November 16, 2020

Submitted via Federal E-rulemaking Portal (www.regulations.gov)

Kenneth A. Blanco
Director
Financial Crimes Enforcement Network
P.O. Box 39
Vienna, VA 22183

Re: Advance Notice of Proposed Rulemaking; Anti-Money Laundering Program Effectiveness; RIN 1506–AB44; Docket Number FINCEN–2020–0011

Dear Director Blanco:

These comments are submitted on behalf of INFiN, A Financial Services Alliance ("INFiN"), in response to the above referenced Advance Notice of Proposed Rulemaking, Anti-Money Laundering Program Effectiveness ("ANPRM") issued by the Financial Crimes Enforcement Network ("FinCEN"). INFiN strongly supports efforts to modernize and reform the Bank Secrecy Act/Anti-Money Laundering ("BSA/AML") regulatory regime and believes that the ANPRM is a helpful first step in that direction. However, INFiN is concerned that the potential additive regulatory burden, if the proposals in the ANPRM are adopted without changes in other areas, will further restrict money services businesses' ("MSBs") access to banking services.

Introduction

INFiN is a national trade association representing approximately 350 companies operating 8,000 consumer financial service provider locations throughout the U.S. INFiN members offer a wide array of financial products and services, including check cashing, money orders, electronic bill payments, domestic and international money transfers, ATM access, government benefit and payroll payments, tax preparation, prepaid cards, deposit acceptance services, small-dollar loans, and numerous other financial and consumer services. INFiN members are classified as MSBs. As such, they are subject to the BSA's AML provisions and Suspicious Activity Report ("SAR") filing requirements. INFiN members have for decades served millions of Americans, including individuals that have relationships with banks as well as those that do not.

According to FinCEN, SARs filed by MSBs provide some of the most important information currently available to law enforcement and other security agencies in the United States. FinCEN has stated that MSBs, the second largest category of SAR filers, play a unique and important role in BSA reporting "because they often provide financial services to people less likely to use traditional banking services and because of their prominent role in providing remittance services, both domestically and abroad." In other words, MSBs reach and obtain information about populations that banks and other financial service providers cannot, and therefore provide an important national security function.

Background

As discussed in the ANPRM, the Currency and Foreign Transactions Reporting Act of 1970, generally known as the BSA, authorizes the Secretary of the Treasury to require financial institutions to keep records and file reports that ''have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis to protect against international terrorism.''[1] As such, the BSA is primarily a recordkeeping and reporting statute. The Secretary of the Treasury has delegated to the Director of FinCEN the authority to implement, administer, and enforce compliance with the BSA and its related authorities.[2]

At the time of enactment, the primary focus of the BSA was on organized crime. Since then, its focus has expanded to include areas such as money laundering and drug trafficking; terrorist financing; elder abuse; human trafficking; and cybercrime. It currently plays a key role in combating various frauds associated with the COVIDid-19 pandemic.

In its role as Administrator of the BSA, FinCEN, along with the Federal functional regulators,[3] issues regulations to implement the statute. The Federal banking agencies first issued BSA compliance program rules for banks in 1987.[4] Since then, as set forth in the ANPRM, FinCEN has issued program rules for other industries that are covered by the BSA, including MSBs.[5] Additionally, FinCEN and the Federal functional regulators have issued many more rules implementing the BSA including the Customer Identification Program Rule[6] and, more recently, the Customer Due Diligence Rule.[7]

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[1] 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, and 31 U.S.C. 5311–5314; 5316–5332.
[2] Treasury Order 180–01 (Jan. 14, 2020).
[3] The Federal functional regulators are the Board of Governors of the Federal Reserve System ("FRB"), the Office of the Comptroller of the Currency ("OCC"), the Federal Deposit Insurance Corporation ("FDIC"), the National Credit Union Administration ("NCUA") (collectively, "the Federal banking agencies"), the Securities and Exchange Commission, and the Commodities Futures Trading Commission.
[4] *See* 12 CFR 208.63 (FRB); 12 CFR 21.21 (OCC); 12 CFR 326.8 (FDIC); and 12 CFR 748.2 (NCUA).
[5] *See* 31 CFR 1022.210.
[6] *See, e.g.*, FinCEN, Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of Thrift Supervision, National Credit Union Administration, "Customer Identification Programs for Banks, Savings Associations, Credit Unions and Certain Non-Federally Regulated Banks," 68 FR 25090 (Final Rule, May 9, 2003).
[7] FinCEN, "Customer Due Diligence Requirements for Financial Institutions," 81 FR 29398 (Final Rule, May 11, 2016).

Since the enactment of the BSA 50 years ago, virtually all changes to the regulatory regime have been additive. While the rules implementing the BSA were designed to serve an important purpose, most of them were written decades ago to address problems that existed in a world that is very different from the one we live in today. The cumulative impact of these additive changes has been to increase the costs and burdens of AML compliance exponentially. This, in turn, has led to perverse and destructive outcomes, including the widespread de-risking[8] of legitimate businesses, many of which play an important role in the U.S. economy.

Among the industries that have been impacted by de-risking, none have been harder hit than MSBs. The reality is that vast numbers of MSBs, which play a critical role in providing financial services, especially to unbanked and underbanked populations, continue to have a great deal of difficulty obtaining and maintaining banking relationships, threatening their viability and causing many of them to cease operations. This, in turn, has had a harmful effect on their customers, often driving their business into the unregulated and opaque corners of the financial system.

Perhaps this would be acceptable if the system were working optimally, but we submit it is not. While there can be little question that the information that is generated by the BSA is of immense value to law enforcement, it is also true that huge amounts of illicit activity go undetected, and only a small percentage of money laundering and other illicit acts are ever investigated and prosecuted. With technological advances presenting a host of new opportunities and challenges, the time has never been better to take a hard look at the current regulatory regime and explore ways of making it more effective as well as more efficient.

<u>The Overlay of New Requirements Will Further Drive Up Compliance Costs and Contribute to De-Risking</u>

FinCEN is considering regulatory amendments that would fundamentally change the way AML program effectiveness is measured. Central to this approach is a new definition of an "effective and reasonably designed" AML program as one that:

- identifies, assesses, and reasonably mitigates the risks resulting from illicit financial activity—including terrorist financing, money laundering, and other related financial crimes—consistent with both the institution's risk profile and the risks communicated by relevant government authorities as national AML priorities;

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[8] As used in this context, "de-risking" refers to a bank's decision to terminate customer accounts, on a categorical basis, because the costs of managing the accounts are too high relative to the profitability of the relationship.

- assures and monitors compliance with the recordkeeping and reporting requirements of the BSA; and

- provides information with a high degree of usefulness to government authorities consistent with both the institution's risk assessment and the risks communicated by relevant government authorities as national AML priorities.

Viewed in isolation, this is a reasonable definition of an "effective and reasonably designed" program. However, when considered along with other changes that FinCEN is contemplating, the overall effect is that it would appear to overlay a set of new evaluative criteria for assessing an institution's AML compliance program on top of the existing criteria – as opposed to replacing the existing criteria with the new criteria.

For example, the ANPRM contemplates that the Director of FinCEN would issue national AML priorities, to be called "Strategic Anti-Money Laundering Priorities," every two years (or more frequently as appropriate to inform the public and private sector of new priorities). Part of the standard for assessing whether an institution has implemented an "effective and reasonably designed" program would be whether that institution has considered and integrated the national AML priorities into its risk assessment processes. The ANPRM also seeks comment on whether these priorities should be considered in a financial institution's risk assessment (discussed below).

Without a corresponding adjustment to the way that AML program effectiveness is currently assessed, this is effectively a new requirement and another additive change to the regulatory regime. If implemented, affected institutions would not only have to continue to do everything they are presently doing – and be evaluated by their examiners on how well they are doing it – but they will also need to incorporate the national AML priorities into their policies and procedures, and be evaluated on that as well. And, even if one of the identified AML priorities is inapplicable to a financial institution, that will need to be addressed and documented.

Another example is the consideration being given to amending the AML program regulations to establish an explicit requirement for a risk assessment process. While most institutions presently conduct a risk assessment as a means of developing a complete and accurate understanding of their risks, it is not a formal requirement. Making it one could add to institutions' AML compliance costs, as it will require institutions to retool their existing risk assessment process to ensure that it is conducted in accordance with the new regulatory requirement, including addressing the national AML priorities.[9] It will also raise the stakes for institutions that fail to do so, as it will elevate non-compliance with a supervisory expectation to a violation of law that is enforceable by the assessment of civil money penalties and the issuance of other enforcement actions. As a result, the risk assessment could take on a life of its own and becomes more important than providing useful information for law enforcement.

Additionally, it is hard to envision how such a requirement would apply to the broad range of financial institutions in the U.S. Surely, an effective risk assessment for a large, internationally active bank looks very different from that of a small community bank or credit union, or MSB. Consequently, to account for these vast differences in size, services, customer base, and risk levels, any regulatory requirement for a risk assessment would almost have to be too general to be useful, or else issued on a categorical basis to apply to the various types of institutions that would be subject to the requirement. Clearly, this is not an area where "one size fits all" makes any sense.

Without a reassessment of the requirements that institutions are currently subject to, and corresponding adjustments to those requirements, these and other changes that are being contemplated will likely result in further increases in the costs and burdens of AML compliance.[10] Not only will that do nothing to address the current difficulties that MSBs and other businesses are experiencing obtaining access to banking services, but it will exacerbate them. In other words, the potential danger in this contemplated shift is an increase and not a decrease in de-risking.

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[9] This could also undermine existing risk assessments if a financial institution changes its existing risk assessment to meet regulatory standards, if those standards set a lower bar than what the financial institution was doing.

[10] FinCEN's recent issuance of guidance on customer due diligence requirements and FinCEN's and the Federal banking agencies' recent issuance of guidance on politically exposed persons strongly emphasize the risk-based nature of AML compliance in these areas as opposed to prescriptive requirements. *See* FinCEN, FIN-2020-G002, "Frequently Asked Questions Regarding Customer Due Diligence (CDD) Requirements for Covered Financial Institutions" (August 3, 2020); and the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Financial Crimes Enforcement Network, the National Credit Union Administration, and the Office of the Comptroller of the Currency, "Joint Statement on Bank Secrecy Act Due Diligence Requirements for Customers Who May Be Considered Politically Exposed Persons" (August 21, 2020). While it is not clear, these and other guidance documents, when read in conjunction with the ANPRM, seem to be offered as burden-reduction measures, perhaps to offset the additional requirements being contemplated in the ANPRM. On the other hand, it is difficult to reconcile some of the recent changes to the Federal Financial Institutions Examination Council Bank Secrecy Act/Anti-Money Laundering Examination Manual with the ANPRM, particularly the systemic replacement in the Manual of the term "effectiveness" with "adequacy" or "reasonable design" in reference to assessment of a bank's AML program. See Federal Financial Institutions Examination Council Bank Secrecy Act/Anti-Money Laundering Examination Manual (revised April 15, 2020).

Operational Risks and Challenges

Additionally, the changes that are under consideration will create significant operational risks and challenges, both for institutions and the Government. For example, it is not clear how financial institutions will be expected to incorporate the national AML priorities into their risk assessment processes, and how such incorporation will be measured. Nor is it clear how financial institutions will assess and address risks that are outside the identified national priorities, or what will happen if there is a major shift as we have seen in 2020 with the COVID-19 pandemic.

It will also be critically important that examiners are in alignment with their agency's senior leadership to ensure that examinations are conducted in accordance with policy direction. To this end, examiner training will be critical to the implementation of the changes contemplated in the ANPRM. And, it will be critically important that financial institutions understand how examiners plan to approach this new regime.

The issuance of national AML priorities will also give the Director of FinCEN a much greater role in bank supervision, as the Federal banking agencies would be expected to align their examinations and supervision with the priorities. While coordination among these agencies would be essential, it is also important that the Federal banking agencies' independence with respect to supervisory matters is not compromised.

MSBs Should Not Be Subject to the Rulemaking or Should Have an Opportunity to Opt-In or Opt-Out of Resulting Program Changes

As noted in the ANPRM, MSBs are currently required to have an "effective" AML program. Moreover, the MSB AML program rule already defines an "effective" program as "one that is reasonably designed to prevent the money services business from being used to facilitate money laundering and the financing of terrorist activities."[11] The program must be in writing, commensurate with the risks posed by the location and size of, and the nature and volume of the financial services provided by, the MSB, and, at minimum, include:

- policies, procedures, and internal controls reasonably designed to assure compliance;
- a designated individual to assure day to day compliance;

[11] 31 CFR 1022.210(a).

- education or training of appropriate personnel; and

- independent review to monitor and maintain an adequate program.[12]

MSBs have been subject to their AML program rule since 2010 and have successfully developed and implemented programs in compliance with the rule. For many MSBs, amending their existing programs in order to comply with the changes contemplated in the ANPRM will not only be costly and burdensome, but unnecessary to mitigate the risks that they face. Consequently, MSBs should be carved out of the rulemaking or, at the very least, given the opportunity to "opt-in" or "opt-out" of any regulatory changes that result.

Conclusion

INFiN strongly supports efforts to modernize and reform the BSA/AML regulatory regime and believes that the ANPRM is a positive first step. However, without offsetting changes to existing regulatory requirements, the changes contemplated in the ANPRM will be additive, further increasing compliance costs and burdens, and resulting in further de-risking of MSB accounts. Additionally, since MSBs are already subject to an AML program rule that has an "effectiveness" component, as well as a definition of "effectiveness," MSBs should not be included in the rulemaking. At the very least, MSBs should be allowed to "opt-in" or "opt-out" of any changes that are made to their program rule.

On behalf of INFiN, thank you again for the opportunity to comment on the ANPRM. Please do not hesitate to contact me if you would like to discuss any aspect of this letter.

Respectfully submitted,

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Executive Director

cc: Daniel P. Stipano, Esq.

[12] 31 CFR 1022.210(b)-(d).