

MAYER • BROWN

# Enforcement Trends

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# Overview



- We will address
  - Prosecutorial and enforcement objectives and priorities in light of Trump
    - US Department of Justice (“DOJ”)
    - New York Department of Financial Services (“NYDFS”)
    - Office of Foreign Assets Control (“OFAC”)
    - Office of the Comptroller of the Currency (“OCC”) and Federal Reserve Board (“FRB”), and FinCEN
    - Congressional investigations
    - Cross-border cooperation
    - Consumer Financial Protection Bureau (“CFPB”), Federal Trade Commission (“FTC”), and state AGs
  - With illustrative examples

# DOJ: Prosecutorial and enforcement objectives



“As we re-double our efforts to combat violent crime, we will still enforce the laws that protect American consumers and ensure that honest businesses aren’t placed at a disadvantage. This Department of Justice will continue to investigate and prosecute corporate fraud and misconduct; bribery; public corruption; organized crime; trade-secret theft; money laundering; securities fraud; government fraud; health care fraud; and Internet fraud, among others.”

U.S. Attorney General Jeff Sessions, April 24, 2017

# DOJ: Prosecutorial and enforcement objectives



“The Department of Justice remains steadfast in its commitment to protecting our nation’s financial system, by thoroughly investigating and aggressively prosecuting fraud cases.”

U.S. Deputy Attorney General Rod Rosenstein, May 23, 2017

# DOJ: Prosecutorial and enforcement objectives



- “Public corruption” and the Foreign Corrupt Practices Act (“FCPA”)
  - In a series of speeches about the FCPA, Acting PDAAG Trevor McFadden has emphasized:
    - Enthusiasm for continued FCPA enforcement
    - Focus on cooperation and voluntary compliance
    - Continued emphasis on individual accountability
    - International cooperation

“Companies that obey law should not be at disadvantage. One area where this is critical is the Foreign Corrupt Practices Act.”

Attorney General Sessions, April 24, 2017

# DOJ: Prosecutorial and enforcement objectives



- FCPA
  - Whistleblowers?
    - SEC has whistleblower incentives program
    - As a Senator, Sessions approved of whistleblower programs
  - Self Disclosure?
    - “Pilot program” remains in place

# DOJ: Prosecutorial and enforcement objectives



- Offshore Tax and Related Enforcement Efforts
  - In the wake of the Swiss Bank Program (for Swiss banks to resolve potential criminal exposure to the United States) what is next?
    - Line level prosecutors remain the same
    - Popular to focus on US tax cheats, non-US alleged aiders and abettors
  - “Category 1” Swiss banks still in the DOJ pipeline
  - “Category 2” materials still being reviewed by DOJ
  - Individuals, especially those who submitted faulty OVDs
  - Possibility of additional industries, e.g., insurance, EAMs
  - Possibility of additional jurisdictions, e.g., Hong Kong, Singapore

# DOJ: Prosecutorial and enforcement objectives



- Tax enforcement: Turnabout is fair play

“In fighting international tax evasion, the IRS recognizes hidden offshore accounts are problem facing other nations as well. By using our existing network of bilateral agreements and tools such as the John Doe Summons, we can help address a common problem of evading taxation by hiding assets abroad.”

IRS Commissioner John Koskinen, April 3, 2017

- March 2017 JDS to American Express Travel Services, requested by Netherlands.
- *Pasquantino v. United States*, 535 U.S. 274 (2005)

# DOJ: Prosecutorial and enforcement objectives



- Terrorism
  - Will remain a priority

“In recent years, our law enforcement officers also have been called upon to protect our country from the rising threat of terrorism that has reached our shores. If I am confirmed, protecting the American people from the scourge of radical Islamic terrorism will continue to be a top priority of the Department of Justice.”

Attorney General Sessions, Jan. 10, 2017

- President Trump has nominated Sigal Mandelker to serve as Under Secretary of the Treasury for Terrorism and Financial Intelligence.

# DOJ: Prosecutorial and enforcement objectives



- Risks of spillover to civil terrorism actions
  - The ATA, as expanded by JASTA, creates a civil cause of action for US persons injured by reason of an act of international terrorism
    - Attack must be committed, planned, or authorized by designated Foreign Terrorist Organization
  - Instances involving money laundering may be springboard for plaintiffs' attorneys to bring ATA claim.
  - Instances involving sanctions violations also may lead to ATA claims
  - More entities could be designated as terrorists, e.g., Jeff Sessions mentioned MS-13 gang
  - Defenses often based on lack of causation, knowledge, or jurisdiction, as well as scope of definition of "terrorism."

# DOJ: Prosecutorial and enforcement objectives



- Anti-Trust

- Last week, the Senate approved Makan Delrahim as assistant attorney general in charge of DOJ's Antitrust Division.
  - His positions will be better known as begins to give speeches.
- Anticipate that cartel enforcement (e.g., LIBOR) will continue
  - Bipartisan support
- Other conduct (e.g., dominant behavior) less likely to be an issue
- Focus may be on industries other than financial services

# DOJ: Prosecutorial and enforcement objectives



- Securities

- Sales Practice

- *United States v. Jesse Litvak*, 808 F. 3d 160 (2d Cir. 2015)
    - *United States v. Ross Shapiro et al.*, 15 Cr. 155 (D. Conn.)

- Marking of Positions

- Testimony in recent sales practice trial suggests federal investigation related to mis-marking of positions in structured credit products.

# NYDFS: Charting the path forward



- Counterbalance to Feds (and/or piggybacking on federal investigations?)

“Global financial institutions must be the first line of defense in the war against international terrorism, cybercrime and tax evasion.” “Effective and responsible transaction monitoring systems are an essential tool in the battle against illicit transactions and terrorist financing in this age of risk. There is little doubt that the negligent conduct of [a] bank is the type of conduct that can fuel international criminal activity, thereby seriously compromising the security of the international financial system.”

NYDFS Superintendent Maria T. Vullo, Dec. 15, 2016

# NYDFS: Charting the path forward



- Focus on AML compliance deficiencies
  - Risk-based AML/ATF regulation effective Jan. 1, 2017
  - DFS fines Deutsche Bank \$425 million and imposes independent compliance monitor re violations in connection with failing to detect the laundering of \$10 billion from Russia (Dec. 2016)
    - Compare fine of \$41 million by FRB, fine of \$200 by FCA.
  - DFS fines Agricultural Bank of China \$215 million (Nov. 2016)
  - DFS fines Mega Bank \$180 million (Aug. 2016)
- But AML is not only focus
  - DFS fines BNP Paribas \$350 million re foreign exchange “cartel” (May 2017)

# OFAC: What to expect



- Acting Director/Director John E. Smith
  - From February 2015 – Present
- Have not seen a major bank enforcement action since 2015
  - French bank \$330 million. German bank \$259 million
  - Some large bank matters still in pipeline
  - Most banks may now “get it”
- Senator Sessions co-sponsored the Iran Sanctions Loophole Elimination Act
  - Sanctions on any foreign bank that knowingly engaged in certain transactions with the Central Bank of Iran or any entity blacklisted within the shipping, shipbuilding, port operation, or energy sectors.

# OFAC: What to expect



- Sanctions may change under Trump Administration
  - Iran sanctions. Trump skeptical of Obama deal with Iran. Probably will not “rip it up,” but may impose more sanctions going forward.
  - Cuba. Obama rollback unlikely to continue.
  - Russia. Despite Trump’s expressed desire to ease these sanctions, political climate makes doing so difficult.
    - Bill enhancing Russia sanctions

# FRB, the OCC, and FinCEN



- The FRB fined Deutsche Bank AG \$19.7 million fine for failure to maintain an adequate Volcker rule compliance program
  - Should others be concerned with this issue?
- Timely filing of SARs has been a theme ...
  - FinCEN fine of \$4 million on Gibraltar Bank & Trust Corp. (Feb. 2016)
  - FinCEN fine of \$7 million on Merchants Bank & California (Feb. 2016)
  - OCC \$1 million settlement with Stearns Bank
  - FinCEN, DOJ, FTC combined fined of \$586 million on money transmitter business for failing to maintain an adequate AML program, aiding and abetting wire fraud, and failure to file SARs.

... and is likely to continue to be a theme.

# Congressional investigations



- Investigations into specific banks are likely to be reactive and scandal driven, e.g.,
  - House Financial Services Committee and Senate Banking Committee investigations into Wells Fargo concerning allegations about creation of accounts
  - Democrats calling for congressional investigation into DOJ's handling of probe concerning Deutsche Bank, which is Trump's largest creditor

# Cross-border cooperation



- US has been increasingly coordinated, especially as to global financial crime
  - FCPA
    - 2016 FCPA cases involved investigations, coordination and cooperation with countries such as Brazil, Russia, China, Switzerland, and others
    - May pave path for coordination in future cases
  - AML/ATF
    - FATF report confirms that US is successful in providing and seeking cooperation from international partners
    - FATF report commends DOJ’s complex and often international prosecutions against persons and businesses—including major financial institutions—that enable money laundering
- Will this continue under Trump?

# CFPB, FTC, and State AGs



- Aggressive enforcement against consumer financial services providers
- PHH case in front of full D.C. Circuit:
  - Seems likely that court will not find the CFPB to be unconstitutionally structured
  - CFPB may lose on the RESPA arguments
- Financial CHOICE Act passes House on 6/6/2017
- Director Cordray's term expires in July 2018
  - Will Trump wait that long, or will he fire Cordray for cause?
  - House Financial Services Oversight Subcommittee Report serves as indictment of Cordray
- Will state AGs ramp up their enforcement activity?

# CFPB, FTC, and State AGs



- Unfair, Deceptive, or Abusive Acts or Practices (UDAAP)
  - Sections 1031 and 1036 of the Dodd-Frank Act
  - Section 5 of the FTC Act
  - States also may have mini-UDAP statutes
- All three categories address unfair or deceptive acts or practices (UDAP)
- Dodd-Frank added “abusive” prong (UDAAP), enforced by the CFPB (or state Attorneys General in some cases)

# CFPB, FTC, and State AGs



- Deception: Material representation or omission that misleads or is likely to mislead a consumer acting reasonably under the circumstances
- Unfairness: Causes or is likely to cause substantial injury and not reasonably avoidable by consumer and not outweighed by countervailing benefit to consumers or to competition.
- Abusiveness:
  - (1) Materially interferes with consumer's ability to understand term or condition of product or service
  - (2) Takes unreasonable advantage of:
    - (A) consumer's lack of understanding of material risks, costs or conditions of product or service
    - (B) consumer's inability to protect her interests in selecting or using product or service
    - (C) consumer's reasonable reliance on merchant to act in consumer's interest

# CFPB, FTC, and State AGs



Company	Date	Agency	Restitution	Penalty	Product	Alleged Violation
Dish Network	6/8/2017	FTC, DOJ, CA, IL, NC, OH	n/a	280 M	Tele-marketing	Made more than 66 million calls that violated the Do Not Call, entity-specific, and abandoned call provisions of the FTC's Telemarketing Sales Rule. Violated the Telephone Consumer Protection Act and multiple state laws.
Financial Freedom Nat'l et al.	5/23/2017 (preliminary injunction granted)	FTC, Florida	n/a	n/a	Debt relief services	Unfairly or deceptively engaged in a massive scheme to offer consumers phony debt relief services, including fake loans; violated TSR and Florida trade practices act
Experian	3/23/2017	CFPB	0 M	3 M	Credit Scores	Deceptively marketed credit scores, allegedly providing an inaccurate picture of how lenders assessed consumer creditworthiness
Mastercard & UniRush LLC	2/1/2017	CFPB	10 M	3 M	Prepaid cards	Unfairly denied customers access to their own money for days or weeks by botching conversion to payment processing platform
Western Union	1/19/2017	FTC, DOJ	586 M	0 M	Money services	Unfairly failed to take timely, appropriate, and effective action to detect and prevent fraud-induced money transfers; in the course of processing money transfers, assisted in and facilitated Telemarketing Sales Rule violations which constitute UDAP violations; primary allegations are anti-money laundering violations and consumer fraud charges

# CFPB, FTC, and State AGs



Company	Date	Agency	Restitution	Penalty	Product	Alleged Violation
Navient	1/18/2017 – suit filed	CFPB, Washington, Illinois	n/a	n/a	Student loans	Unfairly steered federal student loan borrowers experiencing financial hardship into multiple consecutive forbearances; deceptively represented cosigner release requirements; deceptively created the false impression that the only consequence of submitting a renewal application with incomplete or inaccurate information would be a processing delay; numerous other counts
Equifax	1/3/2017	CFPB	2.5 M	3.8 M	Credit scores	Deceptively marketed credit scores
TransUnion	1/3/2017	CFPB	13.9 M	3 M	Credit scores	Deceptively marketed credit scores
Moneytree	12/16/2016	CFPB	.255 M	.25 M	Unsecured loans	Deceptively marketed price of check-cashing services; made false threats of vehicle repossession
DeVry University	12/15/2016	FTC	100 M	0 M	Student loans	Deceptively advertised employment success rates and income levels upon graduation

# CFPB, FTC, and State AGs



Company	Date	Agency	Restitution	Penalty	Product	Alleged Violation
American Advisors Group	12/19/2016	CFPB	0 M	.4 M	Reverse mortgages	Deceptively advertised reverse mortgage credit products with statements about the borrower's right to stay in home with "no monthly payments" and "tax free" cash, without prominent disclosures about ongoing financial obligations such as property taxes
Reverse Mortgage Solutions	12/19/2016	CFPB	0 M	.325 M	Reverse mortgages	Deceptively advertised reverse mortgage loans by, among other things, falsely promoting them as a way to eliminate debt and materially misrepresenting that heirs will keep home after borrower's death
Aegean Financial	12/19/2016	CFPB	0 M	.065 M	Reverse mortgages	Deceptively advertised reverse mortgage loans by, among other things, making misrepresentations about the risk of losing home and right to remain in home
Wells Fargo	9/8/2016	CFPB, OCC	TBD	135 M	Deposit accounts, cards	Unfairly and abusively opened deposit accounts and credit or debit cards that may not have been authorized by consumers

# CFPB, FTC, and State AGs



The CFPB continues to focus in a material way on loan servicing.

- It settled enforcement actions against Fay Servicing, Ocwen, Prospect Mortgage, and Citi this year alone. More in the works.
- Issues include: poor payment processing, failing to provide correct information to consumer reporting agencies, waiving consumer rights as a condition to a modification, improper treatment of pending loss mitigation applications or approved trial and permanent modification plans when servicing is transferred, improperly denied or failure to disclose availability of loan modifications, dual tracking, failure to provide required notices, and data discrepancies on MSR transfers.
- It used its UDAAP authority to attack practices that occurred prior to implementation of 2014 servicing regulations and threatening major civil money penalties and restitution.

# CFPB, FTC, and State AGs



- Mortgage Origination - Anti-Kickback Provision of RESPA
  - In a purchase money market, how an originator finds its clients can raise real RESPA issues.
  - Can't pay fees or things of value for referral of mortgage loans, but can pay reasonable value for non-referral services actually performed or for purchase of loan in bona fide secondary market transaction.
  - While there are no new regulations regarding anti-kickback requirements of Section 8 of RESPA, the CFPB has undertaken various enforcement actions relating to such items as marketing agreements, affiliated business arrangements, captive insurance, and rental of office space.
  - 1/31/2017 settlement with Prospect Mortgage and two real estate brokers – Prospect allegedly illegally paid for referrals of mortgage business through agreements (marketing services agreements, lead agreements, desk license agreements, and co-marketing arrangements) with ReMax Gold Coast and Keller Williams Mid-Willamette.
  - More in the pipeline.

# CFPB, FTC, and State AGs



- Debt collection
  - In 2016, the CFPB brought 10 public enforcement actions involving debt collections and continued litigation in 3 cases that had been filed previously. In the cases that were concluded in 2016, respondents paid \$39 million in restitution and \$20 million in civil penalties.
  - The FTC brought or resolved 12 debt collection cases in 2016, including a focus on phantom debt collection and a sweep on deceptive text messages and emails as a means of collecting debt.

# CFPB, FTC, and State AGs



- Debt collection enforcement themes:
  - Robosigning – failure to verify accuracy of debt or review documentation
  - Attorney involvement – misrepresentation of attorney involvement (letterhead, identification as law firm, reference to Litigation Department) where processes are automated and non-attorney staff prepare lawsuits; debt collection mill allegations (one attorney signed 130,000 complaints in two years)
  - False threats – litigation, repossession, garnishment, prosecution
  - Servicemember protection – contact commanding officer, distant forum for collection suits, false threats of UCMJ implications
  - Debt sales – buyers collecting on unverified debts with indicia of problems, filing suit without supporting documentation
  - Phantom debt collection – bogus debts, or debts not owed to the debt collector
  - State law violations – CFPB claims that collecting on loans that state law renders usurious or void constitutes a UDAAP

# Summary



**Q. Is DOJ going to give banks a break?**

A. Don't count on it (but a few signs point to yes)

**Q. Will the NYDFS be any better?**

A. Outlook not so good

**Q. What can we expect from OFAC?**

A. Reply hazy, try again

**Q. Will there be more Congressional investigations of banks?**

A. Better not tell you now

**Q. Will the US continue to engage in cross-border cooperation?**

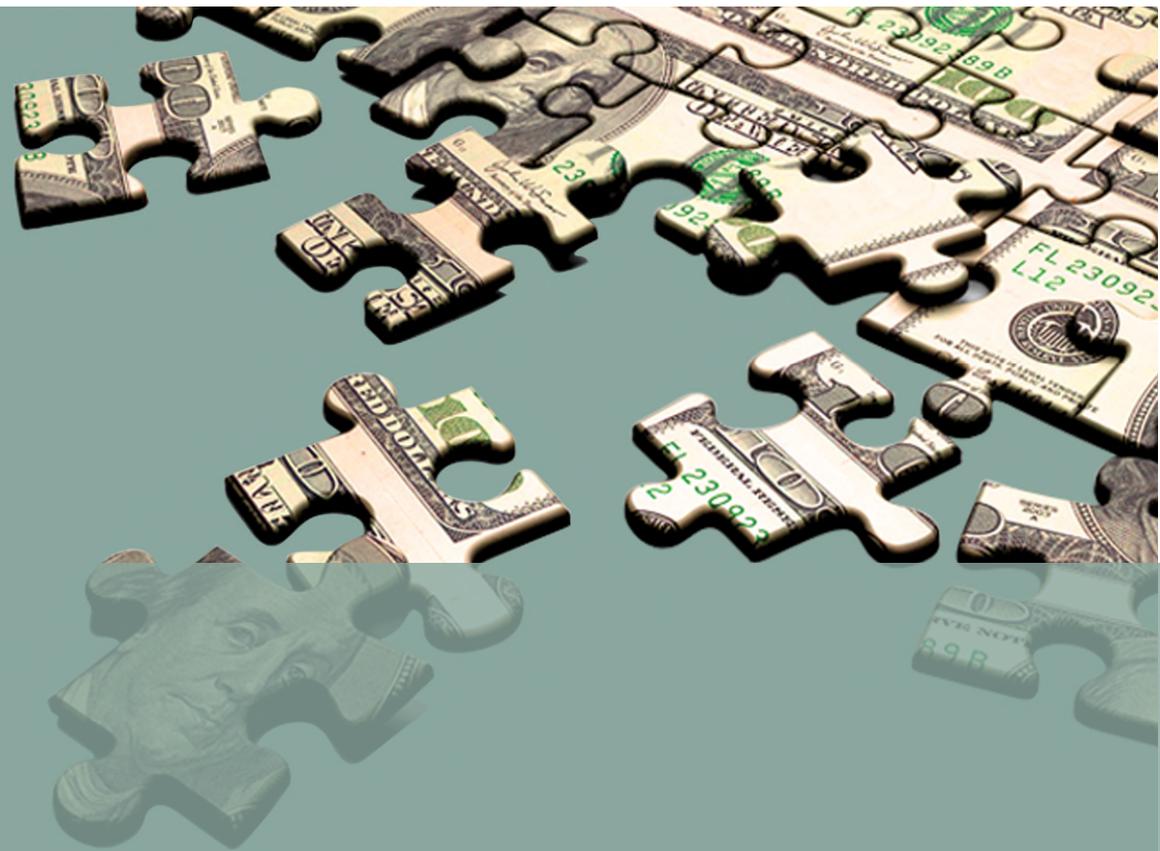
A. Most likely

**Q. Will the CFPB continue to be troublesome in the year ahead?**

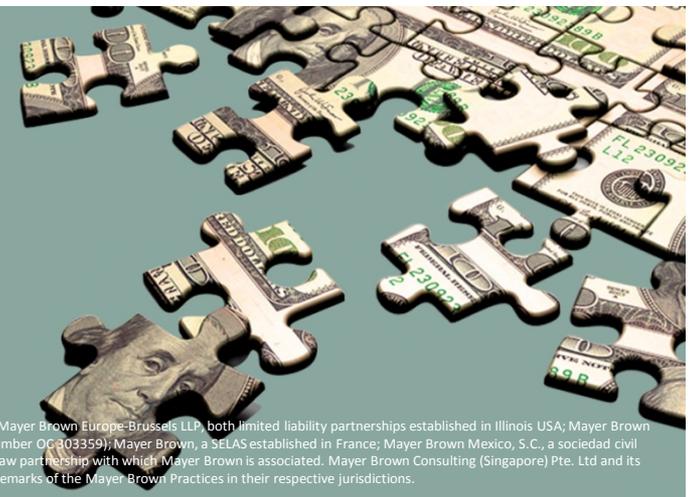
A. Signs point to yes



Questions?



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