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Financial Intelligence Units (FIUs), the U.S. Financial Crimes Enforcement Network, and FIU Operational Independence

As Congress considers anti-money laundering and countering the financing of terrorism (AML/CFT) policy options, one factor may include their effect on Financial Intelligence Unit (FIU) “operational independence.” An FIU is a model of a government entity that receives, analyzes, and disseminates (as appropriate) highly sensitive financial information pertaining to potential money laundering, terrorist financing, sanctions evasion, and other illicit financial activity. The FIU model features greater operational independence from political leaders in an effort to ensure that its work is driven by unbiased expertise and judgment rather than the direct or indirect influence of stakeholders whose activities the entity oversees. The Financial Action Task Force (FATF), an intergovernmental organization co-founded by the United States that promotes international AML/CFT standards, recommends that FIUs maintain “operational independence” (i.e., the ability to operate free from “undue influence or interference” in carrying out their responsibilities).

FIUs: Origins and Global Status

The earliest FIUs were established in the 1990s, shortly after the FATF was established in 1989 to combat the laundering of illicit drug proceeds. Most countries have since established FIUs, as it is an AML/CFT best practice endorsed by FATF. About 170 countries’ FIUs belong to the Egmont Group, an international network of FIUs. (The United States was also a founding Egmont Group member.) Egmont Group membership is contingent on a commitment to uphold AML/CFT best practices for the exchange of financial information, including in particular FIU operational independence and autonomy.

Role of Congress

The *Financial Crimes Enforcement Network* (FinCEN) serves as an FIU for the United States. FinCEN was first established in 1990 pursuant to an order by the Secretary of the Treasury. In 2001, Congress statutorily established FinCEN as a bureau of the U.S. Department of the Treasury (31 U.S.C. §310). Congress authorizes FinCEN’s activities by enacting legislation pertaining to its AML/CFT mandate and its role as an administrator of the Bank Secrecy Act. Congress also shapes FinCEN’s policies and activities when it funds the agency through annual financial services and general government appropriations acts. Committees periodically hold oversight hearings on topics related to FinCEN’s operations, rulemakings, and related policy issues. Through these activities, Congress may play a role in increasing or decreasing FinCEN’s operational independence, potentially affecting FinCEN’s accountability, effectiveness, and international reputation.

FIU Best Practices

FATF maintains a set of 40 recommendations on best practices for protecting the global financial system against money laundering and related illicit financial activity. FATF recommendation 29 focuses specifically on best practices for FIUs. With respect to FIU operational independence, FATF recommends that FIUs possess the

- autonomous authority and capacity to analyze, request, and/or disseminate specific information, including the independent right to forward or disseminate information to relevant domestic and international counterparts;
- ability to access adequate financial, human, and technical resources that ensures an FIU’s independence and autonomy, as well as to conduct its mandate effectively with professional, skilled staff capable of maintaining high standards of confidentiality and integrity; and
- ability to obtain and deploy such resources on an individual or routine basis “free from any undue political, government or industry influence or interference, which might compromise its operational independence.”

Although some foreign FIUs are stand-alone entities, many are housed within certain departments or agencies (e.g., ministries of finance or justice, central banks, financial regulators or supervisory agencies, or customs or law enforcement authorities)—similar to FinCEN’s location within the Department of the Treasury. According to FATF, when an FIU is located within an existing agency, the FIU’s core functions must remain “distinct.”

FIU Assessments

Based on FATF-recommended AML/CFT standards, many jurisdictions—including FATF members and countries belonging to FATF-style regional bodies—participate in periodic peer reviews, known as “mutual evaluations,” of their AML/CFT legal and policy frameworks. Most countries appear to satisfy, at least in part, FATF’s criteria for compliance with FATF recommendation 29.

As of August 2023, 158 jurisdictions have participated in the most recent round of mutual evaluations based on the FATF recommendations. Of these, none were rated “non-compliant” on recommendation 29. This includes the United States, which was rated “compliant” (the best rating) in its 2016 mutual evaluation report. In total, 74 jurisdictions (46.8%) were rated “compliant” on recommendation 29, 69 (43.7%) were rated “largely

compliant,” and 15 jurisdictions (9.5%) were rated “partially compliant.”

Challenges to Operational Independence

A 2018 Egmont Group white paper identified “common jurisdictional shortcomings related to FIU operational independence and autonomy.” According to the white paper, FIU shortcomings may stem from external pressures affecting operational decisions regarding an FIU’s analysis and dissemination of financial intelligence, as well as administrative decisions regarding how an FIU is organized, resourced, and staffed.

The Egmont Group paper identified several key issues, including (1) undue influence in the appointment and dismissal of FIU leadership; (2) impediments to accessing budgetary resources, particularly when an FIU is housed within another agency; and (3) resource decisions that require approval from a higher rank within the larger organization. Potential indicators of diminishing FIU operational independence may manifest in the form of politically influenced appointments, delays in the appointment of FIU leadership, FIU reorganizations leading to a weakening of FIU powers, and high staff turnover, including significant loss of experienced staff, according to the Egmont Group paper.

Failure to establish and sustain FIU operational independence may result in confidentiality breaches or tampering with sensitive financial information for political purposes or on behalf of criminal interests, misuse of FIU authorities to target civil society actors or political opponents, or diminished overall effectiveness of a country’s AML/CFT regime. In certain cases, if operational independence cannot be assured, the Egmont Group has suspended or expelled an FIU from its membership, prohibiting that FIU from participating in Egmont Group activities, including the exchange of sensitive financial information. For example, the Egmont Group expelled Afghanistan’s FIU in June 2022.

FinCEN: The U.S. FIU

FATF assessed in 2016 that the United States’ approach to FIUs, in its current form, is “compliant” with its AML/CFT recommendations, including with respect to FIU operational independence. Treasury Order 180-01 outlines FinCEN’s purpose and specifies the FinCEN director’s responsibilities. Among other provisions, the order states that the FinCEN director has “full authority, powers, and duties to administer the affairs and to perform the functions of FinCEN, including, without limitation, all management and administrative authorities similarly granted to Bureau Heads.” The FinCEN director, a career Senior Executive Service position, is appointed by the Secretary of the Treasury pursuant to Title 31, Section 310, of the *U.S. Code*.

Protection of sensitive financial information is a key operational function of FIUs. *Suspicious activity reports* (SARs) received by FinCEN are treated as confidential information, and SAR disclosures by financial institutions and government officials to those who may be involved in

reported transactions is strictly prohibited (31 U.S.C. §5318(g)). Some instances of unlawful SAR disclosures have been federally prosecuted. Such cases have involved government or bank officials who variously leak SARs to the media or accept bribes for information on which suspicious transactions are reported. In 2020, more than 2,100 SARs were reportedly leaked to the media in an exposé known as the “FinCEN Files.”

Opportunities for Congress

Congressional engagement on FinCEN matters, including ongoing AML/CFT policy concerns, may have implications for FinCEN’s operational independence. With respect to FinCEN, such policy considerations may manifest in the context of ongoing congressional interest in AML/CFT policy developments surrounding:

- **Legislation.** Some bills in the 118th Congress would variously authorize or direct FinCEN to address a wide variety of financial crime concerns, including through requirements to report to Congress. Recent bills have also sought to require the FinCEN director to be appointed by the President and confirmed by the Senate (see H.R. 4036 and S. 2628 in the 118th Congress and H.R. 7623 in the 117th Congress).
- **Hearings.** Pursuant to the Anti-Money Laundering Act of 2020 (AMLA; Division F of P.L. 116-283), the FinCEN director is required to be available to testify before Congress on an annual basis through 2026. FinCEN’s acting director testified most recently in April 2023. (In July 2023, Treasury appointed a permanent FinCEN director, the first since April 2021.)
- **Appropriations.** The Biden Administration requested \$228.91 million for FinCEN in FY2024, up from the requested \$210.33 million for FY2023. Both the House and Senate Appropriations Committees recommended funding FinCEN below the FY2024 request level. (In H.R. 4664, the House committee recommended \$166 million, and in S. 2309, the Senate committee recommended \$190.19 million—the same level appropriated for FY2023.)
- **Access to SARs.** In the AMLA and through other oversight activities, Congress has sought to balance efforts to facilitate sharing financial intelligence information while ensuring that statutory protections remain to safeguard unlawful disclosure of SARs. For example, Section 6212 of the AMLA authorized a pilot program in which U.S. financial institutions may share SARs with their foreign branches, subsidiaries, and affiliates. The timing and potential limitations of congressional access to SARs is also an area of interest. Federal regulations authorize the Secretary of the Treasury to provide SAR data to Congress (31 C.F.R. 1010.950).

Rena S. Miller, Specialist in Financial Economics
Liana W. Rosen, Specialist in International Crime and Narcotics

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