



WASHINGTON, D.C.

99 M Street SE
Suite 300
Washington, D.C. 20003-3799

Phone: 202-638-5777

Fax: 202-638-7734

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

Re: Anti-Money Laundering Program Effectiveness; Docket Number FINCEN–2020–0011/RIN1506-AB44

To Whom It May Concern:

On behalf of the nation’s credit unions and their more than 120 million members, the Credit Union National Association (CUNA) appreciates the opportunity to submit comments to the Financial Crimes Enforcement Network (FinCEN) in response to its advance notice of proposed rulemaking (ANPRM) on anti-money laundering program effectiveness.¹

Background

The Currency and Foreign Transactions Reporting Act of 1970, as amended, (hereinafter the “Bank Secrecy Act” or “BSA”) provides, *inter alia*, authority for the Secretary of the Treasury to require financial institutions to maintain effective anti-money laundering (AML) programs.² These AML programs are designed to protect against financial crimes, international terrorism and counter-intelligence efforts facilitated by the transfer of funds through covered entities.³ The Director of FinCEN has been delegated the authority to adopt and implement certain AML regulations⁴ and ensure compliance by financial institutions, including credit unions, with minimum standards for “effective and reasonably designed” AML programs.⁵

In recognition of changes in financial industry products and business models, FinCEN has recently engaged in several AML regulation modernization efforts.⁶ These efforts include review of reform

¹ FinCEN ANPRM on Anti-Money Laundering Program Effectiveness, 85 Fed. Reg. 58023, September 17, 2020, available at <https://www.federalregister.gov/documents/2020/09/17/2020-20527/anti-money-laundering-program-effectiveness>.

² Id.

³ See The Money Laundering Control Act of 1986, Pub. Law 99-570, 100 Stat 3207 (Oct. 27, 1986) (amending the BSA).

⁴ See Treasury Order 180–01 (re-affirmed Jan. 14, 2020).

⁵ See FinCEN ANPRM on Anti-Money Laundering Program Effectiveness, 85 Fed. Reg. at 58023.

⁶ Id. at 58024-58025.

recommendations from Treasury’s FinCEN-chaired BSA Advisory Group (BSAAG).⁷ Broadly speaking, this ANPRM has been issued to determine whether FinCEN should further define an “effective and reasonably designed” AML program by requiring that regulated entities ensure their program:

1. 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;
2. Assures and monitors compliance with the recordkeeping and reporting requirements of the BSA; and
3. 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.⁸

The ANPRM generally seeks comments on whether the AML program regulations should explicitly require a risk-assessment process and whether the FinCEN Director should publish a list of national AML priorities. The ANPR includes eleven (11) specific questions regarding the details and scope of these potential regulatory changes.

General Comments

CUNA strongly supports FinCEN’s efforts to track and investigate financial crimes involving money laundering and terrorist financing and agrees that AML regulatory changes that eliminate redundancies and unnecessary burdens will help credit unions and other covered institutions streamline and focus their compliance efforts. Nevertheless, it is critically important to strike the right balance between the imposition of compliance costs on leanly staffed, community-oriented credit unions and the benefits that AML programs can provide to law enforcement. Consistent with CUNA’s past advocacy on this issue, we believe that FinCEN should make regulatory changes that provide substantial flexibility for credit unions based on their size, complexity of service offerings and frequency of the transactions at issue.

Specific Comments

Question 1: Does this ANPRM make clear the concept that FinCEN is considering for an “effective and reasonably designed” AML program through regulatory amendments to the AML program rules? If not, how should the concept be modified to provide greater clarity?

This ANPRM makes it clear that FinCEN is considering regulatory amendments that would better define what is required for an “effective and reasonably designed” AML program. Future notices for specific regulatory changes should provide detail and clarity of the proposed text (with redlines available on

⁷ Id. BSAAG membership includes regulated financial institutions (including credit unions), Federal and state regulatory and law enforcement agencies and trade groups, like CUNA, whose members are subject to the requirements of the BSA.

⁸ See FinCEN ANPR on Anti-Money Laundering Program Effectiveness, 85 Fed. Reg. at 58026; see also CUNA Compliance Community, *New BSA Changes in the Works– Share Your Thoughts on What is an “Effective and Reasonably Designed AML Program,”* available at <https://compliancecommunity.cuna.org/blogs/colleen-kelly/2020/10/12/new-bsa-changes-in-the-works-share-your-thoughts-o?ssopc=1>.

Treasury's website) and substantive discussions of the rationales for those proposals. A step-by-step approach to these changes will ensure that the ideas generally described in this ANPRM can be fully understood and analyzed at a more granular level prior to their effective dates.

Question 2: Are this ANPRM's three proposed core elements and objectives of an "effective and reasonably designed" AML program appropriate? Should FinCEN make any changes to the three proposed elements of an "effective and reasonably designed" AML program in a future notice of proposed rulemaking?

The three proposed core elements and objectives are broadly acceptable and consistent with BSA statutory requirements. That said, any new regulations should allow for differences in "effective and reasonably designed" programs based on institution type, size and their relevant product and service offerings. In addition, FinCEN should create and maintain a tight nexus between the "risks communicated by relevant government authorities as national AML priorities" and any determination of what constitutes "information with a high degree of usefulness to government authorities." Ultimately, credit unions and other regulated entities can create effective programs that collect and provide certain information, but they should not be held responsible for determining what information government authorities will ultimately find most useful for particular investigations.

Question 3: Are the changes to the AML regulations under consideration in this ANPRM an appropriate mechanism to achieve the objective of increasing the effectiveness of AML programs? If not, what different or additional mechanisms should FinCEN consider?

Question 4: Should regulatory amendments to incorporate the requirement for an "effective and reasonably designed" AML program be proposed for all financial institutions currently subject to AML program rules? Are there 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?

The changes to the AML regulations under consideration are generally appropriate for an effective AML program and are in general alignment with BSAAG recommendations. However, FinCEN should resist a "one size fits all" regulatory definition of effectiveness and ensure flexibility based on criteria such as institution type, size and service offerings.

Question 5: Would it be appropriate to impose an explicit requirement for a risk-assessment process that identifies, assesses, and reasonably mitigates risks in order to achieve an "effective and reasonably designed" AML program? If not, why? Are there other alternatives that FinCEN should consider? Are there factors unique to how certain institutions or industries develop and apply a risk assessment that FinCEN should consider? Should there be carve-outs or waivers to this requirement, and if so, what factors should FinCEN evaluate to determine the application thereof?

Reasonable risk-assessments are standard practice in the establishment of AML programs. As a result, imposition of an explicit assessment requirement may not negatively impact most covered entities. However, that conclusion presumes significant flexibility in how such a risk assessment is carried out and incorporated into an effective program, and requires recognition that appropriate and reasonable practices may vary significantly based on a variety of factors such as those previously mentioned.

Question 6: Should FinCEN issue Strategic AML Priorities, and should it do so every two years or at a different interval? Is an explicit requirement that risk assessments consider the Strategic AML Priorities appropriate? If not, why? Are there alternatives that FinCEN should consider?

Periodic publication of strategic AML priorities would be helpful for credit unions and other covered institutions, and could lead to more effective AML programs. However, these priorities should not be included as an explicit requirement for risk assessments because priorities are likely to shift after initial publication for reasons that are impossible to know *ex ante*. In the alternative, periodic publication of priorities through sub-regulatory guidance can provide both FinCEN and regulated entities with flexibility, and prevent adherence to potentially outdated program priorities based solely on their required use in a prior risk assessment that is subject to examination.

Question 7: Aside from policies and procedures related to the risk-assessment process, what additional changes to AML program policies, procedures, or processes would financial institutions need to implement if FinCEN implemented regulatory changes to incorporate the requirement for an “effective and reasonably designed” AML program, as described in this ANPRM? Overall, how long of a period should FinCEN provide for implementing such changes?

Specific programmatic changes and impacts are difficult to assess based on the general ideas identified in this ANPRM. Changes in personnel allocation or additional third-party vendors and a significant implementation period may be required if risk-assessment requirements are onerous and overly prescriptive. However, regulatory amendments that are flexible and allow for existing risk assessment methods that are appropriate for the type and size of regulated entity may be accomplished more readily. In terms of additional changes, CUNA agrees with BSAAG’s recommendations for streamlining suspicious activity reporting (SAR) and on the need for enhanced law enforcement feedback on SARs.

Question 8: As financial institutions vary widely in business models and risk profiles, even within the same category of financial institution, should FinCEN consider any regulatory changes to appropriately reflect such differences in risk profile? For example, should regulatory amendments to incorporate the requirement for an “effective and reasonably designed” AML program be proposed for all financial institutions within each industry type, or should this requirement differ based on the size or operational complexity of these financial institutions, or some other factors? Should smaller, less complex financial institutions, or institutions that already maintain effective BSA compliance programs with risk assessments that sufficiently manage and mitigate the risks identified as Strategic AML Priorities, have the ability to “opt in” to making changes to AML programs as described in this ANPRM?

CUNA appreciates FinCEN’s recognition that “financial institutions vary considerably in size and complexity, and even well-intentioned regulatory actions that impact such a diverse collection of financial institutions can result in unintended consequences.”⁹ Practically speaking, a credit union without significant exposure to AML-priority service offerings could have a very different risk profile than a larger and more complex institution, but they also face significant resource constraints. An “opt in” option for smaller, less complex credit unions is preferable to a mandatory program that does not take their differences into consideration. However, an “opt in” option may not be necessary if divergences in AML program implementation are mitigated through improved communications and cooperation. For example, some concerns addressed in this ANPRM could be addressed through tailored communications to

⁹ See FinCEN ANPR on Anti-Money Laundering Program Effectiveness, 85 Fed. Reg. at 58028.

financial institutions fitting a particular profile and/or utilization of BSAAG members to reinforce critical updates and priorities, without the need for additional regulatory amendments.

Question 9: Are there ways to articulate objective criteria and/or a rubric for examination of how financial institutions would conduct their risk-assessment processes and report in accordance with those assessments, based on the regulatory proposals under consideration in this ANPRM?

FinCEN should continue to defer to the relevant prudential regulators regarding examination processes and reporting requirements and resist the urge to adopt a particular rubric or criteria for all examinations. Those regulators, such as the National Credit Union Association (NCUA), can examine the effectiveness of any risk-assessment processes with a more detailed understanding of the regulated entities.

Question 10: Are there ways to articulate objective criteria and/or a rubric for independent testing of how financial institutions would conduct their risk-assessment processes and report in accordance with those assessments, based on the regulatory proposals under consideration in this ANPRM?

It is difficult to ascertain objective criteria for independent testing of risk assessment processes and reporting procedures in the absence of more detailed regulatory proposals. Consistent with prior comments, CUNA believes that existing compliance testing methods are preferable to a new independent testing regime based on any “one size fits all” criteria.

Question 11: A core objective of the incorporation of a requirement for an “effective and reasonably designed” AML program would be to provide financial institutions with greater flexibility to reallocate resources towards Strategic AML Priorities, as appropriate. FinCEN seeks comment on whether such regulatory changes would increase or decrease the regulatory burden on financial institutions. How can FinCEN, through future rulemaking or any other mechanisms, best ensure a clear and shared understanding in the financial industry that AML resources should not merely be reduced as a result of such regulatory amendments, but rather should, as appropriate, be reallocated to higher priority areas?

CUNA supports flexibility for credit unions to allocate resources in the most effective manner possible. As mentioned previously, the amount of regulatory burden on credit unions will depend substantially on the flexibilities provided in subsequent rulemakings. However, because credit unions and other regulated entities in the financial industry have significant supervisory and reputational risks at stake if they are victims of financial crimes, FinCEN does not need to take additional steps beyond those discussed in the ANPRM to convey the importance of maintaining an effective and reasonably designed AML program.

Conclusion

We thank you for your consideration of CUNA’s comments and look forward to working with FinCEN to update these AML program requirements in a manner that benefits law enforcement, credit unions and their members. Please contact me at (202) 235-3390 or dsmith@cuna.coop with any questions.

Sincerely,



Damon Y. Smith
Senior Director of Advocacy & Counsel