

## FinCEN: 2020 Year in Review

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### **FinCEN Developments in 2020 Signal Coming Changes to the AML Regime, Continue to Alert Financial Institutions to Evolving Threats, and Emphasize Individual Accountability for AML Failures**

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#### **SUMMARY**

Over the course of 2020, three major themes emerged from actions by FinCEN. First, FinCEN signaled its receptiveness to potentially significant modifications to the anti-money laundering/countering the financing of terrorism (“AML/CFT”) regime. These efforts included publication of an Advance Notice of Proposed Rulemaking (“ANPRM”) intended to modernize aspects of the regime and provide financial institutions with greater flexibility in allocating resources, and a notice of proposed rulemaking (“NPRM”) that would close AML regulatory gaps for convertible virtual currencies (“CVCs”) and digital assets with legal tender status (“LTDAAs”). Second, FinCEN showed a willingness to clarify important aspects of the AML/CFT regime by issuing guidance in areas such as enforcement, customer due diligence (“CDD”) and customer identification program (“CIP”) requirements. Third, FinCEN showed increased diligence in advising financial institutions and the public of the evolving threats of illicit finance. The majority of the 2020 advisories focused on financial crime associated with the COVID-19 pandemic. FinCEN also issued a supplement to its 2014 advisory on human trafficking and related activity and an advisory on ransomware and the use of the financial system to facilitate ransom payments. Finally, FinCEN brought two enforcement actions against individuals, suggesting that individual accountability for BSA/AML failures continues to be a priority.

With the enactment of the Anti-Money Laundering Act of 2020 (“AMLA”)—DIVISION F of the National Defense Authorization Act for fiscal year 2021—we expect even greater FinCEN activity in 2021 and beyond. The AMLA is discussed in greater detail in our December 17, 2020 client [memo](#).

## A. MODERNIZING AND CLARIFYING ASPECTS OF THE AML/CFT REGIME

Perhaps most notable in 2020 was FinCEN's receptiveness to potentially significant modifications to the AML/CFT regime, and the publication of guidance clarifying various aspects of the regime's requirements.<sup>1</sup> Those developments ranged from the ANPRM on the definition of an "effective and reasonably designed" AML program, and the NPRM related to CVCs and LTDAs, to guidance addressing, among other things, enforcement decisions and conducting due diligence in different scenarios.

### 1. Enhancing the Effectiveness of AML Programs

Although the precise contours vary depending on the type of financial institution at issue, all financial institutions subject to an AML program requirement under FinCEN regulations must maintain an AML program that is "reasonably designed" to assure compliance with the Bank Secrecy Act ("BSA") (or in some cases to prevent the financial institution from being used to facilitate money laundering or the financing of terrorist activities). For some financial institutions, such as money services businesses and futures commission merchants, this requirement is explicit in FinCEN's regulations.<sup>2</sup> For others, such as banks, it instead stems from the requirement in FinCEN's regulations that the financial institution comply with its Federal functional regulator's regulations governing AML programs.<sup>3</sup>

On September 16, 2020, having taken into account recommendations from the BSA Advisory Group's Anti-Money Laundering Effectiveness Working Group, FinCEN issued an [ANPRM](#) soliciting public comment on several potential modifications aimed at "moderniz[ing] the regulatory regime to address the evolving threats of illicit finance, and provide financial institutions with greater flexibility in the allocation of resources, resulting in the enhanced effectiveness and efficiency of anti-money laundering programs." Namely, FinCEN sought comment on the appropriateness of amending its regulations to impose an explicit requirement that financial institutions maintain "effective and reasonably designed" AML programs.<sup>4</sup> FinCEN proposed that an "effective and reasonably designed program" is one that: (1) assesses and manages risk as informed by a financial institution's own risk assessment process, including consideration of AML priorities that FinCEN, as part of the ANPRM, is considering whether to periodically issue; (2) provides for compliance with BSA requirements; and (3) provides for the reporting of information with a high degree of usefulness to government authorities." As part of the ANPRM, FinCEN also sought comment on whether to impose an explicit regulatory requirement that financial institutions conduct a risk assessment.

FinCEN received 111 comments on the ANPRM, suggesting significant interest in helping to identify and frame issues for FinCEN to consider in developing any future Notice of Proposed Rulemaking. The AMLA includes several provisions germane to the ANPRM, so it is unclear whether FinCEN will proceed with the ANPRM, rescind the ANPRM, or take some other action. As one example, the AMLA requires the Secretary of the Treasury to consider specific factors in prescribing the minimum standards for AML/CFT programs. While several of those considerations are consistent with the ANPRM, others seem to go beyond FinCEN's proposal, including that AML/CFT programs involve the expenditure of private funds for a public benefit and

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the importance of financial inclusion for the underbanked. As a second example, as part of the ANPRM, FinCEN sought comment on whether the FinCEN Director should issue a list of national AML priorities every two years for integration into financial institutions' risk assessment processes. The AMLA requires the Department of the Treasury to establish national priorities for AML/CFT and financial institutions to incorporate those priorities into their risk-based programs.

Regardless, FinCEN's intended purpose in issuing the ANPRM – enhanced effectiveness and efficiency of AML programs – is consistent with the new purposes of the AMLA. In our view, a key to achieving that purpose, whether through modifications stemming from the ANPRM or future rulemakings necessitated by the AMLA, will be coordination with Federal functional regulators to ensure that any amendments are complementary, and not additive, to existing regulatory requirements.

### **2. Notice of Proposed Rulemaking (“NPRM”) Pertaining to Certain Convertible Virtual Currency and Digital Asset Transactions**

On December 23, 2020, FinCEN published a [Notice of Proposed Rulemaking \(the “December NPRM”\)](#) proposing to impose on banks and MSBs recordkeeping and reporting requirements with respect to certain transactions in convertible virtual currency (“CVC”) and digital assets with legal tender status (“LTDA”). The proposed recordkeeping requirements are similar to the recordkeeping and travel rule regulations pertaining to funds transfers. The proposed reporting requirements are similar to the existing requirements to file currency transaction reports (“CTRs”), but also include a requirement to report counterparty information. Simultaneously, FinCEN issued [Frequently Asked Questions \(“FAQs”\)](#) aimed at clarifying aspects of the December NPRM.

FinCEN afforded 15 days for the public to comment on the December NPRM, reasoning that the Administrative Procedure Act's mandate that the public be afforded a “meaningful opportunity” to comment does not apply because the rule involves a “foreign affairs function” or “good cause” with respect to which “notice and public procedure” is “impracticable, unnecessary, or contrary to the public interest.” By the close of the 15-day comment period on January 7, 2021, FinCEN had received approximately 7,500 comments on the proposal. One week later, on January 14, 2021, in light of both the “substantial response from commenters during the original comment period” and the enactment of the AMLA on January 1, 2021, FinCEN announced a new [NPRM](#) (the “January NPRM”) in which FinCEN identified additional statutory authority under the AMLA for the proposed rule, supplied additional information concerning the proposed form of reporting, and provided extended comment periods that varied by aspect of the proposed rule, but otherwise effected no substantive changes to the December NPRM. On January 28, FinCEN further extended the comment period on all aspects of the proposed rule to March 9, 2020.

#### **a. Impact of AMLA**

When the December NPRM was issued, FinCEN relied on various provisions in the BSA for authority to issue the NPRM, several of which were modified by the AMLA. These included the provision empowering

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FinCEN to prescribe by regulation “similar material” that qualifies as “monetary instruments.”<sup>5</sup> In the December NPRM, FinCEN proposed prescribing that CVC and LTDA qualify as “similar material,” essentially because they, like coins and currency, can function as money. According to FinCEN, this determination permits Treasury to promulgate reporting requirements for transactions in CVC and LTDA.<sup>6</sup> The AMLA amended the meaning of “monetary instruments” in the BSA to include “as [Treasury] shall provide by regulation, value that substitutes for any monetary instrument” that is otherwise within that meaning. Accordingly, in the January NPRM, FinCEN relies on this new authority under the AMLA, instead of the “similar material” determination made in the December NPRM, to prescribe by regulation that CVC and LTDA are both “value that substitutes for currency” and, therefore, “monetary instruments” under the BSA. FinCEN also initially relied on the general provision in the BSA empowering Treasury to require financial institutions to “maintain appropriate procedures” to comply with the BSA as authority for the new reporting requirements, as well as for the recordkeeping requirements.<sup>7</sup> The AMLA amended that provision to explicitly encompass the collection and reporting of information. Accordingly, in the January NPRM, FinCEN relies on that provision, as amended, as authority for both the proposed reporting and the proposed recordkeeping requirements.

### **b. CTR-Like Reporting Requirements**

As described in the December NPRM, FinCEN would effectuate the proposed reporting requirements by adding a new provision to its rules, 31 C.F.R. 1010.316 (“Section 1010.316”), and amending various existing CTR-related provisions in those rules to encompass Section 1010.316. The proposed Section 1010.316 would include FinCEN’s determination that, for purposes of Section 1010.316 only, CVC and LTDA are “monetary instruments,” thus permitting Treasury to promulgate reporting requirements for transactions in CVC and LTDA. The December NPRM and the January NPRM each make clear that the determination in Section 1010.316 has no impact on the meaning of “monetary instruments” as used elsewhere in FinCEN’s rules, including in relation to the existing CTR requirements. Based on that determination, FinCEN proposes imposing a requirement in Section 1010.316 that each bank or MSB file a report of each transaction involving a financial institution in CVC or LTDA with a value of more than \$10,000, and include in the report “the name and address of each counterparty, and such other information as the Secretary may require.”<sup>8</sup> FinCEN then proposes exempting from this reporting requirement a transaction in CVC or LTDA “that is between the financial institution’s customer and a counterparty whose account is held at another financial institution regulated under the BSA, or at a foreign financial institution” unless that foreign financial institution is located in a jurisdiction identified by FinCEN on a proposed “Foreign Jurisdictions List.” The mandatory statutory exemptions<sup>9</sup> from CTR filing requirements applicable to banks would extend to Section 316 transactions,<sup>10</sup> while neither the exemption for MSBs (and other non-bank financial institutions) from the obligation to file a CTR with respect to a transaction in currency between the MSB (or other non-bank financial institution) and a commercial bank<sup>11</sup> nor FinCEN’s discretionary exemptions would extend to such transactions.<sup>12</sup>

FinCEN would also amend various provisions in FinCEN's rules that "complement" the existing CTR reporting requirement to include in their scope Section 1010.316, including requirements pertaining to identification verification,<sup>13</sup> recordkeeping,<sup>14</sup> and procedure,<sup>15</sup> as well as to structuring<sup>16</sup> and aggregation.<sup>17</sup>

### **c. Recordkeeping- and Travel Rule-Like Requirements**

FinCEN's existing recordkeeping rules require banks and nonbank financial institutions to collect and retain information related to funds transfers and transmittals of funds in amounts of \$3,000 or more.<sup>18</sup> A complementary FinCEN rule—the travel rule—requires banks and nonbank financial institutions to transmit information on certain funds transfers and transmittals of funds to other banks and nonbank financial institutions participating in the transfer or transmittal.<sup>19</sup>

The December NPRM proposes adding a subsection to one of the recordkeeping provisions that establishes new requirements similar to the existing recordkeeping rules and travel rules for certain transactions in CVC and LTDA. The new provision would apply to transactions involving a bank or MSB in CVC or LTDA with a value of more than \$3,000, and specifies transaction-related information that must be retained, including the name and physical address of each counterparty.<sup>20</sup> It would also require a bank or MSB to verify the identity of its customer engaging in a transaction before concluding the transaction. Since FinCEN did not rely as authority for this provision on the provision in the BSA empowering it to promulgate reporting requirements with regard to "monetary instruments," the statutory exemptions, referenced above, are inapplicable. Only one exemption applies to transactions within the scope of the new provision: a transaction in CVC or LTDA that is between the bank's or MSB's customer and a counterparty whose account is held at a financial institution regulated under the BSA, or at a foreign financial institution, except for a foreign financial institution from a country on FinCEN's proposed "Foreign Jurisdictions List." This exemption should encompass the banks that are within the scope of the statutory exemption referenced above, but that exemption is inapplicable because it pertains to reporting.

### **3. Proposed Amendments to the Recordkeeping and Travel Rules**

On October 23, 2020, FinCEN and the Board of Governors of the Federal Reserve System (the "Federal Reserve Board") invited comment on their [proposed amendments](#) to the BSA's recordkeeping and travel rules. The recordkeeping rule was issued under the two agencies' joint authority in 1995 and, as indicated above, requires banks and nonbank financial institutions "to collect and retain information related to funds transfers and transmittals of funds in amounts of \$3,000 or more."<sup>21</sup> At the same time, FinCEN, under separate authority, issued the travel rule. As indicated above, the travel rule requires banks and nonbank financial institutions to transmit information on certain funds transfers and transmittals of funds to other banks and nonbank financial institutions participating in the transfer or transmittal.<sup>22</sup> The agencies' proposed amendments would lower from \$3,000 to \$250 the threshold under the recordkeeping and travel rules for international transactions, but leave intact the present \$3,000 threshold for domestic transactions.<sup>23</sup> According to the agencies, the reduction in threshold for international transactions is appropriate when the

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value of the data is balanced against the burden imposed. More specifically, the agencies state in the proposal that malign actors are using smaller-value cross-border wire transfers to facilitate illicit activity, and increased recordkeeping and reporting concerning such transactions would be valuable to law enforcement while the associated burden on financial institutions and the payments system is likely to be low.

In addition, for purposes of determining what constitutes a “payment order” and a “transmittal order,” the agencies propose to define “money” to make “explicitly clear that both payment orders and transmittal orders include any instruction by the sender to transmit [convertible virtual currency] or any digital assets having legal tender status to a recipient.”<sup>24</sup> The agencies indicate that the new definition is appropriate because convertible virtual currency transactions present heightened illicit finance risk and given assertions that the recordkeeping and travel rules do not apply to such transactions because convertible virtual currency is not “money.” By adjusting the definition of “financial institution” in the BSA to encompass “value that substitutes for currency,” the AMLA, if enacted, would eliminate any doubt that certain virtual currency businesses are financial institutions for BSA purposes, including for purposes of the recordkeeping and travel rules.

FinCEN received 2,881 comments on the proposal, many of which opposed the proposed rule, noting concerns about intrusions on financial privacy in the United States and around the world, and imploring the agency to consider privacy rights in its cost-benefit analysis. As with the ANPRM on effectiveness, while the proposed amendments to the recordkeeping and travel rules are consistent with the AMLA, it is unclear whether FinCEN and the Federal Reserve will proceed with the proposed amendments, rescind them, or take some other action. The December NPRM and January NPRM appear to have no direct relevance to these proposed amendments to the recordkeeping and travel rules.

#### **4. Rule Subjecting Banks with No Federal Functional Regulator to BSA Requirements**

On September 15, 2020, FinCEN issued a [final rule](#) requiring “[b]anks that lack a Federal functional regulator, including, but not limited to, state-chartered non-depository trust companies, non-federally insured credit unions, non-federally insured state-chartered banks and savings and loan or building and loan associations, private banks, and international banking entities[,]” to establish AML programs.<sup>25</sup> The rule removes an exemption applicable to such banks since April 2002 and fills a gap that FinCEN determined could be exploited by bad actors; it also addresses 2016 FATF recommendations.<sup>26</sup> Simultaneously, FinCEN extended CIP and beneficial ownership requirements to banks not already subject to those requirements. The rule was effective November 16, 2020, with a March 15, 2021 compliance date. FinCEN estimates that over 550 institutions will be impacted by the new AML program requirement and beneficial ownership requirement. Fewer than 50 will be impacted by the new CIP requirements because FinCEN previously implemented a CIP rule for credit unions, private banks, and trust companies that do

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not have a Federal functional regulator. If the AMLA is enacted, presumably this new rule, just like other regulations implementing the BSA, will be included in one or more of the reviews mandated by the AMLA.

### 5. Statement on Enforcement of the BSA

On August 18, 2020, FinCEN issued a [statement](#) explaining its approach to enforcing the BSA.<sup>27</sup> In the statement, FinCEN outlines the various actions that it has authority to take when it identifies an “actual or possible” violation of the BSA—no action, a warning letter, equitable remedies, settlement (with remedial undertakings and/or civil money penalties), non-consensual civil money penalties, and criminal referral—and identifies ten factors that FinCEN considers in evaluating which action is appropriate in any given case. The ten factors, which FinCEN indicates are non-exclusive, align in many (but not all) respects with the U.S. Department of Justice’s factors to be considered in prosecuting business organizations.<sup>28</sup> Several aspects of the statement are notable. First, neither the factors nor the statement more generally references willfulness and FinCEN’s enforcement authority generally extends only to “willful” violations of the BSA. Second, FinCEN indicates in the statement that a financial institution’s timely and voluntary disclosure of violations to *FinCEN* matters, not whether such disclosure was made to authorities other than FinCEN. Third, consistent with recent public statements made by other government agencies, FinCEN indicates in the statement that it “will not treat noncompliance with a standard of conduct announced solely in a guidance document as itself a violation of law.” Finally, the statement provides a framework heretofore lacking for financial institutions to rely on in fashioning responses to anticipated or proposed FinCEN enforcement actions.<sup>29</sup>

### 6. FAQs on CDD Requirements

On August 3, 2020, in consultation with the Federal functional regulators, FinCEN issued [responses to several FAQs](#) on requirements under FinCEN’s CDD rule. The FAQs follow prior FAQs issued in July 2016 and August 2018 and address questions arising with respect to the need to: (1) collect information about customer expected activity or information about a financial institution customer’s customer, or to conduct media searches; (2) use a specific customer risk rating methodology or automatically categorize as “high risk” products and customer types based on government publications; and (3) update customer information on a specific schedule. With respect to each, FinCEN indicates that there is no categorical requirement. Rather, the measures a financial institution needs to take are dictated by the institution’s assessment of the customer’s risk and the institution’s policies, procedures and processes.<sup>30</sup> The AMLA requires the Secretary of the Treasury (the “Secretary”) to issue a revised CDD rule to bring it into alignment with the AMLA’s beneficial ownership provisions. Presumably, the status of CDD rule guidance, including the FAQs and further guidance discussed below, will be clarified in connection with issuance of the revised CDD rule.

### 7. Order Granting Exemption from Certain CIP Requirements for Premium Finance Loans

On October 5, 2020, FinCEN and the Federal banking agencies announced the issuance of an [order](#) exempting from the requirements of the agencies’ respective CIP rules loans extended by banks and their

subsidiaries to customers to facilitate the purchase of property and casualty insurance policies (premium finance lending).<sup>31</sup> The order supersedes a September 2018 order granting such an exemption only with respect to commercial customers. Consistent with the applicable standard,<sup>32</sup> the agencies concluded that the exemption is consistent with (1) the BSA because of the low risk for money laundering activity and terrorist financing posed by premium finance loans and (2) safe and sound banking because of the low risk presented to institutions by such loans and the continued applicability of consumer protection laws. The agencies stressed that banks must “continue to comply with all other regulatory requirements,” including the filing of suspicious activity reports (“SARs”).

### **8. Joint Fact Sheet on BSA Due Diligence Requirements for Charities and Non-Profit Organizations**

On November 19, 2020, FinCEN and the Federal banking agencies issued a [joint fact sheet](#) to clarify how banks should apply a risk-based approach to charities and other non-profit organizations (“NPOs”), consistent with FinCEN’s CDD rule. Specifically, the statement clarifies there is neither a regulatory requirement in the CDD rule nor a supervisory expectation that banks employ unique, additional due diligence steps with respect to charities and NPOs. Rather, as with all their customers, banks must apply a risk-based approach to CDD in developing the risk profiles of charities and NPOs. Accordingly, the level and type of CDD should be commensurate with the risks presented by a particular charity or NPO relationship. Under this approach, some charities and NPOs may be high risk, while others may be lower risk. As an example, the statement observes that U.S. charities that operate and provide funds solely to domestic recipients generally present low TF risk, while those that operate abroad or provide funding to, or have affiliated organizations in, conflict regions, can present potentially higher TF risks. Finally, the statement recognizes that, in developing such a profile, banks may consider a wide variety of factors. The statement observes that charities and other NPOs are subject to federal and state reporting requirements and regulatory oversight, and that many adhere to voluntary self-regulatory standards and controls. According to the statement, while not required by the CDD rule, the collection of such information, as well as other information specified in the statement, may be “useful” for banks in determining a charity or other NPO customer’s risk profile.<sup>33</sup>

### **9. Joint Statement on BSA Due Diligence Requirements for Customers Who May Be Considered Politically Exposed Persons**

On August 21, 2020, FinCEN and the Federal banking agencies issued a [joint statement](#) clarifying how banks should apply a risk-based approach to politically exposed persons (“PEPs”)—a term that the statement indicates includes foreign individuals (not U.S. public officials) who are or have been entrusted with a prominent public function and their immediate family members and close associates—consistent with the requirements in FinCEN’s CDD rule.<sup>34</sup> According to the statement, “PEPs should not be confused with the term “senior foreign political figure” (“SFPF”) as defined under the BSA private banking regulation, a subset of PEPs.” The statement clarifies there is neither a regulatory requirement in the CDD rule nor a



supervisory expectation that banks employ unique, additional due diligence steps with respect to PEPs. Rather, as with all their customers, banks must apply a risk-based approach to CDD in developing the risk profiles of PEPs. Accordingly, the level and type of CDD should be commensurate with the risks presented by a particular PEP relationship. Under this approach, some PEPs may be high risk, while others may be lower risk.<sup>35</sup> The statement further clarifies that “[t]he CDD rule also does not require a bank to screen for or otherwise determine whether a customer or beneficial owner of a legal entity customer may be considered a PEP[.]” although a bank may deem it necessary to make such a determination to develop a customer risk profile. Finally, the statement recognizes that, in developing such a profile, banks may consider a wide variety of factors.

### **10. Guidance Regarding BSA Due Diligence Requirements for Hemp-Related Business Customers**

On June 29, 2020, FinCEN issued [guidance](#) for financial institutions on conducting due diligence for hemp-related businesses. The guidance is intended to “enhance the availability” and transparency of financial services for hemp-related businesses in compliance with federal law; it supplements a [2019 interagency statement](#) on providing financial services to customers engaged in hemp-related businesses, and neither replaces nor supersedes FinCEN’s [2014 guidance](#) on BSA expectations regarding marijuana-related businesses. The 2020 guidance explains that financial institutions may confirm a hemp grower’s compliance with applicable licensing requirements by either obtaining (1) a written attestation by the hemp grower that they are validly licensed or (2) a copy of such license. The extent to which a financial institution should seek additional information, such as crop inspection reports, updated attestations, and license renewals, depends on the risk presented by the customer. The 2020 guidance reiterates language from the 2019 statement indicating that because 2018 legislation removed hemp from the definition of marijuana in the Controlled Substances Act, financial institutions are not required to file SARs on customers solely because they grow or cultivate hemp. Instead, financial institutions should “follow standard SAR procedures and file a SAR if the financial institution becomes aware, in the normal course of business, of suspicious activity.” The 2020 guidance includes several “red flags” indicating potentially suspicious activity, and clarifies that, to the extent financial transactions of a hemp-related business are commingled with marijuana-related activities, a financial institution should apply FinCEN’s 2014 guidance, whereas if the proceeds of the businesses are kept separate or can be distinguished, the 2014 guidance applies only to the marijuana-related part of the business. Finally, the 2020 guidance emphasizes the need for both financial institutions and others to comply with applicable reporting obligations for currency or cash transactions over \$10,000.

### **11. Renewal of Real Estate Geographic Targeting Orders (GTOs) for 12 Metropolitan Areas**

On November 5, 2020, FinCEN [renewed, through May 4, 2021, its GTOs](#) requiring U.S. title insurance companies (including their subsidiaries and agents) to report purchases of residential real estate over \$300,000 by certain legal entities in specified locations.<sup>36</sup> The GTOs are designed to ferret out the natural

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persons behind shell companies used in all-cash purchases of real estate. FinCEN also simultaneously issued [responses to FAQs](#) regarding the GTOs. The GTOs cover certain counties within 12 U.S. metropolitan areas: Boston, Chicago, Dallas-Fort Worth, Honolulu, Las Vegas, Los Angeles, Miami, New York City, San Antonio, San Diego, San Francisco, and Seattle.<sup>37</sup> To qualify as a transaction that requires reporting, a purchase of residential property must: (1) have a purchase price of \$300,000 or more and be in any of the specified areas; (2) be by a legal entity; (3) be made without a bank loan or similar external financing; and (4) be made using, at least in part, a check, money order, funds transfer, or virtual currency.<sup>38</sup> The GTOs further detail reporting and record retention requirements.<sup>39</sup>

### 12. FinCEN Issues Fact Sheet on Section 314(b) of the USA PATRIOT Act

On December 10, 2020, FinCEN [issued](#) a fact sheet discussing voluntary information sharing under Section 314(b) of the USA PATRIOT Act.<sup>40</sup> The fact sheet highlights several ways in which participating in Section 314(b) sharing, which is voluntary, can “enhance compliance” with AML/CFT requirements and clarifies that financial institutions “subject to an [AML] program requirement under FinCEN’s regulations, and any *association* of such financial institutions” (emphasis added), are eligible to share information under Section 314(b). The statement further clarifies that, (1) to rely on the Section 314(b) safe harbor, a financial institution (or association) need only have a “reasonable basis” to believe that the information shared relates to activities that the institution suspects may involve possible terrorist financing or money laundering (including specified unlawful activities) and that the sharing is for an appropriate purpose under Section 314(b) and need not have specific information indicating that the shared information directly relates to terrorist activity or money laundering; (2) a financial institution (or association) may share information related to activities that may involve possible terrorist activity or money laundering even if such activities do not constitute a “transaction,” including “attempts” to engage in transactions and “attempts to induce others” to engage in transactions where the other conditions of Section 314(b) are met; and (3) Section 314(b) imposes no limitations on sharing of personally identifiable information under, or restrictions on the type or medium of information that can be shared in reliance on, the safe harbor where otherwise consistent with Section 314(b).

In addition, the statement confirms that the following entities may engage in information sharing covered by the Section 314(b) safe harbor: (1) an association of financial institutions formed by an entity that is not a financial institution under the BSA, such as a compliance services provider; and (2) an unincorporated association governed by a contract among members, all of whom are financial institutions. Finally, the statement explains how financial institutions (or associations) may participate in Section 314(b) sharing and clarifies with regard to joint SARs, while Section 314(b) does not relax the prohibition against SAR disclosures, “financial institutions participating in Section 314(b) that are considering filing or have filed a joint SAR may freely discuss the prospective or already filed joint SAR amongst themselves.” The fact sheet replaces the November 2016 fact sheet and rescinds 2009 guidance, FIN-2009-G002, and a 2012 administrative ruling, FIN-2012-R006.

### B. ADVISORIES AND NOTICES FOCUSED PRIMARILY ON FINANCIAL CRIME ASSOCIATED WITH COVID-19 AND CYBERCRIME

In 2020, FinCEN publicly issued nine advisories—a number not seen since 2014—three notices and one alert. Of the nine advisories, three focused on financial crime associated with the COVID-19 pandemic, one focused on cybercrime, and one focused on both. The alert also focused on a particular cyber scheme. The remaining advisories consisted of three updates to FATF’s list of jurisdictions with strategic deficiencies in their AML, CFT and (as of the July 2020 advisory) counter-proliferation financing regimes, and a supplement to FinCEN’s 2014 guidance on identifying and reporting human trafficking activities. The public notices—a form of guidance infrequently issued by FinCEN in the past—complement FinCEN’s COVID-19-related advisories. The alerts, seemingly a new form of FinCEN guidance, appear aimed at alerting the public and financial institutions to particular schemes and encouraging prompt reporting. While the uptick in advisories and related activity may be a function of COVID-19, it may also suggest that FinCEN is endeavoring to be more diligent in advising financial institutions (and the public) of evolving threats of illicit finance.

#### 1. COVID-19 Advisories and Notices

FinCEN’s COVID-19-related advisories addressed: (1) [medical scams](#), including (a) fraudulent cures, tests, vaccines, and services (e.g., home sanitizing services or test kits), (b) non-delivery scams, in which a customer pays a company for goods (e.g., test kits, masks, drugs) the customer will never receive, and (c) price gouging and hoarding of medical-related items (e.g., face masks and hand sanitizer); (2) (a) [imposter scams](#), in which criminals impersonate legitimate organizations to offer fraudulent services, and (b) money mule schemes, in which a person, with or without knowledge, transfers illegally acquired money on behalf of or at the direction of another; (3) [malicious cyber activity and scams](#), including (a) those targeting vulnerabilities in remote applications and virtual environments, (b) targeted phishing campaigns, malware and extortion, and (c) business email compromise schemes; and (4) [unemployment insurance fraud](#), including (a) fictitious employer-employee fraud in which filers falsely claim they work for a legitimate company or create a fictitious company; (b) employer-employee collusion fraud, in which a filer receives payments while the employer continues to pay the employee reduced, unreported wages; (c) misrepresentation of income fraud, in which an individual returns to work and fails to report the income in order to continue to receive payments or claims higher wages than previously earned; (d) insider fraud, in which state employees use credentials to inappropriately access or change unemployment insurance claims; and (e) identity-related fraud, in which filers submit applications for unemployment insurance payments using stolen or fake identification.

On April 13, 2020, FinCEN [republished certain FAQ](#) issued by the Small Business Administration, in consultation with the Department of the Treasury, addressing implementation of the Paycheck Protection Program (“PPP”) established by section 1101 of the Coronavirus Aid, Relief, and Economic Security Act.<sup>41</sup> With regard to whether a PPP loan to an existing customer constitutes a new account for CDD rule

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purposes, the FAQs state that a financial institution need not re-verify customer information that was previously verified. In the event the financial institution has not yet collected, certified or verified beneficial ownership information for an existing customer in accordance with the rule's requirements, the FAQs state that it need not do so for those customers applying for new PPP loans unless otherwise indicated by the financial institution's risk-based approach. These same principles apply with respect to collecting beneficial ownership information for owners holding a 20 percent or greater ownership in a PPP applicant business that is an existing customer. For new customers, the FAQs identify the information that should be collected from all natural persons with a 20 percent or greater ownership stake in the applicant business to satisfy BSA obligations. The FAQs are discussed in greater detail in our April 16, 2020 [client memo](#).<sup>42</sup>

On March 16, April 3, and May 18, 2020, FinCEN issued notices relating to the COVID-19 pandemic. These notices: (1) [implored](#) financial institutions to communicate concerns related to COVID-19 and remain alert to related illicit financial activity following the President's declaration of a national emergency;<sup>43</sup> (2) [updated](#) financial institutions on their continuing obligations under the BSA, beneficial ownership information collection requirements, and FinCEN's new online contact mechanism during COVID-19;<sup>44</sup> and (3) [notified](#) financial institutions of pertinent information related to reporting COVID-19-related criminal and suspicious activity and certain continuing BSA obligations.<sup>45</sup>

### 2. Ransomware

On October 1, 2020, FinCEN issued an [advisory](#) addressing: (1) the role played by financial intermediaries in ransomware payments; (2) trends and typologies of ransomware and associated payments, including (a) big game hunting schemes, (b) resource sharing among ransomware criminals, such as ransomware exploit kits, (c) "double extortion" schemes, which involve demanding a ransom for sensitive data that the criminal has removed and encrypted, and then threats to publish or sell the stolen data unless the ransom is paid, (d) use of anonymity-enhanced cryptocurrencies, including requiring or incentivizing victims to pay in such currencies, and (e) use of "fileless" ransomware, which involves malicious code written into a computer's memory; (3) ransomware-related "financial red flags," and (4) instructions on the reporting and sharing of information related to ransomware attacks. This advisory is discussed in greater detail in our October 2, 2020 [client memo](#).<sup>46</sup>

The October 1, 2020 advisory followed a July 16, 2020 [alert](#) highlighting a particular high-profile scam exploiting Twitter accounts to solicit fraudulent payments denominated in convertible virtual currency. The cyber threat actors involved targeted public figures, organizations, and financial institutions to solicit payments to convertible virtual currency accounts, promising to double the payment and return it to the sender. FinCEN urged persons to not send money or personal or confidential information in response to such solicitations, and encouraged financial institutions to identify and report suspicious transactions associated with this type of activity as quickly as possible. The alert also included several indicators to help detect, prevent and report potential suspicious activity related to the scam.<sup>47</sup>

### 3. Other

On October 15, 2020, FinCEN [supplemented](#) its 2014 [advisory](#) on human trafficking with 20 new financial and behavioral indicators of labor and sex trafficking, and four additional typologies.<sup>48</sup> It also stressed the importance of educating customer-facing staff on these behavioral indicators because financial institutions are often the only source of contact human trafficking victims have with the outside world.

On March 26, July 14 and November 6, 2020, FinCEN advised financial institutions of updates to the FATF's list of jurisdictions with AML/CFT (and, as of the July 14 advisory, counter-proliferation financing) deficiencies. In each, FinCEN notes FATF's call to all members and jurisdictions to impose countermeasures on Iran and the Democratic People's Republic of Korea, the only two countries listed as "high-risk jurisdictions." In the March 26 advisory, FinCEN notes the removal of Trinidad and Tobago, and the addition of Albania, Barbados, Burma (Myanmar), Jamaica, Nicaragua, Mauritius, and Uganda, to the list of "jurisdictions under increased monitoring" in which it actively works to address "strategic AML/CFT deficiencies."<sup>49</sup> According to the July 14 advisory, in response to the measures countries have adopted to contain COVID-19, such as confinement and travel restrictions, the FATF temporarily paused its review process for most countries with strategic deficiencies, leading to no changes in either list. Finally, the November 6 advisory notes the removal of Iceland and Mongolia from the list of jurisdictions under increased monitoring, but notes that, in response to the measures countries have adopted to contain COVID-19, FATF gave the option for countries publicly identified on that list to defer reporting. FATF's statements as to those countries therefore may not necessarily reflect the most recent status in the jurisdiction's AML/CFT regime.

### C. ENFORCEMENT: FOCUS ON INDIVIDUAL ACCOUNTABILITY

FinCEN issued two public enforcement actions in 2020, each against an individual, suggesting that individual accountability for BSA/AML failures continues to be a FinCEN priority.

#### 1. Bitcoin "Mixer" Penalized for Violating AML Laws

On October 19, 2020, FinCEN [assessed](#) a \$60 million civil money penalty against Larry Dean Harmon, the founder and primary operator of two money service businesses, Helix and Coin Ninja LLC. Helix and Coin Ninja operated as Bitcoin "mixers" or "tumblers."<sup>50</sup> The action is the first of its kind by FinCEN and highlights FinCEN's increasing focus on deterring activity that facilitates anonymity in illicit activity on the dark net. The penalty addressed Mr. Harmon's alleged willful violation of various BSA requirements, including the requirements to: (1) register with FinCEN as an MSB; (2) implement an AML program; and (3) file SARs.

#### 2. Chief Operational Risk Officer Penalized for AML Failures

On March 4, 2020, FinCEN [assessed](#) a \$450,000 civil money penalty against Michael LaFontaine, the former Chief Operational Risk Officer at U.S. Bank National Association for failing to prevent BSA violations during his tenure.<sup>51</sup> Under the terms of the agreement, Mr. LaFontaine also agreed that he would not

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perform a compliance management function for any financial institution for the six years following his departure from the bank. According to FinCEN, Mr. LaFontaine oversaw the bank's AML compliance program and, despite warnings from staff and internal memos alerting him to the issues with that program, he took insufficient remedial action.<sup>52</sup>

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### CONCLUSION

We will continue monitoring FinCEN developments in 2021, which we anticipate will be another active year for FinCEN.

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## ENDNOTES

- <sup>1</sup> It is unclear whether or how President Biden’s regulatory freeze pending review of new or pending rules will affect FinCEN’s many rulemakings. See “Regulatory Freeze Pending Review,” *The White House*, (Jan. 20, 2021), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/regulatory-freeze-pending-review/>.
- <sup>2</sup> See, e.g., 31 C.F.R. § 1022.210 (MSBs); 31 C.F.R. § 1026.210 (futures commission merchants).
- <sup>3</sup> See, e.g., 31 C.F.R. § 1020.210 (FinCEN’s rule applicable to banks); 12 C.F.R. § 208.63 (Federal Reserve’s rule applicable to state member banks); 12 C.F.R. § 21.21 (OCC’s rule applicable to national banks); 12 CFR 326.8 (FDIC’s rule applicable to state non-member banks).
- <sup>4</sup> Anti-Money Laundering Program Effectiveness, 85 Fed. Reg. 58,023 (Sept. 17, 2020); see also “FinCEN Seeks Comments on Enhancing the Effectiveness of Anti-Money Laundering Programs,” (Sept. 16, 2020), available at <https://www.fincen.gov/news/news-releases/fincen-seeks-comments-enhancing-effectiveness-anti-money-laundering-programs>.
- <sup>5</sup> 31 U.S.C. § 5312(a)(3).
- <sup>6</sup> See 31 U.S.C. § 5312(a)(3).
- <sup>7</sup> 31 U.S.C. § 5318(a)(2). For the recordkeeping requirements, FinCEN also relied on 12 U.S.C. § 1829b(b)(1) and 12 U.S.C. § 1953, which authorize the Secretary to adopt recordkeeping requirements for banks and MSBs that have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.
- <sup>8</sup> For this purpose, a transaction includes the deposit, withdrawal, exchange, or other payment or transfer, by, through, or to a financial institution involving CVC or LTDA.
- <sup>9</sup> 31 C.F.R. 1030.315.
- <sup>10</sup> FinCEN believes these exemptions will be of limited relevance because the types of institutions covered by the exemptions—banks and government entities—are not likely to maintain unhosted or otherwise covered wallets.
- <sup>11</sup> FinCEN reasoned that “unhosted and otherwise covered wallets would generally not involve a U.S. commercial bank.” Accordingly, a bank would not need to report Section 1010.316 transactions between the bank and another bank or between the bank and a specified government authority.
- <sup>12</sup> FinCEN reasoned that counterparties that those exemptions encompass are not “likely to be counterparties to transactions between banks’ hosted wallet customers and unhosted or otherwise covered wallets.”
- <sup>13</sup> 31 C.F.R. 1010.312.
- <sup>14</sup> 31 C.F.R. 1010.312 and 31 C.F.R. 1010.306(a)(2).
- <sup>15</sup> 31 C.F.R. 1010.306(a)(1), (3), (d) and (e).
- <sup>16</sup> 31 C.F.R. 1010.100(xx) and 31 C.F.R. 1010.314.
- <sup>17</sup> 31 C.F.R. 1010.313. For purposes of aggregating Section 1010.316 transactions, a bank or MSB would be required to include all of its offices and records, wherever they may be located.
- <sup>18</sup> 31 C.F.R. 1010.410(e) and 31 C.F.R. 1020.410(a).
- <sup>19</sup> 31 C.F.R. 1010.40(f).
- <sup>20</sup> For this purpose, a transaction includes the deposit, withdrawal, exchange, or other payment or transfer, by, through, or to a financial institution involving CVC or LTDA. This differs from the existing rules in that it requires the electronic retention of information. The retained information

## ENDNOTES (CONTINUED)

- must be retrievable by reference to the name or account number of the bank's or MSB's customer or the name of the counterparty.
- 21 Threshold for the Requirement to Collect, Retain, and Transmit Information on Funds Transfers and Transmittals of Funds That Begin or End Outside the United States, 85 Fed. Reg. 68,005, 68,006 (Oct. 27, 2020).
- 22 *Id.*
- 23 "Agencies Invite Comment on Proposed Rule under Bank Secrecy Act," (Oct. 23, 2020), *available at* <https://www.fincen.gov/news/news-releases/agencies-invite-comment-proposed-rule-under-bank-secrecy-act>.
- 24 *Id.* at 68,011.
- 25 Financial Crimes Enforcement Network; Customer Identification Programs, Anti-Money Laundering Programs, and Beneficial Ownership Requirements for Banks Lacking a Federal Functional Regulator, 85 Fed. Reg. 57,129, 57,136 (Sept. 15, 2020).
- 26 *Id.* at 57,131.
- 27 *Id.*
- 28 U.S. Dep't of Justice, U.S. Attorneys' Manual, § 9-28.300, <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.300>.
- 29 "Financial Crimes Enforcement Network (FinCEN) Statement in Enforcement of the Bank Secrecy Act," *available at* [https://www.fincen.gov/sites/default/files/shared/FinCEN%20Enforcement%20Statement\\_FINAL%20508.pdf](https://www.fincen.gov/sites/default/files/shared/FinCEN%20Enforcement%20Statement_FINAL%20508.pdf).
- 30 FinCEN Guidance, FIN-2020-G002, "Frequently Asked Questions Regarding Customer Due Diligence (CDD) Requirements for Covered Financial Institutions," (Aug. 3, 2020), *available at* [https://www.fincen.gov/sites/default/files/2020-08/FinCEN%20Guidance%20CDD%20508%20FINAL\\_2.pdf](https://www.fincen.gov/sites/default/files/2020-08/FinCEN%20Guidance%20CDD%20508%20FINAL_2.pdf).
- 31 FinCEN, "Order Granting an Exemption from Customer Identification Program Requirements," (Oct. 5, 2020), *available at* <https://www.fincen.gov/sites/default/files/2020-10/Order%20for%20CIP%20Exemption%2010-5-2020%20Publication%20508%20Compliant.pdf>.
- 32 31 C.F.R. 1020.220(b).
- 33 "Joint Fact Sheet on Bank Secrecy Act Due Diligence Requirements for Charities and Non-Profit Organizations," (Nov. 19, 2020), *available at* <https://www.occ.gov/news-issuances/news-releases/2020/nr-ia-2020-155a.pdf>.
- 34 "Joint Statement on Bank Secrecy Act Due Diligence Requirements for Customers who may be Considered Politically Exposed Persons," (Aug. 21, 2020), *available at* [https://www.fincen.gov/sites/default/files/shared/PEP%20Interagency%20Statement\\_FINAL%20508.pdf](https://www.fincen.gov/sites/default/files/shared/PEP%20Interagency%20Statement_FINAL%20508.pdf).
- 35 *Id.*
- 36 "FinCEN Reissues Real Estate Geographic Targeting Orders for 12 Metropolitan Areas," (Nov. 5, 2020), *available at* <https://www.fincen.gov/news/news-releases/fincen-reissues-real-estate-geographic-targeting-orders-12-metropolitan-areas-2>.
- 37 "Geographic Targeting Order," (Nov. 4, 2020), *available at* [https://www.fincen.gov/sites/default/files/shared/508\\_Real%20Estate%20GTO%20Order%20FINAL%20GENERIC%2011.4.2020.pdf](https://www.fincen.gov/sites/default/files/shared/508_Real%20Estate%20GTO%20Order%20FINAL%20GENERIC%2011.4.2020.pdf). FinCEN began issuing GTOs related to real estate in 2016. Those GTOs have since been renewed and modified several times. For example, the November 17, 2018 renewal lowered the purchase threshold to \$300,000 and required that covered purchases using virtual currencies be reported, and the November 8, 2019 renewal removed the requirement that purchases made by legal entities that are U.S. publicly-traded companies be reported.



## ENDNOTES (CONTINUED)

- 39 “FinCEN Reissues Real Estate Geographic Targeting Orders,” *supra* note 17.
- 40 “Section 314(b) Fact Sheet,” (Dec. 10, 2020), *available at* <https://www.fincen.gov/sites/default/files/shared/314bfactsheet.pdf>.
- 41 “Paycheck Protection Program Frequently Asked Questions (FAQs),” (Apr. 13, 2020), *available at* [https://www.fincen.gov/sites/default/files/2020-04/Paycheck\\_Protection\\_Program\\_FAQs.pdf](https://www.fincen.gov/sites/default/files/2020-04/Paycheck_Protection_Program_FAQs.pdf).
- 42 S&C Client Memo, “BSA and AML Compliance Guidance and the Paycheck Protection Program,” (Apr. 16, 2020), *available at* <https://www.sullcrom.com/files/upload/SC-Publication-BSA-and-AML-Compliance-Guidance-and-the-Paycheck-Protection-Program.pdf>.
- 43 “The Financial Crimes Enforcement Network (FinCEN) Encourages Financial Institutions to Communicate Concerns Related to the Coronavirus Disease 2019 (COVID-19) and to Remain Alert to Related Illicit Financial Activity,” (Mar. 16, 2020), *available at* <https://www.fincen.gov/news/news-releases/financial-crimes-enforcement-network-fincen-encourages-financial-institutions>.
- 44 “The Financial Crimes Enforcement Network Provides Further Information to Financial Institutions in Response to the Coronavirus Disease (COVID-19) Pandemic,” (Apr. 3, 2020), *available at* <https://www.fincen.gov/news/news-releases/financial-crimes-enforcement-network-provides-further-information-financial>.
- 45 “Notice Related to the Coronavirus Disease 2019 (COVID-19),” (May 18, 2020), *available at* [https://www.fincen.gov/sites/default/files/shared/May\\_18\\_Note\\_Related\\_to\\_COVID-19.pdf](https://www.fincen.gov/sites/default/files/shared/May_18_Note_Related_to_COVID-19.pdf).
- 46 S&C Client Memo, “Treasury Department Issues Advisories on Ransomware Attacks,” (Oct. 2, 2020), *available at* <https://www.sullcrom.com/files/upload/SC-Publication-Treasury-Department-Issues-Advisories-Ransomware.pdf>.
- 47 “FinCEN Alerts Financial Institutions to Convertible Virtual Currency Scam Involving Twitter,” (July 16, 2020), *available at* [https://www.fincen.gov/sites/default/files/2020-07/FinCEN%20Alert%20Twitter\\_508%20FINAL.pdf](https://www.fincen.gov/sites/default/files/2020-07/FinCEN%20Alert%20Twitter_508%20FINAL.pdf).
- 48 FinCEN Supplemental Advisory, FIN-2020-A008, “Supplemental Advisory on Identifying and Reporting Human Trafficking and Related Activity,” (Oct. 15, 2020), *available at* [https://www.fincen.gov/sites/default/files/advisory/2020-10-15/Advisory%20Human%20Trafficking%20508%20FINAL\\_0.pdf](https://www.fincen.gov/sites/default/files/advisory/2020-10-15/Advisory%20Human%20Trafficking%20508%20FINAL_0.pdf).
- 49 FinCEN Advisory, FIN-2020-A009, “Advisory on the Financial Action Task Force-Identified Jurisdictions with Anti-Money Laundering, Combatting the Financing of Terrorism, and Proliferation Deficiencies,” (Nov. 6, 2020), *available at* <https://www.fincen.gov/sites/default/files/advisory/2020-11-06/FATF%20October%202020%20Advisory%20FINAL%20508.pdf>.
- 50 FinCEN Assessment of Civil Money Penalty, Number 2020-2, *available at* [https://www.fincen.gov/sites/default/files/enforcement\\_action/2020-10-19/HarmonHelix%20Assessment%20and%20SoF\\_508\\_101920.pdf](https://www.fincen.gov/sites/default/files/enforcement_action/2020-10-19/HarmonHelix%20Assessment%20and%20SoF_508_101920.pdf).
- 51 “FinCEN Penalizes U.S. Bank Official for Corporate Anti-Money Laundering Failures,” (Mar. 4, 2020), *available at* <https://www.fincen.gov/news/news-releases/fincen-penalizes-us-bank-official-corporate-anti-money-laundering-failures>.
- 52 Contemporaneously, the OCC [assessed](#) a \$50,000 civil money penalty against Mr. LaFontaine.

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