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Congressional Hearing on Terrorism Finance Probes Bank Secrecy Act Data Processing Effectiveness, Lack of Beneficial Ownership Transparency, and Potential BSA and Patriot Act Amendments

On April 27, 2017, I attended a Congressional hearing on “Safeguarding the Financial System from Terrorist Financing,” held by the House Committee on Financial Services’ Subcommittee on Terrorism and Illicit Finance (the “**Subcommittee**”). The sole witness was Mr. Jamal El-Hindi, Acting Director of the Financial Crimes Enforcement Network (**FinCEN**), a bureau of the U.S. Department of the Treasury charged with protecting the financial system from money laundering, terrorism financing and other illicit activities.

The hearing’s purposes were to examine the methods and efficacy of FinCEN data collection, processing and information sharing and whether the Bank Secrecy Act (**BSA**) and USA PATRIOT Act should be amended to improve FinCEN’s anti-money laundering (**AML**) and counter-terrorism financing (**CFT**) capacities and performance.

In this brief MassPoint update, I highlight BSA data collection and usage numbers and some of the questions and issues that appeared to be of particular interest and/or concern to Congress members in attendance, taking into account the nature and frequency of the questions asked, the tone of questions, and related requests for additional or clarifying information from FinCEN.

This Update may be amended following the release of the official hearing transcript. For additional analysis and information, or for details pertaining to the charts below, please write to habelhady@masspointpllc.com.

How FinCEN Executes its Mission

- Implementing, administering, and enforcing the BSA.
- Supporting law enforcement, intelligence and regulatory agencies through the sharing and analysis of BSA information.
- Serving as the Financial Intelligence Unit (FIU) for the United States.
- Building international cooperation and technical expertise among the global network of FIUs.

*Extracted from Mr. El-Hindi’s testimony.

THE NUMBERS: BSA DATA COLLECTION, PROCESSING AND SHARING

FinCEN’s Electronic Database

In 2014, FinCEN completed an Information Technology modernization program. According to Mr. El-Hindi, FinCEN achieved the following “five significant goals” through the modernization.

1. FinCEN assumed responsibility for maintaining BSA data in a FinCEN-based system;
2. moved from paper to electronic BSA report filings
3. developed a new system for “approved law enforcement and regulatory partners to access BSA data”¹
4. “strengthened IT security through implementation of two-factor authentication and other mechanisms,”² and
5. “developed foundational advanced analytics capabilities to enhance FinCEN’s ability to exploit BSA data.”³

BSA Filings and FinCEN Database Usage

FinCEN maintains “over 200 million” BSA filings in its electronic database.⁴ FinCEN receives “an average of roughly” 55,000 new financial institution BSA filings each day from more than 80,000 financial institutions and 500,000 individual foreign bank account holders.⁵ Over 10,000 law enforcement and government parties have access to FinCEN’s BSA database (using the search tool FinCEN Query). These approved users conduct approximately 30,000 daily searches.⁶

SNAPSHOT: FINCEN DATA COLLECTION, USAGE, AND INTELLIGENCE CYCLE⁷

BSA DATA FILINGS

200,000,000

BSA Filings Maintained by FinCEN

55,000

New Financial Institution Filings on Average Each Day

BSA DATA FILERS**

80,000

Financial Institution Filers

500,000

Individual Foreign Bank Account Holder Filers

(**Mr. El-Hindi’s testimony indicated that filings “come from more than” the numbers of financial institution and individual foreign bank account filers indicated above)

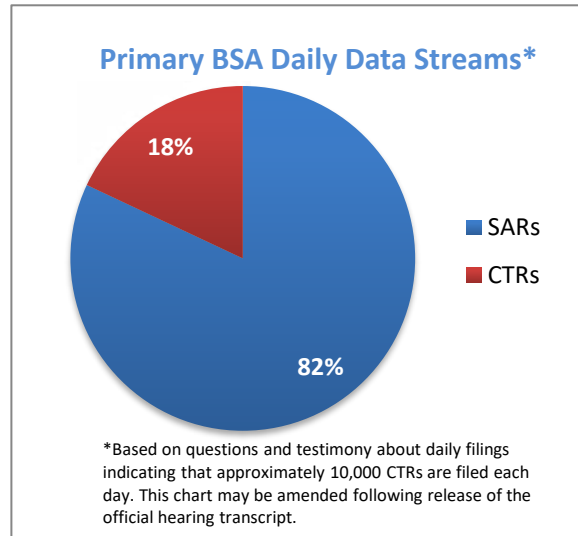
FINCEN DATABASE USERS AND USAGE

10,000

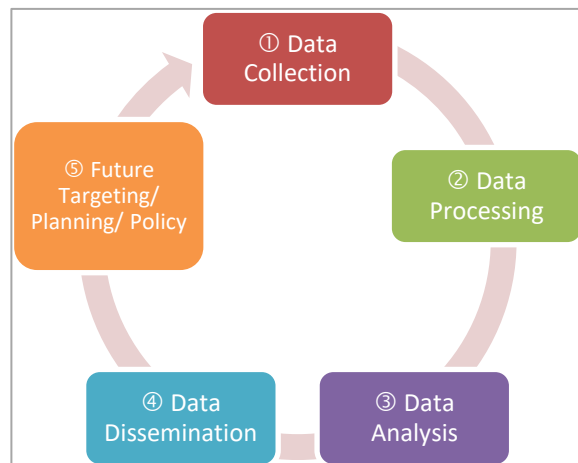
Law Enforcement and Government Users

30,000

Daily Searches of BSA Data (through FinCEN Query)



FinCEN Financial Intelligence Cycle***



***Based on written and oral testimony.

CONGRESS MEMBERS' QUESTIONS AND ISSUES OF INTEREST/CONCERN: SELECT HIGHLIGHTS

Capacity to Process and Act Upon Voluminous BSA Data Collected and Maintained by FinCEN

Several Congress members appeared to be interested in and concerned about the capacity of FinCEN and non-U.S. users of FinCEN's BSA data to process and effectively act upon the voluminous data collected and maintained by FinCEN. Particular questions and areas of concern included the following (the names of Congress members who asked the questions described below are not provided here but are on file).

▪ **How Many BSA Filings Turn Into "Actionable Intelligence"?**

Some Subcommittee members appeared to be interested in understanding (or skeptical as to) whether FinCEN had the necessary staff levels to meaningfully process the data it receives. One Congress member asked how many BSA filings "turn into actionable intelligence." Mr. El-Hindi did not provide a specific answer. The same Congress member and others asked additional questions that were designed to probe and assess the effectiveness FinCEN's data collection, sharing, and dissemination processes, as discussed below.

▪ **FinCEN Staffing Capacity, National Security Implications**

Several Congress members asked whether FinCEN had adequate staff to effectively process the vast amounts of data it receives. One Congress member asked how many persons FinCEN had on staff to process BSA data. Another asked about the number of personnel vacancies and steps that FinCEN was taking to fill open vacancies. In response to these questions, Mr. El-Hindi indicated that FinCEN had 70 "intelligence" staff members tasked with processing BSA data. He also stated that FinCEN had 70 personnel vacancies, half of which were in "active recruitment" or "selection" stages. Mr. El-Hindi also indicated, in response to a specific question, that the process of filling FinCEN roles in active or selection recruitment stages is prolonged by security clearance investigations (which could, said Mr. El-Hindi, take up to one year to complete). One Congress member, who framed the lack of adequate or full staffing levels as a "national security" issues, suggested that legislation or other action might necessary to "fast track" FinCEN security clearances.

Quality of BSA Filings and Searches

▪ **Quality of BSA Filings, "Defensive" Filings**

Some Congress members probed the quality of BSA filings. For example, one Congress member questioned whether financial institutions and other BSA filers made "defensive" filings (interestingly, the Congress member analogized to cases of healthcare providers who order procedures of questionable necessity in order to avoid future liability). Notably, Mr. El-Hindi responded that FinCEN had no "evidence" of defensive BSA filings.⁸

▪ **Mechanics and Quality of FinCEN Searches by Approved Users; "Glorified Google Searches"?**

One Congress member inquired about the quality and mechanics of FinCEN database searches performed by approved users (the 10,000 law enforcement and other government parties with access to conduct searches). More specifically, the Congress member wanted to know how, *in practice*, the 30,000 average daily searches of FinCEN's database are conducted: are they "glorified Google searches?," the member asked. Specific information was not provided in response to this line of questioning, and the Congress member asked Mr. El-Hindi to provide additional details as to the mechanics of searches conducted by the 10,000 "stakeholders."

Information Sharing and Safe Harbor, Privacy and Civil Liberties

▪ **Information Sharing With and Within Financial Services Sector, Patriot Act § 314(b) Information Sharing and Safe Harbor**

A few Congress members asked questions about whether the financial services sector—specifically banks and other BSA data filers—had sufficient access to BSA data filed by other financial institutions/filers and information from law enforcement generally. One Congress member appeared to be concerned that information sharing among financial sector participants and between the financial sector and law enforcement was insufficient.

Another member with similar concerns (or leanings toward greater information sharing) expressed interest in expanding safe harbor protection for financial services participants sharing information with peers. Appearing to favor greater information flows from law enforcement to the financial services sector, one Subcommittee member stated that the financial services sector “needs to know how information is used” by law enforcement and noted FinCEN’s role as “a bridge” between the financial sector and law enforcement.

Other questions echoed apparent concerns that financial institutions do not currently have enough access to other financial institutions’ or law enforcement information, including a high-ranking member who stated that two-way information exchanges and more “proactive” engagement would yield better results. Mr. El-Hindi indicated that further information exchanges would be helpful.

▪ **Privacy and Civil Liberties Concerns, Patriot Act 314(b) Information Sharing and Safe Harbors**

Some Congress members raised concerns about the privacy and civil liberties implications of data collection and information sharing, particularly pursuant to Patriot Act § 314(b). One Subcommittee member stated that he was concerned about “the Bill of Rights,” and wanted to know the degree to which § 314(b) requests are “targeted” (to avoid overbroad requests for information about accounts and transactions).

Beneficial Ownership Transparency Generally and in Real Estate Transactions; Geographic Targeting Orders

▪ **Beneficial Ownership Transparency, Scope and Findings Related to Real Estate Geographic Targeting Orders**

The issue of the lack of beneficial ownership transparency, both generally and in the context of real estate transactions, was raised by several Congress members. One Subcommittee member asked if beneficial ownership should be disclosed (or required) at the point of company formation. Mr. El-Hindi indicated that FinCEN would be in favor of such a measure.

The same member, along with others, highlighted the lack of beneficial ownership information in real estate transactions in which real property is acquired by legal persons like LLCs, with the identity of beneficial owners shielded. They also questioned the scope, duration and efficacy of FinCEN’s Geographic Targeting Orders (GTOs) requiring U.S. title insurance companies “to identify the natural persons behind shell companies used to pay ‘all cash’ for high-end residential real estate in six major metropolitan areas.”⁹

One Subcommittee member raised doubts about the value of requiring only title insurance companies to collect beneficial ownership information, and asked if title insurance was mandatory in the all cash transactions covered by GTOs. The member also stated that variances in state laws applicable to real property transactions and ownership are relevant to assessing the sufficiency of GTOs. Congress should, the member commented, “take a look” at the issue of anonymous real property ownership.

One high-ranking and high-profile Congress member suggested that GTOs be extended geographically and temporally, to apply nationwide and permanently. Implicitly endorsing a geographic expansion of GTOs, another Subcommittee member noted that “bad actors” will acquire real estate in cities not covered by current GTOs. The same member noted with astonishment FinCEN’s finding that “that about 30 percent of the transactions covered by the GTOs involve a beneficial owner or purchaser representative that is also the subject of a previous suspicious activity report.”¹⁰

A third Subcommittee member asked if the United States was an outlier among nations, for its lack of laws and regulations requiring the disclosure of beneficial ownership on more routine and widespread bases (Mr. El-Hindi indicated that he did not have that information available at the time). The same member asked if the United States, like other countries, should adopt a cadaster system wherein a cadaster (a register) of real property beneficial ownership and other information be collected and maintained, and be readily accessible.

KEY TAKEAWAYS

The following are my key takeaways from the hearing. Some of these takeaways are evident from the information provide above and others incorporate nuance, issues background, and hearing atmospherics that may not be evident from the hearing descriptions provided above.

▪ **BSA Data Quality and Processing, Burden on Financial Services Sector**

It is fairly clear that a not insignificant number of Subcommittee members—mostly Republicans—have an interest in probing the degree to which the current BSA reporting and processing framework is *efficiently and effectively* serving its purpose of protecting the financial system from illicit activity. The same Subcommittee members also appear to be concerned that the current BSA reporting and information sharing framework is overly burdensome for financial services sector participants—particularly banks—including because information sharing is insufficient and/or insufficiently protected.

The tone and content of many of the questions about the capacity of FinCEN and other law enforcement and government users of BSA data to meaningfully process and act upon BSA data appeared to reflect a range of attitudes on the part of Congress members: from reflexive curiosity to considered skepticism to readiness to take action to improve the current framework.

It would not be surprising to see, in the current or next Congress, legislation introduced to amend the BSA or Patriot Act (for example, to enhance information sharing through more favorable safe harbors for the financial services sector) or other measures to ensure that FinCEN is adequately staffed and that other law enforcement and government parties with access to FinCEN’s database have the capacity to skillfully use BSA data.

▪ **Beneficial Ownership Transparency**

Concerns about the lack of beneficial ownership transparency are mounting. In prior sessions of Congress, legislation was introduced to require the disclosure of beneficial ownership of corporate entities generally and in the context of real estate transactions specifically. It is likely, given the degree and widespread nature of beneficial ownership transparency concerns--shared by, *e.g.*, Congress members; Executive Branch agencies including FinCEN; multilateral bodies such as the Financial Action Task Force (FATF); some financial services sector participants; and, anti-corruption, transparency, and integrity advocates—that additional legislation requiring some disclosure of beneficial ownership will be re-introduced in the current or the next Congress.

With respect to real estate, FinCEN may also come under pressure to, or may itself, expand the scope and/or duration of GTOs. Other measures to promote beneficial ownership transparency at the federal or state government levels may also materialize, particularly in connection with high-end real estate transactions.

NOTES

¹ Statement of Jamal El-Hindi, Acting Director, Financial Crimes Enforcement Network, United States Department of the Treasury, Before the United States House of Representatives Committee on Financial Services Subcommittee on Terrorism and Illicit Finance, April 27, 2017 (“El-Hindi Statement”).

² *Id.* at 3.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ The information depicted herein derives from the El-Hindi Statement and my notes of the exchanges between Congress members and Mr. El-Hindi at the April 27 hearing. Information derived from my notes may be amended following the release of the official hearing transcript.

⁸ The response is notable as Suspicious Activity Reports (SAR), where circumstances justifying their filing are not clear cut, incorporate subjectivity. It is known that financial institutions and other SAR filers have at various times engaged in defensive filing to avoid later criticism or liability. The Financial Services Industry and the U.S. Government have acknowledged this issue before, including in Government Accountability Office Reports and SAR Activity Reports published under the auspices of the Bank Secrecy Act Advisory Group. Presumably, Mr. El-Hindi was referring to particular time periods or data sets from which evidence of defensive filings could not be extracted.

⁹ FinCEN, “[FinCEN Renews Real Estate ‘Geographic Targeting Orders’ to Identify High-End Cash Buyers in Six Major Metropolitan Areas](#),” February 23, 2017.

¹⁰ *Id.*