

# FinCEN Explains What Guides Its Enforcement Decisions

**The Capital Commitment Blog** on **September 16, 2020**

On [August 18, 2020](#), the Financial Crimes Enforcement Network (FinCEN), which is the primary regulator and administrator of the Bank Secrecy Act (BSA), issued a [statement](#) on enforcement of the BSA. The requirements of the BSA typically apply to financial institutions, but in certain circumstances the Act applies to nonfinancial businesses and individuals.

FinCEN's statement attempts to clarify when the agency chooses to bring enforcement actions for violations of the BSA. The statement is noteworthy in part because in its role in administering the BSA, FinCEN is the agency that issues rules and guidance to covered industries. Historically, FinCEN did not bring many of its own enforcement actions – in fact, the agency lacks authority to enforce its own civil monetary penalties and [relies on the Civil Division of the Department of Justice](#) to do so. But over the last decade, FinCEN has taken a far more aggressive role in filing its own enforcement action under the BSA. Unlike criminal cases under the BSA, which require the government to prove intentional, willful violations of the statute, the standards that govern FinCEN's enforcement actions are murkier and merely require reckless disregard. FinCEN's statement provides a rare explanation of what the agency considers in bringing an enforcement action. According to FinCEN, it looks to the following factors in determining whether to initiate an enforcement action:

1. Nature and seriousness of the violations, including the extent of possible harm to the public and the amounts involved.
2. Impact or harm of the violations on FinCEN's mission to safeguard the financial system from illicit use, combat money laundering, and promote national security.
3. Pervasiveness of wrongdoing within an entity, including management's complicity in, condoning or enabling of, or knowledge of the conduct underlying the violations.
4. History of similar violations, or misconduct in general, including prior criminal, civil, and regulatory enforcement actions.

5. Financial gain or other benefit resulting from, or attributable to, the violations.

FinCEN notes that it reviews these factors in evaluating whether to bring an enforcement action. While none of these factors are surprising, the very fact that FinCEN has highlighted these factors as guideposts for enforcement suggests that where they do not exist, firms and individuals can emphasize their absence as mitigating factors that weigh against an enforcement action.

FinCEN explains its enforcement process as follows: (1) FinCEN will seek to establish a violation of law based on applicable statutes and regulations, but will not treat noncompliance with a standard of conduct announced solely in a guidance document as itself a violation of law; (2) parties will be given an opportunity to respond to and contest any underlying factual findings or legal conclusions; and (3) upon identifying an actual or possible violation, FinCEN will take one of the steps below.

1. **No Action:** FinCEN may close a matter with no additional action, and may reopen the matter if FinCEN obtains new material information concerning the matter or becomes aware of additional violations.
2. **Warning Letter:** FinCEN may issue a warning through a supervisory letter or similar communication.
3. **Equitable Remedies:** FinCEN may seek an injunction or equitable relief to enforce compliance when FinCEN believes an entity or individual has violated, is violating, or will violate the BSA.
4. **Settlements:** As part of a settlement, FinCEN may require both remedial undertakings and civil money penalties.
5. **Civil Money Penalties:** FinCEN may assess a civil money penalty.
6. **Criminal Referral:** If circumstances warrant, FinCEN may refer a matter to law enforcement agencies for criminal investigation and/or criminal prosecution.

As money-laundering schemes become more sophisticated, there has been widespread concern over the efficiency of the BSA and public pressure on financial regulators to bring their own cases, not simply act as examiners. FinCEN's latest statement on its own enforcement priorities and process is useful for regulated entities and financial institutions – not only in clarifying where FinCEN draws its own lines, but also in suggesting potential defenses and mitigating arguments when dealing with the agency.

[View Original](#)

- **Seetha Ramachandran**

Partner

- **Hena M. Vora**

Associate