



CENTER FOR CAPITAL MARKETS
COMPETITIVENESS



November 16, 2020

Via Electronic Mail

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

Re: Request for Comment Regarding Anti-Money Laundering Program Effectiveness (Docket No. FINCEN-2020-0011; RIN 1506-AB44)

To Whom It May Concern:

The Bank Policy Institute (“BPI”), the American Bankers Association (“ABA”), the Bankers Association for Finance and Trade (“BAFT”), the Center for Capital Markets Competitiveness (“CCMC”), the Consumer Bankers Association (“CBA”), the Independent Community Bankers of America (“ICBA”), the Institute of International Bankers (“IIB”) and the Securities Industry and Financial Markets Association (“SIFMA”) (collectively, the “Associations”)¹ appreciate the opportunity to comment on the advance notice of proposed rulemaking issued by the Financial Crimes Enforcement Network (“FinCEN”) related to anti-money laundering (“AML”) program effectiveness. We believe that regulatory action is necessary to enable financial institutions to allocate resources to enhance the effectiveness and efficiency of their AML programs, while remaining compliant with the legal requirements set forth in the Bank Secrecy Act (“BSA”). Therefore, we support the goals set forth in this rulemaking and the public sector’s efforts generally to “re-examine the BSA regulatory framework and the broader national AML regime. . . to upgrade and modernize [it].”²

¹ Descriptions of the Associations are provided in Annex A of this letter.

² *Anti-Money Laundering Program Effectiveness*, 85 Fed. Reg. 58023, 58024 (Sept. 17, 2020).

As an initial matter, we encourage FinCEN and its regulatory partners to work collaboratively with law enforcement and the private sector to adopt the recommendations set forth by the BSAAG's AML Effectiveness Working Group. Only with meaningful regulatory reform can the programmatic definition described in FinCEN's proposed rule provide financial institutions with sufficient flexibility to address priority threats without imposing additional burden. We support FinCEN's proposal that AML program expectations incorporate the utility of information provided to law enforcement, as applicable to specific types and sizes of financial institutions, in line with the statutory goals set forth in the BSA. The absence of this consideration has, in part, resulted in the current supervisory and internal audit focus on technical compliance, rather than the effectiveness of the program as a whole. Incorporating this concept into the AML program definition will better enable the public and private sectors to drive resource deployment to law enforcement needs and serve as a foundation for the recalibration of exam and internal audit approaches. This change, coupled with the establishment of national AML priorities, has the potential to further enable financial institutions to provide law enforcement with the most relevant and useful information.

Ultimately, the definition of effectiveness should encourage institutions to move away from their current focus on procedural and technical compliance and towards a principles-based, institution-specific approach commensurate with risk. Therefore, we offer the following high-level recommendations to further guide the rulemaking process so that we can realize a more effective and efficient U.S. AML regime.

- *FinCEN should state that compliance expectations apply only to laws and regulations.* In August 2020, FinCEN released its *Statement on Enforcement of the Bank Secrecy Act*, which noted that the agency "will not treat noncompliance with a standard of conduct announced solely in a guidance document as itself a violation of law."³ While a helpful statement, the current misalignment of compliance resources at financial institutions has resulted, in part, from the treatment of regulatory guidance as binding. To facilitate the objective described in FinCEN's proposal of enabling institutions to reallocate resources to improve the effectiveness of their AML programs, FinCEN should affirmatively limit compliance expectations to requirements provided by law or regulation and clarify that institutions will not be subject to examiner criticism for non-compliance with guidance.⁴ By providing institutions and examiners with such clarity, FinCEN will reduce the risk to institutions of being criticized for non-compliance with guidance.
- *FinCEN should acknowledge that institutions can redeploy resources to higher-value AML/CFT activities and deemphasize less effective activities.* Providing institutions with greater flexibility to reallocate resources to achieve enhanced AML program effectiveness may lead institutions to determine that resources currently deployed for certain tasks would be more effective if deployed elsewhere. However, as program activities have, in part, been developed to address supervisory

³ Financial Crimes Enforcement Network, *Statement on Enforcement of the Bank Secrecy Act*, at 1 (Aug. 18, 2020), available at https://www.fincen.gov/sites/default/files/shared/FinCEN%20Enforcement%20Statement_FINAL%20508.pdf.

⁴ The member agencies of the Federal Financial Institutions Examination Council have proposed a rule that would codify a similar statement as binding. See Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union Administration, Office of the Comptroller of the Currency, Bureau of Consumer Financial Protection, Role of Supervisory Guidance, Notice of Proposed Rulemaking, 85 Fed. Reg. 70512 (Nov. 5, 2020).

expectations, institutions may be reluctant to cease performing (or deemphasize) certain AML program activities, absent an express acknowledgement that they may do so. Therefore, we recommend that FinCEN provide express authority to institutions allowing them to redeploy resources to higher-value AML/CFT activities and to deemphasize program elements that are of lower-value for effectiveness and risk management.

- *FinCEN should expressly recognize that an effective program need not be perfect.* In 2020, revisions to the *Federal Financial Institutions Examination Council BSA/AML Examination Manual* clarified that certain institutions covered by the BSA are not expected to have “perfect” BSA/AML programs, by stating that “[m]inor weaknesses, deficiencies, and technical violations alone are not indicative of an inadequate BSA/AML compliance program and should not be communicated as such.”⁵ However, this guidance is not applicable to all covered financial institutions, and many exams have remained focused on procedural and technical details. This focus, in turn, requires institutions to devote substantial resources to activities that do not significantly improve their ability to mitigate illicit finance risks, provide information of a high degree of usefulness to law enforcement or otherwise further the goals of the BSA. Accordingly, to better enable institutions to allocate resources to improve the effectiveness of their AML programs, FinCEN should expressly acknowledge that a regulatory definition of an effective AML program does not require perfection.
- *FinCEN should consider the particular business activities and risks of each institution in order to enable a sufficiently flexible AML program.* Given the diverse business models employed by financial institutions subject to the BSA, it is important that any regulatory requirement be sufficiently flexible to allow institutions to incorporate in a risk-based manner national AML priorities into their programs and not be “locked” into a particular process or frequency. In particular, institutions should have the ability to determine how best to incorporate into their programs any national AML priorities applicable to their businesses and be provided with sufficient time to adapt to updated priorities. In addition, any formal requirement to identify and assess risks should similarly be sufficiently flexible to enable institutions to assess risks in a manner tailored to the institution’s specific activities and risk profile. Consideration of whether an institution’s program is effective should generally be specific to the institution and its unique risks, rather than evaluation of an institution’s program against a prescriptive approach.
- *Clarity, coordination and examiner training are essential to successfully modernizing the AML regime.* While FinCEN’s proposal is a positive step towards a more effective AML regime, we recognize that modernization efforts will require long-term engagement by all relevant stakeholders. In particular, it will be important for any revised framework to ensure that financial institutions and supervisors have a clear understanding of expectations and responsibilities, examiners are trained to evaluate institutions under their supervision based on these revised expectations, and law enforcement provides insights and feedback to regulators and institutions regarding shifting national priorities and actual effectiveness.⁶ To that end, we recommend that

⁵ FFIEC Manual: Developing Conclusions and Finalizing the Exam, at 1 (Mar. 2020).

⁶ Feedback from law enforcement would allow institutions to better align their AML systems and processes with law enforcement and national security priorities. Feedback could include increased opportunities for law enforcement outreach, comments relating to certain SARs or other BSA filings, metrics addressing law enforcement use of an institution’s filings, among other things.

FinCEN, working with applicable supervisory agencies and law enforcement, establish a pilot to test any potential new approach that requires institutions to implement and maintain an “effective” AML program. A pilot could provide valuable information as to how the new approach works in practice, and what (if any) changes should be made in developing and implementing regulatory amendments.

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The Associations appreciate FinCEN’s consideration of our comment. If you have any questions, please contact the undersigned: Angelena Bradfield (angelena.bradfield@bpi.com), Robert Rowe (rrowe@aba.org), Samantha Pelosi (Spelosi@baft.org), Jenna Burke (jburke@consumerbankers.com), Rhonda Whitley (Rhonda.Thomas-Whitley@icba.org), Stephanie Webster (swebster@iib.org), Aseel Rabie (arabie@sifma.org), and Bill Hulse (bhulse@USChamber.com).

Respectfully submitted,



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ANNEX A

The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost two million Americans, make nearly half of the nation's small business loans, and are an engine for financial innovation and economic growth.

The American Bankers Association is the voice of the nation's \$21.1 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard nearly \$17 trillion in deposits and extend nearly \$11 trillion in loans.

The Bankers Association for Finance and Trade is the leading international financial services association whose membership includes large global and regional banks, service providers, and fintech companies headquartered around the world. BAFT provides advocacy, thought leadership, education, and a global forum for its members in transaction banking, including international trade finance and payments. For nearly a century, BAFT has expanded markets, shaped policy, developed business solutions, and preserved the safety and soundness of the global financial system.

The Center for Capital Markets Competitiveness's mission is to advance America's global leadership in capital formation by supporting diverse capital markets that are the most fair, transparent, efficient, and innovative in the world. CCMC advocates on behalf of American businesses to ensure that legislation and regulation strengthen our capital markets allowing businesses—from the local flower shop to a multinational manufacturer—to mitigate risks, manage liquidity, access credit, and raise capital.

The Consumer Bankers Association is the only national trade association focused exclusively on retail banking. Established in 1919, the association is now a leading voice in the banking industry and Washington, representing members who employ nearly two million Americans, extend roughly \$3 trillion in consumer loans, and provide \$270 billion in small business loans.

The Independent Community Bankers of America creates and promotes an environment where community banks flourish. With more than 50,000 locations nationwide, community banks constitute 99 percent of all banks, employ nearly 750,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding more than \$5 trillion in assets, more than \$4 trillion in deposits, and more than \$3.4 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services.

The Institute of International Bankers is the only national association devoted exclusively to representing and advancing the interests of the international banking community in the United States. Its membership is comprised of internationally headquartered banking and financial institutions from over 35 countries around the world doing business in the United States. The IIB's mission is to help resolve the many special legislative, regulatory, tax, and compliance issues confronting internationally headquartered institutions that engage in banking, securities and other financial activities in the United

States. Through its advocacy efforts the IIB seeks results that are consistent with the U.S. policy of national treatment and appropriately limit the extraterritorial application of U.S. laws to the global operations of its member institutions.

The Securities Industry and Financial Markets Association is the leading trade association for broker-dealers, investment banks, and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly one million employees, we advocate for legislation, regulation, and business policy affecting retail and institutional investors, equity and fixed income markets, and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. With offices in New York and Washington, D.C., SIFMA is the U.S. regional member of the Global Financial Markets Association (GFMA).