AML Regulatory and Enforcement Framework

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Impact Assessment

- Although the U.S. AML framework may well be redesigned following this ANPR, the vagueness of the proposal and scope of questioning suggests wide latitude for subsequent standards.
- These could prove largely rhetorical in terms of new statements reducing burden for small entities or sweeping in terms of regulatory relief, sector-specific regimes, or even structural change. However, recent revelations could also lead to tougher FinCEN rules to achieve a new vision of effectiveness and useful filings.
- FinCEN does not make clear how new delivery channels, digital currency, and/or faster payments could or should be reflected in its new framework. Again, action could give covered companies more discretion or conversely result in a more prescriptive and punitive construct.
- The overall role of automation for both filers and law-enforcement agencies is only indirectly addressed despite widespread agreement on the need to increase reliance on certain regtech and/or information-sharing technologies.

Overview

FinCEN is beginning a process that, while apparently not revising or eliminating any existing anti-money laundering (AML) requirements, would add an over-arching principle that AML programs be efficient, "reasonably-designed," and capable of providing high-quality information to law enforcement and other government entities. Given its generality, this principle could well be said to have guided FinCEN and

other agencies since the inception of the U.S. AML regime, but FinCEN appears to mean it now to encompass greater tailoring, deference to internal considerations, and targeted filings. By FinCEN's own discussion, the new approach is designed to harmonize AML rules and make them less burdensome to small, less-complex, and well-regulated entities. It might also redesign the SAR and CTR filing processes to make them better focused on quality, not quantity. However, depending on how it is implemented, it could also add new edicts that, even if tailored to limit application to small filers, could provide additional grounds for enforcement actions even if a firm believes it complies with specific requirements. Because FinCEN is also seeking views on the need for sector-specific standards, changes might make AML rules better targeted and less burdensome or still more divergent. Divergences in AML standards and/or enforcement protocols could also create gaps in which additional illicit or terrorist financing flourishes and places yet more burden for banks subject not only to FinCEN, but also banking-agency regulation and supervision. The extent to which any new regime encourages artificial intelligence (AI) or other "regtech" ventures is unclear – if FinCEN gives companies greater freedom as long as a program is efficient and well-designed, regtech might expand; however, providing only verbiage in rules on these new criteria without substantive change likely would not do so due to remaining legal and reputational risk. The nature of any new FinCEN framework might also clarify the application of an array of AML rules to new financial and currency products and providers, but no guidance is provided on how this might occur.

Impact

This ANPR reflects a long process, partly forced upon FinCEN by Congress, of consultations on ways to make the U.S. standards against money laundering, terrorist financing, and other illicit finance (called AML in this analysis) better adapted to new developments such as digital currency and regtech, new financial-sector entrants, and evolving criminal practice. It reflects several recent FinCEN and/or banking-agency actions designed both to fill gaps (e.g., for private banks) and better target enforcement to patterns and practices, not isolated compliance lapses. However, it also comes at a time of heightened AML concern due to the near-simultaneous release of thousands of leaked SARs that led commentators and some policy-makers to assert that FinCEN rules are too lax and banks remain too docile with regard to problematic, but profitable, customers. As discussed below, geopolitical, electoral, and enforcement developments are likely to have the greatest bearing on how FinCEN builds on the general statements in this ANPR to craft a new AML framework for the United States.

Much in the ANPR cites recommendations from a late-2019 working group, but is considerably less specific than the recommendations made to FinCEN at that time. Rather than expressly focusing on the new developments highlighted in that work, FinCEN has released only high-level principles it believes could reduce AML burden and enhance effectiveness. FinCEN also does not expect changes following this process to alter record-keeping or reporting requirements, although other recommendations may be addressed at a future date.

FinCEN does note that the "vast majority" of financial institutions have effective AML programs. As a result, a key consideration on which comment is sought is the extent to which FinCEN priorities might reallocate resources from other AML-related programs and affect a financial institution's own risk assessments due to its size and business model. FinCEN believes its approach would enhance the quality of AML

filings and improve law-enforcement relations, but disruptions across the system and/or at individual financial institutions are possible. Much comment will likely be devoted to personnel and systems optimization, but the extent to which this is realized will again depend on what FinCEN decides. For example, a new framework might provide considerable optimization for smaller, regulated, domestic-focused entities and at the same time demand more of the largest firms.

One of the few recommendations made by the 2019 working group specifically addressed in this ANPR is setting biennial priorities by which AML compliance would in part be judged. However, as the ANPR notes, there are numerous official prioritization statements (e.g., from Treasury, intelligence agencies, bank regulators). Although the working group outlined ways to make agency priorities both more public and uniform, the ANPR appears to suggest that only FinCEN would undertake a formal prioritization process. If this were the case, then covered entities could remain subject to overlapping or even contradictory priorities that might hinder efficiency and effectiveness from the perspective of other agencies, if not also FinCEN.

As noted, this ANPR does not address another working-group recommendation: advancement of automation for high-frequency, low-complexity reporting requirements for continuing customers. The working group also targeted innovations to address emerging AML risk via third-party vendors and AML requirements in connection with new financial offerings. Extensive comment will surely be made on these issues, possibly leading to greater specifics in FinCEN's subsequent actions. Comments on this ANPR will also influence considerations at the banking agencies, SEC, CFTC, and state insurance commissions.

What's Next

This ANPR was published in the *Federal Register* on September 17; comments are due by November 16. As with much else now under way in U.S. regulation, action on this ANPR will be directly affected by the November election's outcome even though detailed AML requirements are relatively apolitical. Events such as recent press reports about SAR filings focus policy-maker and political attention on the general framework and most particularly on the role of large banks and, from time to time, other entities caught up in issues such as questioning about President Trump's personal finances. Democrats not only view SAR filings as both critical and problematic in cases such as this, but also have lambasted enforcement proceedings they think unduly generous to AML violations. Legislation on several issues within the scope of this ANPR could thus take significantly different directions based on which Treasury Secretary takes office with authority over FinCEN in 2021 and the overarching situation involving international trade, finance, and geopolitical relations.

Analysis

The framework discussed below would apply to all entities subject to FinCEN's AML regulation.

A. AML Effectiveness and Design

Working to coordinate its policies with those of other agencies, FinCEN seeks to define how AML programs will be judged for "reasonable design" and "effectiveness."

An effective and reasonably-designed AML program could be one that:

- identifies, assesses, and reasonably mitigates illicit financial-activity risk consistent with the institution's risks and those identified as priorities by relevant agencies even in the absence of express internal-control requirements. FinCEN is considering whether an express regulatory revision reflecting these provisions is necessary. AML priorities would be set at least biennially by a process described in the ANPR on which comment is solicited; and
- ensures and monitors record-keeping requirements and provides information with a high degree of usefulness. Any rules implementing this expectation would, FinCEN says, better recognize collaborative efforts and an institution's risk profile.

B. Request for Comment

In addition to the issues noted above, comment is sought on:

- the clarity of FinCEN's concepts;
- the core elements of an effective AML program;
- possible regulatory actions, including the need for an express requirement stipulating that AML programs should be effective and reasonably designed. Views on the need for carve-outs, waivers, or other caveats to any such requirement are also sought;
- the benefits of sector-specific standards and/or modifications in existing sector-specific rules;
- whether risk profiles vary by industry sector;
- if small, less-complex firms already have efficient, reasonably-designed systems;
- the benefits of an opt-in approach;
- whether more objective requirements and/or testing are possible within the general framework proposed above;
- how future rules might best ensure independent testing;
- regulatory burden and the best way to reduce it;
- appropriate transition periods if new rules are promulgated; and
- the need for additional changes to AML regulation and/or programmatic change. Questions here address personnel reallocation, transitional arrangements, tailoring requirements, and the need for more specific risk-mitigation requirements.