

The Banking Law Journal

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Beyond BSA Compliance: Human Trafficking Corporate Liability for Small Banks and MSBs

*William M. Sullivan, Jr., and Fabio Leonardi**

Aside from the Bank Secrecy Act, federal law creates corporate liability for financial institutions that, even unknowingly, benefit from human trafficking if they “should have known” about the exploitation. Expanded anti-money laundering compliance focused on identifying human trafficking red flags is instrumental to mitigate potential corporate liability based on an institution’s failure to recognize financial transactions related to human trafficking. The authors of this article discuss the issues and advise smaller banks and money services businesses to expand their compliance to mitigate human trafficking corporate liability.

As larger banks and international financial institutions have been implementing increasingly sophisticated Bank Secrecy Act (“BSA”) and anti-money laundering (“AML”) compliance processes and technologies, they have also become less hospitable and less attractive to bad actors. Accordingly, criminals are increasingly exploiting less-expansive know your customer (“KYC”) controls at money services businesses (“MSBs”), community banks and credit unions to launder proceeds of human trafficking. Thus, in addition to mitigating potential criminal and civil penalties for BSA violations, comprehensive anti-human trafficking policies and procedures at smaller banks and MSBs will address potential exposure under the Victims of Trafficking and Violence Protection Act (“TVPA”), a federal law that creates significant corporate liability for financial institutions that benefit from human trafficking if they know or “should have known” about the exploitation.

FINANCIAL INSTITUTIONS’ LIABILITY FOR HUMAN TRAFFICKING

To assist financial institutions in complying with human trafficking-related BSA obligations, in November 2014, the U.S. Financial Crimes Enforcement

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Network (“FinCEN”) issued specific guidance identifying financial indicators or “red flags” that may indicate financial activity related to human trafficking. Generally, these red flags include “funnel accounts” handling numerous cash deposits from multiple locations, transactions conducted by individuals escorted by a third party, frequent payments to online escort services for advertising and frequent transactions inconsistent with the expected activity or line of business carried out by the customer, among others.

However, implementing effective compliance programs and training to identify potential human trafficking in connection with financial transactions is not only necessary to comply with the BSA and avoid stiff criminal and civil penalties. Indeed, as human traffickers rely on smaller banks and MSBs to launder proceeds of criminal exploitation, these financial institutions are increasingly becoming exposed to additional corporate liability for financially benefitting from such transactions. Consequently, aside from BSA enforcement actions, these entities may also be targeted by anti-human trafficking litigation under the TVPA, a federal law that creates significant corporate liability for entities, such as MSBs and small banks, that benefit from human trafficking if they know or “should have known” about the exploitation.

In particular, the TVPA grants a private right of action to a victim of human trafficking to file a civil lawsuit in federal court. Enacted in 2000 and mostly recently amended in 2013, the TVPA is intended to combat trafficking in persons, especially into the sex trade, slavery and involuntary servitude. While trafficking victims have generally invoked the TVPA to seek damages from their traffickers, the statute also provides a cause of action to bring claims against third parties such as financial institutions and other businesses providing financial or other services to traffickers. Indeed, under the TVPA, a victim may bring an action against “whoever knowingly benefits . . . from participation in a venture that person knew or should have known has engaged in” trafficking (emphasis added). Notably, the TVPA specifically allows courts to award damages as well as attorney’s fees to the victim and, at least in the Ninth and Tenth Circuits, punitive damages. Because such horrific crimes generally have significant and lifelong effects on their victims, defendants in TVPA actions are likely to face damages in the millions of dollars, not to mention significant public relations costs and remediation expenses.

Thus, for instance, a credit union that provides financial services to a trafficker may be exposed to corporate liability under the TVPA if the financial institution should have known that its services were being used to facilitate sexual exploitation, forced labor or trafficking of minors. Additionally, as an employee’s knowledge may generally be imputed to its employer, it may be established that a MSB “should have known” that it was assisting in committing

such terrible crimes where its employees may have witnessed signs of potential exploitation, such as the red flags that FinCEN identified in its guidance, while processing financial transactions.

ANTI-HUMAN TRAFFICKING COMPLIANCE FOR FINANCIAL INSTITUTIONS

The BSA and, indirectly, the TVPA impose anti-human trafficking compliance obligations on financial institutions. While effective KYC due diligence, suspicious activity report (“SAR”) filing and internal controls may prevent regulatory enforcement actions for human trafficking-related money laundering, BSA compliance programs should be enhanced with TVPA-related anti-human trafficking solutions.

As community banks, credit unions and MSBs may be exposed to significant corporate liability if they “should have known” that they were facilitating financial transactions related to human trafficking, it is paramount that they implement effective TVPA-focused anti-human trafficking policies and procedures. Indeed, it may be deemed that a financial institution “should have known” of the trafficking if its employees witnessed red flags and either did not recognize them as such or failed to notify bank management, thereby allowing their institution to “benefit” unwittingly from the crime. A system of anti-human trafficking compliance focused on the TVPA, along with an effective BSA compliance program, would effectively address these concerns by establishing internal policies and procedures to identify instances of exploitation promptly and, one might hope, even prevent future crimes.

In sum, to avoid liability and unintentionally contributing to human trafficking while mitigating TVPA’s potentially significant impact on corporate assets and operations, financial institutions should consider incorporating TVPA-focused anti-human trafficking compliance into their own BSA compliance framework. Doing so is particularly critical for smaller banks and MSBs that, as noted above, might benefit from processing transactions with proceeds derived from human trafficking. In addition, consistent with their BSA obligations, financial institutions should proactively conduct employee training on how to identify red flags of human trafficking-related money laundering as well as perform an internal review of existing policies and procedures to identify areas that may be subject to exploitation by traffickers and make needed corrections.

CONCLUSION

Human trafficking is a horrific form of modern-day slavery, a multi-billion dollar criminal industry where traffickers use force, fraud or coercion to control

their victims. Proactively engaging in anti-human trafficking compliance is thus necessary from both corporate social responsibility and risk management perspectives. Indeed, not only is it an effective way for financial institutions to play a significant role in the fight against exploitation, but it also reduces business risk by mitigating a bank's exposure to potential corporate liability as well as regulatory enforcement actions.