August 5, 2022

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Enforcement and Compliance Division
P.O. Box 39
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Re: No Action Letter Process
Docket Number FINCEN-2022-0007
RIN 1506-AB55

Via: Regulations.gov

Dear Mr. Das:

I am pleased to provide these comments in response to the Advance Notice of Proposed Rulemaking regarding the No-Action Letter Process.[1]

Introduction

A robust no action letter process, fairly administered so as to support innovation and directed toward achieving compliance in furtherance of the underlying policy goals of Congress, would be constructive. It is time to move past "gotcha" enforcement actions and examinations, sometimes imposing massive fines, for violations of the complex morass of deeply ambiguous, unclear, poorly drafted AML-CFT regulations. It is time to provide actual guidance and intelligible, clear rules to regulated entities with the objective of achieving compliance and furthering FinCEN's law enforcement aims. FinCEN has not done an adequate job of this in the past.

The most blatant recent example is the ambiguity laden, opaque and costly beneficial ownership reporting proposed rule implementing the Corporate Transparency Act.[2] Unless the proposed rule is substantially amended, it will be unusually damaging since it regulates, and will be enforced against, millions of the smallest businesses and bury FinCEN in useless, irrelevant paper.[3] The proposing release also demonstrated FinCEN's long standing obliviousness to the

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[1] Department of Treasury, Financial Crimes Enforcement Network, "No-Action Letter Process ,"Advance Notice of Proposed Rulemaking, *Federal Register*, Vol. 87, No. 108, June 6, 2022, pp. 34224-34228 [Docket Number FINCEN-2022-0007, RIN 1506-AB55] https://downloads.regulations.gov/FINCEN-2022-0007-0001/content.pdf.
[2] "Beneficial Ownership Information Reporting Requirements," Notice of Proposed Rulemaking, Financial Crimes Enforcement Network, Department of Treasury, *Federal Register*, Vol. 86, No. 233, December 8, 2021, pp. 69920-69974.
[3] Comment Letter of David R. Burton regarding Beneficial Ownership Information Reporting Requirements, February 7, 2022 https://downloads.regulations.gov/FINCEN-2021-0005-0438/attachment_1.pdf.

costs imposed on companies, especially small firms, and made demonstrable factual errors.[4] The proposed rule regarding "Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets"[5] is another example of a poorly thought through proposal that would hinder rather than promote the purposes of the AML-CFT regime *and* destroy innovation.[6]

While FinCEN's openness to a rulemaking creating a no-action letter process is welcome, such a process will only be helpful in practice if FinCEN makes a serious effort to make it work. FinCEN's apparent unwillingness to use administrative rulings and exceptive or exemptive relief to provide meaningful guidance to regulated entities is not cause for optimism.[7]

The report submitted to Congress by FinCEN in June 2021 regarding potentially creating a no-action letter process was constructive but also deeply ironic, particularly its discussion of cross-regulator no-action letters.[8] In that report, FinCEN goes on at substantial length about its assessment "that such a process [cross-regulator no-action letters] involving multiple agencies and their respective authorities would present legal and practical challenges."[9] It states that "even if a cross-regulator no-action letter process could be implemented effectively, its execution would raise significant logistical challenges, including at least the need to establish complex processes for coordination and final approval. Moreover, additional resources would be necessary for the implementation of such a cross-regulator process, including hiring and retention of personnel to process no-action letter submissions, manage the interagency coordination, and administer corresponding tracking and other systems to implement such a process effectively. While these logistical and resource challenges may not be insurmountable, they pose significant challenges."[10] Moreover, "a cross-regulator no-action letter process would likely be slower and more time consuming than a single-agency no-action letter process because of the various points at which different regulators would need to coordinate. For example, Consulting Parties who already have a no-action letter process explained that they sometimes find an initial submission to be incomplete or otherwise deficient on its face, potentially requiring multiple rounds of communication with the submitting party in order to obtain additional information and arrive at a submission that can be evaluated."[11] This frank, if unintended, acknowledgement of how unwieldy, complex, and expensive that the AML-CFT

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[4] Ibid.

[5] "Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets," Financial Crimes Enforcement Network (''FinCEN''), Treasury, Proposed Rules, *Federal Register*, Vol. 85, No. 247, December 23, 2020 (RIN 1506–AB47) https://www.govinfo.gov/content/pkg/FR-2020-12-23/pdf/2020-28437.pdf.

[6] Comment letter of David R. Burton regarding Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets, March 29, 2021 https://www.crowdfundinsider.com/wp-content/uploads/2021/04/Comment-Letter-of-David-R-Burton-Heritage-Foundation-032921-re-Requirements-for-Certain-Transactions-Involving-Convertible-Virtual-Currency-or-Digital-Assets.pdf.

[7] See discussion below.

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

[9] Ibid. at p. 5.

[10] Ibid. at p. 6.

[11] Ibid. at p. 6.

system has become is welcome. As discussed below, the current system is having important, measurable and adverse effects on our financial sector. And, notwithstanding the massive costs incurred, it is of limited effectiveness in actually combatting illicit finance and terrorism.

In all seriousness, if FinCEN finds the prospect of dealing with the AML-CFT bureaucracy so daunting, how in the world does the agency think those in the private sector that must deal with this morass feel? Any regulated entity is going to have engage with *at the very least* four AML-CFT regulators, to wit, FinCEN, the IRS, its functional regulator and state level AML-CFT regulators. Most will have to deal with more. Then, of course, there is OFAC and other similar regulators. And in most cases an SRO or two.

FinCEN is in a position to do something about this mess. It should clarify its own rules and work with Congress and other agencies (most of whom have AML-CFT authority delegated by FinCEN)[12] to simplify, harmonize and clarify the AML regime. This would have the effect of reducing the egregious costs imposed by the system and improving the ability of the system to impede illicit finance. It is relatively rare in the policy world to find a genuine potential win-win. But this is one.

Besides actual regulations, FinCEN currently uses administrative rulings and exceptive or exemptive relief to provide guidance to regulated entities. It uses administrative rulings and exemptive relief, however, quite rarely – only about once a year.[13] There are, presumably, some that are unpublished but those are of no value to anyone other than the one firm that got the secret ruling or exemptive relief. FinCEN's actual regulations[14] are extremely general (other than those relating to internal matters) and contain little more than vague pronouncements.[15] Thus,

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[12] Pursuant to 31 CFR § 1010.810 power and authority has been delegated by FinCEN to the Comptroller of the Currency, the Federal Reserve System, the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, the National Credit Union Administration, the Securities and Exchange Commission, the Commissioner of Customs and Border Protection, the Internal Revenue Service, the Commodity Futures Trading Commission and the Federal Housing Finance Agency. Many of these agencies, in turn, have delegated authority or imposed AML-CFT requirements on various self-regulatory organizations (SROs) such as the Financial Industry Regulatory Authority or the National Futures Association. State agencies also enforce AML-CFT requirements. Excluding the state banking and securities agencies, there are at least 15 federal agencies and national SROs involved in AML-CFT enforcement. The rules and requirements are not uniform.

[13] Administrative Rulings, FinCEN https://www.fincen.gov/resources/statutes-regulations/administrative-rulings.

[14] See 31 CFR Chapter X.

[15] Banks, for example, must make suspicious activity reports (SARs) if "the bank knows, suspects, or has reason to suspect that:

> (i) The transaction involves funds derived from illegal activities or is intended or conducted in order to hide or disguise funds or assets derived from illegal activities (including, without limitation, the ownership, nature, source, location, or control of such funds or assets) as part of a plan to violate or evade any Federal law or regulation or to avoid any transaction reporting requirement under Federal law or regulation;
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> (ii) The transaction is designed to evade any requirements of this chapter or of any other regulations promulgated under the Bank Secrecy Act; or
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> (iii) The transaction has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the bank knows of no reasonable explanation for the

because administrative rulings or exemptive relief are rarely forthcoming, and even more rarely published, regulated entities must rely on less formal guidance such as alerts, advisories, notices, bulletins and fact sheets to get some idea about FinCEN's regulatory posture.

FinCEN defines its mission thusly: "FinCEN's mission is to enhance U.S. national security, deter and detect criminal activity, and safeguard financial systems from abuse by promoting transparency in the U.S. and international financial systems."[16] It has an obligation to discharge this mission as cost effectively as possible as a matter of good government and under Executive Order 12866 and OMB Circulars A-4 and A-94.[17] A no-action letter process, if used regularly, if administered well and if the no-action letters are published (i.e. transparent) could add clarity to the AML regime and reduce uncertainty and costs experienced by regulated entities. Such a process should be pursued.

That said, the benefits of such a no-action letter process will primarily go to large actors because they will be the firms with enough at stake to hire the attorneys to write the request for a no action letter and navigate the process. Small firms, however, will benefit primarily from the publication of no action letters that they or their attorneys can review when assessing how to comply with FinCEN requirements.

The costs imposed by the AML-CFT regime are mammoth. Various estimates range from $6 billion to $42 billion annually for U.S. firm compliance.[18] To put this in context, the cost of

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> transaction after examining the available facts, including the background and possible purpose of the transaction."

31 CFR §1020.320(a)(2).

Based on these very vague requirements, depository institutions filed about 1.4 million SARs in 2021 and other regulated entities filed another 1.6 million SARs. See "SAR Stats," https://www.fincen.gov/reports/sar-stats.

[16] Mission of FinCEN https://www.fincen.gov/mission-fincen.

[17] Executive Order 12866, *Federal Register*, Vol. 58, No. 190, October 4, 1993 https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf; Circular No. A-4 https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf; Circular No. A-94 https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A94/a094.pdf (see also the annually updated appendices).

[18] "True Cost of Financial Crime Compliance Study," United States and Canada Edition, LexisNexis Risk Solutions September 2021 https://risk.lexisnexis.com/insights-resources/research/true-cost-of-financial-crime-compliance-study-for-the-united-states-and-canada ("The total projected cost of financial crime compliance in the U.S. and Canada for 2021 is $49.9 billion, up 19% from 2020 and 58% from 2019"). $42 billion of this cost in the U.S. and the costs include not only AML related costs but also sanctions compliance costs (e.g. OFAC). "Opportunities Exist to Increase Law Enforcement Use of Bank Secrecy Act Reports, and Banks' Costs to Comply with the Act Varied, Government Accountability Office, GAO-20-574, September 2020 https://www.gao.gov/assets/710/709745.pdf. See in particular, Appendix IV: Summary of Results from Prior Studies of Bank Secrecy Act and Anti-Money Laundering Compliance Costs, 2016– 2018. David R. Burton and Norbert J. Michel, "Financial Privacy in a Free Society, Heritage Foundation Backgrounder No. 3157, September 23, 2016 http://thf-reports.s3.amazonaws.com/2016/BG3157.pdf. David R. Burton, "Financial Privacy in a Free Society: Balancing the Needs of Citizens, Small Businesses, and Government," Testimony before The Committee on Ways and Means Subcommittee on Oversight, United States House of Representatives at a hearing on "The Pandora Papers and

paying everyone in every state and local police force in the U.S. is roughly $92 billion.[19] It is, therefore, far from clear that the current AML-CFT regime is a cost-effective use of scarce resources. FinCEN and Treasury leadership need to take serious steps to simplify and streamline the AML-CFT regulatory regime both internally and among agencies.

These large costs have a differential impact on large and small institutions. Small firms are the least able to deal with regulatory compliance costs because regulatory compliance costs do not increase linearly with size. Whether measured by gross revenues, number of employees, number of customers or some other metric, regulatory compliance costs have a disproportionate adverse impact on smaller firms and create a competitive advantage for larger firms. The GAO recently completed a study demonstrating this in detail with respect to banks.[20] The steady decline in the number of broker-dealers is largely attributable to AML compliance costs.[21] And so on.[22]

Responses to Specific Requests for Comment

(Q1) 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?

(R1) FinCEN should consider how it is going to promote the new no action letter process to regulated entities. It should establish a strong presumption that the no action letters will be published rather than issued in secret. This is of particular importance to smaller regulated entities. It also needs to engage in a serious systematic review of how its regulations can be improved so that clarity and detailed guidance is provided and that fewer no action letters will be required.

Hidden Wealth," December 8, 2021
https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/D.BurtonTestimony.pdf
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[19] Occupational Employment and Wages, Bureau of Labor Statistics, May 2021; 1,402,270 employees times annual mean wage $ 65,530; 33-0000 Protective Service Occupations https://www.bls.gov/oes/current/oes330000.htm.

[20] "Opportunities Exist to Increase Law Enforcement Use of Bank Secrecy Act Reports, and Banks' Costs to Comply with the Act Varied, Government Accountability Office, GAO-20-574, September 2020 https://www.gao.gov/assets/710/709745.pdf.

[21] David R. Burton, "Reforming FINRA," Heritage Foundation Backgrounder No. 3181, February 1, 2017 https://www.heritage.org/sites/default/files/2017-02/BG3181.pdf. See chart 2. The number of FINRA member firms has declined by roughly another 400 (or 10 ½ percent) since this paper was written. See Statistics, Member Firm Statistical Review 2006 - 2020 https://www.finra.org/media-center/statistics.

[22] David R. Burton and Norbert J. Michel, "Financial Privacy in a Free Society, Heritage Foundation Backgrounder No. 3157, September 23, 2016 http://thf-reports.s3.amazonaws.com/2016/BG3157.pdf. David R. Burton, "Financial Privacy in a Free Society: Balancing the Needs of Citizens, Small Businesses, and Government," Testimony before The Committee on Ways and Means Subcommittee on Oversight, United States House of Representatives at a hearing on "The Pandora Papers and Hidden Wealth," December 8, 2021
https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/D.BurtonTestimony.pdf
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(Q2) 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?

(R2) There is little doubt in my mind that other regulators and courts will be substantially influenced by the positions that FinCEN adopts in its no action letters.

(Q3) Would a no-action letter process involving only FinCEN be useful? Why or why not?

(R3) Yes. It will enable well-funded regulated businesses to get actual answers rather than having to guess as to FinCEN's regulatory posture. Smaller firms will be able to read them (provided they are published) and adjust their policies and programs accordingly. Moreover, there is little doubt in my mind that other regulators and courts will be substantially influenced by the positions that FinCEN adopts in its no action letters.

The SEC process – the one with which I have the most familiarity – works reasonably well. One of the reasons for this, of course, is that there are no action letters addressing a lot of issues.

That said, many of these issues would be better addressed by rulemakings.

(Q6) 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?

(R6) This, of course, needs to be clarified to the extent it can be. And FinCEN should make a serious effort to do so either formally through memoranda of understanding relating to the delegation process or otherwise. It would seem that in practice other agencies would typically be willing to follow FinCEN's lead on AML issues. If not, they should say so. If they adopt a position contrary to FinCEN, they will of course be on much shakier ground if they choose to litigate since a court is not going to automatically presume bad faith or *mens rea* on the part of a private firm that sought and received a no action letter and will analyze the other agency's position with greater care.

(Q8) 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? Contours and Format of a FinCEN No-Action Letter Process

(R8) FinCEN should adopt a rule that governs the no action letter process.

(Q9) 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?

(R9) The only limitation should be that the factual circumstances involve no misrepresentation.

(Q10) 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?

(R10) Typically, no action letter requests will come up with respect to prospective action. However, some regulated entities may want to, in effect, determine FinCEN's top officials' posture via a no action letter request if they believe that an examiner is being unreasonable or not acting in accordance with informal guidance issued by FinCEN. I see absolutely nothing wrong with that. There is massive ambiguity in FinCEN rules. Even people of good faith are likely to disagree.

(Q16) 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?

(R16) In large, complex corporations, limiting the application of the no action letter to just the parent holding company may well make them close to useless or, alternatively, require the corporation to make dozens of nearly identical requests. This will waste both private and FinCEN resources and damage the no action letter process considerably. The point of the process should to provide guidance and achieve compliance not to create technical backdoors so FinCEN or other regulators can adopt one posture toward the parent and another towards subsidiaries or affiliates in pursuit of fines or headlines.

(Q17) 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? 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.

(R17) I think it is entirely reasonable for FinCEN to require that the no action letter request it actually makes a determination with respect to be in writing. It will, however, save both FinCEN

and private entities time and money to allow for informal, oral consultations before the written request is made.

(Q18) Should FinCEN determine that it has jurisdiction prior to the issuance of no-action letters?

(R18) Yes.

(Q20) 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?

(R20) In general, if FinCEN asserts jurisdiction because the BSA or some other U.S. law applies, then a no action letter would be appropriate.

(Q21) 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?

(R21) If the factual recitations in the request for the no action letter are still accurate then the no action letter should remain in effect. If not, then on ordinary legal principles it would not apply because the predicate facts would no longer be accurate. Published no action letters are of value to all regulated entities, not just the firm that submitted the request.

(Q22) Should there be any limitations on FinCEN's ability to change the positions reflected in prior no-action letters? If so, under what circumstances?

(R22) The FinCEN rule should require that FinCEN give notice that it is changing its position and withdrawing a no action letter.

(Q25) 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.)

(R25) By the terms of any normal no action letter, the no action commitment is predicated on the proffered facts being accurate in the no action letter itself. Failure to provide requested information has a simple solution. FinCEN would simply not issue the no action letter until it gets what it wants. All of this is fairly straightforward. The business writes a letter to FinCEN saying "If the facts are A, B and C and I do X, Y and Z, will you launch an enforcement action against us?" FinCEN replies "If the facts are A, B and C and you do X, Y and Z, we will not launch an enforcement action against you." Obviously, if the facts are not A, B and C or the business does not do X, Y and Z, then the no action letter does not apply whether or not it is "revoked."

(Q26) Should no-action letters have expiration dates? If so, under what circumstances would an expiration date be appropriate?

(R26) In general, no they should not have expiration dates. If FinCEN changes its position, it should revoke the no action letter and give notice. These no action letters should almost all be published and therefore made available to other regulated entities.

(Q27) 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?

(R27) If FinCEN tries to adopt the position that the no action letters can be ignored retroactively and therefore mean literally nothing, then you might as well not launch the effort. No one will trust you.

(Q30) 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?

(R30) Denials can be as useful as issuances to the regulated community. The name of the requesting entity is not particularly important but neither it is not clear to me why it should be withheld. The proffered facts and the facts that FinCEN thinks the facts could give rise to an enforcement action are what is important.

(Q33) 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?

(R33) In general, they should not be confidential. In general, government policy should be known by those that must comply with that policy. Secret deals should not typically be cut. Transparency should be the presumption *not* secrecy. Secrecy should only be permitted upon meeting specified, narrow criteria. Having these no action letters be public will enable smaller firms to better understand what is required of them, even if they cannot cost effectively make the requests themselves.

(Q34) 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?

(R34) Similarly situated regulated entities should be treated the same. This is a bedrock principle of justice recognized by the equal protection and due process clauses of the constitution. If

FinCEN regulates otherwise, it would be acting in a genuinely arbitrary and capricious manner. So, if actor alphas' facts and actions are the same as actor betas' facts and actions, then the regulatory outcome should be the same. So yes. If FinCEN wants to change its policy, then it should revoke the no action letter with appropriate notice.

(Q38) What procedures should be put in place for FinCEN to consult with other relevant regulators or law enforcement agencies regarding no action letter requests?

(R38) In general consultation is good. In general, tax, securities and banking regulators should take their lead regarding AML issues from FinCEN and FinCEN is in a position to largely make that happen, I suspect, because of the terms of the delegating memorandums of understanding (which may have to be moderately revised).

(Q39) How can FinCEN best balance the need to consult other regulators or law enforcement with the desires of submitting parties for confidentiality and expediency?

(R39) In general, I do not think the submitting parties should be afforded confidentiality and the no action letters should be published. Secret deals are inappropriate and the publication of the letters will help other regulated entities understand FinCEN's enforcement posture and requirements. Transparency should be the presumption *not* secrecy. Secrecy should only be permitted upon meeting specified, narrow criteria. Having these no action letters be public will enable smaller firms to better understand what is required of them, even if they cannot cost effectively make the requests themselves.

The SEC publishes its no action letters.[23] Even the IRS publishes its private letter rulings with some redaction of things like tax identification numbers and other PII.[24]

Sincerely,

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[23] Staff No Action, Interpretive and Exemptive Letters, Securities and Exchange Commission https://www.sec.gov/regulation/staff-interpretations/no-action-letters.
[24] Written Determinations, Internal Revenue Service https://www.irs.gov/written-determinations.