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EXECUTIVE LIABILITY FOR ANTI-MONEY-LAUNDERING CONTROLS

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In March 2015, the New York State Department of Financial Services (DFS) entered into a consent order with a major German bank (with New York affiliate branches), Commerzbank AG, regarding that bank's violations of state and federal anti-money-laundering (AML) laws.[1] And Commerzbank has now paid $1.45 billion to the U.S. government to settle the allegations that it improperly facilitated business for Iran, Sudan, Cuba, and Myanmar, and "abetted a multibillion-dollar securities fraud" for a Japanese company.[2]

The Commerzbank case is just one of several in a recent spate of international money laundering scandals.[3] These cases have prompted regulators to question the effectiveness of existing money laundering controls and provoked thought about the optimal design of AML regulation. This Essay considers one recent proposal for bolstering the existing AML regime. In particular, the Essay considers the merits of a February 2015 proposal by the former superintendent of New York State's Department of Financial Services, Benjamin Lawsky, to increase senior executives' personal responsibility for a financial institution's AML controls.[4]

In a broad sense, the Essay endorses more robust individual accountability for AML compliance. The specter of personal liability would

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1. See Consent Order Under New York Banking Law §§ 39, 44, at 1, In the Matter of Commerzbank AG (N.Y. Dep't. of Fin. Servs., Mar. 12, 2015), http://www.dfs.ny.gov/about/ea/ea150312.pdf [http://perma.cc/H2JL-KV5D] (stating Commerzbank is "major international banking institution with . . . assets exceeding $670 billion"); Press Release, Dep't of Fin. Servs., NYDFS Announces Commerzbank to Pay $1.45 Billion, Terminate Employees, Install Independent Monitor for Banking Law Violations (Mar. 12, 2015), http://www.dfs.ny.gov/about/press2015/pr1503121.htm [http://perma.cc/3UR4-TD24] ("Commerzbank turned a blind eye to its anti-money laundering compliance responsibilities." (internal quotation marks omitted)).

2. Samuel Rubenfeld & Eyk Henning, Commerzbank Settles U.S. Allegations of Sanctions, Money-Laundering Violations, Wall St. J. (Mar. 12, 2015), http://www.wsj.com/articles/commerzbank-to-settle-u-s-allegations-of-sanctions-and-money-laundering-violations-1426177346 (on file with the *Columbia Law Review*).

3. See infra section I.B (discussing recent money laundering scandals).

4. Benjamin Lawsky, Superintendent, N.Y. Dep't. of Fin. Servs., Remarks on Financial Regulation in New York City at Columbia Law School (Feb. 25, 2015), http://www.dfs.ny.gov/about/speeches/sp150225.htm [http://perma.cc/Z89X-26YJ] (describing proposal).

likely force executives to devote more attention to the design and maintenance of an institution's AML program. At the same time, however, the Essay stops short of a full-hearted embrace of traditional legal tools for executive liability. A world in which executives are held liable for AML failures could also lead to socially and economically undesirable results. It could, as recent history has shown, encourage institutions to take more than an optimal level of care, reducing access to banking services in certain communities or infringing on other privacy interests in the process. For those reasons, the Essay suggests that industry-generated liability—in the form of privately set standards—could be equally if not more effective than liability imposed by regulatory fiat or enforcement, of the kind that Lawsky suggested.

The Essay proceeds in three parts. Part I briefly discusses the problem of international money laundering in globally active financial institutions and provides an overview of the existing AML regime. Part II explores the tools available for increasing executive liability in the AML arena: by adding certification requirements, increasing agency enforcement, or pressing the issue as a matter of corporate governance through shareholder suits. Part III then discusses the potential challenges and downsides to certification, enforcement, or litigation. Ultimately, Part III suggests that a more efficient and effective regulatory outcome could be achieved if the private market developed and then adopted standards by which financial firm executives are held liable, by the institutions themselves, for AML failures.

I. MONEY LAUNDERING AND AML COMPLIANCE

This Part illustrates a regulatory puzzle: Despite a robust effort to prevent money laundering through a comprehensive regulatory regime, instances of money laundering still continue to surface in some of the largest, most complex, and sophisticated global banks.

A. *Regulating Money Laundering Controls*

There is no question that preventing money laundering is a high priority for regulators in the United States and abroad.[5] Indeed, major financial economies like the United States and the European Union have taken a strongly prophylactic approach to preventing money laundering in banks. Regulators in these jurisdictions impose significant screening,

5. See, e.g., Bruce Zagaris, The Merging of the Anti-Money Laundering and Counter-Terrorism Financial Enforcement Regimes After September 11, 2001, 22 Berkeley J. Int'l L. 123, 123–30 (2004) (discussing AML regime in United States); James M. Lord, Department of Justice (DOJ) Announces that Anti-Money Laundering Enforcement Is a Top Priority, Nat'l L. Rev. (Mar. 20, 2015), http://www.natlawreview.com/article/department-justice-doj-announces-anti-money-laundering-enforcement-top-priority [http://perma.cc/6V2Y-EQQG] (noting remarks of top DOJ officials describing importance of AML enforcement).

filtering, and reporting requirements on financial institutions with respect to potentially illicit deposits and transfers.[6]

These prevention-oriented AML laws generally require firms to perform two compliance functions: reporting and due diligence. In the United States, for example, the Bank Secrecy Act (BSA) requires financial institutions to screen for and report transactions over a certain dollar amount ($10,000) as well as other "suspicious" transactions.[7] Institutions must also conduct adequate due diligence on their customers. These due diligence rules, often referred to as "Know Your Customer" (KYC),[8] are designed to prevent banks from dealing with illicit funds or "Specially Designated Nationals"—persons or entities whom the Treasury Department's Office of Foreign Asset Control (OFAC) has identified as terrorists, narcotics traffickers, or otherwise sanctioned parties.[9]

A similar prevention-oriented approach to money laundering exists on the international level, where a transnational regulatory body, the Financial Action Task Force (FATF), establishes AML rules for various global financial institutions. In its most recent set of recommendations, issued in February 2012, the FATF endorsed a "risk-based" approach to international money laundering, in which member countries are encouraged to require their financial institutions to undertake comprehensive customer due diligence, prohibit anonymous or fictitiously named accounts, and maintain comprehensive records on all domestic and international transactions.[10]

Yet notwithstanding these regulatory efforts to ensure that banks filter and monitor transactions, banks still remain vulnerable to (or com-

6. See infra note 7; see also Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering or Terrorist Financing, 2015 O.J. (L 141) 73, at ¶3–4, 37, 43, 44, 59 ("address[ing] threat of money laundering" in European Union); U.K. Fin. Conduct Auth., Anti-Money Laundering Annual Report 2013/14, at 11 (2014), https://www.fca.org.uk/static/documents/corporate/anti-money-laundering-annual-report-13-14.pdf [https://perma.cc/Z3C8-WQLD] (discussing AML regulations and FCA's supervisory role).

7. See The Currency and Foreign Transactions Reporting Act (Bank Secrecy Act) of 1970, Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified as amended in scattered sections of 12, 18, & 31 U.S.C.); see also 31 C.F.R. ch. X (2015) (detailing BSA implementing regulations); 31 C.F.R. ch. I, pt. 103 (2010) (same); FinCEN's Mandate from Congress: "Bank Secrecy Act," FinCEN, https://www.fincen.gov/statutes_regs/bsa/ [https://perma.cc/AH9R-ST5N] (last visited Dec. 24, 2015) (providing overview of BSA framework).

8. See PWC, Know Your Customer: Quick Reference Guide (2015), http://www.pwc.com/gx/en/financial-services/publications/assets/pwc-anti-money-laundering-2015.pdf [https://perma.cc/JL6L-WMDL] (providing overview of KYC rules worldwide).

9. See U.S. Dep't of Treasury, Specially Designated Nationals List, http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx [http://perma.cc/Y4LP-9ACN] (last updated Oct. 20, 2015) (describing SDN list).

10. See FATF, International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation 14–15 (2012), http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf [http://perma.cc/6BRK-5DE4] (setting forth FATF recommendations).

plicit in) money laundering.[11]

B. *When Compliance Fails*

Money laundering is pervasive in the global financial markets. By some estimates, laundered money accounts for 2% to 5% of global GDP, totaling somewhere between $800 billion and $2 trillion.[12] Global banks play a key role.

Though certainly not an exhaustive list, a few of these AML cases are instructive. In one 2012 case, the British bank HSBC agreed to forfeit $1.256 billion for violations of U.S. anti-money laundering-related laws to (and entered into a deferred prosecution agreement with) the U.S. Department of Justice (DOJ).[13] Among other deficiencies, a congressional investigation found that the HSBC affiliate in the United States—HBUS—"should have . . . treat[ed] [the HSBC affiliate in Mexico] as a high risk correspondent client subject to enhanced due diligence and monitoring" given that Mexico was "under siege from drug crime, violence, and money laundering."[14] Reportedly, these serious AML deficiencies persisted for years and were known to the HSBC Group.[15] The HSBC case, perhaps well known, "wasn't the first or last bank money-laundering scandal."[16]

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11. See Holding Individuals Accountable and Deterring Money Laundering Act, H.R. 3317, 113th Cong. 3 (2013) (introduced in House) (proposing increased civil penalties for violations of money laundering laws); U.S. Dep't. of Treasury, National Money Laundering Risk Assessment 2015, at 2 (2015), http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/National%20Money%20Laundering%20Risk%20Assessment%20%E2%80%93%2006-12-2015.pdf [http://perma.cc/C68Z-4G9Q] (estimating $300 billion is laundered annually in United States despite stringent regulations).

12. Money-Laundering and Globalization, U.N. Office on Drugs & Crime, https://www.unodc.org/unodc/en/money-laundering/globalization.html [https://perma.cc/9CLV-Z3BV] (last visited Nov. 1, 2015).

13. Press Release, U.S. Dep't of Justice, HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement (Dec. 11, 2012), http://www.justice.gov/opa/pr/hsbc-holdings-plc-and-hsbc-bank-usa-na-admit-anti-money-laundering-and-sanctions-violations [http://perma.cc/G4WB-BBY6].

14. Staff of Senate Permanent Subcomm. on Investigations, Comm. on Homeland Security & Governmental Affairs, 112th Cong., U.S. Vulnerabilities to Money Laundering, Drugs, and Terrorist Financing: HSBC Case History 4 (2012), http://www.hsgac.senate.gov/download/report-us-vulnerabilities-to-money-laundering-drugs-and-terrorist-financing-hsbc-case-history (on file with the *Columbia Law Review*).

15. Id. at 5. One whistleblower has even alleged that HSBC's compliance problems have not yet been resolved, and its complicity in laundering money continues to this day. Whistleblower Believes HSBC Still Money-Laundering, WND (Feb. 22, 2015, 3:01 PM), http://www.wnd.com/2015/02/whistleblower-believes-hsbc-still-money-laundering/ [http://perma.cc/2VT6-XJSQ].

16. Jon Burnett, Awash in Cash, Drug Cartels Rely on Big Banks to Launder Profits, NPR: Parallels (Mar. 20, 2014, 3:39 PM), http://www.npr.org/blogs/parallels/2014/03/20/291934724/awash-in-cash-drug-cartels-rely-on-big-banks-to-launder-profits (on file with the *Columbia Law Review*) (describing money laundering scandals involving Wachovia Bank

In another significant case, the British bank Standard Chartered entered into (and extended) a deferred prosecution agreement in connection with billions of dollars of transactions on behalf of prohibited foreign entities,[17] including Iranian banks and corporations.[18] And just this year, in 2015, several global banks have come under investigation for possible involvement in laundering funds that were associated with the bribery of FIFA officials.[19] The DOJ also, this year, opened an investigation into Deutsche Bank for its possible involvement in laundering funds on behalf of some of its Russian clients, possibly to "skirt U.S. sanctions law."[20]

These cases, and others like them, beg the question of what is missing from the AML regime. To be sure, there is no shortage of *rules* requiring financial institutions to monitor and report suspicious transactions. According to some regulators, like Lawsky, the problem is one of enforcement—that regulators lack the resources to monitor banks' compliance with these regulatory requirements and, as a consequence, systems remain faulty or inadequate, or worse, bank managers choose to be willfully blind to obvious red flags.[21]

In theory, placing responsibility squarely on financial-firm executives could go a long way in compensating for these resource limitations by better incentivizing banks to self-monitor and enforce the AML regime. For one, increased liability could motivate financial-firm managers to

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and Bank of America). Also in 2012, the money transfer company MoneyGram entered into a deferred prosecution agreement with the DOJ, in which it acknowledged responsibility for its deficient AML controls. Press Release, U.S. Dep't of Justice, Moneygram International Inc. Admits Anti-Money Laundering and Wire Fraud Violations, Forfeits $100 Million in Deferred Prosecution (Nov. 9, 2012), http://www.justice.gov/opa/pr/moneygram-international-inc-admits-anti-money-laundering-and-wire-fraud-violations-forfeits [http://perma.cc/83H7-AUXW] (criticizing Moneygram, in press statement, for "knowingly turn[ing] a blind eye to scam artists and money launderers").

17. Deferred Prosecution Agreement, United States v. Standard Chartered Bank, No. 1:12-cr-00262 (D.D.C. Dec. 10, 2012); Chad Bray, Standard Chartered Agrees to 3-Year Extension of Nonprosecution Agreements, N.Y. Times: Dealbook (Dec. 10, 2014, 4:53 AM), http://dealbook.nytimes.com/2014/12/10/standard-chartered-extends-deferred-prosecution-agreements-for-3-years/?_r=0 [http://perma.cc/B3ZW-QR2E].

18. Jessica Silver-Greenberg, Regulator Says British Bank Helped Iran Hide Deals, N.Y. Times (Aug. 6, 2012), http://www.nytimes.com/2012/08/07/business/standard-chartered-bank-accused-of-hiding-transactions-with-iranians.html (on file with the *Columbia Law Review*).

19. Christopher M. Matthews & Rachel Louise Ensign, U.S. Authorities Probe Banks' Handling of FIFA Funds, Wall St. J. (July 23, 2015, 6:42 PM), http://www.wsj.com/articles/u-s-authorities-probe-banks-handling-of-fifa-funds-1437682616 (on file with the *Columbia Law Review*).

20. See Keri Geiger & Greg Farrell, DOJ Said to Probe Deutsche Bank on Russia Mirror Trades, Bloomberg (Aug. 3, 2015, 2:23 PM), http://www.bloomberg.com/news/articles/2015-08-03/deutsche-bank-said-to-be-probed-by-doj-on-russia-mirror-trades [http://perma.cc/37UD-S5J2].

21. See Lawsky, supra note 4 (discussing potential problems with existing transaction monitoring and filtering systems).

invest greater resources, energy, and attention to the institution's AML compliance and to remain alert to the ways in which the institution remains vulnerable to money laundering. And, of course, direct liability removes the incentives (to the extent they exist) for executives to remain willfully blind to questionable financial activity.[22]

But in practice, there are significant challenges to individual liability regimes.[23] Part II discusses three existing models for individual liability for firm compliance and exposes the difficulties of expanding these models to the AML context.

II. The State of Liability

This Part turns to the various paths that regulators or shareholders could take to increase financial firm executives' liability for the compliance function of the firm. Such a path has several conceptual virtues from the perspective of social and economic welfare: Liability can motivate executives to expend a greater proportion of their limited resources on the development and maintenance of a robust, innovative, and agile compliance function. In doing so, liability should, in theory, more closely align these managers' interests in AML compliance with those of the firm in reducing the reputational and financial losses associated with AML

22. As Lawsky suggested with his proposal, the government does not have the resources to comprehensively and proactively monitor compliance with AML laws. Ian McKendry, Lawsky AML Proposal May Scare Off Compliance Talent, Industry Warns, Am. Banker (Mar. 9, 2015), http://www.americanbanker.com/news/law-regulation/lawsky-aml-proposal-may-scare-off-compliance-talent-industry-warns-1073134-1.html (on file with the *Columbia Law Review*). These regulatory gaps inhibit regulators' ability to detect financial misconduct, like fraud, in complex and innovative financial environments. See Christina Parajon Skinner, Whistleblowers and Financial Innovation, 94 N.C. L. Rev. (forthcoming 2016) (manuscript at 6–16) (on file with the *Columbia Law Review*). For this reason, complementarity style supervision can be an effective way to reduce certain kinds of financial misconduct by improving the compliance function of banks on an industry-wide basis. Christina Parajon Skinner, Misconduct Risk, 94 Fordham L. Rev. (forthcoming 2016) (manuscript at 44–54) (on file with the *Columbia Law Review*).

23. Perhaps because of these significant hurdles, individual liability has, to date, been a scantly used tool in the AML context. See Elkan Abramowitz & Jonathan Sack, Bank Secrecy Act Prosecutions: Why Few Individuals Are Charged, N.Y. L.J. (Sept. 2, 2014), http://www.newyorklawjournal.com/id=1202668542243/Bank-Secrecy-Act-Why-Few-Individuals-Are-Charged (on file with the *Columbia Law Review*) ("[I]n essence, the BSA imposes obligations on organizations to take certain actions, rather than prohibiting individuals from taking certain actions."). When announcing a 2014 Deferred Prosecution Agreement with J.P. Morgan, the U.S. Attorney for the Southern District of New York, Preet Bharara, made clear that "'[t]he BSA is a law that requires financial institutions—*as institutions*—to establish and maintain effective [AML] programs and to know their customers . . . . Today's charges have been filed because, in this regard, JPMorgan—*as an institution*—failed and failed miserably.'" Matthew Schwartz, Why Banks, Not Executives, Are Prosecuted, Corp. Counsel (Apr. 27, 2015), http://www.corpcounsel.com/id=1202724641665/Why-Banks-Not-Executives-Are-Prosecuted (on file with the *Columbia Law Review*). He further stated, "'Institutions, not just individuals, have an obligation to follow the law and to police themselves.'" Id.

failures. From an economic perspective, then, executive liability could likely force a firm's key decisionmakers—its managers—to more fully internalize the costs of an institution's AML failures.

Starting from this premise—that more individual responsibility is, in theory, desirable—this Part explores three existing models for executive liability in the compliance arena. In doing so, Part II illustrates that, in practice, there are significant costs and challenges that would accompany increased individual liability for AML compliance.

A. *Control Certification*

One seemingly straightforward way to increase executive responsibility for AML controls is to require these managers to certify their adequacy. Indeed, a control certification regime was precisely what Lawsky had in mind. In his remarks at Columbia Law School in February 2015, Lawsky specifically explained that "since we [DFS] cannot simultaneously audit every institution, we are also considering making senior executives personally attest to the adequacy and robustness of those systems."[24]

Certification requirements have been used to this end before. Congress added a similar certification requirement in the Sarbanes-Oxley Act of 2002 (SOX), which responded to the Enron and WorldCom corporate accounting scandals in the early 2000s.[25] To address those failures, SOX imposed, among other things, a requirement that corporate CEOs and CFOs certify that there are no material misstatements in their firm's financial statements.[26] Closely related, SOX section 404 imposes requirements related to the "controls" in place to avoid financial misreporting.[27] In particular, section 404 requires management each year to provide an "internal control report" that (1) states management's responsibility for "establishing and maintaining an adequate internal control structure and procedures for financial reporting" and (2) provides an assessment "of

24. Lawsky, supra note 4. Lawsky's proposal reflects a similar piece of legislation introduced, but rejected, in the U.S. House of Representatives in 2012. See Holding Individuals Accountable and Deterring Money Laundering Act, H.R. 3317, 113th Cong. 3 (2013) (introduced in House).

25. Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745 (codified as amended in scattered statutes of 15, 18, 28 & 29 U.S.C.); 17 C.F.R. § 228 et seq., Certification and Disclosure of Companies' Quarterly and Annual Reports, U.S. Sec. Exch. Comm'n, http://www.sec.gov/rules/final/33-8124.htm [http://perma.cc/AHC4-7KDE] (U.S. Securities Exchange Commission implementing regulation).

26. See Sarbanes-Oxley Act § 302; Tim J. Leech, Sarbanes-Oxley 302 and 304, A White Paper Proposing Practical, Cost Effective Compliance Strategies 5, 8–10 (2003), https://www.sec.gov/rules/proposed/s74002/card941503.pdf [http://perma.cc/7CZ2-VUNS] (describing disclosure requirements imposed on executives and auditors).

27. Id. at 11.

the effectiveness of the internal control structure and procedures . . . for financial reporting."[28]

Today it remains unclear, however, whether the SOX certification regime has served its intended purpose of restoring public confidence in the accuracy of corporate financial statements.[29] After all, as some commentators point out, "The recent global financial crisis, unequivocally the most damaging wave of unreliable financial reporting in world history, materialized more than five years after the hugely expensive Sarbanes-Oxley Act was enacted."[30] These commentators have criticized SOX's "control-centric" approach, which overlooks the more critical problem of risk assessment and risk management.[31] As such, one concern with an AML certification approach is whether the additional costs (SOX's section 404 costs firms billions for compliance each year) could be justified in light of certification's questionable ability to reduce compliance failures.[32]

B. *Agency Enforcement*

A second path to increasing individual liability is through agency enforcement action. The Treasury Department has, for example, very recently begun to pursue cases against individuals for violation of the Bank Secrecy Act. Agency interpretation of the BSA to include individual liability could thus be seen as an alternative to legislative or regulatory adoption of an affirmative certification requirement.

The challenge with agency action, however, lies in whether courts will uphold such federal agency interpretation. Indeed, this very question—whether individuals are liable for BSA violations—is currently being litigated in the federal courts in *United States Department of Treasury v. Haider*.[33] That case involves an agency action brought by Treasury, against

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28. Daniel O'Connor, Marko S. Zatylny & Kait Michaud, SEC Broadens Corporate Officer Liability Exposure, Bloomberg (Oct. 2, 2014), http://www.bna.com/sec-broadens-corporate-n17179895631 [http://perma.cc/7A6C-BTYA] (detailing disclosure requirements under new regulatory scheme); see also 18 U.S.C. § 1350 (2012) (setting out penalties for knowing and willful violations at maximum of ten or twenty years imprisonment, respectively).

29. See Morrison & Foerster, Client Alert SEC Requires CEO and CFO Certification of Quarterly and Annual Reports (2002), http://www.mofo.com/resources/publications/2002/09/sec-requires-ceo-and-cfo-certification-of-quarte__ [http://perma.cc/CTN7-WAJD] noting "legislative purpose behind Section 302 is to ensure that a company's CEO and CFO take a proactive role in the accuracy, quality and reliability of a company's SEC periodic reports").

30. Tim Leech & Lauren Leech, Preventing the Next Wave of Unreliable Financial Reporting: Why Congress Should Amend Section 404 of the Sarbanes-Oxley Act, 8 Int'l J. Disclosure & Governance 295, 296 (2011).

31. Id. at 297.

32. See id. at 311 (noting there has been insufficient effort to conduct a rigorous cost-benefit analysis concerning section 404).

33. No. 15-cv-1518 (D. Minn. filed Dec. 18, 2014).

the former Chief Compliance Officer of MoneyGram Inc., International, and is the first nonconsensual enforcement action brought under the BSA.[34] Treasury charged Thomas Haider with, among other things, willfully failing to maintain a comprehensive AML program in violation of 31 U.S.C. § 5218(h).[35]

In May 2015, Haider moved to dismiss that claim, arguing that the BSA does not support individual liability.[36] Haider pointed out that the BSA's statutory provisions with respect to AML controls refer to the obligations of "financial institutions," and "nowhere indicat[e] that individual officers and employees can be held liable for an institution's failure to establish a comprehensive AML program."[37] The motions were argued in October 2015, and the court has taken the matter under advisement.[38]

The *Haider* case has thus injected some uncertainty over whether agencies, like Treasury, will be successful in pushing for a more expansive understanding of the BSA, which includes individual (in additional to institutional) liability. Moreover, even if the judge in *Haider* dismisses the motion, it remains unclear whether other federal courts would agree with that court's holding, leaving the agency enforcement route unstable (and in some jurisdictions, possibly quite constrained).[39]

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34. Thomas E. Haider's Memorandum of Law in Support of His Motion to Dismiss the Complaint 1, *Haider*, No. 15-cv-1518 (D. Minn. May 5, 2015), ECF No. 38.

35. Complaint ¶ 16–22, United States Treasury v. Haider, No. 14-cv-9987 (S.D.N.Y. Dec. 18, 2014), ECF No. 1. For context, MoneyGram itself entered into a deferred prosecution agreement in November 2012, acknowledging responsibility for aiding and abetting wire fraud and failing to maintain an effective AML program. Felony Information as to Moneygram Int'l, Inc., United States v. MoneyGram Int'l, Inc. No. 1:12-cr-291 (M.D. Pa. Nov. 9, 2012), ECF No. 1; Deferred Prosecution Agreement as to Moneygram Int'l, Inc., *Moneygram*, No. 1:12-cr-291 (M.D. Pa. Nov. 9, 2012), ECF No. 3.

36. Defendant Thomas E. Haider's Motion to Dismiss the Complaint, *Haider,* No. 15-cv-1518 (D. Minn. May 5, 2015), ECF No. 36.

37. Thomas E. Haider's Memorandum of Law in Support of His Motion to Dismiss the Complaint, supra note 34, at 13–14. Haider leveled several other arguments. For example, he also refers the court to sections of the USA Patriot Act, which amended the BSA. There again, the relevant statutory provisions refer to the requirements imposed on institutions, not individuals, which view the legislative history also supports. Id. at 15–16. He also argues that the relevant Treasury Regulations, implementing the BSA, are to the same effect: 31 C.F.R. § 1010.820(a) provides for individual liability for record keeping, bulk cash smuggling, and structuring violations, but it does not set out individual liability for failure to set up sufficient AML controls. Motion to Dismiss, supra, at 19–20.

38. See Minute Entry, *Haider*, No. 15-cv-1518 (S.D.N.Y. Oct. 23, 2015), ECD No. 58 (text-only entry noting hearing held on October 23 regarding motion to dismiss).

39. But cf. Press Release, SEC, Investment Advisory Firm's Former President Charged with Stealing Client Funds (June 15, 2015), http://www.sec.gov/news/pressrelease/2015-120.html [http://perma.cc/JU9L-R7J3] (announcing SEC was charging chief compliance officer of firm, individually, under Investment Advisers Act for compliance failures).

C. *Shareholder Suits*

State corporate law provides a third avenue to executive liability for compliance failure. Over the past two decades, Delaware law has expanded corporate executives' fiduciary duties into the compliance space.[40] On this score, the Delaware Chancery Court's decision in *Caremark* was foundational.[41] There, the court concluded that the duty of care includes some responsibility on the part of corporate directors for firm "oversight."[42] Specifically, the *Caremark* court held that directors have breached their fiduciary duties to the firm in cases of "a sustained or systemic failure . . . to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists."[43]

Later, in *Stone v. Ritter*, the Delaware Supreme Court elaborated on the *Caremark* duty in the context of legal violations that cause the firm loss.[44] That case involved a $50 million fine imposed on AmSouth Bancorporation for violations of the BSA.[45] Shareholders brought a derivative suit alleging that the directors had breached their fiduciary duty to ensure the firm maintained a program of compliance with the BSA.[46] The court confirmed, consistent with *Caremark*, that "[w]here directors fail to act in the face of a known duty to act . . . they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith."[47] Together, *Caremark* and *Stone* (and their progeny) have opened the door to shareholder suits for AML failures that lead to significant penalties and fines.[48]

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40. See Stephen M. Bainbridge, *Caremark* and Enterprise Risk Management, 34 J. Corp. L. 967, 979 (2009) (noting this standard is "widely followed in the Delaware Chancery Court and in other states").

41. In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996) (concluding corporate directors have fiduciary "duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may . . . render a director liable for losses caused by non-compliance"); see also Stone ex rel. AmSouth Bancorporation v. Ritter, 911 A.2d 362, 369–70 (Del. 2006) (approving *Caremark* standard and conceptualizing director oversight liability as extension of "fiduciary duty . . . of loyalty"); Miller v. McDonald (In re World Health Alternatives, Inc.) 369 B.R. 805 (Bankr. Del. 2007) (extending *Caremark* claims to officers).

42. *Caremark*, 698 A.2d at 971 (creating "demanding test of liability" under which "lack of good faith [must be] evidenced by sustained or systematic failure of a director to exercise reasonable oversight"); see also In re SAIC Inc. Derivative Litig., 948 F. Supp. 2d 366 (S.D.N.Y. 2013) (synthesizing recent cases "clarif[ying] the relationship among good faith, loyalty, and *Caremark* claims").

43. *Caremark*, 698 A.2d at 971.

44. Stone v. Ritter, 911 A.2d 362 (Del. 2006).

45. Id. at 365.

46. Stone v. Ritter, No. Civ.A 1570-N, 2006 WL 302558, at *1 (Del. Ch. Jan. 26, 2006).

47. *Stone*, 911 A.2d at 370.

48. See, e.g., *Miller*, 369 B.R. at 805.

That being said, this aperture may be more hypothetical than real. The *Stone* court narrowed, in some ways, the scope of possible *Caremark* claims by adding a bad-faith standard: Directors (and officers) will only be held liable under *Caremark* if they "utterly failed to implement any reporting or information systems or controls," or having done so, "consciously failed to monitor or oversee its operations."[49] And indeed, *Caremark* itself made plain that a failure-to-monitor claim is "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment."[50]

D. *Liability Externalities*

Even setting aside the various challenges that attend the existing liability models, significant externalities would likely arise from an expanded liability framework. In particular, increasing individual liability would be quite likely to prompt financial institutions to take more than the socially optimal level of care. Already, the regulatory regime is substantial and complex. There are currently as many as thirty different lists of sanctioned or high-risk parties from various jurisdictions with over 30,000 names of entities and individuals,[51] making compliance "one of the most difficult and costly challenges confronting banks" today.[52]

To avoid mistake, oversight, and accompanying regulatory scrutiny, banks have adopted "derisking" strategies.[53] Derisking involves the shedding of entire business types or client bases that could potentially draw heightened regulatory scrutiny—like online lenders and money services businesses.[54] In short, rather than run the risk of banking a potentially illicit client (but failing to catch the problem), banks refuse to deal with

49. *Stone*, 911 A.2d at 370.

50. 698 A.2d at 967; see also In re Citigroup Inc. Shareholder Deriv. Litig., 964 A.2d 106, 123–24 (Del. Ch. 2009) (declining to extend *Caremark* to board's failure to monitor excessive risk-taking of employees).

51. Luc Meurant, Financial Crime Compliance: The Case for an Industrywide Approach, Am. Banker (Aug. 18, 2014), http://www.americanbanker.com/bankthink/financial-crime-compliance-the-case-for-an-industrywide-approach-1069406-1.html (on file with the *Columbia Law Review*).

52. Id.

53. See, e.g., Amber D. Scott, If Banks Can't Solve the Derisking Dilemma, Maybe the Government Will, Am. Banker (Apr. 20, 2015), http://www.americanbanker.com/bankthink/if-banks-cant-solve-the-derisking-dilemma-maybe-the-government-will-1073858-1.html (on file with the *Columbia Law Review*) (discussing tension between regulators imposing significant requirements for AML compliance and, at the same time, urging banks not to "derisk").

54. Ian McKendry, Banks Face No-Win Scenario on AML 'De-Risking,' Am. Banker (Nov. 17, 2014), http://www.americanbanker.com/news/regulation-reform/banks-face-no-win-scenario-on-aml-de-risking-1071271-1.html (on file with the *Columbia Law Review*) [hereinafter McKendry, No-Win Scenario]. As Julie Copeland, general counsel for J.P. Morgan, told the American Banker, "[F]inancial institutions [can't] take their own risk of not making that determination to de-risk" given the impact of enforcement actions on an institution, its reputation, and its shareholders. Id.

certain clients at all.[55] Naturally, this blanket approach has left numerous legitimate businesses and clients without access to banking services.[56] For some, this has meant an inability to access much-needed remittances from abroad.[57] In other cases, it may mean that illegitimate actors will simply funnel illicit funds to smaller banks that are ill-equipped to detect the source for some time.[58]

There is also some suggestion that customer privacy has been deprioritized in banks' efforts to comply with the vast AML regime. At a recent conference of AML specialists, the point was raised about whether AML compliance—shifting through transaction details and customer profiles, and potentially sharing that information with regulators—might run afoul of data privacy.[59] The response was simply that the penalty for infringing on data would be far less severe than an AML breach, implying that violating the former was preferable to the latter.[60] With enforcement authorities on high alert for money laundering lapses, financial institutions' compliance officers are understandably concerned about avoiding regulatory investigation or action, which may prompt them to sacrifice other aspects of consumer privacy and protection.[61]

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55. See id. (explaining de-risking).

56. See, e.g., Amber D. Scott, Who Wins the Derisking Shell Game? Bad Guys, Mostly, Am. Banker (Mar. 31, 2015), http://www.americanbanker.com/bankthink/who-wins-the-derisking-shell-game-bad-guys-mostly-1073512-1.html (on file with the *Columbia Law Review*) ("The unintended consequences of the derisking phenomenon include strained remittance corridors and frustration for legal businesses struggling to get by without reliable banking services."); Sheila Tendy, De-Risking Threatens Religious Access to Banking Services, Am. Banker (Jan. 27, 2015), http://www.americanbanker.com/bankthink/de-risking-threatens-religious-access-to-banking-services-1072363-1.html (on file with the *Columbia Law Review*) (explaining faith-based organizations within United States have been affected by account closures).

57. See Lanier Saperstein & Geoffrey Sant, Account Closed: How Bank 'De-Risking' Hurts Legitimate Customers, Wall St. J. (Aug. 12, 2015, 6:38 PM), http://www.wsj.com/articles/account-closed-how-bank-de-risking-hurts-legitimate-customers-1439419093 (on file with the *Columbia Law Review*) (illustrating effect of derisking on remittances and money transfers to certain high-risk countries).

58. McKendry, No-Win Scenario, supra note 54 (quoting Bank Secrecy Act officer at Wells Fargo); see also Scott, supra note 53 (noting significant burdens felt by "community banks and credit unions" in providing services while following regulations).

59. See Michelle Frasher, Data Privacy and AML Rules on a Transatlantic Collision Course, Am. Banker (Aug. 27, 2015), http://www.americanbanker.com/bankthink/data-privacy-and-aml-rules-on-a-transatlantic-collision-course-1076361-1.html (on file with the *Columbia Law Review*) (quoting panelist who suggested fellow panelist's use of data "might get [him] a 5% global fine").

60. Id.

61. See Ben DiPietro, SEC Actions Stir Concerns over Compliance Officer Liability, Wall St. J. (June 24, 2015), http://blogs.wsj.com/riskandcompliance/2015/06/24/sec-actions-stir-concerns-over-compliance-officer-liability (on file with the *Columbia Law Review*) (discussing concern liability for compliance officers will encourage them to distance themselves from firms' compliance policies and procedures).

It is quite possible, then, that even if the various challenges of expanding certification regimes, enforcement actions, or derivative suits could be overcome, the costs of doing so may be too substantial to justify. One alternative possibility, explored in Part III, is for the private market to develop standards of executive accountability, which financial institutions could then voluntarily adopt and self-enforce.[62]

III. LIABILITY AS A PRIVATE STANDARD

This Part concludes by suggesting two ways that the private market could develop, internal to the industry, quality standards for AML compliance that could serve a similar, yet less costly, role as traditional forms of executive liability.

A. *Compliance "Labeling"*

In recent years, scholars have begun to turn their attention to the role of private regulators in certain traditionally state-regulated industries.[63] These academics and political theorists have discussed how private groups can step in to fill certain "shortcomings of the regulatory state as a global regulator."[64] In a transnational commercial context specifically, there is a robust and growing literature on "transnational private regulation" (TPR) that discusses how private groups have been successful in setting quality (or commercial) standards in various fast-changing industries that deal with complex regulatory problems.[65] The theory behind TPR is that industry-specific private interest groups create norms or

62. See Abramowitz & Sack, supra note 23 (describing actions HSBC took against its executives after its money laundering problems).

63. See, e.g., Alexia Brunet Marks, A New Governance Regime for Food Safety Regulation, 47 Loy. U. Chi. L.J. (forthcoming 2016) (on file with the *Columbia Law Review*) (discussing private regulation in food-safety context).

64. Fabrizio Cafaggi, New Foundations of Transnational Private Regulation, 38 J.L. & Soc'y 20, 23 (2011).

65. Fabrizio Cafaggi, Andrea Renda & Rebecca Schmidt, Transnational International Private Regulation, *in* 3 OECD, Regulatory Co-Operation: Case Studies 9, 11–12 (2013), http://www.keepeek.com/Digital-Asset-Management/oecd/governance/international-regulatory-co-operation-case-studies-vol-3/transnational-private-regulation_9789264200524-3-en#page33 [http://perma.cc/E26B-4UBS] [hereinafter OECD Report on TPR] (citing "good examples of private regulation" in "markets that exhibit very fast-changing dynamics"); see also Julia Black & David Rouch, The Development of the Global Markets as Rule-Makers: Engagement and Legitimacy, 2 Law & Fin. Mkts Rev. 218, 226–27 (2008) (discussing "[m]arket standards-setting in which national or transnational groups of market participants develop standards, guidance or codes of practice for industry participants" (emphasis omitted)). See also Yves Bonzon, Public Participation and Legitimacy in the WTO 11–12 (2014) (noting "non-state actors have been involved in a variety of ways, including advocacy, participation in the decision-making process of intergovernmental organizations, public-private partnerships and private initiatives").

guidelines, which are in turn adopted and internalized by industry actors, becoming the de facto transnational standard.[66]

A few examples illustrate this phenomenon. In the financial context, private bodies have been successful in setting standards for commercial transactions. So, for example, when the International Chamber of Commerce "issues policy documents and standard contract forms" that are then adopted, nearly universally, by the international business community, that institution has effectively accomplished a harmonized, transnational standard.[67] Similarly, in the over-the-counter derivatives market, the International Swaps and Derivatives Association (ISDA) has been instrumental in standardizing swaps contracts. Several commentators have remarked on ISDA as an example of "efficiency-enhancing private industry self-regulation in today's financial markets."[68]

Outside of the financial services industry, private groups have been instrumental in setting standards for quality. In the food-safety context, for example, private bodies have created specialized food labels that reflect certain *heightened* food quality standards, like sustainably farmed, non-GMO, organic, or cage-free.[69] Such privately created standards for food quality have, in many cases, created a race to the top among food suppliers and grocery store chains (like Whole Foods), and thus prompted business in this industry to compete for consumers on the basis of these extra-regulatory quality standards.[70]

Private groups could play a similar role in setting quality standards for AML compliance. Certain industry self-regulatory organizations are already well positioned to develop such compliance quality standards,

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66. Cafaggi, supra note 64, at 32–38.

67. See Anne Peters, Till Förster & Lucy Koechlin, Towards Non-State Actors as Effective, Legitimate, and Accountable Standard Setters, *in* Non-State Actors as Standard Setters 492, 500 (Anne Peters et al. eds., 2009) (describing private groups dedicated to creating soft-law norms, which, once internalized by private market actors, become de facto transnational law or practice in field); see also OECD Report on TPR, supra note 65, at 15 (noting TPR is generally limited to voluntary standards, drawn from private law).

68. Saule Omarova, Wall Street as Community of Fate: Toward Financial Industry Self-Regulation, 159 U. Pa. L. Rev. 411, 444 (2011); see also Gabriel V. Rauterberg & Andrew Verstein, Assessing Transnational Private Regulation of the OTC Derivatives Market: ISDA, the BBA, and the Future of Financial Reform, 54 Va. J. Int'l L. 9, 13 (2013) (identifying ISDA as "critical in generating the infrastructure that has ordered transactions in the OTC derivatives markets for much of the last two decades—an infrastructure that provides the multiple economic benefits of liquidity, certainty, and reduced transaction costs").

69. See, e.g., Kosher Certification as a Model of Private Regulation, Nat'l Ctr. for Policy Analysis (Oct. 2, 2013), http://www.ncpa.org/sub/dpd/index.php?Article_ID=23659 [http://perma.cc/JL9Q-8N4U] (discussing Kosher private labeling); A.C. Gallo, Three-Month Update on GMO Labeling, Whole Foods: Whole Story (June 18, 2013), http://www.wholefoodsmarket.com/blog/three-month-update-gmo-labeling [http://perma.cc/BY8R-C4SM] (noting products in Whole Foods stores "must be labeled to indicate whether they contain genetically modified organisms (GMOs)" and labels should be "based on standards created by multiple stakeholders").

70. See Marks, supra note 63, at 25–26.

which could be adopted on an industry-wide basis. In the United States, the Financial Industry Regulatory Authority (FINRA) is a private organization that regulates financial firms.[71] The SEC oversees FINRA, technically, but on a day-to-day basis FINRA is largely autonomous. And FINRA already addresses money laundering in its Rule 3310, which sets minimum standards for a firm's AML compliance program.[72] As such, FINRA could, for example, amend that AML rule to require or recommend that institutions adopt internal forms of executive liability for AML compliance. Indeed, FINRA already seems headed down this path: In 2014, it fined and suspended the Global AML Compliance Officer of Brown Brothers Harriman & Co. in connection with that firm's "substantial anti-money laundering compliance failures."[73]

But even beyond these reactive (enforcement-oriented) FINRA actions, that organization could also work to develop compliance quality "labels" that would reflect the robustness of an institution's AML compliance—including whether that institution has policies in place for holding top management liable for compliance failures. If, for example, a financial institution committed to clawing back executive compensation or removing an executive from office completely in the event of an AML failure, that institution could become eligible for an AML quality label, which might be featured on the institution's website and shared with its investors. A private labeling system could force banks to start competing on this type of compliance quality dimension, which could, in turn, achieve results that are similar to traditional liability models but with fewer costs and externalities.

B. *Corporate "Compliance" Responsibility*

Similarly, corporations could be motivated to adopt internal liability rules by the forces of international business transactions. The corporate policy changes brought about by the Corporate Social Responsibility (CSR) movement provide an example of how this could be done.

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71. See Firms We Regulate, FINRA, http://www.finra.org/about/firms-we-regulate [http://perma.cc/RKH8-QT8J] (last visited Nov. 6, 2015) (providing list of firms regulated by FINRA); What We Do, FINRA, http://www.finra.org/about/what-we-do [http://perma.cc/5Q3B-LC9T] (last visited Oct. 31, 2015) ("FINRA's mission is to safeguard the investing public against fraud and bad practices. We pursue that mission by writing and enforcing rules and regulations for every single brokerage firm and broker in the United States.").

72. See FINRA, Rule 3310, Anti-Money Laundering Compliance Program, http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=8656 [http://perma.cc/YQM4-74HJ] (last visited Nov. 6, 2015) (requiring firms to develop internal programs against money laundering and to conduct independent testing of said programs).

73. Press Release, FINRA, FINRA Fines Brown Brothers Harriman a Record $8 Million for Substantial Anti-Money Laundering Compliance Failures (Feb. 5, 2014), https://www.finra.org/newsroom/2014/finra-fines-brown-brothers-harriman-record-8-million-substantial-anti-money-laundering [https://perma.cc/TY5E-46NE].

CSR principles, commonly referred to as the "Ruggie Principles," are a set of soft norms concerning the human rights obligations and social responsibilities of transnational corporations. These rules are embodied in the U.N.'s *Guiding Principles on Business and Human Rights*, which were the product of an effort spearheaded by the United Nation's Secretary-General's Special Representative for Business and Human Rights, John Ruggie.[74] In the past few years, many large multinational corporations have voluntarily adopted the Ruggie Principles.[75] With increasing adoption and advertisement, consumers have become more aware of the Ruggie Principles and begun to view those principles as desirable contractual terms.[76] Ruggie Principles have thus become a point of contention and negotiation, as retailers along a supply chain may push for Ruggie commitments as a condition of their business.[77]

Ruggie Principles have, in a way, become a type of human rights "labeling" that businesses can adopt to increase their competitive position in the market. Thus, similar to a privately created compliance label, consumers of financial services and investors could likewise demand financial institutions voluntarily adopt certain compliance principles, like executive liability terms featured prominently in employment contracts. Consumers could also call for firms to make certain representations about liability or accountability in their disclosure statements or public offering memoranda.

CONCLUSION

This Essay has discussed the problem of money laundering in global financial institutions. It pointed out that despite the significant amount of regulatory effort to combat money laundering, serious compliance breaches continue to surface. It then addressed one proposal for improv-

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74. See Office of the High Comm'r, United Nations Human Rights, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (2011), http://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_en.pdf [http://perma.cc/XHN9-RVV9].

75. See, e.g., Chevron, Human Rights, http://www.chevron.com/globalissues/humanrights/ [http://perma.cc/7TFT-V9JG] (last updated May 2015) ("For 2014–2015, Chevron is serving as the lead corporate pillar representative on the steering committee for the Voluntary Principles on Security and Human Rights initiative [of a global oil and gas industry association].").

76. Cafaggi, supra note 64, at 37–38 (describing importance of consumers in CSR movement).

77. See id. at 37 ("Within CSR, the leaders are often retailers . . . ."); John Gerard Ruggie, Business and Human Rights: The Evolving International Agenda, 101 Am. J. Int'l L. 819, 835–37 (2007) (describing how companies' "voluntary initiatives have expanded rapidly in recent years"). Cafaggi also points out how forces of private international contract have generated regulatory change in the context of food safety, "where the specific endorsement of the supply-chain approach demonstrates the regulatory function of (bilateral and multilateral) contracts often in the network form." Cafaggi, supra note 64, at 37.

ing institutional compliance: executive liability. To that end, the Essay considered the potential challenges and costs of increasing liability for financial firms' top executives. The Essay then offered a way of incorporating executive liability into the global AML regime through private labeling, rather than through the formal, often encumbered, processes of domestic lawmaking or regulation.