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GIBSON DUNN

Anti-Money Laundering Update August 14, 2024

Top 10 Mid-Year Developments in Anti-Money Laundering Enforcement in 2024

In this update, we analyze the most important mid-year trends and developments in Anti-Money Laundering (AML) regulation and enforcement thus far in 2024.

Overall, 2024 has been very active, with many new key rules in the AML space. This update includes key rule-making priorities emphasized by enforcers, notable enforcement actions, and significant judicial opinions in the AML space.

NEW RULES/RULEMAKING

[*Note: This alert was published before FinCEN issued the final real estate and investment adviser rules. For a discussion of the final rules, see our piece at the NYU Compliance Blog.]

In the first half of 2024, the Financial Crimes Enforcement Network (FinCEN) has been active in releasing new proposed rules to, most notably, expand coverage of the Bank Secrecy Act (BSA) to certain residential real estate transactions and investment advisers, both industries which had long been FinCEN priorities. The agency also released a notable proposed rule to update AML Program requirements for all financial institutions, as well as continued to implement the Corporate Transparency Act (CTA), among other things.

1. FinCEN Proposes New Reporting Obligations for Residential Real Estate Transfers

On February 7, 2024, FinCEN issued a long-awaited Notice of Proposed Rulemaking (NPRM) to apply certain AML requirements to U.S. residential real estate transactions (hereinafter the "Real Estate Rule").[1] The Real Estate Rule would require certain professionals involved in real estate closings and settlements to report information to FinCEN about non-financed transfers of *residential* real estate to certain legal entities and trusts.[2]

Specifically, the Real Estate Rule would cover non-financed transfers of various types of residential real estate, including single-family houses, townhouses, condominiums, and other buildings designed for occupancy by one to four families.[3] It would also cover non-financed transfers of certain vacant or unimproved land that is zoned for occupancy by one to four families, as well as transfers of shares of cooperative housing corporations.[4] A transaction is considered "non-financed" if it does not involve an extension of credit issued by a financial institution otherwise required to maintain an AML program.[5] Transfers resulting from death or divorce, as well as transfers to a bankruptcy estate and transfers resulting from a grant or revocation of an easement, would be exempted from the Real Estate Rule.[6]

The Real Estate Rule identifies persons required to file a report ("Reporting Persons") through a "cascade" framework which assigns the reporting responsibility in sequential order to various persons who perform closing or settlement functions for residential real estate transfers.[7] The reporting obligation would first fall upon the person listed as the closing or settlement agent.[8] But if no individual executes that settlement function, the reporting obligation would then fall upon the following individuals in the following order: (1) the person that underwrites an owner's title insurance policy; (2) the person that disburses the greatest amount of funds in connection with the reportable transfer; (3) the person that prepares an evaluation of the title status; or (4) the person who prepares the deed.[9] Alternatively, persons specified in this list can designate by written agreement who will serve as a Reporting Person for the transfer.[10] Reports filed for a covered transfer would be required to include certain information, including:[11]

- Beneficial ownership information of the transferee receiving the property;
- Information about individuals representing the transferee (such as legal name, current address, and tax identification number);
- Information about the Reporting Person (such as legal name, current address, and tax identification number);
- Information about the property being transferred (such as physical address and description of the section, lot, or block to be conveyed);
- Information about the transferor (such as legal name, current address, and tax identification number); and
- Information about any payments made (including total amount paid by the transferee entity or trust, the method of each payment made by the transferee entity or transferee trust, the accounts and financial institutions used for each such payment, and, if the payor

is anyone other than the transferee entity or transferee trust, the name of the payor on the payment form).

Under the proposed rule, Reporting Persons would be required to file the disclosure report within 30 days of the date of the transfer.[12]

FinCEN accepted comments on the Real Estate Rule through April 16.[13] The NPRM also proposes an effective implementation date one year after the final version of the rule is eventually issued.[14]

2. FinCEN Proposes Substantial BSA Expansion to Investment Advisers

Just a week after announcing the Real Estate Rule, on February 13, 2024, FinCEN issued another long-awaited proposal to once again propose to extend BSA/AML coverage to certain investment advisers (hereinafter the "Investment Advisers Rule").[15] The Investment Advisers Rule would add certain investment advisers to the list of businesses classified as "financial institutions" under the BSA.[16] Specifically, the Investment Advisers Rule would cover two types of advisers: (1) those that are registered or required to register with the U.S. Securities and Exchange Commission (SEC), and (2) those that report to the SEC as Exempt Reporting Advisers.[17]

As a result, covered investment advisers would be required to implement risk-based Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) programs, file Suspicious Activity Reports (SARs) with FinCEN, keep records relating to the transmittal of funds that equal or exceed $3,000, and comply with other obligations of financial institutions under the BSA.[18] The Investment Advisers Rule would also apply information-sharing provisions between and among FinCEN, law enforcement government agencies, and certain financial institutions.[19] Notably though, because investment advisers provide services to open-end investment companies such as mutual funds (which are already defined as "financial institutions" under the BSA), the Investment Advisers Rule would not require investment advisers to apply AML/CFT program or SAR filing requirements to mutual funds they advise.[20]

The Investment Advisers Rule also proposes to delegate examination/supervisory authority to the SEC, given the SEC's expertise in supervising the investment adviser industry.[21]

FinCEN accepted comments on the Investment Advisers Rule through April 15.[22] The NPRM proposes an effective date of one year after the date the final rule is eventually issued.[23]

On May 13, 2024, FinCEN and the SEC also jointly issued an NPRM setting forth the proposed Customer Identification Program (CIP) requirements for the investment advisers that would be covered by the Investment Advisers Rule (hereinafter the "CIP Proposal").[24] Specifically, covered investment advisers would be required to develop a CIP that includes risk-based procedures for determining and verifying the identity of customers to the extent reasonable and practicable, and the rule further requires that verification occurs within a reasonable time before or after a customer's account is opened.[25] At a minimum, covered investment advisers would, like other financial institutions, be required to obtain each customer's name, date of birth or

formation, address, identification number, and any other information necessary to form a reasonable belief the adviser knows the true identity of each customer.[26]

Covered investment advisers would need to also include procedures in the CIP for recordkeeping of information used to verify a customer's identity, as well as for notifying customers that the adviser is requesting information to verify their identities.[27] The CIP would also need to include procedures for determining whether a customer appears on any list of known or suspected terrorist organizations provided by a government agency.[28] The CIP Proposal does recognize that covered investment advisers may rely on other financial institutions to perform some or all required CIP duties, but it requires that such reliance occur pursuant to a written agreement and be reasonable under the circumstances.[29]

The comment period on the CIP Proposal ran through July 22, 2024. The NPRM proposes an effective date of 60 days after the final version of the rule is eventually issued, but it notes that compliance would only be required within six months of the effective date of the regulation.[30] The NPRM further notes compliance would not be required sooner than the corresponding compliance date of a final rule arising out of the Investment Advisers Rule.[31]

3. FinCEN Proposes Updates to AML Program Requirements

In June of 2024, along with issuing a series of proposals to extend or modify certain due diligence requirements,[32] FinCEN separately issued another long-awaited NPRM to implement updates to the AML Program requirements for financial institutions geared towards modernizing the regulations to better ensure that financial institutions implement effective and risk-based AML/CTF programs.[33] This too was a requirement of the Anti-Money Laundering Act of 2020 (AML Act). The proposed rule would add language to the AML program regulations to codify the regulatory expectation that AML programs must be "effective, risk-based, and reasonably designed…to identify, manage, and mitigate illicit finance activity risks."[34] The NPRM would maintain the four AML program requirements that all financial institutions are currently, subject to, namely: (i) implementation of risk-based, written policies, procedures and controls to ensure ongoing compliance with the BSA; (ii) designation of one or more qualified individuals to be responsible for coordinating and monitoring day-to-day BSA compliance; (iii) periodic training of employees; and (iv) periodic, independent testing of the AML/CTF program by qualified persons. The NPRM also does not propose changes to the CIP and Customer Due Diligence (CDD) AML Program requirements that certain financial institutions are subject to. However, the NPRM proposes adding a few new requirements to the current AML program obligations for all financial institutions:

- Risk Assessment Process: All financial institutions would need to establish a "dynamic and recurrent risk assessment process" to enable each institution to understand its particular AML/CTF risks and to reasonably manage and mitigate those risks.[35] As part of that process, financial institutions would need to periodically "identify, evaluate, and document" their AML/CTF risks, including by consideration of FinCEN's BSA/AML Priorities, the institution's business, operational, and customer characteristics, and SAR and other BSA reports filed by the institution.[36] FinCEN's AML Priorities include focusing on specific predicate crimes that often generate illicit proceeds, including corruption, cybercrime, terrorist financing, fraud, transnational criminal organization activity, drug trafficking organization activity, human trafficking and human smuggling,

and financing of certain state-sponsored weapons programs (known as proliferation financing).[37] If adopted, institutions would need to review these predicate offenses and consider ways in which their products, services, distribution channels, intermediaries, and payment patterns conceivably facilitate said crimes.[38] The resulting risk assessment, as periodically updated, should then inform how the institution's AML/CTF Program and each of its components are developed and updated to include risk-based internal policies, procedures, and controls designed to mitigate identified risks.[39]

- Board Approval and Oversight: All AML/CTF programs would need to be approved and overseen by the institution's Board of Directors, or if the institution does not have a Board of Directors, an equivalent governing body. While some financial institutions are already required by the BSA or their functional regulator to have their AML/CTF programs approved by their Boards, this rule, if adopted, would extend that requirement to all financial institutions. It would also require Board approval of not just a primary AML/CTF Program document, but also "each of the components of the AML/CTF program."[40] In the NPRM, FinCEN further explained that the oversight requirement would be distinct from the approval requirement and would require "appropriate and effective oversight measures…to ensure that the board (or equivalent) can properly oversee whether AML/CFT programs are operating in an effective, risk-based, and reasonably designed manner."[41]

- On-shore Compliance: The NPRM would implement the AML Act's requirement that financial institutions with "the duty to establish, maintain, and enforce the AML/CFT program must remain the responsibility of, and be performed by, persons in the United States who are accessible to, and subject to oversight and supervision by FinCEN and [any] Federal functional regulator."[42] FinCEN acknowledged that "financial institutions may currently have AML/CFT staff and operations outside of the United States, or contract out or parts of their AML/CFT operations to third-party providers located outside of the United States" for reasons such as cost or efficiency—all of which may conflict with the onshoring proposal as stated.[43] As such, the agency has "requested comment on a variety of potential questions that may arise for financial institutions as they address this statutory onshoring requirement, including questions about the scope of the statutory requirement and the obligations of persons that are covered."[44]

As noted, a central purpose of this NPRM is to modernize the BSA regulations by clarifying and streamlining the AML Program requirements, including by making them more consistent across financial institution types, and by adding new requirements designed to make AML Programs more risk-based and effective. These changes may prove useful to regulated entities, as it may help them better understand their obligations and better appreciate what specific steps must be taken to develop an effective AML/CFT program. The comment period on this proposal runs through September 3, 2024, and the NPRM proposes an effective date of six months after the date the final rule is eventually issued.[45]

Following FinCEN's lead, on July 19, 2024, other agencies (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) issued their own NPRMs designed to facilitate the creation of similar risk-based compliance programs.[46] Financial institutions subject to these agencies' regulatory regimes will be tasked with similarly monitoring FinCEN's AML/CFT priorities to look for ways to implement those requirements into its own internal auditing/risk-assessment processes.[47] Regulated financial institutions must

subsequently update their risk assessments on a periodic basis to assure it accounts for risks newly flagged by FinCEN and other government authorities.

CTA DEVELOPMENTS[48]

As discussed in our last update, the Corporate Transparency Act ("CTA") took effect on January 1, 2024.[49] As FinCEN continues to roll out the CTA, it has issued a number of pieces of notable guidance this year while, at the same time, private plaintiffs have begun to challenge the constitutionality of the act. We address both updates in turn.

4. Notable FinCEN Guidance

FinCEN maintains a Frequently Asked Questions (FAQs) website, where it offers guidance on compliance with BOI reporting.[50] We note two particularly important clarifications FinCEN has issued this year. First, in January, FinCEN provided important clarification on the scope of what is known as the "subsidiary exemption."[51] The subsidiary exemption applies to subsidiaries whose "ownership interests" are "controlled or wholly owned" by certain exempt entities.[52] As written, the term "controlled" left room for uncertainty. Specifically, the qualifier "controlled or wholly owned" implies that while total ownership is required for the exemption, *control* may not be similarly limited. FinCEN addressed this in guidance on January 6 by explaining its position: "If an exempt entity controls some but not all of the ownership interests of the subsidiary, the subsidiary does not qualify [for the exemption]. To [instead] qualify, a subsidiary's ownership interests must be *fully, 100 percent* owned or controlled by an exempt entity."[53] FinCEN further added that "the exempt entity [must] entirely control[] all of the ownership interests in the reporting company, in the same way that an exempt entity must wholly own all of a subsidiary's ownership interests."[54] FinCEN's clarification effectively narrows the exception and could require more subsidiaries to file reports with FinCEN.

Next, FinCEN offered clarification as to when dissolved entities are required to disclose BOI. Procedurally, uncertainty existed as to whether companies dissolved before the date of a reporting deadline needed to file. A new FAQ clarifies that if an entity is reportable and existed at *any time* during 2024, it needs to file, even if the entity is dissolved before the date a report would otherwise be due.[55] But if a reportable company ceased to exist before the CTA went into effect (i.e., January 1, 2024), then the entity does not need to file because it was never subject to the applicable reporting requirements.[56]

5. Constitutional Challenges to the CTA

Since the CTA's enactment in January, there have been several challenges to the constitutionality of the CTA filed in federal court. Actions have been filed in the Northern District of Alabama,[57] the District of Maine,[58] the Western District of Michigan,[59] the Eastern District of Texas,[60] and the District of Massachusetts.[61]

In each of these cases, plaintiffs have levied many of the same objections. These primarily include that the CTA exceeds Congress's authority by infringing on states' exclusive power to regulate business entity formation within their borders, in violation of the Tenth and Fourteenth Amendments to the Constitution.[62] Moreover, plaintiffs argue that the mere fact of forming a

"reporting company" (e.g., filing articles of incorporation) does not implicate foreign affairs or national security, and therefore is a power reserved to the states (not Congress). In addition, other plaintiffs allege violations of the Fourth Amendment's prohibitions against unreasonable searches and seizures, and the Fifth Amendment's guarantee of Due Process. With respect to the Fourth Amendment claim, plaintiffs argue that the compelled disclosure to FinCEN of BOI without reasonable suspicion, probable cause, or pre-compliance review constitutes illegal acts at the hands of the federal government.[63] The Due Process claim rests on the assertion that the CTA is unconstitutionally vague. Plaintiffs argue, among other points, that terms such as "beneficial owner" and "substantial control" are insufficiently defined, depriving regulated parties of sufficient notice as to what conduct triggers criminal liability.[64]

While decisions remain pending in most of these actions, on March 1, 2024, in the Northern District of Alabama, a federal judge granted summary judgment in favor of the plaintiffs.[65] Therein, the court concluded that the CTA unconstitutionally exceeds Congress' enumerated powers.[66] The court proceeded to enter a permanent injunction barring the government from enforcing the CTA as to the plaintiffs in the case, but did *not* issue a national injunction barring enforcement of the law as to other entities.[67] In accordance with that ruling's limited scope, FinCEN clarified that "reporting companies" must still generally comply with the CTA, and only the plaintiffs in the Alabama action need not submit BOI.[68] Oral argument on that appeal has been set for September 23, 2024.

Given the narrow scope of relief issued in the proceedings in Alabama—as well as the fact that decisions remain pending in the suits in Michigan, Maine, Texas, and Massachusetts—entities should generally assume (as FinCEN has itself indicated) that they remain subject to the CTA unless an applicable exemption applies.[69] Accordingly, the CTA continues to impose imminent deadlines for many entities as to which the law remains applicable.

PRIORITIES

The below updates include those areas that executive officials, particularly FinCEN, have targeted to boost AML measures through the first half of 2024.

6. Biden Administration Continues to Prioritize Prevention of the Financing of Terrorism

In the first half of 2024, the Biden administration has continued to prioritize investigations and enforcement in the national security area, particularly those implicating AML and terrorism. On June 26, 2024, for instance, FinCEN issued a final rule that identified Al-Huda Bank—an Iraqi bank FinCEN considers to be a conduit for terrorist financing—as a foreign financial institution of primary money laundering concern.[70] Alongside such a designation, the final rule FinCEN issued imposes a special measure severing Al-Huda Bank from the U.S. financial system by prohibiting domestic financial institutions and agencies from opening or maintaining a correspondent account for, or on behalf of, Al-Huda Bank.[71] Covered entities would be required to apply special due diligence to all of their foreign correspondent accounts—implementing measures designed to effectively prevent such accounts from being used to process transactions involving Al-Huda Bank.[72] This final rule comes on the heels of Treasury's Office of Foreign Assets Control (OFAC) designating the chairman of Al-Huda Bank

as having materially assisted, sponsored, or provided financial, material, or technological support to an Iranian foreign terrorist organization (FTO).[73]

In a similar vein, on May 8, 2024, FinCEN issued an advisory providing the private sector with information to assist in detecting potentially illicit transactions related to Iranian and Iran-backed FTOs.[74] The advisory highlights the various ways Iran raises and moves funds in support of FTOs and details the other typologies such FTOs use to raise revenue.[75] The advisory identifies various red flags financial institutions should identify and consider and provides a reminder of relevant BSA reporting obligations for financial institutions to follow.[76] On July 11, 2024, FinCEN issued a series of similar red flags designed to assist institutions detect, prevent, and report potential financing of Israeli extremist settlor violence against Palestinians located in the West Bank.[77]

7. FinCEN's Broad and Expanding Mission

While FinCEN has been focused on priorities such as national security, in recent years it has also been focusing on a wider range of issues ranging from drug trafficking to environmental crimes to elder abuse to digital assets. We briefly discuss some of these priorities.

a. Drug Trafficking

In December 2023, the U.S. government announced a Treasury Department Counter-Fentanyl Task Force, including FinCEN.[78] In June 2024, FinCEN Director Andrea Gacki traveled to Arizona and led a "FinCEN Exchange," focused on disrupting the fentanyl trade.[79] This trip came on the heels of a similar meeting the previous month, where the Director and senior leadership attended a roundtable in Iowa with Congressman Zach Nunn. The meeting focused on law enforcement priorities, emphasizing the agency's efforts to "degrade and disrupt transnational criminal organizations that traffic opioids and other dangerous substances."[80] The Arizona and Iowa meetings follow a March statement by the White House on its efforts to reduce opioid overdose deaths, including by "investing over $100 billion to disrupt the flow of illicit drugs."[81]

Additionally, in June of 2024, Treasury issued an advisory alert to U.S. financial institutions—informing them of new alarming transaction trends in the fentanyl supply chain.[82] The alert aims to equip institutions with a better understanding of when certain transactions should raise red flags and require reporting. The report specifically informs institutions to monitor shell companies purportedly associated with textiles, food, or the electronics industry, as illicit suppliers frequently use entities of that variety to obfuscate their illegal transactions.[83] Of additional concern to FinCEN is the increased use of virtual currencies, like bitcoin, by Mexican-based cartels to purchase fentanyl's precursor chemicals from Chinese-located suppliers.[84] The report also lists 14 red flags designed to assist financial institutions in detecting transactions related to the illicit production of fentanyl—including increased monitoring of transactions between Chinese sellers and Mexican buyers.[85] Companies obligated to file SARs should take note of these new guidelines and update AML policies with these specific considerations in mind.

b. Environmental Crimes

In April, FinCEN published a notice reminding financial institutions to be vigilant "in identifying and reporting suspicious activity related to environmental crimes," which are frequently related to "fraud, human trafficking, and drug trafficking."[86] Environmental crimes can include wildlife trafficking, illegal mining, and logging.[87] The notice references a prior threat analysis "[highlighting] wildlife trafficking as a transnational criminal organization-related concern," asserting it often supports transnational criminal organizations linked to corrupt foreign governments.[88] SARs relating to wildlife trafficking increased each year from 2018 through October 2021, helping to identify "various levels of potential foreign government corruption."[89] Wildlife trafficking, in particular, is a "low risk and high reward" crime and presents money laundering concerns.[90] The statutory authorization for the Presidential Task Force on Wildlife Trafficking was recently renewed through 2028.[91] The Task Force includes in its mission the goal of increasing cooperation between "law enforcement and financial institutions to identify [wildlife] trafficking activity."[92]

c. Elder Exploitation

Elder exploitation continues to be an enforcement priority for FinCEN as well.[93] FinCEN reported detection of approximately $27 billion of attempted or completed instances of Elder Financial Exploitation (EFE) between June 2022 and June 2023.[94] In a trend report, FinCEN found scammers are increasingly avoiding in-person contact with banks and money transmitting businesses (e.g., wire transfer companies), which may "identify EFE activity more frequently [because] victims or perpetrators [conduct] transactions in person, and presumably [do] not permit the requested transactions."[95] Instead, perpetrators are increasingly relying on methods not requiring direct contact with intermediaries, like peer-to-peer payment systems and digital payments.[96] The report highlights the "critical role of financial institutions" in detecting and deterring this type of activity.[97]

d. Cryptocurrency and Child and Human Trafficking

In February, FinCEN published a report identifying purported links between "convertible virtual currency" (CVC, or cryptocurrency), online child sexual exploitation (OCSE), and human trafficking.[98] The agency claims the number of OCSE and human trafficking-related SARs increased by about 400% from 2020 to 2021.[99] It also identified typologies used by individuals engaging in these activities, such as "CVC kiosks" (e.g., Bitcoin ATMs), mixers (a way to hide the parties in a CVC transaction), and peer-to-peer exchanges.[100] Most SARs related to OCSE and human trafficking that involve CVCs are linked to child pornography. Generally, the SARs describe possible purchases of child sex abuse materials using CVC, or attempts to exchange the CVC proceeds from those sales into fiat currency.[101] FinCEN indicated that bitcoin is the CVC of choice in an overwhelming majority of the reports. Bitcoin transactions are pseudonymous and readily traceable, but FinCEN warned that privacy-enhancing CVCs can present obstacles to a financial institution's ability to detect these transactions.[102]

In general, firms and individuals should take note of FinCEN's ever-expanding regulatory reach, even to areas not traditionally considered to be under the agency's purview.

POLICIES

The first half of 2024 also featured a number of notable program announcements from the DOJ relating to AML, including its new whistleblower policy.

8. DOJ Announces New Programs to Foster Reporting of Corporate AML Violations and Other Crimes

In our inaugural edition, we noted that it will be important to watch the AML whistleblower space as FinCEN's AML whistleblower program comes online. Indeed, in February 2024, FinCEN Director Gacki testified that FinCEN has already received over 100 tips.[103]

In parallel, DOJ has announced an individual voluntary self-disclosure program to further incentivize reporting of potential corporate misconduct. On April 15, 2024, the Criminal Division of DOJ announced the Pilot Program on Voluntary Self-Disclosure for Individuals (hereinafter the "Pilot Program"), which clarifies the circumstances under which DOJ will offer non-prosecution agreements (NPAs) to individuals who voluntarily disclose original information about corporate criminal misconduct.[104] The Pilot Program sets forth various criteria a reporting individual must satisfy in order to receive an NPA.[105] As to subject-matter, a reporting individual must disclose original information that is non-public and not otherwise known to the DOJ.[106] The original information must also relate to a specified list of offenses that includes:[107]

- Violations by financial institutions involving money laundering or fraud;
- Violations related to the integrity of financial markets;
- Violations related to foreign corruption and bribery;
- Violations related to healthcare fraud or illegal healthcare kickbacks;
- Violations related to fraud or deception of the U.S. in relation to federally funded contracting (not including healthcare fraud); and
- Violations relating to bribes or kickbacks paid to domestic public officials.

Beyond the subject-matter requirements, there are several other limitations on eligibility for an NPA through the Pilot Program. Disclosure of the original information must be voluntary, meaning it (1) must be made before any government request or inquiry into the issue, (2) the reporting individual must have no preexisting obligation to report the information to the Criminal Division, and (3) the disclosure must occur in the absence of any government investigation or threat of imminent disclosure of the information to the government or the public.[108] The disclosure must also be truthful and complete, including any misconduct that the reporting individual participated in or is aware of.[109] The reporting individual must agree to "fully cooperate" with and provide "substantial assistance" to DOJ in its investigation.[110] The reporting individual must also agree to repay any profits obtained from the reported misconduct and pay restitution to victims.[111] Finally, the reporting individual must not be involved in any terrorist activity, violent crime, or sexual offenses, and cannot be a Chief Executive Officer, Chief Financial Officer, or organizer of the scheme.[112]

The Pilot Program comes alongside the DOJ's announcement of its financial reward program for corporate whistleblowers, which was formally enacted on August 1, 2024.[113] Please see our recent alert for further details. Companies following these developments should evaluate and continue to invest in compliance programs that help to identify misconduct and encourage internal detection and reporting of potential violations, particularly those relating to allegations of money laundering or other criminal activity.

ENFORCEMENT ACTIONS

Although FinCEN did not have any corporate enforcement actions in the first half of 2024, DOJ continues to be active in enforcing AML compliance, including in the digital assets industry.

9. DOJ Prosecutions

Alongside new DOJ policy initiatives, the first half of 2024 also featured a number of notable enforcement actions taken by DOJ in pursuit of its AML efforts.

a. Cryptocurrency Exchanges

On March 26, 2024, the United States Attorney for the Southern District of New York unsealed an indictment against global cryptocurrency exchange KuCoin, along with two of its founders.[114] The crux of the allegation is that the indicted individuals operated KuCoin as an unlicensed money transmitting business and conspired to violate the BSA by willfully failing to maintain an adequate AML program.[115] Specific failures included the absence of reasonable procedures in place for verifying the identity of customers, and failing to file SARs.[116] As an alleged money transmitting business and futures commission merchant, KuCoin had been subject to applicable FinCEN regulations and failed to implement them as required.

Similar conduct has led to a recent guilty plea by another cryptocurrency exchange. On July 10, 2024, the Southern District of New York separately announced that Bitcoin Mercantile Exchange (BitMEX) pled guilty to violations of the BSA.[117] Similar to the allegations levied against KuCoin, BitMEX admitted to willfully failing to establish, implement, and maintain an adequate AML program.[118] Formerly one of the leading cryptocurrency derivatives platforms, BitMEX admitted that because it operated in the United States, it knew it was required to implement adequate AML and KYC policies and chose to nevertheless "flaunt" those requirements.[119] Both the DOJ's indictment of KuCoin and the guilty plea secured against BitMEX highlight the serious ramifications that non-compliance with FinCEN regulations can pose on an entity's operations.

b. Individual Liability

The DOJ also recently obtained a guilty plea from Gyanendra Asre—a former member of the supervisory board for the New York State Employees Federal Credit Union—for causing the institution to facilitate illicit transactions.[120] Specifically, the DOJ alleged that Asre influenced the bank to violate the BSA's reporting requirements while, among other things, processing bulk cash deposits and checks exceeding $100 million dollars. Asre executed the scheme "to bring lucrative and high-risk international financial business to a small, unsophisticated credit

union,"[121] and pled guilty to failing to maintain an effective AML program. FinCEN separately assessed a $100,000 penalty for Asre's violations of the BSA.[122]

Similarly, a former bank executive in Missouri pled guilty to assisting customers in evading BSA protocols, as well as submitting falsified currency transaction reports. Defendant Peter McVey, a longtime Kansas City banker, "worked with other bank officials and customers to submit fraudulent . . . forms to [FinCEN] and . . . knowingly accepted forged bank forms from customers."[123] McVey's activities assisted unscrupulous customers and he faces a maximum of 10 years in federal prison.

These recent prosecutions illustrate that DOJ has continued to focus on holding individuals criminally liable for violations of the BSA.

RELEVANT CASE LAW UPDATES

10. Recent Acquittal on Section 1957 Charges in Trial of Backpage Executives Highlights Potential Importance of Tracing Requirements

In April, a federal court in Arizona issued a notable money laundering decision in *U.S. v. Lacey*.[124] Michael Lacey, who had previously been convicted at trial, allegedly participated in a money laundering conspiracy stemming from the DOJ's allegations that a website Lacey helped operate, Backpage.com, was primarily a tool for the promotion of prostitution in violation of the Travel Act.[125] Lacey moved for acquittal of his convictions under 18 U.S.C. § 1957, the money laundering statute prohibiting the use of illicit proceeds in a financial transaction of $10,000 or more.[126] The statute does not offer guidance on how to determine when use of these proceeds triggers liability if they are comingled with "clean" money in a single account, leading to a circuit split on the issue of tracing.[127]

Here, the government's theory had been that "all" proceeds from Backpage.com resulted from criminal activity. But the court held that the government failed to sufficiently prove that fact at trial, given that *some* ad revenue purportedly came from legitimate sources.[128] This decision reaffirmed the Ninth Circuit's unique tracing requirement—which "rejects the presumption that proof that some criminally derived funds exist in an account means that a subsequent transfer of funds … involves those [same] criminally derived funds."[129] This decision stands in contrast to opinions from other circuits, some of which presume any money transferred from a mixed accounts is tainted.[130] But in the Ninth Circuit, even if the government shows a "great majority" of the funds in an account constitute illicit proceeds, this is insufficient to support a violation of Section 1957.[131]

Thus, in ordering the acquittal, the district court reaffirmed that Section 1957's scope is somewhat cabined, at least in the Ninth Circuit.

CONCLUSION

2024 has thus far been notable in the AML enforcement space. We anticipate that the second half of the year will be similarly active, as litigation challenging the CTA continues to unfold, and FinCEN works to finalize the rules it has proposed in the first half of the year. We will continue to

monitor these updates and report accordingly on steps individuals and entities should take to navigate the ever-changing regulatory regime.

The footnotes referenced in this update are available on Gibson Dunn's website at the following link. Please click on a particular footnote above to view details. The complete update is available at the link below:

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Gibson Dunn has deep experience with issues relating to the Bank Secrecy Act, other AML and sanctions laws and regulations, and the defense of financial institutions more broadly. For assistance navigating white collar or regulatory enforcement issues involving financial institutions, please contact any of the authors, the Gibson Dunn lawyer with whom you usually work, or any of the leaders and members of the firm's Anti-Money Laundering / Financial Institutions, White Collar Defense & Investigations, or International Trade practice groups:

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