

Banking and Finance Law Daily Wrap Up, BANK SECRECY ACT—FinCEN explains use of SARs in ban on FBME correspondent accounts, (Nov. 30, 2016)

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In response to a court order by the U.S. District Court for the District of Columbia, the Financial Crimes Enforcement Network has published a supplement to its final rule imposing the "fifth special measure" against FBME Bank, Ltd. In the [supplement](#), FinCEN clarifies how it used Suspicious Activity Reports to bolster its finding that FBME was a primary money laundering concern and provides justification for why it found the volume of FBME's shell company activity—at least 4,500 suspicious wire transfers that totaled at least \$875 million—to be "substantial," warranting the imposition of the fifth special measure.

Fifth special measure. Under section 311 of the USA PATRIOT Act, FinCEN has authority to require covered financial institutions to take special measures with regard to financial institutions that are found to be of primary money laundering concern. Generally, the special measure most commonly imposed under the section is the fifth special measure. The fifth special measure prohibits all covered financial institutions from opening or maintaining a correspondent account in the United States for, or on behalf of, entities identified as a primary money laundering concern.

In July 2014, FinCEN issued a Notice of Finding (NOF), concluding that FBME was a financial institution of primary money laundering concern. One year later, FinCEN issued a [final rule](#) imposing the fifth special measure against FBME, banning financial institutions from opening or maintaining a correspondent account on FBME's behalf. The NOF and final rule have been the subject of ongoing litigation in the U.S. District Court for the District of Columbia, and the court has [ordered](#) the agency not to enforce the rule until it is able to resolve FBME's challenge to the ban.

FBME's challenge. In a Sept. 20, 2016, [order](#), the court remanded to FinCEN the final rule imposing the fifth special measure, stating in its [memorandum opinion](#) that the agency had not responded meaningfully to FBME's challenge to FinCEN's interpretation of aggregate Suspicious Activity Report data on the following four grounds:

1. SARs are so over-inclusive—"sweeping in [so many] transactions that are perfectly legitimate"—that "categorically" viewing SARs as indicative of illicit transactions is "invalid and improper."
2. While the absolute dollar amounts of transactions tagged as "suspicious" might appear high on the surface, they represented a small proportion of FBME's overall transactions.
3. FinCEN failed to consider "alternative bases for the increase in SARs involving FBME

between April 2013 and April 2014," particularly the "Cypriot financial crisis and attendant controls."

4. FinCEN failed to provide either a "point of comparison between FBME and other . . . banks that [the agency] considers similarly situated but less deserving of suspicion given their SAR statistics," or "any baseline for the SARs statistics it considers standard or acceptable for an international bank like FBME."

Use of SARs in rulemaking. As an initial matter, FinCEN noted that FBME's comments regarding FinCEN's use of SARs "reflect a misunderstanding of SARs generally and how FinCEN analyzed and used SARs in this rulemaking."

According to FinCEN, the SARs were not the only evidence that supported FinCEN's determination that

FBME is of primary money laundering concern. Rather, the agency's analysis of SARs "simply affirmed FinCEN's concern surrounding FBME's involvement in money laundering."

Those concerns, said FinCEN, were informed by other information, including: an FBME customer's receipt of a deposit of hundreds of thousands of dollars from a financier for Lebanese Hezbollah; FBME provided services to a financial advisor for a major transnational organized crime figure; FBME facilitated funds transfers to an FBME account involved in fraud against a U.S. person; and FBME facilitated the evasion of U.S. sanctions through its extensive customer base of shell companies

Response to FBME. FinCEN went on to address each of FBME's concerns. First, FinCEN analyzed the SARs as *qualitative* evidence of activity conducted by FBME that reflected one of FinCEN's primary concerns about FBME—the size and number of "[w]ire transfers related to suspected shell company activities." Therefore, when reviewing SARs associated with such activity, FinCEN concluded that they were indicative of potential money laundering.

As to FBME's second contention, FinCEN responded that it may identify a bank as a financial institution of primary money laundering concern pursuant to Section 311 even if it has extensive legitimate activities. FinCEN was concerned by the substantial volume of all suspicious activity at the bank, regardless of the extent to which money laundering was a percentage of FBME's activities. FinCEN explained that it found "the opportunity for money laundering of such a magnitude and through so many transactions to be 'substantial' because, in absolute terms, it poses a significant threat to the U.S. and international financial systems, potentially allowing large amounts of funding to pass to terrorist or criminal activity."

FinCEN responded to FBME's third complaint that, while suspicious activity and reports of such activity could be influenced by a number of factors, including international development, the Cypriot financial crisis and attendant controls were inapplicable to the case. The suspected shell company activities accounted for hundreds of millions of dollars between 2006 and 2014—the activity was not limited to the period of the Cypriot financial crisis.

As to FBME's final point, FinCEN reiterated that FBME misunderstands the role that SARs played in FinCEN's analysis and that it does not necessarily depend on a relative comparison to other banks. FinCEN found that the SAR filings established "substantial" significant shell company activity at FBME because, in absolute terms, it poses a significant threat to the U.S. and international financial system. The conclusion did not depend on comparison with other banks. FinCEN also noted that following the issuance of its Notice of Findings, FBME employees took measures to obscure information, "underscoring the high likelihood that SARs involving FBME are actually under-inclusive."

Companies: FBME Bank Ltd.

RegulatoryActivity: BankSecrecyAct

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