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October 2014

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Spotlight on FinCEN: An Increasing Focus on AML Regulation and Enforcement

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Although the Financial Crimes Enforcement Network (“FinCEN”) is often perceived as the aggregator of Suspicious Activity Reports (“SARs”) and other federally-mandated financial forms and reports, its actual activities extend well beyond the information-gathering role suggested by its designation as a “Network.” FinCEN, in fact, makes proactive use of its regulatory and enforcement powers. Indeed, it was involved in 19 of the 20 largest anti-money laundering (“AML”) settlements with banks in the last decade.

FinCEN was created by Congress in 1990 as an information clearinghouse. It was not granted regulatory authority until four years later. The 2001 terrorist attacks brought a new emphasis to the importance of financial crimes investigations, and Congress again expanded FinCEN’s jurisdiction in the USA Patriot Act to enhance its AML and counter-terrorist financing focus.

Overview of Significant FinCEN Enforcement Actions

Today, FinCEN is a ubiquitous and influential participant in major AML enforcement actions against banks and other financial institutions. It has been involved in roughly twice as many of these actions as either the Justice Department or the Office of the Comptroller of the Currency (“OCC”), the other two most active enforcement authorities in this area.

With respect to its enforcement influence, FinCEN claimed a \$461 million fine as part of the massive \$2.05 billion JPMorgan settlement in January 2014. Similarly, it collected millions of dollars in fines relating to the TD Bank and Saddle River Valley Bank settlements in September 2013 and the 2012 settlements with HSBC and the First Bank of Delaware.

Although FinCEN handles investigations and settlements with other more traditional regulators and law enforcement agencies, it occasionally acts on its own and against enterprises other than banks. In April 2014, for example, FinCEN assessed a \$10,000 civil monetary penalty (“CMP”) against New Millennium Cash Inc. This case was notable because the company was a money services business (“MSB”), not a bank, and the alleged violations related to New Millennium’s inadequate AML program and SAR filings. Also, as recently as August 2014, FinCEN imposed a CMP of \$125,000 against BPI, Inc., another MSB, based on what FinCEN perceived as “willful and repeated” violations of the Bank Secrecy Act (“BSA”). Here again the violations involved AML program deficiencies,

including controls, testing, and training lapses, along with the noted failure to file even a single SAR prior to 2011. FinCEN also assessed a \$2 million CMP against The Foster Bank for purported AML-related failings in another solo enforcement action in 2006.

Information is Power, and FinCEN Has Plenty of Both

FinCEN's over-sized role in the AML arena is directly attributable to its multi-faceted duties as information aggregator, federal rule maker, and law enforcement agency. Thousands of businesses and individuals submit sensitive information to FinCEN each month pursuant to federally-mandated filing requirements. In addition to SARs, FinCEN receives Currency Transaction Reports ("CTRs"), reports from all U.S. persons with control or authority over foreign bank accounts ("FBARs"), and various other forms that demonstrate where money is flowing. These reports not only include information on the filers, but other parties related to the transactions at issue.

Since last summer, FinCEN requires all of these reports to be filed electronically, which expedites the information-gathering process and greatly enhances FinCEN's ability to aggregate the information and report it out to other regulators and federal, state, and local law enforcement agencies.

As a regulator, FinCEN also issues rules that carry significant implications for banks and other financial institutions alike, including with respect to high-profile, "hot button" regulatory areas soon after they surface. For instance, over the past year and a half, FinCEN has issued two letter rulings relating to Bitcoins and other virtual currency systems, declaring that the determination of whether an entity is a "money transmitter" for AML regulatory purposes depends on what activity is undertaken and for whose benefit, rather than whether the activity relies on virtual or traditional currency. Similarly, FinCEN made it easier for financial institutions to loan money to "marijuana businesses" in states that have legalized marijuana, but only after the institutions have conducted heightened due diligence of the business and filed a specialized SAR alerting FinCEN to the activities. In both situations, FinCEN has weighed in on cutting-edge issues in a way that enhances the agency's power and knowledge within these new markets.

Leveraging FinCEN as a Compliance Resource

FinCEN's role as an information disseminator extends beyond its provision of information to other government agencies. It can also serve as a key compliance resource for new financial institutions and existing businesses looking to adapt to evolving regulatory expectations. Unlike the Justice Department or other traditional law enforcement agencies, its help lines are available not just for individuals wishing to blow the whistle on other individuals or financial institutions, but also for entities seeking guidance on compliance issues. In addition to offering informal guidance through the help line, FinCEN issues regular guidance memoranda and letter rulings in response to formal requests for information.

As a vital agency in the AML regulatory arena that frequently participates with other agencies in investigations and enforcement actions, FinCEN's guidance can help businesses avoid unseen AML program pitfalls and build a tailored AML infrastructure designed to provide reassurances when investigators come knocking. Designing, implementing, and maintaining a robust and functional AML

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compliance program in coordination with knowledgeable counsel is essential to keeping FinCEN close by as a reliable resource rather than a potential adversary.

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