THE COMPLEX OVERLAP BETWEEN ADMINISTRATIVE AND CRIMINAL LAW: SOME POLICY CONSIDERATIONS AND AML REGULATIONS

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Resumen: *El siguiente artículo analiza de forma amplia la zona gris y la interrelación entre el derecho penal y el derecho administrativo. Este artículo es un estudio enfocado en la dualidad entre el derecho norteamericano y el derecho venezolano, como ejemplos de culturas legales distintas, comparando sus regulaciones en materia de delitos de cuello blanco y legitimación de capitales. En la sección A de este artículo se estudia la acción privada y la responsabilidad civil como teorías legales para enjuiciar entes corporativos desde una perspectiva de derecho comparado y así explorar las actuales tendencias en derecho penal y derecho regulatorio. En la sección B se analiza y compara las regulaciones contra la legitimación de capitales entre Estados Unidos y Venezuela como ejemplo de esquemas regulatorios y penales complejos. En tal sentido, este artículo explica de forma general las normas de cumplimiento rectoras en la materia en ambos sistemas siguiendo las tendencias regulatorias y de política pública en el área. Finalmente, se discuten las dificultades de aplicación práctica de tan compleja regulación.*

Palabras Clave: *Legitimación de capitales. Delitos de cuello blanco. Derecho Regulatorio. Acción Privada.*

Summary: *The following article analyses in a big picture the current and very strong overlap between criminal law and administrative law in a comparative perspective focusing specially in the dualism between U.S and Venezuelan regulations, tradi-*

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tions, and money laundering legislations. In doing so, on one hand, in the part A of this article, it is studied private action and civil liability theories to punish corporative crimes from a comparative perspective in order to explore the current trends in criminal and regulatory law. On the other hand, in the part B of this article, we analyze the American and Venezuelan Anti Money Laundering reporting regulations as an example of such criminal regulatory scheme. For that purpose, the paper explains the overall AML regulation in both systems, with focus in the banking sector and AML compliance obligations under the current regulatory trends. Finally, this essay points out the particularities of AML enforcement between the systems, analyzing the difficulties of such complex regulation.

Key words: *Money Laundering. White Collar Crime. Regulatory & Comparative Law. Private Action.*

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SUMARIO

INTRODUCTION

Law is a complex idea to explain to non-lawyers. In brief, it provides order and freedom but also coercion and punishment when necessary. Law is diverse in its rules and has a diversity of principles and traditions. But law is transforming and becoming more unified from a practical point of view. More and more, systems are touching each other creating not domestic law but generalized principles of law. This idea is mainly applicable to Administrative Law and Criminal Law, areas which were considered a few decades ago very distinguishable. This is no longer the case when the law practice is more complex, integral and multidisciplinary.

Law is changing in very unpredictable ways and internationalization may seem to be the new horizon for law practitioners. The local reach of our systems is less every day. Just as an example, international litigation is leading the new way of handling legal disputes. U.S. and foreign legal systems have further connections thanks to either international treaties or simply because the foreign parties involved. The territoriality of the law, in the past a sacred principle, is no more. U.S. and foreign courts more than ever are handling cases with facts interconnected with foreign jurisdictions.

This essay has born precisely due to our personal comparative study of different perspectives of regulatory law. We strongly believe that the path of the litigator has ended. As the writer of these notes declares himself as a regulatory attorney, we have witnessed how the administrative practice is changing to become an overlap of different areas otherwise not connected. This is especially relevant is you are a law practitioner outside the United States: the world has changed forever. The old principles of criminal law have merged to create a new trend of corporate compliance, private regulation, and programs focused culture to adapt business to heavy regulated sectors and creating new practices.

The importance of the solo practitioners and law firms have ceased to give space to in-house counsels who really need to know how business adapts to complex environments while global commerce supposes being in touch with multiple laws at the same time. Counseling American corporations with foreign operations imply that they are subject to American laws as well but also domestic. This extraterritorial approach of U.S law has been profoundly studied and has been very controversial under international law standards. But the extraterritorial application of law is a reality that should be well understood by law practitioners around the world. Somehow, it's true to affirm that the laws are no territorial anymore.[2] Then, in many

2 Under the traditional view of the objective territorial principle of jurisdiction, prescriptive jurisdiction may be asserted over acts that occur inside State. In practice, the United States case law has held that extraterritorial application of the law may be asserted if there is an adverse or detrimental "substantial effect within" the United States. Then, protective jurisdiction is often asserted when non-U.S. nationals have committed an act outside the United States that is "directed against the security of the state or other offenses threatening the integrity of governmental functions that are generally recognized as crimes" –acts such as espionage, conspiracy to violate immigration or customs laws, and the like. Under *Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247*, the Supreme Court of the United States has held that is a "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." However, in prac-

aspects, law practice has changed. This is why, as Norman Veasey and Christine T Di Guglielmo point out "we start with the premise that [...] counsel[s] in the new reality must understand that there *is* a new reality"[3] and our job is to adapt and navigate this new landscape.[4] Now, what is currently happing in the regulatory framework where companies (and ourselves) are living today? From a corporate point of view, which is the goal of these notes, corporations have more regulatory duties than ever before to carry out their businesses. We explore the policy considerations about this punishment of corporate business in the heavy regulatory landscape that goes beyond the U.S border and is shaping the new notions of Public Law worldwide.

Following these guidelines of academic questioning of the current state of affairs in corporate criminal law and administrative law, Part A of these notes studies the current challenges of white-collar crimes from a policies' perspective. Part B will analyze comparatively anti-money regulations between the United States and Venezuela, which will be particularly useful for Regulatory Attorneys in the banking sector but also as an example of the complex scenarios corporations are set on.

I. Part A: A policy consideration about Criminal and Administrative Law in a new era

Under the general theory of crime, it has been understood the basic principle that some conducts are contrary to essential human values, interest or rights. Crime and its punishment is the extreme application of force under the rule of law. In doing so, the State imposes the most coercive penalties to their citi-

tice, Congress has adopted laws with this particular provision, extending the application of the U.S. law worldwide.

3 E. Norman Veasey and Christine T. Di Guglielmo, Indispensable Counsel: The Chief Legal Officer In The New Reality, Oxford University Press (2012) at 14.

4 *Id*. At 15.

zens. As a policy consideration, some crimes are more punishable than others from the moral perspective. Then, crimes like homicide, are clearly and identifiably wrongdoings where every person may agree with. The question, however, arises in cases where the result of the crime is not that simple to identify. In the homicide, there is an imminent result, a person has been killed with malice aforethought. But in other kinds of crimes, like illegal conducts with impact in the financial system, sometimes arise the question: what's exactly the wrongdoing that has been committed? Why do we have to punish those conduct with the extreme force of criminal sanctions?

After *Enron* and *Arthur Andersen*, the American corporate world has changed. But also, the world has changed. On one hand, it is undeniable the sphere of influence that the United States represents to the rest of the world, being one of the most important actors in global commerce. Somehow, American Law is shaping the law worldwide, having an important influence in countries in the western hemisphere. On the other hand, important and sensitive corporate activity is carried on the American markets. Then, a high-level financial crime may impact the global economy in ways never imagined before. Corporations indeed have committed crimes, and this has been well-settled and understood in the United States. The context where white-collar crimes develops has been studied several times with mix opinions.

For some, "white-collar crime came to epitomize greed, which increasingly seemed morally wrong and more deserving of retribution."[5] For others, white-collar crime is more rational, cool, and calculated than sudden crimes of passion or opportunity, so it should be a prime candidate for general deterrence.[6] Even, some people have argued that, from an economist perspective, it might be argued that if one increased

5 Stephanos Bibas, *White-Collar Plea Bargaining and Sentencing after Booker*, 47 Wm. & Mary L. Rev. 721 (2005) at 723.

6 *Id*. at 724.

the expected cost of white-collar crime by raising the expected penalty, white-collar crime would be unprofitable and would thus cease.[7] In short, criminological speaking, it is difficult to characterize these sophisticated crimes. But white-collar corporate liability has also been subject to debate: whether to punish corporations, the individuals doing the illegal activity, or both in parallel. In other jurisdictions, lawmakers have taken a different approach to this question, considering only criminally liable the individual behind the criminal activity instead the corporation as a legal persona. In any case, what's the best policy approach?

It is accurate to say that every citizen wants justice to be served, and white-collar criminals do not escape of such consideration. But white-collar practice is complex. It is well-known that white-collar crimes suppose complexity and it is a very sophisticated practice. Indeed, these cases are difficult in several ways because "white-collar crimes [are] difficult to investigate and prove, beginning with reconstruction of what happened (are financial statements false?) to determining who knew the facts (were duties so dispersed that no one person knew the big picture?) to assessing intent (was the falsity an innocent error or purposeful fraud?)."[8]

In this background, the aim of this part A is to explore the policy considerations of the punishment of corporation's white-collar crimes from a pragmatic perspective. In addition, we are going to pass through several considerations based on comparative law, using the example of Venezuelan criminal law, as a typical civil law system. In this contrast, we hope to proportionate some ideas about the regulation of white-collar crime with a comparative perspective and share our opinion over the issue of punishment of corporation in the context of

7 Bibas *supra*, citing Richard A. Posner, Economic Analysis of the Law 205 (3d ed. 1986).

8 Pamela Bucy Pierson, *RICO, Corruption and White-Collar Crime*, 85 Temp. L. Rev. 523 (2013) at 542.

white-collar crimes. For this purpose, in part I of this paper, we address the general question of punishing corporations in the new criminal law and the raise of the regulatory state. In part II, we address some ideas and concerns of private action as a technique of punishing corporations. In part III, we address civil liability as a way of punishment of corporate wrongdoing. Finally, we conclude with our opinion about what is the best way to make policy in this debate arguing that corporate criminal liability may be a problem in the sense of their punishment implications to third parties and society.

1. Punishing corporations wrongdoing

As a premise today, corporations are criminal offenders. Corporations commit crimes because they have criminal liability. To illustrate how corporations are punished, we want to explore the current law regarding the criminal and civil liability of corporations to then introduce a discussion of their policy importance. As a comparative law analysis, let's keep clear that white-collar Law is in good part supported by case law in the United States, while in other parts of the world there are several criminal statutes which are regulating this situation with formal regulations. As we will see, in other jurisdictions the corporate wrongdoing is only a matter of statutory creation. In both cases, the policy behind is the same: the protection of an infinite number of potential victims in very sensitive areas and procure enforcement of laws and regulations from very sophisticated criminal offenders. In any event, the consequence of prosecution of corporations are actually the same: the destruction of the corporate entity and the business held by itself, having this several collateral consequences (employees losing their jobs, consumers not having access to good and services otherwise provided, economic crisis, among others).

Under U.S law, corporations have criminal liability such as any legal person. Long time ago, in *Hudson River Railroad*,[9] the Supreme Court held that "a corporation is held responsible for acts not within the agent's corporate powers strictly construed, but which the agent has assumed to perform for the corporation when employing the corporate powers actually authorized, and in such cases there need be no written authority under seal or vote of the corporation in order to constitute the agency or to authorize the act."[10] In this way, and under the theory of agency, Federal law has recognized the criminal liability of corporate entities.

As every individual, the commission of a crime supposes the violation of a statute which considers particular interest protected. Corporations can violate such interest by their illegal behavior. In a broad way, corporate wrongdoing is the violation of any legal statutes with criminal consequences under the agency theory. But it is hard for companies to keep constantly on track and compliant with rules and regulations. In some sense, it is inevitable the violation of some rules, but the problem arises when such violation is critical given their criminal nature. Money laundering, securities fraud, RICO, among others, may explain some corporate criminal behavior. As a matter of policy, U.S. legislation has considered corporations criminal offenders as well as individuals.

In civil law, this is not the case. Corporations are not criminally liable. But this situation is changing dramatically. For instance, under Venezuelan law criminal corporate liability is a new institution under Money laundering laws. Although it's fair to say that there are no specific laws regulating corporate liability in Venezuela, there are some special regimes in the matter changing traditional notions of Venezuelan criminal

9 New York Central & Hudson River Railroad v. United States, 212 U.S. 481 (1909).

10 *Id*. at 494.

law.[11] Traditionally, civil law systems have been reluctant to criminalize corporate wrongdoing.

In several civil law jurisdictions, there is not the idea of corporate criminal liability because of this distinction between the legal entity and the individual. Usually, it is held the aphorism that corporations cannot be imprisoned because there are not persons. This is also known as *societas delinquere non potest* which means corporations do not commit crimes.[12] However, thanks to the current trends, civil law legislations are changing this old perspective. For instance, Venezuelan Criminal Law has allowed the prosecution of corporate entities as defendants in criminal cases under investigation in money laundering offenses. Even though neither the Venezuelan Criminal Code nor the Criminal Procedure Code contemplate a provision allowing the prosecutions of corporations for criminal offenses because they are tailor-made provisions for the crimes committed by the individuals. In any event, the legislation seems to be in the directions of imposing monetary penalties to corporations given the fact of the impossibility of other remedies. At the end, legal systems are not so different and there are touching each other. We may say that we face the same material problems worldwide.

As a comparative example, in the case of the Venezuelan money laundering provisions, under the Law against Organized Crime and Terrorist Financing[13] ("LOCTF"), legal entities are *"are civil, administrative and criminally liable for criminal offenses related to organized crime and financing of terrorism committed by them, by their agents or their representatives*,"[14] subject

11 In particular, Money Laundering, Environmental Act, Fair Prices Act, among others.

12 See generally, Thomas Weigend; *Societas delinquere non potest*?: A German Perspective, J. Int'l C. Law, (2008).

13 Official Gazette No. 39.912 dated 30 April 2012.

14 *Id*. In particular, LOCTF, Art. 31 established that: "Legal entities, excluding the State and its companies, are civil, administrative and criminally liable for criminal offenses related to organized crime and financing of

to sanctions in the administrative and judicial setting. In so doing, in the case of the commission of criminal offense, the LOCTF allows the judiciary to impose criminal sanctions to those corporations found guilty of committing criminal offenses. In this framework, judges may impose, upon their discretion and only in crimes related to Organized Crime and Terrorist Financing, the final closure of the legal entity in the case of the intentional commission of the offenses established in this LOCTF; the prohibition to carry out commercial, industrial, technical or scientific activities; and fines equivalent to the value of the capital in the event of the money laundering resulting from the criminal offense, among other discretionary sanctions.[15]

Legislators around the world are moving forward to penalize criminal behavior. In the United States, today, "fighting corporate fraud and other misconduct is a top priority of the Department of Justice"[16] but "in large corporations, where responsibility can be diffuse and decisions are made at various levels, it can be difficult to determine if someone possessed the knowledge and criminal intent necessary to establish their guilt beyond a reasonable doubt."[17] This is not a new problem and in fact, it has been always the main issue: how to determine the scope of the corporate wrongdoing and its consequences?

terrorism committed by them, by their agents or their representatives. In the case of legal entities in the banking, financial or any other sector of the economy, which intentionally commits or contributes to the commission of crimes of organized crime and financing of terrorism, the Public Ministry shall notify the corresponding agency for the application of administrative measures that may apply."

15 *Id*. Art. 32. Judges are allowed to impose a complete publication of the judgment in one of the newspapers of greater national circulation at the expense of the legal person in any case, or even refer the case to the corresponding administrative agencies for the purpose of deciding the revocation of concessions, authorizations and administrative authorizations granted by the State.

16 Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice to All U.S. Att'ys et al., Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015) [Yates Memo].

17 *Id*. at 2.

Indeed, corporations may commit crimes. But the punishment of those crimes cannot be the same as the punishment of the individual for obvious reasons: the corporation may be a legal entity, but it is not a human being that can be imprisoned.

So, it is fair to say that there is a trend in the legislation to adopt new techniques of punishment to new kinds of crimes that, when criminal law was originally thought, I would have never imagined happening.[18] Insofar the world is more complex, the complexity of criminal activities is also evolving. Venezuelan law, and some other civil law system are an example of such statement. Then, regulations made only for crimes committed by individuals, are somehow archaic for the new reality: some crimes must be directly focused on corporations rather than individuals. In view of this rationale, the policy consideration is that the punishment may not be the same. But which is the best remedy possible in these circumstances?

We believe there are two ways to punish corporations. First, using criminal law and typified crimes about some corporate behavior considered wrong. Second, using civil and administrative remedies sanctioning some corporate behavior considered wrong. We believe the best option is the second one and we explore this in part III of this paper. In addition, and in practice, there is an underlying situation: corporations are "prosecuted" by two teams: regulators and prosecutors, which have different goals, purposes, and interests. But between these teams, there is no chance of the private prosecution of crimes as a part of the criminal justice system.

18 However, as a matter of practice, still Venezuelan prosecutors are not charging corporate entities but rather the human beings behind the corporate veil. There are not statistics or data which can explain with this phenomenon. But we truly think it has to be with the notions of justice in the prosecution of crimes. There isn't the same impact of the prosecution of a corporation than the prosecution of a director or owner of such enterprise.

As we will discuss, the theory of private action is an idea essentially from common law systems. Every Constitution has created a particular model of criminal justice systems and this may vary depending on the jurisdiction we are talking about. The U.S. constitution has created a criminal justice system where prosecutors must prove their cases beyond reasonable doubt. In this case, prosecutors must prove that a crime has been committed by the defendant. Similarly, in Venezuela, the Constitution has created a system where prosecutors must prove their case against the defendant which is innocent until proved it's guilty.[19] But why all the powers of prosecution may rest upon the shoulders of the State? Is not Justice a matter where everyone is concerned? What is the problem of allowing people outside the State's side to participate in the criminal process? These are some questions regarding the importance of private action in criminal law we want to explore as follows.

2. Private action: why the enforcement of critical regulations must be done only by the government?

As a preliminary matter, we can see the discussion of the theory of private actions from two perspectives. On one hand, there is private action when a private party seeks civil remedies from the wrongdoing of another because a statute provides relief in case of doing so. This is also called private enforcement of public laws. On the other hand, we may say there is a private action in the course of a criminal prosecution where the victim may seek criminal remedy against the criminal offender. In this paper, we refer essentially to the first category, although both classes of actions may be discussed as a matter of public policy upon white-collar crimes. We hope to offer an overview of the institution and present our conclusion of its usefulness in the current white-collar theory.

19 Venezuelan Constitution, art. 49 (2).

Traditionally, civil law systems have denied the possibility of their citizens to file actions in cases where the State has a mandatory function to enforce regulations. Then, civil law prosecutors are obliged to enforce the law rather than bargaining with it. However, in some instances, this answer is not absolute. For instance, under Venezuelan criminal law, some kinds of crimes are private in nature. This means that victims may bring their own actions against the criminal offender under particular circumstances without prosecutorial supervision.[20] In the United States, when we refer to private action, we are actually referring to the situation where potential plaintiff has incentives to enforce regulations.

The idea of civil private action is very American in a lot of senses. Private action has a long history of antitrust laws around the world. In particular, common law systems have been receptive to the idea of private enforcement of laws and regulations. It has its origin under competition laws, where "private enforcement also plays a significant role in deterring antitrust violations."[21] In the context of antitrust private action litigation, many commentators have criticized the existing system of private antitrust litigation. Some assert that "private actions too often result in remedies that provide lucrative attorney's fees but secure no real benefits for overcharged purchasers."[22] The private action in antitrust law is essentially a civil remedy, granting to the victorious party money damages.

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20 Under Venezuelan Procedural Criminal Law, there is an old distinction between crimes of private action and crimes of public action, where the first were prosecuted by the cause of action brought by the victim's crime while the second were all the crimes subject to prosecution by public officials in representation of the people. This distinction is useless in practice because almost all crimes are considered of public actions. The only crimes considered of private action are adultery, defamation, and those related to the injury of property.

21 Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. Rev. 879 (2008) at 884.

22 *Id.*

At least in this area of law, it has been usually allowed private individuals bringing their own cause of actions, mainly due to the advantages it has for the collective good. But even in antitrust, where private actions are generally accepted, there are several critics. So, "one common criticism of private actions in general, and of class actions in particular, is that they are a form of blackmail or extortion, one in which plaintiffs' attorneys, with little risk to themselves, coerce defendants into settlements based not on meritorious claims, but rather on the cost of litigation or fear of an erroneous and catastrophic judgment."[23] Indeed, there is the possibility of manipulating the judicial process to obtain outcomes not related to the justice of the case as we further will discuss in this paper. In contrast, some point out "there has been a traditional tendency to assume that laws designed to produce public benefits should be enforced by public authorities while laws designed to regulate the interactions of private actors should be enforced by private actors."[24]

This is essentially the case of civil law jurisdictions as we have explained where the monopoly of power tends to rest upon the public authority as the criminal justice system is organized. But this monopoly of authority has been questioned with some truth in the arguments against this theory of the criminal process. Indeed, as some have pointed out, "the private enforcement of public laws can act as a check on the monopoly power of enforcement that public authorities would otherwise enjoy. [Then] a private individual who has suffered a violation may be in a better position and may have better information to enforce public laws than a public official. It is the aggrieved person rather than the public official who has the greatest incentive to seek corrective justice in the form of

23 Id at 885 referring to Donald F. Turner, *The Durability, Relevance and Future of American Antitrust Policy*, 5 Cal. l. Rev. 797, 811-812 (1987).

24 Kent Roach; Michael J. Trebilcock, *Private Enforcement of Competition Laws,* 34 Osgoode Hall L. J. 461 (1996) at 471.

damages or other remedies."[25] But it is not the same to seek money damages than jail time by a criminal offender. The nature of the civil process is to remedy a legal situation while the objective of the criminal process is essentially to punish wrongdoers notwithstanding the compensatory measure that may take place.

There are several arguments in favor of the idea of private action in white-collar crimes. In the first place, it may be argued that private action provides access to the justice system. Indeed, when people may sustain a legal action in a court of law, the legal system is not only providing a right to action but also a right to be remedied its harms. In addition, private action may provide potential relief to parties injured by white-collar criminals. Instituting a process for such relief will open a potential practice of civil lawsuits against guilty corporations and individuals to seek and recover damages. In addition, it may be argued that the counterpart of a crime in a criminal action, is a tort in a civil action. Interestingly, from a criminological perspective, "criminologists have paid little attention to tort law, a subject closely related to the conceptualization of certain white-collar offenses as crimes."[26] One of the main challenges of private action in white-collar crimes is how abstract the crime and their victims are.

In the case of white-collar crime, where time to time involved very important stakes, the participation of everyone involved may be encouraged as a matter of justice. Then, as an example and as a matter of policy, what happen with the victims of a potential crisis of the financial and banking system where millions of dollars have been embezzled by sophisticated schemes? Is a legal action for the victims of white-collar crime a solution? In practice, victims of this kind of crimes may

25 *Id*. 472.

26 Steve Blum-West; Timothy J. Carter, *Bringing White-Collar Crime Back in: An Examination of Crimes and Torts*, 30 Soc. Probs. 545 (1982) at 546.

file torts claims against the criminal offender.[27] But because of the diverse pool of potential victims, a specific legal action looks insufficient before the numbers of claims against this kind of criminal offenders.

Allowing private action claims may provide a legal way to conduct the seeking of relief either thought class actions or specific remedies with respect to particular heavy-regulated areas. Under U.S. white-collar crime law, there are some areas where private right of action is allowed. For instance, under RICO "permits any person (individual or entity) that has been injured in his business or property by RICO violations to sue under RICO, and if successful, to collect treble damages and attorney's fees and costs, brings two important resources to law enforcement's efforts against crime: (1) the time, talent, and expertise of private counsel, and (2) "inside information" by victims about wrongdoing."[28] In particular, there is a huge incentive to bring RICO claims because the legislations have provided an important monetary relief. Then, "RICO's lucrative private cause of action incentivizes knowledgeable victims to come forward."[29]

Second, it may be argued that private action provides distribution of power over criminal and civil cases between the prosecutors –as an agent of the State– and the people –exercising their rights to file claims in a court of law–. It is true that prosecutors have a tremendous power monopolizing the exercise of legal actions in the prosecution of crimes. Giving that power to the people, prosecutor workload may be less burdensome while both, the state and the people have the common

27 Under Venezuelan Law, civil liability has always existed under the principle that "any person who, intentionally, negligently, or through bad faith, causes harm to another person is liable to that person for the full amount of the injury (Civil Code, Articles 1185, 1196). This principle also applies to corporate entities as well as individuals as a general rule in civil law systems.

28 *Supra* note 1 at 543.

29 *Id*. 543.

interest of prosecuting crimes and enforce the laws in their communities. Thus, private action litigation may potentially help the prosecution of crimes and the enforcement of public laws. This idea relates to the argument that private action may give power to the people and encourage participation in the judicial process as a way to ventilate disputes.

By contrast, private action also supposes several disadvantages to the judicial system. From the civil procedure perspective, it has been proposed several arguments against private action. In particular "private enforcement regimes (1) empower judges, who lack policy expertise, to make policy; (2) tend to produce inconsistent and contradictory doctrine from courts; (3) weaken the administrative state's capacity to articulate a coherent regulatory scheme by preempting administrative rulemaking; (4) usurp governmental prosecutorial discretion; (5) discourage cooperation with regulators and voluntary compliance; (6) weaken oversight of policy implementation by the legislative and executive branches; (7) lack democratic legitimacy and accountability."[30] Indeed, as a matter of policy, as some authors have pointed out "private enforcement regimes produce fragmented and incoherent policy. As compared to a more centralized, unified, and integrated administrative scheme, orchestrated by an administrator at the top of a hierarchical agency with powers of national scope, when a large role is given to private litigation in implementation, the resulting policy will tend to be confused, inconsistent, and even straightforwardly contradictory."[31]

In the case of white-collar crime, this discussion may even more deepen. Thus, it may be argued that private action may disrupt the judicial process through its abuse. Sometimes, unfortunately, plaintiffs use the court system as a business and attorneys are looking for contingent fees rather than legal

30 Stephen B. Burbank; Sean Farhang; Herbert M. Kritzer, *Private Enforcement*, 17 Lewis & Clark L. Rev. 637 (2013) at 667.

31 *Id*.

solutions for their clients. This is not a new concern. Indeed, "debates about collective actions abroad suggest that much of the angst about "American style class actions," as about American litigation more generally, stems from the perception that such lawsuits are conceived by and serve to enrich lawyers."[32] Private action may be a way to ventilate disputes with the only purposes of making money from corporations.

Second, a private right of action may destroy corporations as well, and even more, disrupt the market. In the case of winning this kind of litigation, are corporations in the position to pay every claim against them? Giving private actions rights to the people, it is also giving the power to destroy enterprises. We have discussed the issue of the tremendous powers of prosecutors over corporations. If such power is shared among the state and the people, there are concerns about the effective enforcement of regulations and burdensome claims against corporations as criminal defendants. In this scenario, it is plausible the argument that private action gives too much powers to individuals in the civil and criminal process, over punishing white-collar offenders. Finally, private action may be not adequate for every dispute. As we have seen, private rights of action may be workable if there is an adequate incentive to litigate –generally granting punitive damages–. Indeed, there are some crimes are not encompassed with a clear judicial relief or whether the society is not interested in the prosecution. Therefore, private action may not relief the plaintiff but rather disrupt the judicial process. For instance, it's very difficult to see an adequate private action in a securities fraud case, where the victim is the owner of the stock and not the society. By the same token, it is difficult to propose a private right of action where there is not a collective damage to society, which is interested to prosecute crimes which injure collectively.

32 Stephen B. Burbank; Sean Farhang; Herbert M. Kritzer, *Private Enforcement of Statutory and Administrative Law in the United States (and Other Common Law Countries),* Penn Law: Legal Scholarship Repository (2011) at 4.

As we have seen, arguably, private action may not be the best way to punish corporate entities and white-collar criminals. If we allow a private right of action, a judicial process would be more expensive for the plaintiff. At the same time, in a big picture analysis, DOJ might lose power in several cases with national importance. In addition, it is fair to affirm that in some areas, private action must be excluded as a matter of policy. For instance, in the Foreign Corruption Practices Act, a lawsuit may have an important impact from the political spectrum. This opens the door to abuse of process and manipulation of its forms in order to obtain political results rather than judicial remedies.

In our opinion, the idea of private action supposes a judicial remedy determinable to the party seeking it. The process by itself, it is not declaratory but rather, adjudicative through a remedy in law. And the wrong incentive may cause a lot of damage to the judicial system by the plaintiff abusing the judicial process. Finally, private action concludes with a civil punishment to a corporation or individual. But punishment takes forms that judges cannot control at its entirety. A jail time sentence in white-collar crimes is destroying the life criminal offender, their reputation and professional career.

In the United States, "it is widely understood that private litigation plays an unusually large role in policy implementation in the U.S. as compared to a large majority of industrial democratic countries with predominantly parliamentary systems"[33] but this isn't the case in other systems. It is important to remember that policy is made by regulators and not courts. Truly has been said that the legislative and executive branches have less continuing control over policy when private enforcement is relied on for implementation, as contrasted with administrative implementation.

33 Robert a. Kagan, Adversarial Legalism: The American way of Law, (2001) at 6–8.

After a statute is enacted, private enforcement activity and associated judicial interpretation of statutes is far harder for legislatures and executives to control and influence than post-enactment implementation by bureaucrats. Most significant among forms of continuing legislative control over bureaucracy, even if future legislatures lack the political capacity or will to pass a new law, they can exercise some leverage over agency implementation of statutes through such tools as investigation, oversight hearings, earmarking funds, formal reporting requirements, refusing to confirm appointees, and, of course, by threatening to reduce or actually reducing an agency's budget.[34]

As conclusion, we have discussed that the idea behind private action is not adequate to every dispute which requires adjudication. In some cases, as in corruption cases, it is plausible to make the argument that unnecessary claims may distort judicial process and abuse it. In other cases, as RICO, it may allow victims to recover damages and impact some corporate practices. The idea behind this discussion is to show that the idea of compensation in white-collar crimes is complex and it is not adequate for every issue.

In antitrust and RICO litigation is allowed civil remedies to prevent further criminal violations of such regulations. The main advantage of government power over white-collar crimes is that condensates all potential problems in one cause of action, giving the power to the government to charge or discharge under the best interest of the circumstances. Private action is workable if there is an adequate incentive to litigate. As we have discussed, it is difficult to find this incentive in every white-collar crime. In addition, although private enforcement of regulations is something that must be encouraged, in white-collar crime victims are difficult to characterize. In sum,

34 Stephen B. Burbank; Sean Farhang; Herbert M. Kritzer, *Private Enforcement of Statutory and Administrative Law in the United States (and Other Common Law Countries),* Penn Law: Legal Scholarship Repository (2011) at 43.

the mere power of file charges against a corporation may have a terrible impact on the market, and then, maybe consumers are affected by wrong prosecutorial discretion. Allowing private action in every white-collar crime, may disrupt normal corporate practices and impact the life of many if their exercise is not cautious.

3. Civil liability: corporations are responsible to pay damages for their wrongdoings

In these words, we have discussed the relevance of criminal liability and we're assuming that corporations commit wrongdoing able to criminal penalties as the maximum punishment the criminal justice system may allow. Having said that, as a preliminary matter, we are in front of several liabilities in face of the commission of a corporate crime rather than its criminality. So, first, we have the criminal liability of the corporation by itself as a legal entity. Second, we have the criminal liability of the individuals, corporate employees and directors or managers of the corporations, as agents of the corporation. They may commit crimes by themselves or representing the corporation. Third, and in addition, we have the civil liability of either the corporations or its employees and managers.

It is fair to say that the split of liability between civil and criminal has several implications legally and a separate treatment. So, for instance, "corporations exposed to criminal liability can suffer reduced stock price and perhaps even insolvency as a result of the stigma of criminality. Treatment of corporations under the civil system may remove some of this stigma, and thus provide less incentive for a corporation to agree to inequitable terms in any settlement."[35] Some authors have pointed out the difference between the civil and criminal system of liability. In the civil system of liability, usually, there is a

35 Wilson Meeks, *Corporate and White-Collar Crime Enforcement: Should Regulation and Rehabilitation Spell an End to Corporate Criminal Liability*, 40 Colum. J.L. & Soc. Probs. 77 (2006) at 81.

tort cause of action against the corporation while in a criminal system of liability there is a crime subject to prosecution.

In the first kind, the punishment of the corporation passes through a civil trial in the ordinary judicial system. Then, parties may settle depending on the case-by-case scenario and the law applicable to the case. In this case, the corporate wrongdoing is generally based on a tort action. On the other hand, in the criminal system, corporations are just another defendant in a criminal prosecution with the ultimate consequence of monetary penalties or other several sanctions. As we see, in both cases, the solution of the wrongdoing is a monetary relief to the victim or injured party, plus ancillary sanctions affecting the ability of management to carry out strategic corporate initiatives.

In some countries, civil and administrative liability are the same idea, while in others, are two autonomous concepts. Under Venezuelan law, civil liability comes from the fact of a statutory violation, while administrative liability comes from the violation of a regulation enacted by an agency and consequently, a monetary sanction from the agency against the wrongdoer. Regarding this statement, we're assuming either civil or administrative are the same because they are looking for monetary relief. This answers the same reality of the punishment of corporations: they are only able to pay damages because it is not possible to confine them to a physical prison.

A. Administrative proceedings and sanctions instead of criminal prosecution?

We believe that as a policy approach to the question of whether corporations should be criminal or civilly liable to their wrongdoing, the answer must be civil rather criminal. This makes sense considering the rise of the regulatory state in the new criminal law. We can see that legal traditions agree in the same material problem: corporations should be punished

for their wrongdoing. Now, how to characterize such wrongdoing –rather criminal or civil– is the big policy issue. One of the issues is the proportionality and balance considering the potential enforcement implications. Nowadays, with a complex economy market and financial system, the notion of crime has evolved in several ways, and legal systems are aware of these changes. In addition, the law systems are more complex as well. There are more regulations, with different hierarchy, legal implications and with more detail than ever.

Regulatory law may be a key consideration in heavy-regulated industries like the pharmaceutical or banking industry. Let's depart from the idea than both in common and civil law traditions, the idea of regulations is a set of rules neither enacted by the Congress nor other legislative authority. In fact, regulations are essentially made by administrative bodies or agencies to execute laws enacted by Congress, and those rules have an important impact on the economy and life of their citizens. This is an important distinction because administrative regulations and their proceedings are an important part where corporate wrongdoing is committed. Indeed, administrative and regulatory law increasingly blurs the distinction between public and private sectors so that civil and criminal are no longer meaningful labels for classifying either underlying behaviors or types of legal actions or reactions to these behaviors.[36]

In this abstraction, agencies are those with the power to enforce their regulations by their own means. In parallel, there is a prosecutor who will prosecutions crimes rather than sanctions of those violations of the law enacted by Congress. Then, we have two participants or teams in the enforcements of the laws and regulations. On one hand, the agency enforcing their regulations and, on the other hand, the prosecution enforcing

36 Steve Blum-West; Timothy J. Carter, *Bringing White-Collar Crime Back in: An Examination of Crimes and Torts*, 30 Soc. Probs. 545 (1982) at 552.

the laws.[37] This distinction is clearly the case of U.S. and Venezuelan law, as we are discussing as an example in these words.

Then, there is the current tendency of legislations to create sanctions (administrative or criminal) to impose strict compliance of such regulations. We call this the rise of the regulatory state. With some certainty, we believe it is a phenomenon happening in almost every country in the western hemisphere. Here, really no matter the legal tradition (although the forms of implementation may vary). This is because, in fact, there is a constant interaction between people and regulatory agencies for several purposes. Companies interact constantly with regulators in order to do business as routine basis. In this sense, more and more there is an overlap between administrative and criminal law in several aspects. Upon the creation of more regulations to every sector affecting human life, likewise, there is the creation of more sanctions concerning the violation or noncompliance of such provisions. Indeed, "a good deal of what is described as white-collar crime is a violation of federal regulations, but whether federal regulatory violations are handled as a criminal or civil matter cannot be determined by the intent of the perpetrator, the immorality of acts, the purpose of the sanction, or by the object of protection."[38]

Agencies can set regulations under their subject-matter, while, they are also allowed to start administrative proceedings or adjudications in cases where there is not strict compliance with such rules. Agencies also may start civil litigation in cases where Congress allows to do so and collect damages for the collective good. In addition, congressional statutes may create or typified criminal offenses in cases where the regula-

37 Semantics play an important role here. Laws and regulations are two different legal concepts with different nature. Law is enacted by Congress. Regulations are enacted by agencies in execution of the laws enacted by Congress.

38 Steve Blum-West; Timothy J. Carter, *Bringing White-Collar Crime Back in: An Examination of Crimes and Torts*, 30 Soc. Probs. 545 (1982) at 549.

tion is so sensitive that the mere noncompliance should not be tolerated.

The reasons why criminal offenses may be typified may have several reasons far beyond the discussion of this paper. The fact is that Congress may enact statutes typifying crimes because of the noncompliance of regulation here in the United States and everywhere around the globe.[39] And in this complexity, it is easy for individuals to not understand what conduct is considered legal rather than illegal. In this reality, on one hand, agencies may "*prosecute*" individuals using their own ways. This is essentially starting administrative measures against the person with the final impositions of monetary sanctions. On the other hand, you have prosecutors that may start a cause of action with several tools in their arsenal, to prosecute criminally, the non-compliance of regulations. The current framework is too harsh. DOJ is from the opinion to prosecute individuals rather than corporations: why do not change the framework to abolish criminal liability of corporations and encourage administrative sanctions instead?

One of the main advantages of administrative proceedings instead of criminal prosecution is the fact that who is better to know the violations and consequences of the corporate wrongdoings than the regulators who procure an efficient administrative action. But regulators have tremendous power over the economic sectors they regulate, and they may change the way of how they enforce their own regulations over time. This administrative discretion may impact the necessary impartiality of any adjudicator. In addition, corporations as legal entities have also legal rights, and among them, the right to have the day in court. Administrative proceedings do not provide

39 In this aspect, United States is so sovereign as Venezuela or any country is sovereign to enact such legislations punishing crimes. Every country is an own world of regulations, sanctions and crimes, all of them with a presumption of legitimacy under basic principles of Public International Law.

advantages that the ordinary judicial process may provide, like discovery, an unbiased judge conducting the procedure, and the opportunity. If we adopt the administrative way, we are also providing potential judicial oversight of such proceeding. This is something good in a scheme of separations of powers.

However, it is important to clarify that the object of criminal prosecution is different than the object of the administrative proceeding. Criminal investigation, criminal process, and administrative proceeding are different notions in scope but also in their objectives from the perspective of the criminal offender. Agencies have the purpose of enforcing the regulation they enact; and prosecutors are looking to enforce laws representing the people and seeking justice. With this, prosecutors want to put criminals in jail to keep on track the criminal justice system while regulators want to collect the money from administrative sanctions. But both have the same purpose in common: enforcement of rules no matter these are right or wrong.

The issue arises when there is an overlap between the administrative o civil sanction with the criminal sanctions. In these matters, as a rule, there is no *double jeopardy* when criminal and civil actions are filed against the same person. Similarly, in civil law systems, this situation has been called *non bis in idem*.[40] Because policy allows the parallel prosecution criminal and civilly, this generates multiple sanctions to offenders. We believe this is too harsh as a way of punishment for corporations. Indeed, we believe in the case of corporate liability, the civil liability is enough punishment.

In addition, it is different to negotiate with regulators than prosecutors. In the United States federal practice, companies

40 Although not the same institution, in a broad sense, both generally looks to prevent a person from being tried or punished twice for the same offence.

have a variety of options such as deferred prosecution agreements ("DPA") which may be negotiated and implemented exclusively by the prosecutor, giving them the ability to apply sanctions without criminally charging the offender. The DPA practice, "arose from the rubble of Enron is the proliferation of deferred prosecution agreements between the government and corporations, including some of the largest companies in the world."[41] The amount of prosecutorial discretion is enormous in cases of DPAs, given that prosecutors have the sole power to decide whether to prosecute a corporation without any judicial oversight.

In doing so, DPAs create a dynamic between the prosecution and the corporate defendant where "[o]nly the prosecutor can be merciful, and for his mercy the corporation rationally chooses to cooperate in any way demanded."[42] Here, the amount of prosecutorial discretion is troubling in cases of deferred prosecution agreements, given the fact that prosecutors have the sole power to decide whether to prosecute a corporation without any judicial oversight. In this scenario, "a corporate entity is in a weak position when negotiating the terms of a DPA"[43] for several reasons.

Deferred prosecutions are negotiated and implemented exclusively by the prosecutor, giving them the ability to apply sanctions without criminally charging the offender. As a matter of practice, judges have no authority to turn down a DPA, they are not submitted at all to courts. Actually, "prosecutors have substantial room to bargain over the facts."[44] This is why prosecutors have in their hands life and death powers over people and companies. This shows another tremendous differ-

41 Andrew Weissman, *Rethinking Criminal Corporate Liability*, 82 Ind. L.J. 411 (2007) at 424.

42 Miriam H. Baer, *Organizational Liability and the Tension between Corporate and Criminal Law*, 19 J.L. & Pol'y 1, 14 (2010).

43 *Id*. 106.

44 Bibas, *supra* note 1 at 728.

ence between administrative proceedings and criminal investigation.

In the criminal setting, prosecutors must have their case proven beyond reasonable doubt; in the civil or administrative setting, usually just by preponderance of evidence. In the same scenario but applied in a Venezuelan context, this bargaining system does not exist under Venezuela criminal law. In fact, prosecutors are obliged to enforce the law without any bargaining process. But more than the criminal liability, the administrative liability under several Venezuelan laws creates a scenario where is way more common to negotiate with agencies than prosecutors.[45]

B. Civil liability and administrative proceedings as a better policy approach

Criminal penalties and civil sanctions may rest in the same core punishment: monetary penalties. This makes sense because courts can only grant relief in monetary terms as a matter of law because there is no remedy at equity. But, is it this a good policy approach? We truly believe the regulators are those who better know the essence and implications of the violations of the regulations they enact and enforce. Their job is not only issuing regulations but also overseeing it. At this point, it comes to play the application of civil sanctions to corporate wrongdoing. As a practical matter, the law only

45 From a comparative perspective, due process presents several concerns in the administrative and criminal setting. Due process of law is always a key consideration every time that liberty, property or life are involved. But the notion of due process is not the same everywhere. For instance, in the civil law tradition the notion of due process is broader than the common law idea of this institution. Due process protects all phases of criminal investigations and it is not limited to a legal process in a court of law. In this aspect, there is due process in administrative proceedings, and agencies must respect due process of law in their adjudications and enforcement of regulations. In common law system, the due process idea is narrower than its civil counterpart and only is applicable to adjudicative proceedings as procedural due process.

has remedies in monetary terms. If we implement an effective administrative enforcement scheme, we are assuring an aggressive implementation of compliance and even administrative revenue for every wrongdoing sanctioned civilly.

In other terms, a good way to punish corporations is through their pockets, and not their license to do business. A good example that the final conclusion of some white-collar crimes are resolved in monetary terms is the current FCPA practice. The combination of robust enforcement and minimal judicial oversight has produced a number of trends unique to the FCPA.[46] The increased criminal prosecution of individuals, aggressive enforcement against entities, and industry-wide investigations, much of the FCPA's success (or notoriety) is attributable to the growing number of companies that voluntarily disclose potential violations. The DOJ and SEC, realizing the incentive-altering force of massive sanctions, have parlayed a handful of highly publicized multi-million-dollar prosecutions into many more self-disclosures by companies hoping for more lenient sentencing.[47]

We believe that as much as the corporation is paying and cooperating, this would help authorities to investigate corporate wrongdoing and prosecute the corporate agents criminally liable. Criminal corporate liability tends to destroy the corporation by itself. This is a harsh consequence for third parties because of the collateral damages that may cause. If we limit the liability to its civil terms, we accomplish the goal of compensation to the society without injuring third parties. There is a big difference between the criminal treat against the corporation and against the individual. We believe the first one must not be, while the second must be the rule.

46 Drury D. Stevenson; Nicholas J. Wagoner, *FCPA Sanctions: Too Big to Debar*, 80 Fordham L. Rev. 775 (2011) at 785.

47 Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act-1977 to 2010*, 12 San Diego Int'l L.J. 89, 103 (2010) at 115.

Through administrative proceedings, agency action may be challenged in the jurisdictional setting. Indeed, in our opinion, one advantage of administrative adjudication is the potential judicial supervision of the process. Although it is true that an adjudicative administrative proceeding is conducted in the agency itself, the end of such proceeding is subject to judicial supervision up to the injured party. In this case, because all the setting of the investigation is civil rather criminal, criminal procedure considerations should be put aside. In this set, prosecutors should prove by preponderance of evidence. But think this would balance government prosecution against private companies. As we can see, this analysis would only proper for corporations as offenders. As a matter of criminal policy, we believe is a better option to prosecute a corporate agent rather than the corporation by itself.

Criminal liability of corporations presents several challenges. Under the agency theory –*respondeat superior* as a vicarious liability– the corporation does not have real control of their wrongdoing. In theory, every corporate employee can commit corporate crimes at the same time, jeopardizing the entire corporate action. We truly think the full enforcement of corporate criminal law is impossible in practice. "DPAs and NPAs do look great when compared to full enforcement of the law, but full enforcement of the law is unthinkable. Every Fortune 500 company presumably has had at least one employee who violated a federal criminal law while carrying out his duties."[48] As a practical standpoint, it is better to prosecute individuals rather than corporations due to the potential economic impact of the prosecution.

This supposes a necessary implementation of a balance test. The current regulation supposes that the overlap between civil and criminal liability is something to be encouraged as a matter of legislative technique. As we discussed, we dis-

48 Albert W. Alschuler, *Two Ways to Think about the Punishment of Corporations*, 46 Am. Crim. L. Rev. 1359 (2009) at 1382.

agree with such approach because it is too harsh to a corporation being liable of civil and criminal at the same time. On the contrary, we believe corporations should be liable civilly while individuals must be prosecuted criminally and civilly as a matter of justice. This approach helps to mitigate potential collateral damages caused by corporation prosecution in the criminal setting and prevent similar outcomes as *Enron* and *Arthur Andersen*.

II. Part B: Money laundering as an example of the overlapping between regulatory and criminal law. The comparative case of U.S vs. Venezuelan regulations

In part A of this essay, we have explored some policy problems of corporate wrongdoing a current practice. In doing so, we have analyzed two questions in the criminal theory behind white-collar crimes: the potential solution of private action and the civil liability of the corporations to seek relief in litigation. The corporation by itself should be punished in the civil and administrative setting because it grants monetary remedies. At the end, in law, the only potential remedy granted is only measured in monetary terms.

This would avoid the terrible consequences of criminal prosecution of a corporation to third parties and its collateral damage to the society and consumers. Finally, the criminal prosecution of individuals must be something encouraged as the Yates memo states. The aim of these first notes was exploring the liability of corporations as legal entities and not the individuals committing such wrongdoing. The idea, in any event, is to propose different ways of punishment for this kind of wrongdoing. Here, administrative fines and sanctions may help to accomplish such goals while obtaining revenue for the regulatory agencies.

Now, as a way of example of complex regulations that impact business practice, we explored the heavy regulated scenario of money laundering regulations. We have mentioned the rise of the regulatory state as a normal part of the new legal landscape. We use AML essentially because it is a mix between criminal law and regulatory law in several aspects: (i) AML provisions are passing the burden of regulations to the private sector; (ii) this private sector has adopted compliance programs to make sure they are following the mandates of law; (iii) the regulations are criminal (to those how are prosecuted as criminals for Money Laundering crimes) and administrative (in the sense that there are Federal Agencies involved in the compliance of these provisions as a matter of public policy).

The part A is illustrative because in the AML world, first, corporate entities are criminally liable, and second, there is the phenomenon of autoregulation through compliance programs to avoid potential civil liability (fines imposed thanks to the tremendous power of the Agencies who enforce these regulations). Even though there are important trends to incorporate private actions in the AML framework, there is a clear intent from our lawmakers to increase regulations regarding the financial system.

Generally speaking, money laundering affects almost every legal and banking system in the world. Even though it is difficult to see its impact, the proceeds from crimes may be used to divert illegal activities into apparently lawful ones. It has been held several reasons why money laundering must be punished, relying on the fact "money laundering is commonly understood as the process of cleansing the taint from the proceeds of crime."[49] However, we are going to focus on the compliance perspective of money laundering laws, in particular,

49 Charles Doyle, *Money Laundering: An Overview of 18 U.S.C. 1956 and Related Federal Criminal Law*, (Feb. 2012), available at: http://fas.org/sgp/crs/misc/RS22401.pdf

from the banking sector. In fact, generally, the banking system is an important factor in the money laundering regulations because of its sensitivity in the collection of money from costumers to carry on financial intermediation. Truly it has been said that "for most countries, money laundering and terrorist financing raise significant issues with regard to prevention, detection and prosecution,"[50] while "sophisticated techniques used to launder money and finance terrorism add to the complexity of these issues."[51]

The idea in this paper is to also approach comparatively, the Venezuelan law and the U.S regulations to conclude some of the failures of Anti Money Laundering compliance systems and law enforcement. Being, U.S. a financial factor in global commerce, it is undeniable its influence around the world. Money laundering does not escape from such consideration. Likewise, thanks to the recent U.S sanctions, Venezuela has become a complex regulatory scenario to U.S. banks to carry on financial transactions with Venezuelans, making compliance programs a key consideration in a big picture analysis.

In addition, there is the idea, mainly thanks to the U.S. government, that Venezuela is an ideal place to commit money laundering crimes thanks to the Venezuelan weak regulation, enforcement and generalized corruption.[52] We want to

50 Comprehensive Reference Guide to AML/CFT, (2006) at Chapters 1 and 2, available at: http://siteresources.worldbank.org/EXTAML/Resources/3965111146581427871/Reference_Guide_AMLCFT_2ndSupplement.pdf

51 *Id*.

52 United States Department of Treasury, FinCEN: "In recent years, financial institutions have reported to FinCEN their suspicions regarding many transactions suspected of being linked to Venezuelan public corruption, including government contracts. Based on this reporting and other information, all Venezuelan government agencies and bodies, including SOEs, appear vulnerable to public corruption and money laundering. The Venezuelan government appears to use its control over large parts of the economy to generate significant wealth for government officials and SOE executives, their families, and associates. In this regard, there is a high risk of corruption involving Venezuelan government officials and

address a comparative approach of Venezuelan-U.S. regulation explaining the current weaknesses of Venezuelan anti money laundering laws in the banking sector and the current criticism to such provisions in both systems. For such purpose, in part I we address the overall AML regulation under U.S. law. In part II, we address the AML regulation under Venezuelan Law. In part III, we address some critics to the current AML regulations in both systems and discuss the importance of an adequate AML compliance program. Finally, as a conclusion and as a matter of policy, we want to point out the necessary changes that Venezuelan should take to strengthen its banking AML regulations, taken some examples of U.S law current practices.

1. The U.S Bank Secrecy Act and regulations

Under the U.S law, the banking money laundering regulation is governed by the Bank Secrecy Act of 1970 ("BSA"). The purpose of the BSA is to establish the requirements for record-keeping and reporting by private individuals, banks and other financial institutions. U.S. Congress passed the BSA to help identify the source, volume, and movement of currency and other monetary instruments transported or transmitted into or out of the United States or deposited in financial institutions. This is why the BSA request to the required banks to (i) report cash transactions over $10,000 using the Currency Transaction Report; (ii) properly identify persons conducting transactions; and (iii) maintain a paper trail by keeping appropriate records of financial transactions.

To accomplish this purpose, it has been created the Financial Crimes Enforcement Network ("FinCEN"). As part of the Department of Treasury, FinCEN is the regulatory and enforcement agency in charge of BSA regulations and works jointly

employees at all levels, including those managing or working at Venezuelan SOEs." Available at https://www.fincen.gov/resources/advisories/fincen-advisory-fin-2017-a006

with the Department of Justice for the enforcement of AML regulations. The BSA was made in a way to allow the Department of Treasure to promulgate the necessary and prudent regulation in the matter, and this is the main purpose of FinCEN. Thus, "the Bank Secrecy Act does not actually specify the type of reports that financial institutions must file, but rather serves as an enabling statute that authorizes the Secretary of the Treasury [through FinCEN] to promulgate regulations to that end."[53] In doing so, "the most significant contribution to the current anti-money laundering regulatory scheme is a regulation issued by the Secretary of the Treasury that requires financial institutions, as defined by the BSA, to file Currency Transaction Reports (CTRs)."[54]

As a preliminary matter, it is importance to realize the important of U.S. regulations and its importance in global commerce. It is fair to say that the U.S. will always have the interest to enforce its own regulation no matter its international implications. In addition, as a world power, the U.S. has the most important banking and financial system of the world. Then, any regulation affecting U.S financial system will definitively impact countries even if they don't have direct commerce with the United States. It is well-known that the good part of monetary transactions around the world are conducted in U.S. dollars because there is confidence in the currency itself and the institutions and system behind it. In addition, there is a potential jurisdictional hook for those transactions who have passed through the U.S. financial system. All of these factors have created a solid and institutional system of anti-money laundering regulations and compliance that somehow is shaping the rest of the world's system. As we will see, it is fair to say that Venezuelan anti money laundering regulations are very similar to its American counterpart in most aspects.

53 *The Anti Money Laundering Provisions of the Patriot Act: Should They Be Allowed to Sunset?*, 50 St. Louis L.J. 1361 (2006) at 1370.

54 *Id.*

The BSA framework is detailed and very tailor-made for banking institutions with the goals of detecting money laundering crimes. Generally speaking, compliance is the rule nowadays. After several examples and big scandals such as HSBC,[55] it is fair to affirm that the reach of U.S. law is more aggressive than ever, and federal agencies require AML compliance program, in particular, in the banking sector thanks to its activities of financial intermediation. Indeed, several banks have been prosecuted under BSA violation, some of them as important as Lloyds, Credit Suisse, Wachovia, Barclays, Standard Chartered Bank, ING Bank, Ocean Bank, and a money transmitter in MoneyGram International.[56] Because the sensitive subject-matter regulated, under the BSA, U.S. banking institutions are required to report several actives to Federal Agencies. Federal Regulations have set forth the administrative reporting requirement of financial institutions. As a practical standpoint, there are two important obligations under the BSA and the regulation framework. On one hand, there are several BSA reporting requirements. On the other hand, there are specific BSA record keeping obligations.

A. BSA reporting requirements

Under the current regulatory scheme, U.S. banks are required to report to regulatory agencies an important amount of information of its customers to prevent and detect criminal activities. From the BSA reporting requirements, the most relevant for the purpose of this paper are the Suspicious Activities Report ("SAR"); currency transaction reports ("CTR"); reports of foreign bank and financial accounts ("FBAR"), and

55 Agustino Fontevecchia, *HSBC Helped Terrorists, Iran, Mexican Drug Cartels Launder Money, Senate Report Says,* FORBES, (June 16, 2016), available at https://www.forbes.com/sites/afontevecchia/2012/07/16/hsbc-helped-terrorists-iran-mexican-drug-cartels-launder-money-senate-report-says/#ad8f9565712c

56 M. Kendall Day, *Prosecuting Financial Institutions and Title 31 Offenses*, U.S. ATT'YS BULL, (Sep. 2013) at 19. Available at https://www.justice.gov/sites/default/files/usao/legacy/2013/09/16/usab6105.pdf

reports of International Transportation of Currency or Monetary Instruments ("CMIR").

a. Suspicious Activities Report

SAR is a report that documents suspicious or potentially suspicious activity (e.g., has no business purpose or apparent lawful purpose) attempted or conducted at or through a financial institution.[57] Banks are required to file a SAR when they have detected an unusual banking activity of their customers. Essentially, SAR reporting requirements serve the main tool used by federal agencies to detect money laundering and terrorist financing activities. Banks and other financial institutions are obligated to file SARs in good faith and maintain the confidentiality of the SAR filing and any information that would reveal the existence of a SAR. This SAR information is the internal information gathered by the Financial Institution for banking purposes and filing the SAR. This information collected is confidential and only allowed for SAR filling and only for internal banking use. From a policy perspective, the Information provided by the customer and the subsequent gathered in SARs also "presents FinCEN with a method of identifying emerging trends and patterns associated with financial crimes."[58] A SAR must be filed and reported in the following cases:

(i) *Insider abuse involving any amount.* Whenever the national bank detects any known or suspected Federal criminal violation, or pattern of criminal violations, or that the bank was used to facilitate a criminal transaction, and the bank has a substantial basis for identifying one of its offenders regardless of the amount involved in the violation.[59]

57 *See* Guide to U.S. Anti-Money Laundering Requirements. Frequently Asked Questions. Sixth Edition (2014) at 77.

58 *Id.*

59 12 C.F.R. § 21.11 (c)(1).

(ii) *Violations aggregating $5,000 or more where a suspect can be identified*. Whenever the national bank detects any known or suspected Federal criminal violation, or pattern of criminal violations, committed or attempted against the bank or involving a transaction or transactions conducted through the bank and involving or aggregating $5,000 or more in funds or other assets.[60]

(iii) *Violations aggregating $25,000 or more regardless of potential suspects*. Whenever the national bank detects any known or suspected Federal criminal violation involving a transaction or transactions conducted through the bank and involving or aggregating $25,000 or more in funds or other assets where the bank believes that it was either an actual or potential victim of a criminal violation, or series of criminal violations, or that the bank was used to facilitate a criminal transaction, even though there is no substantial basis for identifying a possible suspect or group of suspects.[61]

(iv) *Transactions aggregating $5,000 or more that involve potential money laundering or violate the BSA*. Any transaction, deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, or purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument or investment security, or any other payment, transfer, or to a financial institution, conducted or attempted by, at or through the national bank and involving or aggregating $5,000 or more in funds or other assets, if the bank knows, suspects, or has reason to suspect that (i) The transaction involves funds derived from illegal activities or is intended or conducted in order to hide or disguise funds; (ii) The transaction is designed

60 12 C.F.R. § 21.11 (c)(2).
61 12 C.F.R. § 21.11 (c)(3).

> to evade any regulations promulgated under the BSA ; or (iii) The transaction has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the institution knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction.[62]

Banks and other financial institutions are required to report and file a SAR no later than 30 calendar days after the date of the initial detection of facts that may constitute a basis for filing a SAR.[63] In case of situations of ongoing violations or further criminal schemes detected by the financial institution, banks must immediately notify, by telephone, an appropriate law enforcement authority and the OCC in addition to filing a timely SAR.[64] In addition, financial institutions are expected to report to state and local authorities the crimes detected. Indeed, "national banks are encouraged to file a copy of the SAR with state and local law enforcement agencies where appropriate."[65] Finally, banks are expected to keep SAR records for a period of 5 years after the SAR filling for enforcement purposes.[66]

There have been a few cases regarding the reporting requirements mainly due tothe difficulties to bring this kind of litigation. It's worth mentioning *United States v. Clines*, in which United States Court of Appeals for the Fourth Circuit held that Treasure Secretary's regulations "require that a person subject to the jurisdiction of the United States shall report to the Commissioner of Internal Revenue a financial interest in, or signature or other authority over, a bank, securities or

62 12 C.F.R. § 21.11 (c)(4).
63 12 C.F.R. § 21.11 (d).
64 *Id*.
65 12 C.F.R. § 21.11 (e).
66 12 C.F.R. § 21.11 (g).

other financial account in a foreign country,"[67] as a part of the reporting requirements for foreign accounts. Another relevant case in this matter is *United States v. Sturman*. In this case, regarding the potential self-incrimination at the time of filling out the reporting requirements, the United States Court of Appeals for the Sixth Circuit held that "defendant's fear of self-incrimination cannot serve as a defense to a failure to complete the information called for on his tax return unless he raised an objection when he filed,"[68] given the non-criminal nature of the BSA statute.

In view of the confidentiality of SAR reporting, bank customers are not allowed to access the SAR information gathered by the bank. Indeed, as a general rule "no national bank, and no director, officer, employee, or agent of a national bank, shall disclose a SAR or any information that would reveal the existence of a SAR."[69] The mere disclosure of SAR information may constitute a crime in a scheme of violation of the SAR framework. In addition, "failure to file a SAR in accordance with this section and the instructions may subject the national bank, its directors, officers, employees, agents, or other institution-affiliated parties to supervisory action."[70]

b. Currency Transaction Reports

Banks and other financial institutions are obliged to report cash currency transactions of its customers over $10,000 in one business day.[71] For the purpose of this report, multiple transactions must be aggregate as long as they meet the minimum of US$10,000 in one business day. Financial institutions can des-

67 *United States v. Clines*, 958 F.2d 578 (4th Cir. 1992) at 581.
68 *United States v. Sturman*, 951 F.2d 1466 (6th Cir. 1991) at 1487.
69 12 C.F.R. § 21.11 (k)(1)(i).
70 12 C.F.R. § 21.11 (h)(2)(i).
71 31 C.F.R § 1010.311.

ignate exempt customers by filing the Designation of Exempt Persons (DOEP) into the FinCEN.[72]

c. Foreign bank and financial accounts

Report of FBAR is a report that must be filed by a U.S. person who has a financial interest or other authority over, any foreign financial accounts, including bank, securities or other financial accounts in a foreign country, which have a maximum value exceeding US$10,000 (alone or in aggregate) at any time during a calendar year.[73] The idea behind the FBAR is to encourage transparency. Foreign accounts in jurisdictions like Switzerland with bank secrecy laws are commonly used to conceal the beneficial ownership of funds. A non-U.S. person doing business in the United States are not subject to the FBAR filing requirement.[74]

d. Report of International Transportation of Currency or Monetary Instruments

Generally speaking, CMIR is required to be filed by: (i) each person who physically transports, mails or ships, or causes (or attempts to cause) to be physically transported, mailed or shipped, currency or other monetary instruments in an aggregate amount exceeding US$10,000 at one time from the United States to any place outside of the United States or into the

72 An exempt person may be a bank, government agency/government authority, listed company, listed company subsidiary, eligible non-listed business, or payroll custom. See Financial Crimes Enforcement Network, *Designation of Exempt Person (FinCEN 110) Electronic Filing Instructions*, October 2012.

73 *See generally*, Guide to U.S. Anti-Money Laundering Requirements. Frequently Asked Questions. Sixth Edition (2014).

74 However, under the Foreign Account Tax Compliance Act ("FATCA"), requires foreign financial institutions to report directly to the Internal Revenue Service ("IRS") information about financial accounts held by U.S. taxpayers, or held by foreign entities in which U.S. taxpayers hold a substantial ownership interest.

United States from any place outside of the United States;[75] and (ii) each person who receives U.S. currency or other monetary instrument(s) in an aggregate amount exceeding US$10,000 at one time, which has been transported, mailed or shipped from any place outside of the United States.[76]

B. BSA record keeping requirements

The BSA requires the retention of all FinCEN Reports (SARs, CTRs, FBARs, CMIRs, among others). In addition, financial institutions are required the retention of checks; money orders for more than US$100; a record of each remittance or transfer of funds or of currency, other monetary instruments, checks, investment securities or credit of more than US$10,000 to a person, account or place outside of the United States; each document granting signature authority over each deposit account; each document relating to a transaction of more than US$10,000 remitted or transferred to a person or account outside of the United States, among several others.[77] In addition, the verifying information obtained about a customer at account opening must be retained by the Bank, which must be retained for five years after the date the account is closed.

C. Know your customer

Under the current AML regulations, *know your customer* ("KYC") is a mandatory obligation for banks if they want to carry out financial intermediation operations in the financial system. KYC may be explained as the bank's obligation to gather information about their clients for banking purposes and potential facilitation of enforcement actions. KYC serves two main purposes. On one hand, it provides "consumer

75 31 C.F.R. § 1010.340 (a).
76 31 C.F.R. § 1010.340 (b).
77 *See* 31 C.F.R. § 1010.410.

protection and economic stability."[78] On the other hand, it facilitates the early detection of financial crimes either affecting the financial system or helping the commitment of other crimes. Under the current regulatory trend, the enforcement of the AML framework rest mainly in the compliance of private entities rather than enforcement agencies.

Generally speaking, banks are required to put in place internal policies, procedures, and controls to detect money laundering by: (1) designating a compliance officer; (2) developing and maintaining an employee anti-money laundering training program; and (3) utilizing independent auditing to test banks' effectiveness in detecting money laundering.[79] However, although KYC is a well-established compliance rule nowadays, it has been criticized as a way of shifting liability from agencies to corporations. Indeed, corporations are somehow deemed to do the job of enforcement agencies should be doing. But in the current world, where the financial system is so complex and sophisticated, it is fair to affirm that only this symbiotic relationship between agencies and corporations may facilitate the enforcement of regulations that at the end of the day help the consumers. Besides, only banks have access to some information at first hand. The bank "should know who individuals and businesses are before starting the process of opening deposit accounts, entering into loan agreements, or forming a client relationship."[80] This access in the customer information is particularly relevant for Patriot Act purposes.

a. The Patriot Act

The Patriot Act was enacted with the intention to fight against money laundering and terrorism financing requiring financial institutions to set internal compliance programs

78 Deborah L. Dickson, Bank on Marijuana: *A Legitimate Industry Warranting Banking Access*, 2 Savannah L. Rev. 459 (2015) at 486.

79 31 U.S.C.S. § 5318 (h).

80 *Know Your Customer -Or Not*, at 322.

for early detention of these crimes. The Patriot Act is beyond the scope of this paper, but it's important to understand its relevance in the current AML regulation. Banks are expected to assign a rating to each customer reflecting the risk that particular customer might conduct money laundering, terrorist financing or other financial crime through the institution. This risk assessment process is performed behind the scenes and financial institution's customers do not have access to such process. First, this implies the bank obligation to collect specific information from their customers and verify their identities using prescribed procedures. Second, the bank regulators have insisted that institutions conduct due diligence on their customers that at times goes well beyond the basic requirements of Section 326.[81]

b. Customer Due Diligence

FinCEN issued final rules under the BSA to clarify and strengthen customer due diligence requirements for Banks; brokers or dealers in securities; mutual funds; and futures commission merchants and introducing brokers in commodities.[82] Generally speaking, Financial institutions are required to ask customer and gather information about (i) purpose of the account; (ii) actual or anticipated activity in the account; (iii) nature of the customer's business; (iv) customer's location; (v) types of products and services the customer plans to use; (vi) source of funds and wealth, among others. This supposes a preliminary obligation of client due diligence.

As a practical matter, banks also are required to subject each customer to a customer due diligence process that may involve collection of more information of customers, such as banking references, description of the customer's primary trade area, and whether international transactions are expected to be routine; description of the business operations, the antici-

81 Pub. L. No. 107-56 § 326.
82 81 FR 29397.

pated volume of currency and total sales, and a list of major customers and suppliers; beneficial owners of the accounts, if applicable; customer's (or beneficial owner's) occupation or type of business; domicile (where the business is organized), and financial statements. This actually is a pre phase before the KYC rule but in the end, both KYC and customer due diligence accomplish the goal of gathering customer information to detect potential criminal activities in the banking sector.

c. Beneficial ownership rule

The final rules about customer due diligence also established a new requirement to identify and verify the identity of beneficial owners of legal entity customers.[83] The Beneficial ownership rule ("BOR") sets that financial institutions must identify and verify the identity of the beneficial owners of all legal entity customers (other than those that are excluded) at the time a new account is opened (other than accounts that are exempted).[84] The policy behind these rules is the necessary transparency in financial transactions and customers accessing the banking system. The BOR information provides high value information for enforcement agencies with the purpose to prevent or detect money laundering and tax crimes as well as facilitate criminal investigations related to terrorism and organized crime.[85]

Recently, FinCEN has issued a memorandum addressing frequent ask questions about BOR and its consequences.[86] One of the main concerns was the scope of the BOR for AML purposes. In this sense, under BOR there is an identification requirement, in which a covered institution must collect, from its legal entity customers, information about any individual(s)

83 *Id*.
84 *Id*. at B (1).
85 FinCEN, *Guidelines Beneficial Owner Rule*, FIN-2018-G001, (April 3, 2018).
86 *Id*. at question 3.

that are the beneficial owner(s).[87] Therefore, covered financial institutions must obtain from their legal entity customers the identities of individuals who satisfy the definition, either directly or indirectly through multiple corporate structures.[88]

In addition, covered financial institutions must verify the identity of each beneficial owner according to risk-based procedures that contain, at a minimum, the same elements financial institutions are required to use to verify the identity of individual customers under applicable Customer Identification Program ("CIP") requirements.[89] So, financial institutions are in a position where, the due diligence does not only extend to their customers but also third parties who are not customers or related to the bank by itself. The idea behind the CDD to third parties is to identify a "straw man" or nominee companies. Then, for BOR purposes, bank's customers are not only the legal entity who does business with the bank, but also the natural person who represents such legal entity. So, banks are constantly required to gather customer information regarding their banking accounts in case of suspicious activity. In the case of BOR, this information must be updated and must be maintained for a period of five years after the legal entity's account is closed.[90]

2. Venezuelan Money Laundering regulations in the banking sector

Venezuelan law provides a robust body of AML and several banking regulations in this sector, clearly influenced by regulatory trends around the world but in particular, U.S regulations and Financial Action Task Force ("FATF") guidelines and international standards. Today, Venezuela has a very sophisticated body of money laundering laws in place with

87 *Id*.
88 *Id*.
89 *Id*. at question 4.
90 *See* 31 CFR 1010.230(i)(2).

the Law against Organized Crime and Terrorist Financing[91] ("LOCTF") and important provisions in the Law of Banking Sector Institutions[92] ("Banking Law.") However, the current problem of the Venezuelan framework isn't its regulation but its enforcement. As a practical matter, in a country now having a political and economic crisis, money laundering crimes are way far to be the main attention of Venezuelan prosecutors.[93] Although the Venezuelan government has agencies to combat financial crimes, their technical capacity and willingness to address this type of crime remain inadequate. To some extent, government AML and anti-corruption entities are ineffective and lack political will.[94]

In addition, there is an underlying situation. In words of the Treasury Department, "currency controls in Venezuela limit the supply of U.S. dollars for most economic activities, which encourages the demand for foreign currency and smuggled goods in the parallel market." The current currency exchange control since 2002 and the Law against Illicit Currency Trades.[95] Then, "although illegal, Venezuela's parallel market is a highly profitable business for those with regime connections that enable them to access inexpensive dollars and goods. This parallel market relies upon unregulated brokers; whose clients often include criminals who integrate illicit proceeds into the legal economy. Venezuelan officials who receive preferential access to U.S. dollars at the more favorable, official exchange rate, also exploit the multi-tier exchange rate system for profit."[96] From the U.S. perspective and by virtue of

91 Official Gazette No. 39.912 dated April 30, 2012.

92 Official Gazette No.6.154, dated November 19, 2014.

93 Know your country, https://www.knowyourcountry.com/venezuela1111 (last visited April. 15, 2018).

94 *Id*.

95 Chapter III, Art.9.

96 FinCEN, Reports from financial institutions are critical to stopping, deterring, and preventing the proceeds tied to suspected Venezuelan public corruption from moving through the U.S. financial system, (last visited April. 15, 2018) available at https://www.fincen.gov/resources/adviso-

the changing circumstances, financial institutions, companies and investors conducting business in or with Venezuela should ensure appropriate procedures are in place, and actively implemented, to comply anti-money laundering requirements.[97]

A. LOCTF and Banking Law framework

The main body of money laundering regulations is found in the LOCTF which creates the Financial Crimes Intelligence Unit ("FCIU") as part of the Superintendent of Banks ("SUDEBAN") as the Agency governing banking regulation and its enforcement. Under Venezuelan law, as a preliminary matter, there is no distinction in the regulation between money laundering and terrorism financing. This is because essentially "the techniques used to launder money are essentially the same as those used to conceal the sources of, and uses for, terrorist financing."[98] Then, "funds used to support terrorism may originate from legitimate sources, criminal activities, or both."[99] In addition to the AML framework, there are important sanctions in the Banking law regarding money laundering in general.

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ries/fincen-advisory-fin-2017-a006#_ftn4. But no only officials have used the black market to sell currency. Citizens who obtain remittances from abroad, commercialize their currency into the black market to avoid using the official market, which is also a crime under the Illicit Currency Trades. Therefore, as a matter of practice, there is a lot money laundering going on without any further prosecution or awareness by some individuals. Unfortunately, the economic crisis has created an implosion in the system with the high inflation rates and the high cost of living.

97 *Understanding the Rising Corruption, Sanctions and Money Laundering Risks of Doing Business with Venezuela*, Kirkland & Ellis Alert, (October 12, 2017) available at https://www.kirkland.com/siteFiles/Publications/Understanding_the_Rising_Corruption_Sanctions_and_Money_Laundering_Risks_of_Doing_Business_with_Venezuela.pdf (last visited April. 15, 2018).

98 Comprehensive Reference Guide to AML/CFT, (2006) at Chapters 1 and 2. Available at: http://siteresources.worldbank.org/EXTAML/Resources/396511146581427871/Reference_Guide_AMLCFT_2ndSupplement.pdf

99 *Id*.

In this regard, SUDEBAN will request information from other public and private institutions regarding the behavior of natural or legal persons, whether they are users or not of the national banking sector, to gather additional information to facilitate risk assessment and contribute to customer identification rules for the prevention of money laundering and financing of terrorism.[100] In addition, under the Banking framework, Financial Institutions will be sanctioned with a fine between 0.2% and 2% of their capital stock if they facilitate the exit or money laundering in any of its modalities, without prejudice to the legal actions that may have taken place.[101] Notwithstanding this general framework, one of the main deficiencies of the current LOCTF is the lack of important mechanisms to combat domestic criminal organizations, such as the exclusion of the state and its companies from the scope of investigations.[102] But currently, Venezuela is no longer on the FATF list of countries that have been identified as having strategic AML deficiencies.[103]

As we will see, LOCTF imposes several regulatory obligations to financial institutions in Venezuela. These formal obligations also impose the creation of compliance programs in the banking sector as a way of prevention and detection of money laundering offenses. In fact, banks are required to design and put in place an operative AML/CTF compliance program.[104] Such compliance program must be available for the SUDEBAN in the first 15 business day of years in which such program would be implemented.[105] As we can see, there is a self-reporting obligation under the LOCTF which covers several aspects. In fact, the purpose of the LOCTF is to promote the creation of AML compliance programs by banking institutions with the

100 Banking law, Article 88.
101 Banking law, Article 202, (6).
102 *Id* at note 46.
103 *Id*.
104 Prudential Norms, Article 22.
105 *Id*.

idea of having a matrix of information shared by governmental agencies to prosecute money laundering offenses and assuring banking regulation enforcement.

Under the LOCTF, the principal Money Laundering crime typified is broad provision to catch up several illicit conducts. In this respect, under the money laundering crime provision, it is forbidden to use money coming from illegal activities, knowing that they come directly or indirectly from an illicit activity, and with a penalty of prison for ten to fifteen years.[106] With the same penalty, it is considered a crime the concealment, receipt, simulation, and the acquisition of goods from proceeds from crime and illegal activities.[107] In addition, "any director, manager, or employee of the obliged entities, who by negligence, imprudence, lack of expertise, favor or contribute the commission of a money laundering crime and terrorism financing, without any participation on it, shall be sanctioned by reclusion to three to six years."[108] But more than the money laundering crime statute, there are extensive money laundering regulations to prevent money laundering activities that

106 LOCTF, Article 35. Who by himself or by another person is owner or proprietor, possessor or owner of capital, cash, funds, knowing that they come directly or indirectly from an illicit activity, will be sentenced to prison for ten to fifteen years and a fine equivalent to the value of the illegal proceed. The same penalty will apply to those who, by themselves or through another person, carry out the following activities:

1. The conversion, transfer by any means of goods, capital, liquid assets, profits or surpluses in order to hide or conceal the illicit origin of them or to help anyone who participates in the commission of such crimes to avoid the legal consequences of their actions.
2. The concealment, or simulation of nature, origin, location, disposition, destination, movement or ownership of goods or legitimate right of these.
3. The acquisition, possession or use of goods resulting from a crime.
4. The receipt, investment, transformation, custody or administration of goods or capital from illicit activities.

The capital, property or money subject to the crime of money laundering will be confiscated or confiscated.

107 *Id*.

108 LOCTF, Article 36.

are way beyond the scope of this criminal provision. The scope of this paper is the regulatory approach of such regulatory framework from the reporting obligations perspective in the Banking sector.

SUDEBAN has issued several memorandums explaining the scope and application of AML rules under the LOCTF. Under Venezuelan banking law, these are called "prudential regulation." Among those prudential regulations issued by SUDEBAN as governing agency in the banking sector, there are several legal instruments. Some of these memos or resolutions are advisory rather than mandatory, but in practice, financial institutions follow those mandates as a matter of best practices and regulatory compliance and as a way to avoid potential sanctions and fines.

Under the LOCTF, financial institutions are classified as persons subject to LOCTF as obliged entities.[109] This means that any participant in the banking sector (as a person conduct financial intermediation) is subject to the law and its provisions. There is the general obligation that obliged entities must keep physical and digitally the records, documents, and other papers from their clients by a period of five years[110] with the idea to facilitate criminal prosecution and securement of criminal evidence. With this general principle, there is the obligation of identification of clients prior any transaction,[111] the obligation of reporting any unusual activity,[112] the obligation of reporting cash operations,[113] the obligation to identify third party intervenient in transactions,[114] and the obligation

109 Under LOCTF Article 9, (1), entities subjects to the LOCTF are any agency, institution, natural or legal person subject to the provisions of the banking laws regulations. Therefore, the whole banking sector is subject to the LOCTF and its legal consequences.

110 LOCTF, Article 10.

111 *Id*. Article 11.

112 *Id*. Article 13.

113 *Id*. Article 17.

114 *Id*. Article 16.

of reporting political exposed persons.[115] The violation of these formal obligations would result in an pecuniary fine between 500 to 3,000 T.U. to the obliged entity.[116] These reports are not criminal in nature and do not have to meet the formalities of a criminal action.[117] Then, the FCIU will remit the case to the Attorney General Office in case of sufficient evidence criminal activity to start the investigation and prosecution.

B. Reporting requirements

Regarding reporting requirements, SUDEBAN has issued a "Prudential Norms related to the Administration and Control of Financial Risks related to AML/CFT"[118] ("AML/CFT Prudential Norms") to implement AML regulations with enough detail in financial transactions. These rules are mandatory for financial institutions. Reporting obligations are crucial under current AML regulation in Venezuela to help authorities to detect and prevent organized crime. We explain the most relevant reporting requirements as follows.

a. Suspicious activity report

Under the LOCTF, Venezuelan law has its own Suspicious Activity Report ("RAS" in Spanish). The obliged entities must pay special attention to any transaction or group of transactions regardless of their amount and nature, when it is suspected that the funds, capital or assets come from or are linked, or could be used to commit money laundering offenses, or finan-

115 *Id.* Article 18.

116 Under several Venezuelan laws and regulations, it has been adopted the Tax Unit (T.U) as a way to determine the pecuniary sanction in the specific case. This method is mainly to surpass the high inflation rates in the Venezuela economy and avoid worthless sanctions. The T.U amount is established every fiscal year by the Venezuelan Ministry of Finance.

117 LOCTF, Article 13, third paragraph.

118 Official Gazette No. 39.388, dated March 17, 2010. Available in Spanish at http://sudeban.gob.ve/wp-content/uploads/N_Prudenciales/7-PREVENCION-DE-LEGITIMACION-DE-CAPITALES/7-2-RES-119-10.pdf

cing of terrorism or any other crime of organized crime.[119] Under the LOCTF, financial institutions should pay special attention to such activities notwithstanding their eventual a lawful source.[120] The obliged entities must report in an expedited way the suspicious activities detected to the FCIU. Then, the FCIU will determinate if the case should be sent to the Public Prosecutor Office for the purpose of starting a criminal investigation. This general obligation is complemented with the general obligation to cooperate with government agencies to enforce AML/CFT regulations.[121]

Financial institutions are required to pay special attention to cash operations –unusual deposit or withdraws– credit, currency operations, credit notes, and other indicia of operations related to money laundering when there is not enough justification of such movements o simply because of its unusual nature in the client history.[122] In addition, Venezuelan banks are required to classify transactions as suspicious transaction, at bank discretion, when the transaction is either unusual, unconventional, in transit, structured or complex from the analysis of the information gathered from the client.[123] Failure to comply with SAR reporting is sanctioned by a fine between five 500 T.U and 1,000 T.U.[124]

When an obliged entity decides to report a suspicious activity related to AML/CFT, Financial Institution compliance officer must send the RAS to the FCIU, using electronic or written means, no later than 2 business days after the bank AML/CTF committee has established the necessity of reporting the suspicious operation.[125] For the purpose of the RAS, financial institutions are not required to have certainty of the conduct they

119 LOCTF, Article 13.
120 *Id*.
121 AML/CFT Prudential Norms, Article 83.
122 AML/CFT Prudential Norms, Article 84.
123 *Id*. Article 85.
124 LOCTF, Article 13.
125 AML/CFT Prudential norms, Article 86.

report, and neither has the nature of a criminal or civil action nor implies liability. In this respect, obliged entities should pay special attention to the information gathered in the media (TV, press, etc.), government reports, international organizations, clients, internet, among others at the discretion of the financial institution.[126]

This is useful information to build a client's profile but in any event, the RAS report must be sent upon a reasonable analysis under the client circumstances and based on reasonable indicia of potential wrongdoing.[127] In this sense, obliged entities must implement their own proceedings to develop a policy of customer due diligence and asses customer's risk.[128] Finally, the written RAS report must be accompanied by all the client documentation gathered by the Bank to facilitate the potential investigation.[129] RAS is confidential and clients do not have access to such information. Its disclosure may constitute only an administrative fine to the financial institution.

b. Report of transactions over Bs.F. 10,000 and report of currency transactions

Financial institutions are required to report electronically all transactions –deposits or withdraws– for amount equal or over Bs.F. 10,000 made by their clients in their accounts or other financial products.[130] SUDEBAN may exempt this requirement upon designation in the exception list for this matters.[131] As a practical matter, thanks to the current inflation and economic crisis, this amount is illusory in practice but still, banks are required to report such amount but current regulations allow SUDEBAN to modify this quantum over time.[132] In addition,

126 *Id*. Article 91.
127 *Id*. Article 91.
128 *Id*. Article 34.
129 *Id*.
130 *Id*. Article 78.
131 *Id*.
132 *Id*. Article 120.

obliged entities must report, between 15 business days after month closing, operations of buying, sale, currency wire transfers, and sale of electronic currency which are: (i) transactions equal or over U.S. 10,000, in jurisdiction of the Republic or through wire transfer to other jurisdictions abroad;[133] (ii) transactions equal or over U.S. 3,000 which are made in off shore jurisdictions (which are specified by the Organization for Economic Co-operation and Development); (iii) transactions equal or over U.S. 750 which are made from or to countries producers of illicit drugs (countries who are specified under United Nation guidelines to that regard.)[134]

c. Report of banking employees and new clients

Financial institutions are required to send a monthly report of new clients to the SUDEBAN electronically,[135] as well as report of new banking employees. This report must provide information of the current bank employees as well as an indication of those employees who no longer work for the institution.[136]

C. Record keeping requirements

Similarly, to U.S. regulations, Venezuelan Law requires recordkeeping for a period of 5 years.[137] In particular, the obliged entities will keep in physical and digital form during a minimum period of five years, the corresponding documents or records to verify the performance of operations and business relationships of customers with these, as well as the

133 *Id.*

134 *Id.* at 4.

135 Prudential Norms, Article 81.

136 Prudential Norms, Article 80.

137 Interestingly, under the Prudential norms this period is extended for a period of ten years. However, the Prudential norms precedent the LOFCT. (the LOFCT was enacted by Congress in 2015 while the Prudential Norms where enacted in 2010 by SUDEBAN.) Today, the LOFCT is controlling statute over the regulations contained in the Prudential Norms.

documents required for their identification when establishing business relationships with the obliged entity.[138] This five years period will be counted in several ways depending on the document gathered.[139]

D. Know your customer

Under the LOCTF, the obliged entities will not be able to initiate or maintain relations economic, with natural or legal persons whose identity cannot be determined fully.[140] Nor will they be able to maintain anonymous, encrypted accounts, unnamed or with fictitious names.[141] SUDEBAN and other regulatory agencies in the sector have the authority to set forth regulations to require the client's identification. Failure to comply with this rule is fined with 500 T.U and 1,000 T.U. In addition, SUDEBAN has issued a memo to all commercial and universal banks requiring the deepening of "know your client" policies, as well as "know your employee,"[142] in particular, in currency transactions in the border with Brazil and Colombia.[143] In addition, as we can see, there is an overlap between the RAS regime and the *know your customer* regulations, in the sense that, in any case, the banks need to know with whom is doing business with. Under current regulation, there is an

138 LOFCT, Article 10.

139 In particular, (i) for documents relating to the identification of clients, from the day when the relationship ends; (ii) for those documents that prove a financial operation, starting from the execution of operation; (iii) for the reports of suspicious activities, from the referral of this; (iv) for business correspondence, after the commercial relationship has ended. Failure to comply with this rule will be fined with 300 T.U. and 500 T.U. See LOFCT, Article 10.

140 LOCFT, Article 11.

141 *Id*.

142 *Informative Guide to deepen and promote Know your Client and Employee policies for Financial Institutions*, published as SIB-DSB-CJ-OD-25045 (August 4, 2015). Available in Spanish at http://sudeban.gob.ve/wp-content/uploads/N_Prudenciales/7-PREVENCION-DE-LEGITIMACION-DE-CAPITALES/7-5-CC-DSB-CJ-OD-25045.pdf

143 This is because the important cash flows and transactions in this area in the course of trade and commerce in the border.

emphasis on foreign banking institutions. In so doing, obliged entities must establish a policy of *know your client* when the customer is a foreign financial institution who is doing business outside the Republic. Those clients must present to the banking institution, at minimum: (i) that such institution has an AML/CFT and required proof of such program; and (ii) identification of shareholders of such institution.[144]

Under current regulations, banking institutions must gather information of their customers, extending this requirement to third parties and beneficial owners. Thus, obliged subjects must establish, by all means, the true identity of the intervening third parties and beneficiary owner.[145] Failure to comply with this rule will be fined between 1,000 T.U. and 3,000 T.U.[146] However, there are not prudential norms that explain the scope of such provision. In fact, due to the lack of guidelines in this beneficiary owner rules, there is a loophole for potential administrative sanctions. So generally, as a practical matter, the financial institution must gather information about the parties involved in the transactions assessing their risk, being advisable to gather more information in red flag transactions rather than routinely ones. In theory, this may accomplish the purpose of LOCTF article 16 about third parties and beneficial owners, but regulators may have a different analysis in each case.

a. Customer Due Diligence generalities

Under the Prudential Norms, financial institutions are required to set in place customer due diligence procedures.[147] These policies and procedures must be done continually, as a way to asses' customer's risk. Thus, banks are required to have

144 AML/CFT Prudential norms, Article 49.
145 LOCFT, Article 16.
146 *Id*.
147 AML/CFT Prudential norms, Article 34.

an individualized customer file of each customer.[148] In case of opening of new accounts, banks are required to make an interview in person with the potential client.[149] Potential clients must provide copy of their identification number or passport for foreigners domiciled in the country.[150] In the case of foreign corporations, clients must provide their articles of incorporation legalized and translated in Spanish,[151] and customers who are represented by others must provide the power of attorney who authorizes such representation.[152] Banks are also required to create an individualized card for each client, which will be electronically held by the bank as a way of easily client identification. This card must contain (i) the motives of opening the account; (ii) name and last name of the client; (iii) date and place of birth; (iv) profession or economic activity; (v) nationality; (vi) salary and other monthly earnings; (vii) personal and business address; (viii) banking references; (ix) fingerprint of the thumb, among several others.[153] Finally, financial institutions are required to report the detection of the falsity of the information provided,[154] and constantly verify the information gathered.[155]

3. Critics to the Banking reporting system provisions

Some people have argued that imposing all these obligations to banks implicates an unnecessary burden to financial intermediation activities. Thanks to the new general compliance trends, private individuals must collaborate with the governmental agencies to prevent and control criminal activities. However, this statement has been challenged: is it not the obli-

148 *Id*. Article 35.
149 *Id*. Article 36.
150 *Id*. Article, 37.
151 *Id*. Article 37.
152 *Id*. Article 38.
153 *Id*. Article 39.
154 *Id*. Article 41.
155 *Id*. Article 43.

gation to governmental agencies to do that kind of job instead of banks? In practice, compliance programs may inverse the job priorities to the parties involved: banks finding the criminals while agencies only way to catch when everything is already done. It is true, financial institutions must invest considerable resources to accomplish the goals of compliance regulations. But it is undeniable that the compliance trend is here to stay. Compliance helps in several ways to prevent crime and enforcement of regulations.

The legislative approach to this question has been imposing more regulatory obligations to financial institutions and even, criminalize some conducts to emphasize the enforcement of AML regulation. In the big picture, some legislations are implementing criminal liability of banking institutions to create a better regulated scheme of enforcement. In the LOFCT framework, financial institutions are "are civil, administrative and criminally liable for criminal offenses related to organized crime and financing of terrorism committed by them, by their agents or their representatives,"[156] subject to sanctions in the administrative and judicial setting. In so doing, in the case of the commission of criminal offense, the LOCTF allows the judiciary to impose criminal sanctions to those corporations found guilty of committing criminal offenses. This was a surprising change in the Venezuelan legislation, considering that, traditionally corporations were not subject to criminal liability. However, the violations of regulatory obligations are only subject to civil fines under Venezuelan Law, which is a significant difference comparing with the current American

156 *Id*., LOCTF, Art. 31 established that: "Legal entities, excluding the State and its companies, are civil, administrative and criminally liable for criminal offenses related to organized crime and financing of terrorism committed by them, by their agents or their representatives. In the case of legal entities in the banking, financial or any other sector of the economy, which intentionally commits or contributes to the commission of crimes of organized crime and financing of terrorism, the Public Ministry shall notify the corresponding agency for the application of administrative measures that may apply."

framework where the violation of the regulatory framework may have criminal consequences.

In the case of Venezuelan law, violation of record keeping, and reporting duties are essentially sanctioned through civil fines. By contrast, in the American system, these violations may constitute a crime against regulatory agencies. The American approach of enforcement is difficult to translate into the current Venezuelan practice. Given the way Venezuelan criminal law works, there is a substantial difference in the way money laundering crimes are prosecuted. Under Venezuelan Criminal law, it is fair to affirm that once a criminal procedure is filled, it is very difficult to stop it. As a matter of fact, Venezuelan prosecutors do not have the option to negotiate penalties as American prosecutors have in Federal cases. Indeed, for Venezuelan prosecutors, it is mandatory to prosecute until a final judgement in the case. In doing so, there is no bargaining power in the hands of the prosecution, but very limited procedural ways to avoid the legal obligation to prosecute. Then, there is no possible deferred prosecution agreements ("DPA") practice as the United States has.

In the United States federal practice, companies have a variety of options such as DPA which may be negotiated and implemented exclusively by the prosecutor, giving them the ability to apply sanctions without criminally charging the offender. The amount of prosecutorial discretion is enormous in cases of DPAs, given that prosecutors have the sole power to decide whether to prosecute a corporation without any judicial oversight. Thus, DPAs create a dynamic between the prosecution and the corporate defendant where "[o]nly the prosecutor can be merciful, and for his mercy the corporation rationally chooses to cooperate in any way demanded."[157] This dynamic definitely impacts how compliance programs work and how solutions to potential controversies are set up. Here, the amount

157 Miriam H. Baer, *Organizational Liability and the Tension between Corporate and Criminal Law,* 19 J.L. & Pol'y 1, 14 (2010).

of prosecutorial discretion is troubling in cases of deferred prosecution agreements, given the fact that prosecutors have the sole power to decide whether to prosecute a corporation without any judicial oversight. In words of the DOJ:

> "Prior to 2002, there were no criminal enforcement actions, or even serious regulatory penalties, for the failure of financial institutions to file SARs or comply with the requirements of § 5318(h). The first civil penalty against a bank for failing to file SARs was imposed on the Great Eastern Bank of Miami, Florida, on September 2002. In November 2002, the Department of Justice (the Department) began conducting a series of criminal investigations into financial institutions, resulting in either significant criminal convictions or deferred prosecutions of several institutions for a variety of offenses, including the aforementioned BSA statutes."[158]

Indeed, the U.S. government agenda is to enforcement at maximum their regulations. In most of the cases, regulatory issues are informally resolved through these DPAs agreements. In the United States, deferred prosecutions are negotiated and implemented exclusively by the prosecutor, giving them the ability to apply sanctions without criminally charging the offender. As a matter of practice, judges have no authority to turn down a DPA, they are not submitted at all to courts. This is why prosecutors have in their hands life and death powers over people and companies. In so doing, "once the conditions on the settlement agreement are satisfied, the formal charge is dismissed with no resulting conviction."[159]

In the same scenario but applied in a Venezuelan context, this bargaining system does not exist under Venezuela criminal law. In fact, prosecutors are obliged to enforce the law

158 Kendall, *supra* note 8 at 19.

159 Miriam Weismann, Money Laundering, Legislation, Regulation & Enforcement, (2014) at 57.

without any bargaining process. But more than the criminal liability, the administrative liability under several Venezuelan laws creates a scenario where is way more common to negotiate with agencies than prosecutors. In practice, compliance in Venezuela is a constant process with regulators rather than prosecutors. Indeed, it would very difficult to translate this DPA system into the Venezuelan criminal justice system, given the concerns about due process in such bargaining setting.

From a policy perspective and as a practical standpoint, not every crime can be prosecuted. Money laundering crimes by themselves are crimes so sophisticated that are worthless of enforcement if there is not an adequate underlying crime to charge as well. The rationale is applicable to the violation of reporting requirements. In this case, a money laundering crime prosecuted may be catalogued as a waste of resources. Here, an adequate prosecutorial discretion is key to determine which crimes are better to be prosecuted than others. In practice, at least in the U.S. practice, the violation of these requirements has been enough to settle DPAs against banking institutions.

In any case, the imposition to civil or administrative fines is necessary to accomplish the goals of the current framework. For some people, fines should be viewed as a mere cost of doing business in an otherwise lucrative marketplace.[160] Report and recordkeeping requirements have their fundament in the idea of internal compliance and assessment of risk and make sense in the sophisticated financial system of today's world. Then, we truly believe the idea of an internal compliance program makes sense especially, in the financial system. Given the fact that money laundering crimes are very sophisticated crimes, only sophisticated actors are able to efficiently detect them. This is essentially the case of the banking sector. Even if the government would have complete control of banking institutions,

160 WEISMANN, *Id*.

only the banks are in the position to detect irregular financial activities because they have the technological platform to do so. In addition, banks have the knowhow of the banking business and they have developed internal proceeding, systems and practices way far complex that any enforcement agency.

The recordkeeping, reporting obligations, KYC and due diligence obligations are critical for the right implementation of AML regulations and compliance and administrative policies. This generates a "public-private partnership between the federal government and the financial industry creates a symbiotic relationship in a joint effort to detect and prevent money laundering, which threatens the integrity of the interbank systems."[161] Indeed, it has been pointed out that "failures by commercial and investment banks to implement and fully comply with KYC [and other regulatory] policies in either lending or product offerings were among the causes of the economic and financial crisis of 2007 to 2009."[162]

In this scenario, financial institutions have helped the government to further enforcement of regulation which information that Banks easily can obtain through setting up and internal regulation to accomplish the compliance of the legal framework. In addition, as a policy consideration, "the abuse of legal entities to disguise involvement in illicit financial activity is a longstanding vulnerability that facilitates crime, threatens national security, and jeopardizes the integrity of the financial system."[163] This rationale can be easily sustained under the current Venezuelan regulation which follows the same principle. In the end, combating money laundering is a common goal in the western world well-settled and accepted for several governments.

161 *Id*. at 487.

162 Genci Bilali, *Know Your Customer -Or Not*, 43 U. Tol. L. Rev. 319 (2012) at 319.

163 81 FR 29397 at § II, (B) 1.

Conclusions

In this essay, we have discussed issues of current interest in regulatory law. In the first part, we have explored the theory of private action in white-collar-crimes to punish these kinds of criminal offenses and enforce regulations. In this analysis, we have shown that private action by itself is not an adequate legal institution to every criminal offense. Using the example of American antitrust law and RICO, we believe it is possible to create a private action cause of action that allows victims of white-collar crimes to remedy their harms though the private prosecution of those offenses. But this is not an absolute answer to the issue because it requires an incentive to litigate. Depending on the magnitude of the crime, it seems the theory of private action may be or not adequate under the circumstances of the crime committed. In this regard, allowing private action in all white-collar crimes (or in all criminal law) does not provide more efficiency to the criminal system but a potential waste of resources.

Likewise, we have explored the proposal of civil liability as the right way to punish corporate wrongdoing rather than the criminal aspect of it. We believe civil liability rather criminal is beneficial for the legal system in several aspects. First, it guarantees a remedy for those injured by corporate wrongdoing. Second, it limits the powers of prosecutors and the abuse of power of recent DPA practice. Indeed, the secrecy of DPA gives so much power to the government and in this kind of practice there are no check and balances who guarantees a basic notion of fairness. This would balance the current overlap between civil and criminal liability.

In the second part of this essay, we have analyzed comparatively the AML regulations between the United States and Venezuela, considering the current regulatory trends. In our opinion, Venezuelan law provides a robust body of Anti Money laundering laws, mainly influence by U.S. AML regulations.

U.S. is exporting the ideas of KYC, due diligence, and reporting obligations, which in our opinion are necessary to prevent and detect early money laundering crimes and possibly help in the underlying criminal activities. Both systems have important reporting requirements which are key in the current AML framework. We believe this is the right policy approach in the banking sector.

In practice, the sophistication of money laundering crimes is so complex that their prosecution may be debatable depending on the other crimes the prosecution is going to charge in a criminal investigation. This conflict arises because of the balance between the necessity of justice and enforcement of laws and the adequate use of public resources to prosecute crimes in the best way possible to maximize those resources.

In the case of Venezuela, however, the problem isn't the anti-money laundering law by itself but its enforcement. It does not matter if countries have a good regulation if there is not an adequate method of enforcement of their regulations. And this is one of the main weaknesses in the Venezuelan Anti-money laundering system. They are in place, but they are not enforced due to their sophistication. In both the American and Venezuelan systems, there is a robust body of regulations set in place and this is the right direction. Nonetheless, one of the main challenges is to accomplish these goals efficiently. It truly has been said that compliance requires a lot of resources that Agencies are not willing to pay and impact corporate profitability of many businesses. But only the effective relationship between private and public sector can accomplish the enforcement of AML and prevent crime.

Both topics are related following the transformations in the law practice. The regulatory landscape is complex and mixes criminal, corporate and administrative law in unimaginable ways in our recent past. Nowadays, it is hard to find either answers at the court´s system or in corporate law alone.

As counsels, we ought to be very careful counseling in several areas to better understand complex regulatory cases. It is also necessary to have an international radar at the time to solve corporate legal issues because it is easier than ever to have regulatory or criminal problems while doing business in complex schemes. Attorneys must take this situation into consideration while counseling corporate clients. Then, compliance programs are useful to prevent heavy sanctions and fines in commerce. In these scenarios, new practitioners should acknowledge the new legal reality which requires more preparation and new challenges when the law is more global than ever.