The FinCEN Files: Leakers and Whistleblowers
Combating Economic Crime

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Despite substantial efforts to regulate the conduct of the financial services sector, a significant and substantial leak from within FinCEN (US Treasury Financial Crimes Enforcement Network) has identified over $2 trillion in suspect transactions over 18 years, linked to money laundering, cartels, organised criminals, terrorism, mafia entities, and avoiding international sanctions. This article explores the ineffectiveness of the industry to counter illicit conducts and transactions in the wake of previous leaks and disclosures, and the cause of this inability to effectively regulate. The article then considers methods of addressing these inadequacies, and the contribution of whistleblowers in industry regulation and accountability.
Introduction

Following a series of damming and damaging leaks from the financial services industry over the past several years, there has been a commitment to alter conduct and ensure accountability within the industry, however, following the latest FinCEN leaks it is evident this is not the case.

This article explores the inability of the financial services industry to internally curtail illicit conduct, and the endemic failure of regulators to bring about effective and meaningful change, before briefly considering possible reform, the potential effect of whistleblowers and leakers, and the highlights the essential nature of the work they carry out.

Public disclosure of harmful conduct and the industry response

The FinCEN leak (named after US Treasury Financial Crimes Enforcement Network), is a trove of over 2,500 documents leaked to journalists at Buzzfeed news by an unidentified source. Over the previous year, Buzzfeed shared these documents with hundreds of investigative journalists in 88 countries who have been sifting through the data, to create a coherent picture of secretive banking practices. Broadly, the leak is an accumulation of Suspicious Activity Reports filed by banks with the Financial Crimes Enforcement Network, that identify over $2 trillion in transactions between 2000 and 2017 that were flagged as possible evidence of money laundering or other criminal activity by compliance officers of banks and financial institutions.

While these revelations are significant, they are not surprising, new in nature, nor unexpected. Over the previous several years, leaks have included the Offshore Leaks (2011-12), Luxembourg Leaks (2014), Swiss Leaks (2015), Panama Papers (2016), and the Paradise Papers (2017). Many previous revelations draw stark contrasts to the current disclosure, including avoiding international sanctions, money laundering, facilitating the funding of terrorism, tax avoidance, and hiding funds.
Several banks and institutions have been quick to respond to the leaks, emphasising they take the responsibility for fighting financial crime seriously and highlight the work of compliance programmes which meet industry expectations, in identifying suspect transitions. However, empirical evidence demonstrates that, over the last decade, the most significant steps forward in the fight against corruption have been made thanks to the courage of leakers, whistleblowers and investigative journalists, who help bring the most serious allegations of misconduct to light.

Institutional incapacity to counter illicit conducts in the financial sector

Much of the information garnered from these leaks and disclosures came at great personal risk to the individuals involved – the threat of retribution to whistleblowers and leakers is well documented and very real, but cases involving organised criminal enterprises, cartels, mafia entities, and high ranking political actors come with a much higher risk, as seen when Daphne Caruana Galizia was assassinated with a car bomb for her part in investigating the Panama Papers.

Following such repeatedly high profile and damning disclosures, combined with public and industry outrage, it could be reasonably expected that regulators, legislators, and the judiciary be empowered with the authority to demand change in the financial services industry, and should that not be forthcoming, the ability to enact meaningful and real sanctions. This would further act as a deterrent to others in the industry.

However, the FinCEN files make clear this is not the case. Despite being investigated and subsequently fined or prosecuted for financial misconduct, numerous high profile and highly respected financial institutions continued to move money for suspected criminals, including funding terrorism, drug cartels, violent criminals, corrupt political actors, and organised crime. What's more, those who have not been fined or prosecuted for similar criminal activity have also engaged, demonstrating the lack of effective deterrence.
As Martin Woods, whistleblower at the former Wachovia bank, points out in the Buzzfeed News article: “Some of these people in those crisp white shirts in their sharp suits are feeding off the tragedy of people dying all over the world.”

Fines have been levied, independent monitors have been appointed, and deferred prosecution agreements have been reached, however, these have not been effective in altering the conduct of the financial services industry, and could be said to be largely without teeth.

According to Buzzfeed News, “Since 2010, at least 18 financial institutions have received deferred prosecution agreements for anti-money laundering or sanctions violations... Of those, at least four went on to break the law again and get fined. Twice, the government responded to this kind of repeat offense by renewing the deferred prosecution agreement — the very tool that failed the first time.”

The remote causes of institutional inefficiency and the future of whistleblowing

Therefore, it is necessary to ask, what are the remote causes of this comprehensive failure to regulate an industry that enables, facilitates, and supports violent crime and terrorism.

The reasons are complex and nebulous. Since 2008, ministers and leaders at the G20 have made 340 commitments to improve and strengthen financial regulation and compliance measures, and while there has been some progress, it is self-evident these have been unsuccessful. This is in part due to a lack of real political will – in a post-colonial world, financial supremacy has overtaken military might as a measure of authority, power, and influence, and accordingly is much revered and jealously guarded by nations. For wealthy countries with global financial hubs, meaningful reform would risk industry flight, therefore diluting the perceived authority of those nations. It would also create a potential competitive disadvantage when large corporations and industry players look to establish regional bases or conduct business, and prevent the strategic use of secretive tax networks and tax havens, often exploited by those on whom politicians rely.
A good explanation of this conflict of interest is offered by the independent documentary *The Spider's Web: Britain's Second Empire.*

Critically, white-collar crime isn’t viewed in the same way as other forms of criminality, and as such is not treated with the same urgency, resultant of being the crime of the powerful. It is not an ‘equal opportunity crime’, but ‘entails diverse combinations of respectability, social status and occupation’ (Ruggiero 2015 pp. 7-9). Reflecting this, in the US in 2019, prosecution of white-collar crime fell to the lowest levels since 1998, with criminal penalties levied by the justice department at $110million, down from $3.6 billion. During 2018, only 37 successful prosecutions occurred as a result of corporate crime. Through ‘country-club nepotism’, the wealthy and powerful can distort the nature of their crimes, and their impact on the individual. In the article [Market ideology and financial crime](#), Professor Ruggiero briefly discusses issues of self-regulation and the links to white-collar crime.

For instance, the circumstance that, although in response to the financial crisis the [Dodd Frank Act](#) was presented to Americans as the cure for the deep-rooted unfairness of the economic system, after a decade many of its key provisions have not been implemented yet, is emblematic that where strong economic interests are at stake, even the most developed societies face almost insurmountable obstacles in their efforts to foster transparency and eradicate corruption (Grasso, 2020, p. 381).

At the same time, we should investigate what would be the effect of such institutional incapacity on the future of whistleblowing. This situation has *de facto* transformed the role of investigative journalists, whistleblowers and leakers from the last line into the sole line of defence we can use to detect such criminal activities.
Should we expect to see potential whistleblowers and leakers empowered by how serious the allegations have been taken and the global coverage, or conversely, are they likely to see that while token punishments have been issued, there has been little lasting cultural change or punishment for the individuals involved.

Research has demonstrated, a major obstacle to whistleblowing is not only the fear of retribution (Near, Rehg, Van Scotter, & Miceli 2004 p. 789), but also the perception that concerns would not be taken seriously, and nothing be done following the disclosures (Sawyer, Johnson, & Holub 2010 p. 86). If we, as an increasingly globalised society, expect whistleblowers and those who leak evidence of illegality and wrongdoing to continue to do so, to act as an effective check and balance on powerful international actors, and to uncover international crimes, then these barriers must be overcome and the individuals involved empowered.

The literature on empowering whistleblowers is vast, and includes a structured process of rewards (for instance the US Dodd-Frank Act), improved internal compliance programmes, a corporate culture of openness, anonymous reporting, third party reporting with impartial investigations, clear timelines on case resolutions, a system of promoting whistleblowers for their valiant behaviour, top-down management involvement, regular compliance evaluations and a process of continual feedback, amongst others (Dworkin, T.M. & Near, J.P., 1997 pp. 10-12; Van De Bunt, H., 2010 pp. 448-450; Westbrook, A.D., 2018 pp. 1147-1158). But in reality, these measures are only effective once the whistleblower is satisfied that they will be taken seriously, and change is possible.

Leaks of this nature are distinct, resultant of the depth and breadth of the material disclosed. Typically, a disclosure is made against one specific entity or group, and as such, management can deploy a defence of a small number of bad actors while arguing the organisation as a whole is compliant and the culture one of duty and cooperation.
Yet with information that spans 18 years, trillions of dollars, numerous significant and prominent financial institutions, and multiple countries, governments, and administrations, then there no longer exists a defence of a few bad apples. This is not a small oversight by a middle manager that has gone unnoticed, but is clearly an endemic problem within the industry and the culture, for which senior leadership must take responsibility.

Addressing the remote causes of irresponsible corporate behaviours in the financial sector

Accordingly, the problem is the industry culture as a whole, and as such resolution must be addressed towards the industry as a whole. The current system of regulation has failed in its efforts to prevent financial institutions engaging in illegal, immoral, and harmful behaviour, therefore, is unfit for purpose.

If we want whistleblowers and leakers to take the risks of acting in the public interest, then they must be secure there exists the possibility of addressing nefarious conduct, and act as an effective future deterrent. On this scale, this is achievable through a system of comprehensive reform of the regulators, and the powers available to them.

It is simply not enough that institutions pay fines once caught, often seen as the cost of doing business (Connor & Lande 2012 p. 428), and executives and managers escape personal criminal liability. If a bank can be given a deferred prosecution, and then continue to engage in the same conduct that led to the sanction, without further punishment, then the system is not fit for purpose.

In response, it would be beneficial for all financial industry staff to be held accountable for their role and actions. Individuals often overestimate their ability to influence events that are predominantly chance, and overconfident in the accuracy of forecasts. Greed and a ‘bonus culture’ can encourage decision-makers and staff at the coal face to minimise risk and turn a blind eye to consequences (Turner 2009).
Similarly, the desire to generate profits contributes to decision-makers and senior management being willfully ignorant to the history, circumstances, and experiences that have lead to previous crisis (Holland, J. 2010 p. 93), put simply, the industry is reluctant to learn the lessons of the past and continues to engage in immoral, risky, or illegal conduct – however, if individuals had a reasonable belief that to engage in illegality or suspect transactions, they were personally criminally responsible for those transactions, there would exist both an effective deterrent in approving the transaction and retaining the client, and an important means of personal accountability outside of the ineffective corporate system.

Therefore, following leaks of this nature, regulators and criminal investigators could pursue both executives and staff for the parts they played, including through negligence. Once bad actors, regardless of their position, begin seeing reasonable risks of criminal liability and incarceration, this would provide an opportunity for effective cultural shift in the industry, and those who continue to refuse to change would be responsible for the harm they are involved in, and as such, whistleblowers would see they are not only taken seriously, but change would occur as a result of their risks.

Whistleblowers and leakers are providing the means of applying pressure, but this must be sustained to effect the change required. The lesson isn’t in the futility of whistleblowing as a means of bringing change in the financial services industry, but one of its absolute requirement to make the case for change. If whistleblowers and leakers stop their heroic efforts to alert the wider society of the illegal and immoral actions pervasive throughout the industry, this would be counterproductive to the case for change, giving the impression that actors had learned their lessons and past efforts were effective.

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