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High Risk Foreign Banks Beware:
Expanded Use of § 311 Projected in FinCEN 2020 Budget

Banks serving clients in the many countries the U.S. views as high risk for money laundering should be aware that the U.S. Financial Crimes Enforcement Network ("FinCEN"), a bureau of the U.S. Department of the Treasury, plans to expand its use of "special measures" to fight money laundering and terrorist financing. Per its 2020 budget and performance report, FinCEN expects by 2022 an increase of 30% in its use of "special measures," including those authorized by § 311 of the USA PATRIOT Act ("§ 311").[1]

Section 311 is a powerful tool that authorizes FinCEN to take "special measures" against foreign jurisdictions, financial institutions, or international transactions to protect the U.S. financial system from money laundering and terrorist financing.[2]

The first four § 311 special measures are seldom-used; FinCEN has imposed them only twice since the enactment of the USA PATRIOT Act in 2001. These measures authorize FinCEN to require U.S. financial institutions to undertake additional due diligence regarding particular transactions. While it is possible that FinCEN plans to increase use of these provisions to improve its data collection efforts in the fight to disrupt financial crime and terrorism, it is more likely that FinCEN means to increase its imposition of the harshest § 311 special measure, the so-called "fifth special measure," which it has levied against financial institutions some 17 times since enactment of the USA PATRIOT Act. The "fifth special measure" authorizes FinCEN to "prohibit, or impose conditions upon, the opening or maintaining in the United States of a correspondent account… by any domestic financial institution or domestic financial agency for or on behalf of a foreign banking institution" it deems to of primary money laundering concern.[3]

Technically, as provided by § 311, the fifth special measure "may be imposed only by regulation." This language implicates the informal rulemaking process of the Administrative Procedure Act. The U.S. rulemaking process requires the publication of factual findings and a proposed rule so that interested parties – including the targeted institution – can challenge the agency's proposed action before it becomes effective.

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[1] https://home.treasury.gov/system/files/266/12.-FINCEN-FY-2020-CJ.pdf. In its Congressional Budget Justification and Annual Performance Report and Plan" for FY 2020, FinCEN reported that it "anticipates an increase of 30 percent in the number of completed 311 actions and Geographic Targeting Order actions by FY 2022."

[2] 31 U.S.C. § 5318A.

[3] 31 U.S.C. § 5318A(a)(1).

In practice, however, FinCEN's announcement of a Notice of Proposed Rulemaking forces the targeted institution into exile from the U.S. financial system, as all U.S. banks immediately sever ties with it. This typically drives the targeted institution into liquidation within days of the announcement, even if FinCEN never issues the actual rule. Indeed, FinCEN sometimes withdraws the proposed rule when the bank shuts down (and the so-called threat to the U.S. system is eliminated), so the merits of FinCEN's action are never litigated.

It is difficult for the targeted institution to dispute the accusations for the further reason that § 311 is unique in the notice-and-comment rulemaking process, as it allows FinCEN to use "classified information" in promulgating a rule, i.e., "information which… is, for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution."[4] This statutory authorization creates tension with a large body of U.S. case law that otherwise requires agencies to disclose for public comment the most critical factual information underlying a proposed rule.

To be sure, FinCEN's declaration that it anticipates a 30% uptick in its use of special measures may refer to Geographic Targeting Orders (orders that require enhanced reporting by U.S. institutions of transactions conducted in particular jurisdictions) – which were also referenced in the proposal – or to the seldom-used information-gathering tools included in § 311. It is a good bet, however, that FinCEN will target institutions it views as a threat to the U.S. financial system with the harshest available measures under § 311.

Foreign banks must factor FinCEN's potential increase in § 311 actions into their compliance risk assessments. Banks should be responsive and prompt in answering inquiries from U.S.-located banking partners – particularly if the questions focus on matters of interest to the U.S. government, such as North Korea, Iran, or Venezuela. Any request that even hints at a subject of interest to the U.S. government should be treated seriously, and the foreign bank should take all possible proactive steps to evidence its commitment to strong anti-money laundering and sanctions-related compliance controls. Foreign banks should also quickly bring to the attention of their own regulators any issues they discover relating to these countries or to material anti-money laundering or counter-terror finance risk.

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[4] 18 U.S.C. § 798(b)