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Quiz

## Penalties for Violations

### A. Willful Blindness

As we begin our discussion on penalties for violations of the Bank Secrecy Act, USA PATRIOT Act, or SDN lists, it is important for agents to understand the concept of **willful blindness**. Willful blindness in the context of a discussion of money laundering and the dealings of an insurance agent could be described by the idiom: “Turning a blind eye.”

It is easy to see how an agent could be penalized for a violation of one of the various money laundering laws where it is proven that the agent “knew” that money laundering was occurring. However, the terms “deliberate indifference” and “willful blindness” have been employed in criminal and civil courts to establish that an individual did, in fact, “have knowledge” of a crime.

If we consult Black’s Law Dictionary (8th edition), we see that “deliberate indifference” is defined as “*the careful preservation of one’s ignorance despite awareness of circumstances that would put a reasonable person on notice of a fact essential to a crime*”, and “willful blindness” is defined as “*the deliberate **avoidance** of knowledge of a crime, especially by failing to make a reasonable inquiry about suspected wrongdoing despite being aware that it is highly probable*”.

### B. Red Flags and Willful Blindness

As an agent, you should not look the other way and ignore red flags that might indicate money laundering is occurring, because ignorance will be a weak excuse if it turns out that money laundering was indeed being carried out. If a prosecutor is attempting to employ the concept of willful blindness in a criminal trial, the judge will, when giving the jurors their final instructions before deliberations begin, often charge the jury with a standard of “conscious avoidance” (nicknamed the ostrich instruction).

Below is the actual text of the pattern instructions published as a guide for federal judges to use when instructing the jurors relative to determining if a defendant possessed knowledge of a fact.

*In deciding whether [defendant] acted knowingly, you may infer that [defendant] had knowledge of a fact if you find that he/she deliberately closed his/her eyes to a fact that otherwise would have been obvious to him/her. In order to infer knowledge, you must find that two things have been established. First, that [defendant] was aware of a high probability of [the fact in question]. Second, that [defendant] consciously and deliberately avoided learning of that fact. That is to say, [defendant] willfully made himself/herself blind to that fact. It is entirely up to you to determine whether he/she*

*deliberately closed his/her eyes to the fact and, if so, what inference, if any, should be drawn. However, it is important to bear in mind that mere **negligence** or mistake in failing to learn the fact is not sufficient. There must be a deliberate effort to remain ignorant of the fact.*

The criminal actors that launder illicit funds and/or finance terrorism are often well trained in tactics designed to manipulate unknowledgeable agents, and spot those individuals who will easily compromise their standards for financial gain.

## C. Penalties for Violations of BSA or USA PATRIOT Act

### 1. Damage to Reputation

An agent or insurance company's reputation and/or license to transact business within the financial services industry are often the first casualties when a violation of the anti-money laundering laws is discovered. Both insurers and agents can face substantial civil and criminal penalties for violations of anti-money laundering laws.

### 2. Penalties

**Criminal penalties** may include fines of up to \$500,000 or twice the value of the property involved in the act, whichever is greater, and incarceration in a federal penal institution for up to **20 years**.

**Civil penalties** can be as high as \$10,000 or the value of the property involved in the act, whichever is greater. In addition, asset forfeitures of any ill-gotten gains can be imposed. These penalties are for each violation. If a continuing pattern of conduct is considered to be a deliberate and ongoing criminal enterprise the consequences can be much more severe.

Under the Bank Secrecy Act, additional civil and criminal penalties can be imposed, including

- Up to 5 years imprisonment;
- Civil fines of up to \$250,000; or
- Both: fines and imprisonment.

The USA PATRIOT Act has increased the civil and criminal penalties that can be imposed for some sections of the Bank Secrecy Act up to twice the amount of the property involved or \$1,000,000. The Department of the Treasury website shows that for calendar year 2017, OFAC imposed fines of \$119,517,845 for 16 separate enforcement actions.

### 3. Penalty Determination

When deciding how to proceed with criminal prosecution or civil penalties after a violation has been discovered, OFAC uses a measured approach and takes the following into account:

- Was the violation self-reported by the individual or financial institution;
- The degree of willfulness or recklessness exhibited by the agent or institution;
- Whether the agent or institution had knowledge;
- Whether the agent or institution had intent;
- If reckless disregard or failure to exercise minimal caution existed;
- If there was **concealment** or collusion on the part of multiple parties within the financial institution;
- If there can be established a deliberate pattern of misconduct; or
- If upper management was involved.

### 4. Penalty Mitigation

Items that are considered and can serve to mitigate penalties during an OFAC investigation of a violation include the following:

- If the violation was self-reported;
- The scope and level of sophistication of the violation;
- The effectiveness and quality of OFAC compliance program at time of violation;
- The degree to which the insurer practiced software interdiction;
- The timing of the violation with respect to when the prohibited individual, institution or country was added to the OFAC lists;
- Corrective remedial action taken by financial institution after discovery of the violation;
- Conduct of thorough review/investigation to detect and identify other possible violations; or
- Degree of cooperation with OFAC investigators.

## D. In the News

### FinCEN Penalizes U.S. Bank National Association for Violations of Anti-Money Laundering Laws

**Feb. 15, 2018**

The Financial Crimes Enforcement Network (FinCEN), in coordination with the Office of the Comptroller of the Currency, and the U.S. Department of Justice, announced the assessment of a \$185 million civil money penalty against U.S. Bank for willful violations of several provisions of the Bank Secrecy Act (BSA). U.S. Bank's obligation will be satisfied by payment of \$70 million to the U.S. Department of the Treasury with the remaining amount satisfied by payments in accordance with the DOJ's actions. Since 2011, U.S. Bank willfully violated the BSA's program and reporting requirements by failing to establish and implement an adequate anti-money laundering program, failing to report suspicious activity, and failing to adequately report currency transactions.

Banks are required to conduct risk-based monitoring to sift through transactions and to alert staff to potentially suspicious activity. Instead of addressing apparent risks, U.S. Bank capped the number of alerts its automated transaction monitoring system would generate to identify only a predetermined number of transactions for further investigation, without regard for the legitimate alerts that would be lost due to the cap.

"U.S. Bank is being penalized for willfully violating the Bank Secrecy Act, and failing to address and report suspicious activity. U.S. Bank chose to manipulate their software to cap the number of suspicious activity alerts rather than to increase capacity to comply with anti-money laundering laws," said FinCEN Director Kenneth A. Blanco. "U.S. Bank's own anti-money laundering staff warned against the risk of this alerts-capping strategy, but these warnings were ignored by management. U.S. Bank failed in its duty to protect our financial system against money laundering and provide law enforcement with valuable information."

U.S. Bank systemically and continually devoted an inadequate amount of resources to its AML program. Internal testing by U.S. Bank showed that alert capping caused it to fail to investigate and report thousands of suspicious transactions. Instead of removing the alert caps, the bank terminated the testing. U.S. Bank also allowed, and failed to monitor, non-customers conducting millions of dollars of risky currency transfers at its branches through a large money transmitter. In addition, U.S. Bank

filed over 5,000 Currency Transaction Reports (CTRs) with incomplete or inaccurate information, impeding law enforcement's ability to identify and track potentially unlawful behavior.

U.S. Bank also had an inadequate process to handle high-risk customers. As a result, customers whom the bank identified or should have identified as high-risk were free to conduct transactions through the bank, with little or no bank oversight. By not having an adequate process in place to address high-risk customers, U.S. Bank failed to appropriately analyze or report the illicit financial risks of its customer base. These failures precluded the bank from adequately addressing the risks that such customers posed, including filing timely suspicious activity reports that law enforcement investigators rely upon to recognize and to pursue financial criminals.

## Chapter Complete

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