

United States House of Representatives
Committee on Financial Services
2129 Rayburn House Office Building
Washington, D.C. 20515

March 8, 2019

Memorandum

To: Members, Committee on Financial Services

From: FSC Majority Staff

Subject: March 13, 2019, “Promoting Corporate Transparency: Examining Legislative Proposals to Detect and Deter Financial Crime.”

The Subcommittee on National Security, International Development, and Monetary Policy will hold a hearing entitled, “Promoting Corporate Transparency: Examining Legislative Proposals to Detect and Deter Financial Crime” on Wednesday, March 13, 2019, at 2:00 p.m. in room 2128 of the Rayburn House Office Building. This will be a one-panel hearing with the following witnesses:

- **Jacob Cohen**, Former Director, Office of Stakeholder Engagement, FinCEN
- **Dennis M. Lormel**, President & CEO, DML Associates, LLC
- **Amit Sharma**, CEO, FinClusive
- **Gary Shiffman, Ph.D.**, Founder and Chief Executive Officer, Giant Oak, Inc

Additional witnesses may be added.

Overview

Federal Laws Addressing Anti-Money Laundering/Counter Financing of Terrorism

Criminals and terrorists raise, hide, move, and launder their financial resources often by exploiting the licit financial system. Recognizing that financial institutions hold a wealth of financial intelligence on bad actors, their activities, and their associates, Congress passed the Financial Recordkeeping and Reporting of Currency and Foreign Transaction Act of 1970, more commonly known as the Bank Secrecy Act (BSA),¹ to require these institutions to collect records that could be used in criminal, tax, and regulatory investigations and proceedings. In the subsequent decades, Congress passed additional laws, amending the BSA and strengthening anti-money laundering (AML) laws, to reflect the changing threat landscape, such as the emergence of drug trafficking and terrorism.² After the terrorist attacks of 9/11, Congress passed the Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act of 2001,³ creating new laws to tackle money laundering and terrorism. Two notable provisions 314(a) and (b) were designed to facilitate cooperation and information sharing between

¹ Pub. L. No. 91-508 (1970), 84 Stat. 1114-4 (1970) codified as amended at 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, and 31 U.S.C. 5311–5314; 5316–5332.

² See *Money Laundering Control Act of 1986* (Pub. L. No. 99-570); *Annunzio-Wylie Anti-Money Laundering Act of 1992* (Pub. L. No. 102-550); *Money Laundering Suppression Act of 1994* (Pub. L. No. 103-325); and *Money Laundering and Financial Crimes Strategy Act of 1998* (Pub. L. No. 105-310).

³ Pub. L. No. 107-56 (2001).

law enforcement and financial institutions, and amongst financial institutions, regarding individuals and entities suspected of terrorist or money laundering activities.⁴

Stakeholders

Among the federal agencies that have responsibilities for AML and counter financing of terrorism (CFT) efforts include the U.S. Department of the Treasury (Treasury), federal banking authorities and law enforcement. At Treasury, the Financial Crimes Enforcement Network (FinCEN) is tasked with the “responsibilities to implement, administer, and enforce compliance with the authorities contained in” the BSA.⁵ Its powers and duties include: maintaining a government-wide database with a range of financial transaction information; disseminating information in support of law enforcement; determining emerging trends in money laundering and other financial crimes; serving as the Financial Intelligence Unit (FIU) of the United States; and, carrying out other delegated regulatory responsibilities.⁶ FinCEN is one of 159 FIUs internationally, which together form the Egmont Group, which is “a platform for the secure exchange of expertise and financial intelligence to combat money laundering and terrorist financing.”⁷

In accordance with the BSA, covered financial institutions are required to have a BSA/AML compliance program that includes internal policies, procedures, and controls; a compliance officer; ongoing employee training; and an independent audit of its programs.⁸ Compliance with BSA/AML includes: filing a report on a suspicious transaction that may be or is related to a violation of law or regulation, called a Suspicious Activity Report (SAR),⁹ and a report on any cash transaction or aggregated transaction of more than \$10,000, called a cash transaction report (CTR);¹⁰ and managing risks associated with politically exposed persons (PEPs).¹¹

The primary users of the information associated with these filings are law enforcement agencies. In the last five years, users have made more than 10 million FinCEN database queries. This includes more than 126,000 annual BSA database inquiries from Internal Revenue Service Criminal Investigation, which helped launch 24% of its investigations.¹² For the FBI, more than 21% of its investigations involve BSA data, and for some types of crime, like organized crime and international terrorism, nearly 60% and 20% of FBI investigations involve this data, respectively.¹³

Enforcement

To ensure that BSA requirements are appropriately administered across financial institutions and that information is uniformly collected and shared in a timely manner, agencies issue industry regulation and guidance, and enforce compliance. An institution’s failure to maintain a comprehensive BSA/AML compliance program could result in a consent order, significant fines, or a downgrade in its management rating by its regulator. Further, facilitation of financial crime via

⁴ Pub. L. No. 107-56 (2001), §§ 314(a)-(b).

⁵ *FinCEN’s Mandate From Congress*, FinCEN Website: <https://www.fincen.gov/resources/statutes-regulations> (last visited Feb. 23, 2019) (describing Treasury Order 180-01, <https://www.treasury.gov/about/role-of-treasury/orders-directives/Pages/to180-01.aspx> [last visited Feb. 23, 2019]).

⁶ *Id.*

⁷ *About*, Egmont Group Website: <https://egmontgroup.org/en/content/about> (last visited Feb. 23, 2019).

⁸ 31 U.S.C. § 5318 (h).

⁹ 31 U.S.C. § 5318 (g); *see also* 31 CFR § 1020.320.

¹⁰ *Currency Transaction Reporting—Overview*, FFIEC Manual, https://www.ffiec.gov/bsa_aml_infobase/pages_manual/olm_017.htm (last visited Feb. 24, 2019).

¹¹ “The term “politically exposed person” generally includes a current or former senior foreign political figure, their immediate family, and their close associates.” *Politically Exposed Persons—Overview*, FFIEC Manual, https://www.ffiec.gov/bsa_aml_infobase/pages_manual/OLM_087.htm (last visited Feb. 24, 2019).

¹² *Testimony of FinCEN Director Kenneth A. Blanco*, Committee on Banking, Housing and Urban Affairs, United States Senate, November 29, 2018. <https://www.banking.senate.gov/imo/media/doc/Blanco%20Testimony%2011-29-18.pdf>

¹³ *Ibid.*

an institution's overt BSA/AML evasion or abuse by its personnel of BSA/AML laws and regulations, can be punishable by civil and criminal action. The federal agencies with responsibility to examine covered financial institutions for BSA compliance include: FinCEN, the Board of Governors of the Federal Reserve System (Fed), the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Administration (NCUA), and the Office of the Comptroller of the Currency (OCC).

Discussion Draft, "To make reforms to the Federal Bank Secrecy Act and anti-money laundering laws, and for other purposes"

Since the last major reforms to the AML framework in 2001, the environment has evolved to now include threats such as lone-actor terrorists, nuclear weapons proliferation, cyber-attacks, and an opioid epidemic. These perils, along with longstanding threats like human trafficking, have been magnified and accelerated through the advent of technologies such as virtual currency and dark-web online marketplaces. Financial institutions are required to make appropriate modifications to their BSA/AML programs to adjust to threats and invest in means to assist that process, however, they need reliable guidance on how and where to focus their efforts. This includes the use of responsible, effective BSA/AML innovation, knowing how examiners define success in adapted programs, and managing privacy and civil liberties concerns with increasing data access and volume. The discussion draft (Draft) would reform the structure, capabilities, and oversight of BSA/AML to keep pace with changing priorities, adapting threats, and new technologies.

Strengthening Treasury

Title I of the Draft focuses on improving Treasury's authority to connect with the public and private sector, both domestically and abroad. Title I expands the purpose of the BSA to also "protect of our national and collective security" and "to safeguard the integrity of the international financial system." This title changes the pay-scale of FinCEN employees to be comparable to other federal financial regulators, enabling FinCEN to better attract the best talent in the financial market and from among its partner agencies. Title I would also restructure Treasury's international attachés program by adding six additional liaisons who are subject matter experts on BSA/AML to promote adoption of U.S. AML/CFT standards internationally.

Title I would create two new outreach and feedback mechanisms within Treasury to provide clarity on BSA compliance, targeted information, and broader typologies. It establishes a FinCEN Domestic Liaison program through which six senior FinCEN employees will perform regional outreach and education among financial institutions and non-financial institutions. This title also codifies the FinCEN Exchange program, a voluntary information-sharing partnership among law enforcement, financial institutions, and FinCEN.

Title I would also require at Treasury and each of the federal financial regulators a dedicated Civil Liberties and Privacy Officer to engage on the development and review of regulation, including the evaluation and oversight of new technologies where there may be a civil liberties concern. The Officers would also provide input on information-sharing activities (government-to-government, government-to-private-sector, and private-sector-to-private-sector), especially where there may be access to personally identifiable information.

Improving AML-CFT Oversight

Title II of the Draft would allow financial institutions to share SARs with their foreign affiliates and would establish a contact list of law enforcement point of contacts for financial institutions, so they are more easily able to comply with their reporting obligations. It codifies existing guidance from FinCEN that permits financial institutions to share compliance resources, such as sharing the same training or BSA officer, which could increase efficiency and be cost-saving

for regulated entities, especially community banks with similar risk geographic profiles.¹⁴ Title II enhances annual examiner training to ensure that federal financial examiners have the tools to evaluate the quality of the BSA-AML programs. Additionally, this title would require reports on the value of BSA data and feedback mechanisms to facilitate two-way exchange.

Title II also closes a number of loopholes in the current BSA-AML regime. This title applies the BSA-AML framework to the previously exempt arts and antiquities industry by adding dealers in this industry to the definition of “financial institutions,” and thereby requiring compliance with the BSA. The title also addresses the real-estate loophole that facilitates the transfer of residential and commercial real estate through anonymous shell companies, by expanding FinCEN’s Geographic Targeting Orders (GTO),¹⁵ which require beneficial ownership information for certain opaque real-estate transfers, to also include commercial real estate and in-kind transactions.

Title II would enhance protections for whistleblowers who provide information related to BSA violations, increase monetary damages for repeat BSA violations, and prohibit individuals who committed egregious BSA violations from serving on a public company board for ten years. Individuals convicted of BSA violations would be required to return their profits and bonuses they received during every year the violation occurred, and they would be prohibited from taking a tax deduction on their attorney’s fees related to the BSA violation. Finally, Title II direct the Department of Justice report to Congress annually on its use of deferred or non-prosecution agreements with a financial institution alleged to have violated the BSA.

Modernizing the BSA

Title III of the Draft codifies a joint innovation-related statement released by FinCEN and fellow regulators in December 2018,¹⁶ to provide the private sector with greater certainty about regulators’ approach to technology adoption and reinforce the importance of investments in improved technology, associated training, and personnel. This title also codifies the establishment of BSA-related Innovation Labs within each regulator, as required by the joint innovation-related statement. It would also require Directors of these Innovation Labs to meet regularly via a standing regulatory Innovation Council to discuss and coordinate action.

Corporate Transparency Act of 2019

No U.S. state currently requires companies to disclose their beneficial owners.¹⁷ Criminals, terrorists, and money launderers frequently use anonymous shell companies to hide their money and facilitate their illegal activities, because the veil of secrecy afforded by anonymous shell companies prevents or impedes law enforcement discovery of who is behind these companies.¹⁸ This

¹⁴ *Interagency Statement on Sharing Bank Secrecy Act Resources*, FDIC, October 3, 2018. <https://www.fdic.gov/news/news/press/2018/pr18068a.pdf>

¹⁵ “*FinCEN Reissues Real Estate Geographic Targeting Orders and Expands Coverage to 12 Metropolitan Areas*,” FinCEN website, <https://www.fincen.gov/news/news-releases/fincen-reissues-real-estate-geographic-targeting-orders-and-expands-coverage-12> (last visited March 8, 2019)

¹⁶ *Joint Statement on Innovative Efforts to Combat Money Laundering and Terrorist Financing*, OCC, December 3, 2018. <https://www.occ.treas.gov/news-issuances/bulletins/2018/bulletin-2018-44.html>

¹⁷ *Survey on Company Formation Processes in the States*, National Association of Secretaries of State, September 30, 2013.

¹⁸ *Poverty, Corruption, and Anonymous Companies: How Hidden Company Ownership Fuels Corruption and Hinders the Fight Against Poverty*, Global Witness, March 12, 2014. https://www.globalwitness.org/documents/13071/anonymous_companies_03_2014.pdf

lack of information is considered by law enforcement¹⁹, financial institutions²⁰, and anti-corruption organizations²¹ to be a primary American obstacle to tackling financial crime in the modern era.

The Corporate Transparency Act of 2019 would crack down on the illicit use of anonymous shell companies by requiring corporations and LLCs to disclose their true “beneficial owners” to FinCEN at the time the company is formed. The bill defines “beneficial owner” to include all natural persons who, directly or indirectly, exercise substantial control over the company, own a substantial interest in the company, or receive substantial economic benefits from the company. The FinCEN database of beneficial ownership information would not be publicly available, but instead would be available only to law enforcement agencies, as well as to financial institutions, with customer consent, for purposes of complying with their “Know-Your-Customer” requirements.²² The bill exempts entities that are already required by Federal or state law to disclose their beneficial owners, such as SEC-regulated public companies, state-regulated insurance companies, and charitable organizations.

Kleptocracy Asset Recovery Rewards Act

According to World Bank data, more than \$1 trillion in bribes are paid worldwide every year.²³ This corruption has a significant impact on developing countries, with estimates as high as \$40 billion per year stolen by public officials.²⁴ To assist in recovering for victims the proceeds of crime and to punish the bad acts of the criminals, the Kleptocracy Asset Recovery Rewards Act (KARRA) establishes a rewards program to incentivize individuals to notify the U.S. government of assets in U.S. financial institutions that are linked to foreign corruption, allowing authorities to recover and return these assets and prevent further enabling foreign corruption and terrorist financing. Rewards are paid with funds taken from the recovered stolen assets.

¹⁹ *Testimony of Steven M. D’Antuono, Section Chief, Criminal Investigative Division, Senate Banking Committee, November 29, 2018.* <https://www.banking.senate.gov/imo/media/doc/D'Antuono%20Testimony%202011-29-18.pdf>

²⁰ *Letter from Industry Associations, August 8, 2016.* https://bpi.com/wp-content/uploads/2018/07/20160808_tch_letter_incorporation_transparency_and_law_enforcement_assistance_act_support.pdf

²¹ “*The U.S. is One of the Easiest Places in the World for Criminals to Open Anonymous Companies to Launder Money with Impunity*” <https://thefactcoalition.org/issues/incorporation-transparency> (last visited March 5, 2019)

²² *See e.g., Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. 29,398 (May 11, 2016).*

²³ *Global Cost of Corruption at Least 5% of World GDP.* United Nations, September 2018.

<https://www.un.org/press/en/2018/sc13493.doc.htm>

²⁴ *Few and Far: The Hard Facts on Stolen Asset Recovery*, United Nations Office on Drugs and Crime, The World Bank, September 2014. https://star.worldbank.org/sites/star/files/few_and_far_the_hard_facts_on_stolen_asset_recovery.pdf