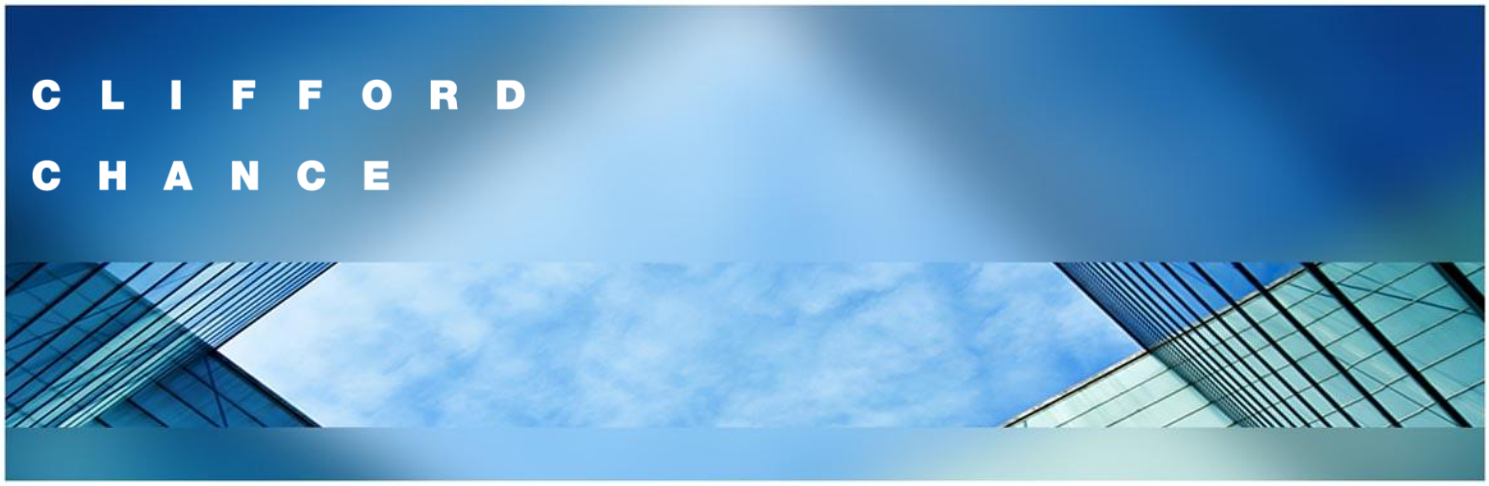

LOOMING RESURGENCE OF FINCEN'S SECTION 311 AUTHORITY

On January 13, 2021, the Acting Director of the Financial Crimes Enforcement Network ("**FinCEN**"), a bureau within the US Department of the Treasury ("**Treasury**") responsible for developing anti-money laundering ("**AML**") requirements for financial institutions, addressed the annual Financial Crimes Enforcement Conference hosted by the American Bankers Association and American Bar association.[1] During his speech, the Acting Director provided a detailed update on current FinCEN initiatives and priorities, including a "renewed focus" on using FinCEN's special authorities under Section 311 of Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("**USA PATRIOT ACT**") to protect national security.[2] Roughly three weeks later, the US Congress renewed consideration of expanding FinCEN's authority under Section 311 to facilitate its use generally and to strengthen FinCEN's ability to use it in connection with money laundering threats associated with the use of the digital currencies. Almost two months later, on March 9, 2022, President Biden signed an Executive Order pertaining to digital assets that highlighted the dangers posed by illicit actors able to operate in jurisdictions that had not implemented sufficient AML and terrorist finance controls for virtual currencies, noting that the US government should use a range of authorities to mitigate against such threats. All of these actions indicate the potential

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1 Financial Crimes Enforcement Network, *Prepared Remarks of FinCEN Acting Director Him Das, Delivered Virtually at the American Bankers Association/American Bar Association Financial Crimes Enforcement Conference* (Jan. 13, 2020), https://www.fincen.gov/news/speeches/prepared-remarks-fincen-acting-director-him-das-delivered-virtually-american-bankers.

2 *Id*.

for a broader use of Section 311 authority under the Biden Administration.

WHAT IS FINCEN'S SECTION 311 AUTHORITY?

Section 311 of the USA PATRIOT Act, passed shortly after the 9/11 terrorist attacks, provides FinCEN with broad discretion to take measures tailored to the particular money laundering problems presented by specific foreign jurisdictions, financial institutions operating outside of the United States, and classes of international transactions or types of account.[3] In particular, Section 311 states that FinCEN may initiate rulemaking and require US financial institutions and domestic financial agencies to take one or more of the following five different "Special Measures" against foreign jurisdictions, foreign financial institutions, classes of international transactions, or types of accounts that FinCEN finds as "primary money laundering concern."[4] Although with one exception FinCEN has only invoked the stiffest measure, Special Measure No. 5, in its actions, all five measures are outlined as follows:

Recordkeeping and reporting of certain financial transactions

Under Special Measure No. 1, FinCEN may require any domestic financial institution or domestic financial agency to maintain records, file reports, or both, concerning the aggregate amount of transactions, or concerning each transaction, with respect to a foreign jurisdiction, foreign financial institution, class of transaction involving or within a foreign jurisdiction, or a type of account, if FinCEN finds such jurisdiction, financial institution, class of transaction, or type of account to be of primary money laundering concern.[5] Information required for these records and reports may include (i) the identity and address of the participants in a transaction or relationship, including the identity of the originator of any funds transfer; (ii) the legal capacity in which a participant in any transaction is acting; (iii) the identity of the beneficial owner of the funds involved in any transaction; and (iv) a description of any transaction.[6]

Information relating to beneficial ownership

Under Special Measure No. 2, FinCEN may require any domestic financial institution or domestic financial agency to take reasonable and practicable steps to obtain and retain information concerning the beneficial ownership of any account opened or maintained in the United States by a foreign person, or a representative of such a foreign person, that involves a foreign jurisdiction, foreign financial institution, class of transaction involving or within a foreign jurisdiction, or a type of account which FinCEN finds to be of primary money laundering concern. One exception is that this Special Measure cannot be applied to a foreign entity whose shares are subject to public reporting requirements or are listed and traded on a regulated exchange or trading market.[7]

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3 Pub. L. No. 107-56, §302(b)(5), 115 Stat. 297.
4 31 U.S.C. §5318A(a)(1).
5 31 U.S.C. §5318A(b)(1)(A).
6 31 U.S.C. §5318A(b)(1)(B).
7 31 U.S.C. §5318A(b)(2).

Information relating to certain payable-through accounts

Under Special Measure No. 3, after finding a foreign jurisdiction, foreign financial institution, or class of transactions in or involving a foreign jurisdiction to be of primary money laundering concern, FinCEN may require any domestic financial institution or domestic financial agency that opens or maintains a payable-through account[8] in the United States for a foreign financial institution involving any such jurisdiction, financial institution, or a payable-through account through which any such transaction may be conducted, to (i) identify each customer (and representative of such customer) who is permitted to use or whose transactions are routed through such payable-through account; and (ii) to obtain information about each customer (and representative of such customer) that is substantially comparable to that which the depository institution obtains in the ordinary course of business with respect to its customers residing in the United States.[9]

Information relating to certain correspondent accounts

Under Special Measure No. 4, if FinCEN finds a foreign jurisdiction, foreign financial institution, or class of transaction within or involving a foreign jurisdiction to be of primary money laundering concern, it may require any domestic financial institution or domestic financial agency that opens or maintains a correspondent account in the United States for a foreign financial institution involving any such jurisdiction, such financial institution, or a correspondent account through which any such transaction may be conducted, to (i) identify each customer (and representative of such customer) who is permitted to use or whose transactions are routed through such correspondent account; and (ii) to obtain with respect to each such customer (and each such representative) information that is substantially comparable to that which the depository institution obtains in the ordinary course of business with respect to its customers residing in the United States.[10]

Prohibitions or conditions on opening or maintaining certain correspondent or payable-through accounts

Under Special Measure No. 5, if FinCEN finds a foreign jurisdiction, foreign financial institution, or class of transactions within or involving a foreign jurisdiction to be of primary money laundering concern, FinCEN may prohibit or impose conditions upon the opening or maintaining in the United States of a correspondent account or payable-through account by any domestic financial institution or domestic financial agency for or on behalf of a foreign banking

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8 The term "payable-through account" ("**PTA**") means an account, including a transaction account, opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a subaccount, in banking activities usual in connection with the business of banking in the United States. 31 U.S.C. §5318A(e)(1). Foreign financial institutions use PTAs, also known as "pass-through" or "pass-by" accounts, to provide their customers with access to the US banking system. Some US banks, Edge and agreement corporations, and US branches and agencies of foreign financial institutions (collectively referred to as US banks) offer these accounts as a service to foreign financial institutions. PTA activities should not be confused with traditional international correspondent banking relationships, in which a foreign financial institution enters into an agreement with a US bank to process and complete transactions on behalf of the foreign financial institution and its customers. Under the latter correspondent arrangement, the foreign financial institution's customers do not have direct access to the correspondent account at the US bank, but they do transact business through the US bank. This arrangement differs significantly from a PTA with subaccount holders who have direct access to the US bank by virtue of their independent ability to conduct transactions with the US bank through the PTA. *See* https://bsaaml.ffiec.gov/manual/RisksAssociatedWithMoneyLaunderingAndTerroristFinancing/05.

9 31 U.S.C. §5318A(b)(3).

10 31 U.S.C. §5318A(b)(4).

institution, if such correspondent account or payable-through account involves any such jurisdiction or institution, or if any such transaction may be conducted through such correspondent account or payable-through account.[11]

THE SECTION 311 DESIGNATION PROCESS

As noted above, Section 311 provides FinCEN a wide range of tools to address any money laundering concern. However, to date, FinCEN has rarely used Special Measure Nos. 1 – 4 when targeting foreign financial institutions, and typically imposes the strongest Special Measure No. 5 to prohibit US financial institutions from directly or indirectly maintaining correspondent accounts or payable-through accounts for designated foreign financial institutions.[12]

As set forth in Section 311, Special Measure No. 5 can be imposed only by issuing a regulation.[13] Accordingly, concurrent of its finding of a foreign financial institution to be "of primary money laundering concern," Treasury, through FinCEN, must issue a Notice of Proposed Rule Making ("**NPRM**") which will then be subject to a comment period.[14] During this period, Treasury will consider comments received and review any other available information, including the targeted financial institution's remedial actions and implemented reforms. Upon review of the comments and information received, FinCEN can subsequently proceed with a final rule, withdraw the finding and proposed rule, or keep the matter open for further review.[15]

For instance, on July 7, 2017, FinCEN issued its finding that Bank of Dandong, a commercial bank located in Dandong, China, was a financial institution of primary money laundering concern because it served as a conduit for North Korea to access US and international financial systems, including by facilitating millions of dollars of transactions for companies involved in North Korea's WMD and ballistic missile programs.[16] Concurrent with its finding, FinCEN issued a NPRM to impose Special Measure No. 5 against Bank of Dandong to prohibit US financial institutions from opening or maintaining a correspondent account in the United States for, or on behalf of the bank.[17] The proposed rule was then subject to a public comment period which lasted until September 5, 2017. After considering comments received from the public, as well as other information available to the agency, FinCEN concluded that the money laundering risks posed by Bank of Dandong had not been mitigated, and that the bank had not addressed FinCEN's concerns as described in the NPRM.[18] FinCEN thus issued a final rule on November 8, 2017, finding Bank of Dandong continued to be a financial institution of primary money laundering concern and imposing the originally proposed

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11 31 U.S.C. §5318A(b)(5).

12 Financial Crimes Enforcement Network, 311 *Special Measures, Special Measures for Jurisdictions, Financial Institutions, or International Transactions of Primary Money Laundering Concern*, https://www.fincen.gov/resources/statutes-and-regulations/311-special-measures.

13 31 U.S.C. §5318A(a)(2)(C). Note that Special Measure Nos. 1 – 4 may be imposed by regulation, order, or otherwise as permitted by law without prior public notice and comment, but such orders must be issued together with a NPRM and must last no longer than 120 days absent the promulgation of a rule on or before the end of the 120-day period beginning on the date the order was issued. Thus, while a Jurisdiction, financial institution, class of transactions, or type of account may be designated of primary money laundering concern in an order issued together with an NPRM, Special Measures of unlimited duration can only be imposed by a final rule. 31 U.S.C. 5318A(a)(3).

14 5 U.S.C. § 553(b)–(c).

15 Press Releases, Fact Sheet: Overview of Section 311 of the USA PATRIOT Act, https://www.treasury.gov/press-center/press-releases/Pages/tg1056.aspx.

16 82 Fed. Reg. 31,537 (Jul. 7, 2017).

17 *Id*.

18 82 Fed. Reg. 51,758 (Nov. 8, 2017).

prohibition on US financial institutions from opening or maintaining a correspondent account for, or on behalf of, Bank of Dandong.[19]

In other instances, the risks identified in the NPRM as supporting the finding of primary money laundering concern have been mitigated after FinCEN's publication of the proposed rule.[20] In those cases where the money laundering risks to the US financial system appeared to be diminished, FinCEN had decided not to pursue a final rule and notice was given to rescind the regulatory proposal.[21] For example, after first issuing a Notice of Finding naming Banca Privada d'Andorra ("**BPA**") a financial intuition of primary money laundering concern[22] and publishing an NPRM imposing Special Measure No. 5 under Section 311 against BPA on March 13, 2015,[23] FinCEN published a withdrawal of notice of proposed rulemaking on March 4, 2016 because subsequent material developments had mitigated the money laundering risks associated with BPA.[24] Accordingly, FinCEN determined that BPA was no longer a primary money laundering concern that warranted the implementation of a Special Measure under Section 311.[25]

IMPLICATION OF A SECTION 311 DESIGNATION ON A FOREIGN FINANCIAL INSTITUTION

As noted above, Special Measure No. 5 which FinCEN can take against a foreign financial institution is to prohibit the opening or maintaining in the United States a correspondent account or payable-through account by any domestic financial institution for, or on behalf of, that foreign institution.[26] Such measure essentially has the effect of eliminating or curtailing a foreign financial institution's access to the US financial system and to transactions involving the US dollar. As such, a Section 311 designation can be "a death sentence" for smaller foreign banks who depend on access to US dollar clearing through correspondent accounts.[27] In other words, Section 311 gives Treasury, through FinCEN, the power to effectively drive a foreign financial institution out of business.

In practice, FinCEN often achieves the intended effects of Special Measure No. 5 before it completes the rulemaking process. Although a notice of finding and a proposed rule are not final and in theory still have some room for negotiation, a

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19 *Id*. As the result of FinCEN's designation, Bank of Dandong was barred from access to the US financial system in 2017, but this designation did not cause severe harm to the bank's business. In fact, Bank of Dandong had revenue and assets increase in the following year. *See 2018 Annual Report for the Bank of Dandong, Co., Ltd*., Bank of Dandong (April 2019); *See also*, Daniel Wertz, *Special Report, Understanding U.S and International Sanctions on North Korea* (November 2020).

20 Press Releases, Fact Sheet: Overview of Section 311 of the USA PATRIOT Act, https://www.treasury.gov/press-center/press-releases/Pages/tg1056.aspx.

21 *Id*.

22 80 Fed. Reg. 13,464 (Mar. 6, 2015).

23 80 Fed. Reg. 13,304 (Mar.13, 2015).

24 Specifically, FinCEN noted in its withdrawal notice that on April 27, 2015, the Andorran government agency Age`ncia Estatal de Resolucio´ d'Entitats Banca`ries ("**AREB**") took control of BPA and approved a resolution plan for BPA, under which the bank's "good" assets, liabilities, and clients are to be transferred to a bridge bank named Vall Banc. FinCEN noted that the bridge bank would not employ the high-level BPA managers described in FinCEN's Notice of Finding. FinCEN also noted that after the good assets, liabilities, and clients were transferred from BPA to Vall Banc, it would remain under the control of AREB. FinCEN further noted that its understanding that BPA would not be reactivated as an operational financial institution at any point except to facilitate the finalization of the resolution process. FinCEN understood that AREB, in coordination with other authorities in Andorra, intended to liquidate BPA following the resolution of judicial proceedings in Andorra and other jurisdictions. *See* 81 Fed. Reg. 11,496 (Mar. 4, 2016); *see also* 81 Fed. Reg. 11,648 (Mar. 4, 2016).

25 *Id*.

26 § 5318A(b)(5).

27 Steven Mark Levy, *Federal Money Laundering Regulation: Banking, Corporate and Securities Compliance* § 30.03(E) (2d ed. Supp. 2017); *See also, Cierco v. Mnuchin*, No. 16-5185 (D.C. Cir. 2017).

public announcement that a foreign financial institution is deemed by a US regulator as "a primary money laundering concern" is often enough to cause risk-averse US financial institutions to sever correspondent relationships, stop financial transactions, and generally cut off financial relationships with designated foreign banks before any rule is finalized.

Moreover, FinCEN's mere announcement of such a finding can cause foreign regulators to take immediate and drastic enforcement actions against the targeted institution in the relevant foreign jurisdiction before FinCEN takes any action itself. For instance, in the case of BPA's Section 311 designation, only one day after FinCEN announced that it was preparing to take action against the bank, the Andorran Government declared that it would seize control of BPA.[28] The Andorran Government then appointed a new administrator for the bank and subsequently created a new bank to which it transferred the lawful assets of BPA in preparation to sell off those assets.[29] Through just a notice of finding and NPRM, FinCEN had effectively achieved the objective of imposing the severe Special Measure No. 5 without completing the rulemaking.

MATURING OF SECTION 311 AUTHORITY

Recognition of the Legitimacy of Section 311

Given FinCEN's Section 311 designation could mean a "death penalty" to many foreign banks, we have seen litigation challenging FinCEN's Section 311 authority in recent years. However, the case law in this area has generally served in FinCEN's favor, giving the agency more incentive in using its authority in the future.

For instance, in the BPA case noted above, after FinCEN published a notice of finding and NPRM stating its reasons for suspecting that BPA was of primary money laundering concern and proposing Special Measure No. 5 that would prevent US financial institutions' involvement with the bank, the Andorran government seized BPA and planned to liquidate its assets.[30] FinCEN eventually withdrew both notices as the bank no longer posed a money laundering concern, but BPA's majority shareholders filed a civil action against FinCEN, seeking, among others, a declaratory order that FinCEN's two notices were unlawfully issued, hoping such a judicial determination in the US would lead the Andorran Government to reverse its seizure of the bank.[31] The District Court disagreed and granted FinCEN's motion to dismiss the suit. The Andorran Government subsequently liquidated BPA's assets. When the shareholders appealed, the DC Circuit Court affirmed the lower court's opinion and opined that the BPA shareholders lacked "standing" to sue because they had not shown that a favorable judicial order will effectively redress their alleged injuries given they had not demonstrated that it was "likely, as opposed to merely speculative, that their injuries will be redressed by a favorable decision."[32]

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28 *See* Press Release, Institut Nacional Andorrá de Finances (Mar. 11, 2015), Joint Appendix 286; *See also Cierco v. Mnuchin*, No. 16-5185 (D.C. Cir. 2017), at p.7.
29 *See* Press Release, AREB, The Board of the AREB Creates the New Bank Named Vall Banc (July 22, 2015), Joint Appendix 290.
30 *Cierco v. Lew, et al.*, 190 F. Supp. 3d 16 (D.D.C. 2016).
31 *Id*.
32 *Cierco v. Mnuchin*, No. 16-5185 (D.C. Cir. 2017).

This precedent has significantly limited foreign institutions' abilities to challenge FinCEN's Section 311 authority. Especially in cases similar to BPA where FinCEN has only initiated the rulemaking before a foreign regulator stepped in and liquidated the target, FinCEN's initial public announcement that a foreign entity is "of a primary money laundering concern" and its proposed prohibition (usually Special Measure No. 5) against such institution, even if subsequently withdrawn by FinCEN, would not likely be declared "unlawful" in court since most foreign plaintiffs in such cases would have difficulty proving that they still have "standing" to press the claim after their home regulators have completed drastic enforcement actions.

Tempering of FinCEN's Processes through Other Legal Challenges

FinCEN's use of its Section 311 authority has gradually expanded in waves over recent years. Although there was a temporary period of decreased activity after the court blocked FinCEN's two attempts to impose Special Measure No. 5 on FBME Bank Ltd ("**FBME**") in 2015 and 2016, FinCEN eventually succeeded in its third attempt, and since then increased use of its Section 311 authority up until 2018.

In the FBME case, FinCEN first found FBME a financial institution of primary money-laundering concern and published an NPRM to impose Special Measure No. 5 against the bank in July 2014.[33] One year later, FinCEN promulgated a final rule, scheduled to be effective in August 2015, which would prohibit all US domestic financial institutions from opening or maintaining correspondent bank accounts on behalf of FBME. Facing the severe consequence of being left out of the US financial system, FBME immediately moved for a preliminary injunction to block the final rule. The court granted FBME's motion and enjoined FinCEN's final rule on August 27, 2015, holding that FinCEN's failure to make public non-classified, non-protected information it had relied upon in making its decision with respect to FBME's designation constituted a procedural error under the Administrative Procedure Act.[34] This error, according to the court, deprived FBME the opportunity to review and comment on the information.[35] Instead of appealing the injunction, FinCEN moved for a "voluntary remand" to conduct new rulemaking and correct the deficiencies the court had identified in the injunction.[36]

On November 27, 2015, FinCEN published a notice to reopen the final rule for 60 days to solicit additional comments.[37] When the comment period ended, FinCEN published the second final rule on March 31, 2016, which again found that FBME was of primary money laundering concern and imposed Special Measure No. 5 pursuant to Section 311.[38] FBME re-challenged the rule and won a second injunction against FinCEN's designation on September 20, 2016.[39] The District Court held that FinCEN had not adequately responded to certain comments from

33 79 Fed. Reg. 42,639 (Jul. 22, 2014); 79 Fed. Reg. 42,486 (Jul. 22, 2014).
34 *FBME Bank Ltd v. Lew*, 125 F. Supp. 3d 109 (D.D.C. 2015).
35 *Id*.
36 *FBME Bank Ltd v. Lew*, 142 F.Supp.3d 70 (D.D.C. 2015).
37 80 Fed. Reg. 18,481 (Nov. 27, 2015).
38 81 Fed. Reg. 18,480 (Mar. 31, 2016).
39 *FBME Bank Ltd. v. Lew*, 209 F.Supp.3d 299 (D.D.C. 2016).

FBME during the second rulemaking process.[40] Accordingly, the court returned the matter once again to FinCEN and stayed implementation of the final rule for a second time.[41] On remand, FinCEN supplemented its rule with responses to those comments and renewed its motion for summary judgement. This time, the court was satisfied, and found that FinCEN had met its obligation to respond to FBME's comments "in a reasoned manner," and thereby granted the agency's motion.[42]

Although the court's two initial negative rulings against FinCEN seemed to have temporarily decreased the agency's motivation to use its Section 311 authority, FinCEN took this opportunity to address the court's feedback, enhance its rulemaking process, and eventually strengthen its ability to use Section 311. Indeed, in 2018, only one year after FinCEN's final win in the FBME case, FinCEN named ABLV Bank of Latvia ("**ABLV**") an institution of primary money laundering concern and proposed Special Measure No. 5 against the institution.[43] In the NPRM published on February 16, 2018, FinCEN revealed the sources of information it relied on in reaching its designation decision with respect to ABLV. In particular, FinCEN posted 12 exhibits containing the public sources it had considered in reaching its decision.[44] In addition to the publicly available information, FinCEN also revealed an internal document named "Evidentiary Memorandum" prepared as a supporting material and published on March 1, 2018.[45] This 44-page internal memorandum, provided the comprehensive information on ABLV's problematic operations and the detailed reasons for FinCEN's conclusion that ABLV was a primary money laundering concern. Although the released memorandum redacted the confidential information, it made public non-classified, non-protected information FinCEN had considered in making its decision, as the court in the FBME case required.

When looking at the FBME case in combination with the above-mentioned BPA case, courts appear willing to accept FinCEN's authority and make it more difficult to challenge FinCEN's decisions, as long as FinCEN follows the required due process in its rulemaking procedure. While this strengthens FinCEN's position, it does not mean that there will not be other bases for challenges in the future.

FinCEN is Set to Expand Use of Section 311 Generally, and May Make Use of Other Special Measures in the Digital Age

In August 2019, FinCEN launched a new Global Investigations Division ("**GID**") as a dedicated team focused on utilizing its unique Section 311 authority to the maximum effect.[46] In its press release, FinCEN confirmed that GID is "responsible for implementing targeted investigation strategies rooted in FinCEN's unique authorities to combat illicit finance threats and related crimes, both domestically and internally…GID will leverage FinCEN's BSA authorities, including Section 311 of the USA PATRIOT Act, to investigate and target terrorist finance and money

40 *Id*.
41 *Id*.
42 *FBME Bank Ltd. v. Munchin*, 249 F. Supp.3d 215 (D.D.C. 2017).
43 83 Fed. Reg. 6,986 (Feb. 16, 2018).
44 *See* https://www.regulations.gov/search?agencyIds=FINCEN&documentTypes=Supporting%20%26%20Related%20Material&filter=ABLV.
45 *See* https://www.regulations.gov/document/FINCEN-2017-0013-0022.
46 Financial Crimes Enforcement Network, *New FinCEN Division Focuses on Identifying Primary Foreign Money Laundering Threats*, https://www.fincen.gov/news/news-releases/new-fincen-division-focuses-identifying-primary-foreign-money-laundering-threats.

laundering threats."[47] The roll-out of GID coincided with a time at which FinCEN was addressing new concerns with respect to virtual currency and expected to use the new division to increase its capacity to act in new ways.[48]

As noted above, FinCEN has historically relied on Special Measure No. 5 alone in targeting foreign financial institutions. The only recent instance where it imposed other Special Measures was the designation of JSC CredexBank ("**Credex**"). FinCEN found that Credex was a financial institution of primary money laundering concern and published an NPRM to impose Special Measure No. 1 and Special Measure No. 5 against Credex in 2012,[49] and eventually withdrew the proposed rule in 2016.[50]

In its NPRM published in 2012, FinCEN explained that it chose Special Measure No. 1 in addition to Special Measure No. 5 because of the special circumstances and concerns raised by Credex's activities.[51] Specifically, FinCEN noted that the pervasive lack of transparency surrounding Credex indicated a high degree of money laundering risk and vulnerability to other financial crimes. Per FinCEN, information gathered through reports submitted by financial institutions pursuant to Special Measure No. 1 would provide it and law enforcement with greater insight into transactions related to Credex, including details regarding its underlying beneficial owners. This knowledge, in turn, could help FinCEN and law enforcement pierce the veil of shell corporations behind which the true owners of the funds intended to hide.[52]

Apparently, FinCEN's inaugural use of Special Measure No. 1 in that instance was to understand the transactions engaged by Credex and enhance transparency into its activities of money laundering concern, which in turn would be utilized in efforts to detect and deter significant money laundering activity and other financial crimes. Through the simple measure of information gathering, the US Government would be able to enhance its national security, making it more difficult for terrorist and money launderers to access the substantial resources of the US financial system.[53] Moreover, FinCEN noted that Special Measure No. 1 would not unduly burden domestic financial institutions or create a significant competitive disadvantage for US financial institutions given that banks generally already apply some level of screening and reporting of their transactions and accounts.[54]

Like Special Measure No.1, Special Measure Nos. 2, 3, and 4 were all designed to achieve similarly effective results. Unlike Special Measure No. 5, which cuts a foreign financial institution from the US financial system, the record keeping and reporting-focused Special Measure Nos. 1 – 4 impose less severe restrictions on banks, thereby providing a middle ground where the US Government can use the reported data to form insights on potential money laundering threats to the US

47 *Id*.
48 Treasury's Financial Crimes Unit Ramps Up Foreign Targeting, Investigations, Wall Street Journal, December 29, 2019. https://www.wsj.com/articles/treasurys-financial-crimes-unit-ramps-up-foreign-targeting-investigations-11577620800.
49 77 Fed. Reg. 31,794 (Mar. 30, 2012).
50 81 Fed. Reg. 14,408 (Mar. 17, 2016).
51 77 Fed. Reg. 31,794 (Mar. 30, 2012).
52 *Id*.
53 *Id*.
54 *Id*.

financial system, and the targeted financial institution could have the opportunity to alter its behavior and improve its practices.

Moreover, even though FinCEN has only used its Section 311 tools to address money laundering concerns from individual countries and financial institutions, its authority under Section 311 is much broader. As noted above, Section 311 also allows FinCEN to sanction "classes of transactions" as well as "types of account." Given that the definition of "transaction" is broad under Bank Secrecy Act regulations,[55] FinCEN could target any action undertaken by a foreign financial institution or with a foreign jurisdiction. This is more relevant now in the current digital age as we have seen various cryptocurrency exchanges and other money service businesses used for significant money laundering across the world, and the previously often used Special Measure No. 5 may be insufficient to tackle this problem.

As noted above, Special Measure No. 5 prohibits domestic financial institutions and agencies from opening or maintaining correspondent accounts for foreign financial institutions. However, sending a payment to the US in bitcoin does not require any correspondent US bank account. The ability of cryptocurrencies to transfer money directly from one peer to another has largely removed the role of correspondent banking. Therefore, imposing correspondent account restrictions under Special Measure No. 5 alone does not seem to be effective in dealing with digital-age money laundering issues. To better understand the nature and extent of digital currency money laundering schemes, and address specific types of high-risk transactions, FinCEN might consider expanded use of Special Measure Nos. 1 – 4 now to require cryptocurrency exchanges to gather data on targeted transactions via heightened record keeping requirements. This could in turn help FinCEN to pierce the veil of anonymity usually associated with most cryptocurrency transactions.

In addition, in connection with the passing of Anti-Money Laundering Act of 2020 ("**AMLA**"), the National Defense Authorization Act ("**NDAA**") includes a subtitle called the Combating Russian Money Laundering Act ("**CRMLA**"), which directs Treasury to consider identification of Russia-related primary money laundering concerns under its 311 authorities and provides FinCEN with additional authority "to prohibit, or impose conditions upon, certain transmittals of funds (to be defined by the Secretary) by any domestic financial institution or domestic financial agency."[56] In other words, Section 9714 of the NDAA provides the ability to FinCEN to prohibit a broader range of transactions in addition to the ability to use Special Measure No. 5 to prohibit domestic financial institutions from providing correspondent banking services.

Recently Proposed Legislation Would Provide FinCEN a New Special Measure to Target Cryptocurrency Money Laundering Schemes

In addition to potentially applying Special Measure Nos. 1 – 4 more frequently when targeting cryptocurrency money laundering schemes, and the additional authority with respect to Russian-related primary money laundering concerns

55 31 C.F.R. pt. 103.11(ii).
56 2021 NDAA, Section 9714, *see* https://www.congress.gov/116/bills/hr6395/BILLS-116hr6395enr.pdf.

referenced above, FinCEN may soon have a new Special Measure added to its Section 311 toolbox. FinCEN's more recent hiatus in taking 311 actions might be explained by a desire to wait for this new authority to make FinCEN's work easier in this regard.

On February 4, 2022, the America Creating Opportunities for Manufacturing Pre-Eminence in Technology and Economic Strength Act of 2022 ("**America COMPETES Act**"), which aims to strengthen the competitiveness of the US economy and counters anti-competitive actions taken by China,[57] was passed in the House of Representatives.[58] Specifically, Section 60202 of this bill, titled "Prohibitions or Conditions on Certain Transmittal of Funds," proposes two important amendments to Section 311.[59]

One proposed amendment broadens the applicability of Special Measure No. 5 by removing the requirement that the prohibition apply only to transactions with correspondent or payable-through accounts "*for or on behalf of a foreign banking institution*." This change would mean that the prohibition could apply to any transactions without the previous qualifier that they be associated with a foreign bank. The second proposed amendment provides FinCEN a new Special Measure mirroring the authority in the CRMLA through which it can prohibit or impose conditions upon certain "*transmittals of funds*" to or from any domestic financial institution or domestic financial agency, if such transmittal of funds involves any foreign jurisdiction, foreign financial institution, type of account or class of transaction in/involving a foreign jurisdiction, that is found to be of a primary money laundering concern.[60] The bill does not define the term "transmittals of funds." Rather, it leaves FinCEN complete authority to define what constitutes as "transmittals of funds" in a Special Measure issuance, by regulation or as otherwise permitted by law.[61] Essentially, with this broad discretion, FinCEN can name any transaction that involves a foreign jurisdiction "a transmittal of funds," and prohibit such a transaction (e.g., cryptocurrency transfers) at any domestic financial institution.

As noted above, cryptocurrency transfers do not generally require correspondent banking services or foreign banks. Therefore, the amendment to Special Measure No. 5 and the newly proposed Special Measure No. 6 would remove some of the limitations of the current Special Measure No. 5 and provide FinCEN a new category of authority to target cryptocurrency money laundering.

An earlier version of the bill proposed to delete the required rulemaking procedure that FinCEN currently must follow when imposing the Special Measures under the existing Section 311 framework.

If there were such a change to Section 311, FinCEN could essentially impose any Special Measures, effective immediately, without having to first publish a finding and an NPRM in the Federal Register, and then wait for the public to comment and respond to the received comments "in a reasoned manner" as required by the FBME court before it can finalize the restrictions. In other words, FinCEN would be

57 *See* https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=409024.
58 *See* https://science.house.gov/news/press-releases/chairwoman-johnson-celebrates-house-passage-of-the-america-competes-act-of-2022.
59 America COMPETES Act, Section 6020, *see* https://www.congress.gov/bill/117th-congress/house-bill/4521/text.
60 *Id*.
61 *Id*.

able to simply declare that a foreign financial institution, jurisdiction, class of transactions, or type of account is a primary money laundering concern and immediately impose any Special Measure of unlimited duration through any process without unnecessary delay.[62]

Without the rulemaking requirement, FinCEN could move fast to quickly identify and effectively isolate the true primary money laundering concerns in the industry, which is often time-sensitive in the current digital age. As such actions would help the parties that are not primary money laundering concerns to quickly distinguish and effectively protect themselves from those that are, it could be in the US financial industry's interest to enable faster movement on some FinCEN actions through certain adjustments to the current due process provisions in Section 311.

However, the complete removal of any due process requirement, as an earlier version of the bill proposed, would undercut some of the procedural developments and care with which FinCEN is now required to undertake 311 actions. If Congress wants FinCEN to be able to act more flexibly where exigent circumstances warrant, it might still be considering language in the legislation that requires the rulemaking process unless FinCEN can demonstrate that exigent circumstances necessitate the need for more immediate action.

Currently, given the bill was passed in the House, and its Senate version, the United States Innovation and Competition Act ("**USICA**") was already passed in June 2021, the next step would be for the lawmakers to work out the differences between the two versions of the legislation.

Recently Issued Executive Order Indicates the Potential for More Use of Section 311 Authorities

On March 9, 2022, President Biden signed the Executive Order on Ensuring Responsible Development of Digital Assets, outlining the first ever, whole-of-government approach to addressing the risks and harnessing the potential benefits of digital assets and their underlying technology.[63]

The Executive Order further indicates the Biden Administration's priority in addressing illegal activities in the digital asset space. In particular, the Executive Order encourages regulators to "ensure sufficient oversight and safeguard against any systemic financial risks posed by digital assets" and calls for an "unprecedented focus of coordinated action across all relevant US Government agencies" in mitigating illicit finance and national security risks posed by the illicit use of digital assets.[64] Moreover, it highlights the issue of illicit international actors in jurisdictions with inadequate controls to mitigate illicit finance, and urges the United States to "ensure appropriate controls and accountability for current and future digital assets systems to promote high standards for transparency, privacy, and security…through regulatory… measures that counter illicit activities."[65] Such

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62 Arguably the same ability to act without a rulemaking may already exist with respect to Russia-related primary money laundering concerns under CRMLA given that the prohibition authority under Section 9714 of the NDAA was created outside the scope of Section 311.

63 Fact Sheet: President Biden to Sign Executive Order on Ensuring Responsible Development of Digital Assets, https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/09/fact-sheet-president-biden-to-sign-executive-order-on-ensuring-responsible-innovation-in-digital-assets/.

64 *Id*.

65 Executive Order on Ensuring Responsible Development of Digital Assets (March 9, 2009), https://www.whitehouse.gov/briefing-room/presidential-actions/2022/03/09/executive-order-on-ensuring-responsible-development-of-digital-assets/.

emphasis on curtailing illegal cryptocurrency activities indirectly indicates the potential for a broader use of Treasury's Section 311 authority under the Biden Administration.

CONCLUSION

FinCEN's Section 311 authority is a powerful tool and FinCEN's use of it has matured through the years. Although it has been more than 4 years since FinCEN issued a finding of a primary money laundering concern, FinCEN is clearly ramping up to use its authority again and in new ways. As noted above, the America COMPETES Act would expand the authority for FinCEN to impose a new type of prohibition. Non-US digital exchanges will have to take into account the likelihood of increased FinCEN powers to identify "primary money laundering concerns" and prohibit transactions with them. This new authority would pave the way for a potential wave of FinCEN Section 311 actions to isolate what should be the most egregious actors in the digital assets space with respect to illicit activities. Even without this new authority, there is a present basis for FinCEN to use Special Measure Nos. 1 – 4 to require more information collection in connection with various types of transactions, including those involving virtual assets, and CMRLA provides for broader prohibitive authorities with respect to Russia-related primary money laundering concerns. Both US and foreign financial institutions should be fully prepared in complying with any future Section 311 actions. Others operating in the digital asset space should take note that a potent US regulatory tool designed to address primary money laundering concerns could positively impact that ecosystem by helping to identify and curtail activity that the rest of the financial sector fears when dealing with it.

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