

Cooperative Credit Union Association

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Creating Cooperative Power

August 5, 2022

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

**RE: Advanced Notice of Proposed Rulemaking on a
No Action Letter Process
FINCEN-2022-0007 / RIN 1506-AB55**

Dear Director Das:

On behalf of its member credit unions, the Cooperative Credit Union Association, Inc. (“Association”) appreciates the opportunity to comment on the Financial Crimes Enforcement Network’s (“FinCEN’s”) Advanced Notice of Proposed Rulemaking on a new Bank Secrecy Act (BSA) “No-Action Letter” guidance process as required by the Anti-Money Laundering Act of 2020. The Association is the state trade association representing approximately 200 state and federally chartered credit unions located in the states of Delaware, Massachusetts, New Hampshire, and Rhode Island, which further serve over 3.6 million consumer members. The Association has developed these comments in consultation with our member credit unions.

The Association’s High-Level Comments

- The Association supports FinCEN creating a No-Action Letter process. Credit unions being able to ask FinCEN for this type of less-formal guidance would help limit BSA and other anti-money laundering/countering the financing of terrorism (AML/CFT) compliance burdens on credit unions by diminishing regulatory uncertainty.
- The Association supports FinCEN publishing redacted copies of its No-Action Letters so that its guidance can be relied upon by similarly situated credit unions and other Covered Entities as a compliance safe harbor.
- FinCEN should redact the name of the requesting institution, any personal information, all information concerning examination of a financial institution, and any other information that could tip-off money launderers or terrorists about a Covered Entity’s AML/CFT procedures such as its customer due diligence sources and methods.

The Association's Detailed Comments

The Association supports FinCEN creating a No-Action Letter process for providing BSA and other AML/CFT guidance. While we urge FinCEN to publish most No-Action Letters in redacted form to help give guidance to industry in general, we understand the difficulty that FinCEN must face in terms of balancing providing clear AML/CFT guidance to regulated institutions and maintaining the confidentiality necessary for a financial intelligence unit, prudential regulators, and Covered Entities to promote effective AML/CFT regulation.

We believe that the No-Action Letter process that Congress instructed FinCEN to create in the Anti-Money Laundering Act of 2020 represents a unique opportunity for the agency to strike the right balance between providing regulatory certainty to financial institutions and not tipping-off bad actors.

The Association's comments in response to FinCEN's specific questions are as follows:

I. No-Action Letters

Additional Considerations Relating to the Report

(1) FinCEN evaluated several issues in the Report on no-action letters, including, among other things, the viability of a cross-regulator no-action letter process, a timeline for considering and issuing no-action letters, and the extent to which no-action letters would mitigate or accentuate illicit finance risks. Are there additional considerations not identified in the Report that FinCEN should weigh in evaluating these issues?

Yes, the Association urges FinCEN also to consider the No-Action Letter Process's potential to limit compliance burdens on credit unions by reducing regulatory uncertainty.

(2) While FinCEN has no legal authority to prevent another agency, including a Federal functional regulator or the Department of Justice, from taking an enforcement action under the laws or regulations that it administers, are there additional points FinCEN should consider in assessing the viability of a cross-regulator no-action letter process? What is the value of establishing a FinCEN no-action letter process if other regulators with jurisdiction over the same entity do not issue a similar no-action letter?

The Association supports FinCEN acting as a central authority for guidance on BSA and other AML/CFT laws that FinCEN has rulemaking authority over. Other regulators should accord deference to FinCEN's interpretations of those laws because it is the federal government's financial intelligence unit and expert in AML/CFT policy.

FinCEN's guidance should also be granted deference by other regulatory agencies because U.S. Supreme Court precedent accords judicial deference to federal regulatory agencies' interpretations of the laws they administer even when those interpretations are not subject to public notice and comment. *See, e.g., Auer v. Robbins*, 519 U.S. 452, 461 (1997) (granting judicial deference to the Department of Labor's interpretations of its regulations promulgated in court filings during litigation); *NationsBank, N.A. v. VALIC*,

513 U.S. 251, 257 (1995) (granting judicial deference to the Comptroller of the Currency's letter interpretations of the National Bank Act).

(3) *Would a no-action letter process involving only FinCEN be useful? Why or why not?*

Yes, a No-Action Letter process involving only FinCEN would be useful because FinCEN is the expert administrator financial intelligence unit charged by Congress with interpreting the BSA and other AML/CFT laws.

We urge FinCEN, however, to consult with the National Credit Union Administration (NCUA) and/or state credit union regulators on matters that have a potentially unique impact on credit unions specifically, such as BSA matters materially intertwined with the operation of the Federal Credit Union Act and/or state credit union laws.

One example is the intersection between BSA customer due diligence requirements and federal and state credit union field of membership laws specifying the requirements for credit union membership. Were FinCEN to receive a request for a No-Action Letter regarding a credit union's BSA "Know Your Member" customer due diligence program, we would urge FinCEN to consult with NCUA (especially if the credit union is a federal credit union) and/or state credit union regulators (if the credit union is state-chartered) to ensure better that FinCEN's guidance is consistent with the applicable laws concerning the criteria for becoming a credit union member.

(4) *Are there additional points FinCEN should consider regarding the timeline proposed in the Report?*

The Association supports that the following timeline proposed in the Report, which is:

1. FinCEN receives a request for a no-action letter and performs an initial review of the request, including for completeness, accuracy, and conformity with relevant rules and regulations FinCEN puts in place for No-Action Letter requests.
2. FinCEN determines the relevant regulators or agencies (including State or other regulators) that also regulate the entity and may have an interest in the request, and FinCEN shares the request.
3. FinCEN consults internally on the request.
4. FinCEN consults with the appropriate regulators, departments, and agencies on the request.
5. FinCEN makes a final decision on the request.
6. FinCEN drafts the No-Action Letter, denial, or other response and transmits it to the submitting party.

7. FinCEN may elect to post the No-Action Letter on its website.

(5) *Are there additional points FinCEN should consider concerning the mitigation or accentuation of illicit finance risks beyond those identified in the Report?*

Yes, in addition to risks associated with potential abuse of the No-Action Letter system or risks arising from supervisory confusion, FinCEN should also consider the risk of a published No-Action Letter tipping-off bad actors concerning an institution's BSA compliance procedures, especially its customer due diligence methods and sources of information.

Disclosures of sources and methods should be kept at a high-level—such as “the requestor participates in a Know Your Customer utility” without mentioning which one—to be consistent with the Financial Action Task Force's Recommendation Number 21 international AML/CFT standard on “Confidentiality and Tipping-Off”.¹

In addition, we urge FinCEN to keep confidential the identities of an institution's BSA compliance personnel—such as the identity of the individual writing to FinCEN to request the No-Action Letter determination—to reduce the chances that financial institutions' BSA compliance staff will be identified by bad actors who could potentially make threats against those individuals and their families.

(6) *To what extent would an institution be able to rely upon a no-action letter from FinCEN if the institution is subject to oversight and examination for the same or similar matters by another agency?*

The Association believes that a credit union should be able to rely fully upon a FinCEN No-Action Letter as a compliance safe harbor, even if it is subject to supervision by NCUA and/or state credit union regulators, so long as the subject matter of the FinCEN No-Action Letter is substantially similar to the credit union's factual circumstances.

(7) *What impact would a FinCEN-only no-action letter process or a cross-regulator no-action process have on State, local, or Tribal regulators?*

We believe that either approach could provide useful information to state credit union regulators, however, we urge FinCEN to consult with state credit union regulators on matters affecting state-chartered credit unions prior to making a final policy determination.

¹ Financial Action Task Force, *International Standards on Combatting Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations*, at 17 (2012), available at <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/guidance-information-sharing.html>.

(8) *Do existing laws and regulations permit the issuance of no-action letters, or are any additional rules or changes required to implement such a process? If so, what additional rules or changes would be appropriate?*

The Association believes that the authority to issue No-Action Letters is inherent to FinCEN's statutory enforcement powers. We also believe, however, that a rulemaking on No-Action Letters is needed to establish the administrative procedures for requesting No-Action Letters as well as establishing their legal significance as a compliance safe harbor for regulated institutions.

Contours and Format of a FinCEN No-Action Letter Process

(9) *Should FinCEN establish via regulation any limitations on which factual circumstances would be appropriate for a no-action letter? If yes, what should those limitations be?*

We do not support prospective limits on which factual circumstances would be appropriate for a No-Action Letter request. We urge FinCEN instead to address this issue on a case-by-case basis.

(10) *Should FinCEN limit the scope of no-action letters so that such requests may not be submitted during a BSA or BSA-related examination—including when the subject of the request is already a matter under examination, or when it becomes a matter under examination while the no-action letter process is ongoing?*

The Association believes that a credit union should have the option to seek a FinCEN No-Action Letter while it is subject to a BSA or a BSA-related examination by the NCUA or a state credit union regulator if the credit union wishes to seek one.

We caution against, however, creating an expectation that a credit union can be required by its examiner to seek a FinCEN No-Action Letter to resolve negative examination findings. Credit union examiners' questions concerning potentially unclear BSA compliance requirements, such as those related to emerging technologies, etc., would be more efficiently resolved through interagency dialogue between FinCEN and NCUA and/or state credit union regulators.

(11) *Would it be valuable for FinCEN to provide to information from a no-action letter request to agencies with delegated examination authority under 31 CFR 1010.810 for the purpose of evaluating specific conduct addressed in a no-action letter request, including, among other things, to obtain information that may inform FinCEN's response to the request?*

Yes, the Association supports interagency transparency and dialogue on BSA and other AML/CFT matters in general and believes that FinCEN requesting such information from credit union regulators would result in better informed policymaking.

(12) *In its regulation covering administrative rulings, FinCEN requires specific information to be included in the request for a ruling. Should FinCEN require similar elements in no-action letter submissions? If so, which? What is the burden on the requester in gathering this information?*

We believe that the limited information that the FinCEN administrative rulings regulation requirements would also reasonable for No-Action Letters except that: (a) much of the submitted information—such as the name of the institution, material details concerning its BSA compliance procedures, any personally identifying information, etc.—should be kept confidential without a specific request for confidentiality; and (b) FinCEN should not include the prohibition on requestors making a guidance request if they are being examined by an agency for BSA compliance or are subject to other enforcement action. Therefore, we urge FinCEN only to require requestors for No-Action Letters to include the following information in the request:

- (1) A complete description of the situation for which the ruling is requested.
- (2) A complete statement of all material facts related to the subject transaction.
- (3) A concise and unambiguous question to be answered.
- (4) If the subject situation is hypothetical, a statement justifying why the particular situation described warrants the issuance of a ruling.
- (5) The signature of the person making the request; or
- (6) If an agent, such as a corporate officer or a law firm, makes the request, the signature of the agent and his or her title or another explanation of his or her relationship to the principal (e.g., “Assistant Vice President of XYZ Credit Union,” or “Please be advised that this firm represents XYZ Credit Union.”)

(13) *Are there additional pieces of information not addressed in FinCEN’s requirements for administrative rulings that FinCEN should, or should not, request to be included in no-action letter submissions?*

No.

(14) *In its regulation covering administrative rulings, FinCEN mandates specific procedural and filing requirements for the request. Should FinCEN include similar requirements for no-action letter submissions? If so, which? What is the burden on the requester in complying with these potential requirements?*

Yes, we support FinCEN specifying its submission procedures similar to those of 31 C.F.R. § 1010.711 except striking subsections (a)(4), (5) that otherwise would not

generally allow a credit union subject to a BSA examination to make such a request and require a specific request for confidentiality.

(15) *Are there additional procedural or filing requirements not addressed in FinCEN's requirements for administrative rulings that FinCEN should, or should not, require for no-action letter submissions?*

No.

(16) *Understanding that typically FinCEN will rely on the facts and circumstances contained in the request, if FinCEN issues a no-action letter to a parent corporation, under what circumstances should the letter apply to some or all subsidiaries, or vice versa? Should the requester specify the entities in the corporate structure to which the no-action letter request applies?*

The Association believes that any Covered Entity should be able to rely upon published FinCEN No-Action Letter guidance as a compliance safe harbor so long as its factual circumstances are substantially similar.

(17) *Should FinCEN limit consideration of no-action letter requests to written materials? For example, should FinCEN require that the content of any oral communication between FinCEN and the requester intended to inform FinCEN's response be submitted in writing to receive official consideration? What is the burden on the requester in complying with this potential requirement?*

We urge FinCEN to note in its No-Action Letter any factual representations that it found materially relevant to its determination, regardless of how that information was submitted, without providing details that could tip-off bad actors.

FinCEN Jurisdiction and No-Action Letters

It is possible that FinCEN may not be able to immediately or definitively establish whether FinCEN has jurisdiction (i.e., regulatory authority) over the entity submitting a no-action letter request. This could be a result of, among other things, facts and circumstances relating to geographic location, the product or service involved, or the business model of the requesting entity.

(18) *Should FinCEN determine that it has jurisdiction prior to the issuance of no-action letters?*

We urge FinCEN to respond to No-Action Letter requests made by credit unions.

(19) Should FinCEN issue no-action letters where the request is for a ruling on whether FinCEN has jurisdiction over the submitting party? Is this more appropriate for a FinCEN administrative ruling request?

We believe that FinCEN should presume that it has jurisdiction over all credit unions located in the United States of America with respect to the No-Action Letter process.

(20) How should the no-action letter process apply to agents, third parties, domestic affiliates, and foreign affiliates that may be conducting anti-money laundering or BSA functions on behalf of a financial institution either inside or outside the United States?

If the AML/CFT laws of the United States of America are relevant to an organization's operations, it should be permitted to seek guidance from FinCEN.

Changed Circumstances

(21) Should a change in the overall business organization, such as when two entities merge or one entity acquires another, cause a no-action letter to lose its effect? If so, under what circumstances? If not, how would such a no-action letter continue to apply?

No, mergers should not affect the status of a No-Action Letter because doing so would result in post-merger regulatory uncertainty. The test should be whether a merger or other business combination or reorganization creates a material factual change in circumstances that renders the earlier No-Action Letter determination moot.

(22) Should there be any limitations on FinCEN's ability to change the positions reflected in prior no-action letters? If so, under what circumstances?

FinCEN should be able to change the positions reflected in its prior No-Action Letters, especially if the agency is petitioned by Covered Institutions to make clarifications to or to redress unintended consequences resulting from an earlier No-Action Letter.

(23) What are the potential impacts on the submitting party if, after FinCEN's response, the relevant law or regulation changes?

If the law changes materially, the earlier No-Action Letter would have been rendered moot by operation of law. It would be helpful to Covered Entities if FinCEN were to publish a notice on its website and issue a press release announcing that a particular No-Action Letter has been rendered moot in this fashion.

Revocation

(24) Should FinCEN publicize standards governing the revocation of no-action letters, or should revocation be determined on a case-by-case basis?

We believe that revoking No-Action Letters on a case-by-case basis makes the most sense for a less-formal guidance procedure such as that envisioned for the No-Action Letter process.

(25) Under what circumstances should no-action letters be automatically revoked? (Triggering events could include, for example, changes to law or regulation, provision of false or incomplete information, failure to provide requested additional information, or violation of potential specified procedural requirements.)

If the law changes materially, the earlier No-Action Letter would have been rendered moot by operation of law. Providing false information would mean that the requestor acted in bad faith, and should not enjoy a compliance safe harbor for that reason, however, FinCEN's policy position regarding the purported factual circumstances on which it opined should remain valid.

(26) Should no-action letters have expiration dates? If so, under what circumstances would an expiration date be appropriate?

No.

(27) If a no-action letter is revoked, how should FinCEN handle conduct that occurred while the no-action letter was active? In particular, would a rescission result in potential enforcement actions only for conduct after the rescission date, or would an entity also potentially be subject to liability for conduct that occurred while the now-revoked letter was active? Would the answer depend on the basis for the revocation?

FinCEN should forebear from retroactive enforcement for conduct that happened while a No-Action Letter was active so long as the Covered Entity attempted to comply in good faith. Otherwise, the No-Action Letter process will not succeed in limiting regulatory burdens by providing increased regulatory certainty because the possibility of retroactive enforcement after policy changes would always be present.

In addition, the possibility of retroactive enforcement, because of enforcement's inherently punitive nature, raises important constitutional due process concerns.

(28) What other rules should govern the revocation of no-action letters?

FinCEN should publish its revocation of No-Action Letter notice on its website and in a press release to announce to Covered Entities that this guidance had been withdrawn.

No-Action Letter Denials and Withdrawals

(29) Should FinCEN create an appeals or reconsideration process for no-action letter denials? What factors and procedures should this process involve?

Covered Entities should be able to appeal to the Director of FinCEN and, if denied by the Director, promptly receive a determination from the Director explaining in detail the factual and legal reasons for the denial.

(30) Should FinCEN publish denials on its website? If so, what level of detail and type of information should be included? For example, should denials be anonymized?

No.

(31) Should FinCEN allow submitting entities to withdraw their requests for no-action letters? If so, under what circumstances and at what point in the process should withdrawals be allowed? What should the process be for withdrawing a request for a no-action letter?

Yes, FinCEN should allow submitting entities to withdraw their requests for No-Action Letters without limitation at any time prior to FinCEN making a formal determination.

Confidentiality

(32) Should the no-action letter process be confidential during FinCEN's adjudication of a request?

The Association supports FinCEN consulting with industry as well as regulatory agencies whenever FinCEN's determination is likely to have a significant impact on a substantial number of other Covered Entities, such as other Covered Entities also carrying on the activity in question.

(33) Should FinCEN maintain the confidentiality of no-action letters for a period of time, or indefinitely, after granting them? Under what circumstances should FinCEN maintain confidentiality?

FinCEN should in general publish redacted versions of their No-Action Letters that provide the public with useful AML/CFT compliance guidance without disclosing the identity of the requestor or its staff, or other confidential matters such as information concerning the examination of financial institutions, personally identifying information, or a Covered Entity's customer due diligence sources and methods.

We believe that FinCEN should only keep No-Action Letters completely confidential if redaction would not be sufficient to protect the requestor's identity or other material AML/CFT information confidential, such as non-public details about a Covered Entities

BSA procedures, or if the mere knowledge of the existence of such a letter would tip-off bad actors.

(34) Should no-action letters be used as published precedents? If so, under what circumstances and conditions should they be precedential? Should no-action letters be applicable beyond the requesting institutions, and under what circumstances and conditions?

The Association supports FinCEN publishing redacted copies of its No-Action Letters so that the agency's position can be relied upon by credit unions and other financial institutions as a compliance safe harbor.

(35) How should FinCEN notify State, local, or Tribal regulators of confidential requests for cross-regulator no-action letters or, if appropriate, confidentially issued cross-regulator no-action letters?

We urge FinCEN to notify these other regulatory agencies confidentially in writing.

(36) How should FinCEN notify Federal, State, local, or Tribal regulators of confidential requests for FinCEN-only no-action letters or, if appropriate, confidentially issued FinCEN-only no-action letters?

We believe that these notifications should also be made confidentially in writing.

(37) If no-action letters and their underlying requests are made public, how should FinCEN handle content that is confidential or sensitive, such as triggering mechanisms for suspicious activity report (SAR) reviews?

The Association strongly urges FinCEN to redact any submission content that is confidential or sensitive in order to protect the integrity of Covered Entities' AML/CFT compliance programs.

Consultation

(38) What procedures should be put in place for FinCEN to consult with other relevant regulators or law enforcement agencies regarding no-action letter requests?

We urge FinCEN to establish an interagency workgroup to liaise with that includes NCUA and the National Association of State Credit Union Supervisors (NASCUS).

(39) How can FinCEN best balance the need to consult other regulators or law enforcement with the desires of submitting parties for confidentiality and expediency?

We believe that AML/CFT and other law-enforcement-related information shared between government agencies will generally remain confidential if the rules require such confidentiality.

We also believe that well-reasoned FinCEN opinions issued after consultation with NCUA and/or state credit union regulators would generally make better policy.

(40) Should FinCEN require a submitting party that is seeking a no-action letter to identify all of its regulators? Should FinCEN require that institution to identify all of the regulators of its parent or subsidiary corporations?

A submitting party should be required to identify all of its regulators, but not the regulators of its corporate affiliates unless that information is material to the request or is provided voluntarily.

(41) Under what circumstances other than consultation should information FinCEN obtains through the no-action letter process be shared with other Federal, State, local, and Tribal agencies, including the U.S. Department of Justice?

When the information in FinCEN's possession creates probable cause to believe that a predicate AML/CFT offense is occurring and/or it finds material BSA program deficiencies.

Other Questions

(42) What burdens are requesting institutions expected to face in connection with the implementation of a no-action letter process? Please identify any burdens with specificity, such time spent or salary costs, and estimate the dollar costs of these burdens if possible. How could FinCEN address any such burdens on regulated parties?

The Association's concerns about regulatory burdens associated with No-Action Letters center around potential unintended consequences arising from this process, such as credit union examiners requiring credit unions to request a FinCEN No-Action Letter to resolve negative examination findings (e.g., "You must request a no-action letter from FinCEN to determine whether your customer due diligence program employing emerging biometric identification technology is BSA compliant,") which would likely significantly increase paperwork burdens on FinCEN's staff as well as increase compliance burdens on credit unions.

As noted above, we believe that credit union examiners' questions concerning potentially unclear FinCEN's compliance requirements would be more efficiently resolved through interagency dialogue between FinCEN and NCUA and/or state credit union regulators.

(43) What topics, issues, transaction types, customer types, geographies, products, services, or other matters would be expected to be the subject of no-action letter requests to FinCEN?

We believe that customer due diligence/Know Your Customer (KYC) requirements will generate the most requests because of changing technology and the rise of mobile banking and other remote banking technological solutions.

(44) *Are there any other comments FinCEN should consider in crafting rules to implement a no-action letter process?*

We urge FinCEN to consider the potential impact of the No-Action Letter process on credit unions and other community-based financial institutions, including by making its guidance proportional to the level of complexity of a Covered Institution and its AML/CFT risk profile.

No-Action Letters issued in response to requests from big, internationally active banks, for example, could make it seem as though the BSA procedures that highly complex banks engaged in cross-border activities must use are a compliance requirement for much less complex and less risky community-based credit unions that, for example, focus on serving a single local community in just one state such as Delaware, Massachusetts, New Hampshire, or Rhode Island.

Instead, BSA compliance requirements should be proportional to an institution's size, complexity, and AML/CFT risk profile.

II. The Proposed No-Action Letter and Existing Processes

FinCEN currently provides the following forms of regulatory guidance or relief: (1) administrative rulings and (2) exceptive or exemptive relief, as described in Section II.B above. FinCEN is seeking comment on how the potential no-action letter process may complement existing processes.

(45) *What criteria should distinguish a no-action letter request from an administrative ruling, or from exceptive or exemptive relief?*

A No-Action Letter should provide guidance and a compliance safe harbor for institutions that have substantially similar factual circumstances without claiming to be a binding requirement on institutions other than the one that requested it.

(46) *What value or benefit does a no-action letter bring that is distinct from an administrative ruling, or from exceptive or exemptive relief?*

A No-Action Letter will presumably be a faster, less formal, and potentially more confidential procedure for obtaining FinCEN guidance.

(47) *Are there improvements that could be made to FinCEN's existing processes for issuing administrative rulings or exceptive or exemptive relief?*

Yes, 31 C.F.R. § 1010.717 ("Disclosing information.") should be rescinded, at least with respect to requests made by credit unions.

Non-public information submitted by a credit union to FinCEN should automatically qualify as exempt from disclosure under the Freedom of Information Act (FOIA) pursuant to FOIA Exemption 8, which exempts from public disclosure information “contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.” 5 U.S.C. § 552(b)(8).

In addition, keeping this information confidential would be consistent with the Financial Action Task Force’s Recommendation Number 21 (“Confidentiality and Tipping-Off”) international AML/CFT standard.

(48) What sort of guidance would be helpful from FinCEN concerning administrative rulings or exceptive or exemptive relief?

The most helpful FinCEN guidance on this issue would be clarifications for when Covered Entities should seek one type of administrative action versus another.

The Association appreciates the opportunity to comment on the FinCEN’s Advanced Notice of Proposed Rulemaking on a possible BSA No-Action Letter process. If you have any questions about our comments or require further information, please do not hesitate to contact the Association at govaff-reg@ccua.org.

Sincerely,

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