ELECTRONIC TRANSACTIONS ASSOCIATION

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August 5, 2022

Via E-Rulemaking Portal

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

Re: Comments Regarding Implementing a FinCEN No-Action Letter Process - Docket Number FINCEN-2022-0007 and RIN 1506-AB55

On behalf of the Electronic Transactions Association ("ETA"), we appreciate the opportunity to share our thoughts on the Financial Crimes Enforcement Network's ("FinCEN") advanced notice of proposed rulemaking relating to the implementation of a no-action letter process. ETA supports FinCEN's effort to promote innovation and to make it easier for companies to comply with the law.

ETA's members are dedicated to providing innovative, convenient, secure, and timely financial services and products that make their customers' lives easier. No-action letter policies provide mechanisms for innovative companies to launch new products that serve consumer and small businesses' best interests while complying with laws or regulations that may be ambiguous or unduly burdensome when applied to new products that were never envisioned when the law or regulation was first adopted. If FinCEN were to create no-action letter practices, this would represent potentially significant improvements in the financial services that customers can receive, as well as the regulatory environment for financial services.

Who We Are

ETA is the world's leading advocacy and trade association for the payments industry. Our members span the breadth of significant payments and fintech companies, from the largest incumbent players to the emerging disruptors in the U.S and in more than a dozen countries around the world. ETA members make commerce possible by processing more than $21 trillion in purchases worldwide and deploying payments innovation to merchants and consumers.

ETA's Input on FinCEN's ANPRM

Regulatory Coordination

The value of FinCEN establishing a no-action letter is contingent upon its ability to ensure that companies receiving the no-action letter do not face enforcement, or the risk of enforcement, for activities covered under the no-action letter.

ETA encourages FinCEN to work with and facilitate coordination and cooperation among regulatory agencies. The proposal provides a good starting point and a mechanism for coordination with a goal of promoting a consistent regulatory treatment of innovative financial services products. FinCEN should continue to work with other regulators and state authorities to enter into agreements to issue similar forms of no-action letters. The willingness to facilitate coordination makes the no-action letter process more appealing for potential applicants within the jurisdiction of multiple state and federal regulatory agencies. Such coordination, when formalized, will ultimately result in a regulatory framework that is efficient and conducive to innovation.

While no action letter and sandbox efforts have been successful in countries with more centralized financial regulatory structures, such as the United Kingdom and Singapore, previous attempts to realize the benefits of these efforts in the U.S. have largely failed to attain their goals of industry uptake. This is largely due to the complex and overlapping jurisdictions that exist in our regulatory environment. The aforementioned issues with the U.S. regulatory environment disincentivize industry engagement in a no-action letter, because financial institutions that receive a no-action letter by one agency may still face enforcement by another regulator that oversees them for the same conduct.

Thus, FinCEN should try to leverage its delegating authority under Bank Secrecy Act to ensure that "functional regulators" do not create undue examination and enforcement burdens for companies under their jurisdictions that may be conducting activities pursuant to the terms of a FinCEN no-action letter.

Confidentiality

Due to the potential reputational and operational concerns raised by public disclosure of a firm's engagement in FinCEN's no-action letter process, it seems prudent to ensure that involvement in the program is not publicly shared by the agency. This is important because firms that may be interested in obtaining a no-action letter may be wary of providing competitive information which, without that protection, could be accessed by competitors and ultimately make the no-action letter approach an unappealing one.

To expound on the reputational and operational risks associated with participation, while a firm might benefit from the press associated with gaining a no-action letter, they would likely face a negative impact to their reputation if they were either denied a no-action letter or have their no-action letter revoked, or if confidential business information were shared in connection with a no-action letter approval, denial, or revocation.

Firms that experience denial or revocation of their no-action letter application may face the consumer perception that they are engaging in unsafe and unsound practices, even if this is not the case. Operational risks could also be realized from public disclosure of a firms participation in the program, because fraudsters and money launderers could target companies engaging in no-action letters in an attempt to benefit from an untested innovation. It is important to note that these risks are not unique to FinCEN's no-action letter but given the jurisdiction of the agency and the letters, it seems that the risks could be heightened due to the historical examples of money laundering and funding illicit activities.

As a result, ETA requests that the name of any firm engaged in any FinCEN no-action letter process not be publicly disclosed in connection with FinCEN's evaluation of the requested no-action letter or any final approval, denial, or revocation of a no-action letter. Additionally, ETA requests that FinCEN no-action letter policies include a process whereby requesting firms may identify certain information as confidential business information such that the information will be redacted in any public no-action letter issued by FinCEN. For the avoidance of doubt, ETA nonetheless requests that approved no-action letters be made public (subject to these redactions) so that other financial institutions in the market and consumers can better understand FinCEN's interpretation of its rules and the regulatory requirements that apply to available financial services products.

Appeals Process

Firms that are denied for a no-action letter should be entitled to an appeals process. The appeals process should provide firms with additional consultation with FinCEN to help remedy application issues and ensure that the firms are given a fair opportunity to make their case to agency officials. This effort led by

FinCEN would ensure that agencies and firms build a strong collaborative relationship that will help ensure further collaboration throughout the no-action letter process.

Regulatory Sandbox

ETA is also supportive of establishing a national regulatory sandbox. A regulatory sandbox will help to provide a positive policy environment for companies to test innovative new financial services products while ensuring they have appropriate consumer and financial crime protections. This proposal would allow firms to do meaningful experimentation for innovative products, services, and processes. Permitting meaningful experimentation in the real world, subject to appropriate limitation to ensure that consumers are protected, is highly beneficial for regulators, consumers, and financial services providers alike.

Responses to Specific Questions

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

> FinCEN should ensure that it has jurisdiction prior to issuing a no-action letter in order to ensure that firms engaged in the process do not experience unnecessary costs or potential enforcement risk through their participation in the no-action letter process.

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

> FinCEN should publish the standards and procedures it will use to govern no-action letter revocations. ETA encourages FinCEN to reference the CFPB's no-action letter process as an example of how this could work. Furthermore, outside of exigent circumstances, and consistent with our answer to Question 27, firms should be given a wind-down period before FinCEN could take enforcement action against practices that were covered by a no-action letter.

(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?

> If a no-action letter is revoked, practices conducted by the recipient of the no-action letter, as well as any other market participants conducting similar practices, during the time that the no-action letter was in effect should not be subject to enforcement, provided that the no-action letter recipient or other market participant conducted these practices consistent with any requirements specified in the no-action letter.

(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?

> ETA suggests that FinCEN publishes both the written request (anonymizing the requestor's identifying information) and denial letter, including detailed legal analysis explaining why FinCEN denied the no-action letter. This way, the public can learn about issues that FinCEN does not want to consider for a no-action letter, as well as the agency's rationale for denying a request.

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(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?

No-action letters should be treated as precedent for FinCEN and other relevant federal and state authorities both with respect to the financial institution that requested the no-action letter and any other market participant conducting similar activity covered by the no-action letter (provided that any requirements specified in the no-action letter are complied with).

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

ETA believes FinCEN should adopt fair and transparent procedures to receive and consider no-action letter requests. Firms should receive an acknowledgment of receipt from the agency and an expected timeline for a response – similar to the CFPB's no-action letter process.

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ETA appreciates the opportunity to provide input on this important issue. If you have any questions, please contact me or ETA's Senior Vice President of Government Affairs, Scott Talbott at stalbott@electran.org.

Sincerely,

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