Consumer Finance Monitor (Season 3, Episode 38): Federal Banking Regulators and FinCEN Issue New Statements on Bank Secrecy Act/Anti-Money Laundering Enforcement: A Look at Highlights

Speakers: Alan Kaplinsky, Beth Moskow-Schnoll, and Peter Hardy

Alan Kaplinsky:

Welcome to the Consumer Finance Monitor podcast, where we explore important new developments in the world of consumer finance and what they mean for your business, your customers, and the industry. I'm your host today, Alan Kaplinsky, and I chair the Consumer Financial Services Group at Ballard Spahr.

Alan Kaplinsky:

And before we get into the heart of our podcast today, let me just quickly remind you of some other resources that we make available and that I invite you to consult. We have a blog called ConsumerFinanceMonitor.com, same name as our podcast, used to be called CFPBMonitor.com and then, after the election a few years ago, when we felt that there would be less focus on the CFPB, we broadened the subject matter content and, accordingly, broadened the title of our podcast. We also regularly do webinars and, if you're not signed up for our webinars, I invite you to do that. You can do that by going on our website and there is a place for you on the Consumer Financial Services part of the website, there will be a place for you to put your name on our mailing list. If you have any difficult with that, you can always contact me, Kaplinsky@BallardSpahr.com and I'll be able to accommodate whatever you need.

Alan Kaplinsky:

With respect to our podcast, we've been doing it for two years. We recently published, or released, I should say, our 100th podcast and we release a new podcast each week on a Thursday and we do that every week during the year except when a Thursday falls on certain holidays and we take the week off when that happens. Well, I'm very pleased today to revisit a topic that I covered with my two guests, and who are my colleagues and partners at Ballard Spahr, a very important subject that isn't consumer and financial services. Yeah, it does affect consumer finance, but it's a lot broader than that and extremely important, and what I'm referring to is the federal Anti-Money Laundering act and the Bank Secrecy Act or, for those of you who are familiar with it, the acronyms are AML and BSA. As I said, we did a podcast with my two guests a while ago, but there's been a lot going on very recently that we need to cover with you today.

Alan Kaplinsky:

Without further ado, let me introduce you to Beth Moskow-Schnoll and Peter Hardy. Beth is the managing partner of Ballard Spahr's Delaware office and a member of our firm's board of directors. She concentrates her practice on both white-collar and civil fraud litigation matter, including banks and credit card fraud, money laundering, and asset forfeiture. Among other matters, she represents financial institutions and other entities that are subject to administrative, civil, and criminal enforcement actions as a result of alleged Bank Secrecy Act and OFAC violations. Before joining Ballard Spahr several years ago, or I should say rejoining Ballard Spahr, Beth served for more than 15 years as a federal prosecutor with the U.S. Attorney's Office for the District of Delaware and, in that capacity, Beth investigated and prosecuted financial fraud, crimes including bank, credit card fraud, and, of course, money laundering.

Alan Kaplinsky:

Let me also introduce for you Peter Hardy. Peter is the leader of our anti-money laundering team. He edits the firm's blog, actually, the second blog of our firm. The first one was the Consumer Finance Monitor blog, and then Peter, and we'll find out in a minute, how long the blog has been going on, but my guess is well over a year, probably a couple of years. That is called Money Laundering Watch and I very much invite our listeners to log on that and subscribe to that. Before joining us, or I should say before entering private practice because, for a short while, Peter was at another law firm, Peter was a federal prosecutor in Washington and in Philadelphia for over a decade.

Alan Kaplinsky:

Let me give both of you a very warm welcome, Beth and Peter. Okay. Let me begin this by first addressing this question to you, Beth. On August 13th, the Federal Reserve system, the FDIC, the National Credit Union Administration, and the Comptroller of the Currency issued a joint statement updating and clarifying their 2007 guidance on how they evaluate enforcement actions when financial institutions violate or fail to meet BSA/AML requirements. Can you tell us about that, Beth, and also, in describing it, tell us how it differs from the 2007 guidance? What are the material differences?

Beth Moskow-Schnoll:

First of all, what the guidance was supposed to do is its purpose is to interpret Section 8(s) of the Federal Deposit Insurance Act, which mandates agencies to issue cease and desist orders when financial institutions fail to establish and maintain appropriate anti-money laundering programs or to correct problems their BSA and AML compliance programs previously identified by the regulators, but it also talks about, in lieu of issuing a cease and desist order, when an agency could take other formal or informal enforcement actions for additional types of BSA and AML program concerns.

Beth Moskow-Schnoll:

Let's start first, it talks about when an agency shall issue a cease and desist order. It lists three categories of when it shall issue a cease and desist order, and the first is where a financial institution fails to have a written AML compliance program, which you would think doesn't occur very often, but they're saying that they want a written AML compliance program that includes a customer identification program that adequately covers the required program components or the pillars of an AML program, which would be internal controls, independent testing, designated BSA/AML personnel, and training. And this is one area where this updated guidance actually differs from the 2007 guidance. It has much more emphasis on the pillars of your AML program and breaking down the specific components of those pillars, things like internal controls. And it talks about beneficial ownership, which didn't exist at the time of the 2007 guidance.

Beth Moskow-Schnoll:

It gives an example for this, where you fail to have a written BSA/AML compliance program that adequately covers the required program components or pillars. An example of where a financial institution would be subject to a cease and desist order would be where its system of internal controls is inadequate either with respect to a high-risk part of its business or multiple lines of business that significantly impact its BSA/AML compliance program or it has deficiencies in one key component, a component such as testing, but it's coupled with other issues like evidence of highly suspicious activity that wasn't uncovered.

Beth Moskow-Schnoll:

The second category where they shall issue, they must issue, a cease and desist order is where the financial institution fails to implement a compliance program that adequately covers the required program components or pillars. This would be things like where, if the financial institution rapidly grew its business relationships through its foreign affiliates but it hadn't conducted an appropriate AML risk assessment, or it hadn't implemented the internal controls necessary to verify customer identities or to conduct customer due diligence or to identify and monitor suspicious activity. Another example would be where it grew its business without giving its BSA officer the authority and resources necessary for proper oversight of their BSA/AML program. That's just some examples.

Beth Moskow-Schnoll:

The third category where they will absolutely issue a cease and desist order is where the financial institution has defects in its BSA/AML compliance program in one or more program components or pillars that indicate that either the written BSA/AML compliance program or its implementation is not effective. Examples would be where the deficiencies are coupled with other aggravating factors, like highly suspicious activity or patterns of structuring, significant insider complicity, or systemic failures to file CTRs, currency transaction reports, or a systemic failure to file suspicious activity reports. But for a cease and desist order to issue in this circumstance, the deficiencies have to be significant enough to render the entire BSA/AML compliance program ineffective when viewed as a whole across the financial institution's ... all of their businesses and activities.

Beth Moskow-Schnoll:

And another category of when it shall issue a cease and desist order is where a financial institution fails to correct a problem regulators previously identified during the supervisory process. And that problem would have to be quite substantial, involving substantive deficiencies in one or more pillars and it's a problem that would have had to have been big enough that it would've been reported to the financial institution's board of directors or senior management and it would've been reported to them in a supervisory communication as a violation or a regulation that must be corrected. What they're trying to say is they're not going to issue a cease and desist for something that an institution didn't correct unless they made it very clear that it was something that had to be corrected.

Beth Moskow-Schnoll:

They wanted to emphasize, though, that failure to correct isolated or technical violations or less serious issues or items that they note merely as areas for improvement will not result in the issuance of a cease and desist order. And, also, they won't issue a cease and desist order if you fail to correct previously identified problems unless the problem they find the next time around is the same as the one they previously reported to you.

Beth Moskow-Schnoll:

Then they go on to talk about ... it also covers situations where they won't pursue necessarily a cease and desist order, but they may pursue other formal or informal enforcement actions. And when we talk about formal and informal enforcement actions, formal generally refers to a public enforcement action, informal is where it's private. And they would do this for deficiencies in individual components of a financial institution's BSA/AML compliance program or for related safe and sound practices that may impact individual components, and, again, this is a difference from 2007, again, much more emphasis on the components of an AML compliance program.

Beth Moskow-Schnoll:

And the form and content of the enforcement action in a particular case will depend, obviously, on the severity of the concerns or deficiencies, the capability and cooperation of the institution's management, and the agency's confidence that the institution's management will take appropriate and timely corrective action. They also could take informal or formal enforcement action where they find other violations of BSA/AML requirements, such as with suspicious activity reporting or currency transaction reporting, violations involving beneficial ownership or customer due diligence, and, again, they emphasize that isolated or technical violations of these non-program requirements generally will not result in an enforcement action.

Beth Moskow-Schnoll:

And that's just what I want to end on here is they really do emphasize repeatedly that isolated or technical deficiencies in BSA/AML compliance programs will not generally result in cease and desist orders. They have to be substantial enough that they really impact the program as a whole as opposed to just one component of the program.

Alan Kaplinsky:

Beth, let me ask you before we move on to another subject, did the industry welcome this guidance? Is it viewed like a lot of initiatives that come out of the Trump administration as relaxing things that used to be more strict or rigid under Democratic administrations?

Beth Moskow-Schnoll:

Yeah. It's not the case that that's what the regulators were doing previously. In fact, if you review enforcement actions in this area, generally, they were going after financial institutions that not only had one problem, but they had more than one problem. It's a situation where they failed to investigate alerts on high-risk accounts where those accounts had been investigated previously, even when the new suspicious activity to which the bank had been alerted differed from the activity that had previously been investigated. It's not a situation where they get an alert and they find out it's the same thing they investigated, it was nothing, so it's no big deal. Here, it's different activity. It's things where the bank should've known better or things where they decide that they're going to cap the number of alerts from its transaction monitoring system based on the number of staff they have available to review the alerts. Well, that's not the way it works. It's not a situation where regulators have been going after banks for mere technical deficiencies.

Alan Kaplinsky:

Yeah. Okay. Beth, that's what happened on August 13th. Just a few days later, FinCEN issued its own statement on enforcement of the Bank Secrecy Act. What did FinCEN have to say?

Beth Moskow-Schnoll:

FinCEN's, their guidance was extremely short and the first thing it wanted to explain, which was in keeping with other agencies' position on the role of guidance, it explained that, in pursuing an enforcement action, it would seek to establish a violation law based on applicable statutes and regulations and not treat noncompliance with a standard of conduct announced solely in guidance as itself a violation of law. If you do something contrary to what the guidance says, that in itself will not be the basis for an enforcement action, and that's in keeping, like I said, with other regulators' positions and other agencies' positions.

Beth Moskow-Schnoll:

Then it just goes and it lists the types of actions that it could take in light of an identified violation of the Bank Secrecy Act and those would include, from the beginning to the end, it would be taking no action or issuing an informal warning letter. The next level would be seeking equitable remedy, such as an injunction into a cease and desist. The next would be settling the matter with the settlement possibly including corrective actions and civil money penalties. The next would be it could assess civil money penalties, and the last and most serious would be referring the matter for criminal investigation and a prosecution.

Beth Moskow-Schnoll:

And then it just identifies the different factors that FinCEN looks to when it's making a determination of what it should do in response to a Bank Secrecy Act violation. And the factors it looks to, none of which are surprising to anyone, are nature and seriousness of the violations, what effect violations have, do they have some type of impact, how pervasive is the wrongdoing within the institution, the financial institution's history of prior violations, what type of benefit did the financial institution get as a result of the violations, how much money did they save by maybe not having the proper internal controls in place, whether the financial institution terminated and remediated the violations upon discovery, whether it voluntarily disclosed the violations, whether it cooperated with FinCEN and other relevant agencies in any investigation, whether the violations are evidence of a systemic breakdown, and the last was actions taken by other agencies with overlapping jurisdictions, including bank regulators. And that was really it. It was very short.

Alan Kaplinsky:

Okay. Peter, we haven't given you an opportunity to talk yet. I do have a question I'd like to throw your way, and we'll have to go back chronologically because this event occurred on April 15th. And the FFIEC, which is an umbrella organization of the federal banking agencies, the Federal Financial Institutions Examination Council, they updated their BSA/MLA examination manual. What did they do and what's the relationship, Peter, between the regulator's guidance on enforcement and the updated exam manual?

Peter Hardy:

Thank you, Alan. And the first thing I'm going to do is answer the question you posed at the beginning of the podcast, which is how long has Money Laundering Watch been in existence. Proud to say that, in the beginning of next year, we will have completed our fourth year, entering our fifth, going strong and read throughout the world, so I definitely encourage listeners to check out our blog.

Peter Hardy:

Yeah. In terms of the FFIEC BSA exam manual, they did indeed update it. The FFIEC is a bit of a mouthful. Just so folks are clear, it includes the Federal Reserve, the FDIC, the Office of the Comptroller of Currency, the National Credit Union Administration, and the CFPB. They also have a state liaison committee. That's the regulators we're talking about. And what I'm going to chat about really echoes a lot of what Beth was saying. A lot of the concepts are similar. Indeed, some of the language itself is very similar. And, of course, there's a direct connection because many, a vast majority, of enforcement actions against banks, regulatory enforcement actions arise, of course, out of the exam process, that's where it often begins, and so these are really two peas in a pod here in terms of what we're discussing.

Peter Hardy:

Now when they updated the exam manual, they made clear that it was not establishing any new requirements. Rather, the stated purpose was to try to provide greater transparency into the examination process, and they emphasized, again, this just comes from global comments, that examiners should be tailoring their exam to the bank's risk profile, and that's a concept that'll come up several times during this podcast, and they wanted to ensure that examiners were distinguishing between mandatory regulatory requirements, actual laws, and simply supervisory expectations and, of course, there's definitely a delta between the two, and to focus on the actual regulatory requirements.

Peter Hardy:

Now there were four areas that were updated. It was scoping and planning of the exam, the BSA/AML risk assessment, assessing the BSA compliance program that Beth talked a lot about, and developing conclusions and finalizing the examination. And, again, another global comment before we get a little bit more into the weeds here, they emphasize that examiners should take a, quote, risk-focused approach. This echoes language that we hear all the time in the realm of BSA/AML, that AML compliance programs should be risk-based, so examiners should also take a risk-focused approach to tailor their review, the specific risk profile of that institution.

Peter Hardy:

Now the nice side, from the financial institutions' perspective of a risk-focused approach is that, as the manual says, banks have flexibility in designing their AML compliance programs, and this is straight-up language from what Beth was talking about, minor weaknesses, technical violations, minor deficiencies alone do not indicate an inadequate program. Flexibility is good, right? Now there is a downside here, which is that, at least I've always thought, that the phrase risk-based or risk-focused, however you want to phrase it, is very vague and it can be a vacuum into which one can pour any subjective expectations that one sees fit if you're so inclined, and sometimes rules are good. Clear guidelines are good. It makes things easier.

Peter Hardy:

I think there's always a risk that in, after the fact, when something's occurred, a regulator will come in and say, "Well, sure, we're going to take a risk-based review here, but you missed the risks," or "You were focused on the wrong risks." We shall see. I think the mindset or the real goal here, from the regulator's standpoint, is to avoid some rote, check-the-box style compliance and to try to focus on the substantive issues, a lot of which comes down to a good risk assessment being done in terms of your particular business.

Peter Hardy:

Okay. Now let's talk a little bit about some of the details. There's a whole laundry list of topics that the manual updates, that the manual suggests examiners should focus on. I'm not going to go through that, it is indeed a long laundry list, but I'm just going to hit some of the highlights. One thing that it really stresses, and we've seen this in some of the more recent enforcement actions themselves, is the need and importance of independent, that's the key word, independent testing.

Peter Hardy:

Now the good news for the regulated community is that the manual says that findings from independent testing can be leveraged to reduce the examination areas covered and the amount of testing that's necessary to assess the BSA/AML's compliance program. Translation, if you've got really good independent testing, then the examiner can use that and the process doesn't have to be quite so labored. However, of course, there are some warnings here. It does have to be truly independent, and I think one thing that the regulators don't like is having unqualified testers or bank staff who have some skin in the game, they themselves being the testers, which, of course, calls into question how truly independent they are.

Peter Hardy:

Okay. I mentioned the risk assessment. It also talks about having a good risk assessment and that's just, to dumb it down, a process that generally involves the identification of specific risk categories, like products or services, your customers' geographic locations, for example, that are unique to the financial institution. The manual makes the point that improper identifications and improper assessments of risks can have a, quote, cascading effect, cascading effect, which are going to create deficiencies in multiple areas of internal controls. And that gets into what Beth was saying in terms of, if you have a cascading effect, then you are getting into lots of different areas, multiple areas, and that may put you at greater risk for an actual enforcement action.

Peter Hardy:

Just a few more comments here. They hit on the basics, the standard compliance program. You got to have internal controls. You got to have independent testing, which we've discussed. You, of course, have to have a designated BSA compliance officer. You got to have appropriate training. Now just a few things on each of those, in terms of internal controls, they stress having continuity at an institution despite any changes in composition or structure. If you have turnover, you got to have a good plan in place to make sure that nothing's going to fall through the cracks. Again, getting independent testing, and, by the way, there's no regulatory requirement for the frequency of the testing. It just gets into something that is commensurate with your risk profile, which, again, is nice because it's flexible, but, of course, the devil can be in the details in terms of determining what is, quote, sufficient.

Peter Hardy:

Talk a little bit about the compliance officer and, of course, that's a very important person, but the exam manual also makes the point, and I think this is key for institutions who may be facing any enforcement action, is that, at the end of the day, it's the job, the role, of the board of directors to ensure that the compliance officer is fully supported, has the appropriate authority, has the independence and all of that stuff. Yeah, the compliance officer is very, very important, but the buck stops, of course, not surprisingly, at the board.

Peter Hardy:

Just a few final comments here, it's actually a fairly detailed document and there's lots to be potentially talked about, so I'm just trying to hit the highlights here. In terms of violations or deficiencies, they have, again, this multifactor list. They can be caused by a number of issues, including not appropriately assessing the risk profile, we talked about that, lack of coherent policies or procedures. And as I tick through this, a lot of this sounds very similar to the factors that Beth was talking about in the more recent document. Of course, disregard of regulatory requirements or policies, compliance program not commensurate with growth and higher risk operations, insufficient staffing, again, hitting the HR issue, and insufficient communications of policy changes to staff.

Peter Hardy:

At the end of the day, examiners are supposed to look at whether or not any violations are systemic, again, mirroring the language that Beth was describing in the more recent document, and, ultimately, of course, examiners, if there are issues, should discuss with the financial institution their preliminary findings and go from there. Good communication is always a must. I think Beth is going to hit on that in our next portion, but that's a two-way street. Yes, the financial institution has to communicate, but the examiners are also being told, "You, too, must communicate."

Alan Kaplinsky:

Okay. Well, thank you, Peter. Let me throw out a very broad question to both of you and that's this, based on all this new guidance that you've explained so well for us today, what should a regulated entity do to try to stay out of trouble? Do you have any suggestions to make? And let me go to you first, Beth, and then we'll go to Peter.

Beth Moskow-Schnoll:

Okay. As Peter just touched on, I think communication with your regulator is number one or close to the top because, based on the new guidance, the joint statement, by the regulatory agencies, one of the big things they talk about is correcting mistakes that they've noted. And in order for you to be able to make sure that you're correcting them, you should really be talking to your regulator. Look, it's always good to have a good relationship with your regulator because you get information from them, they're not out to get you if they become your friend and that's very important, but you need to understand exactly what they found out or they discovered as a deficiency. Is it something that has to be corrected immediately? Is it something that, if it's going to take time, you should tell them that it's going to take time and they will understand that. They'd point that out in the guidance. Number one, I think, is communication with your regulator.

Beth Moskow-Schnoll:

Another factor would be, it sounds like a trope, but tone at the top really matters and, when you look at financial institutions that have gotten in trouble, a lot of times, it's because management and the board don't take an active role in compliance and lead by example. That's very important. But as part of that, it has to be that revenue concerns don't lead to compromises on compliance. It really should go without saying, but you can't turn a blind eye to obvious red flags just because someone's a good or a long-time customer or because the account's generating enormous fees and it's important to the bank. And you shouldn't overlook the risks attendant with a potential customer because that customer will be profitable. You have to look at them based on the risk that they're going to pose.

Beth Moskow-Schnoll:

Another factor that gets banks in trouble is that they don't share information as well as they should. If you have corporate silos, then you're going to have a problem with your information sharing. And your compliance department has to know about all the risks and processes throughout the organization. If they don't know about them, there's an increased risk that violations will go undetected and unreported. Things like your AML and your fraud departments have to be able to communicate and share information, meaning they shouldn't have different case management systems that aren't integrated. That just makes it much harder for them to share information. And things like sometimes customers' profiles and their transaction activity are in separate and unconnected systems and they really need to be integrated so that the financial institution has a complete understanding of their customers.

Beth Moskow-Schnoll:

Another thing that would keep banks out of trouble is to identify and handle high-risk accounts appropriately. The first thing is you have to be able to identify your high-risk accounts and the question to ask is, "Do you have adequate procedures in place to do that? And, if you do, do you consistently follow those procedures?" Because regulators, when they come in, they're going to take a very close look at high-risk accounts and how you identify them, so keep in mind that you may have to defend your decisions with your regulator and ask yourself are you going to be able to do that? And then, once you've identified high-risk accounts, you have to perform enhanced due diligence and you have to update and document the know-your-customer information and utilize the KYC information for risk grading, monitoring, and for periodic reviews. And, again, are you doing that because those are the kind of things, if you don't do them, that get you in trouble.

Beth Moskow-Schnoll:

And the last one of the things I wanted to address, and Peter touched on this, it's really important that you're conducting regular risk assessments because AML programs have to be dynamic. If you're not continually enhancing your AML program to keep up with your changing risk profile, then, at best, you're going to disappoint your regulator, at worst, you're going to find yourself in an enforcement action. To be able to update your program, you have to first know the risk you're facing, which means you have to perform regular risk assessments, including when you offer new services or products or enter new markets. And based on the risk assessments, you have to regularly update your AML policies and procedures, including customer due diligence and suspicious activity monitoring. Those are the kind of things that get banks and financial institutions in trouble, if they're not having a dynamic program.

Peter Hardy:

The part I just want to cover is we've been talking a lot, of course, about institutions, but let's not forget that individuals can also be the subject of regulatory enforcement actions. It's relatively rare, but it does happen. In terms of what individuals can do, in one hand, it's the same thing, but on the hand, it's also fundamentally different, of course, because you have the tension between the institution and individual employees. All of the things that we've been talking about that the regulators for, systemic breakdowns, problems being dragged out over long periods of time, perhaps red flags being consistently ignored, activity that's high risk or has a potential for high customer harm, obviously, those are all things to avoid.

Peter Hardy:

The more difficult issues, of course, arise if some of those things have arguably occurred, then what? Obviously, for individuals, one of the best things they can do is document and elevate, whether you're a compliance officer or an in-house lawyer or whoever, but then, of course, you can also get into a tension with the institution. Depending, of course, on the facts and the personalities involved and what's going on, documentation and elevation may be appreciated and the problem may be ameliorated or it may not be, either because of the higher-ups are perhaps not as interested in compliance or you can also have a scenario where simply the perceived problem is perhaps being exaggerated. That does occur. Not everything is actually necessarily as bad as it seems and there are putative whistle-blowers floating around out there.

Peter Hardy:

You can get into a situation, and this also can involve ... actually, we talked a lot about independent testing, if you involve outside consultants, they can be a blessing, but at the same time, if you then are creating paperwork that lists out a lot of problems, and it could be completely accurate or it could be not completely catching reality and perhaps overstating things, then that's in the file. And just to end it here with a practical example, in many ways, some of these issues were exemplified in an enforcement action from last year against the former chief in-house lawyer of a very large bank who was the subject of a consent order with the OCC.

Peter Hardy:

Now there was a lot going on in that case and the bank also had some criminal issues, so again, it's an extreme example and perhaps that's the point, it only happens in extremis, but the underlying facts were very interesting because what the regulator was not happy about was that there was a consultant who was hired due to red flags that were being raised by the chief compliance officer, a different person. The consultants essentially agreed with those red flags, and then the in-house lawyer, who is dealing with the regulator, allegedly did not provide this report that was done although the regulator said that they were asking for it. There were other issues, but, essentially, this became the focus of the regulatory action and so it just exemplifies that, if you ask for something, you're going to have to live with it. But, of course, in the realm of AML, like much regulatory compliance, you can't turn a blind eye and then just ignore problems either.

Peter Hardy:

There's always going to be a tension between individuals and institutions and, even if the individual is not ultimately the subject of an enforcement action, of course, there's all sorts of fun on the HR level and with any sort of internal investigation or anything like that. Just want to make the point that everything we've been talking about, obviously, applies to institutions themselves, but also individuals.

Alan Kaplinsky:

What do you do for clients other than, yeah, particularly for clients who are not being investigated right now by any agency, but want to make sure that they've got good policies and procedures and protocols, etc., or those that, by virtue of some internal investigation, they believe that there might be a problem? What do you do for those clients?

Peter Hardy:

Well, if I may, I'll start to answer that and I'll do it in reverse order. In terms of institutions that already are under some regulatory scrutiny, it can vary, but I think the classic response is to do an appropriate degree of an internal investigation, pull the documents, review the documents, interview relevant parties, and determine whether or not there is really a true issue and a real problem and then, of course, advise the institution accordingly in terms of how to ameliorate it, whatever compliance steps need to be taken, whatever communications with the regulator, and maybe there's also, again, hitting on this issue, some HR issues. Now I'll also point out that, of course, a classic advantage of hiring an attorney is having attorney-client privilege, but in the federally regulated banking scenario, again, this depends, it's a really complicated topic so I just want to speak at a very high level on it, the regulators are not always under the impression that any work that you are doing that is related to an exam or audit is covered by a attorney-client privilege. Now both sides can argue that one, but a word to the wise.

Alan Kaplinsky:

Yeah, sure. Beth, do you have anything to add on that topic?

Beth Moskow-Schnoll:

I think, in addition to handling situations where a financial institution may be in trouble or think it might be in trouble, we handle litigation like that, we handle investigations that deal with that, but we do things from the start as well. Very often, especially with fintech, there's new companies starting all the time that are engaged in the financial services industry and, even if they're not subject to the Bank Secrecy Act, very often, they are, I was going to say forced, but, really, their investors or the bank with whom they're working insists that they have a BSA policy in place and an AML program in place. And so we help them draft those policies and procedures, we help them conduct risk assessments, I'm doing that for a few clients right now, because, hopefully, they have a compliance officer already in place who knows what they're doing. Very often, they do not, and they don't even know that they need one or what's required for a program. We'll start, really at ground zero and help them build a program from the start and we do that very often.

Beth Moskow-Schnoll:

One other thing we do is, I often handle OFAC-related actions. OFAC conducts enforcement actions. It's the Office of Foreign Assets Control, a part of Treasury, and they're concerned about sanctions, but that's something where there's issues that come up. We can provide guidance regarding that and we can also defend institutions in enforcement actions.

Alan Kaplinsky:

Final question for the two of you. We have an election coming up in November, no surprise there. A lot of people think that Joe Biden will win and, if he does win, he will be able, over some period of time, to put people in a number of these agencies that supervise and enforce BSA and AML. And my question is does that make much of a difference? When you talk about the CFPB, it may make a world of difference to our clients that are regulated by the CFPB, between Kathy Kraninger, the current director, and whoever might be appointed by Biden after consulting with Senator Elizabeth Warren [crosstalk 00:46:08].

Beth Moskow-Schnoll:

I was just going to say that.

Alan Kaplinsky:

... does it matter in this world or is this a bipartisan issue that both parties don't like the practices that constitute AML, anti-money laundering, and violations of BSA? Anyway, that's my long-winded question. Either of you can take it.

Beth Moskow-Schnoll:

My initial reaction is this, there has certainly, Peter and I are both primarily white-collar lawyers, and there has certainly been a downtick in the number of criminal actions being brought by the U.S. Department of Justice. And one thing that I could potentially see is that, while the regulators really ... I don't think that their opinion about violations of the Bank Secrecy Act have changed at all depending on the administration, what I could see is that there may be more what might now be administrative actions being referred to the Department of Justice for either criminal or civil prosecution, perhaps. That would be the only change that might occur, I think, but I'd like to hear Peter's opinion on that too.

Peter Hardy:

I agree and I also agree that front-line examiners, their approach, is generally not going to change, given the vagaries of whoever is in the Oval Office. There is one issue that might be interesting to see if there is a Democratic president and/or more Democratic Congresspeople, which is whether or not there will be inquiries into the conduct of financial institutions relating to how the Paycheck Protection Program has been administered. I think it's an open question. It's not purely a BSA/AML question, but it is related to BSA/AML and it can implicate BSA/AML in terms of how banks have looked at the files of their loan applicants, particularly for previously existing customers. And there have been some noises on the Hill about how banks have administered the program. It may just be a lot of noise or there may be some action next year down the road. We shall see.

Alan Kaplinsky:

Okay. Well, we've drawn to the end of our show today and want to thank both Beth and Peter for taking the time to share their very important thoughts about these changes that have recently occurred in the AML/BSA world. And let me, again, encourage those of you who really focus on this area to make sure you log on to to their blog. What's the name of your blog again, Peter?

Peter Hardy:

Our blog is Money Laundering Watch.

Alan Kaplinsky:

MoneyLaunderingWatch.com, and it shows you how time flies, I thought it had been one to two years. I didn't realize it was four years already. But it's a great resource for those of you that have to know about what's happening in this area.

Alan Kaplinsky:

Let me thank all our listeners today who downloaded this podcast and also remind you that don't forget about the blog the Consumer Financial Services Group has, which is called ConsumerFinanceMonitor.com, and tell you, once again, that our podcast new recording is released every Thursday, except when Thursday falls on a holiday. Basically, we do about 50 podcasts a year and, if you're interested in seeing what we've done, all of that is on our website or on our blog. If you go on Consumer Finance Monitor, you can get that information. That's all we have for today. Once again, thank you, everybody, and have a good day.