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How FinCEN's new Global Investigations Division changes the Treasury Department enforcement landscape

Crowell & Moring attorneys Carlton Greene, Rebecca Monck Ricigliano, Nicole Sayegh Succar and Nimi Aviad discuss what financial institutions can expect from the Financial Crimes Enforcement Network's new Global Investigations Division.

On Aug. 28, the U.S. Department of the Treasury's Financial Crimes Enforcement Network announced the launch of a Global Investigations Division. Matthew Stiglitz, a former principal deputy chief in the Justice Department's Criminal Division, will lead the GID.

The GID replaces and expands on FinCEN's Office of Special Measures, which was part of FinCEN's Enforcement Division. On Sept. 3, FinCEN also announced that AnnaLou Tirol, acting chief of the Justice Department's Public Integrity Section, would join FinCEN as the head of its Liaison Division.¹


The creation of the new GID and these appointments suggest that FinCEN will make more extensive use of its information-gathering authorities, increase two-way information-sharing with foreign partners and regulated industry, and make more frequent use of the quasi-sanctions powers granted by Section 311 of the USA Patriot Act. They also suggest increased involvement by FinCEN in national security and foreign policy matters.

Finally, it is possible that more aggressive use of these information-gathering tools will result in increased enforcement activity, especially given the appointments of veteran prosecutors to both positions by FinCEN Director Kenneth Blanco (also a Justice Department veteran). Financial institutions and other stakeholders should make sure that they know how to respond to typical FinCEN information-gathering demands and how to deal with Section 311 listings.


Financial institutions also may wish to consider the potential benefits of participating in information-sharing arrangements with FinCEN and law enforcement agencies, which can aid compliance and build trust with the agency.


The Global Investigations Division

The GID will oversee FinCEN's use of Section 311 of the Patriot Act and a variety of other unique enforcement information collection authorities available to FinCEN, including geographic targeting orders and foreign financial agency regulations.²

• Section 311: Section 311,  31 U.S.C.A. § 5318A, allows FinCEN, upon a finding that a foreign jurisdiction, financial institution, class of transactions, or type of account is "of primary money laundering concern," to require U.S. financial

institutions and financial agencies to take one or more of five "special measures" to address such concerns.³ FinCEN most frequently targets foreign financial institutions with this authority, and, when it chooses to impose special measures, typically imposes the fifth special measure. This special measure prohibits domestic financial institutions from maintaining correspondent accounts for designated financial institutions, either directly or indirectly. It may only be imposed through notice-and-comment rulemaking. However, the original finding that a foreign financial institution is a "primary money laundering concern" often is reason enough to cause U.S. banks to sever correspondent relationships before any rule is finalized. There has been an increase in litigation challenging Section 311 actions in recent years, and one result is that FinCEN now releases non-classified, non-privileged parts of the administrative record supporting proposed rules to impose the fifth special measure against a financial institution.⁴ This can provide useful material, along with the findings and rules themselves, for financial institutions seeking to identify and protect themselves against financial crime threats. Many of the threats identified in these proceedings go beyond criminal money laundering to include the financing of terrorist groups such as Hezbollah and the facilitation of the proliferation of weapons of mass destruction. FinCEN also has imposed special measures against North Korea, and it has proposed them against Iran, supplementing Office of Foreign Assets Control sanctions against these jurisdictions. Finally, Section 311 offers a number of other tools beyond the fifth special measure, most of which are geared toward requiring U.S. financial institutions to obtain additional information about designated jurisdictions, financial institutions, accounts and transactions.⁵

- GTOs: Under  31 U.S.C.A. § 5326(a), FinCEN may issue orders, effective for up to 180 days and subject to renewal thereafter, that impose temporary recordkeeping and reporting requirements on U.S. financial institutions, or even non-financial trades or businesses, in a specific geographic area for transactions involving the payment, receipt or transfer of funds.⁶ This authority previously was limited to transactions in currency or monetary instruments, but it was expanded by the Countering America's Adversaries Through Sanctions Act of 2016 to include all "funds," which allows reporting requirements relating to wire transfers. Such orders can be public or confidential. In the past, FinCEN has used public GTOs to target attempted evasion of reporting on cash transactions in the electronics industry in Miami and in the Los Angeles fashion district, both intended to target trade-based money laundering used by drug trafficking organizations.⁷ More recently, FinCEN has used the orders to require title insurance companies to obtain information on the natural person beneficial owners of limited liability companies that purchase luxury residential real estate in all cash transactions in several major metropolitan areas.⁸ FinCEN has estimated that as many as one-third of all parties reported through this GTO, which has been renewed repeatedly, are the subject of previous suspicious activity reporting by financial institutions, and has suggested that its findings from the use of these orders may eventually lead to anti-money laundering regulation of the real estate sector.⁹

- FFA regulation authorities: Under  31 U.S.C.A. § 5314(a), FinCEN may promulgate regulations that require U.S. financial institutions to report on various categories of transactions with "foreign financial agencies," including most foreign financial institutions.¹⁰ The regulations may be confidential and promulgated without notice and comment (with the rule delivered personally to affected parties). FinCEN has said very little about its use of this provision, but the GID announcement suggests that FinCEN has been using this tool routinely and intends to continue doing so.

FinCEN says that its use of these authorities has expanded substantially over the last several years, and that the new GID will continue to use these authorities to investigate and take action against targets "that have a nexus to the proliferation of weapons of mass destruction, rogue state actors, transnational organized crime, international narcotics trafficking and terrorism."¹¹ FinCEN also says that the new GID will look to increase cooperation and coordination with foreign counterparts.

FinCEN's decision to separate these authorities from the Enforcement Division, which handles traditional compliance and enforcement matters relating to AML programs and the reporting requirements of banks and other financial institutions, and its signaling of an expanded use of the authorities, together, suggest a further expansion of FinCEN's role with respect to national security and foreign policy.

This is likely to manifest not only in actions targeting foreign entities but also in compliance and enforcement actions against U.S. financial institutions that, through inadequate administration of their AML programs and failure to file suspicious activity reports, allow such foreign parties to operate. Increased and more high-profile use of the Section 311-type sanctions, and the burdens of any resulting litigation challenges, may be another reason for a stand-alone division with greater staff.

The Liaison Division

The appointment of an experienced prosecutor to head FinCEN's Liaison Division has the potential to further FinCEN's national security and compliance efforts.

The Liaison Division historically has administered FinCEN's issuance of Section 314(a) demands (named after the section of the Patriot Act that provides the authority) made by federal, state, local and even some foreign law enforcement agencies.

This tool allows FinCEN confidentially to request information from financial institutions regarding whether the institution has maintained accounts for or conducted transactions with individuals or entities suspected of money laundering or terrorist activity, typically within the last year for accounts and within the last six months for transactions.

The recipient of a Section 314(a) request must search its records and report to FinCEN within a brief period and may not reveal to third parties that it has received the request or its response.

The responding institution must provide detail on the identifying information used by the targeted party to open the relevant accounts or conduct the relevant transactions, as well as details on responsive account numbers and on the dates and types of responsive transactions.

Such requests are sent through FinCEN's Secure Information Sharing System and can be sent simultaneously to as many as 22,000 financial institutions.¹²

The requesting law enforcement agency must certify that targets are "reasonably suspected based on credible evidence of engaging in terrorist activity or money laundering," meaning that these tools can provide useful information to financial institutions about targets of concern to law enforcement.

Investigation of such targets can yield further information about potentially suspicious activities that regulators will expect financial institutions to consider as part of their AML programs.

More recently, FinCEN has begun supplementing Section 314(a) demands with additional information about the targets of law enforcement investigations.¹³ Receiving financial institutions also have been encouraged to share with each other using another Patriot Act authority — Section 314(b) — which allows financial institutions, under certain conditions, to exchange information about people suspected of possible terrorist activity or money laundering, and to benefit from a safe harbor from civil liability for such sharing.

The institutions then may use the fruits of such sharing to identify and report suspicious activity to FinCEN in the form of SARs.¹⁴ This has led to FinCEN's formalization and expansion of this initiative in December 2017, under the name FinCEN Exchange.¹⁵

Separately, the Liaison Division administers the Bank Secrecy Act Advisory Group, a group of representatives from various categories of financial institutions regulated under the Bank Secrecy Act. The forum allows FinCEN to gauge industry reaction to the agency's approach to AML regulation and to share information and collaborate on special projects.

Internationally, the Liaison Division manages requests for exchanges of financial intelligence between FinCEN and foreign financial intelligence units that perform similar functions.

Many of these exchanges occur under the auspices of the Egmont Group — an international network of 150 international FIUs, established in 1995 to improve communication on criminal financial activity.

It is likely that GID will use the Egmont Group forum to advance international communication on national security threats.¹⁶ GID likely will collaborate with the Liaison Division to increase cooperation and coordination with its foreign counterparts on the national security threats mentioned above.

Practical considerations

Financial institutions, especially those with a global footprint, should ensure that their organizations are ready to respond to the expanded use of the authorities outlined above.

BSA rules require U.S. financial institutions to engage in special due diligence to ensure that their foreign correspondent accounts are not used to process transactions for prohibited foreign financial institutions designated under Section 311 authorities, including through "nested" correspondent accounts. U.S. institutions should be alert to such high-risk accounts.

Public and confidential GTOs and FFA regulations suggest areas of potential money laundering or other risk that FinCEN and other regulators may hold financial institutions accountable for investigating.

Financial institutions should assess the risks associated with the targets of such measures much as they do now with other FinCEN information requests, such as those made under Section 314(a).

That is especially true in cases like the real estate GTOs, where FinCEN has encouraged third parties to file SARs on transactions that also may involve U.S. financial institutions, resulting in a situation where FinCEN or other regulators might receive such voluntary SARs and conclude that financial institutions involved in such transactions also were required to file but did not.

Regulated financial institutions also may wish to consider the option of participating in FinCEN Exchange and related efforts, which can provide useful information on money laundering or terrorist financing risks and result in better suspicious activity reporting, or to apply for membership in BSAAG, which affords a useful window into FinCEN's enforcement priorities and the agency's approach to its authorities. Both of these activities can enhance compliance and generate trust with regulators, though they come at a cost in resources.





Footnotes

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1 See FinCEN, "New FinCEN Division Focuses on Identifying Primary Foreign Money Laundering Threats" (Aug. 28, 2019), <https://bit.ly/35st1eN>

2 See  31 U.S.C.A. § 5326 (GTOs); 31 C.F.R. § 1010.370 (implementing  § 5326);  31 U.S.C.A. § 5314 (FFAs); 31 C.F.R. § 1010.360 (implementing  Section 5314).

3  31 U.S.C.A. § 5318A(a)(1).

4 See 81 Fed. Reg. 86577, 2016 WL 6995974 (F.R.) (Dec. 1, 2016).

5  31 U.S.C.A. § 5318A(b)(1)-(4).

6 See  31 U.S.C.A. § 5326(a); see also 31 C.F.R. § 1010.370.

7 See FinCEN, "FinCEN Targets Money Laundering Infrastructure with Geographic Targeting Order in Miami" (Apr. 21, 2015) (<https://bit.ly/31icEhj>); FinCEN, "FinCEN Issues Geographic Targeting Order Covering the Los Angeles Fashion District as Part of Crackdown on Money Laundering for Drug Cartels" (Oct. 2, 2014), <https://bit.ly/31fVMrH>.

8 See FinCEN, "FinCEN Reissues Real Estate Geographic Targeting Orders and Expands Coverage to 12 Metropolitan Areas" (Nov. 15, 2018), <https://bit.ly/2lQtXzL>.

9 See FinCEN, FIN-2017-A003, Advisory to Financial Institutions and Real Estate Firms and Professionals (Aug. 22, 2017), at 5.

10  31 U.S.C.A. at § 5314(a); see also 31 C.F.R. § 1010.360 (implementing this authority).

11 *Id.*

12 USA Patriot Act of 2001, PL 107-56, at § 314(a); see also 31 C.F.R. § 1010.520 (implementing this authority).

13 See FinCEN Exchange Questions and Answers, <https://bit.ly/2MDsqON>.

14 USA Patriot Act of 2001, PL 107-56, at § 314 (b); see also 31 C.F.R. § 1010.540 (implementing this authority).

15 See FinCEN, "FinCEN Launches 'FinCEN Exchange' to Enhance Public-Private Information Sharing" (Dec. 4, 2017), <https://bit.ly/2EOc9So>.

16 See The Egmont Group of Financial Intelligence Units, <https://bit.ly/2OLVYwd>.

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