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FinCEN's $390 Million case against Capital One – And What it Means for AML Enforcement

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As the financial services industry prepares for expanded criminal and civil enforcement under the Bank Secrecy Act ("BSA") with the passage of the Anti-Money Laundering Act of 2020, FinCEN's recent case against Capital One shows how FinCEN's approach to AML enforcement is evolving.

On January 15, 2021, FinCEN assessed a $390 million civil money penalties against Capital One for violations of the BSA related to Capital One's Check Cashing Group (the "CCG"). CCG was previously a business unit under Capital One's commercial bank until 2014, through which Capital One provided banking services including processing checks and providing customers with armored car cash shipments. Capital One made the decision to exit the CCG business and closed the unit in 2014. In issuing its decision, FinCEN determined that, between 2008 and 2014, Capital One's CCG failed to report millions of dollars in suspicious transactions. Specifically, FinCEN found that Capital One:

- failed to maintain an AML program to guard against money laundering as per 31 U.S.C. § 5318(h);
- failed to file suspicious activity reports (SARs) on suspicious transactions in violation of 31 U.S.C. § 5313; and
- failed to file currency transaction reports (CTRs) for the CCG in violation of 31 U.S.C. § 5313.

The enforcement action is noteworthy because it is one of very few cases that FinCEN has charged against a major financial institution, where no other government agency, such as DOJ, OFAC, or the SEC, has charged a parallel case. It signals a shift for FinCEN, an agency that has historically been known for its role in administering the BSA and issuing rules and guidance to covered industries. Though we have seen FinCEN take a far more aggressive role in filing its own enforcement action under the BSA over the past decade, it typically does so on the heels of another criminal or regulatory matter. Thus, the Capital One settlement signals that FinCEN is not only filing its own cases – it is also likely taking a more active, investigative role.

The Capital One settlement also illustrates what factors FinCEN takes into account when bringing an enforcement action. As we shared with you last year, FinCEN issued a rare statement putting the financial industry on notice of the factors that guide its enforcement decisions. Unlike criminal cases under the BSA, which require the government to prove intentional, willful violations of the statute, the evidentiary standards that govern FinCEN's enforcement actions are murkier and merely require reckless disregard.

The charging document asserts that Capital One engaged in "willful violations" of the BSA. But a closer look at the factual allegations suggests that ineffective compliance controls and a series of reckless or negligent acts – not intentional conduct – were enough to support the enforcement action. The allegations include the following AML compliance deficiencies:

- weak transaction monitoring;
- weakness in suspicious activity identification;
- poor compliance controls;
- failure to act on negative news/indictments;
- and failure to file CTRs.

FinCEN's key finding of willfulness appears to be largely premised on Capital One's prior awareness of circumstances that could have led to the compliance failures described above. FinCEN alleged that prior to Capital One's acquisitions of two banks in as early as 2006, federal and state regulators had notified Capital One of deficiencies in the banks' AML programs.

Further, in 2008, a CCG customer was indicted on issues related to its business operations. FinCEN seized on this fact, alleging that despite these warnings, Capital One failed to implement appropriate methods to comply with the BSA.

After admitting to the facts surrounding its violations, Capital One consented to FinCEN's assessment of civil money penalties.

Though this enforcement action concerns a financial institution regulated under the BSA, it highlights what FinCEN views as ineffective AML compliance, and provides other government agencies – such as the SEC – with a precedent that they might look to in assessing the AML compliance program of a private investment fund. Asset managers should ensure that the financial entities in which they invest have appropriate AML programs in place.

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