BIDEN ADMINISTRATION RATCHETS UP PRESSURE ON FINANCIAL INSTITUTIONS TO HELP COMBAT HUMAN TRAFFICKING AND FORCED LABOR

The US government is sending clear signals that financial institutions need to increase their focus on detecting and preventing the use of the US financial system in support of human trafficking as a prioritized part of their anti-money laundering ("**AML**") program. The Financial Crimes Enforcement Network ("**FinCEN**") has long warned financial institutions regarding the risks of their services being misused in support of human trafficking and related crimes, which could constitute specified unlawful activities under the Money Laundering Control Act of 1986. FinCEN issued its first comprehensive guidance on recognizing activity associated with human trafficking in September 2014. Last year, FinCEN issued a supplementary advisory highlighting 20 additional potential behavioral indicators of forced labor and sex trafficking, and four additional typologies. In May 2021, prompted by the Biden Administration, the G7 reaffirmed its members' commitment to protect individuals from forced labor, specifically referencing the risks of forced labor in global supply chains.

Since entering office, the Biden Administration has signaled an escalated focus on the use of AML requirements to combat human trafficking, including use of forced labor, with financial institutions directly in line of sight. The current administration's focus on financial institutions is consistent with bipartisan legislative efforts, including the Anti-Money Laundering Act of 2020 ("**AMLA**"), which, among other initiatives, requires study and reporting on government and private sector efforts to address human trafficking. The currently pending End Banking for Human Traffickers Act of 2021 would provide even more specific focus on increasing the role of the financial industry in combating human trafficking. All of these efforts and FinCEN's recently released AML priorities, discussed below, change the risk calculus in how a financial institution should assess the adequacy of its compliance systems and controls with respect to human trafficking.

FinCEN issued the first government-wide anti-money laundering and countering the financing of terrorism ("**CFT**") priorities ("**AML/CFT Priorities**") pursuant to the AMLA in June 2021. The AML/CFT Priorities highlight the Biden administration's more aggressive approach of using AML enforcement to curtail global threats such as corruption, international terrorism, cybercrime, human trafficking, and human smuggling.

With respect to human trafficking, FinCEN highlighted that financial institutions should be aware of illegal proceeds that may result from human trafficking activities because funds from these illicit activities tend to move through money laundering networks and criminal organizations. The Priorities themselves do not create new immediate obligations for financial institutions and financial services providers (including brokers or dealers in securities, insurance companies, and dealers in precious metals) already subject to the Bank Secrecy Act ("**BSA**"). Nevertheless, FinCEN has stated that *"in preparation for any new requirements when those final rules are published, banks may wish to start considering how they will incorporate the AML/CFT Priorities into their risk-based BSA compliance programs*." FinCEN also has urged financial institutions to be keenly aware of "*how they will incorporate the [priorities] into their risk-based AML Programs such as by assessing the potential risks associated with the products and services they offer, the customers they serve, and the geographic areas in which they operate*."

Another change to the BSA under the AMLA involved the emphasis and codification of the requirement that AML programs be reasonably designed and risk-based. With respect to human trafficking, financial institutions should recognize that what qualifies as a "reasonably designed" program is subject to change based on evolving capabilities of industry and FinCEN's priorities. With respect to human trafficking, financial institutions need to realize that reasonable expectations for their AML programs are increasing. This is a result of a combination of the elevation of human trafficking as a priority, growing clarity from FinCEN as to how to identify illicit activity, and the successes that financial institutions have achieved in identifying bad activity through their concerted efforts.

Risk Factors for Human Trafficking/Forced Labor

Financial institutions should take a holistic approach to determining whether they are processing funds used for human trafficking or forced labor. No single risk factor alone can determine whether a customer is involved in human trafficking or forced labor, but financial institutions should monitor for combinations of red flags to determine whether enhanced customer due diligence is necessary. Some areas of particular risk for financial institutions to consider include:

- Higher-Risk Geographical Areas

  The geographical location of a client and the jurisdictions in which it does business should be considered in assessing the relative risk of client involvement in human trafficking activity. Financial institutions should carefully scrutinize clients operating in areas with a higher prevalence of human trafficking and forced labor. Information about geographical areas with a high risk of human trafficking and modern slavery activity can be found here and here as well as in the US State Department's Annual Trafficking in Persons Report.

- Higher-Risk Industries/Sectors

Certain industry sectors also have been recognized as carrying a higher risk of involvement in human trafficking activity. Per FinCEN's 2014 advisory and 2020 supplementary advisory, these include industries such as hospitality, agriculture, janitorial services, construction, restaurants, care for persons with disabilities, salon services, massage parlors, retail, fairs and carnivals, peddling and begging, child care, domestic work, drug smuggling and distribution, mining, textiles, and other industries relying on manual labor.

- Higher-Risk Products

  Similarly, certain products carry an enhanced risk of involvement with human trafficking and forced labor. For example, the US Bureau of International Labor Affairs maintains a list of products suspected of being produced using child or forced labor and their source countries. The list can be found here. Financial institutions should not only consider whether customers directly manufacture higher risk products, but whether they have higher risk products in their supply chain.

Best AML Practices/Recommendations for Financial Institutions

Under the BSA, financial institutions are required to implement reasonable risk-based programs to combat money laundering. It is becoming clearer that financial institutions are expected to incorporate human trafficking risk analysis into their routine customer onboarding and due diligence, risk rating, and customer/transaction monitoring. In doing so, financial institutions will be better able to identify the risks, stop transactions involving proceeds from human trafficking activity, and reject or offboard clients associated with such activities.

- Employee Training Programs

  While the tools for identifying human trafficking risk are essentially the same as for other AML compliance issues, the risk factors are not. It is therefore important for financial institutions to ensure that their AML training program includes adequate content to equip their employees to detect, prevent, and report any attempt to misuse the financial institution to support human trafficking activities.

- Use of Suspicious Activity Reports ("**SARs**")

  Financial institutions are required to report transactions that meet SAR thresholds involving suspicions of human trafficking involvement. In 2018, FinCEN introduced a human-trafficking-specific checkbox on its SAR forms to increase the ease of this reporting.

  The burdens on financial institutions to detect and prevent a range of illegal activity are only increasing, both because of new legislation and banks' increasing capacity to accurately and efficiently monitor clients and transactions. Given increasing focus on the important role of the financial sector in thwarting human trafficking, financial institutions must invest time and talent to address and detect human trafficking or face reputational harm and stiff financial penalties, with enforcement risk from both US and non-US authorities.

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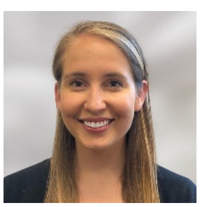

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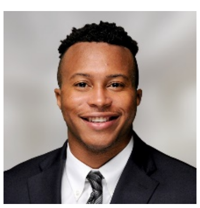

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