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On Your Mark, Get Set, Get Ready to Go -- Release of National AML Priorities Means Financial Institutions Will Need to Assess, Amend Their Anti-Money Laundering Programs

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On June 30, 2021, the Financial Crimes Enforcement Network (FinCEN) published the first national AML/CFT Priorities under the Anti-Money Laundering Act of 2020 (the "AML Act"),² which requires the Secretary of the Treasury, in consultation with the Attorney General, Federal functional regulators, relevant State financial regulators, and relevant national security agencies, to establish and make public priorities for anti-money laundering and countering the financing of terrorism policy (the "Priorities"). The Priorities (presented by FinCEN "in no particular order") are:

1. corruption;
2. cybercrime, including relevant cybersecurity and virtual currency considerations;
3. foreign and domestic terrorist financing;
4. fraud;
5. transnational criminal organization activity;
6. drug trafficking organization activity;
7. human trafficking and human smuggling; and
8. proliferation financing.

Issuance of the Priorities does not create an immediate change to Bank Secrecy Act (BSA) obligations or supervisory expectations for financial institutions. Instead, the issuance of the Priorities starts a 180-day clock for FinCEN to promulgate regulations regarding the Priorities.³ While financial institutions are not required to incorporate the Priorities into their risk-based anti-money laundering compliance programs until the effective date of final regulations, which will not occur until some point in 2022, institutions should use the notice of Priorities to begin to assess risks associated with the products and services they currently offer, the customers they serve, and the geographic areas in which they operate.

Each of the risks identified in the Priorities has been the subject of BSA/AML compliance and enforcement for many years. Nevertheless, the eight Priorities in the June 30, 2021 release are presented in quite a different light than how they have historically been addressed: they are now domestic and foreign policy priorities of the United States in a new era of relative domestic political tension and a renewed era of great power competition. As a result, financial institutions would be wise to view the upcoming rulemaking processes, and ultimate enforcement efforts, less as a continuation of what has come before in each area, but rather with new urgency in the current domestic and international political and business climate.

The Eight Initial Priorities

"The Priorities reflect longstanding and continuing AML/CFT concerns" that have been the focus of FinCEN for a number of years, and heightened priorities for the U.S. government in light of recent events. As they address money laundering concerns, each of the Priorities includes "predicate crimes that generate illicit proceeds" which malign actors may launder through the U.S. financial system, which the BSA is directed to address. While several of the Priorities address areas of political nuance, and arguably raise issues of deputizing financial institutions to support foreign policy and potentially even political agendas, the issues addressed also raise legitimate concerns about misuse of the U.S. financial system.

I. Corruption

Corruption is a Priority for which financial institutions must affirmatively monitor as part of their BSA programs. It is addressed in the Priorities due to corruption—both domestic and foreign—causing "instability and conflict and undermin[ing] economic growth."⁴ FinCEN notes that "corrupt actors and their financial facilitators may seek to take advantage of vulnerabilities in the U.S. financial system to launder their assets and obscure the proceeds of crime." Corruption is deemed a Priority because "[m]isappropriation of public assets, bribery, and other forms of corruption affect individuals and entities across the world, threaten the national security of the United States and the global financial system, degrade the rule of law, perpetuate conflict, and deprive innocent civilians of fundamental human rights."

These negative effects continue an increasingly long line of U.S. government pronouncements identifying foreign and domestic corruption as significant public policy issues facing the United States, most recently in President Biden's June 3, 2021 National Security Study Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest.⁵ As multiple government agencies have in recent months declared foreign and domestic corruption to be issues affecting the national security of the United States, and have promised increased enforcement, we view corruption's inclusion in the Priorities as another indicator that the BSA, the Foreign Corrupt Practices Act, economic sanctions, and domestic anti-corruption enforcement will see an uptick government-wide in activity in the second half of 2021 and beyond.

II. Cybercrime, Including Relevant Cybersecurity and Virtual Currency Considerations

Cybercrime—"broadly defined as any illegal activity that involves a computer, another digital device, or a computer network"—is a Priority that financial institutions must affirmatively address in their AML programs. "Cybercrime includes common cybersecurity threats like social engineering, software vulnerability exploits, and network attacks." As FinCEN notes, "cybercrime is a significant illicit finance threat" given that the "size, reach, speed, and accessibility of the U.S. financial system make covered

institutions attractive targets to criminals, including terrorists and state actors.” Preventing cybercrime, including “ransomware attacks, and the misuse of virtual assets that exploit and undermine their innovative potential, including through laundering of illicit proceeds,” will need to be built into institutions’ AML programs to monitor for and report on suspicious activities by persons and entities exploiting virtual currencies.

Given the significant increase in the use of digital assets and virtual currencies in recent years, and those assets’ increasing popularity among malign cyber actors, we expect that the Priorities portend an increase in enforcement by relevant regulators and enforcement agencies in connection with digital assets’ use as well.

III. Terrorist Financing

Since September 11, 2001, terrorist financing has been a priority under the BSA. The Priorities require that financial institutions continue to address and thwart the use of the U.S. financial system to facilitate terrorist financing, both internationally through terrorist networks such as Al Qaeda, ISIS, and Hezbollah, and domestically by individuals seeking to further ideological goals through acts of force or violence, often targeting specific racial or ethnic groups. This Priority addresses groups that seek “to use both political and religious justifications to support racially or ethnically based ideological objectives and criminal activities, and have used or threatened acts of violence to promote their agendas” as well as “[m]ilitia violent extremists” that “use or threaten to use force or violence in furtherance of an anti-government or anti-authority violent extremist ideology, including opposition to abuses of power by the government.” Although terrorist financing has not been a controversial focus of BSA/AML compliance programs since at least the September 11, 2001 attacks, the current political climate in the United States, and this Priority’s explicit focus on domestic terrorist groups and their activities—some of which will be inherently political—may make the inclusion of this Priority controversial.

IV. Fraud

“[F]raud—such as bank, consumer, health care, securities and investment, and tax fraud—” is a Priority given the need to use the U.S. financial system to commit such crimes or move proceeds related to them. This Priority also addresses a stated concern that “foreign intelligence entities and their proxies” can—and do—“employ illicit financial practices to fund influence campaigns and facilitate a range of espionage activity by establishing front companies, and conducting targeted investments to gain access to sensitive U.S. individuals, information, technology and intellectual property,” thus potentially politicizing the BSA. Given the political climate in the United States, the recent focus on certain state and para-state actors seeking to influence the U.S. political climate and process, and the domestic political reverberations of such efforts, this Priority could also prove controversial.

V. Transnational Criminal Organization Activity

Transnational criminal organizations (TCOs) operating in the United States are a stated Priority given the various threats that arise “due to the crime-terror nexus and TCOs’ engagement in a wide range of illicit activities, including cybercrime, drug trafficking, fraud, wildlife trafficking, human smuggling, human trafficking, intellectual property theft, weapons trafficking, and corruption.” Financial institutions will need—as they have likely done for some time—to ensure their AML programs appropriately identify, monitor, and report activities by TCOs.

VI. Drug Trafficking Organization Activity

Drug trafficking is a Priority, as it is the initial purpose of the BSA. Laundering drug funds involves complex money laundering schemes to misuse the U.S. financial system. Most financial institutions should be familiar with how to address issues raised by this Priority, at least as it pertains to their business.

VII. Human Trafficking and Human Smuggling

Human trafficking and human smuggling are Priorities, as they frequently involve “a variety of mechanisms to move illicit proceeds, ranging from cash smuggling by individual victims to sophisticated cash smuggling operations through professional money laundering networks and criminal organizations.” Notably, “proceeds from human trafficking can include income associated with logistics, such as housing and transportation of victims, as well as earnings from the exploitation of victims.”

VIII. Proliferation Financing

Thwarting nuclear proliferation has long been a goal of the U.S. government, so inclusion of proliferation financing raises no surprises. Financial institutions must continue to monitor transactions to ensure that the U.S. financial system is not used to move funds to acquire weapons of mass destruction, including their components, or in association with a state-sponsored weapons program, including helping to evade applicable U.S. and U.N. sanctions.

Takeaways and Conclusions

On the one hand, the Priorities reflect AML concerns that have been the subject of covered institutions’ BSA/AML compliance programs and efforts for many years. While each institution will face these AML risks in a way specific to their own risk profile, there are no surprises in the topics covered. On the other hand, the Priorities present each risk area in an entirely new lens: each of the Priorities is cast in transnational and international terms, with foreign and domestic corruption explicitly identified as a national security priority of the United States, in an era of renewed great power competition—this time with pervasive international funds and cyber assets flows.

As a result—pending the proposed regulations to be promulgated by FinCEN—domestic and non-U.S.-based covered institutions should start to consider their own BSA/AML compliance programs and begin to prepare for the regulatory tightening and focusing that appears all but certain to arrive in the coming months.

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Paul Hastings actively advises financial institutions on their obligations under applicable anti-money laundering and sanctions regimes.

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² The AML Act was enacted as Division F, §§ 6001-6511, of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, 116th Cong. (2021) (enacted) (enrolled bill available at <https://www.govinfo.gov/content/pkg/BILLS-116hr6395enr/pdf/BILLS-116hr6395enr.pdf>).

³ 31 U.S.C. § 5318(h)(4)(D) as amended by AML Act § 6101(b)(2)(C).

⁴ See The White House, National Security Study Memorandum Establishing the Fight Against Corruption as a Core United States National Security Interest (NSSM-1), June 2021.

⁵ See *id.*

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