

# Federal Banking Agencies and FinCEN Seek to Clarify BSA/AML Enforcement

August 28, 2020

On August 13, 2020, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration and the Office of the Comptroller of the Currency (together, the “Banking Agencies”) published a “Joint Statement on Enforcement of Bank Secrecy Act/Anti-Money Laundering Requirements.”<sup>1</sup> FinCEN followed on August 18, 2020 with its own “Statement on Enforcement of the Bank Secrecy Act.”<sup>2</sup>

Although distinct in various ways, these pronouncements shed helpful light on how regulatory authorities approach BSA/AML enforcement matters generally, and what penalties may result on any given set of facts. Together, the statements suggest a uniformity of approach that may help alleviate concerns that different agencies will apply different standards when taking BSA/AML-related enforcement actions against a financial institution within their jurisdiction. They also provide transparency into a process that has long been opaque to financial institutions. The stakes could hardly be higher—in 2018 there were \$4.27 billion in total AML-related fines globally and in 2019 that figure was almost doubled at \$8 billion in AML-related fines globally. In the United States the AML-related fines were staggering with 25 penalties totaling over \$2 billion.<sup>3</sup>

Below, in this Debevoise In Depth, we briefly summarize each of the statements, highlight similarities and differences between them, and discuss their potential import for financial institutions. Three key takeaways emerge:

---

<sup>1</sup> Joint Statement on Enforcement of Bank Secrecy Act / Anti-Money Laundering Requirements (Aug. 13, 2020), available [here](#) [hereinafter Joint Statement].

<sup>2</sup> FinCEN, Statement on Enforcement of the Bank Secrecy Act (Aug. 18, 2020), available [here](#) [hereinafter [FinCEN Statement](#)].

<sup>3</sup> See Cheri Burns, \$8.14 billion of AML fines handed out in 2019, with USA and UK leading the charge (Jan 13, 2020), available [here](#) (2019 figures); Cheri Burns, Analysis From Encompass Shows 2019 Set To Be Year of Record AML Fines (May 30, 2019), available [here](#) (2018 figures).

- The statements continue a recent trend among federal authorities in providing greater clarity and consistency regarding the enforcement process, following similar guidance from the DOJ, in June 2020,<sup>4</sup> and OFAC in May 2019.<sup>5</sup>
- Both the Banking Agencies and FinCEN explain that the most severe enforcement consequences—cease and desist (“C&D”) orders, the imposition of civil money penalties or criminal referrals—will be reserved for significant, programmatic deficiencies rather than isolated or technical violations of the BSA. Additionally, FinCEN emphasizes that it will take action only for violations of law and not “noncompliance with a standard of conduct” derived from agency guidance.
- The supervisory process continues to inform and, in meaningful ways, presage, enforcement activity. Financial institutions appear to be at greatest risk of an enforcement action for long-dated, persistent BSA/AML deficiencies that are identified during examinations (e.g., as “Matters Requiring Attention”).

---

## Relevant Highlights

### The Banking Agencies’ Joint Statement

The Banking Agencies’ Joint Statement details three broad areas in which a public C&D order is effectively required under the relevant statutory authorities, where an institution: (1) fails to establish or maintain a required element or “pillar” of a BSA/AML compliance program; (2) fails to effectively implement its compliance program in the context of specific business activities or products; or (3) displays widespread or pervasive deficiencies in the implementation of its compliance program, such that the program as a whole appears ineffective.

Perhaps even more helpfully, the Joint Statement describes areas in which the Banking Agencies ordinarily would not issue a C&D order. These include issues identified in an examination that have not been “previously reported to the institution” in earlier supervisory communications and made known to the board of directors or senior management and “isolated and technical violations or deficiencies.”<sup>6</sup> Accordingly, it appears that failing to address known issues creates enforcement liability for an institution (unless they can be described as “isolated or technical”), and that the longer

---

<sup>4</sup> See U.S. Dep’t of Justice, Criminal Division, Evaluation of Corporate Compliance Programs (June 2020), <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

<sup>5</sup> See OFAC, A Framework for OFAC Compliance Commitments (May 2019), [https://www.treasury.gov/resource-center/sanctions/Documents/framework\\_ofac\\_cc.pdf](https://www.treasury.gov/resource-center/sanctions/Documents/framework_ofac_cc.pdf).

<sup>6</sup> Joint Statement, *supra* note 1, at 9, 10.

deficiencies remain unaddressed, the greater the likelihood that a public enforcement action could result.

That said, the Banking Agencies acknowledge that some systemic issues will require longer than one examination cycle to remediate, especially where IT upgrades are required, and that an enforcement action should not occur if the institution makes “acceptable substantial progress” toward remediation.<sup>7</sup> In our experience, addressing BSA/AML compliance deficiencies often involves making substantial changes to an institution’s technology infrastructure, including transaction monitoring and customer screening programs. It may be helpful in this regard that the Banking Agencies seem to accept that “long tail” supervisory matters should not result in an enforcement action simply for the length of time required to remediate them.

The Joint Statement also explains that enforcement actions may be taken even in cases where a C&D Order would not ordinarily be issued for a program deficiency. Here—as well as in other “appropriate circumstances”—the Banking Agencies explain that the “form and content” of an enforcement action (which could be informal and private or formal and public) will depend on various factors, including the severity of the concerns, management awareness and culpability, and the primary regulator’s “confidence” that appropriate corrective action will occur.<sup>8</sup> In this respect, the Joint Statement makes plain that, notwithstanding these principles of general application, the Banking Agencies retain significant discretion to tailor an enforcement response to the facts of any case.

### FinCEN’s Statement

FinCEN’s Statement is shorter and more of a summary than the Banking Agencies’ and it focuses principally on procedural rather than substantive matters. Its most detailed section concerns the ten factors FinCEN will consider “when evaluating an appropriate disposition” for actual or potential BSA violations. These generally mirror factors described in the Joint Statement and, as discussed below, suggest a convergence in federal enforcement approaches, including: the nature, severity and “pervasiveness” of the violations; an institution’s history of prior, related enforcement; management’s cooperation, including through self-disclosure; and the presence or absence of efforts to take corrective action.<sup>9</sup> It is noteworthy that FinCEN calls out self-disclosure as a potentially mitigating enforcement factor, in part because—in contrast to, for example, OFAC—FinCEN has not established a procedural mechanism for voluntary self-disclosures and also does not state clearly the type of credit that may be available for such a disclosure.

---

<sup>7</sup> Joint Statement, *supra* note 1, at 9, 10.

<sup>8</sup> Joint Statement, *supra* note 1, at 11.

<sup>9</sup> FinCEN Statement, *supra* note 2, at 2.

Consistent with FinCEN's recent priorities, its Statement departs from the Banking Agencies' in one notable respect: it expressly references enforcement actions against individuals for violating the BSA, including "partners, directors, officers, or employees" who participate in institutional violations.<sup>10</sup> Although the Banking Agencies also have authority to take action, where appropriate, against institution-affiliated parties, only FinCEN emphasizes this fact in its Statement. Finally, despite the clarifications and insight provided in FinCEN's statement, there is still some opacity with respect to the amount of civil monetary penalties sought that is not addressed in the statement.

---

## Practical Implications for Financial Institutions

### Convergence in Federal Enforcement-Related Guidance

A persistent challenge for financial institutions is the number of enforcement authorities to which they are accountable, especially in areas such as BSA/AML, where overlapping jurisdiction and differing expectations exist. Historically, to determine the nature and severity of a potential enforcement action, financial institutions had few guideposts to consult – mostly, but not reliably, prior public enforcement actions and the press releases that accompany them.<sup>11</sup> Thus, by publishing these guidance documents with unprecedented detail regarding their enforcement approaches, the Banking Agencies and FinCEN have helped to remove some of the mystery that has traditionally characterized BSA/AML enforcement. How useful the Joint Statement will ultimately prove to be, however, rests in part on how faithfully the Banking Agencies follow this guidance over time.

The statements also continue a recent trend of greater transparency among federal authorities. They follow, in little more than one year: OFAC's "Framework for OFAC Compliance Commitments," providing unprecedented insight into the agency's expectations for an effective sanctions compliance program;<sup>12</sup> and DOJ's updated (for the second time in two years) "Evaluation of Corporate Compliance Programs" guidance, detailing the factors federal prosecutors weigh when assessing the effectiveness of a

---

<sup>10</sup> *Id.* at 1. FinCEN has taken various actions against individuals in recent years. See, e.g., FinCEN Press Release, *FinCEN and Manhattan U.S. Attorney Announce Settlement with Former MoneyGram Executive Thomas E. Haider* (May 4, 2017); FinCEN Press Release, *FinCEN Penalizes U.S. Bank Official for Corporate Anti-Money Laundering Failures* (Mar. 4, 2020),

<sup>11</sup> Although the federal banking agencies issued guidance in 2007 concerning BSA/AML enforcement, that document was limited in scope and far less detailed than the Joint Statement. See Interagency Statement on Enforcement of Bank Secrecy Act/Anti-Money Laundering Requirements (July 19, 2007), <https://www.fdic.gov/news/press-releases/2007/pr07061a.html>.

<sup>12</sup> See Debevoise Update, *OFAC Guidance and Recent Enforcement Actions: A Road Map for Compliance with U.S. Sanctions* (May 9, 2019) available [here](#).

company's compliance program in criminal investigations.<sup>13</sup> At the same time that DOJ also has signaled its continuing commitment to the “anti-piling on” policy it announced in 2018, these documents have increased clarity and consistency in enforcement approaches and should provide helpful guideposts to institutions navigating future investigations and enforcement actions.<sup>14</sup> That said, although these documents provide insight regarding federal enforcement approaches, they do not address the priorities or procedures followed by state regulators, most notably the New York Department of Financial Services.<sup>15</sup>

### Apparent Priority Areas for BSA/AML Enforcement Activity

The Banking Agencies' Joint Statement highlights certain substantive areas as apparent priorities for BSA/AML enforcement scrutiny, in many ways echoing recent guidance from the Federal Financial Institutions Examination Council.<sup>16</sup> Chief among these appears to be reporting and record keeping requirements, and particularly SARs, which are described as “the cornerstone of the BSA reporting system.”<sup>17</sup> Other areas—the effectiveness of Customer Identification Programs, an institution's internal testing and audit functions—also are called out as areas for which C&D orders likely will be issued if deficiencies are identified. To be sure, the full scope of enforcement actions is available for other deficiencies as well, but these appear to be areas of special concern for the agencies. Most recently, the Federal Financial Institutions Examination Council issued revised sections of the BSA/AML examination manual that emphasized the importance of risk-based approaches that is echoed in the Banking Agencies' Joint Statement.<sup>18</sup>

### Due Process Considerations

Both the Banking Agencies and FinCEN acknowledge that no enforcement action should take a financial institution by surprise. In this respect, the respective statements are consistent with broader efforts, especially within the Federal Reserve, to increase

---

<sup>13</sup> See Debevoise Update, DOJ Updates Guidance on Corporate Compliance Programs (June 8, 2020) available [here](#).

<sup>14</sup> Deputy Attorney General Rod Rosenstein Delivers Remarks to the New York City Bar White Collar Crime Institute (May 9, 2018) (transcript available [here](#)).

<sup>15</sup> See NYDFS Press Release, Superintendent Laceywell Announces DFS Imposes \$150 Million Penalty on Deutsche Bank in Connection with Bank's Relationship with Jeffrey Epstein and Correspondent Relationship with Danske Estonia and FBME Bank (July 7, 2020), [https://www.dfs.ny.gov/reports\\_and\\_publications/press\\_releases/pr202007071](https://www.dfs.ny.gov/reports_and_publications/press_releases/pr202007071) (imposing a penalty for failures to adequately access the risk posed by certain clients given the information publicly available regarding these clients).

<sup>16</sup> FFIEC, Federal and State Regulators Release Updates to BSA/AML Examination Manual (Apr. 15, 2020) <https://www.ffeic.gov/press/pr041520.htm>. See also Debevoise Client Update, Banking Regulators Release Updates to BSA/AML Examination Manual (Apr. 17, 2020) available [here](#).

<sup>17</sup> Joint Statement, *supra* note 1, at 12.

<sup>18</sup> FFIEC, Federal and State Regulators Release Updates to BSA/AML Examination Manual (Apr. 15, 2020) <https://www.ffeic.gov/press/pr041520.htm>. See also Debevoise Client Update, Banking Regulators Release Updates to BSA/AML Examination Manual (Apr. 17, 2020) available [here](#).

fairness and transparency in bank supervision.<sup>19</sup> Specifically, the Banking Agencies make clear that a public enforcement action ordinarily would follow from issues that previously have been identified and communicated to management and boards in the supervisory process; enforcement should never be the first option. FinCEN strikes a similar tone when explaining that institutions will be “afforded an opportunity to respond to and contest factual findings or legal conclusions underlying any FinCEN enforcement action,” which may be even more important given that FinCEN lacks supervisory authority over and thus uses more informal means of communicating with financial institutions, such as undocumented discussions.<sup>20</sup> Although neither statement fundamentally changes the process through which enforcement actions originate, these express affirmations of due process concerns may prove helpful to institutions going forward.

\* \* \*

Please do not hesitate to contact us with any questions.

---

<sup>19</sup> Vice Chair for Supervision Randal K. Quarles, Speech at Law and Macroeconomics Conference (Sept. 27, 2020) (transcript available [here](#)) (noting “transparency and fairness are pillars of due process”).

<sup>20</sup> FinCEN Statement, *supra* note 2, at 1.

**NEW YORK**

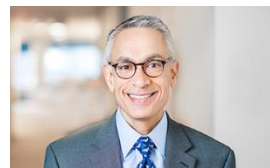


Helen V. Cantwell  
hcantwell@debevoise.com



David Sarratt  
dsarratt@debevoise.com

**WASHINGTON, D.C.**



Satish M. Kini  
smkini@debevoise.com



Bruce E. Yannett  
beyannett@debevoise.com



Lisa Zornberg  
lzornberg@debevoise.com



David G. Sewell  
dsewell@debevoise.com



Zila Acosta-Grimes  
zracosta@debevoise.com



Noelle E. Lyle  
nelyle@debevoise.com



Tara Raam  
traam@debevoise.com