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## The little known third option of **FIRREA** and **FIAFEA**

**V**iolations of the Bank Secrecy Act (BSA) and its anti-money laundering (AML) requirements place a financial institution's employees in a difficult bind. Should they remain silent and risk appearing complicit, or should they speak up and face potential retaliation? The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) and Financial Institutions Anti-Fraud Enforcement Act of 1990 (FIAFEA) provide a little-known third option: filing a confidential declaration that discloses the BSA violations to the U.S. Department of Justice (DOJ). Such a declaration dispels any appearance of complicity, maintains the confidentiality of any allegations and can potentially result in awards of up to \$1.6 million. Moreover, DOJ's past actions show that it regards FIRREA as a potential mechanism for redressing BSA violations. In light of those actions, FIRREA and FIAFEA are important to both (1) institutions looking to understand the full scope of their regulatory risk, and (2) compliance personnel with concerns about potential BSA violations.

### **FIRREA, FIAFEA and the BSA**

Congress enacted FIRREA and FIAFEA in the wake of the savings and loan crisis of the 1980s. By authorizing DOJ to seek civil penalties of up to \$1.9 million for each violation of specified criminal statutes,<sup>1</sup> FIRREA strengthens DOJ's ability to penalize fraudulent conduct that affects financial institutions. Several of the criminal statutes included in FIRREA can apply to BSA violations. For example, 18 U.S. Code §1005 criminalizes making a "false entry" in any report with intent to defraud the Office

of the Comptroller of the Currency (OCC) or "any agent or examiner appointed to examine the affairs of" a bank. Because the OCC, together with other components of the Department of Treasury, examines banks' AML programs for compliance with the BSA, any attempt to disguise shortcomings in an AML program could well violate §1005. Moreover, FIRREA encompasses

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statutes that penalize the types of activity that an effective AML program must detect and report, such as wire fraud.

Because FIRREA authorizes DOJ to seek civil, rather than criminal penalties, a lower burden of proof applies to enforcement proceedings under that statute. In a civil proceeding, DOJ can prevail by showing that a “preponderance”—i.e., more than half—of the evidence supports its allegations, and it does not need to meet the “beyond a reasonable doubt” standard that applies to criminal actions. Thus, even if DOJ cannot show criminal violations of the statutes at issue, it may still have sufficient evidence to seek civil penalties under FIRREA.

In turn, FIAFEA creates incentives for private individuals to report fraud that affects financial institutions. If an individual knows of violations that give rise to civil penalties under FIRREA, FIAFEA authorizes them to file a confidential declaration disclosing the violations to DOJ.<sup>2</sup> Once filed, that declaration must be kept confidential, and within a year of the filing, DOJ must tell the declarant whether it has taken any action.<sup>3</sup> If any component of the U.S. acquires funds or assets as a result of the declaration, including any civil money penalties under FIRREA or the BSA, then the declarant has a right to receive a shifting percentage of that award: 20-30 percent of the first \$1 million, 10-20 percent of the next \$4 million, and 5-10 percent of the next \$5 million.<sup>4</sup> Alternatively, if DOJ obtains a criminal conviction as a result of the information in the declaration, then the attorney general can pay the declarant a discretionary reward.<sup>5</sup> If DOJ does not address the declaration’s allegations within a year, then the declarant can demand that the attorney general contract with their private attorney to pursue legal action on a contingency basis.<sup>6</sup> Thus, FIAFEA provides potential rewards to those who disclose misconduct affecting financial institutions, including BSA violations.

## Past actions by DOJ


An enforcement action by DOJ demonstrates how FIRREA may be used to redress BSA violations. In 2015, DOJ sought and obtained civil penalties under FIRREA in an action for BSA violations against CommerceWest Bank (CommerceWest).<sup>7</sup> DOJ alleged that CommerceWest permitted a third-party payment processor to

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make unauthorized withdrawals from the bank accounts of CommerceWest’s customers. CommerceWest had notice of the misconduct from multiple sources, including consumer complaints, internal investigations, and reports from other banks. But CommerceWest neither terminated the processor’s ability to access customer accounts nor filed a suspicious activity report (SAR), as required by the BSA. Ultimately, CommerceWest entered into a deferred prosecution agreement (DPA) based on its failure to file SARs, which allegedly constituted a criminal violation of the BSA. DOJ also imposed a \$1 million civil penalty under FIRREA, alleging that CommerceWest’s knowing failure to stop the processor’s wire fraud rendered it a participant in that fraud in violation of 18 U.S. Code §1343.

DOJ’s action in CommerceWest shows how FIRREA and the BSA overlap and complement one another. CommerceWest’s failure to respond to the use of its facilities for criminal purposes violated the BSA’s requirements that it maintain an adequate AML program and file timely SARs. Moreover, CommerceWest’s failure to take action required by the BSA allowed DOJ to characterize the bank, for civil purposes, as a participant in the underlying wire fraud, which gave rise to penalties under FIRREA. Thus, the same conduct that violated the BSA also amounted to violations that were actionable under FIRREA.

## Conclusion

FIRREA’s potential use in BSA enforcement is largely undeveloped, but straightforward statutory interpretation and prior regulatory actions demonstrate that a role exists. In light of that role, financial institutions need to understand FIRREA to identify the full scope of their regulatory risk. In addition, FIAFEA offers individuals who have knowledge of BSA violations the opportunity and incentive to disclose them. That opportunity may prove particularly useful to the employees of financial institutions, whose careers and reputations may be threatened by the BSA violations of others. 

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<sup>1</sup> 12 U.S. Code §1833a; 28 C.F.R. §85.5.

<sup>2</sup> 12 U.S. Code §4201 *et seq.*

<sup>3</sup> *Id.* §§4203, 4206.

<sup>4</sup> *Id.* §4205(d).

<sup>5</sup> *Id.* §4205(c).

<sup>6</sup> *Id.* §4207.

<sup>7</sup> “CommerceWest Bank Admits Bank Secrecy Act Violation and Reaches \$4.9 Million Settlement with Justice Department,” The United States Department of Justice, March 10, 2015, <https://www.justice.gov/opa/pr/commercwest-bank-admits-bank-secrecy-act-violation-and-reaches-49-million-settlement-justice>