



WILMER CUTLER PICKERING HALE AND DORR LLP

WEBINAR

# *Anti–Money Laundering Trends and Developments*

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*Attorney Advertising*



WEBINAR  
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- Questions will be answered as time permits
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## *Agenda*

- Introduction
- Enforcement Trends and Cross-Border Investigations Best Practices
- Regulatory and Legislative Developments
- Questions



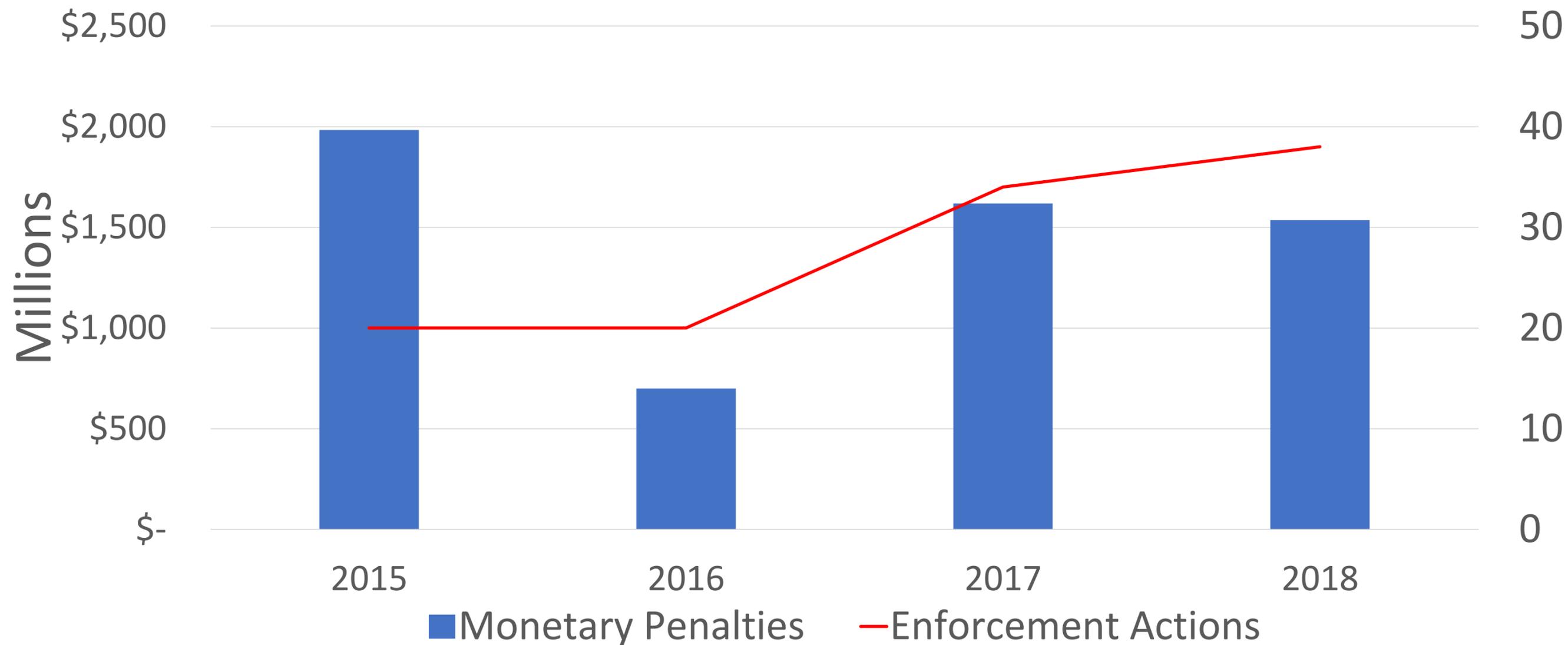
## *Enforcement Trends*

- **Individual Liability** – Executives held personally accountable for failures of AML programs
- **Innovation vs. Resourcing** – FIs still must have sufficient resources to review AML issues
- **Correspondent Banking** – Proper risk management around correspondent banking required
- **Cash Transactions** – Reporting requirements are a priority, particularly near the border
- **Broker-Dealers' BSA Obligations** – Aggressive enforcement surrounding SAR filings
- **CFTC BSA Enforcement** – The CFTC has recently brought AML-related enforcement actions
- **Consumer Fraud** – Emphasis on fraud-associated AML failures, particularly with MSBs



## *Recent Spike in BSA / AML Enforcement*

### Anti-Money Laundering Penalties 2015-2018





## *AML Enforcement Risk Area: Individual Liability*



### — Individual liability for AML program failures

- **MoneyGram** – FinCEN alleged CCO **Thomas Haider** failed to terminate high-risk locations and structured an AML program where information was not communicated to SAR analysts (FinCEN, SDNY; May 2017)
- **Rabobank** – In July 2019, OCC imposed a \$50,000 penalty and barred Rabobank’s GC from participating in the affairs of any federally insured bank for concealing a third-party audit of AML program; previously, OCC alleged that the CCO and a vice president made false statements to examiners and concealed weaknesses in AML program (OCC; Feb. 2018); (VP also entered a DPA with DOJ; Dec. 2017)
- **BTC-e** – FinCEN fined Bitcoin exchange administrator \$12 million for failing to maintain and design any AML program or report suspicious transactions (DOJ also indicted him) (FinCEN, DOJ; July 2017)
- **Lek Securities** – Lek principal/CEO failed to develop and implement a reasonable AML program and supervisory system for the deposit and trading of microcap securities (FINRA; Nov. 2018) and allowed a Ukrainian company to conduct illegal trading activity; Lek personally paid \$420,000 penalty (*SEC v. Lek Securities and Samuel Lek*; Oct. 2019)
- **C.L. King** – FINRA National Adjudicatory Council found that C.L. King AMLCO did not discharge his AML responsibilities reasonably, and assessed 3-month suspension and \$20,000 fine (FINRA; Oct. 2019).



## *AML Enforcement Risk Area: Innovation vs. Resourcing*

- Agencies encourage experimentation with innovative compliance programs
- A joint statement of OCC, FRB, FDIC, FinCEN, and NCUA authorized innovative compliance programs
- But enforcement actions for inadequate AML compliance resourcing continue, with recent fines ranging from \$10 million to over \$500 million

### **Joint Statement on Innovative Efforts to Combat Money Laundering and Terrorist Financing**

**December 3, 2018**

vulnerabilities and threats. Some banks are also experimenting with artificial intelligence and digital identity technologies applicable to their BSA/AML compliance programs. These innovations and technologies can strengthen BSA/AML compliance approaches, as well as enhance transaction monitoring systems. The Agencies welcome these types of innovative approaches to further efforts to protect the financial system against illicit financial activity. In addition, these types of innovative approaches can maximize utilization of banks' BSA/AML compliance resources.

At the same time, compliance with the BSA and its regulations is critically important in protecting the U.S. financial system, and banks that fail to comply with BSA/AML requirements expose the financial system to abuse by illicit actors. Accordingly, banks must continue to meet their BSA/AML compliance obligations, as well as ensure the ongoing safety and soundness of the bank, when developing pilot programs and other innovative approaches. Bank management

**Board of Governors of the Federal Reserve System  
Federal Deposit Insurance Corporation  
Financial Crimes Enforcement Network  
National Credit Union Administration  
Office of the Comptroller of the Currency**



## *AML Enforcement Risk Area: Correspondent Banking*

- **Habib Bank** – \$225 million and banking license revoked by NYDFS
  - Omitted information necessary to screen transactions and designated a “low risk” “good guys” list to permit transactions without sufficient oversight
  - (NYDFS; Sept. 2017)
- **Deutsche Bank** – \$41 million by the Fed; \$425 million by NYDFS
  - European affiliates failed to provide sufficient information to assess AML risks
  - (FRB; May 2017. NYDFS; Jan. 2017)
- **Danske Bank**—Public reports of ongoing investigations into Danske’s U.S. correspondent banks.



## *AML Enforcement Risk Area: Cash Transactions*

### **Rabobank** – Guilty plea; nearly \$400 million to DOJ and OCC

- Admitted not investigating nor reporting hundreds of millions of dollars in “untraceable cash” that was deposited and transferred near the Mexican border
- (DOJ, OCC; Feb. 2018)

### **Lone Star National Bank** – \$2 million by FinCEN

- Allegedly failed to report hundreds of millions of dollars in bulk cash shipments into the US financial system by a foreign financial institution
- (FinCEN; Nov. 2017)



FINANCIAL CRIMES

ENFORCEMENT NETWORK

Section 312 authority. Smaller banks, just like the bigger ones, need to fully understand and follow the 312 due diligence requirements if they open up accounts for foreign banks. The risks can indeed be managed, but not if they are ignored.”



# *AML Enforcement Risk Area: The BSA and Broker-Dealers*

## — SAR filing obligations for Broker-Dealers

- SEC v. Alpine Sec. (SDNY; Feb. 2019): SEC has independent authority to require broker dealers to file SARs
  - Institutions must closely review guidance to determine when to file a SAR (for example, as to red flags in connection with low-priced securities)
  - The case also may introduce ambiguity about the 30 day SAR filing deadline
- DOJ brought first ever **criminal charge** against a broker-dealer for failure to file SARs against Central States Capital Markets (SDNY; Dec. 2018)

In 2019, OCIE will continue to prioritize examining broker-dealers for compliance with their AML obligations, including whether they are meeting their SAR filing obligations, implementing all elements of their AML program, and robustly and timely conducting independent tests of their AML program. The goal of these examinations is to ensure that broker-dealers have policies and procedures in place that are reasonably designed to identify suspicious activity and illegal money laundering activities.



## — Microcap Trading

- FINRA fined Morgan Stanley \$10 million, in part for failure to monitor customers' deposits and trades of penny stocks for suspicious activity. (FINRA; Dec. 2018)



# AML Enforcement Risk Area: CFTC BSA Enforcement



## CFTC Whistleblower Alert: Be on the Lookout for Violations of the Bank Secrecy Act, Including Failures in AML and SAR Filing Programs

### What types of misconduct should you be on the lookout for?

- Improper supervision and records violations
- Failure to diligently supervise officers', employees', and agents' opening and handling of accounts
- Failure to protect customers and the markets from fraud and corruption
- Improper enforcement of trading limits assigned by regulators
- Inadequate construction of a customer identification program as part of the firm's compliance program
- Failure to file suspicious activity reports

### About the CFTC

We are the U.S. regulator charged with ensuring the integrity of the futures & swaps markets.

### About the Whistleblower Program

We will pay 10%-30% in monetary awards to eligible persons who voluntarily provide us with original information on a Form TCR about violations of the CEA or its rules, if that information leads to a successful CFTC enforcement action resulting in more than \$1 million in monetary sanctions. The program also affords confidentiality and anti-retaliation protections.

- **1pool Ltd.** – nearly \$1 million disgorgement and penalty to CFTC
  - Failed to implement an adequate KYC/CIP program necessary to prevent money laundering with bitcoin transactions, and failed to register as a FCM
  - (CFTC; Mar. 2019)

James McDonald, CFTC Director of Enforcement, stated: "Intermediaries should take notice that they will be held accountable by the CFTC for failing to comply with registration requirements and failing to implement policies and procedures that are crucial in protecting U.S. customers and our markets. Through the Division's Bank Secrecy Task Force, Enforcement will continue to investigate and prosecute such violations."



## *AML Enforcement Risk Area: Consumer Fraud*

### — Regulator focus

- FinCEN has focused on fraud-related AML violations in the U.S., including bank fraud, consumer fraud, securities fraud, and cyber-enabled crimes
- For example, the BTC-e resolution with FinCEN cited use of the laundered proceeds for ransomware, hacking, identity theft, and other fraud



#### Senior Investors

Protection of senior investors, as well as investors who are retired or approaching retirement, remains a top priority for FINRA and we will continue to focus on how firms are protecting such persons from fraud, sales practice abuses and financial exploitation.

Source: FINRA, *2019 Risk Monitoring and Examination Priorities Letter 3* (January 2019)

### — SARs must follow protocol and FIs must investigate red flags and indicia of fraud

### — Money Service Businesses

- Fraudulent acts using MSB financial services create BSA liability risks for MSBs
- Penalties for alleged facilitation have ranged from \$125 million to over \$600 million



# *Conducting an Internal Investigation*

## — Stages of an Investigation

- Stage I: Preserve the Status Quo
- Stage II: Develop the Facts
- Stage III: Remediate the Problem

## — Privilege

- Protect privilege from the outset / *Upjohn*
- Understand waiver (never assume privilege is absolute)

## — Other Considerations

- Cooperation and communication with U.S. regulators
- Cross-border considerations
  - Data privacy
  - Laws protecting culpable employees
  - Engagement with foreign regulators
  - Differences in privilege / confidentiality protections



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# *Regulatory and Legislative Developments*



## *Select Regulatory Trends*

- **Convergence Among Types of Financial Crimes**—Increasing overlap of AML, sanctions, and anti-bribery/anti-corruption programs
- **Coordination Among Regulators**—Increased coordination of regulators in the U.S. and between U.S. and foreign regulators (e.g. through the FATF)
- **Marijuana**—Complex legal and compliance matters around MRBs
- **Cryptocurrency**—Increasing prominence and issues such as anonymity lead to risk management issues for Fis
- **International Corruption and Intermediation**—Continued areas of focus for FinCEN



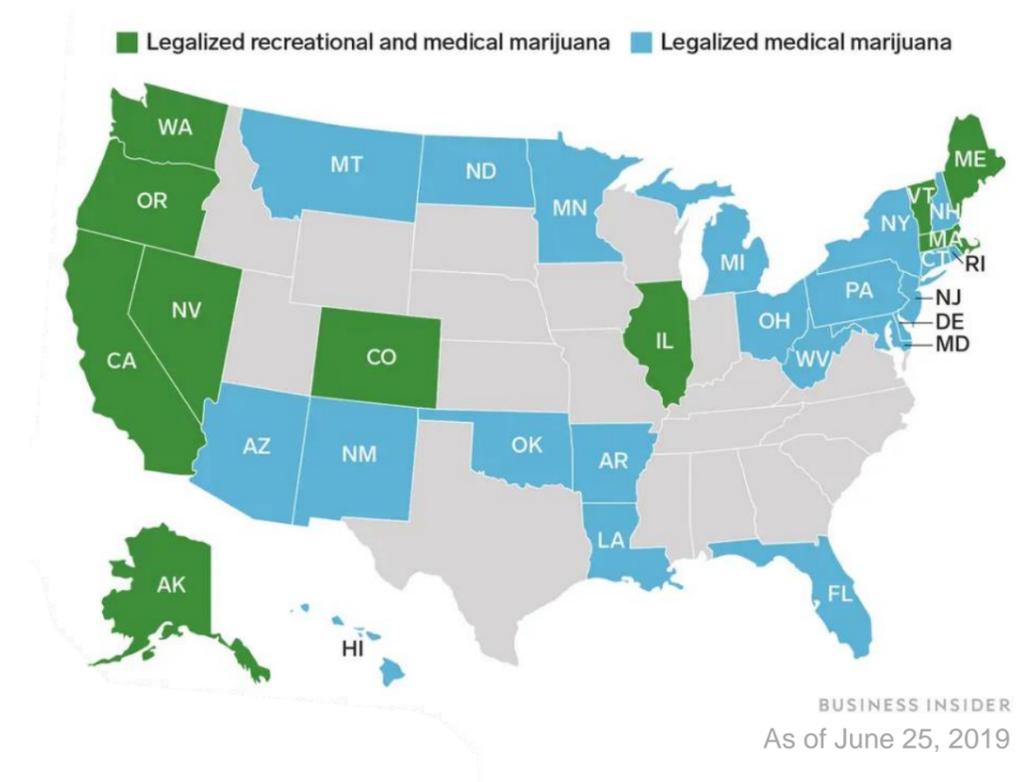
# *Enforcement Coordination and Convergence of Financial Crime Compliance*

- **U.S.-Foreign Regulator Cooperation**
  - FinCEN recently launched Global Investigations Division
    - Focused on international money laundering threats
  - Financial Action Task Force (FATF)
    - Continued international AML cooperative
    - Over 200 jurisdictions are committed to its recommendations
  - Standard Chartered Bank Settlement
    - UK's SFO, DOJ, and SEC worked together to investigate and settle anti-bribery case
  
- **Convergence of Bribery, Sanctions, and Money Laundering**
  - FIs internal compliance functions must collaborate to manage these risks
    - Shared access to relevant data
    - Coordinated approach to risk identification and risk management
  - E.g. Regulators are increasingly focused on corruption
    - FIs' sanctions, anti-bribery and AML programs must coordinate on exposure to PEPs



# Marijuana

- Risks of Banking MRBs:
  - Criminal Exposure
    - Money laundering laws / Controlled Substances Act (“CSA”) aiding and abetting
    - The manufacture, distribution, and dispensing of marijuana for any purpose continues to be a violation of the CSA even where recreational or medical marijuana is legal
  - Asset Forfeiture
  - BSA / AML Compliance
    - Internal Controls: Policies and Procedures
    - Customer Due Diligence
    - Suspicious Activity Reporting
- Factors Influencing Risk Profiles of Specific MRBs:
  - Manufacture vs. Sale vs. Distribution
  - Recreational vs. Medical
  - Foreign nexus





## *Cryptocurrency / Digital Assets*

- Crypto has unique characteristics that heighten the risk environment
  - **Enhanced anonymity** – Unlike fiat currency, no centralized counterparty to link digital identifiers with real-world entities
  - **Disintermediation** – No required involvement of regulated financial institutions
  - **Indirect Exposure** – Even if not dealing directly in crypto, banks may be indirectly exposed to AML issues via customers that make extensive use of crypto, particularly e-commerce businesses
  - **Real-time settlement** – Irrevocable settlement of transactions is near instantaneous
  - **Global reach** – Entities can transact anywhere in the world
  
- Recent guidance from FinCEN, CFTC and SEC suggests increased oversight
  - Digital assets may be considered “securities,” and the types of digital asset-related activities a person engages in will determine how they must register with CFTC, FinCEN, and SEC
  - Increased collaboration by regulatory agencies around the world
  - Comprehensive FinCEN guidance from May 2019 emphasized that AML / CFT applies to cryptocurrency



# *International Corruption and Intermediation*

## — **Corruption**

- Global adoption of “Magnitsky Acts”
- Treasury focus
  - 2018 NMLRA indicated foreign corruption as a key focus area for the Treasury
- OFAC sanctions focused on corruption
- FinCEN advisories
  - Transactions related to South Sudan, Venezuela, Ethiopia, Bahamas, Botswana, Ghana, North Korea, Nicaragua, and Iran, and additionally, related to fraudulent disaster relief efforts and human rights abuses

## — **Intermediation**

- Continued focus for FinCEN and other regulators
- 2018 OFAC Advisory re North Korea
  - Financial institutions should be aware of deceptive business practices intended to shield the North Korean ties of transactions



## *Pending Legislation – House of Representatives*

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### — **Corporate Transparency Act (H.R. 2513 – Introduced May 3, 2019)**

- Passed House 249-173 on October 22 (25 Republicans in favor)
- Bill requires corporations and LLCs to report their beneficial owners to FinCEN
- Amendment provides that FinCEN can use the information to notify public about criminal trends
- Passed version included the text of the COUNTER Act (see below)

### — **COUNTER Act (H.R. 2514 – Introduced May 3, 2019)**

- Text passed along with H.R. 2513 on October 22
- Creates a pilot program for sharing SARs with foreign affiliates of domestic financial institutions
- Creates a rewards program for BSA whistleblowers for penalties exceeding \$1 million
- Requires annual training on AML / CFT for bank examiners
- Requires FinCEN to issue a Geographic Targeting Order requiring beneficial ownership information for certain commercial real estate transactions
- Increases penalties for individuals: fines equal to profits gained, bonuses disgorged, prohibited directorships for ten years, and treble damages for repeat offenders





## *Pending Legislation – Senate*

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### — **ILLICIT CASH Act (S. 2563 – Introduced Sept. 26, 2019)**

- Currently pending in the Senate Banking, Housing and Urban Affairs Committee
- Bill allows easier adoption of future technologies combatting money laundering
- Updates the definition of “coins and currency” to include digital currency, ensuring the inclusion of current and future payment systems in the AML-CFT regime.
- Requires reporting beneficial (>25%) ownership of non-exempt business entities to FinCEN
- Requires Treasury and AG to review SAR and CTR thresholds to determine if changes are necessary
- Creates a statutory FinCEN no-action letter process for financial institutions



*Questions?*



## *Questions*

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