FinCEN No-Action Letter Process

COMMENT LETTER

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Financial Crimes Enforcement Network
Enforcement and Compliance Division
P.O. Box 39
Vienna, VA 22183

FINCEN-2022-0007

RIN 1506-AB55

Re: Advance Notice of Proposed Rulemaking – No-Action Letter Process

Dear Sir or Madam,

The Conference of State Bank Supervisors ("CSBS")1 appreciates the opportunity to provide input on the Advance Notice of Proposed Rulemaking ("ANPR") issued by the Financial Crimes Enforcement Network ("FinCEN") on questions relating to implementation of a FinCEN no-action letter ("NAL") process. The Anti-Money Laundering Act of 2020 ("AML Act") recognizes the vital role states play in the Bank Secrecy Act ("BSA") and anti-money laundering ("AML") supervisory regimes, and it requires FinCEN to consult with state regulators on implementing transaction monitoring technologies and NALs issued by FinCEN. State regulators support FinCEN's efforts to design a thoughtful NAL framework that enhances the BSA/AML regime and provides new benefits to financial institutions, regulators, and law enforcement.

State regulators supervise the largest number of financial institutions, both banks and nonbanks, subject to BSA/AML requirements, and their broad supervisory portfolio provides them with a unique perspective of BSA/AML risks. State regulators charter and supervise more than 3,800 banks, or 79 percent of all U.S. banks. During 2021 alone, state regulators conducted more than 1,000 BSA compliance exams of state-chartered banks. Moreover, unlike any single federal prudential regulator, most state banking departments regulate multiple financial intermediaries in the U.S. payments system, including banks and money services businesses ("MSBs"). Collectively, state-chartered banks and state-licensed MSBs filed nearly 1.5 million Suspicious Activity Reports ("SARs") in 2021. As such, state financial regulators have extensive experience recognizing BSA/AML risks at a variety of financial institutions and are well positioned to improve supervision for these risks at both bank and nonbank institutions, including by providing input on FinCEN's NAL process.

State regulators provide responses to several questions posed in the ANPR, with emphasis on the following points:

- The NAL process should include ongoing consultation and information sharing with state supervisors in the case of state-chartered or state-licensed institutions.
- The NAL process must be clear on what type(s) of activities are eligible for an NAL, prioritizing innovative compliance and intelligence sharing.
- FinCEN should provide a clear NAL framework that includes a sunset date, timeline estimates, and a withdrawal grace period for applicants.

State-Federal Coordination on NALs

State regulators believe it is imperative that FinCEN inform the appropriate state supervisor regarding any NAL submission or determination for any of their state regulated institutions. The BSA/AML supervisory framework is inherently complex for banks, with both state and federal banking regulators examining for compliance with BSA/AML regulations promulgated by FinCEN. NALs may create additional complexity for regulators and their regulated institutions if all relevant supervisory authorities are not informed and updated as the NAL process unfolds. A potential solution could be to require an entity requesting an NAL to identify all its regulators, as well as the regulators of its parent or subsidiary companies, in the NAL request. NAL information shared between FinCEN and state regulators would be consistent with existing arrangements for the sharing of confidential supervisory information among state and federal regulators.

Moreover, several states have established their own BSA/AML requirements and regulatory expectations, and it is crucial that FinCEN consult with state regulators in such cases to ensure NALs appropriately consider and avoid conflicts with state BSA/AML requirements. Coordination between FinCEN and state regulators on NALs will help institutions understand which BSA/AML requirements are in and out of scope of the NAL, and how their BSA/AML compliance policies and procedures will need to reflect these state and federal requirements.

State regulators can also serve as a vital resource to FinCEN as the agency considers granting a potential NAL to a particular entity. States can provide feedback on an institution's record of BSA/AML compliance, overall risk profile and business model, and other material information that would help FinCEN as it weighs granting an NAL.

In sum, it is imperative that FinCEN consult, coordinate, and share information to the fullest extent possible with state regulators to ensure the entirety of the NAL process is clear for regulators and regulated entities alike. State regulators will work with FinCEN to ensure it has the appropriate BSA/AML point of contact information for each state banking agency.

NAL Eligibility and Requirements

State regulators believe FinCEN should prioritize through the NAL process innovative technologies and practices that have the potential to streamline or improve bank operations and/or benefit law enforcement (e.g., innovative applications of machine learning or advanced automation for compliance purposes). Ideally, the NAL process should help expedite regulatory decision-making in situations where implementing regulations and other guidance have yet to be formulated.

As a general matter, state regulators also request that FinCEN limit the scope of NALs to prohibit requests concerning matters that are currently subject to state examination or investigation. Again, consultation with state regulators throughout the entire NAL process will be critical, as regulators can help FinCEN understand how NAL requests relate to specific matters that arise during the examination, investigation, or enforcement processes.

In the interests of full disclosure and transparency, NAL rulings should require the same information called for under 31 CFR 1010.711(a) in the case of administrative rulings, even if NAL rulings are not published and are not deemed to have precedential value. State regulators also propose that NAL requestors seeking a ruling on a matter previously subject to an adverse finding from a regulatory examination, and not otherwise disposed of through an administrative procedure, should make full disclosure to FinCEN of the earlier adverse finding and all relevant circumstances. Additionally, and as proposed in the ANPR, it would be helpful for FinCEN to provide information derived from an NAL request to agencies with delegated examination authority.

State regulators request FinCEN consider these additional comments regarding NAL procedures and filing requirements:

- NAL procedural and filing requirements should be broadly in line with those stipulated under 31 CFR 1010.711 (b), (c) and (d).
- NAL requestors should specify all entities in the corporate structure to which the NAL applies.
- All NAL requests should be submitted in writing to FinCEN, and the requestor should copy their appropriate state supervisory and, if applicable, federal functional regulator on the submitted request.
- With respect to the applicability of NALs to agents, third parties, and affiliates of the requestor, state regulators recommend that in the case of money services businesses such as money transmitters, all agents should be subject to these rulings.
- Certain circumstances might justify revocation of an NAL and should be determined on a case-by-case basis and in consultation with the state supervisory and, if applicable, federal functional regulator. For example, an NAL could be revoked upon a subsequent determination (e.g., by examiners) of incomplete information or when superseded by other regulatory or statutory actions.
- State regulators believe industry participants should provide FinCEN and their regulators with a plan on how they will meet their BSA/AML compliance program requirements after the NAL has terminated for any reason.

Timeline and Treatment of NAL Determinations

The ANPR requests additional considerations regarding the proposed timeline addressed in FinCEN's recent NAL Report submitted to Congress.2 State regulators recognize FinCEN's staffing limitations, amongst other factors cited in the NAL Report, that may disrupt a rigid timeline for issuing an NAL determination. In our original consultation with FinCEN, state regulators suggested a 90-day issuance window while recognizing reaching that threshold may require additional resources from Congress. Given the practical limitations that FinCEN highlighted in its report to Congress, we request additional explanation from FinCEN on whichever timeline they determine is appropriate. Providing transparency to NAL applicants can help legitimize the process.

State regulators see little practical benefit in publishing NAL denials on FinCEN's website, whether or not anonymized, or in establishing an appeals process for NAL denials. However, in order to eliminate unnecessary costs and delays, FinCEN should explore publishing other information that would help financial institutions understand the types of NAL requests FinCEN will consider. State regulators suggest including discussion of regulatory burden and associated compliance costs in any future proposal.

State regulators propose the NAL process be treated as a non-public confidential matter during the period the no-action decision remains in effect. Publication of NALs could imply a degree of precedential value, like administrative rulings, with unintended broader application. Therefore, NALs should be limited to the specific

institution applying for the NAL and the facts and circumstances at the time of the application and review process. Additionally, state regulators believe NALs, and any information submitted to or shared between FinCEN and/or state regulators as part of the NAL process, should be deemed confidential supervisory information pursuant to the existing MOUs FinCEN has established with state supervisory agencies. However, periodically publishing general NAL trends, such as types of requests, number of NALs granted and denied, and NAL duration, would provide useful information and direction to the industry without sacrificing the confidential nature and treatment of individual NAL requests.

Conclusion

State regulators share Congress's and FinCEN's goal of fostering a regulatory environment that allows for innovation in BSA/AML compliance. We believe a properly designed NAL process can expedite regulatory innovation and improve vital financial intelligence. State regulators look forward to continuing to partner with FinCEN to help mitigate illicit finance risk, combat money laundering and related crimes including terrorist financing, and provide feedback on any future proposal.

Sincerely,

James Cooper
President & CEO

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