

ALERTS

FinCEN Issues First National AML/CFT Priorities and Defers Implementation of Priorities and No-Action Letter Process to Future Rulemakings

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On June 30, 2021, pursuant to the recently passed Anti-Money Laundering Act of 2020 (“AML Act”),^[1] the U.S. Department of the Treasury’s Financial Crimes Enforcement Network (“FinCEN”) issued for the first time government-wide priorities for anti-money laundering and countering the financing of terrorism (“AML/CFT”) (“Priorities”). The Priorities identify and describe the most significant AML/CFT threats currently facing the United States. FinCEN also issued two statements, one to banks and the other to non-bank financial institutions (“NBFIs”), providing additional guidance regarding the Priorities (collectively, “Statements”)^[2] and making it clear that banks and NBFIs will only be required to incorporate the Priorities into their risk-based AML/CFT programs after FinCEN issues implementing regulations.^[3]

Also on June 30, 2021, FinCEN released a report summarizing its assessment of whether to establish a process for issuing no-action letters regarding the application of the Bank Secrecy Act and its implementing regulations (“BSA”)^[4] to specific conduct (“No-Action Letter Assessment”).^[5] The No-Action Letter Assessment concludes that FinCEN will enact a no-action letter process, but will only do so pursuant to formal rulemaking, the timing of which will be subject to FinCEN’s resource limitations and competing priorities.

AML/CFT Priorities and Statements

FinCEN issued eight AML/CFT Priorities following consultation with other Treasury Offices,[6] the Attorney General, as well as relevant federal and state regulators, law enforcement and national security agencies.[7] According to the Priorities, “[t]hese threats exploit some perceived ‘vulnerability’ in the U.S. financial system that may be in law, regulation, supervision, or enforcement, or may stem from a unique attribute of a product, service, or jurisdiction.”[8] They include predicate crimes that generate illicit proceeds which actors may then launder through the financial system.

- The Priorities note that countering corruption is a core national security interest because, among other things, “[m]isappropriation of public assets, bribery, and other forms of corruption affects individuals and entities across the world, threatens the national security of the United States and the global financial system, degrades the rule of law, perpetuates conflict, and deprives innocent civilians of fundamental human rights.”
- FinCEN includes cybercrime in the Priorities because of the national security risks involved in cyber-enabled financial crime, ransomware attacks and the misuse of virtual assets that exploit and undermine their innovative potential. The Priorities define cybercrime broadly as any illegal activity that involves a computer, another digital device or a computer network, and they note that it includes activities involving convertible virtual currencies (“CVCs”) to purchase illicit products and services. With respect to ransomware, the Priorities provide that “[i]n some instances, ransomware campaigns have been associated with adversary governments, sanctioned entities, or jurisdictions with weak AML/CFT regimes and high AML/CFT and sanctions risks, such as Russia, North Korea, and Iran” and note that the Department of the Treasury’s Office of Foreign Assets Control “has designated numerous malicious cyber actors under its sanctions programs in response to aggressive and harmful malicious cyber activities by state actors targeting U.S. government and private sector networks.”[9] With respect to CVCs, the Priorities note that “[c]riminals use a number of techniques to obscure the source of illicit funds when conducting transactions involving CVCs, including the use of mixers and tumblers” and “CVCs have been used by some of the highest-priority threat actors,” such as North Korea, “to advance their illegal activities and nuclear weapons ambitions.”[10]

- *Terrorist Financing.* The Priorities describe both foreign and domestic terrorist financing as a risk to national security. They also note that terrorist financing has evolved to include a growing number of homegrown, self-radicalized individuals who carry out low-cost attacks with support from overseas organizations, in addition to proliferating domestic racially- and ethnically-motivated violent extremists.
- The Priorities note that fraud, such as bank, consumer, health care, securities and investment, and tax fraud, is believed to generate the largest share of illicit proceeds in the United States.[11] Increasingly, fraud schemes are internet-enabled and may launder assets through a variety of methods, including transfers through accounts of offshore legal entities, accounts controlled by cyber actors and money mules.
- *Transnational Criminal Organization Activity.* Transnational criminal organizations (“TCOs”) are noted on the list of Priorities due to the crime-terror nexus and their engagement in a wide range of illicit activities, including cybercrime, drug trafficking, fraud, wildlife trafficking, human smuggling, human trafficking, intellectual property theft, weapons trafficking and corruption. The Priorities note that TCOs increasingly employ professional money laundering networks and often use their specialized expertise to launder proceeds generated by others, regardless of the predicate criminal activity.
- *Drug Trafficking Organization Activity.* The Priorities explain that drug trafficking organizations (“DTOs”) have contributed to a significant public health emergency in the United States involving drugs like fentanyl and cocaine, which are brought to the United States from Mexico, Colombia and China. DTOs have developed schemes to launder proceeds of drug sales by facilitating their exchange, including to Mexico or to Chinese citizens residing in the United States, who may make use of front companies or couriers to deposit funds into the banking system. These schemes allow DTOs to repatriate proceeds to Mexico and sidestep Chinese capital flight restrictions.
- *Human Trafficking and Human Smuggling.* Human traffickers and smugglers use several mechanisms to move illicit proceeds, ranging from cash smuggling by individual victims to sophisticated operations that rely on professional money laundering networks and criminal organizations. Human trafficking proceeds can derive from the housing, transportation and exploitation of victims. Human traffickers and smugglers may establish shell companies to hide their activities and

may receive payments in a variety of ways, such as funnel accounts and trade-based money laundering schemes.

- *Proliferation Financing.* The Priorities describe proliferation financing as the act of providing funds or financial services used for the manufacture, acquisition, possession, development, export, trans-shipment, brokering, transport, transfer, stockpiling or use of nuclear, chemical or biological weapons, in contravention of national laws or international obligations. Global correspondent banking is a principal vulnerability and driver of proliferation financing risk within the United States due to its central role in processing U.S. dollar transactions, which comprise a substantial proportion of cross-border trade.

In describing each of these eight Priorities, FinCEN cites to numerous guidance and advisory releases that it has previously issued, some in consultation with other government entities. As required by the AML Act, FinCEN will update the Priorities at least once every four years to account for new and emerging threats to the U.S. financial system and national security.[12]

The Statements issued by FinCEN concurrently with the Priorities clarify that publication of the Priorities does not create an immediate change in the BSA requirements or regulatory expectations for banks or NBFIs. Such financial institutions will not be required to incorporate the Priorities into their risk-based AML/CFT programs until the effective date of the final regulations. The Statements further provide, however, that banks and NBFIs “may wish to start considering how they will incorporate the AML/CFT Priorities into their risk-based AML programs, such as by assessing the potential risks associated with the products and services they offer, the customers they serve, and the geographic areas in which they operate.”[13] FinCEN has acknowledged that not every Priority will be relevant to every covered financial institution.

The bank-specific Statement also provides that the federal banking agencies, state bank and credit union regulators, and FinCEN “recognize the need to provide revised regulations and timely guidance to assist banks in complying with the BSA” and that they are committed to working together “to develop any necessary corresponding guidance and examination procedures for [bank] examiners.” The NBFI-specific Statement makes similar points and provides that FinCEN is committed to working with the staff of the U.S. Securities and Exchange Commission, Commodity Futures Trading Commission, Internal Revenue Services and

state financial regulators to develop and publish NBFIs-specific guidance and examination procedures.

No-Action Letter Assessment

According to the No-Action Letter Assessment, FinCEN will institute a no-action letter process in addition to its existing forms of regulatory guidance and relief, such as administrative rulings and exceptive or exemptive relief.^[14] However, that no-action letter process will only be implemented after FinCEN conducts a formal rulemaking. The No-Action Letter Assessment describes a no-action letter as an acknowledgement by FinCEN that FinCEN will not take enforcement action against the requesting party for engaging in the specific activities as described in the request. FinCEN cautions, however, that issuing a no-action letter will require additional resources as “[a]ny request for no-action relief would need to be carefully reviewed in consultation with other regulators.”^[15]

The No-Action Letter Assessment notes that FinCEN considered a cross-regulator no-action letter process, in which FinCEN could issue a no-action letter that would apply to FinCEN as well as other regulators, but ultimately determined, after consultation with the Attorney General, the federal functional regulators, state bank supervisors, state credit union supervisors, and other federal agencies (the “Consulting Agencies”), that it presented significant hurdles to implementation because “while FinCEN is the administrator of the BSA, it does not have authority to administer or enforce all AML and CFT laws that are administered or enforced by other regulators, departments, and agencies” and “[i]f FinCEN were to issue a no-action letter, it would not have the ability to prevent another agency from bringing an enforcement action under that agency’s own authority.” The No-Action Letter Assessment nonetheless makes clear that coordination among FinCEN and the Consulting Agencies may be part of any future no-action letter process. It provides that the “the degree of consultation with other regulators would vary on a case-by-case basis and, in some instances, a coordinated response among relevant agencies may be appropriate” depending on the nature of the request, the type of requesting entity, and the activity at issue. The No-Action Letter Assessment further states that “[c]onsultation carries the substantial benefit of helping to ensure that regulated persons are not subject to conflicting requirements, and that regulators are not working at cross purposes.”

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

[1] “Passage of Anti-Money Laundering Act of 2020 Includes Comprehensive BSA/AML Reform Measures,” *SRZ Alert* (Jan 7, 2021), available [here](#).

[2] “Anti-Money Laundering and Countering the Financing of Terrorism National Priorities,” FinCEN (June 30, 2021), available [here](#) (“Priorities Statement”); “Statement on the Issuance of the Anti-Money Laundering/Countering the Financing of Terrorism (AML/CFT) National Priorities,” FinCEN (June 30, 2021), available [here](#) (“NBFI Statement”); “Interagency Statement on the Issuance of the Anti-Money-Laundering/Countering the Financing of Terrorism National Priorities,” FinCEN (June 30, 2021), available [here](#) (“Bank Statement”).

[3] On Sept. 17, 2020, prior to the passage of the AML Act, FinCEN issued an advanced notice of proposed rulemaking soliciting comment on enhancing the effectiveness of AML programs, which included significant discussion on how financial institutions should incorporate strategic and national AML priorities into their risk-assessment process and overall BSA/AML programs. *See* FinCEN, ANPRM, Anti-Money Laundering Program Effectiveness, 85 Fed. Reg. 58023 (Sept. 17, 2020), available [here](#).

[4] 31 U.S.C. §§ 5311-5330; 31 C.F.R. Chapter X.

[5] “A Report to Congress Assessment of No-Action Letters in Accordance with Section 6305 of the Anti-Money Laundering Act of 2020,” FinCEN (June 28, 2021), available [here](#) (“No-Action Letter Assessment”); *See also* “FinCEN Completes Assessment on the Use of No-Action Letters,” FinCEN Press Release (June 30, 2021), available [here](#). FinCEN’s issuance of the No-Action Letter Assessment was required pursuant to Section 6305 of the AML Act of 2020, and it incorporated feedback received by FinCEN from the Attorney General, the federal functional regulators, state bank supervisors, state credit union supervisors, and other federal agencies.

[6] The Treasury Offices consulted were the Office of Terrorist Financing and Financial Crimes, the Office of Foreign Assets Control and the Office of Intelligence and Analysis.

[7] The AML/CFT Priorities were issued pursuant to Section 6101(b)(2)(C) of the AML Act (31 U.S.C. § 5318(h)(4)(A)).

[8] Priorities Statement at 2.

[9] Priorities Statement at 5.

[10] *Id.*

[11] U.S. Department of the Treasury, National Money Laundering Risk Assessment, at 2 (Dec. 20, 2018), available here.

[12] 31 U.S.C. § 5318(h)(4)(B) (as amended by AML Act § 6101(b)(2)(C)).

[13] NBFI Statement at 2; Bank Statement at 2.

[14] Administrative rulings are written rulings that have precedential value, could apply to a given situation and “may be relied upon by others similarly situated.” Report at 9; 31 C.F.R. §§ 1010.710-1010.717. Exceptive or exemptive relief applies to situations in which FinCEN, as delegated by the Secretary of Treasury, grants an exception or exemption to “particular persons or to classes of persons, and may apply to particular transactions or classes of transactions.” No-Action Letter Assessment at 9; 31 C.F.R. § 1010.970.

[15] No-Action Letter Assessment at 14.

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