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FinCEN Seeks Comments on Enhancing the Effectiveness of Anti-Money Laundering Programs

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On September 17, 2020, the U.S. Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN") published an Advance Notice of Proposed Rulemaking ("ANPRM") soliciting public comment on eleven questions relating to potential amendments to FinCEN's anti-money laundering ("AML") regulations.

The proposed amendments are intended to provide financial institutions of all types greater clarity regarding their evolving AML obligations, additional flexibility in resource allocation, and increased alignment of priorities across industry and government.

This is potentially a very significant development for the financial services industry and represents a thoughtful and forward-thinking effort by FinCEN to obtain input from covered financial institutions about the AML regulations with which they must comply. To that end, financial institutions of all types and sizes – from banks to broker dealers to money services businesses ("MSBs") to casinos to cryptocurrency exchanges – have an opportunity to have their voices heard, shape the regulatory landscape, and influence the obligations imposed on them.[1]

Background

FinCEN's Bank Secrecy Act ("BSA") Advisory Group ("BSAAG") serves as an industry forum to keep private sector representatives informed of the ways in which BSA reports are used, and to receive advice regarding the modification of reporting requirements. In 2019, the BSAAG created an AML Effectiveness Working Group ("AMLE WG") that included representatives from financial institutions, federal and state regulatory and law enforcement agencies, and relevant industry trade groups. Its mandate was to develop recommendations for increasing the effectiveness and efficiency of the national AML compliance framework.

Today's ANPRM is a result of FinCEN's evaluation of the AMLE WG's recommendations. The overall goal of the proposed amendments is to "upgrade and modernize the national AML regime, where appropriate, and to facilitate the ability of the financial industry and corresponding supervisory authorities to leverage new technologies and risk-management techniques, share information, discard inefficient and unnecessary practices, and focus resources on fulfilling the BSA's stated purpose of providing information with a high degree of usefulness to government authorities."

Summary of the ANPRM

The ANPRM poses eleven broad questions (with embedded follow up questions) regarding each potential change to the current AML compliance framework. We highlight three priority areas below, including a key potential amendment that would clarify how FinCEN defines an "effective and reasonably designed" AML compliance program. This is a welcome invitation, given that FinCEN's AML program rules specifically require certain covered financial institutions to maintain either "effective" or "reasonably designed" AML compliance programs, but fail to define those terms. *See e.g.*, 31 CFR §§ 1021.210 (AML program requirement for casinos), 1022.210 (AML program requirement for MSBs), 1027.210 (AML program requirement for dealers in precious metals, precious stones, or jewels), 1028.210 (AML program requirement for operators of credit card systems). For example, MSB AML programs are required to be "effective," which is defined as "reasonably designed," though, like other AML program regulations, "reasonably designed" is not defined. *See* 31 CFR § 1022.210. Casino AML programs, in contrast, are required to have "reasonably designed" AML programs, but "effective" is not included in the casino AML program regulations. *See* 31 CFR § 1021.210. Many in the industry have suggested that basing a regulatory obligation on an undefined standard has led to unpredictable regulatory expectations. By proposing to define "effective and reasonably designed," FinCEN is taking significant steps toward resolving such uncertainty. There are three key elements of the proposed changes.

1. Elements of an "Effective and Reasonably Designed" AML Program

FinCEN is seeking comment on whether it is appropriate to clearly define an "effective and reasonably designed" AML program as one that:

a. assesses and manages risk as informed by a financial institution's own risk assessment process, including consideration of AML priorities to be issued by FinCEN consistent with the proposed amendments;

b. provides for compliance with BSA requirements; and

c. provides for the reporting of information with a high degree of usefulness to government authorities.

1 This ANPRM is applicable to all industries that have AML program requirements under FinCEN's regulations, including banks (which includes credit unions and other depository institutions); casinos and card clubs; money services businesses; brokers or dealers in securities; mutual funds; insurance companies; futures commission merchants and introducing brokers in commodities; dealers in precious metals, precious stones, or jewels; operators of credit card systems; loan or finance companies; and housing government sponsored enterprises.

FinCEN hopes that this definition would allow financial institutions to more efficiently allocate AML compliance resources and foster a common understanding between regulators and their supervised financial institutions, while imposing minimal additional burden.

FinCEN has requested comments regarding specific programmatic changes that would be required to implement this new definition, as well as how the practical impact of the regulatory proposals could vary in implementation for institutions of differing type, size, and complexity. For example, commenters are encouraged to provide input on whether "an 'effective and reasonably designed' AML program [should] be proposed for all financial institutions currently subject to AML program rules" and whether there are any "industry-specific issues that FinCEN should consider in a future notice of proposed rulemaking to further define an 'effective and reasonably designed' AML program."

2. Required Risk Assessment

Although there is currently no explicit risk-assessment requirement for most institutions, FinCEN and other regulatory agencies traditionally view a risk assessment as a critical element of a "reasonably designed" program. In the ANPRM, FinCEN notes that an AML compliance program "cannot be considered reasonably designed to achieve compliance with the recordkeeping and reporting requirements of the BSA unless the institution understands its risk profile." The ANPRM seeks comment on a proposal to require the establishment of a risk-assessment process that "includes the identification and analysis of money laundering, terrorist financing, and other illicit financial activity risks faced by the financial institution based on an evaluation of various factors, including its business activities, products, services, customers, and geographic locations in which the financial institution does business or services customers."

3. Publication of National AML Priorities

Finally, FinCEN is seeking comments on whether an "effective and reasonably designed" AML program should require financial institutions to consider and integrate evolving national AML priorities into their risk-assessment processes. Specifically, FinCEN is evaluating whether it should issue national "Strategic Anti-Money Laundering Priorities," at least every two years. Such priorities would be informed by a wide range of government and private sector stakeholders. The ANPRM encourages commenters to provide quantifiable data that supports any views on whether the regulatory proposals under consideration would impact financial institutions' regulatory burdens.

Why This Matters

Given the significant impact the proposed changes could have on BSA/AML compliance obligations, this is a defining moment for the financial services industry and a genuine opportunity for regulated entities to share with the agency their priorities, perspectives, and concerns. FinCEN is explicitly requesting industry- and business-specific considerations, representing a unique opportunity for those who know best – i.e. the regulated entities themselves – to share emerging threats, concerns, and trends and ensure that the BSA/AML rules make sense for them. Moreover, all financial institutions will be required to evaluate and update their BSA program based on the rules that FinCEN ultimately implements. Every financial institution, large or small, should therefore take advantage of the invitation to weigh in on the rules that will shape their BSA/AML compliance obligations for years to come.

How We Can Help

With our leading financial crime defense and compliance, financial services, and public policy practices, we are uniquely positioned to help clients craft compelling comments that highlight their perspective on the proposed changes. From our own time in a number of key government agencies (including the Bank Integrity Unit of the DOJ, the Securities and Exchange Commission, the OCC, and Congress, among others), our regular and frequent interactions with regulators in AML and sanctions matters, and our many years as private practitioners handling AML and sanctions compliance and enforcement issues, we have deep experience assisting clients in advocating their positions to government agencies, particularly those related to AML and sanctions.

We routinely advise clients on the design, implementation, and evaluation of BSA/AML and U.S. economic sanctions compliance programs and defend the sufficiency of BSA/AML programs in enforcement matters, and are therefore well-positioned to help develop compelling comments to FinCEN.

Comments must be submitted within 60 days of the ANPRM's publication in the Federal Register, so financial institutions will need to act quickly. Our team can help provide strategic advice, evaluate your priorities for response, and draft effective comments.

We are closely following BSA developments, proposed rulemaking, and new rules. Please contact any member of our team with any questions on this ANPRM, as well as the public comments submission process.

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Claiborne (Clay) W. Porter is a partner in Squire Patton Boggs' Government Investigations and White Collar Practice Group, with a focus on financial crime defense and compliance matters. He represents financial institutions and their individual officers and directors in connection with criminal, regulatory, and civil enforcement actions involving anti-money laundering (AML)/Bank Secrecy Act (BSA) and U.S. economic sanctions laws and regulations, SEC-related AML rules, and other financial crime matters. Mr. Porter's practice also includes AML and U.S. economic sanctions counseling, as well as AML and sanctions compliance program evaluations for financial institutions, money services businesses, and Fintechs.

Prior to joining Squire Patton Boggs, Mr. Porter spent seven years as a white collar prosecutor with the Department of Justice (DOJ). His extensive government experience includes various leadership and supervisory roles in the Money Laundering and Asset Recovery Section of the US Department of Justice's Criminal Division (MLARS), including Acting Principal Deputy Chief of MLARS and the Chief of the Bank Integrity Unit. In these leadership positions, Mr. Porter supervised investigations and prosecutions of many of the country's most significant AML and sanctions cases. He also supported MLARS' nationwide supervisory authority over the DOJ's money laundering enforcement program, particularly any BSA and money-laundering charges, deferred prosecution agreements and non-prosecution agreements involving financial institutions.

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