

FinCEN's No-Action Letter Plan May Have Limited Impact

By **Marc-Alain Galeazzi and Malka Levitin** (August 4, 2022, 6:08 PM EDT)

On June 3, the U.S. Department of the Treasury's Financial Crimes Enforcement Network published an advance notice of proposed rulemaking to solicit comments on the implementation of a no-action letter process related to anti-money laundering, or AML, compliance.

While a no-action letter process could provide clear guidelines for the financial services industry and promote its growth, the successful implementation of the process may be limited by FinCEN's resources, approach and a single-agency process that lacks comprehensive cross-regulator input.

Background

Under Section 6305(a) of the Anti-Money Laundering Act of 2020,[1] FinCEN was required to assess whether a no-action letter process should be established for inquiries concerning the application of the Bank Secrecy Act and other AML and counter-financing of terrorism, or CFT, laws and regulations to specific conduct.

On June 28, 2021, FinCEN submitted a report to Congress[2] that concluded it would be useful for FinCEN to implement such a process. Roughly one year later, FinCEN issued the advance notice of proposed rulemaking,[3] which poses 44 questions on implementing a no-action letter process, and seeks public comment on, among other topics:

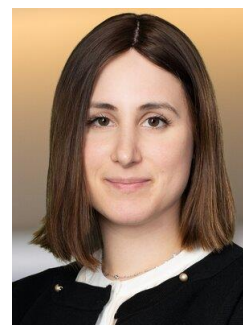
- The contours and format of a no-action letter process;
- The revocation of no-action letters;
- No-action letter denials; and
- FinCEN's obligation to consult with other regulators or law enforcement agencies before issuing a no-action letter.

Analysis

FinCEN currently provides two forms of regulatory relief:



Marc-Alain Galeazzi



Malka Levitin

1. Administrative rulings, which interpret the relationship between a certain FinCEN regulation and a specific situation for which a ruling has been requested, and which have precedential value when published by FinCEN; and
2. Exemptive or exemptive relief from the BSA or its implementing regulations, which applies only as expressly stated in the order of authorization from FinCEN, and which may be revoked in the sole discretion of the secretary of the Treasury.

In contrast, a no-action letter requests confirmation of FinCEN's intent not to take or recommend enforcement action against the submitting party for the specific conduct in question.

Acting Director Himamauli Das touted the proposed process in FinCEN's press release to the advance notice of proposed rulemaking,[4] stating that "[a] no-action letter process has the potential to spur innovation and enhance overall effectiveness of the AML and CFT framework and the implementation of financial institutions' compliance programs."

But the benefits of a no-action letter process are yet to be determined, and will likely depend on the details of the final rule, which may be affected by the comments received. Among other issues, commenters may consider whether and how a no-action letter process offers a significant advantage over administrative rulings, which also address specific conduct and have precedential value when published.

FinCEN has exercised its forms of regulatory relief sparingly, at least in public, with only seven public issuances since 2015, one of which was simply an extension of a prior exemption. If no-action letters are issued at a similar pace, the effect on the industry may be minimal. Commenters might identify that the no-action letter process would benefit if FinCEN obtain additional resources — such as funding, staffing, etc.

A valuable no-action letter process depends not only on the number of letters issued, but also on their content.

The Consumer Financial Protection Bureau also implemented a no-action letter process,[5] and it has proven to be "ineffective," in the words of the bureau. With respect to its no-action letter initiative, the agency noted "that some firms participating in these programs made public statements indicating that the [CFPB] had conferred benefits upon them that the [CFPB] expressly did not." [6]

To avoid similar consequences, FinCEN may take a restrained, narrow approach to issuing no-action letters. Commenters might provide input on how FinCEN can balance the potential misuse of the process with the industry need for meaningful, even progressive, responses.

Finally, public comments may be particularly focused on the agency interplay issue. In its report to Congress, FinCEN found that a no-action letter process would be most "effective and workable" if limited to FinCEN's exercise of its own enforcement authority, but that consultation with other regulators may be appropriate.

While FinCEN recognized that a coordinated regulatory process could be beneficial for a no-action letter process, FinCEN also noted that it does not have authority to administer or enforce all AML and CFT laws, and that a formal, cross-regulator, no-action letter process would be logistically challenging and time-consuming.

It will be interesting to see whether any commenters propose solutions to this issue.

The Bigger Picture

A no-action letter process could be a valuable tool for financial institutions that are, or may be, subject to FinCEN's jurisdiction. Well-established financial institutions, along with fintech companies and startups, may leverage the process to obtain clarity and comfort with their compliance with BSA requirements and regulatory expectations. This, in turn, should encourage innovation in the industry.

If implemented, however, this process would likely invite numerous no-action letter requests. FinCEN will need sufficient staff with the relevant expertise to effectively respond to these letters, and may need to hire additional personnel. Moreover, FinCEN may take a conservative approach in issuing responses, and err on the side of increased regulation.

And, even in instances where FinCEN may issue a no-action letter, the submitter could still face action from other financial services regulators with authority over AML and CFT issues.

For the above reasons, the proposed process may have limited utility, but the advance notice of proposed rulemaking reflects FinCEN's willingness to engage with the financial services industry to streamline processes and to relieve regulatory burdens.

Stakeholders should answer this request for comment, and submit their responses before the deadline in order to produce the most effective and purposeful no-action letter process.

Marc-Alain Galeazzi is a partner and Malka Levitin is an associate at Morrison Foerster LLP.

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[1] <https://www.mofo.com/resources/insights/210112-anti-money-laundering-act.html>.

[2] <https://www.fincen.gov/sites/default/files/shared/No-Action%20Letter%20Report%20to%20Congress%20per%20AMLA%20for%20ExecSec%20Clearance%20508.pdf>.

[3] <https://www.govinfo.gov/content/pkg/FR-2022-06-06/pdf/2022-12048.pdf>.

[4] <https://www.fincen.gov/news/news-releases/fincen-issues-advance-notice-proposed-rulemaking-no-action-letter-process>.

[5] The CFPB is one of three financial services regulators that offers a no-action letter process. The others are the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission.

[6] <https://www.consumerfinance.gov/about-us/newsroom/cfpb-launches-new-effort-to-promote-competition-and-innovation-in-consumer-finance/>.