

# FinCEN's Expanding Application of the Bank Secrecy Act and Anti-Money Laundering Regulations

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The Financial Crimes

Enforcement Network (FinCEN) is again flexing its regulatory muscles by increasing the breadth and scope of the types of entities regulated by the Bank Secrecy Act (BSA). Among other things, the BSA requires certain types of financial institutions to implement anti-money laundering (AML) programs and file suspicious activity reports (SARs). The expansion efforts were underscored by FinCEN's late-August release of its Notice of Proposed Rulemaking, which announced FinCEN's plans to begin regulating investment advisers under the BSA. FinCEN's scrutiny of regulated entities had already reached a peak in the third quarter of 2015, when it assessed an \$8 million civil penalty against Caesar's Palace and joined forces with other government agencies to investigate rampant evasion of regulatory requirements at the Bank of Mingo in Pennsylvania. The increased scrutiny of financial institutions and the expansion of AML regulations to investment advisers may not be all. FinCEN's director recently suggested that further future expansion of the application of AML regulations may be on the horizon for the real estate industry. **1. FinCEN's proposed inclusion of registered**

## investment advisers in the definition of financial institution.

On August 25, 2015, FinCEN released its Notice of Proposed Rulemaking. The lengthy and detailed Notice laid out a proposal to expand the requirements of AML programs and suspicious activity reporting to investment advisers.<sup>[i]</sup> In the Notice, FinCEN cited two reasons to expand the BSA's reach: (i) the approximately \$61.9 trillion in assets held by investment advisers for their clients; and (ii) investment advisers' unique understanding of their clients' movements of funds through the financial system. FinCEN envisions investment advisers will play an important role in safeguarding the financial system against money-laundering, terrorist financing, and crime. FinCEN director Jennifer Shasky Calvery said, "Investment advisers are on the front lines of a multi-trillion dollar sector of our financial system .... If a client is trying to move or stash dirty money, we need investment advisers to be vigilant in protecting the integrity of their sector."<sup>[ii]</sup> Under the proposed rule changes, investment advisers—who include financial planners, pension consultants, and certain types of foreign investment advisers—will be required to implement AML programs, begin examining transactions for suspicious activity, start reporting suspicious activity, and satisfy other general recordkeeping requirements for transactions under the BSA. Only investment advisers already required to register with the Securities and Exchange Commission will be subjected to the new requirements. Importantly, FinCEN intends to delegate the responsibility of enforcing investment advisers' compliance with the proposed AML regulations to the SEC. Because only large investment advisers are required to register with the SEC, small and mid-sized firms will still not be required to institute AML policies and procedures. However, as FinCEN seeks to close loopholes through which money can be laundered in the U.S. financial system, it may add rules that address other types of investment advisers deemed to present a high risk of money-laundering activity.

## 2. FinCEN is increasingly enforcing existing AML regulations against entities other than large banks.

a. FinCEN's Assessment of a Civil Money Penalty Against Bank of Mingo, Williamson, West Virginia<sup>[iii]</sup>

*Facts* On June 15, 2015, FinCEN assessed a \$4.5 million civil penalty against Bank of Mingo in Williamson, West Virginia after finding that, for certain customers, bank managers purposely structured transactions to evade requirements to file currency transaction reports (CTRs) on cash transactions over \$10,000. This assessment came after a joint investigation of Bank of Mingo by FinCEN and the Federal Deposit Insurance Corporation, which also imposed a separate \$3.5 million penalty. In addition, as part of a deferred prosecution agreement and forfeiture action brought by the U.S. Attorney's Office for the Southern

District of West Virginia in connection with Bank of Mingo's purposeful evasion of the BSA's requirements, Bank of Mingo agreed to forfeit \$2.2 million. *FinCEN's Findings* FinCEN found that Bank of Mingo serviced several high-risk corporate customers that initiated large numbers of high-volume cash transactions. Bank of Mingo failed to implement an adequate AML system to respond to the heightened risk posed by servicing these customers. Deficiencies in Bank of Mingo's AML program and its failure to implement an adequate customer identification program kept it from identifying or addressing suspicious activity as it happened. First, FinCEN found that although Bank of Mingo had a designated BSA compliance officer, he was also saddled with numerous non-AML responsibilities such that he could not sufficiently monitor the bank's compliance. Second, Bank of Mingo failed to risk-rate its customers during the account opening process or properly designate certain customers as high risks for money laundering. Finally, Bank of Mingo consistently opened accounts for customers who listed P.O. boxes instead of physical addresses in their applications. Bank of Mingo's policies prohibited it from opening such accounts, and potential customers' attempts to use P.O. box addresses constituted red flags that should have alerted the bank to risk. In addition to the systemic shortcomings of the bank's AML controls, FinCEN also found that bank management actively helped certain customers structure cash deposits and withdrawals such that the filing of CTRs was not required. For certain customers, multiple high-dollar cash transactions were conducted per day, but were not aggregated by employees. As a result, SARs regarding these transactions were never filed. In connection with these activities, a corporate customer of Bank of Mingo was charged and pleaded guilty to conspiring to structure transactions, and the Williamson branch manager of Bank of Mingo pleaded guilty to lying to federal agents regarding his knowledge of the cash withdrawals.

b. Consent to the Assessment of a Civil Money Penalty against Desert Palace, Inc. d/b/a Caesars Palace, Las Vegas, Nevada[iv]

*Facts* On September 8, 2015, FinCEN announced a settlement with Caesars Palace in which it consented to the assessment of an \$8 million civil penalty following an investigation conducted by FinCEN and the Internal Revenue Service, Small Business/Self-Employed Division uncovered major shortcomings in Caesars' AML controls in its private, high-stakes gaming salons. The investigation also uncovered failures to report minimal gaming, which is known as a suspicious practice indicative

of money laundering activities. *FinCEN's Findings* FinCEN found that Caesars willfully violated the requirement that it implement a reasonably designed AML program and failed to report at least 30 instances of suspicious gambling activity. FinCEN found that Caesars allowed individuals to gamble anonymously in its private, high-stakes gaming salons where patrons were required to begin play with an initial deposit or credit line of at least \$300,000. Because these patrons were primarily wealthy individuals from overseas who gambled very large sums, the money laundering risk was significant. Caesars failed to impose more stringent controls to match the heightened risk. FinCEN also found that at its Asian branches, where Caesars marketed its casinos to wealthy foreign gamblers, Caesars routinely accepted third-party checks for marker (gambling credit line) payments without obtaining any identifying information regarding the paying party. Because of its deficient AML controls, Caesars failed to detect or report any of the foregoing activity as potentially suspicious. FinCEN found that Caesars' employees were grossly untrained in AML controls and that even if Caesars had detected suspicious activity, it failed to maintain sufficient records required to file meaningful SARs. Due to FinCEN's findings, Caesars must pay the \$8 million civil penalty plus \$1.5 million in additional penalties to local authorities, and is subject to pervasive oversight by, and periodic reporting to, FinCEN.

**3. Looking Ahead: FinCEN will likely continue to enforce existing regulations more vigorously and subject new industries to AML regulation.** FinCEN's proposed rules expanding AML regulations to investment advisers, and its recent investigation of a non-traditional banking organization, which led to the imposition of civil penalties, show FinCEN is attempting to close any loopholes in the enforcement of the BSA and its regulations. In keeping with that goal, it appears FinCen's next frontier will be the real estate industry. Jennifer Shasky Calvery, FinCEN's director, said that she is attempting to close the loop through which fraud, money launderers, and transnational organized crime can exist and be furthered through U.S. money services. Accordingly, FinCEN may next reach real estate, one of the remaining industries not regulated under the BSA in which large amounts of funds change hands daily. Director Shasky Calvery suggested that the use of real estate to disguise laundered funds is pervasive. Although there are existing AML regulatory requirements for originators of mortgages, there are no regulations that currently apply to other actors involved in real estate closings and settlements, such as closing attorneys, agents, appraisers, title search and insurance and escrow companies. In a May 6, 2015 speech at the West Coast AML Forum, Director Shasky Calvery addressed the money laundering risks associated with limited regulation of real estate transactions and intimated that proposed regulations for all actors involved in real estate purchases may be coming.

**4. Conclusion** It is clear that no entity already regulated under the BSA can take any shortcuts when implementing and evaluating their AML programs and their employees'

compliance therewith. More than ever, financial institutions of the type currently regulated under the BSA must ensure they implement AML programs that match the level of AML risks involved in their business, that the programs effectively identify suspicious activity, and that the programs are followed by the financial institution's employees. In addition, as indicated by FinCEN leadership's recent announcements and publications, participants in the investment advising and real estate industries should consider the impact of AML regulations on their businesses and perhaps also begin preparing to implement systems and procedures to comply with AML regulations.

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[i] Prop. Treas. Reg. 31 C.F.R., Chapter X, 80 Fed. Reg. 52,680 (proposed Sept. 1, 2015).

[ii] *FinCEN Proposes AML Regulations for Investment Advisers*. FinCEN Press Release, Aug. 25, 2015 (quoting).

[iii] *See In the Matter of Bank of Mingo, Williamson, West Virginia*, Case No. 2015-08, Assessment of Civil Money Penalty (U.S. Dept. of Treasury, Financial Crimes Enforcement Network June 15, 2015).

[iv] *See In the Matter of Desert Palace, Inc. d/b/a Caesars Palace, Las Vegas, Nevada*, Case No. 2015-10, Consent to the Assessment of Civil Money Penalty (U.S. Dept. of Treasury, Financial Crimes Enforcement Network September 8, 2015).

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