

FinCEN publishes national AML/CFT priorities and report on no-action letters

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FinCEN recently issued the much-anticipated national AML/CFT priorities and announced its intention to implement a no-action letter process to complement to its current regulatory guidance efforts.

On June 30, 2021, the Financial Crimes Enforcement Network (FinCEN) issued the first list of national priorities for anti-money laundering and countering the financing of terrorism (AML/CFT) policy (the [Priorities](#)). The Priorities, which were issued pursuant to the Anti-Money Laundering Act of 2020 (the AMLA), are intended to assist financial institutions in prioritizing the use of their respective compliance resources and administer effective AML/CFT compliance programs. In conjunction with the Priorities, FinCEN published two statements (the Priorities Statements) that provide further guidance to [bank](#) and [non-bank financial institutions](#) (Covered Institutions) on how to approach the Priorities.¹

In addition to the publication of the Priorities, FinCEN announced that it completed a [report](#) (the No-Action Report) on its assessment of whether the Agency would establish a process for the issuance of no-action letters in response to inquiries related to the application of the Bank Secrecy Act (BSA) and other AML/CFT laws to certain conduct. FinCEN's report concluded that the Agency would plan towards a rulemaking to create a process for issuing no-action letters in addition to FinCEN's current forms of regulatory guidance and relief.

FinCEN's publication of the Priorities and the No-Action Report represent important early steps towards implementing the requirements of the AMLA. According to FinCEN's Acting Director, Michael Mosier, the publication of the Priorities "is a significant milestone in FinCEN's efforts to improve the efficiency and effectiveness of the nation's AML/CFT regime and to foster greater public-private partnerships" Indeed, the Priorities and forthcoming no-action letter process signal FinCEN's commitment to promoting and supporting risk-based AML/CFT compliance programs and increased dialogue between private entities and the Agency. Notably, Covered Institutions are not required to implement any immediate changes to their respective AML/CFT compliance programs. In the coming months, Covered Institutions can expect FinCEN to propose implementing regulations related to the Priorities and a rulemaking to create a process for issuing no-action letters.

Overview of AML/CFT priorities

The AMLA, enacted on January 1, 2021 as part of the National Defense Authorization Act for Fiscal Year 2020, includes the most substantial changes to U.S. AML/CFT law since the USA PATRIOT Act of 2001.² One of the stated purposes of the AMLA is to "reinforce that the [AML/CFT] policies, procedures, and controls of financial institutions shall be risk-based" To ensure that Covered Institutions' risk-based policies and procedures align with the most important AML/CFT risks, the AMLA requires FinCEN, in consultation with other relevant Department of the Treasury offices, as well as Federal and State regulators, law enforcement, and national security agencies, to establish national AML/CFT priorities and update such priorities once every four years. Covered Institutions must incorporate the Priorities into their AML/CFT policies, procedures and internal controls. Relatedly, each Covered Institution's primary regulator must incorporate the Priorities into its examination programs and evaluate compliance on that basis.

The publication of the Priorities is the first step towards implementing the new risk-based AML/CFT compliance regime envisioned by the AMLA.³ The Priorities include: (1) corruption; (2) cybercrime, including relevant cybersecurity and

virtual currency considerations; (3) foreign and domestic terrorist financing; (4) fraud; (5) transnational criminal organization activity; (6) drug trafficking organization activity; (7) human trafficking and human smuggling; and (8) proliferation financing. Notably, the Priorities are high-level themes, and reflect longstanding AML/CFT concerns that FinCEN and other AML/CFT regulators have previously identified. Indeed, in developing the Priorities, FinCEN considered sources such as the [2018](#) and [2020](#) National Strategies (including the related risk assessments) and prior FinCEN advisories and guidance documents.

In addition to the Priorities, FinCEN published the Priorities Statements, which provide guidance to Covered Institutions on how to approach the Priorities. While the Priorities Statements clarify that the Priorities do not create an immediate change to the BSA requirements or supervisory expectations, Covered Institutions will be required to incorporate the Priorities into their AML/CFT programs upon the effective date of the final revised implementing regulations. The Priorities Statements recommend that Covered Institutions begin considering how they will incorporate the Priorities into their risk-based AML/CFT compliance programs, such as assessing the potential related risks associated with the Covered Institutions' products and services offered, customers served, and the geographic areas in which operations are conducted. The AMLA requires FinCEN to issue regulations regarding the Priorities within 180 days of the publication of the Priorities. Accordingly, Covered Institutions should expect implementing regulations by the end of 2021.⁴

No-action letters

The AMLA also required FinCEN, in consultation with the Attorney General, the Federal functional regulators, State bank supervisors, State credit union supervisors, and other Federal agencies, to conduct an assessment on whether to establish a process for the issuance of no-action letters by FinCEN in response to inquiries from Covered Institutions. On June 30, 2021, FinCEN published its report to Congress on its assessment of a no-action letter process and concluded that such a process “would be a useful complement to its current forms of regulatory guidance and relief.”

Currently, FinCEN employs two forms of regulatory guidance for relief: administrative rulings and exceptive or exemptive relief. In contrast to these existing forms of relief, no-action letters would represent an exercise of enforcement discretion by which FinCEN would determine that it would not take an enforcement action against the submitting party for engaging in the specific conduct described in the request. No-action letters are important guidance mechanisms that provide useful clarity for Covered Institutions, and may be relied upon even if a Covered Institution is not the submitting party.

The independent authority of other Federal functional regulators to enforce the BSA may limit the usefulness of no-action letters issued by FinCEN.⁵ If FinCEN were to issue a no-action letter, it would not have the authority or ability to prevent a Federal functional regulator from bringing an enforcement action under that agency's own authority. Moreover, as the No-Action Report acknowledges, “[i]t is also unlikely that other agencies would consent to be bound by a FinCEN no-action letter without requiring that requesters seek no-action relief directly from them, pursuant to the other agencies' own authorities.” Accordingly, FinCEN's no-action process may have limited value unless the other functional regulators issue their own no-action letters or join FinCEN's no-action letters.

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- ¹ The Interagency Statement for banks was issued along with the federal banking agencies (FBAs), State bank and credit union regulators.
- ² For additional key takeaways, please see our client update on the AMLA [here](#).
- ³ On April 1, 2021, FinCEN issued an Advance Notice of Proposed Rulemaking to implement the beneficial ownership reporting provisions of the Corporate Transparency Act. For key takeaways, please see our client update available [here](#).
- ⁴ Although not required, the FBAs announced their intention to revise their respective BSA regulations, as necessary, to address how the Priorities will be incorporated into banks' BSA requirements.
- ⁵ The Federal functional regulators include the FBAs, Securities Exchange Commission, and the Commodity Futures Trading Commission.