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# FinCEN Confronts "Unfair Surprise" and Provides Roadmap for its Enforcement Investigations

The U.S. Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN") recently published a list of factors it will use when deliberating an administrative cause of action against a financial institution for Bank Secrecy Act ("BSA") violations. Understanding these factors, and how they intersect with a financial institution's operational realities, is crucial to anti-money laundering ("AML") compliance and effectively navigating an AML enforcement investigation.

By publishing its enforcement factors, FinCEN joined the ranks of its larger regulatory partners, who also have publicly-available documents identifying their respective enforcement factors and investigative procedures.<sup>1</sup> Notably, the substance of FinCEN's enforcement factors, found [here](#), closely mirrors the Department of Justice's "Filip Factors," identified in the Justice Manual and used by the Department of Justice when determining whether to charge a corporation for wrongdoing.<sup>2</sup>

FinCEN identified ten specific factors, through which it will view a financial institutions' conduct, when it believes the institution failed to comport with BSA/AML laws and regulations.

1. **Nature and seriousness of the violations, including the extent of possible harm to the public and the amounts involved.**
2. **Impact or harm of the violations on FinCEN's mission to safeguard the financial system from illicit use, combat money laundering, and promote national security.**

<sup>1</sup> See e.g. Federal Reserve, FDIC, OCC, and NCUA "Joint Statement on Enforcement of Bank Secrecy Act/Anti-Money Laundering Requirements," available at <https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20200813a1.pdf> (August 13, 2020); U.S. Securities and Exchange Commission Division of Enforcement, Enforcement Manual, Sec 2.3 (November 28, 2017), available at <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>

<sup>2</sup> U.S. Department of Justice, Justice Manual, Sec. 9-28.300 (updated November 2018), available at <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.300>

3. **Pervasiveness of wrongdoing within an entity, including management's complicity in, condoning or enabling of, or knowledge of the conduct underlying the violations.**
4. **History of similar violations, or misconduct in general, including prior criminal, civil, and regulatory enforcement actions.**
5. **Financial gain or other benefit resulting from, or attributable to, the violations.**
6. **Presence or absence of prompt, effective action to terminate the violations upon discovery, including self-initiated remedial measures.**
7. **Timely and voluntary disclosure of the violations to FinCEN.**
8. **Quality and extent of cooperation with FinCEN and other relevant agencies, including as to potential wrongdoing by its directors, officers, employees, agents, and counterparties.**
9. **Systemic nature of violations. Considerations include, but are not limited to, the number and extent of violations, failure rates (e.g., the number of violations out of total number of transactions), and duration of violations.**
10. **Whether another agency took enforcement action for related activity. FinCEN will consider the amount of any fine, penalty, forfeiture, and/or remedial action ordered.<sup>3</sup>**

Shining a light on its BSA enforcement considerations may be a benefit to FinCEN and possibly strengthen its position in future matters. By releasing this document, the AML regulator established a formal notice to financial institutions, which could be used to counter an argument of "unfair surprise," a term used when an administrative agency asserts a legal standard without fair warning or notice.<sup>4</sup> At the same time, FinCEN's notice may also benefit financial institutions, who now have more clarity into the bureau's enforcement methodology. This clarity can assist financial institutions not only with managing an AML investigation, but can also serve as a guideline for day-to-day AML programmatic decisions that can have long-term ramifications when viewed in hindsight by a regulator.

## How We Can Help

FTI's Anti-Money Laundering and Sanctions team is comprised of former regulators, law enforcement officials, prosecutors, auditors, data scientists, and AML executives. Our team of experts can assist financial institutions in all phases of AML compliance, including assessing AML risk, understanding AML examinations and formal investigations, and providing independent remediation services in response to a regulatory inquiry.

## AML Compliance Program Development and Assessment

An AML investigation can often be the result of incremental programmatic decisions that have compounding unintended consequences, as well as those made with incomplete information due to organizational realities. FTI can assist financial institutions with an independent assessment of their current AML compliance programs, implementation of CIP/KYC/CDD/EDD best practices, and performing gap analyses to ensure an institution's specific AML risk factors are accounted for.

## Transaction Monitoring Design, Analytics, and Validation

With the use of increasingly sophisticated transaction monitoring systems to review for suspicious activity, appropriate calibration of transaction monitoring, and data validation within those systems, can be paramount to a reasonably designed AML program. FTI has substantial AML technology and large-scale data analysis expertise, including model validation, AML systems integration, and assessing scoring and weighting methodologies.

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<sup>3</sup> Financial Crimes Enforcement Network (FinCEN) Statement on Enforcement of the Bank Secrecy Act at pp. 2-3.

<sup>4</sup> See *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) and *Martin Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 158 (1991).

## Enforcement Advisory and Remedial Actions

If a financial institution does find itself subject to an AML inquiry, FTI offers enforcement advisory and remedial services at all stages of an adverse action. Our team of former regulators, law enforcement personnel, and industry professionals can give support during an AML examination or investigation, provide expert testimony, and perform independent transaction “lookback” reviews. FTI has also served as an independent monitor for several financial institutions that were subject to state and federal AML enforcement actions.

To learn more about how FTI Consulting can help with your AML compliance needs, please reach out to one of our professionals.

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