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FinCEN issues new compliance guidance in light of COVID-19

By Christopher Hotaling, Larry Fruchtman, and Rob Fisher

Last week, the Treasury Department's Financial Crimes Enforcement Network (FinCEN) issued guidance that provides much-needed relief to financial institutions that are struggling to file their reports required under the Bank Secrecy Act (BSA). Here is what you need to know about what FinCEN said and how it will impact the financial services sector's BSA reporting requirements moving forward during the COVID-19 crisis.

FinCEN's response to COVID-19

Following President Trump's March 13, 2020, declaration of a national emergency in connection with the COVID-19 pandemic, FinCEN issued two notices that address both reasonable steps financial institutions should take to comply with their obligations under the BSA, as well as guidance for those institutions issuing loans under the Paycheck Protection Program (PPP) created by the CARES Act. In addition, as of April 6, 2020, the Small Business Administration (SBA), in consultation with the Treasury Department, has issued a series of Frequently Asked Questions (FAQs), including one (FAQ #18) that bears directly on lenders' BSA reporting obligations. While FinCEN's goal continues to be combating money laundering and related crimes, including terrorism and its financing, one of the main takeaways from these new policy notices is that FinCEN will be understanding if institutions cannot satisfy their BSA reporting obligations as quickly as they might normally in light of the challenges posed by the outbreak.

FinCEN's March 16, 2020 Notice

Shortly after the national emergency declaration, on March 16, 2020, FinCEN issued the first COVID-19 Notice to its regulatory constituency. Notable for its brevity, this first alert simply asked financial institutions to contact FinCEN as soon as practicable if they determined they were not going to be able to timely file their required BSA reports, including suspicious activity reports (SARs) and currency transaction reports (CTRs). The Notice further asked financial institutions to be on heightened alert for particular types of fraud that commonly arise following natural disasters or national emergencies, such as imposter scams (when bad actors attempt to solicit donations or collect personal information by impersonating government agencies), investment scams (such as promotions that falsely claims that particular services or products of publicly traded companies can prevent, cure, or detect the coronavirus), product scams (where companies advertise or sell unapproved or misbranded products that make false health claims regarding the coronavirus), and COVID-19-related insider trading.

FinCEN's April 3, 2020 Notice

FinCEN's more recent April 3, 2020 Notice has done much to fill in the gaps left open by its March 16 Notice, while also providing further guidance to assist in the implementation of the PPP enacted as part of the CARES Act.

BSA compliance

FinCEN continues to require all financial institutions to follow a "risk-based" approach to BSA compliance and to diligently comply with their BSA obligations. This means that banks and credit unions must still vigorously monitor all of their financial transactions in an effort to detect the illicit movement of money through their institutions and properly report any suspicious financial activity. Nevertheless, understanding that financial institutions are made up of human beings whose families have been significantly impacted by this crisis, FinCEN now recognizes that the pandemic has "created challenges in meeting certain BSA obligations, including the timing requirements of certain BSA report filings." While the Notice does not defer the submission of required BSA reports nor does it provide a specific grace period during which the filing of required reports is excused, it does, for the first time, create a specific online contact mechanism, through the "Need Assistance" tab on its website www.FinCEN.gov, whereby affected financial institutions can notify FinCEN about any delays they may be experiencing in completing required BSA reports. Though these COVID-19-related communications are not required, we strongly encourage all financial services clients who are facing delays in submitting their BSA reports to notify FinCEN about the issue, identify what steps are being taken to address the delay, and indicate how long it will take for the reporting delay to be remedied.

PPP guidance

One of the key components of the recently enacted CARES Act is the PPP, which is a loan designed to provide a direct incentive for small businesses to keep their workers on the payroll. As part of its April 3, 2020 Notice, FinCEN has determined that, for eligible federally insured banks and credit unions, PPP loans for "existing customers will not require re-verification under applicable BSA requirements," unless the banks and credit unions' already established risk-based compliance protocols require such a verification to take place. This guidance is a welcome approach to facilitating getting these funds into the hands of small businesses that so desperately need them. In addition, the SBA's FAQ # 18 further provides that banks and credit unions that have not yet collected beneficial ownership information on existing customers do not need to collect and verify such information with respect to PPP loans for such customers unless otherwise indicated by its assessment of the BSA risk of that borrower. Because the PPP loans are made on a first-come, first-served basis, FinCEN's approach to BSA compliance in this area, while facilitating the origination of PPP loans by banks and credit unions for certain borrowers, has contributed to skewing the program to existing bank customers. It has also made it difficult for nonbank originators to participate in the program.

Suspension of certain CTR reporting requirements

In a slight twist of fate, on February 6, 2020, FinCEN issued a ruling which amended CTR filing obligations for reportable transactions involving sole proprietorships and entities operating under a "doing business as" (d/b/a) name. In its April 3, 2020 Notice, FinCEN temporarily suspended the implementation of its February CTR ruling until further notice. When the coronavirus crisis abates, FinCEN will issue a ruling with amended timelines for the implementation of the new sole proprietorship–d/b/a filing obligations. In the meantime, if a financial institution has not yet had the opportunity to modify its CTR filing protocols to comply with the February 6, 2020 ruling, it is permitted to continue to file appropriate reports under the old system. If, on the other hand, a financial institution has already changed its filing protocols to meet the February 6 ruling, it does not have to revert to prior practice, and it is encouraged to continue filing CTRs under the new regime.

Conclusion

Everyone has been tremendously impacted by the COVID-19 pandemic, including the agencies of the federal government and the law enforcement entities that work with them. Thankfully, FinCEN has recognized that the financial institutions which report to it are suffering as well. As such, the April 3, 2020 Notice includes appropriate common-sense modifications to the BSA reporting system. If a financial institution needs additional time to file its required BSA reports, such as SARs or CTRs, our advice is simple; just ask for it, and you are very likely to receive it. As long as your risk-based BSA compliance protocols are in place and working, FinCEN is not interested in playing "gotcha" if the coronavirus crisis has delayed the submission of various reports. If you have questions, feel free to contact us. We can guide you through it.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

— Christopher Hotaling at **chotaling@nixonpeabody.com** or 312-977-4418
— Larry Fruchtman at **lfruchtman@nixonpeabody.com** or 212-940-3015
— Rob Fisher at **rfisher@nixonpeabody.com** or 617-345-1335