

FINCEN AND THE US FEDERAL BANK REGULATORY AGENCIES UPDATE STATEMENT ON ENFORCEMENT OF BANK SECRECY ACT/ANTI-MONEY LAUNDERING REQUIREMENTS

On August 13, 2020, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the National Credit Union Administration (collectively, the "**Agencies**"), [updated](#) a joint statement, previously issued in [July 2007](#), regarding enforcement of failures to comply with the Bank Secrecy Act/Anti-Money Laundering ("**BSA/AML**") requirements (the "**Statement**"). While the Statement notes that it "does not create new expectations or standards," it does provide further clarity regarding the circumstances under which the Agencies would take BSA/AML-related enforcement actions, focusing on the circumstances under which the Agencies will issue cease and desist orders. The Statement follows the July 2019 publication of the Joint Statement on Risk-Focused Bank Secrecy Act/Anti-Money Laundering Supervision in which the Financial Crimes Enforcement Network (the "**FinCEN**") and the Agencies reemphasized their risk-focused approach to BSA/AML supervision and their broader effort to reinforce and enhance the effectiveness and efficiency of the BSA/AML regime. Both statements provide helpful guidance to ensure BSA/AML compliance and mitigate the risk of a BSA/AML-related enforcement action.

On August 18, 2020, FinCEN issued a statement [summarizing](#) its enforcement approach to the BSA. In its statement, FinCEN outlined six possible enforcement options for BSA violations and a non-exhaustive list of ten factors it considers in making its enforcement determination, which include the "nature and seriousness

of the violations," "pervasiveness of wrongdoing," and "quality and extent of cooperation with FinCEN."

PILLARS OF BSA/AML COMPLIANCE PROGRAMS

The Statement notes that a company's BSA/AML compliance program must: (1) "be reasonably designed to assure and monitor the institution's compliance" with BSA requirements; (2) contain, at a minimum, the following four pillars to ensure BSA/AML compliance: (i) a system of internal controls, (ii) independent testing of compliance, (iii) a designated individual to coordinate and monitor compliance, and (iv) training; and (3) include a Customer Identification Program that "enable[s] the institution to form a reasonable belief that it knows the true identity of its customers."

The Statement also emphasizes that a BSA/AML compliance program must incorporate customer risk assessment and ongoing customer due diligence. This should include risk-based procedures for conducting ongoing customer due diligence as set forth in US Treasury Department regulations, such as: (i) "understanding the nature and purpose of customer relationships for the purpose of developing a customer risk profile"; and (ii) "conducting ongoing monitoring to identify and report suspicious transactions and, on a risk basis, to maintain and update customer information, including information regarding the beneficial owner(s) of legal entity customers." The Statement also notes that BSA/AML compliance programs must address reporting and recordkeeping requirements set out in US Treasury Department regulations and that these requirements are evaluated as part of the internal controls pillar of a BSA/AML compliance program.

AGENCIES MUST ISSUE A CEASE AND DESIST ORDER WHEN COMPLIANCE PROGRAMS OR EFFORTS TO REMEDY PREVIOUS PROBLEMS ARE INADEQUATE

An Agency must issue a cease and desist order against an institution that fails to implement "a reasonably designed BSA/AML compliance program" or "fails to correct a previously reported problem with its BSA/AML compliance program identified during the supervisory process."

Failure to Implement a Reasonably Designed Program

A cease and desist order is mandated if a compliance program (1) does not include a written BSA/AML compliance program that sufficiently covers the pillars, (2) does not have policies, procedures and processes that implement the pillars, or (3) is so deficient in several pillars "that either the written BSA/AML compliance program or its implementation is not effective." The Statement leaves considerable discretion to the Agencies to determine whether a BSA/AML compliance program is ineffective, while providing indicia of ineffective BSA/AML compliance programs.

Among other things, the Statement specifically highlights an institution that "rapidly expands its business relationships through its foreign affiliates and businesses" without taking appropriate precautions. Here, the Agencies caution against a system of internal controls that does not conduct customer due diligence or monitor suspicious activity, does not support the BSA officer's oversight of the

BSA/AML program, does not conduct independent testing to identify deficiencies, and does not include adequate training.

The Statement also indicates that certain compliance program deficiencies, including violations of individual program components or pillar requirements, would not necessarily result in the issuance of a cease and desist order. The Agencies maintain discretion to determine whether deficiencies are "so severe or significant as to render the BSA/AML compliance program ineffective when viewed as a whole."

Failure to Fix Previously Reported Deficiencies

The Statement clarifies that an Agency must issue a cease and desist order if an institution fails to correct a previously reported "problem" identified by Agency examiners. A "problem" would "involve substantive deficiencies in one or more of the required components or pillars of the institution's BSA/AML compliance program" or program implementation reported "to the institution's board of directors or senior management in a report of examination or other supervisory communication as a violation of law or regulation that is not isolated or technical, or as a matter that must be corrected." The Statement indicates that the reported "problems" must be "substantially the same as those previously reported" to trigger a cease and desist order and that isolated and technical violations or deficiencies communicated to the institution in an examination report or through other written means are generally not considered "problems" that would result in a mandatory cease and desist order.

Acknowledging that in certain situations, such as conversion to automated systems, remedial measures may take more time to implement than planned, the Statement notes a cease and desist order is not required if "the institution has made acceptable substantial progress toward" its goal.

The Statement also describes circumstances in which an Agency may use its discretion to issue formal or informal enforcement actions or use other supervisory actions to address BSA-related violations, deficiencies, or unsafe or unsound banking practices. Without addressing the assessment of civil money penalties for BSA/AML violations, the Statement highlights the continued focus of the Agencies on robust BSA/AML enforcement and the significant enforcement risks from non-compliance with BSA/AML requirements. Formal enforcement actions in connection with BSA/AML violations often result in substantial monetary penalties and other adverse collateral consequences. Institutions should take the time to familiarize themselves with the Statement and should continuously work on ensuring that their BSA/AML compliance program is effective and complies with all applicable BSA/AML requirements.

CONTACTS

David DiBari
Managing Partner
T +1 202 912 5098
E david.dibari
@cliffordchance.com

Steven Gatti
Partner
T +1 202 912 5095
E steven.gatti
@cliffordchance.com

Megan Gordon
Partner
T +1 202 912 5021
E megan.gordon
@cliffordchance.com

Celeste Koeleveld
Partner
T +1 212 878 3051
E celeste.koeleveld
@cliffordchance.com

Daniel Silver
Partner
T +1 212 878 4919
E daniel.silver
@cliffordchance.com

Michelle Williams
Partner
T +1 202 912 5011
E michelle.williams
@cliffordchance.com

Philip Angeloff
Counsel
T +1 202 912 5111
E philip.angeloff
@cliffordchance.com

Susan Foster
Associate
T +1 202 912 5129
E susan.foster
@cliffordchance.com

Adam Goldstein
Associate
T +1 202 912 5114
E adam.goldstein
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 31 West 52nd Street, New York, NY 10019-6131, USA

© Clifford Chance 2020

Clifford Chance US LLP

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • London • Luxembourg • Madrid • Milan • Moscow • Munich • Newcastle • New York • Paris • Perth • Prague • Rome • São Paulo • Seoul • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.