

**MEMORANDUM TO:** Board of Directors  
**FROM:** Ryan Billingsley  
Director, Division of Risk Management Supervision  
**SUBJECT:** Revised Anti-Money Laundering/Countering the Financing of  
Terrorism Program Rule (12 C.F.R. Part 326)

## **SUMMARY**

The attached proposed rule would revise and republish the Federal Deposit Insurance Corporation's (FDIC's) previously titled Bank Secrecy Act (BSA) compliance program rule at 12 C.F.R. Part 326 with a new Anti-Money Laundering/Countering the Financing of Terrorism (AML/CFT) program rule to align with the bank AML/CFT program rule concurrently proposed by the Financial Crimes Enforcement Network (FinCEN). FinCEN is revising and replacing its BSA/anti-money laundering (AML) program rules with new AML/CFT program rules to incorporate updates consistent with the Anti-Money Laundering Act of 2020 (AML Act or the Act), including the AML/CFT priorities issued pursuant to 31 U.S.C. 5318(h)(4). The proposed rule and attached preamble would be issued jointly by the FDIC, the Office of the Comptroller of the Currency (OCC), and the National Credit Union Administration (NCUA) (each an Agency, and collectively, the Agencies).

The proposal aims to ensure that banks establish and maintain effective AML/CFT programs that better achieve the purposes of the BSA and lead to more effective outcomes for financial institutions as well as law enforcement and national security agencies.

## **RECOMMENDATION**

Staff recommends that the FDIC's Board of Directors (Board) authorize publication of the attached Notice of Proposed Rulemaking (Notice or proposed rule) in the *Federal Register* with a public comment period of 60 days.

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Concur:  
Matthew P. Reed  
General Counsel

## BACKGROUND

Enacted in 1970 and amended several times since, the Bank Secrecy Act (BSA)<sup>1</sup>, along with Sections 8(s) of the Federal Deposit Insurance Act<sup>2</sup> and 206(q) of the Federal Credit Union Act,<sup>3</sup> comprise the statutory framework for the Agencies’ and the Board of Governors of the Federal Reserve System (Federal Reserve Board) to AML/CFT regulatory requirements. The BSA is designed to combat money laundering, the financing of terrorism, and other illicit financial activity risks (ML/TF). Congress has authorized the Secretary of the Treasury (Secretary) to administer the BSA. The Secretary has in turn delegated its authority to the Director of FinCEN (FinCEN Director).<sup>4</sup> Sections 8(s) of the Federal Deposit Insurance Act<sup>5</sup> and 206(q) of the Federal Credit Union Act<sup>6</sup> also require the Agencies and the Federal Reserve Board to issue regulations to “establish and maintain procedures reasonably designed to assure and monitor the compliance” of their supervised institutions with the requirements of the BSA.

On January 1, 2021, Congress enacted the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, of which the AML Act was a component. The AML Act made several changes to the BSA and required FinCEN to update its program rules to implement the requirements of the Act.<sup>7</sup>

## PROPOSED RULE

The proposed rule would amend the Agencies’ regulations that prescribe AML/CFT program requirements for banks to align with the rule concurrently proposed by FinCEN. This will allow banks’ AML/CFT program requirements to remain consistent with those imposed by FinCEN and ensure consistent standards between FinCEN and the Agencies.

- The proposed rule would define several terms used throughout the section.
  - The term “AML/CFT enforcement action” would mean any formal or informal action taken by one of the Agencies that seeks to penalize, remedy, prevent, or respond to noncompliance with, past or ongoing violations of, or past or ongoing deficiencies relating to, an AML/CFT requirement. The term includes a cease-and-desist order, written agreement, consent order, or memorandum of understanding; or the assessment of a civil money penalty.

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<sup>1</sup> FinCEN’s proposed rule would define the BSA to mean 12 U.S.C. 1829b, 12 U.S.C. 1951-1960, and 31 U.S.C. 5311-5314 and 5316-5336, including notes thereto.

<sup>2</sup> 12 U.S.C. § 1818(s).

<sup>3</sup> 12 U.S.C. § 1786(q).

<sup>4</sup> Treasury Order 180–01 (Jan. 14, 2020), paragraph 3; *see also* 31 U.S.C. 310(b)(2)(I) (providing that the Director of FinCEN shall “[a]dminister the requirements of subchapter II of chapter 53 of this title, chapter 2 of title I of Public Law 91–508, and section 21 of the Federal Deposit Insurance Act, to the extent delegated such authority by the Secretary.”).

<sup>5</sup> *Supra* note 2.

<sup>6</sup> *Supra* note 3.

<sup>7</sup> Anti-Money Laundering Act of 2020, Pub. L. No.116-283, §§ 6001-6511, 134 Stat. 4547-4633 (2021).

- The term “significant AML/CFT supervisory action” would mean any written communication or other formal supervisory determination issued by one of the Agencies that identifies one or more alleged deficiencies, weaknesses, violations of law, or unsafe or unsound practices or conditions relating to an AML/CFT requirement; communicates supervisory expectations to a bank regarding actions or remedial measures required to correct the deficiency, weakness, violation, or practice or condition; and contemplates significant or programmatic actions or remedial measures to be taken by the bank. The term does not include examiner observations, suggestions, or other informal comments.
- The proposed rule would adopt into regulations the AML Act requirement that a bank’s AML/CFT program should be risk-based, including ensuring that banks direct more attention and resources toward higher-risk customers and activities, consistent with the risk profile of the institution, rather than toward lower-risk customers and activities.
- The proposed rule would describe the requirements for a bank to establish an AML/CFT program, which would involve the four existing required BSA components, with certain proposed revisions, including (1) requiring risk assessment processes as part of the internal controls process that incorporates the AML/CFT priorities issued pursuant to 31 U.S.C. § 5318(h)(4);<sup>8</sup> (2) adding as part of the Agencies’ program requirements FinCEN’s existing ongoing customer due diligence requirement; and (3) clarifying, as required under the AML Act, that a bank’s designated AML/CFT compliance officer must be located in the United States and accessible to regulators.
- The proposed rule would create a two-pronged framework under which a bank’s AML/CFT program would be deemed to be effective if the bank establishes and maintains its program. The proposed rule would provide that a bank has an “effective” program if it is (1) established in accordance with the proposed rule’s establishment requirements; and (2) maintained, meaning that a properly established program is implemented in all material respects. By structuring the requirement to have an effective AML/CFT program as distinct obligations to establish and maintain an AML/CFT program, the proposed rule is intended to clarify and reinforce the distinction between failures to establish an AML/CFT program and failures to implement a properly established program.
- The proposed rule would not limit enforcement or supervisory actions for failures to establish an AML/CFT program. However, once a bank has properly established an AML/CFT program, the proposed rule would raise the threshold for significant supervisory or enforcement actions based solely on implementation deficiencies so only significant or systematic failures by a bank to implement the established program would warrant an “AML/CFT enforcement action” or a “significant AML/CFT supervisory action,” as these terms are defined in the proposed rule.

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<sup>8</sup> 31 U.S.C. § 5318(h)(4) requires Treasury Secretary, in consultation with the Attorney General, Federal functional regulators, relevant State financial regulators, and relevant national security agencies to establish and make public priorities for anti-money laundering and countering the financing of terrorism, and to update such priorities not less than once every 4 years. Policies established pursuant to this subsection must be consistent with the national strategy for countering the financing of terrorism and related forms of illicit finance developed pursuant to federal law.

- The proposed rule would also revise the AML/CFT supervisory and examination process for banks by enhancing FinCEN’s role in the supervision and enforcement process. In support of this objective, the proposed rule would establish a mechanism in which FinCEN is provided with an opportunity to review and provide feedback to the Agencies prior to AML/CFT enforcement and significant AML/CFT supervisory actions.
- The proposed rule would clarify that banks may share any information with the FinCEN Director that relates to an existing or potential AML/CFT enforcement action or significant AML/CFT supervisory action. The proposed rule specifically provides that this authorization to share information includes information that would ordinarily be considered non-public information under the Agencies’ respective rules.
- The proposed rule would include additional provisions that seek to harmonize the FDIC’s rules with those of FinCEN: (1) references to “BSA/AML” programs would be updated to “AML/CFT programs,” in line with the terminology in the AML Act, (2) in addition to a bank’s board of directors, the proposed rule would allow either an “equivalent governing body” to a bank board or a bank’s “appropriate senior management” to approve the written AML/CFT program, reflecting operationally how banks divide roles to establish and implement their AML/CFT programs, and (3) the Agencies propose minor, non-substantive updates to, among other things, reference the “AML/CFT” terminology for the Customer Identification Program requirements.

## **CONCLUSION**

Staff recommends that the Board approve the attached Notice for publication in the *Federal Register* with a comment period of 60 days.

## **STAFF CONTACTS**

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