



THE FINCEN FILES

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Senior Associate Nin Ritchie shares her thoughts on the recent news about the FinCEN leaks.

I'm a regulatory lawyer, I love a bit of drama (I shouldn't admit it, I know), but when early Monday morning my roomie said 'you've got to see *this!*', having barrelled around the desk to come full visual on the BBC news headline 'The FinCEN Files', my heart sank to an all-time regulatory low.

Some 2,657 of FinCEN's documents, of which 2,121 were suspicious activity reports (SARs), have been leaked to BuzzFeed News and shared with a group that brings together investigative journalists from around the world, who in turn distributed them to 108 news organisations in 88 countries, including the BBC's Panorama programme.

FinCEN is the US Financial Crimes Enforcement Network, described by the BBC as "*the people at the US Treasury who combat financial crime*". The BBC revealed that "*hundreds of journalists have been sifting through the dense, technical documentation, uncovering some of the activities that the banks would prefer the public not to know about.*"

I have many issues with this, not least:

- It seems that the BuzzFeed News, the journalists and any of the news organisations did not think to hand the highly sensitive criminal files back to FinCEN – not least to protect the bankers who were obeying the law and their regulatory duties of detecting and preventing the furtherance of criminal conduct.
- Against the background of recent criminal prosecutions of MLROs in the Channel Islands, and some severe regulatory sanctions against individuals for compliance breaches, which have caused the question to be asked: *Who wants to be a MLRO?*, I would think now the more pressing question is: *Who wants to be a banker diligently doing their job and alert enough to identify that the bank may be handling the proceeds of crime?* Answer: *Not me!* Would I like to risk being publicly (or not so publicly) identified as the person at JP Morgan who picked up that a company that it banked might be identified with an individual who was on the FBI's top 10 most wanted list? I would feel very uneasy that the suspected money launderer knew I was the one who blew the whistle.
- The fact that the *technical documentation* uncovered *some of the activities that banks would prefer the public not to know about*. At least in the Channel Islands, we would be concerned about *tipping off*, itself a criminal offence. The very point of protected disclosures is that information contained within a SAR, if leaked, could undermine current or future criminal investigations. Is it in the public interest to potentially thwart the work of FinCEN and its counterparts around the world, particularly if, like many law enforcement agencies around the world, it is already under resourced and overworked?

FATF, the global money laundering and terrorist financing watchdog, notes that a study undertaken by the United Nations Office on

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Drugs estimated that in 2009 criminal proceeds amounted to 3.6% of global GDP, with 2.7% (or USD 1.6 trillion) being laundered. We know that vast sums of criminal proceeds are being laundered through the global financial system, that is not new news, and is why the regulatory landscape has evolved so rapidly over the past 20 years, it has done so precisely with a view to combating financial crime. That is why SARs exist.

While many financial services businesses worldwide have made great strides in fighting financial crime over the past couple of decades, the FinCEN leak undermines this system.

I am sure the banks have engaged the big guns to do their best to protect themselves and their employees, I just hope that they have managed to do so in time.

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