

CLIENT ALERT

Implementation of FinCEN Rule Imposing Special Measures on FBME Bank Again Delayed

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On September 20, 2016, the U.S. District Court for the District of Columbia again delayed implementation of a rule by the U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN) branding FBME Bank Ltd. as a "primary money laundering concern" and effectively severing the foreign bank from the U.S. financial system. The rule, which would prohibit U.S. financial institutions from maintaining correspondent bank accounts on FBME's behalf, imposes the harshest measure available under Section 311 of the USA PATRIOT Act of 2001, one characterized by the court as "a potentially existential threat to any international bank."

The court rejected the great majority of FBME's challenges to the final rule, but agreed with FBME that FinCEN did not sufficiently address FBME's challenges to the conclusions that FinCEN drew from aggregated data drawn from suspicious activity reports (SARs) filed against the bank. FBME contended that the agency failed to discriminate between SARs representing legitimate and illicit transactions, to consider that the SARs implicated a small proportion of the bank's overall business, to account for the impact of the Cypriot financial crisis in increasing SARs, and to identify any baseline against which to measure whether the volume of SARs filed on FBME represented a threat. The court ordered that the rule remain stayed until FinCEN provides adequate responses to these arguments. However, the court noted that FinCEN has "immense expertise" in interpreting SAR data, and repeatedly explained its belief that "there is a substantial probability that FinCEN could respond adequately" to the SAR issue on remand.

Moreover, as noted above, the court ruled in FinCEN's favor on many key issues. It once again upheld the agency's use of classified information *ex parte* and *in camera* in support of special measures, and its reliance on aggregated SAR data without disclosing to the plaintiff the confidential underlying reports. It upheld the sufficiency of the agency's factual record under a highly deferential standard. It held that FBME likely was not entitled to due process merely by virtue of holding a U.S. correspondent banking account but that, even if it was, it would not have been entitled to more process than it received through participation in the most recent notice and comment rulemaking FinCEN conducted. And it rejected FBME's efforts to open FinCEN's compilation of the administrative record to scrutiny. On one issue where it did agree with FBME—that FinCEN should have given FBME the opportunity to comment on findings that its employees attempted to obscure information and that it maintained accounts with multiple associates of Hezbollah, an organization designated by the Secretary of State as a Foreign Terrorist Organization (FTO)—the court found the deficiencies to be harmless.

Impact of the Case on Compliance Programs

The most important potential legacy of this case for regulated financial institutions is the court's earlier ruling that FinCEN is required to provide for comment all unclassified, non-privileged information that it relies on to impose special measures – a ruling the court affirmed again in its most recent decision. This will increase the amount of information available to banks and other parties subject to anti-money laundering regulation about potential money laundering red flags and issues of concern to FinCEN. Banks should monitor any such information disclosed as part of future Section 311 designations, as well as information

appearing directly in related proposed rules and findings, as an ongoing part of their compliance operations. U.S. banks that provide correspondent banking services for foreign financial institutions in particular should closely follow such information. Further, U.S. banks across the board should expect that bank examiners will hold them accountable for awareness of any money laundering red flags that appear in these documents.

This is the second time the district court has delayed implementation of FinCEN's proposed special measures for FBME, but it seems likely to be the last. Given the overall tenor of the district court's opinion, the final rule against FBME appears likely to be upheld (subject to any appeal FBME might file). As the first litigated challenge to FinCEN's use of Section 311, this case will set important precedents that will shape the legal landscape for FinCEN's continued and perhaps increased use of this authority, much as early decisions in cases like *Global Relief Foundation, Inc. v. O'Neill* and *Holy Land Foundation for Relief and Development v. Ashcroft* paved the way for a substantial expansion in targeted economic sanctions administered by the Treasury Department's Office of Foreign Assets Control.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Carlton Greene

Partner – Washington, D.C.
Phone: +1 202.624.2818
Email: cgreene@crowell.com

Kelly T. Currie

Partner – New York
Phone: +1 212.895.4257
Email: kcurrie@crowell.com