



50 Years of the *Bank Secrecy Act*

It's Time to Renew the Purpose
of Providing Actionable Intelligence
to Law Enforcement

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From its birth on October 26, 1970 as the *Foreign Bank Secrecy Act* of 1970, through make-overs in 1986 (criminalizing money laundering and structuring), 1990 (establishing FinCEN), 1992 (introducing Suspicious Activity Reports), and 2001 (the biggest make-over with the *USA PATRIOT Act*), the *Bank Secrecy Act* has evolved and slowly adapted to a rapidly changing world.

In this examination of its storied history, we will see that the Act itself had formal statutory make-overs, as well as several less formal, but equally impactful, changes through new regulations, regulatory guidance, and industry reactions. But in the course of those changes, there's been a slow but sure drift in purpose and focus from a regime intended to provide timely, actionable intelligence to law enforcement, to a regime that appears more focused on meeting regulatory expectations.

So, let's look back at the last (almost) fifty years, to see how the *Bank Secrecy Act* was driven, or even caused, by global events and technology developments, the shifting goals of the industry, and the resulting impact on financial crimes risk management as a whole.

History of the BSA

As we start this journey, we should ask ourselves "What is the purpose of the *Bank Secrecy Act*?" This simple question is one that seemingly does not lend itself to a simple answer, despite the fact the BSA includes the following Declaration of Purpose:

"It is the purpose of this subchapter to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism." (BSA, 31 USC 55311)

The statement above does not seem to resonate with today's regulatory landscape. One could argue that the industry has shifted its focus to procedural enforcement, while losing focus on the "usefulness" and actionable "intelligence" goals, as outlined in the declaration. Put another way, the private sector participants are more focused on managing the management of financial crimes risk management than on managing financial crimes risk. As this history unfolds, we will see how the definition of purpose has evolved in response to industry changes.

1970 – 1987: The Early Years

Born at a time of rotary telephones and letters written with carbon paper copies and posted in the mail, the BSA quietly lived out its initial years while the 1970s' fintech revolution went on around it (ATMs, debit cards, the Visa network, ACH, and SWIFT were all introduced in the few years after the BSA was passed in 1970). In



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those early years the BSA seemed to garner little attention and, apparently, existed without much notice from anyone.

Then, in early 1985, the First National Bank of Boston was charged with, and pleaded guilty to, knowingly and willfully failing to comply with the BSA by failing to report over \$1 billion in cash transactions. A Congressional hearing ensued (the transcripts are a great read, including lines like “The Bank of Boston has made noncompliance with the Bank Secrecy Act an art form”), leading to the first major changes to the BSA with the introduction of the *Money Laundering Control Act* (MLCA) in 1986. It should be noted that the MLCA was one of twenty-two subtitles buried in one of ten titles (the *Anti-Drug Enforcement Act of 1986*) of the *Anti-Drug Abuse Act of 1986*.

The MLCA made money laundering a crime and imposed criminal liability on financial institutions that knowingly assisted in it. This statutory change led to the January 1987 regulatory changes (an example being the OCC's program requirements at 12 CFR 21.21) that directed financial institutions to establish and maintain procedures reasonably designed to ensure and monitor compliance with the reporting and recordkeeping requirements.

The BSA/AML program requirement was born.

1987 – 2001: Maturing and Developing

The BSA began maturing in the 1990s. Programs began to mature, the Suspicious Activity Report (SAR) era began with the *Annunzio-Wylie Anti-Money Laundering Act of 1992*, and a single agency within the Treasury Department — FinCEN — was created to manage and enforce the BSA.

The 1990s also saw the rise of interstate banking, the introduction of the internet, and a growing international private banking industry. In the late 1990s, KYC regulations were proposed and, after much kvetching by the private sector, withdrawn.

The Role of FinCEN in BSA

While the BSA has a declaration of purpose, the BSA regulations do not. Rather, there are certain requirements laid out in those regulations (31 CFR Part X). The regulations at 31 CFR §1010.810 provide that “overall authority for enforcement and compliance, including coordination and direction of procedures and activities of all other agencies exercising delegated authority under this chapter, is delegated to the Director, FinCEN.”

FinCEN's original (1990) mission was to “establish a government-wide multi-source financial intelligence and analysis network to support the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes.” In 1994, FinCEN's mission expanded to include regulatory responsibilities, so that it currently has overall authority over the BSA and the

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authority to examine institutions for compliance, which it delegates to ten functional regulators. Its current Mission Statement is clear: "The mission of the Financial Crimes Enforcement Network is to safeguard the financial system from illicit use and combat money laundering and promote national security through the collection, analysis, and dissemination of financial intelligence and strategic use of financial authorities."

This is a positive for financial institutions looking to provide financial intelligence to FinCEN. However, those institutions are not examined by FinCEN — that responsibility is delegated to the regulatory agencies (OCC, FDIC, NCUA, FRB, etc.). Those regulatory agencies do a good job in regulating and supervising financial institutions given the mandates that they have, which are "safety and soundness" mandates. The focus of those agencies is on the programmatic aspects of BSA/AML: risk assessments, customer identification programs, monitoring and reporting systems, proper documentation, independent testing programs, etc. It is only where "effective intelligence" is not part of "safety and soundness" that we see the loss of purpose and drift from effectiveness of the private sector's BSA/AML efforts.

Through the 1990s we saw an increasing focus on the nuts and bolts (safety and soundness) of programs. Over time this resulted in an increasing divergence between the regulators' mandates and priorities, and the stated purpose of the Act.

Then, the tragic events of 9/11 changed everything.

2001 – 2005: Turning Point

Forty-five days after 9/11, the *USA PATRIOT Act* was passed. In many ways it was a "wish list" of provisions that law enforcement, the intelligence community, and legislators had tried to obtain for a number of years. This list included KYC (now CIP) provisions, private banking controls, information sharing provisions, and the ushering in of more entities and industries subject to BSA requirements.

The focus was on providing actionable intelligence to law enforcement and many new companies, including Verafin, were established in this post-Patriot Act period, with the express intent of fighting financial crime.

"Verafin was born in 2003, when our founders Jamie King, Raymond Pretty and Brendan Brothers decided to take the technology they used to build robots for the mining industry and apply it in a new way to help fight financial crime. They used their research abilities to not only examine the ever-growing problem of fraud and money laundering, but to think about what they would want on hand if they worked for a bank or credit union. Then they built it." (www.verafin.com)

Regulations were introduced two years after the passage of the *PATRIOT Act*, followed by the publishing of the FFIEC's BSA/AML Examination Manual two years later. In 2004, FinCEN's mission was further clarified when it, and OFAC, became a part of the Department of the Treasury's new Office of Terrorism and Financial Intelligence.

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By the book: FFIEC BSA/AML Exam Manual

Regulatory guidance was first outlined in the June 2005 Federal Financial Institutions Examination Council's (FFIEC's) BSA/AML Examination Manual (amended in 2006, 2007, 2010, and 2014). Keep in mind that FinCEN is not a member of the FFIEC: five of the ten regulators that have delegated BSA compliance responsibilities are members. As early as page seven we find the following statement:

The BSA is intended to safeguard the US financial system and the financial institutions that make up that system from the abuses of financial crime, including money laundering, terrorist financing, and other illicit financial transactions... a sound BSA/AML compliance program is critical in deterring and preventing these types of activities at, or through, banks and other financial institutions.

This statement declares the importance of maintaining a sound program without a reference to the importance of the purpose of a sound program — to provide actionable intelligence to law enforcement.

Modern Day BSA—A Health Check

From its birth in 1970 and its early years; a maturation and development period in the 1990s; and then the immediate years after 9/11 — the BSA has evolved its purpose of providing actionable intelligence to law enforcement. New BSA/AML laws enacted shortly after the events of 9/11, followed by regulations two years later and regulatory guidance two years after that had a cascading effect on the industry.

2005 – 2008: Losing focus

As outlined above, the 2003 regulations and 2005 Exam Manual brought rising regulatory and program expectations, and a slow drift away from the post-9/11 focus on law enforcement.

A number of early, post-9/11 enforcement actions (for example, the January 2003 Banco Populaire Deferred Prosecution Agreement (DPA) and \$21.6 million penalty, and the October 2004 AmSouth DPA and \$40 million penalty) seemed to begin a focus on program requirements.

A number of the mid-2000s BSA/AML penalties, such as the 2005 Riggs Bank DPA with a penalty of \$16 million, the 2005 Bank of New York “double” Non-Prosecution Agreements with total penalties of \$38 million, the 2007 American Express Bank International DPA and civil money penalties totaling \$85 million, and the 2007 Union Bank of California penalties of \$32 million, cemented the need for BSA officers to focus on their program requirements — whether timely, effective SARs were getting to law enforcement was now secondary to ensuring that all programmatic requirements and expectations were met. Although these cases all involved AML deficiencies — failing to identify and report suspicious activity — they all had



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the effect of focusing BSA Officers' attention on well-designed and documented programs... not on providing timely, actionable intelligence to law enforcement.

2008 – 2015: Lost and struggling

Although the financial crisis started slowly, it truly reached crisis-levels in 2008 with the collapse of Bear Stearns, Lehman Brothers, Washington Mutual, Wachovia, and others.

The seven-year period after the financial crisis saw the emergence of two major trends in the financial crimes space. The first of these two trends was an ever-increasing growth of penalties for BSA, AML, and sanctions violations and the first cases brought against individuals, including BSA officers.

This stage of the BSA saw penalties rising into the *billions* of dollars.

Between 2009 and 2015 there were over 20 major financial crimes cases against financial institutions and officers, with massive penalties imposed for OFAC-related "stripping" violations (11 cases totaling more than \$14.5 billion in penalties), and for BSA program and AML violations (10 cases totaling more than \$4.4 billion in penalties).

The second trend was rising regulatory expectations, notably the OCC's "minimum standards" for large banks' risk governance programs, which took effect in November 2014. These were first referenced in the OCC's July 2010 memorandum referring to "heightened expectations." Those "heightened expectations" became "heightened standards" in the proposed guidelines (published in January 2013), which became minimum standards in the final guidelines the following year.

2016 – Present: Getting back on track

In the last few years, the financial crimes risk management industry realized that it cannot continue to spend massive amounts of money on developing programs, filing reports of dubious value to law enforcement, and paying fines and penalties. Nor could it avoid certain higher-risk products, services, customer classes, or geographies (often referred to as "de-risking"; most institutions actually practice "pre-risking," or *not* offering certain products, *not* banking certain classes of customers, or *not* entering certain jurisdictions).

Coming Full Circle: Goals for the Future of the BSA

I, and many others, believe that providing timely and actionable intelligence to law enforcement is critical to the successful prevention of illicit activity. Of course, as outlined in the FFIEC manual, a sound BSA/AML compliance program provides the necessary foundation for providing that intelligence.

With that in mind, a first step in reforming the BSA/AML regime in the United States may be changing the language of the Manual itself. I propose that the language is changed from "a sound BSA/AML compliance program is critical in deterring



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and preventing these types of activities at, or through, banks and other financial institutions..." to **providing timely and actionable intelligence to law enforcement is critical** in deterring and preventing these types of activities at, or through, banks and other financial institutions, and a sound BSA/AML compliance program provides the foundation for the ability to provide that intelligence."

The change is subtle but important as it strengthens and focuses the very purpose of the BSA.

Providing actionable, timely intelligence to law enforcement, while maintaining sound but rational programs, should be the new goal — and the rise of fintech and regtech solutions are key to doing so.

Having the ability to look at more internal and external information, for multiple purposes (fraud detection, AML, and sanctions), and share that information both across private sector groups and with the public sector, will allow us to get back to why the BSA was created almost fifty years ago — to provide reports or records that have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, and, since 9/11, in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism.

We've entered an exciting and dynamic time!



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About Jim Richards



Jim Richards is a Senior Advisor to Verafin Inc., the leading provider of fraud detection and BSA/AML collaboration software for financial institutions in North America. Jim is also the principal and founder of RegTech Consulting LLC, focused on developing the next generation of financial crimes technologies and professionals, and providing strategic advice on all aspects of financial crimes risk management.

Prior to founding RegTech Consulting, Jim worked for almost 13 years at Wells Fargo & Co. as the BSA Officer and Global Head of Financial Crimes Risk Management. Prior to Wells Fargo and back to the late 1990s, Jim developed and ran BSA/AML programs at BankBoston and FleetBoston, which became part of Bank of America in 2003. Jim was a founding member of the Association of Certified Anti-Money Laundering Specialists (ACAMS) Advisory Board, a three-time member of the Treasury Department's BSA Advisory Group (BSAAG), and is the author of *Transnational Criminal Organizations, Cybercrime, and Money Laundering* (CRC Press 1998).