REFLECTING ON THE FINCEN FILES: WHAT HAPPENED AND WHAT NEXT?

How counsel can help financial institutions shape better practice

More than a month has passed since the storm of media reporting associated with the 'FinCEN files', a leak of over 2,000 Suspicious Activity Reports (SARs) filed with the US Financial Crimes Enforcement Network (FinCEN). These leaked SARs reflect transactions worth over $2 trillion between 1999 and 2017, but are only a fraction of the total population of SARs filed in this period. Salacious headlines of wrongdoing by the global banks have faded out of the mainstream, but what key messages should financial crime lawyers have taken from the FinCEN files? Is anything changing as a result?

What actually happened?

Banks filed SARs with the US authorities but continued to do business with the subject clients. This has been cited as proof that the banks were complicit in money laundering, but a SAR is, as the name indicates, only a suspicion. It is often difficult for a single institution looking at a limited number of transactions to conclude that there is underlying criminal behaviour.

Criminals deliberately attempt to obfuscate the trail of illicit funds and are likely to use multiple banks across jurisdictions to do so. A single bank, or even a single investigating authority, is unlikely to see the whole picture. It would be unreasonable to expect a bank to terminate a client relationship on suspicion alone.

Another point of note is that the FinCEN files comprised SARs filed in the US, but often related to activity conducted overseas. This is because a US dollar transaction is always processed through the US, via a correspondent bank acting on behalf of other banks. This provides a US nexus for SAR reporting, but the activity may reside in any two of the 170 different countries reported to appear in the FinCEN files.

The mechanisms for sharing information between different law enforcement authorities can be slow and uncertain. The information filed in the US may well never reach a local party, which would be better placed to investigate and assess the suspicious behaviour.

What can be done?

Information sharing in the fight against Financial Crime is undoubtedly essential. Criminals operate without borders and authorities will fail unless they do the same. We are starting to see more public international cooperation, as with the Airbus investigation which involved the UK, US and French authorities, but this may be lagging in exactly those jurisdictions where it is most needed.

Sharing information with banks is also crucial to provide additional context to the limited view of a single financial institution. The UK's Joint Money-Laundering Intelligence Taskforce allows prosecuting authorities to not only gather information from participating banks but also, without compromising investigations, share information with the banks.

Banks attempting to do the right thing are often hampered by a lack of publicly available information to support their 'know your customer' processes. This is a crucial component of AML compliance – without understanding the client, it is impossible to gauge whether any activity appears suspicious.

Opaque offshore jurisdictions aside, the FinCEN files have re-emphasised known concerns with UK Companies House, with over 3,000 UK companies appearing. It is currently incredibly easy to register a UK company without any check at formation or thereafter to verify the information provided. Reforms have now been proposed to Companies House to introduce compulsory identity verification and give the body greater powers to investigate or remove information.

Immediately prior to the publication of the FinCEN leaks, FinCEN issued a notice seeking comment on proposed regulatory amendments, designed to enhance the effectiveness of AML compliance programmes. The proposal encourages the "reporting of information with a high degree of usefulness to government authorities". This may be in recognition that firms are filing too many SARs of poor evidential quality in order to fulfil their obligations to raise SARs (often referred to as 'defensive' filings). While such filings help firms to mitigate their regulatory risks, they are difficult for authorities to investigate further and thus do little to mitigate the underlying risk of money laundering or financial crime.

The FinCEN files have clearly highlighted that the current environment gives too much away to the wrong side. Whether or not one condones the leaks, the industry should reflect on what they reveal about our fight against financial crime.

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