Association of Corporate Counsel

1025 Connecticut Avenue, NW, Suite 200
Washington, DC 20036-5425 USA
tel +1 202.293.4103
fax +1 202.293.4701
www.acc.com

March 31, 2016

Gene C. Brooks
New York State Department of Financial Services
One State Street
New York, NY 10004

VIA EMAIL

Re: Proposed Addition of Part 504 to Title 3 NYCRR

Dear Mr. Brooks:

The Association of Corporate Counsel, its Compliance & Ethics and Financial Services committees, its New York-based chapters, and the 74 compliance officers and general counsel signing this letter are pleased to have the opportunity to present comments on the proposed addition of Part 504 to Title 3 NYCRR, setting out New York Department of Financial Services (DFS) requirements for transaction monitoring and filtering program requirements and certifications.

Our comments are narrowly focused on the part of the proposal that materially affects a large group of our members – the chief compliance officer certification requirement. We strongly urge the DFS to reconsider that provision. We think imposing criminal penalties on compliance officers in connection with the proposed certification is not only inappropriate but will ultimately diminish the effectiveness of the proposed regulations and compliance programs overall. If the DFS does link the certification to criminal liability, at a minimum, we urge that the regulations articulate a clear *mens rea* requirement.

The Association of Corporate Counsel is a global bar association representing over 40,000 attorneys within the in-house legal departments of more than 10,000 corporations and private-sector organizations in over 85 countries. Our Compliance & Ethics Committee has 7,260 attorneys who practice in corporate compliance and ethics matters. Our Financial Services Committee has nearly 3,000 in-house attorneys who provide legal advice to financial institutions throughout the country, including those regulated by the DFS. ACC's three New York chapters represent Central and Western New York, New York City, and Westchester County (with part of Connecticut). These chapters have more than 2,300 in-house counsel members in New York representing leading local, national, and international companies. Our members include chief compliance officers (CCOs) and other high-level compliance professionals. Our members who address compliance issues in financial institutions

are particularly concerned by the DFS' potential imposition of criminal liability on CCOs in the anti-money laundering (AML) and sanctions context.

In its current form, the DFS proposal seeks to impose criminal penalties on a "senior certifying officer" (the CCO or functional equivalent) who incorrectly certifies that his or her institution is in compliance with the requirements set forth in proposed section 504.3. The certification form included in the DFS proposal requires compliance officers to attest to two points: (1) they have reviewed, or caused to be reviewed the Transaction Monitoring Program and Watch List Filtering Program of the institution; and (2) the Transaction Monitoring and Watch List Filtering Program complies with all the requirements of section 504.3. In signing, the compliance officers certify that "to the best of their knowledge" the statements in the certification are "accurate and complete."

Proposed section 504.5 authorizes criminal penalties against certifying officers who file incorrect or false certifications but it does not specify what those penalties might be or under what law they might be imposed. We object in general to the imposition of criminal penalties on CCOs based on this certification requirement. Further, as we noted above, if the DFS does include this CCO certification requirement, we strongly urge the DFS to adopt a clear *mens rea* intent element in connection with any criminal penalties that might be imposed.

A. The proposed certification requirement is not an appropriate vehicle for holding CCOs criminally liable for institutional compliance lapses

The DFS proposal appears to be part of the growing call for individual accountability in connection with corporate wrongdoing. We do not object to the theory behind such demands, but we have a broader concern that requirements like the DFS annual certification will lead enforcement authorities to punish in-house counsel and compliance personnel for simply doing their jobs. This is completely inappropriate in the criminal context. This was illustrated in the 2010 case of Lauren Stevens, in-house counsel for Glaxo Smith-Kline, who was twice indicted on false statement and obstruction of justice charges for her discovery responses to an informal Food & Drug Administration inquiry of her company. The judge ultimately dismissed both indictments, noting that the case should never have been prosecuted and that courts should protect the practice of law.[1] Criminalizing compliance presents similar concerns for compliance personnel. In dismissing an enforcement case against a compliance officer for aiding and abetting, an administrative law judge at the Securities and Exchange Commission cautioned against prosecuting compliance professionals, stating "every time a violation is detected there is, quite naturally, a tendency for investigators to inquire into the reasons that compliance did not detect the violation first, or prevent it from happening at all. The temptation to look to compliance for the 'low hanging fruit,' however, should be resisted. There

[1] U.S. v. Lauren Stevens, 8:10-cr-00694-RWT (D. Md. 2011). See pages 9-10 of court transcript, available at: http://webcasts.acc.com/handouts/110510STEVENS.PDF.

is a real risk that excessive focus on violations by compliance personnel will discourage competent persons from going into compliance, and thereby undermine the purpose of compliance programs in general." [2]

Individual criminal liability should be limited to those instances where there is significant individual wrongdoing or at least clear responsibility and opportunity to prevent the wrongdoing of others. The proposed certification requirement undermines that basic legal principle by holding CCOs responsible for potentially any deficiencies in their institutions' compliance systems – including ones that were not caused by, and could not have been prevented by, the CCO. While we understand the motivation behind holding compliance officers personally responsible for the compliance systems they oversee, we think the imposition of individual criminal penalties under the certification requirement goes too far because (1) the root causes of the perceived shortcomings in institutional compliance systems do not all warrant criminal liability; (2) CCOs may lack the authority within their institutions to implement the required changes; and (3) the nature of compliance programs and compliance roles within an institution may make an accurate certification difficult.

(1) Criminal liability is not the appropriate consequence for many of the perceived shortcomings the DFS proposal seeks to address

Criminal penalties are the most severe form of punishment society imposes. Even though the DFS proposal addresses important AML and economic sanction issues by increasing oversight and accountability, the laudability of the goals does not warrant the remedy being proposed. Benjamin Lawsky, then Superintendent of Financial Services, first proposed making senior executives personally attest to the adequacy of their institutions' compliance systems in a February 2015 speech. [3] He opined that shortcomings in transaction monitoring and watch list filtering programs can be the result of a "lack of sophistication, knowledge, expertise, or attention by the management and/or employees," or worse, the result of "willful blindness or intentional malfeasance by bank management or employees," who, for example, set system filters so high that they miss too many genuinely suspicious transactions that warrant heightened review.

The first set of causes listed – lack of sophistication, expertise, etc. – simply do not warrant criminal liability. Expertise and sophistication evolve over time – and even highly qualified CCOs need to continually refine and enhance their understanding of the rapidly evolving developments in money laundering so they can identify new risks. Although the certification itself includes language that the signatories are attesting "to the best of their knowledge," criminal penalties can attach if the

---

[2] In the Matter of Judy K. Wolf, Initial Decision Release No. 851; Administrative Proceeding File No. 3-16195 at page 22. Available at: https://www.sec.gov/alj/aljdec/2015/id851ce.pdf

[3] See http://www.dfs.ny.gov/about/speeches/sp150225.htm for the full text of the speech.

certification is "incorrect or false." Thus, compliance officers who, in good faith and conscience and upon reasonable diligence, certify to the best of their knowledge that the firm has complied may still be subject to criminal sanctions if DFS subsequently determines that the firm's AML program had gaps, even if they were unknown or even unknowable to the compliance officer.

The second set of suggested causes – willful blindness or malfeasance – is categorically different than the first set and, if the misconduct is directly attributable to the CCO, can be an appropriate basis for criminal penalties. The current proposal, however, does not distinguish among wrongdoers and could punish a CCO for the malfeasance of others – even if such malfeasance was hidden from the CCO at the time of the certification. The DFS proposal does not merely require knowledgeable and effective CCOs – it demands omniscience regarding the intent and abilities of each person and process involved in the firm's AML program.

(2) Unlike C-suite executives, not all CCOs have the authority necessary to implement the requirements of the DFS proposal

The DFS certification requirement is reportedly modeled on the Sarbanes-Oxley executive officer certification requirements. However, unlike the chief executive officers and chief financial officers to whom the Sarbanes-Oxley requirements apply, CCOs have not historically had the same authority within an organization to allocate resources and set company priorities. Holding a CCO personally responsible in this situation is not fair, and is especially unsuitable in the context of criminal penalties. For example, a CCO may recognize that the institution's systems need improvement, and indeed make recommendations as to how the improvements should be made, but if the institution's management refuses to dedicate the necessary resources to the improvements, then it is not the CCO who should be responsible. The impact of this rule may be to deter conscientious and capable persons from joining firms that do not already have impeccable AML programs as they will not want to assume the risk of criminal liability over matters that predate them. This decreases the likelihood that the deficiencies will be remedied.

(3) The nature of compliance programs in organizations will make it difficult for a CCO to certify actual compliance with the DFS requirements

Unlike the Sarbanes-Oxley certification, which requires executives to certify that their internal controls systems have been *reasonably designed* to comply with applicable requirements, the DFS proposal requires CCOs to certify the *actual compliance* of the transaction monitoring and watch list filtering programs with more than 20 requirements in proposed section 504.3. In complex financial institutions, CCOs necessarily rely on the efforts and conclusions of others to fulfill their roles. For example, the DFS proposal expressly contemplates that firms may use vendors to develop automated surveillance, so long as there is a vendor selection process. If, however, the program code from the vendor mistakenly

misclassifies certain transactions, the CCO could be held criminally liable for such error. A certification requirement for CCOs would be more meaningful if the scope were limited to certifying that the relevant programs were appropriately designed to comply with the DFS requirements, rather than certifying actual compliance with the requirements.

B. The *mens rea* requirement for the imposition of criminal penalties should be clearly stated

If the DFS does not eliminate the annual certification by an institution's CCO, it should revise the proposal to clearly state a *mens rea* requirement, which would remedy a number of the issues identified above. The proposal as currently drafted appears to create almost a strict liability standard for the imposition of criminal penalties. CCOs could complete the certification "to the best of their knowledge," but later investigation may still find that the institution's compliance systems did not satisfy the requirements of proposed section 504.3, making the certification incorrect. We do not think it is appropriate to impose criminal penalties under such circumstances. If CCOs conduct reasonable diligence and certify "to best of their knowledge," they should not be strictly liable for the underlying program.

The most obvious place to look for a *mens rea* requirement is in the laws that the DFS proposal cites as statutory authority. The proposal cites New York Banking Law sections 32 and 672; as well as Financial Services Law section 302 as the statutory authority for the requirements in the proposal. Of those three, only section 672 of the New York Banking Law is a criminal provision. It lays out three felonies related to making false entries, with the intent to deceive, in any book, report, or statement of any corporation or private bank to which the banking law applies. If DFS intends to make the submission of an incorrect annual certification a violation of section 672 of the Banking Law, then it should explicitly state that in section 504.5 of the proposed regulations. Such a statement would lend greater clarity to the potential criminal penalties, and it would also solve the *mens rea* issue mentioned above, as section 672 requires an intent to deceive. We think this would be a fair requirement before imposing criminal liability – that the certifying officer sign the certification with the intent to deceive banking regulators or others that the institution's compliance systems meet the requirements under proposed section 504.3.

If the DFS does not incorporate the *mens rea* standard used in section 672, we urge that the standard plainly include intentional conduct, or at the very least, reckless or knowing conduct. Such a *mens rea* requirement would also bring the DFS's certification requirement more in line with the officer certification requirement under Sarbanes-Oxley. A criminal violation of the certification requirements under Sarbanes-Oxley requires willfulness – so a false certification would not likely result in criminal penalties unless the certifying officer knew the certification was false.

* * *

Our members are committed to counseling their employers to uphold the laws and assist in preventing money laundering. But with the specter of criminal sanctions, the very people who are best able to implement and oversee effective compliance programs may be deterred from taking on the responsibility. We appreciate the opportunity to comment on the DFS proposal, and hope the DFS reconsiders the annual certification requirement as currently drafted.

Sincerely,

Amar D. Sarwal
Vice President & Chief Legal Strategist
Association of Corporate Counsel

Mary Blatch
Director of Government and Regulatory Affairs
Association of Corporate Counsel

Robert Jett
Chair, Compliance & Ethics Committee
Association of Corporate Counsel

Miriam Lefkowitz
Chair, Financial Services Committee
Association of Corporate Counsel

Brian Campbell
President
ACC New York City

Colm Dobbyn
President
ACC Westchester County NY/Southern Connecticut

David Mowry
President
ACC Central & Western New York

***

Scott Green
Senior Vice President
1st Century Bank, N.A.

Roy Buchholz
Deputy Chief Compliance Officer
AllianceOne Receivables Management, Inc.

Michael Lavigne
General Counsel
American Recovery Service, Inc.

Sabrina Noyola
Chief Compliance Officer
AmeriHome Mortgage Company, LLC

Jerry Hager
Senior Vice President - Legal
AmeriHome Mortgage Company, LLC

Claudia Giunta
Vice President & General Counsel
Asset Control Ireland Ltd

Marianne Ibrahim
Senior Compliance Counsel
Baker Hughes, Inc.

Harold Rojas
SVP & General Counsel
Baltimore Life Insurance Company

Carlos M. Portugal
Chief Compliance Officer
Bayview Asset Management, LLC

Joan M. Schmidt
General Counsel
Biotronik, Inc.

Elyse Beidner
Senior Vice President, Chief Legal Officer
Boiling Springs Saving Bank

Robert J. Rossi, Esquire
VP, Compliance
Boston Heart Diagnostics Corporation

Josh Beser
General Counsel
Canary Connect, Inc.

Alexander Rosenstein
General Counsel
Cardiovascular Systems, Inc.

Sean Patrick Loughran
General Counsel
Carnegie Associates Ltd

Liza L. Wolf
General Counsel & Chief Compliance Officer
Catapult Learning, Inc.

Carol Yee
Chief Compliance Officer
City National Bank

S. Marshal Martin
Co-General Counsel
City National Bank of Florida

Cara Thompson
Chief Compliance Officer
Columbia Bank

Kumi Yamamoto Baruffi
EVP, General Counsel
Columbia Bank

Tim Collins
Chief Compliance Officer
Convergent Outsourcing, Inc.

Judith A. VIllarreal, Esq., CAMS, CIPP/US
SVP, General Counsel, Chief Compliance Officer & AML Compliance Officer
CoreCap Investments, Inc, (BD) & CoreCap Advisors, Inc. (RIA)

Brian P. Campbell
Vice President & General Counsel
DHI Group, Inc.

Edward Forman
Executive Vice President & General Counsel
Duff & Phelps Corporation

Nancy Robles-Guess
Compliance Officer/VP Operations
Eastern Funding, LLC

Theodore J. Cohen
Vice President & General Counsel
Eastern Funding, LLC

Allen Nason
General Counsel
Eastwood Homes

Matthew Clark
VP Legal/Compliance & General Counsel
EOS USA Corporation

Benjamin Zeliger
General Counsel
Evolution Markets, Inc.

Brock Worthen
General Counsel
Flagship Financial Group

Matthew J. Donnelly
Vice President, Compliance
FreedomPay, Inc.

Conor French
General Counsel
Funding Circle USA, Inc.

Therese Yakel
Chief Compliance Officer
General Service Bureau, Inc.

Jessica Sohl
General Counsel & Chief Compliance Officer
HC Technologies, LLC

Earl M. Bennett
General Counsel, Americas
Husqvarna Group of Companies

Adam J. Reback
Chief Compliance Officer
J. Goldman & Co., L.P.

Martin Oppenheimer
General Counsel
Jewish Theological Seminary of America

Jeremy Traster
General Counsel & Chief Compliance Officer
Kawa Capital Management, Inc.

Lucy Mathews
General Counsel
Kidde Fire Trainers, Inc.

Keri McKeone
Chief Privacy Officer
Lifelock, Inc.

Clara J. Ohr
Legal Counsel & Compliance Officer
LUKOIL Pan Americas, LLC

Arnold S. Graber
Executive Vice President, General Counsel & Secretary
Metalico, Inc.

Elisabeth Bedore
Chief Compliance Officer
MetLife Investment Advisors, LLC

Deepa Khosla
Associate General Counsel
MetLife, Inc.

Sallie Colaco Wagner
Chief Operating Officer
Metro Consulting Services, LLC

Brian B. Dutton
Chief Legal Counsel
NexTier Bank, N.A.

David Cherner
Chief Compliance Officer
Northland Group, Inc.

Edward A. Mervine
General Counsel
Pathfinder Bank

Andrew Alpern
General Counsel & Chief Compliance Officer
Peter Kimmelman Asset Management, LLC

Matthew R. Dornauer
General Counsel
Phusion Projects, LLC

Rajesh Swaminathan
Senior Managing Director & General Counsel
PineBridge Investments, LLC

Kathleen Leatherbury
Director, Compliance & Licensing
Premiere Credit of North America, LLC

Trent Ford
General Counsel
Residential Bancorp

Colin Thomas Darke
Chief Compliance Officer
RocketLoans Marketplace, LLC

Jacquelyne M. Belcastro
Vice President & General Counsel
Sapa Extrusion North America, LLC

Julie J. Kim
In-House Counsel & Compliance Officer
Sierra Credit Corporation

Patrick J. Donegan
Chief Compliance Officer & Senior Vice President
Signature Bank

Allison Cole
Assistant General Counsel
Signet Jewelers Ltd

Amber Asher
General Counsel & EVP
Standard International Management, LLC

Lisa Harrington
General Counsel
Surf Airlines, Inc.

Arlen W. Gelbard
Managing Member & General Counsel
Swains Lock Partners, LLC

Tina M. Bardak
General Counsel
Synergy Business Management Corporation

Carlyn M. Carey
Compliance Officer & Corporate Counsel
The Cooperative Bank of Cape Cod

Adrian Mebane
VP, Deputy General Counsel
The Hershey Company

Douglas N. Cohen
General Counsel
Triad Securities Corporation

Hope L. Newsome
Chief Compliance Officer & Assistant General Counsel
Triloma Securities, LLC

Tracey L. Gibson
Chief Compliance Officer
Unifund CCR LLC

Gregory A. Robbins
Senior Vice President & General Counsel
Veeco Instruments, Inc.

Mark S. Flynn
EVP, General Counsel & Secretary
Virtus Investment Partners, Inc.

Jonathan R. Hegwood
Chief Compliance Officer
Vital Recovery Services, LLC

Angie Williams
Compliance Officer
WEX Bank

Chris Lal
Vice President & General Counsel
World of Jeans & Tops d/b/a Tilly's

Dennis Kerrigan
EVP, General Counsel & Corporate Secretary
Zurich American Insurance Company

Vicki Baue
V. P. & General Counsel, Chief Compliance Officer
Cosi, Inc.