quinn emanuel trial lawyers | washington, dc
777 Sixth Street NW, 11th Floor, Washington, District of Columbia 20001-3706 | TEL (202) 538-8000 FAX (202) 538-8100

January 26, 2016

VIA ELECTRONIC FILING

Jennifer Shasky Calvery
Director
Financial Crimes Enforcement Network ("FinCEN")
U.S. Department of Treasury
P.O. Box 39
Vienna, VA 22183

Re: Notice of Proposed Rulemaking Regarding FBME Bank Ltd., (RIN 1506-AB27)

Dear Director Shasky Calvery:

On behalf of our client, FBME Bank Ltd. ("FBME" or the "Bank"), we submit the following comments with respect to the Notice of Proposed Rulemaking (the "Proposed Rule") contained in RIN 1506-AB27, dated November 27, 2015 and published in the Federal Register on the same day, incorporating the Notice of Finding ("NOF") and NPRM (the "Prior Rule") (collectively, the "2014 Notices") contained in RIN 1506-AB27, dated July 15, 2014 and published in the Federal Register on July 22, 2014.[1]

Notably, after requesting and obtaining a voluntary remand from Judge Cooper of the U.S. District Court for the District of Columbia to address acknowledged deficiencies in FinCEN's promulgation of the very same rule, FinCEN has simply reiterated the 2014 Notices, without elaboration or modification. It is only appropriate, therefore, that FBME reiterate its own prior, voluminous, thoroughly-substantiated submissions addressing the 2014 Notices and refuting at length the false and misconceived allegations contained therein. Accordingly, FBME hereby respectfully incorporates by reference all of its prior submissions to FinCEN, which themselves suffice to demonstrate that FinCEN lacks substantial evidence for its Proposed Rule and would be arbitrary and capricious in adopting it. At the same time, FBME herein further expands upon the deficiencies underlying FinCEN's Proposed Rule and spotlights a variety of points, including with the benefit of new revelations surrounding FinCEN's abandonment of its Prior Rule in the face of judicial challenge. For the reasons already noted by FBME in court and elaborated herein, any re-adoption by FinCEN of the fifth special measure should be destined for vacatur once this matter returns to court.

To the extent that FinCEN may be open to a responsive exchange on any of these points, FBME would welcome the opportunity to meet and discuss them. Such a meeting may be

[1] *See* 80 Fed. Reg. 74064-01 (Nov. 27, 2015) (incorporating 79 Fed. Reg. 42639-01 and 79 Fed. Reg. 42486-01).

particularly helpful to all concerned insomuch as it would enable FBME to understand and address any outstanding concerns on the part of this agency—concerns that otherwise remain cryptic, at best, and shrouded in opacity. But by no means would such a meeting obviate FBME's request for a fair hearing before a neutral decisionmaker, to which FBME is entitled, as set forth below. It would simply afford a means of ventilating any persisting differences and a further chance at amicable resolution. Indeed, dating back to when FinCEN first raised concerns about FBME, FBME has done everything it can to understand those concerns and to engage FinCEN constructively.

Even now, FBME remains committed to engaging the agency and ensuring that any outstanding compliance questions or concerns are fully addressed. In that light, we will be at your disposal and eager to meet at any time and in any way that may work for you.

Respectfully submitted,

QUINN EMANUEL URQUHART & SULLIVAN, LLP

/s/ *Derek L. Shaffer*
Derek L. Shaffer
William A. Burck
Lauren H. Dickie
Jonathan G. Cooper
777 Sixth Street NW, 11th Floor
Washington, DC 20001
(202) 538-8000

HOGAN LOVELLS US LLP

/s/ *Peter S. Spivack*
Peter S. Spivack
M. Elizabeth Peters
J. Evans Rice III
555 Thirteenth Street NW
Washington, DC 20004
(202) 637-5600

Attorneys for FBME Bank Ltd.

Enclosures

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I. INTRODUCTION

FBME respectfully seeks rescission of the NOF and the Proposed Rule on the grounds that:

(1) the Proposed Rule was issued in disregard of the procedures required by the Administrative Procedure Act ("APA") and the Due Process Clause of the Fifth Amendment;

(2) FinCEN's continued reliance upon information provided by the Central Bank of Cyprus ("CBC"), the Cypriot financial regulator, is arbitrary and capricious in light of CBC's (a) admitted animus towards FBME; and (b) well-orchestrated plan to serve up FBME to U.S. regulators to protect local, failing banks and seize FBME and its significant assets using FinCEN's actions as a pretext;

(3) the Proposed Rule relies upon the same, flawed evidence as before, even though FBME previously rebutted each of the discernible allegations in the NOF;

(4) FBME, if given the opportunity, could refute the secret evidence that FinCEN unlawfully refuses to disclose;

(5) FinCEN has failed to explain why FBME is an institution of "*primary* money laundering concern" under U.S. law; and

(6) FinCEN has not explained why imposition of the fifth special measure, which stands to cut off FBME from the U.S. financial system and thus deal a very serious blow to the Bank, is necessary and appropriate, especially as compared to less draconian alternative measures that FinCEN should be considering and using to address any genuine, persisting concern.

Accordingly, refusal by FinCEN to rescind the NOF and the Proposed Rule should be followed by judicial vacatur.

A. Procedural Deficiencies In The Proposed Rule Warrant Vacatur If This Matter Returns To Court

As in the previous administrative action, the procedures employed by FinCEN in connection with the Proposed Rule violate the APA and due process.

First, FinCEN is again failing to provide FBME with meaningful notice of the evidence against it and a meaningful opportunity to comment on and refute that evidence. Rather, FinCEN relies on (1) opaque and cryptic allegations that prevent FBME from fully understanding and refuting the allegations against it; and (2) secret evidence that the agency refuses to disclose such that FBME cannot properly defend against it.

Second, the agency has not employed a neutral arbiter to evaluate FinCEN's initial determination to impose a Section 311 sanction against FBME. Only a neutral arbiter or independent decisionmaker can ensure the fair, impartial assessment required by law. The imperative for a neutral arbiter is heightened in this matter given CBC's infection and

manipulation of the administrative process in service of the Cypriot government's own illicit agenda, as set forth below, and incorporation of Cypriot inputs into a confidential "black box" that remains altogether withheld from FBME and the public.

Third, FinCEN has not convened a hearing at which FBME may orally present arguments and evidence before a decisionmaker. The opportunity to submit comments is insufficient to satisfy FBME's due process right to be heard, especially in light of FinCEN's reliance on vague allegations, secret evidence, and CBC, which has proved to be a corrupt, lawless regulator pursuing its own agenda.

The failings described above violate the APA and due process. Should FinCEN blow past these procedural deficiencies in prohibiting FBME from maintaining U.S.-based correspondent bank accounts, judicial vacatur of the rule would be in order.

B. FinCEN's Continued Reliance On CBC Is Not Only Arbitrary And Capricious But Irresponsible Given The Regulator's Prejudice Against FBME And Treatment Of FBME As A Scapegoat For Failing Cypriot Banks And Piggy-bank From Which To Claim Assets

The NOF relies heavily upon actions taken and information provided by CBC. As discussed further below, however, CBC is by no means a trustworthy partner upon whom FinCEN should rely. Indeed, throughout its relationship with FBME, CBC has consistently discriminated against the Bank because it is owned by non-Cypriots and outperforms local Cypriot banks. The evidence of this hostility is overwhelming and cannot be ignored. For example:

- CBC has repeatedly stymied FBME's attempts to incorporate in Cyprus or outright refused the Bank's requests to do so;

- CBC has prohibited FBME from participating in local investment opportunities;

- CBC has blocked FBME's efforts to challenge an illegal monopoly involving a CBC-controlled financial-services company; and

- CBC has imposed arbitrary and unreasonable fines and regulatory requirements on FBME, but not on other banks that were equally if not more deserving of the same.

The evidence of CBC's animus has mounted since the inception of this proceeding. When FinCEN issued the NOF in July 2014, CBC quickly seized the opportunity to use FinCEN's actions as a pretext to take control of FBME and its assets, including by (1) issuing a resolution permitting CBC to take control of the Bank; (2) appointing a Special Administrator to oversee management of the Bank and attempt to sell it; and (3) in December 2015, revoking FBME's branch license and initiating wholesale liquidation proceedings. Because CBC's actions flagrantly violate Cypriot, Tanzanian, and international law, FBME and its shareholders are right now pursuing litigation against CBC and the Cypriot government in Cyprus and the

International Chamber of Commerce in Paris, France. But CBC's actions should also shred, quite completely, whatever credibility it may have had to this point with FinCEN.

The history set forth above is relevant because FinCEN has relied upon and coordinated with CBC throughout this entire administrative proceeding. The agency cannot now bury its head in the sand when presented with evidence that its partner infected these rulemaking proceedings to further its own unlawful agenda in Cyprus.[2] It is now incumbent upon FinCEN to evaluate critically the veracity and reliability of all inputs to date from CBC. Failure to do so renders the output of this proceeding arbitrary and capricious.

C. The Proposed Rule Relies Upon The Same, Flawed Evidence That FBME Previously Rebutted

It is conspicuous and telling that FinCEN has offered no new evidence in support of the Proposed Rule. Rather, the agency relies on the same, flawed, outdated allegations as before, even though FBME previously refuted all decipherable allegations against it. Specifically, FinCEN continues to ignore, without explanation or justification, (1) FBME's extensive anti-money laundering ("AML") compliance program that meets or exceeds local and international requirements; (2) the positive findings reached by independent auditors and investigators throughout recent years regarding the Bank's compliance program; and (3) FBME's demonstrated commitment and alacrity in adopting recommendations from auditors in order to improve the Bank's compliance program, even beyond what local and international law require.

Similarly, FinCEN still fails to recognize that the NOF contains misleading and inaccurate information as demonstrated, *e.g.*, by Ernst and Young's ("EY") investigation of those allegations that are sufficiently specific and detailed to allow for meaningful review. In each of these instances, EY found that FBME acted appropriately. In particular, in each instance identified, the Bank conducted due diligence according to its policies and procedures, it screened customers against sanctions lists to ensure that it did not process transactions for anyone linked by government agencies with illicit activity, and it cooperated with correspondent banks when they requested additional information regarding a particular customer or transaction.

Furthermore, FinCEN misstates the import of data relating to suspicious activity reports ("SARs"). The upshot is that FinCEN is using SARs data for a purpose divorced from SAR design—and, still worse, viewing the data in a vacuum while ignoring key variables, including the impact the Cypriot financial crisis would naturally have on the number and nature of suspicious transactions reported out of Cyprus between 2013 and 2014. Once viewed fairly, the data reported by FinCEN are unilluminating, at best.

Last, none of the additional information recently disclosed by FinCEN relating to the *Lega Nord* political scandal or the customer with alleged Syrian connections, which the agency

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[2] *See Catawba County v. EPA*, 571 F.3d 20, 45 (D.C. Cir. 2009) (agencies "have an obligation to deal with newly acquired evidence in some reasonable fashion").

only provided after FBME brought a lawsuit against it, support the Proposed Rule. As explained *infra*, FBME acted appropriately in each of these circumstances and the allegations by no means support a finding that the Bank is of "primary money laundering concern." That FinCEN would nonetheless grasp for these allegations, while trying to keep them hidden from FBME, further confirms the lack of substance behind its allegations.

FinCEN's cut-and-paste approach to the new rule and persisting refusal to acknowledge the overwhelming evidence FBME has presented refuting the allegations in the NOF suggest that the agency remains locked into a fixed course. Certainly there is no indication that FinCEN has reevaluated the relevant substance or premises. To take such an approach to the voluntary remand, given all that has preceded it, would itself be arbitrary and capricious and contrary to law. Even if FinCEN may now purport behind the scenes to be substantively reformulating its case, FBME will have had no opportunity to comment responsively on FinCEN's new and different case—and such opportunity to respond is, at a minimum, essential to the APA and due process.

D. FBME Could Refute The Secret Evidence In FinCEN's Black Box If Only The Agency Would Disclose It

As set forth above, FinCEN has refused to disclose an unknown amount of material on which the NOF and Proposed Rule supposedly rest; according to FinCEN, such evidence is classified or protected by some other unspecified privilege, and neither FBME nor any of FBME's counsel can know anything about it. As a result, FBME can only guess what information FinCEN has in the black box. But to the extent that FinCEN has withheld and relied upon information provided by CBC, FinCEN should now disregard that information and reassess its findings given (1) CBC's obvious bias against FBME, (2) its willingness to scapegoat FBME to protect failing Cypriot banks, and (3) its years-long campaign to seize the Bank and its substantial assets. FinCEN has a duty to ensure that the Proposed Rule is based upon reliable, unbiased information. Additionally, if the agency is relying on unsourced intelligence such as unsubstantiated news articles, FinCEN must critically evaluate the veracity and reliability of this intelligence or risk jeopardizing the integrity of the entire administrative process.

E. FinCEN Has Failed To Explain Why FBME Is An Institution Of "Primary Money Laundering Concern"

Section 311 mandates that FinCEN consider multiple factors when deciding whether an institution is of "primary money laundering concern." These factors include (1) "the extent" to which an institution is "used to facilitate or promote money laundering"; (2) "the extent" to which it is "used for legitimate business purposes in the jurisdiction"; and (3) "the extent to which such action is sufficient to . . . guard against international money laundering." FinCEN fails to satisfy the statutory standard on every element. With respect to the first factor, FinCEN wholly fails to grapple with, among other things, FBME's refutation of each specific instance of money laundering that FinCEN has alleged, FBME's extensive AML controls, and FBME's continual efforts to improve its AML controls to be ever more vigilant in combating money laundering. Similarly, FinCEN devotes only a single paragraph to the second factor, stating that "[l]egitimate activity at FBME's Cyprus branch is difficult to assess because of the limited

amount of information that is available regarding Cypriot branches of foreign banks, such as FBME." That hardly reflects conscientious consideration. Suffice it to note that imposition of the fifth special measure is "difficult" for FBME and its depositors; FinCEN owed it to all concerned, before going to such drastic lengths, to take fair account of the mass of legitimate activity that hangs in the balance. Finally, the NOF's one-paragraph treatment of the third factor makes no attempt to explain why a special measure short of the fifth would not be "sufficient" to protect against "international money laundering and other financial crimes."

Separate and apart is FinCEN's ultimate obligation to show that FBME is of "primary money laundering concern," which FinCEN is not carrying. In particular, FinCEN has altogether failed to consider the requirement that FBME be of "*primary*" money laundering concern. It is not enough that an institution be of supposed "money laundering concern." Nothing in the NOF or proposed rule remotely suggests that FBME exists *primarily* to launder funds, has engaged in money laundering that is of *primary* concern to FinCEN, or otherwise should be treated as being of "*primary*" money laundering concern within the meaning of Section 311.

F. FinCEN Can Impose Measures Less Draconian Than The Fifth Special Measure, And Failure To Do So Would Violate The APA And Due Process

Even if, notwithstanding the extensive evidence to the contrary, FinCEN refuses to rescind the NOF, FinCEN still should not go so far as prohibiting FBME from maintaining U.S. correspondent accounts. Indeed, to do so would be arbitrary and capricious because it is unnecessary and disproportionate. There are obvious, less damaging measures that FinCEN can impose that should more than suffice to allay any legitimate concerns FinCEN may have about FBME. For example, FinCEN could require, as a condition of FBME's eligibility to maintain correspondent accounts, that FBME:

- Pay a monetary fine for any historical shortcomings in FBME's AML compliance;
- Accept an independent monitor, chosen by FinCEN, to oversee and report on FBME's operations;
- Make regular periodic reports to FinCEN regarding FBME's operations;
- Place appropriate conditions on the use of correspondent accounts;
- Consult with FinCEN, or an expert chosen by FinCEN, to adopt specific and detailed policies to supplement FBME's existing compliance program;
- Refrain from transactions that FinCEN deems most worrisome; or
- Any combination of, or all of, the above.

FBME has demonstrated that it is committed to working constructively with FinCEN to address any concerns this agency has with FBME's AML compliance. Any or all of the above measures

would be sufficient to do so, and FinCEN's insistence upon imposing the most drastic sanction conceivable would be arbitrary and capricious.

II. THE PROCEDURES FINCEN HAS FOLLOWED IN CONNECTION WITH THE PROPOSED RULE ARE UNCONSTITUTIONAL AND UNLAWFUL

The Proposed Rule suffers from the same procedural deficiencies that caused Judge Cooper to grant FBME's motion for preliminary injunction in August 2015 and then led FinCEN to seek a voluntary remand.[3] Specifically, these deficiencies render the Proposed Rule unlawful under the APA and violative of due process.[4] Three specific procedural errors must be remedied: (1) FinCEN has failed to supply FBME with meaningful notice of the evidence against it and a meaningful opportunity to comment on and refute that evidence; (2) FinCEN has failed to use a neutral arbiter; and (3) FinCEN has failed to provide a hearing.

A. FinCEN Has Failed To Provide FBME With Meaningful Notice And Opportunity To Confront Evidence Against It

First, it is axiomatic that FBME is entitled to meaningful notice of FinCEN's evidence against it and a meaningful opportunity to comment on and refute that evidence.[5] Thus, FinCEN cannot impose a sanction against FBME based on secret evidence known only to it (the "black box"), and not to FBME.[6] "[W]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."[7] FinCEN has violated this fundamental precept in multiple separate respects:

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[3] *See FBME Bank Ltd. v. Lew*, --- F. Supp. 3d ----, 2015 WL 5081209 (D.D.C. Aug. 27, 2015).

[4] Congress, when it amended Section 311 in 2003 to authorize the use of classified information, explained that it explicitly intended that parties confronting classified evidence in a Section 311 proceeding would receive "due process of law." H.R. Conf. Rep. 108-381, at 55 (2003). FBME is thus entitled to due process both as a matter of constitutional law (by virtue of the Due Process Clause of the Fifth Amendment) and as a matter of statutory law (by virtue of Section 311 itself). *See also Greene v. McElroy*, 360 U.S. 474, 507–08 (1959) (it is presumed that Congress intends that the "traditional safeguards of due process" be afforded to those affected by administrative actions). There should be no doubt that FBME has U.S. property and presence for purposes of due process, not only through its U.S.-dollar accounts and activities but also through specific assets held in North Carolina in connection with a loan there. *See, e.g.*, Ex. 44, Declaration of Ayoub-Farid Saab ¶¶ 34–38, *FBME Bank Ltd. v. Lew*, 15-cv-1270 (CRC) (D.D.C. Aug. 7, 2015), ECF No. 3-4.

[5] *Mathews v. Eldridge*, 424 U.S. 319, 348-49 (1976); *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288 n.4 (1974); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008); *Air Transportation Ass'n of America v. FAA*, 169 F.3d 1, 6-7 (D.C. Cir. 1999); *American Medical Ass'n v. Reno*, 57 F.3d 1129, 1132-33 (D.C. Cir. 1995); *Florida Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988); *Connecticut Light & Power Co. v. Nuclear Regulatory Commission*, 673 F.2d 525, 530 (D.C. Cir. 1982).

[6] *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 300–06 (1937); *United States Lines, Inc. v. Federal Maritime Commission*, 584 F.2d 519, 537-42 (D.C. Cir. 1978); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973); *States Marine Lines, Inc. v. Federal Maritime Commission*, 376 F.2d 230, 238–39 (D.C. Cir. 1967); *ASSE International, Inc. v. Kerry*, 803 F.3d 1059, 1076–79 (9th Cir. 2015).

[7] *Greene v. McElroy*, 360 U.S. 474, 496 (1959); *accord Goldberg v. Kelly*, 397 U.S. 254, 270 (1970).

- **Classified evidence**. The NOF relies on undisclosed classified information. Due process requires agencies using classified information to take affirmative steps to mitigate the inherent unfairness of relying on secret evidence. The more an agency relies on classified material, the more the agency must do to level the playing field.[8] At a minimum, due process requires FinCEN to reveal to FBME as much of the classified information as can be disclosed in a manner consistent with national security, including by (1) providing unclassified summaries of the classified information; and (2) allowing FBME's counsel with appropriate security clearances to review the classified material.[9] But FinCEN is affording no such accommodations, despite FBME's repeated requests and suggestions.

- **Unclassified evidence**. The NOF relies on undisclosed unclassified information. Due process and the APA require FinCEN to disclose to FBME *all* unclassified information that FinCEN is relying on to take action against FBME.[10] FinCEN must (1) produce all unclassified evidence; and (2) provide a clear statement to FBME that it has produced all unclassified evidence it relied on. To the extent FinCEN has fallen short of this obligation in any respect, it must rectify that.

- **Privileged evidence**. It is unclear whether and to what extent the NOF relies on evidence that is being withheld on privilege grounds. Like all unclassified evidence, privileged evidence must be disclosed. FinCEN cannot use privilege as both a sword and a shield—that is, it cannot rely on privileged materials while also refusing to disclose them on privilege grounds.[11] FinCEN must therefore issue a clear statement that it has produced to FBME all unclassified privileged evidence it relied on. Even assuming *arguendo* that FinCEN could manipulate privilege and use it as a sword and a shield, it must at the very least provide a privilege log of all the privileged materials it is relying on so that FBME can have a meaningful opportunity to review the log and challenge the privileges asserted.

- **Communications with third parties**. FinCEN has indicated that the NOF relies on materials sent to or received from third parties—including CBC—that FinCEN is withholding on privilege grounds.[12] No privilege authorizes such withholding.

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[8] *See People's Mojahedin Organization of Iran v. U.S. Department of State*, 613 F.3d 220, 230–31 (D.C. Cir. 2010) (noting that certain procedures for the use of classified material satisfied due process so long as "the Secretary has not relied critically on classified material and the unclassified material provided to the [regulated entity] is sufficient to justify the [agency action].").

[9] *Al Haramain Islamic Foundation, Inc. v. U.S. Department of Treasury*, 686 F.3d 965, 982–84 (9th Cir. 2012).

[10] *Ralls Corp. v. Committee on Foreign Investment in the United States*, 758 F.3d 296, 319–20 (D.C. Cir. 2014); *People's Mojahedin*, 613 F.3d at 228; *KindHearts for Charitable Humanitarian Development, Inc. v. Geithner*, 647 F. Supp. 2d 857, 897–908 (N.D. Ohio 2009).

[11] *Navajo Nation v. Peabody Holding Co.*, 255 F.R.D. 37, 44 (D.D.C. 2009).

[12] *See* Ex. 45, Declaration of Derek L. Shaffer ¶ 5, *FBME Bank Ltd. v. Lew*, No. 15-cv-01270 (CRC) (D.D.C. Oct. 5, 2015), ECF No. 42-1.

As a general matter, to ensure openness in government, the scope of privilege for government officials is narrow.[13] Among other limitations, the "usual rule" is that "disclosure of attorney-client or work product confidences to third parties waives the protection of the relevant privileges."[14] Communications between agencies of different governments—such as those between FinCEN and CBC—are subject to the usual waiver rule: "no case . . . extends this privilege to communications between an attorney working for the U.S. government and a foreign official."[15] Accordingly, FinCEN cannot withhold on privilege grounds any evidence it relied upon that it sent to, or received from, a third party, which includes (but is not limited to) any materials sent to or received from CBC.

- **SARs**. SARs are another particular type of undisclosed unclassified evidence cited in the NOF.[16] "SARs are reports by banks and other financial institutions disclosing transactions that the institution 'knows, suspects, or has reason to suspect' involve possible illegal activity."[17] Like all unclassified evidence, SARs must be disclosed. It is not enough for FinCEN to provide aggregate data gleaned from the SARs.[18] In order to vindicate FBME's right to comment meaningfully on FinCEN's findings, this agency must also divulge the underlying transactions and data from which the aggregate information was tabulated.[19] FinCEN has nonetheless suggested that it can lawfully rely on SARs while also withholding them. That, however, violates due process as well as the law more generally. The D.C. Circuit long ago held that due process does not allow a party to be sanctioned based on secret third-party complaints—which is precisely what FinCEN is doing by relying on withheld SARs; the sanctioned party *must* be afforded the opportunity to confront such third-party evidence "in its original form."[20] Moreover, contrary to FinCEN's understanding, the statutes and regulations governing SARs actually authorize disclosure of SARs. Specifically, FinCEN can disclose both (1) an entire SAR for certain official purposes, including in connection with litigation and other proceedings involving the

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13 *See In re Lindsey*, 158 F.3d 1263, 1270–78 (D.C. Cir. 1998).

14 *Id.* at 1282.

15 *United States v. Trabelsi*, 2015 WL 5175882, at *4 (D.D.C. Sept. 3, 2015).

16 *See* NOF, at 42640; Ex. 46, Transcript of Preliminary Injunction Hearing at 80:14–21, *FBME Bank Ltd.*, No. 15-cv-1270 (CRC) (D.D.C. Aug. 25, 2015), ECF No. 26 (FinCEN's counsel admitting that it is "fair to say" that "references to suspicious wire activity, 4,500 suspicious wires over a certain amount of time, or surge activity or whatever else is mentioned in [the NOF]" represented information gleaned from SARs).

17 *FBME Bank*, 2015 WL 5081209, at *7 n.3 (citation omitted).

18 *See* NOF, at 42640.

19 *See American Radio*, 524 F.3d at 237; *Chamber of Commerce v. SEC*, 443 F.3d 890, 899 (D.C. Cir. 2006).

20 *States Marine Lines*, 376 F.2d at 238–40; *accord, e.g.*, *Forcade v. Knight*, 416 F. Supp. 1025, 1037–40 (D.D.C. 1976).

Government,[21] and (2) the "underlying facts, transactions, and documents upon which a SAR is based."[22] FinCEN must therefore disclose these materials.

B. FBME Is Entitled To A Neutral Arbiter

Second, an "independent decisionmaker"—"some person other than one initially dealing with the case"—must make the initial determination whether to impose a sanction under Section 311.[23] When the same FinCEN personnel who investigated FBME also serve as judge, jury, and executioner, FBME is deprived "of the impartial adjudication in the first instance to which it is entitled under the Due Process Clause."[24] This problem looms especially large in the present circumstances, where FinCEN is relying in large part on classified evidence that it is simultaneously withholding from FBME along with members of the public who might otherwise comment on it. Only if that evidence is reviewed by a designated neutral who has yet to commit to preconceptions and can review it through a disinterested, critical lens alongside competing submissions will there be any semblance of fairness to the agency's decisionmaking process—and such fairness is, of course, the defining touchstone of due process.

FinCEN has nonetheless argued that it has no obligation to separate its investigators from its adjudicators under *Withrow v. Larkin*.[25] But the premise of *Withrow* was that government officials are generally presumed to consider evidence fairly; thus, investigators can also serve as adjudicators *so long as* the party under investigation has a meaningful opportunity to adduce its own evidence and contest the evidence against it at an adversarial hearing. *Withrow* made clear that when this premise does not hold—when there is no adversarial process or insufficient adversarial process—then there *is* a due-process problem: "Clearly, if the initial view of the facts based on the evidence derived from nonadversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, *a substantial due process question would be raised*."[26]

That is the problem posed here. FinCEN arrived at an "initial view of the facts based on the evidence derived from nonadversarial processes," and, because it is continuing to rely on classified and other evidence withheld from FBME, there cannot be "fair and effective consideration" of the evidence at "a subsequent adversary hearing." *Withrow* thus confirms that due process entitles FBME to a neutral arbiter, someone who is separate from the FinCEN investigators and who can evaluate *all* the evidence afresh with an unbiased eye. Failure to appoint an independent decisionmaker would be all the more problematic considering that

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[21] *See* 31 U.S.C. § 5318(g)(2)(A)(ii) (2012); 31 C.F.R. § 1020.320(e)(2) (2015); 75 Fed. Reg. 75593, 75600 (Dec. 3, 2010).

[22] 31 C.F.R. § 1020.320(e)(1)(ii)(A)(2); *In re JPMorgan Chase Bank, N.A.*, 799 F.3d 36, 43 (1st Cir. 2015).

[23] *Morrisey v. Brewer*, 408 U.S. 471, 486 (1972).

[24] *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602, 626 (1993); *accord, e.g.*, *In re Murchison*, 349 U.S. 133 (1955); *Propert v. District of Columbia*, 948 F.2d 1327, 1333–34 (D.C. Cir. 1991).

[25] 421 U.S. 35 (1975).

[26] *Id.* at 58 (emphasis added).

FinCEN's process and deliberations to date have been so thoroughly infected and tainted by illicit inputs from CBC, as elaborated upon below.

C. FBME Has A Right To A Hearing

Third, before FinCEN takes any final action against FBME, it must offer a hearing at which FBME can orally present argument and evidence to the decisionmaker.[27] Due process requires notice and *an opportunity to be heard* whenever the Government targets a particular individual for a deprivation of property, even when that deprivation is accomplished through a rulemaking.[28] In this context, the opportunity to submit written comments alone is insufficient to satisfy FBME's right to be heard, especially given FinCEN's reliance on secret evidence that FBME is unable to contest in writing. FinCEN's failure to provide FBME with such a hearing violates its right to be meaningfully heard. Again, the absence of such a hearing would be all the more problematic and glaring because FinCEN has ostensibly been heard from CBC at every turn, even as FBME remains in the dark.

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[27] *Gray Panthers v. Schweiker*, 652 F.2d 146, 160–61 (D.C. Cir. 1981).

[28] *Londoner v. City and County of Denver*, 210 U.S. 373, 385–86 (1908); *see United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 244–45 (1973).

III. FINCEN'S CONTINUED RELIANCE ON CBC IS ARBITRARY AND CAPRICIOUS

As for the substance of its proposed rule, FinCEN draws heavily from CBC in directing the instant allegations and sanctions against FBME. Accordingly, it is imperative that FinCEN take due account of the history and course of proceedings surrounding CBC's continuing campaign against FBME in Cyprus. Upon doing so, it should be manifest that CBC comes at FBME with animus and bad faith. The upshot is that CBC's extensive involvement has tainted this entire proceeding, including FinCEN's allegations and reasoning set forth in the 2014 Notices. For FinCEN nonetheless to proceed as proposed without renouncing CBC's input and starting from a clean, fair slate would be arbitrary and capricious. As courts have long held, if an agency fails to, among other things, "consider an important aspect of the problem" or "ignore[s] new and better data," the resulting rule will be set aside as "arbitrary and capricious."[29] Similarly, "agencies do not have free rein to use inaccurate data."[30] Here, CBC's irrational hostility towards FBME and its unlawful actions towards the Bank constitute an "important aspect of the problem." If FinCEN ignores that problem or continues to rely on "inaccurate data" derived from CBC, then the proposed rule should be slated for vacatur.

Given the import of the relevant history and context, we are providing below a fulsome, rigorously-substantiated account of what FinCEN to this point has been overlooking. In doing so, we urge FinCEN to disavow the information obtained from CBC and CBC's actions against the Bank—or, at the very least, to view CBC's inputs through a critical lens and acknowledge profound inaccuracies.

A. Notwithstanding FBME's Decades-Long Presence In Cyprus, Cypriot Regulators Have Never Accepted It

1. FBME Has Made Valuable Contributions to Cyprus During Its Thirty-Three Year History in the Country

FBME is an international commercial bank that, as of mid-2014, had approximately USD 2 billion in deposits.[31] The Bank has operated in its current form since 1982, though its roots date back to 1952, when the Saab family established a bank in Lebanon. In 1977, in response to the increasing instability in Lebanon and Syrian occupation, the Saabs opened a representative

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[29] *See District Hospital Partners, L.P. v. Burwell*, 786 F.3d 46, 56–57 (D.C. Cir. 2015) (quoting *Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co*., 463 U.S. 29, 43 (1983)); *see also Catawba County v. EPA*, 571 F.3d 20, 45 (D.C. Cir. 2009) (agencies "have an obligation to deal with newly acquired evidence in some reasonable fashion").

[30] *District Hospital*, 786 F.3d at 56.

[31] Since its inception, the Bank has never declared a dividend.

office in Cyprus. The Saabs chose Cyprus, in part, because of the country's relative political and economic stability as compared to Lebanon and other countries in the region.[32]

By 1982, the situation in Lebanon had grown dire, and the Saabs—members of the Lebanese-Christian minority—feared nationalization of their bank by Syrian forces. To protect the family business, the Saabs incorporated FBME in Cyprus as a 51% subsidiary of their bank in Lebanon, with the remaining shares held by members of the Saab family. The family then relocated to the island, where they have lived almost full-time ever since.

From its beginnings in Cyprus, FBME has been the country's pioneer international bank.[33] Over the course of its approximately thirty-three year history in Cyprus, FBME has made significant contributions to the country, particularly the Cypriot financial sector, while also employing hundreds of Cypriot staff and contributing hundreds of thousands of Euros to Cypriot charities and community organizations. For example, FBME was the first offshore bank in Cyprus (and the first bank in Tanzania) to secure membership of VISA International and MasterCard International. In addition, it was the first non-Cypriot bank to lead and manage an international syndicated loan for a Cypriot company. Furthermore, it was the first Cyprus-based foreign bank (and the first bank in Tanzania) to offer internet banking. And, importantly, FBME was the first foreign bank in Cyprus to become a member of SWIFT.[34]

As of July 2014, FBME had a geographically diverse client base of international companies and individuals located in more than fifty countries. Of FBME's customer deposits in mid-2014, approximately 33.2% of deposits were from Europe, 35.4% were from the CIS (Commonwealth of Independent States) market, 13.0% were from Asia, 11.3% were from sub-Saharan Africa, 4.3% were from the Americas, 2.5% were from the Middle East and Northern Africa, and 0.3% were from other locations. In 2013, the Bank had assets (*e.g.*, cash balances, customer loans, property, etc.) of approximately USD 2.78 billion; liabilities (*e.g.*, customer deposits) of USD 2.6 billion and reserves of USD 173 million. FBME's prudent financial management has proven successful, allowing the Bank to maintain a healthy financial condition amidst recent financial crises both internationally and in Cyprus. As of July 18, 2014, FBME's Cyprus branch had a liquidity ratio to deposits of 104%.

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[32] For more information regarding the history and development of FBME, see FBME's submissions during the prior rulemaking, which are attached as Exhibits 26 and 53–65 and incorporated by reference as if fully set out within this comment.

[33] FBME was the first bank to apply for an offshore banking license in Cyprus.

[34] SWIFT, or the Society for Worldwide Interbank Financial Telecommunication, provides a network for financial institutions around the world to send and receive information about financial transactions in a secure, standardized, and reliable environment.

2. The Cypriot Government Has Consistently Discriminated Against FBME Because It Is Owned by Non-Cypriots and Is Financially Stable

Since the Bank's founding in 1982, CBC has been hostile towards FBME apparently because FBME (1) is owned by non-Cypriots; and (2) has lately outperformed other banks in Cyprus with its exceptional liquidity and financial stability. CBC has manifested its hostility in a number of ways, including by (1) repeatedly frustrating FBME's efforts to incorporate in Cyprus or outright refusing to allow FBME to do so; (2) prohibiting FBME from participating in local investment opportunities and blocking the Bank's efforts to challenge an illegal monopoly involving a CBC-regulated financial-services company; and (3) imposing arbitrary and unreasonable regulatory requirements and fines on FBME but not other banks.

Given that FinCEN has made critical judgments about FBME based upon, among other things, administrative fines levied against the Bank by CBC[35] and information provided by CBC to FinCEN,[36] it is incumbent upon FinCEN to evaluate CBC's actions and any material provided by it with a critical eye—a critical eye that acknowledges and accounts for CBC's animus towards FBME, its desire to protect failing domestic banks at any cost, and its intent to destroy FBME and steal its assets, as discussed further below. Failure to do so would not only be irresponsible but would be arbitrary and in violation of the APA and due process. Stated simply, FinCEN cannot blindly rely upon a corrupt,[37] lawless regulator when CBC's wrongdoing and ulterior motives are naked for all to see.

(a) CBC Repeatedly Prohibited FBME from Incorporating in Cyprus

Contrary to the NOF's insinuation that FBME had nefarious intentions when it decided to incorporate in the Cayman Islands, and later Tanzania, the reason that FBME did not incorporate

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[35] *See* NOF, at 42639.

[36] *See* Ex. 46, Transcript of Preliminary Injunction Hearing at 52:1–14, *FBME Bank Ltd.*, No. 15-cv-1270 (CRC) (D.D.C. Aug. 25, 2015), ECF No. 26.

[37] In Cyprus, systemic corruption and politically motivated investigations are well documented and, indeed, notorious. Just by way of illustration, at least three out of the last four CBC Governors have been criminally investigated by Cypriot authorities, and one of the Governors has been imprisoned as a result of the investigation. *See, e.g.*, Sarah Fenwick, *Corruption Allegations Fly Between Central Bank Governor – Dep. Attorney-General*, CYPRUS NEWS REPORT (Mar. 13, 2015), **http://old.cyprusnewsreport.com/?q=node/8346**; Elias Hazou, *CBC Investigation 'Moving Rapidly'*, CYPRUS MAIL (May 28, 2015), **http://cyprus-mail.com/2015/05/28/cbc-investigation-moving-rapidly/**; *Shock Revelations as Kiliaris Quits*, IN-CYPRUS (Dec. 3, 2015), **http://in-cyprus.com/shock-revelations-kiliaris-quits**; George Psyllides, *Criminal Investigation Launched into A&M Deal (Updated)*, CYPRUS MAIL (Oct. 24, 2013), **http://cyprus-mail.com/2013/10/24/criminal-investigation-launched-into-am-deal-updated/**; Poly Pantelides, *'We Are Obliged to Keep Laiki Alive' (FULL STORY)*, CYPRUS MAIL (Aug. 14, 2013), **http://cyprus-mail.com/2013/08/14/we-were-obliged-to-keep-laiki-alive-full-story**; *Orphanides Willing to Answer Fraud Allegations*, CYPRUS MAIL (Feb. 14, 2014), **http://cyprus-mail.com/2014/02/14/orphanides-willing-to-answer-fraud-allegations**; Michele Kambas, *Cyprus Court Jails Ex Central Banker for Tax Evasion*, REUTERS (Oct. 27, 2014), **http://uk.reuters.com/article/uk-cyprus-governor-prison-idUKKBN0IG0S820141027**.

in Cyprus is that CBC effectively foreclosed it from doing so. Indeed, CBC has repeatedly refused to allow FBME to incorporate in Cyprus despite the Bank's repeated requests. For example, in 1986, when the Saabs became concerned about the deteriorating political and security situation in Lebanon, they sought to protect FBME by separating it from their bank in Lebanon. Accordingly, the Saabs approached CBC seeking permission for FBME to become a standalone Cypriot bank owned by the family; CBC inexplicably refused and insisted that FBME remain an "offshore bank" incorporated in a foreign jurisdiction with only a licensed branch in Cyprus. Thus, in June 1986, at CBC's recommendation and encouragement, FBME incorporated in the Cayman Islands but retained all its operations in Cyprus.[38]

In 2001, the Cayman Islands passed legislation requiring all banks without a "physical presence" in the Islands to establish such a presence or leave the jurisdiction by the end of 2001. For FBME, this would have required, among other things, at least one of the Saab brothers to move to the Cayman Islands. This was not a viable option. Having lived in Cyprus for decades, the Saabs did not want to uproot their families. In addition, FBME's employees and the majority of its customers were based in Europe and surrounding countries. Accordingly, wholly transforming the Bank's operations to satisfy the "physical presence" requirement did not make sense financially or otherwise.[39]

Therefore, the Bank needed to incorporate in a new country. Once again, FBME asked CBC to allow the Bank to incorporate in Cyprus.[40] Once again, consistent with its historical animus against FBME, CBC refused.[41] The Bank considered other European countries including Austria, Romania, Slovakia, and Croatia, but CBC placed a number of impediments in FBME's way and made little or no effort to support or facilitate the Bank's efforts to incorporate in those countries.[42] Accordingly, FBME turned to evaluating other countries. In 2003, after an extensive, multi-year search, FBME decided to incorporate in Tanzania because it was the most politically stable country in Africa with strong macroeconomic indicators, and it presented an opportunity for the Bank to provide domestic banking services. CBC eventually agreed (only after FBME initiated legal action in the Cayman Islands), but not without first threatening possible revocation of the Cyprus branch's license and liquidation, and then placing a significant number of additional requirements on the Bank.[43] These included FBME's ultimate (1) pledge to reduce the percentage of assets held at the Cyprus branch to 25% of the Bank's total assets;

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38 *See* Ex. 4, Letter from CBC to FBME (Mar. 3, 1986); Ex. 5, Letter from FBME to CBC (Mar. 24, 1986). The "offshore" license also prohibited FBME from conducting transactions in the local currency at the time (the Cypriot Pound), thereby effectively (1) preventing FBME from opening accounts for and conducting business with Cypriot customers; and (2) forcing the Bank to focus on non-Cypriot clients and on foreign currency transactions.

39 *See* Ex. 6, Affirmation of John Spinks, *In the Matter of the Banks and Trust Companies Law (2001 Revision), etc. (Cayman Islands)* (2002).

40 *See* Ex. 7, Letter from CBC to FBME (July 9, 2001).

41 *Id.*

42 FBME was not *required* to obtain CBC's approval to incorporate in these countries, but the prospective home regulators expected FBME to demonstrate that CBC supported incorporation in their country, which CBC did not.

43 *See* Ex. 47, Letter from CBC to FBME, at 2 (July 14, 2003).

and (2) commitment to transfer certain liabilities from the Cyprus branch to the Tanzanian head office.[44] Since 2003, the Bank has established a significant presence in Tanzania and become one of the country's largest banks in terms of assets. Thus, to be clear, FBME's decision to move its headquarters to Tanzania was not motivated by any attempt to escape regulation in the Cayman Islands or in Cyprus, contrary to the unfair picture painted by the NOF. In fact, FBME Ltd., which owns FBME Bank Ltd., is still registered in the Cayman Islands.

Notwithstanding FBME's incorporation in Tanzania, in 2012, FBME once more asked CBC for permission to relocate its headquarters and head office to Cyprus given FBME's continued presence in the country. CBC effectively denied the request by requiring the Bank to accept arbitrary and financially-unworkable conditions in order to incorporate in Cyprus.[45]

(b) CBC Denied FBME Business Opportunities and Blocked the Bank's Efforts to Challenge Illegal Cypriot Financial Practices

Because of its animus towards the Bank, CBC also prohibited FBME from participating in various local investment opportunities. For example, in 2002, CBC refused FBME's request to contribute funds for the construction of a replica of an antique Cypriot ship (the Kyrenia) to transport copper from Cyprus to Athens for the minting of bronze medals for the 2004 Olympics in Athens. By CBC's own account, it denied the request because FBME was "incorporated outside Cyprus and owned by non-Cypriots."[46]

In addition, beginning in at least 2012, CBC fought FBME's efforts to break the monopoly held by local banks and JCC Payment Systems ("JCC")—a consortium of domestic Cypriot banks that excludes FBME—in Cyprus on electronic card payment services. For example, Bank of Cyprus has an exclusivity contract with American Express such that it is the only entity in Cyprus authorized to provide American Express cards to the public. Since 2012, FBME has sought approval from Bank of Cyprus to process American Express transactions. Bank of Cyprus has always refused, however, thereby preventing FBME from bidding on large projects requiring American Express processing. Despite Bank of Cyprus's obvious monopoly on American Express processing, CBC never intervened—which is particularly telling given that CBC's job, as the Cypriot financial regulator, is to regulate the country's financial services industry and prevent illegal monopolies. CBC's protection of Bank of Cyprus is just one of many instances when the regulator has unfairly and irrationally protected local banks over the interests of consumers and the needs of foreign banks and in violation of its mandate under Cypriot law to regulate the Cypriot financial system.

Similarly, up until 2008, JCC was the only company in Cyprus that provided the technology merchants needed to process MasterCard, VISA, and American Express payments from consumers. Because JCC controlled the market, it charged exorbitant fees in exchange for

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[44] Ex. 8, Letter from CBC to Bank of Tanzania, at 2–3 (July 20, 2003).

[45] Ex. 9, Letter from CBC to FBME, at 2–3 (July 16, 2012).

[46] Ex. 10, Letter from CBC to FBME (Oct. 21, 2002).

processing credit and debit transactions. Merchants passed these fees along to consumers, thereby inflating prices in Cypriot shops, hotels, and restaurants to the point that Cypriot consumers paid the highest processing fees in the European Union. At the relevant time, local Cypriot banks owned 75% of JCC.[47]

In 2008, FBME partnered with a local technology start-up company in order to break into the electronic card payment market in Cyprus. It did so because (1) as a member of the VISA and MasterCard payment systems, FBME was required to carry out local, physical card processing; and (2) FBME had a strategic desire to grow its international card-processing business. When FBME announced its partnership, the local banks, through JCC, lowered their transaction fees significantly, translating to an immediate cost saving of over EUR 60 million per year for local consumers. In 2012, FBME acquired 100% of the local start-up company (JCC's new competitor). Although the competition was obviously benefitting Cypriot consumers, JCC retaliated against those merchants that used FBME's services by instituting further predatory prices along with other illegal actions. Because CBC regulates any material changes in pricing, it was well aware of JCC's conduct, which proceeded in plain view. But CBC did nothing to stop it, once again unlawfully favoring Cypriot banks over Cypriot consumers and non-Cypriot financial institutions. In response, FBME filed a complaint against JCC before the Cyprus Commission for the Protection of Competition ("Cyprus Commission").[48] In April 2014, the Cyprus Commission issued a preliminary award in FBME's favor, ruling in substance that CBC and other local banks, through JCC, engaged in illegal predatory pricing and violated fair competition.[49] That decision struck a blow that (1) benefited consumers; (2) deprived the local banks of easy money from overcharging local merchants and consumers for electronic card payment services through JCC; and (3) embarrassed CBC. By no means did FBME, as a non-Cypriot bank that had exposed the anti-competitive practices of a Cypriot bank directly regulated by CBC, endear itself to CBC by delivering that blow.[50] The matter remains pending before the Cyprus Commission.

CBC's skewed and biased approach in connection with JCC and Bank of Cyprus is just one of many episodes in which CBC has acted (or intentionally failed to act) (1) in furtherance of its own self-interest, (2) to support domestic banks in violation of its duties as the Cypriot

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47 A consortium of local subsidiaries of Greek and French banks owned the remaining 25% of JCC. *See* Ex. 11, Complaint Pursuant to Section 35 of the Competition Law ¶ 5.1, *In the Matter of the Protection of Competition Law, Law 13(I)2008* (Dec. 23, 2009).

48 *Id.*

49 The Cyprus Commission has yet to issue a formal, written decision.

50 Unfortunately, the actions of FinCEN and CBC resulted in the suffocation of FBME's electronic card payment services business and thus the return of the JCC monopoly, harming local consumers by increasing processing fees to their previous high levels. *See CYPRUS: FBME Cards Lays Off Staff, JCC Resumes Monopoly*, FINANCIAL MIRROR (Aug. 11, 2014), **http://www.financialmirror.com/news-details.php?nid=32987** (due to the suspension of FBME's card services business, "JCC . . . is now expected to become a monopoly once again, with the blessing of the Central Bank and the Competitions Protection Commission (EPA)"); *see also CYPRUS: FBME Clients, Cards in Limbo as Central Bank Clueless*, FINANCIAL MIRROR (July 30, 2014), **http://www.financialmirror.com/news-details.php?nid=32930**.

financial regulator, or (3) in response to deep-seated prejudices against non-Cypriots. Given this background, it is astonishing that FinCEN would partner with CBC and treat it as an honest broker. Certainly when it comes to considering the fifth special measure under Section 311, which constitutes a serious blow for an international commercial bank such as FBME, CBC should have no place in fair, principled deliberations.

3. CBC's Regulatory Requirements and Fines on FBME Were Unreasonable, Unjustified, and Discriminatory, and FinCEN Should not be Relying Upon Them

Although the NOF suggests that the 2010 fine levied against FBME by CBC is evidence of the Bank's deficient AML controls and failure to comply with local laws, the 2010 fine in fact amounted to another manifestation of CBC's unfair, intractable prejudice against FBME. Specifically, following a routine on-site inspection in 2009, CBC asked the Bank to obtain additional information and documentation for select customers. In order to fulfill this request, FBME needed to review approximately 9,000 account files and obtain documentation from its customers located abroad. While conducting the review and obtaining the required documents, the Bank continually apprised CBC of its efforts, which included employing additional staff to work days, nights, and weekends on the project. Despite FBME's consistent and comprehensive updates to CBC, in December 2009, CBC arbitrarily imposed a three-month deadline for completion. CBC imposed this deadline *only* on FBME. *No other bank* similarly charged with updating account files *was subject to the same deadline*.

The Bank promptly notified CBC that it would be unable to meet this deadline given the project's scope and requested a short extension. But CBC refused. Nonetheless, by CBC's deadline, FBME had reviewed all 9,000 applicable account files and was simply awaiting select documentation from foreign entities—including, *e.g.*, certified documents that CBC insisted upon in antiquated refusal to accept apostille or notarization. This remaining process was one over which the Bank had no control. Regardless, CBC imposed a fine of EUR 80,000 for FBME's technical failure to meet the arbitrary deadline.[51] In sum, FBME "missed" the deadline only in the sense that its documentation, to the extent dependent on continuing returns from overseas, was not yet complete; it was that slight delay in obtaining the updated documentation relative to CBC's three-month deadline, and only that, which triggered the fine. There was no substantive failure at issue and, even as to the documentation, there was no persisting failure—only a concerted effort by FBME to meet an arbitrary deadline from CBC with the utmost good faith and with an earnest, prompt, well-justified request for an extension, which CBC then took as an opportunity to ding the Bank. Suffice it to note that FinCEN should not now take the episode as suggesting any basis for U.S. sanctions, much less sanctions of the utmost severity.

[51] Ex. 48, Letter from CBC to FBME (Nov. 15, 2010).

4. Despite Decades of Hostility Towards FBME, Cyprus Turned to the Bank During Its Own Financial Crisis

Beginning in 2012, Cyprus experienced a severe financial crisis that threatened to cause systemic collapse of its economy and banking system.[52] The situation became so extreme that the Troika of International Lenders (comprising the European Commission, the European Central Bank, and the International Monetary Fund) was forced to provide Cyprus with a EUR 10 billion bailout.[53] Significantly, the principal reason for the collapse of the Cypriot banking system was CBC's continual lack of proper supervision and mismanagement of domestic banks. For example, CBC failed properly to supervise and monitor Bank of Cyprus, the largest Cypriot bank and a systemically important one that suffered substantial losses on its holdings of Greek government bonds between 2012 and 2013.[54] Similarly, CBC failed to supervise Laiki Bank properly, another systemically important domestic financial institution. Specifically, CBC provided emergency liquidity assistance ("ELA") to Laiki from May 2012 through 2013 while the bank was insolvent and ineligible for ELA.[55] As a result of CBC's continuing assistance to Laiki while it was insolvent, the bank wound up with an ELA debt in excess of EUR 9 billion, which CBC transferred to Bank of Cyprus after Laiki was liquidated in March 2013 pursuant to the Troika of International Lenders' bailout agreement. Depositors of Laiki and Bank of Cyprus lost nearly 100% and approximately 50% of their deposits, respectively.[56] The demise of Bank of Cyprus and Laiki, for which CBC was largely responsible, played no small part in the collapse of the Cypriot financial system. Once again, by refusing to monitor domestic banks strictly and irresponsibly propping them up when they were obvious failing, CBC put the needs of domestic banks ahead of the interests and stability of its own country and financial system.

While Cyprus's domestic banks suffered significant economic and banking turmoil during the crisis, FBME remained stable, highly solvent, and well run. Accordingly, even after

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[52] *See, e.g.*, Jack Ewing, *Collateral Damage in Europe*, N.Y.TIMES, April 12, 2012, *available at* **http://www.nytimes.com/2012/04/12/business/global/in-cyprus-a-national-quest-to-shore-up-teetering-banks.html?_r=0**.

[53] *See, e.g.*, *Cyprus Asks EU for Financial Bailout*, ALJAZEERA (June 25, 2012), **http://www.aljazeera.com/news/europe/2012/06/201262517189248721.html**; Charle Magne, *A Better Deal, but Still Painful*, THE ECONOMIST (Mar. 25, 2013), **http://www.economist.com/blogs/charlemagne/2013/03/cyprus-bail-out**; Dylan Matthews, *Everything You Need to Know About the Cyprus Bailout*, WASHINGTON POST (Mar. 18, 2013), **https://www.washingtonpost.com/news/wonk/wp/2013/03/18/everything-you-need-to-know-about-the-cyprus-bailout-in-one-faq-2/**.

[54] *See*, *e.g.*, Ex. 12, Investigation Report: Bank of Cyprus – Holdings of Greek Government Bonds, Alvarez & Marsal, ¶¶ 2.9.1 – 2.9.3 (Mar. 26, 2013) ("CBC supervision department was potentially under-resourced, both in terms of numbers and experience[d] staff members . . . CBC did not have any formal asset concentration monitoring in place . . . CBC formally requested information regarding [Bank of Cyprus's] holdings of [Greek government bonds] . . . no written response was received . . . [yet] CBC did not follow up on this on a timely basis").

[55] *See* George Christou, *The Case Against the Governor*, CYPRUS MAIL (Oct. 20, 2013), **http://cyprus-mail.com/2013/10/20/the-case-against-the-governor**.

[56] *See* Menelaos Hadjicostis, *Bank of Cyprus Depositors Lose 47.5% of Savings*, USA TODAY (July 29, 2013), **http://www.usatoday.com/story/money/business/2013/07/29/bank-of-cyprus-depositors-lose-savings/2595837/**.

mistreating FBME for a number of years, the Cypriot government sought the Bank's help to survive the crisis. FBME ultimately invested what amounted to ***approximately EUR 240 million*** in the government's junk-rated treasury bills.[57] Indeed, on a capital-weighted basis, FBME provided more assistance to Cyprus than any other entity, local or foreign. Furthermore, FBME maintained a stockpile of readily-available local and sovereign bonds (which domestic banks could not do given the need to de-leverage their trading books during the financial crisis) to trade with U.S., U.K., and other international hedge funds. Absent FBME's market-making in local and sovereign bonds, there would have been a severe shortage in liquidity for Cypriot government bonds. FBME's creation of liquidity in this bond market coupled with its marketing efforts ensured that Cyprus remained attractive for international investors.

Significantly, Cyprus did not seem to fear that it was relying on any supposed money-laundering proceeds from FBME. To the contrary, Cyprus was rightly grateful that it had a robust, healthy, well-run bank willing and able to support it. Appreciating the significance of FBME's support, in April 2014, Cyprus's Ministry of Finance expressed gratitude to the Bank for providing the government with the time and resources to continue negotiating with international financial bodies regarding the country's economic woes.[58]

5. CBC Imposed an Illegal Fine on FBME for Alleged Violations of Capital Controls

As a consequence of the financial crisis, Cyprus imposed capital controls on all domestic and international banks in Cyprus, including FBME. Specifically, starting in March 2013, CBC issued continuous capital control decrees ("Decrees"), each one typically lasting for 30 to 60 days.[59] The early Decrees required, among other things, that: (1) all banks (irrespective of any given bank's liquidity or financial stability) **obtain CBC's approval before transferring funds** outside Cyprus; (2) CBC approve or deny transfer requests **within 24 hours of receipt**; and

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[57] This was on top of FBME's earlier investment of EUR 30 million in the government-controlled Cyprus Electricity Authority following a devastating accident that knocked out energy supplies to much of the country. Indeed, FBME contributed more than any other company or bank in Cyprus to the Electricity Authority.

[58] Ex. 13, Letter from Ministry of Finance to FBME (Apr. 4, 2013); Ex. 14, Letter from FBME to Ministry of Finance (Apr. 9, 2013); Ex. 15, Letter from Ministry of Finance to FBME (May 8, 2013).

[59] For each Decree issued, FBME filed an administrative action against CBC in the Supreme Court of Cyprus on the grounds that the Decrees violated the Cypriot constitution and E.U. law. The Supreme Court held that these were not "administrative" actions, and instructed FBME to file the actions in Cyprus District Court. In connection with FBME's first administrative challenge of a Decree, on April 4, 2013, FBME also filed for an interim injunction in the Supreme Court. However, the Supreme Court refused to hear FBME's case in time to rule on the Decree at issue before a new Decree was imposed. In response to the Supreme Court's refusal to timely hear FBME's request for injunctive relief, on May 9, 2013, FBME filed an action in the European Court of Human Rights, which is now pending.

(3) CBC "**take into account the liquidity buffer situation**"[60] of the financial institution when evaluating and ruling on transfer requests.[61]

Immediately following the First Decree issued on March 27, 2013, FBME began sending transfer requests to CBC. CBC *never* responded to the requests within 24 hours and often did not respond *at all*. And when CBC denied FBME's transfer requests, it did so without requisite explanation or justification for the denial. CBC's failure to comply with the timing and notice provisions of the Decrees posed debilitating problems for bank customers in Cyprus and abroad, including those of FBME. Because banks could not fulfill transfer and withdrawal requests, bank customers necessarily could not receive or make payments; the predictable result was that some customers defaulted on third-party obligations. Equally problematic, CBC's failure to respond to or approve FBME's transfer requests put FBME at risk of defaulting on obligations relating to letters of credit and letters of guarantee, thereby exposing the Bank to potential suits by its own clients.

On April 3, 2013, FBME notified CBC that it had not received timely responses to its transfer requests.[62] In addition, FBME: (1) notified the Minister of Finance about the detrimental impact of the capital controls; (2) requested that the Minister of Finance limit the Decrees to those unhealthy banks and not the healthy, solvent, and liquid banks; and (3) proposed a plan for FBME to comply with the Decrees in a manner that would protect against capital flight from Cyprus while doing less harm to FBME's customers and business.[63] As part of the plan, FBME proposed a modified arrangement whereby it would notify CBC when transferring funds to international clients but not necessarily await CBC's separate, affirmative approval before executing each transaction. Additionally, FBME confirmed its commitment to comply with the spirit of the capital controls, including by: (1) refusing to allow local, Cypriot clients from transferring funds outside Cyprus; (2) refusing to open accounts with funds transferred from a domestic Cypriot bank; (3) providing CBC with all required reports on liquidity and inflows/outflows; and (4) providing proposals, as requested by CBC, for modifying the Decrees for healthy, solvent, and liquid banks.[64]

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[60] At all times during the financial crisis, FBME was solvent, highly liquid, and financially stable.

[61] *See*, *e.g.*, Ex. 16, Cyprus Minister of Finance, Enforcement of Restrictive Measures on Transactions in Case of Emergency First Decree (Mar. 27, 2013) ("First Decree").

[62] Ex. 17, Letter from FBME to CBC (Apr. 3, 2013).

[63] *Id.*

[64] *Id*. In response to each Decree issued by the Cypriot government, FBME submitted comments to the Ministry of Finance and CBC, which included an analysis of the practical effect of the Decrees and recommendations for allowing healthy, solvent banks to operate normally. *See, e.g.*, Ex. 18, Email from FBME to CBC (Apr. 3, 2013). The Ministry of Finance and CBC ignored all of FBME's comments, declining to amend or change the Decrees to account for FBME's suggestions. Rather, CBC issued a series of decrees for "foreign banks" ("Foreign Bank Decrees"), which exempted the transactions of international customers of subsidiaries and branches of foreign banks from the capital controls, provided that the foreign bank comply with certain requirements. Ex. 19, Cyprus Minister of Finance, Enforcement of Restrictive Measures on Transactions in Case of Emergency Law of 2013 (Apr. 25, 2013) ("First Foreign Bank Decree"). The Foreign Bank Decrees were available only to those banks that provided CBC with a complete international client list in direct contravention of CBC's own confidentiality rules. Ex. 20,

(footnote continued)

Neither the Ministry of Finance nor CBC responded or objected to FBME's proposal. FBME understandably interpreted the government's silence as signaling approval of the proposal. Accordingly, from April 2013 to July 16, 2014, FBME notified CBC of all transfers outside Cyprus but did not await CBC approval before executing the transfer. CBC never responded or objected to FBME's conduct, further indicating that CBC was on board with the Bank's proposal. Moreover, as FBME also demonstrated in its reports to CBC, FBME's receipt of capital inflows *exceeded* outflows such that, one year after the capital controls went into place, FBME's deposits had *increased*.[65]

In September 2013, CBC conducted an on-site examination of FBME to assess the Bank's compliance with the Decrees. FBME fully cooperated with the examination and complied with all of CBC's requests. On November 4, 2013, CBC informed FBME, for the first time, that it was not in compliance with the Decrees and could be subject to a fine or suspension or withdrawal of its banking license. In response, FBME reminded CBC that: (1) the Bank had complied with the spirit of the capital controls and attempted to comply with the Decrees; (2) FBME had strong liquidity, excellent solvency, and a stable deposit base; and (3) CBC implicitly approved FBME's conduct by failing to object to the April 2013 proposal or the numerous transfer notifications submitted thereafter.[66] CBC did not respond to FBME's letter. Then, in February 2014, ***over eight months after FBME proposed the modified plan and began transferring funds to customers,*** CBC arbitrarily and without explanation fined FBME approximately EUR 650,000 for failing to follow the capital controls first imposed in March 2013.[67]

This administrative fine was not only fundamentally unfair but illegal. FBME had no choice but to act as it did in the face of CBC's own failure to (1) comply with the 24-hour requirement; and (2) respond to FBME's (a) many comments and recommendations regarding the Decrees; (b) proposal to reach a good-faith solution for its customers while simultaneously complying with the spirit and purpose of the Decrees; and (c) numerous transfer notifications between April 2013 and July 2014. Accordingly, FBME brought actions against CBC before the

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Letter from CBC to Foreign Banks ¶ 1 (Apr. 26, 2013). FBME refused to provide confidential client information to CBC via electronic means, but sent CBC internal client reference numbers and invited CBC to FBME's premises to view the confidential data. Ex. 21, Email from FBME to CBC (May 14, 2013). But CBC refused. Because FBME was unwilling to violate Cypriot banking laws regarding confidentiality, FBME could not apply to be included on the list of banks covered by the Foreign Bank Decrees.

65 FBME will provide the voluminous supporting documentation to FinCEN upon request.

66 *See* Ex. 22, Letter from FBME to CBC (Nov. 18, 2013).

67 The "Cyprus Mail" newspaper incorrectly reported that FBME faced a potential fine of EUR 240 million. Elias Hazou, *CBC Threatens FBME With EUR 240m Fine*, CYPRUS MAIL (Nov. 29, 2013), **http://cyprus-mail.com/2013/11/29/cbc-threatens-fbme-with-e240m-fine/**. In actuality, CBC never imposed, or threatened to impose, a fine of EUR 240 million. When FBME asked CBC to investigate the CBC "source" that the Cyprus Mail quoted, CBC neither responded to FBME's request nor asked the newspaper to correct the misstatement. Ex. 23, Letter from FBME to CBC (Dec. 2, 2013). Rather, CBC remained silent.

Supreme Court of Cyprus contending that the fine is unconstitutional and unlawfully imposed.[68] This action remains pending. In the meantime, as permitted by Cypriot law, FBME has not paid the fine while continuing to contest its legality.

6. FinCEN's Reliance on the Capital Controls Administrative Fine for Present Purposes is Arbitrary and Capricious

Despite (1) the illegality of the capital controls and corresponding administrative fine; and (2) FBME's pending legal challenges against the Republic of Cyprus and CBC in connection with the same, FinCEN continues to cite the fine as an example of FBME's purported non-compliance with Cypriot laws and, by implication, AML regulations.[69] It is indefensible, however, for FinCEN to rely on the administrative fine as though it supports a finding that FBME is an institution of "primary money laundering concern."

First, and most importantly, the fine had nothing whatsoever to do with AML or other compliance issues. Instead, it related solely to capital controls, applicable to all domestic and international banks in Cyprus. The capital controls were designed to prevent Cypriots from transferring funds outside Cyprus during the financial crisis—a concern that was largely inapplicable to FBME's customers, the vast majority of whom are not Cypriots. Thus, the administrative fine is leagues removed from FinCEN's conclusion that FBME has failed to comply with applicable AML requirements and is an institution of "primary money laundering concern."

Second, FinCEN failed to evaluate, critically and for itself, all of the essential background and context set forth above. Once the background and context are duly considered, any fair-minded observer can readily grasp that CBC's own malfeasance, nonfeasance, and bad faith were the root cause of the fine against FBME. After CBC placed FBME and its depositors in an impossible position by failing to provide prompt feedback and authorization as required by law, FBME simply did what any responsible bank in its position would need to do—maintain essential operations for the sake of its depositors and counterparties while keeping its regulator apprised at every turn. For CBC then to fine FBME after the fact was unjust and perverse. For FinCEN then to rely on CBC's fine as a basis for supposed *AML* concerns, however, is even worse.

Third, when evaluating the significance and import of the fine, FinCEN irresponsibly relied upon and cited information from a Cypriot newspaper article, quoting a CBC senior official, that reported the fine could reach EUR 240 million—over 350 times higher than any fine levied or proposed. When FBME challenged FinCEN on this point, the agency admitted the information may be inaccurate because it came from a newspaper article citing an anonymous

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[68] FBME's position that the capital controls are unlawful is supported by a leading London Queens' Counsel who is an expert in this area of the law. Both administrative actions filed by FBME challenging the EUR 650,000 fine are currently available only in Greek. However, FBME will provide translations to FinCEN upon request.

[69] *See* NOF, 79 Fed. Reg. 42639, 42639 (July 22, 2014); Proposed Rule, 80 Fed. Reg. 74064 (Nov. 27, 2015) (citing to NOF).

senior CBC source.[70] By relying on inaccurate information from a newspaper article, FinCEN grossly exaggerated the severity of FBME's alleged non-compliance with Cypriot law.

7. CBC Has Seized Upon FinCEN's Actions as a Pretext to Illegally Assume Control of FBME and Its Assets

Before the issuance of the NOF, CBC was unable to initiate any proceedings against the Bank under Cypriot law because of FBME's (1) indisputable financial health; (2) effective management; (3) compliance with CBC and EU AML requirements; and (4) continued and demonstrated ability to meet its customers' banking and financial needs. When FinCEN issued the NOF in July 2014, however, CBC found itself with an opportunity: CBC seized on FinCEN's actions as a pretext for acting on its preexisting desire to take control of FBME and its sizeable assets. Indeed, since July 2014, CBC has engaged in a well-orchestrated plan to destroy FBME as an international financial institution and siphon its assets for the Cypriot government's own use. Such efforts have included (1) seizing control of FBME's Cyprus branch; (2) appointing a Special Administrator to oversee management of the Branch and attempt to sell it; and, most recently, (3) revoking FBME's Cypriot license and initiating wholesale liquidation proceedings. Throughout these efforts, CBC has been looking for and finding opportunities to fill Cypriot coffers with FBME deposits.

Although CBC's true intentions have remained the same throughout, the regulator has provided shifting explanations for why (1) such drastic actions against FBME are supposedly necessary; and (2) alternative measures proposed by FBME are supposedly inadequate. These shifting justifications well evidence CBC's "result in search of a reason" approach as well as the illegality and bad faith that animate its regulatory actions. In light of CBC's obvious ulterior motives, FinCEN must evaluate any information provided by CBC or actions taken by the regulator against FBME with the utmost skepticism. To do otherwise would be arbitrary and capricious. Indeed, at this juncture, FinCEN should be doing everything within its power to disassociate itself from CBC, notwithstanding its close coordination to date. Any persisting tie between the two regulators is disabling and, indeed, disreputable in light of CBC's gross, recurring, and continuing disregard for the rule of law.

(a) CBC Issued a Supervisory Measure as a First Step to Taking Control of FBME's Cyprus Operations

FBME first learned of the NOF on July 18, 2014. That same day, FBME contacted CBC, which was already aware of it. From the outset, FBME invited CBC representatives to enter the Bank to monitor operations including FBME's compliance with all applicable laws and regulations.[71] Thus, CBC was enjoying FBME's full cooperation and all the access and resources CBC might need to ensure the Bank was fully compliant with its AML obligations and was safeguarding the interests of customers and creditors. Yet, later that day, without regard for FBME's invitation to monitor and control the activities of the Cyprus branch, CBC issued a

[70] Final Rule, 80 Fed. Reg. at 45060 (July 29, 2015).

[71] Ex. 24, Letter from FBME to CBC (July 18, 2014).

"Supervisory Measure" authorizing CBC to immediately assume control of FBME.[72] Then a team of CBC representatives entered the Bank to (1) supervise the IT system; and (2) monitor Bank operations, particularly payments, which thereafter could be made only with CBC approval.

(b) CBC Ignored PWC's Findings in Connection with the Annual Examination of FBME That Seemingly Would Have Vindicated the Bank Relative to FinCEN's Allegations

In similar fashion, CBC disregarded the findings of PWC, the auditor CBC engaged to conduct the 2014 annual examination of FBME's Cyprus branch in conjunction with CBC.[73] In an unprecedented move, CBC refused to provide FBME with PWC's report. Historically, CBC always provided FBME with copies of the examination reports. In this instance, however, CBC consistently refused, without explanation, to provide FBME with a copy of PWC's 2014 findings despite the Bank's repeated requests. The upshot was that CBC, even after inspecting the branch for itself in conjunction with its own, first-class, outside auditors from PWC, withheld the work product that was directly on point relative to FinCEN's allegations and would, by all indications, vindicate the Bank.[74]

(c) CBC Unlawfully Assumed Control of the Bank and Appointed a Special Administrator Only by Misusing a Resolution Reserved for Failing Banks

In the immediate wake of FinCEN's notices, some correspondent banks froze FBME's USD accounts for payments in USD only. In response, CBC requested EUR 300 million from FBME ostensibly so that CBC could act as a correspondent bank for FBME and reassure the Bank's customers and creditors.[75] The Bank agreed to transfer EUR 100 million to CBC. But, not surprisingly, CBC did not use the funds for their designated purposes—one of many in CBC's series unlawful acts against FBME in the wake of the NOF.

The record of CBC's ensuing misconduct in its purported supervision of FBME following issuance of the 2014 Notices is extensive and damning. To catalogue it all here would go beyond the scope of these proceedings and into the heart of an ongoing arbitration in which FBME's shareholders are identifying a wide variety of brazen violations of law and rights perpetrated by CBC. Because the key point for present purposes is that CBC's input to FinCEN

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72 Ex. 25, Letter from CBC to FBME (July 18, 2014).

73 As discussed further at Section III.B.1 below, between June and September 2014, PWC conducted on-site inspections of FBME. PWC did not report any problems or concerns to FBME. Similarly, in informal meetings between CBC and FBME, CBC senior officials reported that neither PWC nor CBC had identified any material issues.

74 *See infra* Section III.B.1.

75 The proposed sanctions in the NOF and NPRM did not prevent FBME from conducting transactions in Euros.

has been devoid of substance yet thick with taint, we will simply summarize for now and elaborate upon request. In brief:

- To circumvent constraints of Cypriot law that prevented CBC from seizing FBME and claiming control over its assets, CBC improperly relied upon the Law on the Resolution of Credit and Other Institutions of 2013 (the "Resolution Law"), which was enacted to deal with bank bankruptcies, and specifically the bankruptcies of the two largest systemic Cypriot banks in 2013—Laiki Bank and Bank of Cyprus.

- Far from protecting the Bank's customers or creditors, CBC rode roughshod over the interests of those it was supposedly out to benefit. For example, shortly after his appointment, the Special Administrator immediately closed FBME's Cyprus branch for six weeks and restricted FBME customers' access to their accounts, effectively cutting off essential funds even as the Bank's liquidity remained better than healthy, with liquidity covering 104% of deposits.

- In a similar vein, the Special Administrator ordered all correspondent banks to transfer FBME deposits to CBC. FBME eventually prevented such transfers by intervening with the correspondent banks, but not before one transferred EUR 194 million and GBP 46 million in FBME deposits to CBC. CBC continues to hold these funds illegally, even though they clearly belong to FBME customers, including customers outside of Cyprus.

- CBC has expressly directed its Special Administrator to accumulate Cyprus branch deposits sufficient to cover insurance payments owed under Cyprus's Deposit Protection Fund, evidently in disregard of the *premiums* CBC has *already separately* collected from FBME and other banks to cover such obligations as required by Cypriot law.[76]

- In a variety of respects, CBC has shown nothing short of disdain for Cypriot, Tanzanian, and international law, each of which it has violated willfully and flagrantly at different turns.[77]

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[76] Ex. 36, Letter from CBC to Special Administrator (Dec. 23, 2014) (directing Special Administrator to ensure that "[t]he credit balances in the accounts that the Branch has with the Central Bank of Cyprus shall be at any given time equal or larger than the total amount which would have been paid by the Deposit Protection Fund . . . in case the deposits would have become non available").

[77] CBC's revocation of FBME's Cypriot license and its efforts to liquidate all of the Bank's assets clearly violates Tanzanian, Cypriot, and international law. For example, CBC's efforts to liquidate *all* of FBME's assets tramples upon Tanzanian law. Tanzania—not Cyprus—is FBME's home regulator and has the sole authority to oversee FBME's Tanzanian-based assets. *See, e.g.*, Ex. 31, CBC Decision, No. 04/2015, ¶ 4 (Dec. 9, 2015) (noting that the Statutory Manager appointed by the Bank of Tanzania "is solely authorised under the Tanzanian Laws to act on behalf of FBME Bank Ltd"). Similarly, CBC's appointment of a Special Administrator and seizure of FBME's Cyprus branches violated the Cypriot Constitution. *See, e.g.*, Ex. 32, Administrative Application by FBME Against

(footnote continued)

Indeed, CBC's conduct, motives, and goals have not gone unnoticed by close observers. For example, the statutory manager appointed by the Bank of Tanzania (who has responsibility for the entire Bank) has denounced the Special Administrator's illegal actions.[78] Among other things, after the Special Administrator admitted to the statutory manager that he wanted "to access [FBME's] funds so [the Special Administrator] can keep them *as cover for potential legal damages that the Central Bank of Cyprus or the Republic may have to pay*," the statutory manager responded that such an admission was "a clear sign that [the FBME] funds that you so badly want to access are not to pay back the depositors to whom the money belongs but for other uses."[79] The statutory manager called CBC's actions "illegal" and accused the regulator of creating a "mess by acting unilaterally and prematurely" with respect to the Bank.[80]

(d) CBC Took the Voluntary Remand Proceedings as an Opening to Try to End FBME Under Cover of Darkness, Just Before Christmas

Incredibly, CBC descended into even worse lawlessness after FinCEN obtained its voluntary remand. By all indications, CBC took the pause in judicial review as an opportunity to proceed under cover of darkness, resorting to extreme measures that might extinguish the Bank before judicial review could resume. After FinCEN reissued its Proposed Rule on November 27, 2015, CBC hatched a Christmas-Eve surprise. On December 21, 2015, CBC revoked FBME's local banking license and, the very next day, initiated liquidation proceedings against the Bank.[81] Still more incredibly, in its December 22 application filed in Cypriot District Court, CBC sought to liquidate the ***entire*** FBME Bank, including both its Cypriot- and Tanzanian-based assets.[82] Thus, after threatening liquidation for months, CBC waited until December 22, mere days before the Christmas holiday, to spring proceedings against FBME and its assets worldwide.

If all that were not bad enough, CBC filed its application *ex parte* in an effort to prevent FBME from challenging it. Only because counsel for FBME anticipated CBC's shameful strategy and waited for CBC's lawyers to appear at court for the *ex parte* hearing were they able to have any say. Upon spotting the arrival of CBC's counsel, FBME's counsel joined CBC's

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CBC (May 8, 2015). And as FBME's shareholders are demonstrating before the International Chamber of Commerce in Paris, CBC's attempts to expropriate the Bank's assets violate the bilateral investment treaty between Lebanon and Cyprus. *See* Press Release, FBME Ltd., Shareholders Seek $500 Million Damages (Nov. 28, 2014), *available at* **http://goo.gl/XWqyIT**.

78 *See* Ex. 35, Email from Lawrence Mafuru to Andrew Andronikou (Sept. 24, 2015).

79 *Id.* (emphasis added). The statutory manager further noted that "[t]he bank has a duty to protect customers deposits and therefore I will not support any move to appropriate the deposits sitting in correspondent banks for something else." *Id.*

80 *Id.*

81 *See* Ex. 2, Central Bank of Cyprus, Decision: Revocation of the License Granted to FBME Bank Ltd to Operate a Branch in Cyprus, No. 05/2015 (Dec. 21, 2015); Ex. 3, Liquidation Application No. 905/2015 (Dec. 22, 2015).

82 Ex. 3, Liquidation Application No. 905/2015 (Dec. 22, 2015).

lawyers in chambers and demanded a right to be heard, which the court granted. The court subsequently recognized that CBC's application could not be granted *ex parte*. The Supreme Court of Cyprus then denied CBC's petition for review, thereby ensuring CBC's application (which remains pending) would proceed in the normal course. Yet even in that posture, CBC requested that the court afford FBME a mere ***three days*** to provide a response, making the opposition due on ***Christmas Day***. As shameful as such tactics are, they are par for the course for CBC and, as such, most instructive.

B. Coordination Between CBC And FinCEN Raises Serious Concerns

All of the above bears recounting because FinCEN has not been working at arms length from CBC. Although details of the collaboration between the two regulators remain shielded behind a shroud of secrecy, we have strong indications that FinCEN and CBC have been working closely together behind the scenes. And we certainly know from the 2014 Notices that, at the very least, FinCEN has been cuing off regulatory red flags it picks up from CBC, specifically in the form of the two prior fines against FBME—albeit without accounting for the specific extenuating circumstances surrounding those fines, as already addressed above and in prior submissions. Beyond that, the remarkable synchronization in timing and choreography between FinCEN and CBC cannot plausibly be taken as mere coincidence.[83]

Given this agency's partnership with Cyprus and reliance on information from it, it is incumbent upon FinCEN now to acknowledge and renounce its source. Alternatively, to the extent FinCEN may be relying on a corrupt, lawless regulator that has proved willing to violate Cypriot and international law in order to destroy a bank and seize its assets for its own self-serving purposes, that will render FinCEN's resulting action arbitrary and capricious, to say the least. For a decisionmaker to *hold a bias* is inimical to due process.[84] It follows that when a decisionmaker relies on *input tainted by bias*, without permitting fair scrutiny or testing, due process is similarly violated. That violation is compounded by the distinct but related procedural deficiencies—particularly the reliance on a "black box" of evidence and the absence of any neutral decisionmaker or hearing—that have been catalogued above.

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[83] *See infra* Section III.B.2. It also bears noting that, after FBME pressed specifically for inputs CBC may have secretly provided FinCEN—and after Judge Cooper then ordered FinCEN to specify any unclassified materials that it might be continuing to withhold, *see* Ex. 49, Transcript of Telephone Conference 3:2–11, *FBME Bank Ltd. v. Lew*, 15-cv-1270 (CRC) (D.D.C. Oct. 23, 2015), ECF No. 46—FinCEN acknowledged for the first time the existence of certain still-unidentified materials, purportedly withheld as "law enforcement sensitive," that it had never before hinted might be part of the administrative record. *See* Ex. 50, Defendants' Notice at 3 & n.2, *FBME Bank Ltd. v. Lew*, No. 15-cv-1270 (CRC) (D.D.C. Oct. 30, 2015), ECF No. 47. According to FinCEN, such materials need never be disclosed because FinCEN will no longer rely upon them for purposes of this remand proceeding. *Id*. Assuming we will never learn anything more about these materials, we must note that FinCEN's belated mention of them (which the agency revealed only upon pointed inquiry by the district court), its refusal to produce them, and its decision to exclude them after the fact from its review are odd enough to heighten suspicions still further.

[84] *See, e.g.*, *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (where "the adjudicator has a pecuniary interest in the outcome" "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable"); *see also Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009).

Because FinCEN is currently privy to facts and evidence well beyond those available to FBME, FBME has neither need nor ability to trace the full extent of FinCEN's collaboration with CBC, as known to both. That said, we are impelled to note, by way of illustration only, troubling ways in which the two regulators have been playing off one another in this proceeding.

1. FinCEN Should not Rely on Any Purported Findings by PWC Provided by CBC

One particularly troubling indication of the coordination between CBC and FinCEN surrounds the 2014 examination conducted by PWC on FBME. As previously discussed, CBC engaged PWC in 2014 to conduct the annual examination of FBME's Cyprus branch in conjunction with CBC.[85] Between June and September 2014, PWC conducted on-site inspections of FBME and completed the examination without incident. Indeed, PWC reported there were no problems or concerns raised by the examination. Similarly, in informal meetings between CBC and FBME shortly before FinCEN issued the NOF and NPRM, CBC senior officials reported that neither it nor PWC had identified any material problems.

Once PWC completed its review, FBME requested a copy of PWC's findings. Historically, CBC always provided FBME with copies of the examination reports. In this instance, however, following the issuance of the 2014 Notices, CBC consistently refused, without explanation, to provide FBME with a copy of PWC's 2014 findings despite the Bank's repeated requests.

Beginning in September 2015, based on suspicions that CBC had provided a purported PWC report to FinCEN—presumably as part of CBC's attempt to convince this agency that FBME's AML procedures were somehow deficient—FBME began asking FinCEN to provide the Bank with a copy of the report, which necessarily reflected unclassified information this agency was required to disclose. After repeated requests, FinCEN's counsel eventually provided a carefully-worded response saying that "to the best of our knowledge FinCEN does not have [the PWC reports] in its possession and therefore does not plan to rely on them."[86] In response to a follow-up inquiry, however, FinCEN's attorneys would ***not*** confirm that "FinCEN never previously received, reviewed, or relied upon the [PWC reports]."[87]

Conspicuously, the day after FinCEN refused to confirm or deny that it previously received, reviewed, or relied upon the PWC report, CBC *for the first time* provided FBME with a

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[85] Cypriot law requires CBC to conduct annual audits of all domestic and international banks in Cyprus. *See* Business of Credit Institutions Laws of 1997 to (No. 6) of 2015, § 26E-(1). For years, CBC's standard practice has been to retain an outside auditor to assist CBC in conducting an AML evaluation of the Bank and provide a report upon completion of the audit.

[86] Ex. 40, Email from FinCEN Counsel to FBME Counsel (Sept. 17, 2015).

[87] *Id; see also supra* n.83 (noting the conspicuous and peculiar manner in which FinCEN was ultimately forced by the district court to acknowledge, even while refusing to disclose, unspecified "law enforcement sensitive" materials that it effectively purged from the administrative record after the fact).

report purporting to incorporate PWC's 2014 findings.[88] Such timing affords every indication that FinCEN and CBC were closely communicating about the alleged reports.

Even more alarming, however, is the ensuing revelation: Shortly after CBC disclosed its report that purported to incorporate PWC's findings, PWC issued a statement reporting that ***it never authored or reviewed any reports***, despite multiple references by CBC and ostensible reliance by FinCEN.[89] FBME is thus left to guess at what PWC actually reviewed, concluded, and reported to CBC. If anything, the shroud of secrecy and mysterious circumstances surrounding the phantom PWC report suggest that the Cypriot regulators likely misrepresented information to FinCEN about FBME—or else (much the same) disguised their own biased, self-serving findings regarding FBME as those of PWC in order to advance their goal of scapegoating FBME to distract from the systemic problems within the domestic Cypriot banking sector and seizing the Bank and its assets.

2. FinCEN and CBC Partnered Against FBME in Response to the Bank's Various Legal Actions Against the Regulators

Conduct of the litigation points to equally close and troubling coordination between the two regulators whereby each indefensibly assails FBME while positioning itself to deflect blame onto the other so that both can escape accountability. For example, only days after FBME notified FinCEN, through its litigation counsel at the Department of Justice, that FBME would be (1) bringing a legal challenge contending that the imposition of the Final Rule would irreparably harm FBME; and (2) seeking a preliminary injunction against it, CBC claimed that the Final Rule "precludes any prospect that FBME Cyprus" will be able to continue functioning, thus necessitating liquidation of the Bank.[90] At the same time, CBC was careful "not [to] concede that [doing so] would destroy irreparably the business of FBME or FBME Cyprus Branch" because FBME "has already been irreparably destroyed by FinCEN's actions."[91] CBC thus offered, quite gratuitously, a defense to FinCEN, suggesting an absence of "irreparable harm" and using terms that would be familiar to U.S. lawyers schooled in litigating injunction requests.

Unsurprisingly, CBC's offering matched the terms in which FinCEN went on to argue—albeit unsuccessfully—to Judge Cooper that effectiveness of the Final Rule would not irreparably harm FBME and should not be enjoined.[92] Moreover, by FinCEN's account, it was *CBC* that posed the harm to FBME, insomuch as "any potential liquidation by the [CBC] is not the *direct* result of the Final Rule . . . ."[93] As FinCEN's counsel submitted to Judge Cooper,

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88 Ex. 41, Letter from CBC to FBME (Sept. 18, 2015).

89 Ex. 42, Letter from PWC to FBME (Nov. 4, 2015); Ex. 43, Letter from PWC to FBME (Dec. 21, 2015).

90 Ex. 29, Letter from CBC to Arbitration Tribunal, at 4 (Aug. 3, 2015).

91 *Id.* at 4–5.

92 *See, e.g.*, Ex. 51, Defendants' Opp. to Motion for Preliminary Injunction at 39–44, *FBME Bank Ltd.*, No. 15-cv-1270 (CRC) (D.D.C. Aug. 27, 2015), ECF No. 23-1.

93 *Id.* (emphasis added).

"while [CBC] say they are motivated by the Final Rule, they do not say that their actions are contingent on the final date of that rule. To the extent they are persuaded that the Final Rule is going to take effect, there is no reason for them not to take action, regardless of what this court does."[94] Thus, FinCEN argued that a preliminary injunction was not necessary because *CBC*, rather than FinCEN, was responsible for harming the Bank.

At the same time, Cyprus has employed a similar strategy in FBME's pending arbitration action in order to evade liability. Central to Cyprus's defense in the arbitration is its argument that *FinCEN*'s actions are to blame for FBME's demise. For example, CBC has argued that:

- *FinCEN*'s actions have crippled FBME by, for example, rendering FBME "unable to properly conduct business in all currencies, including Euros."[95]

- "Once *FinCEN* [announced the Final Rule], any possibility of FBME returning to normal banking operations in the foreseeable future was eliminated."[96]

- "In light of *FinCEN*'s statements, [FBME] clearly is not viable, and has no possibility of surviving as a normal banking institution. . . . The actions of FinCEN are reason enough for the Central Bank to consider FBME and the Branch as irremediably damaged . . . ."[97]

- "[T]he measures to be taken by the Central Bank of Cyprus, in its capacity as Resolution Authority, are necessary to resolve the substantial negative impact of *FinCEN*'s actions on FBME . . . ."[98]

In sum, the two regulators have expressly been cuing off one another in an effort to wipe out FBME, with neither supposedly accountable. CBC has been trying to clear the way for FinCEN to wipe out FBME in a way that CBC contends would absolve CBC of liability. At the same time, FinCEN has been pointing over to CBC as independently sealing FBME's fate. And the voluntary remand that FinCEN fought for and won, over FBME's objection, was used by CBC as its window for rushing to terminate FBME once and for all before any tribunal could say anything more. The result is that, even as both regulators together set out to destroy FBME, they each cynically preserve their ability to pin the blame on the other. They would thereby tie a vicious, complete circle between continents--one that may succeed in destroying the Bank without basis in law or reason, yet enable each regulator to avoid answering to the courts simply

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94 Ex. 46, Transcript of Preliminary Injunction Hearing at 102:16–21, *FBME Bank Ltd.*, No. 15-cv-1270 (CRC) (D.D.C. Aug. 25, 2015), ECF No. 26.

95 Ex. 37, Letter from CBC to Arbitration Tribunal, at 4 (Aug. 26, 2015) (emphasis added).

96 Ex. 30, Letter from CBC to Arbitration Tribunal, at 3 (Aug. 31, 2015) (emphasis added).

97 Ex. 38, Letter from CBC to Arbitration Tribunal, at 7 (Sept. 3, 2015) (emphasis added).

98 Ex. 39, Letter from CBC to Arbitration Tribunal, at 2 (Sept. 15, 2015) (emphasis added). As described above, notwithstanding CBC's finger-pointing, it has also carefully worded its public communications to support FinCEN's defense in the U.S. legal proceedings.

by pointing to the other regulator's portion of their shared noose. Such a dynamic does not fit comfortably within the rule of law and should disquiet any fair-minded observer of these proceedings. The dynamic should now come to a hard and complete stop.

3. Given its Partnership With CBC Throughout This Proceeding, FinCEN Must Now Critically Evaluate and Renounce All Input and Influence From CBC

At this point, FinCEN should not be ignoring or denying CBC's taint on this proceeding. Instead, FinCEN should be taking care to acknowledge and eradicate that taint, for which FinCEN stands to be held accountable in the context of this proceeding. The rightful result would then be to withdraw the Proposed Rule.

In light of the course of proceedings recounted above, FinCEN cannot deny that it has partnered with CBC since at least July 2014, including by relying on information about FBME that stems from CBC.[99] Before relying on information provided by CBC, this agency must critically evaluate the veracity and reliability of CBC. Failure to do so would be irresponsible and violative of FBME's rights under the APA and due process. Accordingly, FinCEN must now acknowledge and account for the reality that Cypriot regulators are attempting to avoid scrutiny of domestic banks and implementing an opportunistic plan to seize control of and liquidate the Bank, and have been using FinCEN and this proceeding as instruments of that plan. Through its continuing partnership with FinCEN, CBC has infected these proceedings from root to branch, causing this agency unfairly to target FBME and to ignore or discount compelling evidence provided by the Bank.

With CBC thoroughly discredited, the submissions of FBME must be given their due. And FBME has refuted the allegations in the NOF and demonstrated the ever-improving compliance of the Bank's AML program. Indeed, as discussed below and in prior submissions, outside auditors whose professionalism and integrity are beyond reproach have found that FBME's AML protocols meet or exceed Cypriot and European laws and regulations.[100] This is not a Bank deserving of any sanction, much less the extreme blow of a prohibition under the fifth special measure. Only a regulator that has ill motives or has ventured badly astray—to the point of arbitrariness and caprice, then past it—could conclude otherwise.

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[99] *See, e.g.*, Memo. of FinCEN Supporting Final Rule, at 2 (July 14, 2015); *See* Ex. 46, Transcript of Preliminary Injunction Hearing at 52:10–14, *FBME Bank Ltd.*, No. 15-cv-1270 (CRC) (D.D.C. Aug. 25, 2015), ECF No. 26.

[100] *See infra* Section IV.B–IV.D.

IV. THE NEW ADMINISTRATIVE ACTION REMAINS THOROUGHLY FLAWED

A. After FBME Previously Rebutted Each Of FinCEN's Allegations, FinCEN Has Offered No New Evidence

The Proposed Rule confirms this agency has done nothing to improve its case. FinCEN is now re-relying upon precisely the same flawed, outdated, unsubstantiated allegations that it did previously—including many that FBME suspects CBC cooked up for FinCEN in furtherance of its calculated plan to deflect scrutiny from domestic banks and seize control of FBME and its sizeable assets.[101] In no respect has FinCEN supplemented, updated, or improved its findings.[102] Even if FinCEN may now purport behind the scenes to be substantively reformulating its case, FBME will have had no opportunity to comment responsively on FinCEN's new and different case—and such opportunity to respond is, at a minimum, essential to the APA and due process. As such, FinCEN's failure to expand and improve its case for purposes of the Proposed Rule should be preclusive of any valid adoption.

As this agency will recall, in the original proceeding, FBME demonstrably addressed and refuted every single one of FinCEN's decipherable allegations, following a detailed investigation by forensic investigators and auditors at EY in the United States. EY's reports reflect the conclusion of a team of professionals—who received all requested support from FBME in reviewing the Bank's files, transactions, and other information—that there was no discernible basis for most of the allegations.[103] Similarly, EY confirmed that (1) FBME's compliance policies worked as they should have in the various instances at issue; and (2) the Bank had taken appropriate steps to report suspicious activity, freeze assets, and terminate customer relationships.[104]

Although FinCEN characterizes FBME as a bank designed to violate and circumvent AML laws and procedures, the evidence demonstrates, to the contrary, that FBME is committed to meeting or exceeding applicable AML laws. Needless to say, all banks will experience problems with customers and transactions.[105] The purpose of AML procedures is to identify suspicious customers or transactions so that the Bank may take appropriate action. In the case of FBME, its AML procedures worked as they should—problematic customers or transactions were identified and the Bank reported these issues to the proper regulatory authorities. FinCEN has

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[101] *See* Proposed Rule, 80 Fed. Reg. 74064 (Nov. 27, 2015).

[102] *See id*. (merely citing to FinCEN's original Notice of Finding regarding FBME and not supplying any additional findings).

[103] Ex. 52, ERNST & YOUNG, FBME BANK LTD. TRANSACTION REVIEW AND ASSESSMENT WITH RESPECT TO FINCEN'S NOTICE OF FINDINGS DATED JULY 15, 2014 (Dec. 5, 2014) (the "Transaction Analysis").

[104] *Id.*

[105] *See*, *e.g.*, DELOITTE, THIRD PARTY ANTI-MONEY LAUNDERING (AML) ASSESSMENT OF THE EFFECTIVE IMPLEMENTATION OF CUSTOMER DUE DILIGENCE (CDD) MEASURES WITH REGARD TO CYPRUS'S DEPOSITS AND LOANS 3 (2013) ("[T]he practical impact is that in our extensive experience, no institution can be expected to have a 100% perfect compliance record.").

yet to provide any meaningful response to the on-point facts and evidence establishing that FBME's AML procedures are fundamentally compliant—and certainly have been maintained, implemented, and improved in good faith.

To the extent that FinCEN may nonetheless identify *isolated instances* in which AML systems and procedures proved *imperfect*, no one should mistake that as basis for invoking Section 311 sanctions reserved for an institution of "*primary* money laundering concern." Otherwise, any and all commercial international banks would be exposed to such sanctions merely because a handful of illicit transactions may slip through, despite the utmost good faith and compliance by the bank and its officers, amidst years of operations and ever-evolving AML policies and practices.

B. FinCEN Arbitrarily Ignores FBME's Extensive AML Compliance Program, Which Meets Or Exceeds Local And European Requirements

Throughout this proceeding, without any cogent explanation or justification, FinCEN has disregarded and ignored the robust and ever-improving nature of FBME's compliance program. FBME's program has consistently evolved in response to developing legal authorities within Europe, including the E.U. Third Money Laundering Directive (2005/60/EC) ("MLD3") and the fourth issue of the CBC Directive to credit institutions in accordance with Article 59(4) of the Prevention and Suppression of Money Laundering Activities Laws of 2007 to 2013, issued in December 2013 (the "CBC 4th Directive") (together the "Directives"). As discussed further below, FBME has (1) adopted a manual of policies and procedures that is compliant with applicable local and international laws; (2) appointed a qualified money laundering compliance officer who has wide discretion and power to ensure that the Bank effectively implements all AML and compliance-related policies and procedures; (3) a well-structured, multi-tiered compliance department with appropriate staffing and resources; (4) detailed policies relating to the account opening process and know your customer ("KYC") procedures; and (5) ongoing, rigorous customer due diligence procedures. FinCEN's refusal to consider FBME's extensive compliance program violates the APA and due process and is presumably the result of CBC's invidious taint. Provided below is a summary of key aspects of FBME's compliance program that FinCEN must now consider as it never before has.[106]

1. FBME Has a Robust Manual of Policies and Procedures

The Bank has an extensive manual of policies and procedures (the "Manual") that includes a detailed compliance section. According to Ernst & Young, which FBME engaged in

[106] For additional information relating to FBME's compliance program, see FBME's September 22, 2014 comment on the NOF and NPRM, incorporated by reference and attached as Exhibit 53 as if fully set forth in this comment.

2014 to review its compliance protocols, FBME's Manual "is in line with the applicable requirements of the [CBC and E.U.] Directives."[107]

Adopted in its current form in October 2006, the Manual is provided to all employees and is easily accessible on every employee's computer. Compliance personnel annually review and revise the Manual to implement enhancements to the Bank's compliance program that are made regularly and also when prompted by changes in legal and regulatory requirements, industry best practices, or the recommendations of internal or external audits. Since its adoption in 2006, the Manual has been approved by senior management and the Bank's Board of Directors at least annually and whenever there were changes to law or policy that required updates to the Manual.

The Manual's compliance section specifies detailed policies and procedures covering AML issues, including but not limited to: KYC procedures, required documentation for personal and corporate accounts, procedures for high-risk customers, monitoring of accounts and transactions, and the role of the Money Laundering Compliance Officer.

2. The Money Laundering Compliance Officer Has Wide Discretion and Power to Ensure the Effectiveness of FBME's Compliance Program

FBME's Board of Directors has appointed a Money Laundering Compliance Officer ("MLCO") to oversee the compliance program and regularly assess the Bank's compliance and report to the Board. As EY found in its 2014 Assessment, the current MLCO is highly qualified. With over a decade of banking experience, a diploma in Compliance from the International Compliance Association in the United Kingdom, and a background studying international law, she "has the requisite qualifications (e.g., knowledge, skills, experience) and seniority to discharge her duties."[108] She started working at the Bank in 2009 and in 2011, with CBC's approval, ascended to the position of MLCO and Group Head of Compliance.

The MLCO's duties include, among others, effective implementation of the compliance program. Thus, the MLCO oversees the training of employees and is responsible for assessing and managing the risks emanating from existing and new customers. The MLCO also serves as a first point of contact for AML regulators. The MLCO submits suspicious transaction reports ("STRs") to the appropriate authorities and maintains a registry of all such reports.

The Compliance Department reports to the MLCO/Group Head of Compliance, who in turn reports directly to the Board of Directors. The MLCO/Group Head of Compliance has been a member of the Executive Committee, the Bank's senior management committee, since that committee was formed in 2012 and delivers an annual report on the state of the compliance program to the Board of Directors and the Executive Committee. The MLCO's report to the Board includes an overview of (1) new measures implemented to comply with CBC's applicable

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[107] *See* Ex. 34, ERNST & YOUNG, FBME BANK LTD. ASSESSMENT OF FBME BANK LTD'S ANTI-MONEY LAUNDERING (AML)/SANCTIONS COMPLIANCE PROGRAM at FBME000000012 (Sept. 22, 2014) (the "2014 EY Assessment").

[108] *Id.*, at FBME00000009.

directives; (2) the findings and recommendations of any new audit results; (3) the number of STRs submitted to MOKAS, the Cypriot agency responsible for combatting money laundering, with any particular trends identified; (4) the number of suspicious transactions investigated by the MLCO for which no report was filed with MOKAS; (5) preparation of any recent internal suspicion reports to MLCO (which may then form the basis of a STR); (6) the identification of any gaps in monitoring, due diligence, or other compliance functions; (7) a summary of key information related to high-risk customers; (8) an update on AML employee training; and (9) any other information necessary to keep the Board apprised of AML developments within the Bank. CBC, which also receives the MLCO's annual report, has never commented on it, much less found fault with it. Additionally, in her role as Group Head of Compliance, the MLCO reports to the Board semiannually on general compliance matters, including AML, for the rest of FBME's operations, including those in Tanzania.

In 2014, the Board appointed an Alternate MLCO to assist the MLCO with her duties or formally act in her place in the case of absence or illness. Before joining FBME, the Alternate MLCO worked in the credit department of Commerzbank in Berlin. She began working at FBME in July 2007 and has served in the Account Opening section assisting the Head of the section and the Compliance Department, where she is currently an Assistant Manager. In April 2015, she obtained certification as an Anti-Money Laundering Specialist by the trade group ACAMS, the Association of Certified Ant-Money Laundering Specialists.

3. FBME's Compliance Department is Well-Structured and Multi-Tiered

FBME is committed to maintaining a compliance program in line with or exceeding regulatory requirements and industry best practices of comparably-sized, similarly-located banks. When it named its new MLCO in 2011, FBME empowered its MLCO with the authority and resources necessary to expand and enhance the compliance program.

As explained below in Section IV.C, FBME and its management welcome regular feedback from internal and external sources such as auditors, correspondent banks, and regulators in order to identify and implement any necessary program enhancements. In response to recommendations and requests by CBC, internal and external auditors, and Compliance Department leadership, FBME has taken significant steps to bolster its policies, procedures, and practices and has dramatically augmented the Compliance Department's resources. FBME has steadily increased the size and capability of the Compliance Department, which tripled in size over the span of five years, growing from six employees in 2009 to eighteen employees in 2014.

The current Compliance Department consists of seasoned professionals who have broad experience across the Bank. They draw from their understanding of how other departments function in order to ensure a healthy, seamless relationship between the compliance and business functions. In June 2011, the MLCO restructured the Compliance Department to provide dedicated functions for specific program requirements. The Compliance Department is presently divided into three units: the New Accounts Approval Unit; the KYC Due Diligence Update Unit; and the Monitoring Unit. By the time the NOF was issued, FBME had 17 people working in these units.

(a) New Accounts Approval Unit

The New Accounts Approval Unit ("NAAU") reviews all applications for new accounts. For each account, the NAAU is required to perform a full KYC/background review of the prospective customer in accordance with the Bank's policies, described below in Section IV.B.4. Before approving the account, the Unit considers the prospective customer's business activities and risk level to determine whether such an account is consistent with the Bank's internal policies and the CBC 4th Directive. For example, upon the recommendation of the Compliance Department, the Board banned the onboarding of Russian Politically Exposed Persons ("PEPs") in January 2013 in light of compliance risks.

(b) KYC Due Diligence Update Unit

The KYC Due Diligence Unit ("KDDU") is responsible for reviewing customer files to obtain up-to-date KYC documentation. The Bank reviews all high-risk customer files annually, and normal-risk files every three years. In the case of corporate customers, the Unit will check that the customer remains in good standing in the country of incorporation (*e.g.*, by requesting a Certificate of Good Standing or performing a company search); review the customer's business activities to ensure they align with its transactions; and perform World-Check searches, internet searches, and sanctions screening (which is conducted for the shareholding structure, including the ultimate beneficial owner(s)). Should a KDDU employee encounter any questions or concerns, he or she notifies other compliance personnel, such as the MLCO, to determine what further action should be taken. These KYC reviews are described in more detail in Section IV.B.4 below.

(c) Monitoring Unit

This unit regularly monitors transactions processed through the Bank's accounts. Among other things, the unit (1) monitors transactions in real-time using HotScan, a screening technology that evaluates pending transfers and identifies potentially problematic transactions for additional analysis by the Compliance Department; (2) monitors all credit and debit card transactions for potentially suspicious or problematic payments; (3) evaluates completed transactions using MANTAS, a screening technology which detects irregularities in past transfers; and (4) monitors all inward and outward transfers relating to high-risk accounts, regardless of amount, using HotScan. The Monitoring Unit also prepares daily cash and check reports to determine whether there were any cash deposits in excess of EUR 10,000 or withdrawals in excess of EUR 15,000 (or equivalent), in which case documentation supporting the deposit or withdrawal is requested from the customer.[109] In addition, the Unit prepares numerous other reports, such as monthly reports to the MLCO analyzing cash deposit patterns, reports of accounts closed by the Compliance Department, and STRs to MOKAS.

[109] Cash and check payments total only 0.067% of the total value of payments made and 1.9% of the total number of transactions.

4. FBME Has Detailed Account Opening and "Know Your Customer" Policies

FBME requires thorough KYC exercises, including obtaining documentation to confirm the customer's identity, and the Bank uses standardized account forms to complete this process whenever an account is opened. For corporate accounts, such documentation is required for all parties, including shareholders with an interest over 10% of each entity up to and including the ultimate beneficial owner(s). Required documentation includes passports and certified true copies thereof (or other legal alternatives), references, proof of address, certificates of incorporation, statutory documents, and other items consistent with industry best practices. Individual customers complete an activity profile, and corporate customers complete a business profile, which contains information on the purpose for which the account is required; the anticipated annual account turnover and method of deposits; a detailed description of the customer's main business activities; the expected sources of incoming funds (including countries and principal counterparties); and expected destination of outgoing payments (including countries and principal counterparties). Further, since 2007, the Bank has used the World-Check database to screen customers not only for sanctions exposure, but also to help identify reputational risk (the background check includes a search of adverse media).[110]

Some aspects of the Bank's KYC practices exceed U.S. regulatory requirements. For example, consistent with EU best practices and CBC and Bank of Tanzania requirements, FBME has required the identification and verification of ultimate beneficial owners since at least 2000. In contrast, FinCEN proposed just last year that U.S. financial institutions might be required to identify ultimate beneficial owners. Moreover, FinCEN's proposal sets a threshold of a 25% equity interest for identifying ultimate beneficial owners, whereas FBME adheres to a much stricter threshold, defining ultimate beneficial owners as "persons with direct or indirect ownership or control or voting rights of 10% plus one share of the company's share capital."

As EY noted in its 2014 Assessment, "FBME applies [Enhanced Due Diligence ('EDD')] measures on its high-risk customers" in accordance with the requirements of the Manual. The Compliance Department is required to classify customers as high-risk if they are: PEPs; bearer share companies; trusts; foundations; non-face-to-face customers; customers from countries that do not apply the Recommendations of the Financial Action Task Force; correspondent banks outside the E.U.; or if they meet any of several other factors listed in the Compliance section of the Manual. FBME does not employ a one-size-fits-all approach to EDD for high-risk clients. Instead, as EY points out, EDD measures "are tailored to address the unique risk(s) posed by each . . . customer type." The Manual defines appropriate EDD measures, which may include, for example, completing bearer share questionnaires (*e.g.*, to identify changes in corporate ownership structure), conducting a further analysis of PEP relationships (*e.g.*, additional background checks on the PEP focusing on source of wealth), and verifying the validity of

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[110] *See Thomson Reuters World-Check*, THOMSON REUTERS, http://thomsonreuters.com/world-check-risk-intelligence/ (last visited Jan. 22, 2016). The Bank conducts its own KYC on all customers, even those referred by its most trusted Approved Third Parties ("ATPs").

business/professional licenses. All high-risk customers must be approved by the MLCO or Alternate MLCO prior to account opening.

As discussed below in Section IV.C, FBME recognizes the importance of regularly reviewing its KYC procedures in order to eliminate any potential gaps and ensure the Bank harnesses evolving technologies. In its 2013 external audit of FBME (discussed below), KPMG noted that a Customer Relationship Management System ("CRMS") ought to be implemented to enable better oversight of all customer-related data, and the Bank did so in 2013. Similarly, at KPMG's suggestion, the compliance program now includes specific markers in FBME's core banking system, "FlexCube," that describe the nature of all high-risk accounts.

In its 2014 Assessment, EY tested a statistically relevant sample of recent and older corporate and individual customer files in order to determine whether the procedures are properly carried out in line with the Manual. For almost all of the reviewed customer files, FBME had conducted sufficient due diligence and collected all necessary information from its customers.[111]

5. FBME Conducts Vigorous, Ongoing Customer Due Diligence

As noted above in Section IV.B.3(b), FBME has a separate unit dedicated to reviewing and updating KYC. The team of seven officers is devoted exclusively to updating and maintaining customer files.

(a) All Customers

FBME regularly reviews all customer files to ensure the adequacy and validity of relevant identification documents and information. The outcomes of these reviews are recorded in separate notes kept in the customer files. Each non-high-risk customer file is reviewed every three years, and FBME undertakes additional due diligence whenever, for example, (1) an individual transaction appears to be unusual or significant compared to the normal pattern of transactions or business profile of the customer; (2) there is a change in the customer's legal status or corporate structure; or (3) there is a change in the way the account operates. The Compliance Department also maintains files that compare transactions executed against anticipated or usual turnover.

(b) High-Risk Customers

Consistent with the Bank's Manual, FBME reviews high-risk customer files on an annual basis. The KYC team compares executed transactions against anticipated or usual turnover and keeps the results on file. The KYC team also reconfirms the customer's business activities,

[111] As to the files EY highlighted, the issues consisted primarily of gaps in documentation of in connection with account opening procedures, such as documentation evidencing that FBME performed background internet searches before opening the account. As described in Exhibits 28 and 33, FBME has remedied these issues by calling for clearer documentation of the KYC measures taken so that when those measures, such as a background search, do not identify information for inclusion in the file, it is nevertheless clear that such searches were conducted.

location, and status as an entity in good legal standing and not subject to international sanctions. In addition, certain types of high-risk accounts (such as accounts held for PEPs or companies with bearer shares) are subject to annual all-encompassing review by the Monitoring Team and approval by the MLCO or Alternate MLCO for continuation of the relationship.

PEPs must fill out a supplemental due diligence form, which probes their involvement in public administration as well as their professional background and source of wealth. The form also contains questions about close associates and the visibility of immediate family members in public life. As stated above, for example, FBME prohibited the onboarding of Russian PEPs beginning in January 2013.

C. FinCEN Inexplicably Continues To Ignore The Positive Conclusions Reached By Independent Auditors And Investigators

Also significant is that FinCEN cannot and does not deny that FBME has, of its own initiative, made consistent improvements apace with evolving AML practices, which FinCEN has been encouraging around the world, with gradually increasing—but by no means complete and immediate—success. Nor should FinCEN overlook that FBME has demonstrated a commitment to AML best practices by routinely engaging first-class outside auditors, implementing their recommendations, and operating transparently with regulators.

Indeed, FBME regularly solicits review and feedback regarding its compliance programs from experts at Big Four accounting firms such as KPMG and Ernst & Young. Since 2011, FBME has engaged these firms on three separate occasions to enter the Bank, review its policies and procedures, and give an unvarnished assessment of FBME's AML practices. By the time of KPMG's audit in 2013, "FBME basically fulfill[ed] the requirements as set out by the Cyprus regulator and [was] in principle in compliance with E.U. standards."[112] And as discussed above, EY found one year later that "FBME has developed, administered, and maintained an AML/sanctions compliance program [that] incorporates the requirements of both the CBC . . . and the EU . . . ."[113] In addition, FBME specifically instructed a team from EY in the United States to investigate the specific allegations in the NOF in the fall of 2014 (discussed below). The outside auditors' findings are summarized below.

1. The 2011 Ernst & Young Audit Finds FBME's Then-Contemporary Policies Satisfy Regulatory Requirements

In 2011, FBME engaged a team from EY to audit its compliance program, with the primary goal of assessing the customer onboarding process. Among other things, FBME made all of its AML policies, procedures, reports, and other related documents available for EY to review; produced senior Bank employees, who sat for interviews with EY; and pulled a sample of 95 customer files for EY's examination. After EY's review, EY concluded that FBME's

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[112] Ex. 27, KPMG, REPORT ON THE EFFECTIVENESS OF MEASURES REGARDING ANTI-MONEY LAUNDERING AND COUNTER-TERRORISM FINANCING AT 12 (2013).

[113] Ex. 34, 2014 EY Assessment, at FBME00000005 (Sept. 22, 2014).

standard business profile in use at the time for all new accounts included all the information required by the applicable CBC Directive. To be sure, EY found that legacy accounts dating back years did not always contain information the CBC Directive required for new accounts but, in its audit report, EY noted that FBME's compliance department was already in the process of updating those accounts according to the CBC-compliant template.

The 2011 EY audit also reviewed whether FBME obtained appropriate documentation, including company incorporation documents, passports, and utility bills, and ensured that the certifications of such documents were valid. It noted that in certain cases incorporation documents for corporate customers, and passports and utility bills for individuals, were not appropriately certified. But, even as to those small and few ostensible shortcomings, a number were due, for example, to (1) CBC's refusal to follow international standards and accept apostille as an acceptable means of certification (though EY noted it found such certification sufficient); (2) FBME's use of photocopies of documents contained in multiple files; and (3) the Bank's reliance on informal as opposed to certified translations. The 2011 EY audit noted that for all high-risk accounts, the Bank compared actual against anticipated turnover to screen for unusual activity. And even though the Bank did not do the same for its non-high-risk customers with the same frequency, it performed such comparisons annually for all clients using an automated report extracted by the Bank's system.

Notwithstanding some technical faults such as accepting a photocopy as opposed to an original document, the 2011 EY audit did not identify any aspect of FBME's compliance procedures that violated any substantive regulatory requirement applicable to FBME. Moreover, in areas in which EY suggested improvement, such as documentation of legacy accounts that, under contemporary guidelines, was inadequate, EY noted that FBME had plans to remedy that issue. Indeed, EY cautioned that "it may not be appropriate to use these findings in the future" because it was only based on the information it had at the time. Whatever the wisdom of relying on shortcomings from more than four years ago to draw conclusions about the present state of an international bank, here it is particularly misplaced given EY's express disclaimer of reliance on its findings in the future. Moreover, as discussed further *infra*, subsequent reviews confirmed that FBME had followed through on its plans to remedy any shortcomings as it continues to improve its compliance programs.

2. The 2013 KPMG Audit Concludes That FBME Complies With Applicable Regulatory Standards

Less than two years after EY's 2011 audit report, FBME brought in professionals from KPMG to review the Bank's policies once again. KPMG conducted an extensive document review (including 68 customer files and two bank files selected randomly from lists of new and/or high-risk customers), walkthroughs, interviews with Bank personnel, and an assessment of the Bank's AML/CTF policies, procedures, and practices. KPMG observed FBME's use of standardized account opening forms, customer-specific risk-rating assignments, verification of customer and ultimate beneficial owner information, and database searches on all customers, and concluded that the Bank's internal policies were comprehensive. Finding no regulatory

shortcomings, KPMG concluded that "FBME basically fulfills the requirements as set out by the Cyprus regulator and is in principle in compliance with E.U. standards."[114]

But FBME was not content simply to comply with E.U. and Cypriot regulatory requirements. Instead, FBME solicited KPMG's evaluation of how its compliance program compared to European and Cypriot best practices. KPMG's recommendations focused on ways to modernize and automate FBME's compliance program in order to streamline its procedures and reduce the possibility of human error. For example, KPMG noted that FBME stores the names of ultimate beneficial owners in an Excel file that is screened on a monthly basis and when there are changes in applicable sanctions lists from OFAC, the E.U., and others. Even though KPMG did not identify any specific failure that arose from that system—the spreadsheet can be accessed by middle and senior management in Compliance, IT, Audit, and Customer Service Departments, and has been screened regularly since 2011—KPMG nevertheless recommended that the information be transferred to FBME's core information system, FlexCube, to reduce the need for manual checks and updates. KPMG also recommended that FBME's new procedures for collecting and evaluating ownership information, which demonstrated links between group entities, be implemented for older customers, as well. And KPMG found that certain customer files reviewed did not have sufficient information to gain a complete understanding of the customers' activities or business rationale.

In short, KPMG suggested that FBME's protocols, though sufficient to meet applicable regulatory requirements, would benefit from updates to streamline the AML process. KPMG recommended that FBME document comprehensive risk analysis regarding its approach to money-laundering and terrorist-financing. As described below in Section IV.D, the Bank has adopted the AML/CTF risk assessment report and implemented the recommendations.

3. Ernst & Young's 2014 Assessment is to Like Effect

As explained above in Section IV.B, FBME engaged EY in 2014 to conduct a thorough assessment of its compliance program. EY observed that FBME's compliance program "incorporates the requirements" of the European Union and CBC directives regarding AML compliance[115] and that FBME has "protocols in place that allow the Bank to continuously keep the Program aligned with these legal requirements."[116]

4. Ernst & Young's 2014 Transaction Analysis Specifically Refutes FinCEN's Allegations

As explained below in Section IV.E, FBME separately engaged EY to investigate the allegations in the NOF. The results of that investigation are discussed at length below, and EY's report itself is attached as Exhibit 52. In short, EY's investigation found no basis for the

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114 Ex. 27, KPMG, at 12.

115 Specifically, the MLD3 and CBC 4th Directive.

116 Ex. 34, 2014 EY Assessment, at FBME00000005.

allegations in the NOF and found that a number of them were based on inaccurate or incomplete information.

D. FinCEN Ignores That FBME Has Promptly And Consistently Adopted Auditors' Suggestions So As To Establish Compliance Above And Beyond The Requirements Of Law

FinCEN also continues to overlook, without explanation or justification, FBME's eagerness to adopt recommendations from outside auditors, which clearly demonstrates the Bank's commitment to effective AML controls. As EY reported in its 2014 Assessment, "[a]ll previously identified money laundering and sanctions-related issues have been addressed by the institution. For those corrective actions that have yet to be fully implemented, documented project plans with milestone dates are in place."[117] FBME's work to implement or improve procedures relating to the areas identified in past audit reports is described below. Notably, the few improvements that await implementation have been held up only as a result of this proceeding and resulting, persisting operational constraints upon the Bank.

1. FBME's Response to the 2013 KPMG Audit Demonstrates its Commitment to Effective AML Policies

As noted above in Section IV.C.2, KPMG concluded that FBME "basically fulfills the requirements as set out by the Cyprus regulator and is in principle in compliance with E.U. standards."[118] KPMG found that FBME employed AML-compliant procedures, including using standardized account opening forms, assigning risk ratings to customers, verifying customer and ultimate beneficial owner information, and performing database searches on all customers.

As to the areas where KPMG suggested improvements, FBME took these suggestions to heart and went to work on them. In Exhibit 28, FBME has laid out each of KPMG's recommendations and FBME's progress in implementing them. Of the 40 suggestions KPMG made, as of today, nearly every single one has been implemented. Among other things, FBME changed its risk assessment procedures, appointed an alternate MLCO, amended its Manual of Policies and Procedures, upgraded its software, collected additional information on customers (excluding some accounts that remain dormant) and implemented additional procedures to enhance its KYC process.

2. In Response to the 2014 EY Assessment, FBME Undertook More Improvements to Again Go Above and Beyond

EY's 2014 Assessment observed that the Bank's AML program "incorporates the requirements" of the MLD3 and the CBC 4th Directive.[119] EY's Assessment further reported that FBME "has protocols in place that allow the Bank to continuously keep the Program aligned

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117 *Id.*

118 Ex. 27, KPMG, at 12.

119 Ex. 34, 2014 EY Assessment, at FBME00000005.

with these legal requirements." The Assessment covered critical elements of FBME's Program, including compliance policies and procedures, employee training, customer identification and due diligence, risk assessments, transaction monitoring/account surveillance, and alert investigations. EY documented FBME's efforts to improve its Program over the years, and recommended areas of improvement where FBME could further strengthen it.

The Bank has reviewed EY's observations and recommendations. The Bank has already taken steps to implement these recommendations, even in the current environment where it is under resolution by CBC and the Special Administrator is poised to sell the Cyprus branch or liquidate the Bank.

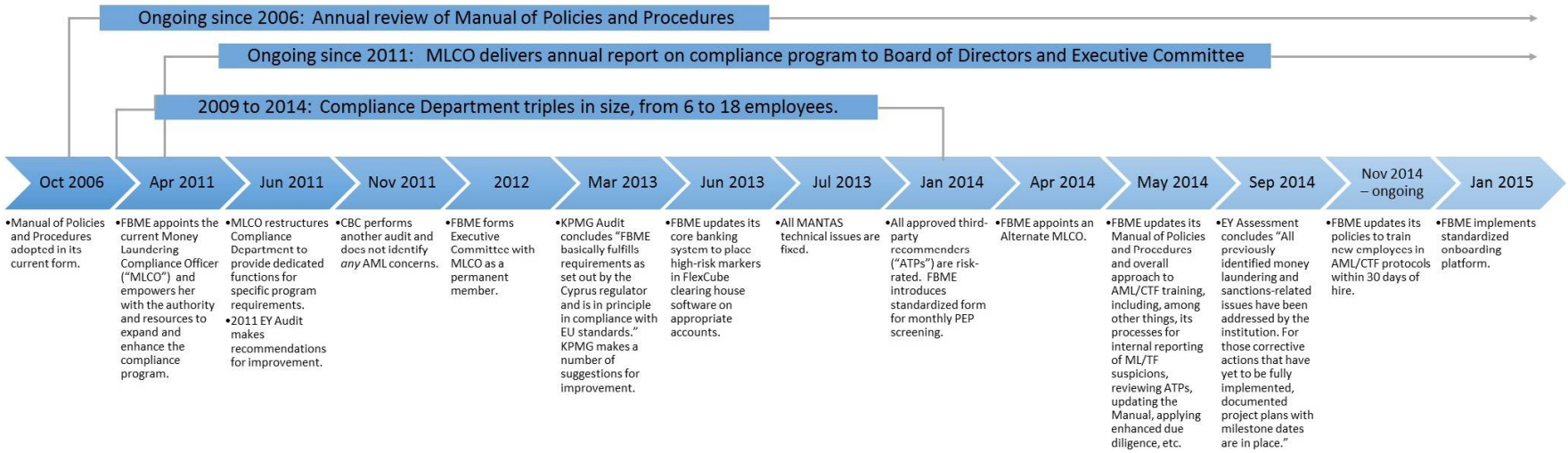
Exhibit 33 outlines each recommendation and details the actions FBME has taken in response to each recommendation. The document specifies the procedures that have been implemented, new IT or other upgrades that have been proposed, and timelines for completion. For example, in response to EY's observations, FBME instituted enhancements to its AML/sanctions employee training program, including by providing AML/CTF training to members of the Bank's board of directors (which exceeds regulatory requirements) and to new hires within a specified period after their hiring. Similarly, FBME updated its AML/CTF risk assessment to include a documented methodology for fiscal year 014. With respect to its customer identification and due diligence procedures, FBME has implemented new forms to capture additional KYC information, improved documentation in customer files of what KYC research has been performed, and adopted software adjustments to ensure centralized maintenance of the information collected. Although the Bank already uses industry-leading electronic screening software, FBME is upgrading its software and alert investigation systems.[120] These and other actions are detailed in Exhibit 33, which shows that FBME is committed to implementing any suggestions that can improve its AML protocols. The remaining suggestions are ready to be implemented as soon as the Bank resumes normal operations once FinCEN withdraws the 2014 Notices and the Proposed Rule or a U.S. court vacates them.

3. Figure 1 Summarizes FBME's Continuous AML Improvements From 2006 Through the Present

The chart on the following page highlights the series of consistent, systematic, demonstrated improvements that FBME has been making to its AML/CTF compliance program and protocols since 2006.

[120] Unfortunately, once placed under a cloud by FinCEN's proclamations in the NOF, FBME was unable to obtain certain system upgrades because the software provider's own internal compliance protocols prevented it from doing business with FBME. As a result, FBME has not been able to add certain MANTAS scenarios (which, like so many of the recommendations, FBME has committed to implementing even though not required under any applicable regulatory regime) designed to target suspected structuring transactions.

Figure 1: Developments in FBME AML/CTF Compliance Program and Protocols



E. The Allegations In The NOF Are Misleading And Inaccurate

1. Ernst & Young Investigates and Refutes the Allegations in the NOF

In addition to the AML review EY performed following the NOF, FBME separately engaged EY to investigate the allegations in the NOF that were sufficiently specific to allow for meaningful review. EY conducted an intensive review in an attempt to identify information related to eleven allegations in the NOF and to determine what information and documents would be relevant based on the content of each statement and available data. EY's review included, for example, transaction data, customer files, FlexCube account data, MANTAS and HotScan alerts, STRs and other data submitted to MOKAS, open source web searches, World-Check searches, interviews of FBME personnel, and sample-based testing. As always, FBME cooperated fully with EY and provided every document or other information within its control in response to requests by EY.

These review procedures and the resulting findings of EY are described in detail in the Transaction Analysis attached as Exhibit 52. Section 3 of the Transaction Analysis contains a separate subsection that describes the review process and findings for each of the eleven NOF statements that are the subject of the Report. For ease of reference, each of these eleven subsections contains a summary of findings and a more detailed discussion of EY's review procedures and findings. The eleven NOF statements appear in the Report according to the order in which they appear in the NOF.

The Transaction Analysis lays out EY's findings in detail, but to summarize it briefly, the Transaction Analysis shows a pattern of conduct that is starkly at odds with FinCEN's account as laid out in the NOF. Through its review of specific transactions, customer accounts and related information, EY's fact- and documentation-based findings demonstrate that FBME acted appropriately. The Bank conducted due diligence according to its policies and procedures and screened customers against restricted party lists (such as U.S., E.U., U.N., and U.K. sanctions lists) to confirm that it did not process transactions for anyone linked by government agencies with illicit activity. When correspondent banks requested additional information regarding its customers or transactions involving its customers, FBME cooperated.

Significantly, when the Bank became aware of suspicious activity in relation to accounts or transactions, it investigated and submitted STRs to MOKAS and froze or closed accounts as appropriate. In fact, in the case of a number of transactions described in the Transaction Analysis, FBME notified MOKAS of suspected illicit activity, but MOKAS responded by saying that it intended to take no further action.

EY's detailed review to date identified the following key points in relation to each of the eleven NOF items assessed in its Report:

1. EY conducted thorough screening on FBME's entire customer database and all remitting parties named on wire transactions during 2008. It screened names against restricted party lists maintained by the United States, European Union, and others and

identified no connection between an FBME customer and Lebanese Hezbollah or other known terrorist organizations.

2. EY conducted thorough screening on FBME's entire customer database and all remitting parties and compared them against relevant restricted party lists, certain names associated with a DEA investigation, and other sources. EY identified no connection between FBME customer accounts and those identified by government agencies as being involved in international narcotics trafficking or money laundering.

3. EY identified an FBME customer that could be the individual referenced in the NOF as a "financial advisor for a major transnational organized crime figure." Following a review of relevant customer files and transactions, as well as enhanced due diligence searches, EY identified no activity whatsoever in the individual's customer file or account activity involving organized crime figures of any sort.

4. EY identified an FBME customer as the possible beneficiary of funds derived from the High-Yield Investment Program ("HYIP") fraud referenced in the NOF. However, based on its review of the customer file and the Bank's due diligence in relation to this customer, EY found no reason why this customer should have sounded alarm bells prior to the commission of the fraud. Moreover, EY found that, when FBME was alerted to potential fraud in a subsequent transaction involving the customer in 2010, FBME filed an STR with MOKAS, froze the customer's account, and transferred the funds only upon receiving a court order to do so.

5. EY identified a company that potentially was involved in the phishing scheme noted in the NOF by reviewing the STRs FBME filed with MOKAS in 2010. The STR revealed that when FBME received information from a correspondent bank identifying the relevant payment as fraudulent, FBME suspended the account, started an investigation, returned the funds to the correspondent bank, closed the account, and filed an STR with MOKAS.

6. Similarly, EY identified the company that potentially was involved in the cybercrime fraud scheme noted in the NOF through a review of STRs that FBME had filed with MOKAS. In that case, too, immediately upon being alerted to the alleged fraud by the correspondent bank involved in the transaction, FBME conducted an investigation, closed the relevant customer account, and filed an STR with MOKAS. FBME took these actions even though MOKAS expressed indifference because the relevant parties were not included in MOKAS or U.S. Financial Intelligence Unit databases.

7. EY conducted a comprehensive and detailed review in August and September 2014 of relevant customer files and transactions and did not identify any link between an FBME customer and the Scientific Studies and Research Center ("SSRC"). Following changes to the List of Specially Designated Nationals and Blocked Persons ("SDNs") implemented on October 16, 2014, FBME conducted a further review and

promptly took appropriate action by freezing two accounts linked to a newly designated SDN.

8. EY reviewed documentation related to an FBME customer who received funds from the public treasury department in Equatorial Guinea. EY identified that the relevant payment was supported by due-diligence documentation collected and retained by the Bank, including a construction contract, project materials breakdown, business plans, published articles, and pictures of the construction site. EY identified no link whatsoever between the funds transferred to the FBME customer and proceeds of any foreign corruption offense perpetrated by the President of Equatorial Guinea, Teodoro Obiang's son and his associates, or anyone else.

9. EY reviewed FBME accounts for indications of structuring, surge activity, high-risk business customers, and shell companies. EY confirmed that the Bank has in place procedures to monitor, review, and assess behavior related to surge activity, high-risk business customers, and shell companies as described in the 2014 EY Assessment. Even though neither U.S. nor Cypriot regulatory requirements expressly covers wire transfers for structuring behavior, EY found that FBME had undertaken to add a structuring scenario to its compliance program for wire transfers.

10. EY reviewed U.S. correspondent banking inquiries and FBME's responses for transactions covering more than $450 million. EY confirmed that FBME responded to the inquiries and generally documented business information and a purpose for the transaction that was consistent with business profiles and other due-diligence documentation maintained by the Bank.

11. EY confirmed that FBME implemented a policy at the end of 2009 to include either the customer's operating address or registered address in wire transactions instead of using the Bank's address. FBME maintains a limited list of current customers who are still permitted to use the Bank's address, but these customers are limited to those with a direct relationship with the Bank, such as internal accounts that FBME holds directly, Bank employee/shareholder accounts, or accounts for companies associated with Bank ownership.[121]

As demonstrated in the Transaction Analysis, FBME has provided all requested support to EY in its review of files, transactions, and other information to prepare its detailed analysis. FBME's commitment to working with EY to identify past transactions that might be relevant to information identified in the NOF demonstrates FBME's commitment to continue to cooperate with the U.S. Government, as well as the governments of Cyprus and Tanzania, in the fight against money laundering and other illicit activities.

[121] As of January 2016, the only accounts that show FBME's address are those that the Bank holds directly. The few employee and shareholder accounts that previously used the Bank's address have been updated to reflect their personal addresses.

Despite these on-point, thoroughly documented findings by EY, the Proposed Rule relies on the same misleading, inaccurate, hollow, and stale allegations that EY and FBME previously addressed and discredited. Such regurgitation demonstrates that FinCEN has not endeavored to reevaluate FBME's case or to reassess the procedural or substantive aspects of the Proposed Rule. On that basis alone, FinCEN's actions are arbitrary and capricious and violative of the APA and due process. Furthermore, FinCEN's reliance on the same NOF suggests that FBME has uncovered no new evidence or rationale helpful to its case—or, alternatively, that it fears exposing any new evidence or rationale to the light of external scrutiny and refutation.

2. New Disclosures by FinCEN Only Further Undermine FinCEN's Conclusions as Reflected in the NOF

As EY notes in its Transaction Analysis, the information in the NOF was so vague that it frustrated and stymied intelligent investigation. EY nevertheless endeavored to investigate each as best it could and found no basis for the allegations. And although FBME requested time and time again that FinCEN give more specific information to enable FBME and EY to investigate the claims—and put a stop to any potential money laundering—FinCEN has ignored and otherwise refused those requests, including through the present.

Since issuance of the NOF (and as a result of FBME's lawsuit against FinCEN), however, this agency has disclosed information suggesting it believes that FBME is implicated in corruption involving an Italian political party and financial assistance to the Government of Syria. There is no truth whatsoever to these allegations. To the extent the 2014 Notices are premised on the notion that FBME facilitated or was involved in corruption in the *Lega Nord* political party or assistance to the Syrian regime, the Proposed Rule is founded on demonstrated falsehoods. Moreover, the very fact that FinCEN was silently relying upon these unclassified, non-privileged materials while withholding them from FBME and others provides strong indication that FinCEN recognizes the weakness of its case.

(a) The *Lega Nord* Political Scandal Had Nothing to Do with FBME

On November 26, 2015, FinCEN disclosed a redacted article discussing a corruption scandal involving *Lega Nord*, an Italian political party. The article makes reference to a "middle-man" in the illicit scheme who is "connected to bank accounts in Cyprus and Tanzania."[122] Contrary to FinCEN's apparent conclusion, however, the *Lega Nord* scandal demonstrates that FBME's AML controls are in place and working properly to prevent money laundering.

On January 11, 2012, FBME received an inward payment from what appeared to be a political party. FBME immediately segregated the payment and put it into a suspense account, precisely per FBME's Manual. Indeed, that was only the second basis for holding the funds: FBME initially segregated the funds even before it was clear that a political party was involved

[122] *See* Memo. of FinCEN Supporting Final Rule, at 16 (July 14, 2015).

because the transfer lacked sufficient supporting documentation to identify the source of funds. FBME's Compliance Department determined that the documentation provided was not adequate to verify the source of funds and purpose of payment.

In particular, the fact that the customer was an independent financial adviser (as established when the account was opened) without an obvious legitimate connection to *Lega Nord* gave FBME cause for concern. Accordingly, FBME requested supporting documentation and met with the customer to investigate the origin of the funds and legitimacy of the transfer. Because the additional information did not satisfy FBME's due diligence requirements, FBME returned the funds to the source, notified the Tanzanian authorities, and closed the customer's accounts and all accounts related to it. Thus, FBME's policies and procedures ensured that the customer never received any of the money in question and that the relevant authority was properly notified.

(b) A Long-Dormant Customer Never Used FBME to Funnel Money to Syria

In December 2015, FinCEN unredacted additional portions of the July 14, 2015 FinCEN Memo. Specifically, on page 30 in the second full paragraph, FinCEN disclosed more of its response to the EY Transaction Analysis concerning a former FBME customer who was added to the sanctions list in May 2014 as a result of his alleged Syrian connections.[123] The newly released part of the memo treats the fact that FBME had a customer who was listed on the sanctions list as "bolster[ing] the argument that FBME banks customers that [sic] conduct illicit activities, including sanctions evasion, *although FinCEN does not have any evidence that [redacted] used his FBME accounts to conduct financial transactions in support of his illicit activities*."[124] (emphasis added). FinCEN's conclusion is particularly unjust given that: (1) EY reported that this customer's accounts had been closed or inactive since at least 2008—*years* before the customer was added to the sanctions list;[125] (2) FBME's AML screening software immediately notified the Bank as soon as this customer's name appeared on the sanctions list, and FBME immediately froze the dormant accounts; and (3) even FinCEN concedes that there is no evidence the customer ever used any FBME account for any illegal transaction.

3. FinCEN's Reliance on SARs is Misconceived

To paint FBME as posing a significant threat to U.S. and other financial institutions, FinCEN relies on limited and misleading statistical data regarding "suspicious wire transfers" as well as biased reports from financial institutions seeking to offload responsibility for their own actions.[126] During the hearing before Judge Cooper, FinCEN revealed that the statistical data

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123 *Id. at* 30.

124 *Id.*

125 Ex. 52, EY Transaction Analysis.

126 *See* NOF, at 42640.

relied upon in the NOF was based on SARs.[127] But such reliance is categorically invalid and improper. To begin, we know of no instance, prior to this proceeding, in which FinCEN has equated any particular SARs data or rate as indicative of a problem under Section 311. Nor is such use valid. To the contrary, it ignores the purpose of a SAR, which involves a designedly low threshold for the sake of erring on the side of over-inclusion—sweeping in transactions that are perfectly legitimate, simply to ensure there is scrutiny of them to ensure against any issue.[128] It is spurious in this light to take a SAR or any number of them as evidencing the illegitimacy of any transaction or set thereof—not to mention as evidence that a particular bank is one of "primary money laundering concern" under Section 311.[129]

(a) When Viewed within the Proper Context, the SARs Do Not Support FinCEN's Findings about FBME

Further still, FinCEN makes no serious effort to explain how or why it is faulting FBME based on SARs. For example, the NOF simply states that, between April 2013 and April 2014, FBME conducted at least USD 387 million in suspicious wire transfers through the U.S. financial system. Here, FinCEN is simply throwing off numbers in a vacuum, without sound attention to methodology, context, or reasoning. Thus, the NOF takes no account of the fact that, during the same one-year period FinCEN references, FBME conducted 270,205 wire transfers in all currencies totaling approximately USD 24.1 billion, of which 128,455 were USD transfers totaling USD *16.6 billion*. To be clear, only *1.7*% of the total amount of transfers and *2.3*% of the amount of USD transfers triggered a SAR—which hardly fits the profile of a bank *primarily* engaged in facilitating money laundering or other illicit activity. And, as discussed further below, FinCEN fails to consider alternative bases for the increase in SARs involving FBME (and presumably numerous other banks in Cyprus) between April 2013 and April 2014, such as the

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[127] *See* Ex. 46 Transcript of Preliminary Injunction Hearing at 80:14–21, *FBME Bank Ltd.*, No. 15-cv-1270 (CRC) (D.D.C. Aug. 25, 2015), ECF No. 26; *see also*, *e.g.*, Ex. 51, Defendants' Opp. to Plaintiffs' Motion for Preliminary Injunction at 38, *FBME Bank Ltd.*, No. 15-cv-1270 (CRC) (D.D.C. Aug. 19, 2015), ECF No. 23-1 ("In addition, a portion of the information that formed the basis of FinCEN's finding consisted of Suspicious Activity Reports ("SARs") by banks and financial institutions.").

[128] For example, as this agency well knows, FinCEN encourages regulated entities to file SARs even if they do not meet the monetary threshold established by statute, thereby ensuring that many legitimate transactions will be included within SARs. *See The SAR Activity Review: Trends, Tips & Issues*, FinCEN, Issue 6, at 55 (Nov. 2003), *available at* **https://www.fincen.gov/news_room/rp/files/sar_tti_06.pdf** (even where "the dollar thresholds for filing may not always be met[, f]inancial institutions are encouraged to file nonetheless in appropriate situations involving [terrorism, identity theft, and computer intrusions], based on the potential harm that such crimes can produce. Even when the dollar thresholds of the regulations are not met, financial institutions have the discretion to file a SAR and are protected by the safe harbor provided for in the statute.").

[129] Indeed, several internal Treasury Department audits conducted by the Office of Inspector General have revealed deficiencies in data quality and systems processing related to SARs. *See, e.g.*, Audit Report: SAR Data Quality Requires FinCEN's Continued Attention, Office of Inspector General Department of Treasury 3 (2010), *available at* **https://www.treasury.gov/about/organizational-structure/ig/Documents/OIG10030_(SAR_Data Quality).pdf** (59% of SARs reviewed "had instances of missing, incomplete, inappropriate, or inconsistent information"). These deficiencies "diminish the usefulness of the data for FinCEN, law enforcement, and other users." *Id*. at 13.

most obvious and likely contributor—the Cypriot financial crisis and attendant controls.[130] By ignoring such key variables as the Cypriot financial crisis, FinCEN has manipulated the data to support its own predetermined conclusion, as opposed to critically evaluating the data en route to a reasoned conclusion.

Similarly, the NOF alleges that, between November 2006 and March 2013, FBME facilitated at least 4,500 suspicious wire transfers through U.S. correspondent accounts totaling at least $875 million. Once again, however, FinCEN cherry-picks a number without regard for the larger story. Between November 2006 and March 2014, FBME conducted 1,436,100 wire transfers in all currencies totaling approximately USD 156.8 billion, of which 798,748 were USD transfers totaling USD 108.2 billion. Thus, *less than 1%* of the total USD transactions conducted by FBME over this six-year period triggered a SAR. Furthermore, the USD 875 million in suspicious transfers cited in the NOF constitutes *only* 0.55% of the total amount of transfers and 0.81% of the USD amount of transfers conducted by FBME during this period. In other words, the overwhelming majority of FBME transactions between November 2006 and March 2013 did not exhibit anything suspicious that might warrant even a SAR, much less a Section 311 sanction.

(b) FinCEN's Failure to Compare FBME's SAR Rate to Those Other Similarly Situated Banks Renders the Statistics Meaningless and Any Reliance on Them Arbitrary and Capricious

Tellingly, FinCEN offers no point of comparison between FBME and other U.S. or Cypriot banks that it considers similarly situated but less deserving of suspicion given their SAR statistics. Neither does FinCEN suggest any baseline for the SARs statistics it considers standard or acceptable for an international bank like FBME, say, from April 2013 to April 2014. The omission is especially glaring in light of indications that FinCEN would view Cyprus generally as throwing off a high rate of SARs. Indeed, reports provide every indication that Cypriot banks have been associated with especially high SARs rates—rates that are likely substantially higher than those FinCEN has noted for FBME.[131] This may be a function of the sort of clients and transactions common to Cyprus. It may be a function of the different regulatory requirements to

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[130] In addition to the Cypriot financial crisis, changes in FinCEN's own policies and procedures may have contributed to the increase in suspicious transactions involving FBME in 2013 and 2014. As this agency knows, between 2012 and 2014, FinCEN (1) began encouraging depository institutions to file more SARS; and (2) revised the reporting forms to include a wider range of conduct. *See* Brian Monroe, *Increasing Number of SARs, More Detailed Data Breaking Big Cases Despite Calls for Feedback*, ASSOCIATION OF CERTIFIED FINANCIAL CRIME SPECIALISTS (Nov. 26, 2014), **http://www.acfcs.org/increasing-number-of-sars-more-detailed-data-breaking-big-cases-despitecalls-for-feedback**; *FinCEN Releases Suspicious Activity Report Statistics*, WILEY REIN LLP (Aug. 4, 2014), **http://www.wileyrein.com/newsroom-articles-3249.html**. Accordingly, depository institutions filed significantly more SARs in 2013 and 2014 than in previous years, which likely resulted in an increase of SARs involving many banks, including FBME. *See*, *e.g.*, Spreadsheet, Filings by Year and Month by Depository Institutions, Department of Treasury – FinCEN, *available at* **https://goo.gl/HiuiPp.**

[131] Andrew Rettman, *Leaked Report Damns Cyprus on Money Laundering*, EUBOSERVER (May 20, 2013), **https://euobserver.com/economic/120167**.

which banks in Cyprus answer. And it is likely, in large part, a function of the tight capital controls that were imposed to address the Cypriot financial crisis in 2013—capital controls that limited withdrawal rates for depositors and resulted in routine, legitimate withdrawal patterns (with depositors withdrawing daily the maximum amount permitted to them by Cypriot controls) that might nonetheless be mistaken abroad as reflecting "structuring" otherwise associated with money laundering.[132]

What FinCEN cannot do is single out FBME as supposedly a bank of "primary money laundering concern" without comparing it to any other similarly situated bank as a control. If FinCEN now proceeds to use, in a vacuum, its *sui generis* report on SARs activity surrounding FBME as basis for sanction under Section 311, that will be the essence of agency arbitrariness and caprice. At a bare minimum, FinCEN should be setting forth the apples-to-apples comparison between SARs reports for FBME during the relevant period and those for other international banks in Cyprus and explaining why, against that backdrop, this Bank specially stands out as being of "primary money laundering concern."

(c) FinCEN's Reliance on Reports by Other Financial Institutions is Misplaced

FinCEN appears to have accepted reports of other financial institutions regarding FBME. Because the other financial institutions were *involved* in the suspicious transfers, however, they had every reason, when under scrutiny, to shift blame to FBME for their role in processing suspicious transfers.[133] Accordingly, FinCEN should have evaluated any reports from financial institutions involved in processing the suspicious transfers with skepticism in light of the reporting institution's inherent bias. Yet there is no indication that this agency engaged in any critical evaluation of the reliability of these reports. Moreover, given that many requests for information from correspondent banks between 2006 and 2014 required FBME to violate local Cypriot bank secrecy laws in order to provide the information, it would be unfair for FinCEN to fault FBME for not always being able to provide confidential customer information immediately upon request.

(d) FinCEN's Refusal to Provide FBME with the Underlying SARs Violates Due Process

Equally troubling, as discussed above, FinCEN has not provided FBME with the underlying documents and data supporting the aggregate data cited in the NOF. Accordingly, the Bank does not have any information as to the (1) number of suspicious transactions per year

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[132] *See*, *e.g.*, Tom Stoukas, Maria Petrakis & Marcus Bensasson, *Cyprus Averts Panic Withdrawals as Banks Open with Cash Controls*, BLOOMBERG (Mar. 28, 2013), **http://www.bloomberg.com/news/articles/2013-03-27/cypriot-banks-to-open-for-first-time-in-2-weeks-with-cash-curbs**; *Cyprus Scraps Maximum Daily Cash Withdrawal Limits*, DW (Mar. 28, 2014), **http://www.dw.com/en/cyprus-scraps-maximum-daily-cash-withdrawal-limits/a-17529353**.

[133] *See* NOF at 42640 ("other financial institutions *involved* in the transfers reported that they were unable to verify the identities of FBME's customers").

during the period November 2006 through March 2013; or (2) basis upon which the transfers were deemed suspicious, thereby frustrating FBME's ability to explain and challenge the aggregate data. Indeed, FinCEN is altogether hiding such specifics in the "black box." Given the numerous benign explanations for the number and nature of SARs involving FBME between 2006 and 2013,[134] the agency must disclose the underlying SARs to FBME so that the Bank can then properly defend itself against the NOF's misleading, inaccurate, novel and, at best, suspect use of the aggregate SARs data. To deny FBME's right to meaningfully comment on FinCEN's findings, including the SARs data, violates due process as well as the APA.[135] And, as previously discussed, FinCEN can disclose both (1) an entire SAR for certain official purposes, and (2) the "underlying facts, transactions, and documents upon which a SAR is based."[136] Alternatively, there is no reason whatsoever why FinCEN cannot and should not, at the very least, provide FBME with a summary of the "underlying facts, transactions and documents" upon which the aggregate data in the NOF are based. FinCEN's failure to do so warrants rescission of the NOF either by this agency itself, or else by a reviewing court upon noting the repeated deficiency.

F. The Mere Fact That FBME Transacts With Shell Or Holding Companies Is Not A Basis To Conclude That The Bank Is Of "Primary Money Laundering Concern"

FinCEN's suggestion that FBME is of "primary money laundering concern" because it transacts with shell companies[137] is just as misplaced and ill conceived as its reliance on aggregate, meaningless SARs data. By no means are shell companies illegal or nefarious. Countless corporations in the United States and elsewhere use holding or "shell" companies for perfectly legitimate purposes. Of particular pertinence here is the fact that many international businesses establish holding companies in Cyprus in order to take advantage of the country's favorable tax and fiscal environment, including the double-taxation treaties Cyprus has in place with almost 60 countries.[138] The predictable and irreproachable upshot of Cyprus's uniquely attractive business environment is that many of FBME's customers (no different from those of other Cypriot banks) are (1) holding companies, (2) businesses with nominee structures, or (3) "brass plate" companies with addresses in Cyprus. Although FinCEN unfairly suggests

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134 This prospect is especially pronounced because these banks likely were applying 2013–14 standards and technology to 2006–08 data. The result is that these SARs necessarily reflect an unfair *ex post* evaluation of transactions that FBME could not legitimately have been able to (or expected to) flag in real time when they occurred. Moreover, these banks submitting backward-looking SARs had every reason to err on the side of over-inclusion in order to ensure anything even remotely unusual or suspicious would be caught.

135 *See supra* Section II.A; *see also States Marine Lines*, 376 F.2d at 238–40; *accord, e.g.*, *Forcade v. Knight*, 416 F. Supp. 1025, 1037–40 (D.D.C. 1976).

136 31 C.F.R. § 1020.320(e)(1)(ii)(A)(2) (2015); *In re JPMorgan Chase Bank, N.A.*, 799 F.3d 36, 43 (1st Cir. 2015).

137 NOF, at 42640.

138 *See* Ministry of Finance, Double Taxation Agreements, www.mof.gov.cy.

otherwise, it is not uncommon or suspect for banks to provide services to these types of companies; indeed, Cypriot banking laws facilitate and attract such customers.

By the same token, shell companies are of course subject to FBME's AML policies and procedures, which have been vetted by international auditors and deemed compliant with local and international law. For example, as set forth in the Bank's Manual, upon the opening of any account, including one for a holding company, FBME collects specific and detailed information from the accountholder to ensure that (1) the Bank knows the identity of the accountholder *and* the beneficial owners of the account (including beneficial owners of holding companies); and (2) the accounts are not used for illicit purposes. In particular, the Bank has policies and procedures to identify "high-risk" customers, including any "high-risk" shell companies, and to monitor the activities of such customers accordingly. In sum, FinCEN's allegations regarding shell companies are part and parcel of its concerted effort to paint FBME as a bad bank despite the absence of supporting evidence.

G. Only If FinCEN Permits Analysis Of The "Black Box" By FBME's Counsel Can Any Additional Allegations Be Properly And Fairly Addressed

As noted above in Section II.A, FinCEN has refused to disclose an unknown amount of materials on which the NOF and the Proposed Rule are supposedly based. FinCEN claims it may withhold these materials because they are classified or, even if not classified, protected by some unspecified privilege. FBME disputes the legitimacy and legality of this procedure because, among other things, it unfairly and unnecessarily prevents FBME and others from commenting meaningfully on the NOF and Proposed Rule.[139] Because FinCEN has neither afforded FBME any opportunity to review the withheld materials in any form nor offered any other accommodation, FBME still can only guess at what information is contained in the black box. It bears emphasizing that FBME has decisively debunked any suggestion that the information FinCEN improperly withheld during the prior rulemaking evidences any failure in FBME's AML programs. There is every reason to think that further disclosure would result in further debunking.[140]

Certainly to the extent FinCEN is withholding yet considering input provided by CBC, that information is inherently compromised by CBC's long-running and ongoing campaign to protect local banks at the expense of FBME and to seize FBME and its assets.[141] FinCEN has a duty to ensure that its actions and decisions are based on reliable, unbiased information. This extends to information CBC provided directly to FinCEN as well as any information provided to FinCEN by a third-party based on information from CBC, such as other branches of the Government of Cyprus. Any conclusions based on such information are inherently unreliable. Simply put, FinCEN cannot justify, even in part, cutting FBME off from the U.S. financial system based on input traceable to CBC under the circumstances recounted above.

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139 *See supra* Section II.A.

140 *See supra* at IV.E.

141 *See supra* Section III.A.

Additionally, FinCEN has already demonstrated the folly of relying on unsourced reporting to draw conclusions about FBME. For example, as previously discussed, its suggestion in the NOF that CBC fined FBME EUR 240 million was based on a demonstrably false, unsourced statement in an article attributable to an unnamed CBC official.[142] To the extent that FinCEN persists in relying on unsourced intelligence in briefing papers, dossiers, and other reporting—especially without giving FBME an opportunity to rebut the information—FinCEN jeopardizes the integrity of its decisionmaking process and the legality of any Final Rule.

H. FinCEN Has In Any Event Failed To Explain Why FBME Is An Institution Of "Primary Money Laundering Concern" Within The Meaning Of The Statute

Section 311 mandates that FinCEN consider multiple factors when deciding whether an institution is of "primary money laundering concern.[143] These factors include (1) "the extent" to which an institution is "used to facilitate or promote money laundering;" (2) "the extent" to which it is "used for legitimate business purposes in the jurisdiction;" and (3) "the extent to which such action is sufficient to . . . guard against international money laundering."[144]

An agency "may not 'entirely fai[l] to consider an important aspect of the problem' when deciding whether regulation is appropriate."[145] When a statute requires an agency to consider certain factors, the agency must actually consider them—simply "[s]tating that a factor was considered . . . is not a substitute for considering it"—or else be reversed.[146]

The NOF briefly mentions these factors, but fails to adequately consider them. With respect to the first factor, FinCEN wholly fails to consider (1) FBME's refutation of each alleged instance of money laundering that FinCEN attributes to it, (2) FBME's extensive AML controls that prevent FBME from being used to facilitate or promote money laundering, (3) the positive conclusions about FBME's AML controls reached by independent auditors and investigators, and (4) FBME's continual efforts to improve its AML controls to be ever more vigilant in combating money laundering.[147]

FinCEN's cursory discussion of the second factor is also insufficient. The record leaves no doubt that the overwhelming number of FBME account transactions are legitimate business transactions. Yet FinCEN does not even attempt to consider this factor. The NOF devotes only a single paragraph to this factor, in which it states that "[l]egitimate activity at FBME's Cyprus branch is difficult to assess because of the limited amount of information that is available

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142 *See supra* Section III.A.6; 80 Fed. Reg. at 45060.

143 31 U.S.C. § 5318A(c)(2)(B)(i)–(iii) (2012).

144 *Id.*

145 *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (quoting *State Farm*, 463 U.S. at 43).

146 *Getty v. Federal Savings & Loan Insurance Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986); *accord, e.g.*, *Missouri Public Service Commission v. FERC*, 234 F.3d 36, 41 (D.C. Cir. 2000).

147 *See supra* Section IV.A–E.

regarding Cypriot branches of foreign banks, such as FBME."[148] Then, rather than using the "limited" information available to consider FBME's legitimate business purposes, FinCEN simply returns to its prior statements that FBME "functions largely as an offshore bank catering to a significant number of shell entities that are nominally located in Cyprus and other high-risk jurisdictions."[149] This discussion fails to discuss the full "extent" of FBME's legitimate business, as required by Section 5318A(c)(2)(B)(ii).

That there may be only a "limited amount of information available" about FBME's Cypriot branch does not excuse FinCEN from considering this factor—to the contrary, the statute obligates FinCEN to consider FBME's legitimate business in light of all the information available to it. Moreover, given FinCEN's extensive coordination with CBC, it is implausible that FinCEN could not obtain information about FBME's legitimate business activities in Cyprus. As it has elsewhere, FinCEN is simply choosing to ignore positive evidence about FBME for fear of exposing the fundamental weakness of its case against FBME. FinCEN's selective presentation of the evidence is perhaps most pronounced with respect to Tanzania, where FBME operates four branches and is the largest bank by asset size. Although the header for FinCEN's one-paragraph discussion of this second factor states that it will address "The Extent To Which FBME Is Used for Legitimate Business Purposes in Cyprus *and Tanzania*,"[150] there is not a single mention of Tanzania in that paragraph. Simply put, FinCEN has wholly failed to consider and weigh the extent to which FBME is used for legitimate business purposes in Cyprus and Tanzania.

Similarly deficient is FinCEN's one-paragraph treatment of Section 311's third factor. FinCEN made no attempt to explain why a measure short of a prohibition under the fifth special measure would not be "sufficient" to protect against "international money laundering and other financial crimes."[151] To the extent that FinCEN said anything about this, it did so in conclusory fashion unadorned by any substantive analysis or specifics.[152]

A distinct (albeit related) error is that the Proposed Rule never explains why FBME meets the statutory threshold of being an institution of "primary money laundering concern." In particular, FinCEN completely fails to consider the requirement that FBME be of "*primary*" money laundering concern. It is not enough that an institution be of "money laundering concern." Nothing in the NOF or proposed rule indicates that FBME exists *primarily* to launder funds, has engaged in money laundering that is of *primary* concern to FinCEN, or otherwise should be treated as being of "*primary*" money laundering concern.

The failures identified above intertwine in a critical respect. Had FinCEN analyzed the statutory factors—especially the first two factors, which call for an assessment of the "extent" to

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148 NOF, at 42640.

149 *Id.*

150 NOF, at 42640 (emphasis added).

151 31 U.S.C. § 5318A(c)(2)(B)(iii) (2012).

152 NOF, at 42640.

which a foreign bank is used for legitimate business and the "extent" to which it is used to promote money laundering[153]—that analysis would have informed any ultimate conclusion about whether FBME was of "primary" money laundering concern. But FinCEN made no such effort to differentiate good from bad before branding the Bank a scofflaw.

[153] § 5318A(c)(2)(B)(i)–(ii).

V. FINCEN HAS AVAILABLE OBVIOUS, LESS DRACONIAN ALTERNATIVES TO CUTTING FBME OFF FROM THE U.S. FINANCIAL SYSTEM

Even if, notwithstanding the compelling, on-point evidence to the contrary, FinCEN refuses to rescind the NOF, FinCEN's Proposed Rule to prohibit FBME from maintaining U.S. correspondent accounts would still be unnecessary and disproportionate. There are obvious, less damaging measures that FinCEN can impose that would more than suffice to ensure to FinCEN's satisfaction that FBME poses no danger to the U.S. financial system. For example, FinCEN could require, as a condition of FBME's eligibility to maintain correspondent accounts, that FBME:

- Pay a monetary fine for any historical shortcomings in FBME's AML compliance;
- Accept an independent monitor, chosen by FinCEN, to oversee and report on FBME's operations;
- Make regular periodic reports to FinCEN regarding FBME's operations;
- Place appropriate conditions on the use of correspondent accounts;
- Consult with FinCEN, or an expert chosen by FinCEN, to adopt specific and detailed policies to supplement FBME's existing compliance program;
- Refrain from transactions that FinCEN deems most worrisome; or
- Any combination of, or all of, the above.

FBME is ready, willing, and able to comply with any or all of these requirements and is open to alternative proposals that might satisfy FinCEN as to the absence of any risk of money laundering, terrorism financing, corruption, or other misconduct posed by FBME.

Indeed, in June 2015, just one month before FinCEN imposed the original rule, FinCEN penalized West Virginia-based Bank of Mingo for serving high-risk customers without effectively monitoring their accounts for suspicious activity. Among other things, Mingo's willful violations of applicable AML protocols allowed one customer to conduct over $9 million of structured transactions. Mingo personnel then criminally obstructed a government investigation into Mingo's AML failures.[154] FinCEN, along with the Federal Deposit Insurance Corporation and Department of Justice, imposed a USD 4.5 million fine but no prohibition on U.S.-based correspondent bank accounts.

FinCEN has not hesitated to impose fines, monitoring, or other alternative conditions on overseas entities as well. Days before FinCEN announced its action against Mingo in June 2015,

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[154] *See In the Matter of Bank of Mingo*, No. 2015-08 (2015), *available at* **https://goo.gl/Ejx6ld**.

it announced that Hong Kong-based Tinian Dynasty Hotel & Casino had developed *no* AML program of any kind, appointed *no* staff to monitor day-to-day AML compliance, *never* conducted an independent test of its compliance systems, and obtained *no* training for AML compliance requirements. The casino also had systemic and pervasive failures in reporting suspicious transactions, documented by undercover agents in the course of a criminal investigation.[155] After paying a USD 75 million fine to FinCEN, however, Tinian Dynasty still retains access to U.S. bank accounts and dollars.

And in past proceedings under Section 311, FinCEN has demonstrated that imposing a prohibition is inappropriate where the subject financial institution has fully cooperated with FinCEN, as FBME has done here. After FinCEN issued a notice of finding and notice of proposed rulemaking to impose the fifth special measure against Multibanka,[156] Multibanka contacted FinCEN, was "forthcoming in addressing the concerns that [FinCEN] identified in the notice of proposed rulemaking and . . . instituted measures to guard against money laundering abuses."[157] These measures included retaining an auditing firm to address weaknesses in its compliance programs, reviewing its accountholders, and overhauling its information technology systems.[158] FinCEN concluded that these "cumulative efforts demonstrate [Multibanka's] continuing commitment to fighting money laundering and other financial crimes," and "[i]n light of Multibanka's significant remedial measures," FinCEN withdrew the notice of finding and proposed rulemaking.[159] As described above in Section IV, FBME has followed the same course as Multibanka, on more innocuous facts. That FinCEN chose to rescind the Multibanka notice of finding and proposed rulemaking confirms FinCEN here has adequate alternatives to imposing a prohibition under the fifth special measure against FBME.[160]

FBME respectfully disputes that it is an institution of primary money laundering concern and that FinCEN has a valid basis on which to conclude that it is. Even if FinCEN disagrees, however, FBME further disputes that the appropriate remedy is to prohibit it from maintaining correspondent bank accounts in the United States. As the foregoing examples illustrate, and as FBME has previously explained to FinCEN,[161] there are alternatives to that debilitating measure that can address any concerns FinCEN still has. If FinCEN is serious about wanting to rehabilitate banks and work constructively with them on AML issues, then it should embrace this case as a prime opportunity for demonstrating as much. FinCEN has before it a bank in FBME that has been hard at work and remains hard at work to improve itself on the AML front. If

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155 *See In the Matter of Hong Kong Entertainment (Overseas) Investments, Inc.*, No. 2015-07 (2015), *available at* **https://goo.gl/W9fWI5**.

156 *See* 70 Fed. Reg. 21362 (Apr. 26, 2005).

157 71 Fed. Reg. 39606, 39608 (July 13, 2006).

158 *Id.*

159 *Id.*

160 *See also* Exs. 26, 60.

161 *See* Ex. 26, FBME Presentation to FinCEN (Jan. 29, 2015); Ex. 1, Declaration of M. Elizabeth Peters ¶¶ 15, 17, *FBME Bank Ltd. v. Lew*, 15-cv-1270 (CRC) (D.D.C. Aug. 7, 2015), ECF No. 3-3.

FinCEN nonetheless proceeds to impose the maximum sanction, that will give the lie to the positive message it has tried to send to banks around the world, to the effect that their efforts will be rewarded and their engagement welcomed.

VI. CONCLUSION

Simply stated, no fair-minded observer with knowledge of the publicly available facts could conclude that FBME is a financial institution "of primary money laundering concern." As demonstrated by the numerous evaluations conducted by internationally-recognized audit firms, FBME has consistently improved its AML procedures and today meets or exceeds all applicable AML laws and regulations. Moreover, FBME has disproved all discernible allegations in the NOF and demonstrated dispositive flaws in FinCEN's methodology, investigation, and evaluation of the evidence, including by providing additional material information relating to the SARs data that discredits FinCEN's heavy reliance thereon. Certainly none of the evidence FinCEN has disclosed, even taken at face value, establishes why a prohibition of, as opposed to meaningful conditions on, FBME's U.S. correspondent bank accounts would be necessary to prevent any AML failures—which, on this record, have been isolated if not nonexistent.

Finally, the Bank has demonstrated beyond all doubt that FinCEN would be violating the APA as well as due process by relying on CBC given its demonstrated and pronounced bias against FBME. By continuing to partner with and relying on CBC, whose corrupt and lawless behavior is now in plain sight, FinCEN would be acting arbitrarily and capriciously. The only correct and just course is for FinCEN now to rescind the NOF against FBME and to renounce and denounce CBC for its role to date relative to these proceedings.

APPENDIX

EXHIBIT LIST

Ex. 1. Declaration of M. Elizabeth Peters, *FBME Bank Ltd. v. Lew*, 15-cv-1270 (CRC) (D.D.C. Aug. 7, 2015), ECF No. 3-3

Ex. 2. CBC Decision: Revocation of the License Granted to FBME Bank Ltd to Operate a Branch in Cyprus, No. 05/2015 (Dec. 21, 2015)

Ex. 3. In Relation to the Works on Credit Institutions Laws of 1997 to (No. 8) of 2015, L. 66(I)/1997 (District Court of Nicosia, Application No. 905/2015) (Dec. 22, 2015)

Ex. 4. Letter from CBC to FBME (Mar. 3, 1986)

Ex. 5. Letter from FBME to CBC (Mar. 24, 1986)

Ex. 6. Affirmation of John Spinks, *In the Matter of the Banks and Trust Companies Law (2001 Revision), etc. (Cayman Islands)* (July 2002)

Ex. 7. Letter from CBC to FBME (July 9, 2001)

Ex. 8. Letter from CBC to Bank of Tanzania (July 20, 2003)

Ex. 9. Letter from CBC to FBME (July 16, 2012)

Ex. 10. Letter from CBC to FBME (Oct. 21, 2002)

Ex. 11. Complaint Pursuant to Section 35 of the Competition Law, *In the Matter of the Protection of Competition Law, Law 13(I)2008* (Dec. 23, 2009)

Ex. 12. Investigation Report: Bank of Cyprus – Holdings of Greek Government Bonds, Alvarez & Marsal (Mar. 26, 2013)

Ex. 13. Letter from Ministry of Finance to FBME (Apr. 4, 2013)

Ex. 14. Letter from FBME to Ministry of Finance (Apr. 9, 2013)

Ex. 15. Letter from Ministry of Finance to FBME (May 8, 2013)

Ex. 16. Cyprus Minister of Finance, Enforcement of Temporary Restrictive Measures on Transactions in Case of Emergency First Decree (Mar. 27, 2013)

Ex. 17. Letter from FBME to CBC (Apr. 3, 2013)

Ex. 18. Email from FBME to CBC (Apr. 3, 2013)

Ex. 19. First Foreign Bank Decree (Apr. 25, 2013)

Ex. 20. Letter from CBC to Foreign Banks (Apr. 26, 2013)

Ex. 21. Email from FBME to CBC (May 14, 2013)

Ex. 22. Letter from FBME to CBC (Nov. 18, 2013)

Ex. 23. Letter from FBME Saab to CBC (Dec. 2, 2013)

Ex. 24. Letter from FBME Saab to CBC (July 18, 2014)

Ex. 25. Letter from CBC to FBME (July 18, 2014)

Ex. 26. FBME Presentation to FinCEN (Jan. 21, 2015)

Ex. 27. KPMG, REPORT ON THE EFFECTIVENESS OF MEASURES REGARDING ANTI-MONEY LAUNDERING AND COUNTER-TERRORISM FINANCING (2013)

Ex. 28. Summary Chart, Recommendations from April 2013 KPMG Report and Status of Bank Response and Actions Implemented as of January 26, 2016

Ex. 29. Letter from CBC to Arbitration Tribunal (Aug. 3, 2015)

Ex. 30. Letter from CBC to Arbitration Tribunal (Aug. 31, 2015)

Ex. 31. CBC Decision, No. 04/2015 (Dec. 9, 2015)

Ex. 32. Administrative Application by FBME Against CBC (May 8, 2015)

Ex. 33. Summary Chart, Recommendations from September 2014 EY Program Assessment and Status of Bank Response and Actions Implemented as of January 26, 2016

Ex. 34. ERNST & YOUNG, FBME BANK LTD. ASSESSMENT OF FBME BANK LTD'S ANTI-MONEY LAUNDERING (AML)/SANCTIONS COMPLIANCE PROGRAM (Sept. 22, 2014)

Ex. 35. Email from Lawrence Mafuru to Andrew Andronikou (Sep. 24, 2015)

Ex. 36. Letter from CBC to Special Administrator (Dec. 23, 2014)

Ex. 37. Letter from CBC to Arbitration Tribunal (Aug. 26, 2015).

Ex. 38. Letter from CBC to Arbitration Tribunal (Sep. 3, 2015).

Ex. 39. Letter from CBC to Arbitration Tribunal (Sep. 15, 2015).

Ex. 40. Email from FinCEN Counsel to FBME Counsel (Sep. 17, 2015).

Ex. 41. Letter from CBC to FBME (Sep. 18, 2015)

Ex. 42. Letter from PWC to FBME (Nov. 4, 2015)

Ex. 43. Letter from PWC to FBME (Dec. 21, 2015)

Ex. 44. Declaration of Ayoub-Farid Saab, *FBME Bank Ltd. v. Lew*, 15-cv-1270 (CRC) (D.D.C. Aug. 7, 2015), ECF No. 3-4.

Ex. 45. Declaration of Derek L. Shaffer, *FBME Bank Ltd. v. Lew*, No. 15-cv-01270 (CRC) (D.D.C. Oct. 5, 2015), ECF No. 42-1

Ex. 46. Transcript of Preliminary Injunction Hearing, *FBME Bank Ltd.*, No. 15-cv-1270 (CRC) (D.D.C. Aug. 25, 2015), ECF No. 26

Ex. 47. Letter from CBC to FBME (July 14, 2003)

Ex. 48. Letter from CBC to FBME (Nov. 15, 2010)

Ex. 49. Transcript of Telephone Conference , *FBME Bank Ltd. v. Lew*, 15-cv-1270 (CRC) (D.D.C. Oct. 23, 2015), ECF No. 46

Ex. 50. Defendants' Notice, *FBME Bank Ltd. v. Lew*, No. 15-cv-1270 (CRC) (D.D.C. Oct. 30, 2015), ECF No. 47

Ex. 51. Defendants' Opp. to Motion for Preliminary Injunction, *FBME Bank Ltd.*, No. 15-cv-1270 (CRC) (D.D.C. Aug. 27, 2015), ECF No. 23-1

Ex. 52. ERNST & YOUNG, FBME BANK LTD. TRANSACTION REVIEW AND ASSESSMENT WITH RESPECT TO FINCEN'S NOTICE OF FINDINGS DATED JULY 15, 2014 (Dec. 5, 2014)

Ex. 53. FBME Bank Ltd., Public Comment, RIN 1506-AB27 (Sep. 22, 2014)

Ex. 54. Letter from FBME Counsel to FinCEN (Nov. 17, 2014)

Ex. 55. Letter from FBME Counsel to FinCEN (Dec. 1, 2014)

Ex. 56. Letter from FBME Counsel to Under Secretary for Terrorism and Financial Intelligence, U.S. Department of Treasury (Jan. 5, 2015)

Ex. 57. Letter from FBME Counsel to FinCEN (Jan. 26, 2015)

Ex. 58. Letter from FBME Counsel to Under Secretary for Terrorism and Financial Intelligence, U.S. Department of Treasury (Jan. 29, 2015)

Ex. 59. Letter from FBME Counsel to FinCEN (Apr. 20, 2015)

Ex. 60. Letter from FBME Counsel to FinCEN (May 12, 2015)

Ex. 61. Letter from FBME Counsel to FinCEN (May 29, 2015)

Ex. 62. Letter from FBME Counsel to FinCEN (June 1, 2015)

Ex. 63. Letter from FBME Counsel to FinCEN (June 2, 2015)

Ex. 64. Letter from FBME Counsel to FinCEN (June 9, 2015)

Ex. 65. Letter from FBME Counsel to Acting Under Secretary for Terrorism and Financial Intelligence, U.S. Department of Treasury (June 26, 2015)