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National Association of Federally-Insured Credit Unions

August 5, 2022

Financial Crimes Enforcement Network
Enforcement and Compliance Division
P.O. Box 39
Vienna, VA 22183

RE: No-Action Letter Process (Docket No.: FINCEN-2022-0007; RIN No.: 1506-AB55)

Dear Sir or Madam:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), I am writing in response to the Financial Crimes Enforcement Network's (FinCEN) advance notice of proposed rulemaking (ANPR) regarding the solicitation of public comment on questions relating to the implementation of a no-action letter process at FinCEN. NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 131 million consumers with personal and small business financial service products.

NAFCU supports FinCEN's efforts to promote innovation but urges FinCEN to update its regulations when industry-wide issues are identified through no-action letter applications. NAFCU also recommends that FinCEN: (1) establish a formal application process with a decision timeline and appeals process; (2) share no-action letters with the submitting party's prudential regulator; (3) keep no-action letters confidential but publish public guidance as to best practices when highly effective innovative methods are realized; and (4) decide approval and revocation on a case-by-case basis. NAFCU discourages FinCEN from applying retroactive liability after revocation and placing temporal limitations on no-action letters after approval.

General Comments

A no-action letter is an exercise of enforcement discretion wherein the staff of an agency or the staff of a division of an agency issues a letter indicating its intention not to take or recommend enforcement action against the submitting party for the specific conduct presented in the submitting party's request. Generally, no-action letters only address activity not yet undertaken by the submitting party.

Under the Anti-Money Laundering Act of 2020, FinCEN was required to consider a no-action letter process by way of an assessment and submit a report to Congress presenting the findings and determinations from the assessment. In the report submitted to Congress, FinCEN concluded that a cross-regulator no-action letter process would present legal and practical challenges. FinCEN

further concluded that it should undertake a rulemaking to establish a no-action letter process. The report states that the primary benefits of a no-action letter include promoting robust and productive dialogue with the public, spurring innovation among financial institutions, and enhancing the culture of compliance and transparency in the application and enforcement of the *Bank Secrecy Act* (BSA). Lastly, the report concluded that FinCEN should include consultation with other agencies as needed and appropriate in its rulemaking process.[1]

NAFCU's credit union members have reported that a FinCEN no-action letter process would be beneficial to support innovation in the financial sector. It is an opportunity for financial institutions to influence BSA/Anti-Money Laundering policy and provides certainty to the industry on FinCEN's position regarding prospective activities.

FinCEN can leverage no-action letters to find high-performing innovations and more quickly develop future guidance. There are several efficiencies that credit unions can gain from such a process but there are some guardrails that should be in place to do so. While it is widely understood that this is the first stage of the process, NAFCU urges FinCEN to ensure that there are very specific details on what the process will look like in its future steps in the rulemaking process.

No-Action Letter Process

NAFCU recommends that FinCEN establish a formal, delineated process for applying for a no-action letter. The application should have specific requirements for the submitting party that allow FinCEN to review the activity and make a fully informed decision without placing a significant burden on the submitting party. There should be minimal data collection burdens and a streamlined application process. NAFCU suggests that there be a single round of document requests to prevent a continuous back and forth between FinCEN and the submitting party; this will also prevent a prolonged process and slower decision making.

Credit unions will be expending resources to complete a no-action letter application; therefore, FinCEN should establish a clear and consistent timeframe for issuing a decision. NAFCU recommends that FinCEN be required to issue a decision on a no-action letter application within 90 days of that application being submitted, regardless of the outcome. A no-action letter process will lose value if decisions are not made in a timely manner. A 90-day time period is appropriate for both FinCEN and the submitting party because it gives FinCEN time to make an informed decision, but also provides a reasonable deadline so submitting parties are not waiting for an extended amount of time for approval to begin their new activity.

NAFCU suggests that FinCEN communicate with submitting parties while it evaluates their applications through a platform where the submitting party can receive regular status updates. FinCEN should ensure a designated office for application review is sufficiently staffed to handle

[1] A Report to Congress: Assessment of No-Action Letters in Accordance with Section 6305 of the Anti-Money Laundering Act of 2020. June 28, 2021. https://www.fincen.gov/sites/default/files/shared/No-Action%20Letter%20Report%20to%20Congress%20per%20AMLA%20for%20ExecSec%20Clearance%20508.pdf

the volume of no-action letter applications submitted and provide timely responses to questions and requests for status updates by submitting parties.

Information Sharing

NAFCU recommends that no-action letters only be shared with other federal regulators, not the public. Regulators should be required to communicate regarding these no-action letters so financial institutions are not faced with scrutiny or, in the worst-case scenario, penalties during examinations for activities that have been sanctioned by FinCEN. Accordingly, FinCEN no-action letters should be shared with the National Credit Union Administration, and when applicable state supervisory authorities and the Consumer Financial Protection Bureau. A no-action letter from FinCEN loses its value if other regulatory authorities are not aware of it. It would be a waste of a credit union's resources to apply for a no-action letter and have it be approved only to then have the activity penalized during an examination by its prudential federal regulator because the regulator did not know that FinCEN had approved the activity.

Being that no-action letters address activity that has not yet been undertaken by the requesting party, they should initially be kept confidential from the public. No-action letters should be used as a way to promote innovation as well as healthy competition. NAFCU recommends that no-action letters be decided on a case-by-case basis as the details can be very specific and tailored to each institution. Sharing no-action letters publicly would dissuade institutions from participating in the process for fear of competitive pressures or even inadvertent disclosure of confidential information.

In the spirit of innovation and efficiency, NAFCU also recommends that FinCEN have a centralized monitoring authority that can review the life-cycle of these no-action letters and the efficacy of their innovations. Should there be an innovative method that FinCEN deems highly effective, FinCEN should publish it as a potential best practice for other institutions to model. NAFCU urges FinCEN to develop a way to withhold sensitive information while still providing meaningful guidance. This monitoring authority can be used to inform new rulemakings or relax existing requirements.

On the other hand, future industry-wide change should not solely depend on the successful demonstration of pilot programs at the direction of the industry. While no-action letters may permit FinCEN to accelerate regulatory transformation in connection with discrete product service offerings, it should not operate to slow general reform efforts. Credit unions will have to use significant resources to apply for a no-action letter and then comply with the terms and conditions once that application is approved. The preferred mechanism for regulatory relief would be for FinCEN to amend its rules and regulations when it is deemed necessary through notice and comment rulemaking and with a sufficient comment deadline for stakeholders to provide input.

Revocation

No-action letters are a regulatory mechanism driven by circumstance. No two no-action letters will be the same, therefore there should not be generalized standards for revocation. If FinCEN does develop standards for revocation, these standards should be published. The published standards should be sufficiently specific and clear to avoid confusion. Additionally, standards for revocation should be limited to avoidance standards. If financial institutions know how to avoid revocation of their no-action letter, the letters will be more beneficial and have more value. However, NAFCU urges FinCEN to decide on revocations on a case-by-case basis.

Moreover, NAFCU discourages FinCEN from applying retroactive liability should a no-action letter be revoked. The possibility of retroactive liability would be counter to the purpose of no-action letters. Retroactive liability would discourage the financial industry from using FinCEN no-action letters because the letters would carry very little meaningful protection.

Additionally, NAFCU discourages FinCEN from placing a temporal limitation on the no-action letter after approval. The resources needed to apply for a no-action letter and participate in a requested activity would typically demand a long-term commitment to and investment in the activity in question. The industry must have some assurance that its investments in innovative activities can be recovered over a reasonable timeframe. Arbitrary limitations on the effectiveness of the no-action letter would limit incentives to discover these innovative compliance solutions and activities and have a chilling effect on participation and interest in the program.

NAFCU further recommends that decisions on no-action letter applications and their revocation after approval be appealable by the submitting party. A final rule on the matter should detail a formalized appeals process that allows the submitting party to escalate a decision on their no-action letter application as well as cure anything that FinCEN may see as unacceptable or grounds for revocation. An appeals process is beneficial because it allows for a system of checks and balances, requiring FinCEN to provide reasoning and justification for denying or revoking a no-action letter application. A formal, independent appeals process encourages transparency, fairness, and an informed decision-making process.

Conclusion

NAFCU appreciates the opportunity to comment on this ANPRM and share our members' views. NAFCU applauds and fully supports FinCEN's efforts to promote innovation but urges FinCEN to update its regulations when industry-wide issues are identified through no-action letter applications. NAFCU also recommends that FinCEN: (1) establish a formal application process with a decision timeline and appeals process; (2) share no-action letters with the submitting party's prudential regulator; (3) keep no-action letters confidential but publish guidance as to best practices when highly effective innovative methods are realized; and (4) decide approval and revocation on a case-by-case basis. Finally, NAFCU discourages FinCEN from applying retroactive liability after revocation and placing temporal limitations on no-action letters after

approval. Should you have any questions or require additional information, please do not hesitate to contact me at (703)842-2268 or amoore@nafcu.org.

Sincerely,

Aminah Moore
Senior Regulatory Affairs Counsel