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August 5, 2022

Via Electronic Submission

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

RE: Docket Number FINCEN–2022–0007 and RIN 1506–AB55: No-Action Letter Process

Dear Sir or Madam:

The Independent Community Bankers of America ("ICBA")[1] appreciates the opportunity to respond to the Financial Crimes Enforcement Network's ("FinCEN") Advance Notice of Proposed Rulemaking ("ANPRM") to solicit public comment on questions relating to the implementation of a no-action letter ("NAL") process at FinCEN.

Background

A NAL is a type of regulatory enforcement document in which an agency agrees, in writing, that it will provide no-action relief and not take enforcement action against an entity for particular conduct documented in the entity's no-action request.

Section 6305(a) of the Anti-Money Laundering Act of 2020 (the "AML Act")[2] requires the Director of FinCEN to assess ("Assessment") whether to establish a NAL process pertaining to

[1] *The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services.*

With nearly 50,000 locations nationwide, community banks constitute roughly 99 percent of all banks, employ nearly 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding nearly $5.9 trillion in assets, over $4.9 trillion in deposits, and more than $3.5 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. For more information, visit ICBA's website at www.icba.org

[2] The AML Act was enacted into law as Division F, sections 6001-6511, of the National Defense Authorization Act for Fiscal Year 2021, Public Law 116-283 (2021)

the application of Bank Secrecy Act ("BSA") laws and regulations to specific conduct.[3] The Assessment is to be conducted in consultation with the Attorney General, the Federal functional regulators, State bank and credit union supervisors, and other Federal agencies, as appropriate.[4] Section 6305(b) of the AML Act requires the Secretary of the Treasury (the "Secretary"), "in coordination with the Director of the Federal Bureau of Investigation, the Attorney General, the Secretary of Homeland Security, and the Federal functional regulators," to submit a report of its findings and determinations ("Report") to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives and propose rulemakings, if appropriate.[5]

On June 28, 2021, the Secretary submitted the Report to Congress, concluding that FinCEN should undertake a rulemaking to establish a NAL process. Consistent with the Report's conclusion, this ANPRM seeks initial public input on the need for a NAL process and potential procedures and rules regarding its implementation.

Summary

ICBA supports the creation of a NAL process. It is our belief that doing so will enable open and transparent dialogue between FinCEN, financial institutions ("FI(s)"), including community banks, and, if implemented properly, financial regulators. By extension, such dialogue can facilitate innovation among FIs, enhance BSA compliance efforts, and result in more effective and efficient BSA enforcement. A NAL process could be a significant tool in a community bank's BSA compliance program. This tool could aid community banks by providing clarity, assurance, and protection when seeking to comply with BSA regulatory requirements and expectations pertaining to new and existing products and services, new business lines, and high-risk customers and activities. The NAL could further be used as part of a community bank's risk-internal assessment when developing and implementing appropriate internal controls for managing and mitigating BSA/AML risk exposure.

In response to this ANPRM, ICBA offers the following feedback and recommendations noted below.

ICBA's Responses to FinCEN's ANPRM Questions

Viability of a cross-regulator no-action letter process. Would a no-action letter process involving only FinCEN be useful?
The ANPRM seeks input on the viability of a cross-regulator NAL process and the value of establishing a FinCEN NAL process if other regulators with jurisdiction over the same entity do not issue the same.

[3] AML Act section 6305(a)(1).
[4] Ibid.
[5] *Id.* section 6305(b)

It is common for a single community bank or other FIs to have multiple regulators with distinct and independent jurisdiction over the institution. Accordingly, the success of a potential NAL process will largely depend on FinCEN's ability to work across regulatory agencies in order to achieve consistent application. The current disjunctive nature of the regulatory system frequently thwarts efforts by regulators to support industry innovation, especially in the realm of BSA oversight. For a FinCEN NAL to be effective, a coordinated effort is needed to obtain appropriate relief across the industry. A NAL is of no use for a community bank if the specific purpose of the NAL is penalized by its regulator. In fact, FinCEN's parent agency, the U.S. Treasury Department ("Treasury") has already acknowledged the lack of parity across regulatory agencies and the need for a fix. In a 2018 report, Treasury captured the need for consistency when it wrote, "The fragmented nature of the U.S. financial regulatory system undercuts efforts by regulators to support innovation. For example, a no-action letter or exemptive relief from one agency may be of limited use without assurance that other agencies with jurisdiction will provide comparable relief. Fragmentation also raises the likelihood of inconsistency among regulators. To be effective, a coordinated effort is needed to obtain appropriate relief across the marketplace."[6] Treasury's report further opined on the criticality of not allowing the fragmentation that exists within the financial regulatory system to impede innovation. The same report urged regulators to study new approaches to "effectively promote innovation, including permitting meaningful experimentation by financial services firms to create innovative products, services, and processes."[7]

ICBA agrees with Treasury and believes the purpose for establishing a FinCEN NAL process will be undermined if other agencies do not follow suit. A NAL issued by FinCEN could be rendered useless, or of limited effect, if other agencies with jurisdiction over a community bank's BSA/AML compliance program do not provide similar relief. Furthermore, the time and financial resources spent preparing for a NAL from FinCEN would be wasted.

To what extent would an institution be able to rely upon a NAL from FinCEN if the institution is subject to oversight and examination for the same or similar matters by another agency?

A NAL process established by FinCEN should first endeavor to procure consistency and harmonization with other regulators with BSA jurisdiction over their regulated entities, as noted above. FinCEN can achieve harmonization through consultation, input, and buy-in from the requesting entity's regulators (state and federal). If this level of coordination is achieved, an institution should be able to fully rely on FinCEN's NAL. This level of coordination also eliminates agency-by-agency fragmentation. Further, a NAL should indicate that a given FI has taken a diligent and risk-based approach to understanding its own risk profile, effectively taking steps to manage and mitigate resulting exposure, through this approach.

[6] U.S. Department of Treasury, "*A Financial System That Creates Economic Opportunities - Nonbank Financials, Fintech, and Innovation"* (2018), p.168

[7] Id., p13

Would it be valuable for FinCEN to provide information from a NAL request to agencies with delegated examination authority for the purpose of evaluating specific conduct addressed in a NAL request, including, among other things, to obtain information that may inform FinCEN's response to the request?
ICBA believes it would be beneficial to provide information from a NAL request to agencies with examination authority. Providing insight into an institution's NAL request will: allow FinCEN and regulators to discuss the merits of the request; allow regulators to provide additional or material information that may otherwise not be available to FinCEN; upon issuance of a NAL, mitigate confusion during an examination; and ultimately operate as a consistent and uniform voice of FinCEN and the regulators as it relates to the specific contents of the NAL.

Should FinCEN limit consideration of NAL requests to written materials?
To avoid miscommunications and misunderstandings, ICBA believes that a written process between entities and FinCEN is crucial. The purpose of the NAL is to procure assurances that FinCEN will not pursue actions pertaining to specific activities. The NAL is essentially a contract and represents a meeting of the minds. The absence of a written document exposes an FI to potential negative outcomes, varying and potentially inconsistent interpretations, and possible enforcement or legal action.

Should FinCEN publicize standards governing the revocation of no-action letters, or should revocation be determined on a case-by-case basis?
ICBA recommends that FinCEN establishes and publicizes standards governing the revocation of NALs. Publicizing standards operates as notice. NAL recipients and institutions considering NAL requests should have full transparency and awareness of the entire process, including revocation.

If a final decision is made to revoke, and that decision is not due to failure to comply, national security, or criminal activity, FinCEN should allow recipients reasonable time to wind-down the specific conduct or purpose for which was the basis of the NAL. Examiners should be mindful of the practical ramifications of revoking a NAL. Upon revocation of that NAL, the lack of a fully realized risk assessment or under-valued independent testing should not be considered a violation by an examiner.

Furthermore, FinCEN and the bank's prudential regulator, should not issue retroactive supervisory findings, enforcement actions, nor subject the entity to liability if the NAL is revoked for a reason other than those listed above.

Under what circumstances should NALs be automatically revoked?
ICBA strongly urges against a process that allows for the automatic revocation of a NAL, unless there is gross, willful, or repeated failure to comply in good faith with its terms and conditions; evidence pertaining to the threat of national security; or substantial evidence of money laundering, terrorism financing, and other illicit financial activity.

Community banks need assurances that the underlying facts that were subject to the issuance of the NAL, will be shielded from enforcement. The NAL process should include procedural steps that FinCEN takes before an ultimate decision of revocation. For reasons that are more administrative in nature, or changes in law and regulation, procedures should include providing written notice of potential revocation; and an appeals process. NAL recipients should have a reasonable opportunity to respond to, or cure, FinCEN's grounds for revocation, and the final decision to revoke should be subject to a second level approval process.

Should FinCEN create an appeals or reconsideration process for no-action letter denials? What factors and procedures should this process involve?
A formal appeals or reconsideration process for NAL denials should be implemented. The process should require FinCEN to inform the entity of specific reasons why the NAL was denied, and specific information needed to reverse their decision. The submitting institutions should then be able to provide additional information without having to resubmit their request, thus delaying the process further. The institution should have a reasonable amount of time to appeal the denial before FinCEN takes a final action on the request.

Should FinCEN allow submitting entities to withdraw their requests? If so, under what circumstances and at what point in the process should withdrawals be allowed? What should the process be for withdrawing a request for a NAL?
Yes. Circumstances underlying a NAL request may change and render the NAL unnecessary. Accordingly, a submitting entity should be allowed to withdraw their request, before a final decision is made, explaining the reason for withdrawal in writing. FinCEN should act quickly to confirm receipt of the withdrawal, cease processing the request, and notify the entities' regulators who FinCEN may have coordinated with to evaluate the request.

Should the process be confidential during FinCEN's adjudication of a request?
Yes. Since information in a NAL request could be subject to proprietary constraints, ICBA urges the agency against the public disclosure of application materials.

Should FinCEN maintain the confidentiality of NALs for a period of time, or indefinitely, after granting them? Under what circumstances should FinCEN maintain confidentiality?
Since information submitted in a NAL request could be subject to proprietary constraints, ICBA urges the agency against the public disclosure of the application. To encourage the full use of a NAL program, ICBA further urges FinCEN to provide assurances that application materials will remain confidential from public consumption, including from discovery during an administrative proceeding or the FOIA process of accessing information, throughout the approval process and as appropriately maintained for a defined period thereafter.

However, consistent with ICBA's views on cross regulatory coordination and universal application of a NAL, FinCEN should create a non-public, secured, and confidential process by which other agencies with authority over the same entity, have access to the application during the decision-making process. ICBA agrees with FinCEN's view, documented in its report to

Congress, that if a NAL request and decision is kept confidential "other regulators, departments, and agencies may be limited in their ability to consider the request and FinCEN's determination in their own decision-making."[8] Furthermore, keeping the NAL request and decision confidential would impede efforts to remove fragmentation and prevent harmonization between FinCEN and financial regulators.

Should NALs be used as published precedents? If so, under what circumstances and conditions should they be precedential? Should NALs be applicable beyond the requesting institutions, and under what circumstances and conditions?
Yes. NALs should be used as a published precedent. Community banks should be able to benefit beyond the requesting institution, so long as their facts and circumstances align with or are similarly situated to the facts and circumstances of the original submission, and in accordance with the confidentiality protections that are deemed appropriate. Community banks seeking to use a published NAL as precedence should also notify FinCEN and their respective regulators, in writing, their intent as additional protection from enforcement action.

Conclusion

ICBA appreciates the opportunity to respond to the agency's ANPRM relating to the implementation of a NAL process. If you have any questions or would like additional information, please contact me at Rhonda.Thomas-Whitley@icba.org or (202) 821-4451.

Sincerely,

/s/

Rhonda Thomas-Whitley
Vice President and Regulatory Counsel

[8] FinCEN No-Action Letter Report to Congress per AMLA for ExecSec Clearance p.13