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20 Years After The Patriot Act, FinCEN Still Has Room To Grow

By **Jon Hill**

Law360 (October 25, 2021, 10:03 PM EDT) -- Before it was catapulted to the front lines of the war on terror, the Financial Crimes Enforcement Network was a tiny, meagerly funded federal agency exiled in the D.C. suburbs. Twenty years later, the nation's top anti-money laundering watchdog is still the runt of the regulatory litter, and some observers say it badly needs a growth spurt.

Tuesday marks the 20th anniversary of the enactment of the USA Patriot Act, the sweeping anti-terror legislation passed in the wake of 9/11. Although more commonly known for its surveillance and border security provisions, the Patriot Act vastly expanded the U.S. government's fight against terrorist financing and money laundering, promoting the then-obscure FinCEN to lead the charge.

Since then, FinCEN's regulatory footprint has continued to grow as federal authorities seek to stanch the flow of what some estimates say is the more than $1 trillion of dirty money that sloshes through the global financial system every year. But the agency remains chronically underresourced compared to other financial regulators, with a head count that has barely budged in more than a decade and employee morale that ranks among the lowest surveyed in the federal government.

"Its headquarters is located so far outside the Beltway that you have to take a bus or a taxi from the closest Metro station just to get there," said Ross Delston, a veteran Washington, D.C., lawyer and anti-money laundering expert witness.

"FinCEN's own employees call it the 'Toilet Bowl Building,'" Delston added, saying that while some observers might find the circular arch at the entrance of the building aesthetically pleasing, "it always seemed very revealing to me that the people who were there the most thought so little of it."

A Sea Change in Compliance

For more than 50 years, the government has relied on banks and other financial institutions to serve as its eyes and ears in rooting out dirty money.

This arrangement began to take shape with the passage of the Bank Secrecy Act of 1970, which included requirements for banks to flag certain larger transactions and keep records on customers' identities. The framework was then broadened several times in the 1980s and 1990s, sweeping in more types of financial institutions, stiffening potential penalties and introducing compliance obligations like the requirement to file a report with the government when a suspicious transaction is spotted.

But the Patriot Act took this framework to the next level. Hoping to choke off illicit cash flows that could fund another attack like 9/11, the legislation brought new swaths of the financial industry into the scope of the nation's anti-money laundering laws, strengthened expectations for covered companies' AML programs and armed regulators with more potent tools to enforce compliance, including some much stiffer penalties.

"The effect of it was to turbocharge a whole new industry of anti-money laundering compliance in a way that had never been seen before," Delston said. "It went from being a relatively minor part of banking compliance to the first, second and third priorities on everybody's list."

In the process, the Patriot Act thrust FinCEN — up until then a relatively lowly U.S. Department of the Treasury office — into the spotlight as the chief custodian of this beefed-up new framework.

Created by administrative fiat in 1990, FinCEN was conceived as more of an AML intelligence and information clearinghouse than a full-fledged regulatory agency. But the Patriot Act elevated FinCEN's formal status inside the Treasury Department and scaled up its responsibilities accordingly, beginning with the job of issuing a blizzard of regulations to implement the new legislation.

"FinCEN worked diligently with Treasury and other federal regulators to start pushing out regulations for all different categories of financial institutions," said Melissa G.R. Goldstein, special counsel at Schulte Roth & Zabel LLP and former attorney-adviser at FinCEN. "Veterans in the industry still talk about the long hours they were putting in at that time."

As FinCEN's jurisdiction expanded following the Patriot Act's enactment, so too did the agency's investigative caseload and the amount of information pouring in its door.

From 2002 to 2010, for example, the agency saw a roughly 400% increase in the number of suspicious activity reports submitted to it as money services businesses, broker-dealers, casinos, currency dealers and other financial institutions became newly required to make the filings. This number has nearly doubled again since then, reaching more than 2.5 million SARs filed just last year.

FinCEN has also had to stay on top of a financial services landscape that has undergone rapid change during this time, with rising transaction volumes and new technologies like cryptocurrency creating new challenges for AML detection and compliance.

And the agency's workload is still growing. The Anti-Money Laundering Act enacted earlier this year tasked FinCEN with a host of new regulatory responsibilities as part of a landmark modernization effort, including building a major database of beneficial ownership information, establishing certain information-sharing and coordination programs and rolling out compliance requirements for art and antiquities dealers.

"The agency has so much on its plate right now," said Julie Copeland, a partner at the global advisory firm StoneTurn Group LLP and former big-bank anti-money laundering compliance chief. "It's hard to believe that they'll be able to get everything done in the time frame that they're supposed to."

Limited Resources, Large Mandate

For as much as FinCEN's responsibilities have swelled over the years, its staffing levels have not. With authority for 300 full-time employees as of 2021, the agency's head count hasn't budged much over the past 15 years following an initial bump in hiring after the Patriot Act, according to U.S. Office of

Personnel Management data and past budget documents.

Other financial regulators, by contrast, have grown — in some cases, significantly so. The U.S. Securities and Exchange Commission, for example, saw its staffing levels climb from just under 3,900 employees to about 4,500 between 2005 and 2020, an increase of 16%, while the Federal Deposit Insurance Corp. and Commodity Futures Trading Commission each logged roughly 42% increases in their workforces over the same time period, reaching just under 5,900 and 700 employees, respectively.

FinCEN's budget has also stayed relatively flat in recent years, averaging just about 2% annual growth from 2015 to 2021.

"FinCEN does have limited resources and a large mandate," Goldstein of Schulte Roth said. "For example, since FinCEN does not have a large examination staff, it has managed its mandate by delegating many of its examination responsibilities to other federal regulators."

This outsourcing approach goes back years at FinCEN and reflects the agency's humble origins as a Treasury office with a very narrow focus. It also reflects a recognition that other federal regulators already have expertise in overseeing their respective segments of the financial industry and may be better positioned to identify AML issues on their home turf.

But the result for industry is that the agency that writes AML rules isn't necessarily the same agency that handles examinations and enforcement, raising the potential for differing priorities and inconsistent interpretations among regulators.

"It gets complicated for financial institutions, for sure," Goldstein said.

It has also led to legal challenges. Next month, for example, the U.S. Supreme Court may decide whether to hear an appeal brought by a broker-dealer that argues the SEC is **overstepping its authority** by trying to enforce FinCEN's suspicious activity reporting requirements.

But even if there's nothing legally wrong with the model of outsourced examination and enforcement, it may not be the most productive way to promote strong, uniform AML compliance across the financial industry. Instead, enlarging FinCEN so it can handle more of those functions itself could prove better for everyone involved, according to financial services attorneys who spoke to Law360.

"There could be some efficiencies there," said Gregory Lisa, a Hogan Lovells global regulatory partner and former acting FinCEN compliance and enforcement office chief. "You would keep some learning in-house, and you wouldn't have these kind of decoupled examination and enforcement decisions."

Carlton Greene, a former FinCEN chief counsel who is now a partner in Crowell & Moring LLP's white collar and regulatory enforcement group, similarly said that having more staff would enable FinCEN to ensure "more consistent enforcement of the requirements of the [AML laws] and have more of an impact on enforcement writ large."

"That can be important for developing spaces like virtual currency," Greene said. "I think it would also allow them to do things like respond more quickly to requests for policy interpretation."

Indeed, FinCEN's persistently smaller size is seen by some attorneys as hindering the agency's ability to provide timely regulatory guidance and other compliance assistance — and even FinCEN seems to share this concern. Earlier this year, the agency issued a report expressing interest in starting a no-action letter program like those at other financial agencies, but it said that it was too short-staffed to move forward at this time.

That could be an issue when it comes to industry efforts to deploy innovative technologies to improve AML program effectiveness, for example. Although FinCEN and other banking regulators have said they welcome these efforts, Goldstein said financial institutions remain hesitant to experiment with and embrace these innovations at scale without more regulatory assurances.

"Financial institutions are leery of making major changes to their compliance processes to integrate these innovative technologies, because they are uncertain of how regulators will react and don't want to risk being subject to an examination finding or enforcement action," Goldstein said.

A similar dynamic has helped fuel long-standing industry complaints that regulators take an overly formalistic attitude toward suspicious activity reporting, privileging quantity of filings over quality.

With examination authority shared among different agencies and with limited bandwidth at FinCEN for giving in-depth feedback, attorneys said financial institutions have often felt in the dark about how to make their SAR filings more useful to authorities, instead filing anything and everything to play it safe.

"Banks have always wanted the government to help them to do this better," said Copeland of StoneTurn Group. "But if FinCEN doesn't have sufficient staff, they can't."

Lisa of Hogan Lovells acknowledged that it might sound strange to suggest that an industry could benefit from a bigger regulator.

"No one ever wants to say, 'Hey, let's just grow government to make the problem go away.' But the thing is, when you put all these additional tasks on an agency like FinCEN, you're allowed to expect more results if you allocate more resources," said Lisa, who is also a former federal organized crime prosecutor with the U.S. Department of Justice.

"That agency could easily have five times the amount of people, and they would still have plenty more items in their inbox to address," he added.

'Really Needs To Be Beefed Up'

Today, FinCEN is in the thick of another rulemaking spell as it faces deadlines to implement the Anti-Money Laundering Act, the most comprehensive AML legislation since the Patriot Act.

To help facilitate this work, the Biden administration has called for a 50% boost in FinCEN's budget for the 2022 fiscal year, including funding to hire 80 more full-time employees. It would be the biggest single-year jump in staffing for the agency in at least two decades, but Congress has yet to fully sign off on this budget request, and some observers question whether even that will be enough.

"They need more people, they need more money," Copeland said. "This is an agency that really needs to be beefed up."

Asked about the adequacy of the agency's recent staffing and funding levels, a FinCEN spokesperson referred Law360 to the agency's 2022 budget request narrative. Among other things, the document notes that AMLA put roughly 40 new rules or other requirements on FinCEN's to-do list, but "did not come with accompanying funding," so the agency "has been diverting existing resources to meet the rigorous deadlines set forth in the legislation."

Over the longer term, Delston said that FinCEN needs more strategic, structural change to bolster its effectiveness, including elevating its director to a Senate-confirmed position to give the agency more political heft on Capitol Hill and within the Treasury Department.

"It needs to insource analysis of suspicious activity reports, and it needs to have a much stronger compliance and enforcement unit so that FinCEN can play a stronger role in the areas of the financial system that do not have a federal functional regulator," the D.C. attorney said.

Delston was also part of the committee that drafted a March report produced by the D.C. think tank Global Financial Integrity, which recommended additional ideas for "reimagining" FinCEN. Among them were proposals to expand the agency's trend-spotting and data integration capabilities, give the agency a seat on the National Security Council and bring the agency's salaries up to those offered at other financial regulators.

The issue of pay has been a perennial sore spot for FinCEN employees, who earn less on average than their counterparts at the Federal Reserve, SEC and other federal financial regulators. That's because those other agencies aren't on the same federal civil service pay scale as FinCEN. This discrepancy is often blamed for making FinCEN's salaries comparatively less competitive and contributing to its dismal rankings in "Best Places to Work" surveys over the years.

"There's a risk of [FinCEN staff] being recruited and the agency losing their expertise," said Greene of Crowell & Moring. "Salary is a consideration, and as anti-money laundering's importance has increased, they've become attractive hires. It probably is worth considering salary dynamics and whether their compensation is at a point to keep them around."

But Greene and other attorneys stressed that it is a strong sense of purpose, not pay, that drives FinCEN's workforce.

"The people within FinCEN are hardworking," Goldstein said. "Frankly, you don't get done what FinCEN gets done with the amount of staffing it has and with the mandate it has unless your people are dedicated to the mission."

--Editing by Alanna Weissman and Nicole Bleier.
