A NEW FRAMEWORK FOR PARTNERSHIP

Recommendations for Bank Secrecy Act / Anti-Money Laundering Reform
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A New Framework for Partnership

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**Executive Summary**

In July 2007, the American Bankers Association (ABA) formed a special Chairman’s Committee on Bank Secrecy Act (BSA)/Anti-Money Laundering (AML) Reform. The Committee’s task was to take a “fresh look” at the history and current status of BSA legislation, regulation and enforcement and to make appropriate recommendations for possible changes and enhancements.

The Bank Secrecy Act was originally passed in 1970 with the requirement that banks file currency transaction reports and maintain other BSA-related records, with the goal of making financial information more readily available to law enforcement without generating undue burden. From this modest start and understandable goal, legislative and regulatory developments reflecting evolving law enforcement and national security policy and legislative intent have expanded the scope of BSA compliance exponentially. Banks are now expected to comprehensively and proactively search for and report suspicious activity in support of our nation’s fight against criminal activity, including organized crime, money laundering and terrorist acts. Stepping up to the new role requested of them, banks have developed increasingly comprehensive BSA programs and systems, based on the continuing passage of new BSA legislation and regulations and the evolving guidance provided by the Financial Crimes Enforcement Network (“FinCEN”) and the bank regulatory agencies. This investment in BSA compliance is reflected in the estimated increase of industry costs of 66% between 2001 and 2004 and another 71% between 2004 and 2007.

In light of the extensive commitment of the banking industry in responding to date to the challenges of our nation’s fight against crime and terrorism, it is now time to enhance and to make more effective and cooperative the partnership between the private sector and the government in the fight against our common foes who would abuse our financial system for illegitimate ends. Accordingly, the ABA makes the following five recommendations to improve the BSA regime.

**Recommendation 1:** Create an independent BSA Gatekeeper to oversee and coordinate the BSA regime and to promote system integrity and efficiency.

A BSA Gatekeeper positioned within the financial system and independent from law enforcement should be created to oversee and coordinate the BSA regime. Such positioning and independence will facilitate a more cooperative balance between law enforcement/intelligence agencies and the banking industry, and will foster BSA efficiency through priority-focused, risk-based regulation. The BSA Gatekeeper should be empowered to ensure a consistent application of the BSA regime and to promote the integrity and efficiency of the American banking system while also encouraging the detection of banking system abuse in the areas of financial crime, money laundering and terrorist financing.

**Recommendation 2:** Take a priority-focused approach to compliance.

The bank regulatory agencies should explicitly endorse a priority-focused, risk-based approach to BSA regulation, coupled with deference to a bank’s risk assessment and assignment of priorities for its BSA compliance program. Each bank, understanding its particular operations and customers, is uniquely positioned to design a BSA program that focuses resources where there is the greatest opportunity for addressing and mitigating the risk posed by potential money laundering and terrorist financing. Applied across the banking industry, a priority-focused, risk-based approach should create a more powerful and efficient regime for detecting illegal financial activity.
**Recommendation 3: Increase the quality of feedback and transparency.**

Although there has been improvement in agency-initiated communication of BSA feedback, greater feedback is needed on the law enforcement cases attributable to bank reporting. The ability of banks to design and implement effective BSA programs will be enhanced if banks have a more tangible understanding of how their BSA reports have been useful to law enforcement and are provided more actionable information about serious threats to our financial system. In turn, the banking industry should facilitate dissemination of this enhanced feedback, foster more effective means to share relevant experience and financial intelligence, and promote priority-focused training to improve the value of information detected and reported. Together, these undertakings will establish a foundation for better trust and partnership and will enable bank regulatory agencies, law enforcement and the banking industry to strengthen the interdependence upon which the BSA regime depends.

**Recommendation 4: Streamline reporting and validate its utility.**

BSA data reporting obligations should be streamlined and their utility validated using appropriate metrics to ensure accountability and to improve transparency. This will enhance system efficiency and the ability of legislators and regulators to strike the proper balance among individual privacy, law enforcement, national security and financial system integrity policy concerns.

**Recommendation 5: Refrain from criminal sanctions that impose administrative compliance standards and redefine procedures for taking criminal actions against banks.**

The responsibility and authority for establishing and enforcing the administrative standards for bank regulatory compliance belong with the relevant bank regulatory agencies. Thus, law enforcement agencies should avoid the imposition of criminal remedies that address a bank’s ongoing administrative standards for BSA compliance. Further, certain standards and procedures should be established for bringing BSA-related criminal actions against banks, including a policy that law enforcement consult with applicable bank regulatory agencies prior to bringing BSA-related criminal actions.

**Summary**

This Report and these Recommendations will serve as the guiding principles for future ABA advocacy with respect to BSA/AML compliance and will provide a constructive strategic vision that the ABA will recommend to this and the next administration as they chart their policy courses. The goal of the ABA will be to achieve a New Framework for Partnership with the Government, the law enforcement/intelligence agencies and the bank regulatory agencies that is dedicated to the principle that the purpose of BSA/AML compliance is to protect financial system integrity and to provide quality and valuable information to law enforcement in the face of serious criminal and national security challenges without compromising the efficiency of the American banking system and its ability to meet future global and domestic economic needs.

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Preface

On July 2007, the American Bankers Association (ABA) formed a special Chairman’s Committee on Bank Secrecy Act (BSA)/Anti-Money Laundering (AML) Reform. The panel, appointed by ABA Chairman Earl D. McVicker, was made up of banking industry leaders in the field of anti-money laundering. The Committee’s task was to take a “fresh look” at the history and current status of BSA legislation, regulation and enforcement and to make appropriate recommendations for possible changes and improvements.

In conducting this review, the Committee obtained input from various people with insight and experience in the BSA process, including from the legislative branch, the law enforcement agencies, the bank regulatory agencies, the banking industry and the public. The Committee and the ABA appreciate their thoughtful insight and thank them for their many observations and suggestions.

The Committee engaged in extensive deliberations and worked closely with staff and the special consultant to prepare this Report. The resulting Report and its recommendations are those of the American Bankers Association and do not necessarily reflect the views of individual committee members or the institutions with which they are associated.

Introduction

With the passage of the first piece of BSA legislation by Congress in 1970, and even before, the ABA and its members have been active and supportive partners in the fight against money laundering and, more recently, terrorist financing. As set forth in the ABA’s testimony before Congress in 1989:

Since the early part of this decade, the financial industry has cooperated closely with the law enforcement community to rid our nation’s institutions of this terrible menace. The American Bankers Association has been in the forefront of providing information and education to the banking community in order to prevent our institutions from being part of this process.

In issuing this report, the ABA would like to echo the introductory words of the President’s Commission on Organized Crime in its 1984 Interim Report entitled: “The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering”:

By issuing this report, the Commission seeks to develop a closer and continuing collaboration with the Congress, the Treasury Department and financial institutions in devising a sound and effective program of legislation, administration, and voluntary actions to combat money laundering.

Almost a quarter of a century later, we seek to renew that collaboration by creating a new framework for partnership between the banking industry, the bank regulatory and law enforcement agencies and Congress that is more responsive to the banking system and the threats it faces.
Composition of the Committee

The members of the Chairman’s Committee on BSA Reform are:

- Jeff Austin, III, Vice Chairman, Austin Bank, Jacksonville, Texas;
- William Fox, Senior Vice President and Global Anti-Money Laundering Executive, Bank of America, Charlotte, North Carolina;
- Michael Kelsey, Managing Vice President, Anti-Money Laundering Compliance, Capital One, Richmond, Virginia;
- William D. Langford, Senior Vice President and Director of Global Anti-Money Laundering, JP Morgan Chase, New York, New York;
- Thomas Laursen, General Counsel, Zions Bancorporation, Salt Lake City, Utah;
- Rick Maltz, Senior Vice President and Chief Risk Officer, Bangor Savings Bank, Bangor, Maine;
- Anna Rentschler, Vice President and Bank Secrecy Act Officer, Central Bancompany, Jefferson City, Missouri;
- Rick Small, Vice President, Enterprise Wide Anti-Money Laundering and Sanctions Risk Management, American Express, New York, New York;
- Daniel D. Soto, Senior Vice President, Anti-Money Laundering/Bank Secrecy Act Officer, Wachovia Corporation, Charlotte, North Carolina; and

ABA staff working with the Committee are:

- Wayne Abernathy;
- Richard Riese; and
- Sepideh Behram.

Special Consultant and Reporter

- Robert Pasley, attorney and consultant, AML and bank regulatory matters.
**Purpose and Layout of the Report**

The overriding purpose of this report is to take a “fresh look” at the BSA/AML compliance regime to identify enhancements that will enable the ABA and its membership and the industry at large to more effectively and efficiently contribute to the on-going fight against money laundering and terrorist financing. The ABA has always been a partner with the banking industry and the Government in this effort. With this report, the ABA seeks to establish a new framework for partnership between the banking industry and the Government in finding ways to improve our collective efforts in fighting money laundering and terrorist financing.

The report contains an executive summary with a summary of recommendations. Following that is an explanation and analysis of the policy foundation for the recommendations. The recommendations are described primarily in terms of strategic goals and tactical objectives. Appendix A to the report sets forth additional concrete suggestions accumulated during the Committee’s efforts. Appendix B sets forth the Congressional reports and hearings on anti-money laundering and counter-terrorist financing issues that led up to the various BSA legislative acts. Appendix C contains an overview of the BSA legislation, from the initial Congressional Act in 1970 to the present, in order to establish how we have gotten to where we are now and to serve as a baseline for examining our current BSA/AML policies, practices and procedures. Appendix D sets forth an overview of the BSA and counter-terrorist financing-related regulations.

**Background**

In 1970, Congress passed the initial BSA legislation with the intent of assisting law enforcement in the investigation and prosecution of financially-related crimes. Prior to that time, law enforcement had been frustrated in its efforts by the lack of transacational records kept by banks and by foreign bank secrecy laws. The BSA legislation, thus, started with basic recordkeeping requirements and fairly mechanical transaction reporting requirements.

From the beginning, the fundamental policy trade-off between the value to law enforcement and the cost of industry implementation were embedded in the BSA regime. In addition, the tension between leveraging existing common business practice versus imposing additional paperwork was present. However, there was no mistaking that the pivotal objective around which these issues were intended to revolve was, as articulated by Will Wilson, Assistant Attorney General of the Department of Justice, in 1970: “to detect and prosecute crime, not build a mountain of paper.”

Over the subsequent decades, Congress expanded these recordkeeping and reporting requirements and, in 1992, mandated that banks establish anti-money laundering programs, with experienced staff, extensive internal controls, training and audits. This provision, which required what has become commonly known as the “Four Pillars” of BSA compliance programs, has become the cornerstone for banks’ BSA compliance efforts. In this fashion, the BSA regime went from a relatively passive recordkeeping and reporting process to a comprehensive compliance system that has escalated into an industry all of its own.

In light of the banking industry’s long and dedicated participation, commitment, cooperation and overall extensive compliance, it is appropriate that the banking industry play a significant role in redefining and reinvigorating the partnership that was envisioned from the beginning between the private sector and the government in the fight against our common foes who would abuse our financial system.
Analysis of Foundation for Recommendations

Create a BSA Gatekeeper to Oversee and Coordinate the BSA Regime and to Promote System Integrity and Efficiency

In light of the fact that the BSA regime in the United States has gone from a relatively mechanical process in 1970 of filing some reports and maintaining certain records to a virtual industry supporting an extensive BSA compliance effort, it would be appropriate to have a clearly designated “gatekeeper” within the Government to oversee and coordinate BSA compliance, guidance and enforcement.

As is evident from a review of the legislative history of the BSA, the BSA regime has become a complex layering of successive legislative and regulatory efforts that stem from disparate and sometimes conflicting focuses and purposes. In addition, it has been widely recognized for some time that there “are too many agencies responsible for money laundering deterrence oversight and [that] this detracts from government efforts at eliminating the problem.”8

In partial response to this increasingly complex and overlapping structure, the Secretary of the Treasury established the Office of Financial Enforcement (OFE) (and later the Financial Crime Enforcement Network (FinCEN) into which OFE eventually was merged) to administer the BSA and to coordinate the various stakeholders in the process. However, as Senator Sarbanes noted just four years ago, the creation of OFE and then FinCEN did not eliminate the complexity or overlap:

No one seems to be directly accountable for enforcement of the Bank Secrecy Act. Congress vested authority for the Bank Secrecy Act’s administration and enforcement in the Secretary of the Treasury, who has delegated that authority, since 1994, to the Director of FinCEN. The Federal banking agencies examine the compliance of depository institutions with the Bank Secrecy Act, under authority delegated by Treasury. But they also have a separate statutory obligation to examine for BSA compliance procedures, employing a different set of sanctions than the statutory penalties in the Bank Secrecy Act.

The list of agencies involved in potential BSA compliance problems does not end there. Federal enforcement and, now, intelligence agencies — for example, the FBI, the Bureau of Immigration and Customs Enforcement, the Drug Enforcement Administration, the Criminal Investigation Division of the Internal Revenue Service – investigate potential BSA violations in the course of their activities. State bank regulators have their own oversight authority that extends to the Bank Secrecy Act in the case of State-chartered institutions. Different regulators may — in fact, likely will — regulate different parts of increasingly integrated bank holding companies. Treasury, through FinCEN, will become involved in compliance penalties only in a limited number of situations in which cases are referred to it under procedures that, according to testimony we will be receiving today, are more than a decade old.

… the Bank Secrecy Act is not really “administered” at all in any coordinated way. Again, no one seems to be responsible for putting the statute into effect.9

Consequently, it is time to step back to articulate a unifying mission that can accommodate and coordinate the variety of regulatory, law enforcement and national security agencies and their overlapping goals. In doing so, it is apparent that a renewal of the founding purpose of BSA that places the emphasis on detecting and prosecuting financial crime in furtherance of financial system integrity should serve as the core mission of a reformed BSA regime.
To accomplish this mission, there must be a coordinating authority — or gatekeeper — that is charged with the responsibility of both encouraging detection of financial system abuse, including money laundering and terrorist financing, and maintaining system operating efficiency. Only with both of these responsibilities can a BSA Gatekeeper properly balance the interests of law enforcement and banking in furtherance of the overarching mandate to safeguard financial system integrity.

To advance this mandate and mission, the BSA Gatekeeper must be carefully situated within the financial/payments system and must be sensitive and responsive to both the public and private aspects of the systems. While being neither a law enforcement agency nor a bank regulatory agency, it must serve and support both. At the same time, it should have sufficient independence from both in order to hold each of them accountable for fulfilling their respective roles in the BSA regime. Only with the combination of positioning the Gatekeeper within the financial/payments system and the independence described here can the BSA Gatekeeper be truly effective in properly carrying out the function of overseeing the BSA regime.

It is clear that the creation of a BSA Gatekeeper cannot be drawn on a blank slate. FinCEN is already assigned many of the responsibilities that should become duties of the BSA Gatekeeper. In particular, FinCEN issues BSA regulations; provides interpretive guidance; pursues enforcement actions; serves as the receiver and disseminator of data collected under BSA requirements; and mobilizes feedback to the private sector regarding the utility of BSA data to law enforcement.

However, in order to ensure that the BSA Gatekeeper can accomplish its mission of safeguarding system integrity and can meet its responsibilities of encouraging the detection of system abuse and promoting system operating efficiency, the following critical elements should be required steps in establishing the Gatekeeper:

- Integrate the Gatekeeper in the financial/payments system;
- Keep the Gatekeeper independent of both law enforcement and national security/intelligence agencies that are the consumers of BSA data;
- Distinguish the Gatekeeper’s role of ensuring BSA data utility and security from any obligations as a Financial Intelligence Unit (FIU) to conduct investigative analysis; and
- Incorporate an Ombudsman function within the Gatekeeper to resolve issues pertaining to the bank regulatory agencies’ conduct of BSA examinations.

**Integrate the Gatekeeper in the Financial/Payments System**

From a functional standpoint, establishing a nexus with the financial/payments system is essential to properly positioning the BSA Gatekeeper to meet its objectives. Time and again bankers have been concerned that BSA compliance might generate burdens that could adversely affect the efficiency of the financial system. Accordingly, the BSA Gatekeeper will be severely disadvantaged in meeting its mission if it is not closely embedded in the functioning of the financial/payments system so that it is accountable for preserving system efficiency as an integral part of its responsibility to safeguard system integrity.

**Keep the Gatekeeper Independent of Law Enforcement**

The “prosecutorial” and intelligence-gathering part of the BSA regime is the responsibility and function of law enforcement, the national security/intelligence agencies and the FIU. Although the Gatekeeper would administer a process for collecting information on financial transactions for law enforcement and the intelligence agencies, its ability to monitor law enforcement or the intelligence
agencies’ use and utility of such information can be compromised if the Gatekeeper does not adequately maintain its independence.

As set forth by this Report’s proposal, the Gatekeeper should be positioned within the financial/payments system structure and should be charged with promoting both system integrity and operating efficiency. To fulfill these responsibilities, it needs to oversee BSA compliance to promote the type of reporting that contributes to safeguarding financial system integrity. Encouraging reporting for the purposes of protecting the banking industry from abuse; while, at the same time, being independent of law enforcement may be difficult at times, but it is nonetheless essential. It is for this reason that the Gatekeeper should be identified with the financial/payments system, not the law enforcement/national security/intelligence apparatus.

_Distinguish between the Gatekeeper’s Functions and the FIU_

It is further recommended that there be a designated, independent FIU that would have the responsibility of gathering, analyzing and disseminating appropriate BSA information.

The need for an FIU is well established. As set forth by the Financial Action Task Force’s (FATF’s),10 40 Recommendations:

Countries should establish a FIU that serves as a national centre for the receiving (and, as permitted, requesting), analysis and dissemination of STR [Suspicious Transaction Reports] and other information regarding potential money laundering or terrorist financing.11

This is echoed by the United Nations in its Convention against Transnational Organised Crime (2000) (Palermo Convention):

Each state Party … shall … consider the establishment of a financial intelligence unit to serve as a national center for the collection, analysis and dissemination of information regarding potential money laundering.

In terms of what an FIU is and what it does, the Egmont Group12 in 1996 set forth a universally accepted definition of an FIU. In 2004, the Egmont Group revised the definition of an FIU to specifically include combating terrorist financing. As a result, the current definition of an FIU is as follows:

A central, national agency responsible for receiving (and, as permitted, requesting), analyzing and disseminating to competent authorities, disclosures of financial information:

i. concerning suspected proceeds of crime and potential financing of terrorism, or

ii. required by national legislation or regulation, in order to combat money laundering and terrorist financing.13

In the establishment of FIUs, there are basically three different models — the administrative model, the law enforcement model and the judicial model.14 In the administrative model, FIUs are usually part of the structure, or under the supervision, of an administration or an agency other than law enforcement or judicial authorities. The primary benefit for such an arrangement is to have a “buffer” between the financial sector and the law enforcement authorities in charge of financial crime investigations and prosecutions.15

The second type of FIU model, the law enforcement model, provides for the FIU to be placed within the law enforcement structure. The primary benefit of this model is a perceived enhanced coordination and level of communication and sharing between the FIU and law enforcement.
The third type of FIU model is the judicial or prosecutorial model which is ordinarily found in countries with a continental law tradition, where the public prosecutors are part of the judicial system and have authority over the investigatory bodies, allowing the former to direct and supervise criminal investigations.

There is a fourth model, but it is simply referred to as the Hybrid Model and includes any combination of the above mentioned three models.

Today, FinCEN is the United States’ officially designated FIU and is considered an example of the administrative model. However, FinCEN is probably more an example of a hybrid model. Evaluating its resource-constrained operations, it appears that FinCEN represents more of a data conduit than a true buffer between the banking industry and the law enforcement agencies and is limited in its target- or case-specific analytical capabilities.

Under the new framework, the FIU would be separate from the Gatekeeper. The FIU’s responsibilities for data handling, analysis, dissemination and security, would be separated from the Gatekeeper’s role of promoting system integrity and efficiency. Such a separate FIU could then be aligned more directly with the law enforcement/national security/intelligence community, while being subject to the oversight of an independent, financial system-oriented Gatekeeper. The Gatekeeper would continue to be the official collector of BSA data, thereby putting it in a strong position to hold the FIU accountable for demonstrating BSA data use, utility, security and proper access. This would create a desirable check and balance on the FIU.

Establish the Gatekeeper as the BSA Ombudsman

While BSA examination and first-line compliance enforcement are the responsibilities of the bank regulatory agencies, the oversight of the bank regulatory agency’s adherence to the rules and policies established by the administrator can be improved by designating the BSA Gatekeeper as the Ombudsman for BSA issues.

Although the Ombudsman model within the bank regulatory agencies has varied, in this proposed framework, the BSA Gatekeeper would be primarily focused on examination quality assurance. To effectuate this focus, the Ombudsman functions would include:

- Serving as an umpire for interpretive issues that arise during the course of an examination at the request of the bank or the bank regulatory agency;
- Conducting management reviews of a bank regulatory agency’s BSA examination program and performance, much as is done by an Inspector General conducting similar reviews; and
- Being a resource for the Ombudsman role within each agency.

The Gatekeeper qua Ombudsman would be available to provide case specific guidance in the course of an examination, if requested by the bank or the bank regulatory agency. Such guidance would facilitate resolution of exam issues and would promote consistency with BSA national policy in the application of the Interagency BSA/AML Exam Procedures. While providing this kind of ad hoc guidance during the course of an examination, may not be definitive due to its immediacy and potential lack of vetting, it needs to be emphasized that the Gatekeeper will be the ultimate arbiter of BSA-related issues. The bank regulatory agencies, however, will continue to have the final supervisory authority over the institutions they regulate.
The Gatekeeper would also conduct management reviews of a bank regulatory agency’s adherence to the BSA rules and applicable examination procedures. This would enable the Gatekeeper to promote interagency examination consistency and quality assurance. It would also establish benchmarks for comparing different functional regulator exam programs against the standards of the Gatekeeper, thus, fostering greater consistency and efficiency across regulatory jurisdictions.  

Finally, the Gatekeeper would act in the Ombudsman function by simply enabling each bank regulatory agency Ombudsman to directly tap into the expertise of the Gatekeeper with respect to any matter the agency Ombudsman deems appropriate. By encouraging this collegial interaction, examination quality and consistency should be enhanced.

**Recommendation 1:** Create an independent BSA Gatekeeper to oversee and coordinate the BSA regime and to promote system integrity and efficiency.

A BSA Gatekeeper positioned within the financial system and independent from law enforcement should be created to oversee and coordinate the BSA regime. Such positioning and independence will facilitate a more cooperative balance between law enforcement/intelligence agencies and the banking industry, and will foster BSA efficiency through priority-focused, risk-based regulation. The BSA Gatekeeper should be empowered to ensure a consistent application of the BSA regime and to promote the integrity and efficiency of the American banking system while also encouraging the detection of banking system abuse in the areas of financial crime, money laundering and terrorist financing.

Authorities and responsibilities critical to the proper functioning of the Gatekeeper include:

- Being positioned within the government structure such that it is sufficiently integrated with the entities responsible for the prudential supervision of the financial system and its various components, and is completely independent from government law enforcement or national security agencies.
- Developing a national, priority-based, BSA policy (after the solicitation and consideration of input from BSA system stakeholders, including the Bank Secrecy Act Advisory Group) over a long-term horizon that enables stakeholders to plan effectively, set priorities and manage risk with reasonable assurance about the consistency of supervisory expectations over time.
- Overseeing and coordinating BSA compliance, guidance and enforcement that enables bank regulatory agencies to fulfill their statutory obligations to regulate the safety, soundness and compliance of banks within their respective jurisdictions in accordance with a priority-focused approach.
- Issuing all BSA-related regulations and interpretations, exercising such authority with the prior consultation of relevant bank regulatory agencies and with the purpose of coordinating functional regulators in a way to minimize the burden on institutions subject to compound supervision.
- Facilitating, in cooperation with the banking industry, the bank regulatory agencies, and law enforcement agencies, BSA-related feedback and ensuring that it is instructive and up-to-date.
- Providing the definitive guidance for BSA compliance and serving as Ombudsman for bank regulatory agency supervision of BSA compliance obligations.
- Monitoring law enforcement/intelligence agencies’ use and utility of BSA data, as well as their ability to ensure the security of and proper access to BSA data.
While the ensuing four recommendations are offered on a stand-alone basis, it should be emphasized that these four recommendations will work more effectively and efficiently if implemented in conjunction with the creation of the BSA Gatekeeper set forth in this first recommendation.

**Take a Priority-Focused Approach to Compliance**

It is generally accepted that, overall, BSA compliance programs, examinations and administrative enforcement actions are priority-focused and risk-based in that they tend to focus on high-risk transactions and activity and on the most serious risks and instances of non-compliance. However, such a priority-focused approach needs to be more explicit and the individual judgments of banks on how best to address their money laundering risks and to achieve BSA compliance should be respected and given deference.

Too often, there is an approach to BSA compliance that tends to take every risk identified in an assessment and to marry it to an expectation that each risk must be minimized without regard to its overall significance. This is anathema to the motivating principles behind risk-based compliance. It substitutes an expectation of undifferentiated risk minimization for the original goal of differentiating among risks in accordance with their importance and prioritizing resources accordingly.

In order to capture the need to differentiate risks to establish and address priorities, the emphasis should be on “priority-focused, risk-based” compliance. This will serve as a reminder that the purpose of adopting a priority-focused approach has always been to recognize the legitimacy of making judgments among risks to establish priorities for the application of scarce resources and to devise internal controls tailored to address those risks.

Therefore, there should be a formal and explicit statement issued by all bank regulatory agencies espousing the need for and importance of priority-focused compliance, examinations and enforcement actions in the area of BSA. In this regard, the banking industry and the bank regulatory agencies should work together in partnership to make the approach to BSA compliance and enforcement explicitly priority-focused, recognizing the complexity and comprehensiveness of the task, the limited resources on all sides, the need to address the highest risks on a priority basis and the need to ensure that administrative sanctions are only taken in appropriate cases.

As recognized by leading organizations worldwide, the goal of a priority-focused approach to BSA programs is not to reduce the BSA efforts of banks, but to make sure that banks’ BSA efforts are designed to create the most powerful, efficient system possible.

In 2007, FATF, in a public-private partnership effort, issued a publication endorsing the need to create a risk-based approach to BSA compliance. In the publication, entitled “Guidance on the Risk-Based Approach to Combating Money Laundering and Terrorist Financing,” FATF explained and justified the risk-based approach by expressly linking it to the application of resources in accordance with the prioritization of risks as follows:

By adopting a risk-based approach, competent authorities and financial institutions are able to ensure the measures to prevent or mitigate money laundering and terrorist financing are commensurate to the risks identified. This will allow resources to be allocated in the most efficient ways. **The principle is that resources should be directed in accordance with priorities so that the greatest risks receive the highest attention.** The alternative approaches are that resources are either applied evenly, so that all financial...
institutions, customers, products, etc. receive equal attention, or that resources are targeted, but on the basis of factors other than the risk assessed. This can inadvertently lead to a “tick box” approach with the focus on meeting regulatory needs rather than combating money laundering or terrorist financing.\(^\text{18}\)

As FATF explained further, the formal adoption of a risk-based approach should lead to an improved and more effective use of resources and to an enhanced implementation of a BSA regime:

> The adoption of a risk-based approach to combating money laundering and terrorist financing can yield benefits for all parties including the public. Applied effectively, the approach should allow financial institutions and supervisory authorities to be more efficient and effective in their use of resources and minimise burdens on customers. Focusing on higher risk threats should mean that beneficial outcomes can be achieved more effectively.\(^\text{19}\)

One of the primary goals of BSA regulation should be to improve the effectiveness of banks’ efforts in assisting law enforcement agencies discover and prosecute financial crimes. In helping banks meet this goal, bank regulatory agencies and other agencies should focus on supporting and guiding the institutions in creating and implementing a priority-focused BSA compliance program.

**Priority-Focused, Risk-based Compliance Promotes Partnership**

Many BSA regulations already call for reasonable steps to be taken and underscore the fact that banks are not expected to — nor can they — uncover or protect against every instance of possible money laundering or terrorist financing. However, this needs to be made a greater and more concrete part of the BSA regime. In doing so, the government would more effectively dispel the perception that sometimes occurs that all risks must be equally mitigated, if not eliminated altogether. With a firm policy statement to this effect, followed up with coordinated work by the banking industry and the government in partnership, this perception can be effectively overcome.

The goal of having a strong, priority-focused BSA regime is, thus, one that the banking industry and the Government should work towards together. FinCEN itself has stressed the importance of “the strong partnership that Congress mandated under the BSA”\(^\text{20}\) and the fact that such a partnership is “essential to our risk-based approach.”\(^\text{21}\) In addition, FinCEN has noted that the “public policy choice requiring government and private industry to work together to fight money laundering, terrorist financing and other illicit activity is not unique to the United States, but rather represents a global consensus.”\(^\text{22}\)

One country that is part of this consensus is the United Kingdom, which has stated:

> The Government has made clear that it regards the risk-based approach to AML as essential to the effective and proportionate functioning of the UK’s AML regime.\(^\text{23}\)

> A proportionate challenge to crime and terrorism is one that is unremittingly “risk-based.” Under this principle, all parties — law enforcement, Government departments, regulators and industry — focus their resources on the areas where the likelihood and impact of abuse is greatest.\(^\text{24}\)

What the United Kingdom stresses is the fact that a risk-based approach should not be merely implicit, as it is in many countries, but that it should be made explicit.\(^\text{25}\) It should be clearly articulated that “[w]e manifestly cannot do everything, and need a mechanism for prioritising our work.”\(^\text{26}\) This need to prioritize and to recognize that even BSA compliance resources are finite is the first step toward our new partnership.
**Priority-Focused, Risk-Based Compliance Recognizes Bank Judgment**

FATF’s Guidance stresses the fact that using a risk-based approach means that not all risks will be identified and that the bank regulatory agencies must keep this fact in mind:

However, it must be recognized that any reasonably applied controls, including controls implemented as a result of a reasonably implemented risk-based approach will not identify and detect all instances of money laundering or terrorist financing. Therefore, regulators, law enforcement and judicial authorities must take into account and give due consideration to a financial institution’s well-reasoned risk-based approach.27

This regulatory caution was articulated as well by the United Kingdom in the following fashion:

Acceptance that money laundering can never be entirely eliminated. Criminals will continue to attempt to make use of the proceeds of crime. Firms will not always be able to prevent this. There should therefore be reasonable supervisory expectations about what a firm with sound controls aimed at preventing money laundering is able to achieve. To attempt to design a ‘zero-failure regime’ would be damaging and counterproductive: it would place excessive burdens on supervisors and firms alike and, consequently, act against the interests of the general public.28

As set forth by the United Kingdom, there needs to be:

A principles-based supervisory approach that encourages firms to aim for achieving outcomes related to reducing money laundering, rather than exclusively concentrating on compliance with prescriptive and detailed rules.29

Based on this reasoning, FATF pointed out the need to give considerable deference to banks’ judgment and their efforts to comply with BSA requirements:

An effective risk-based approach will allow financial institutions to exercise reasonable business judgment with respect to their customers. Application of a reasoned and well-articulated risk-based approach will justify the determinations of financial institutions with regard to managing potential money laundering and terrorist financing risks and allow financial institutions to exercise reasonable business judgment with respect to their customers.30

Supervisors should appreciate that even though the financial institution has established appropriate risk management structures and procedures that are regularly updated, and has followed the relevant policies, procedures, and processes, the financial institution may still make decisions that were incorrect in light of additional information not reasonably available at the time.

In implementing the risk-based approach financial institutions should be given the opportunity to make reasonable judgments. This will mean that no two financial institutions are likely to adopt the exact same detailed practices. Such potential diversity of practice will require that regulators make greater effort to identify and disseminate guidelines on sound practice, and may pose challenges to supervisory staff working to monitor compliance.31

Such a priority-focused, risk-based examination process is essential to guard against the perception that some examiners may use a “tick-box” approach to BSA examinations or may overly
stress the need for banks to address all possible risks. In addition, a priority-focused, risk-based approach is important in order to avoid having bank examiners rely too heavily on peer comparisons, potentially resulting in a situation where examiners expect a bank to have whatever compliance bells and whistles another bank might have, regardless of the bank’s particular situation, BSA-related risk and legitimate compliance priorities. As noted by FATF, each bank should be allowed to devise its own compliance program based on its own reasonable risk analysis.

These sentiments have also been articulated by FinCEN:

> Both the financial industry and the government have limited resources to devote to detecting and preventing illicit financial activity. As such, we need to work together to ensure these resources are directed where they will be most productive for AML/CFT purposes.32

A primary focus of the New Framework for Partnership being proposed must be the effort to “work together” to ensure the implementation of and respect for a priority-focused approach to BSA compliance and examinations.

In the same vein, under a priority-focused, risk-based approach to compliance and BSA administration, the bank regulatory agencies should expressly recognize the resource constraints of community banks. As Secretary Paulson has recognized, BSA examinations can and should be streamlined for community banks. For example, expectations for implementing a self-testing, self-correcting process can be administered in a way that does not require banks to incur the considerable expense of retaining outside BSA experts to conduct the testing. General outside auditors or the board level audit committee can supply sufficient independent oversight of internally conducted program quality reviews to satisfy an appropriately stream-lined BSA exam process for community banks.

**Priority-Focused, Risk-Based Administrative Enforcement Reinforces Compliance**

As part of a newly forged partnership between the government and the banking industry and in keeping with the necessity for a priority-focused compliance and examination process, there also needs to be a corresponding priority-focused enforcement process. As the 1970 Congressional Report accompanying the initial legislation stated: “mere isolated lapses ought not ordinarily be the occasion for the imposition of heavy penalties.”33

As noted, a priority-focused approach would allow a bank to make objective judgment calls about the prioritization and allocation of its limited BSA compliance resources. In addition, a priority-focused approach would recognize that some matters may be missed. This must be reflected not only in the examination process, but also in the enforcement actions taken by the bank regulatory agencies.

It is heartening that FinCEN has said that: “It is paramount to FinCEN and our federal partners that we continually work to dispel the myth that minor technical infractions lead to major penalties.”34 However, this “myth” can only be thoroughly dispelled through a better partnership and an explicit commitment from all of the bank regulatory agencies that adhere to this standard.

As observed nearly 25 years ago, the President’s Commission on Organized Crime in 1984 recommended that in considering administrative actions:

> Treasury should take into account whether the institution has adopted formal procedures for ensuring compliance with the Act, as well as the scope and detail of such procedures and the vigor with which the institution applies and enforces them.35

Reflecting these factors and this approach, the Department of the Treasury testified during the 1986 Congressional hearings:
We would not generally assess civil penalties against banks that have taken prudent steps to ensure that their employees comply with the law, but nevertheless have discovered Bank Secrecy Act violations by their employees in a routine audit or other timely fashion.36

These pronouncements provide a policy predicate for the legislative directive in the 1992 Annunzio-Wylie Anti-Money Laundering Act establishing the Four Pillars of BSA compliance directing that banks establish board-approved control programs with suitable governance and a self-testing, self-correcting process. The 1992 Annunzio-Wylie reforms sought to establish robust compliance programs. The intent was not to instill perfection, but to promote a process that enabled reasonable judgment to be applied to the challenge of detecting often elusive indicators of financial crime.

That administrative enforcement should reinforce a self-testing, self-correcting compliance program was recently recognized in a study conducted by British authorities:

The Hampton Review also recognised that a penalty regime should be [to] manage the risk of re-offending, and the impact of the offence, with tougher penalties for businesses that persistently or seriously break the rules. This should be accompanied with greater focus upon giving advice and support to businesses on how to comply with regulations.37

Following this dictate, it is clear that emphasis should be placed by the Government on providing advice and support as a partner and, only as a last resort, on assessing penalties against banks for noncompliance.

Unfortunately, the bank regulatory agencies, and the banking industry as a result, are still saddled with overly prescriptive legislation from 22 years ago that was triggered by a Congressional reaction to primarily one case. Specifically, as set forth in Appendix C to this Report, as the result of the First National Bank of Boston case and concern about the perceived lack of forcefulness by the bank regulatory agencies at the time, Congress mandated that each and every bank examination review BSA compliance and that formal enforcement action be taken on a relatively automatic basis.38 This prescriptive approach is an anathema to the risk-based approach that is currently needed.39 Consequently, it will greatly undermine the government’s commitment to a risk-based approach if this legislation is not repealed.

Even if Congress’ concern was well-taken in 1986, it represents a different era and does not reflect the effort and progress over the last 22 years, as well as the fact that all of the bank regulatory agencies have extremely robust BSA examination and enforcement programs and that the banking industry has more than proven its commitment to compliance with BSA and to cooperating with and assisting the Government in all anti-money laundering and counter-terrorist financing efforts.

The standard set forth in the Agency Statement addressing problems outside the prescriptive scope of 12 U.S.C. § 1818(s)(3) more properly reflects an appropriate approach:

The form of the enforcement action in a particular case will depend on the severity of the noncompliance, weaknesses, or deficiencies, the capability and cooperation of the institution’s management, and the Agency’s confidence that the institution will take appropriate and timely corrective action.40

Under a proper risk-based approach, provisions such as 12 U.S.C. §§ 1818(s)(2) and (3) have no value and should be repealed. The repeal of these sections will not diminish the ability of bank regulatory agencies to take whatever enforcement action they might determine to be necessary in particular cases.
Recommendation 2: Take a priority-focused approach to compliance.

The bank regulatory agencies should explicitly endorse a priority-focused, risk-based approach to BSA regulation, coupled with deference to a bank’s risk assessment and assignment of priorities for its BSA compliance program. Each bank, understanding its particular operations and customers, is uniquely positioned to design a BSA program that focuses resources where there is the greatest opportunity for addressing and mitigating the risk posed by potential money laundering and terrorist financing. Applied across the banking industry, a priority-focused, risk-based approach should create a more powerful and efficient regime for detecting illegal financial activity.

This recommendation would include the following:

1. Interagency BSA Compliance Policy Statement
   - After notice and comment, and working in partnership with the banking industry, the bank regulatory agencies, as well as other relevant agencies, should adopt a policy statement that explicitly endorses a priority-focused, risk-based compliance approach with regard to BSA, anti-money laundering efforts and counter-terrorist financing efforts, that includes:
     - An explicit statement by the bank regulatory agencies that banks should focus their priorities on their highest risks, with the aim of creating more powerful and efficient BSA programs.
     - A recognition that BSA resources are finite and that, as a result, not all risks can be addressed with the same level of resource allocation.
     - A recognition that using a priority-focused, risk-based approach will result in banks not uncovering — and not being expected to uncover — every potential instance of money laundering or terrorist financing.
     - An explicit recognition that a priority-focused, risk-based approach means that different banks will have different risks and different priorities in addressing those risks.

2. Interagency BSA Examination Process
   - The interagency exam procedures should be amended, in partnership and consultation with the banking industry, to include the following items:
     - A requirement that examiners review and discuss a bank’s risk assessment with bank management and reach an initial evaluation of the bank’s stated priorities and self-testing procedures at the beginning of BSA examinations, prior to conducting any supervisory transaction testing.
     - An explicit recognition that deference should be given by bank examiners to individual banks in their analysis and articulation of their BSA-related risks and their prioritization of BSA compliance resources.
     - A directive to examiners not to criticize a bank for failing to follow a best practice or agency suggestion unless warranted by the nature and magnitude of the risk facing the bank and its failure to take alternative reasonable measures.
The Interagency BSA/AML Exam Procedures should be administered so that:

– A bank that self-identifies and appropriately self-corrects program deficiencies will be evaluated favorably as displaying the desirable traits of a dynamically responsive priority-focused BSA compliance program.

– Quality assurance is recognized as the primary goal of independent testing and therefore community banks with modest BSA risk-profiles will be provided latitude in conducting and having adequate oversight of program testing without insisting that the bank incur unnecessary additional expense to retain an outside BSA expert to conduct such testing.

3. Interagency BSA Administrative Enforcement Policy

– The interagency enforcement policy should be amended, in partnership and consultation with the banking industry, to include the following items:

– The bank regulatory agencies should confirm, as a matter of administrative enforcement policy, that a bank’s failure to uncover instances of potential money laundering or terrorist financing shall not ordinarily result in an enforcement action if the bank otherwise has conscientiously established a BSA compliance program reasonably addressing the statutory elements consistent with a fair, priority-focused, risk-based assessment of the bank’s operations.

– The bank regulatory agencies should confirm, as a matter of administrative enforcement policy, that a bank that self-identifies and appropriately corrects program deficiencies should not, absent special circumstances, be subject to an enforcement action based on the deficiencies identified and corrected.

4. Legislative Recommendation

– 12 U.S.C §§ 1818(s)(2) and (3) should be repealed.

In an effort to instill the Quality of Feedback and Transparency in the banking industry, the American Bankers Association (ABA) and the banking industry would like to work in partnership with the Government to ensure continued and enhanced feedback to better support a priority-focused BSA regime.

In addition, transparency, which often includes a form of feedback — namely, information about what the bank regulatory agencies expect of the banking industry and how the bank regulatory agencies function — is also a process which needs to be instilled as part of a new framework for partnership. Further, there needs to be a process whereby the banking industry, working with FinCEN and the bank regulatory agencies, can be assured that the transparency effort is successful and reliable.
Feedback

Providing feedback is not only representative of “good government,” it is essential to providing the banking industry with a better understanding of how its compliance efforts and reports are useful in the fight against money laundering, terrorist financing, and other financial crimes; and how the industry can improve its efforts and modify, where appropriate, its allocation of compliance resources.

As FinCEN explained in an address to the banking industry:

by providing feedback about emerging risks and criminal typologies, and about how law enforcement uses the reports you file and what they are looking for, it helps you provide the information the government needs most. This in turn helps protect your financial institutions and your customers from criminal actors and perpetrators of fraud who may try to abuse them.42

Over the years, FinCEN has increasingly striven to improve and enhance the content and extent of feedback to the banking industry.43 It is important to continue these efforts, while improving, enhancing and expanding the feedback as much as possible. This feedback should include even more descriptions of specific cases and explanations as to how the activity was uncovered, and what was most useful to law enforcement.

This type of feedback and assistance from the government is essential. As set forth by the ABA in its Congressional testimony in 1990 with regard to suspicious reporting:

we would like to spend more of our efforts on what is unusual or unique, but we cannot do it alone. We are bankers. We are not law enforcement. We have some idea, but we need a real cooperative effort with Justice and others ….44

More recently, in one of the hearings leading up to the passage of the USA PATRIOT Act, the ABA reiterated the need for feedback from the government and the need for an “alliance,” or partnership, for purposes of such feedback:

The trends in money laundering must, by definition, be discovered by law enforcement and state and federal bank regulators since those entities are better equipped than bank officials to discover new forms of criminal activities and to distribute this information to all concerned parties. The U.S. government has been working toward an improved “alliance” with the private sector to share information on new trends and schemes and we are optimistic that the sharing of critical information will continue.45

The necessity for good and complete feedback and information sharing as part of a public/private partnership is promoted internationally. As stressed by the United Kingdom, for instance, in executing its risk-based approach to anti-money laundering and counter-terrorist financing compliance:

a genuinely risk-based approach requires supervisors and businesses to develop and share knowledge of changing threats, and use this to focus on areas that are particularly vulnerable to exploitation.46

The European Union has also echoed the need for feedback as follows:

In order to ensure that the institutions and others subject to Community legislation in this field remain committed, feedback should, where practicable, be made available to them on the usefulness and follow-up of the reports they present.47
The importance of feedback and of doing it as part of a partnership between the government and the banking industry was specifically outlined by FATF in its Guidance on the Risk-Based Approach:

“It is desirable that public and private bodies work collaboratively to identify what information is valuable to help combat money laundering and terrorist financing, and to develop means by which this information might be shared in a timely and effective manner.”

**Collaboration is the Core of the Renewed Partnership**

Outreach by the Chairman’s Committee revealed a well-spring of goodwill between law enforcement agency staff and bank BSA officers. At the most basic level, good communication among bankers and law enforcement officers has fostered real success in pursuing, apprehending and prosecuting those who would abuse our financial system. At the same time, these successes are not universally experienced, or consistently repeated. It is toward this shortfall that further collaboration should be encouraged and better feedback should be directed.

It is clear that banks and their compliance programs have been very effective in combating money laundering and in identifying activity that may be related to terrorist financing and that further progress and efficiency can be best achieved by keeping communication between law enforcement and bankers at local, regional and national levels open and not obscured by technical regulatory detail. The goal is not mindless compliance, but compliance mindful of the priority of providing highly useful information to law enforcement to safeguard financial system integrity.

Consequently, the goal of a new framework for partnership is to make improved collaboration on system integrity a priority and to build compliance around detection reflective of a priority-focused, risk-based BSA policy. For this reason, there should be better leverage of feedback and transparency.

With regard to feedback and the sharing of information, one of the more obvious methods, which has been neglected to date, is through the use of the § 314(a) process set forth in the USA PATRIOT Act. Section 314(a) specifically called for Government-to-bank sharing as follows:

(a) Cooperation Among Financial Institutions, Regulatory Authorities, and Law Enforcement Authorities.

(1) Regulations. — The Secretary shall ... adopt regulations to encourage further cooperation among financial institutions, their regulatory authorities, and law enforcement authorities, with the specific purpose of encouraging regulatory authorities and law enforcement authorities to share with financial institutions information regarding individuals, entities, and organizations engaged in, or reasonably suspected based on credible evidence of engaging in, terrorist acts or money laundering activities.

In spite of this directive, the Government implemented § 314(a) to only require banks to respond to inquiries from law enforcement. The Government’s regulations did not provide for any substantive sharing, as envisioned by § 314(a), from the Government to the banking industry. The current use of § 314(a) is laudable and appears to be useful to the Government, but full implementation of the statutory design would be better.

The importance of public/private sharing was stressed in one of the Congressional Reports issued in support of the USA PATRIOT Act:
[The Act] provides the United States government with new tools to combat the financing of terrorism and other financial crimes. The legislation contains provisions to strengthen law enforcement authorities, as well as enhance public-private cooperation between government and industry in disrupting terrorist funding.49

The need for complete and thorough public/private sharing is essential to combat money laundering and, in particular, terrorist financing. Consequently, there should be an expanded use of § 314(a) in a way that fully implements the original Congressional intent of public to private sharing. It is important to stress that the Government-to-private sector sharing must be informative and actionable with regard to specific targets and cases, and not simply a recitation of background information about the general risks of money laundering and terrorist financing. At the same time, this sharing should be accomplished without increasing the documentation requirements imposed on the banking industry. Specifically, this cooperative effort should not become burdened by a supervisory expectation for a paper trail demonstrating how each communication was disseminated or applied internally. After all, the goal of a more robust use of 314(a) is to enable banks to better make their own detection decisions using actionable information in a manner that comports with their own operating context and risk profile. The purpose is to assist bank judgment, not to supplant or second-guess that judgment by imposing a new agency compliance standard.

Further, it is recommended that the dissemination of information through the use of § 314(b) of the USA PATRIOT Act, relating to bank-to-bank sharing, should be encouraged and improved. This is a greatly under-used process for sharing and for providing information and it can be put to great advantage. However, it must be stressed that sharing under § 314(b) must be recognized as being voluntary and that the bank regulatory agencies should not critique banks on the manner or extent to which they avail themselves of 314(b) sharing avenues. It is simply recommended that the industry and the Government work together to come up with improved and easier ways to use the provisions of § 314(b). The ABA stands ready to take a more active role in this process.

**Transparency**

In addition to feedback, there should be extensive transparency with regard to the BSA compliance and examination functions. As part of a priority-focused BSA regime, the banking industry needs to be as informed as possible as to what is expected by the bank regulatory agencies. Part of this is knowing what BSA-related risks and trends the Government is identifying and, also, knowing how the bank regulatory agencies will be examining for BSA compliance.

The issuance and continued updating of the interagency BSA Manual is an excellent example of the transparency that has been provided to the banking industry — and should be applied in other industries. However, enhanced transparency could serve to eliminate the occasional perception that examiners may be reading the check lists and guidance contained in the BSA Manual and elsewhere as de facto requirements, regardless of the actual legal requirements of the BSA statutes and regulations. In addition, enhanced transparency could serve to eliminate the perception that some examiners might convert commitments, best practices and peer conduct into requirements, regardless of the demonstrable need of a particular bank, based on its individualized BSA risk analysis.

One way to dispel some of these perceptions and to enhance transparency is to delineate or highlight in the BSA Manual the BSA legal and regulatory requirements versus suggested risk mitigation practices. The goal of improved partnership is not to convert helpful feedback into detailed supervisory expectations.

Another way to promote transparency is to provide for interagency BSA training to ensure consistency. This training could also be coordinated with the banking industry as part of an
An ongoing partnership. This would enhance the training process and would improve the level of trust and communication between the public and private sectors.

A third and very important way of protecting and ensuring transparency and uniformity is to establish a BSA ombudsman, as discussed earlier, who would be available to review BSA-examination issues as they arise. In this way, there could be an independent review process and the banking industry and the government could both be assured that there is transparency, consistency and accuracy in the BSA examination process.

**Recommendation 3: Increase the quality of feedback and transparency.**

Although there has been improvement in agency-initiated communication of BSA feedback, greater feedback is needed on the law enforcement cases attributable to bank reporting. The ability of banks to design and implement effective BSA programs will be enhanced if banks have a more tangible understanding of how their BSA reports have been useful to law enforcement and are provided more actionable information about serious threats to our financial system. In turn, the banking industry should facilitate dissemination of this enhanced feedback, foster more effective means to share relevant experience and financial intelligence, and promote priority-focused training to improve the value of information detected and reported. Together, these undertakings will establish a foundation for better trust and partnership and will enable bank regulatory agencies, law enforcement and the banking industry to strengthen the interdependence upon which the BSA regime depends.

It is recommended that the government and the banking industry work in partnership to create more feedback to banks. It is also recommended that this partnership work to create more transparency as to what is expected by the bank regulatory agencies of the banking industry and as to how the examination process is conducted.

These recommendations would include the following:

1. **Feedback Recommendations**

   - There should be a public/private collaboration developed to sponsor regular direct contact between local/regional law enforcement users of BSA data, the banks in those communities and the bank regulatory agency staff in the regions so that all can be better informed about the value of information received as well as improving the appreciation of all stakeholders for the contributions of each.

   - The existing SAR trend analysis should be enhanced by going beyond descriptive reports to include more instructive lessons about law enforcement’s use of the data, ways to identify the activities subject to reporting and pointers from law enforcement about what they found more or less valuable — and what to be attuned to in the future.

   - The Government should fully implement the original intent of § 314(a) of the USA PATRIOT Act by providing for meaningful sharing by the Government to the private sector of actionable guidance about serious money laundering and terrorist financing information.

   - There should be a careful study conducted on how to improve government-to-private sector communication of sensitive alerts and typologies under the § 314(a) process without generating unnecessary compliance paperwork expectations or other burdens for recipients.
• The banking industry association leadership and the Government should work together to re-invigorate the use of § 314(b) by having the banking industry participate, on a voluntary basis, more fully in the certification process and work to promote the sharing of highly useful information among banking industry members.

2. Transparency Recommendations

• Bank regulatory agencies and other functional regulators should be expected to make exam procedures and/or exam expectations available to the banks or the regulated entities, and exam citations of violations should be strictly based on BSA statutes and regulations and not on guidance or peer practice.
  – The BSA Manual, for clarity’s sake, should specifically delineate or highlight BSA legal requirements versus suggested risk mitigation practices.

• There should be enhanced training for bank examiners conducted on an interagency basis and jointly with the banking industry and law enforcement in order to ensure accuracy, consistency and transparency. There is no need to instruct bank examiners differently from banking industry representatives.

• During examinations, the bank regulatory agencies should provide banks with the same data that examiners receive concerning the particular bank’s SAR and CTR filings.

Streamline Reporting and Validate its Utility

In 1970, Congress passed the initial BSA legislation with the intent of assisting law enforcement in the investigation and prosecution of financially-related crimes. Prior to that time, law enforcement had been frustrated in its efforts by the lack of transactional records kept by banks and by foreign bank secrecy laws. The BSA legislation, thus, started with basic recordkeeping requirements and fairly mechanical transaction reporting requirements.

These reporting and recordkeeping responsibilities fell chiefly upon U.S. banks which were required to file Currency Transaction Reports (CTRs) and to maintain certain BSA-related records.

In spite of this one-sided burden, Congress, in enacting the Bank Secrecy Act, repeatedly professed the desire to not burden the banking industry or to disrupt international commerce. In fact, in its legislative report, Congress claimed that it was actually using a conservative and non-burdensome approach.

Further, Congress cited the flexibility built into the law and the contention that most banks were already doing what the legislation would require:

It should be noted that the Secretary has ample authority to limit recordkeeping and reporting requirements to those which will be useful to carry out the purposes of the Act and not unduly burdensome to legitimate business.

Administrative agencies are given the flexibility to avoid the imposition of unwarranted and burdensome reporting and recordkeeping requirements. Most of the records required to be maintained under the bill are already kept by most financial institutions, so the regulations should impose almost no additional expense upon those affected.
The photocopying requirements of the bill will not significantly increase the cost to the affected financial institutions. Most banks and other financial institutions already maintain the types of records contemplated by the bill. In addition, the cost of microfilming checks and similar drafts is minimal.54

The overall theme of the lack of burden was echoed by a number of witnesses testifying at the hearings that led up to the passage of the 1970 legislation. As stated by the Department of Justice: “Our purpose … should be to detect and prosecute crime, not build a mountain of paper.”55

Congress ended up hearing testimony on both sides of the issue of burden and ultimately determined that the need for the legislation outweighed any potential burden, concluding:

Many of these records are already kept by financial institutions and it is not the committee’s intent to encumber these institutions with a substantial volume of additional paperwork. The committee has, however, received testimony from law enforcement officials on the high degree of importance of having access to copies of checks drawn on commercial banks.56

Further, in addition to providing the bank regulatory agencies with flexibility in implementing the requirements of the legislation, Congress provided the Secretary of the Treasury with exemptive powers as a possible means to reduce any undue burden:57

For that reason, the Secretary of the Treasury … [was] given broad exemptive authority which the committee expects will be applied whenever the law enforcement benefits are not sufficient to outweigh the cost of implementation.58

From the beginning, the fundamental policy trade-off between law enforcement value and the costs of industry implementation were embedded in the BSA regime. In addition, the tension between leveraging existing common business practice versus imposing additional paperwork was recognized.

How to address this trade-off in the future as reporting and recordkeeping obligations expand continues to be a matter of primary concern to America’s bankers who are tasked with compliance. Accordingly, it is important to develop appropriate metrics for evaluating the use and utility of BSA data so that the value of reporting can be more clearly demonstrated.

Currency Transaction Reports

CTR filings have continued to grow in number despite efforts to contain that growth. Specifically, in 1994, the volume of CTR filings was overwhelming the system and, accordingly, Congress passed legislation calling for the Secretary of the Treasury to “seek to reduce” CTR filings by 30%, primarily through the use of exemptions.59 Of course, such a reduction was never achieved.

In the subsequent 14 years, annual CTR filings have increased from approximately 9 million60 to 16 million,61 representing an increase of 78%. While in a recent study the GAO concludes that data processing advances have enabled law enforcement agencies to better handle the burgeoning numbers of CTRs, those same agencies have taken no action to apply that technology to track their use of CTRs or the utility of CTRs in developing or proving cases involving financial crime.62

This is in contrast to the tracking and publication of the use of information developed from the § 314(a) process. FinCEN has in place a robust system to link § 314(a) data to outcomes and regularly reports these results in aggregated form, enabling banks, agencies, Congress and the public to have a common source for evaluating the use and utility of § 314(a) data.
The recent GAO Study went on to conclude that:

Increasing [the] use of exemptions would help depository institutions avoid filing unnecessary CTRs, as well as reduce the government’s costs to process them. ... Because the transactions of exempt customers are likely to be of little use to law enforcement efforts, steps to encourage the use of exemptions among depository institutions would not be harmful to law enforcement and could avoid some CTR filing costs.63

Ideas abound for improving the CTR filing and exemption system, including legislative initiatives that have received wide support in Congress. FinCEN, too, has proposed instituting several of the GAO recommendations. The ABA has also advocated for the simplification of the system and will continue to do so. Other concrete suggestions for reform are set forth in Appendix A. All of these ideas are on the table and may contribute to the effort to craft a better CTR process.

From among this broad range of ideas, ABA recommends that first and foremost, in keeping with a priority-focused, risk-based approach, deference should be given to banks in their decisions as to how they establish and implement their CTR compliance process and, specifically, how they determine whether or not to exempt a particular customer. Banks should not run the risk of having exemption decisions second-guessed and of being required to undertake a time-consuming and expensive “look-back” procedure. Banks should not be required to undertake such measures unless their exemption and overall CTR system is fundamentally flawed.

Based on the history of BSA, it is noted that, as part of a simplified exemption process, it may be appropriate to implement the little-noticed provision in the 1994 legislation, the Money Laundering Suppression Act of 1994, that called for Treasury to:

publish in the Federal Register at such times as the Secretary determines to be appropriate (but not less frequently than once each year) a list of all the entities whose transactions with a depository institution are exempt under this subsection from the reporting requirements of subsection (a).64

This Treasury list of exempt entities provided for in the 1994 Act was widely supported65 but was never implemented. If such a list were published, especially as an aide to minimizing confusion about whether companies are “listed” for purposes of Phase I, it could be very useful to banks seeking to exempt more of its customers and, as stated by Congress, would “eliminate any uncertainty or hesitation on the part of financial institutions to exempt institutions since such exemptions would be approved by Treasury.”66

Fundamentally, in order to reduce reporting burdens through streamlining and to improve the accountability of law enforcement agencies’ use of BSA data, the Government should: (1) develop appropriate measures to track the use and utility of CTRs that more clearly associate them with the outcomes of criminal prosecutions; and (2) work to further simplify the CTR filing and exemption processes.

**Suspicious Activity Reports**

Reform of the original criminal referral process in the 1990s ushered in the current format of the Suspicious Activity Report (SAR). The development of the SAR form brought together the reporting requirements on one form and provided for a single filing. Funneling these reports to a central repository for controlled access by appropriate law enforcement and bank regulatory agencies sought to lessen reporting compliance burdens; at the same time it worked to provide more direct alerts to law enforcement of factual circumstances meriting further investigation.
It is appropriate to follow up this simplification process by ensuring that deference be given to banks on how they establish and implement their SAR monitoring and compliance procedures based on the individual circumstances, location, risk, client base and products of the particular institution.

In addition, deference should be given to banks in connection with their decision not to file a particular SAR. Not every unusual or anomalous situation over $5,000 should be the subject of a SAR and, as long as there is a reasonable justification for the decision not to file, banks should not be second-guessed. In this regard, it is imperative that requirements to create extensive and overly burdensome documentation of decisions not to file, which requirements were never part of the SAR regulations, should be substantially reduced. The system will not work if banks are expected to spend more time justifying and documenting the decision not to file, than the time it would take to actually file a SAR. Further, it should be recognized that, in the decision to file or not to file a SAR, a bank is almost always operating with imperfect and incomplete information. That needs to be taken into account when reviewing a particular bank’s record and its decision to not file a particular SAR.

As noted previously in this Report, improved feedback from the Government can contribute to the ability of banks to provide quality SARs. Through improved communication between law enforcement agencies and banking industry groups, banks can focus on responding to identified law enforcement priorities. Better communication and more direct partnership will also help banks improve their priority-focused judgments about their own internal controls. This will lead to a shift in emphasis from supervisory second-guessing of the SAR process to a more general oversight of the SAR compliance process to reasonably detect and report suspicious activity.

A more robust partnership with law enforcement representatives can help resolve issues related to SAR reporting. For instance, it is noted that the banking industry has received conflicting guidance on whether the narrative portion of the SAR should be as detailed as possible, or should just identify the broad nature of the potentially unusual or suspicious activity. Further, there is confusion, even among bank examiners, with regard to how many times repetitive SARs need to be filed, and whether there can be a presumption that a bank can cease making repetitive filings after three times.

Similarly, as with the filing of CTRs, it should be the practice of bank examiners, absent unusual circumstances, not to measure the volume of a particular bank’s SAR filings and compare it to peers, or to criticize a bank for the manner in which a SAR is filed or worded. This is not a meaningful measure of either SAR compliance process or a beneficial means of promoting partnership with law enforcement agencies.

Last, the integrity and confidentiality of SARs has recently become an issue. Breaches of SAR confidentiality by Government representatives can erode a bank staff’s sense of security when being candid about reporting suspicious customer activity. Consequently, procedures should be established for maintaining the confidentiality of SAR information and for investigating and taking appropriate action when Government representatives breach this confidentiality. As is already the case for the banking industry, if breaches of SAR confidentiality are the result of disclosures from the Government, then the Government should be held accountable.

**Other Data Reporting**

While CTRs and SARs are the two types of BSA data that receive the most attention and form (at this time) the bulk of BSA data, other types exist and new types may be added.
The ABA has taken positions, for instance, on the wisdom, value and burden of collecting data about cross-border electronic funds transfers (CBEFT). Those views have been expressed on several occasions. For purposes of this Report, the ABA urges that, in addition to current statutory hurdles associated with the proposed collection of CBEFT data, the Government, after public notice and comment, establish appropriate metrics to measure the use and utility of any such data should it ever be collected. One lesson learned from the § 314(a) reporting process is that such tracking systems are easier to implement when they are installed at the beginning rather than after the reporting process has been in place.

**Recommendation 4: Streamline reporting and validate its utility.**

BSA data reporting obligations should be streamlined and their utility validated using appropriate metrics to ensure accountability and to improve transparency. This will enhance system efficiency and the ability of legislators and regulators to strike the proper balance among individual privacy, law enforcement, national security and financial system integrity policy concerns.

This recommendation would include the following:

- The bank regulatory agencies should ensure that reasonable deference is given to banks in their establishment of monitoring systems and in their decisions not to file SARs in particular cases so that they are encouraged to apply their best judgment.
  - A supervisory presumption should be established that allows banks to stop filing repetitive SARs after three filings.
  - The bank regulatory agencies should eliminate or greatly reduce the reliance on peer comparisons as a way to evaluate a bank’s compliance with the CTR and SAR requirements.
- Unnecessary reporting and recordkeeping requirements should be reduced by continuing the process to simplify the CTR process to make it as easy to comply with appropriate exemption qualifications as it is to file a CTR.
  - The bank regulatory agencies should ensure that reasonable deference is given to banks in their execution of CTR compliance procedures and in their procedures for exempting customers and the agencies should strive to eliminate excessive and redundant paperwork.
- Lessons from current § 314(a) reporting should be applied to better track and report on the law enforcement use of SARs and CTRs and to use such tracking in the regular evaluation of whether the BSA meets its mission to protect the efficiency, integrity and legitimacy of the financial system by detecting and prosecuting crime.
- The Government should refrain from expanding BSA-related financial data reporting requirements in the absence of record evidence that such expansion: is reasonably necessary to accomplish the mandate of maintaining financial system efficiency and integrity; cannot be achieved using less costly reporting requirements that intrude less broadly on the conduct of routine legitimate financial transactions; will have its utility validated by metrics implemented from its inception; and its collection and access can be effectively and securely managed.
Criminal BSA Sanctions

The legislative history of BSA makes it clear that the intent of the initial legislation in 1970, and of all of the subsequent Acts, was to target organized crime, drug traffickers, tax evaders and money launderers in general. The involvement of the banking industry was and continues to be a necessary part of the implementation of the BSA regime, but the banking industry was never—and should not be viewed as—the target of the legislation. In 1993, Rep. Gonzalez, then Chairman of the House Banking Committee, reemphasized that criminal were the targets of the BSA regime:

Since the 1970’s, the committee has sought ways to reduce the ability of tax evaders, drug traffickers, and others with criminal intent from using our Nation’s financial institutions as their own personal laundromat in order to wash clean the proceeds of their dirty deeds.

Standard for Taking Criminal Actions against Banks

A necessary corollary to this history is the fact that a priority-focused BSA regime should continue to be directed toward obtaining information about organized crime and money launderers BSA-related criminal prosecutions and penalties should be targeted against the real perpetrators and not against the banks that represent the front line implementing BSA in good faith.

With regard to the founding concept of BSA being focused on money launderers instead of on banks, Eugene Rossides, former Assistant Secretary of the Treasury for Enforcement who testified before Congress on behalf of Treasury with regard to the early BSA legislation, submitted a written statement to Congress in 1986 after he had left the Department of the Treasury. It is instructive on this point and reads as follows:

First, while money laundering is a serious problem that must be vigorously addressed, it does not necessarily follow that imposing broad new requirements upon banks will solve the problem. Second, I become concerned when I see the law enforcement community shifting its focus away from drug traffickers and others in organized criminal groups and preoccupying itself with reporting failures by banks. While some banks have been less than diligent in meeting their filing obligations under the Act, I think William Nickerson, former Deputy Assistant Secretary of the Treasury for Enforcement, was directly on point recently when he observed that the government had "misenforced" the law by prosecuting bankers instead of narcotics dealers and other money launderers and that "what we've seen is a loss of understanding of the purpose of the act."

To understand the application of the Currency and Foreign Transactions Reporting Act of 1970, often referred to as the “Bank Secrecy Act,” one must recall the purpose for which it was enacted. … The data to be retained by the banks under the Act was to provide a source of information to bolster or help direct ongoing investigations of targeted suspects and future specific investigations. It was created to ensure that documents relevant to a particular suspect remained available for the use of the investigators and prosecutors. The Act’s target was the alleged criminals being investigated, not the banks.

This testimony serves to underscore the need for respecting the burden that banks are already under and the fact that the Government should reserve “major penalties,” as promised by FinCEN, for the “rare” cases.
There was additional testimony in 1985 and 1986 to the effect that the then increased penalties were designed, in part, to be assessed “against financial institutions that act in collusion with money launderers,”71 or that “facilitate[] laundering.”72 Such a standard requiring affirmative misconduct would obviously eliminate banks that attempt in good faith to comply with the many requirements under BSA.

The Department of the Treasury expressed this position in testimony in 1991:

Absent unusual circumstances, if a bank took proper measures to guard against money laundering and nevertheless discovered it was being used by money launderers, it would not be prosecuted following the report of illegal activity to Federal law enforcement.73

To properly implement this concept, law enforcement and the bank regulatory agencies should jointly develop, in consultation with the banking industry, a policy setting forth the proper standard for taking BSA-related criminal cases against a bank. Pursuant to such a policy, the government should review and consider the compliance history of the bank; the nature and scope of its BSA program; whether the violations are “persistent and serious” as opposed to limited and nonrecurring; whether the bank has knowingly facilitated money laundering; whether the bank’s internal controls and management detected and corrected the violations; and whether the bank has substantially or significantly failed to implement a good-faith BSA compliance program. In keeping with this last factor, as set forth earlier, an appropriate standard for taking BSA-related enforcement actions — especially criminal actions — would be a finding that the bank has fundamentally failed to comply with the requirements of BSA.

**Consultation Before Prosecution**

It is further recommended that, prior to bringing any criminal action against a bank, the Department of Justice be required to consult with the relevant bank regulatory agency on the history of institution’s compliance as well as the severity of the alleged misconduct. The existing guidelines issued by the Department of Justice already suggest that prosecutors “may” consider a bank’s “history of similar conduct, including prior criminal, civil, and regulatory enforcement actions …”74 Given the complexity and importance of the banking system as well as the BSA regime, it is recommended that the review of the bank’s history be mandatory.

In connection with the recommendation that the Department of Justice consult with the bank regulatory agencies, it is important to note that the bank regulatory agencies are in the best position to review and evaluate the history and efficacy of the compliance efforts of the banks they supervise and examine on an on-going basis. This is particularly true when a proposed criminal action is based on the inadequacy of a bank’s BSA program, bank regulatory agencies, which regularly examine in detail the BSA programs of all banks, have a breadth of experience and expertise with which to inform the prosecutorial decision.

The need for reviewing a bank’s history and for consulting with a bank regulatory agency is based on the gravity and sensitivity of taking actions against banks for BSA-related violations. This sensitivity is recognized by the Department of Justice itself by virtue of the fact that § 9-105.300(4) of the United States Attorneys’ Manual requires that all money laundering prosecutions and deferred prosecutions against banks be approved by the Asset Forfeiture and Money Laundering Section of the Department of Justice.

In further support of this recommendation, it should be noted that the complexity of the financial regulatory environment, and the expertise of the bank regulatory agencies, is also specifically recognized in the Department of Justice guidelines:
Many corporations [including banks] operate in complex regulatory environments outside the normal experience of criminal prosecutors. Accordingly, prosecutors should consult with relevant federal and state agencies with the expertise to evaluate the adequacy of a program’s design and implementation. For instance, state and federal banking [agencies] . . . have considerable experience with compliance programs and can be very helpful to a prosecutor in evaluating such programs.75

This type of consultation is in fact in keeping with a 1985 Agreement the Department of Justice entered into with the bank regulatory agencies on the day before the start of the Congressional hearings on the First National Bank of Boston case.76 Pursuant to this Agreement, the Department of Justice and the bank regulatory agencies promised to coordinate and cooperate in the handling of criminal cases relating to banks.77 Of particular note is the ninth paragraph of the Agreement which allowed for “inquiries, complains and [even] ‘appeals’” by the bank regulatory agencies with regard to Department of Justice cases against banks:

The Supervisory Agencies will strive to communicate directly with the U.S. Attorneys’ offices about significant criminal referrals involving their regulated financial institutions…. These parties shall communicate their concerns about particular cases and engage in dialogue to resolve problems. Thereafter, the Justice Department Fraud Section will entertain inquiries, complaints, and “appeals” of declinations by U.S. Attorneys with respect to referrals made by the Supervisory Agencies or their regulated financial institutions on cases believed by the Agencies to be significant.78

While this language is focused primarily on permitting the bank regulatory agencies to raise issues about cases not prosecuted, the addendum to the Agreement79 is broader and speaks in general of “inquiries, complaints, and ‘appeals’ by the Supervisory Agencies concerning referrals made to U.S. Attorneys’ offices (Paragraph 9).”80 This would encompass the equally important aspect of reviewing cases that potentially should not be brought against banks.

It should be noted that the current statutory authority set forth in the USA PATRIOT Act provides for other similar examples of required consultations. Specifically, Section 311 of the USA PATRIOT Act, pertaining to the issuance of “special measures” against foreign jurisdictions, foreign financial institutions, international transactions and accounts that are deemed to be “of primary money laundering concern,” requires a variety of interagency consultations. For instance, in determining whether there is a “primary money laundering concern,” the Secretary of the Treasury is required to consult with the Secretary of State and with the Attorney General.81 Further, in selecting the appropriate “special measure,” the Secretary of the Treasury is required to consult with the “Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency …. the Secretary of State, the Securities and Exchange Commission, the Commodity Futures Trading Commission, the National Credit Union Administration Board and … such other agencies and interested parties as the Secretary may find to be appropriate.”82 Last, before selecting the fifth, or most stringent, “special measure,” dealing with the prohibition of opening or maintaining correspondent or payable-through accounts, the Secretary of Treasury must consult with “the Secretary of State, the Attorney General, and the Chairman of the Board of Governors of the Federal Reserve System.”83

Another provision of the USA PATRIOT Act requiring consultation is Section 319 which allows either the Secretary of the Treasury or the Attorney General to issue a summons or subpoena for information relating to a foreign correspondent account,84 but which requires each to consult with the other before ordering a U.S. bank to terminate the foreign correspondent relationship for noncompliance with the summons or subpoena.
This history of promised and required coordination, cooperation and consultation provide compelling grounds to reaffirm the need for binding, consultative processes in this very important and sensitive area.

**Avoid Using Criminal Sanctions to Impose Administrative Compliance Obligations**

In addition to establishing a clear standard for taking BSA-related actions against banks, it is recommended that changes be made in connection with the manner in which the Department of Justice takes BSA-related actions against banks. There is no question that the Department of Justice has the responsibility to take all appropriate criminal actions, including those against banks when necessary. The banking industry supports the Department of Justice in investigating and prosecuting all financial crimes, particularly those relating to money laundering and terrorist financing.

However, there is a concern that the relief mandated in some criminal cases has impinged on the administrative regulatory functions of the bank regulatory agencies. In one case, for instance, the criminal action required a bank to "demonstrate its future good conduct and full compliance with the Bank Secrecy Act and all of its implementing regulations." In another case, the Department of Justice required the bank to undertake extensive and detailed remedial steps. In two other BSA-related cases, the Department of Justice required the banks to comply with the remedial consent orders that each bank had previously entered into with its respective bank regulatory agency.

Again, this Report is neither questioning the underlying basis for the criminal action in any of these cases nor challenging the appropriateness of the required relief. In fact, as noted, in the last two cases referred to, the bank regulatory agency not only concurred with the relief, it was the agency that actually wrote out the steps the banks were to take.

It is not and should not be the role of the Department of Justice to implement or to monitor remedial BSA-related compliance procedures. The Department of Justice is not in a position to properly determine the standards for, or sufficiency of, programmatic compliance by a bank with the BSA regulations. That is the jurisdiction of the bank regulatory agencies based on their experience developed over the past 38 years of working with BSA, as well as 145 years of experience in bank examination and supervision. To place the Department of Justice in the position of reviewing administrative BSA compliance, without either the technical or practical experience in bank supervision or regulation, is unfair to the Department of Justice and risks confusing and disrupting the policies and administration of a complex regulatory scheme. Thus, it is recommended that the Department of Justice leave the oversight of BSA regulatory compliance by a bank to the bank regulatory agencies.

**Recommendation 5: Refrain from criminal sanctions to impose administrative compliance standards and redefine procedures for taking criminal actions against financial institutions.**

The responsibility and authority for establishing and enforcing the administrative standards for bank regulatory compliance belong with the relevant bank regulatory agencies. Thus, law enforcement agencies should avoid the imposition of criminal remedies that address a bank’s ongoing supervisory expectations for BSA compliance. Further, certain standards and procedures should be established for bringing BSA-related criminal actions against banks, including a policy that law enforcement consult with applicable bank regulatory agencies prior to bringing BSA-related criminal actions.
In light of the importance of the BSA regime and the significant effect criminal proceedings can have not just the individual bank at issue, but on the banking industry as a whole, certain standards and procedures should be established for taking BSA-related criminal actions against banks.

To further re-balance the roles of law enforcement and the bank regulatory agencies under the BSA regime, the following steps should be taken:

- The Department of Justice (DOJ) and the bank regulatory agencies should jointly develop, in consultation with the banking industry, a policy setting forth the proper standard for bringing BSA-related criminal cases against a bank.
- DOJ should establish and abide by a formal statement of prosecutorial policy setting forth appropriate standards for prior consultation with the relevant bank regulatory agency in advance of taking a criminal prosecution against a bank or its affiliate for a Bank Secrecy Act violation.
- DOJ and state prosecutorial offices should establish and follow guidelines that involve the bank regulatory agencies in determining the appropriateness of criminal sanctions that include the imposition of regulatory compliance requirements, programs or standards.

**Conclusion**

The ABA advances the recommendations set forth in this Report as a basis for developing a New Framework for Partnership between the banking industry and the Government — one in which compliance is a process for better protecting our financial system from abuse. The goal is to apply our resources to priorities that achieve real progress against, and prosecutions of, serious financial crimes, money laundering and terrorist financing. This is an aspiration we know that all of the system partners share.

The ABA encourages feedback to the recommendations in this Report and looks forward to discuss it further with the banking industry and the Government, including Congress, the Executive branch and the bank regulatory agencies.

The ABA expresses its gratitude to the Committee members for their significant service in preparing this Report. The ABA would also like to thank the various people from the legislative branch, law enforcement agencies, the bank regulatory agencies, the banking industry and the public who provided useful input and thoughts. Our experience in this process convinces the ABA and its members that all the participants in the BSA/AML regime share a common goal of improving our collective ability to more effectively and efficiently safeguard the integrity of the American financial system from serious abuse.
Endnotes


2. The ABA and the Committee are keenly aware of the recent extraordinary events in the financial market and the banking industry. In pursuing the recommendations and the New Framework for Partnership, ABA will adjust its strategy and objectives as appropriate to the events as they continue to unfold.

3. As noted in the BSA History and Overview of BSA Regulations, set forth in Appendices C (footnote 23) and D, the requirement to file Currency Transaction Reports and limited criminal referrals dates back to 1959 and the passage of the Trading with the Enemy Act.

4. 1990 – V – 156; 1990 – V – 156. (The convention for these types of citations in this Report relates to Appendix B. The Congressional reports and hearings are grouped in Appendix B by the date of the legislation they relate to. Thus, this citation refers to the 1990 Act, the Crime Control Act of 1990. The Roman numeral refers to the Congressional report or hearing as numbered in Appendix B. The number at the end refers to the page in the report or hearing.) This testimony included the following personal anecdote from Cliff Cook on behalf of the ABA, which is relevant today: This testimony included the following personal anecdote from Cliff Cook on behalf of the ABA, which is relevant today: Finally, Mr. Chairman, to sum up the general feelings of the industry I would like to read an excerpt from a recent ABA study on the overall regulatory burden of banking. “Bankers in our study group expressed strong support for the underlying goal of limiting drug traffic. Most appear quite willing to accept some cost in order to further this goal.” One compliance officer whom we interviewed stated seriously and emphatically, “It is our kids that we are doing this for.” (1990 – V – 73.)

5. 1986 – X – 87. This Interim Report was issued in October, 1984. Hereinafter referred to as the President’s Commission’s Report.


7. This requirement, however, could have been promulgated as early as 1970, based on § 205 of the original BSA Act. Similarly, in §1359 of the Money Laundering Control Act of 1986, the bank regulatory agencies were directed to prescribe regulations requiring banks to establish BSA compliance procedures.


10. FATF is an international organization created by the G-7 group of countries and is recognized as a leading authority on anti-money laundering and counter-terrorist financing guidance.


12. The Egmont Group is an informal organization of financial intelligence units named after the location of the group’s first meeting at the Egmont-Arenberg Palace in Brussels in 1995. It is recognized as the international standard setter for FIUs.


16. There is no intention to add redundant oversight to the exam process; but rather the intent is to suggest that the Inspector Generals, in the interest of comity, accede to the specialized expertise and the focused mission of the Gatekeeper when it comes to conducting BSA-related supervisory management reviews. Mindful of the limitation of the resources available to the current BSA administrator, it may be appropriate to conduct management reviews using IG staff detailed to the Gatekeeper.

17. FATF Guidance on the Risk-Based Approach to Combating Money Laundering and Terrorist Financing, June, 2007, ¶ 1.2-1.3.

18. FATF Guidance on the Risk-Based Approach, ¶ 1.7. [Emphasis added.]


20. Speeches by the Director of FinCEN given on 2/27/08 and 3/5/08.

21. Speeches by the Director of FinCEN given on 2/27/08 and 3/5/08.

22. Speech by the Director of FinCEN given on 3/5/08.

23. UK’s Anti-Money Laundering Supervisor’s Forum, 3/08.


25. “Risk Based Regulation: The FSA’s Experience,” Speech by Callum McCarthy, Chairman, FSA, 2/13/06.

26. “Risk Based Regulation: The FSA’s Experience,” Speech by Callum McCarthy, Chairman, FSA, 2/13/06.


28. UK’s Anti-Money Laundering Supervisors’ Forum, 3/08. [Emphasis in the original heading.]

29. UK’s Anti-Money Laundering Supervisors’ Forum, 3/08.


31. FATF Guidance on the Risk-Based Approach, ¶¶ 1.21-1.22. See also, FATF Guidance on the Risk-Based Approach, ¶ 2.16.

32. Speeches by the Director of FinCEN given on 2/27/08 and 3/5/08.


34. Speech by the Director of FinCEN given on 2/27/08.
As set forth by FATF, “Barriers to [a risk-based approach] may include inappropriate reliance on detailed and prescriptive requirements . . .” FATF Guidance, ¶ 2.8.

FinCEN has conducted extensive outreach to the banking industry and to various banking organizations; has issued extensive guidance on their website; and has continued to issue ever-expanding and comprehensive editions of its periodic publication entitled “The SAR Activity Review: Tips, Trends and Issues.” In addition, pursuant to a Memorandum of Understanding between FinCEN and the bank regulatory agencies signed on 9/30/04, FinCEN agreed to provide: analytical products that identify common BSA compliance deficiencies, patterns, trends in BSA compliance, developments in money laundering and terrorist financing, and trends and best practices in BSA examination. Such products also focus on assisting the banking organizations and other financial institutions in meeting their BSA compliance obligations. Accordingly, FinCEN will provide the FBAs, and, as appropriate, the industry, and the public with such analytical products to enhance the overall effectiveness of the agencies administration of the BSA. (MOU between FinCEN and the federal banking agencies, dated 9/30/04, ¶ III.C.)
Conover – No, we were not involved. If you recall, we were asked to stay out of the bank as far as the Bank Secrecy Act was concerned in April 1983. We had absolutely nothing to do with the Justice Department’s case – no contact whatsoever, and no information on the subject until not too long ago when I got a phone call that informed me, “Tomorrow morning, you are going to read an article in the newspaper about the Bank of Boston pleading guilty and being fined $500,000.” I had no contact with the Justice Department on that subject whatsoever.

BB – 418. The fact that this was the way the OCC found out that a major national bank was pleading guilty to a major felony charge and was paying the largest criminal BSA penalty to date underscored the obvious need for reform.

The timing of this Agreement is explained by the fact that the agencies knew that they were going to be highly criticized for their handling of the First National Bank of Boston case – the bank regulatory agencies for not recognizing that there was a problem and for failing to refer the case to law enforcement; and the Department of Justice for being too lenient on the bank. BB – 1-3, 276, 296, 357, 418.

78 1985 – 452.
79 The addendum is entitled “Summary of the rationale for certain of the matters set forth in the attached agreements and recommendations of the Justice Department – Supervisory Agencies working group.”
80 1985 – 463.
85 Department of Justice action against AmSouth Bank, Birmingham, Alabama, 10/12/04.
86 Department of Justice action against the Bank of New York, 11/4/05.
87 Department of Justice actions against American Express Bank International, 8/6/07, and Union Bank of California, 9/7/07.