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Financial sector compliance officers have been referred to by prominent law enforcement and regulatory officials as "essential partners" in ensuring compliance with relevant laws and regulations. Yet a series of recent enforcement actions in which individual compliance officers have been sanctioned personally have placed strains on the partnership, fueling concern among these professionals that they are being unfairly targeted.

Law enforcement and regulatory officials have responded with assurances that the partnership remains intact. In the rare instances in which financial sector compliance officers have been held personally responsible for program failures, they have stressed, the actions were undertaken only after careful consideration, where the facts demonstrated that the compliance officers "crossed a clear line."

Efforts to justify regulators' charging practices have been ineffective, however, for the perception of targeting has endured. Indeed, it has coincided with increased attrition within the ranks of senior compliance officers in the industry. The Author offers several possible explanations for this "chilling effect."

Regardless of the cause, regulators are confronted with a fundamental policy question: whether the benefits of current charging practices justify the continued exodus of senior compliance professional from their firms or the industry entirely. The Author advances two proposals to reverse the perception of compliance officer targeting and its attendant chilling effect, including the adoption in the United States of a supervisory structure akin to the United Kingdom's "Senior Managers Regime"

These proposals reflect a clear message. Actions must be taken to reverse the perception of compliance officer targeting before the "big chill" sets in, and the industry finds that this critical function has been robbed of its best and brightest.

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INTRODUCTION

Prominent law enforcement and regulatory officials have referred to financial sector compliance officers, whose "difficult job[s]" merit "appreciat[ion] and respect,"[1] as "essential partners"[2] in ensuring compliance with relevant laws and regulations. Officials have noted the critical role compliance officers can and do play in shaping the culture of financial institutions, as well as the industry more generally.[3] However, a series of recent enforcement actions in which financial sector compliance officers have been personally sanctioned[4] have strained the

1. *See* Andrew Ceresney, Dir., Div. of Enf't, U.S. Sec. & Exch. Comm'n, Keynote Address at the 2015 National Society of Compliance Professionals, National Conference (Nov. 4, 2015), https://www.sec.gov/news/speech/keynote-address-2015-national-society-compliance-prof-cereseney.html; ("[Compliance officers] have a challenging and difficult job . . . . The Commission and its staff hold compliance professionals in high regard . . . . We thank you for your diligence and commend and support your work."); *see also* Luis Aguilar, Comm'r, U.S. Sec. & Exch. Comm'n, Public Statement, The Role of Chief Compliance Officers Must Be Supported (June 29, 2015), https://www.sec.gov/news/statement/supporting-role-of-chief-compliance-officers.html; ("[Chief Compliance Officers] take their jobs seriously and are a credit to the compliance community."); Preet Bharara, U.S. Attorney for S. Dist. of N.Y., SIFMA's Compliance and Legal Society Annual Seminar Prepared Remarks of U.S. Attorney Preet Bharara (Mar. 31, 2014), https://www.justice.gov/usao-sdny/speech/sifma-s-compliance-and-legal-society-annual-seminar-prepared-remarks-us-attorney [hereinafter Bharara SIFMA Remarks] ("Over the years, I have come to appreciate and respect more and more the work that you all do, as compliance and legal professionals in the securities and finance industry. You do not have an easy job."); Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n, Remarks at National Society of Compliance Professionals National Membership Meeting (Oct. 22, 2013), https://www.sec.gov/news/speech/2013-spch102213mjw; ("[Compliance officers] have a very tough job in a complex industry where the stakes for all concerned are extremely high. We recognize that and have tremendous respect for the work you do.").

2. *See* Ceresney, *supra* note 1 ("[Compliance officers] have the Commission's full support. We rely on you as essential partners in ensuring compliance with the federal securities laws and we will do all we can to help you perform your work."); *see also* Press Release, Dep't of Justice, U.S. Attorney's Office, S. Dist. of N.Y., Manhattan U.S. Attorney Sues Thomas E. Haider, Former Chief Compliance Officer of MoneyGram International, Inc., for Violating the Bank Secrecy Act (Dec. 18, 2014), https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-sues-thomas-e-haider-former-chief-compliance-officer-moneygram [hereinafter DOJ Haider Press Release] ("Compliance officers perform an essential function in our society, serving as the first line of defense in the fight against fraud and money laundering.") (quoting Preet Bharara, U.S. Attorney, S. Dist. of N.Y.).

3. *See, e.g.*, Bharara SIFMA Remarks, *supra* note 1 ("It gives me confidence that together we can usher in a new age of institutional accountability and responsibility. And that together, we can ensure that our companies set a global standard for operating ethically and with integrity.").

4. *See* Letter from Raymond James & Assoc., Inc., et al., to Dep't of Enf't, Fin. Indus. Regulatory Auth., Financial Industry Regulatory Authority Letter of Acceptance, Waiver & Consent No. 2014043592001 (May 18, 2016); *see also* U.S. Dep't of the Treasury v. Haider, No. 15-1518 (D. Minn. Jan. 8, 2016) (order denying motion to dismiss); Dep't of Enf't v. Aegis Capital Corp., No. 2011026386001 (Aug. 3, 2015) (order accepting order of settlement); In the Matter of SFX Fin. Advisory Mgmt. Enterprises, Inc., SEC; Investment Advisers Act Release No. 4116, Administrative

partnership between such officers and law enforcement and regulatory officials, fueling concerns that these professionals are being unfairly targeted.[5]

Law enforcement and regulatory officials have responded to these concerns with assurances that both the ethos of a partnership and their even-handed enforcement approach remain intact.[6] Officials have stressed that in the rare instances in which financial sector compliance officers have been held personally accountable, the majority had engaged in affirmative misconduct.[7] Rarer still, the officials contend, are cases where compliance officers were found to have exhibited "wholesale" or "broad-based" failures in carrying out responsibilities assigned to them.[8]

Proceeding No. 3-16591 (June 15, 2015); In the Matter of Blackrock Advisors, LLC, SEC; Investment Advisers Act Release No. 4065, Investment Company Act Release No. 31558, Administrative Proceeding No. 3-16501 (Apr. 20, 2015); Brown Bros. Harriman & Co., Letter of Acceptance, Waiver and Consent No. 2013035821401 (Feb. 4, 2014) [hereinafter Brown Brothers Consent]; *see also infra* notes 15, 24, 35–79, 82–116, 130–167, 176–183, 268 and accompanying text.

5. *See, e.g.*, Emily Glazer, *The Most Thankless Job on Wall Street Gets a New Worry*, WALL ST. J. (Feb. 11, 2016, 4:39 PM), https://www.wsj.com/articles/now-in-regulators-cross-hairs-bank-compliance-officers-1454495400; Dawn Causey, *Who Should Have Personal Liability for Compliance Failures?*, A.B.A. BANKING J. (Aug. 17, 2015), http://bankingjournal.aba.com/2015/08/who-should-have-personal-liability-for-compliance-failures/; Ben DiPietro, *SEC Action Stirs Concerns Over Compliance Officer Liability*, WALL. ST. J.: RISK & COMPLIANCE JOURNAL (June 24, 2015, 1:08 PM), https://blogs.wsj.com/riskandcompliance/2015/06/24/sec-actions-stir-concerns-over-compliance-officer-liability/; Rachel Louise Ensign, *How Compliance Officers Can Limit Personal Liability*, WALL ST. J.: RISK AND COMPLIANCE JOURNAL (Jan. 30, 2015, 1:43 PM), https://blogs.wsj.com/riskandcompliance/2015/01/30/how-compliance-officers-can-limit-personal-liability/; Matt Kelly, *Compliance Officer Liability, Part I: How Much to Panic in General*, COMPLIANCEX (Jan. 27, 2016), http://compliancex.com/compliance-officer-liability-part-i-how-much-to-panic-in-general; DLA PIPER, DLA PIPER'S 2016 COMPLIANCE AND RISK REPORT: CCO'S UNDER SCRUTINY 3 (2016), https://www.dlapiper.com/~/media/Files/Insights/Publications/2016/04/DLA_Piper_Compliance_Risk_Survey_Report2016.pdf; *see also infra* notes 169–170, 196–197, 210, 252, 267–271, 275–276, 279, 312 and accompanying text.

6. *See* Ceresney, *supra* note 1 ("I am hopeful that, after you hear my remarks, you will understand that [recent SEC actions against compliance officers] . . . are consistent with the partnership we have developed to foster compliance with the laws."); *see also* Mary Jo White, Chair, Sec. & Exch. Comm'n, Opening Remarks at the Compliance Outreach Program for Broker-Dealers (July 15, 2015) ("To be clear, it is not our intention to use our enforcement program to target compliance professionals."); DOJ Haider Press Release, *supra* note 2 ("In my job, I've met hundreds of compliance officers and I know them to be some of the most dedicated and trustworthy professionals in the financial industry. FinCEN and our law enforcement partners greatly depend on their judgment and their diligence in our common fight against money laundering, fraud, and terrorist finance.") (quoting Jennifer Shasky Calvery, Dir., Fin. Crimes Enf't Network, U.S. Treasury Dep't); *see also infra* notes 198, 211–225, 288 and accompanying text.

7. *See* Ceresney, *supra* note 1 (explaining that in the vast majority of cases the SEC brings against CCOs the compliance officers "are affirmatively involved in misconduct that is unrelated to their compliance function" or have engaged "in efforts to obstruct or mislead."); Aguilar, *supra* note 1 (noting that the "vast majority" of cases the SEC brought against compliance officers involved officers "who 'wore more than one hat,' and many of their activities went outside the traditional work of [compliance officers] . . . ."); *see also infra* notes 8, 9, 198, 202, 211–223, 225, 264, 288 and accompanying text.

8. *See* Ceresney, *supra* note 1 ("The third category of cases where we have charged CCOs are where

In these particular cases, officials have stressed that the enforcement actions proceed only when, after carefully weighing the evidence, the facts indicate that the compliance officers "crossed a clear line."[9]

Efforts to allay compliance officers' fears and justify regulators' charging practices appear to have been ineffective, however, for the perception of targeting endures. In fact, the perception has coincided with increased attrition within the ranks of senior compliance officers in the industry.[10] In February 2016, for example, *The Wall Street Journal* reported that the number of senior bank compliance executives who had left their jobs in 2015 was three times greater than in 2014.[11] Evidence also suggests that the specter of personal liability is causing potential leaders in financial sector compliance to reconsider their career paths.[12] In a recent survey of Chief Compliance Officers ("CCOs") of public companies, sixty percent said they would think more carefully about future roles they might consider given the risk of personal liability.[13] Regulators are thus confronted with a fundamental policy question: whether the benefits of current charging practices, such as the potential for increased vigilance, justify the continued exodus of senior compliance professionals from the industry.

This Article examines the emerging focus on personal liability for financial sector compliance officers and the potential "chilling effect" attendant thereto. Part I begins by reviewing the most noteworthy recent enforcement actions in which compliance officers have been held personally accountable for program failures at their firms, and the

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the CCO has exhibited a wholesale failure to carry out his or her responsibilities. . . . This category is considerably smaller . . . but has drawn significantly more attention."); *see also* Press Release, Fin. Indus. Regulatory Auth., FINRA Fines Raymond James $17 Million for Systemic Anti-Money Laundering Compliance Failures: Former AML Compliance Officer Fined and Suspended (May 18, 2016), http://www.finra.org/newsroom/2016/finra-fines-raymond-james-17-million-systemic-anti-money-laundering-compliance ("[W]hen there are *broad-based failures* within specific areas of responsibility, we will seek individual liability where appropriate.") (quoting Brad Bennett, Exec. Vice President & Chief of Enf't, Fin. Indus. Regulatory Auth.) (emphasis added); *see also infra* notes 9, 198, 202, 211–223, 225, 264, 288 and accompanying text.

9. *See* Ceresney, *supra* note 1 ("[W]e in Enforcement and the Commission take the question of whether to charge a CCO very seriously and consider it carefully. We think very hard about when to bring these cases. When we do, it is because the facts demonstrate that the CCO's conduct crossed a clear line."); *see also* Jennifer Shasky Calvery, Dir., Fin. Crimes Enf't Network, Securities Industry and Financial Markets Association Anti-Money Laundering and Financial Crimes Conference (Jan. 30, 2014), https://www.fincen.gov/news/speeches/remarks-jennifer-shasky-calvery-director-financial-crimes-enforcement-network-8 ("I think if you look at our past enforcement actions, and review the facts, you can see clearly why FinCEN took action in these cases."); *see also infra*, notes 198, 202, 211–223, 225, 264, 288 and accompanying text.

10. *See* Glazer, *supra* note 5; DLA PIPER SURVEY, *supra* note 5.

11. *See* Glazer, *supra* note 5.

12. *See* DLA PIPER SURVEY, *supra* note 5*; see also infra* notes 169–170, 196–197, 252, 267, 275–276 and accompanying text.

13. *See* DLA PIPER SURVEY, *supra* note 5, at 9.

statutory bases for these actions.[14] The cases fall into two categories: (1) Financial Industry Regulatory Authority ("FINRA") and U.S. Treasury Department's Financial Crimes Enforcement Network ("FinCEN") actions for alleged violations of the Bank Secrecy Act ("BSA"); and (2) Securities and Exchange Commission ("SEC") actions for alleged violations of the Investment Advisers Act of 1940 ("Advisers Act").[15]

Part II explores the impact of these and related enforcement actions, including the perception among compliance officers that they are being unfairly targeted.[16] This Part also delineates the efforts undertaken by senior SEC, Treasury and FINRA officials to combat this perception through public statements defending their charging practices generally, as well as the evidentiary records in the noteworthy cases discussed in Part II.[17] Based on regulators' public statements, it is possible to ascertain an overarching rationale supporting the regulators' approach to holding compliance officers responsible for failures involving their firms' programs.[18]

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14. *See infra* Part II.

15. *Id.* FinCEN, FINRA and the SEC have brought a number of enforcement actions against individual compliance officers in recent years alleging a variety of regulatory violations. Some have involved charges against compliance officers who served in other senior managerial roles. *See, e.g.*, *In re* Sunrise Sec. Corp., Letter of Acceptance, Waiver & Consent No. 2013036840901 (Dec. 9, 2015). Some have involved compliance officers who were charged along with other firm personnel. *See, e.g.*, *In re* John Carris Investments, Inc., Disciplinary Proceeding No. 2011028647101 (Jan. 20, 2015). This paper focuses on the cases that have garnered the most press attention, and therefore have been most influential in contributing to the emerging perception of compliance officer targeting. *See* Raymond James & Assoc., Inc., *supra* note 4; U.S. Dep't of the Treasury v. Haider, No. 15-1518 (D. Minn. Jan. 8, 2016); Aegis Capital Corp., *supra* note 4; In the Matter of SFX Fin. Advisory Mgmt. Enterprises, Inc., *supra* note 4; In the Matter of Blackrock Advisors, LLC, *supra* note 4; Brown Brothers Consent, *supra* note 4. For a more complete overview of SEC and FINRA enforcement actions against compliance officers generally, see Brian L. Rubin & Amy Xu, *Make America Compliant Again: SEC and FINRA Enforcement Actions Against Compliance Officers During an Election Year (January–August 2016)*, EVERSHEDS SUTHERLAND (Jan.–Feb. 2017), http://www.sutherland.com/NewsCommentary/Articles/195841/Make-America-Compliant-Again-SEC-and-FINRA-Enforcement-Actions-Against-Compliance-Officers-During-an-Election-Year; Brian L. Rubin, Katherine E. Dumeer & Amy Xu, *Harry Potter and the Compliance Stone: SEC and FINRA Actions Against Compliance Officers (July–December 2015)*, EVERSHEDS SUTHERLAND (May-June 2016), http://www.sutherland.com/NewsCommentary/Articles/189138/Harry-Potter-and-the-Compliance-Stone-SEC-and-FINRA-Enforcement-Actions-Against-Compliance-Officers; Brian L. Rubin & Irene A. Firippis, *Shaken Not Stirred: SEC and FINRA Disciplinary Actions Against Compliance Officers (January–June 2015)*, EVERSHEDS SUTHERLAND (Nov.–Dec. 2015), http://www.sutherland.com/NewsCommentary/Articles/180877/Shaken-Not-Stirred-SEC-and-FINRA-Disciplinary-Actions-Against-Compliance-Officers; Brian L. Rubin & Irene A. Firippis, *Compliance Wars: SEC and FINRA Disciplinary Actions Against Chief Compliance Officers and In-House Counsel in a Galaxy Not Too Far Away (July–December 2014)*, EVERSHEDS SUTHERLAND (May-June 2015), http://www.sutherland.com/NewsCommentary/Articles/174146/Compliance-Wars-SEC-and-FINRA-Disciplinary-Actions-against-Chief-Compliance-Officers-and-In-House-Counsel-in-a-Galaxy-Not-Too-Far-Away.

16. *See infra* Part III.

17. *Id.*

18. *Id.*

Part III examines the "chilling effect" that regulators' actions are having on both current and would-be compliance officers. This section also offers several possible explanations as to why the targeting perception endures, despite the efforts of regulators to mollify compliance officers' fears.[19] These explanations include the aggregate impact of recent enforcement actions, the failure to charge other senior business and control-side personnel along with compliance officers, and the increased focus by law enforcement and regulators on individual accountability in the corporate context.[20]

Part IV advances two proposals designed to mitigate the chilling effect of compliance officer liability. First, U.S. regulators should adopt a supervisory scheme similar to the "Senior Managers and Certification Regime" recently implemented by the U.K. Financial Conduct Authority ("FCA") and Prudential Conduct Authority ("PCA"). This regime, which assigns personal liability to designated "Senior Managers" in connection with defined standards of conduct, promotes the appropriate degree of accountability for both compliance officers and for a range of senior business and control-side personnel.[21] Second, the industry should establish an advisory body composed of former industry and regulatory officials to develop guidelines on best practices in cases where the conduct of compliance officers is at issue.[22] A group of this sort would promote greater uniformity and transparency in charging decisions, as well as a sense among compliance officers that their interests are fairly represented.[23]

I. RECENT CASES CHARGING INDIVIDUAL COMPLIANCE OFFICERS WITH "WHOLESALE" OR "BROAD-BASED" PROGRAM FAILURES

The last several years have witnessed an increase in enforcement actions against individual compliance officers for alleged breakdowns in their financial institutions' compliance programs.[24] The most noteworthy of these actions, which have been pursued by various regulators, have alleged violations of either of the BSA or the Advisers Act.

19. *Id.*
20. *Id.*
21. *See infra* notes 278-291 and accompanying text.
22. *Id.*
23. *Id.*
24. Greg Marshall & Erin Sullivan, *Avoiding Personal Liability Amidst Heightened AML Enforcement*, INSIDE COUNSEL (Mar. 3, 2015), http://www.insidecounsel.com/2015/03/03/avoiding-personal-liability-amidst-heightened-aml ("Given the changes in the enhanced regulatory landscape . . . it is no surprise that more cases against individual compliance officers are now being brought.").

A. The BSA Cases

The BSA and its implementing regulations require, among other things, that financial institutions: (1) implement an effective anti-money laundering ("AML") program to prevent financial institutions from being used to facilitate money laundering or the financing of terrorist activities and (2) report suspicious transactions involving potentially unlawful activity.[25] The BSA requires that all financial institutions establish an AML program that includes, at a minimum: (1) the development of internal policies, procedures and controls; (2) the designation of an AML compliance officer; (3) an ongoing employee training program; and (4) an independent audit function to test the program.[26]

The most significant recent enforcement action charging a compliance officer with violating the BSA was brought by the FinCEN and FINRA.[27] The case, *U.S. Department of the Treasury v. Haider*, involved allegations that MoneyGram International ("MoneyGram") and its former CCO failed to implement and maintain an effective AML program and file timely suspicious activity reports ("SARs").[28] The BSA transaction reporting rule on which FinCEN's case against MoneyGram and Haider was based requires money remitters to report financial transactions of at least $5,000 occurring by, at, or through the remitter.[29]

MoneyGram and Haider were charged with violating the BSA's general civil penalty provision, 31 U.S.C. § 5321(a)(1), which allows FinCEN to assess civil penalties against a "partner, director, officer, or employee" of a financial institution for willful violations of the BSA, with the exception of two BSA sections.[30] FinCEN has long interpreted "willfully" in the civil context to include conduct where a person acts with "reckless disregard or with willful blindness."[31]

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25. *See* 31 U.S.C. §§ 5318(g), (h) (1982); 31 C.F.R. §§ 103.19, 103.20, *recodified at* 31 C.F.R. §§ 1022.210, 1022.300, 1023.320 (2006).

26. 31 U.S.C. § 5318(h)(1) (1982). Among the procedural requirements the BSA prescribes is that covered financial institutions have in place risk-based customer identification programs, customer due diligence and, in the case of certain higher-risk customers, and enhanced due diligence. *See* Uniting & Strengthening America by Providing Appropriate Tools Required to Intercept & Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, §§ 312, 326, 115 Stat. 272, 304–06, 317–18 (2001).

27. *See* Raymond James & Assoc., Inc., *supra* note 4; Aegis Capital Corp., *supra* note 4; Brown Brothers Consent, *supra* note 4.

28. The applicable BSA regulation required money remitters to report financial transactions that: (1) were sent by or through the remitter; (2) involved (individually or in the aggregate) funds of at least $5,000; and (3) the remitter knew, suspected, or had reason to suspect, among other things, the use of its money transfer system to facilitate criminal activity. 31 C.F.R. § 103.15(a)(2) (1972). Such SARs were required to be filed within thirty days of the remitter detecting facts that may have constituted a basis for filing the SARs. *Id.*

29. 31 C.F.R. § 103.15(a)(2) (1972).

30. *See* 31 U.S.C. § 5321(a)(1) (1982).

31. *In re* B.A.K. Precious Metals, Inc., No. 2015-12, at 3 n.6 (Dec. 30, 2015) ("In civil enforcement of the Bank Secrecy Act under 31 U.S.C. § 5321(a)(1), to establish that a financial institution or individual acted willfully, the government need only show that the financial institution or individual

The most noteworthy recent BSA enforcement actions brought by FINRA have involved three broker-dealers: Brown Brothers Harriman & Co. ("Brown Brothers"); Aegis Capital Corp. ("Aegis"); and Raymond James & Associates, Inc. and its affiliate Raymond James Financial Services, Inc. (collectively, "Raymond James"). The FINRA cases included charges that the broker-dealers' AML compliance officers violated one or both of two FINRA rules: (1) Rule 3310(b), which requires member firms to establish and implement an AML program, including written procedures reasonably designed to ensure compliance with the BSA; and (2) Rule 3310(a), which requires members to establish and implement procedures "that can be reasonably expected to detect and cause the reporting of transactions" required under the BSA and its implementing regulations.[32] The primary BSA transaction reporting rule that on which FINRA predicated its cases against individual compliance officers is the requirement that broker-dealers report suspicious transaction activity involving at least $5,000 that are conducted by, at, or through the broker-dealer.[33]

Unlike the recent FinCEN case against MoneyGram and its CCO, the FINRA cases against compliance officers of Brown Brothers, Aegis and Raymond James did not cite the general BSA penalty provision. Nor did the cases include any allegations that the compliance officers penalized acted willfully, recklessly, or with willful blindness. Rather, FINRA simply alleged facts with respect to specific program deficiencies without regard to the individual compliance officers' states of mind.

Detailed discussions of these recent BSA cases against compliance officers follow.

1. *FINRA v. Brown Brothers Harriman & Co. and Harold Crawford*

One of the most highly publicized FINRA enforcement actions against an individual compliance officer for AML program failures came in February 2014. Brown Brothers and its global AML Compliance Officer, Harold Crawford, entered into a settlement with FINRA on charges that Brown Brothers and Crawford failed to maintain an AML program reasonably designed to detect and cause the reporting of suspicious activity.[34] The charges stemmed from what FINRA deemed to

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acted with either reckless disregard or willful blindness.").

32. *See* FINRA Rule § 3310(a), (b) (Jan. 1, 2010). The FINRA cases have also alleged violations of FINRA Conduct Rule 2010, a "catchall" provision which requires members, in the conduct of their business, to "observe high standards of commercial honor and just and equitable principles of trade." FINRA Rule § 2010 (Dec. 15, 2008).

33. 31 C.F.R § 103.19, *recodified at* 31 C.F.R. § 1023.320(a)(2) (2016).

34. *See* Brown Brothers Consent, *supra* note 4, at 2–5, 16.

be control failures relating to Brown Brothers' transaction activity in low-priced securities, otherwise known as "penny stocks."[35]

Specifically, FINRA alleged that Brown Brothers directly executed sales or, as custodian, delivered to other firms the securities underlying the sale of at least six billion shares of penny stocks, generating at least $850 million in proceeds.[36] This included penny stock transactions conducted via the omnibus accounts of foreign banks, which enabled certain underlying customers in known bank secrecy havens such as Switzerland, Guernsey, and Jersey to transact without disclosing identifying information of their clients or information regarding the origin and beneficial ownership of the penny stock positions.[37]

FINRA contended that federal law obligated Brown Brothers to investigate customer activity "on a risk basis," and that omnibus accounts transacting in penny stocks merited additional scrutiny.[38] In addition, Brown Brothers and Crawford were aware that the firm's brokerage activity had expanded "when its Swiss clients 'realized they could offer their underlying clients anonymous access to U.S. Securities [sic] markets.'"[39] FINRA observed that while Brown Brothers had an AML program that included suspicious activity monitoring, the system "failed to adequately monitor and detect potentially suspicious penny stock activity, and sufficiently investigate potentially suspicious penny stock transactions that were raised to the Firm's attention."[40]

FINRA further alleged that from January 1, 2009, to June 30, 2013, Brown Brothers executed transactions or delivered securities involving at least six billion shares of penny stocks, many on behalf of undisclosed customers of foreign banks in known bank secrecy havens.[41] Brown Brothers executed these transactions despite the fact that it was unable to obtain information verifying that the stocks were free trading.[42] In many instances, Brown Brothers lacked such basic information as the identity of the stock's beneficial owner, the circumstances under which the stock was obtained, and the seller's relationship to the issuer.[43]

FINRA averred that Brown Brothers and Crawford were aware of the heightened risk associated with penny stock activity and the limited

35. *Id.* at 2. FINRA adopted the SEC's definition of penny stocks, which includes securities that trade at less than $5 per share and are quoted over-the-counter. *See Fast Answers: Penny Stock Rules*, U.S. SEC. & EXCHANGE COMMISSION (May 9, 2013), https://www.sec.gov/fast-answers/answers pennyhtm.html.

36. Brown Brothers Consent, *supra* note 4, at 2.

37. *Id.* at 3.

38. *Id.* at 2.

39. *Id.* at 3.

40. *Id.*

41. *Id.* at 2–3.

42. *Id.*

43. *Id.*

ability to obtain beneficial ownership information from clients in bank secrecy havens.[44] In light of these risks, Brown Brothers and Crawford "failed to have an adequate surveillance system to review penny stock transactions" conducted through the firm, and failed to tailor the firm's AML procedures "to adequately detect, investigate and report suspicious activity," particularly patterns or other red flags, relating to penny stock transactions.[45]

FINRA noted that Crawford, as Brown Brothers' global AML Compliance Officer, was responsible for ensuring that the firm's AML program was adequately tailored to the risks of its business.[46] In addition, Crawford "was personally, or through his designee, responsible for making determinations as to whether to file SARs on behalf of the [f]irm and was ultimately responsible for establishing and implementing a program reasonably expected to detect and cause the reporting of suspicious activity" in appropriate cases.[47] FINRA ascribed to Crawford the following, specific program failures: (1) being aware of Brown Brothers' increasing penny stock business and the risks associated therewith, but failing to persuade the business to adopt its recommendations to enhance controls;[48] (2) permitting Brown Brothers' business to conduct a manual review (rather than automated surveillance) of the firm's execution trading activity to identify and escalate potentially suspicious activity for approximately two years, when this manual system could not adequately monitor given the volume of trading that was taking place;[49] (3) implementing automated surveillance which, for approximately two and one-half years, was not adequately tailored to detect the volume of transactions going through Brown Brothers' accounts;[50] (4) failing to establish written procedures relating to surveillances and delaying reviewing reports for several

44. *Id.* at 5. FINRA noted that in May 2011, Crawford forwarded an email with a draft of an AML Compliance presentation that was to be the basis for a discussion with bank clients in Switzerland and for a presentation made to a firm committee in June 2011 relating to the firm's involvement in penny stocks. *Id.* The draft presentation stated, "Brokerage is being offered as an ancillary service to [Brown Brothers'] Custody clients. The service expanded on the brokerage platform once Swiss banks realized they could offer their underlying clients anonymous access to U.S Securities markets. . . . Anonymity is 'ensured' throughout the life of the trade." *Id.* at 5–6.

45. *Id.* at 5.

46. *Id.*

47. *Id.*

48. For example, in a memorandum to the business, the AML Compliance group, including Crawford, recommended that, among other things, Brown Brothers cease executing trades for penny stocks below a certain threshold value. *Id.* at 6. The group also recommended that Brown Brothers consider discontinuing the omnibus account structure in favor of a structure requiring the disclosure of the underlying clients on whose behalf penny stock transactions were being effected. *Id.* The firm did not follow these recommendations. *Id.*

49. *Id.* at 7.

50. *Id.*

months after automated surveillances were implemented;[51] (5) implementing one automated report to track significant increases in the share price of a security, but failing to implement procedures to review related surveillance alerts until approximately four months later; (6) improperly handling surveillance alerts;[52] (7) inadequately investigating reports generated by a surveillance to identify trading that represents a significant portion of the daily volume;[53] (8) failing to provide adequate guidance to AML compliance staff regarding the review and disposition of surveillance alerts;[54] (9) failing to update and properly investigate information accumulated through the firm's system on custody movements associated with entities previously known to be a concern;[55] and (10) failing to file SARs in several instances where AML staff erroneously misinterpreted the relevant reporting standards or failed to update prior SAR filings when activity continued through the firm more than 90 days after the previous SAR was filed.

Brown Brothers was censured and fined $8 million for these and other alleged program deficiencies,[56] the largest penalty ever issued by

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51. *Id.* FINRA observed that Brown Brothers implemented a low-priced equities ("LPE") report in about December 2010, but failed to establish written procedures for instructing AML compliance staff about how to review the report until May 2011. *Id.* In another case, a "trading-ahead-of-market events" report was implemented in August 2011, but the firm failed to create written procedures regarding how alerts were to be addressed until December 2011. *Id.* at 8.

52. *Id.* FINRA noted several cases in which AML compliance staff did not address or review activity identified through the LPE report for several months after the surveillance was implemented. *Id.* at 7. For example, FINRA cited four reports, generated in January 2011, that identified firm customers selling a penny stock that was previously known to the firm as being the subject of regulatory requests and a web post accusing the CEO has having "ripped off" people. *Id.* While firm clients sold the security in January and February 2011, resulting in over $5 million in proceeds, AML compliance staff failed to review the report until April 2011. *Id.* In another example, a July 2012 "trading-ahead-of-market events" alert was disposed of by an analyst with comments indicating that no derogatory news had been identified in the public domain regarding the issuer, and that no suspicious activity had been identified. *Id.* at 8. In fact, the penny stock in question had been the subject of previous alerts and several suspicious news articles touting the stock. *Id.*

53. *Id.* According to FINRA, Brown Brothers implemented a monitoring price manipulation trade alert module ("MPM"), designed to track high representation of firm clients in a stock's daily trading volume, to its automated transaction review system in May 2012. *Id.* at 8. FINRA cited "at least one occasion" where the MPM surveillance failed to alert due to a failure in the surveillance logic. *Id.* FINRA also contended that certain MPM alerts were inadequately investigated. *Id.* at 9. For example, in November 2012 an MPM alert was disposed of without taking into account previous investigations relating to the security that was the subject of the alert or trading activity taking place earlier in the week involving the same client and security. *Id.*

54. *Id.*

55. *Id.* FINRA noted that throughout the relevant period, Brown Brothers' AML program monitored custody movements and associated settlement activity by, among other things, using alerts generated based on a keyword list established by the firm. *Id.* at 9. While words were added to the list from time to time, the firm failed to properly investigate information that continued to be accumulated on entities that had previously been identified as a concern. *Id.*

56. Brown Brothers was also charged with failure to: (1) adequately supervise activity in foreign financial institution accounts; (2) conduct adequate AML training and testing; and (3) establish, maintain and enforce a supervisory system to achieve compliance with Section 5 of the Securities Act

FINRA.[57] Crawford was fined $25,000 personally, and was subject to a one-month suspension from association with any FINRA member.[58]

2. *U.S. Department of the Treasury v. Thomas Haider*

The most significant BSA enforcement case against a compliance officer in his personal capacity was brought by FinCEN against Thomas Haider, the former CCO of MoneyGram.[59] MoneyGram operates a money transfer service that enables its customers to transfer money to and from various locations in the United States and abroad through its global network of agents and outlets.[60] MoneyGram outlets are independently owned entities that MoneyGram has authorized to transfer money through its money transfer system.[61] MoneyGram agents are the individuals or entities that own and/or operate MoneyGram outlets.[62] As a money transmitter, MoneyGram is subject to, and must comply with, various requirements set forth in the BSA and its implementing regulations, including the regulatory requirements to implement and maintain an effective AML program and file timely SARs.[63] As

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of 1933. *Id.* at 12–16.

57. *See* Press Release, Fin. Indus. Regulatory Auth., FINRA Fines Brown Brothers Harriman a Record $8 Million for Substantial Anti-Money Laundering Compliance Failures, (Feb. 5, 2014), https://www.finra.org/newsroom/2014/finra-fines-brown-brothers-harriman-record-8-million-substantial-anti-money-laundering.

58. *Id.* In a more recent case, the SEC charged the former AML Compliance Officer of broker-dealer Windsor Street Capital (Windsor) with BSA violations. In re Windsor St. Capital, L.P. (f/k//a Meyers Associates, LP), Administrative Proceeding No. 3-17813 (Jan. 25, 2017). The SEC alleged that Windsor, formerly named Meyers Associates L.P. (Meyers), failed to file SARs relating to $24.8 million in suspicious transactions, including those occurring in accounts controlled by two microcap stock financiers who were separately charged the same day with conducting a pump-and-dump scheme. *Id.* ¶¶ 19–25; *see also* Sec. & Exch. Comm'n v. Raymond Barton, Case 2:17-cv-00403 (Jan. 25, 2017). The violations attributed to Meyers and Telfer related to Meyers' penny stock liquidation business, in which the firm routinely accepted physical deposits of large blocks of penny stock shares and allowed its customers to liquidate them, followed by the customers transferring out the sale proceeds. *Windsor St. Capital, L.P.*, No. 3-17813 ¶ 20. The SEC alleged that the information submitted to Meyers in connection with such deposits put the firm and Telfer on notice of numerous red flags. *Id.* Moreover, certain red flags were brought directly to Telfer's attention through notifications from Meyer Associates' clearing firm. *Id.* Notwithstanding the presence of these red flags, Meyers and Telfer allegedly failed to undertake a reasonable investigation to determine whether a SAR filing would be necessary. *Id.* ¶ 21. The SEC further charged Meyers and Telfer with failing to investigate and file SARs on a series of additional penny stock transactions by eight unnamed customers despite the presence of red flags. *Id.* ¶¶ 25–38. Meyers was charged with repeatedly violating Rule 17a-8, which requires broker-dealers to comply with the BSA's suspicious activity reporting rule, as well as the other BSA reporting, recordkeeping and record retention requirements. *Id.* ¶ 19. Telfer was specifically charged with "caus[ing]" and "aid[ing] and abett[ing]" those violations. *Id.* Filed as an administrative proceeding, the matter is currently pending. *Id.* at 1.

59. *See* Complaint, U.S. Dep't of the Treasury v. Haider, Civ. No. 14-9987 (S.D.N.Y. Dec. 18, 2014).

60. *Id.* ¶ 1.

61. *Id.*

62. *Id.* ¶ 2.

63. *See* 31 C.F.R. § 103.15(a) (1972).

MoneyGram's CCO, Haider was responsible for ensuring that the company complied with these obligations.[64] FinCEN charged that Haider failed to ensure that MoneyGram met either obligation during his tenure as the company's CCO.[65]

The Federal Trade Commission alleged that between 2004 and 2008, MoneyGram agents in the United States and Canada "aided fraudulent telemarketers and other perpetrators of telephone and internet scams who misled U.S. consumers into wiring tens of millions of dollars" to participants in fraudulent schemes.[66] In connection with this misconduct, FinCEN ascribed to Haider's AML program the following deficiencies: (1) rejecting or ignoring written disciplinary policies that required agents and outlets to be terminated for engaging in transaction activity deemed high risk for fraud;[67] (2) failing to terminate agent outlets despite evidence that they were the subject of high numbers of internal fraud alerts and recommendations to terminate specific agents and outlets;[68] (3) allowing sales personnel to resist proposed agent or outlet terminations;[69] (4) failing to ensure that MoneyGram's Fraud Department shared relevant information on instances of known fraud with the department responsible for filing SARs, contrary to guidance furnished by outside AML consultants;[70] (5) failing to ensure that MoneyGram performed adequate audits of agents and outlets, including those whom MoneyGram personnel knew or suspected were involved in

64. Haider Complaint, *supra* note 59, ¶ 3.

65. *Id.* ¶ 4.

66. *Id.* ¶ 61.

67. *Id.* ¶¶ 68–75.

68. *Id.* ¶¶ 76–93. Haider allegedly received regular spreadsheets identifying specific outlets that had accumulated "an alarmingly high number of Consumer Fraud Reports." *Id.* ¶ 78. One such spreadsheet, which listed all of the Canadian outlets that had received at least one fraud-induced money transfer in 2006, revealed that the top ten outlets in terms of losses to consumers had received between 62 and 241 fraud-induced transfers in 2006 alone. *Id.* For those outlets, "an exceedingly high percentage of their total number of received money transfers . . . were reported as fraudulent." *Id.* In addition, Haider allegedly received periodic recommendations from MoneyGram's Fraud Department to terminate specific agents and outlets for fraud. *Id.* ¶ 79. On several occasions in 2007, for example, MoneyGram's then-Director of AML Compliance assembled lists of outlets in Canada that the Fraud Department recommended for termination, along with information supporting the conclusion that these outlets were engaging in or ignoring fraud. *Id.* ¶¶ 79–80. Despite the recommendations, all but seven of the 49 outlets remained with MoneyGram during Haider's tenure as CCO. *Id.* ¶ 86.

69. *Id.* ¶¶ 94–95. Haider allegedly "allowed the agent/outlet review process to function such that when the Fraud Department wanted to terminate an agent/outlet, it generally had to consult with the Sales Department before doing so." *Id.* at ¶ 94. As a result of this structure, the consultation process resulted in instances where "efforts by the Fraud Department to terminate or otherwise discipline known high-risk agents were frustrated or delayed." *Id.*

70. *Id.* ¶¶ 96–101. FinCEN alleged that Haider maintained MoneyGram's AML program such that the analysts responsible for filing SARs were not provided with information from the Fraud Department, including information identifying specific outlets that had experienced high incidence of fraud. *Id.* ¶ 96. As a result, the Fraud Department failed to refer potentially reportable events to the SAR analysts. *Id.*

fraud or money laundering;[71] (6) failing to ensure that MoneyGram conducted adequate due diligence on prospective agents, or existing agents seeking to open additional outlets;[72] and (7) failing to ensure that MoneyGram filed timely SARs despite MoneyGram personnel having been put on notice that specific agents and outlets accumulated excessive numbers of internal fraud alerts and other red flags or had been proposed for termination.[73]

FinCEN alleged that as a result of Haider's failures, agents and outlets that MoneyGram personnel knew or suspected were involved in fraud and/or money laundering were allowed to continue to use MoneyGram's money transfer system to facilitate their fraudulent schemes, thereby causing MoneyGram's customers to suffer substantial losses.[74] Haider was assessed a $1 million civil money penalty for willfully violating the BSA and its implementing regulations—the largest penalty ever assessed against an individual compliance officer for BSA violations.[75] A Department of Justice ("DOJ") action to collect the fine also sought to enjoin Haider from participating, directly or indirectly, in

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71. *Id.* ¶¶ 102–07. For example, FinCEN contended that as of December 2005, MoneyGram had not performed any compliance audits in Canada, despite the fact that the Fraud Department had suspected that numerous agents/outlets in Canada were participating in fraud. *Id.* at ¶ 103. Even after December 2005, MoneyGram did not perform risk-based audits of known high-risk agents and outlets in Canada. *Id.* Moreover, to the extent audits were performed, they were allegedly often ineffective, in that auditors were not trained to look for the warning signs of fraud or otherwise conducting thorough AML compliance reviews. *Id.* ¶¶ 105–08. FinCEN noted that "some MoneyGram agents/outlets that Haider failed to terminate were not subjected to audits precisely because the agents/outlets were understood to be engag[ed] in fraud." *Id.* ¶ 107.

72. *Id.* ¶¶ 109–12. According to FinCEN, this resulted in, among other things, MoneyGram granting outlets to agents who had previously been terminated by other money transmission companies, and granting additional outlets to agents who MoneyGram personnel knew or suspected were involved in fraud and/or money laundering. *Id.* FinCEN alleged that under Haider, MoneyGram personnel allowed new agents to open outlets, and existing agents to open additional outlets, without taking steps to verify that a legitimate business did or could exist at the proposed outlet sites. *Id.* ¶ 110. In addition, in evaluating new agents MoneyGram did not inquire whether they had previously been terminated by another money transmission company, "notwithstanding that MoneyGram personnel recognized that prior terminations were an indicator of fraud." *Id.* ¶ 111. In addition, during Haider's tenure MoneyGram allowed an agent known to have operated outlets engaged in fraud or money laundering to expand his network of twelve outlets. *Id.* ¶ 112.

73. *Id.* ¶¶ 114–26. FinCEN cited instances in which MoneyGram outlets had been identified by the Fraud Department as having participated in so-called "flipping" schemes, whereby outlets in the U.S. received fraud-induced money transfers and then immediately sent the funds to another outlet in Canada. *Id.* ¶¶ 113–16. Despite these discoveries, MoneyGram failed to file SARs on the outlets due to the lack of information sharing between the Fraud Department and SAR analysts. *Id.* FinCEN cited other cases in which the Fraud Department identified outlets that had engaged in a high number of fraud payouts resulting in significant losses, and were the subject of hundreds of internal fraud reports. *Id.* ¶¶ 116–20. In these and many other cases, the agents and outlets involved had been recommended for termination. *Id.* ¶¶ 116–26. Yet, in none of these cases were SARs timely filed. *Id.*

74. *Id.* ¶ 5.

75. *Id.* ¶ 134; *see also Former Compliance Officer Assessed Million Dollar Penalty for Company's Role in Money Laundering Violations*, WIGGIN & DANA (Jan. 12, 2015), http://www.wiggin.com/15639 (calling the penalty against Haider "unprecedented").

the conduct of the affairs of any financial institution as defined in the BSA for a term of years sufficient to prevent future harm to the public.[76]

Haider moved to dismiss the fine, arguing that the BSA applies to institutions, not individuals.[77] The United States District Court for the District of Minnesota denied the motion, reasoning that the BSA's civil money penalties provision applies to partners, directors, officers, and employees of financial institutions.[78] Haider eventually settled the charges, accepting responsibility and consenting to a $250,000 fine and a three-year injunction from performing a compliance function for a money transmitting business.[79]

3. *FINRA v. Aegis Capital, Charles Smulevitz, and Kevin McKenna*

Another noteworthy FINRA case against individual compliance officers for AML program deficiencies occurred in August 2015, when Aegis, its former CCO Charles Smulevitz, and its former AML Compliance Officer Kevin McKenna, consented to the settlement of charges relating to their roles in facilitating the sale of unregistered securities, in violation of Section 5 of the Securities Act of 1933.[80]

FINRA alleged that, between April 2009 and June 2011, Aegis, a retail and institutional broker-dealer, liquidated nearly 3.9 billion shares of five "microcap"[81] securities that customers deposited into their accounts with the firm.[82] These shares were not registered with the SEC, nor were they subject to an applicable exemption from registration.[83] The customers generated over $24.5 million from the illicit sales, resulting in over $1.1 million in commissions for Aegis.[84] FINRA noted that each of the customers that had deposited and sold the unregistered shares had been referred or controlled by an individual who had previously been the subject of three significant regulatory actions, including an SEC enforcement proceeding charging the individual with aiding and abetting the sale of unregistered securities.[85]

76. *Id.*
77. U.S. Dep't of the Treasury v. Haider, No. 15-1518, at 1–2 (D. Minn. Jan. 8, 2016).
78. *Id.*
79. U.S. Dep't of the Treasury v. Haider, Case 0:15-cv-01518-DSD-KMM, ¶ 2 (May 7, 2017) (stipulation and order of settlement and dismissal).
80. Aegis Capital Corp., *supra* note 4, at 1–2.
81. "Microcap securities" refer to the securities of issuers in the United States that have market capitalization between approximately $50 million and $300 million." *Micro Cap*, INVESTOPEDIA, http://www.investopedia.com/terms/m/microcapstock.asp (last visited Nov. 21, 2017).
82. Aegis Capital Corp., *supra* note 4, ¶ 1.
83. *Id.*
84. *Id.*
85. *Id.* ¶ 2.

The alleged scheme involved the same general fact pattern among all clients in question.[86] First, a third party acquired a debt instrument from the issuer.[87] The debt instrument was then held by the acquirer (or another third party who acquired the instrument in a subsequent purchase) for a period of time.[88] The customers thereafter acquired the debt instruments from the third party and negotiated with the issuer to make the instruments convertible to stock (if they were not already so convertible).[89] The customers then deposited the shares of the microcap stocks into their accounts at Aegis, liquidated the shares shortly after deposit, and transferred the proceeds out of their accounts shortly following the sales.[90] FINRA contended that the sales of the microcap securities amounted to a significant percentage of the outstanding shares of each issuer.[91]

FINRA alleged that Smulevitz and McKenna, during their respective tenures as Aegis Compliance Officers, "failed to adequately implement the firm's [AML] program."[92] Specifically, they failed to reasonably detect and investigate red flags indicative of potentially suspicious transactions, namely: (1) the deposits of billions of shares of unregistered microcap securities of ten issuers in several firm accounts; (2) the fact that the accounts were referred or controlled by individuals who had been the subject of prior regulatory actions, including a proceeding related to the sale of unregistered securities; (3) the liquidations of the shares shortly after their deposit, sometimes during periods of increased promotional activity and trading volume; and (4) the transfers of the proceeds of those sales out of the accounts shortly thereafter.[93]

FINRA noted that during the relevant period, Aegis did not have any specific surveillances or exception reports that addressed anomalous transactions in micro-cap securities or penny stocks.[94] Nor did it have reports or manual procedures to monitor for patterns of deposits and liquidations of unregistered securities so as to facilitate the detection, investigation and reporting of suspicious activity.[95] Moreover, the firm failed to maintain adequate evidence that potentially suspicious

86. *Id.* ¶ 3.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* ¶ 4. FINRA also charged Aegis with engaging in the distribution of unregistered securities in violation of Section 5, as well as the "just and equitable principles of trade" provision of its Rule 2010. *Id.* ¶ 110.
92. *Id.* ¶ 7.
93. *Id.* ¶¶ 7, 210–15.
94. *Id.* ¶ 217.
95. *Id.*

transaction activity was being investigated and detected.[96] Because of these failures, Aegis, Smulevitz and McKenna failed to file SARs on the aforementioned sales of unregistered securities.[97]

Aegis was censured and fined $950,000 for the above-referenced violations. Smulevitz and McKenna were fined $5,000 and $10,000, and were suspended from associating with any FINRA member for 30 and 60 days, respectively.[98]

4. *FINRA v. Raymond James & Associates and Linda Busby*

In May 2016, FINRA entered into a settlement with two of Raymond James Financial, Inc.'s broker-dealer subsidiaries, Raymond James & Associates ("RJA"), and Raymond James Financial Services ("RJFS") on charges of AML compliance program failures.[99] In the same proceeding, FINRA settled charges against Linda Busby, RJA's AML Compliance Officer, for the same program infractions.[100]

At the time of the alleged misconduct, RJA was a broker-dealer that provided execution, clearing and custodial services to retail and institutional clients.[101] RJA was a broker-dealer engaged in clearing services for approximately 40 correspondent firms.[102] Busby was RJA's AML compliance officer from 2002 through February 2013.[103]

FINRA averred that from 2006 to 2014, RJA and RJFS experienced significant growth in their business, but the firms did not dedicate sufficient resources to ensure that its AML compliance procedures and controls could accommodate the growth.[104] More specifically, rather than establishing AML programs tailored to each firm's business, RJA, RJFS, and Busby instead relied upon "a patchwork of written procedures and systems across different departments to detect suspicious activity."[105] These disparate systems and procedures were not coordinated to permit the firms to link patterns and trends of suspicious behavior, "leaving certain risk areas and certain red flags unchecked."[106] FINRA also alleged that RJA, RJFS, and Busby failed to conduct required due diligence and enhanced due diligence and periodic risk reviews for foreign financial institutions.[107]

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96. *Id.* ¶ 218.
97. *Id.* ¶¶ 218–22.
98. *Id.* at 51.
99. Raymond James & Assoc., Inc., *supra* note 4, at 1–2.
100. *Id.*
101. *Id.* at 1.
102. *Id.*
103. *Id.* at 2.
104. *Id.*
105. *Id.*
106. *Id.* at 2–3.
107. *Id.* at 3

FINRA specifically ascribed to Busby the following AML compliance program deficiencies: (1) failing to commit adequate resources to support RJA's and RJFS's AML compliance programs despite the firms' significant growth;[108] (2) failing to implement reasonable written AML procedures;[109] (3) failing to implement surveillance reports reasonably designed to monitor for suspicious activity;[110] (4) implementing surveillance reports that failed to detect suspicious activity;[111] (5) inadequately investigating those surveillance alerts that did identify

108. *Id.* at 4. FINRA contended that during the relevant time period, RJA added approximately one thousand registered representatives through the February 2013 acquisition of another broker-dealer. *Id.* By June 2014, RJA handled approximately 2 million accounts and cleared and monitored trading for more than 30 introducing brokers. *Id.* RJF had approximately 2 million accounts and generated over 51 million transactions. *Id.* As RJA's AML Compliance Officer, Busby supervised only six AML compliance personnel who, along with two AML compliance personnel at RJF, were responsible for reviewing "more than a dozen lengthy AML exception reports for suspicious activity across the millions of accounts, filing [SARs] . . . and communicating with branch managers and registered representatives regarding client actions and account activity." *Id.* FINRA observed that RJA's and RJF's staffing of their AML compliance groups was "inadequate in light of the extensive responsibilities assigned to the few individuals," including "labor-intensive manual reviews, particularly given the firms' growth during the [r]elevant [p]eriod." *Id.* FINRA further noted that RJA was aware of FINRA's concerns about the adequacy of its AML compliance resourcing, but only increased its staffing when it added four AML compliance personnel who came with the acquisition of another broker-dealer. *Id.* at 5.

109. FINRA highlighted the fact that RJA did not have a single written AML procedures manual, but rather the firm's procedures were scattered through various departments. *Id.* at 5. In addition, while RJA had written procedures relating to the generation of exception reports and review of suspicious trading activity, it did not have sufficient written procedures setting forth red flags for suspicious activity. *Id.* Moreover, in its capacity as a clearing firm, RJA allegedly lacked a written supervisory procedure requiring it to monitor for suspicious activity in introduced accounts of RFS. *Id.* Finally, FINRA noted that while RJA and RJF had procedures governing the filing of SARs, neither firm had reasonable procedures for monitoring and reporting continued or repeated suspicious activity. *Id.* As a result, the firms failed to consider the filing of SARs in cases of continuing activity. *Id.*

110. *Id.* at 5–6. FINRA alleged that RJA and Busby failed to develop and implement surveillance reports tailored to certain types of potentially suspicious transactions, including: funds transfers to unrelated accounts without apparent business purpose; journaling cash and securities between unrelated accounts for no apparent business purpose; movements of funds from multiple accounts to the same third-party account; and high-risk incoming wire activity. *Id.* at 6. FINRA also noted that while RJA and RJS had procedures that required surveillance of accounts with wire activity and no securities trading, they did not have surveillance or other means of identifying the reds flags indicative of such conduct. *Id.* As a result, the firms failed to identify five hundred thirteen accounts that engaged in such activity. *Id.* Finally, FINRA found that RJA, RJS, and Busby failed to establish procedures to conduct trend or pattern analysis or otherwise view information holistically across multiple surveillance reports. *Id.*

111. *Id.* at 6–7. FINRA cited deficiencies in three surveillance reports utilized by RJA and RJF, and implemented by Busby, that resulted in the failure to detect certain suspicious activity. *Id.*

potentially suspicious activity;[112] and (6) failing to conduct due diligence on certain accounts of foreign financial institutions.[113]

In connection with the foregoing and other alleged program deficiencies,[114] RJA and RJFS consented to censures and fines of $8 million and $9 million, respectively.[115] Busby was fined $25,000 and was suspended from any association with a FINRA member for three months.[116]

B. The Advisers Act Cases

The Advisers Act cases at the center of the recent debate around compliance officer liability have involved Rule 206(4)-7.[117] Rule 206(4)-7 is a subsection of Advisers Act Section 206(4), an anti-fraud provision that prohibits an investment adviser from "engag[ing] in any act, practice, or course of business which is fraudulent, deceptive, or manipulative."[118]

Adopted in 2003, Rule 206(4)-7 requires registered investment advisers to adopt and implement written policies and procedures reasonably designed to prevent violation of the federal securities laws, review those policies and procedures annually for their adequacy and the effectiveness of their implementation, and designate a chief compliance officer to be "responsible for administering the policies and procedures."[119]

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112. *Id.* at 7–8. FINRA noted that at RJF, AML exception reports and alerts generated on approximately 140,000 issues during the relevant period, but only 1,800 of these items were escalated for further review. *Id.* at 7. The surveillance reports for RJA generated about 150,000 issues, but only about 4,000 were escalated. *Id.* FINRA also cited five examples of cases where, although RJA and RJF analysts identified some red flags and commenced investigations, the investigations were "deficient." *Id.* at 8.

113. *Id.* at 10–11. FINRA alleged that RJA and Busby failed to obtain key client profile information for certain correspondent accounts of foreign financial institutions as prescribed by its procedures, thereby limiting its ability to assess the correspondent account's risk level. *Id.* In addition, RJA and Busby had no reliable periodic review process in place to ensure that the activity in the foreign financial institutions' accounts was consistent with the information supplied by the clients at account opening. *Id.*

114. RJA and RJF were also charged with failure: (1) to maintain written procedures reasonably designed to monitor journaling between accounts and to maintain books and records for movements of stock to third-party accounts; (2) to maintain an adequate customer identification program; (3) to establish, maintain and enforce a supervisory system to achieve compliance with Section 5 of the Securities Act of 1933; and (4) to update certain written supervisory procedures related to variable annuity transactions. *Id.* at 10–12.

115. *Id.* at 13–14.

116. *Id.* at 14.

117. Investment Advisers Act of 1940, 17 C.F.R. § 275.206(4)-7 (2012).

118. 15 U.S.C. § 80b-6(4) (2012).

119. Rule 206(4)-7 provides:

> If you are an investment adviser registered or required to be registered under section 203 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3), it shall be unlawful within the meaning of section 206 of the Act (15 U.S.C. 80b-6) for you to provide investment advice to clients unless you:

The rule was designed to address a finding by the SEC and state securities authorities that some fund advisers, broker-dealers and other service providers were engaging in or facilitating inappropriate market timing and late trading of fund shares and misusing material, non-public information about fund portfolios.[120] The SEC and state authorities also found that some senior executives of fund advisers had breached their fiduciary duties to the funds involved and their shareholders by placing their own interests ahead of those of the funds and shareholders.[121] The SEC noted that the failure of an adviser or a fund to have in place adequate compliance controls was something that should be addressed before that failure could harm clients or investors.[122]

To address the potential failure of an adviser to have adequate compliance controls, Rule 206 (4)-7 requires registered investment advisers to "adopt and implement written policies and procedures reasonably designed to prevent violation[s]" of the Advisers Act and periodically "[r]eview . . . the adequacy of the policies and procedures . . . and the effectiveness of their implementation."[123] In the Adopting Release accompanying Rule 206(4)-7, the SEC indicated that the policies and procedures should be reasonably designed to prevent violations from occurring, detect violations that have occurred, and correct promptly any violations that have occurred.[124]

Under Rule 206(4)-7, each registered investment adviser must designate a CCO. The CCO should be competent and knowledgeable regarding the Advisers Act and empowered with "full responsibility and authority to develop and enforce appropriate policies and procedures for the firm."[125] Rule 206(4)-7 also specifies that the CCO is "responsible for administering the [adviser's] compliance policies and procedures . . . ."[126]

> (a) *Policies and procedures*. Adopt and implement written policies and procedures reasonably designed to prevent violation, by you and your supervised persons, of the Act and the rules that the Commission has adopted under the Act;
>
> (b) *Annual review*. Review, no less frequently than annually, the adequacy of the policies and procedures established pursuant to this section and the effectiveness of their implementation; and
>
> (c) *Chief compliance officer*. Designate an individual (who is a supervised person) responsible for administering the policies and procedures that you adopt under paragraph (a) of this section.
>
> 17 C.F.R. § 275.206(4)-7.

120. Compliance Programs of Investment Companies and Investment Advisers, 68 Fed. Reg. 74714 (Dec. 24, 2003) (amending 17 C.F.R. pts. 270, 275, 279), https://www.sec.gov/rules/final/ia-2204.pdf.

121. *Id.* at 74715.

122. *Id.*

123. Investment Advisers Act of 1940, 17 C.F.R. § 275.206(4)-7 (2012).

124. Compliance Programs of Investment Companies and Investment Advisers, *supra* note 120, at 74716.

125. *Id.* at 74720.

126. 17 C.F.R. § 275.206(4)-7(c) (imposing a requirement on registered investment advisers to "[d]esignate an individual (who is a supervised person) responsible for administering the policies and

The Adopting Release emphasized that the CCO should have a position of seniority and authority sufficient to compel others to adhere to the compliance policies and procedures.[127]

Notably, Rule 206(4)-7 does not require a showing of scienter.[128] The SEC can therefore bring an enforcement action against a compliance officer based merely on negligence, alleging that the compliance officer "caused" the firm's violations.[129]

Discussions of the most prominent Advisers Act cases follow.

1. *In the Matter of SFX Financial Advisory Management Enterprises, LLC and Eugene S. Mason*

In June 2015, the SEC brought an administrative proceeding charging SFX Financial Advisory Management Enterprises ("SFX"), an investment adviser that specialized in providing advisory and financial management services to high-net worth individuals, and its CCO Eugene Mason, with violating Rule 206(4)-7.[130]

The SEC alleged from 2006 through 2011, an SFX employee, Brian Ourand, misappropriated at least $670,000 from three client accounts while serving as SFX's President and Vice President.[131] Specifically, while exercising authority over client accounts to pay bills, transfer money, and deposit checks, Ourand wrote unauthorized checks from client bank accounts payable to "cash" or to himself, and wired the unauthorized amounts to himself for his own personal use.[132] He also wired money using client credit cards for unauthorized amounts to others for their personal use.[133]

During this time, the SEC contended, SFX failed to supervise the employee and committed numerous compliance breaches. First, given that individuals at SFX, including Ourand, had full signatory authority over client bank accounts relating to SFX's bill-paying services, "there was a significant risk that those individuals could misappropriate client funds."[134] The SEC deemed SFX's compliance policies and procedures, for which Mason was responsible, "not reasonably designed" and "not

procedures . . . .").

127. Compliance Programs of Investment Companies and Investment Advisers, *supra* note 120, at 74720.

128. SEC v. Steadman, 967 F.2d 636, 647 (D.C. Cir. 1992) ("[S]cienter is not required under section 206(4), and the SEC did not have to prove it in order to establish the appellants' liability . . . .").

129. *See* Letter from Lisa D. Crossley, Exec. Dir., Nat'l Soc'y of Compliance Prof'ls to Andrew Ceresney, Dir., U.S. Sec. & Exch. Comm'n Div. of Enf't (Aug. 18, 2015) (requesting that the SEC refrain from bringing charges against individual compliance officer based on simple negligence, and instead adopt internal guidelines requiring that only intentional or reckless conduct be pursued).

130. In the Matter of SFX Fin. Advisory Mgmt. Enterprises, Inc., *supra* note 4, ¶¶ 2, 4, 16–17.

131. *Id.* ¶ 6.

132. *Id.*

133. *Id.*

134. *Id.* ¶ 8.

effectively implemented" to prevent the misappropriation of client funds.[135] "In particular, SFX's policies were not reasonably designed to prevent the person authorizing payments from client accounts from circumventing a secondary [level of] review of . . . [the] payments."[136] Furthermore, while SFX's policy required the existence of a review of cash flows in client accounts, SFX and Mason did not effectively implement this provision for client accounts used for bill-paying services.[137]

Second, the SEC alleged that SFX filed a form ADV falsely stating that client cash accounts used for bill paying were reviewed several times each week by senior management for "accuracy and appropriateness," suggesting a review was being conducted by someone other than Ourand.[138] In fact, no one other than Ourand was conducting a review of the accounts over which he had bill-paying authority.[139]

Third, the SEC found that SFX did not conduct an annual review of its compliance program in 2011.[140] This was so despite the initiation of an investigation into Ourand's conduct.[141] The SEC pointed out that Mason was responsible for ensuring that the annual review was completed and was "negligent in failing to conduct the annual review."[142]

Based on the aforementioned breaches, the SEC determined that SFX willfully violated Section 206(4)-7, and that Mason "caused" SFX's violation.[143] SFX entered into a settlement pursuant to which it did not admit or deny the SEC's charges and consented to a fine of $150,000, a censure, and an order to cease and desist from committing or causing any future violations of the applicable provisions of the Advisers Act.[144] Mason entered into a similar "no admit or deny" settlement, was fined $25,000, and also was subjected to a cease and desist order.[145]

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135. *Id.*

136. *Id.* ¶ 9.

137. *Id.* ¶ 10.

138. *Id.* ¶ 11.

139. *Id.* The SEC noted that Mason executed a separate section of the form ADV that was filed concurrently with the section containing these allegedly erroneous representations. *Id.*

140. *Id.* ¶ 12.

141. *Id.*

142. *Id.* ¶ 12.

143. *Id.* ¶ 16–17. The SEC also alleged that SFX committed the following offenses under the Advisers Act: (1) "willfully" violating Section 206(2), which prohibits fraudulent conduct by an investment adviser; (2) failing reasonably to supervise Ourand within the meaning of Section 203(e)(6) of the Investment Act; and (3) willfully violating Section 206 and Rule 206(4)-2 thereunder, which requires that an investment adviser have a reasonable basis, after due inquiry, for believing that the qualified custodian sends an account statement, at least quarterly, to each of its clients for which it maintains funds or securities. *Id.* ¶ 13–15.

144. *Id.* at 5.

145. *Id.*

2. *In the Matter of BlackRock Advisers and Bartholomew Battista*

Another noteworthy case holding a CCO personally accountable for violating Rule 206(4)-7 occurred in April 2015, when the SEC brought charges against BlackRock Advisers, LLC ("BlackRock") and its CCO, Bartholomew Battista.[146] The action stemmed from BlackRock's alleged failure to disclose a conflict of interest involving the outside business activity of one of its portfolio managers, Daniel Rice III.[147] Rice, a well-known energy sector portfolio manager, joined BlackRock in 2005 and managed BlackRock energy-focused registered funds, private funds and managed accounts.[148]

The SEC alleged that in 2007, Rice founded Rice Energy, L.P., an oil and natural gas production company that was owned and operated by the Rice family.[149] Rice was the general partner of Rice Energy and personally invested approximately $50 million in the company, while his three sons served as CEO, CFO, and Vice President of Geology.[150] In February 2010, during Rice's tenure as a BlackRock portfolio manager, Rice Energy formed a joint venture with Alpha Natural Resources, Inc. ("ANR"), a publicly traded coal company held in the BlackRock funds and accounts managed by Rice.[151] By the end of the first quarter of 2010, the Rice-managed BlackRock funds and separate accounts held over two million shares of ANR, with the largest fund's position in ANR representing one of its largest holding by June 2011.[152]

The SEC contended that by no later than January 2007, BlackRock learned that Rice had formed and funded a family trust to hold interests in energy companies Rice intended to create, in violation of BlackRock's private investment policy.[153] Moreover, by at least that time, certain BlackRock senior executives, including Battista, were told that Rice intended to form and fund Rice Energy.[154] BlackRock's Legal and Compliance Department, including Battista, reviewed and discussed the matter and allowed Rice to form the company, concluding that no conflict of interest existed.[155] By January 2010, BlackRock learned that Rice made loans of approximately $14 million to a Rice Energy subsidiary in violation of its private investment policy.[156]

146. *See* In the Matter of Blackrock Advisors, LLC, *supra* note 4, at 1.
147. *Id.* ¶ 1.
148. *Id.* ¶¶ 1, 8.
149. *Id.* ¶¶ 1, 9–12.
150. *Id.* ¶¶ 1, 14.
151. *Id.* ¶ 1.
152. *Id.* ¶¶ 1, 15.
153. *Id.* ¶ 16.
154. *Id.*
155. *Id.*
156. *Id.* ¶ 16.

In January 2010, Rice advised BlackRock that he wanted to serve on the board of directors of the joint venture between Rice Energy and ANR.[157] Not recalling its initial review of Rice Energy in 2007, BlackRock's Legal and Compliance Department conducted a fact-gathering exercise that resulted in the issuance of a February 2010 memorandum to Rice identifying potential conflicts of interest inherent in Rice's entering into joint ventures with companies he held in the BlackRock portfolios he managed.[158] The memorandum also expressed concern that Rice may gain access to information regarding ANR that could be used for his personal benefit rather than that of his BlackRock clients.[159] Rice was nevertheless permitted to continue managing the ANR stock positions he managed on behalf of BlackRock clients subject to certain restrictions.[160]

The SEC alleged that BlackRock failed to inform the boards of directors of the Rice-managed registered funds and advisory clients about Rice's involvement with, and investment in, Rice Energy.[161] It also charged BlackRock and Battista with failing to have written policies and procedures governing the manner in which the outside activities of its employees were to be assessed, as well as assigning responsibility for determining whether the outside activity should be permitted.[162] It further faulted BlackRock and Battista for failing to adopt and implement policies and procedures to monitor those employees' approved outside activities.[163] Finally, the SEC found that BlackRock and Battista failed to inform the boards of the Rice-managed registered funds that Rice violated the firm's private investment policy by not obtaining pre-approval to form and fund the trust and to make approximately $14 million in loans.[164]

The SEC determined that BlackRock willfully violated Section 206(4) and Rule 206(4)-7 thereunder and that Battista "caused BlackRock's compliance-related violations."[165] BlackRock entered into a "no admit, no deny" settlement under which it agreed to pay a $12 million

157. *Id.* ¶ 18.

158. *Id.* ¶¶ 18–19.

159. *Id.* ¶¶ 19–20.

160. *Id.* ¶ 20. These included not exercising decision making authority over the joint venture, and not receiving information that could limit his ability to freely trade ANR securities.

161. *Id.* ¶ 23.

162. *Id.* ¶¶ 26–27.

163. *Id.* ¶ 28.

164. *Id.* ¶¶ 31–33.

165. *Id.* ¶¶ 35–36. The SEC also charged BlackRock with willfully violating the Investment Adviser's Act prohibition, under Section 206(2), against engaging in fraud. *Id.* It further charged BlackRock and Battista with causing certain BlackRock funds violations of Rule 38-1(a) of the Investment Company Act of 1940, which requires registered investment companies, through their CCO, to provide a written report at least annually to the fund's board of directors that addresses "material" compliance matters. *Id.*

penalty, accept a censure, and retain a consultant to review its compliance policies and procedures regarding the outside activities of its employees.[166] Battista settled the charges on a "no admit, no deny" basis as well, agreed to pay a $60,000 penalty, and was censured.[167]

II. The Impact of the Recent Enforcement Actions Against Financial Sector Compliance Officers

The wave of recent enforcement actions against individual financial sector compliance officers stimulated a spirited discussion in the media and among industry commentators as to the implications of this trend.[168] Many commentators questioned whether the cases signaled a strategic shift among regulators such that compliance officers presumptively would be held personally responsible for their institutions' control failures.[169] Reports also surfaced of an emerging fear among financial institution compliance officers that they were being unfairly targeted.[170]

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166. *Id.* ¶ 37; *Id.* at 12.

167. *Id.* at 12.

168. *See* Causey, *supra* note 5; DiPietro, *supra* note 5; Ensign, *supra* note 5; Glazer, *supra* note 5; Kelly, *supra* note 5; DLA Piper Survey, *supra* note 5, at 3.

169. *See, e.g.*, Aguilar, *supra* note 1 ("The Blackrock and SFX enforcement actions . . . continue a trend toward strict liability for CCOs that unfairly holds them accountable for compliance failures they cannot control"); Kelly, *supra* note 5 ("One surprising conversation to arise in the compliance world last year was the sudden worry about compliance officer liability: the idea that you, the head of compliance at your firm, might be held responsible because some other employee violated the rules and committed some form of misconduct"); Hazel Bradford, *Chief Compliance Officers Prepare for Closer SEC Scrutiny*, Pensions & Investments (Jan. 11, 2016), http://www.pionline.com/article/20160111/PRINT/301119976/chief-compliance-officers-prepare-for-closer-sec-scrutiny ("[T]he SEC's oversight of compliance officers is changing in tone. . . . Now . . . the tone has turned a little more skeptical.") (quoting Karen Barr, President and CEO of the Inv. Adviser Ass'n); Timothy Bernstein, *How Much is Too Much? The Over-Enforcement of Compliance Officers*, New Oak (Aug. 27, 2015), http://newoak.com/thought-leadership/much-much-enforcement-compliance-officers/ ("A growing body of . . . precedent is slowly shifting the regulatory failings of organizations onto their chief compliance officers . . . at least when they are around to take the blame.").

170. *See, e.g.*, Glazer, *supra* note 5 (reporting that in the wake of recent enforcement actions "[c]ompliance officers are 'shaking in their boots'" and "feel unfairly singled out"); Ensign, *supra* note 5 ("[R]ecent high profile cases against compliance officers have stirred fears of liability among practitioners in this field. Some now say they worry that they could be penalized for decisions they make in the course of their work."); Causey, *supra* note 5 ("While banking may be the business of risk management, personal liability for CCOs puts them in a serious predicament of assessing business risk appetites against their own. Compliance is challenging enough without personal liability. Is the CCO the correct target?"); DLA Piper Survey, *supra* note 5, at 3 (describing "waves of apprehension through the corporate compliance world"); Jacob Decker, *Investment Adviser Chief Compliance Officer Liability: Is the SEC Overreaching?*, Woodruff-Sawyer (Aug. 31, 2015), https://wsandco.com/industry-matters/investment-adviser/ ("Compliance officers have reason to feel uneasy. They have been tasked with an increasing number of responsibilities, asked to manage a complex variety of compliance risks, and often wear multiple hats . . . . Finally, and notably, the SEC recently imposed personal fines against two high-profile CCOs in response to their alleged failure to implement the firm's policies and procedures."); Chris Kentouris, *Compliance Officers: Taking the Regulatory Heat, Personally*, FinOps Rep. (Apr. 1, 2014), http://finops.co/regulations/compliance-officers-taking-the-regulatory-heat-personally/ ("We're caught between a rock and a hard

A. THE REGULATORS' INITIAL RESPONSE

The regulators' response to these concerns varied over time. At the outset, it was unclear whether they were even conscious that their actions could be perceived as targeting.

In connection with its record settlement against Brown Brothers, for example, FINRA offered little in defense of its decision to charge Harold Crawford personally.[171] In a February 2014 press release announcing the settlement, FINRA focused instead on the allegations against the firm itself.[172] The press release specifically highlighted the fact that Brown Brothers: (1) executed transactions or delivered securities involving at least six billion shares of penny stocks, many on behalf of undisclosed customers of foreign banks in known bank secrecy havens; (2) that the transactions were executed despite the fact that the firm was unable to establish that the shares were freely tradable; and (3) in many instances the firm lacked basic information necessary to detect the presence of red flags.[173]

In a statement accompanying the press release, Brad Bennett, FINRA's Executive Vice President and Chief of Enforcement, concentrated on Brown Brothers' program failures:

> The firm opened its doors to undisclosed sellers of penny stocks from secrecy havens without regard for who was behind those transactions, or whether the stock was properly registered or exempt from registration. This case is a reminder to firms of what can happen if they choose to engage in the penny stock liquidation business when they lack the ability to manage the risks involved.[174]

Notably, FINRA's press release made no mention of Crawford's conduct, let alone attempt to justify charges against him.[175]

When FinCEN announced the penalty against Thomas Haider several months later, the emphasis shifted. Unlike FINRA's press release in Brown Brothers, FinCEN focused exclusively on Haider's role in MoneyGram's alleged program failures. FinCEN first noted that Haider was responsible for monitoring MoneyGram's network of agents and, based on the complaints to which he was privy, "could have suspended or terminated any agents that were participating in illicit activity."[176]

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place," one compliance officer at a New York brokerage tells FinOps. "We can provide the best advice possible, but if it falls on deaf ears, we're the ones paying the price.").

171. *See* FINRA Brown Brothers Press Release, *supra* note 57.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *See* Press Release, Fin. Crimes Enf't Network, FinCEN Assesses $1 Million Penalty and Seeks to Bar Former MoneyGram Executive from Financial Industry (Dec. 18, 2014), https://www.fincen.gov/news/news-releases/fincen-assesses-1-million-penalty-and-seeks-bar-former-moneygram-executive.

Haider's inaction, the agency claimed, "led to thousands of innocent individuals being duped out of millions of dollars through fraud schemes that funneled, and sometimes laundered, their illicit profits through MoneyGram's money transmission network."[177] FinCEN also pointed out that Haider "failed in his responsibility to ensure the filing of suspicious activity reports . . . on agents whom he . . . had reason to suspect were engaged in fraud, money laundering, or other criminal activity."[178]

In an early sign of regulatory sensitivity to potential perception issues stemming from charging compliance officers, FinCEN Director Jennifer Shasky issued a statement accompanying the *Haider* press release, calling the hundreds of compliance officers she had met "some of the most dedicated and trustworthy professionals in the financial industry."[179] She then drew a stark contrast between the compliance function generally and Haider's conduct, which she portrayed as "an affront to his peers and to his profession."[180] "With his willful violations," Shasky said, Haider "created an environment where fraud and money laundering thrived and dirty money rampaged through the very system he was charged with protecting."[181]

Preet Bharara, then U.S. Attorney for the Southern District of New York, whose office simultaneously filed a complaint in federal court to enforce FinCEN's sanction against Haider, echoed Shasky's message of support for compliance professionals, opining that "[c]ompliance officers perform an essential function in our society, serving as the first line of defense in the fight against fraud and money laundering."[182] Like Shasky, moreover, Bharara portrayed Haider as an extreme outlier:

> Unfortunately . . . Mr. Haider violated his obligations as MoneyGram's Chief Compliance Officer. By allegedly failing to take the actions clearly required of him under the law, he allowed criminals to use MoneyGram to defraud innocent consumers and then launder the proceeds of their fraudulent schemes.[183]

As with FINRA's press release in *Brown Brothers*, FinCEN's approach to the *Haider* announcement primarily focused on the factual allegations of the case at hand. No broader effort was undertaken to justify the regulators' charging practices or to address the policy implications of charging individual compliance officers.

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177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*

B. SEC Commissioner Gallagher's Dissent in *SFX* and *BlackRock*

The decisive point in the evolution of the regulators' reaction to concerns about compliance officer targeting came in June 2015. It was then that SEC Commissioner Daniel Gallagher issued an unusual public statement explaining the rationale for his dissenting votes in the Commission's approvals of the *SFX* and *BlackRock* settlements.[184] In so doing, he raised broader policy concerns about the consequences of charging compliance officers individually.

Gallagher expressed the view that the "settlements illustrate[d] a Commission trend toward strict liability for CCOs under Rule 206(4)-7."[185] For Gallagher, this trend sent a "troubling message" that CCOs should avoid taking ownership of their firm's compliance policies and procedures, so as to avoid being held accountable for conduct that, under Rule 206(4)-7, is the responsibility of the investment adviser itself.[186] Worse still, he posited that the cases could influence CCOs to opt for less comprehensive policies and procedures with fewer specified compliance responsibilities "to avoid liability when the government plays Monday morning quarterback."[187]

Gallagher observed that Rule 206(4)-7 "offers no guidance as to the distinction between the role of CCOs and management in carrying out the compliance function."[188] He accused the SEC of supplying guidance via enforcement actions that "have unfairly contorted the rule to treat the compliance function as a new business line, with compliance officers assuming the role of business heads."[189] Gallagher pointed out that the rule confers responsibility on investment advisers to designate a CCO to *administer* its compliance policies and procedures, but that ultimate responsibility for *implementation* rested with the adviser.[190] Gallagher noted a "significant risk" at such firms that by taking ownership of the implementation of the policies and procedures, CCOs could unwittingly also be taking ownership of business functions, thereby "subjecting them to strict liability whenever there is a violation of the securities laws."[191]

Gallagher cautioned that the SEC needed to be "especially cognizant of the messages it sends to the compliance community."[192] He specifically warned against the potential chilling effect of such enforcement actions:

184. Daniel Gallagher, Comm'r, U.S. Sec. & Exch. Comm'n, Statement on Recent SEC Settlements Charging Chief Compliance Officers with Violations of Investment Advisers Act Rule 206(4)-7, (June 18, 2015), https://www.sec.gov/news/statement/sec-cco-settlements-iaa-rule-206-4-7.html.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

> [A]s regulators, we should strive to avoid the perverse incentives that will naturally flow from targeting compliance personnel who are willing to run into the fires that so often occur at regulated entities. This includes exercising restraint and discretion even at the investigation stage. The psychological impact, and in many cases reputational damage, that can come with months or years of testimony, the Wells process, and settlement negotiations can be just as chilling as the scarlet letter of an enforcement violation.[193]

Gallagher concluded by observing that "[t]he status quo simply will not do."[194] By continuing to follow the same approach to compliance officer liability, he said, "the Commission seems to be cutting off the noses of CCOs to spite its face."[195]

C. The SEC's Response to Gallagher's Dissents

Commissioner Gallagher's public dissents in *SFX* and *BlackRock* garnered a significant amount of public attention.[196] Many commentators seized on his criticism of the *SFX* and *BlackRock* cases as evidence that the SEC was unfairly targeting CCOs and foisting on them a degree of responsibility that rightfully belonged to their firms.[197]

Concerned that the Gallagher dissent and its resulting publicity had created an environment of "unwarranted fear" within the CCO community, the SEC mounted a defense of its actions in the form of a series of statements from key officials over the course of several

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193. *Id.*

194. *Id.*

195. *Id.*

196. *See, e.g.*, Kelly, *supra* note 5; Aguilar, *supra* note 1; Mark Schoeff Jr., *SEC's Gallagher Says Agency Unfairly Cracks Down on Compliance Officers*, InvestmentNews (June 18, 2015), http://www.investmentnews.com/article/20150618/FREE/150619901/secs-gallagher-says-agency-unfairly-cracks-down-on-compliance; Stephanie Russell-Kraft, *SEC Too Tough on Compliance Officers, Gallagher Says*, Law360 (June 18, 2015), http://www.law360.com/articles/669779/sec-too-tough-on-compliance-officers-gallagher-says; Alex Padalka, *Commissioner Says the SEC Picks on Compliance Officers*, Fin. Advisor IQ (June 22, 2015), http://financialadvisoriq.com/c/1142383/123533/charged_with_fraud_penny_stock_case.

197. *See, e.g.*, Schoeff Jr., *supra* note 196 ("Securities and Exchange Commission member Daniel M. Gallagher said the agency unfairly targeted chief compliance officers in recent enforcement actions and is leaving them unsure of the extent of their responsibility for firm behavior."); Aguilar, *supra* note 1 ("The Blackrock and SFX enforcement actions . . . continue a trend toward strict liability for CCOs that unfairly holds them accountable for compliance failures they cannot control."); Aguilar, *supra* note 1 ("Under the status quo Gallagher worries that CCOs may decide to have less stringent policies that are easier to implement so that they can't be held liable for any wrongdoing. Even worse, compliance personnel may not want to dig too deeply into potential problems if they are unsure whether or not they could be on the hook for any misconduct that they uncover."); Russell-Kraft, *supra* note 196 ("[T]he agency is taking too harsh of an enforcement stance against chief compliance officers, treating them too much like management and not like the gatekeepers they are."); Padalka, *supra* note 196 ("[T]he SEC has a habit of forcing compliance officers to enforce compliance procedures that aren't always suited to—or even strict enough for—some practices and then to take responsibility for the actions of colleagues when in-house rules fall short.").

months.[198] First, in June 2015, within two weeks of the issuance of the Gallagher dissent, SEC Commissioner Luis Aguilar issued an equally unusual public response.[199]

Aguilar began by expressing the view that "most CCOs take their job[s] seriously and are a credit to the compliance community."[200] He offered assurance that CCOs who "faithfully and reasonably fulfill the requirements of Rule 206(4)-7 are not going to be subject[s] of SEC enforcement actions."[201] Gallagher noted that since the adoption of the rule, enforcement proceedings against individuals who exclusively perform the function of CCO have been rare.[202] Two of the cases, he said in reference to *SFX* and *BlackRock*, "were recently settled in 2015 and have been the catalyst for the recent concerns that CCOs are being targeted."[203]

Aguilar asserted that the facts in *SFX* and *BlackRock* reflected "egregious misconduct" on the part of the CCOs in question and did not "signify the beginning of some nefarious trend to use Rule 206(4)-7 to target CCOs."[204] He concluded by stressing that "CCOs are vital to the protection of investors and the integrity of the capital markets."[205] "To that end," he said, "the Commission works to support CCOs who strive to do their jobs competently, diligently, and in good faith—and these CCOs should have nothing to fear from the SEC."[206]

Aguilar's message was reinforced through a series of subsequent public statements by SEC Chair Mary Jo White, SEC Division of Enforcement Director Andrew Ceresney, and other officials over the course of the next several months.[207] In a July 2015 address to a group of compliance professionals from the brokerage community, for example, Chair White spoke directly to the standards the SEC applies in deciding to charge a compliance officer:

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198. *See* Ceresney, *supra* note 1; Aguilar, *supra* note 1; Andrew Ceresney, Dir., U.S. Sec. & Exch. Comm'n Div. of Enf't, Keynote Address at Compliance Week 2014 (May 20, 2014), https://www.sec.gov/news/speech/2014-spch052014ajchttp://www.sec.gov/News/Speech/Detail/Speech/1370541872207 [hereinafter Ceresney Compliance Week Address]; Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n, Opening Remarks at the Compliance Outreach Program for Broker-Dealers (July 15, 2015), http://www.sec.gov/news/speech/opening-remarks-compliance-outreach-program-for-broker-dealers.html; Andrew Donohue, Chief of Staff, U.S. Sec. & Exch. Comm'n, Remarks at NRS 30th Annual Fall Investment Adviser and Broker-Dealer Compliance Conference (Oct. 14, 2015), http://www.sec.gov/news/speech/donohue-nrs-30th-annual.html.

199. Aguilar, *supra* note 1.

200. *Id.*

201. *Id.*

202. *Id.* Aguilar noted that in an eleven-year period, only five cases were brought against CCOs for compliance-related breakdowns. *Id.*

203. *Id.*

204. *Id.* at 3.

205. *Id.* at 4.

206. *Id.*

207. *See* Ceresney, *supra* note 1; White, *supra* note 198*;* Donohue, *supra* note 198.

> [I]t is not our intention to use our enforcement program to target compliance professionals. We have tremendous respect for the work that you do . . . . That being said, we must, of course, take enforcement action against compliance professionals if we see significant misconduct or failures by them. Being a CCO obviously does not provide immunity from liability, but neither should our enforcement actions be seen by conscientious and diligent compliance professionals as a threat. We do not bring cases based on second guessing compliance officers' good faith judgments, but rather when their actions or inactions cross a clear line that deserve sanction.[208]

A more robust defense of SEC charging practices came in November 2015, when Enforcement Director Ceresney addressed the National Society of Compliance Professionals.[209] Ceresney began by acknowledging that "recent enforcement actions by the Commission against compliance personnel in the investment adviser space have caused concern in the compliance community."[210] He emphasized that compliance officers had no reason to fear enforcement action if they performed their responsibilities "diligently, in good faith, and in compliance with the law."[211]

Ceresney noted that the SEC takes the question of whether to charge a CCO "very seriously" and "consider[s] it carefully."[212] "We think very hard about when to bring these cases," he said, "[w]hen we do, it is because the facts demonstrate that the CCO's conduct crossed a clear line."[213]

Ceresney pointed out that when the SEC brings enforcement actions against CCOs, they generally fall into three categories: (1) CCOs who are affirmatively involved in misconduct that is unrelated to the compliance functions;[214] (2) CCOs who engage in efforts to obstruct or mislead the Commission staff; or (3) CCOs who have "exhibited a wholesale failure to

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208. White, *supra* note 198.

209. *See* Ceresney, *supra* note 1.

210. *Id.*; *see also* Donohue, *supra* note 198 ("Following [the *SFX* and *BlackRock*] cases, there was a lot of discussion about whether the Commission was targeting CCOs.").

211. Ceresney, *supra* note 1; *see also* White, *supr*a note 198 ("Being a CCO obviously does not provide immunity from liability, but neither should our enforcement actions be seen by conscientious and diligent compliance professionals as a threat."); Donohue, *supra* note 198 ("[C]ompliance officers who perform their responsibilities diligently, in good faith, and in compliance with the law are our partners and need not fear enforcement action.") (quoting White, *supra* note 1). Ceresney noted that Mary Jo White had delivered a similar message to the National Society of Compliance Professionals two years earlier. Ceresney, *supra* note 1 (quoting White, *supra* note 1).

212. Ceresney, *supra* note 1.

213. *Id.*; White, *supra* note 198 ("We do not bring cases based on second guessing compliance officers' good faith judgments, but rather when their actions or inactions cross a clear line that deserve sanction."); Donohue, *supra* note 198 (quoting same statement by Mary Jo White in White, *supra* note 198).

214. Ceresney, *supra* note 1. Ceresney was specifically referring to cases in which CCOs, who also serve as CEOs, CFOs or in other capacities, commit misconduct that is related to these other roles.

carry out his or her responsibilities."[215] He noted that it was the latter category, which included the *SFX* and *BlackRock* cases, that had drawn significant attention.[216]

Ceresney also emphasized that the number of cases of the sort the SEC brings for wholesale compliance failures "is considerably smaller."[217] Specifically, he cited statistics demonstrating that from 2003 to 2015, the SEC brought more than 8,000 enforcement actions, approximately 1,300 of which involved investment advisers or investment companies.[218] During this period, only five enforcement actions were brought against individuals with CCO-only titles for Rule 206(4)-7 and other compliance-related failures, where efforts to obstruct or mislead the SEC were not at issue.[219] For Ceresney, these numbers confirmed that the SEC only rarely charges CCOs for wholesale compliance failures under Rule 206(4)-7, and that the *SFX* and *BlackRock* cases "d[id] not signal a change in how Enforcement staff or the Commission approaches the issue of CCO liability."[220] Rather, the facts clearly showed why the SEC held the CCOs liable for their firm's compliance failures.[221]

In the case of *BlackRock,* Ceresney noted that the CCO failed to develop written policies and procedures to assess and monitor the outside activities of its employees despite being on notice of "red flags," including the fact the CCO "knew of and approved numerous outside activities engaged in by BlackRock employees," and that he was "involved in extended discussions about a significant outside family business of a senior portfolio manager that posed a conflict with the investments his funds held."[222] In the case of SFX, Ceresney pointed out that the CCO failed to ensure that any review of cash flows in client accounts occurred for more than five years despite the fact that "[t]he firm's policies and

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215. *Id.*; Donohue, *supra* note 198 (citing the same three categories and opining that, "[i]n light of these factors . . . CCOs should feel empowered to diligently carry out their responsibilities without fear of personal liability."); Ceresney, *supra* note 1 (Ceresney also attempted to demonstrate the SEC's support for the compliance function by citing recent cases in which senior business leaders were the targets of enforcement actions for failing to provide compliance personnel with the "resources, cooperation and transparency . . . they need to do their job."). *See, e.g.*, Pekin Singer Strauss Asset Management, Inc., SEC; Investment Advisers Act Release No. 4126, Investment Company Act Release No. 31688, Administrative Proceeding File No. 3-16646 (June 23, 2015) (SEC charged an investment adviser with numerous compliance failures, and charged the adviser's president with causing the violations).

216. Ceresney, *supra* note 1.

217. *Id.*

218. *Id.* (citing U.S. Sec. & Exh. Comm'n, Select SEC and Market Data 2004–2015, *et. seq*. (2004–2015) and Annual Report (2003), https://www.sec.gov/reportspubs/annual-reports/aboutannrep03shtml.html).

219. Ceresney, *supra* note 1.

220. *Id.*

221. *Id.*

222. *Id.*

procedures specifically assigned the CCO with responsibility" to implement such a review.[223]

Ceresney concluded by assuring compliance officers that the SEC fully supported and relied on them as "essential partners in ensuring compliance with the federal securities laws."[224] He stressed that, "[as] reflected in the small number of enforcement actions brought against CCOs for their compliance work, and the clear facts in each of those actions, we decide to recommend charging a CCO only when warranted after a thorough analysis of the facts and circumstances and consideration of fairness and equity."[225]

D. FINRA's Post-Gallagher Dissent Statements

While the SEC engaged in what appears to have been a concerted effort to defend its approach to charging compliance officers following the Gallagher dissent, FINRA also took steps publicly to justify its actions. In April 2016, at a gathering of securities industry legal and compliance professionals, Enforcement Director Brad Bennett explained the review process FINRA undertakes when considering charging compliance officers.[226] "When we look at cases and charging decisions," Bennett said, "we look at potential liability for individuals in every case."[227] He delineated as among the factors FINRA considers "recidivism;" "[the] extent the individual was involved in the wrong-doing;" "the extent of underlying conduct and degree of investor harm;" and "willful blindness or intentional participation in the violations."[228]

Bennett compared two cases in which FINRA charged firms with AML failures relating to penny-stock controls—one in which compliance officers were charged, and another in which they were not charged.[229] While he did not identify it by name, the case that resulted in charges against the compliance officers appears to have been against Aegis,

223. *Id.*; *see also* Donohue, *supra* note 198 (citing the same facts as justification for the charges against the CCOs in *SFX* and *BlackRock*).

224. Ceresney, *supra* note 1; *see also* White, *supra* note 198 ("We have tremendous respect for the work that you do. You have a tough job in a complex industry where the stakes are extremely high.").

225. Ceresney, *supra* note 1; *see also* White, *supra* note 198 ("To be clear, it is not our intention to use our enforcement program to target compliance professionals. . . . That being said, we must, of course, take enforcement action against compliance professionals if we see significant misconduct or failures by them.").

226. J. Bradley Bennett, Exec. Vice President & Dir. of Enf't, Fin. Indus. Regulatory Auth., Remarks from the SIFMA Anti-Money Laundering and Financial Crimes Conference (Apr. 5, 2016), http://www.finra.org/newsroom/speeches/040516-remarks-sifma-anti-money-laundering-and-financial-crimes-conference.

227. *Id.*

228. *Id.*

229. *Id.*

Smulevitz and McKenna.[230] Bennett pointed to specific facts that "differentiated the outcomes" for the compliance officers in both cases.[231] Specifically, Bennett accused Smulevitz and McKenna of implementing a supervisory system that was "more concerned with generating commissions than it was with complying with laws and regulations."[232]

According to Bennett, Smulevitz and McKenna "unreasonably" relied on representations from customers and their counsel without verifying the information.[233] Additionally, "[t]hey also did not consider patterns of deposits and liquidations of microcap securities to be a red flag that required investigation or inquiry."[234] By comparison, Bennett noted that the compliance officer who had not been charged "made numerous attempts to question the activity and inadequate supervisory systems" and was overruled by the business.[235] In short, Bennett claimed, Smulevitz and McKenna were held personally accountable because they "did little to nothing to question or stop the sales of billions of shares of microcap stock dumped into the marketplace through the firm."[236]

In May 2016, one month after Bennett's remarks, FINRA offered a more refined statement of its rationale for charging compliance officers when it announced its settlement with Raymond James and AML Officer Linda Busby.[237] In a press release accompanying the settlement, FINRA concentrated as much on Busby's alleged failures as those of the firm. In particular, FINRA accused RJA and Busby of being unable to keep pace with the firm's protracted growth and establish AML programs tailored to each firm's business.[238] RJA and Busby were faulted for relying upon a patchwork of written procedures and systems across different departments to detect suspicious activity, which caused "red flags" of potentially suspicious activity that went undetected or inadequately investigated.[239] FINRA also cited RJA's failure to conduct required due diligence and periodic risk reviews for foreign financial institutions, and Busby's failure to ensure that those reviews were conducted.[240]

FINRA went beyond merely focusing on Busby's alleged misconduct, however. In a statement accompanying the press release,

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230. *Id.*
231. *Id.*
232. *See* Bennett, *supra* note 226.
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
237. *See* Fin. Indus. Regulatory Auth., *supra* note 8.
238. *Id.*
239. *Id.*
240. *Id.* Consistent with Bennett's focus on recidivism as a significant factor impacting compliance officer charging, in its remarks a month earlier, FINRA noted that RJF had previously been sanctioned for inadequate AML procedures and, as part of that settlement, had agreed to review its program and procedures, and certify that they were reasonably designed to achieve compliance.

Executive Vice President and Enforcement Chief Brad Bennett articulated a standard for holding compliance officers accountable:

> Raymond James had significant systemic AML failures over an extended period of time, made even more egregious by the fact that the firm was previously sanctioned in this area. The monitoring for suspicious transactions is an essential part of protecting our financial system and firms must allocate adequate resources to their AML compliance efforts. *This case demonstrates that when there are broad-based failures within specific areas of responsibility, we will seek individual liability where appropriate.*[241]

With the portrayal of Busby's conduct as "broad-based failures within specific areas of responsibility," FINRA established a standard closely resembling that which SEC Enforcement Director Ceresney invoked in justifying individual CCO charges in *SFX, BlackRock* and similar cases—namely, a "wholesale failures in carrying out responsibilities."[242]

E. The Rationale in Support of Compliance Officer Targeting

Taken as a whole, the regulators' public statements reflect the following rationale in support of their compliance officer charging practices. As a threshold matter, the cases in which compliance officers are charged with wholesale or broad-based failures are rare.[243] When they do occur, they are subject to careful consideration, and charges are only brought when the evidence demonstrates that a clear line was crossed.[244] Under these circumstances, the behavior at issue is as problematic as it would be if the compliance officer had engaged in collusive or obstructive misconduct, and the targeting of compliance officers is entirely appropriate.[245]

A possible additional justification for the regulators' approach to compliance officer charging is the notion that personal liability encourages a greater degree of vigilance by compliance officers.[246] According to this line of reasoning, the specter of personal liability provides the requisite incentive for compliance officers to implement strong, effective compliance programs.[247] It also offers more inducement

241. *Id.* (emphasis added).
242. *See* Ceresney, *supra* note 1, at 4–5; Donohue, *supra* note 198.
243. *See supra* notes 202, 215 and accompanying text.
244. *See supra* notes 8, 9, 198, 202, 211–223, 225 and accompanying text.
245. *Id.*
246. *See* Crossley, *supra* note 129.
247. *See* Mary Bennett, *Chief Compliance Officers: Mitigating Personal Liability*, ETHICS & COMPLIANCE MATTERS (May 29, 2014), http://www.navexglobal.com/blog/chief-compliance-officers-crosshairs.

for compliance officers to challenge management over risky or questionable behavior.[248]

While no senior regulatory official has publicly acknowledged the potential for increased vigilance to be a factor influencing their agency's stance on compliance officer liability, one interested party has suggested that it should be. In a letter to SEC Enforcement Director Ceresney, Lisa Crossley, Executive Director of the National Society of Compliance Professionals, framed the policy debate around compliance officer liability as one in which the potential for encouraging greater vigilance should be weighed against the possible downsides of perceived targeting: "[W]e submit that a fundamental policy question is whether enforcement actions against compliance officers will motivate them to greater vigilance or risk a demoralizing belief that even exercising their best judgment will not protect them from the risk of [. . .] enforcement action . . . ."[249]

III. THE ENDURING PERCEPTION OF TARGETING AND ITS "CHILLING EFFECT" ON FINANCIAL SECTOR COMPLIANCE OFFICERS

A. THE CHILLING EFFECT

As the foregoing Part suggests, regulators have engaged in a significant, public campaign to mollify the concerns of financial sector compliance officers regarding targeting. Despite these efforts, however, the perception of targeting has endured and has had a demonstrable chilling effect on compliance officers.

In February 2016, *The Wall Street Journal* reported that "[a]round three dozen senior bank-compliance executives left their jobs in 2015," three times the number that had done so the year before.[250] A recent survey of CCOs conducted by the law firm DLA Piper also revealed that "81 percent of respondents were at least somewhat concerned" about their personal liability, with nearly a third describing personal liability as "extremely concerning."[251] A 2015 Thompson Reuters survey of approximately 600 compliance professionals further indicated that 59 percent expected their personal liability to increase over time.[252]

248. *Id.*
249. Crossley, *supra* note 129, at 2.
250. *See* Glazer, *supra* note 5; *see also* DLA PIPER SURVEY, *supra* note 5.
251. DLA PIPER SURVEY, *supra* note 5.
252. *Thomson Reuters Annual Cost of Compliance Survey Shows Regulatory Fatigue, Resource Challenges and Personal Liability to Increase Throughout 2015*, THOMSON REUTERS (May 13, 2015), http://thomsonreuters.com/en/press-releases/2015/05/cost-of-compliance-survey-shows-regulatory-fatigue-resource-challenges-personal-liability-to-increase.html [hereinafter Thomson Reuters Press Release]. "[Ninety-three percent] of practitioners voting at the Thomson Reuters New York customer summit expected the personal liability of compliance professionals to increase in 2016." *Top 5 Compliance Trends Around the Globe in 2016*, THOMSON REUTERS, https://risk.thomson

Anecdotally, one online financial industry publication reported that ten compliance officers at U.S. banks and broker-dealers who had been contacted said they were in a "no-win situation and short of resigning can do little to reduce their personal liability."[253]

In addition to the potential "chilling effect" on current senior compliance professionals, there is evidence that the prospect of personal liability is causing future leaders in financial sector compliance to reconsider their career paths.[254] Sixty percent of the CCOs of public companies surveyed by DLA Piper said they would think more carefully about roles they might consider given the specter of personal liability.[255] In addition, approximately two-thirds of the compliance professionals who responded to the Thomson Reuters survey reported that the focus on individual accountability would have an impact on their ability to recruit skilled senior staff.[256]

In sum, the regulators' efforts to allay compliance officer fears and to justify the recent enforcement actions against their peers as appropriate responses to wholesale or broad-based program failures, seem to have had little impact on the perception of targeting or its attendant "chilling effect." The perception has persisted, and seems to be causing people to exit—or at least consider exiting—the compliance profession, if not the industry more broadly.

B. Potential Explanations for the Enduring Perceptions of Targeting

There is little basis for questioning the validity of senior law enforcement and regulatory officials' expressions of esteem and support for the financial sector compliance function.[257] Nor is there reason to doubt regulators' representations that enforcement actions against individual compliance officers are the product of careful consideration and are undertaken only when supported by evidence indicating that a clear line was crossed.[258] Given that regulators' efforts to quell the sense of anxiety among compliance, nevertheless, have had little effect, we must consider what other causes could be responsible for the prevailing perception of compliance officer targeting persists.

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reuters.com/content/dam/openweb/documents/pdf/risk/infographic/top-5-compliance-trends-around-globe-2016-infographic.pdf (last visited Nov. 21, 2017).

253. Kentouris, *supra* note 170.

254. DLA Piper Survey, *supra* note 5, at 9.

255. *Id.*

256. Thomson Reuters Press Release, *supra* note 252.

257. *See, e.g.*, Ceresney, *supra* note 1; DOJ Haider Press Release, *supra* note 2; Bharara SIFMA Remarks, *supra* note 1; White, *supra* note 1; Fin. Crimes Enf't Network, *supra* note 176 (quoting Jennifer Shasky, Dir., U.S. Dep't of the Treasury Fin. Crimes Enf't Network).

258. Ceresney, *supra* note 1; White, *supra* note 198; Donohue, *supra* note 198; Bennett, *supra* note 226.

The following factors, either alone or in combination, may be contributing to this trend.

1. *The Aggregate Impact of Recent Enforcement Actions*

The first, and perhaps the most obvious, is the aggregate impact of recent enforcement actions. SEC Enforcement Director Ceresney and other SEC officials have proffered compelling statistics to demonstrate that the number of cases the Commission has brought against compliance officers for causing a violation of law, in the absence of allegations of willful misconduct or obstruction, is an extremely small fraction of the whole.[259] Indeed, this appears to be the case with all of the agencies that have brought recent cases against financial sector compliance officers.[260]

Yet when the average compliance officer observes not just the SEC bringing highly publicized cases,[261] but the SEC *and* FinCEN,[262] *and* FINRA, then perhaps it is the totality of these actions that catches their attention, rather than the merits of any individual case. This is especially so when the enforcement actions are brought by these various agencies relatively close in time. The fact that it has been historically rare for these agencies to bring personal charges against financial sector compliance officers may therefore offer scarce comfort when they appear to be doing so presently.

2. *The "Isolation Factor"*

The second possible explanation for the perception of targeting can be termed the "isolation factor." One common feature linking *Brown Brothers*, *Haider*, *Raymond James*, *Aegis, BlackRock*, *SFX*, and the other highly publicized enforcement actions charging financial compliance officers with wholesale or broad-based program failures is the fact that, in each of these cases, the compliance officer was the only individual charged. Indeed, a substantial number of the enforcement cases brought against individual compliance officers in the past several

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259. *See supra* notes 7–9, 202, 213, 225 and accompanying text.

260. *See FinCEN Seeks Civil Money Penalty and Injunction Against Former Chief Compliance Officer of MoneyGram*, SIDLEY (Jan. 2, 2015), http://www.sidley.com/news/2015-01-02_banking_and_financial_services_update ("The Complaint [against Thomas Haider] is significant because it is highly uncommon, and possibly unprecedented, for FinCEN to hold a compliance officer personally responsible for the AML failures of an employer."). *See Enforcement Actions*, FIN. CRIMES ENF'T NETWORK, https://www.fincen.gov/news-room/enforcement-actions (last visited Nov. 21, 2017).

261. *See* In the Matter of SFX Fin. Advisory Mgmt. Enterprises, Inc., *supra* note 4; In the Matter of Blackrock Advisors, LLC, *supra* note 4; *see also supra* notes 130–167 and accompanying text.

262. *See* U.S. Dep't of the Treasury v. Haider, No. 15-1518 (D. Minn. Jan. 8, 2016); Raymond James & Assoc., Inc., *supra* note 4; Aegis, *supra* note 4; Brown Brothers Consent, *supra* note 4.

years have not included charges against other senior business or control-side personnel.[263]

Of the cases brought by the SEC, FinCEN, and FINRA over the past two years in which compliance officers holding just that title have been charged with program failures, the majority have included charges against other parties associated with the infractions in question.[264] That any enforcement action that fails to allege collusion or obstruction could proceed against a compliance officer in isolation, however, is cause for concern.

The success of a financial institution's compliance program depends on the efforts of multiple stakeholders, including compliance, legal, operations, and, of course, the business. Indeed, regulators view the business as the "first line of defense" with primary responsibility for implementing internal controls.[265] Compliance and other control functions are considered the "second line," responsible for unearthing issues that are not captured by the first line.[266]

Thus, imposing personal liability on compliance officers for the frailties of their firms' compliance programs only addresses one part of the equation. Each line of defense should operate in a robust and effective fashion toward the shared goal of strengthening a financial firm's overall control environment. Enforcement actions that fail to reflect this sense of shared responsibility, and instead focus exclusively on the role of the compliance officer, may not be ensuring the appropriate level of engagement by all senior managers with the ability to influence a firm's compliance culture. In addition, such enforcement actions risk being

263. *See* Raymond James & Assoc., Inc., *supra* note 4; U.S. Dep't of the Treasury v. Haider, No. 15-1518 (D. Minn. Jan. 8, 2016); Aegis Capital Corp., *supra* note 4; In the Matter of SFX Fin. Advisory Mgmt. Enterprises, Inc., *supra* note 4; In the Matter of Blackrock Advisors, LLC, *supra* note 4; Brown Brothers Consent, *supra* note 4.

264. Of the twenty-six enforcement actions FinCEN brought for BSA violations from in 2014 and 2015, only seven were against compliance officers. *See Enforcement Actions*, FINANCIAL CRIMES ENFORCEMENT NETWORK, https://www.fincen.gov/news-room/enforcement-actions (last visited Nov. 21, 2017). Of these, only one involved charges against other firm personnel. *Id.* From 2003–2015, the SEC brought 1,300 enforcement actions against investment advisers/investment companies, only five of which were brought against individuals with CCO-only titles that involved charges under Rule 204(4)-7. Ceresney, *supra* note 1; Aguilar, *supra* note 1. Two of these, the *SFX* and *BlackRock* cases, were brought in 2015 and did not involve charges against other parties. Ceresney, *supra* note 1. Of eighty-two FINRA enforcement actions for AML program failures from 2014 through 2016, twenty-three involved charges directed only at compliance officers. Spreadsheet Tracking FINRA Enforcement Matters, prepared by Sutherland, Asbill & Brennan (on file with the Author).

265. GEOFFREY P. MILLER, THE LAW OF GOVERNANCE, RISK MANAGEMENT, AND COMPLIANCE 4 (2d ed. 2017) ("The Three Lines of Defense Line One: operating executives have initial responsibility for implementing internal controls within their own areas. Line Two: risk-management and compliance operations catch problems that are not weeded out at the front line. Line Three: internal audit checks up on everyone, including risk management and compliance, in an attempt to make sure that no problems remain.").

266. *Id.*

viewed by the compliance community as unfairly placing the totality of responsibility for the effectiveness of a firm's program on the compliance officer's shoulders.[267]

3. Recent Trends in Law Enforcement and Regulatory Policy

Finally, the perception among financial sector compliance officers that they are being targeted may also be attributed to recent trends in law enforcement and regulatory policy. At the same time that they are witnessing an uptick in noteworthy enforcement actions against their peers at other institutions, compliance officers are also observing an increased focus on individuals in cases of corporate misconduct.[268]

Deputy Attorney General Yates' issuance of new DOJ guidance in September 2015, which compels federal prosecutors to examine individual culpability as a condition of resolving cases against corporations, is the most significant illustration of this shift.[269] Another

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267. *See* Glazer, *supra* note 5 (quoting one compliance officer who had worked for large U.S. and foreign banks as saying, "It's easier for firms to give up their compliance officer, because what are they going to do, give up the CEO?"); Kentouris, *supra* note 170 (quoting a brokerage compliance officer as saying, "We're caught between a rock and a hard place . . . . We can provide the best advice possible but if it falls on deaf ears, we're the ones paying the price.").

268. *See* Jeremiah Buckley, *The Compliance Officer Bill of Rights*, AM. BANKER (Feb. 22, 2016), https://www.americanbanker.com/opinion/the-compliance-officer-bill-of-rights ("Regulators and prosecutors are under increasing pressure to bring charges not only against companies, but also against individual corporate officers."); DLA PIPER SURVEY, *supra* note 5 (noting "a new era of scrutiny and personal liability for senior executives and compliance officers."); *Key Trends in BSA/AML Compliance: Heightened Regulatory Expectations as Industry Growth Presents New Challenges*, PAUL HASTINGS (Apr. 14, 2015), http://www.paulhastings.com/publications-items/details/?id=58f9e369-2334-6428-811c-ff00004cbded ("[The federal banking agencies] may hold individual officers accountable for compliance program deficiencies, regardless of whether the officers serve at national banks with significant experience and compliance resources, at small insured institutions, or at relatively new MSBs or other nonbank entities.").

269. Memorandum from Sally Quillan Yates, Dep. Att'y Gen., Individual Accountability for Corporate Wrongdoing, U.S. Dep't of Justice (Sept. 9, 2015) (prescribing six guidelines to strengthen DOJ action: "(l) in order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct; (2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation; (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another; (4) absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation; (5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should memorialize any declinations as to individuals in such cases; and (6) civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay."); *see also DOJ's Newest Policy Pronouncement: The Hunt for Corporate Executives*, GIBSON DUNN (Sept. 11, 2015), http://www.gibsondunn.com/publications/pages/Yates-Memo--DOJ-New-Posture-on-Prosecutions-of-Individuals--Consequences-for-Companies.aspx ("The Yates Memorandum has been heralded as a sign of new resolve at DOJ, and follows a series of public statements made by DOJ officials indicating that they intend to adopt a more severe posture towards 'flesh-and-blood' corporate criminals, not just corporate entities."); *The Yates Memo and the DOJ's Focus on Individuals*, ALSTON & BIRD (Sept. 14, 2015), http://www.alston.com/advisories/DOJ-

is the tonal shift among prominent law enforcement and regulatory officials emphasizing individual accountability.[270] Accompanying this enhanced focus on individuals is a greater emphasis on the role of compliance more generally, as evidenced by the appointment last year of the first-ever Compliance Counsel to the DOJ.[271]

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yates-memo/ ("The new policies are intended to increase scrutiny of high-level executives and pressure corporations to turn over evidence against their employees, in both criminal and civil proceedings."); *DOJ Issues New Guidance on Pursuing Individual Accountability for Corporate Wrongdoing*, COVINGTON & BURLING (Sept. 11, 2015), https://www.cov.com/-/media/files/corporate/publications/2015/09/doj_memo_individual_corporate_wrongdoing.pdf ("[O]ne thing is clear: DOJ is trying to send a message to the public and to agents and prosecutors across the country that the twin goals of punishment and deterrence will not be served unless individuals, as well as companies, are held accountable for corporate wrongdoing.").

270. *See, e.g.*, Bennett, *supra* note 226 ("When we look at cases and charging decisions, we look at potential liability for individuals in every case."); Sally Quillan Yates, Dep. Attorney Gen., Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing (Sept. 10, 2015), https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school ("[N]othing discourages corporate criminal activity like the prospect of people going to prison."); Benjamin M. Lawsky, Superintendent, N.Y State Dep't of Fin. Serv., Remarks on Financial Institution Regulation in New York City at Columbia Law School (Feb. 25, 2015), http://www.mondovisione.com/media-and-resources/news/new-york-state-department-of-financial-services-superintendent-benjamin-m-lawsk/ ("In my opinion, if in any particular instance [of corporate wrongdoing] we cannot find someone, some *person*, to hold accountable, that just means we have stopped looking. Moreover, even if there are certain circumstances where misconduct does not rise to the level of criminal fraud, civil financial regulators can also play a role in imposing individual accountability."); Andrew Ceresney, Dir., U.S. Sec. & Exch. Comm'n Div. of Enf't, American Conference Institute's 32nd FCPA Conference Keynote Address (Nov. 17, 2015), http://www.sec.gov/news/speech/ceresney-fcpa-keynote-11-17-15.html ("Holding individuals accountable for their wrongdoing is critical to effective deterrence and, therefore, the [Enforcement] Division considers individual liability in every case."). Indeed, this rhetorical focus on individual liability in corporate criminal cases appears to be agnostic to party affiliation. *See Testimony of Under Secretary for Terrorism and Financial Intelligence David S. Cohen Before the Senate Committee on Banking, Housing, and Urban Affairs on "Patterns of Abuse: Assessing Bank Secrecy Act Compliance and Enforcement,"* U.S. DEPARTMENT OF THE TREASURY (Mar. 7, 2013), https://www.treasury.gov/press-center/press-releases/Pages/jl1871.aspx ("[T]he BSA allows FinCEN to impose civil penalties not only against domestic financial institutions and non-financial trades or businesses that willfully violate the BSA, but also against partners, directors, officers and employees of such entities who themselves actively participate in misconduct. Although FinCEN has employed these tools only occasionally in the past, in the future FinCEN will look for more opportunities to impose these types of remedies in appropriate cases.").

271. *See Expanding Personal Liability for Chief Compliance Officers: MN Federal Court Decision, Proposed NY Regulation Continue the Trend,* DLA PIPER (Feb. 24, 2016), https://www.dlapiper.com/en/us/insights/publications/2016/02/expanding-personal-liability/ ("The imposition of personal liability on chief compliance officers is part of the regulators' broader interest in compliance failures at the highest levels of financial institutions."); Ralph E. Sharpe, *Personal Liability: Issues for Compliance Professionals*, ABA BANK COMPLIANCE (Mar.–Apr. 2016) https://www.aba.com/Products/bankcompliance/Documents/BCcoverstory.pdf ("Clearly, on an increasing basis, regulators are looking for ways to underscore the importance of AML compliance by sending a very strong message to compliance professionals that not only may the institution they serve be at risk, they may also be found personally liable."); *see also New Compliance Counsel Expert Retained by the DOJ Fraud Section*, https://www.justice.gov/criminal-fraud/file/790236/download. "Among her duties as a consulting expert, [the Compliance Counsel] will provide expert guidance to Fraud Section prosecutors as they consider the enumerated factors in the United States Attorneys'

While these initiatives have signaled a new era of individual scrutiny, a proposed regulation introduced by the New York State Department of Financial Services in December 2015 threatened to take this notion to a potentially troubling extreme.[272] The proposed rule required CCOs or their functional equivalents to annually certify as to the compliance of their financial institutions' AML and sanctions screening controls with applicable regulations, facing potential criminal penalties for false or *incorrect* certifications.[273]

The criminal sanctions were ultimately dropped from the final version of the rule.[274] However, when viewed in the context of the new DOJ guidance, the appointment of Compliance Counsel and other policy developments, the inclusion of criminal penalties in the earlier iteration may have been sufficient to heighten the anxiety of financial sector compliance officers and fuel the impression that they are receiving a disproportionate amount of attention.[275]

IV. PROPOSALS FOR MITIGATING THE PERCEPTION OF TARGETING AND ITS "CHILLING EFFECT"

Whatever the cause, the potential "chilling effect" of the recent enforcement actions against financial sector compliance officers is deeply concerning. If the "demoralizing belief" persists among compliance officers that the system is potentially undermining them, and that "even exercising their best judgment will not protect them from the risk of a career ending enforcement action," many more will leave or forego the profession entirely rather than face the risks.[276]

Manual concerning the prosecution of business entities, including the existence and effectiveness of any compliance program that a company had in place at the time of the conduct giving rise to the prospect of criminal charges, and whether the corporation has taken meaningful remedial action, such as the implementation of new compliance measures to detect and prevent future wrongdoing." *Id.*

272. Regulating Transaction Monitoring and Filtering Systems Maintained by Banks, Check Cashers and Money Transmitters, 37 N.Y. REG. 9, 11 (proposed Dec. 16, 2015).

273. *Id.*

274. *Id.*

275. *See* DLA PIPER SURVEY, *supra* note 5, at 3 ("Coupled with the appointment of Hui Chen as the Justice Department's first-ever compliance counsel and accompanied by a steady drumbeat of guidance from Andrew Ceresney, Securities and Exchange Commission director of enforcement, the [Yates] memo seemed to signal a new era of scrutiny and personal liability for senior executives and compliance officers."); *see also Personal Liability or Talent Drain?*, ACAMSTODAY (May 9, 2016), http://www.acamstoday.org/personal-liability-or-talent-drain/ ("Ultimately, regulators were put under severe criticism for not having been able to hold responsible key executives for all failings of the financial crisis. The lack of meaningful enforcement actions against senior individuals shifted the nature of supervisory responsibilities to personal liability. That said, compliance officers gradually became the target of 'witch hunts,' in which some ended up being 'burned alive' at the stake for all noncompliant obligations and wrongdoings.").

276. *See* Crossley, *supra* note 129 (suggesting that enforcement actions against compliance officers will engender "a demoralizing belief that even exercising their best judgment will not protect them from the risk of a career ending enforcement action, with the result that many of the best compliance

A. Senior Manager Accountability

To mitigate the perception of compliance officer targeting, a senior manager accountability scheme similar to the system recently implemented in the United Kingdom. On March 7, 2016, the FCA and PRA implemented the so-called "Senior Managers Regime" ("SMR").[277] The SMR, which was conceived in response to the financial crisis of 2007-2008 and LIBOR rate-fixing scandals,[278] is designed to "embed personal accountability into the culture" of the UK financial services industry.[279]

The SMR focuses on individuals who perform "Senior Management Functions" in regulated firms, including not only senior compliance functions, but a range of other senior business and controls-side roles as well.[280] Firms are required to identify personnel performing such functions and to allocate to them certain prescribed responsibilities.[281] Firms will also have to seek and obtain regulatory approval for any new Senior Manager appointment or any material change in role for a current Senior Manager.[282] The SMR is supported by conduct rules that apply to Senior Managers and other employees, requiring them to act with integrity, to display due care, skill, and diligence, to have regard for customers and treat them fairly, and to observe proper standards of

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officers will choose to leave the profession rather than face the risks.").

277. *Senior Managers and Certification Regime*, FIN. CONDUCT AUTHORITY (Sept. 9, 2016), https://www.fca.org.uk/print/firms/senior-managers-certification-regime. The Senior Managers Regime replaced the previous "Approved Persons Regime," ("APR") which required regulated financial services firms to apply for FCA or Prudential Conduct Authority approval before a person could be employed to perform a "controlled function." HER MAJESTY'S TREASURY, SENIOR MANAGERS AND CERTIFICATION REGIME: EXTENSION TO ALL FSMA AUTHORIZED PERSONS 3 (2015). The APR was criticized as being insufficiently focused on senior management. *Id.* at 4.

278. The London Interbank Offered Rate ("LIBOR") is supposed to represent the price that a bank pays to borrow money from another bank. *LIBOR*, WIKIPEDIA, https://en.wikipedia.org/wiki/Libor. In the LIBOR scandal, financial institutions were accused of providing information on the interest rates used to calculate LIBOR in order to keep LIBOR artificially low. *See* James McBride, *Understanding the Libor Scandal*, COUNCIL ON FOREIGN REL. (Oct. 12, 2016), https://www.cfr.org/backgrounder/understanding-libor-scandal; *LIBOR Scandal*, INVESTOPEDIA, http://www.investopedia.com/terms/l/libor-scandal.asp (last visited Nov. 21, 2017); Rep. Dennis Kucinich, *The LIBOR Scandal Explained*, HUFFINGTON POST (Sept. 10, 2012), http://www.huffingtonpost.com/rep-dennis-kucinich/the-libor-scandal-explain_b_1666353.html; *All Things Considered, What Does London's LIBOR Mean to the U.S.?*, NPR (July 7, 2012), http://www.npr.org/2012/07/07/156428433/what-does-londons-libor-mean-to-the-u-s.

279. *FCA Publishes Final Rules to Make Those in the Banking Sector More Accountable*, Financial Conduct Authority (July 7, 2015), https://www.fca.org.uk/news/press-releases/fca-publishes-final-rules-make-those-banking-sector-more-accountable (quoting Martin Wheatley, Chief Exec., Fin. Conduct Auth.).

280. HER MAJESTY'S TREASURY, *supra* note 277.

281. *Id.*

282. *Id.* at 7. Individuals not performing Senior Management Functions but whose roles are deemed capable of causing harm to the firm or its clients will be subject to a "Certification Regime" requiring firms to assess, and certify to, the fitness and propriety of these persons. *Id.*

market conduct.[283] In addition, Senior Managers in particular are compelled to take reasonable steps to ensure that their businesses comply with the relevant requirements, to delegate appropriately, and to supervise the performance of the delegation.[284]

Notably, the SMR incorporates a "[s]tatutory duty of responsibility to be applied consistently to all Senior Managers across the financial services industry."[285] Pursuant to this duty, regulators may take enforcement action against individual employees that have "contravened the statements of principle that apply directly to them," or if the manager is "knowingly concerned in a breach of regulatory requirements by the firm."[286] An additional standard applies to Senior Managers, permitting individual action if: (1) the firm has contravened regulatory requirements and the breach occurred in the part of the business for which the Senior Manager is responsible; and (2) the regulator can demonstrate that the manager "failed to take steps that is reasonable for a person in that position to take" to prevent the breach.[287]

Senior FCA officials have stressed that the "[SMR] is not a means for making senior managers strictly or even vicariously liable for contraventions by firms."[288] Rather, the SMR is designed to focus "on the people who can make a difference, the senior management, and it is top down rather than bottom up . . . ."[289] By definition, therefore, the SMR focuses on a range of key personnel performing key supervisory functions, most certainly including the business as well as additional control-side functions.

The adoption in the U.S. of a senior manager accountability regime similar to the SMR would be a significant step in the effort to combat the perception of compliance officer targeting. By establishing clear expectations and standards for senior managers across multiple business and control functions, the ability to a shape a firm's compliance culture and control environment will be enhanced. Moreover, the explicit sharing of personal responsibility across a wider spectrum of senior personnel performing key supervisory functions would provide greater

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283. Mark Seward, Dir. of Enf't & Mkt. Oversight, Fin. Conduct Auth., *Tackling the Hard Questions* (Apr. 26, 2016), https://www.fca.org.uk./print/news/speeches/tackling-hard-questions; *see also* HER MAJESTY'S TREASURY, *supra* note 277.

284. *See* HER MAJESTY'S TREASURY, *supra* note 277.

285. *Id.* at 11.

286. *Id.*

287. *Id.*

288. Seward, *supra* note 283; *see also* Martin Wheatley, Chief Exec. Officer, Fin. Conduct Auth., Accountability, from Debate to Reality (Apr. 19, 2016), https://www.fca.org.uk/news/speeches/accountability-debate-reality#header ("We should remember—[SMR] is about reasonable steps. I understand it worries firms that the FCA cannot say 'if you do X, Y and Z you'll be fine'; but in the same breath, it is equally true that Senior Managers are not automatically going to be fined.").

289. *See* Seward, *supra* 283.

assurance to compliance officers that their conduct will be assessed not in isolation, but within the context of a broader managerial effort.[290]

B. Joint Industry-Regulatory Advisory Group

A second proposal for mitigating the perception of compliance officer targeting is to establish a joint industry-regulatory advisory group to address the issue. At a conference of securities industry legal and compliance professionals in March 2016, John F.W. Rogers, in his capacity as Chair of the Securities Industry and Financial Markets Association ("SIFMA"), proposed the creation of a permanent working group "to act as a unified voice for collective viewpoints and concerns . . . ."[291] This group, which would be made up of key representatives from both the regulatory community and the financial sector, would meet regularly to discuss "the efficacy and impact of existing and prospective regulatory, examination and enforcement efforts."[292]

The approach is not novel. The Treasury Department's Bank Secrecy Act Advisory Group has served as an effective advisory body to regulators on AML compliance issues for more than thirty years, providing valuable feedback on the commercial impact of their initiatives, and the industry with an opportunity to influence the manner in which they are regulated.[293]

On the issue of compliance officer liability, this working group could be a "vehicle . . . through which a more organized and focused industry engagement effort can share its views, opine on matters of fairness . . . and make recommendations."[294] For example, the group could facilitate an open and continuous discussion about the types of behavior undertaken by compliance officers that would meet the

290. *See Personal Liability or Talent Drain?*, *supra* note 275 ("Perhaps regulators should push the board of directors and senior management to emphasize a stronger culture of compliance across all three lines of defense . . . . This would foster a better collaboration and prevent compliance professionals . . . from asking the question of whether it is worth their personal reputation to remain with the organization.").

291. John. F.W. Rogers, Chairman, Sec. Indus. & Fin. Mkts. Assoc., Remarks as Prepared for SIFMA C&L Society Annual Seminar 2016 (Mar. 15, 2016).

292. *Id.* SIFMA could be a viable sponsor for such a forum. So too could an American Law Institute-sponsored project on the Principles of the Law, Compliance, Enforcement, and Risk Management for Corporations, Nonprofits, and Other Organizations. *See New Principles Project on Corporate Compliance*, Am. L. Inst. (May 20, 2015), http://2015annualmeeting.org/new-principles-project-on-corporate-compliance.

293. *Id.* The Bank Secrecy Act Advisory Group ("BSAAG") was established in 1992 and has served as a forum for industry, regulators and law enforcement to communicate about how BSA reporting and regulatory requirements can be improved. Fin. Crimes Enf't Network, Annual Report: Fiscal Year 2004 17 (2004), https://www.fincen.gov/sites/default/files/shared/annual_report_fy2004.pdf. Chaired by the Director of FinCEN, the BSAAG is comprised of representatives of the financial sectors that are subject to BSA regulation, as well as the law enforcement and regulatory authorities responsible for BSA regulation and enforcement. *Id.*

294. Rogers, *supra* note 291.

definition of crossing the line.[295] It could also promote consensus among regulators as to the definition of wholesale or broad-based failures giving rise to individual liability.[296] The group could thus provide increased transparency into the types of conduct deemed actionable by regulators, and greater uniformity in charging practices.

The advisory group could also offer valuable insight to law enforcement and regulators regarding the broader implications of charging decisions.[297] The group could serve as the forum for evaluating the range of appropriate sanctions that should apply to compliance officer conduct.[298] The group could even act as an advisory body in specific cases where the conduct of individual compliance officers is at issue.[299] The advisory group's imprimatur could therefore have a leavening effect on negative sentiment from the compliance community by conveying the impression that compliance officers' interests are effectively represented, and that the potential for unfair or inappropriate targeting will be accorded the requisite level of attention.[300]

A significant mandate of the advisory group would be to regularly publish guidance.[301] This guidance would reflect the experiences and perspectives of each agency that is conducting examinations and enforcement investigations, as well as each industry member that is on the receiving end of them.[302] The result would be a regulatory community that is applying more consistent standards, and a community of the regulated that is more cognizant of prevailing expectations.[303]

In short, by providing compliance officers with a greater sense of control over their collective destiny, the group could temper the factors, such as the aggregate impact of multiple enforcement actions, and the enhanced law enforcement and regulatory focus on individuals that are contributing to the continued perception of targeting.[304]

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295. *See supra* notes 7-9, 198, 202, 211–223, 225, 264, 288 and accompanying text.
296. *Id.*
297. *Id.*
298. Indeed, the working group could have been provided an opportunity to explore the unintended consequences of the DFS' proposal to criminalize incorrect AML officer certifications, before the proposed rule was disseminated to the public. *See supra* note 272 and accompanying text.
299. Rogers, *supra* note 291.
300. *Id.*
301. *Id.*
302. *Id.*
303. *Id.*
304. *See supra* notes 260-275 and accompanying text.

CONCLUSION

> The work you perform as compliance professionals is critically important to investors and the integrity of the markets. You are on the front lines working to create, implement, and enforce a strong and comprehensive set of policies, procedures, and systems to govern and supervise firm employees. Your work helps ensure that investors are armed with the information they need to make fully-informed decisions. Importantly, you help prevent problems from occurring in the first place and, if and when problems do arise, you use those experiences to inform your future work to promote early detection and remediation. . . . We want to support you in your efforts and work together as a team.[305]

This statement by SEC Chair White, made at a convocation of brokerage industry compliance professionals in 2015, reflects a theme that has been consistently reinforced by senior law enforcement and regulatory officials. Officials have repeatedly touted their partnership with financial sector compliance officers, their appreciation for the vital role they play, and their recognition of how complex and challenging the task can be.[306]

Notwithstanding these genuine expressions of support, the recent upswing in noteworthy enforcement actions against individual compliance officers has engendered anxiety, and a perception that they are being singled out.[307] Regulators' efforts to alleviate such concerns, moreover, have thus far proven insufficient.[308] This is so despite repeated assurances that personal charges against compliance officers for wholesale or broad-based program failures rarely occur, and when they do, are carefully considered and always supported by compelling evidence.[309] The perception of targeting has persisted, and has been accompanied by increased attrition within the ranks of senior compliance officers in the industry, and a growing number of would-be compliance officers who are reconsidering this career path.[310]

The enduring nature of the perception can be attributed to any or all of several factors, including the aggregate impact of recent enforcement actions, the isolation factor, and the increased focus by law enforcement and regulators on individual accountability.[311] Regardless of the cause, the resulting "chilling effect" on financial sector compliance officers should raise an alarm. The level of ensuing "brain drain" could diminish

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305. White, *supra* note 198.
306. *See supra* notes 198, 211-225, 287 and accompanying text.
307. *See supra* notes 169-170, 196-197, 210, 252, 267-271, 275-276, 279 and accompanying text.
308. *Id.*
309. *See supra* notes 7–9, 198, 202, 211-223, 225, 264, 288 and accompanying text.
310. *See supra* notes 169-170, 196-197, 252, 267, 275-276 and accompanying text.
311. *See supra* notes 260-275 and accompanying text.

significantly the efficacy of financial sector compliance programs, and the integrity of the industry more generally.[312] What lawmakers and regulators must decide, then, is whether the benefits of their current approach to holding compliance officers accountable for their firms' program failures, whether in terms of increased compliance officer vigilance or something else, outweigh the costs of this continued exodus.

As previously noted, in explaining his dissent in the *BlackRock* and *SFX* cases, SEC Commissioner Gallagher cautioned, "we should strive to avoid the perverse incentives that will naturally flow from targeting compliance personnel who are willing to run into the fires that so often occur at regulated entities."[313] We believe the proposals discussed above in Part V reflect Commissioner Gallagher's message. Actions must be taken to restore confidence among financial sector compliance officers that their already difficult jobs have not become untenable. More than having an understanding of their role within the larger framework, these professionals need to fully internalize that they are part of an unbiased system in which accountability is distributed among all relevant senior business and control-side personnel. They need to feel as if their interests are being effectively considered and represented. The perception of compliance officer targeting must be reversed before the "big chill" sets in and the industry finds that this critical function has been robbed of its best and brightest.

312. *See* Aguilar, *supra* note 1 ("[I] am concerned that the recent public dialogue may have unnecessarily created an environment of unwarranted fear in the CCO community. Such an environment is unhelpful, sends the wrong message, and can discourage honest and competent CCOs from doing their work."); Rogers, *supra* note 291 ("The 'brain drain' that could result from the misdirected targeting of compliance officers will eventually detract from—not enhance—the efficacy of financial institutions' compliance programs."); Crossley, *supra* note 129 ("[W]e submit that a fundamental policy question is whether enforcement actions against compliance officers will motivate them to greater vigilance or risk a demoralizing belief that even exercising their best judgment will not protect them from the risk of a career ending enforcement action, with the result that many of the best compliance officers will choose to leave the profession rather than face the risks.").

313. Gallagher, *supra* note 184.

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