August 5, 2022

Via Electronic Mail

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

Re: No Action Letter Process (Docket No. FINCEN—2022—0007 and RIN 1506—AB55)

To Whom It May Concern:

The Bank Policy Institute[1] and the American Bankers Association[2] appreciate the opportunity to respond to the Financial Crimes Enforcement Network's advance notice of proposed rulemaking on establishing a no action letter process. We support FinCEN's efforts to implement such a process and believe that it has the potential to encourage and support financial institutions' efforts to adopt innovative approaches and technologies for AML/CFT compliance. This is in line with the purpose of the Anti-Money Laundering Act of 2020 which was, among other things, to "encourage technological innovation and the adoption of new technology by financial institutions to more effectively counter money laundering and the financing of terrorism."[3]

In our view, a no action letter process would (i) allow individual financial institutions to seek assurance from FinCEN that regulators will not take action against the institution for employing a certain

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1 The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks, and the major foreign banks doing business in the United States. Collectively, they employ almost two million Americans, make nearly half of the nation's small business loans, and are an engine for financial innovation and economic growth.

2 The American Bankers Association is the voice of the nation's $24 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $19.9 trillion in deposits and extend $11.4 trillion in loans.

3 William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 ("NDAA 2021"), § 6002, Pub. L. No. 116-283, 134 Stat. 3388, 4547.

technology, process, or program contemplated by the institution; (ii) allow for quick answers from regulators; and (iii) increase the flow of information from industry to FinCEN about new technologies and procedures, which could assist the agency's rulemaking efforts, particularly those required under the AML Act.[4] It would be used in distinctly different ways than FinCEN's administrative ruling and exceptive or exemptive relief authority. In addition, a no action letter process would be useful to banks should it contain the following characteristics – provide a no action letter that is accepted by all relevant regulators so as to truly provide the assurance institutions need to proceed with a covered activity, allow for a flexible and confidential application process, include timely response mechanisms for both simple and complex applications as well as the opportunity for a recipient to cure if problems arise, provide for the public release of no action letters subject to the requestor's consent, and provide avenues for third parties to rely on published letters.

I. A No Action Letter Issued Solely By FinCEN, That Is Not Accepted By Relevant Regulators, Will Leave Banks Exposed To Adverse Regulatory Action And Discourage Program Participation

While we appreciate FinCEN's efforts to implement a no action letter program, we are concerned with FinCEN's initial finding that it should establish this program solely under its own enforcement authority and not build in cross-regulator recognition of a no action letter. We agree with FinCEN's view that a no action letter, "as used by other agencies is typically an exercise of enforcement discretion wherein the staff of an agency…issues a letter indicating its intention not to take or recommend enforcement action against the submitting party for the specific conduct presented in the submitting party's request."[5] However, as many financial institutions have multiple regulators, with jurisdiction over different aspects of the institution's business, a no action letter issued by FinCEN that is not accepted by all regulators will leave financial institutions with significant exposure to regulatory action, thereby discouraging use of the no action letter program. Banks of all sizes are unlikely to devote the level of resources necessary to execute on an initiative that requires a no action letter if they cannot fully rely on it.

The existing statutory and regulatory structure provides support for cross-regulator recognition of a no action letter. The Secretary of the Treasury has the authority, and is charged with the responsibility, of administering the Bank Secrecy Act. The Secretary has delegated most of these functions to FinCEN.[6] Moreover, the Secretary was also given authority to examine financial institutions for BSA compliance, which has been delegated to various agencies, including the federal banking agencies, the Securities and Exchange Commission, and the Internal Revenue Service, among others.[7] Most of these agencies have issued regulations outlining requirements for the financial institutions they

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4 We particularly note that such a process could assist FinCEN's testing methods rulemaking under Section 6209 of the AML Act.

5 87 Fed. Reg. 34225.

6 *See* 31 U.S.C. 5318(a)(2) and (h)(2). *See also* Treasury Order 108-01 (Jul. 1, 2014, reaffirmed Jan. 14, 2020); *available at* https://home.treasury.gov/about/general-information/orders-and-directives/treasury-order-180-01.

7 *See* 31 CFR § 1010.810(b).

regulate that parallel regulations issued by FinCEN. As the administrator of the BSA, FinCEN can and should be able to speak for these other agencies on regulatory policy decisions and other matters taken under the statute. If FinCEN fails to assert this authority, the result is regulatory policy and enforcement by committee, which could create unnecessary redundancy or disparate treatment. Ultimately, a no action letter issued by FinCEN, as the administrator of the BSA, that does not speak for the agencies that have delegated authority, will be impractical for the regulated sector in most cases as many institutions are supervised by multiple regulators for BSA compliance.

In order to address these concerns, FinCEN should create a comprehensive no action letter program that provides for the escalation of questions or concerns to the requesting entity for further discussion and resolution – with the view that once a no action letter is issued, it provides a shield against supervisory and enforcement actions from all regulators with jurisdiction over the institution. Such an approach would not only assist institutions' efforts to adopt innovative AML/CFT compliance approaches and technologies, but it also would align with many federal functional regulators' efforts to encourage responsible innovation. For example, in the December 2018 *Joint Statement on Innovative Efforts to Combat Money Laundering and Terrorist Financing*, the federal banking agencies and FinCEN indicated that they were "exploring additional methods to encourage innovation," through the Bank Secrecy Act Advisory Group and other means, including by acting on requests for exceptive relief. The no action letter process outlined above could be the next step in that effort and corresponds well with the regulatory relief option highlighted in the statement – use of FinCEN's exceptive relief authority.[8] Furthermore, it could be supported by the Innovation Officers appointed under Section 6208 of the AML Act. Such individuals, among other responsibilities, are meant to "provide technical assistance or guidance relating to the implementation of responsible innovation and new technology by financial institutions and associations of financial institutions, agents of financial institutions, and other persons (including service providers, vendors and technology companies), in a manner that complies with the requirements of the Bank Secrecy Act."[9] Thus, this individual would have the expertise necessary, and be well placed to support a FinCEN-led no action letter process.

II. FinCEN's Application Process Should Be Flexible And Timely, With No Action Letters Only Revoked After The Opportunity To Cure

Some no action letter requests will likely require institutions to invest significant resources in testing innovative technological approaches and training staff. To that end, it will be important for FinCEN to provide, with specificity, the application requirements and parameters, as well as the timeline within which it will provide a response. Given the breadth of potential uses, which is discussed further in

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8 Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Financial Crimes Enforcement Network, National Credit Union Administration, Office of the Comptroller of the Currency, Joint Statement on Innovative Efforts to Combat Money Laundering and Terrorist Financing (Dec. 3, 2018), *available at* https://www.fincen.gov/sites/default/files/2018-12/Joint%20Statement%20on%20Innovation%20Statement%20%28Final%2011-30-18%29_508.pdf.

9 William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, § 6208, Pub. L. No. 116-283, 134 Stat. 3388, 4573.

Section IV, we believe that a flexible approach that allows both covered financial institutions and other interested parties (e.g., trade associations, law firms, etc.) to apply for a no action letter, and specify the coverage requested, would best facilitate prospective no action letter requests.

In particular, the submitting party should have the ability to specify the scope of application for any no action letter, including its applicability to the submitting party's agents, partners (including financial institution partners), parent and/or subsidiary corporations, or members. However, as discussed above, throughout the process, institutions or entities should have the ability to adjust elements of their no action letter proposal in order to address questions or concerns raised by relevant regulators. Furthermore, we believe that trade associations and others should have the ability to utilize the process on behalf of those they represent, similar to other agencies' no action letter programs, such as the Securities and Exchange Commission.[10]

In addition, while FinCEN's report under Section 6305 of the AML Act recommended a 90- to 120-day feedback period in cases that "do not present novel, complex, or sensitive issues,"[11] we believe that a 60-day period would be more appropriate in these cases and comport with the Consumer Financial Protection Bureau's no action letter process.[12] In its Policy Guidance establishing a no action letter policy, the Bureau stated that a 60-day period "strikes the optimal balance between permitting sufficient time for a thorough review of applications and encouraging entities to submit applications."[13] As the Bureau noted, no action letters "facilitat[e] innovation."[14] If FinCEN does not act quickly, it may stifle banks' efforts to adopt innovative approaches as institutions have limited financial and staffing resources and those that have been designated for process changes, following the receipt of a no action letter, may be redeployed if responses are not timely.

Once a request has been approved, which materially impacts the compliance operations of a financial institution, the firm may take steps to redeploy resources to other areas or shut off less

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10 For example, *see* Letter from SEC to SIFMA, "Request for No Action Relief Under Broker-Dealer Customer Identification Program Rule (31 C.F.R. § 1023.220) and Beneficial Ownership Requirements for Legal Entity Customers (31 C.F.R. §1010.230)" (Dec. 9, 2020), *available at* https://www.sec.gov/divisions/marketreg/mr-noaction/2020/sifma-120920-17a8.pdf.

11 Financial Crimes Enforcement Network, A Report to Congress – Assessment of No action Letters in Accordance with Section 6305 of the Anti-Money Laundering Act of 2020 (Jun. 28, 2021), p.8, *available at* https://www.fincen.gov/sites/default/files/shared/No action%20Letter%20Report%20to%20Congress%20per%20AMLA%20for%20ExecSec%20Clearance%20508.pdf.

12 *See* Consumer Financial Protection Bureau, "Policy on No-Action Letters," (Sept. 6, 2019) *available at* https://files.consumerfinance.gov/f/documents/cfpb_final-policy-on-no-action-letters.pdf. We note that the 60-day period commences after the CFPB receives a complete application and does not include informal discussions around a potential request. Since establishing its no action letter process, the Bureau has replaced the Office of Innovation, which issued the letters, with an Office of Competition and Innovation.

13 *Id.* at 27.

14 *Id.* at 14.

productive technological systems. As FinCEN considers policy issues related to no action letters, when it comes to establishing processes related to revoking such letters, we recommend that it first consider issuing a "notice of intent to revoke a no action letter," which would provide any institution or entity the opportunity to cure identified concerns and continue to operate under the letter. However, should the agency ultimately decide to revoke a no action letter, we recommend that at least 18 months be provided to the entity so that it can unwind any changes it made to its AML/CFT program while relying on a no action letter. An 18-month period is necessary because the revocation of a no action letter would likely require an institution to make changes to AML/CFT technologies or processes, perform testing of that change, train first and second line employees on how to implement the change, conduct a "pilot" of the technology change, and make modifications to related processes to account for the change.

Therefore, we recommend that any final rule state that revocation procedures will include (i) the provision of a notice of intent to revoke a no action letter and the opportunity to cure and (ii) if denied, a timeline that will allow the institution 18 months to review and, as needed, put in place alternate compliance approaches that meet the entity's regulatory obligations absent a previously granted letter.

III. No Action Letter Requests Should Be Afforded Confidential Treatment, Redacted Letters Should Be Released To The Public With the Requestor's Consent, And The Program Should Provide An Avenue For Third Parties to Rely On A Published Letter

No action letter requests and related regulatory responses should be afforded confidential treatment to allow requestors, including financial institutions, to provide sufficient detail, including personal, proprietary, or sensitive information, without the fear of disclosure. However, industry would benefit from publication of certain no action letters that have broader applicability. Therefore, we recommend FinCEN publish such no action letters only after obtaining the requestor's consent and redacting any personal, proprietary, or sensitive information, including the name of the requestor upon request. We believe that publishing redacted no action letters will further encourage banks to explore innovative processes and facilitate the distribution of innovative ideas and novel compliance approaches. It would also further illustrate regulators' willingness to authorize innovative compliance approaches and drive institutions' and other parties' efforts to undertake similar efforts. Our members have already seen this take place. For example, the Office of the Comptroller of the Currency has published interpretive letters relating to the automation of suspicious activity reports and relief from aspects of the Customer Identification Program rule[15], which has led institutions to consider making similar changes to their programs. However, consent from the requesting party is an essential component of any public-facing release as letters could contain confidential or sensitive information that should not be made public. If consent is not provided for the publication of a redacted letter, FinCEN should consider other avenues or mechanisms (e.g., fact sheets or statements) that could be

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[15] *See, e.g.*, Office of the Comptroller of the Currency, Interpretive Letter #1166, Request for Interpretive Letter to Streamline SARs for Potential Structuring Activity (2019), *available at* https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2019/int1166.pdf.

used to provide the industry with insights and trends on the adoption of innovative AML/CFT compliance approaches or technologies.

In addition, to the extent necessary, FinCEN should also allow institutions to share no action letters with other relevant regulators, including those in an institution's home country, to further demonstrate the banks' efforts to maintain an enterprise-wide AML program that complies with relevant law. Finally, as FinCEN is aware, in the no action letter program established by the Securities and Exchange Commission, the agency "permit[s] parties other than the requestor to rely on the no-action relief to the extent that the third party's facts and circumstances are substantially similar to those described in the underlying request."[16] We recommend that FinCEN follow the SEC's approach and allow others to rely on published no action letters as it would further foster innovative compliance efforts and broader changes across the industry.

IV. A No Action Letter Process Would Provide The Protections Necessary for Institutions to Adopt Innovative Approaches to AML/CFT Compliance

We believe that a no action letter process that provides supervisory and enforcement-related assurances from other relevant regulators, has the potential to significantly spur novel compliance approaches and technological developments. Below we list examples where such a process could be leveraged to address current[17] or future industry issues:

- Automating currency transaction reports and certain suspicious activity reports[18] (e.g., structuring, low dollar fraud, etc.);
- Providing regulatory clarity related to a risk-based approach for filing continuing activity reports;
- Allowing institutions to collect the last four digits of a customer's social security number for purposes of the Customer Identification Program Rule, and obtain the remaining five digits from a third party;
- Providing regulatory assurances that AML requirements are met in other new technology proposals (e.g., emerging questions about what information financial institutions need to receive to meet Know Your Customer requirements, and when, from a second customer in the chain, depending on the nature of the products and services offered and relationships);

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16 Securities and Exchange Commission, "No Action Letter," (accessed Aug. 3, 2022); *available at* https://www.investor.gov/introduction-investing/investing-basics/glossary/no-action-letters.

17 *See* BPI letter to FinCEN where many of these ideas are discussed in greater depth, "Request for Information and Comment Regarding Review of Bank Secrecy Act Regulations and Guidance (Docket No. FINCEN-2021-0008)," (Feb. 14, 2022); *available at* https://bpi.com/wp-content/uploads/2022/02/BPI-Comments-on-FinCEN-Review-of-Bank-Secrecy-Act-Regulations-and-Guidance.pdf.

18 For suspicious activity that can be reported clearly through the submission of transaction data, such as for reporting "structuring," allowing institutions to provide raw transaction data (e.g., deposit amounts) in lieu of filing a completed suspicious activity report with a narrative on the structuring activity.

- Permitting novel uses of machine learning and artificial intelligence in compliance programs; and
- Facilitating transaction corridors to high-risk jurisdictions.

While the above is a non-exhaustive list, we thought it would be useful to FinCEN as it considers the contours of a no action letter program and how best to direct the industry as it seeks to pursue innovative AML/CFT compliance processes and technologies.

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The Associations appreciate FinCEN's consideration of its comments on this proposal. If you have any questions, please contact the undersigned at *Angelena.Bradfield@bpi.com* and *Jthessin@aba.com*.

Respectfully submitted,

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