Personal Liability
ON DECEMBER 1, 2015, the New York Department of Financial Services (“DFS”) proposed “…a new anti-terrorism and anti-money laundering regulation that includes—among other important provisions—a requirement modeled on Sarbanes-Oxley that senior financial executive[s] certify that their institutions has sufficient systems in place to detect, weed out, and prevent illicit transactions.”¹ The proposed regulation, if adopted, would require that DFS-supervised institutions maintain a transaction monitoring program designed to identify potential BSA/AML violations and ensure timely Suspicious Activity Reporting, as well as a watch list filtering program for the purpose of interdicting transactions before their execution that are prohibited by applicable sanctions, including OFAC and other sanctions lists, politically exposed persons lists, and internal watch lists.²

Under the proposed regulation, on or before April 15 of each year, each covered institution would also be required to submit to the DFS a certification of compliance with the above requirement duly executed by its chief compliance officer or functional equivalent.³ Section 504.5 of the proposed regulation provides that:

All Regulated Institutions shall be subject to all applicable penalties provided for by the Banking Law and the Financial Services Law for failure to maintain a Transaction Monitoring Program, or a Watch List Filtering Program complying with the requirements of this Part and for failure to file the Certifications required under Section 504.4 hereof. A Certifying Senior Officer who files an incorrect or false Annual Certification also may be subject to criminal penalties for such filing.⁴

This pronouncement follows a long series of recent policy pronouncements and enforcement actions initiated by the DFS and other financial services regulators where the focus has included not only corporate but individual responsibility, with a particular focus on compliance professionals. The purpose of this article it to discuss the implications of this shift in focus for compliance professionals, to offer suggestions on how such professionals can better protect themselves from potential liability, and to raise a cautionary note that in their effort to ensure that financial services firms maintain a high level of regulatory compliance with all AML-related laws and regulations, the financial service regulators do not make it increasingly difficult for firms to find and retain those best qualified to lead this effort, i.e., well-qualified compliance professionals.

How we got here—

Governmental Policies and Statements

As history instructs, the 2007-2008 financial downturn mostly took banks and regulators by surprise—and both have been running hard since to “catch up.” Regulators reacted in a number of ways. They ratcheted up their rhetoric regarding their supervisory expectations; issued policy statements signaling increased supervisory scrutiny and took a series of high-profile enforcement actions intended to reinforce a “no more Mr. nice guy” message. Most of these were directed at the financial institutions themselves, but as legislators, commentators and the public began to clamor for actions against individuals, the regulators began to turn their focus more in that direction. In March of 2013, David S. Cohen, Under Secretary for Terrorism and Financial Intelligence, testifying before the Senate Committee on Banking, Housing, and Urban Affairs on Patterns of Abuse: Assessing Bank Secrecy Act Compliance and Enforcement stated:

[T]he BSA allows FinCEN to impose civil penalties not only against domestic financial institutions and non-financial trades or businesses that willfully violate the BSA, but also against partners, directors, officers and employees of such entities who themselves actively participate in misconduct. Although FinCEN has employed these tools only occasionally in the past, in the future FinCEN will look for more opportunities to impose these types of remedies in appropriate cases (https://www.treasury.gov/press-center/press-releases/Pages/jl1871.aspx).

In March of 2014, Comptroller of the Currency Thomas Curry offered the following remarks before the Association of Certified Anti-Money Laundering Specialists: “The question I would pose from a risk management and corporate governance standpoint is whether it’s time to require large complex banks to establish clear lines of accountability that make it possible to hold senior executives responsible for serious compliance breakdowns that
lead to BSA program violations.” (See http://www.sec.gov/news/statement/supporting-role-of-chief-compliance-officers.html.)

In June of this year, SEC Commissioner Luis A. Aguilar offered a defense of two SEC enforcement actions taken to discipline Chief Compliance Officers (“CCOs”), stating in part, that:

“In my experience, the Commission has approached CCO cases very carefully, making sure that it strikes the right balance between encouraging CCOs to do their jobs competently, diligently, and in good faith, and bringing actions to punish and deter those that engage in egregious misconduct. In making this determination, the Commission cautiously evaluates the facts and circumstances of each case, and considers many important factors such as fairness and equity.”

Commissioner Aguilar’s view that the SEC’s actions against compliance officers has been a balanced one is not shared by all of his fellow commissioners, however. Commissioner Daniel Gallagher, commenting on the same two cases referred to by Commissioner Aguilar’s view that the SEC’s actions against compliance officers has been a balanced one is not shared by all of his fellow commissioners, however. Commissioner Daniel Gallagher, commenting on the same two cases referred to by Commissioner Aguilar, offered a more cautionary view:

“Both settlements illustrate a Commission trend toward strict liability for CCOs under Rule 206(4)-7. Actions like these are undoubtedly sending a troubling message that CCOs should not take ownership of their firm’s compliance policies and procedures, lest they be held accountable for conduct that, under Rule 206(4)-7, is the responsibility of the adviser itself. Or worse, that CCOs should opt for less comprehensive policies and procedures with fewer specified compliance duties and responsibilities to avoid liability when the government plays Monday morning quarterback.” (See http://www.sec.gov/news/statement/seccco-settlements-iaa-rule-206-4-7.html.)

In September of 2015, the U.S. Department of Justice also weighed in with an unprecedented proposal that, if adopted, would require annual certifications by compliance officers that their DFS-regulated institutions were maintaining an effective transaction monitoring program to detect potential BSA violations, maintaining watch list filtering programs to identify and interdict prohibited transactions and filing SARs when suspicious activities are identified.

Collectively, these statements evince a growing, and increasingly uniform articulation of governmental policies reflecting a willingness and determination to visit personal liability on individuals as well as corporate entities. As discussed in the next section, this willingness and determination has manifested itself in a number of recent enforcement actions taken by financial services regulators against individuals.

Recent Enforcement Actions—Policy Becomes Reality

The most well-known enforcement action aimed at a compliance professional is, of course, the action being taken by FinCEN against Thomas Haider, former Chief Compliance Officer of MoneyGram International Inc. In a complaint filed on FinCEN’s behalf by the United States Attorney for the Southern District of New York on December 18, 2014, the government seeks an order enforcing a $1,000,000 civil money penalty (“CMP”) against Mr. Haider for failing to ensure that MoneyGram:

1. Implemented a policy for disciplining agents and outlets that MoneyGram personnel knew or suspected were involved in fraud and/or money laundering;
2. Terminated agents and outlets that MoneyGram personnel knew or suspected were involved in fraud and/or money laundering, including outlets that Haider himself was on notice posed an unreasonable risk of fraud and/or money laundering;
3. Fulfilled its obligation to file timely SARs, because Haider maintained MoneyGram’s AML program so that the individuals responsible for filing SARs were not provided with information possessed by MoneyGram’s Fraud Department that should have resulted in the filing of SARs on specific agents or outlets;
4. Conducted effective audits of agents and outlets, including outlets that MoneyGram personnel knew or suspected were involved in fraud and/or money laundering; and
5. Conducted adequate due diligence on prospective agents, or from the very beginning of an investigation, we maximize the chances that the final resolution of an investigation uncovering the misconduct will include civil or criminal charges against not just the corporation but against culpable individuals as well. (See http://www.justice.gov/dag/file/769036/download at 4.)

Finally, as noted in the introduction to this article, the DFS has now weighed in with an unprecedented proposal that, if adopted, would require annual certifications by compliance officers that their DFS-regulated institutions were maintaining an effective transaction monitoring program to detect potential BSA violations, maintaining watch list filtering programs to identify and interdict prohibited transactions and filing SARs when suspicious activities are identified.

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4. Conducted effective audits of agents and outlets, including outlets that MoneyGram personnel knew or suspected were involved in fraud and/or money laundering; and
5. Conducted adequate due diligence on prospective agents, or
existing agents seeking to open additional outlets, which resulted in, among other things, MoneyGram (1) granting outlets to agents who had previously been terminated by other money transmission companies and (2) granting additional outlets to agents who MoneyGram personnel knew or suspected were involved in fraud and/or money laundering.

In 2014, the New York Department of Financial Services (“DFS”) took a pair of actions against financial institutions that while not directly seeking to penalize individuals, nevertheless resulted in adverse actions being taken against individuals currently or formerly working for the institutions involved. In June of 2014, DFS entered into a Consent Order with BNP Paribas, S.A., New York Branch directing BNP to pay an $8.9 billion civil money penalty, restrict its U.S. dollar clearing operations going forward and terminate certain senior executive officers.9 As to the latter, DFS directed the termination of twelve officers and officials of the Bank involved in the illegal clearing operations, including the former Group Head of Compliance and directed that the Bank shall not in the future, directly or indirectly retain any of the former Group Head of Compliance and directed that the

In December of 2014, In the Matter of Bank Leumi, USA, Bank Leumi Le-Israel, B.M., DFS entered into a Consent Order that included provisions requiring the Bank to terminate and/or ban certain specific employees from further involvement in compliance-related activities, including the former Chief Compliance Officer, who the DFS alleged was complicit in perpetuating compliance-related warnings raised by more junior compliance personnel and not only deferred to business managers who pressed to maintain a profitable line of business, but actively worked to support serious illegal conduct by the Bank and conceal it from their regulators and other authorities.10

In 2014, FINRA not only took action against the firm of Brown Harriman by fining the firm $8 million for numerous AML compliance failures. It also took action against the firm’s former AML compliance officer, Harold Crawford, by fining him $25,000 and suspending him for one month for his role in those failings, which FINRA alleged included failure to have an adequate anti-money laundering program in place to monitor and detect suspicious penny stock transactions, failure to sufficiently investigate potentially suspicious penny stock activity brought to the firm’s attention, and failure to meet SAR filing requirements.

What this all means for Compliance Professionals

Collectively, the above cases paint a sobering picture for compliance officers, particularly those in larger, more complex, financial institutions. Clearly, on an increasing basis, regulators are looking for ways to underscore the importance of AML compliance by sending a very strong message to compliance professionals that not only may the institution they serve be at risk, they may also be found personally liable. This raises a number of serious questions, including how do compliance professionals protect themselves from this kind of risk, and what are the implications of the current approach for the institutions they serve?

“...but one thing is certain, compliance professionals subject to DFS jurisdiction (and those who may become subject to some variation of the proposal should other financial service regulators follow suit) may understandably see this measure as one more means of targeting compliance professionals at a time when their services are needed most”

There are also a number of fundamental questions that all compliance professionals should be asking themselves in the current environment, and if they are not able to answer these questions in a satisfactory manner, they should consider themselves as being exposed to elevated risks of personal liability if/when something goes wrong.

■ Are you working in a healthy compliance environment? Is there a strong compliance culture that emanates from the top of the organization? If not, you may be personally at risk.

■ Is compliance receiving adequate staffing, resources and systems commensurate with the risks faced by the organization? If not, are you making those needs known to senior management and the Board and doing all you can to see that they are being met? If not, you may be personally at risk.

■ Does the organization have adequate controls in place that serve to identify risks, including those presented by third-party relationships, before they rise to unmanageable levels and ensure that risks are properly addressed once recognized? If not, you may be personally at risk.

■ When problems need to be elevated, does the organization have a good system in place for alerting senior management and the Board and getting their support for any corrective actions that need to be taken? If not, you may be personally at risk.
Is the Compliance function keeping meticulous records that enable it to fully document issues and corrective measures taken? If not, you may be personally at risk.

While the cases discussed in this article are relatively few in number, the current environment suggests that we will see more to come. No one questions the need for strong remedial measures being taken against a compliance officer who knowingly fails to discharge his or her responsibilities or who looks the other way in the face of strong push-back from business lines in the organization focused exclusively on revenues and agnostic with respect to whether or not the organization is satisfying its compliance responsibilities. That said, there is certainly room for discussion as to when a compliance officer’s failures should rise to that level. As in all things, it’s a question of balance and when that balance tips too far one way or the other, the result can work a disservice to sound public policy. A recent SEC action illustrates the dilemma.

In August of 2015, the SEC issued a decision In the Matter of Judy K. Wolf, a compliance professional working with Wells Fargo (https://www.sec.gov/alj/aljdec/2015/id851ce.pdf). The SEC found clear violations on the part of Ms. Wolf, but ultimately declined to sanction her, citing, among other considerations, the following:

There is one additional consideration: the fact that Wolf worked in compliance. Obviously, compliance professionals are subject to the securities laws like everyone else. But Wolf is correct to complain that in compliance, “the risk is much too high for the compensation.” Tr. 439. In my experience, firms tend to compensate compliance personnel relatively poorly, especially compared to other associated persons possessing the supervisory securities licenses. Compliance personnel typically have, likely because their work does not generate profits directly. But because of their responsibilities, compliance personnel receive a great deal of attention in investigations, and every time a violation is detected there is, quite naturally, a tendency for investigators to inquire into the reasons that compliance did not detect the violation first, or prevent it from happening at all. The temptation to look to compliance for the “low hanging fruit,” however, should be resisted. There is a real risk that excessive focus on violations by compliance personnel will discourage competent persons from going into compliance, and thereby undermine the purpose of compliance programs in general. That is, “we should strive to avoid the perverse incentives that will naturally flow from targeting compliance personnel who are willing to run into the fires that so often occur at regulated entities.” Commissioner Daniel M. Gallagher, Statement on Recent SEC Settlements Charging Chief Compliance Officers With Violations of Investment Advisers Act Rule 206(4)-7 (June 18, 2015), available at http://www.sec.gov/news/statement/sec-cco-settlements-iaa-rule-206-4-7.html.

The SEC’s statement suggests that the public policy objectives of ensuring that organizations maintain high levels of compliance while also attracting and retaining highly-qualified and dedicated compliance professionals need not be at odds. The statement also suggests that when a balance is struck between the two, that the scales should arguably tip in favor of the latter objective. There is a finite number of well-qualified compliance professionals available to financial service organizations, particular in the AML arena. However, as the above cases illustrate, in today’s environment, assuming a position as a compliance professional carries with it increasing risk of ever closer regulatory scrutiny and the potential for personal liability when things go wrong.

This article opened with a brief discussion of the DFS’ recent regulatory proposal to require that compliance officers certify to their organization’s compliance with requirements to maintain transaction monitoring and filtering program designed to detect potential violations of the Bank Secrecy Act and other AML laws and to identify and report suspicious activity. As noted above, under the proposal, failure to so certify, or the filing of an incorrect or false certification could expose the officer making the certification (i.e., the compliance officer) to criminal and other penalties. It remains to be seen whether the DFS’s regulation will be adopted as proposed, but one thing is certain, compliance professionals subject to DFS jurisdiction (and those who may become subject to some variation of the proposal should other financial service regulators follow suit) may understandably see this measure as one more means of targeting compliance professionals at a time when their services are needed most.

ABOUT THE AUTHOR
RALPH SHARPE, Counsel at Venable LLP, is head of Venable’s Financial Services Group Risk Management and Compliance Team. Mr. Sharpe draws upon his 26 years of experience in key positions with the Office of the Comptroller of the Currency (OCC), including Director of Enforcement and Compliance, Deputy Comptroller for Bank Technology, and Deputy Comptroller for Community and Consumer Compliance. In addition, Mr. Sharpe served as the Deputy Comptroller for Multinational Banking at the OCC, where he was responsible for the supervision of the ten largest national banks. His full bio can be found at: https://www.venable.com/ralph-e-sharpe/. He can be reached at resharp@venable.com.

ENDNOTES
1 See http://www.dfs.ny.gov/about/press/pr1512011.htm
2 Id.
3 Id.
4 Id.
5 FinCEN’s action against Mr. Haider follows on the heels of a Deferred Prosecution Agreement (“DPA”) entered into by MoneyGram on November 9, 2012 with the U.S. Attorney’s Office for the Middle District of Pennsylvania on various charges, including a charge of willfully failing to implement an effective AML program. MoneyGram agreed to forfeit $100 million as part of the DPA and to retain an independent compliance monitor approved by the DOJ.
7 By Order dated March 17, 2015, the case was transferred to the U.S. District Court for the District of Minnesota. As of the submission of this article, no dispositive actions have been taken in the matter.
8 Supra, fn 5, Complaint at 3-4. 
9 See http://www.dfs.ny.gov/about/press/pr1406301.htm
10 Id.
11 Id., See Paragraph 47 of the Order.