

QUI TAM AND THE BANK SECRECY ACT: A PUBLIC-PRIVATE ENFORCEMENT MODEL TO IMPROVE ANTI-MONEY LAUNDERING EFFORTS

*Giovanni Scarcella**

Cartels, terrorists, fraudsters, and other criminals face a problem: when they receive the proceeds from their illicit activities, how can they get this money into their bank accounts without raising regulatory eyebrows? The Bank Secrecy Act (BSA) has established a complex regulatory regime, imposing on banks the duty to assess the risks presented by their clients, to monitor the transactions they process, and to report transactions that contain indicia of money laundering and other criminal activity to the Financial Crimes Enforcement Network (FinCEN). In response, criminals utilize increasingly sophisticated means to obfuscate the origins of these transactions and disguise their illicit nature to enter the U.S. banking system. Banks thus face a difficult task standing at the front line of anti-money laundering (AML) detection. Strong financial incentives for banks to neglect their BSA compliance function compound the difficulties innate to AML detection. While banks are subject to regular examinations and face fines for failing to maintain adequate BSA compliance procedures, and while bank officials can even face imprisonment, the primary federal enforcement agency, FinCEN, faces perennial resource shortages. Agencies must also consider a variety of factors when deciding whether to bring an action against a noncompliant bank. The confluence of these issues leads some banks to ignore, neglect, or undermine their BSA compliance officials.

This Note proposes a qui tam model within the BSA to provide recourse to bank BSA compliance personnel who have evidence of violations by their employers. This model allows private individuals with knowledge of a violation to bring a claim on behalf of the government, while still providing for agency oversight through the ability to intervene in or dismiss cases. This Note argues that qui tam will help increase the amount of BSA enforcement, ameliorate the resource shortages faced by FinCEN, and preserve regulatory discretion by allowing FinCEN to transition into a gatekeeper role. This Note also discusses additional controls unique to the BSA to deter abuse and maintain effective BSA compliance departments at banks.

* J.D. Candidate, 2022, Fordham University School of Law; B.A., 2016, George Washington University. Thank you to Professor Youngjae Lee and Alex Langsam for their guidance throughout the writing process and to the *Fordham Law Review* staff for their thorough editing. I would also like to thank my family, friends, and especially Meline, for their endless support and encouragement.

INTRODUCTION.....	1360
I. THE BANK SECRECY ACT AND THE FALSE CLAIMS ACT: TWO APPROACHES TO WHISTLEBLOWING	1365
A. <i>The Bank Secrecy Act Framework</i>	1365
B. <i>The NDAA's Whistleblower Amendments</i>	1368
C. <i>Qui Tam Actions and the False Claims Act</i>	1370
1. The Historical Foundations of Qui Tam	1370
2. The Development of the False Claims Act	1371
3. The Current State of Qui Tam Actions Under the False Claims Act.....	1372
II. CHALLENGES IN BSA ENFORCEMENT AND POSSIBLE SOLUTIONS	1373
A. <i>Gaps and Challenges in Bank Secrecy Act Enforcement</i> 1373	
1. Enforcement at the Federal Level	1374
a. <i>Indicia of Underenforcement</i>	1374
b. <i>Factors Underlying the Current Level of Enforcement</i>	1377
2. Challenges to Creating a Culture of Compliance at Banks.....	1379
B. <i>Evaluating the NDAA's Whistleblower Enhancements</i> ..	1380
C. <i>The Efficacy of Qui Tam Enforcement of the Bank Secrecy Act</i>	1382
1. Critical Reception to Qui Tam Under the False Claims Act	1382
2. Potential Benefits and Challenges to Qui Tam Enforcement of the Bank Secrecy Act	1385
a. <i>Standing Issues and the Bank Secrecy Act's Distinction Between Civil and Criminal Liability</i>	1387
b. <i>The SAR Problem: Preserving Confidentiality</i> . 1388	
c. <i>Maintaining Effective Bank Secrecy Act Compliance</i>	1389
III. A PROPOSED QUI TAM MODEL UNDER THE BSA	1391
A. <i>Revisions to the Agency Intervention Process</i>	1392
B. <i>Confidentiality Controls</i>	1393
C. <i>Restrictions on Permitted Classes of Qui Tam Relators</i> 1394	
D. <i>Changes to the Qui Tam Reward Structure</i>	1394
CONCLUSION	1395

INTRODUCTION

On July 6, 2020, the New York State Department of Financial Services (DFS) issued a consent order against Deutsche Bank AG (“Deutsche Bank”)

for deficiencies in its anti-money laundering (AML) program.¹ Such an action would hardly have qualified as news—DFS had issued five such orders against Deutsche Bank in as many years²—if not for the parties involved: Deutsche Bank continued to maintain client relationships with Jeffrey Epstein and related entities “despite repeated indications of facilitation of improper transactions.”³ Epstein, a financier who faced allegations of child trafficking and pled guilty to underage prostitution charges in 2007,⁴ maintained an account at Deutsche Bank from 2013 until 2018.⁵

The consent order describes a program that had all the trappings of an AML compliance function but with little buy-in from bank leadership.⁶ Although a junior employee prepared a memorandum detailing the allegations against Epstein and his 2007 plea deal,⁷ a bank executive nevertheless approved Epstein’s onboarding without any review by the bank’s risk committee.⁸ Despite Deutsche Bank’s classification of Epstein as a high-risk customer,⁹ he and his representatives sent dozens of suspicious transactions to his alleged co-conspirators, as well as Eastern European women for “school tuition.”¹⁰ No minutes exist of a January 2015 risk committee meeting—in contravention of bank policy—where the committee determined the relationship with Epstein would continue.¹¹ While the bank placed mandatory conditions on Epstein’s account to monitor for suspicious activity and reputational risk,¹² these conditions were misinterpreted, or in some cases, never followed.¹³

The DFS consent order did not address exactly why Deutsche Bank employees ignored the risks in continuing their relationship with Epstein, but emails quoted in the order provide some insight. The relationship manager who onboarded Epstein emphasized the estimated cash flows of “\$100–300 million” that would stem from the accounts, with a possible revenue of “2–4 million annually.”¹⁴ Subsequent to the January 2015 risk committee meeting where Deutsche Bank decided to continue its relationship with Epstein, one

1. See Consent Order Under New York Banking Law §§ 39 and 44, at 32, *In re Deutsche Bank AG, et al.* (N.Y. State Dep’t of Fin. Servs. July 6, 2020), https://www.dfs.ny.gov/system/files/documents/2020/07/ea20200706_deutsche_bank_consent_order.pdf [<https://perma.cc/V2SM-V6LM>] [hereinafter Deutsche Bank Consent Order].

2. See *Enforcement and Discipline*, N.Y. STATE DEP’T OF FIN. SERVS., https://www.dfs.ny.gov/industry_guidance/enforcement_actions_lfs [<https://perma.cc/UBD9-2R3H>] (last visited Oct. 29, 2021).

3. Deutsche Bank Consent Order, *supra* note 1, at 3.

4. *Id.* at 4–5.

5. *Id.* at 4.

6. *See id.* at 6–15.

7. *Id.* at 6–7.

8. *Id.* at 7–8.

9. *Id.* at 8.

10. *Id.* at 9, 15.

11. *Id.*

12. *Id.* at 12–13.

13. *Id.* at 13–14.

14. *Id.* at 7.

member of the committee “noted a number of sizable deals recently” involving Epstein’s accounts.¹⁵

The United Nations Office on Drugs and Crime estimates that up to \$2 trillion are laundered globally each year.¹⁶ Money laundering involves placing proceeds from unlawful activity into the banking system, separating these proceeds from their criminal origin (“layering”), and using seemingly legitimate transactions to disguise the true nature of these illicit funds (“integration”).¹⁷ Criminals use a variety of sophisticated methods to layer and integrate their illicit funds, putting financial institutions on the front lines of AML detection and reporting.¹⁸

Federal statutes¹⁹ and regulations²⁰ provide a set of requirements that banks must meet in their AML compliance programs. The Bank Secrecy Act²¹ (BSA) is the primary federal statute governing such compliance programs. Under this regime, banks’ AML compliance responsibilities generally fall within two categories: reporting and due diligence.²² Banks that fail in their monitoring and reporting duties face civil and criminal liability.²³ While Deutsche Bank paid a fine of \$150 million and faced additional scrutiny by an independent monitor for its compliance violations, DFS, a state regulator, imposed these sanctions.²⁴

Despite these regulations, money laundering remains a serious problem. Approximately \$800 billion to \$2 trillion are laundered globally each year.²⁵ Offshore shell companies are used not only to evade taxes but to obscure the activities of criminal organizations and terrorist groups, as well.²⁶ And the ramifications of money laundering include real human costs. Epstein

15. *Id.* at 12.

16. See *Money Laundering*, U.N. OFF. ON DRUGS AND CRIME, <https://www.unodc.org/unodc/en/money-laundering/overview.html> [https://perma.cc/WXN6-JLQZ] (last visited Oct. 29, 2021).

17. Steven M. D’Antuono, Section Chief, Crim. Investigative Div., Fed. Bureau of Investigation, Dep’t of Just., Statement Before the Committee on Banking, Housing, and Urban Affairs for Hearing Entitled “Combating Money Laundering and Other Forms of Illicit Finance: Regulator and Law Enforcement Perspectives on Reform” (Nov. 29, 2018) (on file with author).

18. *Id.*

19. See 12 U.S.C. §§ 1786(q), 1818(s), 1829b, 1951–1959; 18 U.S.C. §§ 1956–1957; 31 U.S.C. §§ 5311–5355.

20. See, e.g., 31 C.F.R. §§ 1000–1099 (2021) (describing AML program requirements).

21. Pub. L. No. 91-507, 84 Stat. 1114 (1970) (codified as amended in scattered sections of 12, 15, and 31 U.S.C.); see 31 U.S.C. §§ 5311–5355.

22. See Christina Parajon Skinner, *Executive Liability for Anti-Money-Laundering Controls*, 116 COLUM. L. REV. SIDEBAR 1, 3 (2016).

23. See Pamela H. Bucy, *Epilogue: The Fight Against Money Laundering: A New Jurisprudential Direction*, 44 ALA. L. REV. 839, 850–51 (1993).

24. See Deutsche Bank Consent Order, *supra* note 1, at 33. Although Deutsche Bank incurred penalties for violating New York, not federal, regulations, these regulations require that banks comply with the BSA’s anti-money laundering provisions. See N.Y. COMP. CODES R. & REGS. tit. 3, § 116.2 (2020).

25. See *Money Laundering*, *supra* note 16.

26. See Carmine Franchesca S. Del Mundo, *How Countries Seek to Strengthen Anti-Money Laundering Laws in Response to the Panama Papers, and the Ethical Implications of Incentivizing Whistleblowers*, 40 NW. J. INT’L L. & BUS., no. 1, 2019, at 87, 95.

sexually abused or trafficked dozens of victims, if not more.²⁷ The program requirements banks must meet under the BSA are meant to deter such high-risk individuals from processing suspicious transactions through the U.S. financial system.

Understaffed regulators, institutional decision-making by federal authorities, and the innate difficulties in money laundering detection all contribute to the gap between the extensive statutory and regulatory scheme and the continued shortcomings of banks' BSA/AML compliance functions.²⁸ Enforcement officials often point to resource shortages to explain why so few actions are brought.²⁹ FinCEN has seen its budget slowly grow and its full-time staff decrease since 2013.³⁰ Critics, including the Republican staff of the House Committee on Financial Services, have instead framed this issue as another flavor of the "too big to fail" problem—that enforcement officials at the U.S. Department of the Treasury ("the Treasury") and the U.S. Department of Justice (DOJ) have declined to enforce violations of the BSA at large financial institutions precisely because of their size and "systemic importance."³¹

Investigating BSA violations takes significant time and resources even when regulators are monitoring attentively; for example, the Treasury's \$1 billion settlement with Standard Chartered resulted from a five-year investigation, even though a deferred prosecution agreement had given regulators increased visibility into its compliance program.³²

While the BSA imposes its requirements on banks through coercion—by duties to report suspicious activity or refrain from participating in certain transactions—until recently, the BSA provided little by the way of rewards.³³ Formerly, whistleblowers could only receive a discretionary reward capped

27. See *How the Law, the Press and His Victims Finally Caught Up with Jeffrey Epstein*, MIAMI HERALD (Dec. 19, 2019), <https://www.miamiherald.com/news/local/article238237729.html> [https://perma.cc/9YKS-68T3].

28. See *infra* Part II.A.

29. See Skinner, *supra* note 22, at 5 ("[T]he problem is one of enforcement—that regulators lack the resources to monitor banks' compliance with these regulatory requirements . . . or worse, bank managers choose to be willfully blind to obvious red flags."); see also *infra* notes 128–32 and accompanying text.

30. Compare FIN. CRIMES ENF'T NETWORK, PROGRAM SUMMARY BY BUDGET ACTIVITY, (2013), <https://home.treasury.gov/system/files/266/12.%20FinCEN%20BIB%20FINAL%20ok.pdf> [https://perma.cc/AB2S-XC3F], with FIN. CRIMES ENF'T NETWORK, PROGRAM SUMMARY BY BUDGET ACTIVITY (2021), <https://home.treasury.gov/system/files/266/16.-FinCEN-FY-2022-BIB.pdf> [https://perma.cc/AQ34-3PV2].

31. REPUBLICAN STAFF OF H.R. COMM. ON FIN. SERVS., 114TH CONG., TOO BIG TO JAIL: INSIDE THE OBAMA JUSTICE DEPARTMENT'S DECISION NOT TO HOLD WALL STREET ACCOUNTABLE 12, 33 (2016) [hereinafter TOO BIG TO JAIL].

32. See Eric R. Havian & Michael Ronickher, *The Need for Whistleblowers in AML Enforcement*, BANKING EXCH. (Apr. 22, 2019, 11:01 AM), <https://www.bankingexchange.com/news-feed/item/7852-the-need-for-whistleblowers-in-aml-enforcement> [https://perma.cc/R8YW-7XZF].

33. See Bucy, *supra* note 23, at 852.

at the lesser of 25 percent of the criminal fine, civil penalty, or forfeiture collected, or \$150,000.³⁴

These reward provisions paled in comparison to similar programs under other enforcement regimes. The Securities and Exchange Commission (SEC), for example, offers a mandatory reward of 10 to 30 percent of imposed monetary sanctions to informants.³⁵

Congress included provisions within the U.S. Department of Defense appropriations bill it passed for fiscal year 2021—the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021³⁶ (NDAA)—to “comprehensively update the BSA for the first time in decades.”³⁷ The NDAA contains amendments to the BSA’s whistleblower program³⁸ that are “substantially similar to”³⁹ the Coordinating Oversight, Upgrading and Innovating Technology, and Examiner Reform Act of 2019⁴⁰ (the “COUNTER Act of 2019”) modeled on the SEC’s program.⁴¹

Would increasing the amount paid to informants really improve enforcement of the BSA? Common sense suggests that increased whistleblower rewards will beget more whistleblowers. Armed with more information on banks that neglect their compliance programs under the BSA, or worse, that willfully facilitate suspicious transactions, regulators will then bring more cases. Still, this reasoning presumes that the Treasury lacks visibility into noncompliant financial institutions; yet, this is not wholly accurate, as banks are subject to regular examinations by federal banking regulators.⁴²

There are other ways to increase whistleblower involvement beyond simply increasing the reward amount. The False Claims Act⁴³ (FCA) includes qui tam provisions⁴⁴ that allow private individuals to enforce its terms, with the government permitted to intervene in, or dismiss, claims.⁴⁵ Following amendments in 1986 that expanded the ability of private citizens to bring claims on behalf of the United States for fraud against the

34. See 31 U.S.C. § 5323(b), amended by William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 § 6314(a), Pub. L. No. 116-283, 134 Stat. 3388, 4597 (2021) [hereinafter NDAA].

35. See 15 U.S.C. § 78u-6(b).

36. Pub. L. No. 116-283, 134 Stat. 3388 (2021) (codified as amended in scattered sections of the U.S.C.).

37. H.R. REP. NO. 116-617, at 2137 (2020) (Conf. Rep.).

38. See NDAA § 6314, 31 U.S.C. § 5323.

39. H.R. REP. NO. 116-617, at 2136.

40. Coordinating Oversight, Upgrading and Innovating Technology, and Examiner Reform Act of 2019, H.R. 2514, 116th Cong. § 206 (1st Sess. 2019).

41. See Havian & Ronickher, *supra* note 32.

42. See *infra* note 60 and accompanying text.

43. 31 U.S.C. §§ 3729–3733.

44. “Qui tam” refers to the Latin phrase *qui tam pro domino rege quam pro se ipso*, meaning “he who as much for the king as for himself.” See *infra* note 88 and accompanying text.

45. See 31 U.S.C. § 3729.

government,⁴⁶ the FCA's qui tam model stimulated discussion about its benefits and shortcomings as a mixed public-private enforcement model, its potential for abuse, and its replicability in other fields of law.⁴⁷

If the BSA is not sufficiently enforced, then it will not be sufficiently complied with, as banks will face less deterrence against accommodating money launderers. A qui tam model allows for greater enforcement of the BSA against recalcitrant banks by knowledgeable private attorneys general while still preserving a degree of regulatory oversight. Furthermore, FinCEN's low staffing levels suggests it is better suited for a gatekeeping function than as the primary enforcer of BSA actions.

Part I of this Note introduces the AML laws, provides an overview of the BSA's old whistleblower provisions and the NDAA's amendments to these provisions, and presents the FCA's qui tam framework. Part II discusses the current gaps in AML enforcement and analyzes the efficacy of the NDAA's newly enacted incentives, as well as the benefits and likely challenges in utilizing qui tam under the BSA. Part III proposes a qui tam model for BSA enforcement, taking into account the specific limitations presented by the BSA and broader scholarly proposals to improve qui tam actions under the FCA.

I. THE BANK SECRECY ACT AND THE FALSE CLAIMS ACT: TWO APPROACHES TO WHISTLEBLOWING

This part provides an overview of the federal AML laws and how the NDAA amends these laws, focusing on the requirements that the BSA imposes on banks to create programs to monitor their transactions and customers, as well as the NDAA's enhancements to the BSA's whistleblower provisions. This part then reviews critical reception to the SEC's informant program to understand how similar strengths and weaknesses in the NDAA's whistleblower enhancements may arise. Finally, this part outlines the history of qui tam actions in England and the United States, particularly focusing on such actions arising under the FCA.

A. The Bank Secrecy Act Framework

The primary federal statutes governing AML standards and enforcement are the BSA and the Money Laundering Control Act of 1986⁴⁸ (MLCA).⁴⁹ The BSA requires individuals, banks, and other financial institutions to keep records of and report certain transactions for suspected money laundering to aid criminal, tax, and regulatory investigations, as well as counterterrorism

46. See Christopher M. Alexion, Note, *Open the Door, Not the Floodgates: Controlling Qui Tam Litigation Under the False Claims Act*, 69 WASH. & LEE L. REV. 365, 378 (2012).

47. See David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 NW. L. REV. 1689, 1690–91 (2013).

48. Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of the U.S.C.).

49. See Bucy, *supra* note 23, at 840.

efforts.⁵⁰ The MLCA imposes criminal and civil liability on a party who engages in the act of money laundering—concealing proceeds derived from unlawful activity through transporting money between the United States and abroad or avoiding transaction reporting requirements.⁵¹ Crucially, the MLCA supplements the reporting and recordkeeping requirements of the BSA by requiring banks to establish procedures “reasonably designed” to ensure compliance with these provisions of the BSA.⁵²

The BSA also directs the president and relevant executive agencies to develop anti-money laundering strategies.⁵³ Pursuant to this directive, the Treasury issues regulations that detail more particularized BSA compliance program requirements.⁵⁴ Such regulations direct banks to, *inter alia*, establish a BSA compliance program,⁵⁵ file Suspicious Activity Reports (SARs) when they detect violations of the BSA in the form of suspicious transactions,⁵⁶ and conduct enhanced due diligence programs for high-risk correspondent accounts⁵⁷ and private banking accounts.⁵⁸

Several government agencies have roles in implementing and enforcing the BSA. FinCEN is a bureau within the Treasury that “issues regulations and interpretive guidance, provides outreach to regulated industries, supports the examination functions performed by federal banking agencies, and pursues civil enforcement actions when warranted.”⁵⁹ Federal banking agencies—including the Board of Governors Federal Reserve System (“Federal Reserve”), Federal Deposit Insurance Corporation (FDIC), National Credit Union Administration (NCUA), and Office of the Comptroller of the Currency (OCC)—examine banks within their respective jurisdictions.⁶⁰ States also maintain their own AML enforcement agencies, such as DFS in New York.⁶¹

In practice, examiners from these agencies assess whether BSA/AML compliance programs include internal controls to ensure compliance, establish independent testing mechanisms, designate individuals responsible for compliance responsibilities, provide for training, and establish procedures

50. See 31 U.S.C. §§ 5311–5355.

51. 18 U.S.C. § 1956(a).

52. 12 U.S.C. § 1818(s).

53. 31 U.S.C. §§ 5341–5342.

54. See, e.g., 31 C.F.R. §§ 1000–1099 (2021) (requiring banks to, *inter alia*, conduct due diligence to understand the true owners of their customers’ accounts and report suspicious activity to the Treasury).

55. See 12 C.F.R. § 21.21 (2021).

56. *Id.* § 21.11.

57. See 31 C.F.R. § 1010.610 (2021).

58. *Id.* § 1010.620.

59. FED. FIN. INSTS. EXAMINATION COUNCIL, BANK SECRECY ACT/ANTI-MONEY LAUNDERING EXAMINATION MANUAL intro., at 5 (2015).

60. *Id.* at 4–5.

61. See *supra* note 24 and accompanying text.

for customer identification and customer due diligence, including compliance with beneficial ownership requirements.⁶²

The BSA imposes both civil and criminal penalties for violations of its reporting requirements.⁶³ In criminal prosecutions, individuals—particularly partners, directors, officers, or employees of financial institutions—face a maximum penalty of five years' imprisonment and a \$250,000 fine for willful violations of the BSA or related regulations, and financial institutions can face fines of \$1 million per violation.⁶⁴ The NDAA includes additional fines equal to the profit gained by a criminal violator, as well as a mechanism for financial institution employees to repay any bonus received to the financial institution if the employee committed a criminal violation.⁶⁵ Civil penalties can reach \$100,000 per violative transaction.⁶⁶ Under the NDAA's amendments, repeat violators now face an additional civil penalty up to triple the profit gained or loss avoided by the violation or double the maximum penalty for the violation.⁶⁷

States also maintain anti-money laundering laws that carry their own penalties. For example, New York law requires banks to establish anti-money laundering programs that comply with the BSA.⁶⁸ Banks in New York that fail to comply with the BSA's anti-money laundering provisions face fines or even revocation of their license by DFS.⁶⁹

The BSA formerly provided that a whistleblower whose information leads to a recovery greater than \$50,000 may, at the secretary of the Treasury's discretion, receive a reward of no greater than \$150,000.⁷⁰ The federal AML regime continues to bar government employees who provide information in the performance of their employment from reward eligibility after the passage of the NDAA.⁷¹ While the BSA had prohibited banks from discriminating against Treasury informants and provided a civil cause of action in the event of such discrimination,⁷² the NDAA repeals § 5328 and

62. See *Assessing the BSA/AML Compliance Program Introduction*, in FED. FIN. INSTS. EXAMINATION COUNCIL, BANK SECRECY ACT/ANTI-MONEY LAUNDERING EXAMINATION MANUAL (2015).

63. See 31 U.S.C. §§ 5321–5322.

64. *Id.* § 5322; see also 31 C.F.R. §§ 1010.820, 1010.840 (2021).

65. See NDAA § 6312, 31 U.S.C. § 5322(e).

66. See 31 U.S.C. § 5321.

67. See NDAA § 6309, 31 U.S.C. § 5321(f).

68. See N.Y. COMP. CODES R. & REGS. tit. 3, § 116.2 (2021).

69. See N.Y. BANKING LAW §§ 39, 40, 44 (McKinney 2021).

70. See 31 U.S.C. § 5323(a)–(b).

71. Compare *id.* § 5323I (“An officer or employee of the United States, a State, or a local government who provides information . . . in the performance of official duties is not eligible for a reward . . .”), with NDAA § 6314(a), 31 U.S.C. § 5323 (“No award . . . may be made [] to . . . a member, officer, or employee [] of [] (I) an appropriate regulatory or banking agency; (II) the Department of the Treasury or the Department of Justice; or (III) a law enforcement agency; . . . acting in the normal course of the job duties of the whistleblower.”).

72. See 31 U.S.C. § 5328.

requires that an employee alleging discrimination first file a complaint with the secretary of Labor.⁷³

B. The NDAA's Whistleblower Amendments

As the NDAA reforms “the BSA for the first time in decades,”⁷⁴ it offers a comprehensive set of changes addressing several facets of the BSA.⁷⁵ Among its notable provisions, the NDAA overhauls the BSA’s whistleblower program.⁷⁶ In any “judicial or administrative action brought by the Secretary” or attorney general under the BSA that results in penalties, disgorgement, or interest exceeding \$1 million, the secretary may award a whistleblower who voluntarily provided original information⁷⁷ that led to the successful enforcement of said action up to 30 percent of the amount collected.⁷⁸

In determining the award amount within the above parameters, Congress requires the secretary to consider “the significance of the information provided by the whistleblower” to the action’s success, “the degree of

73. See NDAA § 6314(a), 31 U.S.C. § 5323 (prohibiting discrimination and requiring an individual alleging discrimination to “fil[e] a complaint with the Secretary of Labor,” but “if the Secretary of Labor has not issued a final decision within 1280 days of the filing of a complaint . . . and there is no showing that such a delay is due to the bad faith of the claimant,” allowing the claimant to sue in federal district court); *see also id.* § 6314(b) (“Section 5328 of title 31, United States Code, is repealed.”).

74. H.R. REP. NO. 116-617, at 2137 (2020) (Conf. Rep.).

75. See generally NDAA, Pub. L. No. 116-283, §§ 6001–511, 134 Stat. 3388, 4547–633 (2021) (codified as amended in scattered sections of the U.S.C.). That many of these reforms are outside, or tangential to, the scope of this Note makes them no less significant in altering the landscape of the federal AML laws. In addition to the changes discussed above, *see supra* notes 65, 67, 71, 73, and accompanying text, the NDAA “broaden[s] the mission of the BSA to specifically safeguard national security as well as the more traditional investigatory pursuits of law enforcement.” H.R. REP. NO. 116-617, at 2137. The NDAA “requires more routine and systemic coordination, communication, and feedback among financial institutions, regulators, and law enforcement to identify suspicious financial activities.” *Id.* The NDAA also “establishes a critical feedback loop and improved routine reporting requirements, to ensure that resources are directed effectively and that [the above stakeholders] better communicate and coordinate on BSA-AML priorities, collection methods, and outcomes.” *Id.* at 2137–38. The NDAA fosters this communication in part by allowing for greater data sharing among and within financial institutions and their affiliates. *Id.* at 2138. In addition, following the passage of the NDAA, the secretary “must consider, when imposing SAR reporting requirements, the benefits and burdens of specific requirements and whether the reporting is likely to be ‘highly useful’ to law enforcement and national security efforts.” *Id.* The NDAA also expands the coverage of the BSA to include the antiquities trade. *Id.* Further, the NDAA adds \$10 million to FinCEN’s budget and requires entities to report and disclose information regarding their beneficial owners to the Treasury. *Id.* at 2139. The NDAA defines a “beneficial owner” of an entity as “an individual who, directly or indirectly, . . . exercises substantial control over the entity; or [] owns or controls not less than 25 percent of the ownership interests of the entity.” NDAA § 6403(a), 31 U.S.C. § 5336.

76. See NDAA § 6314(a), 31 U.S.C. § 5323.

77. The NDAA defines “original information” as information derived from the whistleblower’s “independent knowledge or analysis” not known from any other source and not exclusively derived from “an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit or investigation, or from the news media.” *Id.*

78. *Id.*

assistance provided by the whistleblower” and the whistleblower’s legal representative, the Treasury’s interest “in deterring violations” of the BSA, as well as additional factors the secretary “may establish by rule or regulation.”⁷⁹

In addition to the prohibition on awards to government employees,⁸⁰ the NDAA also bars the secretary from awarding a whistleblower: (1) “convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award”; (2) “who fails to submit information to the Secretary or the Attorney General, as applicable, in such form as the Secretary, in consultation with the Attorney General, may, by rule, require”; or (3) who knowingly and willfully provides false information.⁸¹

The SEC’s whistleblower program provided the basis for the NDAA’s whistleblower amendments.⁸² Under section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), enacted in 2010, Congress required the SEC to create a whistleblower program with rewards of 10 to 30 percent of the recovered penalty.⁸³ While the NDAA’s whistleblower amendments largely mirror the provisions of the SEC’s program, they differ in one key respect: the NDAA does not include the 10 percent reward floor provided by the SEC’s whistleblower regime.⁸⁴

Prior to the 2010 legislation, the SEC expressed disappointment regarding the lack of success of its “practically unknown” whistleblower program, which only applied to insider trading violations.⁸⁵ From the inception of the new regime in 2010 through September 2019, the SEC collected over \$2 billion in sanctions from actions brought with information from whistleblowers and awarded approximately \$387 million to sixty-seven informants.⁸⁶ By December 18, 2020, that total ballooned to approximately \$735 million awarded to 127 individuals.⁸⁷

79. *Id.*

80. See *supra* note 71 and accompanying text.

81. NDAA § 6314(a), 31 U.S.C. § 5323.

82. See *supra* notes 38–41 and accompanying text.

83. See Pub. L. No. 111-203, § 922(a), 124 Stat. 1376, 1841–48 (2010) (codified as amended at 15 U.S.C. § 78u-6).

84. Compare NDAA § 6314(a), 31 U.S.C. § 5323 (capping awards at “an aggregate amount equal to not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions”), with 15 U.S.C. § 78u-6(b)(1) (providing for an award “not less than 10 percent” and “not more than 30 percent, in total of what has been collected of the monetary sanctions imposed in the action or related actions”).

85. See U.S. SEC, OFF. OF THE INSPECTOR GEN., ASSESSMENT OF THE SEC’S BOUNTY PROGRAM 4 (2010).

86. See U.S. SEC, 2019 ANNUAL REPORT TO CONGRESS, WHISTLEBLOWER PROGRAM 1 (2019).

87. See Press Release, SEC, SEC Issues Multiple Whistleblower Awards Totaling over \$3.6 Million (Dec. 18, 2020), <https://www.sec.gov/news/press-release/2020-325> [<https://perma.cc/9BZX-WQDB>].

C. *Qui Tam Actions and the False Claims Act*

Qui tam actions have existed under English and American law for 700 years. Today, qui tam provisions survive in the United States under the False Claims Act (FCA). This section details qui tam actions' rich history in the law, tracks their development into their modern form under the FCA, and explains how such actions are brought.

1. The Historical Foundations of Qui Tam

Stemming from the Latin phrase *qui tam pro domino rege quam pro seipso*,⁸⁸ qui tam actions have a long history rooted in both English and American common law. Qui tam suits began in the thirteenth century in England as a way of bringing actions that combined public and private interests.⁸⁹ Qui tam plaintiffs bringing such actions under the common law sued for both their private interest, as well as for the king's interest.⁹⁰ Private parties bringing qui tam actions under the common law fell into two categories: (1) aggrieved parties suing for redress primarily because of a personal wrong committed against them and (2) informers motivated by recovering a portion of the penalty levied against parties for a private wrong that affected the king's interests.⁹¹

As common law qui tam actions became less common in the fourteenth century, the English Parliament began enacting statutes that allowed private parties to bring claims to address public wrongs.⁹² While some of these statutes required plaintiffs to demonstrate that they suffered injury, others allowed any informer to bring suit.⁹³ Although these actions proved crucial to enforcing England's penal laws in the absence of an adequate police force, outrage over abuse of qui tam actions by informers caused Parliament to place restrictions on qui tam from the fifteenth through seventeenth centuries.⁹⁴

By the time the American colonies adopted English law, significant confusion surrounded qui tam actions.⁹⁵ Two forms of statutory qui tam actions were commonplace for both aggrieved parties and unharmed informers, who could receive remedies and a share of the penalty, respectively.⁹⁶ These suits could be brought in civil or criminal proceedings.⁹⁷ While no evidence suggests that common law qui tam suits could be brought in America, several colonies expressly adopted English statutes in their entirety, which allowed for qui tam procedures to enforce

88. "He who as much for the king as for himself." Note, *The History and Development of Qui Tam*, 1972 WASH. U. L.Q. 81, 83.

89. *See id.*

90. *Id.*

91. *Id.* at 84–85.

92. *Id.* at 85–86.

93. *Id.* at 86.

94. *Id.* at 86–88.

95. *Id.* at 91.

96. *Id.* at 90–91.

97. *Id.* at 91.

their provisions.⁹⁸ Early American legislatures also passed statutes that permitted informers or aggrieved parties to sue qui tam, while other statutes provided rewards to informants without permitting informants to sue.⁹⁹ By the end of the nineteenth century, as public agencies and law enforcement became more effective, legislatures and courts placed restrictions on qui tam provisions or removed them outright.¹⁰⁰ In the presence of adequate public enforcement mechanisms, legislatures had little or no need for private individuals to enforce the criminal law by civil action, and such a regime conflicted with prosecutorial discretion.¹⁰¹

2. The Development of the False Claims Act

By 1943, the only federal statute containing qui tam provisions still in use was the False Claims Act.¹⁰² Congress originally enacted the FCA in 1863 at the height of the Civil War to incentivize fraudsters to inform on their coconspirators seeking to defraud the U.S. government as it handed out contracts to support the war effort.¹⁰³ The FCA's qui tam provisions allow private individuals with knowledge of fraud against the U.S. government to file lawsuits on behalf of the United States for violations of the FCA.¹⁰⁴

Congress amended the FCA several times between 1943 and 2010. To limit abuse in qui tam suits, Congress amended the FCA in 1943 to bar suits "based upon evidence or information in the possession of the United States . . . at the time such suit was brought."¹⁰⁵ Yet, this limitation proved unworkable in situations in which states were required by statute to provide such information to the federal government, as it barred the state from bringing an FCA claim. Where the federal government possessed information of a fraud, the qui tam informant plaintiff, known as a relator, who was the original source of this information, could not maintain an FCA suit.¹⁰⁶ To correct this scenario, in 1986, Congress provided an exemption to the above bar under the FCA if "the person bringing the action is an original source of the information."¹⁰⁷ In the 1986 amendments, Congress intended to stem the recent increase in government-contractor fraud by providing the government with more effective tools and incentivizing whistleblowers to come forward.¹⁰⁸

98. *Id.* at 94.

99. *Id.* at 95.

100. *Id.* at 101.

101. *Id.* at 101 & n.113.

102. See 31 U.S.C. §§ 3729–3733; see also *The History and Development of Qui Tam*, *supra* note 88, at 100, 102 & n.116.

103. See Alexion, *supra* note 46, at 371.

104. See 31 U.S.C. § 3730(b).

105. Alexion, *supra* note 46, at 374 (quoting Act of December 23, 1943, 57 Stat. 608, recodified in 31 U.S.C. § 3730(b)(4) (1982) (superseded)).

106. *Id.* at 375–77.

107. *Id.* at 378 (quoting 31 U.S.C. § 3730(e)(4)(A)).

108. *Id.*

With the passage of the Patient Protection and Affordable Care Act¹⁰⁹ (ACA) in 2010, Congress again amended the definition of “original source” under the FCA.¹¹⁰ As of the 2010 amendments, an original source is one who: (1) voluntarily disclosed the information prior to a public disclosure or (2) has independent knowledge of the publicly disclosed information that materially adds to this information and has voluntarily provided the information to the government before commencing the suit.¹¹¹

3. The Current State of Qui Tam Actions Under the False Claims Act

Under the current FCA, any person who defrauds the U.S. government is liable for a civil penalty of \$5,000 to \$10,000, plus triple the damages the fraud caused the government.¹¹² The FCA tasks the attorney general with investigating violations.¹¹³ A person may also bring a civil action for violations of the FCA in the name of the government, which may be dismissed only with the written consent of the court and attorney general.¹¹⁴

When a private individual files such an action, the complaint remains under seal for at least sixty days, during which time the government may decide to intervene and proceed with the action itself.¹¹⁵ If the government intervenes, it may prosecute the action, but it may also dismiss the claim or settle with the defendant without consideration of any objections by the relator and irrespective of intervention.¹¹⁶ While the relator may call witnesses and continue to participate in the litigation, the government can even impose limitations on the relator’s participation if the government demonstrates that such actions will interfere with its prosecution.¹¹⁷ The FCA requires the court to dismiss an action if

substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party; (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or (iii) from the news media, unless

109. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S.C.).

110. Alexion, *supra* note 46, at 395.

111. See 31 U.S.C. § 3730(e)(4)(B).

112. *Id.* § 3729(a)(1). The statute specifies six categories of fraudulent activity: (1) false or fraudulent claims, *id.* § 3729(a)(1)(A); (2) false records or statement material to such claims, *id.* § 3729(a)(1)(B); (3) underpayment, *id.* § 3729(a)(1)(D); (4) delivery of false receipts, *id.* § 3729(a)(1)(E); (5) buying government property from an unauthorized government employee, *id.* § 3729(a)(1)(F); and (6) false or avoided payments to the government, *id.* § 3729(a)(1)(G). The statute also imposes liability on anyone who conspires to commit any of the above violations. *Id.* § 3729(a)(1)(C).

113. *Id.* § 3730(a).

114. *Id.* § 3730(b)(1).

115. *Id.* § 3730(b)(2), (4).

116. *Id.* § 3730(c)(1), (2)(A)–(B).

117. *Id.* § 3730(c)(2)(C).

the action is brought by the Attorney General or the person bringing the action is an original source of the information.¹¹⁸

The qui tam relator is entitled to 15 to 25 percent of the proceeds collected if the government intervenes and 25 to 30 percent of proceeds if it does not, plus fees and costs.¹¹⁹ In fiscal year 2019, whistleblowers filed 633 qui tam actions in which the DOJ recovered over \$2.1 billion.¹²⁰

II. CHALLENGES IN BSA ENFORCEMENT AND POSSIBLE SOLUTIONS

This part outlines some of the issues in BSA enforcement that stem from both regulators and regulated parties and examines how changes to the BSA's treatment of whistleblowers can ameliorate these issues. After detailing the challenges present in BSA enforcement and compliance in Part II.A, Parts II.B and II.C assess the efficacy of the NDAA's whistleblower enhancements and a qui tam model, respectively.

A. Gaps and Challenges in Bank Secrecy Act Enforcement

Effective financial regulation requires accountability and buy-in from all parties: regulators need to act when they identify misconduct, and regulated parties need to establish compliance programs that amount to more than just "window dressing."¹²¹ Despite an abundance of regulations, the threat of fines or criminal prosecution, and an increasing number of examiners,¹²² regulators face barriers to enforcement outside their control, including personnel limitations and resource shortages.¹²³ When it comes to enforcing the BSA against the largest banks, however, regulators have been slow or reluctant to act.¹²⁴ And even with effective enforcement, banks too often treat monetary fines as merely the cost of doing business.¹²⁵

118. *Id.* § 3730(e)(4)(A). The government may also oppose this dismissal to keep the relator's claim in court. *Id.*

119. *Id.* § 3730(d)(1)–(2).

120. See Press Release, Dep't of Just., Justice Department Recovers over \$3 Billion from False Claims Act Cases in Fiscal Year 2019 (Jan. 9, 2020), <https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019> [https://perma.cc/5F5W-232Q].

121. Justin O'Brien & Olivia Dixon, *The Common Link in Failures and Scandals at the World's Leading Banks*, 36 SEATTLE U. L. REV. 941, 971–72 (2013) (discussing various financial crime failures at banks, including AML compliance failures).

122. Compare *Occupational Employment and Wages May 2019—Financial Examiners*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/oes/2019/may/oes132061.htm> [https://perma.cc/3KZK-QV3Q] (July 6, 2020) (64,550 financial examiners), with *Occupational Employment and Wages May 2018—Financial Examiners*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/oes/2018/may/oes132061.htm> [https://perma.cc/UR9C-4HUR] (Mar. 29, 2019) (58,590 financial examiners).

123. See O'Brien & Dixon, *supra* note 121, at 970; see also Skinner, *supra* note 22, at 5 ("[T]he problem is one of enforcement—that regulators lack the resources to monitor banks' compliance with these regulatory requirements . . . or worse, bank managers choose to be willfully blind to obvious red flags.").

124. See TOO BIG TO JAIL, *supra* note 31, at 26–27, 39.

125. See O'Brien & Dixon, *supra* note 121, at 964.

1. Enforcement at the Federal Level

As this section sets out, evidence suggests that federal regulators have greater opportunity to enforce the BSA than current enforcement levels suggest. The resulting underenforcement appears to stem from a lack of resources and a reluctance to hold larger financial institutions accountable due to concerns of the possible ramifications on the U.S. and global economy.

a. Indicia of Underenforcement

Determining whether federal regulators and prosecutors underenforce the BSA against financial institutions with faulty compliance programs is a difficult analytical endeavor. Such an assessment flows from the presumption that there exists some ideal level of enforcement—the number of civil and criminal actions needed to bring each bank’s BSA compliance function into conformity with federal regulations and standards. Yet the gap between this ideal level of enforcement and the number of enforcement actions taken will always exist, and determinations of both how large a gap is acceptable and what an ideal enforcement environment looks like are subjective.¹²⁶ Furthermore, overenforcement can occur when the implementation of the BSA generates more harm than necessary in achieving the goal of effective AML monitoring.¹²⁷ With these caveats in mind, several factors indicate that federal enforcement authorities could be doing more to bring financial institutions into compliance with the BSA.

First, comparing state enforcement of AML laws against financial institutions to federal enforcement helps contextualize the broader environment of noncompliance. In 2016, the U.S. Attorney’s Office for the Southern District of New York (“Southern District”) issued a press release detailing the Southern District’s impressive haul of approximately \$12 billion in forfeitures and civil actions from January 1, 2014, through December 31, 2015.¹²⁸ Of this amount, only \$2 billion stemmed from actions that included charges that certain banks violated the BSA.¹²⁹ Over this same time period, available enforcement data indicates that FinCEN collected approximately \$561 million in civil penalties for violations of the BSA

126. As Benjamin M. Lawsky, former superintendent of DFS succinctly explained, regulators “will always run slightly behind [financial firms]—it is just a matter of how far.” 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](https://perma.cc/Z89X-26YJ)].

127. See Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 GEO. L.J. 1743, 1744 (2005). Overenforcement of the BSA can occur, for example, when it actually undermines the valuable role banks play in monitoring transactions and customer behavior for money laundering. See *infra* Part II.C.2.c.

128. See Press Release, Justice Department, U.S. Attorney’s Offices, U.S. Attorney’s Office for the Southern District Of New York Recovers Nearly \$12 Billion in Forfeitures and Civil Actions During Two-Year Period from January 1, 2014, Through December 31, 2015 (Apr. 21, 2016), <https://www.justice.gov/usao-sdny/pr/us-attorney-s-office-southern-district-new-york-recovers-nearly-12-billion-forfeitures> [<https://perma.cc/5SFV-5BJ5>].

129. *Id.*

nationwide.¹³⁰ In contrast, actions by DFS, a New York state agency with considerable jurisdictional overlap with the Southern District, returned about \$7.4 billion in fines and restitution, with approximately \$4.2 billion stemming from actions involving deficiencies in banks' AML programs.¹³¹ This discrepancy illustrates the more expansive landscape of BSA noncompliance that federal enforcement officials are missing.¹³²

Next, issues arising from agencies' frequent use of deferred prosecution agreements (DPAs) in BSA enforcement, while by no means dispositive proof of underenforcement, can serve to illustrate some of the shortcomings of federal authorities. A DPA is “[a] contractual arrangement between a US government agency . . . and a company or an individual facing a criminal or civil investigation.”¹³³ The agency simultaneously charges the defendant and requests postponement of the prosecution so the defendant has the opportunity to demonstrate remediation of the alleged violations.¹³⁴ DPAs typically include the imposition of fines, admission of relevant facts, and commitments to enter compliance with the alleged violation of law, sometimes overseen by an independent monitor.¹³⁵ Of eighteen financial institutions that entered into DPAs for AML and sanctions violations since 2010, four went on to violate the law again, and the government responded in two instances by simply renewing the DPA.¹³⁶ These financial institutions

130. See *Enforcement Actions*, FIN. CRIMES ENF'T NETWORK, <https://www.fincen.gov/news-room/enforcement-actions> [https://perma.cc/U26X-6ZW9] (last visited Oct. 29, 2021).

131. See *Enforcement and Discipline*, N.Y. STATE DEP'T OF FIN. SERVS., https://www.dfs.ny.gov/industry_guidance/enforcement_actions_lfs [https://perma.cc/DJ6R-57GQ] (last visited Oct. 29, 2021). This amount stems from consent orders entered into between DFS and: (1) BNP Paribas (June 30, 2014); (2) Standard Chartered, New York branch (Aug. 19, 2014); and (3) Commerzbank AG (Mar. 12, 2015). See Consent Order Under New York Banking Law § 44, at 18, *In re BNP Paribas, S.A. New York Branch* (N.Y. State Dep't of Fin. Servs. June 30, 2014), https://www.dfs.ny.gov/system/files/documents/2020/04/ea140630_bnp_paribas.pdf [https://perma.cc/7X6C-MAH3]; Consent Order Under New York Banking Law §§ 39 and 44, at 3, *In re Standard Chartered Bank, New York Branch* (N.Y. State Dep't of Fin. Servs. Aug. 19, 2014), https://www.dfs.ny.gov/system/files/documents/2020/04/ea140819_standard_chartered.pdf [https://perma.cc/X4ML-P6QK]; Consent Order Under New York Banking Law §§ 39 and 44, at 16, *In re Commerzbank AG, et al.* (N.Y. State Dep't of Fin. Servs. Mar. 12, 2015), https://www.dfs.ny.gov/system/files/documents/2020/04/ea150312_commerzbank.pdf [https://perma.cc/V6QP-8EE2].

132. While targeted cooperation between federal and state authorities may help explain this gap, the relationship between the Southern District—as well as the DOJ more broadly—and DFS has been marked not just by cooperation, but also by competition. See, e.g., Kenneth S. Rosenzweig, Note, *Regulation of Foreign Banks Operating in the United States: A State Regulator's Controversial Pursuit of a London-Based Bank*, 18 FORDHAM J. CORP. & FIN. L. 1021, 1032–34 (2013) (noting that DFS pursued regulatory action against Standard Chartered as DOJ decided not to file criminal charges); Too BIG TO JAIL, *supra* note 31, at 20–21 (observing that DOJ and federal regulators “scrambl[ed]” to complete their investigations of HSBC to ensure they would bring enforcement actions before DFS). Federal authorities may also simply exercise more selectivity in their enforcement efforts.

133. THOMSON REUTERS PRACTICAL L., GLOSSARY: DEFERRED PROSECUTION AGREEMENT (DPA) (2021).

134. *Id.*

135. *Id.*

136. See Jason Leopold et al., *The FinCEN Files*, BUZZFEED NEWS (Sept. 20, 2020), <https://www.buzzfeednews.com/article/jasonleopold/fincen-files-financial-scandal-criminal>.

included major banks such as JPMorgan Chase & Co., Standard Chartered, Deutsche Bank, Bank of New York Mellon, and HSBC Bank USA (“HSBC”).¹³⁷

The case study of how HSBC entered into its DPA is instructive as to some of the issues commonplace in federal BSA enforcement. In 2012, the U.S. Senate Permanent Subcommittee on Investigations found that the OCC failed to correct problems in HSBC’s AML program despite conducting regular examinations.¹³⁸ The subcommittee determined that this failure stemmed in part from the OCC’s decision to cite AML compliance failures as “Matter[s] Requiring Attention” instead of violations of law,¹³⁹ its use of infrequent and compartmentalized examination procedures that did not account for the program as a whole,¹⁴⁰ and its reluctance to use enforcement actions to prescribe informal remedies of identified problems.¹⁴¹ The subcommittee blamed OCC supervisors and enforcement, noting that examiners actually identified many of the problems in HSBC’s compliance program that enforcement officials declined to act on.¹⁴²

Later that year, HSBC entered into a DPA with the DOJ in which it agreed to pay \$1.9 billion in penalties stemming from its “blatant failure to implement proper anti-money laundering controls [leading to] the laundering of at least \$881 million in drug proceeds through the U.S. financial system.”¹⁴³ Yet even this DPA included some controversy—DOJ continued to negotiate with counsel for HSBC well past the attorney general’s “take-it-or-leave-it” offer and deadline.¹⁴⁴ The final DPA included revisions that shielded HSBC employees and executives from future prosecution for certain identified violations and left the door open for executives overseeing continuing deficiencies at the bank’s AML program to keep their bonuses.¹⁴⁵

Under the DPA, HSBC agreed to oversight by an independent monitor who submitted annual reviews of the bank’s AML program to prosecutors.¹⁴⁶

networks [<https://perma.cc/3A36-N397>]. Congress has appeared to take note of this issue, as under the NDAA’s amendments, repeat violators now face penalties triple the profit gained or double the maximum penalty. *See* NDAA § 6309, 31 U.S.C. § 5321(f).

137. *See* Leopold et al., *supra* note 136.

138. *See* STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 112TH CONG., U.S. VULNERABILITIES TO MONEY LAUNDERING, DRUGS, AND TERRORIST FINANCING: HSBC CASE HISTORY 8 (2012).

139. *Id.* at 321–25.

140. *Id.* at 325–28.

141. *Id.* at 328–29.

142. *Id.* at 334.

143. Press Release, Dep’t of Just., 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), <https://www.justice.gov/opa/pr/hsbc-holdings-plc-and-hsbc-bank-usa-na-admit-anti-money-laundering-and-sanctions-violations> [<https://perma.cc/DUS4-BUM7>].

144. TOO BIG TO JAIL, *supra* note 31, at 19–20.

145. *Id.*

146. *See* Spencer Woodman, *HSBC Moved Vast Sums of Dirty Money After Paying Record Laundering Fine*, INT’L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Sept. 21, 2020), <https://www.icij.org/investigations/fincen-files/hsbc-moved-vast-sums-of-dirty-money-after-paying-record-laundering-fine/> [<https://perma.cc/T5AC-4VC3>].

An investigation revealed, however, that while under monitorship and probation, AML compliance officers at HSBC faced serious obstacles in bringing the bank's program into compliance.¹⁴⁷ Former compliance officers maintained that HSBC did not give their departments sufficient time to conduct investigations, that non-U.S. HSBC branches often ignored requests for basic beneficial owner information about their customers, and that they had little power to close problematic customer accounts.¹⁴⁸ These issues led to the filing of SARs that lacked basic identifying customer information on over 6800 transactions totaling \$1.5 billion that were processed through HSBC's Hong Kong branch, with \$900 million of that total involving shell companies linked to criminal activity, as identified by the International Consortium of Investigative Journalists (ICIJ).¹⁴⁹ Despite these and other issues, in 2017, the DOJ ended its DPA with HSBC, a move that "stunned" a former senior AML executive at the bank who believed issues at the Hong Kong branch—the "epicenter" of HSBC's financial crime problems—were "largely untouched" while the bank was under monitorship.¹⁵⁰ Enforcement data and the use of DPAs suggests that there is greater opportunity for federal authorities to prosecute banks for violations of the BSA, yet resource shortages and the decision to account for possible secondary effects of BSA enforcement limit prosecutors' ability to bring actions.

b. Factors Underlying the Current Level of Enforcement

Several reasons have been proffered by observers, regulators, and policymakers to explain underenforcement of the BSA. Federal banking regulators face an "extremely broad expanse of issues,"¹⁵¹ and the BSA applies to a wide range of financial institutions.¹⁵² Yet, enforcement officials often face resource shortages,¹⁵³ in the form of limited financial resources, staffing, and enforcement tools.¹⁵⁴ FinCEN's budget had only grown by

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. Lawsky, *supra* note 126.

152. The BSA applies to FDIC-insured banks, commercial banks, trust companies, private bankers, branches of foreign banks operating in the United States, credit unions, thrift institutions, brokers, dealers, investment bankers, investment companies, currency exchanges, money service businesses, credit card operators, insurance companies, precious metals dealers, pawnbrokers, loan companies, travel agencies, telegraph companies, automobile dealers, real estate brokers, the U.S. Postal Service, and casinos, to name a few. See 31 U.S.C. § 5312(a)(2).

153. See Skinner, *supra* note 22, at 5 ("[T]he problem is one of enforcement—that regulators lack the resources to monitor banks' compliance with these regulatory requirements . . . or worse, bank managers choose to be willfully blind to obvious red flags.").

154. See O'Brien & Dixon, *supra* note 121, at 970 (noting that the Organization for Economic Cooperation and Development and the Australian Government Productivity Commission have identified several factors to evaluate the quality of a regulatory system, including "the number of regulators and scope of the regulation for which each is responsible; extent of independence and policymaking responsibilities; and resources, enforcement tools,

about 3 percent from 2013 to 2019, from \$111.5 million to \$115 million.¹⁵⁵ The budget for fiscal year 2020 provides a significant windfall for the agency's resources: \$124.7 million—an 8.4-percent increase.¹⁵⁶ In recognition of this, the NDAA provides for an additional \$10 million for FinCEN's budget.¹⁵⁷

Yet, FinCEN currently employs fewer full-time staff than it did in 2013.¹⁵⁸ As for enforcement tools, several observers have noted the sparse mechanisms that facilitate BSA compliance and have proposed several additional tools, including increasing enforcement against individual bank executives,¹⁵⁹ regular auditing of banks' AML software systems,¹⁶⁰ market-based creation of industry standards by private interest groups,¹⁶¹ and corporate codes of conduct for financial services akin to the concept of corporate social responsibility in the areas of labor and human rights.¹⁶²

Although some of the above resource limitations fall outside the control of federal enforcement officials, when authorities have identified and prosecuted violations of the BSA, the use of DPAs and non-prosecution agreements (NPAs) against large financial institutions has, at times, allowed banks and their executives to skirt responsibility for enabling or passively permitting criminals to launder money through their systems. In testimony before the Senate Judiciary Committee, then-Attorney General Eric Holder observed in March 2013 that the DOJ found it difficult to prosecute large financial institutions when indications suggested that prosecution would negatively impact the national or global economy.¹⁶³ Then-Treasury Under Secretary of the Office of Terrorism and Financial Intelligence David Cohen also testified that the DOJ asked the Treasury to assess the economic impact of prosecuting HSBC.¹⁶⁴ Despite internal recommendations from DOJ's Asset Forfeiture and Money Laundering Section in September 2012 to pursue a guilty plea from HSBC,¹⁶⁵ the DOJ entered into a DPA with the bank later that year.¹⁶⁶

and discretion with which they are provided" (quoting AUSTRALIAN GOV'T PRODUCTIVITY COMM'N, IDENTIFYING AND EVALUATING REGULATORY REFORM, app. H (2011))).

155. Compare U.S. DEP'T OF THE TREASURY, BUDGET IN BRIEF EXECUTIVE SUMMARY (2014), <https://home.treasury.gov/system/files/266/1.%20Exec%20Summary%202014%20-%20FINAL%20ok.pdf> [https://perma.cc/KR3R-K7GJ], with U.S. DEP'T OF THE TREASURY, BUDGET IN BRIEF 1 (2020) [hereinafter 2020 BUDGET IN BRIEF], <https://home.treasury.gov/system/files/266/FY2020BIB.pdf> [https://perma.cc/37H5-J4SX].

156. 2020 BUDGET IN BRIEF, *supra* note 155, at 1.

157. H.R. REP. NO. 116-617, at 2139 (2020) (Conf. Rep.).

158. *See supra* note 30.

159. *See* Lawsky, *supra* note 126.

160. *Id.*

161. *See* Skinner, *supra* note 22, at 13–15.

162. *Id.* at 15–16.

163. *See* TOO BIG TO JAIL, *supra* note 31, at 8.

164. *Id.* at 9–10.

165. *Id.* at 12–13, 39, 41.

166. *See* Press Release, *supra* note 143.

Dubbed “Too Big to Jail” by some observers,¹⁶⁷ critics—including Judge Jed Rakoff of the Southern District of New York—see the overuse of DPAs as prosecutors letting banks off the hook for BSA violations.¹⁶⁸ In Judge Rakoff’s view, such DPAs constitute “the cost of doing business rather than a real punishment,” and his “single greatest objection” to BSA enforcement is that the “ultimately responsible executives never get prosecuted at all.”¹⁶⁹

Congress continues to assess the propriety of DPAs and NPAs in enforcing the AML laws. The NDAA’s amendments require the attorney general to submit a report to Congress every four years that lists the DPAs and NPAs entered into, the justification for each agreement, the factors accounted for in entering these agreements, and the extent of coordination between the attorney general and the Treasury in reaching these agreements.¹⁷⁰

Congress and the Treasury have created a complex and detailed regulatory scheme in the BSA. In implementing this regime, enforcement authorities must “balance specific economic efficiency . . . and professional rights to self-governance with explicit requirements that society should not be held responsible or liable for the failures of the former.”¹⁷¹ How federal regulators decide to balance these concerns necessarily implicates the volume and kinds of claims prosecuted under the BSA. Besides the extent of enforcement, challenges faced by banks also contribute to the limitations on BSA compliance.

2. Challenges to Creating a Culture of Compliance at Banks

On the other side of the regulatory equation are the regulated parties. The BSA predominantly utilizes coercion to compel banks to enforce its provisions—through duties to report suspicious activity or refrain from participating in certain transactions.¹⁷² By choosing the stick over the carrot, regulators have imposed on financial institutions the duty to police the activity of their clients and avoid transactions with some parties altogether;

167. See, e.g., Danielle Douglas, *Holder Concerned Megabanks Too Big to Jail*, WASH. POST (Mar. 6, 2013), https://www.washingtonpost.com/business/economy/holder-concerned-megabanks-toobig-to-jail/2013/03/06/6fa2b07a-869e-11e2-999e-5f8e0410cb9d_story.html [<https://perma.cc/Z3ZE-9B9L>]; Victoria Finkle & Rob Blackwell, *How Holder’s Surprising ‘Too Big to Jail’ Admission Changes Debate*, AM. BANKER (Mar. 6, 2013), <https://www.americanbanker.com/news/how-holders-surprising-too-big-to-jail-admission-changes-debate> [<https://perma.cc/4RLU-UYUP>]; HSBC and Standard Chartered: *Too Big to Jail*, ECONOMIST (Dec. 15, 2012), <https://www.economist.com/finance-and-economics/2012/12/15/too-big-to-jail> [<https://perma.cc/84MJ-N4BX>].

168. Ben Hallman et al., *6 Money Laundering Reforms That Experts Say Need to Happen Right Now*, INT’L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Oct. 19, 2020), <https://www.icij.org/investigations/fincen-files/6-money-laundering-reforms-that-experts-say-need-to-happen-right-now/> [<https://perma.cc/2S93-A7VA>].

169. *Id.*

170. See NDAA, Pub. L. No. 116-283, § 6311, 134 Stat. 3388, 4595 (2021).

171. O’Brien & Dixon, *supra* note 121, at 972.

172. See Bucy, *supra* note 23, at 852.

thus, banks must spend resources on compliance functions, which may lead the bank to refuse certain transactions and even close certain accounts.¹⁷³

Financial institutions therefore have strong financial incentives—particularly in the absence of sufficient enforcement—to underfund, understaff, or otherwise neglect or even undermine their BSA compliance function, even if it means an occasional fine.¹⁷⁴ While HSBC forfeited a then-record \$1.9 billion in its 2012 DPA,¹⁷⁵ its global assets of over \$2 trillion that year perhaps softened the blow.¹⁷⁶

Furthermore, the problems presented by this incentive structure are compounded at U.S. branches of global banks because such branches serve “as a gateway into the U.S. financial system.”¹⁷⁷ Absent strong global governance, U.S. branches face significant challenges in processing transactions from affiliate branches that are located abroad with different AML and sanctions laws and that face less scrutiny and greater incentives to process violative transactions through their U.S counterpart.¹⁷⁸

B. Evaluating the NDAA’s Whistleblower Enhancements

As Congress modeled the NDAA’s additions to the BSA’s whistleblower provisions on the 2010 enhancements to the SEC’s whistleblower program,¹⁷⁹ the critical reception to this program may provide some insight into the potential impact of the newly amended BSA on AML enforcement. The NDAA’s provisions differ from those found in the SEC program in one key respect: the NDAA does not retain the 10-percent reward floor for informants.¹⁸⁰ This difference grants the secretary greater discretion to provide lower rewards to informants in the BSA context than in the SEC program.

Keeping this potential difference in mind, from a financial standpoint, the SEC’s whistleblower program revisions have been an enormous success. The program, formerly “practically unknown,”¹⁸¹ is now a mechanism that the SEC has used to collect over \$2 billion in monetary sanctions since its

173. See Michael Levi, *Pecunia non olet: Cleansing the Money-Launderers from the Temple*, 16 CRIME, L. AND SOC. CHANGE 217, 217 (1991).

174. See O’Brien & Dixon, *supra* note 121, at 971–72; see also Hallman et al., *supra* note 168 (noting Judge Jed Rakoff’s observation that fines have “become in effect the cost of doing business rather than a real punishment”). As one former HSBC employee observed, “[y]ou can’t get a man to believe in something when a salary depends on him not believing it.” Woodman, *supra* note 146.

175. See Press Release, *supra* note 143.

176. See HSBC HOLDINGS PLC, ANNUAL REPORT AND ACCOUNTS 2012, at 374 (2012).

177. Press Release, S. Permanent Subcomm. on Investigations, HSBC Exposed U.S. Financial System to Money Laundering, Drug, Terrorist, Financing Risks (July 16, 2012), <https://www.hsgac.senate.gov/subcommittees/investigations/media/hsbc-exposed-us-financial-system-to-money-laundering-drug-terrorist-financing-risks> [https://perma.cc/2BKK-PZFD].

178. See O’Brien & Dixon, *supra* note 121, at 960–61.

179. See *supra* notes 38–41 and accompanying text.

180. See *supra* note 84 and accompanying text.

181. See U.S. SEC, *supra* note 85, at 4.

inception.¹⁸² Awards have been made in relation to a variety of violations, including tips about issuer reporting and disclosure requirements, offering frauds and Ponzi schemes, and Foreign Corrupt Practices Act of 1977¹⁸³ (FCPA) violations.¹⁸⁴ The SEC's increase in antiretaliation enforcement actions and efforts to prevent companies from placing restrictive confidentiality agreements on employees and other potential whistleblowers also suggest that the agency places high priority on the program.¹⁸⁵

The program, however, is not without its faults. While whistleblower attorneys can help screen tips for meritorious cases,¹⁸⁶ the SEC routinely receives thousands of tips, and only a small portion result in enforcement actions. From August 2011 through 2019, the SEC received over 33,300 whistleblower tips.¹⁸⁷ Yet, only sixty-seven informants received awards—totaling approximately \$387 million—during this same time period.¹⁸⁸ Such a high degree of meritless information may make the search for each credible tip more difficult, thus necessitating greater investment in enforcement staff.¹⁸⁹

Under the BSA, increased information provided by whistleblowers addresses only one side of the regulatory equation. Money laundering detection is increasingly difficult, especially when regulators lack access to financial records in shell jurisdictions.¹⁹⁰ Even within U.S. jurisdictions, compliance failures at banks can take years to root out.¹⁹¹ An increase in whistleblower tips will aid enforcement in the above situations, but what of

182. See U.S. SEC, *supra* note 86, at 1. The Congressional Budget Office (CBO) estimates that the NDAA's amendments to the BSA will have a negligible net effect on the deficit. See Letter from Phillip L. Swagel, Dir., Cong. Budget Off., to Hon. Mike Enzi, Chairman, U.S. S. Comm. on the Budget, at 2 (Dec. 7, 2020), https://www.cbo.gov/system/files/2020-12/hr6395paygoSenate_0.pdf [https://perma.cc/4SUP-BK2T] ("Division F would increase direct spending by \$283 million and increase revenues by that same amount.").

183. Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.).

184. See MICHAEL C. KELLY & MARISOL RAMIREZ, THE SEC'S WHISTLEBLOWER PROGRAM IN 2016: HAS IT "HIT ITS STRIDE" AFTER FIVE YEARS? 3–4 (2016).

185. *Id.* at 4–6.

186. *Id.* at 7–8.

187. See U.S. SEC, *supra* note 86, at 22.

188. *Id.* at 1.

189. See Victor A. Razon, Note, *Replacing the SEC's Whistleblower Program: The Efficacy of a Qui Tam Framework in Securities Enforcement*, 47 PUB. CONT. L.J. 335, 347 (2018) ("Instead of using taxpayer dollars to hire additional enforcement staff, the SEC ought to outsource some of its enforcement efforts to private parties.").

190. See Havian & Ronickher, *supra* note 32. Ideally, the NDAA's new provisions regarding disclosure of beneficial owners will help buttress federal authorities' efforts in enforcing the AML laws against bad actors hiding behind shell companies formed in U.S.-based jurisdictions or those formed abroad and registered in the United States, but the effect of this revision remains to be seen. See NDAA, Pub. L. No. 116-283, §§ 6401–03, 134 Stat. 3388, 4604–25 (2021) (codified as amended in scattered sections of 31 U.S.C.).

191. See Havian & Ronickher, *supra* note 32 ("[I]t took a five-year investigation to root out the bad behavior [at Standard Chartered], even though Standard Chartered was already under a deferred prosecution agreement that required its cooperation and gave U.S. authorities additional visibility into the bank.").

a scenario like the one Congress identified at HSBC.¹⁹² OCC examiners identified many of the problems at the banking giant over a six-year period, yet the OCC's enforcement and supervisory arms failed to act.¹⁹³ Though federal regulators face staffing shortages at the enforcement level,¹⁹⁴ the same is not true of federal bank examiners tasked with reviewing financial institutions' BSA compliance programs—in 2019, the government employed 64,550 financial examiners, a 10-percent increase from the prior year.¹⁹⁵ This suggests that while whistleblowers under this framework will likely help glean more information from regulated parties, they will not substantially increase federal enforcement.

C. The Efficacy of *Qui Tam* Enforcement of the Bank Secrecy Act

Following its groundbreaking investigation of money laundering and BSA compliance at major financial institutions, the ICIJ interviewed several industry experts who proposed a variety of reforms to combat money laundering.¹⁹⁶ These reforms included empowering banks' BSA compliance officers.¹⁹⁷ Congress, too, appears in search of new ways to enforce the BSA. The NDAA establishes the Subcommittee on Innovation and Technology within the Treasury to "encourage and support technological innovation in" AML efforts and provides for the appointment of BSA innovation officers at banks.¹⁹⁸ *Qui tam* actions can address both underenforcement by federal regulators and malfeasance or negligence by financial institutions by encouraging enforcement where regulatory resource shortages would otherwise prevent actions, empowering BSA compliance officials at banks by providing them a cause of action and incentivizing financial institutions to take their BSA obligations more seriously. On the other hand, several barriers exist to simply importing the FCA's *qui tam* provisions into the BSA, including the preservation of prosecutorial discretion, ensuring *qui tam* actions do not unnecessarily burden BSA compliance responsibilities, and maintaining confidentiality.

This section will first examine some of the benefits and problems arising from *qui tam* actions under the FCA. It will then analyze how *qui tam* provisions benefit BSA compliance and the issues posed by such a regime.

1. Critical Reception to *Qui Tam* Under the False Claims Act

Qui tam actions under the FCA are now commonly brought—whistleblowers filed 633 suits in 2019 leading to the recovery of

192. See *supra* Part II.A.1.

193. See STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 112TH CONG., U.S. VULNERABILITIES TO MONEY LAUNDERING, DRUGS, AND TERRORIST FINANCING: HSBC CASE HISTORY 334 (2012).

194. See *supra* Part II.A.1.b.

195. See *supra* note 122.

196. See Hallman et al., *supra* note 168.

197. *Id.*

198. NDAA §§ 6207–6208, 31 U.S.C. § 5311 note.

\$2.1 billion.¹⁹⁹ Although this data suggests qui tam has functioned as an effective mechanism for the government to recover significant funds lost through fraud by contracting partners, in-depth evaluations of qui tam consider not only the purpose that private enforcement serves but also the impact on the broader legal landscape.

Recoveries through qui tam actions inherently include other costs, including the rewards given to informants and the impact of frivolous FCA claims on courts and the public.²⁰⁰ To wit, the government paid \$265 million to whistleblowers in 2019,²⁰¹ reducing the net gain to the government's coffers to \$1.835 billion.²⁰² Evaluating other, more nebulous costs can prove difficult. While private enforcement by relators saves taxpayer dollars by shifting litigation and detection costs onto private parties better positioned to monitor misconduct, and by providing resources unavailable to enforcement agencies, it can also disrupt public policy more broadly.²⁰³ As such, there is disagreement as to whether enforcement through a civil cause of action is more efficient than public enforcement on its own.²⁰⁴ For example, the cost efficiency of private actions may be outweighed by settlement agreements that do not consider the public interest.²⁰⁵

In an attempt to quantify some of these costs, Professor David Kwok obtained raw data via Freedom of Information Act requests on qui tam actions from 1986 to 2009.²⁰⁶ Professor Kwok sought to determine the prevalence of frivolous FCA qui tam actions by identifying “filing mill” law firms—those firms representing qui tam relators with a high number of case filings but a low government intervention rate.²⁰⁷ Only two firms demonstrated a high number of filings, and only one of these firms filed claims that the government intervened in at rates lower than its average 27-percent intervention rate.²⁰⁸ Furthermore, the data indicated that, as firms filed more qui tam actions, the government intervened at a higher rate, suggesting that experience improved firms’ ability to identify and present strong cases or that less successful firms stopped filing qui tam actions.²⁰⁹ Professor Kwok also determined that the government does not frequently dismiss or delay its investigation of FCA cases.²¹⁰ Ultimately, Professor Kwok concluded that most firms do not pursue a “low-effort, high-volume”

199. See Press Release, *supra* note 120. The \$2.1 billion amount recovered through qui tam actions under the FCA made up the majority of the \$3 billion recovered under the FCA that year. *Id.*

200. See David Kwok, *Evidence from the False Claims Act: Does Private Enforcement Attract Excessive Litigation?*, 42 PUB. CONT. L.J. 225, 226 (2013).

201. See Press Release, *supra* note 120.

202. *See id.*

203. See Kwok, *supra* note 200, at 230–31.

204. *Id.* at 231–32.

205. *Id.* at 232.

206. *Id.* at 238.

207. *Id.* at 240.

208. *Id.* at 241–42.

209. *Id.* at 243–44.

210. *Id.* at 245–47.

case strategy and recommended further case studies to validate his preliminary conclusions that the FCA's qui tam provisions do not attract excessive litigation.²¹¹

Another empirical analysis of FCA claims by Professor David Freeman Engstrom also determined that the DOJ rarely uses its authority to terminate qui tam actions brought by relators.²¹² Professor Engstrom, however, advocated for greater DOJ screening on the merits as opposed to interventions and terminations based on strategic concerns.²¹³ In offering guidance to those seeking to implement qui tam in other areas, such as securities violations enforcement, Professor Engstrom posits several enhancements, including incentivizing the agency to play a greater gatekeeper role, reconsidering the FCA's tiered bounty system so relators with strong cases and sufficient resources can bring actions without DOJ intervention, and mixing public and private enforcement instead of clearly delineating responsibilities between the two.²¹⁴ Indeed, some evidence suggests that courts already interpret the DOJ declining to intervene as a signal that a claim lacks merit.²¹⁵

These analyses suggest that concerns over waste or abuse—while understandable given the historical prevalence of such issues²¹⁶—are somewhat overstated, as DOJ intervention and dismissal rate data suggest frivolous claims are not brought frequently.²¹⁷ At the same time, the DOJ's rare use of dismissal and its low intervention rate can partly be explained by the agency's consideration of strategic, rather than merit-based, factors, as well as the shortcomings inherent in the FCA's incentive structure.²¹⁸ The FCA, then, presents an effective, if imperfect, model that has led to an enormous financial return: under the FCA, the government recovered \$56 billion from 1986 to 2017,²¹⁹ with a majority of this total coming from qui tam actions.²²⁰ Indeed, in contrast to whistleblowing regimes that provide only rewards, such as that at the SEC, qui tam claims are more likely to be meritorious and contain better quality information precisely because of

211. *Id.* at 248–49.

212. See Engstrom, *supra* note 47, at 1749.

213. *Id.*

214. *Id.* at 1751–54.

215. See Daniel Silver & Benjamin A. Berringer, *Whistleblowers: The US Perspective*, in THE PRACTITIONER'S GUIDE TO GLOBAL INVESTIGATIONS 328, 342 & n.105 (Judith Seddon et al. eds., 3d ed. 2019) (compiling cases).

216. See *supra* Part I.C.1.

217. See generally Kwok, *supra* note 200.

218. See Engstrom, *supra* note 47, at 1748–54.

219. See Silver & Berringer, *supra* note 215, at 340.

220. See Kwok, *supra* note 200, at 239 (finding \$11.7 billion recovered via qui tam from 1986 to 2009); see also Michael J. Slattery, *What DOJ's FY 2018 False Claims Act Recovery Statistics Reveal*, BLANK ROME LLP (Jan. 17, 2019), <https://governmentcontractsnavigator.com/2019/01/17/what-doj-s-fy-2018-false-claims-act-recovery-statistics-reveal/> [https://perma.cc/3RB8-BA5D] (listing amounts totaling approximately \$16.1 billion in qui tam recovery from 2013 to 2017).

the costs of bringing a claim imposed on the relator.²²¹ Although the qui tam model under the FCA holds promise as an effective tool to enforce the BSA, concerns particular to the BSA and maintaining effective AML enforcement must also be accounted for.

2. Potential Benefits and Challenges to Qui Tam Enforcement of the Bank Secrecy Act

Despite a vast amount of literature on qui tam actions and several proposals to expand the use of public-private enforcement into other contexts,²²² little has been written on the efficacy of qui tam in the BSA. Professor Pamela Bucy argues against qui tam provisions in the AML context.²²³ Much of Professor Bucy's analysis, however, relates to a qui tam scheme that deputizes the bankers and professionals who deal directly with money launderers as private attorneys general to enforce the AML laws against their clients or business partners.²²⁴ Professor Bucy convincingly argues that such a regime would prove ineffective, as business incentives would lead potential relators to prioritize client relationships over BSA enforcement²²⁵ and because whistleblower protections in the AML context would not suffice to address the harm done to the business's reputation.²²⁶

But Professor Bucy's argument speaks specifically to the applicability of qui tam in enforcing the AML laws against money launderers. By contrast, this Note focuses on qui tam's potential to help enforce the BSA against financial institutions lacking sufficient AML controls. In this context, the potential attorneys general would primarily consist of bank employees, particularly AML compliance officials, enforcing the BSA against their employers—financial institutions who disregard or undermine their BSA compliance duties and allow money laundering to flourish. This relationship between bank employee and employer better resembles the typical relationship between an FCA qui tam relator and defendant.²²⁷ As such, whistleblower protections will help compensate for some of the damage done to the employer-employee relationship.²²⁸ While Professor Bucy observes that a single whistleblower is less likely to offer sufficient proof of AML violations than an FCA relator due to the greater complexity of detecting

221. See Anthony J. Casey & Anthony Niblett, *Noise Reduction: The Screening Value of Qui Tam*, 91 WASH. U. L. REV. 1169, 1216–17 (2014).

222. See Engstrom, *supra* note 47, at 1691 n.6 (compiling articles proposing public-private enforcement regimes in securities regulation, environmental protection, civil rights, and tax); see also Zachary M. Dayno, *Private-Citizens Policing Corporate Behavior: Using a Qui Tam Model to Catch Financial Fraud*, 43 VT. L. REV. 307, 333–49 (2018); Razon, *supra* note 189, at 347.

223. See Bucy, *supra* note 23, at 851–55.

224. *Id.* at 852.

225. *Id.*

226. *Id.* at 853.

227. *Id.* (“The *qui tam* plaintiff often will be an employee of the defendant and, it is likely, will have had a long-standing relationship which will be jeopardized by the *qui tam* lawsuit.”).

228. *Id.*

money laundering,²²⁹ BSA compliance staff are well positioned to evaluate their own employers' AML shortcomings. Financial institutions must maintain AML programs that designate individuals responsible for monitoring compliance with the BSA.²³⁰ This staff is directly responsible for monitoring transactions for suspicious activity and updating customer information to assess the risks customers pose.²³¹ Financial institutions have strong incentives to stymie the efforts of their BSA compliance functions.²³² In such situations, BSA compliance staff need recourse to report wrongdoing.

In addition to empowering BSA compliance staff and incentivizing compliance by regulated parties, *qui tam* also benefits BSA enforcement through decreased reliance on regulatory agencies to bring actions. Private enforcement can provide additional resources and expertise through capable plaintiffs and circumvent regulators who are unwilling or unable to effectively police regulated parties.²³³ BSA compliance staff have the requisite expertise to understand a financial institution's obligations under the BSA by virtue of their positions. Moreover, *qui tam* provisions modeled on the FCA have the additional benefit of mixing a degree of public oversight with private enforcement. However, issues arise in finding the right balance between the private enforcement goals of antiregulatory capture and cost saving and the public interest in effectively gatekeeping meritless claims.²³⁴

Congress modeled the NDAA's enhancements to the BSA's whistleblower rewards on the whistleblower program at the SEC.²³⁵ Indeed, several authors have suggested improving the SEC program via the use of *qui tam*. One observer has argued that a *qui tam* framework's screening ability and its imposition of professional and personal costs would improve the quality of whistleblower information under the SEC's program.²³⁶ Another scholar has proposed a modified *qui tam* model within section 922 of the Dodd-Frank Act.²³⁷

Professor Bucy also raises other objections to a *qui tam*-style framework in AML enforcement that reflect broader concerns about private enforcement—namely, that such provisions remove prosecutorial discretion, deter systematic development of the law, and interfere with, or duplicate, the government's ability to prosecute.²³⁸ These considerations, as well as more

229. *Id.*

230. See 31 C.F.R. § 1020.210 (2021).

231. *Id.*

232. See *supra* notes 174–77 and accompanying text.

233. See Engstrom, *supra* note 47, at 1690–91.

234. See *id.* at 1697–700. Engstrom identifies five core gatekeeper requirements an agency would ideally perform: (1) terminating meritless or inefficient private actions to protect the public interest, (2) policing collusion between private enforcers and defendants, (3) using nonintervention as a means to signal skepticism about a claim, (4) intervening in strong cases brought by under-resourced private enforcers, and (5) assisting claimants concerned about retribution. *Id.*

235. See *supra* notes 38–41 and accompanying text.

236. See Razon, *supra* note 189, at 348–50.

237. See 15 U.S.C. § 78u-6; 18 U.S.C. § 1514A; Dayno, *supra* note 222, at 333–49.

238. See Bucy, *supra* note 23, at 854–55.

specific issues, will help guide the following discussion of some of the limitations of adding a qui tam framework to the BSA: specifically, ensuring relators' suits do not preclude criminal enforcement, preserving confidentiality, and maintaining effective BSA compliance at banks by deterring abuse and circumvention of regular BSA compliance procedures.

a. Standing Issues and the Bank Secrecy Act's Distinction Between Civil and Criminal Liability

The U.S. Supreme Court addressed the issue of standing under the FCA in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*.²³⁹ The Court had previously held that to establish Article III standing, a plaintiff had to show injury in fact, causation, and redressability.²⁴⁰ Thus, relators bringing suit under the FCA faced a potential standing problem in demonstrating injury in fact, as exemplified by the respondent in the case before the Court: Jonathan Stevens only asserted injury to the United States, in the form of "injury to its sovereignty arising from violation of its laws . . . and the proprietary injury resulting from the alleged fraud."²⁴¹ Thus, the qui tam relator's interest in recovering the bounty from a successful suit does not suffice to confer standing, as such interest bears no relation to the actual injury suffered by the United States.²⁴²

The Court, however, upheld the standing of the qui tam relator under a partial assignment theory.²⁴³ Under this doctrine, the relator functions as an assignee of a claim stemming from an injury suffered by the assignor (the United States), and the assignor's injury in fact confers standing on the qui tam relator.²⁴⁴ The Court further buttressed this reasoning by looking to the history of qui tam actions, finding that the historical prevalence of qui tam statutes permitting informers who had suffered no injury to sue demonstrated that qui tam actions constituted "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process" under Article III.²⁴⁵

Incorporating qui tam into the BSA presents similar issues in demonstrating injury in fact. As one author argues, under the reasoning of *Stevens*, the government retains a partial interest due to the dual injuries suffered: the injury to U.S. sovereignty stemming from the violation of its laws, which cannot be assigned, and the injury to U.S. proprietary interests stemming from the fraud, which is assigned to the relator.²⁴⁶ In the context of the BSA, the United States retains the same injury to its sovereignty due

239. 529 U.S. 765 (2000).

240. *Id.* at 771.

241. *Id.*

242. *Id.* at 772.

243. *Id.* at 773.

244. *Id.* at 773–74.

245. *Id.* at 774, 777 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998)).

246. See Eric S. Askanase, *Qui Tam and the False Claims Act: Criminal Punishment in Civil Disguise*, 70 DEF. COUNS. J. 472, 477 (2003).

to a financial institution's violations of the BSA, but the equivalent proprietary interest transferred to the relator proves more difficult to discern. However, as the *Stevens* court observed, “[t]he FCA can reasonably be regarded as effecting a partial assignment of the Government's *damages claim*.²⁴⁷ As such, it appears that damages arising from BSA violations may be assignable.

Qui tam actions may also conflict with the double jeopardy clause when not properly administered. In *United States v. Halper*,²⁴⁸ the Court held that an FCA claim can give rise to a double jeopardy violation when a defendant who has been punished in a criminal prosecution is subjected to an additional civil sanction that is not remedial but instead serves as deterrence or retribution.²⁴⁹ The Court later abrogated *Halper* in holding that a civil sanction need not be solely remedial to avoid violating the double jeopardy clause and offered a list of factors to determine whether civil penalties were so punitive as to be criminal, rather than remedial, in nature.²⁵⁰ Because the BSA also provides for criminal and civil penalties,²⁵¹ careful drafting and controls are necessary to ensure that a qui tam regime would not violate a defendant's Fifth Amendment rights.

b. The SAR Problem: Preserving Confidentiality

Among the many requirements imposed on banks, the BSA requires that financial institutions “report any suspicious transaction relevant to a possible violation of law or regulation.”²⁵² The statute also prohibits financial institutions and the government from notifying any party involved in a transaction that the transaction had been reported.²⁵³ Regulations go a step further in clarifying the scope and confidentiality of these SARs.

Regulations issued by the Treasury require every bank to file SARs with FinCEN on transactions “relevant to a possible violation of law or regulation”²⁵⁴ or on transactions of \$5,000 or more that “the bank knows, suspects, or has reason to suspect”: (1) stem from or disguise illegal activities; (2) are designed to evade federal laws, regulations, or reporting

247. *Stevens*, 529 U.S. at 773 (emphasis added).

248. 490 U.S. 435 (1989).

249. *Id.* at 448–49.

250. See *Hudson v. United States*, 522 U.S. 93, 99–100 (1997). These factors include: (1) “[w]hether the sanction involves an affirmative disability or restraint”; (2) “whether it has historically been regarded as a punishment”; (3) “whether it comes into play only on a finding of *scienter*”; (4) “whether its operation will promote the traditional aims of punishment—retribution and deterrence”; (5) “whether the behavior to which it applies is already a crime”; (6) “whether an alternative purpose to which it may rationally be connected is assignable for it”; and (7) “whether it appears excessive in relation to the alternative purpose assigned.”

Id. (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)).

251. See 31 U.S.C. §§ 5321–5322.

252. *Id.* § 5318(g)(1).

253. *Id.* § 5318(g)(2)(A)(i)–(ii).

254. 31 C.F.R. § 1020.320(a)(1), (b)(1)–(2) (2021).

requirements; or (3) have no apparent business or lawful purpose.²⁵⁵ SARs form “the cornerstone of the BSA reporting system,” as U.S. law enforcement agencies utilize the information contained in SARs filed by banks to “combat terrorism, terrorist financing, money laundering, and other financial crimes.”²⁵⁶ The regulations prioritize maintaining the confidentiality of sensitive information contained in SARs: if subpoenaed, financial institutions must decline to produce a SAR or admit that a SAR on a transaction had even been prepared or filed.²⁵⁷ Banks, however, may disclose a SAR to FinCEN, law enforcement agencies, state and federal authorities that administer examinations pursuant to the BSA, other financial institutions in preparation of a joint SAR, and banks may also disclose a SAR in connection with employment references or termination notices.²⁵⁸

Consider a scenario under a qui tam action brought for violations of the BSA. A bank files several SARs on Customer A over a short time period on the basis that the transactions involve shell jurisdictions and serve no clear business purpose, thus suggesting a high risk of money laundering. In a monthly risk committee meeting, the committee decides to retain Customer A. Subsequent to this decision, the bank processes more transactions from the customer, involving the same shell jurisdictions and similar indicia of money laundering. These transactions are all flagged as high-risk by the bank’s transaction monitoring software, and several employees in the bank’s BSA compliance function recommend that a SAR be filed. However, these recommendations are quashed at the highest levels of the bank. A mid-level BSA compliance officer is rebuffed when the officer raises this issue with his superiors. Eventually, the officer files a qui tam action in federal court alleging violations of the BSA related to these transactions and the bank’s lack of customer due diligence procedures. How much of the above information from the SAR can the relator’s complaint include? Enforcement by private attorneys general will thus implicate confidentiality concerns unique to the BSA’s compliance regime.²⁵⁹

c. Maintaining Effective Bank Secrecy Act Compliance

Extending the authority to bring actions under the BSA to private attorneys general risks overenforcement.²⁶⁰ Qui tam may undermine BSA compliance by (1) pushing banks to file more defensive SARs that are less useful to law enforcement agencies or (2) pushing bank employees to file qui tam actions instead of adhering to bank BSA compliance procedures.

255. See *id.* § 1020.320(a)(2).

256. FED. FIN. INSTS. EXAMINATION COUNCIL, *supra* note 59, at 60.

257. See 12 C.F.R. § 21.11(k) (2021) (national banks); *id.* § 163.180(d)(12) (savings associations); *id.* § 208.62(j) (state banks); 31 C.F.R. § 1020.320(e) (2021) (financial institutions broadly).

258. See 31 C.F.R. § 1020.320(e)(1)(ii)(A)–(B).

259. See *infra* Part III.B.

260. See *supra* note 127.

Overenforcement does not only refer to excessive sanctions, such as unjustifiably long prison sentences or high fines but also the secondary effects on the sanctioned party.²⁶¹ In the context of BSA enforcement, reputational harm stemming from a criminal or civil investigation may cause a bank's stock value to decline.²⁶² In addition to such financial effects, termed "market spillover," overbroad enforcement can capture conduct not justified by the purpose of the BSA, known as "definitional spillover."²⁶³ Still, some market spillover is justifiable. If qui tam actions only resulted in fines, the deterrent effect would be weaker than if banks also faced market-based pressures for their BSA compliance failures and would "trivialize the normative message" that the BSA intends to convey—namely, that banks ought to maintain effective AML programs to assist law enforcement in detecting criminal behavior.²⁶⁴

Qui tam enforcement of the BSA also implicates unjustifiable definitional spillover. Banks already file "defensive SARs" out of an abundance of caution when the activity at issue raises few concerns, but to avoid regulatory action, the bank files a SAR with FinCEN.²⁶⁵ The quality of SARs is just as, if not more, important than the quantity of SARs filed, and evidence suggests defensive filing makes for weaker SARs and less effective AML systems.²⁶⁶ FinCEN received over 2.3 million SARs in 2019, with over one million of these filed by banks.²⁶⁷ Law enforcement agencies should be able to utilize information in SARs to combat the underlying criminal activity, instead of wasting time and resources searching for substantive SARs that are buried like needles in a haystack of defensive reports. Faced with the threat of qui tam actions if they choose not to file SARs on transactions that border on regulatory standards for suspicious activity, banks may elect to file reports anyway. Increased enforcement of the BSA via qui tam actions could thus provide greater incentives for banks to file defensive SARs in the absence of demonstrated, robust public oversight of private actions.

261. See, e.g., Bierschbach & Stein, *supra* note 127, at 1751.

262. *Id.*

263. *Id.* at 1748. For example, a strict fifty-five mile per hour speed limit intends to limit dangerous driving, but it may also capture defendants driving safely above the speed limit. *Id.*

264. *Id.* at 1751.

265. See James DeFrantz, *When to Hold 'Em and When to File 'Em—A Two-Part Series on SAR Filings: The Decision*, ASS'N OF CERTIFIED FIN. CRIME SPECIALISTS (Mar. 24, 2016), <https://www.acfcs.org/when-to-hold-em-and-when-to-file-em-a-two-part-series-on-sar-filings-the-decision/> [https://perma.cc/5DDX-SPBU]; see also Matthew Collin, *What the FinCEN Leaks Reveal About the Ongoing War on Dirty Money*, BROOKINGS INST. (Sept. 25, 2020), <https://www.brookings.edu/blog/up-front/2020/09/25/what-the-fincen-leaks-reveal-about-the-ongoing-war-on-dirty-money/> [https://perma.cc/NU22-UU6D].

266. See generally Brigitte Unger & Frans Van Waarden, *How to Dodge Drowning in Data: Rule- and Risk-Based Anti Money Laundering Policies Compared*, 5 REV. L. & ECON. 953 (2009) (examining the over-reporting of suspicious activity under the AML laws and contrasting the Netherlands's risk-based approach with the rules-based approach used in the United States).

267. See *Suspicious Activity Report Statistics (SAR Stats)*, FINCEN, <https://www.fincen.gov/reports/sar-stats> [https://perma.cc/88ZC-TEGF] (last visited Oct. 29, 2021).

At the other end of the spectrum, banks are a valuable source of information on suspected criminal activity when they comply with the BSA. An oft-cited criticism of *qui tam* is the potential for abuse.²⁶⁸ An undesirable result under the BSA would involve an employee bypassing a bank's regular compliance procedures to file a *qui tam* action, thus burdening the bank with litigation in pursuit of a bounty instead of allowing the bank's good-faith efforts to comply with its AML obligations to proceed.

III. A PROPOSED QUI TAM MODEL UNDER THE BSA

The regulation of banks under the BSA is a complicated endeavor—one that involves regular reporting and reviews by banks' BSA/AML compliance departments, regular examinations by banking authorities, and enforcement actions by a variety of federal agencies, most notably FinCEN and the DOJ.²⁶⁹ Bank compliance departments face a difficult task in monitoring transactions and customer accounts for suspicious activity and institutional risk, a task made all the more difficult when banks neglect, understaff, or override the recommendations of the compliance function.²⁷⁰ A small staff at FinCEN both reviews SARs filed by banks and sanctions banks when they fail to comply with the BSA.²⁷¹ Furthermore, when FinCEN or DOJ enforcement officials weigh bringing civil or criminal actions against noncompliant banks, they consider not only the important role banks play in AML monitoring and the associated need to deter defensive SAR filings²⁷² but arguably the systemic economic effects that may result from such actions, as well.²⁷³

A *qui tam* model addresses the above issues through its combination of private and public enforcement. *Qui tam* would serve to empower bank BSA compliance officials—the people best situated to bring such actions by nature of their positions—at noncompliant banks. *Qui tam* would also supplement understaffed federal agencies while preserving a greater degree of prosecutorial discretion than a purely private model. However, simply transplanting the FCA's *qui tam* model onto the BSA poses double jeopardy,²⁷⁴ confidentiality,²⁷⁵ and potential abuse problems.²⁷⁶ Furthermore, much literature has examined and critiqued *qui tam* enforcement under the FCA; a model based on the FCA ought to draw from these critiques and not repeat the same mistakes. This part incorporates the various benefits and limitations explored above into a functional outline for a *qui tam* model in the BSA.

268. See discussion *supra* note 94 and accompanying text.

269. See *supra* Part I.A.

270. See *supra* Part II.A.2.

271. See *supra* notes 59, 265, 267 and accompanying text.

272. See *supra* notes 265–68 and accompanying text.

273. See *supra* notes 163–64 and accompanying text.

274. See *supra* Part II.C.2.a.

275. See *supra* Part II.C.2.b.

276. See *supra* Part II.C.2.c.

A. Revisions to the Agency Intervention Process

Qui tam actions under the BSA should provide a longer time frame for FinCEN to decide whether to intervene or refer the case to the DOJ to prosecute the case criminally. Under the FCA, the government has sixty days to intervene or allow relators to conduct the action on their own.²⁷⁷ The government can intervene in an action to prosecute the claim, dismiss the action, or settle with the defendant.²⁷⁸ Increasing the time frame for FinCEN's initial decision to intervene in a BSA qui tam action accomplishes two goals: (1) reducing the likelihood of a double jeopardy issue and (2) emphasizing the agency's gatekeeper role.

Unlike the FCA, the BSA imposes different degrees of civil and criminal liability depending on the mens rea of the violator and the particular statutory or regulatory provisions violated.²⁷⁹ Although the BSA permits the imposition of a civil penalty for the same violation that gave rise to a criminal penalty,²⁸⁰ qui tam actions could complicate such a scenario.²⁸¹ Under the *Hudson* factors,²⁸² the BSA's civil penalties are likely to be found punitive in nature. Many of the civil penalties articulated in the BSA require "willful" actions²⁸³ and thus "come[] into play only on a finding of *scienter*."²⁸⁴ While the statute calculates some penalties based on the amount of the transactions that the bank processed in violation of the BSA,²⁸⁵ such a foundation does not make the penalties "remedial" in nature, given that the processed transactions do not constitute a loss to any single party in need of restitution. Furthermore, many of the civil penalties articulated under the BSA do not bear any relation to the amount of the transaction and merely serve to punish previous violators and deter future ones.²⁸⁶ Increasing the time for FinCEN to intervene can help assuage double jeopardy concerns by clearly delineating between criminal actions brought by the DOJ and civil actions pursued by FinCEN and qui tam relators.

An increased intervention time frame that includes criminal referral serves functionalist ends, as well. Qui tam actions would likely increase the amount of civil claims brought; such an increase in civil enforcement should not come at the expense of appropriate criminal enforcement, particularly in light of criticisms that enforcement authorities have been too lax in prosecuting BSA violations, as best exemplified in the HSBC case.²⁸⁷ Under an effective

277. See 31 U.S.C. § 3730(b)(4).

278. *Id.* § 3730(c)(1), (2)(A)–(B).

279. *Id.* §§ 5321–5322.

280. *Id.* § 5321(d).

281. See *supra* Part II.C.2.a.

282. See *supra* note 250 and accompanying text.

283. See, e.g., 31 U.S.C. § 5321(a)(1), (5)(C). Some penalties do not require any finding of mental state, see *id.* § 5321(a)(2)–(5)(B), or penalize negligent violations, see *id.* § 5321(a)(6).

284. *Hudson v. United States*, 522 U.S. 93, 99 (1997).

285. See, e.g., 31 U.S.C. § 5321(a)(1), (4)(B) (establishing penalties of up to \$100,000 per transaction for violations of the BSA).

286. *Id.* § 5321(a)(2)–(3), (5).

287. See *supra* notes 167–69 and accompanying text.

private-public enforcement model, the regulators should instead leverage the increase in resources provided by private attorneys general to focus their enforcement efforts on prosecuting more egregious violations of the BSA and fulfilling their gatekeeper role in managing claims brought by qui tam relators.²⁸⁸ An increased time frame would allow FinCEN to protect the public interest through the termination of meritless or inefficient private actions and targeting potential criminal actions for prosecution by the DOJ.²⁸⁹ A qui tam relator whose claim is terminated and referred for criminal prosecution should still qualify as an original source eligible for a reward to incentivize such claims. In such a situation, the NDAA's whistleblower reward structure should control.²⁹⁰

B. Confidentiality Controls

The gatekeeper agency should strive to keep confidential information under seal, while broadening the scope of permissible SAR disclosures to include qui tam relators. Though current regulations call for sweeping confidentiality of SARs, banks may still disclose “[a] SAR or any information that would reveal the existence of a SAR” to regulatory and law enforcement agencies involved in BSA compliance.²⁹¹ Banks also can disclose the “underlying facts, transactions, and documents upon which a SAR is based” to other financial institutions for the filing of a joint SAR.²⁹² Because a qui tam relator functions as an assignee of the government’s interests,²⁹³ for the purposes of SAR disclosure, it follows that the relator would be included among the parties to which banks, upon request or demand, could disclose a SAR. Nevertheless, robust public oversight of qui tam claims includes ensuring the continued confidentiality of SARs where appropriate.

In the first instance, a qui tam relator whose information includes, for example, a failure by the bank to file SARs or to offboard customers who engage in activity that has given rise to several SAR filings, will not be able to include a SAR itself among the evidence in the initial complaint. If the relator serves, as is contemplated, as a BSA compliance official at a bank, the relator likely has “information that would reveal the existence of a SAR”²⁹⁴ or a contemplated SAR filing or “underlying facts”²⁹⁵ that supported or should have supported a SAR. The statute and associated regulations should be amended to permit inclusion of such information in a qui tam complaint. Additionally, the increased intervention time described in Part III.A will also provide FinCEN assistance here: the agency must take care to ensure not only that meritorious claims stand but also that confidential

288. See Engstrom, *supra* note 47, at 1697–700.

289. See *id.* at 1697–98.

290. See NDAA § 6314(a), 31 U.S.C. 5323.

291. 31 C.F.R. § 1020.320(e)(1)(ii)(A)(1) (2021).

292. *Id.* § 1020.320(e)(1)(ii)(A)(2).

293. See *supra* notes 243–47 and accompanying text.

294. 31 C.F.R. § 1020.320(e)(1)(ii)(A)(1).

295. *Id.* § 1020.320(e)(1)(ii)(A)(2).

information therein remains confidential to protect possible future civil and criminal investigations into parties subject to SAR filings.

C. Restrictions on Permitted Classes of Qui Tam Relators

The BSA's qui tam provisions should incorporate the NDAA's restrictions denying awards to certain classes of whistleblowers to the same classes of qui tam relators, as well as expand the kinds of relators that are prevented from bringing claims, to better deter abuse.²⁹⁶ The NDAA bars government employees—those convicted of related criminal violations, those who submit information by different means than regulations the secretary may implement, and those who provide false information—from receiving awards as whistleblowers.²⁹⁷ To prevent abuse, the BSA should prevent the same classes from bringing claims as qui tam relators.

Furthermore, the qui tam provisions should also bar any bank employee who has failed to follow internal bank BSA compliance procedures from bringing a claim, provided these procedures constitute a good faith effort to comply with the BSA and do not merely serve as an obstacle to—or an undue burden on—potential qui tam actions. Ideally, this restriction would curb abuse by preventing qui tam relators from end-running internal bank procedures for the reporting of suspicious activity.

D. Changes to the Qui Tam Reward Structure

The incentive structure of the FCA that provides the relator with a greater percentage of the proceeds of the action or settlement if the government declines intervention than if it intervenes does not necessarily align with the strength of the claim.²⁹⁸ To incentivize greater agency participation and optimize the efficiency of the public-private enforcement mechanism, this Note adopts two revisions proposed by Professor Engstrom. First, the tiered bounty system—originally devised to incentivize relators to bring claims that an overly cautious or captured agency would reject—has made it less likely for agencies to delegate enforcement to competent private attorneys general, thus undermining one of the principal benefits of qui tam enforcement.²⁹⁹ Qui tam relators under the BSA should receive the same reward regardless of intervention by the agency. Second, to engender the robust gatekeeper role required to allay the concerns discussed above, a qui tam model for the BSA should induce the agency to utilize its termination and intervention powers by holding the agency jointly liable for prevailing defendants' fees in declined cases.³⁰⁰ Ideally, such provisions would incentivize competent private attorneys general to pursue meritorious claims without the need for agency resources, while inducing FinCEN to intervene and dismiss meritless cases.

296. See *supra* notes 71, 80–81 and accompanying text.

297. See *supra* notes 71, 80–81 and accompanying text.

298. See 31 U.S.C. § 3730(d)(1)–(2); Engstrom, *supra* note 47, at 1752.

299. Engstrom, *supra* note 47, at 1752.

300. *Id.*

CONCLUSION

This Note seeks to improve enforcement of the BSA. The BSA has created a complex statutory and regulatory scheme that requires banks to maintain staff to monitor transactions for money laundering, report suspicious activity, and conduct due diligence on their customers.³⁰¹ Despite the crucial role banks play in AML enforcement, FinCEN—the primary federal agency tasked with sanctioning banks that fail to comply with their BSA obligations—routinely faces staff and resource shortages.³⁰² In addition, FinCEN and the DOJ have drawn criticism for several high-profile prosecutions that have ended in DPAs, and as some argue, less punishment than necessary to effectively enforce the BSA.³⁰³ Banks, for their part, sometimes neglect or undermine their BSA compliance staff.³⁰⁴ While the revisions under the NDAA represent a step in the right direction through the increase in FinCEN’s funding, the provision of greater rewards and guidance to the agency’s whistleblower program, increased penalties, and greater insight into beneficial owners,³⁰⁵ these provisions do not address instances where regulators have declined to bring down the hammer on banks that have violated the BSA.

Against this backdrop, a qui tam model empowers BSA compliance staff by deputizing them as private enforcers and spurs increased enforcement, while retaining public oversight of these actions to ensure that only meritorious claims are prosecuted and that banks’ BSA compliance functions can still effectively operate.

While this Note has attempted to anticipate some of the difficulties in adapting the FCA’s qui tam model to the BSA, further scholarship is necessary to examine the efficacy of this proposed model more fully. Similarly, more comprehensive data analysis is needed to determine whether current levels of enforcement are adequate to ensure compliance with the BSA. Furthermore, this Note neither examines the validity of the “too big to fail” theory or potential resolutions to issues posed by financial institutions that have perceived systemic importance nor comments on the complications posed by state enforcement of the BSA. These questions will no doubt affect federal enforcement of the BSA going forward. This Note has hopefully added to the ongoing conversation about how to best prevent bad actors from utilizing the U.S. financial system to advance or profit from criminal activity.

301. See *supra* notes 55–58, 62 and accompanying text.

302. See *supra* notes 153–62 and accompanying text.

303. See *supra* notes 133–37, 163–71 and accompanying text.

304. See *supra* notes 174–76 and accompanying text.

305. See *supra* notes 65–67, 74–81 and accompanying text.