reports (CTRs)
- Report suspicious activity that might signify:
 - Money laundering
 - Tax evasion or other criminal activities
- SARs are filed with FinCEN and searchable by government entities
- Must have a **reasonably designed, risk-based program** to prevent the MSB from being used to facilitate money laundering and the financing of terrorist activities.



Basis for FI Liability

- Knew or should have known about bad conduct and “willful blindness”
- AML failures are a common law enforcement hook
 - Failure to monitor, report or terminate relationships
 - Related civil liability: *Studco Bldg. Sys. V. 1st Advantage Fed. Credit Union*
- Regulatory liability: FTC’s Telemarketing Sales Rule
 - Certain sections apply to FIs if they “provide substantial assistance or support to sellers or telemarketers”
 - *FTC v. Walmart* – Court rejected the claim that Walmart violated the federal Telemarketing Sales Rule (July 2024)
- Credit card laundering has been recent focus and UDAAP violations



Polling Question 4

Should Fis be liable for unworked alerts that could have prevented losses or crimes?

1. Yes
2. It depends
3. Only criminally
4. No

Tracking Developments in AML

- Regulations and laws change periodically
 - Government interpretations change
 - Expectations may be “communicated” through enforcement
 - Changes can impact regulatory risk
- Understand the government’s approach:
 - [Criminal Division’s Corporate Enforcement Policy \(August 2023\)](#)
 - [Evaluation of Corporate Compliance Programs \(September 2024\)](#)
- What are law enforcement’s priorities?



Takeaway: Pay attention to enforcement actions and updates to guidance!

Polling Question 5

How important is it that the BSA Officer be located within the U.S.?

1. Very important
2. Not important
3. Only for financial institutions of a certain size
4. Should be at FinCEN's sole discretion

Hot Topics – FinCEN’s Proposed Rule

- Long overdue: Anti-Money Laundering Act of 2020 required rule clarifying how FIs were to incorporate National AML/CFT Priorities into their programs. It took three years to propose the rule. Proposed rule:
 - Amends the existing program rules to explicitly require financial institutions to establish, implement, and maintain effective, risk-based, and reasonably designed AML/CFT programs with certain minimum components, including a mandatory risk assessment process;
 - Requires financial institutions to review government-wide AML/CFT priorities and incorporate them, as appropriate, into risk-based programs, as well as provide for certain technical changes to program requirements; and
 - Promote clarity and consistency across FinCEN’s program rules for different types of financial institutions.
 - Individuals responsible for establishing, maintaining, and enforcing a financial institution’s AML/CFT program must be located in the United States and be accessible to, and subject to the oversight of, the Secretary of the Treasury and the appropriate federal functional regulator.
- Comments closed on September 3, 2024 with 88 comments received.

Polling Question 6

Do we need more federal payments regulations?

1. Yes
2. No and the current level of regulation is fine
3. Only states should regulate payments
4. No and we need less regulations

Hot Topics – Federal Payments Regulations?

- October 10, 2024: Comments made by Under Secretary for Domestic Finance at the Federal Reserve Bank of Chicago’s Payments Symposium focused on the recommendation to develop a federal regulatory framework for domestic payments.
 - Growth of electronic payments and payment apps offered by nonbank firms continues to grow. The use of stablecoins is also growing.
 - “The existing regulatory patchwork is burdensome and inefficient, *and* at the same time does not adequately address risks to consumers and the financial system or promote competition and innovation by facilitating access to real-time payment systems.”
 - Comments took aim at state-level money transmission licensing and regulation.
- Goal: A federal framework for nonbank payment service providers that better addresses risks.
- Approach: A framework built on existing rules at the federal level for anti-money laundering and countering the financing of terrorism (or AML/CFT) and for consumer protection.

Takeaway: Watch for conflict on who regulates money transmission.

Polling Question 7

Should the government regulate interchange fees?

1. Yes
2. Yes, and the government should set interchange fees
3. No
4. No and restrictions on debit interchange should be lifted

Hot Topics – Interchange Regulation

- Illinois' enacted Interchange Fee Prohibition Act, which will take effect on July 1, 2025.
 - ◆ Was a separate bill – but was inserted in the state budget without much debate!
 - ◆ No interchange fees on the tax or gratuity
 - ◆ Presents serious operational challenges to payment processors and merchants
- Law is being challenged in court and there are some heavy-weights that are taking positions.
 - ◆ Senator Durbin filed an amicus brief on October 4 in support of the new law.
 - ◆ OCC filed an amicus brief in opposition to the new law.
- Other states are considering similar legislation (e.g., PA House Bill 2394).



CFPB's Open Banking Rule

- “Covered data” encompasses information about transactions, costs, charges, and usage related to consumer financial products and services. These includes:
 - information about account balances, upcoming bills, and Regulation E payment initiations
 - historical transaction information (24 months) in the control or possession of the data provider
 - terms and conditions
- Consumers can authorize third parties to access this data, provided they adhere to strict security and data use limitations.
- The final rule mandates that data providers make covered data accessible to consumers and authorized third parties upon request, ensuring the process is reliable, secure, and competitive.

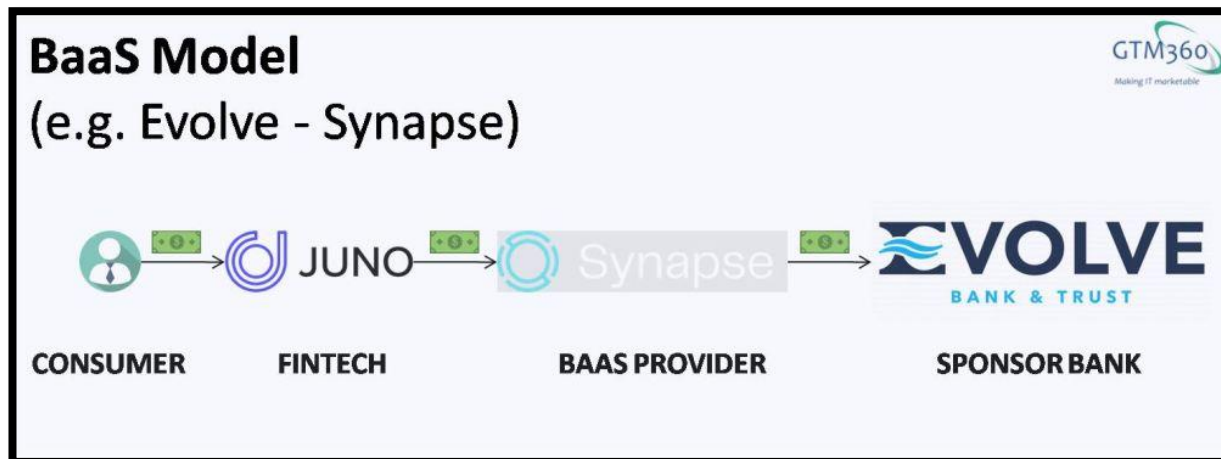
Polling Question 8

The CFPB's Open Banking Rule main result will be to:

1. Put consumer data at risk
2. Provide more choices to consumers
3. Cause banks to provide better customer service
4. Ultimately be struck down in court

Hot Topics – Synapse Collapse and BaaS

- Synapse Financial, an embedded finance platform, filed for bankruptcy protection in April 2024.
- Based on Synapse’s filings, as many as 100 fintechs and 10 million end customers were impacted by the company’s collapse. Millions of consumers with nearly \$160 million in deposits remain unable to access their funds because of poor records.
- The Evolve FBO accounts contained much less than what was in Synapse’s records—roughly \$85 million less—fueling speculation that Synapse may have used Evolve customers’ funds to keep itself afloat.
- September 2024, Yotta Technologies, a savings gamification app, sued Synapse’s bank partner, Evolve Bank & Trust, for allegedly stealing and misappropriating customer funds.



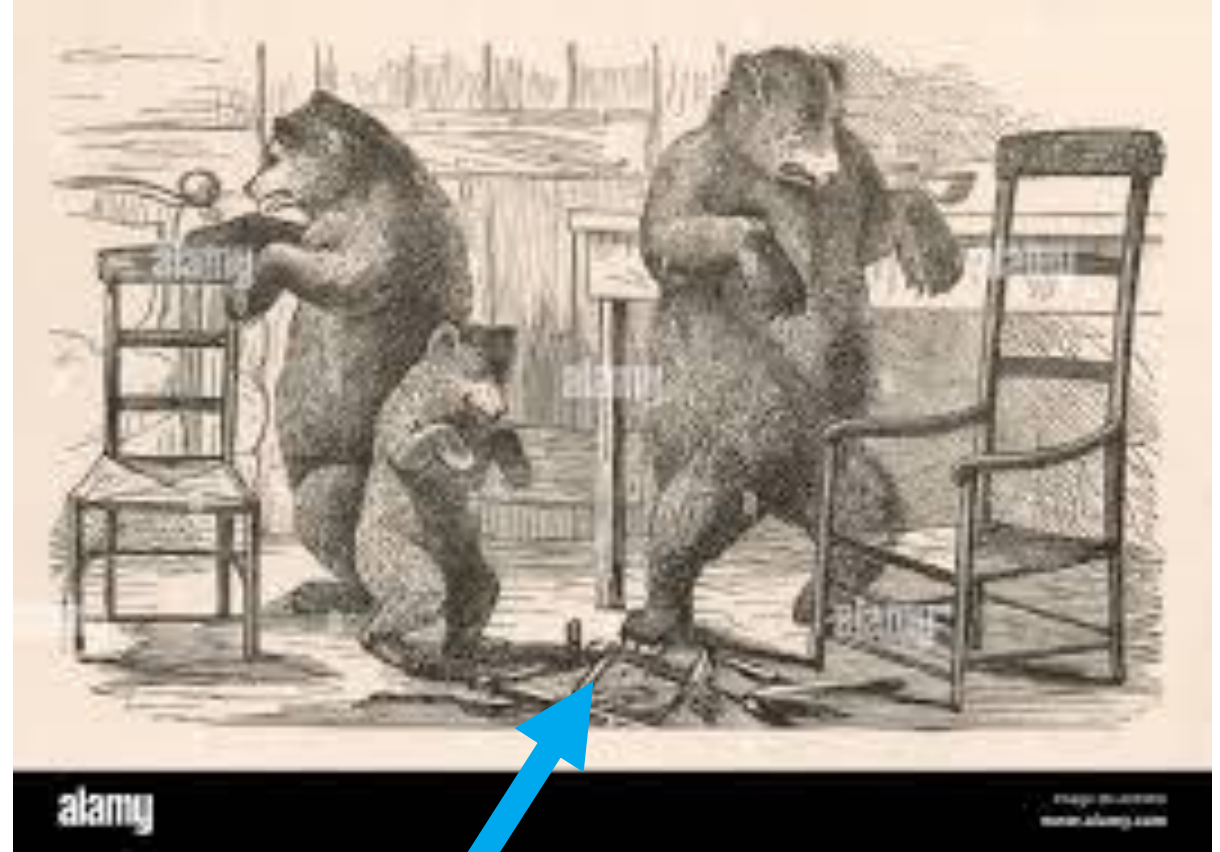
Hot Topics – Synapse Collapse and BaaS (cont.)

- Regulators are focused on third-party risk:
 - *Interagency Guidance on Third-Party Relationships: Risk Management* (June 2023)
 - *Third-Party Risk Management: A Guide for Community Banks* (May 2024)
- Fintech’s “move fast and break things” ethos conflicts with risk mitigation as a central tenet
- Banks and Credit Unions must prioritize risk and compliance when entering partnerships
 - July 2024 – FDIC publicly ordered Thread Bank to document its risk assessment and the board must approve risk tolerance thresholds
 - Evolve, Blue Ridge Bank, Piermont Bank, Sutton Bank and Lineage Bank have all faced enforcement actions over BaaS programs

Polling Question 9

BaaS regulation should be:

1. More restrictive
2. Less restrictive
3. Just right
4. More focused on the fintechs



Synapse

Kelley
Drye

Recent Enforcement

- **Wells Fargo** – Sanctions Violations = \$97.8 million settlement [March 2023]
 - OFAC: 124 apparent violations of three different sanctions programs (Iran, Syria and Sudan)
 - Federal Reserve Board: Unsafe or unsound practices relating to historical inadequate oversight of sanctions compliance risks
 - Issues were with legacy Wachovia Bank software platform, Eximills, used by European bank
 - Demonstrates federal regulators' focus on prosecuting the "facilitation" of sanctions-violating transactions involving IT systems
- **JPMorgan Chase** – AML Violation = \$75 million settlement [September 2023]
 - Processed over \$1 billion for Jeffrey Epstein between 2003 and 2019
 - Compliance staff took note of Epstein's huge cash withdrawals every month
 - Bank violated Trafficking Victims Protection Act and USVI law that incorporates the BSA/USA PATRIOT Act
 - Also resolved bank's claims against former private banking chief
- BUT, there's bigger fines out there.....

Biggest Fines Ever – Binance

AML and OFAC Violations = \$4.3 billion in fines and restitution [February 2024]

- Founder and CEO Changpeng Zhao (CZ) pleaded guilty to AML and OFAC violations = \$50 million civil and \$50 million criminal penalties and sentenced to four months in prison
- “Wild West” model that ignored compliance with U.S. law and illicit transactions
 - ◆ Failed to report over 100,000 in suspicious transactions
 - ◆ Facilitated more than 1.1 million transactions between Americans and Iranians, in addition to terrorist organizations, including Hamas
 - ◆ Said it would block U.S. customers in 2019, but didn’t block “VIP customers”
- One Binance compliance employee wrote, “we need a banner ‘is washing drug money too hard these days - come to binance we got cake for you.’”
- “A corporate strategy that puts profits over compliance isn’t a path to riches; it’s a path to federal prosecution.” - Deputy Attorney General Lisa O. Monaco.

Biggest Fines Ever – TD Bank

AML Violations = \$1.8 billion (DOJ) and \$1.3 billion (FinCEN) = \$3.1 billion total [October 2024]

- Issues were numerous, including allowing funnel accounts, slow to close accounts and criminals bribing bank employees
 - ◆ Didn't allocate sufficient resources and incentivized a "flat cost" approach to budgeting
 - ◆ Didn't tailor training to personnel and risks
 - ◆ Siloed governance structure – Neither AML Operations nor AML Technology heads reported directly to BSA Officer
 - ◆ BSA Officer failed to take accountability for program issues. The Monitor will now undertake an "Accountability Review"
- Bank already spent \$366 million and added 500 employee to improve its anti-money laundering programs
- Four-year Monitor and SAR Lookback Undertaking going back to 2018

Where They Went Wrong: Common Failures



- Most common compliance program failures include:
 - Failing to address risks and regulatory expectations
 - Failing to properly implement and maintain the program, lack of guardrails on customer on-boarding/termination
 - Allowing suspicious activity to go unreported – *i.e.*, not enough SARs filed
- Deputy Attorney General Lisa Monaco on TD Bank settlement: "Invest now or face severe consequences later."
- Big fines result from “business” overruling compliance decisions

Tone at the Top and Individual Liability

- Tone at the Top: Management should routinely emphasize and promote a commitment to a culture of compliance and lawfulness through words and actions
- *Advisory to U.S. Financial Institutions on Promoting a Culture of Compliance* cited repeatedly in FinCEN's TD Bank Consent Order
- DOJ's *Evaluation of Corporate Compliance Programs* (ECCP) [Updated March 2023]
 - criminal resolutions will take into account corporate compliance programs, including compensation-related criteria, and
 - DOJ will offer fine reductions for companies that seek to claw back compensation in appropriate cases
- Individual Liability: Regulators, including DOJ, FinCEN and NYDFS, often seek individual liability in AML compliance which may result in BOD and C-Suite-level individual liability

Polling Question 10

Should individuals be held personally liable for compliance violations?

1. Yes
2. Yes, and it should happen more often
3. Doesn't matter because D&O insurance will cover it
4. No

Key Take Aways

- Know your partner's business
- Pay attention to enforcement actions and updates to guidance
- Watch for conflict on who regulates payments
- Be careful with surcharges and convenience fees
- Prepare for Rule 1033 Implementation
- Expect regulatory scrutiny of third-party relationships to increase
- Emphasize a culture of compliance and devote appropriate resources



Resources and References

- Who Regulates Whom? An Overview of the U.S. Financial Regulatory Framework, <https://crsreports.congress.gov/product/pdf/R/R44918> (Updated October 13, 2023).
- Interagency Guidance on Third-Party Relationships: Risk Management: <https://www.fdic.gov/news/financial-institution-letters/2023/fil23029.html>
- FinCEN's NPRM: <https://www.federalregister.gov/documents/2024/07/03/2024-14414/anti-money-laundering-and-countering-the-financing-of-terrorism-programs>
- DOJ Evaluation of Corporate Compliance Programs: <https://www.justice.gov/criminal/criminal-fraud/page/file/937501/dl>
- Advisory to U.S. Financial Institutions on Promoting a Culture of Compliance: <https://www.fincen.gov/resources/advisories/fincen-advisory-fin-2014-a007>
- I ♥ Compliance: <https://www.walmart.com/ip/CafePress-I-Heart-Compliance-Unique-Coffee-Mug-Coffee-Cup-CafePress/558656000>

Time for Your Questions!



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