

Stop deputizing banks as law enforcement agents

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Last week's [congressional hearing](#) with the Financial Crimes Enforcement Network (FinCEN) showed that there is much work to be done to improve the oversight of the agency and the anti-money laundering (AML) regime in general. One problem that came up is how FinCEN and the AML regime rely on “deputizing” banks as law enforcement agents.

Currently, banks and other financial institutions are required to investigate and file reports to the government whenever a customer's financial activity is deemed suspicious or crosses any number of minimum thresholds. Understanding the depths of these compliance requirements is no easy task: an entire industry of certification programs, courses, and consultants has been constructed around assisting the government from within the financial sector. Even so, many financial institutions still fall short. As Norbert Michel and Jennifer Schulp pointed out in [their new working paper](#), FinCEN recently fined the Community Bank of Texas \$8 million for having—in the agency's view—an understaffed compliance program.

To make matters worse, financial firms are largely left out of the conversation after they file their reports. There is little to no follow-up regarding individual reports or even aggregate reports in general. So despite compliance [costing an estimated \\$26.4 billion](#) annually, the industry is left without any idea of whether its actions were worthwhile. Representative Bryan Steil (R-WI) described the situation well when he said, “Many people feel that the [suspicious activity report (SAR)] information is going into a black hole.”

Given these shortcomings, it was unfortunate to see two pieces of legislation at the hearing that would enlist further deputies and expand the duties of those already deputized.

Transparency and Accountability in Service Providers Act

The “[Transparency and Accountability in Service Providers Act](#)” was introduced to “expand the scope and authorities of anti-money laundering [AML] safeguards.” In order to do so, the bill would require so-called “financial gatekeepers” to adopt AML procedures to actively monitor for potential criminal activity. The bill states, “Absent such authorities, the United States Government will be unable to adequately protect the U.S. financial system.”

As far as who the bill seeks to “deputize,” the list is quite expansive. It calls for the Treasury to conscript any person involved in,

- the exchange of foreign currency, digital currency, or digital assets;

- the managing, advising, or consulting with respect to money or other assets;
- the provision of cash vault services;
- the processing of payments;
- the wiring of money;
- the direct or indirect filing of any return on behalf of a foreign individual, trust, or fiduciary;
- the formation, registration, acquisition, or disposition of a corporation, limited liability company, trust, foundation, limited liability partnership, partnership, association, or arrangement;
- the sourcing, pooling, organization, or management of capital; and
- the process of acting as a trustee.

Anyone within this list would thus be required to identify and verify account holders as well as beneficial owners, maintain compliance procedures, establish anti-money laundering programs, report suspicious activity, and establish due diligence policies.

In short, the bill seeks to expand its enlistment of deputies to nearly every corner of the financial industry.

Gun Violence Prevention Through Financial Intelligence Act

The other bill mentioned at the hearing was the “Gun Violence Prevention Through Financial Intelligence Act,” introduced by Representative Madeline Dean (D-PA). This bill would require FinCEN to study financial information reported by banks for possible predictors of terrorism and gun violence. If FinCEN found any valuable predictors, it would then issue an advisory to banks regarding what new information they should look for and report as suspicious activity. As an advisory notice, it would not be mandatory that banks act on this information, but it is still in the bank’s best interests to follow it. In a 2019 press release for a previous version of the bill, Representative Jennifer Wexton (D-VA), one of the bill’s cosponsors, said, “Financial institutions have a legal obligation under the Bank Secrecy Act to have programs in place to help detect and report suspicious financial activity, but they have to know what they are looking for... The red flags are there—someone just needs to be paying attention.”

Although the bill seems to be well-intentioned in its desire to stop terrorism and gun violence, it shouldn’t be overlooked that the effort the bill calls for relies on banks collecting, analyzing, and reporting consumer information to the government and thus further entrenches their role as deputy law enforcement agents. In fact, it was a similar endeavor that led to the erosion of freedoms caused by the PATRIOT Act.

Turning the Tide

Representative John Rose (R-TN) was right to express his concern during the hearing about how “the federal government deputizes financial institutions.” The financial industry suffers costs in the billions for its role in the process and its largely unknown what benefit has come out of it all.

It's time to rethink the entire AML approach under the Bank Secrecy Act , including how financial data is treated in the United States. Rather than further enlisting the private sector in the government's activities, Congress should instead, as recommended previously by Norbert Michel , “simply require financial firms to keep customer records while requiring law enforcement to abide by the Fourth Amendment to access those records.” By taking this approach, Congress can put financial privacy first and begin to disentangle the financial surveillance system that has enlisted countless private individuals to report on their peers.

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