State Money Transmission Regulators Announce Universal Exam Program

Overview: State money transmission regulators, through their advocacy organization, the Conference of State Bank Supervisors (“CSBS”), have announced a new program that will allow a single regulatory exam to satisfy all participating states. The program, called MSB Networked Supervision, will allow licensed money transmitters operating in at least 40 states to undergo a single comprehensive examination to satisfy the supervision requirements in all participating states.

Background and Context

Simply put, the money transmission regulatory framework in the US is a patchwork. Unlike the banking regulatory scheme, where both federal preemption and reciprocity among states allow banks to operate nationally with a single charger, a money transmitter must be licensed by 49 states plus the District of Columbia, Puerto Rico, Guam, and the US Virgin Islands in order to operate across the entire United States. The costs associated with obtaining all these licenses can be prohibitively high, and the process historically could take up to a year or more. In addition, to maintain its licenses, a money transmitter must also submit to periodic examination by each jurisdiction. Given that each examination can take a week or two, depending on the size and complexity of the business and the scope of the exam, being examined is a nearly full-time operation for some licensees.

The combination of complexity and cost to obtain and maintain more than fifty licenses has periodically applied some pressure on legislators and federal regulators to cut the Gordian knot with a preemptive federal solution. However, a national license that preempts state licenses could pose an existential threat to some state regulators. This tension is best illustrated by the battle over the Office of the Comptroller of the Currency’s (the “OCC”) so-called fintech charter.

In 2016, the OCC began moving toward offering a special purpose national bank charter to fintech companies. It was believed that this fintech bank charter could allow companies that offer lending or payment products to operate nationally without the burden of multistate licensing. The OCC officially began accepting charter applications from fintech companies in July 2018. Based on the belief that non-depository financial institutions should be the province of state regulation, several lawsuits were brought by the states to
challenge the OCC’s authority to issue these charters. Immediately after the OCC issued a proposed licensing manual for fintech charters in 2017 (before the agency was even accepting applications), both CSBS and the New York Department of Financial Services (“NYDFS”) filed suits in federal court, essentially arguing that the National Bank Act did not authorize the OCC to charter institutions that do not accept deposits. Both suits were dismissed for being premature. Undeterred by the setback, both CSBS and NYDFS filed new lawsuits in 2018 after the OCC announced it would accept charter applications. In September 2019, the CSBS suit was again dismissed. The NYDFS suit currently sits before the U.S. Court of Appeals for the 2nd Circuit.

In addition to arguing that the OCC’s special purpose fintech charter exceeds the agency’s statutory authority, the states also argue that the OCC fintech charter harms state regulators. CSBS filed a brief in the NYDFS case before the 2nd Circuit in which it claimed, “Because the OCC has circumvented the process for active companies to switch to national charters and its approach retroactively deprives states of their supervisory authority, [the NYDFS] is actually injured even before a charter is granted.”

In addition to threat posed by a national bank charter, state money transmission regulators have felt pressure from industry. It is understandable, therefore, that regulators, on their own and through regulator associations such CSBS and the Money Transmitters Regulators Association (“MTRA”), have made significant efforts in recent years to modernize and streamline the state-based national regulatory framework.

In 2017, CSBS announced a concerted initiative called Vision 2020 to gather and implement ideas for bringing state financial regulation forward. The mandate of Vision 2020 is to seek input from the regulated industries, harmonize multistate regulatory practices, streamline the licensing process, and make supervision of non-depository institutions generally more efficient. Toward this end, CSBS expanded the use of the Nationwide Mortgage Licensing System (“NMLS”) to money transmission licensing (rebranding it as the Nationwide Multistate Licensing System in the process) and established it as a single technology platform for submission of money transmission applications to all applicable regulators at one time. CSBS also facilitated the creation of the State Examination System (“SES”). SES is intended to be a technology platform that allows states to coordinate multistate examinations in a way that is similar to how NMLS provides a single point of contact for multistate licensing. The next step in this process of standardizing requirements and procedures across states is the launch of MSB Networked Supervision.

Details of MSB Network Supervision

Under the MSB Networked Supervision program, a single state will oversee a group of examiners from multiple state regulatory agencies. The program was piloted in 2019 and 2020 under the title “One Company, One Exam.” A representative of Western Union, which participated in the pilot program, stated that “the impact of this new approach to multistate exams will be significant in terms of driving harmonization and streamlining of state supervision across the board.” CSBS has not released many details about how the program will operate in 2021, but the program clearly is building on years of experience developing multistate exams, which have been largely successful and generally supported by the industry.

Outlook: While the precise details of the program have not been fully revealed, the prospect of conducting a single examination in place of dozens should be welcomed by the industry. MSB Networked Supervision has great potential to significantly reduce the regulatory burden on money transmission licensees. At the same time, some federal regulators – and potentially lawmakers – remain interested in pursuing potential alternatives to the current multistate licensing regime, through the fintech charter, a more limited payments charter (as recently proposed by OCC Acting Comptroller Brian Brooks) or a federal money transmitter license. Whether the fintech industry will advocate as strongly for such federal alternatives – in the face of opposition from the banking industry and some consumer advocacy groups – while benefiting from MSB Networked Supervision remains to be seen.
Federal Regulators Provide Transparency Into BSA Enforcement

**Overview:** In August, the federal banking regulators issued a joint statement on enforcement of Bank Secrecy Act (“BSA”) anti-money laundering (“AML”) requirements (the “Banking Guidance”). Less than a week later, FinCEN issued its own statement describing its approach to enforcement of the BSA (the “FinCEN Statement”). Both statements are intended to give regulated entities clearer understanding of the potential consequences of noncompliance with the BSA.

**Background**

In 2007 the Federal Reserve Board of Governors, FDIC, OCC, Office of Thrift Supervision, and the National Credit Union Administration (together, the “Banking Agencies”) issued an interagency joint statement on enforcement of BSA/AML requirements. The 2007 statement outlined the basic requirements of a BSA compliance program, how the Banking Agencies communicate supervisory concerns about BSA compliance programs, when the Banking Agencies will issue cease and desist orders for BSA noncompliance, and certain other enforcement actions they might take. Rather than replacing the 2007 statement, the new Banking Guidance released in August clarifies and updates the 2007 statement. By contrast, the FinCEN Statement appears to be the first guidance published by FinCEN that substantially establishes the agency’s enforcement approach.

**The Banking Guidance**

The Banking Guidance sets forth the Banking Agencies’ policy regarding the circumstances in which a banking regulator will issue a mandatory cease and desist order for noncompliance with BSA/AML requirements, as well as the circumstances in which it may instead use another formal or informal enforcement tool. However, the Banking Guidance explicitly states that it does not create new expectations or standards, but rather further clarifies the policies and goals set forth in the 2007 statement. For example, the Banking Guidance provides new detail about the pillars of a successful BSA/AML compliance program that were not elucidated in the 2007 statement, such as the appointment of AML personnel, performance of independent testing, implementation of internal controls, and training of employees.

As a general principle, the Banking Agencies will not issue cease and desist orders for isolated or technical deficiencies in BSA/AML compliance programs. However, the Banking Guidance points out that Section 8(s) of the Federal Deposit Insurance Act requires that the Banking Agencies must issue cease and desist orders when regulated financial institutions fail to establish and maintain appropriate AML programs or correct problems with their AML programs once their regulators identify such problems.

A failure to establish and maintain an appropriate BSA/AML program can occur in one of three general ways:

1. The financial institution does not have a written compliance program or has a compliance program that does not cover all the required program components, such as internal controls, independent testing, designated BSA/AML personnel, or employee training;

2. The BSA/AML compliance program does not adequately cover the required program components or pillars; or

3. The compliance program has one or more defects or deficiencies that are coupled with other aggravating factors, such as highly suspicious activity, patterns of structuring, significant insider complicity, or systemic failures to file required BSA reports.
A mandatory cease and desist order would also be issued when a financial institution fails to correct a problem previously identified by regulators, but only when the problem involves substantive deficiencies in one or more pillars of the compliance program. But a Banking Agency will not issue a cease and desist order relating to a previously identified problem unless the problem is substantially the same as when it was previously identified. However, the Banking Agencies acknowledged that some criticized issues may not be fully remedied from one examination to the next, and therefore a cease and desist order will not be required if the financial institution shows substantial progress toward correcting the problem. For the sake of clarity, it should be noted that although a cease and desist order is not mandated in that situation, the Banking Agencies would retain the discretion to issue one.

In addition to the issuance of a cease and desist order, the Banking Guidance mentions that Banking Agencies may take other formal or informal actions against an institution for other types of BSA/AML compliance program concerns or deficiencies. The Banking Guidance stops short of providing details about such other actions, however. It merely states that the “form and content of the enforcement action in a particular case will depend on the severity of the concerns or deficiencies, the capability and cooperation of the institution’s management, and the Agency’s confidence that the institution’s management will take appropriate and timely corrective action.”

The FinCEN Statement
The FinCEN Statement is brief and straightforward. While this makes the document clear and easy to parse, it lacks the level of detail provided by the Banking Guidance. The FinCEN Statement confirms FinCEN’s authority to bring action against corporate officers and employees of financial institutions, as well as nonfinancial trades or businesses, and other individuals or businesses that violate the BSA. The statement also provides certain boundaries on FinCEN’s enforcement activity. For example, if a standard of conduct is only established in a guidance document, not in a statute or regulation, FinCEN will not view noncompliance with that standard of conduct by itself as a violation of law. Additionally, in the event of an enforcement action, the person or business subject to the action will be given an opportunity to respond to and contest any findings of fact or conclusions of law.

Similar to the Banking Agencies, FinCEN will first “seek to establish a violation of law based on applicable statutes and regulations.” Once a violation is identified, FinCEN may take one of six enumerated courses: (1) take no action; (2) issue an informal warning letter; (3) seek equitable remedies such as an injunction; (4) settle the matter with the violator, which may include a corrective plan and/or civil money penalties; (5) assess civil money penalties; or (6) refer the matter for criminal investigation.

In determining the appropriate course of action, FinCEN will consider a range of factors. When analyzing these factors and the alleged violations, FinCEN will attempt to balance proportionality, consistency, and effectiveness. The factors include, but are not limited to, how serious and/or harmful the violations are; the pervasiveness and/or history of wrongdoing by an entity; whether the company self-initiated remedial measures and/or voluntarily disclosed its violations to FinCEN; and whether the entity cooperation with FinCEN and other relevant agencies.

Outlook: The Banking Guidance and the FinCEN Statement are concrete steps taken by federal regulators to provide greater transparency and clarity with respect to the agencies’ enforcement policies. As such, they not only provide useful guidance for regulated entities, but demonstrate an encouraging trend toward regulatory clarity.
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