



## Financial Services & Products / White Collar, Government & Internal Investigations ADVISORY ■

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### FinCEN Signals BSA/AML Regulatory Reform

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After decades of increased burdens and heightened compliance expectations for financial institutions, on September 17, 2020, the Financial Crimes Enforcement Network (FinCEN) published an [advance notice of proposed rulemaking](#) (ANPR) and request for comment on potential regulatory amendments “intended to modernize the regulatory regime” implementing the Bank Secrecy Act (BSA) and anti-money laundering (AML) laws. FinCEN released the ANPR in a climate of consensus among industry, regulators, and lawmakers regarding the need for reform. Further, the challenges of BSA/AML compliance and the need for reform have been brought into sharper contrast given the recent revelations of the “[FinCEN Files](#).”

#### **BSA/AML Problems and the Lack of Congressional Action**

The full spectrum of BSA/AML professionals, from federal officials to compliance professionals and attorneys, have repeatedly and extensively detailed the many problems of the BSA. Chief among these are a lack of clarity on what constitutes an “adequate” BSA/AML program and a failure of Congress to take action to update the BSA and AML laws to reflect the modern realities of the day-to-day business of regulated financial institutions. As a result of these issues, regulated financial institutions are devoting more time and resources than ever trying to satisfy an ill-articulated and seemingly ever-changing standard of BSA/AML best practices. Despite these efforts, congressional failure to act to update the BSA has led to output from these financial institutions of decreasing value to regulators, federal investigators, and prosecutors.

As one example, the current AML regime requires regulated entities to file currency transaction reports (CTRs) for any cash deposit, withdrawal, or exchange of currency exceeding \$10,000 and suspicious activity reports (SARs) in a number of circumstances, including for transactions aggregating \$5,000 or more when a suspect can be identified. These thresholds have been unchanged since 1970 and 1996, respectively, and contribute to an overwhelming number of reports FinCEN must review. In 2019, depository institutions filed a record-setting 1 million SARs. To address the staggering burden on FinCEN to review and act on these reports, legislation has been introduced to deploy scarce resources more effectively, including by proposing to triple the dollar threshold for filing CTRs and to double it for SARs. Such legislation appeared likely to pass with bipartisan support early this year, but it was quickly derailed by the COVID-19 pandemic.

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In addition to these reporting threshold issues, federal regulators, investigators, and prosecutors have increasingly lamented a perceived lack of quality of many SARs being filed. It is undoubtedly the case that many regulated financial institutions file an excessive number of SARs, often containing limited detail about the activities in question and sometimes highlighting only historical suspicious activity rather than reporting issues in real time. In many respects, however, the federal government has only itself to blame as timing pressures, threats of increased regulatory scrutiny, and the specter of potential criminal prosecution for failure to comply with SAR filing requirements or failure to maintain an adequate BSA/AML program have left regulated institutions with little choice but to file quick SARs—and many of them. Regulated institutions rightly perceive that the existing BSA regime rewards quantity over quality, with the result that government is left searching for a needle in a haystack when trying to identify expansive money laundering schemes through review of SARs.

### **FinCEN Offers Hope for Improvements to the Federal BSA/AML Regime**

In the absence of reform legislation, the ANPR is FinCEN's first effort toward formally implementing the recommendations of an Anti-Money-Laundering Effectiveness Working Group convened by representatives of federal agencies known as the Bank Secrecy Act Advisory Group in 2019 "to develop recommendations for strengthening the national AML regime by increasing its effectiveness and efficiency." As described in the ANPR, the Working Group recommended that stakeholders:

- Develop and focus on AML priorities, including by placing a greater emphasis on delivering highly useful information to government authorities based on national AML priorities.
- Facilitate the reallocation of compliance resources away from activities that are less useful to government authorities to those that address areas of risk and national AML priorities.
- Modernize and streamline monitoring and reporting practices "to maximize efficiency, quality, and speed of providing data to government authorities."
- Enhance the sharing of information between financial institutions, regulators, and law enforcement.
- Encourage responsible innovations "to address new and emerging money laundering and terrorist financing risks and the evolving industry landscape."

### **The ANPR**

FinCEN requests comment on amending BSA regulations to:

- Include an express requirement that AML compliance programs must be "effective and reasonably designed" to prevent money laundering.
- Provide a clear definition of "effectiveness" for this purpose.

An "effective and reasonably designed" AML program would provide highly useful information to government authorities by addressing risk consistent with the regulated entity's risk profile and national AML priorities, and by assuring compliance with BSA recordkeeping and reporting requirements. FinCEN asserts that such

amendments “would allow financial institutions to more efficiently allocate resources and would impose minimal additional burden on existing AML programs” that are already effective.

Also, FinCEN is considering whether its director should communicate national AML priorities to the public in a “Strategic Anti-Money Laundering Priorities” document published every two years. FinCEN is considering whether it should require regulated entities to consider these priorities in their risk assessments, recordkeeping, and reporting programs in addition to the risks identified by each individual regulated entity.

## Request for Comment

In its requests for comment, FinCEN asks whether the amendments under consideration are appropriate and reasonably likely to achieve the agency’s objectives. It also invites information about industry-specific issues that it should consider and whether it should include any carve-outs or waivers for certain industries or institutions. Relatedly, FinCEN asks whether it should consider tailoring requirements to account for differences in size, complexity, and risk profile among institutions.

FinCEN also requested feedback on specific aspects of the proposed requirement for an “effective and reasonably designed” AML program, including:

- What additional changes to AML program policies, procedures, or processes financial institutions would need to implement.
- How to articulate objective criteria for independent testing.
- How regulated entities would conduct and report on their risk assessment processes.
- Whether such regulatory changes would increase or decrease the regulatory burden on regulated entities.

The agency also requested feedback on whether and how frequently it should issue its Strategic AML Priorities. Finally, FinCEN queried how it could ensure that regulated entities reallocate any cost savings resulting from the amendments under consideration to higher priority areas rather than reducing expenditures.

## Conclusion

Given the severity and recent publicity of the shortcomings in the current AML regulatory regime, this is likely the first of many efforts toward reform. FinCEN explicitly states in the ANPR that it “anticipates taking additional steps, such as issuing guidance where appropriate, as FinCEN continues to evaluate the full set of [Working Group] recommendations.”

While the ANPR may not address all the concerns that have proliferated within the industry over the last several years, and FinCEN’s ability to do so may be limited without congressional action, most industry participants are likely to view the ANPR as a step in the right direction. If regulated entities and FinCEN can work together to devise a better BSA/AML regime, the only parties that stand to lose are money launderers, terrorists, and other criminals.

Comments on the ANPR are due by November 16, 2020.

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