

Implementing Proposed AML Rules May Take More Guidance

By **Meghann Donahue and Nikhil Gore** (August 22, 2024, 2:15 PM EDT)

On July 19, the federal banking agencies — the Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corp., Office of the Comptroller of the Currency and National Credit Union Administration — jointly announced a proposed rule to update formal anti-money laundering and countering the financing of terrorism program requirements for banking institutions they supervise.[1]

They also issued, together with the Financial Crimes Enforcement Network, an interagency statement addressing efforts to implement Congress' 2020 Anti-Money Laundering Act.[2]

The agencies' proposed rule is intended to align banks' program requirements to those set forth in a proposed rulemaking by FinCEN issued July 3.[3]

These proposals seek to enable more dynamic, responsive and innovative AML/CFT programs. But it remains to be seen if the general standards they articulate can achieve these objectives.

The interagency statement acknowledges that the proposed updates to AML/CFT program rules only "represent one part of the significant reform envisioned in the AML Act" and note that further regulatory input will be needed to fulfill the AML Act's goals of promoting modernization and reducing regulatory burdens.[4] The contours of this regulatory input, however, are not specified.

Comments on FinCEN's proposed rule are due Sept. 3 and on the agencies' proposed rule Oct. 8.

Proposed Program Requirements for Banks

The agencies and FinCEN intend for banks to have one standard governing their AML/CFT programs.[5]

Currently, banks' programs must be reasonably designed to either achieve compliance with the Bank Secrecy Act, prevent money laundering or do both. The proposals would replace this standard with a broader requirement that the programs be not only reasonably designed, but also effective and risk-based, with robust risk assessments.[6]

Under the proposals, banks' AML/CFT programs will now have six required pillars, discussed below.



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Risk Assessments

Risk assessments will become the first program component and serve as the key to the implementation of banks' AML/CFT programs. Firms will be required to consider three elements: (1) the AML/CFT priorities issued by FinCEN in June 2021;^[7] (2) firm-specific money laundering and terrorist financing risks; and (3) suspicious activity and other reports filed pursuant to FinCEN regulations.

The agencies anticipate that "banks will be able to leverage their existing risk assessment processes" in many respects.^[8] Under the proposals, however, the risk assessment process is expected to be "dynamic and recurrent," with firms reviewing and updating their assessments "on a periodic basis, including, at a minimum, when there are material changes to the financial institution's [money laundering and terrorist financing] risks."^[9]

While not yet reflected in the text of the agencies' proposed rule itself, the preamble contemplates requiring that risk assessments be updated at specific intervals. It discusses the relative merits of various options, including annual assessments, updates at least once between examinations or revisions at least as frequently as the AML/CFT priorities are updated.^[10]

Four Existing Program Pillars

The four existing program pillars — internal controls, independent testing, a Bank Secrecy Act compliance officer and training — will be modified in minor ways to codify existing supervisory standards into regulation.

Some of these standards will continue to be interpreted broadly by examination staff. For example, the agencies' proposed rule will expressly require that a compliance officer be "qualified," but does not define this term.

The preamble suggests that a qualified AML/CFT officer not only possesses the "requisite training, skills, expertise, and experience" commensurate with an institution's risk profile, but also has an appropriate "position in the bank's organizational structure ... to effectively implement the bank's AML/CFT program" with decision-making authority, and access to "adequate compliance funds and staffing ... and sufficient technology and systems."^[11]

Customer Due Diligence Requirements

Customer due diligence requirements will become a sixth program component, to "mirror FinCEN's existing rule and reflect the Agencies' long-standing supervisory expectations."^[12]

Implications for Supervised Financial Institutions

Financial institutions already conduct risk assessments and apply risk-based approaches to managing AML/CFT risks. Nevertheless, the proposals' risk assessment requirement is significant.

Risk assessments will be key to the design and implementation of other program components, including internal controls that are tailored to the risk assessment's findings; they will require substantial resources from banks. The preamble of FinCEN's proposed rule appears to anticipate that financial

institutions will conduct their risk assessments at a somewhat granular level based on specific operations.

Financial institutions will want to be deliberate not only in calibrating their policies, procedures and controls as their AML/CFT programs evolve, but also in making specific resource allocation determinations in light of perceived risks. Firms will be expected to document their risk assessment analysis, "particularly any analysis that relies on the exercise of discretion or judgment," and subject their assessment processes to oversight and governance.[13]

The extent to which banks effectively document their risk assessment processes, including their impact on associated internal controls, will likely affect regulatory assessments of their programs.

Continued 2020 AML Act Implementation

The agencies and FinCEN emphasize that they intend for their proposed program rules "to further the AML Act's overarching purposes" of modernizing institutions' programs, encouraging innovation and facilitating risk-based allocation of resources.[14] But the proposals alone may not contain sufficient guidance for firms to make substantial progress in fulfilling these goals.

For example, while FinCEN and the agencies propose incorporating into the internal controls pillar that firms' "internal policies, procedures, and controls may provide for consideration" of innovative approaches to meet compliance obligations, actual implementation of such approaches would be cabined by a potentially subjective judgment as to what is "warranted by the [institution's] risk profile and AML/CFT program." [15]

Institutions may be hesitant to reallocate resources absent more clarity on how their decisions will be examined and assessed. Perhaps recognizing this, the proposals seek comment regarding whether the proposed regulatory text permits "sufficient flexibility," [16] and, as to the agencies' proposed rule specifically, on ways banks could demonstrate appropriate and effective resource distribution.[17]

Ongoing developments in administrative law make these particularly valuable questions for industry commenters to respond to, in order to ensure that any limitations in the current proposals are clearly documented in the administrative record.

Notably, the interagency statement hints that additional rulemaking and guidance regarding firms' incorporation of the national AML/CFT priorities is forthcoming. Institutions may encounter difficulties presently in determining how to assess their exposure to risks associated with the 2021 AML/CFT priorities, given their breadth.

The 2021 priorities do list many, if not all, significant money laundering and terrorist financing threats, but they do not point to any single threat or group of threats as taking priority over the others. The proposals focus on firms' use of risk-based approaches, but they do not provide clear parameters for institutions seeking to prioritize among these existing risks.

In the interagency statement, the agencies and FinCEN say that they "recognize the need to provide revised regulations and timely guidance" to firms in this area. They also state that they are committed to "develop[ing] any necessary corresponding guidance and examination procedures for examiners." [18] These efforts may be useful to institutions, although, as noted, FinCEN and the agencies continue to provide little specificity on what this will mean in practice.

Finally, financial institutions may expect to see additional evolution of existing AML/CFT regulations, although on what timeline is unclear. The interagency statement notes FinCEN's ongoing — and overdue — work to comply with the 2020 AML Act's requirements to review AML/CFT regulations, including reviews of streamlined Bank Secrecy Act reporting requirements and dollar reporting thresholds, and a report with administrative or legislative recommendations for Congress.[19]

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[1] <https://www.occ.gov/news-issuances/news-releases/2024/nr-ia-2024-82b.pdf>.

[2] <https://www.fincen.gov/sites/default/files/shared/Interagency-Statement-on-the-Issuance-of-the-AML-CFT-Program-Notices-of-Proposed-Rulemaking-FINAL.pdf>.

[3] <https://www.federalregister.gov/documents/2024/07/03/2024-14414/anti-money-laundering-and-countermeasures-to-the-financing-of-terrorism-programs>.

[4] FinCEN, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union Administration, Office of the Comptroller of the Currency, Interagency Statement on the Issuance of the AML/CFT Program Notices of Proposed Rulemaking ("Interagency statement") (July 19, 2024), at 4-5.

[5] *Id.* at 1.

[6] *Id.* at 2.

[7] [https://www.fincen.gov/sites/default/files/shared/AML_CFT%20Priorities%20\(June%2030%2C%202021\).pdf](https://www.fincen.gov/sites/default/files/shared/AML_CFT%20Priorities%20(June%2030%2C%202021).pdf).

[8] Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union Administration, Anti-Money Laundering and Countering the Financing of Terrorism Program Requirements ("Agencies' proposed rule"), 89 Fed. Reg. 65242 (Aug. 9, 2024) at 21.

[9] FinCEN, Anti-Money Laundering and Countering the Financing of Terrorism Programs ("FinCEN proposed rule"), 89 Fed. Reg. 55428, 55437 (Jul. 3, 2024).

[10] Agencies' proposed rule at 24-25. The preamble also discusses similar considerations in connection with the frequency of firms' independent testing. See *id.* at 33-34.

[11] *Id.* at 28-30.

[12] Id. at 34.

[13] FinCEN proposed rule, 89 Fed. Reg. at 55439.

[14] Interagency statement at 2.

[15] E.g., FinCEN's proposed rule, 89 Fed. Reg. at 55485 (proposed revision to 31 C.F.R. § 1020.210); Agencies' proposed rule at 75 (proposed revision to OCC regulations, 12 C.F.R. § 21.21).

[16] Agencies' proposed rule at 41; see also FinCEN's proposed rule, 89 Fed. Reg. at 55449.

[17] Agencies' proposed rule at 41.

[18] Interagency statement at 4-5.

[19] Id. at 5.