CENTER FOR CAPITAL MARKETS COMPETITIVENESS

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November 16, 2020

Kenneth A. Blanco
Director, Financial Crimes Enforcement Network
U.S. Department of the Treasury
2070 Chain Bridge Road
Vienna, VA 22182

Re: Anti-Money Laundering Program Effectiveness – FinCEN-2020-0011 – RIN 1506-AB44

Dear Director Blanco:

The U.S. Chamber of Commerce's Center for Capital Markets Competitiveness (CCMC) appreciates the opportunity to comment on the Advanced Notice of Proposed Rulemaking (ANPR) on "Anti-Money Laundering Program Effectiveness" that was published by the Financial Crimes Enforcement Network (FinCEN) on September 16, 2020.

The stated purpose of the ANPR is to "provide financial institutions greater flexibility in the allocation of resources and greater alignment of priorities across industry and government, resulting in the enhanced effectiveness of and efficiency of anti-money laundering (AML) programs." The ANPR solicits comment on a wide range of questions pertaining to potential regulatory amendments under the Bank Secrecy Act (BSA) to establish that all covered financial institutions subject to an AML program requirement must maintain an ''effective and reasonably designed'' AML program.

The Chamber welcomes the ANPR and shares in FinCEN's commitment to modernizing the regulatory framework of the BSA. The Chamber has long sought reforms to AML rules. We have noted that much of the BSA-AML regulatory regime has not been updated since the 1970s, and that reforms would help regulators better prioritize possible investigations into illicit activity. The ANPR notes that BSA's AML regime needs to adapt to address the evolving threats of illicit financial activity, some of which have changed considerably in scope, nature, and impact since the initial passage of the BSA. The Chamber appreciates FinCEN forming an Anti-Money Laundering Effectiveness Working Group in June 2019 as part of its Bank Secrecy Act Advisory Group; this has proved to be an effective mechanism for FinCEN to consider the practical experiences of AML professionals at various financial institutions.

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The ANPR is an important and long-awaited step towards implementing a risk-based approach to preventing money laundering. This should help financial institutions allocate resources more effectively to assist FinCEN and law enforcement with identifying potential illicit financial activity. A risk-based approach should move away from prescriptive requirements, but also clearly articulate FinCEN's expectations – we recognize this is not an easy undertaking. It should also provide financial institutions new options to leverage technology so they can provide more useful information to the government.

The Chamber is pleased to provide the following input to inform FinCEN's rulemaking:

I. Clarify the meaning of "effectively and reasonably defined"
II. Provide flexibility for the "risk-assessment process"
III. Communicate with Financial Institution Supervisory Authorities to Ensure Appropriate and Consistent Implementation
IV. FinCEN's proposed biannual report on "Strategic Anti-Money Laundering Priorities" should be designed to provide guidance
V. Expand BSAAG Engagement and Adopt Additional Recommendations

I. The ANPR should clarify the meaning of "effective and reasonably designed"

According to the ANPR, FinCEN believes that incorporation of an "effective and reasonably designed" AML program requirement with a clear definition of "effectiveness" would allow financial institutions to more efficiently allocate resources and would impose minimal additional burden on existing AML programs that already comply under the existing supervisory approach. The ANPR notes that the term "effectiveness" often refers to "the implementation and maintenance of a compliant AML program, but has no specific consistent definition in existing regulation."

The Chamber believes that an "effective" AML program should primarily be measured in terms of providing useful information to law enforcement. The term "effective and reasonably designed" needs to be clarified so financial institutions have a better understanding of how to allocate the limited resources for their AML programs.

The ANPR contemplates defining an "effective and reasonably designed" AML program as one that:

- Identifies, assesses, and reasonably mitigates the risk resulting from illicit financial activity – including terrorist financing, money laundering, and other related financial crimes – consistent with both the institution's risk profile and the risks communicated by relevant government authorities as national AML priorities;

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- Assures and monitors compliance with the recordkeeping and reporting requirements of the BSA; and
- Provides information with a high degree of usefulness to government authorities consistent with both the institution's risk assessment and the risks communicated by relevant government authorities as national AML priorities.

The Chamber appreciates the ANPR's attempt to define "effective and reasonably designed," but believes it should more strongly emphasize the risk profile of individual financial institutions. Every institution has a unique risk profile consistent with the products it offers, the geographies in which it operates, and the customers that it serves. A coequal emphasis on an institution's risk profile and "national AML priorities" could confuse how to prioritize resources given some national AML priorities may be totally irrelevant, or have very little relevance, to certain institutions. For example, banks without a retail business do not normally transact in cash, at least not nearly as often as banks that serve retail customers. National AML priorities should be considered as part of an "effective and reasonably designed" AML program such that they are layered on top of the risk-based framework established by the financial institution.

Financial institutions need additional guidance on if the information provided has a "high degree of usefulness to government authorities." Financial institutions file "Suspicious Activity Reports" (SARs) but receive no feedback about their usefulness from FinCEN. The absence of feedback, even for financial institutions that file relatively few SARs, limits the ability of financial institutions to efficiently allocate the resources of their AML programs to provide information that is useful to law enforcement. FinCEN is the only government office with access to SARs and it is incumbent on them to be an effective agent on behalf of law enforcement in assisting financial institutions with identifying suspicious activity.

II. Provide flexibility for the "risk-assessment process"

The ANPR notes that FinCEN believes that the risk-assessment process warrants explicit incorporation into regulation given its importance to establishing an "effective and reasonably designed" AML program. The risk-assessment process would be "based on an evaluation of various factors, including business activities, products, services, customers, and geographic location in which the financial institutions does business or services customers."

The Chamber believes that the risk-assessment process could be incorporated into regulation, but cautions against codifying standards in a way that would effectuate new compliance mandates. Simply speaking, a risk-based process for AML compliance will be difficult to administer without a risk-assessment. Importantly, this should be considered as more of "an assessment of risk" rather than a check-the-box compliance exercise based on an inflexible formal "risk-assessment" constructed by FinCEN. Codifying the risk-assessment could

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have the benefit of providing more clarity via a "bright line" approach but could also prevent the flexibility touted by the ANPR.

FinCEN should not impose a one-size-fits all standard for the risk assessment requirement. Only insured depository institutions are required to establish and maintain procedures ''reasonably designed'' to assure and monitor compliance with the requirements of the BSA. FinCEN's codification of a risk assessment requirement should preserve firms' flexibility to determine the best way to assess and document relevant risk. For example, limited purpose broker-dealers do not process transaction so money laundering, terrorist financing, and other financial crimes do not occur, by, at, or through these financial institutions. Therefore, conducting a formal written risk assessment would be illogical in this context. If a financial institution can demonstrate the risk-based nature of its AML program without a formal, written risk assessment, that should be sufficient for meeting the expectations of the regulation.

The Chamber appreciates FinCEN underscoring that the risk-assessment be based on factors, such as business activities, that are specific to a financial institution. Every financial institution will benefit from a tailored risk-assessment to operationalize an effective AML program. For example, some subsidiaries, depending on their geographic footprint or products that they offer, will not merit the same resources and scrutiny as other subsidiaries in the risk-assessment process.

Measuring the effectiveness of an AML program should focus on the amount of useful information provided to the government while also considering that institutions are exposed to different levels of activities with a risk of illicit financial activity. SARs and CTRs no doubt are a critical component of AML programs but not every institution will need to file the same number of reports and not every report provides useful information. Therefore, FinCEN should develop metrics for what is an "effective" AML program that focus on the amount of useful information provided to law enforcement and recognize that some financial institutions may file fewer reports if exposed to fewer risks. This approach would also require FinCEN, working closely with law enforcement, to define "useful."

In addition, financial institutions may file voluntary SARs that are not strictly required by the law. This may happen in a variety of scenarios including those may not even involve proceeds of a financial crime. Financial institutions engage in voluntary filings to provide "useful" information. FinCEN should communicate which types of voluntary SARs are useful and which are not.

III. Communicate with Financial Institution Supervisory Authorities to Ensure Appropriate and Consistent Implementation

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The Chamber greatly appreciates FinCEN's efforts to modernize the AML framework, but we also recognize the effectiveness of the rulemaking is contingent upon supervision and enforcement by federal regulators. We encourage FinCEN to coordinate closely with federal regulators during the rulemaking process to ensure that the updates to AML standards can be effectively implemented. Updates to examinations by federal supervisors is paramount to overall objective of modernizing AML programs.

FinCEN's rulemaking should aim to limit the practice of "defensive filings" by financial institutions that aim to predict the arbitrary expectations of examiners. "Defensive filings" (e.g. of SARs) is driven by financial institutions trying to anticipate the expectations of their examiners rather than focusing on providing useful information to law enforcement. Financial institutions should not design AML programs that are based on second-guessing by examiners asking, "Why did you not a file a report?" – this will only cause them to file numerous reports that have little use. This may cause financial institutions to inappropriately focus their AML program resources on check-the-box compliance exercises. Therefore, it is critical that FinCEN engage with supervisors throughout the development of their policymaking so an effective risk-based framework can be developed and implemented.

FinCEN should coordinate with financial institution supervisors to ensure that examinations reflect FinCEN policy. This will require FinCEN to work closely with federal regulators to update supervisory materials including examination manuals. Updating these materials will be fundamental to educating examiners about how to appropriately assess AML programs.

IV. FinCEN's proposed biannual report on "Strategic Anti-Money Laundering Priorities" should be designed to provide guidance

The ANPR contemplates whether the Director of FinCEN should issue national AML priorities, to be called its "*Strategic Anti-Money Laundering Priorities*," every two years (or more frequently as appropriate to inform the public and private sector of new priorities). The ANPR also seeks comments on whether these priorities should be considered, among other information, in a financial institution's risk assessment.

The Chamber supports FinCEN issuing Strategic Anti-Money Laundering Priorities in order to provide more guidance to financial institutions about how to allocate resources and to clarify how to meet the expectations of regulators. The Chamber strongly believes that this type of guidance from law enforcement is critical to financial institutions designing effective AML programs that provide useful information. A regular communication of priorities by FinCEN will greatly assist financial institutions in efficiently allocating the resources of their AML programs.

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It is important that FinCEN articulate priorities instead of an exhaustive list of every possible risk for the Strategic Anti-Money Laundering Priorities to be effective. This could be accomplished by singling out specific activities for additional scrutiny by financial institutions and by clearly stating what is *not* a priority. This should not be construed to mean an activity is irrelevant, but by articulating what is not a priority, financial institutions will have clear guidance from FinCEN to not waste time on scrutinizing low-risk activities, and instead focus resources where they will be the most effective. FinCEN should also deprioritize (or reprioritize) past Strategic Anti-Money Laundering Priorities when new ones are issued so firms do not feel obligated to focus on past priories and current priorities. Furthermore, law enforcement will still issue inquiries that will affect the workflow of AML programs at financial institutions.

The Strategic Anti-Money Laundering Priorities should not preclude financial institutions from allocating resources considering the risks it faces. For example, if a firm identifies an internal risk that requires significant allocation of resources, the firm should retain the flexibility to prioritize its resources based on its determination of its risk profile and should not be constrained by inflexible requirements pertaining to the Strategic Anti-Money Laundering Priorities. This is particularly applicable to the extent that certain priorities do not impact the firm's business activities, products, or customer base. If any of the Strategic Anti-Money Laundering Priorities are not relevant to the business and relevant risks of a financial institution, then they should not be considered as part of any risk assessment.

The Chamber appreciates that incorporation of the Strategic Anti-Money Laundering Priorities into the risk assessment are not intended to be a one-size-fits-all approach, but realization of this objective is largely dependent on the judgement of supervisors. According to the ANPR, "financial institutions may consider how FinCEN's Strategic Anti-Money Laundering Priorities impact and inform the risk assessment based on the institution's size, complexity, business activities, products, services, customers, and geographic locations in which the financial institution does business or services customers. These are appropriate factors for tailoring the incorporation of the Strategic Anti-Money Laundering Priorities into the risk assessment, but stronger direction should be provided to examiners about how to provide appropriate flexibility between financial institutions.

The Chamber believes the Strategic Anti-Money Laundering Priorities should be issued every two years. This schedule will provide useful guidance to financial institutions on a regular basis without subjecting them to frequent changes in priorities that would require them to constantly update how to conduct their risk-assessments. It is important, however, that financial institutions be provided ample time to incorporate any relevant updates to Strategic Anti-Money Laundering Priorities in their AML programs if they are to be incorporated into the risk assessment. Separately, more frequent issuance of FAQs by FinCEN about current issues would provide helpful guidance to financial institutions. These FAQs would provide highlights about

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issues being worked through by other financial institutions and offer practical thoughts and advice for how risks should be managed.

V. Expand BSAAG Engagement and Adopt Additional Recommendations

The Chamber strongly supports the work of FinCEN's Bank Secrecy Act Advisory Group (BSAAG) and its Anti-Money Laundering Effectiveness Working Group. This is an effective mechanism of communication between the private sector and law enforcement to enhance AML programs, including the use of SARs and the regulatory framework through which they are implemented. The Chamber supports FinCEN "taking additional steps" to implement recommendations made by the Anti-Money Laundering Effectiveness Working Group.

The Chamber recommends that FinCEN expand its engagement on improving AML program effectiveness beyond the BSAAG. Additional opportunities for stakeholder engagement, including from industry, will increase opportunities for input to FinCEN and strengthen the policy outcomes. Expanded engagement could include, for example, holding public hearings or roundtables as FinCEN did in 2012 with respect to its ANPR on Customer Due Diligence (CDD) Requirements for Financial Institutions. Input from these public hearings or roundtables should be summarized and made available to the public for consideration in the rulemakings.

The Chamber believes FinCEN should focus on updating monitoring and reporting framework as recommended by the Anti-Money Laundering Effectiveness Working Group. There are opportunities for decreasing compliance burden for SARs and Currency Transaction Reports (CTRs) that will allow financial institutions to more effectively allocate the resources dedicated to their AML programs. The ANPR underscores that high-frequency/low-complexity reports could possibly be automated and there may be ways to streamline SARS on continuing activity.

As part of the ANPR, FinCEN urges firms to share information and discard unnecessary and inefficient practices. However, some inefficient and unnecessary practices are still required by regulation and FinCEN should seek to eliminate them. An example is requiring both introducing broker-dealers and clearing broker-dealers to obtain/retain foreign bank certifications from a shared customer that is a foreign bank, which is duplicative and burdensome. FinCEN provided relief in May 2006 for correspondent account due diligence in the introducing/clearing context (i.e., generally, clearing firms were relieved of the obligation) and the same definition of "correspondent account" is used in foreign bank recordkeeping and foreign shell bank prohibition requirements, therefore it would be logical that relief be extended. Updates to the monitoring and reporting framework will provide more flexibility to financial institutions to leverage new technology and supply useful information to government authorities.

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Thank you for considering our comments on FinCEN's ANPR regarding Anti-Money Laundering Program Effectiveness. We support this endeavor and would be pleased to further discuss any of these comments.

Respectfully,

Bill Hulse