

**PROCEEDINGS AT HEARING  
OF  
MAY 11, 2021**

**COMMISSIONER AUSTIN F. CULLEN**

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1

**May 11, 2021**

2

**Via Videoconference**

3

**(PROCEEDINGS COMMENCED AT 9:30 A.M.)**

4

THE REGISTRAR: Good morning. The hearing is now

5

resumed. Mr. Commissioner.

6

THE COMMISSIONER: Thank you, Madam Registrar. Yes,

7

Ms. Latimer.

8

MS. LATIMER: Yes, good morning, Mr. Commissioner.

9

Our next witness is Stephanie Brooker, and I

10

understand the witness will be affirmed.

11

**STEPHANIE BROOKER, for**

12

**the commission,**

13

**affirmed.**

14

THE REGISTRAR: Please state your full name and spell

15

your first name and last name for the record.

16

THE WITNESS: Stephanie Lauren Brooker.

17

S-t-e-p-h-a-n-i-e, Brooker, B-r-o-o-k-e-r.

18

THE COMMISSIONER: Yes, Ms. Latimer.

19

MS. LATIMER: Thank you.

20

**EXAMINATION BY MS. LATIMER:**

21

Q Good morning, Ms. Brooker. Can you hear me

22

okay?

23

A Yes, thank you.

24

Q Okay. Great. Ms. Brooker, you provided a CV

25

for use in this commission hearing process; is

1                   that correct?

2           A       Yes.

3           MS. LATIMER:  Mr. Commissioner, this CV was only  
4                   circulated this morning, so I do need to seek  
5                   leave to this have this document marked this  
6                   morning, but there is no prejudice to the  
7                   witness.

8           THE COMMISSIONER:  Clearly not.  I think that's fine,  
9                   Ms. Latimer.  You may proceed.

10          MS. LATIMER:  Thank you.  Madam Registrar, may I have  
11                   the CV displayed, please.

12          Q       Ms. Brooker, do you recognize this as your CV?

13          A       I do.

14          MS. LATIMER:  I ask that this be marked as the next  
15                   exhibit, please.

16          THE COMMISSIONER:  Very well.  That will be 972,  
17                   Madam Registrar.

18          THE REGISTRAR:  Yes, exhibit 972.

19                   **EXHIBIT 972:  Curriculum Vitae of Stephanie**  
20                   **Brooker**

21          MS. LATIMER:  I don't need that displayed any longer,  
22                   Madam Registrar.

23          Q       Ms. Brooker, you were a graduate of Georgetown  
24                   University Law Center and currently work as a US  
25                   attorney practising as a partner at Gibson, Dunn

1 in Washington, DC; is that correct?

2 A Yes.

3 Q And you are the co-chair of the financial  
4 institutions practice group and a member of the  
5 white collar defence and investigations practice  
6 group?

7 A Yes.

8 Q Can you tell us a little bit about your current  
9 practice, please.

10 A Yes. Thank you, Ms. Latimer. And thank you,  
11 Mr. Commissioner for the opportunity to appear  
12 before you in the commission.

13 My practice in private practice is similar  
14 to the type of work that I did on the government  
15 side both at the Department of Justice and the  
16 Department of Treasury during my tenure in  
17 government. In private practice I handle a wide  
18 range of enforcement defence and internal  
19 investigation matters for clients in the  
20 anti-money laundering space, as well as other  
21 similar types of issues that arise, including  
22 sanctions, anti-corruption and fraud matters. I  
23 also work with a wide range of financial  
24 institution clients and other types of clients  
25 on anti-money laundering compliance issues,

1 everything from helping clients design and  
2 enhance AML programs to working on corporate  
3 deals and AML issues that arise in that context.  
4 I also work on a number of different types of  
5 criminal and civil forfeiture matters for US and  
6 global clients.

7 Q Thank you. And you were formerly the Director  
8 of the enforcement division at the US Department  
9 of the Treasury Financial Crimes Enforcement  
10 Network, also known as FinCEN; correct?

11 A Yes.

12 Q And I'll come to speak with you about FinCEN in  
13 more detail, but for now is it fair to say that  
14 FinCEN is the lead federal regulator with  
15 responsibility for enforcing the US AML laws and  
16 regulations?

17 A That's correct. FinCEN is in that lead role and  
18 works collaboratively with a number of different  
19 US federal government agencies and state  
20 agencies as well as corollary international  
21 agencies around the world on anti-money  
22 laundering compliance and enforcement.

23 Q Can you tell us just a little bit about your  
24 role as Director of the enforcement division?

25 A I joined FinCEN in the fall of 2012 when a new

1 director joined the agency. She had been a  
2 colleague of mine at the justice department.  
3 And during her tenure in the early phases of her  
4 tenure, she implemented a fairly significant  
5 reorganization of FinCEN, and that included  
6 restructuring and standing up a number of  
7 divisions, including the agency's first  
8 standalone enforcement division. So I initially  
9 served at the agency as Chief of Staff and  
10 assisted with that reorganization and then  
11 served as the first director of FinCEN's  
12 standalone enforcement division. And as we'll  
13 talk about during the course of today's session  
14 the enforcement division at that time had a wide  
15 range of enforcement authorities that it  
16 implemented. In more recent times the  
17 responsibilities of the enforcement division  
18 have been spread more widely across other  
19 divisions, but it continues to handle domestic  
20 enforcement and compliance matters involving  
21 financial institutions who are regulated by the  
22 *Bank Secrecy Act*.

23 Q Okay. And Then the last area of your  
24 professional background I wanted to cover with  
25 you was your former work as a federal

1                   prosecutor. You served as Assistant US Attorney  
2                   in the US Attorneys' Office for the District of  
3                   Columbia; is that correct?

4           A     Yes.

5           Q     And in that role you served as the first Chief  
6                   of the new asset forfeiture and money laundering  
7                   section?

8           A     Yes.

9           Q     Could you tell us a little bit about what that  
10                  section was responsible for and a little bit  
11                  about your roles and responsibilities there?

12          A     I served in the US Attorneys' Office for the  
13                  District of Columbia for about seven and a  
14                  half years. During my tenure there I handled a  
15                  wide range of both state and federal  
16                  investigations, trial and appeals matters,  
17                  covering a wide range of criminal activity. In  
18                  the latter part of my tenure a new US attorney  
19                  came into the office and he wanted to have a  
20                  standalone asset forfeiture and money laundering  
21                  section similar to the types of sections that  
22                  existed for many years in prior US Attorneys'  
23                  offices, other US Attorneys' offices around the  
24                  country as well as the main Department of  
25                  Justice in the US. The section at the time that



1 I stood it up and ran it for a few years before  
2 moving to FinCEN handled all asset forfeiture  
3 matters in the office's criminal cases and that  
4 involved forfeiture related to fraud, money  
5 laundering, narcotics trafficking, bank robbery,  
6 any type of crime that the office was  
7 prosecuting that had forfeiture authority  
8 attached to it, which is broad under the US  
9 regime. The office -- the section of the office  
10 also assisted with money laundering cases, some  
11 of those standalone cases and some of those  
12 handled by other sections. For instance the  
13 fraud section that there would be a money  
14 laundering component to the investigation or  
15 prosecution.

16 Q Okay. Thank you. You also prepared a report to  
17 assist in presenting your evidence before this  
18 commission. Is that right?

19 A Yes.

20 MS. LATIMER: Madam Registrar, may I have  
21 Ms. Brooker's report displayed, please.

22 Q And do you recognize this as the report in  
23 question?

24 A Yes.

25 MS. LATIMER: Mr. Commissioner, I'd ask that this

1                   report be marked as the next exhibit, please.

2                   THE COMMISSIONER: Yes, very well, 973.

3                   THE REGISTRAR: Exhibit 973.

4                   **EXHIBIT 973: The Role of FinCEN, the US**  
5                   **Financial Intelligence Unit, in the US**  
6                   **Anti-Money Laundering Regime and Overview of the**  
7                   **US Anti-Money Laundering Structure and**  
8                   **Authorities, by Stephanie Brooker**

9                   MS. LATIMER:

10                  Q     What I'd like to do, Ms. Brooker, is walk you  
11                    through this report a little bit this morning,  
12                    although I might jump around a little bit. But  
13                    first just by way of overview in this report you  
14                    discuss the role of FinCEN and other government  
15                    entities with anti-money laundering regulatory  
16                    enforcement authority, FinCEN's enforcement  
17                    process and certain legislative initiatives and  
18                    you offer a bit of a comparison with FINTRAC.  
19                    Is that a fair summary?

20                  A     Yes.

21                  MS. LATIMER: Okay. Madam Registrar, could we go to  
22                    page 2 of the report, please.

23                  Q     Just by way of overview, could you start please  
24                    by telling us a little bit about the *Bank*  
25                    *Secrecy Act*, when that was enacted and what that

1 statute authorizes.

2 A The *Bank Secrecy Act* is the primary civil  
3 regulatory and criminal statute governing money  
4 laundering obligations against US financial  
5 institutions and associated individuals. So  
6 sitting under the *Bank Secrecy Act* historically,  
7 and obviously it's been amended many times over  
8 the years in the several decades since it was  
9 enacted in the US, it imposes a number of  
10 compliance obligations on financial institutions  
11 regulated by the act, which we can talk about in  
12 more detail, and also has criminal provisions  
13 for financial institutions governed by the act  
14 when the level of violation reaches a sufficient  
15 level that the US Department of Justice feels  
16 it's appropriate to investigate and in some  
17 instances enforce against financial institutions  
18 and related individuals.

19 So a number of different types of compliance  
20 obligations, authorities held by US government  
21 agencies and enforcement mechanisms are  
22 umbrellaed under the *Bank Secrecy Act* as it's  
23 been amended over the years.

24 Q Okay. And the *Bank Secrecy Act*, I take it, was  
25 enacted in 1970, but FinCEN was created in 1990.

1            Could you tell us what was the mandate of FinCEN  
2            at that time and whether and how that mandate  
3            has changed over time?

4            A    The initial mandate of FinCEN was focused on  
5            gathering of reports filed by financial  
6            institutions governed by the act, so reports  
7            like currency transaction reporting, also  
8            suspicious activity reporting. The mandate of  
9            FinCEN has expanded dramatically over time and  
10           the stature of FinCEN has enhanced dramatically  
11           over time in the US system. In terms of its  
12           stature, FinCEN was moved eventually to a bureau  
13           status under the US Department of Treasury. And  
14           although it continues to be considered a  
15           subcomponent of the Department of Treasury, by  
16           giving it bureau status it was an imprimatur of  
17           some level of independence from the main  
18           treasury political officials who run the  
19           department across administrations in the US  
20           political system. It also gave FinCEN some  
21           level of budget autonomy that the Hill could  
22           have greater control over FinCEN's budget as  
23           opposed to offices of the treasury department in  
24           contrast.

25           Q    Okay. And FinCEN operates as the financial

1 intelligence unit in the United States; is that  
2 correct?

3 A That's correct. FinCEN does serve in the  
4 financial intelligence unit role. It has a  
5 number of different roles, as you alluded to,  
6 Alison, that have expanded over the years, but  
7 that has continued to be one of its core roles  
8 and missions to work with the Egmont Group of  
9 Financial Intelligence Units to promote  
10 information sharing under the various  
11 protections of the Egmont Group around world.

12 MS. LATIMER: Okay. And, Madam Registrar, if we  
13 could go to page 3, please.

14 Q Here in the second paragraph, you state that the  
15 director of FinCEN reports directly to the  
16 Treasury Undersecretary of the office of the  
17 financial intelligence, and can you just explain  
18 the mandate of the that body?

19 A The Treasury Undersecretary for terrorism and  
20 financial intelligence is a political official  
21 appointed by the president and confirmed by the  
22 Senate, one of many political officials within  
23 the treasury department. And under that office  
24 are a number of different components, everything  
25 from the Office of Foreign Assets Control, OFAC,

1           which implements US sanctions, to an Office of  
2           Intelligence and Analysis that assist with  
3           intelligence gathering and analysis in support  
4           of anti-money laundering and terrorist financing  
5           initiatives and FinCEN, of course. So there's a  
6           number of components, as I said, that sit within  
7           TFI and they work collaboratively with each  
8           other reporting up to the undersecretary in  
9           order to be the main component within the  
10          treasury department focused on these issues. Of  
11          course they also collaborate with many other  
12          departments and offices within the US government  
13          structure on anti-money laundering and  
14          anti-terrorist financing initiatives.

15          Q     You go on to in your report to describe the  
16          structure of FinCEN, which is a topic I'm going  
17          come back to in more detail. But first I wanted  
18          to turn to a topic you address at page 11 of the  
19          report, please, Madam Registrar.

20                     And this is the topic of other US  
21          authorities with anti-money laundering  
22          regulatory responsibility. The first point you  
23          make and that you have alluded to this morning  
24          already is that FinCEN does collaborate with a  
25          lot of other bodies and entities. Here in your

1           report you say FinCEN has delegated the *Bank*  
2           *Secrecy Act* examination authority to federal  
3           functional regulators. Can you tell us a little  
4           bit about that and how that works in practice.

5           A       Well, FinCEN is an agency with a broad mandate  
6           and significant legal authorities but with a  
7           relatively small staff in light of the number of  
8           institutions and different types of institutions  
9           that are regulated by the *Bank Secrecy Act*.  
10          Typically FinCEN over the years has had  
11          somewhere between 300 to 600 staff members, and  
12          that has ebbed and flowed over the years. And  
13          there are hundreds of thousands of financial  
14          institutions who are regulated by the *Bank*  
15          *Secrecy Act* in the US, plus, as we can talk  
16          about today, there are also financial  
17          institutions who are not domestic who also come  
18          in various ways within the ambit of the *Bank*  
19          *Secrecy Act*. In order to carry out this mission  
20          in light of the small number of staff relatively  
21          speaking, FinCEN works with agencies around  
22          government in order to effectuate its mission.  
23          And that is the banking regulators for the  
24          various depository institutions, the securities  
25          and exchange commission for broker dealers.

1 TECHNICAL COORDINATOR: Excuse me, Mr. Commissioner.

2 We need to stand down for a few minutes.

3 THE COMMISSIONER: All right. We have some technical  
4 difficulties, I take it.

5 TECHNICAL COORDINATOR: Yes, we do.

6 THE COMMISSIONER: All right. We will stand down  
7 then for five minutes or longer if it takes a  
8 little longer to correct the problem. I am  
9 sorry, Ms. Brooker, we're just going to stand  
10 down briefly. We will resume as soon as we can.

11 THE WITNESS: Thank you, sir.

12 THE REGISTRAR: This hearing is stood down. Please  
13 mute your mic and turn off your video.

14 **(WITNESS STOOD DOWN)**

15 **(PROCEEDINGS ADJOURNED AT 9:47 A.M.)**

16 **(PROCEEDINGS RECONVENED AT 9:56 A.M.)**

17 THE REGISTRAR: The hearing is now resumed.

18 Mr. Commissioner.

19 **STEPHANIE BROOKER, for**  
20 **the commission,**  
21 **recalled.**

22 THE COMMISSIONER: Thank you, Madam Registrar. Yes,  
23 Ms. Latimer, I gather our technical problems  
24 have been cleaned up.

25 MS. LATIMER: Thank you, Mr. Commissioner. I'm



1           concerned that the technical problem may have  
2           been on my end.

3           **EXAMINATION BY MS. LATIMER (continuing):**

4           Q     I can tell you that when I lost audio and video  
5           and everything I had just asked about FinCEN's  
6           delegation of *Bank Secrecy Act* examination  
7           authority to federal functional regulators. And  
8           I apologize if others made it further than that,  
9           but I didn't hear your answer to that question,  
10          Ms. Brooker, so perhaps if you could pick it up  
11          there I'd appreciate it.

12          A     Certainly, Ms. Latimer. Thank you. FinCEN has  
13          a relatively small staff, typically between 300  
14          and 600 staff members, and that is a small  
15          number of people for a broad mandate and then  
16          there are of course hundreds of thousands of  
17          financial institutions that are regulated by the  
18          *Bank Secrecy Act*. So in order to carry out its  
19          mission it works with other US government  
20          agencies who have primary regulatory authority  
21          over the different types of financial  
22          institutions governed by the act both for AML  
23          and also for other types of supervisory  
24          activity. So, for instance, the federal banking  
25          regulators work with FinCEN on AML compliance

1                   and enforcement over the various banks that they  
2                   regulate. For broker dealers, for example  
3                   FinCEN works with the Securities and Exchange  
4                   Commission and its delegated self-regulatory  
5                   organization FINRA in order to oversee  
6                   enforcement and compliance of anti-money  
7                   laundering for broker dealers. And another  
8                   example which is slightly different is in the  
9                   space of casinos, money service businesses,  
10                  insurance companies, precious metals, stones and  
11                  jewels dealers, for those types of institutions  
12                  who are regulated by the *Bank Secrecy Act* FinCEN  
13                  delegates examination authority to a unit of the  
14                  Internal Revenue Service to conduct these exams,  
15                  but the enforcement authority is reserved with  
16                  FinCEN. Whereas, for example, banks and broker  
17                  dealers, the Securities Exchange Commission, the  
18                  federal banking regulators can also enforce for  
19                  anti-money laundering violations. So in order  
20                  to carry out its mission given its small staff  
21                  and I think, frankly, the expertise of those  
22                  prudential regulators generally over the types  
23                  of institutions that they regulate in the US  
24                  system, it is a matrixed approach across  
25                  government agencies.

1 Q And do some of those regulators further  
2 subdelegate some of the *Bank Secrecy Act*  
3 authorities as well?

4 A The primary subdelegation, if you will, comes  
5 from the Securities and Exchange Commission  
6 working with its self-regulatory organization  
7 FINRA and the Commodities Future Trading  
8 Commission, the CFTC, that also has a  
9 self-regulatory organization, the National  
10 Futures Association, that also has some  
11 compliance and enforcement authority over the  
12 types of entities that the CFTC regulates that  
13 are also covered by the *Bank Secrecy Act*.

14 MS. LATIMER: Okay. At page 13 if we could go there,  
15 please, Madam Registrar.

16 Q You make the point that states also have a role  
17 to play in anti-money laundering and that many  
18 states impose parallel anti-money laundering  
19 requirements on state licensed financial  
20 institutes, for example. Could you explain  
21 that.

22 A That's correct. In the US system there are the  
23 many federal agencies that I've just described  
24 on the civil regulatory side. There's also the  
25 Department of Justice, which we've touched on

1                   and I think we'll further talk about today and  
2                   then there are state authorities, and those  
3                   state authorities have independent obligations  
4                   and authorities in order to ensure compliance  
5                   and bring enforcement action against all of the  
6                   different types of financial institutions that  
7                   are regulated by the *Bank Secrecy Act*. So, you  
8                   know, certainly from the perspective of the  
9                   financial institutions regulated by the act,  
10                  there can be a significant what we call in the  
11                  US system piling on of multiple penalties,  
12                  multiple exams, multiple different types of  
13                  obligations, some of which frankly are not  
14                  consistent with each other, all imposed on one  
15                  financial institution depending on the  
16                  circumstances. So it is a layered and in many  
17                  ways burdensome regime for financial  
18                  institutions.

19                Q    Without turning to it, near the end of your  
20                    report you make the point that this shared  
21                    responsibility on anti-money laundering  
22                    compliance with other regulators, and I suppose  
23                    I hear you describe it with the states as well,  
24                    is one sort of important distinction between  
25                    FINTRAC and FinCEN, and you've just spoken about

1           the burden of that layered approach. I'm  
2           wondering if you could unpack for us a little  
3           bit what are the advantages and challenges of a  
4           system like that.

5           A    I think some of the advantages are that each  
6           type of government agency that we talked about  
7           has different areas of expertise generally with  
8           respect to financial institution regulation and  
9           certainly with respect to anti-money laundering.  
10          So, for example, the federal banking regulators  
11          are regulating our depository institutions  
12          across the wide range of issues that have  
13          oversight, everything from liquidity, safety and  
14          soundness across a number of different areas and  
15          a myriad of bank regulatory obligations in the  
16          US system. Anti-money laundering is just one  
17          piece of it, but certainly the federal banking  
18          regulators bring to that supervision a holistic  
19          understanding of the institutions that they  
20          regulate.

21                   FinCEN vis-à-vis the banks has an AML  
22                   expertise that cuts across different types of  
23                   institutions, and as we'll talk about today  
24                   although each of our types of institutions is  
25                   regulated by the act there's a fair amount of

1 overlay between, for instance, casinos and banks  
2 and where the risk may lie. Money service  
3 businesses and banks and where the risks may  
4 lie. In the emerging technology space crypto,  
5 for instance, intersects with our banks, our  
6 casinos, other types of financial institutions.

7 So FinCEN that has that oversight over all  
8 the different types of institutions has perhaps  
9 an expertise that a banking regulator would not  
10 have. And then on the state side, similarly,  
11 there are different licensing requirements and  
12 supervision requirements for the state  
13 regulatory bodies and they may bring a different  
14 expertise and lens to anti-money laundering  
15 enforcement and compliance. So I think, you  
16 know, those are some of the potential advantages  
17 to our system. There are, though, I think a  
18 number of drawbacks. There can be, and in fact  
19 have been, enforcement actions all for the same  
20 set of conduct against a bank that may different  
21 regulatory both criminal and civil agencies  
22 involved, sometimes, you know, six or eight  
23 involved. Sometimes they will credit for each  
24 other's penalties and sometimes they will not.  
25 All of those different agencies will set forth

1           the violations in different ways, which can  
2           undermine the impact of the lessons learned from  
3           enforcement actions.

4           In addition, and we'll cover this when we  
5           talk about the new legislation in the US in the  
6           AML space that was passed at the beginning of  
7           this year, the burden of trying to meet the  
8           regulatory and enforcement risk obligations of  
9           all these different regulators is extremely  
10          costly for financial institutions, and  
11          ultimately there's been a view for many years in  
12          the US that we have gotten very far afield from  
13          the initial purpose of the *Bank Secrecy Act*  
14          which was to assist law enforcement with  
15          fighting criminal activity and assist with  
16          showing them indications of suspicious activity  
17          through filings and other engagements of the  
18          money trail of criminal activity, and we've  
19          moved significantly, in the view of many,  
20          towards more check the box compliance that is  
21          both costly and ultimately potentially  
22          ineffective in terms of the purpose that it's  
23          trying to work toward. So I think those are  
24          some of the primary disadvantages of our system.

25          MS. LATIMER: Okay. And, Madam Registrar, now if I

1           could go back please to page 3 of the report,  
2           again now dealing with FinCEN structure in a bit  
3           more detail. You note that it conducts its work  
4           through seven separate divisions. I'd first  
5           like to ask you some questions about the  
6           enforcement division, which is the group you  
7           were the former director of. Could you describe  
8           please what is the mandate of the enforcement  
9           division.

10           A    The current mandate of the enforcement division  
11           is to ensure compliance and bring enforcement  
12           actions when deemed appropriate in the view of  
13           the Director of FinCEN against financial  
14           institutions regulated by the *Bank Secrecy Act*.  
15           This is done in a number of different ways.  
16           FinCEN will work with agencies, as we've talked  
17           about today, to design examination initiatives  
18           to weigh in on the decisions of the Internal  
19           Revenue Service examiners who have that  
20           delegated authority for certain types of  
21           industries of the many, many types of casinos,  
22           money service businesses, et cetera, who they  
23           will examine on a given year, because they're  
24           not examined every year, to be sure, and some  
25           will never be examined.



1                   When FinCEN feels that there has been a  
2                   sufficient level of violation, it may choose to  
3                   impose its enforcement authority. Its  
4                   enforcement actions are published on the  
5                   agency's website. They allege detailed factual  
6                   allegations of FinCEN's view of the AML  
7                   violations that are covered by the matter and  
8                   often will include penalties that can range from  
9                   hundreds of millions of dollars to in some cases  
10                  10-, \$15,000 or smaller, depending on how FinCEN  
11                  exercises its discretion. It can also include a  
12                  number of undertakings, including bars of  
13                  individuals from industry positions, as well as  
14                  other types of undertakings which have included  
15                  in the past retention of a compliance consultant  
16                  and provision of the consultant's report to  
17                  FinCEN. So that is the current mandate and  
18                  authorities of FinCEN's enforcement division.

19                  MS. LATIMER: Okay. Thanks. And Madam Registrar,  
20                  maybe we could just go to page 14 where these  
21                  enforcement actions that you've been describing  
22                  are sort of described in more detail.

23                  Q    On this page you make the point that unlike  
24                  FINTRAC there is no public matrix describing how  
25                  a penalty will be calculated for FinCEN. Could

1                   you explain why that is so.

2                   A     FinCEN historically, unlike some US government  
3                   agencies, has never had a prescriptive formula  
4                   for enforcement and its calculation of  
5                   penalties. In fact, until about 18 months ago  
6                   FinCEN also had not publicly provided in  
7                   guidance what enforcement factors and  
8                   discretionary principles it would use to guide  
9                   its enforcement decision-making. Certainly  
10                  those principles had been alluded to informally  
11                  in speeches of FinCEN leadership over the years  
12                  and in more recent times in some of its  
13                  enforcement actions, but unlike many US  
14                  enforcement agencies it had not stated its  
15                  principles of enforcement, much less had a  
16                  matrix. So I think certainly it is a welcome  
17                  development that FinCEN has now stated its  
18                  factors that it will consider for enforcement,  
19                  similar to what we see with the Department of  
20                  Justice and the Securities and Exchange  
21                  Commission that has these type of factors laid  
22                  out for public consideration.

23                  Q     You set out in your report that most financial  
24                  institutions in practice sort of cooperate fully  
25                  and in the end end up consenting to FinCEN's

1           assessment of penalties or whatever their  
2           enforcement action may be. Can you explain why  
3           that is so.

4           A     It's consistent with the general corporate  
5           approach in the US, and there are some  
6           exceptions to be sure, but in general for  
7           corporate enforcement in the US, whether it be  
8           civil regulatory or criminal, the typical  
9           outcome is that the financial institution or,  
10          depending on the nature of the violations,  
11          non-financial institutions will ultimately  
12          settle with the US enforcement agency. It is  
13          more likely to see contested litigation and  
14          challenge of US government agency enforcement  
15          both in the AML space and more broadly when  
16          individuals are involved, when there will be an  
17          individual penalty, either criminal or civil  
18          regulatory, against an individual. And so what  
19          we see in the FinCEN space is really consistent  
20          with what we see in many other areas throughout  
21          the US enforcement regime.

22          MS. LATIMER: Okay. And, Madam Registrar, if we  
23          could go please to page 16.

24          Q     On this page you set out that if people or if  
25          the financial institution doesn't consent FinCEN

1           can bring a civil collection suit, and you  
2           describe that successful litigation most likely  
3           would depend on the financial institution being  
4           able to prove that FinCEN lacked authority, did  
5           not provide due process or acted in an arbitrary  
6           and capricious manner in assessing the penalty.  
7           That strikes me as a very, very high bar and I  
8           wonder if you could comment on that and whether  
9           there's any means to challenge, for example, the  
10          reasonableness of the penalty.

11          A     In recent times there has never been a fully  
12                litigated penalty action involving FinCEN. So  
13                although we can certainly understand the types  
14                of arguments that may be made and I laid out in  
15                my report, there hasn't been the adversarial  
16                process to really test these principles and  
17                understand ultimately how the judicial system  
18                would rule in a contested action. There was one  
19                action filed about eight years ago, but  
20                ultimately after some motions practice in our  
21                federal district court even that matter was  
22                settled. And so we don't have a robust  
23                jurisprudence in the US system because, you  
24                know, as I mentioned, financial institutions  
25                tend to settle with FinCEN. So, you know, to

1                   your question Ms. Latimer, about the  
2                   reasonableness of the penalty, I think there's  
3                   certainly the possibility that that could be  
4                   litigated, but the likelihood of success is  
5                   unknown because we are not building against a  
6                   body of precedent.

7                   Q     And sort of anticipating my next question is do  
8                   you see sort of advantages and challenges to a  
9                   system that sets up sort of settlement as a  
10                  likely outcome on most of these inquiries?

11                 A     I think obviously litigation is costly for the  
12                  government.  It's costly for financial  
13                  institutions in a number of different ways.  So  
14                  I think, you know, certainly there could be a  
15                  view that resolution is the best outcome  
16                  generally speaking in these matters.  On the  
17                  other hand, similar to other types of precedent  
18                  that is not developed in the US system because  
19                  of the tendency for corporate resolutions,  
20                  ultimately the standards that the government has  
21                  to meet in order to make its case can be watered  
22                  down because naturally adversarial processes can  
23                  lead to adverse rulings against the government  
24                  where then they need to ensure that they are  
25                  meeting the statutory standards.  And in the US

1                   system, the standards broadly, and certainly  
2                   with respect to anti-money laundering, are  
3                   malleable. So, for instance, willfulness,  
4                   FinCEN standard, that can be willful blindness  
5                   or reckless disregard. Obviously that could be  
6                   a very high bar or it could be a relatively low  
7                   bar, and if there are repeated settlements it's  
8                   more difficult for the government to be tested  
9                   in terms of what that means and what standards  
10                  they need to meet.

11                 Q     Okay. And you made the point in your report  
12                   that willful violations of the *Bank Secrecy Act*  
13                   are subject to both criminal or civil penalties.  
14                   Criminal penalties, I take it, are enforced by  
15                   the Department of Justice; is that correct?

16                 A     That's correct.

17                 Q     And could you just walk us through how that  
18                   determination is made whether to proceed on the  
19                   criminal side or the civil side.

20                 A     The decision whether to investigate and  
21                   ultimately prosecute a financial institution or  
22                   an individual affiliated with a financial  
23                   institution for criminal violations is  
24                   ultimately discretionary. The Department of  
25                   Justice has certain factors that it considers

1 broadly in corporate prosecutions that are  
2 similar to the standards that have now been set  
3 forth by FinCEN but existed in Department of  
4 Justice guidance for many years prior to  
5 FinCEN's guidance. It is more common, although  
6 not statutorily required, that the Department of  
7 Justice will proceed criminally when there are  
8 criminal proceeds that have been identified as  
9 part of its case. So although the programatic  
10 and reporting violations can constitute a basis  
11 for the Department of Justice to bring a  
12 criminal action, the department in various  
13 speeches and other statements also studying  
14 their cases has developed a general practice  
15 that its matters will point to criminal proceeds  
16 that ran through the financial institution,  
17 whether that be a money service business, a  
18 crypto exchange, a casino, a bank, that there  
19 were identifiable criminal proceeds that ran  
20 through the institution as a result of the  
21 compliance breakdowns under the BSA AML  
22 requirements. I think that is a distinguishing  
23 factor in practice that we generally see. So in  
24 a criminal resolution we will see allegations of  
25 narcotics trafficking and it will be in detail.

1 Different types of fraudulent activity. Other  
2 types of criminal activity, which is broad in  
3 the US as you know, as part as part of the  
4 allegations. And I should also say there is  
5 significant cooperation behind the scenes  
6 between the Department of Justice and FinCEN as  
7 well as a number of the other different types of  
8 agencies we've talked about here today both in  
9 coordinating their investigations and also  
10 determining which agencies will bring  
11 enforcement actions. Even though they can act  
12 independently and without coordination, they  
13 typically do coordinate and there are matters  
14 where they are all investigating and ultimately  
15 the Department of Justice decides to stand down  
16 because it believes that the civil regulatory  
17 authorities, including FinCEN, can most  
18 appropriately handle the action in light of the  
19 evidence.

20 Q Okay. So we've touched on willful violations of  
21 the *Bank Secrecy Act*. You make the point as  
22 well in your report that FinCEN has authority to  
23 enforce civil monetary penalties where there's  
24 been a negligent violation of the act, but you  
25 say in practice to the best of your knowledge



1           that authority hasn't been used, and I'm  
2           wondering if you can comment on why that  
3           authority is not used in practice?

4           A     Although FinCEN, to my knowledge, has never made  
5           a public statement on why it's not been used in  
6           practice, I think the practical reality is, as  
7           I've laid out, given FinCEN's small staff and  
8           broad mandate it likely in its view cannot  
9           investigate and enforce against all the cases  
10          that could meet the willfulness standard and  
11          would meet its discretionary factors. And so to  
12          proceed on a negligence standard for conduct  
13          that meets the negligence standard but not the  
14          willfulness standard is, I think, not practical  
15          for FinCEN given its resource constraints. So  
16          again although that's not an official  
17          pronouncement of the agency, you know, that's my  
18          view of why we haven't seen a negligence action  
19          to date.

20          Q     Okay. Maybe that sort of foreshadows the  
21          answer to my next question, which is you also  
22          make the point at page 18 of your report that  
23          the *Bank Secrecy Act's* civil money penalty  
24          authority has not been used frequently,  
25          especially in recent year. Is that also a

1                   resourcing issue?

2                   A     I think that is primarily a resourcing issue  
3                   both the number of people that FinCEN has and  
4                   also the expertise.  Although there are, you  
5                   know, many wonderful FinCEN former colleagues of  
6                   mine who continue on, new colleagues, really  
7                   incredible expertise in what they do, when you  
8                   combine the resource constraints in a variety of  
9                   different ways I think it does lead to lesser  
10                  numbers of enforcement action.  Obviously  
11                  there's not a benchmark on what is the right  
12                  number of enforcement actions and certainly from  
13                  a defence perspective, you know, there's a view  
14                  that there should be no enforcement actions, but  
15                  I think if you look at the trend line of FinCEN  
16                  enforcement over the years there have been ebbs  
17                  and flows but, for instance, over the last  
18                  few years there have been very few enforcement  
19                  actions against any sector by FinCEN.

20                 Q     Okay.  And at page 19 you make the point that  
21                  formal public BSA enforcement actions are much  
22                  more frequently brought by the federal  
23                  functional regulators who have that delegated  
24                  authority.  And I'm just wondering again do you  
25                  know what accounts for that?  Is it again just

1           the resources of those other entities, or can  
2           you speak to that?

3           A    The federal functional regulators, for example  
4           the banking regulators, the Securities and  
5           Exchange Commission, they do have more robust  
6           staffing than FinCEN. And, you know, again, if  
7           you were speaking with a former official of one  
8           of those agencies, a current official, they may  
9           say they also need more staffing, but certainly  
10          in terms of numbers they have greater staffing.  
11          In addition, those are primary regulators and  
12          they have an obligation to ensure the safety and  
13          soundness of the institutions that they regulate  
14          and one can argue in some respects that FinCEN's  
15          enforcement and compliance authority and  
16          responsibilities are more discretionary, so if  
17          there is a bank that has a dramatic failure in  
18          its AML controls and there is billions of  
19          dollars in narcotics trafficking or fraud  
20          proceeds running through the bank, obviously the  
21          bank will be held accountable, but we have also  
22          seen instances where the bank examiners from the  
23          federal agencies are held accountable because  
24          they have the primary authority to ensure the  
25          safety and soundness of the institution, whereas

1                   that is not typically what you would of see with  
2                   FinCEN.  Certainly, the director of FinCEN is  
3                   held accountable in various ways by treasury  
4                   leadership and congress, but it's not that same  
5                   direct connection to safety and soundness that  
6                   you see, for instance, with the banking  
7                   regulators.

8                   Q     Okay.  I'm turning to page 20 of your report and  
9                   here you talk about three groups of recent  
10                  FinCEN enforcement actions in recent years  
11                  focusing on promoting compliance.  I'm wondering  
12                  if you could just give us an overview about the  
13                  enforcement actions that have been focused on  
14                  casinos in recent years.

15                 A     Starting in 2012 when, as I mentioned  
16                  previously, Jennifer Shasky Calvery became  
17                  director of FinCEN after a long tenure at the  
18                  justice department.  She gave a number of public  
19                  remarks that are posted on FinCEN's website  
20                  indicating that the casino sector was an area  
21                  that she was going to focus on from a policy and  
22                  enforcement as well as liaison perspectives.  
23                  And then following those set of speeches in the  
24                  2012, 2013 time frame, FinCEN had a number of  
25                  different enforcement actions against casinos,

1 everything from major large casinos, brand names  
2 that are well known in the US and throughout the  
3 world, to smaller casinos that are more regional  
4 casinos and card clubs, for instance, in  
5 Las Vegas and in California. And it was both, I  
6 think, the number of enforcement actions but  
7 also the way that FinCEN's view of the  
8 violations were laid out in the public  
9 enforcement actions that were seen as a unique  
10 moment in time in FinCEN's enforcement history  
11 in terms of focus in that way on an industry for  
12 a sustained period of time.

13 Q Do you know why it was that casinos became a  
14 focus of attention?

15 A You know, I think a piece of it is the DOJ  
16 action referenced in my report on the page you  
17 have displayed which was a fairly major  
18 enforcement action against a well-known casino  
19 that allegedly had proceeds of significant  
20 Mexican drug trafficking going through the  
21 casino and the allegations are highly detailed  
22 and varied in the techniques that were used by  
23 the drug trafficking organization to launder  
24 proceeds and the alleged failings that DOJ  
25 asserted, the types of different failings that

1                   it found in terms of the casino's *Bank Secrecy*  
2                   *Act* AML program. So I think that is a piece of  
3                   why there was a decision to focus on casinos in  
4                   the following years from a civil regulatory  
5                   perspective.

6                   In addition, prior to that point, and, you  
7                   know, rightly or wrongly depending on your  
8                   perspective, there had not been at that time the  
9                   same level of focus on casinos from FinCEN  
10                  perhaps as there had been on banks, and FinCEN  
11                  leadership at that time made a judgment that  
12                  this was a sector that it wanted to focus on.

13                Q    Okay. At page 21 of your report you indicate  
14                  that this casino enforcement initiative  
15                  heightened folks on casino *Bank Secrecy Act* and  
16                  anti-money laundering programs and establishing  
17                  know your customer programs, including the  
18                  source of funds of large and higher risk casino  
19                  customers. Could you just unpack a little bit  
20                  those ideas about know your customer and source  
21                  of funds as that applies in the United States  
22                  for this sector.

23                A    There's always been a concept in the US AML  
24                  regime that in order to carry out *Bank Secrecy*  
25                  *Act* obligations an institution, whether that be

1 a bank, a broker dealer, a money service  
2 business, a casino, needs to know the identity  
3 of its customer and its customer's source of  
4 funds, as well as the customer's expected  
5 transactional patterns so that deviations can be  
6 identified. So although for certain sectors  
7 regulated by the act there has been significant  
8 legislative and regulatory efforts over the past  
9 several years with respect to customer due  
10 diligence and source of funds, that's always  
11 been a concept and an area that institutions  
12 attempted to comply with even before this focus.

13 You know, I do think in the casino sector,  
14 the speeches that I've referenced, the  
15 enforcement actions may have provided additional  
16 detail around those expectations from a FinCEN  
17 perspective, but there was already compliance  
18 within the casino sector prior to this  
19 initiative starting in 2012, 2013.

20 Q Okay. You talk about FinCEN's concern not only  
21 with technical *Bank Secrecy Act* compliance in  
22 the casino industry but with whether all of the  
23 actors within the industry had a culture of  
24 compliance. What did you mean by that turn of  
25 phrase?

1           A     There's been significant focus in the US both in  
2                   the AML space and other enforcement spaces on a  
3                   culture of compliance, and a number of different  
4                   regulatory agencies in the US have put out  
5                   formal guidance, had speeches by their  
6                   leadership on the importance of a culture of  
7                   compliance. And FinCEN in 2014 put out its own  
8                   guidance focused on that issue. And what it  
9                   means from a US perspective is that you can  
10                  certainly have systems in place, IT systems,  
11                  human systems, in order to track and report  
12                  suspicious activity, but ultimately from the US  
13                  government's perspective it's really what is the  
14                  culture. If an employee sees an issue do they  
15                  feel empowered to raise it with compliance or  
16                  raise it with their management and know that  
17                  they will be rewarded or certainly not punished  
18                  for raising a concern?

19                         The culture is also informed by the level of  
20                         resources that are devoted to compliance. The  
21                         nature of the training that is carried out. Is  
22                         it a training where, you know, middle managers  
23                         say oh, we have to do this stupid AML training  
24                         again this year or is it the middle managers  
25                         say, you know, compliance is our most important



1 mission of this organization; revenue will not  
2 supplant compliance; we need to go to this  
3 training; management takes it very seriously.  
4 Those are the types of concepts that have  
5 evolved and in I think a more significant way  
6 over the past decade in the US system, including  
7 with respect to AML, and FinCEN in this guidance  
8 it put out was attempting to capture those  
9 concepts and give guidance to financial  
10 institutions regulated by the act that that is  
11 the expectation of FinCEN and its sister  
12 regulator.

13 Q Okay. The second -- at sort of the beginning at  
14 the bottom of page 22 and over to page 23, the  
15 second area of focus for enforcement action that  
16 you discuss in your report are cryptocurrency  
17 exchanges. Can you describe in a summary way  
18 what led to those enforcement actions and what  
19 the challenges there have been.

20 A In 2013 and then again in 2019, as I noted in my  
21 report, FinCEN issued guidance targeted at the  
22 crypto-sector to make clear from its perspective  
23 what types of businesses in the crypto space are  
24 regulated by the *Bank Secrecy Act* and which  
25 types are not. And the regulatory framework was

1           at that time in 2013 and continues to be that  
2           certain types of crypto businesses are  
3           considered money transmitters in the US. So  
4           similar to more classic brick and mortar money  
5           service businesses that have existed for  
6           decades, in 2013 FinCEN made a policy judgment  
7           that it needed to be clear that other types of  
8           crypto companies are regulated by the act.  
9           Similar to what we've described today with  
10          respect to the casino sector, FinCEN then  
11          undertook a number of different measures to  
12          begin to ensure from its perspective compliance  
13          and bring enforcement actions against crypto  
14          companies. So it publicly announced that it was  
15          working with IRS, the civil examiners, to  
16          examine a number of different crypto-exchanges  
17          and also brought several enforcement actions  
18          over the years in this space to further  
19          highlight its view of non-compliant activity.  
20          Q       And the last category of enforcement action  
21          you've talked about in your report are penalties  
22          imposed against senior executives responsible  
23          for *Bank Secrecy Act* and AML compliance at major  
24          financial institutions. Why go after these  
25          individuals as opposed to focusing on the

1 institution itself?

2 A As I've alluded to throughout our discussion  
3 today, the *Bank Secrecy Act* does give authority  
4 to impose penalties and other measures against  
5 individuals associated with regulated financial  
6 institutions. So, for example, executives,  
7 other types of staff level employees, members of  
8 boards of directors. That authority is covered  
9 by the act. And FinCEN has occasionally brought  
10 individual enforcement actions for violations of  
11 the *Bank Secrecy Act*. This is similar to what  
12 we've seen with other regulators who have  
13 individual authority who have similarly brought  
14 enforcement actions against individuals. This  
15 is in keeping with a view of US government  
16 agencies and is also discussed, for instance, in  
17 congressional hearings that in the view of the  
18 US government, it's not always sufficient to  
19 bring a corporate enforcement action that  
20 corporations are made up of individuals and when  
21 there is a sufficient level of evidence and  
22 intent, the US government agencies are supposed  
23 to consider individual enforcement actions,  
24 obviously weighing their discretionary factors.  
25 So in keeping with that general approach in the

1 US system FinCEN has brought a few individual  
2 enforcement actions over the years and certainly  
3 you see many more enforcement actions against  
4 individuals by the banking regulators and other  
5 types of agencies we've talked about today that  
6 have a role in the US AML regime.

7 Q Thank you. And then at the end of this section  
8 you talk about some of the challenges for BSA  
9 enforcement. We've talked about some of those  
10 already. One area you outline as an area where  
11 there may potentially be some efficiencies  
12 gained is on page 26 where you make reference to  
13 the idea of FinCEN having its own examination  
14 team. Could you just unpack that idea a little  
15 bit.

16 A So unlike many other agencies who have AML  
17 responsibilities around the world, FinCEN does  
18 not have a dedicated examination staff.  
19 Certainly in discrete instances FinCEN has sent  
20 its enforcement and compliance staff on exams  
21 with other regulators, for instance the banking  
22 regulators, the IRS examiners. But it depends  
23 on referrals of matters from other agencies  
24 under memoranda of understanding that it has  
25 with all of the agencies. And so typically

1                   FinCEN will get a referral through an  
2                   examination report from another agency or  
3                   another type of referral, for instance criminal  
4                   authorities indicating they've been doing an  
5                   investigation and believe it also merits  
6                   FinCEN's attention, but that is all in the first  
7                   instance examinations findings, sometimes  
8                   evidence from other agencies being referred to  
9                   FinCEN, and FinCEN is not typically doing its  
10                  own examinations of institutions. And across  
11                  the system, as I have alluded to, this can lead  
12                  to inefficiencies and also piling on by multiple  
13                  agencies.

14                Q     Okay. Thanks. I wanted to ask you now about  
15                  the intelligence division of FinCEN. Can you  
16                  talk about the mandate of that division and its  
17                  roles and responsibilities.

18                A     FinCEN's intelligence division is responsible  
19                  for the collection, analysis and dissemination  
20                  of financial intelligence information filed  
21                  primarily by financial institutions but also  
22                  relying on other sources. Similar to other FIUs  
23                  around the world, FinCEN receives millions of  
24                  reports each year from financial institutions  
25                  reporting, for instance, on suspicious

1 transactions at a certain level through  
2 Suspicious Activity Reports and currency  
3 transaction reports, transactions involving a  
4 certain amount of cash on a given day, either a  
5 deposit or withdrawal, through the institution.  
6 So those reports as well as other types of  
7 reports get filed by institutions with FinCEN  
8 and there's direct access to those reports by a  
9 number of different US government agencies and  
10 including FinCEN. And its intelligence division  
11 staff, using technology that has been designed  
12 by the technology division of FinCEN after  
13 significant monetary investment, will use  
14 advanced analytics to analyze these reports and  
15 identify trends that may be of use to other US  
16 government agencies, and also to the public. So  
17 FinCEN's intelligence division authors a number  
18 of different types of reports that get  
19 disseminated across the US government agency  
20 structure identifying trends and also  
21 institutions and individuals of concern. And  
22 FinCEN also uses its analytics to inform  
23 advisories and other types of guidance that  
24 FinCEN issues to industry that will highlight  
25 based on filings and other information money

1           laundering typologies and trends that FinCEN has  
2           identified.

3           Q     Okay. One of the things you said early in your  
4           answer was that a number of agencies have direct  
5           access to these filings. Can you give us an  
6           idea of what other -- in addition to FinCEN what  
7           other agencies have direct access to these  
8           filings.

9           A     There are a number of different types of  
10          agencies that have access to FinCEN filings.  
11          That includes the federal banking regulators,  
12          for example, the Securities and Exchange  
13          Commission, federal law enforcement agents,  
14          depending on what agency they are with,  
15          Department of Justice prosecutors. So in  
16          addition to FinCEN, as I said, analyzing the  
17          data and issuing reports, various different  
18          types of government agency actors will also  
19          directly access the database and do their own  
20          analytics and also looking for particular types  
21          of reports on entities or individuals under  
22          investigation. So, for example, if I am an FBI  
23          agent and I am tracking an alleged fraud ring  
24          and it has 20 different types of entities,  
25          whether they be operating companies, shell

1                    companies and individuals involved, an FBI agent  
2                    can query the system and pull up all the  
3                    Suspicious Activity Reports, for example, that  
4                    have been filed on this network of alleged  
5                    criminal actors that are under investigation.  
6                    So that direct access is really one of the  
7                    hallmarks of our system and allows law  
8                    enforcement and regulators to access the data  
9                    and manipulate queries and other ways of looking  
10                   at the data in order to assist investigations  
11                   and oversight.

12                Q     You mentioned federal law enforcement and some  
13                   federal agencies. Does anyone outside of the  
14                   federal government apparatus have direct access  
15                   to those filings, for example at the state level  
16                   or anyone else?

17                A     There have been instances where state regulators  
18                   under a memoranda of understanding with FinCEN  
19                   have direct access. In addition, FinCEN will  
20                   work with points of contact within a given state  
21                   in order to facilitate access through the point  
22                   of contact for certain state agencies. So the  
23                   access is fairly widespread.

24                Q     What are the sort of advantages and challenges  
25                   of that kind of direct access to those filings?



1           A     The advantages are US government agencies and  
2                    regulators can use the data independently for  
3                    the purposes of their work.  So, for instance,  
4                    if an exam team from one of the federal banking  
5                    regulators is examining XYZ bank in advance of  
6                    its exam, it can analyze SAR filing patterns to  
7                    see if the institution appears to be filing  
8                    timely SARs.  It can also analyze the narratives  
9                    in SARs and determine if it feels the narratives  
10                   are sufficiently robust.  So those are some of  
11                   the advantages from the US government's  
12                   perspective.

13                         Some challenges are, one, there have  
14                         certainly been leaks of SAR information which  
15                         is, you know, of course very sensitive data, and  
16                         two, again just pending on your perspective, it  
17                         can also be seen as a fairly significant  
18                         invasion of privacy.  The standard for filing a  
19                         SAR, for instance, is extremely low and that has  
20                         developed over time with enforcement against  
21                         institutions, so there can be fairly substantial  
22                         sensitive allegations against an account holder  
23                         or a business that meet a very low evidentiary  
24                         bar to state them.  And then when you combine  
25                         that with the risk of leaks, you know, certainly

1           there have been concerns over the years about  
2           data privacy and reputational damage to  
3           individuals and companies who are subject to a  
4           leak of information that met a very low bar.

5           Q     As you've raised privacy interests, I'm  
6           wondering can you tell us are privacy interests  
7           protected in the United States by constitutional  
8           rights or other bill of rights kind of higher  
9           level rights?

10          A     There certainly are federal statutes and  
11          regulations that are informed by constitutional  
12          principles that in various ways attempt to  
13          balance privacy rights and data privacy rights.  
14          And, you know, there are particular banking  
15          statutes that are focused on customer privacy.  
16          The AML regime is arguably an exception or  
17          counterbalance to those rules in many ways. So,  
18          for instance, there are two provisions that were  
19          created coming out of the September 11th  
20          terrorism attacks in the US and the follow-on  
21          legislation under the *Patriot Act* that arguably  
22          prioritize information sharing in law  
23          enforcement over individual customer privacy.  
24          And these two provisions which are under  
25          section 314 of the act allow under section A law

1 enforcement to query through FinCEN which  
2 institutions have held accounts within a defined  
3 time period of particular individuals or  
4 entities that are under investigation. The  
5 institutions have to report that back to FinCEN  
6 and then that allows criminal authorities to  
7 issue a grand jury subpoena or other process in  
8 order to get account records. Arguably that is  
9 a weighting of fighting crime over privacy.  
10 Similarly under section B of that act multiple  
11 financial institutions can share information  
12 about customers. So if I'm suspected of  
13 engaging in money laundering by my bank, bank A,  
14 and I'm sending transactions to your bank, bank  
15 B, there are mechanisms where there can be  
16 depending on the nature of the conduct  
17 information sharing about transactions and  
18 customers between bank A and bank B. Certainly,  
19 you know, in my experience that can help in  
20 fighting crime from a government perspective,  
21 but that is a sharing of information that many  
22 people would find offensive and concerning. And  
23 again, although there are some standards written  
24 into these provisions, in practical effect the  
25 bar is pretty low to meet them.

1           Q     You mentioned how privacy interests are balanced  
2                   in some of these federal statutes. I guess my  
3                   question is, is there sort of a freestanding  
4                   constitutional right to privacy in the United  
5                   States?

6           A     The constitutional right to privacy in the US in  
7                   our system is more focused on, in my opinion,  
8                   privacy from physical searches by US government  
9                   authorities, so for instance, in order for law  
10                  enforcement to search a home there has to be a  
11                  warrant that is signed by a US judge authorizing  
12                  the search. Now, certainly there's an argument  
13                  that even though it's signed by a judge, the  
14                  standard probable cause is a very low standard.  
15                  But that is a way that the US constitution  
16                  attempts to protect privacy. Similarly in the  
17                  modern era, various ways of taking that concept  
18                  of a home and thinking about cellphone tracking  
19                  or cellphone data has developed over time in the  
20                  case law, but it is much more focused on what  
21                  existed at the time of our founding, concerns  
22                  about intrusions of physical premises than  
23                  banking. The banking privacy and customer  
24                  privacy issues tend to be developed more in the  
25                  US system by statute than by constitutional

1 provisions that are explicit.

2 Q Okay. Thank you. I'm turning now to speak  
3 about the global investigations division. Could  
4 you give us just a brief overview of the mandate  
5 of that division, please.

6 A The global investigations division of FinCEN was  
7 developed a few years ago as a way to, as I  
8 alluded to at the outset with respect to the  
9 enforcement division, to divide the authorities  
10 that FinCEN has in the enforcement space between  
11 two divisions because of an emerging view  
12 following living with the reorganized structure,  
13 if you will, for several years that that was in  
14 the view of leadership at the time more mission  
15 space, if you will, then made sense for one  
16 division. In addition, by creating the global  
17 investigations division, FinCEN gave heightened  
18 prominence to these other types of authorities  
19 which tend to have more of an international  
20 focus than the compliance and enforcement  
21 authorities that we talked about with respect to  
22 the enforcement division.

23 The primary authorities that the global  
24 investigations division enforces are section 311  
25 of the *Patriot Act* and geographic targeting

1 orders. Those are the primary authorities.  
2 Section 311 of the *Patriot Act* allows the  
3 director of FinCEN to make a written finding in  
4 detail that a financial institution or a foreign  
5 jurisdiction -- those are the primary uses --  
6 are of primary money laundering concern to the  
7 US. And that is a public finding which lays out  
8 factual detail of the nature of the concern, and  
9 that can be based on public information, FinCEN  
10 reporting through the database, as I've alluded  
11 to. It's also public that it can involve  
12 classified information that is stated in a  
13 particular way in the public filing. And then  
14 there are five special measures that FinCEN can  
15 implement to address the director's view of a  
16 primary money laundering concern, including the  
17 most significant of which, which is to order US  
18 financial institutions to not allow  
19 correspondent transactions through the US  
20 system. So if you are a foreign financial  
21 institution and you depend on US dollar access  
22 in order to carry out your institution's  
23 business needs, which is obviously very common,  
24 this type of order will prevent that type of  
25 transactional activity coming from the foreign

1 financial institution. The power has also been  
2 used against jurisdictions, including North  
3 Korea most recently.

4 So that is one authority that the  
5 investigations division has. The other is  
6 geographic targeting orders, which is a special  
7 information collection authority that FinCEN has  
8 used very robustly over the past several years.

9 Q I'd like to talk a little bit about geographic  
10 targeting orders, which you deal with sort of  
11 beginning at page 26 of your report. Could you  
12 explain what the basis for making that kind of  
13 order is.

14 A FinCEN's geographic targeting authority allows  
15 it to direct for a six-month period which can be  
16 renewed specialized information collection and  
17 reporting obligations on financial institutions  
18 regulated by the act or trades or businesses  
19 that are not regulated presently by the act.  
20 And by way of example, the most recent type of  
21 geographic targeting order that FinCEN has  
22 implemented for the past several years on  
23 multiple renewals is involving title insurance  
24 companies. FinCEN came to the view that  
25 purchases of high-end real estate in certain

1 cities at a sufficient level were being used to  
2 launder proceeds of criminal activity from  
3 around the world and issued these enhanced  
4 reporting obligations on title insurance  
5 companies to try to determine who the beneficial  
6 owner of these real estate purchases were. So  
7 obviously a number of real estate purchases  
8 often for legitimate reasons were being  
9 conducted under various types of limited  
10 liability companies, other types of corporate  
11 structures and the ultimate beneficial owner  
12 sitting behind it would not be known and not  
13 easily discernible. So this geographic  
14 targeting order, which FinCEN has highlighted in  
15 speeches and press releases as having great  
16 success in assisting law enforcement, has been  
17 extended to additional cities since its  
18 inception, other changes made. It has been  
19 renewed many times, which as an aside there are  
20 questions whether that's a proper use of the  
21 authority and if challenged if it would  
22 withstand court challenge, but that has been how  
23 FinCEN has proceeded and that's been a primary  
24 use of that authority over the past  
25 several years, although there are others over



1 the years both public and non-public.

2 Q What's the concern about exercising the  
3 authority in the way that it has been exercised  
4 just renewing these orders over and over and  
5 sort of dealing with these risks in what sounds  
6 like perhaps an ad hoc way?

7 A I think, you know, one view of the continued  
8 extension of a geographic targeting order is  
9 that when FinCEN wants to regulate a particular  
10 sector under the *Bank Secrecy Act* it needs to do  
11 so through notice and comment rulemaking so that  
12 it issues a Notice of Proposed Rulemaking.  
13 There's a period of comment where members of the  
14 public can send FinCEN comments on its proposed  
15 rule making and sometimes there can be thousands  
16 of comments that are submitted. FinCEN then  
17 needs to evaluate those comments and if it  
18 decides to proceed with the rulemaking explain  
19 in the rulemaking how it has reviewed the  
20 comments and how it is balancing the comments  
21 against its view of the proper regulatory  
22 coverage of a sector. And when you use a  
23 geographic targeting order that does not have  
24 this type of notice and comment and frankly is  
25 an order from FinCEN's director and doesn't have

1           to go through all the regulatory hurdles and  
2           process and resource devotion that using the  
3           GTOs in this way in the view of some is a  
4           subversion of notice and comment rulemaking,  
5           which is governed by the *Administrative*  
6           *Procedures Act* and certainly has constitutional  
7           underpinnings in terms of their process. So  
8           that is some of the controversy around the way  
9           that FinCEN has used GTOs of late.

10          Q     I'm turning next to the strategy strategic  
11                operations division. Could you tell us about  
12                the mandate of that division, please.

13          A     The strategic operations division has recently  
14                in recent years been rebranded, if you will. In  
15                the prior structure it was the liaison division.  
16                And it serves a number of important functions  
17                within FinCEN's mandate. Obviously we've talked  
18                a lot about enforcement so far in our time  
19                together, but FinCEN also, interestingly, plays  
20                a role as a liaison to industry. And it's an  
21                interesting juxtaposition in one agency to have  
22                this industry engagement area of responsibility  
23                and also enforcement responsibility against the  
24                same institutions. So the strategic operations  
25                division is responsible for liaising with

1 industry in a number of different ways to  
2 provide feedback and opportunities for  
3 engagement between industry and FinCEN, as well  
4 as other agency that we talked about who are  
5 involved in the regime. And it evolved over  
6 time. For instance, in the past five years  
7 there's been a routinization and formalization  
8 of certain programs that FinCEN had in a more ad  
9 hoc way over the years. And some examples of  
10 that are the FinCEN exchange program, which is a  
11 program that was announced by FinCEN's director  
12 several years ago building on a practice that  
13 was occurring non-publicly to bring together  
14 groups of financial institutions and law  
15 enforcement to focus on a particular set of  
16 criminal actors or money laundering typologies  
17 and in a more private setting engage in  
18 information sharing that then results in the  
19 institution providing discrete information to  
20 law enforcement and filing Suspicious Activity  
21 Reports, for instance, on a particular problem  
22 set from the US government's perspective. So  
23 that's one aspect of the engagement that occurs.  
24 In addition, FinCEN has been implementing a  
25 relatively new program it announced called

1           Innovation Hours, which is its attempt to engage  
2           with industry and understand the way that  
3           emerging technologies can assist with making the  
4           AML regime more effective in bringing down the  
5           compliance burden. So that might involve, for  
6           example, a software company that has an  
7           innovative way of doing transaction monitoring  
8           that is both more highly effective than  
9           traditional methods and also less costly for the  
10          institutions that use this software, and that  
11          might be an opportunity where the developers of  
12          the software could meet, for instance, with the  
13          FinCEN director and talk about this software and  
14          how it might assist with reforming the regime.  
15          So that's another program that falls under the  
16          strategic operations division.

17                 The final program that I would highlight is  
18                 a statutorily created part of FinCEN's mandate  
19                 which is the *Bank Secrecy Act* advisory group,  
20                 which is a formal group of regulators and  
21                 institutions, trade associations that come  
22                 together more formally typically twice a year  
23                 and then in subcommittees to try to have a forum  
24                 where there can be a transparent discussion  
25                 about advantages and growing disadvantages of

1                   our regime and also work to establish change  
2                   within the regime. So that's another area that  
3                   strategic operations division focuses on.

4           Q        Okay. Thank you. I'm turning now to the policy  
5                   division and I'm hopeful that you can tell us  
6                   about the mandate of that group before moving  
7                   towards discussing some of the modernization  
8                   efforts that are going on currently in the US.

9           A        The policy division of FinCEN is responsible for  
10                   issuing an amending regulations that FinCEN  
11                   issues. Obviously some of the regulations under  
12                   FinCEN's mandate have been in existence for  
13                   many years, but FinCEN also issues new  
14                   regulations, including, for example, the  
15                   customer due diligence rule that we talked about  
16                   and also will be issuing additional regulations  
17                   coming out of the new legislation that passed  
18                   this year. The policy division also issues  
19                   working with the strategic operations division  
20                   advisories which can focus financial  
21                   institutions on particular typologies. During  
22                   the pandemic, for example, the policy division  
23                   working with other components of FinCEN have  
24                   issued a number of advisories on typologies of  
25                   COVID fraud that may impact financial

1 institutions. There have also been advisories  
2 on indicators of human trafficking running  
3 through financial institutions and how  
4 institutions should file SARs on indicia from a  
5 financial perspective of human trafficking to  
6 assist law enforcement in anti-human trafficking  
7 efforts. So that's another area of  
8 responsibility for the policy division. The  
9 policy division will also issue guidance, which  
10 is obviously not a full notice and comment  
11 rulemaking, but where it deems appropriate it  
12 will issue guidance documents. For example, in  
13 the crypto space as we discussed, that 2013 and  
14 2019 guidance was done through the policy  
15 division to clarify FinCEN' expectations with  
16 respect to crypto.

17 A final area of primary responsibility for  
18 the policy division is administrative rulings.  
19 That is a provision of FinCEN's regulations that  
20 allow the financial institution to submit a  
21 request to FinCEN to clarify, or the institution  
22 obligations of a particular nature if it is  
23 struggling with its understanding its  
24 obligations, or also to provide acceptive  
25 relief. So if an institution believes that it

1           would have certain obligations under the act but  
2           believes it's warranted to grant an exception in  
3           its circumstances to a particular set of  
4           obligations, it can submit an administrative  
5           ruling request to FinCEN's policy division and  
6           get a private letter ruling. And in some  
7           instances FinCEN will anonymize its private  
8           letter rulings and post them publicly for  
9           similarly situated institutions to find guidance  
10          on a discrete issue. So that is a primary set  
11          of responsibilities for the policy division.

12          Q     Okay. Thank you.

13          MS. LATIMER: And Madam Registrar, I'm moving now to  
14          page 29, please.

15          Q     And here you begin discussion about *Bank Secrecy*  
16          *Act* modernization. This is the last area I'm  
17          going to cover with you this morning. I'm  
18          hoping you can expand upon a point you make  
19          which is that the *Bank Secrecy Act* no longer  
20          fully or adequately addresses the current  
21          environment.

22          A     There's been a view across practitioners whether  
23          they be government, academics, private  
24          practitioners, employees of financial  
25          institutions that the regime has really lost its

1 way and that the primary focus in enacting the  
2 *Bank Secrecy Act* was to assist law enforcement  
3 with fighting crime and what has evolved is a  
4 highly burdensome, ineffective check the box  
5 system of compliance obligations and that that  
6 can be remediated in a number of different ways.  
7 There have been a variety of legislative  
8 initiatives and efforts that have not come to  
9 fruition and there hasn't been a significant  
10 change to the *Bank Secrecy Act* since the *Patriot*  
11 *Act*, in the view of some. And the *Patriot Act*  
12 added obligations to financial institutions; it  
13 certainly did not take them away and refine  
14 them.

15 And this year at the beginning of the year  
16 there was passage of omnibus legislation that in  
17 a variety of ways may bring reform, depending on  
18 how the provisions are implemented to the act,  
19 that there's, you know, great hope will be  
20 meaningful to try to get back to the core  
21 mission of the act and try to reduce some of the  
22 burden. You know, we could spend a day together  
23 talking about the new act, but in terms of  
24 significant provisions that may of interest to  
25 the commission at a high level, there's a focus



1           on a new statute, the *Corporate Transparency*  
2           *Act*, which will require certain types of  
3           companies to report beneficial ownership  
4           directly to FinCEN, and the hope is that that  
5           will bring greater transparency to corporations  
6           and other types of entities in the US system  
7           consistent with FATF recommendations, and also  
8           potentially once the act is implemented fully,  
9           which will take several years, reduce the burden  
10          on financial institutions in the customer due  
11          diligence space because at this point in time  
12          institutions really bear the burden of trying to  
13          achieve the US government's desire and FATF's  
14          directives for transparency.

15                 The act also has a number of provisions  
16                 aimed at strengthening the incentives for  
17                 whistle-blowers to come forward and report  
18                 suspicious activity to US government authorities  
19                 that is happening through their financial  
20                 institutions if they have that concern. The act  
21                 also, interestingly, has a pilot program to  
22                 allow greater sharing of SAR information with  
23                 non-US affiliates. So if you have a global  
24                 bank, if the US affiliate of the global bank  
25                 would like to share SAR information with an

1           affiliate for instance in Brazil, there's a  
2           pilot program to allow that indiscrete instances  
3           and study that as a potential longer-term regime  
4           change.

5                        So those are, you know, a few of many  
6           examples of changes that the act will implement  
7           over the next several years or cause there to be  
8           study of. In some instances it's to do various  
9           studies.

10           Q        Thank you. I wanted to ask you just a couple of  
11           questions about the *Corporate Transparency Act*  
12           which you have made reference to. Appreciating  
13           that the registry is not up and active yet and  
14           you say it will take a number of years before  
15           that occurs, do you know what the plan is for  
16           the registry in terms of who will be able to  
17           access it?

18           A        At this point in time it will be fairly limited  
19           to FinCEN and other government agencies. It  
20           will not be the type of unified corporate  
21           registry that you see in some countries where  
22           private persons can access it. You know,  
23           certainly I think that could change over time  
24           and there are some provisions with consent to  
25           allow private parties to access information, but

1           it really remains to be seen how that will  
2           develop and whether as currently constructed in  
3           terms of the act it will result in a decreased  
4           burden on financial institutions. You know,  
5           another way that that could be achieve is  
6           through the various know your customer pools  
7           that are developing in some countries to share  
8           KYC information across institutions, but for now  
9           in terms of I think real reform, the act is  
10          fairly limited.

11          Q    On page 36 of your report you mention some areas  
12               of potential amendments that were not included.  
13               Those include -- those areas that were not  
14               included in the amendments are the expansion of  
15               real estate, geographic targeting orders to  
16               commercial real estate and also bringing  
17               high-end art dealers and investment funds under  
18               taking the *Bank Secrecy Act*. Do you know why  
19               those weren't included in the amendments, or do  
20               you have a view of whether there was a missed  
21               opportunity?

22          A    So, you know, I think it depends on one's  
23               perspective. For example, as I have alluded to  
24               in the report, there have been many efforts  
25               since the early 2000s by FinCEN to bring

1 investment advisors under the ambit of the *Bank*  
2 *Secrecy Act*, several notice of proposed  
3 rulemaking to extend BSA AML coverage to  
4 investment advisors and the most recent of which  
5 was in 2015 and those have never come to  
6 fruition. So certainly those on the law  
7 enforcement side, for instance, who may believe  
8 that investment advisors are an uncovered gap  
9 with respect to BSA AML coverage are likely  
10 disappointed by the fact that that was not  
11 dictated by the act. Whereas high-end art was  
12 not, antiquities was. So I think it's all a  
13 matter of perspective of what should be covered  
14 in the view of some, in the view of others what  
15 should not be covered.

16 Q You at the bottom of page 36 make certain  
17 recommendations for ensuring that the BSA  
18 modernization efforts are successful. The first  
19 recommendation you made is that an enforcement  
20 moratorium be in place where FinCEN should  
21 refrain from enforcement action if a regulated  
22 entity makes a risk-based decision to trim  
23 aspects of their AML compliance programs that  
24 are not strictly required in the interest of  
25 dedicating more resources towards areas of most

1 law enforcement utility. My question was how  
2 you view it that a regulated entity might  
3 determine what aspects of the AML compliance  
4 program could be trimmed and which ones were  
5 more useful to law enforcement.

6 A There's several provisions of the act that are  
7 aimed at assisting financial institutions with  
8 compliance obligations and also informing  
9 priorities. I think, you know, the concern and  
10 the observation in the report is that if  
11 institutions are simply expected to now  
12 incorporate a new guidance on priorities but are  
13 not allowed to de-emphasize other areas that are  
14 not a priority based on feedback from the US  
15 government, that then it doesn't accomplish the  
16 core mission which is to make the act more  
17 effective. And one of the ways that  
18 effectiveness can be subverted is through  
19 increased enforcement and enforcement that is  
20 not geared toward the policy messaging that the  
21 government is trying to achieve. So that type  
22 of enforcement moratorium can assist with  
23 ultimately achieving the primary goals of the  
24 act and other measures over the years focused on  
25 effectiveness.

1 Q Okay. So do I understand it in other words that  
2 the regulated entities should be focused on the  
3 priorities that FinCEN has set?

4 A That is certainly the suggestion in some of the  
5 dictates of the act. The challenge is it needs  
6 to be coupled with a focus by the other actors  
7 in the BSA/AML space, the federal banking  
8 regulators, the Securities and Exchange  
9 Commission and their exams teams to examine  
10 against those priorities and not cite violations  
11 if a bank chooses or another type of institution  
12 chooses to focus on those priorities and  
13 de-emphasize other obligations. So I think, you  
14 know, frankly although the act in the view of  
15 many practitioners in the space is truly  
16 historic, whether it will reach its full  
17 potential depends on the matrix of agencies that  
18 we talked about today coming together to  
19 effectuate the principles of the act. Because  
20 if we continue business as usual ultimately we  
21 are not going to achieve the purposes.

22 Q Okay. And another point you make is that  
23 regulated entities should be protected if they  
24 innovate and move away from sort of a rule-based  
25 system to a more behaviour model. What did you



1                   question is should the training be somehow  
2                   standardized or unified. You've mentioned here  
3                   are all these different entities going in and  
4                   doing their examinations. How do you see that  
5                   working?

6           A        It's challenging practically to have uniform  
7                   examinations standards that are highly  
8                   prescriptive across the many different exam  
9                   teams; however, there is a manual under the  
10                  auspices of an organization called the FFIEC for  
11                  banking regulators, the manual is public, that  
12                  attempts at a high level to have exam  
13                  consistency. There's really been extraordinary  
14                  effort by the agencies over the past several  
15                  years to update and refine the manual. So  
16                  although I think it's not realistic that every  
17                  examiner will act in a similar fashion  
18                  consistently, certainly efforts to update and  
19                  refine the manual help with that.

20          Q        Okay. The last point you call for here in your  
21                  report is law enforcement flexibility, and could  
22                  you just explain what you had in mind for that.

23          A        You know, we've obviously focused on the  
24                  regulators quite a bit today, but the criminal  
25                  authorities, both prosecutors and agents, do



1                   play an important role in the regime and there's  
2                   been discussion over the years that the  
3                   thresholds for SAR filing, \$5,000 in a  
4                   transaction or aggregation of transactions and  
5                   \$10,000 for currency transaction reporting, have  
6                   been the standards for many years and don't  
7                   sufficiently take into account inflation. And  
8                   there have been discussions over the years and  
9                   the act itself requires consideration of raising  
10                  those thresholds, but, you know, if law  
11                  enforcement fights back against the raising of  
12                  those thresholds it makes it difficult to  
13                  achieve reform. And so that is what is meant by  
14                  law enforcement flexibility.

15                MS. LATIMER: Thank you very much, Ms. Brooker.

16                        Mr. Commissioner, those are all my questions  
17                        this morning.

18                THE COMMISSIONER: Thank you, Ms. Latimer. I think  
19                        we'll take a 15-minute adjournment now and then  
20                        we'll turn the floor over to counsel for the  
21                        participants who have indicated an interest in  
22                        asking questions of Ms. Brooker. So we'll stand  
23                        down for 15 minutes. Thank you.

24                THE REGISTRAR: This hearing is adjourned for a  
25                        15-minute recess until 11:33 a.m. Please mute



1 States?

2 A The primary impact of FinCEN becoming a treasury  
3 bureau as opposed to a treasury office is that  
4 there is some level of budget independence from  
5 the treasury overall budget granted by congress  
6 each year. So FinCEN has a specific line item  
7 in the budget, typically, and it allows congress  
8 to fund FinCEN at a level that it thinks is  
9 appropriate for its mandate as opposed to  
10 FinCEN's budget being part of the overall  
11 treasury budget and then subject to the whims of  
12 the political officials that run the department  
13 depending on the administration. So that is the  
14 primary aspect of bureau status. In addition to  
15 that more formal impact I think it also conveys  
16 a sense of independence from the treasury  
17 department of FinCEN, although FinCEN  
18 coordinates closely with treasury department  
19 components and officials and certainly reports  
20 to the undersecretary, but I think that is also  
21 an imprimatur from congress's perspective of  
22 independence expectations for FinCEN.

23 Q Thank you. My next question is going to relate  
24 to the FinCEN industry outreach program section  
25 which begins around page 9 of this report. So

1                   in the second paragraph here there's a  
2                   discussion of the frequently asked questions and  
3                   you mention that FinCEN issued this frequently  
4                   asked question sheet to address additional  
5                   industry issues. What are some of the issues  
6                   which arose specifically with respect to  
7                   obtaining beneficial ownership information for  
8                   financial institutions?

9                   A       One of the mechanisms that FinCEN uses to  
10                   address industry regulatory questions is  
11                   frequently asked questions and FinCEN is not  
12                   supposed to impose new obligations by frequently  
13                   asked question. That should be through the  
14                   comment rulemaking, as I have alluded to today.  
15                   But there can be areas that are arguably covered  
16                   by the regulations but need further explanation.  
17                   So across a range of issues over the years  
18                   FinCEN has issued frequently asked questions.  
19                   In particular with respect to the customer due  
20                   diligence role that was passed by FinCEN in  
21                   2016, although much effort went into development  
22                   of the customer due diligence regulation,  
23                   industry had a number of questions about  
24                   implementation and found that FinCEN' efforts to  
25                   explain it were incomplete. And FinCEN received

1                   significant feedback from industry and, frankly,  
2                   criticism that there were a number of important  
3                   open questions about how to comply with the  
4                   customer due diligence requirements. FinCEN  
5                   thus issued a series of frequently asked  
6                   questions over the years to try to bring clarity  
7                   to some of these important implementation  
8                   questions around the CDD rule.

9                   Q     Okay. Thank you.

10                  MS. ADDARIO-BERRY: Madam Registrar, can we continue  
11                   down the report to page 14 and the bottom  
12                   paragraph.

13                  Q     You write in this section that:

14                                 "FinCEN's enforcement process is informal  
15                                 and, until recently, has been largely  
16                                 opaque to the public."

17                   Could you expand what you meant in this sentence  
18                   by the informal nature of the enforcement  
19                   process.

20                  A     I think that a couple of considerations inform  
21                   that judgment. First prior to the recent  
22                   guidance issued by FinCEN on its enforcement  
23                   factors and approach, there was no formal  
24                   guidance from the agency about how it approached  
25                   enforcement, and so unlike other US government

1 agencies both in the anti-money laundering and  
2 other enforcement space that have guidance in  
3 varying levels of prescriptiveness and  
4 specificity, FinCEN had none. So that certainly  
5 contributed to a public perception of  
6 informality and unbounded discretion. In  
7 addition FinCEN does not have like many other  
8 agencies do, for instance Securities and  
9 Exchange Commission, a robust enforcement manual  
10 that governs its enforcement investigations and  
11 that's another way in which FinCEN, as opposed  
12 to other regulators in the US, has more  
13 opaqueness and informality to its process. But  
14 I do think the guidance that was issued is an  
15 important first step to bringing more formality  
16 and also more routinization from an institution  
17 and individual perspective in how it carries out  
18 its enforcement mandate.

19 Q Thank you. My next question is regarding the  
20 second paragraph on page 18. And in this  
21 section you write that:

22 "While there is no specific statutory  
23 authority, FinCEN also believes it has the  
24 authority to bar an individual from future  
25 employment with a BSA financial

1                   institution."

2                   What informs this view that you have regarding  
3                   FinCEN's purported belief on this point?

4           A       FinCEN has taken a number of enforcement actions  
5                   in which it pronounces a bar of an individual  
6                   associated with a financial institution as part  
7                   of an enforcement action from surveying either  
8                   permanently or for a defined period of time in  
9                   certain job classes in an institution, for  
10                  instance in compliance or other types of job  
11                  categories at an institution.  And that is not a  
12                  specific provision of its statute, unlike other  
13                  agencies who have AML authority that have very  
14                  specific provisions that allow for these  
15                  industry bars.  Again going back to some of my  
16                  discussion with Ms. Latimer, because there has  
17                  not been robust challenge of FinCEN's  
18                  enforcement authorities and approach, that type  
19                  of provision has not ever been challenged  
20                  through a full litigation process.

21           Q       Fair enough, thank you.  And so you gave  
22                   evidence earlier this morning stating that it  
23                   was an expectation in the United States that in  
24                   order to carry out the BSA requirements entities  
25                   need to know their customer, including the

1 customer's source of funds, and this was in the  
2 context of the casino industry. Do you recall  
3 giving that evidence?

4 A Yes.

5 Q And this was an expectation and not just a  
6 suggestion; is that correct?

7 A Yes. That has been a regulatory expectation  
8 across agency that have BSA/AML enforcement and  
9 compliance authority that institutions know the  
10 identity of their customers, their source of  
11 wealth, their source of funds and their expected  
12 transactional patterns.

13 MS. ADDARIO-BERRY: Okay. And, Madam Registrar, if  
14 we could scroll down a little further to page 20  
15 of the report.

16 In the third paragraph here you state:

17 "In the 2012-2013 time frame, FinCEN  
18 communicated to the casino industry in  
19 speeches by the Director, in IRS industry  
20 conferences and through the IRS  
21 examination process that it expected this  
22 risk-based BSA/AML compliance that  
23 included know your customer due diligence  
24 on a casino's largest players and improved  
25 suspicious activity reporting."



1           As I understand your evidence, the expectation  
2           for these entities to know their customer, it  
3           existed prior to the 2012/2013 time period but  
4           this expectation was communicated to the  
5           industry with more detail at this time.

6           A     That's correct.

7           Q     Is it fair to say that it was FinCEN's  
8           expectation that under the AML requirements  
9           casinos would comply with an adopt a risk-based  
10          compliance approach that included being aware of  
11          customer's source of funds?

12          A     Yes. I think that certainly is the case.  
13          There's not a requirement for every single  
14          patron of a casino that the casino know the  
15          customer's source of funds. It is certainly a  
16          risk-based system and the way that casinos have  
17          implemented this expectation is that for certain  
18          categories of patrons it may be level of play,  
19          if there's an indicia of suspicion, that  
20          depending on certain categories or factors the  
21          casino will inquire into the patron's source of  
22          wealth or source of funds. And there's a  
23          reference in my report to best practices that  
24          have been issued several times over the past  
25          five years by the American Gaming Association,

1                   which is the lead trade association for casinos  
2                   in the US. Public AML best practices from the  
3                   industry's perspective and source of wealth and  
4                   source of funds and the type of risk-based  
5                   approach that I'm describing are certainly  
6                   covered there. I should also say, in full  
7                   disclosure, I'm outside counsel to the gaming  
8                   association in this space, but despite that bias  
9                   I think it really is really an amazing effort by  
10                  the casino industry to set forth standards and  
11                  attempt to self-regulate, adhering to the most  
12                  important principles of the act. So I think,  
13                  you know, to the extent that coming out of the  
14                  commission's work there is a focus on the casino  
15                  sector, I do think that the best practices can  
16                  be really educational on the US approach to  
17                  casino enforcement and compliance in the BSA  
18                  space.

19                Q    Thank you. And with respect to the  
20                    communications by the director in that 2012 to  
21                    2013 period, you don't cite those communications  
22                    verbatim in your paper; correct?

23                A    Yes, that's right. Those speeches are variable  
24                    on FinCEN's website.

25                Q    And you would agree with me that to know the

1                   precise language of the director's  
2                   communications we should rely on and go directly  
3                   to the source?

4           A       Yes.  And there might have also been some press  
5                   reporting at the time.  I believe all of the  
6                   speeches were posted to the website, but there  
7                   may have been a few that were not actually  
8                   published.  Sometimes FinCEN will publish the  
9                   remarks of its director or other officials and  
10                  sometimes not.

11          Q       And some of the public communications by the  
12                   director to the casino industry went beyond  
13                   2013?

14          A       Yes.

15          Q       Okay.  I have one final question for you and we  
16                   can move on to the final section of the report,  
17                   page 32, please, Madam Registrar.

18                   This is under the heading of "The 2020 *AML*  
19                   *Act.*"  The bottom of page 32 and top of 33 you  
20                   write, you're discussing the *Corporate*  
21                   *Transparency Act*, and you mention that this act  
22                   requires certain small companies to report  
23                   beneficial ownership information.  Could you  
24                   expand on to your knowledge why it is that these  
25                   reporting requirements only apply to certain

1 small companies?

2 A There are a number of exemptions in the  
3 *Corporate Transparency Act*. In large part they  
4 track exemptions and the customer due diligence  
5 regulations governing certain types of financial  
6 institutions regulated by the act. You know, I  
7 think it is a balance of having a corporate  
8 transparency regime which will be new for the US  
9 on a national level and exempting institutions  
10 in which the likelihood of the concerns that sit  
11 under the *Corporate Transparency Act* are low  
12 risk, and so I do think it is a balance. And  
13 it's also a first step. We may sit here  
14 together a decade from now and the exemptions  
15 and the approach of the *Corporate Transparency*  
16 *Act* have changed in their expanded requirements.  
17 But I do think this was an attempt to balance a  
18 regime that's thoughtful in terms of burden.

19 MS. ADDARIO-BERRY: Thank you, Ms. Brooker. Thank  
20 you, Mr. Commissioner. Those are my questions.

21 THE COMMISSIONER: Thank you, Ms. Addario-Berry.

22 I'll now call on Mr. Duong for the Lottery  
23 Corporation, who has been allocated ten minutes.

24 **EXAMINATION BY MR. DUONG:**

25 Q Good morning, Ms. Brooker. Can you hear me?

1           A     Yes.  Good morning.

2           Q     Good morning.  As the Commissioner said, I'm  
3                    counsel for the British Columbia Lottery  
4                    Corporation.  I just had a few questions I  
5                    wanted to ask you.  And predictably it starts at  
6                    that section about casinos in your report.  That  
7                    would be at page 20.

8           MR. DUONG:  I would be grateful, Madam Registrar, if  
9                    you can pull that up.

10          Q     Great.  My friend from the province  
11                    Ms. Addario-Berry had touched upon this but you  
12                    had not footnoted the statements about the  
13                    statements made to the casino industry in  
14                    speeches by the Director, but you had  
15                    acknowledged that those speeches are generally  
16                    available on the website?

17          A     Yes.

18          Q     And you then go on to mention IRS industry  
19                    conferences.  Are those generally available?

20          A     The public speeches that the director gave in  
21                    that time frame were at industry conferences.  
22                    FinCEN directors are invited to speak at a wide  
23                    range of industry conferences, including in the  
24                    casino sector, and so she used the opportunity  
25                    primarily in that time frame to issue speeches

1           in person at the industry conferences and then  
2           have her remarks published on FinCEN's website,  
3           which is not unique to the casino sector, to be  
4           sure.

5           Q     So in general in order to -- so in general we  
6           can go back to the FinCEN website, that section  
7           in the website on speeches and sort of pinpoint  
8           exactly what was said by Ms. Calvery at that  
9           time and Mr. Freis before that.

10          A     Yes. And in addition, there were other FinCEN  
11          officials, including myself who spoke at  
12          industry conferences in that time frame of 2012  
13          to 2016, and my remarks are also published on  
14          the website and following my tenure there are  
15          other FinCEN officials who also gave published  
16          remarks in the casino sector.

17                     I should also note, which may go without  
18                     saying, that there's also, you know, one-to-one  
19                     conversations with small groups across different  
20                     industries from FinCEN officials to certainly  
21                     FinCEN speaks to industry in a number of ways  
22                     and published speeches are just one way.

23          Q     I imagine the one-on-one includes these IRS  
24          examination processes, in the sense that the IRS  
25          is examining a certain entity and would tell

1                   them what they would expect at that point?

2           A       That's right.  Certainly in the exam context  
3                   there is feedback of the IRS's view of certain  
4                   compliance practices.  In addition, the exam  
5                   team for IRS that is based in Las Vegas is a  
6                   highly tenured and experienced group of  
7                   examiners led by a long tenured employee of the  
8                   IRS Jason Carmen, who also makes himself  
9                   available to industry to have more informal  
10                  discussions in industry group settings and  
11                  one-to-one, you know, again certainly casinos  
12                  can disagree with his findings, but I think he's  
13                  widely respected as being available to industry  
14                  along with FinCEN officials to provide guidance  
15                  on a realtime basis.

16          Q       Thank you, Ms. Brooker.

17          MR. DUONG:  Can I ask, Madam Registrar, just to go to  
18                  the next page about halfway down.

19          Q       So you have written here, Ms. Brooker, that the  
20                  casino enforcement initiative heightened focus  
21                  on casino AML programs in establishing your know  
22                  your customer program, including source of funds  
23                  of large and high-risk casino customers.  I've  
24                  heard now that you've in answering the questions  
25                  from my friend from the province and Ms. Latimer

1 as well as reading some of the speeches of  
2 Ms. Shasky has provided that you use the term  
3 "source of funds" and source of wealth together  
4 often and I'm wondering if you can just provide  
5 me with a little bit of insight as to how FinCEN  
6 sees the two, whether they are watertight  
7 compartments or if there's overlap between the  
8 two, if source of wealth informs source of  
9 funds. I would be grateful if you can just  
10 provide me with some of your insight on that.

11 A In general in the US *Bank Secrecy Act* AML  
12 regime, there's not a fine distinction made  
13 between source of wealth and source of funds,  
14 and if one had to state which is preferenced.  
15 If you will. In the regime, I would say it's  
16 source of wealth. And that's because there's a  
17 recognition that money is fungible and the real  
18 concern is what is a customer's or a patron's  
19 source of wealth in order to have a presumption  
20 that the financial activity is based on  
21 legitimate funds. So although I certainly  
22 appreciate there can be a concept of source of  
23 funds, I think the US regime is more focused  
24 holistically on source of wealth and  
25 demonstration of legitimate sources of wealth.



1           Q     Just to put a finer point on that, in terms of  
2                   the overlap to the extent, you know, one does  
3                   some background research on a person, finds out  
4                   that they won the lottery or they just sold  
5                   their business, that would inform the likely  
6                   source of funds, then, based on that background  
7                   research in terms of money coming in to a  
8                   financial institution or a casino. Is that  
9                   fair?

10          A     I would state that as source of wealth, meaning  
11                   let's say someone uses a wire transaction to  
12                   fund play at a casino or a bank account.  
13                   Certainly you can look at the wire transaction  
14                   and see what account it derives from and follow  
15                   the payment chain, but ultimately there's a  
16                   fungibility of money in a bank account and you  
17                   don't know for sure what the source of funds is  
18                   for a particular transaction, whereas in the US  
19                   regime in my personal opinion, source of wealth  
20                   is a better indicator of legitimate source  
21                   proceeds.

22          MR. DUONG: Thank you, Ms. Brooker. Those are all my  
23                   questions. And thank you for coming today.

24          THE WITNESS: Thank you very much, sir. Pleased to  
25                   be with you.

1 THE COMMISSIONER: Thank you, Mr. Duong. I'll turn  
2 now to Ms. Magonet for the British Columbia  
3 Civil Liberties Association, who has been  
4 allocated ten minutes.

5 MS. MAGONET: Thank you, Mr. Commissioner.

6 **EXAMINATION BY MS. MAGONET:**

7 Q Ms. Brooker, can you hear me?

8 A Yes, thank you.

9 Q Excellent. So as my first question today I just  
10 wanted to return to some evidence you gave  
11 earlier. Earlier in response to a question from  
12 Ms. Latimer you noted that one concern about the  
13 fact that FinCEN filings are available to  
14 multiple different bodies is the impact on  
15 privacy and you noted in particular the risk of  
16 leaks from FinCEN. Is that accurate?

17 A I think it's the risks of leaks from the  
18 multiple potential parties that have access to  
19 FinCEN filings. There certainly has been some  
20 recent reporting about leaks from FinCEN  
21 directly, but over the years it's a concern  
22 about leaks more broadly of FinCEN data.

23 Q Thank you. That's helpful. And to discuss  
24 recent reporting it's my understanding that in  
25 September 2020 thousands of Suspicious Activity

1 Reports and other documents from FinCEN were  
2 leaked and this has been known as the "FinCEN  
3 Files." Is that accurate?

4 A Yes.

5 Q And it's also my understanding that this leak  
6 revealed over 200,000 transactions. Are you  
7 able to confirm that?

8 A I don't know exactly the number of transactions,  
9 but I know there has been significant reporting  
10 on the so-called FinCEN files and it was, to be  
11 sure, a high volume of transactions and parties  
12 that were the subject of the leaked information.

13 Q Thank you. And earlier today you provided  
14 evidence that FinCEN receives millions of  
15 reports each year. Is that accurate?

16 A Yes.

17 Q Do you have a sense of whether the number of  
18 reports that FinCEN has received has gone up  
19 over time?

20 A I don't know that data.

21 Q No problem. And do you have any idea as a  
22 ballpark number how many reports -- how many  
23 Suspicious Activity Reports FinCEN may have  
24 received in recent years?

25 A I don't know the number offhand, but I do

1 believe that FinCEN publishes that on its  
2 website. It's evolved over the careers how it  
3 does it, but there's some recent reporting on  
4 SAR trends and I think it gives data routinely  
5 on the number of SARs that are filed and in  
6 addition there are references in FinCEN  
7 speeches, you know, on an ad hoc basis to the  
8 number of SARs filed each year.

9 Q Thank you. It is also my understanding from  
10 your evidence earlier today that the standard  
11 for filing a SAR is quite low. Is that correct?

12 A That is certainly a practice that has evolved  
13 over time. Although the standard for SAR filing  
14 is not codified in the regulations it has been  
15 codified, if you will, through enforcement, and  
16 there's certainly been discussion in FinCEN  
17 speeches over the years about the practice of  
18 what is called defensive SAR filing, which is  
19 that financial institutions are afraid of having  
20 penalties or other violations cited by FinCEN or  
21 the regulators for failing to file SARs after  
22 the fact when there's an investigation and so a  
23 practice has developed of filing SARs on a  
24 relatively low standard to avoid that  
25 enforcement risk.

1           Q     Thank you.  It's my understanding that privacy  
2                    advocates such as the Electronic Frontier  
3                    Foundation and the ACLU have raised significant  
4                    concerns about the scope of FinCEN's data  
5                    collection and have even gone so far as to call  
6                    it a mass surveillance program.  Are you  
7                    familiar with those criticisms?

8           A     I am.

9           Q     Thank you.  My next question is about something  
10                   you write in your report and we can go there if  
11                   you wish, but I'll just put to you first.  On  
12                   page 30 you write:

13                         "In addition, the SAR and CTR filing  
14                         thresholds have not been updated for  
15                         inflation or otherwise, which results in a  
16                         significant amount of resources spent  
17                         filing reports that have little or no  
18                         material value to authorities and many of  
19                         which are never even reviewed by the  
20                         government."

21                   And I was wondering if you could speak to this  
22                   concern about that, the large volume of SARs  
23                   that FinCEN is receiving may not be acted upon.

24           A     It is certainly the case that there is a  
25                   percentage of filings that are not directly

1           impacting law enforcement activity on an annual  
2           basis. I don't believe that FinCEN methodically  
3           tracks that percentage and it would be difficult  
4           to do from a technical perspective in any event  
5           even if they tried, so I'm not sure it would  
6           ever be a precise effort. With that said, based  
7           on industry criticism FinCEN has made efforts  
8           over the past several years to give greater  
9           feedback on the impact of filings, including SAR  
10          filings, on law enforcement efforts and one of  
11          many ways that it's done that is the  
12          establishment under Director Calvery of an  
13          awards program to law enforcement agencies every  
14          year. It's usually in May. And there's a  
15          posted press release to in an anonymized way  
16          share some examples of how SAR and other filings  
17          have contributed in a meaningful way to law  
18          enforcement investigations and prosecutions. So  
19          it is a widespread criticism over the years and  
20          that is one example of FinCEN's effort to try to  
21          mitigate that criticism.

22          Q     Thank you. I understood from your evidence  
23                 earlier today that there's a concern that the  
24                 *Bank Secrecy Act* has evolved from its initial  
25                 purpose which was to assist law enforcement in

1 fighting crime and has now moved towards more a  
2 check the box type of compliance approach. Is  
3 that a fair characterization of your evidence?

4 A That is certainly a concern held in various  
5 sectors impacted by the act that the balance is  
6 off kilter, if you will.

7 Q It's my understanding that one criticism or  
8 perhaps a related criticism of the US regime is  
9 that banks treat SARs as a kind of get out of  
10 jail free card. So they will report and, as you  
11 pointed out, maybe overreport suspicious  
12 activity without taking any steps to stop the  
13 suspicious activity. Are you familiar with that  
14 criticism?

15 A I am. That has not been my experience both in  
16 government on also in private practice. In my  
17 experience financial institutions regulated by  
18 the act have robust procedures for considering  
19 account closure, account restriction in order to  
20 at a sufficient level of concern close accounts.  
21 So I'm certainly familiar with the criticism,  
22 but that sort of pure concept of a SAR is a get  
23 out of jail free card to allow suspicious  
24 activity to continue, that has not been my  
25 experience on both sides.

1           Q     Thank you. After the FinCEN files were released  
2                   one criticism raised by journalists was that  
3                   these files seemed to show that significant  
4                   dirty money was moving through the US financial  
5                   system and that banks and the government were  
6                   aware of this but had taken very little action  
7                   to stop it. I was wondering if you were  
8                   familiar with that criticism and if you had any  
9                   thoughts on that perspective?

10          A     I'm certainly aware of that criticism related to  
11                   the FinCEN files reporting and other reporting  
12                   Congressional hearings over the years. I've not  
13                   delved deeply into every reported instance with  
14                   the FinCEN files, and even if one did I'm not  
15                   sure you could reach a level of certainty of  
16                   whether there are discrete instances that are --  
17                   that that is a valid criticism. But certainly  
18                   what I've seen over the years is that there's an  
19                   understanding in the US system that filing a SAR  
20                   is one step. In some instances that's an  
21                   appropriate only step but, you know, an  
22                   acceptance in a practice that ultimately there  
23                   are instances where a procedure needs to be  
24                   activated to consider whether a certain account  
25                   holder or set of account holders should continue



1 to have access to a given institution.

2 Q Thank you. I have just one last question for  
3 you, Ms. Brooker. Sorry. Just one last  
4 question for you, Ms. Brooker. I know you are a  
5 lawyer in the US and have significant expertise  
6 in FinCEN and the AML regime there, but just to  
7 have on the record you do not have expertise in  
8 Canadian law or on the right to privacy under  
9 the Canadian constitution; is that accurate?

10 A I certainly have had the privilege of  
11 interacting with Canadian regulators and  
12 Canadian companies both in the anti-money  
13 laundering space as well as certain matter that  
14 have raised out of privacy concerns. But I am  
15 not an expert. I always rely on the expertise  
16 of colleagues in Canada but have been very  
17 fortunate both in government and private  
18 practice to get to work within the Canadian  
19 system.

20 MS. MAGONET: Excellent. Thank you so much,  
21 Ms. Brooker. Those are my questions,  
22 Mr. Commissioner.

23 THE WITNESS: Thank you, Ms. Magonet.

24 THE COMMISSIONER: Thank you, Ms. Magonet. I'll now  
25 call on Mr. Rauch-Davis on behalf of

1                   Transparency International Coalition, who has  
2                   been allocated 15 minutes.

3                   MR. RAUCH-DAVIS: Thank you. Madam Registrar, can we  
4                   please turn to page 33 of the report.

5                   **EXAMINATION BY MR. RAUCH-DAVIS:**

6                   Q     Ms. Brooker, this is the section of the report  
7                   dealing with the 2020 *AML Act* and in particular  
8                   I'm going to ask some questions on the  
9                   *Corporation Transparency Act*. So at the first  
10                  full paragraph that's viewable on the screen  
11                  here, the one that starts "reporting companies,"  
12                  the bottom, and my friend Ms. Addario-Berry  
13                  referenced these exemptions, the last sentence  
14                  sets out some of the exemptions, those companies  
15                  that are exempted from the beneficial ownership  
16                  reporting requirements. It says:

17                                 "... including, among others, public  
18                                 companies, US financial institutions,  
19                                 trusts, and companies with more than  
20                                 20 employees, \$5 million annual revenue,  
21                                 and a physical location in the United  
22                                 States."

23                  And I think my friend already put this question  
24                  to you, but it does seem to be a small list of  
25                  corporate entities, and I wonder if you would

1                   agree that this is probably a significant gap in  
2                   the types of entities required to report  
3                   beneficial ownership information.

4           A        I think for several of the entities the  
5                   rationale behind the legislation may have been  
6                   that there's already robust information about  
7                   those companies in the public domain.  So, for  
8                   instance, for US public companies there are  
9                   filings, as you know, with the Securities and  
10                  Exchange Commission and annual reports that  
11                  provide, I think frankly, more information than  
12                  the *Corporate Transparency Act* will require that  
13                  is similar for US financial institutions.  On  
14                  the exemption for companies with more than  
15                  20 employees, \$5 million annual revenue, the  
16                  physical location, again, there's no right or  
17                  wrong obviously from my perspective of how the  
18                  act should be cast, but, you know, in terms of  
19                  if it's helpful rationale for that exemption,  
20                  for instance, I think that's because there's a  
21                  presumption that for that type of company it's  
22                  likely to be an actual operating business as  
23                  opposed to likely to be a shell company that  
24                  doesn't have an operating business but rather,  
25                  you know, to the extent this is the concern, a

1                   facilitator of anonymity. In my experience  
2                   there are non-operating companies that have  
3                   legitimate reasons for existence and use, but I  
4                   think that exemption that's probably what  
5                   animates that exemption.

6                   Q     Right. And I appreciate that many of these  
7                   companies the beneficial ownership information,  
8                   as you said, will be covered by other statutes.  
9                   The one that sticks out to me is the issue of  
10                  trusts because those are known to be used to  
11                  anonymize transactions. I wonder if you know  
12                  the rationale on excluding trusts?

13                 A     Certainly there are legitimate use of trusts,  
14                 you know, internationally and in the US. There  
15                 certainly have been reported criminal cases  
16                 where trusts were part of the typology. You  
17                 know, I'm not a trust expert, but in my  
18                 practitioner experience there are ways to get  
19                 information about trusts and including in some  
20                 instances beneficial ownership. The customer  
21                 due diligence role also has exemptions for some  
22                 trusts, so that has been consistent across the  
23                 legislation over the past few years and, you  
24                 know, as I stated previously, this is not in  
25                 defence of the legislation, which is not my role

1           as a private practitioner, but just in my  
2           experience I think, you know, we will see the  
3           act continue to expand and evolve over the next  
4           decade and this likely is just a first step in  
5           the US regime.

6           Q     Right. So you think that the issue of whether  
7           trusts should be listed, that might be revisited  
8           in the future?

9           A     I think that's a possibility. Not because I  
10          think it should be, per se, but I think, you  
11          know, there's been commentary on the treatment  
12          of trusts within the CDD rule as well and I  
13          could certainly see an evolution to more  
14          robustly cover trusts in subsequent legislation.

15          MR. RAUCH-DAVIS: Thank you. Madam Registrar, could  
16          you scroll down to the next paragraph, please.  
17          That's perfect. Thanks.

18          Q     In the following paragraph the final sentence  
19          there speaks of penalties for failure to report,  
20          providing false or inaccurate information, and  
21          it's set out that there are criminal and civil  
22          penalties that are contemplated under this new  
23          legislation, and by "criminal" I take it you  
24          would agree that there's prison time included in  
25          that penalty; right?

1           A     Yes.  And that's consistent with other criminal  
2                   penalties in the US regime for filing false  
3                   information or, if there's a requirement to  
4                   file, failing to do so.

5           Q     Would you agree that the inclusion of prison  
6                   time as a potential penalty that's a recognition  
7                   of two things, both the seriousness of the  
8                   offence of false reporting and the broader  
9                   implications behind that, as well as it ensures  
10                  a compliance with the regime?  Would you agree  
11                  with both those points?

12          A     Yes.  I think it is an effort as with other US  
13                  government filings to incentivize compliance.  
14                  Now, in practical effect in order to have a  
15                  failure to file or a false statement, criminal  
16                  case in the US regime, it's a fairly high bar in  
17                  terms of proving intent in the level of evidence  
18                  that the government needs, but I think that is  
19                  certainly the spirit of a law to incentivize  
20                  compliance and in a variety of different ways.

21          MR. RAUCH-DAVIS:  Thank you.  If we could go to the  
22                  next page Madam Registrar, please.

23          Q     Just the first full paragraph this is talking  
24                  about the use of the registry by financial  
25                  institutions to verify their own client due

1 diligence requirements, and the second sentence  
2 sets out:

3 "This will likely turn on whether the  
4 information in the FinCEN registry will be  
5 verified in some manner and to what extent  
6 FinCEN provides that financial  
7 institutions may rely on information in  
8 the registry."

9 And my question or what I would put to you is  
10 that isn't it broader than that in that  
11 generally the efficacy of the registry will turn  
12 on the accuracy of the information whether it's  
13 verified.

14 A Yes.

15 Q And do you know what types of verification  
16 systems are being considered?

17 A I don't. Certainly I believe that verification  
18 is covered by the ANPRM, and the issue of  
19 identity verification and other types of  
20 verification within the customer identification  
21 program requirements of the BSA, the customer  
22 due diligence requirements has a significant  
23 amount of overlap with the innovation efforts  
24 and I think it's likely that verification will  
25 adopt some of those efforts and, you know, the

1           innovativeness and ingenuity of the private  
2           sector in developing I think some pretty amazing  
3           tools to have efficient identity verification  
4           and other types of verification.

5           Q     Thank you. And then at the bottom of this page,  
6           Madam Registrar if you just scroll down, that's  
7           great. The last paragraph here just talks about  
8           the additional resources that are going to be  
9           required to implement this type of system. And  
10          there's similar sentiment at the conclusion of  
11          the report at page 38 as well, but I don't need  
12          to go there. Do you have any knowledge of  
13          whether new resources have been allocated or how  
14          the registry will be funded?

15          A     The *AMLA* 2020 does have provisions related to  
16          FinCEN resources and there's been other  
17          discussion within budget documents about that  
18          issue. I think the expectation is that the  
19          additional resources will be focused on the  
20          technology side with the registry as well as  
21          funding some of the liaison positions that are  
22          called for by the act. FinCEN has had  
23          international and domestic liaisons over  
24          the years, but given the codification of those  
25          expectations I think some of the funding will



1                   likely be for that activity as well.

2           MR. RAUCH-DAVIS: Thank you. Madam Registrar, we can  
3           take down the report now.

4           Q     Just the final topic of questions I have relates  
5           to the global investigations division. And your  
6           report sets out that they are responsible for  
7           investigating domestic and international issues  
8           and applying certain BSA enforcement authorities  
9           in response. And my question is does that  
10          involve the active review of foreign  
11          jurisdictions' AML regimes to ascertain  
12          potential risk?

13          A     In my experience foreign AML regimes are  
14          considered particularly in the section 311  
15          program. One of the considerations in  
16          section 311 is whether, for instance, if it's a  
17          foreign financial institution that institution's  
18          home country, if you will, regulator, has  
19          sufficient controls to suggest that a  
20          section 311 action against the foreign financial  
21          institution is not warranted. So that's one  
22          example within the global investigations  
23          division's authorities where I think you see  
24          review of a foreign financial institution's home  
25          country regulatory regime.

1 Q Do you know if Canada's AML regime was ever the  
2 subject of review?

3 A Not to my knowledge.

4 Q No. But to your knowledge Canadian financial  
5 institutions and their subsidiaries operating in  
6 the United States, they have been issued fines  
7 by the OCC and FinCEN in the past; right?

8 A I believe that there have been financial  
9 institutions that operate in Canada that have  
10 been the subject of banking regulator penalties.  
11 I don't recall offhand a particular one with  
12 respect to FinCEN.

13 MR. RAUCH-DAVIS: Thank you. Those are my questions.

14 THE WITNESS: Thank you.

15 THE COMMISSIONER: Thank you, Mr. Rauch-Davis.

16 Anything arising, Ms. Magonet?

17 MS. MAGONET: Nothing arising, Mr. Commissioner.

18 THE COMMISSIONER: Mr. Duong?

19 MR. DUONG: Nothing arising and I apologize for yet  
20 another unmuting mistake.

21 THE COMMISSIONER: All right. Thank you.

22 Ms. Addario-Berry?

23 MS. ADDARIO-BERRY: Yes, I do have a couple of  
24 clarifying questions if I may.

25 THE COMMISSIONER: Yes.

1           **EXAMINATION BY MS. ADDARIO-BERRY (continuing):**

2           Q     Ms. Brooker, when you were explaining the  
3                    difference between source of funds and source of  
4                    wealth you gave the example that if a casino  
5                    patron buys in -- I'm sorry, just one moment.  
6                    Very sorry for the interruption. You gave the  
7                    example that if a casino patron buys in with a  
8                    wire transfer the casino should inquire into the  
9                    patron's source of wealth. Is it fair to say  
10                   that part of the reason you said source of  
11                   wealth is more important than source of funds in  
12                   this example is because there would have already  
13                   been due diligence on the funds conducted by the  
14                   bank?

15          A     In the US system of AML coverage there's an  
16                   expectation that each regulated sector fully  
17                   comply with the act. So let's say in my wire  
18                   transfer example even though if there was  
19                   indicia of suspicion related to the wire  
20                   transfer and the bank filed a SAR, took other  
21                   measures, there would still be an expectation to  
22                   the extent that the transaction raised issues of  
23                   suspicion with the casino or the money service  
24                   business that that institution would also  
25                   fulfill its obligations. So I think for me the

1                   distinction between source of funds and source  
2                   of wealth is not that overlap of the two  
3                   institutions intersecting with the same  
4                   transaction but rather my view of the  
5                   fungibility of money. And ultimately I think  
6                   the best proxy for a presumption of legitimate  
7                   proceeds for a transaction is source of wealth  
8                   because I think it's difficult, particularly in  
9                   the way that people transact today, to have  
10                  confidence in the exact source of funds for a  
11                  particular transaction.

12                Q    Okay. And would you agree with me that the  
13                   inquiry into the source of funds is an important  
14                   inquiry in certain circumstances, including for  
15                   large transactions that are conducted in cash?

16                A    Not necessarily. Again I think in our modern  
17                   economy I don't think there's in my view should  
18                   be a presumption of suspicion related to cash  
19                   versus other types of payment mechanisms. And  
20                   even if one was investigating a cash  
21                   transaction, I think it can be difficult to  
22                   determine that just because it's cash or a large  
23                   cash transaction that it's suspicious because  
24                   even cash is ultimately fungible in many  
25                   respects.

1 MS. ADDARIO-BERRY: Thank you, those are my  
2 questions.

3 THE COMMISSIONER: Thank you, Ms. Addario-Berry.  
4 Ms. Latimer.

5 MS. LATIMER: Thank you. Just a couple of questions  
6 Mr. Commissioner.

7 **EXAMINATION BY MS. LATIMER (continuing):**

8 Q Ms. Brooker, you've a couple of times made  
9 reference to a presumption of legitimacy and my  
10 question is leaving aside whether the funds come  
11 in as cash or as a wire, I take it there are  
12 other indicia that might displace a resumption  
13 of legitimacy. Is that fair?

14 A In my view there's not one type of transaction  
15 that is more suspicious than other types in  
16 modern financial services and commerce. It's  
17 really looking at the totality of circumstances  
18 based on the nature of the transaction and  
19 having to make a risk judgment or a reasonable  
20 presumption of whether there are concerns  
21 related to money laundering at a sufficient  
22 level for not. And I don't think you can expect  
23 financial institutions to be a hundred percent  
24 certain in either direction.

25 Q In other words, it's risk-based and the

1 reporting entity has to assess all the different  
2 indicia of risk; correct?

3 A Yes. You know, I think having done this now for  
4 many years in private practice and also in the  
5 government on both sides, it's very hard to make  
6 these judgments and that's why it is important  
7 that the system is risk-based and if an  
8 institution and individuals in institutions are  
9 attempting in good faith to make reasoned  
10 judgments there should be a presumption that  
11 those judgments were reasonable.

12 Q And the more indicia of risk there are, the more  
13 scrutiny should be applied to customer due  
14 diligence. Is that fair?

15 A In general I think that's right, in theory. In  
16 practice, you know, it is challenging and  
17 ultimately in order to have the system be  
18 operational there has to be specific types of  
19 red flags that institutions as a whole,  
20 employees, transaction monitoring systems focus  
21 on, but it's not a mathematical equation and  
22 despite automation in artificial intelligence,  
23 at the end of the day there is, you know, human  
24 judgment required and as long as that is being  
25 done in good faith, I think there has to be a

1                   presumption that those judgments are reasonable.

2           Q       And at a certain point you've made reference to  
3                   red flags, and at a certain point when there are  
4                   too many red flags in the US system is there an  
5                   expectation that a regulated entity will refuse  
6                   a suspicious transaction?

7           A       So certainly the concept of willful blindness is  
8                   that if there are a certain level of red flags  
9                   that requires investigation and consideration of  
10                  what's appropriate. And on the anti-money  
11                  laundering side, as opposed to, for instance,  
12                  the sanction side in the US, there's not a  
13                  presumption on the anti-money laundering side  
14                  that transactions will be stopped by a financial  
15                  institution in realtime. The presumption is  
16                  that when there are indicia of suspicious  
17                  activity that once an institution has made a  
18                  judgment that there is suspicion there's then a  
19                  30-day clock to file a SAR and there's also an  
20                  expectation that institutions will have  
21                  procedures to consider whether to restrict or  
22                  exit customer relationships if there are certain  
23                  level of concern and sustained concern that the  
24                  institution may be being used for illegitimate  
25                  purposes. Those are the expectations, but those

1                   are retrospective. It's not like US sanctions  
2                   where there can be obligations to actually block  
3                   a transaction in transit.

4           Q       But when you refer to a regulated entity exiting  
5                   a client relationship, I take it that's  
6                   prospective in the sense that that person no  
7                   longer has access to that regulated entity; is  
8                   that fair?

9           A       Yes.

10          MS. LATIMER: Okay. Thank you, Ms. Brooker,  
11                   Mr. Commissioner, those are all my questions.

12          THE COMMISSIONER: Thank you, Ms. Latimer. And thank  
13                   you very much, Ms. Brooker, for your taking the  
14                   time to testify before us. Your evidence has  
15                   been very comprehensive and clear and helped us  
16                   to understand the US anti-money laundering  
17                   regime in all its complexity. It is ultimately  
18                   very helpful to us in doing what we are going to  
19                   be obliged to do, which is grapple with making  
20                   recommendations in the context of  
21                   British Columbia's anti-money laundering regime.  
22                   So thank you for your assistance and you're now  
23                   excused from further testimony.

24          THE WITNESS: Thank you, Mr. Commissioner, for the  
25                   opportunity to be with you.



1 THE COMMISSIONER: Thank you. Ms. Latimer, I think  
2 we are adjourned now until 12 noon tomorrow; is  
3 that correct?

4 MS. LATIMER: I believe that's correct.

5 THE COMMISSIONER: Thank you.

6 THE REGISTRAR: The hearing is now adjourned until  
7 May 12, 2021, at 12:00 p.m. Thank you.

8 **(WITNESS EXCUSED)**

9 **(PROCEEDINGS ADJOURNED AT 12:30 P.M. TO MAY 12, 2021)**

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