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SHARPER LINES MEAN TIGHTER NETS: HOW THE FINCEN'S LATEST PRIORITIES ARE ANOTHER STEP TO INCREASED ENFORCEMENT

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In the latest sign that the federal enforcement apparatus is slowly but surely training its sights on white-collar professionals and businesses, particularly financial services, the Financial Crimes Enforcement Network (“**FinCEN**”) published a list of priorities last week. For the last few years, prosecutors have aggressively pursued allegations of corruption and fraud – at times too aggressively, in the views of many federal judges. Executives willing to roll the dice at trials have increasingly found receptive audiences in judges who have chastised prosecutors for bringing criminal charges where the lines demarking unlawful conduct were not so clearly drawn. The publication of the FinCEN priorities is another step in drawing those lines.

DEVELOPMENTS THIS YEAR

Earlier this year, Congress overrode then-President Trump’s veto to pass the Anti-Money Laundering Act of 2020 (“**AMLA**”) which included greatly increased incentives for whistleblowers to report on money laundering and Bank Secrecy Act (“**BSA**”) violations, broadened BSA’s coverage to capture dealers of antiquities and cryptocurrency, and gave the U.S. Treasury Department and the U.S. Department of Justice authority to obtain records from foreign financial institutions.

Just over a month ago, on June 3, 2021, the White House published the [Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest](#) (the “**Memorandum**”). In the Memorandum, President Biden sets forth a policy of “effectively preventing and countering corruption and demonstrating the advantages of transparent and accountable governance” and commits to “lead efforts to promote good governance; bring transparency to the United States and global financial systems; prevent and combat corruption at home and abroad; and make it increasingly difficult for corrupt actors to shield their activities.” The Memorandum directs 15 federal agencies to collaborate in a 200-day “interagency review” to enhance the government’s ability to fight corruption.

FINCEN'S AML/CFT PRIORITIES

In one tangible result of those anti-corruption efforts, FinCEN published guidance for the financial services sector just a few weeks after the release of the Memorandum, in the form of the [Statement on the Issuance of the Anti-Money Laundering/Countering the Financing of Terrorism \(AML/CFT\) National Priorities](#) (the “**Statement**”) and [Anti-Money Laundering and Countering the Financing of Terrorism National Priorities](#) (the “**AML/CFT Priorities**”). The AML/CFT Priorities are applicable to all “covered entities” – financial service providers required to maintain an anti-money laundering program under the BSA – which includes banks, money services businesses, credit card system operators, loan and finance companies, and broker-dealers.^[1] While the priorities are not expected to be addressed until the effective date of regulations,^[2] we expect covered entities to begin consideration of the priorities in the course of any periodic updating processes. Indeed, FinCEN recommends in their statement that covered entities begin considering how to incorporate the AML/CFT Priorities into their compliance programs.

Echoing President Biden’s earlier policy statements, the eight priorities are (1) corruption; (2) cybercrime, including relevant cybersecurity and virtual currency considerations; (3) foreign and domestic terrorist financing; (4) fraud; (5) transnational criminal organization activity; (6) drug trafficking organization activity; (7) human trafficking and human smuggling; and (8) proliferation financing.^[3]

These updated priorities come on the heels of an already-increasing appetite for white-collar prosecution. The aggressive push from the Department of Justice can be traced back to 2015, when then-Deputy Attorney General Sally Yates issued the [Yates Memorandum](#), which made “[f]ighting corporate fraud and other misconduct . . . a top priority of the Department of Justice,” especially in prosecuting individuals. A year and a half and a change in administration later, the Department of Justice’s priorities turned elsewhere – largely to combatting violent crimes – but not before a new wave of white-collar prosecutions had already begun. As the Wall Street Journal recently documented, one of these cases led a judge to vacate a conviction against a Wall Street executive, remarking that the “government completely overreached,” and that the “lines have to be very clear, because when someone crosses a line and is likely to end up in jail, you want that line to be clear.”^[4] Other judges have remarked that federal authorities have been too eager to grab cash and assets before proving any wrongdoing.^[5]

Examples of judges reaching for the extreme remedy of overriding a jury verdict are increasingly common. The Third Circuit Court of Appeals earlier this year threw out convictions of four former bank executives because the key regulation underlying their convictions was ambiguous,^[6] and the Second Circuit will soon decide whether to affirm a New York federal judge’s decisions to toss guilty verdicts against hedge fund executives based on, in that judge’s view, insufficient proof of criminal intent.^[7] The Wall Street Journal noted that the federal prosecutors’ normally near-perfect batting average in getting convictions has slipped to just below 80% in Wall Street cases over the past five

years. That is undoubtedly because proving intent in such cases, particularly against the backdrop of murky regulations, is challenging.

But the FinCEN priorities, along with the AMLA and the Memorandum, may indicate an intent by regulators to ratchet up the pressure. Notably, on July 6, 2021, after listing cybercrime as one of the priorities, FinCEN hired Michele Korver, a former federal prosecutor, as its first “Chief Digital Currency Advisor.”^[8] Enhanced regulations yet to come will help prosecutors extract resolutions from companies and pursue individual prosecutions through trial. When those lines become more focused, verdicts are more likely to stand.

NEXT STEPS

A robust AML/CFT program likely includes elements of the AML/CFT Priorities, but the FinCEN guidance provides helpful information that covered entities should take into consideration – and that covered entities can use to direct internal resources to specific areas of concern. The AML/CFT Priorities also highlight increased national focus on domestic terrorism and cybersecurity, the latter already front-page news from a recent spate of high-profile and critical infrastructure ransomware and hacking attacks. While compliance with the above AML/CFT Priorities is not yet required, covered institutions are encouraged to begin investigating workable solutions for implementation without overburdening compliance and regulatory teams. Starting early to update policies, procedures, and systems can minimize friction when regulations are finalized and implemented.

[1] Separate statements were published for non-bank financial institutions by FinCEN, and jointly for banks and credit unions by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Office of the Comptroller of the Currency. See 31 CFR Chapter X; see also summary of covered entities provided in AML/CFT Priorities, FN 6.

[2] Regulations must be promulgated within 180 days after the establishment of the priorities. 31 U.S.C. § 5318(h)(4)(D) (as amended by the Anti-Money Laundering Act of 2020 § 6101(b)(2)(C)).

[3] Priorities.

[4] Aruna Viswanatha & Dave Michaels, *Flaws Emerge in Justice Department Strategy for Prosecuting Wall Street*, Wall St. J. (July 5, 2021), <https://www.wsj.com/articles/flaws-emerge-in-justice-department-strategy-for-prosecuting-wall-street-11625506658>.

[5] The Wall Street Journal Editorial Board, *Guilty Until Proven Innocent* (July 7, 2021), <https://www.wsj.com/articles/guilty-until-proven-innocent-11625697428>.

[6] *United States v. Harra*, 985 F.3d 196 (3d Cir. 2021).

[7] *United States v. Mark Nordlicht, et al.*, No. 16 CR 640 (BMC), (Dkt. No. 799) (E.D.N.Y. 2019); Second Circuit Docket Nos. 19-3209 & 19-3207.

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