

# Consumer Finance Monitor Podcast (Season 9, Episode 32): Risk-Based AML/CFT Reform: What Financial Institutions Need to Know About the Joint Banking Agency and FinCEN Proposals

Speakers: Alan Kaplinsky and Celia Cohen

Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor Podcast where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. This is a weekly show brought to you by the Consumer Financial Services Group at the Ballard Spahr Law Firm. I'm your host, Alan Kaplinsky, the founder, former practice group leader for 25 years and now senior counsel of the Consumer Financial Services Group at Ballard Spahr. I'll be moderating today's program. For those of you who want more information either about the topic we're going to be talking about today or any other thing in the world of consumer finance, don't forget about our blog, [consumerfinancemonitor.com](http://consumerfinancemonitor.com). We've hosted the blog since 2011. There's a lot of relevant industry content there. We also regularly host webinars on subjects of interest to those in the industry. So subscribe to our blog or to get on the list for our webinars, please visit us at [ballardspahr.com](http://ballardspahr.com).

And if you like our podcast, please let us know about it. You can leave us a review on whatever platform you use to access our podcast. And also, please let us know if you have any ideas for other topics that we should discuss on our show or speakers that we should consider inviting as guests. So let me tell you a little bit about our topic today. It's a topic we revisit from time to time when things are happening in the area. It's not strictly a consumer finance topic for sure. You could categorize it under bank regulation or criminal law, but it is very important to those that do work in the consumer finance area. So on April 7th of this year, the FDIC, the comptroller of the currency and the NCUA jointly issued a notice of proposed rulemaking entitled "Anti-Money Laundering Encountering the Financing of Terrorism Programs." I guess you could say sometimes it's referred to by the shorthand of AML CFT.

The proposal represents a coordinated interagency effort to modernize, and in some respects, really recalibrate the regulatory framework governing AML and CFT compliance. It was published in the Federal Register on April 10th and the comment period expires on June 9th. Importantly, this interagency proposal of the banking regulators aligns with the parallel initiative announced by the Financial Crimes Enforcement Network, or affectionately called FinCEN, also on the same date on April 7th. And it put forth its own proposed rule to modernize AML CFT programs. FinCEN emphasized this proposal is designed to move institutions toward a risk-based, effective programs rather than mere compliance checklists, with a particular focus on ensuring that institutions are continuously identifying and updating risks as the risks evolve over time. The FinCEN rule was also published in the Federal Register on April 10th, and the comment period expires on June 9th. Taken together, these developments reflect a broader government-wide effort to rethink how AML CFT compliance is structured and evaluated.

The proposal is particularly notable because it seeks to more fully implement the mandate of the Anti-Money Laundering Act of 2020, which directed regulators to move toward a more risk-based effectiveness-oriented approach to AML compliance. In fact, one of the recurring themes in the proposal is that AML CFT programs should not simply be checked-the-box exercises, but instead should be reasonably designed to assure and monitor compliance in a manner that's tailored to each institution's unique risk profile. The agencies emphasize that point quite clearly. In the notice of proposed rulemaking, they state that an institution's AML CFT program should be designed to identify, manage, and mitigate risks based on the institution's products, services, customers, and geographic exposures. That language, especially when viewed alongside FinCEN's emphasis on continuously updating risk assessments, signals a continued shift away from rigid static compliance frameworks and toward dynamic risk driven programs.

At the same time, however, this proposal is not purely deregulatory or flexible in nature. No, it's not time to take your foot off the gas. It also reflects an effort to codify and harmonize longstanding supervisory expectations across the federal banking agencies and the NCUA. In other words, while institutions may gain some flexibility in how they design their programs, they should not expect a reduction in scrutiny. If anything, the focus may shift toward demonstrating effectiveness over time as risks evolve.

The agencies also released a number of accompanying materials, including a press release, a financial institution letter, an OCC bulletin, and a statement from acting FDIC chairman Travis Hill. The materials reinforce the message that regulators are seeking greater clarity, consistency, and accountability in AML CFT compliance. For example, in his statement, Travis Hill underscored the importance of ensuring that AML requirements are efficient, risk focused, and appropriately tailored while still meeting the core objective of protecting the financial system from illicit finance.

That balancing act between flexibility and rigor is really at the heart of these proposals. So before we dive into the details, I'm very pleased to introduce my guest today and that is Celia Cohem. Celia is a partner in the Manhattan Office of Ballard Spahr. She is a member of the White Collar Defense and Investigations Group. She represents individual and corporate clients and internal and government investigations and white collar criminal defense with a focus on advising on wire fraud, securities fraud, issues involving virtual currency, bribery, corruption, healthcare fraud matters. And importantly for purposes of our podcast today, anti-money laundering matters.

Celia also has significant experience conducting employee-related investigations, including investigations involving whistleblowers. Her experience includes service as an assistant US attorney for the Eastern District of New York and as in-house counsel at JP Morgan Chase. As a former assistant general counsel at Chase, Celia led internal investigations for the bank's government investigations and regulatory enforcement group. She oversaw complex investigations spanning multiple jurisdictions and representing the bank in response to whistleblower matters and government inquiries. So Celia, a very warm welcome to long overdue. I know you've been at the firm for a few years right now. Great. Wow. And I think the first time I met you, I promised that there'd be an opportunity to get you on our podcast show and today is the day.

Celia Cohen:

Oh, happy to be here.

Alan Kaplinsky:

Yeah, terrific. So let's start at a high level, okay? What is it that prompted the agencies and FinCEN in parallel to issue these proposals at this time and how do they tie back to the statutory changes that were made by the AML Laundering Act of 2020?

Celia Cohen:

So yeah, this absolutely relates back to the AML Act of 2020. That's really what these rules are implementing, the key provisions of that act. And as you said before, it forms part of the Treasury and FinCEN's desire to modernize the AML CFT regulatory and supervisory framework, and both obviously to achieve the purpose of the Bank Secrecy Act. And I think really as we talk about effectiveness here, to produce more effective outcomes, that's what they're really focused on.

So I think while it came out of that and sort of had to happen eventually, why right now, this has been in progress regarding FinCEN and trying to get all of them together and implemented across all of the agencies. I also think obviously terrorism financing, financial crimes and fraud are big right now with this in something I probably all administrations can agree on, but there is a lot of focus on those priorities. So whether or not that had something to do with the timing, but really at some point or another, this was going to happen.

Alan Kaplinsky:

Yeah. So one other thing I guess I might add, at least based on my reading, this is not an area I practice, but the banking industry has been complaining for years about AML compliance, and it's check the box nature and how expensive it is to set up compliance programs. And they wanted things to be streamlined, not for it to go away, but they wanted it to be a lot simpler.

Celia Cohen:

For sure. I think there was always a feel that it was like a gotcha, right? You didn't have one little thing, right? And is that really preventing what it's supposed to prevent? And it's not a one size fits all. I think that was another issue, right? It depends on the size of the bank and the financial institution has to say and what they're doing. And so I think the purpose of this, yes, is to make it in the one hand more streamlined, but on the other hand, just more effective.

Let's not waste time on low risk customers. Let's not waste as much time on all of this check the box and procedures that don't apply to me as whatever financial institution I am. And so I absolutely, the banks have been complaining, I think remains to be seen and we're going to get into this as to whether these proposals, what kind of changes actually will have. I could make a case for both of those and I think we'll have to see how in fact it plays out.

Alan Kaplinsky:

Yeah. All right, let's turn to the substance of the proposal. Then notice of proposed rulemaking places significant emphasis on the requirement that AML CFT programs be risk-based and reasonably designed while FinCEN's proposal underscores the need for programs to remain dynamic and responsive to changing risks. Can you walk us through the most important components of the proposed rule, particularly any new or clarified requirements around risk assessments, internal controls, governance, and ongoing monitoring?

Celia Cohen:

Yeah, absolutely. Look, I think just to say overall, I think that this proposal, again, what happens and what changes remains to be seen, but I think the idea behind it is a good one in terms of making... I think it should be more risk-based, and I think it should be dynamic and ongoing identification. We always say when you think of security issues like at the airport, we're always fighting the last war. So it is better to be anticipating and changing with how things are going and not fighting the last war. So I do think that that is helpful. And what are the aspects of proposal that really get at this or that I think are key obviously in terms of risk base, I think I mentioned this before, ensuring that the banks focus on the high risk customers and activities rather than just...

And I think that's not to say you can't... I think if you start ignoring low risk customers, that's going to be a problem, and then it'll be a definition as to what's high risk, what's low risk, and what's in between. But I think where you have priorities and a focus, you should be really focused on these high risk customers. So you still can't ignore it, but you need to be focused on that. I think very important is there's this two-prong framework for evaluating when a bank has established and maintained this program. So establish it and maintain and getting at the same thing, but making sure that all of this, these updates are there and that you continue again, going onto the dynamic aspect and maintaining this. I think we'll talk about later are there questions as to what that means? For sure, but I think that's definitely important.

Now the proposal also defines effectiveness. You have to meet certain requirements while maintaining them. And I think that a lot of financial institutions already have to establish and have to maintain and implement effective procedures, obviously when I was in my former job, that was a key. So I don't think that fundamentally changes anything, but I do think that it does escalate the potential for supervisory enforcement actions.

If you establish it in the right way, unless there's some kind of significant or for the other word, significant or across the board failure to supervisory implement, then you shouldn't be having this enforcement, but then it begs the question as to what is that significant event that could cause enforcement. So I guess in terms of a systematic failure was the other one.

Yeah. I think systematic failure is probably easier to define, but I think if you're in that boat where there's a significant issues or a systematic failure, it's going to be harsh penalties, given that you're supposed to have this. So I don't know, is that a big change? I think that was probably always the case, but I think now it's more like what's expected of you and they're really going to zoom in on these systematic failures.

Alan Kaplinsky:

So as I understand it, you could have the best written policies and procedures in the world, and you could get an A plus for really having good policies and procedures, but if there is a failure, those policies and procedures aren't going to kill you out.

Celia Cohen:

And I think, and we don't know, again, we'll see how this plays out, but that's exactly the point, that I think in the past you could stand by, but we had these policies and procedures, we did this, we did that, and that's not going to fly necessarily anymore, because of this dynamic nature and keeping it updated and maybe potentially making it easier for enforcement matters to be brought in that sense. You were supposed to constantly have to be so vigilant. So I don't know, it does remain to be seen, but I think that's definitely an issue. Another aspect, I think this is explicitly incorporating FinCEN's customer due diligence requirement. To me, everybody always... Customer due diligence is one of the key issues, but obviously that's trying to streamline there as well.

And then again, the checklist, I think that's also a significant change. I think that's a good one, but how that comes out remains to be seen. So for example, when I was in-house, I always felt like the SAR filings, they were scared not to file a SAR. And it was pretty much if there was a little concern that you filed the SAR because you didn't want to get in trouble. So is that going to be the way that you don't have to file a SAR for some of these things because they're more minor, they're checking the box issues, or are you going to get dinged for that? And I think that's also going to be an issue. We'll have to see how it plays out.

Alan Kaplinsky:

In talking to my banking clients, they always were in a quandary of when to file a SAR. And for those of our listeners who don't know what we're talking about, a suspicious activity report. And there are a lot of things that are in a gray area that are not that clear.

Celia Cohen:

Yeah, but then sometimes you felt you were damned if you do, damned if you don't. It would be bad to file a SAR unnecessarily, but at the same time, I think banks typically lean in towards maybe filing, because they're afraid of getting dinged for not filing.

Alan Kaplinsky:

Of course, we don't know what comments will be received and when it changes.

Celia Cohen:

Yeah, but assuming it's implemented as we see it, I think in theory, yes, I think it should. But again, it depends on the examiner and what they're looking at. These are some of the unknowns, I think. And I imagine everybody will be looking around to see what everybody's doing because nobody wants to be the first one to say like, "I don't think we need a SAR on this."

Alan Kaplinsky:

Let's start to the question of impact. And what I mean by that is how do you expect that the proposal will affect different types of institutions, large banks, community banks, credit unions, non-bank FinTech companies, that operates very often through bank partnerships? And in particular, given the emphasis on continuously identifying and updating risks, do you think this will lead to heightened expectations for banks in overseeing their FinTech partners, the non-bank FinTech partners, especially in fast evolving areas like digital assets, customer onboarding, transaction monitoring?

Celia Cohen:

Yes I do think it will lead to heightened expectations with third party vendors. That's always an issue, but I do think that you've got to make sure your third party vendors, your FinTechs are doing what they're supposed to be doing. And so I think banks have always been afraid of that and will, with this, be more vigilant about those third parties. But in terms of going back and taking it in order and ending at that, I think, look, for larger banks, as always, like a larger institution, obviously, they always have more risk. They always have more issues to confront because the more customers you have, the more different things you're dealing with. Granted, the larger financial institutions probably, most of them, always had all of this in play I think already, but this dynamic aspect of it and really staying on top is going to be something for everyone.

But I think continuous, like this trigger driven assessment, watching for signals on timely changing your surveillance, onboarding threshold, all of that will continually to be updated. I do think I was at the SIFMA conference and I did hear some from compliance about use of automated AI to track these type of things. So I think as that develops, there might be some alleviation of these additional requirements. So that's another interesting to think about in terms of the larger banks, particularly.

Alan Kaplinsky:

That's probably not too far away, I would think.

Celia Cohen:

No, I think it's not. I think some of the bigger ones are really already doing that. And then for smaller institutions like community banks, it may be sort of easier to control from the smaller standpoint, but I think you still have to have the dynamic risk responsive program, the trigger driven program, which may be more difficult for the smaller banks. Again, if you don't have, if you're starting to automate and the smaller ones don't have that, they're going to still have to update on new products and new partners, and all of that, and independent testing. So while it may be easier to control because it's smaller, they may not have the tools that the bigger banks have and that may be more of a lift.

Alan Kaplinsky:

Yeah. And I guess I would add to that that there is sort of unrelated to AML really, but the Prudential banking regulators are trying to loosen some of the regulatory restrictions, in general, on community banks because there has been a... The community banks are just, they don't have nearly the resources that [inaudible 00:24:18] has for a Citibank and often they don't have in-house counsel and they've been complaining for years and finally it sounds like they're going to get some relief. Now, how that's going to mesh with what's going on here with AML going on.

Celia Cohen:

Yeah, exactly. Because it would be great for them to not have to worry about all these little check the boxes, but then if they're supposed to be having this dynamic trigger-driven approach and they don't have the tools and the resources to do it, it might be worse for them. So it is hard to assess how that's going to be. And I mean, the credit union, they're going to have the same issues, although they have different triggers with the wires and money movement and vendors and things like that.

Finally, FinTechs. And just to go back to this, I think financial institutions are going to require more granular, like real time data, enhanced reporting, because if you're the financial institution using the FinTech, you don't want to have that kind of risk there, and that's definitely a risk. I think as again, when I was at a financial institution, third party risk assessment was always huge because you can only control what you control. So I think that'll definitely be here. You're going to have to prove that your partners are compliant as well.

Alan Kaplinsky:

Okay. So let me turn to some of these insights from the agency materials that were included in the notice of proposed rulemaking. Were there any themes or signals in the press release, the financial institution letter, or the OCC bulletin that you think are especially important for listeners to understand? And turning specifically to acting FDIC Chairman Travis Hill's statement, he emphasized making AML compliance more efficient and risk focused. When you read that together with FinCEN's emphasis on dynamic continuously updated risk assessments, do you see a coherent regulatory vision that is emerging here?

Celia Cohen:

I do and I think I said this before. In theory, I think all of that makes a lot of sense. We're looking at this from like, let's not be so robotic and let's look at what's really needed here. So I do think, in theory, all of these different insights focus on that. Again, how this plays out is a different question, but I do think that the intent is a good one. I think throughout all of these

agency materials, establishing and maintaining. Establishing maintaining, as we said before, key points, right? You got to get it there, you got to keep maintaining it, because otherwise you're going to fall down and not catch something as we have all these trigger changes.

So look, I think probably the way it always should have been, but how you do that is really the key here. You have to keep testing, you have to remain diligent, and you have to look at whether your program's actually effective. And by the way, you're also running a massive business at the same time. It sounds easier when we're just focused on this, but you're also trying to satisfy your customers and do all of these things, and it's a lot, but obviously it's also a lot when you get a regulatory enforcement or subpoenas from the government and you have to deal with that because you're embroiled in something that you just could have potentially prevented.

And specifically, I thought Chairman Hill's statement was... And echoed a lot of this, but I like the point that really it needs to be tailored to the institution. I do think we're just talking about the community banks and everything and the expectations. And it's not a one size fits all. Certain institutions don't have certain risks. And so I think that's really important. And then I think Chairman Hill also the point about it's just not that it's good on paper, that's not sufficient.

It's whether it really works. And again, that's something that really always should have been there, but the hope is that during examinations and that will really be the sentiment and that you won't get dinged on these things. Again, TBD remains to be seen as to whether that happens. And also, I think generally the focus of today's priorities like cartels and terrorist financing and fraud, government benefit fraud, all of these things are focused. And so spend time and focus on these issues that matter most. So we'll see. I think all of these statements and on paper, I think it sounds good.

Alan Kaplinsky:

Yeah. So let me ask you this. Let's assume, because I don't know how long it's going to take to get finalized. I assume there'll be a lot of comments and I would guess sometime before the end of the year, I don't know how much before the end of the year. Do you have any thoughts on that?

Celia Cohen:

Well, I think there's already... In some of the comments like needing more time and I think they always go longer and there are a lot of comments already and a lot of comments to sift through, but I agree if it gets done by the end of the year, I think that-

Alan Kaplinsky:

Yeah. So assuming it gets finalized, let's talk about where the lawyers fit into this. And I'm talking both in-house lawyers, which you used to be and now outside counsel, as you've been for a number of years. I take it's going to require quite a bit of work. Everybody's got an AML compliance policy that's going to have to change. Tell us a little bit about what you think the lawyers and compliance people are going to have to deal with pretty quickly. I don't know whether it'll be a delayed effective date for the regs, but there may not be or it may be very short. So what does it mean? What's the burden here?

Celia Cohen:

Yeah. Again, it's going to come down to which institution we're talking about. For some of the larger institutions, I think they've been striving to do a lot of this to begin with. So it might not be that heavier lift, it's just a matter of reorganizing the priorities. So that may not be, but I think everyone needs to... And look, on the one hand, we don't know if it's going to be adopted, but there are things in here, I think, that financial institutions can take away from it regardless of whether it's implemented as just good practice, if they can putting aside the cost and the resource issue.

I think people should really take that look at these priorities that are going on because regardless of what's implemented enforcement action, this is what the focus is. AML in prior administrations and this administration has always been a focus. Maybe different things have shifted, but terrorist financing, all of that was cartels. Everybody's always looking for that. So I think really running gap assessments to see, "Hey, if this gets implemented, what are we missing? What could we do better?" I think that should always be done periodically anyway.

And this is going back to priorities, defining and testing trigger events, like what new events would constitute triggers that we need to remain diligent? What are the key ones that we need to look at? And then updating monitoring scenarios that can always be done, again, with or without this being implemented. Potentially, what kind of automation can we use here if that's a possibility for the business, financial institution or the smaller bank? What are our resources? What can we afford here to do with the knowledge that whatever we do may be an investment to prevent enforcement actions in the future?

And look, as I said, in this administration, these issues are priorities. That being said, I think there's a general consensus that there aren't as many enforcement actions right now under this administration and the banks aren't at... And that may be, but in two years, if we have a new administration, such limitations is going to not be run and therefore, you have to be diligent.

Alan Kaplinsky:

And the new administration, whoever might be, let's say it's a Democrat, for example, and all new people are in the bank regulatory agencies and at FinCEN. And if they come in and do an examination and find out there was a violation during the Trump administration, they could still ding you for that.

Celia Cohen:

Same. The statute of limitations won't run. Yes, absolutely. That's what I'm saying.

Alan Kaplinsky:

It's not a good defense to say, well-

Celia Cohen:

Nobody cared back then. Yeah.

Alan Kaplinsky:

Nobody cared, really.

Celia Cohen:

No, absolutely. That's what we've been telling our clients. Same with SEC. It's only you got two years statute of limitations really wouldn't run for any of this, anything. So yeah, you have to be diligent. And then I think ultimately it's a good idea for everyone to say, look, is our AML CFT policies, are we being effective? I think people should be thinking that anyway. So it's a good time to do that. So to step back, reassess, and get ready in the event of no matter what happens, because maybe it's a time to do a housekeeping anyway and improve your policies and potentially prevent issues in the future.

Alan Kaplinsky:

I assume that the group that you practice in the white collar and government investigation work that you get involved from time to time in not only when a violation gets identified, but you get involved in preparing institutions and making sure that they have their house in order from an AML standpoint and they dotted their I's and they crossed their T's. And sure you'd certainly be willing to do that if anybody were to bring you up and say, "We need help in this area."

Celia Cohen:

No, absolutely. I've done this a lot. Obviously it's nice to have both my perspective from being in-house and dealing with this all the time coupled with my former background as a federal prosecutor in the Eastern District of New York and knowing what from that aspect.

Alan Kaplinsky:

Yeah. Well, you've seen it from three different angles.

Celia Cohen:

All different angles, exactly. Defense, prosecution, and the regular... Well, obviously, in-house it was sort of obviously both Department of Justice and the regulators, Prudential and otherwise. So yeah, all aspects of it, but it is good when thinking through this and advising clients thinking ahead about what are your potential exposures here if you do not do these things, how can we minimize that?

Alan Kaplinsky:

Right. So we've come to the end of our program, but is there anything important that I overlooked, something I should have asked you as a question before we wrap things up?

Celia Cohen:

No, I mean, I think there will be a lot of issues in the comments that people are going to ask for clarification, which also could push this longer. So that's an interesting thing to think about the various topics that would be needed for clarification.

Alan Kaplinsky:

And there are, I'm sure. With anything like this, there's going to be a need for clarification.

Celia Cohen:

Yeah. When you really dig down. And then if you don't dig down now and the rules are adopted, it's going to create a lot of confusion and questions about what is sufficient. I can come up with a bunch of them, but yeah.

Alan Kaplinsky:

Let me close with a few key takeaways for our listeners. This is what I am driving out of our conversation, Celia. First, these proposals, both from the banking agencies and from FinCEN represent a continued evolution toward risk-based, effectiveness-driven AML, CFT compliance. The message is clear. Regulators are moving away from the check-the-box checklist-style compliance and toward a framework that prioritizes real-world results.

Second, a critical component of that shift is the expectation that institutions will continuously identify, assess, and update their understanding of risk. AML CFT programs will increasingly be judged, not as static frameworks, but as living systems that evolve alongside the risks they are designed to mitigate. Third, financial institutions should expect regulators to focus less on whether they have adopted the right policy or procedure in a formal kind of way, and more on whether their programs are actually working and continuing to work overtime. That may require enhanced monitoring, testing, and documentation.

Fourth, the proposals reinforce the importance of tailoring AML CFT programs to the institution's specific risk profile, while also ensuring that those programs remain flexible enough to adapt to new and emerging risks, including those associated with FinTech partnerships and digital assets. And finally, the common process represents a meaningful opportunity for industry participants to help shape how these concepts are ultimately implemented. Institutions should take a close look at how the proposals address dynamic risk assessment and program effectiveness and consider where additional clarity or flexibility may be needed. Did I miss anything, Celia, in terms of takeaways?

Celia Cohen:

Yeah, no, I think that covers it. I think we'll have to a lot of interesting things, and it remains to be seen how it will play out.

Alan Kaplinsky:

Well, we'll of course, continue to monitor these developments and provide updates as the rulemaking process unfolds. I'm sure we'll do a podcast or a webinar when the final rules come out. I want to thank you, Celia, first, for taking the time today to share your expertise and your experience in this area. I think that was extremely helpful. So my thanks to you.

Celia Cohen:

Of course. My pleasure.

Alan Kaplinsky:

And my thanks, of course, to all of our listeners who took the time today to dial in or log on to our Consumer Finance Monitor podcast. And by the way, I should have made one other pitch, and that is your group has a blog that deals with AML and a bunch of other things. I'm drawing a blank on its name right now.

Celia Cohen:

Blog, the AML blog.

Alan Kaplinsky:

Yeah, the AML Blog, but it has maybe a different name, but that of course is a go-to resource for anybody that has responsibilities in this area. And if any of you have any questions about the proposed rule or would like any assistance in preparing comments or later on in helping to comply, please feel free to reach out to us, not to me but to Celia, who is in our Manhattan office. So with that, I wish everybody a very enjoyable rest of their day.