A REPORT TO CONGRESS
ASSESSMENT OF NO-ACTION LETTERS
IN ACCORDANCE WITH SECTION 6305
OF THE ANTI-MONEY LAUNDERING ACT OF 2020

Submitted by
The Financial Crimes Enforcement Network
June 28, 2021

I. INTRODUCTION

Section 6305(a) of the Anti-Money Laundering Act of 2020 (the "AML Act")[1] requires the Director of FinCEN, in consultation with others, to conduct an assessment on whether to establish a process for the issuance of no-action letters in response to inquiries concerning the application of anti-money laundering ("AML") or countering the financing of terrorism ("CFT") laws and regulations to specific conduct, including a request for a statement as to whether FinCEN or any relevant Federal functional regulator intends to take an enforcement action with respect to such conduct (the "Assessment"). Section 6305(b) of the AML Act requires the Secretary, in coordination with others, to submit a report (the "Report") to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives that contains all findings and determinations made in carrying out the Assessment, and propose rulemaking, if appropriate, to implement the findings and determinations.

This Report contains the findings and determinations FinCEN has made through its completion of the Assessment. This Report concludes that FinCEN should undertake a rulemaking in order to establish a no-action letter process to supplement the existing forms of regulatory guidance and relief that may currently be requested from FinCEN.[2] FinCEN believes that a no-action letter process would likely be most effective and workable if it is limited to FinCEN's exercise of its own enforcement authority, as opposed to also addressing other regulators' exercise of their distinct enforcement authorities. FinCEN anticipates, however, that for such a process to be effective, FinCEN would likely need to incorporate into its process an opportunity for consultation among FinCEN and other relevant regulators, departments, and agencies, as appropriate.

II. BACKGROUND

A. FinCEN

FinCEN is a bureau of the Department of the Treasury whose mission is to safeguard the financial system from illicit use, combat money laundering and related crimes including terrorist financing, and promote national security through the strategic use of financial authorities and the collection, analysis, and dissemination of financial intelligence.[3] FinCEN is the agency primarily responsible for the administration of the legislative framework commonly referred to as the Bank Secrecy Act ("BSA"),[4] and its implementing regulations,[5] which are codified at Chapter X of Title 31 of the Code of Federal Regulations ("Chapter X"). The BSA and Chapter X impose obligations

1. The AML Act was enacted as Division F, §§ 6001-6511, of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116-283 (2021).
2. At the time of the submission of this Report, FinCEN continues to seek funding for the resources to implement the AML Act.
3. 31 U.S.C. § 310(a); Treasury Order No. 105-08; https://www.fincen.gov/about/mission.
4. The BSA is codified at 12 U.S.C. §§ 1829b, 1951-1959, and 31 U.S.C. §§ 5311-5314, 5316-5336.
5. *See* 31 U.S.C. § 310(a); Treasury Order No. 105-08.

on a wide range of financial institutions, including depository institutions; casinos and card clubs; money services businesses (including dealers in/exchangers of virtual currency); brokers and dealers in securities; mutual funds; insurance companies; futures commission merchants and introducing brokers in commodities; dealers in precious metals, stones, or jewels; operators of credit card systems; loan or finance companies; housing government sponsored enterprises; and, in the future, dealers in antiquities[6]; as well as any nonfinancial trade or business for certain purposes (collectively "Covered Entities").[7] Pursuant to the BSA and its implementing regulations, FinCEN has authority to enforce compliance with the BSA and implementing regulations by imposing civil penalties and seeking injunctive relief.[8]

B. No-Action Letters

A "no-action letter" is generally understood to be a form of an exercise of enforcement discretion wherein an agency issues a letter indicating its intention not to take enforcement action against the submitting party for the specific conduct presented to the agency.[9] Generally, such letters address only prospective activity not yet undertaken by the submitting party.

C. The Requirements of the Anti-Money Laundering Act of 2020

Section 6305(a) of the AML Act requires the Director of FinCEN, in consultation with the Attorney General, the Federal functional regulators, State bank supervisors, State credit union supervisors, and other Federal agencies, as appropriate (collectively, the "Consulting Parties"), to undertake an Assessment on whether FinCEN should establish a process for the issuance of no-action letters by FinCEN,

> in response to inquiries from persons concerning the application of the Bank Secrecy Act, the USA PATRIOT Act (Public Law 107–56; 115 Stat. 272), section 8(s) of the Federal Deposit Insurance Act (12 U.S.C. § 1818(s)), or any other anti-money laundering or countering the financing of terrorism law (including regulations) to specific conduct, including a request for a statement as to whether FinCEN or any relevant Federal functional regulator intends to take an enforcement action against the person with respect to such conduct.[10]

---

6. *See generally* 31 U.S.C. § 5312(a)(2), (c); 31 C.F.R. § 1010.100(t).
7. *See* 31 U.S.C. § 5312(a)(4).
8. 31 U.S.C. §§ 5320, 5321; 31 U.S.C. §§ 1010.810–1010.850.
9. *See, e.g.,* 17 C.F.R. § 140.99 ("No-action letter means a written statement issued by the staff of a Division of the Commission [CFTC] or of the Office of the General Counsel that it will not recommend enforcement action to the Commission for failure to comply with a specific provision of the Act or of a Commission rule, regulation or order if a proposed transaction is completed or a proposed activity is conducted by the Beneficiary. A no-action letter represents the position only of the Division that issued it, or the Office of the General Counsel if issued thereby. A no-action letter binds only the issuing Division or the Office of the General Counsel, as applicable, and not the Commission or other Commission staff. Only the Beneficiary may rely upon the no-action letter."); 17 C.F.R. § 200.81(a) (describing an SEC no-action letter as a "letter or other written communication . . . requesting a statement that, on the basis of the facts stated in such letter or other communication, the staff would not recommend that the Commission take any enforcement action . . . .").
10. AML Act § 6305(a)(1).

Under the AML Act, the Assessment must include an analysis of:

> (A) a timeline for the process used to reach a final determination by FinCEN, in consultation with the relevant Federal functional regulators, in response to a request by a person for a no-action letter;
>
> (B) whether improvements in current processes are necessary;
>
> (C) whether a formal no-action letter process would help to mitigate or accentuate illicit finance risks in the United States; and
>
> (D) any other matter the Secretary [of the Treasury] determines is appropriate.[11]

Section 6305(b) of the AML Act requires the Secretary of the Treasury ("Secretary") to submit this Report in coordination with the Director of the Federal Bureau of Investigation, the Attorney General, the Secretary of Homeland Security, and the Federal functional regulators (collectively, the "Coordinating Parties") to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives containing the findings and determinations made in carrying out FinCEN's Assessment.[12] The Secretary shall propose rulemakings, if appropriate, to implement the findings and determinations in the Report.[13]

D. Methodology

To conduct the Assessment and prepare the Report consistent with the requirements of Section 6305, FinCEN followed the below procedure:

1. FinCEN consulted with the following Consulting Parties:

   A. The Board of Governors of the Federal Reserve System (FRB);
   B. The Office of the Comptroller of the Currency (OCC);
   C. The Federal Deposit Insurance Corporation (FDIC);
   D. The National Credit Union Administration (NCUA);
   E. The Securities and Exchange Commission (SEC);
   F. The Commodity Futures Trading Commission (CFTC);
   G. The Internal Revenue Service (IRS);
   H. The Attorney General (DOJ);
   I. The Consumer Financial Protection Bureau (CFPB);
   J. State Bank Supervisors; and
   K. State Credit Union Supervisors.

   FinCEN conducted outreach to inform the Consulting Parties of the Assessment and its consultation process and to invite all Consulting Parties to engage. The Conference of State Bank Supervisors (CSBS) and

11. *Id*. § 6305(a)(2).
12. *Id*. § 6305(b)(1).
13. *Id*. § 6305(b)(2).

the National Association of State Credit Union Supervisors (NASCUS) assisted in facilitating consultation with the various State Bank and State Credit Union Supervisors. All State Bank and State Credit Union Supervisors were notified of the Assessment and given an opportunity to consult individually with FinCEN. Among the Consulting Parties that responded to FinCEN's invitation to consult on the Assessment, only the SEC, CFTC, CFPB, and Idaho Department of Finance currently issue no-action letters.

FinCEN received input from all federal agencies and most state agencies. Consultations took place by email, videoconference, or teleconference and included sharing of drafts and, in many instances, written responses. Some Consulting Parties opted to provide feedback with other Consulting Parties in a consolidated submission.[14]

2. FinCEN identified the scope of matters for analysis and consultation. In addition to the areas of inquiry listed in Section 6305, FinCEN sought information regarding other federal and state regulatory agencies' existing no-action letter processes. The purpose of this information-gathering effort was to gain a better understanding of other regulators' experiences, including the potential advantages and disadvantages of such a process, and to inform FinCEN's scoping of resource and personnel needs in the event a no-action letter process were to be developed and implemented at FinCEN.
3. FinCEN analyzed the information from the Consulting Parties, conducted an internal review of FinCEN's current processes for regulatory guidance and relief described further below for engaging with Covered Entities and responding to compliance related issues, and evaluated the viability of implementing a no-action letter process. Based on this analysis, FinCEN generated the "findings and determinations" in this Report.
4. FinCEN coordinated submission of this Report with the Coordinating Parties.[15]

III. FINDINGS AND DETERMINATIONS

A. Role of Other Regulators

As a threshold matter, FinCEN considered and discussed with the Consulting Parties certain challenges arising from the relationship between FinCEN's enforcement

14. To facilitate broad, effective consultation with the Consulting Parties within congressional deadlines, consultation in many cases occurred with the staff of the Consulting Parties and not directly through their principals. In this Report, references to the "Consulting Parties" or "Coordinating Parties" may reflect the views of their staff.

15. Although the Coordinating Parties were not required to submit edits or commentary on the Report, opine on its contents, or sign or otherwise adopt the Report, most Coordinating Parties, through their staff, provided feedback on the Report, their views on the findings, determinations, and ultimate conclusion, and/or suggested issues to be explored and addressed through the anticipated rulemaking.

authority and the authority of other regulators. Some laws, such as Section 8(s) of the FDI Act,[16] mirror some provisions of the BSA and create parallel enforcement authority. In addition, by regulation, FinCEN has delegated certain enforcement authority—for example, enforcement authority relating to the filing of Reports of Foreign Bank and Financial Accounts (FBARs) is delegated to the IRS[17] —and law enforcement also has the authority to investigate and prosecute criminal violations of the BSA. FinCEN's regulations also delegate certain authority to other regulators to examine financial institutions for BSA compliance. In light of these parallel or overlapping authorities, FinCEN considered the feasibility of establishing a cross-regulator no-action letter process and the extent of engagement and consultation with other regulators that would be necessary in any future no-action letter process.

i. Cross-Regulator No-Action Letters

Section 6305 of the AML Act requires FinCEN to assess whether it should implement a no-action letter process that could include a statement as to whether FinCEN "or any relevant Federal functional regulator" intends to take an enforcement action.[18] Section 6305 thus appears to contemplate the possibility of a cross-regulator no-action letter process in which FinCEN could issue a no-action letter that would apply to FinCEN as well as other regulators and that addresses the various agencies' respective enforcement authorities. While regulators that currently have no-action letter processes sometimes engage in consultation with other relevant regulators, FinCEN found no other instance of a process where one regulator provides a no-action letter with respect to another regulator's enforcement authority. Such a process would therefore appear to be unprecedented. As explained further below, while a cross-regulator no-action letter process might have certain benefits, FinCEN assesses that such a process involving multiple agencies and their respective authorities would present legal and practical challenges. Although FinCEN remains open to further consideration of these issues, FinCEN does not believe at this time that a cross-regulator no-action letter process would be the most effective or workable approach.

If FinCEN were to serve as a central point of entry for any person requesting a no-action letter concerning any AML or CFT law, such a system could have some benefits. It might be desirable for FinCEN to serve as the hub for communication between applicants and the relevant regulators on such matters, given FinCEN's substantial expertise in the design, implementation, and enforcement of AML and CFT laws and regulations and as the administrator of the BSA. Such a system might enable applicants to obtain certainty on AML or CFT enforcement from a single agency, rather than several different agencies.

---

16. Federal Deposit Insurance Act, 12 U.S.C. § 1818(s).

17. 31 C.F.R. § 1010.810(g).

18. *See id.* § 6305(a)(1) ("The Director [of FinCEN] . . . shall conduct an assessment on whether to establish a process for the issuance of no-action letters by FinCEN . . . concerning the application of the Bank Secrecy Act, the USA PATRIOT Act (Public Law 107–56; 115 Stat. 272), section 8(s) of the Federal Deposit Insurance Act (12 U.S.C. 1818(s)), or any other anti-money laundering or countering the financing of terrorism law (including regulations) . . . including a request for a statement as to whether FinCEN *or any relevant Federal functional regulator* intends to take an enforcement action against the person with respect to such conduct.") (emphasis added).

Despite these potential benefits, FinCEN, in consultation with the Consulting Parties, identified significant hurdles to the implementation and execution of a cross-regulator no-action letter process. First, while FinCEN is the administrator of the BSA, it does not have authority to administer or enforce all AML and CFT laws that are administered or enforced by other regulators, departments, and agencies.[19] If FinCEN were to issue a no-action letter, it would not have the ability to prevent another agency from bringing an enforcement action under that agency's own authority. It is also unlikely that other agencies would consent to be bound by a FinCEN no-action letter without requiring that requesters seek no-action relief directly from them, pursuant to the other agencies' own authorities. Several of the Consulting Parties were opposed to and raised concerns with any process that involved FinCEN issuing statements of no-action on their behalf without their own consideration of the request and express concurrence.

Second, even if a cross-regulator no-action letter process could be implemented effectively, its execution would raise significant logistical challenges, including at least the need to establish complex processes for coordination and final approval. Moreover, additional resources would be necessary for the implementation of such a cross-regulator process, including hiring and retention of personnel to process no-action letter submissions, manage the interagency coordination, and administer corresponding tracking and other systems to implement such a process effectively. While these logistical and resource challenges may not be insurmountable, they pose significant challenges.

Third, a cross-regulator no-action letter process would likely be slower and more time consuming than a single-agency no-action letter process because of the various points at which different regulators would need to coordinate. For example, Consulting Parties who already have a no-action letter process explained that they sometimes find an initial submission to be incomplete or otherwise deficient on its face, potentially requiring multiple rounds of communication with the submitting party in order to obtain additional information and arrive at a submission that can be evaluated. With a cross-regulator no-action letter process, those same steps would also require cross-regulator coordination to ensure that all agencies are satisfied with the submission. Delays could compound across agencies over the course of the no-action letter evaluation, and thus may ultimately delay the grant of regulatory relief.

On balance, FinCEN proposes that these legal and practical challenges weigh against a cross-regulator no-action letter process.

ii. Consultation

Even if FinCEN does not adopt a cross-regulator no-action letter process, this does not mean that the only alternative is FinCEN simply "going at it alone." FinCEN could issue no-action letters with respect to its own enforcement of the BSA and its implementing regulations, but could nevertheless consult with other regulators,

19. For the purposes of this Report, FinCEN considers Section 6305 of the AML Act to contemplate a no-action letter process to address federal civil AML and CFT laws, not state laws or criminal laws. Section 6305 could be read broadly to encompass state and criminal laws, but it is even less clear whether FinCEN, a federal civil agency, has the legal authority to issue a no-action letter under these laws, which it does not have the authority to enforce.

departments, and agencies, as appropriate, when they may have an equity or interest in the matter. Certain Consulting Parties highlighted that, even if not technically binding, there is a risk that FinCEN's issuance of no-action letters will have practical consequences that may impact the enforcement efforts of various agencies. Indeed, all of the Consulting Parties requested that, if FinCEN opted for a no-action letter process, they be consulted or notified in some capacity, depending on the nature of the request and Covered Entity and activity at issue, during the course of FinCEN's evaluation of a letter from a jointly regulated entity.[20] The degree of consultation with other regulators would vary on a case-by-case basis and, in some instances, a coordinated response among relevant agencies may be appropriate. Consultation carries the substantial benefit of helping to ensure that regulated persons are not subject to conflicting requirements, and that regulators are not working at cross purposes.

In addition, the Department of Justice and other law enforcement agencies may have intersecting interests with this process as well. For example, a Covered Entity that is engaging in criminal activity may seek to obtain a no-action letter (on misrepresented facts or otherwise) to use as a defense in a criminal investigation or to criminal charges. Specifically, if a Covered Entity were to obtain a no-action letter stating that FinCEN would not take an enforcement action on certain conduct, such a letter might be raised in the law enforcement action in an effort to deter law enforcement from bring a criminal action for the same conduct. Consultation with or notification to the Department of Justice or other law enforcement agencies may therefore be important.

However, as the list of agencies warranting consultation grows longer, the process could become lengthier and more cumbersome. A Covered Entity may be supervised or otherwise regulated by multiple federal financial regulators, as well as State, Tribal, territorial, local authorities, or some combination thereof, potentially requiring several resource-intensive consultations, in addition to consultation with the Department of Justice or other law enforcement agencies. Thus, a broad consultation process may substantially delay a no-action letter process.[21]

On balance, FinCEN assesses that a no-action letter process exercising its own enforcement authority should include consultation with other agencies as needed and appropriate, given the various areas where FinCEN's no-action letters may impact agencies with parallel or delegated authority. FinCEN will need to further consider the nature and process for such consultation, balancing the benefits of consultation with the interest in making the no-action letter process as efficient as possible.

---

20. The FRB, FDIC, and NCUA requested in a joint response statement to FinCEN that all the Federal Banking Agencies (FBAs) be consulted on a request by any bank, and that certain no-action letters require relevant FBAs concurrence, depending on the equities impacted. The OCC separately requested that the primary federal functional regulator be consulted and all other FBAs be notified. State banking and credit union supervisors expressed interest in being consulted because their examinations often include an assessment of BSA compliance. Additionally, some states share examination responsibilities with the Federal functional regulators.

21. This does not even address the question of how to handle a request where law enforcement has an ongoing covert investigation of the submitting financial institution.

B. Timeline

Pursuant to Section 6305, FinCEN also analyzed a timeline for a no-action letter process for FinCEN to reach a final determination.[22] FinCEN anticipates that the process would generally require the following steps, not necessarily in this order:

1. FinCEN receives a request for a no-action letter and performs an initial review of the request, including for completeness, accuracy, and conformity with relevant rules and regulations FinCEN puts in place for no-action letter requests.
2. FinCEN determines the relevant regulators or agencies (including State or other regulators) that also regulate the entity and may have an interest in the request, and FinCEN shares the request.
3. FinCEN consults internally on the request.
4. FinCEN consults with the appropriate regulators, departments, and agencies on the request.
5. FinCEN makes a final decision on the request.
6. FinCEN drafts the no-action letter, denial, or other response and transmits it to the submitting party.
7. FinCEN may elect to post the no-action letter on its website.[23]

The timeline for a no-action letter process could vary depending on a number of different factors, including the complexity and nature of the request. Based on feedback from the Consulting Parties the timeline could be as short as 90 to 120 days for cases that do not present novel, complex, or sensitive issues, but other cases could take considerably longer. For example, both the SEC and CFTC indicated that issuance of their no-action letters can take between several months to over a year, depending on the complexity of the issue underlying the request.

First, the timing of the process could be impacted if FinCEN and the other regulators disagree on whether FinCEN should issue a no-action letter, the scope of any such letter, or both. The best way to handle such situations will vary depending on the specifics of the request and the nature of the disagreement between agencies. Nevertheless, such disagreements could measurably impact the speed at which a response to a no-action request is issued.

Second, the timing could also be impacted where the submitting party fails to provide sufficient facts upon which to make a determination, or the request does not conform to relevant rules and regulations that FinCEN puts in place surrounding such requests. Some of the Consulting Parties that issue no-action letters shared that they often engage in several rounds of additional fact-finding during the evaluation of the request. Here, FinCEN would need to communicate with the submitting party to obtain additional facts upon which FinCEN could rely. A postponement could arise where FinCEN is concerned that the submitting party is not being entirely candid in its submission. In these instances, FinCEN could consider returning the request without action.

---

22. *See* AML Act § 6305(a)(2)(A).

23. Whether or in what circumstances to make no-action letters public is a matter that requires further consideration.

Third, due consideration should be given to the sufficiency of the resources allocated to no-action requests and related processes. Both the SEC and CFTC receive and process numerous no-action requests per year. FinCEN regulates a substantially larger population of Covered Entities, but has far fewer employees than other agencies with such processes to handle these requests. As of the date of this assessment, FinCEN does not have adequate resources and personnel to receive, process, and adjudicate no-action letter submissions.[24] Absent additional resources, FinCEN would not be able to process no-action letter requests within a reasonable timeframe without redirecting resources away from important enforcement, compliance, or other FinCEN mission-related work.

C. Improvements to Current Processes

FinCEN also analyzed whether improvements to current processes are necessary.[25]

i. Current Processes

FinCEN currently provides the following forms of regulatory guidance or relief: 1) administrative rulings, and 2) exceptive or exemptive relief. An administrative ruling is a written ruling, "interpreting the relationship between this chapter [Chapter X] and each situation for which such a ruling has been requested" in conformity with specified requirements.[26] An administrative ruling binds FinCEN if it describes a specified situation and can have precedential value—meaning it may be relied upon by others similarly situated—if FinCEN makes it available to the public through publication on FinCEN's website or other appropriate forum.[27] However, if FinCEN elects not to publish the administrative ruling, its effect is non-precedential on similarly situated parties.

FinCEN, as delegated by the Secretary of the Treasury, may also grant exceptive or exemptive relief, that is, an exception or exemption from the requirements of Chapter X.[28] These exceptions or exemptions "may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to particular transactions or classes of transactions"; "[t]hey shall, however, be applicable only as expressly [s]tated in the order of authorization, and they shall be revocable in the sole discretion of the Secretary."[29]

In contrast to these existing forms of relief, a no-action letter is an exercise of enforcement discretion by which FinCEN would determine that it would not take an enforcement action against the submitting party for engaging in the specific conduct described in the request.

---

24. For example, both the SEC and CFTC employ multiple full-time attorneys with expertise in policy matters to handle their no-action letter requests, and considerable time and attention is devoted to evaluating and addressing complex legal issues. To address an increased volume of issues of comparable legal complexity, FinCEN would need to increase its attorney staffing and corresponding resources.

25. *See* AML Act § 6305(a)(2)(B).

26. 31 C.F.R. § 1010.715.

27. *Id.* Administrative rulings may be modified or rescinded under appropriate circumstances, which impacts the extent to which they are binding and have precedential value. 31 C.F.R. § 1010.716.

28. 31 U.S.C. § 5318(a)(7); 31 C.F.R. § 1010.970.

29. *Id.* § 1010.970(a).

ii. Improvements to Current Processes

The Consulting Parties provided feedback to FinCEN that identified four improvements to current processes for administrative rulings and exceptive relief that, Consulting Parties believed, could also be incorporated into the development of a no-action letter process.

First, alongside the implementation of a new no-action letter process, FinCEN could publicly and more clearly define the mechanisms available to parties for obtaining regulatory guidance and relief and explain the difference between the no-action letter process and existing processes. This could include consideration of revising current regulations through a rulemaking process and publication of comprehensive guidance on the types of regulatory guidance and relief issued by FinCEN, including the new no-action letter process, the limitations of each type of regulatory guidance and relief, and the processes for submitting requests for such relief.

Second, current processes for existing relief could include more meaningful and involved consultations with other relevant regulators that would also be incorporated prior to FinCEN's final determination on a request for a no-action letter.[30] Several Consulting Parties, at both the federal and state levels, expressed interest in more frequent and robust dialogue between FinCEN and other regulators during FinCEN's consideration of regulatory guidance and relief. Many Consulting Parties indicated an interest in consultation on *any* matter in which their agency concurrently regulates the submitting party, while others indicated notice of FinCEN's intent to grant relief or take a public position as to a jointly supervised entity in certain instances may be sufficient.[31] Some State regulators wanted to ensure their examiners—who often conduct compliance examinations concurrently with federal regulators—receive timely notice of any regulatory guidance and relief granted to a regulated entity.

Third, we believe that future issuance of no-action letters and the other forms of regulatory relief could be expedited, but only with additional resources. Given severe staffing and resource constraints, it has been historically difficult to manage the volume of requests for administrative rulings and exceptive relief. Over the past year and a half, FinCEN has made tremendous strides in reducing the backlog of these requests by over 80% and has put in place policies and procedures in an effort to respond more swiftly to such requests, notwithstanding current resource constraints. But the introduction of a new relief option without additional staffing and resources—in addition to the significant increase in statutorily required rulemakings and other work streams created by the AML Act without any funding or personnel—would exacerbate the challenges associated with managing the volume of these requests. It is difficult to envision how an expeditious timeline could be achieved while maintaining a consultative component to the process and without additional resources targeted at increasing FinCEN's staffing levels.

---

30. FinCEN currently coordinates with other regulators, as appropriate, when it considers requests for regulatory guidance and relief.

31. *See* footnote 20. As discussed above, should it decide to implement a no-action letter process, FinCEN intends to carefully consider notification and consultation with other regulators and agencies.

Fourth, many Consulting Parties noted that a no-action letter process would aid in a dialogue with parties. For example, financial institutions looking to innovate may be reluctant to embrace new business models and engage with FinCEN on these issues if they lack sufficient certainty about how FinCEN would apply the law to novel or unique scenarios. Changes in current processes, to include the implementation of a new, well-resourced no-action letter option, could encourage parties to engage with FinCEN, and thus may improve this dialogue.

D. Illicit Finance Risk

FinCEN also analyzed whether a formal no-action letter process would help to mitigate or accentuate illicit finance risks in the United States,[32] and, in consultation with Consulting Parties, identified several areas in which a no-action letter process potentially would mitigate or accentuate illicit finance risk.

i. Whether a no-action letter process would mitigate illicit finance risk

Some Consulting Parties suggested that a no-action letter process generally spurs dialogue between a regulator and the parties it regulates. For agencies that issue no-action letters, this relief mechanism has enabled a "conversation" between the agency and its regulated entities, which can be beneficial to both the agency and the regulated entities, even in cases where no-action relief is ultimately denied. In some circumstances, no-action letters might also be obtained more quickly than other forms of regulatory guidance and relief. Administrative rulings, where the interpretation of a regulation can have ripple effects throughout the financial industry, and exceptive relief, where the agency must decide whether to except a party from existing regulations, may require more extensive consideration because of the breadth of their applicability. In some circumstances, it is possible that a no-action letter of narrow applicability and limited impact—addressing a single regulated party and a particular set of facts and circumstances—might be considered more quickly than other forms of relief.

For FinCEN, a more expedited dialogue could further mitigate illicit finance risk. At present, Covered Entities do not have a mechanism by which they can seek confirmation that FinCEN will not pursue an enforcement action, for example, when a financial institution considers changes to its AML programs designed to improve its compliance processes. Providing prompt reassurance to parties may enable creativity and innovation in technological developments that ultimately could serve to enhance BSA compliance at the subject Covered Entity, and perhaps eventually, across financial sectors.

ii. Whether a no-action letter process would accentuate illicit finance risk

Several Consulting Parties indicated that a no-action letter process could accentuate illicit finance risk by creating a defense for violators of the BSA in a criminal or regulatory action. The Consulting Parties identified two hypothetical scenarios. In the first scenario, the submitting party might request a no-action letter by providing false, misleading, or incomplete information in its submission. FinCEN might then issue the no-action letter relying on the false, misleading, or incomplete information.

---

32. *See* AML Act § 6305(a)(2)(C).

A later investigation or examination might reveal that the facts and circumstances underlying the submitting party's request were misrepresented to FinCEN, but the Covered Entity could attempt to use the no-action letter as a defense or rebuttal in the examination or enforcement contexts. In the second scenario, a submitting party might request and receive a no-action letter based on accurate information regarding certain conduct, but then might attempt to use that no-action letter to avoid regulatory scrutiny of additional conduct not contemplated by FinCEN in its initial determination.

While these concerns are reasonable, such risks already exist for the regulatory guidance and relief FinCEN presently offers. Further, FinCEN does not typically see requests for regulatory guidance or relief in which the submitting party seeks permission to violate core requirements of the BSA, such as requests for permission not to file suspicious activity reports (SARs) for a customer or class of customers or in certain situations. Most requests for regulatory guidance or relief focus on interpretations of potentially ambiguous law or specific and unusual scenarios. For example, in September 2018, FinCEN granted exceptive relief to all covered financial institutions from certain beneficial ownership reporting requirements for legal entity customers related to rollovers, renewals, modifications, or extensions of certain accounts or loans.[33] The relief was granted because the specific activity and account relationships described in the request presented low risks for money laundering and terrorist financing, and because the relief did not relieve financial institutions of their obligation to conduct ongoing customer due diligence for purposes of developing and maintaining a customer risk profile. Indeed, FinCEN may decline no-action letter requests that are targeted at factual determinations (such as determining whether some particular set of facts is suspicious) rather than those focused on the application of the law to facts.

FinCEN may consider additional procedural safeguards, to help protect against increased illicit finance risk associated with the no-action letter process. For instance, FinCEN may consider: requiring a submitting party to attest under penalty of perjury that the information contained within the submission is accurate and complete; including express language in the no-action letter that the letter is being issued on the facts as represented, which the submitting party confirms are accurate and complete; and making the no-action letter revocable by FinCEN at its sole discretion. Further, FinCEN would consider internal processes and procedures to address such risks, including maintaining complete records of documents provided and facts represented in each request for a no-action letter, so as to clearly and definitively demonstrate the information and representations relied upon for the issuance of each no-action letter.

Another concern raised during consultation was that a no-action letter process could accentuate illicit finance risk if other regulators, departments, and agencies are unable to understand the full context of a no-action letter because part or all of the submission is kept confidential. For example, certain BSA filings that may be at issue are subject to strict non disclosure requirements,[34] or there may be other personal or

33. *See* FIN-2018-R004, "Exceptive Relief from Beneficial Ownership Requirements for Legal Entity Customers of Rollovers, Renewals, Modifications, and Extensions of Certain Accounts," September 7, 2018.

34. *See, e.g.*, 31 U.S.C. § 5318(g)(2).

proprietary information in a no-action letter request that the submitting party may ask be kept confidential pending FinCEN's evaluation of the request. If the request and FinCEN's determination, or a portion thereof, are 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.

This concern would only appear to arise if confidential information is included in the submission to FinCEN, and so is unlikely to be a frequent issue. Nevertheless, the concern could be addressed by employing a method similar to that of both the SEC and the CFTC, while ensuring appropriate protections specific to BSA filings. These regulators keep submissions confidential while undertaking review of a no-action letter request. Additionally, upon request from the submitting party, the SEC and CFTC will refrain from publishing the no-action letter and underlying request for a period of 120 days. After 120 days, each agency publicizes the submission and responsive no-action letter—with redactions, as appropriate—on its website. By utilizing this method, each agency allows the submitting party's request to remain nonpublic during the consideration of the request and for a period after the no-action letter is issued. When eventually published, redactions ensure that no confidential or otherwise protected information is improperly disseminated. FinCEN would adopt a similar approach and consider establishing protocols for informing other relevant regulators of a pending confidential no-action letter.

E. Whether FinCEN Should Implement a No-Action Letter Process

Most, but not all, of the Consulting Parties agreed that FinCEN should add no-action letters to its options for regulatory guidance or relief.[35] The primary benefits identified by those in favor of a no-action letter process are that it could promote a robust and productive dialogue with the public, spur innovation among financial institutions, and enhance the culture of compliance and transparency in the application and enforcement of the BSA. Those who argued against the implementation of a no-action letter process expressed concerns about FinCEN's ability to fully appreciate the facts and circumstances underlying a request for a no-action letter as compared to, for example, Federal functional regulators, due to their supervision and examination responsibilities, including accounting for safety and soundness considerations that address broader risk management of a supervised institution's activities. They also expressed concerns that a no-action letter process could undermine effective supervision, enforcement, or prosecution of financial institutions who obtain a no-action letter through misrepresentations. Additionally, some of the Consulting Parties expressed concerns that FinCEN will struggle to implement an effective program due to the lack of adequate funding for FinCEN by Congress.

---

35. The FBAs questioned whether a no-action letter process by FinCEN was necessary or helpful and highlighted various concerns and challenges that would need to be addressed given the extent of their overlapping authorities, regulatory supervisory regimes, and delegated authority by FinCEN to conduct examinations. They also proposed limitations to any such process should FinCEN decide to move forward with establishing a no-action process. FinCEN is sensitive to these concerns and will continue to consider the proposals and best way to ensure appropriate consultation and coordination with other regulators and agencies.

Upon completion of the Assessment and consideration of all of the Consulting Parties' comments and concerns raised throughout the process, FinCEN assesses that it should establish a no-action letter process through rulemaking, provided sufficient resources are made available. With adequate resources, FinCEN believes that such a process could be a useful complement to existing forms of regulatory guidance and relief. FinCEN is mindful of the complexities that may arise, particularly when another regulator or agency may have relevant equities or interest. Any requests for no-action relief would need to be carefully reviewed in consultation with other regulators, and FinCEN expects to further consider these and other issues, in continued consultation with the Consulting Parties in the course of establishing a no-action letter process.

IV. REGULATIONS

Section 6305 of the AML Act states that the Secretary shall "propose rulemakings, if appropriate, to implement the findings and determinations" of the no-action letter assessment.[36] FinCEN anticipates beginning a rulemaking process to propose adding no-action letters to the options available for regulatory guidance or relief, with the timing subject to resource limitations and competing priorities. The rulemaking process would provide an opportunity for public comment and further consideration of the issues and feedback highlighted in this Report and any additional issues that may be raised.

V. CONCLUSION

For the foregoing reasons, FinCEN concludes that it should plan towards a rulemaking to create a process for issuing no-action letters in addition to its current forms of regulatory guidance and relief, with the timing subject to resource limitations and competing priorities.

36. AML Act § 6305(b)(2).