Client Alert

October 9, 2018

Agencies Release Interagency Statement on Sharing Bank Secrecy Act Resources

By Marc-Alain Galeazzi

On October 3, 2018, the five federal agencies tasked with the supervision, examination, and enforcement of Bank Secrecy Act (BSA) and anti-money laundering (AML) requirements for banks (the "Agencies"),[1] issued an interagency statement on sharing BSA resources (the "Interagency Statement"). The four-page Interagency Statement is a result of a working group recently formed by the Agencies aimed at improving the effectiveness and efficiency of the BSA/AML regime.

The Agencies recognize that banks use so-called "collaborative arrangements" to reduce costs, increase operational efficiencies, and leverage specialized expertise. The Interagency Statement addresses issues where banks decide to enter into such collaborative arrangements to manage their BSA and AML obligations more efficiently and effectively.[2] However, the Agencies point out that such BSA/AML collaborative arrangements are most suitable for banks with a community focus, less complex operations, and a lower BSA/AML risk profile. In addition, the Agencies emphasize that the Interagency Statement does not alter a bank's existing legal and regulatory requirements. Each bank ultimately remains responsible for its BSA/AML compliance based on its bank-specific risk profile, even if resources to manage BSA/AML risks are shared.

The Interagency Statement describes three situations in which the sharing of human, technology, and other resources through a BSA/AML-related collaborative arrangement may be beneficial.

1. Internal Controls

The first pillar of the required BSA compliance program requires that banks must provide for a system of internal controls to assure ongoing compliance with the BSA. Through a collaborative arrangement, banks could share resources for conducting internal control functions, such as (i) maintaining BSA/AML policies and procedures; (ii) reviewing and developing a risk-based customer identification program and account monitoring processes; and (iii) tailoring monitoring systems and reports to the potential risks.

2. Independent Testing

Under the second pillar of the required BSA compliance program, banks must provide for independent testing to evaluate the adequacy and effectiveness of the BSA/AML compliance program. The Interagency Statement

[1] The Agencies are: the Board of Governors of the Federal Reserve System (FRB), the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Administration (NCUA), the Office of the Comptroller of the Currency (OCC), and the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN). The term "bank" includes savings associations, credit unions, and branches and agencies of foreign banks.

[2] The Agencies point out that the Interagency Statement does not apply to collaborative arrangements or consortia related to the sharing of information under Section 314(a) of the USA PATRIOT Act and that banks should reach out to FinCEN for further information related to the 314(b) program and requirements.

suggests that personnel of one bank could be utilized to conduct the BSA/AML independent testing at another bank under a collaborative arrangement and, for example, be involved in the scoping, planning, and performance of the independent test. However, the banks would have to ensure that the shared resources are qualified and truly independent, i.e., not involved in other BSA/AML functions at the bank being reviewed. In addition, appropriate safeguards would be required to ensure confidentiality of sensitive business information.

3. BSA/AML Training

Under the fourth pillar of the required BSA compliance program, banks must provide training for appropriate personnel. This could present the best opportunity for banks to use collaborative arrangements. The Agencies explain that such arrangements may be used for sharing BSA/AML training-related costs, for example, hiring a qualified BSA/AML instructor to provide the necessary training to multiple banks.

OTHER CONSIDERATIONS

The Agencies point out that the sharing of a BSA compliance officer, required under the third pillar of the BSA, may not be an appropriate use of collaborative arrangements for banks. Sharing a BSA compliance officer would present challenges due to the confidentiality of suspicious activity reports, the need to coordinate and monitor both banks' BSA/AML compliance on a daily basis, and the need to effectively communicate with each bank's board of directors and senior management. However, while the sharing of a BSA/AML compliance officer may not be appropriate with a third-party bank, it may be possible to share a BSA/AML compliance officer among affiliated banks.

A bank's collaborative arrangement with regard to BSA/AML compliance should be supported by a contractual agreement that is periodically evaluated and provides for a performance review by management.[3] A collaborative arrangement agreement must also define the nature and type of the shared resources; clearly define the rights and responsibilities; establish procedures for protecting customer data and other confidential information, such as confidential supervisory information, financial business information, customer data, and trade secrets; and provide for a framework to manage the specific risks associated with the sharing of resources.

Services performed under a collaborative arrangement must be monitored and periodic reports should be provided to senior management and the board of directors in the course of their regular oversight of the bank's activities.

The Interagency Statement emphasizes the importance of designing and implementing collaborative arrangements in accordance with each bank's specific money laundering and terrorist financing risk profile and specifically encourages banks to contact their primary federal regulators regarding the sharing of BSA resources.

CONCLUSION

The Interagency Statement sheds some light on issues related to cooperation and collaboration among banks in connection with their BSA/AML compliance and will likely help smaller and community banks seeking to reduce their (sometimes overwhelming) BSA/AML compliance costs. However, apart from the issues mentioned in the

[3] The Interagency Statement notes that sharing employees under a collaborative arrangement is similar to a situation where an employee is a dual-employee, or "double hatted," and that regulatory guidance in this area could be relevant to collaborative arrangements for sharing BSA/AML resources.

Interagency Statement, many questions remain unaddressed. Before entering into cooperative arrangements, banks should have a close look at, among other things, risks and challenges related to restrictions on sharing and use of information, such as information protected by the attorney-client privilege or information for which disclosure is prohibited by law. In addition, at this time it is unclear whether state banking regulators will accept such BSA/AML-related collaborative arrangements. In any event, banks must continue to refer to existing regulatory guidance related to the outsourcing of services or sharing of information. Ultimately, banks must not forget that they remain responsible for their own BSA/AML compliance, and responsibility cannot be outsourced.

Contact:

Henry M. Fields
(213) 892-5275
hfields@mofo.com

Oliver I. Ireland
(202) 778-1614
oireland@mofo.com

Jiang Liu
(212) 468-8008
jiangliu@mofo.com

Barbara R. Mendelson
(212) 468-8118
bmendelson@mofo.com

Marc-Alain Galeazzi
(212) 336-4153
mgaleazzi@mofo.com

Meghan E. Dwyer
(212) 336-4067
meghandwyer@mofo.com

Mark R. Sobin
(212) 336-4222
msobin@mofo.com

Client Alert

Financial Services Team

California

Alexis A. Amezcua	(415) 268-6557
Elizabeth Balassone	(415) 268-7585
Roland E. Brandel	(415) 268-7093
Sarah N. Davis	(415) 268-7478
Henry M. Fields	(213) 892-5275
Joseph Gabai	(213) 892-5284
Angela E. Kleine	(415) 268-6214
Jim McCabe	(415) 268-7011
James R. McGuire	(415) 268-7013
Mark David McPherson	(212) 468-8263
Ben Patterson	(415) 268-6818
Sylvia Rivera	(213) 892-5734
William L. Stern	(415) 268-7637
Nancy R. Thomas	(213) 892-5561
Lauren Lynn Wroblewski	(415) 268-6458

New York

Robert J. Baehr	(212) 336-4339
James M. Bergin	(212) 468-8033
Meghan E. Dwyer	(212) 336-4067
David J. Fioccola	(212) 336-4069
Marc-Alain Galeazzi	(212) 336-4153
Adam J. Hunt	(212) 336-4341
Jessica Kaufman	(212) 336-4257
Mark P. Ladner	(212) 468-8035
Jiang Liu	(212) 468-8008
Barbara R. Mendelson	(212) 468-8118
Michael B. Miller	(212) 468-8009
Jeffrey K. Rosenberg	(212) 336-4130
Mark R. Sobin	(212) 336-4222
Joan P. Warrington	(212) 506-7307

Washington, D.C.

Marcie Brimer	(202) 887-6932
Rick Fischer	(202) 887-1566
Adam J. Fleisher	(202) 887-8781
Natalie A. Fleming Nolen	(202) 887-1551
Calvin D. Funk	(202) 887-6930
Susan I. Gault-Brown	(202) 887-1597
Julian E. Hammar	(202) 887-1679
Oliver I. Ireland	(202) 778-1614
Crystal N. Kaldjob	(202) 887-1687
Steven M. Kaufmann	(202) 887-8794
Jeremy R. Mandell	(202) 887-1505
Elyse S. Moyer	(202) 778-1616
Obrea O. Poindexter	(202) 887-8741
Sean Ruff	(202) 887-1530
Trevor R. Salter	(202) 887-1527
Nathan D. Taylor	(202) 778-1644
Jennifer S. Talbert	(202) 887-1563

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer*'s A-List for 14 of the last 15 years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.