

The Banking Law Journal

Established 1889

An A.S. Pratt™ PUBLICATION

OCTOBER 2021

EDITOR'S NOTE: CRYPTOCURRENCY

Steven A. Meyerowitz

CRYPTOCURRENCY AND OTHER NEW FORMS OF FINANCIAL TECHNOLOGY: POTENTIAL TERRORIST FINANCING CONCERNS AND LIABILITY

Chase D. Kaniecki, Samuel H. Chang, Michael G. Sanders, and Rathna J. Ramamurthi

WHAT TO EXPECT FROM NEW SEC CHAIR GARY GENSLER ON CRYPTOCURRENCY

Carol W. Sherman

FINCEN ANNOUNCES NATIONAL AML/CFT POLICY PRIORITIES AND ALSO PROPOSES RULEMAKING TO ESTABLISH "NO-ACTION LETTER" PROCESS

Eddie A. Jauregui, Andres Fernandez, Brian N. Hayes, and Jennifer Correa Riera

PAYMENT CARD ISSUERS FACE MIXED RESULTS SEEKING LOSS RECOVERY ON MERCHANT DATA BREACHES

Jennifer Hall

CONSUMER FINANCIAL PROTECTION BUREAU UPDATES GUIDANCE REGARDING "UNAUTHORIZED TRANSFERS" UNDER THE ELECTRONIC FUND TRANSFER ACT

Arthur E. Anthony and Cameasha Turner

FEDNOW SERVICE PILOT PROGRAM GAINING TRACTION AND SUPPORT

J.C. Boggs, Matthew B. Hanson, George M. Williams jr, Justin M. King, and Andrea Demick

BIDEN COMPETITION ORDER MAY INFLUENCE BANK MERGER APPROVALS

Clifford S. Stanford, Sanford M. Brown, Adam J. Biegel, Jordan A. Jensen, and Elizabeth A. Dunn

FORD V. MONTANA: THE U.S. SUPREME COURT'S LATEST FORAY INTO PERSONAL JURISDICTION AND WHAT IT MIGHT MEAN FOR BANKS

Mark G. Hanchet, Christopher J. Houpt, Robert W. Hamburg, and Anjanique M. Watt

THE FEDERAL RESERVE'S PROPOSED GUIDELINES ON REQUESTS FOR ACCOUNTS AND PAYMENT SERVICES AT FEDERAL RESERVE BANKS: EIGHT THINGS TO KNOW

Jeremy Newell, Michael Nonaka, Karen Solomon, Jenny Scott Konko, and Andrew Ruben

ESG LEGISLATION TARGETS CLIMATE RISK DISCLOSURE

Wayne J. D'Angelo, John M. Foote, Jennifer E. McCadney, Courtney L. Kleshinski, and Maggie C. Crosswy



LexisNexis

THE BANKING LAW JOURNAL

VOLUME 138

NUMBER 9

October 2021

Editor’s Note: Cryptocurrency Steven A. Meyerowitz	491
Cryptocurrency and Other New Forms of Financial Technology: Potential Terrorist Financing Concerns and Liability Chase D. Kaniecki, Samuel H. Chang, Michael G. Sanders, and Rathna J. Ramamurthi	494
What to Expect From New SEC Chair Gary Gensler on Cryptocurrency Carol W. Sherman	502
FinCEN Announces National AML/CFT Policy Priorities and Also Proposes Rulemaking to Establish “No-Action Letter” Process Eddie A. Jauregui, Andres Fernandez, Brian N. Hayes, and Jennifer Correa Riera	505
Payment Card Issuers Face Mixed Results Seeking Loss Recovery on Merchant Data Breaches Jennifer Hall	514
Consumer Financial Protection Bureau Updates Guidance Regarding “Unauthorized Transfers” Under the Electronic Fund Transfer Act Arthur E. Anthony and Cameasha Turner	522
FedNow Service Pilot Program Gaining Traction and Support J.C. Boggs, Matthew B. Hanson, George M. Williams jr, Justin M. King, and Andrea Demick	526
Biden Competition Order May Influence Bank Merger Approvals Clifford S. Stanford, Sanford M. Brown, Adam J. Biegel, Jordan A. Jensen, and Elizabeth A. Dunn	534
<i>Ford v. Montana</i>: The U.S. Supreme Court’s Latest Foray into Personal Jurisdiction and What It Might Mean for Banks Mark G. Hanchet, Christopher J. Houpt, Robert W. Hamburg, and Anjanique M. Watt	539
The Federal Reserve’s Proposed Guidelines on Requests for Accounts and Payment Services at Federal Reserve Banks: Eight Things to Know Jeremy Newell, Michael Nonaka, Karen Solomon, Jenny Scott Konko, and Andrew Ruben	543
ESG Legislation Targets Climate Risk Disclosure Wayne J. D’Angelo, John M. Foote, Jennifer E. McCadney, Courtney L. Kleshinski, and Maggie C. Crosswy	547

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Matthew T. Burke at (800) 252-9257
Email: matthew.t.burke@lexisnexis.com
Outside the United States and Canada, please call (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844
Outside the United States and Canada, please call (518) 487-3385
Fax Number (800) 828-8341
Customer Service Website <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call
Your account manager or (800) 223-1940
Outside the United States and Canada, please call (937) 247-0293

ISBN: 978-0-7698-7878-2 (print)

ISSN: 0005-5506 (Print)

Cite this publication as:

The Banking Law Journal (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2021 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW  BENDER

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

BARKLEY CLARK

Partner, Stinson Leonard Street LLP

CARLETON GOSS

Counsel, Hunton Andrews Kurth LLP

MICHAEL J. HELLER

Partner, Rivkin Radler LLP

SATISH M. KINI

Partner, Debevoise & Plimpton LLP

DOUGLAS LANDY

White & Case LLP

PAUL L. LEE

Of Counsel, Debevoise & Plimpton LLP

TIMOTHY D. NAEGELE

Partner, Timothy D. Naegele & Associates

STEPHEN J. NEWMAN

Partner, Stroock & Stroock & Lavan LLP

THE BANKING LAW JOURNAL (ISBN 978-0-76987-878-2) (USPS 003-160) is published ten times a year by Matthew Bender & Company, Inc. Periodicals Postage Paid at Washington, D.C., and at additional mailing offices. Copyright 2021 Reed Elsevier Properties SA., used under license by Matthew Bender & Company, Inc. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 1275 Broadway, Albany, NY 12204 or e-mail Customer.Support@lexisnexis.com. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541. Material for publication is welcomed—articles, decisions, or other items of interest to bankers, officers of financial institutions, and their attorneys. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL, LexisNexis Matthew Bender, 230 Park Ave, 7th Floor, New York, NY 10169.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL, A.S. Pratt & Sons, 805 Fifteenth Street, NW, Third Floor, Washington, DC 20005-2207.

FinCEN Announces National AML/CFT Policy Priorities and Also Proposes Rulemaking to Establish “No-Action Letter” Process

*Eddie A. Jauregui, Andres Fernandez, Brian N. Hayes,
and Jennifer Correa Riera**

The Financial Crimes Enforcement Network (“FinCEN”) has issued national priorities for anti-money laundering and countering the financing of terrorism policy (the “Priorities”), as required by the Anti-Money Laundering Act of 2020. FinCEN, in coordination with relevant federal and state regulators, also issued two statements—one to banks and the other to covered non-bank financial institutions—providing further guidance on the current application of the Priorities. This article reviews the Priorities and FinCEN’s key statements about them, as well as a report concluding that FinCEN should engage in rulemaking to establish a “no-action letter” process.

The Financial Crimes Enforcement Network (“FinCEN”) on June 30, 2021, issued national priorities for anti-money laundering (“AML”) and countering the financing of terrorism (“CFT”) policy (the “Priorities”),¹ as required by the Anti-Money Laundering Act of 2020 (“AMLA 2020”). According to FinCEN, the establishment of these priorities is intended to assist covered institutions in meeting their AML/CFT obligations under relevant laws and regulations. FinCEN will issue regulations specifying how covered institutions should incorporate these Priorities into their AML programs at a later date.

On the same day, FinCEN, in coordination with relevant federal and state regulators, issued two statements—one to banks² and the other to covered non-bank financial institutions³ (“covered NBFIs”)—providing further guid-

* Eddie A. Jauregui is a partner in Holland & Knight’s Los Angeles office and a member of the firm’s White Collar Defense and Investigations Team. Andres Fernandez is a partner in the firm’s Miami office, co-leader of the firm’s Financial Services Regulatory Team, and leader of the firm’s Cuba Action Team. Brian N. Hayes is a partner in the firm’s Chicago office and the leader of its Midwest White Collar Defense and Investigations Practice. Jennifer Correa Riera is an associate in the firm’s Miami office and a member of its Financial Services Team. The authors may be contacted at eddie.jauregui@hklaw.com, andres.fernandez@hklaw.com, brian.hayes@hklaw.com, and jennifer.correaria@hklaw.com, respectively.

¹ [https://www.fincen.gov/sites/default/files/shared/AML_CFT%20Priorities%20\(June%2030%2C%202021\).pdf](https://www.fincen.gov/sites/default/files/shared/AML_CFT%20Priorities%20(June%2030%2C%202021).pdf).

² As defined in 31 C.F.R. § 1010.100(d) and including each agent, agency, branch or office within the U.S. of banks, credit unions, savings associations and foreign banks. See [https://www.fincen.gov/sites/default/files/shared/Statement%20for%20Banks%20\(June%2030%2C%202021\).pdf](https://www.fincen.gov/sites/default/files/shared/Statement%20for%20Banks%20(June%2030%2C%202021).pdf).

³ See 31 CFR §§ 1020.210(b) (banks without a federal functional regulator); 1021.210

ance on the current application of the Priorities, as regulations relating to the Priorities are not likely to be issued for many months.

The statements emphasized that banks and covered NBFIs (collectively, covered institutions) are not required to make immediate changes to their risk-based AML programs in response to the Priorities, but should begin evaluating how to incorporate the Priorities into their respective AML compliance programs.

Separately, on June 28, 2021, FinCEN submitted a report to Congress pursuant to AMLA 2020 concluding that the agency should engage in rulemaking to establish a “no-action letter” process to supplement existing forms of regulatory guidance and relief that may be requested from FinCEN by covered institutions.

ESTABLISHMENT OF NATIONAL ANTI-MONEY LAUNDERING AND COUNTERING THE FINANCING OF TERRORISM POLICY PRIORITIES

On June 30, 2021, FinCEN, in consultation with other U.S. Department of the Treasury offices, federal and state regulators, and law enforcement and national security agencies, issued the Priorities, as required by AMLA 2020.⁴ The Priorities, presented by FinCEN “in no particular order,” are as follows:

- Corruption;
- Cybercrime, including relevant cybersecurity and virtual currency considerations;
- Foreign and domestic terrorist financing;
- Fraud;
- Transnational criminal organization activity;
- Drug trafficking organization activity;

(casinos and card clubs); 1022.210 (money services businesses); 1023.210 (brokers or dealers in securities); 1024.210 (mutual funds); 1025.210 (insurance companies); 1026.210 (futures commission merchants and introducing brokers in commodities); 1027.210 (dealers in precious metals, precious stones or jewels); 1028.210 (operators of credit card systems); 1029.210 (loan or finance companies); and 1030.210 (housing government sponsored enterprises). See [https://www.fincen.gov/sites/default/files/shared/Statement%20for%20Non-Bank%20Financial%20Institutions%20\(June%2030%2C%202021\).pdf](https://www.fincen.gov/sites/default/files/shared/Statement%20for%20Non-Bank%20Financial%20Institutions%20(June%2030%2C%202021).pdf).

⁴ AMLA required the Secretary of the Treasury, in consultation with the Attorney General and other federal regulators and national security agencies, to establish and make public “priorities for anti-money laundering and countering the financing of terrorism policy.” See 31 U.S.C. § 5318(h)(4)(A) (as amended by AMLA § 6101(b)(2)(C)).

- Human trafficking and human smuggling; and
- Proliferation financing.

According to FinCEN, the Priorities “reflect longstanding and continuing AML/CFT concerns previously identified by FinCEN” and other government agencies, and are “intended to assist all covered institutions” in meeting their AML/CFT obligations.⁵

This article reviews the priorities and FinCEN’s key statements about them, in brief, below. Although regulations likely will not issue for several months (potentially as late as the end of the year),⁶ covered institutions should begin reviewing their AML programs, as well as their institutions’ products, practices, policies, and controls, to assess how they align and/or intersect with the newly issued Priorities.

CORRUPTION

Consistent with the Biden Administration’s emphasis on anti-corruption, FinCEN has identified fighting corruption (and the money laundering risks associated with it) as a “core” national security interest because corruption undermines democracy, human rights and the global financial system.⁷ The Priorities recognize that banks play an important role in this effort because corrupt actors “and their financial facilitators” may exploit vulnerabilities in the U.S. financial system to launder assets and obscure the proceeds of crime.⁸ The Priorities direct covered financial institutions to consult prior FinCEN advisories on human rights for help in identifying “typologies and red flags” associated with corruption or corrupt figures.⁹

⁵ Priorities at 1.

⁶ AMLA provides that FinCEN shall promulgate regulations to carry out the national priorities no later than 180 days after the establishment of those priorities. 31 U.S.C. § 5318(h)(4)(D) (as amended by AMLA § 6101(b)(2)(C)).

⁷ Priorities at 3.

⁸ *Id.*

⁹ *Id.* See FinCEN, FIN-2018-A005, Advisory to Financial Institutions on the Risk of Proceeds of Corruption from Nicaragua (Oct. 4, 2018), *available at* https://www.fincen.gov/sites/default/files/advisory/2018-10-04/Nicaragua_Advisory_FINAL_508_0.pdf. See also FinCEN, FIN-2017-A004, Advisory on Political Corruption Risks in South Sudan (Sept. 6, 2017), *available at* https://www.fincen.gov/sites/default/files/advisory/2017-09-06/South%20Sudan%20Advisory_09-06-2017_0.pdf, and FinCEN, FIN-2017-A006, Advisory on Widespread Public Corruption in Venezuela (Sept. 20, 2017), *available at* <https://www.fincen.gov/sites/default/files/advisory/2017-09-20/FinCEN%20Advisory%20FIN-2017-A006-508%20Compliant.pdf>.

CYBERCRIME, INCLUDING RELEVANT CYBERSECURITY AND VIRTUAL CURRENCY CONSIDERATIONS

The Priorities recognize cybercrime as a “significant illicit finance threat,” noting that the size, reach, speed and accessibility of the U.S. system make covered institutions “attractive targets to criminals, including terrorists and state actors.”¹⁰ According to FinCEN, the Treasury Department is particularly concerned about cyber-enabled financial crime (e.g., phishing campaigns, business email compromise), ransomware attacks against public and private institutions and infrastructure systems, and the misuse of virtual assets that exploits and undermines those assets’ innovative potential, including through laundering of illicit proceeds.

FinCEN notes that covered institutions are “uniquely positioned to observe the suspicious activity that results from cybercrime” and encourages institutions to share such information with one another under a safe harbor provision of the Bank Secrecy Act.¹¹ The Priorities point covered institutions to a number of government advisories pertaining to cyber-enabled crime, ransom attacks and misuse of convertible virtual currencies (“CVCs”) for further guidance, including a 2020 Office of Foreign Assets Control (“OFAC”) advisory highlighting the sanctions risks associated with ransomware payments¹² and a 2019 FinCEN advisory seeking to help covered institutions identify and report suspicious activity pertaining to CVCs.¹³

TERRORIST FINANCING

Combatting terrorism and the financing of terrorism continues to be a government-wide priority. FinCEN notes that since the Sept. 11, 2001 terrorist attacks, “the threat posed by international and domestic terrorism has evolved significantly.”¹⁴

The Priorities indicate that while foreign actors such as ISIS, Al Qaeda, Hezbollah, and Iran’s Islamic Revolutionary Guard Corps remain “significant

¹⁰ Priorities at 4.

¹¹ *Id.*

¹² See OFAC, Advisory on Potential Sanctions Risks for Facilitating Ransomware Payments (Oct. 1, 2020), *available at* https://home.treasury.gov/system/files/126/ofac_ransomware_advisory_10012020_1.pdf.

¹³ See FinCEN, Advisory on Illicit Activity Involving Convertible Virtual Currency (May 9, 2019), *available at* <https://www.fincen.gov/sites/default/files/advisory/2019-05-10/FinCEN%20Advisory%20CVC%20FINAL%20508.pdf>.

¹⁴ Priorities at 6.

and persistent terrorist threats” to the United States, the “most lethal domestic violent extremist threats” are posed by racially or ethnically motivated violent extremists, “primarily those advocating for the superiority of the white race.”¹⁵

The Priorities note that because all terrorist groups require financing to recruit and support members, fund logistics, and conduct operations, “preventing such financing” is considered “essential” to countering the threat of terrorism successfully.¹⁶ For this reason, the Priorities state, “covered institutions must comply with required sanctions programs and, as part of their risk-based AML programs, be aware of terrorists or terrorist organizations that are included on sanctions lists issued by the U.S. government.”¹⁷

The Priorities remind covered institutions of their existing obligations to identify and file suspicious activity reports (“SARs”) with respect to potential terrorist financing transactions, as appropriate, and to report violations requiring immediate attention.

FRAUD

As reflected in the Priorities, fraud—such as bank, consumer, healthcare, securities and investment, and tax fraud—is believed to generate the largest share of illicit proceeds in the United States.¹⁸ FinCEN notes that fraud proceeds may be laundered a number of ways, including by transfers through accounts of offshore entities, accounts controlled by cyber actors and money mules.

The Priorities note that fraud related to the COVID-19 pandemic is of “particular concern” to FinCEN and the U.S. Department of Justice (“DOJ”), while also highlighting the threat posed by foreign intelligence entities and their proxies, who may use “front companies” and “targeted investments to gain access to sensitive U.S. individuals, information, technology, and intellectual property.”¹⁹

TRANSNATIONAL CRIMINAL ORGANIZATION ACTIVITY

FinCEN identified transnational criminal organizations (“TCOs”), such as drug trafficking organizations or international organized crime networks, as

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 7.

¹⁸ The Priorities cite to Treasury Department’s National Money Laundering Risk Assessment (Dec. 20, 2018), *available at* https://home.treasury.gov/system/files/136/2018NMLRA_12-18.pdf.

¹⁹ Priorities at 9.

“priority threats due to the crime-terror nexus” and their engagement in a wide array of illicit activities, including cybercrime, drug trafficking, human trafficking, weapons trafficking, and intellectual property theft.²⁰

The Treasury Department has noted that a number of TCOs operate in the United States and that, while Mexican and Russian TCOs are “priority threats,” Africa- and Asia-based TCOs are “becom[ing] more significant each year[.]”²¹ The Priorities note that TCOs are increasingly turning to “professional money laundering networks that receive a fee or commission for their laundering services, and often use their specialized expertise to launder proceeds generated by others, regardless of the predicate criminal activity.”²²

DRUG TRAFFICKING ORGANIZATION ACTIVITY

Citing the “significant public health emergency” caused by the sale of illicit drugs, FinCEN has identified combatting drug trafficking organization (“DTO”) activity, as well as the money laundering networks that assist DTOs, as a national priority.²³ FinCEN notes that DTOs increasingly rely on professional money laundering networks in Asia (primarily China) that facilitate the exchange of Chinese and U.S. currency or serve as brokers in trade-based money laundering schemes.

FinCEN points out that there has been a substantial increase in complex schemes to launder drug money by “facilitating the exchange of cash proceeds from Mexican DTOs to Chinese citizens residing in the United States, including the use of front companies or couriers to deposit cash derived from the sale of narcotics into the banking system.”²⁴

HUMAN TRAFFICKING AND HUMAN SMUGGLING

The Priorities note that human trafficking and human smuggling can intersect with the “formal financial system” at any point during the trafficking or smuggling process, and remind covered entities that FinCEN has collaborated with law enforcement agencies, nonprofit organizations and members of the financial industry in preparing two advisories identifying financial and behavioral red flags.

²⁰ *Id.*

²¹ *Id.* at 9–10.

²² *Id.* at 10.

²³ *Id.*

²⁴ *Id.*

As described in these advisories and other government reports, human trafficking and human smuggling networks use a variety of mechanisms to move illicit proceeds, including cash smuggling and establishing shell or front companies to hide the true nature of their business.²⁵

PROLIFERATION FINANCING

Finally, FinCEN identified weapons proliferation financing as a national priority as proliferation support networks “seek to exploit the U.S. financial system to move funds that will be used either (1) to acquire weapons of mass destruction or delivery systems or their components, or (2) in the furtherance or development of state-sponsored weapons programs, including the evasion of United Nations or U.S. sanctions.”²⁶ FinCEN noted that correspondent banking is a “principal vulnerability and driver of proliferation financing risk within the United States due to its central role in processing U.S. dollar transactions. . . .”²⁷

The agency further noted that covered institutions remain vulnerable to malign actors seeking to generate revenues and transfer funds in support of illicit conduct through gatekeepers, front or shell companies, exchange houses or the illicit exploitation of international trade. The Priorities encourage covered institutions to consult FinCEN and Treasury Department advisories, as well as remind covered institutions of their obligation to comply with sanctions programs and to be aware of economic and trade sanctions issued by the federal government.

FINCEN’S STATEMENTS ON THE APPLICATION AND EFFECT OF THE NATIONAL PRIORITIES

Concurrent with the issuance of the Priorities, FinCEN, in coordination with the federal banking agencies (“FBAs”)²⁸ and state bank and credit union

²⁵ See, e.g., FinCEN, FIN-2014-A008, Guidance on Recognizing Activity that May be Associated with Human Smuggling and Human Trafficking—Financial Red Flags (Sept. 11, 2014), *available at* <https://www.fincen.gov/sites/default/files/advisory/FIN-2014-A008.pdf>, and FinCEN, Supplemental Advisory on Identifying and Reporting Human Trafficking and Related Activity (Oct. 15, 2020), *available at* <https://www.fincen.gov/news/news-releases/supplemental-advisory-identifying-and-reporting-human-trafficking-and-related>.

²⁶ Priorities at 11–12.

²⁷ *Id.* at 12.

²⁸ The FBAs are the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Office of the Comptroller of the Currency.

regulators, issued a statement intended to clarify the immediate effect of the Priorities, given that regulations relating to the Priorities have not been issued and are not required to be issued until late December 2021.²⁹ A separate statement was issued to covered NBFIs.³⁰

The two statements confirmed that covered institutions do not have to incorporate the Priorities into their risk-based AML compliance programs until the effective date of the regulations. The statements further confirmed that regulators will not examine a bank's integration of the Priorities into its respective compliance programs until the effective date of the regulations. Nevertheless, the statements encouraged covered institutions to evaluate how to integrate the Priorities into their compliance programs in anticipation of the regulations.

Covered institutions should heed this advice. Although the Priorities are broadly framed and do not offer detailed guidance at this stage, they refer to numerous government advisories and memoranda, which reflect in greater detail the federal government's concerns. In addition to reviewing their transaction monitoring protocols, internal controls and risk exposure presented by current customers and geographic regions served, covered institutions should be familiar with these advisories and memoranda when beginning to assess where changes may need to be made upon promulgation of regulations implementing the Priorities.

Moreover, financial institutions should consider not only where policies and procedures may need to be modified or adopted but also how best to incorporate appropriate clauses in customer-facing agreements and certifications to address the Priorities.

NO-ACTION LETTER PROCESS

Finally, just two days before the issuance of the Priorities, FinCEN submitted a report to Congress, pursuant to AMLA 2020, detailing the result of an assessment considering whether to establish a process for the issuance of "no-action letters" in response to inquiries from persons concerning the application of the Bank Secrecy Act, the Patriot Act, or any other AML or CFT law or regulation to specific conduct.³¹

²⁹ *Supra*, n.6.

³⁰ Both statements may be found on FinCEN's website, <https://www.fincen.gov/news/news-releases/fincen-issues-first-national-amlcft-priorities-and-accompanying-statements>.

³¹ FinCEN, A Report to Congress: Assessment of No-Action Letters in Accordance with Section 6305 of the Anti-Money Laundering Act of 2020, *available at* <https://www.fincen.gov/>

As discussed in the report, FinCEN concluded that the establishment of a no-action letter process would be a useful complement to its current forms of regulatory guidance and relief.³² The agency stated that a no-action letter process that is limited to FinCEN's exercise of its own enforcement authority, as opposed to also addressing other regulators' exercise of their distinct enforcement authority, would likely be most effective.³³

FinCEN stated, however, that it anticipates incorporating into the no-action letter process an opportunity for consultation with other relevant regulators, departments, and agencies as appropriate, as doing so would lead to a more effective no-action letter process.³⁴

FinCEN noted that it anticipates beginning a rulemaking process consistent with Section 6305 of the AMLA for purposes of codifying the no-action letter process and procedures, but it did not provide a specific time frame for when the rulemaking process would commence. The timing, the agency said, is "subject to resource limitations and competing priorities."³⁵

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

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*