BANK POLICY INSTITUTE

February 14, 2022

Via Electronic Mail

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

Re: Request for Information and Comment Regarding Review of Bank Secrecy Act Regulations and Guidance (Docket No. FINCEN-2021-0008)

To Whom It May Concern:

The Bank Policy Institute[1] appreciates the opportunity to respond to the Financial Crimes Enforcement Network's request for information and comment on ways to streamline, modernize, and update the U.S. anti-money laundering and countering the financing of terrorism regime.[2] BPI appreciates the holistic and comprehensive approach that FinCEN has taken in reviewing this regime. We agree, as outlined in the RFI, that FinCEN's efforts will further important objectives of the Anti-Money Laundering Act of 2020 (the "AML Act"),[3] including by identifying Bank Secrecy Act regulations and guidance that are "outdated, redundant, or otherwise do not promote a risk-based [AML/CFT] regime for financial institutions"[4] and enhancing the ability of institutions to implement risk-based AML programs by, among other things, "ensuring that more attention and resources . . . [are] directed

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1 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.

2 Financial Crimes Enforcement Network, Review of Bank Secrecy Act Regulations and Guidance, Request for Information and Comment, 86 Fed. Reg. 71201 (Dec. 15, 2021) (the "RFI").

3 William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283 ("NDAA 2021").

4 NDAA 2021, § 6216(a)(1)(C)(i).

toward higher-risk customers and activities, consistent with the risk profile of a financial institution[.]"[5] BPI recognizes the extensive efforts that FinCEN has already taken with respect to implementing the AML Act and looks forward to continued engagement with FinCEN as these efforts advance, including through the review described in the RFI.

In this letter, we address several changes that we recommend FinCEN make to BSA regulations and guidance.[6] We believe each of these changes would further the overall objectives of the BSA, as amended by the AML Act, as well as the objectives of certain specific AML Act provisions. The changes that we recommend in this letter include the following:

- FinCEN should, in coordination with the federal banking agencies, update AML program rules so that the rules expressly authorize financial institutions to implement programs that are risk-based—that is, programs that are effective and reasonably designed in light of an institution's specific activities and risk profile;

- FinCEN should coordinate with the member agencies of the Federal Financial Institutions Examination Council (the "FFIEC") so that, through both the *BSA/AML Examination Manual* (the "FFIEC Manual") and examiner training, the BSA/AML examination environment is more clearly focused on the implementation of risk-based practices and the allocation of resources on the basis of risk;

- FinCEN should revise reporting requirements for both suspicious activity reports ("SARs") and currency transaction reports ("CTRs") to reflect changes in practices and technology since applicable regulations were promulgated and increase the usefulness of reported information to law enforcement and national security authorities;

- FinCEN should modernize requirements and expectations for customer due diligence activities, including customer identification, beneficial ownership collection, and processes specific to certain products and customer types;

- FinCEN should update its regulations and guidance to address emerging illicit finance risks, including those that arise in connection with cryptocurrencies and other emerging payment methods; and

- FinCEN should update various other regulatory requirements and guidance to align with the purposes of the BSA, as amended by the AML Act, as well as the objectives of certain specific AML Act provisions.

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5 NDAA 2021, § 6101(b) (codified at 31 U.S.C. § 5318(h)(2)(B)(iv)); *see* 85 Fed. Reg. at 71202.

6 In this letter, references to "guidance" have the same scope as in the RFI: guidance issued by FinCEN includes administrative rulings, advisories, bulletins, fact sheets, responses to frequently asked questions ("FAQs"), and notices issued by FinCEN and posted on its website. *See* 85 Fed. Reg. at 71202 n.1.

As a general matter, we encourage FinCEN, with respect to any actions it takes to streamline, modernize, and update the AML/CFT regime, to act in coordination with federal financial regulators, including the federal banking agencies, which examine banks and other institutions with respect to BSA/AML compliance, including by delegation from FinCEN.[7] Such coordination is especially important where FinCEN and other agencies have parallel regulations, for example, for AML programs and suspicious activity reporting. Coordination and, where appropriate, joint actions with other agencies will facilitate the streamlining, modernization, updating, and associated improvements in effectiveness and efficiency of the U.S. AML/CFT regime contemplated by the AML Act and the RFI.

I. Recommendations regarding updates to AML program rules and expectations

The AML Act codified longstanding expectations that financial institutions implement AML programs that are risk-based. Indeed, the AML Act's purposes include "reinforc[ing] that the [AML/CFT] policies, procedures, and controls of financial institutions *shall be risk-based*,"[8] and this codification of the risk-based approach is reflected in various AML Act provisions.[9] FinCEN's current AML program rules, however, do not clearly incorporate a requirement that a financial institution's AML program be risk-based, except with respect to customer due diligence as provided by FinCEN's Customer Due Diligence Rule (the "CDD Rule"). In the experience of BPI members, this lack of such a requirement in AML program rules creates a challenging misalignment in the current AML/CFT regime: the focus of those responsible for examining and evaluating AML programs is often different from the priorities of the law enforcement and national security communities that are the end-users of information generated by those programs.

In members' experience, notwithstanding guidance stating that AML programs should be risk-based,[10] the focus of the supervision and examination process in practice is generally not tailored on the basis of risk. For example, bank compliance with AML program requirements is assessed primarily by bank examiners, essentially functioning as auditors, who are substantially focused on safety and soundness and ensuring rigorous adherence to written policies and procedures and statutory and regulatory requirements. Independent testing required under the BSA, often performed by internal audit, generally reflects a similar focus. As a result, to avoid supervisory and internal audit criticism, institutions focus in significant part, and expend considerable resources, on rigorous compliance and related operational processes designed primarily to demonstrate technical compliance, rather than on

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7 31 C.F.R. § 1010.810(b).

8 NDAA 2021, § 6002(4) (emphasis added).

9 *See, e.g.*, NDAA 2021, § 6101(a) (codified at 31 U.S.C. § 5311(2)) (amending the purposes of the BSA to include that financial institutions should establish "reasonably designed risk-based [AML] programs"); NDAA 2021, § 6216(a)(1)(C)(i) (directing FinCEN to review BSA regulations and guidance that do not promote "risk-based" AML/CFT compliance).

10 *See, e.g.*, Federal Financial Institutions Examination Council, BSA/AML Examination Manual [hereinafter FFIEC Manual], Assessing the BSA/AML Compliance Program (2020) , *available at* https://bsaaml.ffiec.gov/manual/AssessingTheBSAAMLComplianceProgram/01.

implementing a reasonably designed, risk-based program. Institutions, for example, produce significant amounts of documentation to show adherence to operational processes not directly connected to illicit finance risks generally or the particular risks applicable to an institution's specific activities and risk profile. These processes often include producing extensive documentation of decisions *not* to file a SAR and reporting transactions that may, in hindsight, be deemed suspicious, even if they are of types recognized as low priorities for law enforcement. Such activities—developed primarily to address supervisory expectations and to mitigate *operational* risks—limit institutions' ability to tailor their AML programs to properly manage applicable *illicit finance* risks.

Unambiguously incorporating into FinCEN's AML program rules the overarching principle, codified in the AML Act, that AML compliance should be risk-based is critical—in combination with revisions to the FFIEC Manual and examiner training, as discussed further in Section II—to alleviating this misalignment in the current AML/CFT regime. In this respect, we continue to support FinCEN's proposal, in its 2020 Advance Notice of Proposed Rulemaking (the "AML Effectiveness ANPRM"), to amend the AML program rules to define an "effective and reasonably designed" AML program.[11] These amendments would facilitate the design and implementation of risk-based AML programs and address the misalignment, including by defining such a program as one that (1) identifies, assesses, and reasonably mitigates the risk resulting from illicit financial activity, consistent with an institution's risk profile and risks identified as national AML priorities; (2) assures and monitors compliance with the recordkeeping and reporting requirements of the BSA; and (3) provides information with a high degree of usefulness to government authorities, consistent with the institution's risk assessment and national AML priorities.

Accordingly, we recommend that FinCEN proceed with the rulemaking process initiated with the AML Effectiveness ANPRM and finalize rules that require financial institution AML programs to be "effective and reasonably designed" and that clearly define the meaning of that phrase. In the following subsections of this Section I, we address considerations that FinCEN should incorporate in finalizing these rules and issuing related guidance.

A. FinCEN should provide a clear, objective standard for effectiveness and should consider a pilot to test the application of this new standard.

In defining an "effective and reasonably designed" AML program, FinCEN should provide a clear, objective standard that will be used to assess whether an institution's AML program is effective with respect to the core elements and objectives described by FinCEN in the AML Effectiveness ANPRM.[12] This standard should be incorporated into the AML program rules as a principles-based, institution-specific approach—that is, the definition of effectiveness should make each institution accountable for an AML program that is reasonably developed based on the institution's specific activities and risk

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[11] Financial Crimes Enforcement Network, Anti-Money Laundering Program Effectiveness, Advance Notice of Proposed Rulemaking, 85 Fed. Reg. 58023 (Sept. 17, 2020).

[12] *See* 85 Fed. Reg. at 58026.

profile, with a significant focus on whether the program takes into account program-wide the AML priorities of law enforcement and national security authorities. Several of the recommendations in this subsection were discussed in greater detail in our comment letter regarding the AML Effectiveness ANPRM,[13] and we therefore summarize certain of those recommendations below.

First, in defining a clear, objective standard for effectiveness, we recommend that FinCEN adhere to the following principles: (1) an institution's AML program should be evaluated with respect to the particular activities *that* institution engages in and associated risks; (2) a program should be evaluated not only on design decisions and its structure, but also under a reasonableness standard that looks across program activities, including whether the program generates SARs and other outputs that are "highly useful" for law enforcement and national security authorities; (3) a program should not be required to comply with expectations that are not laws or regulations; and (4) a program need not be "perfect" or designed to achieve "perfection" and should be subject to adverse supervisory findings or other criticism only for program failures, including failures to create sufficient documentation to enable testing for effectiveness, not technical violations, failures to sufficiently document adherence to every operational step, or what are determined in hindsight to be individual or isolated "misses" that occur as a result of reasonable, risk-based decisions on how to monitor for illicit finance risks.[14]

Second, before finalizing a new standard for effectiveness, FinCEN should consider working with relevant supervisory agencies to establish a pilot program to test the proposed approach. BPI would welcome direct engagement with FinCEN in designing and completing such a pilot. A pilot that is targeted and structured with a defined measure of success could provide valuable information as to how the approach works in practice, and what (if any) changes should be made before it is finalized. Any recommendations generated through the pilot, however, should not be binding on the institutions that participated in the pilot unless those recommendations are formalized in applicable rules.[15]

Third, if FinCEN, as proposed in the AML Effectiveness ANPRM, adopts a regulatory requirement for institutions to conduct risk assessments, the requirement should afford institutions flexibility and not impose "one-size-fits-all" obligations. Accordingly, we recommend that FinCEN structure any risk assessment requirement to (1) provide flexibility to each institution to develop and maintain a program for risk assessments that is reasonably tailored based on the institution's specific products, services, customers, and geographies; (2) clarify that institutions are not required to implement a formal "Enterprise-Wide Risk Assessment" (including with respect to illicit finance risks), but instead may satisfy

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[13] Letter to Financial Crimes Enforcement Network, from Bank Policy Institute re: Request for Comments Regarding Anti-Money Laundering Program Effectiveness (Nov. 16, 2020), *available at* https://bpi.com/wp-content/uploads/2020/11/BPI-Comment-Letter-re-FinCEN-AML-Program-Effectiveness-ANPRM-vF.pdf.

[14] For additional discussion regarding these recommendations, please refer to Section I.A of our comment letter regarding the AML Effectiveness ANPRM.

[15] For additional discussion regarding these recommendations, please refer to Section I.B of our comment letter regarding the AML Effectiveness ANPRM.

a risk assessment requirement by implementing processes, irrespective of form, that appropriately assess applicable risks; and (3) consistent with recent updates to the FFIEC Manual,[16] permit institutions to determine an appropriate frequency for conducting risk assessments and not mandate that they be conducted annually or at any other specified frequency.[17]

B. FinCEN should expressly permit financial institutions to reallocate resources from lower-risk to higher-risk activities, including to make risk-based decisions to stop certain tasks related to low-risk activities.

Enabling institutions to implement risk-based AML programs necessarily means that each institution should have sufficient flexibility to determine how to best tailor its AML processes to the specific activities and risks applicable to the institution. The AML Act contemplates this flexibility in mandating that FinCEN, in prescribing minimum standards for AML programs, consider that AML programs should be "risk-based, including ensuring that more attention and resources of financial institutions should be directed toward higher-risk customers and activities, consistent with the risk profile of a financial institution, rather than toward lower-risk customers and activities."[18]

Expressly providing institutions with flexibility to allocate resources on the basis of risk is important to remedy the current misalignment in the AML/CFT regime, described above, between the priorities of those responsible for supervision and examination of AML programs and of the end-users of information generated by those programs. FinCEN should, in any regulatory amendments to the AML program rules, expressly recognize that institutions have flexibility to determine that resources currently deployed for certain tasks would contribute to a more effective AML program if deployed elsewhere. Such a recognition is necessary because program activities have, in significant part, developed to address supervisory expectations and institutions may be reluctant to cease performing certain AML program activities altogether absent an express acknowledgement they may do so.

We therefore recommend that FinCEN, in coordination with the federal banking agencies, expressly acknowledge that institutions should not be subject to criticism solely because they make reasonable, risk-based decisions to stop undertaking various AML tasks or activities not otherwise required under applicable law or regulation. Such an acknowledgement could include examples of the sorts of tasks and activities that institutions may choose to discontinue.[19] This acknowledgment would

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16 FFIEC Manual, BSA/AML Risk Assessment (2020) ("[T]here is no requirement to update the BSA/AML risk assessment on a continuous or specified periodic basis."), *available at* https://bsaaml.ffiec.gov/manual/BSAAMLRiskAssessment/01.

17 For additional discussion regarding these recommendations, please refer to Section II of our comment letter regarding the AML Effectiveness ANPRM.

18 NDAA 2021, § 6101(b)(2)(B) (codified at 31 U.S.C. § 5318(h)(2)(B)(iv)(II)).

19 Specific activities that we believe may be ineffective and/or inefficient at mitigating illicit finance risks, and therefore that institutions should be permitted to discontinue, where appropriate on the basis of risk, are discussed in Sections II-VI of this letter.

enable institutions to better assess trade-offs and reallocate resources away from activities that are ineffective or inefficient at mitigating illicit finance risks, including activities that do not produce output that is useful for national security and law enforcement authorities or that are designed primarily to document adherence to operational processes, and toward activities that contribute to a more effective AML program. These latter activities may include, where appropriate, deploying resources to more innovative technologies and activities.

C. FinCEN should encourage law enforcement to provide feedback to financial institutions and create specific pathways for feedback.

We appreciate FinCEN's publication in June 2021, after consulting with various law enforcement, national security, and financial regulatory agencies, of national AML/CFT priorities pursuant to the BSA, as amended by the AML Act.[20] We also appreciate FinCEN's accompanying statements, issued in consultation with federal financial regulators, clarifying that the institutions discussed in those statements are not required to incorporate the priorities into their AML programs until the effective date of revised or final regulations of the federal banking agencies or FinCEN, as applicable, that will be promulgated with respect to the priorities.[21] As FinCEN, in consultation with other agencies, develops these regulations, we encourage FinCEN to develop standards for the scope, type, duration, and implementation of the priorities. These standards should address, for example: (1) how priorities will be strategic in nature; (2) how they will be developed; (3) how they will be sufficiently targeted to provide institutions and their supervisors with a clear, consistent understanding of how they should be implemented; (4) on what timeline they must be implemented, providing institutions with sufficient time to adapt to changes or updates in priorities; and (5) how institutions may apply a risk-based approach to the amount of resources and the specific controls and processes that are appropriate in light of their specific activities and risk profile.

In addition, to enable financial institutions to incorporate the priorities more effectively into their AML programs, FinCEN should implement processes that enable ongoing, regular feedback from, and collaboration with, law enforcement and national security authorities, as well as financial regulators, with respect to the priorities. Such feedback processes would, in accordance with the

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[20] Financial Crimes Enforcement Network, Anti-Money Laundering and Countering the Financing of Terrorism National Priorities (June 30, 2021), *available at* https://www.fincen.gov/sites/default/files/shared/AML_CFT%20Priorities%20(June%2030%2C%202021).pdf; *see* 31 U.S.C. § 5318(h)(4)(A).

[21] Board of Governors of the Federal Reserve System (the "Federal Reserve"), Federal Deposit Insurance Corporation (the "FDIC"), Financial Crimes Enforcement Network, National Credit Union Administration, Office of the Comptroller of the Currency (the "OCC"), State Bank and Credit Union Regulators, Interagency Statement on the Issuance of the Anti-Money Laundering/Countering the Financing of Terrorism National Priorities (June 30, 2021), *available at* https://www.fincen.gov/sites/default/files/shared/Statement%20for%20Banks%20(June%2030%2C%202021).pdf; Financial Crimes Enforcement Network, Statement on the Issuance of the Anti-Money Laundering/Countering the Financing of Terrorism (AML/CFT) National Priorities (June 30, 2021), *available at* https://www.fincen.gov/sites/default/files/shared/Statement%20for%20Non-Bank%20Financial%20Institutions%20(June%2030%2C%202021).pdf; *see* 31 U.S.C. § 5318(h)(4)(D).

purposes of the AML Act, improve the quality of BSA recordkeeping and reporting and support the production of information that is highly useful for law enforcement and national security authorities.

Such feedback processes could be included in, or separate from, the mechanism that FinCEN develops to provide feedback, pursuant to Section 6203(b) of the AML Act, to each financial institution regarding information in SARs filed by that institution deemed useful to federal or state law enforcement agencies. Also as part of, or separate from, that mechanism, FinCEN should encourage the development of information sharing processes, as contemplated by the AML Act,[22] that would enable institutions to better target their internal monitoring and tracking mechanisms, including improved risk-based tuning of AML programs. Better targeting has the potential to improve both the effectiveness of AML programs and the usefulness of reported information.

BPI offers the following feedback mechanisms as examples that may enhance AML programs and the information they generate: (1) increased use of technical bulletins, (2) improved mechanisms through which intelligence is made available to institutions, (3) regular provision, including through renewed publication of SAR Activity Reviews,[23] of comprehensive statistics and case studies that are actionable and tied to specific illicit finance risks (and not overall priorities, such as fraud generally); and (4) letters from law enforcement and national security authorities, which FinCEN should encourage, that, where appropriate, acknowledge that an institution has provided highly useful information.[24]

Additional considerations that we believe FinCEN should take into account in designing feedback processes are: (1) to the extent appropriate, FinCEN should share output from the FinCEN Exchange[25] beyond only those institutions that participate, which would improve the effectiveness and efficiency of AML programs; and (2) FinCEN should regularly and separately engage with different "subcategories" of financial institutions (such as retail banks, investment banks, custodial banks, etc.) so that feedback can be appropriately tailored.

D. FinCEN should encourage and expressly permit innovative approaches to AML compliance.

One purpose of the AML Act is to "encourage technological innovation and the adoption of new technology by financial institutions to more effectively counter money laundering and the financing of terrorism."[26] In accordance with this objective, FinCEN should affirmatively provide in any revisions to AML program rules that financial institutions with sufficient internal governance mechanisms in place

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22 *See, e.g.*, 31 U.S.C. § 5311(5); *see also* NDAA 2021, § 6214.

23 NDAA 2021, § 6206 (codified at 31 U.S.C. § 5318(g)(6)).

24 Such letters are contemplated by the FFIEC Manual. *See* FFIEC Manual, Scoping and Planning, Risk-Focused BSA/AML Supervision, Examination Procedures (2020) , *available at* https://bsaaml.ffiec.gov/manual/ScopingAndPlanning/02.

25 *See* NDAA 2021, § 6103 (codified at 31 U.S.C. § 310(d)).

26 NDAA 2021, § 6002(3).

are permitted to leverage new and emerging technologies to comply with BSA/AML requirements. Although the December 2018 *Joint Statement on Innovative Efforts to Combat Money Laundering and Terrorist Financing* assisted efforts by institutions to explore such technology,[27] codifying in rule revisions that institutions may (but are not required to) implement such technology would encourage continued modernization of compliance operations over a longer term. Such codification would also provide institutions with greater comfort that they may in appropriate circumstances reallocate resources away from older, less reliable technologies (such as transaction monitoring) toward newer approaches (such as dynamic risk assessments or behavior-based monitoring or the use of machine learning or artificial intelligence) without being subjected to regulatory criticism.

In addition, FinCEN should clarify that institutions have flexibility to determine not only *what* technologies they use as part of an effective, risk-based AML program, but also *how* they implement them. For example, FinCEN should provide, including in the testing methods rulemaking under Section 6209 of the AML Act, that institutions have substantial flexibility in determining whether and how to validate tools used in their AML programs. FinCEN should also make clear that there is no regulatory requirement or expectation that financial institutions undertake "parallel runs" when implementing new systems. In addition, in line with a recent statement by FinCEN's Acting Director that FinCEN is exploring the creation of "regulatory sandboxes,"[28] FinCEN should describe principles for internal financial institution governance that (1) address processes for how an institution may determine to end a pilot program and, if appropriate, transition a piloted concept into business-as-usual processes and (2) enable examiners to evaluate these processes.

Additional steps that FinCEN should take to encourage implementation of new approaches and technologies include facilitating open and frequent dialogue regarding innovation. The AML Act includes several provisions intended to promote dialogue between, among others, FinCEN and financial institutions, including specifically with respect to innovation.[29] To reflect the objectives of these provisions, we recommend FinCEN convene periodic roundtables on technological developments related to BSA/AML compliance activities, such as through the Bank Secrecy Act Advisory Group and its Subcommittee on Innovation and Technology[30] and the periodic financial crimes tech symposium contemplated by Section 6211 of the AML Act. FinCEN should also, based on these discussions, provide

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27 Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Financial Crimes Enforcement Network, National Credit Union Administration, Office of the Comptroller of the Currency, Joint Statement on Innovative Efforts to Combat Money Laundering and Terrorist Financing (Dec. 3, 2018), *available at* https://www.fincen.gov/sites/default/files/2018-12/Joint%20Statement%20on%20Innovation%20Statement%20%28Final%2011-30-18%29_508.pdf.

28 Speech of Himamauli Das, Acting Director, Financial Crimes Enforcement Network at the American Bankers Association/American Bar Association, Financial Crimes Enforcement Conference (Jan. 13, 2022), *available at* https://www.fincen.gov/news/speeches/prepared-remarks-fincen-acting-director-him-das-delivered-virtually-american-bankers.

29 *See,e.g.*, NDAA 2021, §§ 6208, 6211; *see also, e.g.*, NDAA 2021, § 6214.

30 *See* NDAA 2021, § 6207.

insights on what it views as positive developments or "success stories" for innovation in the industry.[31] Further, the Treasury Department, including FinCEN, should consider whether to create, or coordinate with industry on efforts to create, technology utilities for compliance activities, as government authorities have done in other jurisdictions.[32]

E. Any amendments to FinCEN's AML program rules should be harmonized with other AML rules, including the AML program rules of the federal banking agencies.

In developing amendments to FinCEN's AML program rules that would require financial institutions to maintain "effective and reasonably designed" programs and clearly define the meaning of that phrase, FinCEN should work with the federal banking agencies to address how these regulatory amendments would intersect with the "minimum standards" (*i.e.*, the "pillars") of an AML program required under the BSA, the regulations of FinCEN and, for banking entities, the rules of the federal banking agencies.[33] In particular, we strongly urge FinCEN to coordinate with the federal banking agencies to ensure that regulatory amendments to FinCEN's AML program rules are made simultaneously with the same amendments to the banking agencies' AML rules. Consistency among rules is necessary so that institutions are not subject to multiple—and potentially conflicting—compliance requirements. A lack of consistency would also reduce the impact of potential revisions to FinCEN's AML program rules by limiting the ability of institutions to reallocate resources and appropriately tailor their AML programs, as may be contemplated by those revisions.

II. Recommendations regarding revisions to the FFIEC Manual

We appreciate the sustained efforts of FinCEN and the FFIEC member agencies over the last several years to address industry concerns relating to the BSA/AML examination environment. We also appreciate the significant efforts that have been made, including through various helpful updates to the FFIEC Manual, to emphasize the risk-based nature of the AML/CFT regime and to inform examiners of relevant considerations for risk-based examinations. However, in the experience of BPI members, examinations continue to focus instead on strict adherence to procedures. Accordingly, the FFIEC Manual should continue to be updated to reflect the objectives of the AML Act and any future revisions

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31 Such insights could be an important aspect of the public-private partnership and collaboration described by FinCEN's Acting Director in a recent speech. *See* Speech of Mr. Das, *supra*, note 28.

32 For example, a project supported by Japan's Financial Services Agency, sponsored by Japan's New Energy and Industrial Technology Development Organization and with participation from multiple financial institutions, has led to the development of a proof of concept using artificial intelligence algorithms that could lead to the development of a shared transaction monitoring and screening system. *See* Financial Action Task Force, Stocktake on Data Pooling, Collaborative Analytics and Data Protection at 15 (2021), *available at* https://www.fatf-gafi.org/media/fatf/documents/Stocktake-Datapooling-Collaborative-Analytics.pdf.

33 *See, e.g.*, 31 U.S.C. § 5318(h); 31 C.F.R. §§ 1020.210(a)(2), 1020.210(b)(2), 1021.210(b), 1022.210(d), 1023.210(b), 1024.210(b), 1025.210(b), 1026.210(b), 1027.210(b), 1028.210(b), 1029.210(b), 1030.210(b); 12 C.F.R. §§ 21.21(d), 208.63(c), 211.5(m), 211.24(j), 326.8(c), 748.2(c).

to BSA/AML rules, including any final rule that requires institutions to implement an effective and reasonably designed AML program. Updates to the FFIEC Manual should also be reflected regularly in examiner training, including the training contemplated by Section 6307 of the AML Act.[34]

We also recommend that FinCEN coordinate with FFIEC member agencies to make certain further updates to the FFIEC Manual and provide related examiner training. These updates and related training would facilitate the RFI's objectives of modernizing, streamlining, and updating BSA regulations and guidance to promote a risk-based approach, and would ensure examination of institutions for compliance with the BSA does not proceed in a non-risk-based manner, which would work against the risk-based approach codified in the AML Act. Updates and training that we believe would further the objectives of the RFI include the following:

- The FFIEC Manual should emphasize that regulators expect institutions to adopt risk-based AML programs, and provide guidance on what it means for a program to be risk-based. This guidance should clarify, among other things, that a risk-based AML program is to be evaluated, including in connection with implementation of the national AML/CFT priorities, based on its effectiveness and the appropriateness of its risk management processes, not procedural or technical perfection. Further, guidance on the nature of a risk-based AML program, whether in the FFIEC Manual or otherwise, should be updated frequently to keep pace with evolution in financial crime programs, illicit finance risks, and financial products.

- The FFIEC Manual should continue to emphasize that compliance obligations for an AML program are determined by laws and regulations, not guidance. Accordingly, institutions should not be subject to criticism for failing to "comply" with guidance—for example, recommendations in the FFIEC Manual with respect to particular products and customer types, which are not tied to specific regulatory requirements. Institutions may feel it necessary to address FFIEC Manual recommendations in full even when not required by law or rule, given their inclusion in the FFIEC Manual and statements suggesting supervisory expectations may apply for reasons other than regulatory requirements.[35]

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[34] 31 U.S.C. § 5334. The important changes that a rule requiring institutions to implement an effective and reasonably designed AML program would have should weigh strongly in favor of a pilot of any contemplated regulatory amendments, as discussed in Section I.A above. Through such a pilot, FinCEN, other financial institution regulators, and financial institutions could evaluate whether there are unintended consequences with how changes are implemented by institutions and reviewed by examiners.

[35] *E.g.*, FFIEC Manual, Risk Associated with Money Laundering and Terrorist Financing, Introduction—Customers (2021) (describing that although "there is no BSA/AML regulatory requirement or supervisory expectation for banks to have unique or additional customer identification requirements or CDD steps for any particular group or type of customer," "[t]here may be supervisory expectations for other reasons, such as safety and soundness standards, corporate governance, bank-specific enforcement actions and

- The FFIEC Manual should clarify that institutions are not required or expected to collect information from customers on their expected activity except as required under the CDD Rule, including to "[u]nderstand[] the nature and purpose of customer relationships."[36] In guidance published in 2020, FinCEN stated that the CDD Rule "does not categorically require . . . the collection of any particular customer due diligence information (other than that required to develop a customer risk profile, conduct monitoring, and collect beneficial ownership information)."[37] However, multiple sections of the FFIEC Manual discuss determining or collecting "expected activity" from customers.[38] As a consequence, BPI members report that testing functions or examiners have, in some circumstances, communicated expectations that institutions have in place quantitative estimates of expected transactional activity. The FFIEC Manual and related guidance should confirm that there is no requirement or expectation to determine or collect specific information as to a customer's expected activity, other than as is determined necessary on the basis of risk under the CDD Rule.

- The FFIEC Manual should confirm that institutions may and should reallocate resources as appropriate on the basis of risk and in light of revisions to BSA/AML rules, but that there are no obligations that institutions either reduce or increase overall program resources in connection with any reallocation.

- The FFIEC Manual should encourage institutions to develop innovative methods for identifying and otherwise taking proactive measures to assist law enforcement, even if those methods or measures are not in the ordinary course or pursuant to otherwise applicable regular policies and procedures. For example, if an institution provides such proactive assistance, especially where it furthers the underlying purposes of the BSA, the manual should encourage examiners to recognize such efforts in developing examination conclusions.

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conditions for obtaining bank charters and deposit insurance"), *available at* https://bsaaml.ffiec.gov/manual/RisksAssociatedWithMoneyLaunderingAndTerroristFinancing/00.

36 *E.g.*, 31 C.F.R. § 1020.210(a)(2)(v)(A).

37 Financial Crimes Enforcement Network, Frequently Asked Questions Regarding Customer Due Diligence (CDD) Requirements for Covered Financial Institutions, FIN-2020-G002 (Aug. 3, 2020).

38 *See, e.g.*, FFIEC Manual, Assessing Compliance with BSA Regulatory Requirements, Suspicious Activity Reporting—Overview (2014) ("Activities identified during these reviews should be subjected to additional research to ensure that identified activity is consistent with the stated account purpose and expected activity."), *available at* https://bsaaml.ffiec.gov/manual/AssessingComplianceWithBSARegulatoryRequirements/04; FFIEC Manual, Risks Associated with Money Laundering and Terrorist Financing, Electronic Banking—Overview (2014) ("Examples of risk mitigants include . . . [o]btaining expected account activity from the [Remote Deposit Capture ("RDC")] customer, such as the anticipated RDC transaction volume, dollar volume, and type . . . ."), *available at* https://bsaaml.ffiec.gov/manual/RisksAssociatedWithMoneyLaunderingAndTerroristFinancing/07.

- The FFIEC Manual should reflect the flexibility and discretion that institutions have, as confirmed in recent interagency guidance, to determine how to apply to BSA/AML systems the federal banking agencies' "Model Risk Management Guidance."[39]

- The FFIEC Manual and related guidance should address specific illicit finance risks applicable to custodial banks and institutional (non-retail) operations of institutions, and discuss tailored expectations for AML program activities related to these operations.

- The FFIEC Manual should include updated guidance with respect to "electronic banking" to reflect current practices. The FFIEC Manual should refer to "digital banking," instead of "electronic banking" or "e-banking," and should be updated generally to focus on the prevalence of, and risks associated with, electronic payments and digital banking products, including based on experiences during the COVID-19 pandemic.

- FinCEN and the FFIEC member agencies should continue their helpful efforts so that the FFIEC Manual addresses industry concerns relating to the differentiation of risk, and continues to clarify that institutions should identify high-risk attributes, not high-risk activities.

III. Recommendations regarding reporting requirements

A. Suspicious activity reports

In our view, the U.S. suspicious activity reporting regime is outdated, inefficient, and in need of significant regulatory changes. Such changes, in accordance with the purposes of the AML Act, could substantially increase the usefulness of SAR information to law enforcement and national security authorities. Below, we include several recommendations based on the day-to-day experiences of our members in generating SAR information, completing the SAR form (FinCEN Form 111), filing SARs, and discerning the utility of reported information. BPI members are deeply committed to providing useful information in SARs, and we believe that the recommendations below would further that objective.

1. FinCEN and financial regulators should continue to encourage implementation of innovative approaches to transaction monitoring.

BPI members have increasingly implemented innovative technology, including artificial intelligence, machine learning, and behavioral monitoring, to increase the effectiveness and efficiency of their transaction monitoring processes. FinCEN, in coordination with the federal banking agencies and other relevant regulators, should continue to encourage the implementation of these innovative

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[39] *See* Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, Interagency Statement on Model Risk Management for Bank Systems Supporting Bank Secrecy Act/Anti-Money Laundering Compliance (Apr. 9, 2021), *available at* https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20210409a2.pdf.

approaches, to the extent financial institutions determine them to be appropriate in light of their specific activities and profile. For example, institutions that may seek to adopt innovative technological approaches for transaction monitoring are frequently wary of doing so because independent testing of a new system may criticize technology that does not provide the same complete, comprehensive audit trail that existing systems do with respect to every transaction. Such criticisms frequently arise due to the focus, described above, of examiners and auditors on technical and procedural perfection, even though more innovative systems may be more effective and efficient at identifying suspicious activity and providing highly useful information to law enforcement and national security authorities.

To address this and other barriers to adoption of innovative technology for transaction monitoring, FinCEN should clarify, jointly with other relevant regulators, that transaction monitoring, like other BSA/AML compliance activities, need not be "perfect." Instead, transaction monitoring should be evaluated against whether it is reasonably designed to provide, and is effective at providing, highly useful information, taking into account AML priorities communicated by FinCEN and law enforcement and national security authorities.[40] In encouraging the adoption of innovative approaches to transaction monitoring, FinCEN and other regulators should also take into account the difficulties and time-consuming nature of technology transitions. Although new approaches may be more effective and efficient over the longer-term, their initial implementation often requires extensive manual review processes.

In addition, institutions should be expressly permitted to tailor their transaction monitoring mechanisms to focus on applicable AML priorities and to discontinue monitoring activities that are less effective at identifying information related to the priorities or are unnecessary for appropriate risk management. Institutions should not, as a result, be subject to criticism if, as a consequence of reasonable, risk-based decisions and information available at the time, (1) their transaction monitoring systems do not generate the same types of alerts that had been generated under discontinued processes or (2) they do not exit particular customer relationships that pose heightened, but manageable, illicit finance risks.

2. FinCEN should implement as soon as practicable the automated reporting provisions of the AML Act and explore the potential use of "bulk" SAR filings.

Under Section 6204 of the AML Act, the Treasury Department, in consultation with various other authorities and stakeholders, must undertake a review of financial institution reporting requirements relating to SARs and CTRs. Among other things to be addressed in that review is whether the process for

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40 *See* NDAA 2021, § 6202 (codified at 31 U.S.C. § 5318(g)(5)(B)) (providing that any requirement to report suspicious transactions under 31 U.S.C. § 5318(g) must consider, among other things, national AML priorities, the purposes of the BSA, the burdens and efficiency of the means or form of reporting, and the "benefits derived by the means or form of reporting by Federal law enforcement agencies and the intelligence community").

electronic submission of SARs can be "improved for both financial institutions and law enforcement agencies," including through automated reporting of certain data on suspicious transactions.[41]

We encourage FinCEN to implement measures that would enable institutions to choose to make automated SAR filings as soon as practicable, including before completion of the review required under Section 6204. SARs for certain types of transactions are generally less complex and often of little or no investigative value. FinCEN should expressly permit, through exceptive relief or otherwise, financial institutions that have sufficient internal governance mechanisms and appropriate guardrails to make automated filings of SARs in certain circumstances, with all such SARs subject to the SAR safe harbor provisions.[42] The filings within the scope of FinCEN's authorization should be determined on the basis of risk and should include routine structuring, low-dollar fraud, and routine cyber intrusion SARs. Automated SAR filing, which the OCC has permitted for certain types of SARs,[43] has significant potential not only to provide more timely information to FinCEN and law enforcement and national security authorities, but also to enable financial institutions to reallocate resources to more effective AML activities. We further recommend that FinCEN utilize innovation hours, the Bank Secrecy Act Advisory Group, AML Act-related forums, and other communication channels with financial institutions and service providers to promote the use of, and best practices for, permitted automated SAR filings.

FinCEN should also explore mechanisms to permit financial institutions to make "bulk" SAR filings, again for certain types of transactions that are less complex and of little or no investigative value. Such bulk filings could consist of a quarterly report of all transactions identified as satisfying certain criteria. In a similar vein, FinCEN should consider authorizing institutions, through exceptive relief or otherwise, to stop filing SARs on transactions considered low risk and of minimal investigative value.

Minimizing burdens related to reporting transactions of these types would promote a risk-based AML/CFT regime by, as described in the RFI, modifying BSA regulations and guidance that cause resources to be "allocated inefficiently based on the level of risk."[44] For example, institutions currently file individual SARs on attempted application fraud, failed business email compromise schemes, and other fraudulent transactions that result in no actual loss, but involve an attempt to gain access to a credit line, deposits, or other assets worth more than $5,000. Although FinCEN has enumerated fraud as a national AML/CFT priority, banks should be permitted to streamline reporting of these "zero-dollar frauds," instead of preparing and submitting SARs on each individual attempt.

As an additional example, BPI member institutions report that they implement internal screening lists of persons that have previously conducted suspicious transactions and on whose behalf

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41 NDAA 2021, § 6204(b)(2)(H).

42 *See* 31 U.S.C. § 5318(g)(3); *see also, e.g.*, 31 C.F.R. § 1020.320(f).

43 Office of the Comptroller of the Currency, Interpretive Letter #1166 (Sept. 27, 2019), *available at* https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2019/int1166.pdf.

44 86 Fed. Reg. at 71206.

the institution will no longer process transactions. If a listed person attempts to conduct a similar transaction through the institution, it will be interdicted and cancelled. However, under FinCEN's and the federal banking agencies' SAR rules, "attempted" transactions that otherwise satisfy SAR filing criteria must be reported.[45] If the attempted transaction is substantially similar to a transaction by the same person that has already been the subject of a SAR, an additional SAR providing similar information about an uncompleted transaction has marginal, if any, utility for law enforcement and national security authorities. Filing a SAR in these circumstances should not be required.

3. FinCEN should coordinate with the federal banking agencies to update, modernize, and harmonize the criteria that trigger the filing of a SAR.

Unlike other financial institutions, banking organizations are subject not only to FinCEN's SAR filing rule, but also to the SAR filing rule of one or more federal banking regulators. Although FinCEN's SAR rule is similar to those of the federal banking agencies, there are material differences. The process of resolving these differences imposes burdens on banks, without providing a known material benefit to end-users of SAR information. Such differences may, at times, be addressed by FAQs or other guidance; however, FinCEN and the federal banking agencies should engage in a broader effort to review and harmonize SAR filing requirements, including by considering making rule revisions pursuant to a single, joint rulemaking.

This harmonization effort would also enable FinCEN and the federal banking agencies to modernize the SAR filing criteria, which have not substantially changed since 1996. These criteria and related expectations should be reviewed in light of changes in practices and technology and to ensure the criteria continue to fulfill the purposes of the BSA of requiring reports or records that are "highly useful" for law enforcement and national security objectives and of "facilitat[ing] the tracking of money that has been sourced through criminal activity or is intended to promote criminal or terrorist activity[.]"[46] We believe that several current criteria result in the required filing of SARs in circumstances where the reported information does not further the BSA's purposes. With the foregoing in mind, we recommend that FinCEN and the federal banking agencies, as applicable, modify the following criteria or related guidance in connection with modernizing SAR filing requirements:

- *Scope of conduct and level of suspicion or evidence*. FinCEN and the federal banking agencies should narrow the scope of conduct, and clarify the level of suspicion or evidence of that conduct, that triggers an obligation to file a SAR. Doing so would enable institutions to better understand when a SAR is, and is not, required. The broad interpretation of SAR filing criteria and the lack of clarity, especially in the current examination environment, as described above, results in institutions frequently erring significantly on the side of caution and deploying considerable resources to file SARs

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45 *See, e.g.*, 31 C.F.R. § 1020.320(a)(2).

46 31 U.S.C. § 5311(1), (3).

that may not be required and are likely of little usefulness to law enforcement and national security authorities. As an example, SARs generally must be filed for any "transaction [with] no business or apparent lawful purpose or [that] is not the sort in which the particular customer would normally be expected to engage, and the bank knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction."[47] This criterion has been interpreted broadly as requiring SARs even where an institution lacks a basis for suspicion and it results in SARs with little usefulness. FinCEN should clarify what is necessary to satisfy this criterion by specifying that, unless there are additional facts that provide a basis for suspicion (not just "no reasonable explanation"), a SAR is not required simply because a transaction lacks an identifiable business or lawful purpose or is not the sort in which a customer would normally be expected to engage.

- *Continuing activity reports*. FinCEN should modify its guidance regarding the filing of SARs with respect to continuing activity. Under SAR FAQ #16, after an institution files an initial SAR, it must file a continuing activity report ("CAR") for every successive 90-day review period until the applicable activity ceases.[48] The requirement to file a CAR, when initially implemented, ensured institutions continued to monitor activity that had been reported on a SAR. However, the implementation of new regulatory obligations and technological changes since this FAQ was issued have rendered the CAR requirement unnecessary. Institutions are now required under the CDD Rule to conduct ongoing monitoring, including through transaction monitoring systems. As a result, if information on whether activity has continued after the filing of a particular SAR would be helpful to law enforcement or national security authorities, that information could be promptly provided, without the need for CARs in all cases addressed by the FAQ. Further, the filing of CARs may not provide highly useful information in many cases: if continuing conduct raises significant illicit finance risks, an institution may terminate the customer relationship, meaning CARs may be more likely with respect to lower-risk activities. Nevertheless, the processes to review continuing activity and produce CARs impose considerable burdens on institutions. Accordingly, FinCEN should update SAR FAQ #16 to provide that, after the filing of an initial SAR, no report is required with respect to continuing activity.

- *Criminal violations involving unknown suspects*. For transactions where there is no substantial basis for identifying a possible suspect or group of suspects, FinCEN should align its SAR rule with the SAR rules of the federal banking agencies. Under a revised

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47 E.g., 31 C.F.R. § 1020.320(a)(2)(iii).

48 Financial Crimes Enforcement Network, Frequently Asked Questions Regarding the FinCEN Suspicious Activity Report (SAR), https://www.fincen.gov/frequently-asked-questions-regarding-fincen-suspicious-activity-report-sar.

FinCEN rule, a SAR would not be required to be filed in circumstances involving an unknown suspect unless there is a known or suspected criminal violation involving the institution and $25,000 or more in funds or other assets.[49] Simultaneously, FinCEN should issue guidance addressing the circumstances in which an institution may conclude that there is no substantial basis for identifying a possible suspect or group of suspects.[50]

- *Suspicious activity involving employees*. FinCEN permits two or more financial institutions to collaborate in filing a single, jointly filed SAR with respect to suspicious activity involving all of the collaborating institutions. A "joint SAR," however, may not be filed when the subject is a director, employee, officer, or owner/controlling shareholder of any of the joint filers.[51] As a result, where suspicious activity concerns conduct of an employee involving more than one legal entity subject to SAR-filing obligations within a financial institution's group (such as a bank and broker-dealer subsidiary of the same banking organization), FinCEN requires separate, though potentially otherwise identical, SARs be filed by each entity. FinCEN should modify its instructions to permit a joint SAR to be filed in these circumstances, provided appropriate measures are in place to ensure that the SAR is not disclosed to any person not entitled to information about the filing. Permitting joint SARs in these circumstances would reduce burdens on institutions with no impact on the usefulness of reported information and no increased risk of improper disclosure.

- *Calculations of transaction amount*. FinCEN should coordinate with law enforcement and national security authorities, as well as the federal banking agencies, to issue guidance that clarifies how institutions should calculate transaction amounts for purposes of determining whether the criteria for filing a SAR have been met and for completing the SAR form. In particular, FinCEN and the federal banking agencies should specify whether, for these purposes, a transaction that includes a transfer of an amount of funds into, and then out of, an institution should be counted as (1) the value of either leg of the transaction, which may better reflect the total value of suspicious transactions that are occurring, or (2) the aggregate value of both legs of the transaction.

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49 *See*, *e.g.*, 12 C.F.R. §§ 21.11(c)(3), 208.62(c)(3).

50 Such guidance could address, for example, whether there is a sufficient basis to identify a possible suspect if the institution has an IP address, email address and/or phone number, but not a name.

51 *See* Financial Crimes Enforcement Network, FinCEN Suspicious Activity Report (FinCEN SAR) Electronic Filing Requirements, XML Schema 2.0, at 142 (Aug. 2021), *available at* https://bsaefiling.fincen.treas.gov/docs/XMLUserGuide_FinCENSAR.pdf.

- *Typology SARs*. FinCEN should clarify that institutions may, but are not required, to file SARs addressing particular financial crime typologies where the SAR addresses multiple transactions that do not otherwise trigger a requirement to file a SAR.

- *Attempted cyber events*. FinCEN should amend its 2016 advisory addressing cyber-events and related suspicious activity[52] so that institutions are no longer directed to report attempted cyber events.[53] Cyber-events are frequently reported to law enforcement and national security authorities through other mechanisms, including the Financial Services Information Sharing and Analysis Center. Reporting these same cyber-events in SARs, especially where there is no apparent connection to illicit finance, imposes additional burdens on financial institutions but provides limited additional usefulness to law enforcement and national security authorities. Further, attempted cyber events, particularly those undertaken as part of a series of transactions, may have no direct nexus to a financial institution, but under FinCEN's 2016 guidance, may still need to be reported through the filing of a SAR.

- *Marijuana-related businesses*. FinCEN should revise its guidance related to marijuana-related businesses ("MRBs")[54] to provide that financial institutions are not required to file SARs of any sort, including marijuana-limited SARs, on transactions related to MRBs that are operating in compliance with state law and that do not implicate any "Cole Memo priorities" (as defined in the FinCEN guidance). Such SARs, in particular when the MRB is not itself a customer of the filing institution, generally provide limited value to law enforcement, especially because state law enforcement cannot, and federal law enforcement has indicated it will not, prosecute the MRB. Alternatively, FinCEN should limit any obligation to file marijuana-limited SARs to circumstances where the MRB is a customer of the institution.

- *Keywords and advisories*. FinCEN and the federal banking agencies should review the criteria for filing a SAR and related guidance, including advisories and FAQs, and remove any criteria or guidance that are obsolete or of little law enforcement or national security value. In connection with this review, FinCEN should provide an update to financial institutions on the suspicious activity reporting guidance that continues to be active and valid. FinCEN should also clarify its expectations regarding suspicious activity reporting based on trends versus individual flags. Further, FinCEN should consolidate all

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52 Financial Crimes Enforcement Network, Advisory to Financial Institutions on Cyber-Events and Cyber-Enabled Crime, FIN-2016-A005 (Oct. 25, 2016).

53 Alternatively, institutions should be permitted to report these events using a "bulk" SAR, as described in Section III.A.2 above.

54 Financial Crimes Enforcement Network, BSA Expectations Regarding Marijuana-Related Businesses, FIN-2014-G001 (Feb. 14, 2014).

of its SAR-related guidance in a single, accessible form, and keep that guidance up-to-date as regulations are amended and guidance is issued, rescinded, or modified.

In addition to modifying the foregoing suspicious activity reporting criteria or related guidance, FinCEN should clarify certain regulatory expectations related to SAR filings. BPI believes the following clarifications would either increase or have little impact on the usefulness of SAR information, but meaningfully reduce burdens on institutions: (1) after an investigator determines the criteria for filing a SAR have been met and the institution files the SAR, additional follow-up review, if any, related to the filing should be undertaken on the basis of risk; and (2) when a determination is made not to file a SAR, a short, concise statement describing the rationale for not filing a SAR should be sufficient documentation, with no expectation that an institution will prepare a detailed description of the case investigation and related decision-making process.

4. FinCEN should revise the SAR form to more closely align with AML Act requirements and to increase the utility of reported information.

As noted above, under the AML Act, SAR filing requirements must consider, among other things, the national AML/CFT priorities.[55] To better enable institutions to link SARs they are filing to these priorities, FinCEN should revise the SAR form to include check boxes or fields to indicate which, if any, national priorities the reported suspicious activity relates to. FinCEN should make clear in any revisions to the form that institutions are only required to undertake their best efforts to link suspicious activity to national priorities, especially because it will not always be clear at the time of filing whether the activity relates to a priority; the decision of whether to link activity to a national priority should not be subject to retrospective questioning with the benefit of hindsight.

In addition, FinCEN should also revise the term "critical field" on the SAR form (for example, to "required field") to reflect that these fields are not necessarily more "critical" than others, but rather that they are fields that must, as a technical matter, be completed. The term "critical field" is subject to being misconstrued and, in members' experience, the terminology prompts auditors, testing functions, and examiners to focus on whether these fields are technically complete. This focus increases reporting burdens on institutions, without a corresponding benefit for the usefulness of reported information.

5. FinCEN should proceed with implementing the pilot program on intragroup SAR information sharing required under Section 6212 of the AML Act.

We appreciate the Notice of Proposed Rulemaking that FinCEN published that would establish the pilot program contemplated by Section 6212 of the AML Act. In that pilot, institutions would be permitted, subject to approval and conditions set by FinCEN, to share SAR information with foreign

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[55] NDAA 2021, § 6202 (codified at 31 U.S.C. § 5318(g)(5)(B)(i)).

branches, subsidiaries, and affiliates.[56] BPI has historically supported the types of SAR information sharing that would be permitted through the pilot and we look forward to engaging with FinCEN on the proposal. We intend to comment on the proposal through its separate comment process.

B. Currency transaction reports

The Treasury Department's requirement that financial institutions report large currency transactions was implemented well before financial institutions were first required to file reports of suspicious transactions. However, at no point have the requirements for filing CTRs been updated to take into account that financial institutions must now also file SARs, including on suspicious currency transactions. The $10,000 threshold for filing CTRs has also not been updated since it was introduced in 1970. As a consequence of this low dollar threshold, financial instructions often file large numbers of CTRs that may be of little law enforcement or national security value. The following recommendations address revisions to CTR rules that would increase the usefulness of CTR information and update outdated regulations, taking into consideration the information reported on CTRs, including CTRs that do not relate to suspicious transactions, the separate suspicious activity reporting obligations of financial institutions, and the burdens imposed by CTR filing requirements.

1. FinCEN should eliminate aggregation and other burdensome CTR requirements and permit automatic reporting of basic cash transactional data.

The aggregation requirement applicable to CTRs imposes substantial burdens on financial institutions, especially given the breadth of the regulatory language and related FinCEN guidance. We think it is unlikely that Congress envisioned this level of complexity in 1970, when it first instructed the Treasury Secretary to mandate currency transaction reporting.

Under FinCEN's rules, an institution must file a CTR if it "has knowledge that [multiple transactions] are by or on behalf of any person and result in either cash in or cash out totaling more than $10,000 during any one business day[.]"[57] Read broadly, as FinCEN has in applicable guidance, this requirement suggests that an institution must aggregate cash transactions by or on behalf of the same person across the institution and across the bank's agents; for example, an institution must aggregate loan payments, credit card payments (both accepted by the institution and by a retail partner), cash deposits, and other transactions. Satisfying the aggregation requirement imposes particularly large burdens on large institutions with multiple product lines, legacy information systems, and multiple relationships with agents that accept cash on the institution's behalf. The requirement to include

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[56] Financial Crimes Enforcement Network, Pilot Program on Sharing of Suspicious Activity Reports and Related Information With Foreign Branches, Subsidiaries, and Affiliates, Notice of Proposed Rulemaking, 87 Fed. Reg. 3719 (Jan. 25, 2022); *see* NDAA 2021, § 6212 (codified at 31 U.S.C. § 5318(g)(8)).

[57] 31 C.F.R. § 1010.313(b).

information generally in CTRs relating to individuals on whose behalf transactions may be taking place similarly imposes significant burdens.

FinCEN should remove the aggregation requirement and the requirement that institutions include information relating to individuals on whose behalf a transaction may be taking place. Especially when the CTR regime is viewed together with the SAR regime—under which banks will continue to monitor and, where appropriate, report transactions that involve, among other things, large, unusual, or suspicious cash activity—we believe that these changes would reduce burdens on institutions by decreasing the filing of CTRs of little value to law enforcement or national security authorities.[58] In this respect, we note that, according to a recent empirical study of BPI members, ten institutions reported that, of the CTRs they filed in 2017, less than one in 200 (0.44%) resulted in a follow-up inquiry from law enforcement.[59]

We believe the CTR regime would be further enhanced if FinCEN adopts a system in which institutions send basic cash transactional data directly to FinCEN. Such a system would eliminate the need to file a CTR, instead permitting institutions to send certain basic data for cash transactions satisfying specified criteria. The basic data that institutions would provide to FinCEN should include data corresponding to a limited, but prioritized, set of fields currently included in the CTR form.

Such real-time, straight-through currency transaction reporting would allow institutions to redeploy resources to initiatives that are a higher priority to law enforcement and national security authorities, while providing FinCEN with no less (and potentially even more) information than is provided today. Providing data in this way to FinCEN would also not increase or pose additional illicit finance risks. Rather, this reporting approach may mitigate such risks by, for example, facilitating prompt, centralized analysis of data and reducing differences that may arise due to the diverse approaches to CTR reporting utilized by various financial institutions. Of course, each institution would continue to review underlying transactional activity and take additional steps as warranted based on the institution's AML compliance risk management framework.

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[58] For example, the activity that underlies a CTR filed due to the aggregation requirement would almost certainly trigger the filing of a SAR for structuring activity, if such activity was the result of an attempt to hide illicit activity. As another example, if a financial institution's SAR investigation resulted in a determination that a sufficiently large cash transaction was conducted on behalf of another individual, an institution could file both a detailed SAR and a CTR relating to same underlying activity.

[59] Bank Policy Institute, Getting to Effectiveness—Report on U.S. Financial Institution Resources Devoted to BSA/AML & Sanctions Compliance (Oct. 29, 2018), *available at* https://bpi.com/wp-content/uploads/2018/10/BPI_AML_Sanctions_Study_vF.pdf. As discussed in BPI's report, because there is no established metric for measuring whether a CTR is "useful" to law enforcement, a proxy was used, which was derived from instances where law enforcement reached out to institutions, including through subpoenas, national security letters, or requests for backup documentation.

2. FinCEN should update outdated identification requirements applicable to currency transactions.

Before completing large currency transactions, financial institutions must verify and record the name and address of the individual presenting the transaction, as well as record the identity, account number, and social security or taxpayer identification number of any person on whose behalf the transaction is effected. The applicable regulation provides, in limited circumstances, for reliance on a "bank signature card," instead of an identity document.[60]

This regulation, which was last updated in 1987, is outdated in light of changes in how institutions open accounts, conduct transactions, and verify customer information. In particular, the regulation does not take into account the documentary and non-documentary verification processes that institutions may permissibly adopt under FinCEN's customer identification program rule (the "CIP Rule"), which became effective in 2003. As permitted under the CIP Rule, financial institutions now may verify customer identities by comparing identifying information to information in credit reports or non-documentary verification services.[61] Accordingly, the regulation applicable to currency transactions prevents banks, in the context of only one type of transaction, from relying on more advanced verification methods they may otherwise use to verify identities. We therefore recommend that FinCEN update this regulation to align with the verification processes that institutions are otherwise permitted to undertake.

IV. Recommendations regarding requirements and expectations for customer due diligence activities

A. FinCEN should update its CIP Rule to reflect changing customer behavior and technological developments.

We recommend that FinCEN, working with other relevant federal agencies, revise the CIP Rule to reflect a more flexible approach that is capable of accommodating the rapidly changing landscape of financial services and innovations in technology. Under the CIP Rule, promulgated for the most part in 2003, banks are generally required, with limited exceptions, to collect a customer's name, physical address, date of birth, and Social Security number ("SSN") or other identification number.[62] While we recognize they may not be subject to a comparable customer identification program regulation, financial services companies that offer services similar to banks may pursue innovative ways of efficiently, securely, and effectively identifying their customers. For example, these non-bank providers may obtain only the final four digits of an SSN from the customer, and obtain the remainder from other trusted and secure sources. By virtue of the CIP Rule, banks are not afforded the same flexibility. FinCEN should address this dissymmetry by permitting banks to verify customer identities using similar approaches that

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60 *See* 31 C.F.R. § 1010.312.

61 *See, e.g.*, 31 C.F.R. § 1020.220(a)(2).

62 *See* 31 C.F.R. § 1020.220(a)(2)(i).

do not require obtaining a full SSN. We believe that this revision should be incorporated in more comprehensive updates to the CIP Rule. Moreover, because this revision would align with certain AML Act objectives by reducing unnecessary burdens without adversely impacting efforts to combat illicit finance risks, FinCEN should issue exceptive relief permitting banks to make this change even before any CIP Rule revisions are finalized. The revision would also reduce consumer privacy and data security concerns that have been raised with respect to collecting full SSNs.[63]

In addition to the foregoing, we recommend that FinCEN comprehensively update the CIP Rule to provide financial institutions with unambiguous flexibility to incorporate innovative technologies to verify customer identities. These modifications to the CIP Rule should, for example, permit institutions to: (1) obtain secure customer information from third-party trusted and secure sources (and not solely from the customer) for a broad set of account openings, with institutions empowered to determine the customer types for which reliance on such third-party information is reasonable; (2) verify identities through technologies that may not fit neatly into a documentary versus non-documentary dichotomy (*e.g.*, video technology that reduces forgery and impersonation risks), and (3) adopt digital identification systems as they become available. The importance of these modifications is demonstrated by recent efforts, which we applaud, to improve digital verification and identification, such as the recently announced FDIC and FinCEN digital identity Tech Sprint[64] and the Social Security Administration's Consent Based Social Security Number Verification Service.

B. FinCEN should use the required rulemaking to revise the CDD Rule to increase the utility of related activities, promote a risk-based AML/CFT regime, and minimize unnecessary and duplicative burdens.

Certain beneficial ownership collection and certification activities undertaken pursuant to the CDD Rule impose burdens on financial institutions that substantially exceed the utility of those activities. These activities also burden customers that are legitimate businesses and are required to provide extensive information, often on multiple occasions, to address requirements under the CDD Rule. We therefore recommend that FinCEN modify the CDD Rule to address these unnecessarily burdensome activities, whether through regulatory amendments or through the exercise of exceptive authority.

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63 These concerns have been raised consistently with respect to the requirements in the CIP Rule that banks collect full SSNs, including in connection with the initial promulgation of the CIP Rule in 2003. *See, e.g.*, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Financial Crimes Enforcement Network, National Credit Union Administration, Office of the Comptroller of the Currency, Office of Thrift Supervision, Customer Identification Programs for Banks, Savings Associations, Credit Unions and Certain Non-Federally Regulated Banks, Joint Final Rule, 68 Fed. Reg. 25090, 25091, 25098 (May 9, 2003).

64 Financial Crimes Enforcement Network, FDIC and FinCEN Launch Digital Identity Tech Sprint (Jan. 11, 2022), *available at* https://www.fincen.gov/news/news-releases/fdic-and-fincen-launch-digital-identity-tech-sprint.

We appreciate that, as described in FinCEN's Notice of Proposed Rulemaking to implement the beneficial ownership information reporting provisions of the Corporate Transparency Act (the "CTA"),[65] FinCEN will undertake a separate rulemaking process to bring the CDD Rule "into conformance" with the AML Act, including the CTA.[66] We believe the following recommendations below would, with respect to both the existing CDD Rule and future revisions to the rule, facilitate the RFI's objectives of modernizing, streamlining, and updating BSA regulations and guidance to promote a risk-based approach.[67]

- *Account-level information collection*. FinCEN should permit institutions to identify beneficial owners at the legal entity customer level, and not each time a new account is opened by a legal entity customer. The requirement to do so under the CDD Rule is particularly burdensome, especially in situations where an institution routinely opens multiple accounts for a customer on the same day or within a short period of time, and has no apparent corresponding benefit. Eliminating this requirement would enable institutions to direct resources spent identifying beneficial owners to activities that would better contribute to risk-based AML programs. Institutions would, of course, continue to undertake ongoing monitoring of their customers on the basis of risk, which may warrant collecting, updating, or re-verifying beneficial ownership information. Due to the burden imposed by the existing account-level collection requirement, we recommend that, prior finalizing revisions to the CDD Rule, FinCEN eliminate this requirement through the use of its exceptive authority.

- *Harmonizing the CTA, the CDD Rule, and the CIP Rule*. FinCEN should implement the CTA in a manner that harmonizes the implementing rules with the CDD Rule, future revisions to that rule, and related customer verification requirements under the CIP Rule.[68]

- *Definitions of "customer" and "account."* FinCEN should revise the CIP Rule's definitions of "customer" and "account,"[69] which are incorporated into the CDD Rule.[70] These

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65 Financial Crimes Enforcement Network, Beneficial Ownership Information Reporting Requirements, Notice of Proposed Rulemaking, 86 Fed. Reg. 69920 (Dec. 8, 2021).

66 NDAA 2021, § 6403(d)(1)(A).

67 Several of these recommendations were also addressed in BPI's comment letter responding to FinCEN's Notice of Proposed Rulemaking regarding the beneficial ownership information reporting provisions of the CTA. A copy of BPI's comment letter is attached to this letter as Annex I.

68 For additional discussion regarding this recommendation, please refer to Section I of our comment letter referenced in the preceding footnote.

69 *E.g.*, 31 C.F.R. § 1020.100.

70 *E.g.*, 31 C.F.R. § 1010.230(c) (incorporating the definition of account in, for example, 31 C.F.R. § 1020.100(a)); 31 C.F.R. § 1010.230(b)(2) (referencing the elements required for customer identification verification in, for example, 31 C.F.R. § 1020.220(a)(2), for which the definition of customer in 31 C.F.R. § 1020.100(b) applies).

definitions have become outdated and are frequently difficult to apply. BPI members report, for example, that it is unclear how to apply the definition of customer to sole proprietorships and to attorneys, conservators, or guardians that take over accounts opened by customers who die or become incapacitated after the account is opened,[71] and that it is unclear how to apply the definition of account to online banking.[72] These definitions should be modernized and simplified, in order to clarify each definition's scope and in a manner that requires less interpretation than the current definitions, in particular, with respect to relationships not clearly contemplated by those definitions.

- *Foreign financial institution exemption*. FinCEN should clarify the foreign financial institutions that are exempted from the CDD Rule's definition of "legal entity customer." Institutions are not required under the CDD Rule to identify and verify beneficial owners of any "foreign financial institution established in a jurisdiction where the regulator of such institution maintains beneficial ownership information regarding such institution."[73] FinCEN should publish and, as appropriate, update lists of regulators and institution types that satisfy this criterion.

- *Foreign subsidiaries of listed entities*. FinCEN should expand the scope of the CDD Rule exemption for subsidiaries of listed companies. Institutions are generally not required under the CDD Rule to identify and verify the beneficial owners of any entity that (1) has at least 51% of its common stock or analogous equity interest owned by a listed entity and (2) is formed under the law of the United States or any state.[74] Because the beneficial ownership of every entity that satisfies the first criterion is known through its

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[71] With respect to sole proprietorships, it is unclear if verification should be of the sole proprietorship, the sole proprietor, or both. *See, e.g.*, 31 C.F.R. § 1020.100(b) (defining customer to include a "person that opens a new account" *and* an "individual who opens a new account for . . . [a]n entity that is not a legal person"); Financial Crimes Enforcement Network, FAQs: Final CIP Rule (Jan. 2004), at 7 (suggesting that verification should be performed with respect to the sole proprietorship or the sole proprietor, but only if verification cannot be performed with respect to the sole proprietorship), *available at* https://www.fincen.gov/sites/default/files/guidance/finalciprule.pdf; Financial Crimes Enforcement Network, Customer Due Diligence Requirements for Financial Institutions, Final Rules, 81 Fed. Reg. 29398, 29412 & n.54 (May 11, 2016) (describing the sole proprietor, not the sole proprietorship, as the customer).

[72] It is unclear if online banking is an account that is "established to provide or engage in services, dealings, or other financial transactions," *e.g.*, 31 C.F.R. § 1020.100(a)(1), or is instead a feature of an account.

[73] 31 C.F.R. § 1010.230(e)(2)(xiv).

[74] 31 C.F.R. § 1010.230(e)(2)(ii) (referencing a person described in 31 C.F.R. § 1020.315(b)(5)). For this purpose, a listed entity includes any entity, other than a bank, the common stock or analogous equity interests of which are listed on the New York Stock Exchange or the American Stock Exchange or have been designated as a NASDAQ National Market Security listed on the NASDAQ Stock Market (except stock or interests listed under the separate "NASDAQ Capital Markets Companies" heading). A person that is a financial institution other than a bank is exempt only to the extent of its domestic operations. 31 C.F.R. § 1020.315(b)(4)-(5).

parent company's securities filings, FinCEN should expand this exemption to include all such subsidiaries, regardless of whether they are formed under U.S. or non-U.S. law.

- *Second Section 311 special measure*. FinCEN should expressly recognize the extent to which the second special measure under Section 311(b) of the USA PATRIOT Act,[75] under which institutions may be required to obtain and retain information concerning the beneficial ownership of any account opened or maintained in the United States by a particular foreign person or a representative of such foreign person, is or may be redundant for legal entity customers subject to the CDD Rule's beneficial ownership requirements (including as a result of revisions to the CDD Rule) or reporting companies subject to beneficial ownership information reporting pursuant to the CTA.

In addition to the recommendations included above with respect to the CDD Rule (including any revisions to that rule) we recommend that FinCEN consider for potential future legislative efforts expanding the classes of legal entities that are required to report beneficial ownership information to FinCEN. In particular, the CTA defines "reporting companies" to include, with respect to domestic entities, only those entities that are "created by the filing of a document with a secretary of state or a similar office under the law of a State or Indian Tribe."[76] Based on the experience of BPI members under the CDD Rule, we believe other legal entities that are not created by filing a document with a secretary of state or similar office, whether due to differences in state laws or for other reasons, pose illicit finance risks and therefore should be required to report their beneficial ownership information. Considering this recommendation for future legislative efforts would further the objectives of Section 6502(d) of the AML Act, which contemplates a study by the Government Accountability Office regarding the effects of not requiring such other entities, including partnerships and trusts, to report beneficial ownership information under the CTA.

C. FinCEN should clarify and, in many cases, eliminate diligence expectations specific to certain products and customer types.

Certain FinCEN rules and guidance impose diligence requirements and expectations that are specific to certain products and customer types. For example, in accordance with Section 312 of the USA PATRIOT Act,[77] FinCEN has specific requirements that apply to due diligence for certain correspondent accounts and private bank accounts.[78] The FFIEC Manual also has guidance that addresses expectations for numerous individual products and customer types. Many of these regulations and expectations are redundant, especially in light of the general requirement under the CDD Rule that financial institutions understand the nature and purpose of all customer relationships,

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75 31 U.S.C. § 5318A(b)(2).

76 31 U.S.C. § 5336(a)(11)(A)(i).

77 31 U.S.C. § 5318(i).

78 31 C.F.R. § 1010.605 *et seq.*

identify and verify the beneficial owners of legal entity customers, and perform ongoing monitoring to identify and report suspicious transactions and, on a risk basis, to maintain and update customer information. Redundant regulations and expectations impose burdens on institutions, for example, because separate requirements may be subject to separate independent testing or examination.

We therefore recommend that FinCEN review existing requirements and expectations that impose or contemplate due diligence processes specific to individual products and customer types. We believe that, in all or most cases, the processes necessary to satisfy these requirements and expectations should be those that are otherwise required under the CDD Rule and other generally applicable requirements and expectations. For example, diligence requirements applicable to both correspondent accounts and private bank accounts should incorporate the risk-based procedures otherwise applicable under the CDD Rule.[79] Making this change would enable institutions to not apply enhanced due diligence to all correspondent banking and private banking relationships, but to instead tailor their due diligence on the basis of risk on a case-by-case basis, taking into account, among other factors, a customer's geography and transactional activity and the products and services provided to the customer.[80]

More generally, BPI supports the efforts of the Committee on Payments and Market Infrastructures (the "CPMI") of the Bank for International Settlements to enhance cross-border payments, including through potential reforms to AML regulatory and supervisory frameworks. As the CPMI Task Force on Enhancing Cross Border Payments continues its work, and as the Treasury Department and the GAO study de-risking drivers under the AML Act,[81] we encourage FinCEN to engage with the industry on potential recommendations and reforms.

D. FinCEN should reconsider the requirement to collect certifications and recertifications from foreign banks that maintain U.S. correspondent accounts.

FinCEN should reconsider the application of the requirements, including the applicable safe harbor, under Sections 313 and 319(b) of the USA Patriot Act.[82] To satisfy these requirements, an institution must collect a certification or recertification every three years from each foreign bank for

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79 *E.g.*, 31 C.F.R. § 1020.210(a)(2)(v).

80 *Cf.* FFIEC Manual, Assessing Compliance with BSA Regulatory Requirements, Customer Due Diligence—Overview (2018) ("Collecting additional information about customers that pose heightened risk, referred to as enhanced due diligence (EDD), for example, in the private and foreign correspondent banking context, is part of an effective due diligence program. *Even within categories of customers with a higher risk profile, there can be a spectrum of risks and the extent to which additional ongoing due diligence measures are necessary may vary on a case-by-case basis.*" (emphasis added)), *available at* https://bsaaml.ffiec.gov/manual/AssessingComplianceWithBSARegulatoryRequirements/02.

81 *See* NDAA 2021, § 6215.

82 31 U.S.C. § 5318(j)-(k).

which it maintains a correspondent account in the United States.[83] This requirement imposes a significant burden on U.S. institutions, even though most foreign banks publish the certification forms and could, if required, provide the forms directly to FinCEN.

E. FinCEN should clarify the circumstances in which financial institutions are required to send Section 311 notices.

When imposing the fifth special measure under Section 311(b) of the USA PATRIOT Act,[84] under which the Secretary of the Treasury, in consultation with other officials, may prohibit or impose conditions upon the opening or maintaining of certain correspondent or payable-through accounts in the United States, FinCEN has in several cases required financial institutions to notify correspondent account holders that their account may not be used to provide services to an applicable jurisdiction, institution or class of transactions determined to be of primary money laundering concern.[85] Sending these notices to customers imposes on burden on institutions, and the notification requirement may be interpreted broadly.[86] FinCEN should clarify that there is no requirement or expectation that an institution send these notices to a customer unless the institution has a specific reason to believe that the notice is applicable to that customer.

F. FinCEN should update outdated identification and recordkeeping requirements applicable to purchases of monetary instruments.

FinCEN's regulations require that, before issuing or selling certain monetary instruments of between $3,000 and $10,000 in currency, financial institutions obtain and verify the purchaser's identity, generally by means of a government-issued identification document or, in certain circumstances, a signature card or other file on record. If a purchaser holds a deposit account at an institution, the institution can rely on the purchaser's identity having previously been verified. A financial institution also must maintain records of the collected information and the related transaction for a period of five years.[87]

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83 31 C.F.R. § 1010.630(b), (d).

84 31 U.S.C. § 5318A(b)(5).

85 *See, e.g.*, 31 C.F.R. § 1010.661(b)(3); Financial Crimes Enforcement Network, Imposition of Fifth Special Measure Against the Islamic Republic of Iran as a Jurisdiction of Primary Money Laundering Concern, Final Rule, 84 Fed. Reg. 59302, 59312 (Nov. 4, 2019); *see also, e.g.*, 31 C.F.R. § 1010.660(b)(3); Financial Crimes Enforcement Network, Imposition of Special Measure Against Bank of Dandong as a Financial Institution of Primary Money Laundering Concern, Final Rule, 82 Fed. Reg. 51758, 51763 (Nov. 8, 2017).

86 *Cf.* FFIEC Manual, Assessing Compliance With BSA Regulatory Requirements, Special Measures (2021) (stating that, under the fifth special measure, "banks may also be . . . "[r]equired to notify correspondent accountholders that they must not provide access to accounts maintained at the U.S. bank"), *available at* https://bsaaml.ffiec.gov/manual/AssessingComplianceWithBSARegulatoryRequirements/12.

87 31 C.F.R. § 1010.415.

Similar to the identification requirement for large currency transactions discussed in Section III.B.2 above, this verification requirement is outdated and impedes innovation. FinCEN should update this regulation to align with the documentary and non-documentary verification processes that institutions are otherwise permitted to undertake. Further, FinCEN should eliminate the distinction between verification of deposit account holders and non-deposit account holders; if an institution can determine that it has already verified a purchaser's identity, for example, in connection with the purchaser opening any type of account, additional verification should not be required solely because the purchaser does not have a deposit account.

Further, the separate obligation to maintain records specific to these transactions should be eliminated. BPI members believe that maintaining these records is unlikely to provide information to law enforcement and national security authorities that is not available from other records, and the resources in place to ensure these records are properly maintained could be more effectively deployed to other AML activities.

V. Recommendations regarding emerging illicit finance risks

A. FinCEN should clarify regulatory requirements and expectations relating to transactions involving cryptocurrency and other emerging payment methods.

We appreciate FinCEN's efforts to focus on ransomware and the associated illicit finance risks, including by publishing, and later updating, an advisory on ransomware and the use of the financial system to facilitate ransom payments.[88] We also appreciate that FinCEN's focus on ransomware has been part of a U.S. government-wide effort to combat threats related to ransomware.[89]

Ransomware is only one type of illicit finance risk associated, in whole or in large part, with the increased use of cryptocurrencies and other emerging payment methods. Accordingly, we recommend that FinCEN take the following additional actions to clarify the regulatory requirements and expectations that apply to transactions involving these payment methods. If implemented, these recommendations would provide significant clarity regarding the application of the BSA to cryptocurrencies, and also further the objective of the AML Act of "adapt[ing] the government and private sector response to new and emerging threats."[90]

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88 Financial Crimes Enforcement Network, Advisory on Ransomware and the Use of the Financial System to Facilitate Ransom Payments, FIN-2021-A004 (Nov. 8, 2021); Financial Crimes Enforcement Network, Advisory on Ransomware and the Use of the Financial System to Facilitate Ransom Payments, FIN-2020-A006 (Oct. 1, 2020).

89 *See, e.g.*, White House, Fact Sheet: Ongoing Public U.S. Efforts to Combat Ransomware (Oct. 13, 2021), *available at* https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/13/fact-sheet-ongoing-public-u-s-efforts-to-counter-ransomware/.

90 NDAA 2021, § 6002(2).

- *Scope of regulation*. FinCEN should consider whether existing BSA regulatory requirements are sufficiently broad in their application to participants in cryptocurrency markets. FinCEN should also consider whether there are additional participants in these markets that should expressly be subject to AML requirements. This may include, for example, intermediaries that provide ransom-related services, but take the view that they are not required to register with FinCEN as a money services business under the "integral exemption" for persons that only "[a]ccept[] and transmit[] funds only integral to the sale of goods or the provision of services, other than money transmission services, by the person who is accepting and transmitting the funds."[91]

- *Oversight*. FinCEN should, in coordination with other relevant authorities, increase oversight of AML regulatory standards for all participants in cryptocurrency markets subject to those standards. Certain participants are subject to the BSA, but are not complying in whole or in part with their BSA obligations.

- *AML program requirements*. FinCEN should ensure that AML program requirements are consistent for all cryptocurrency market participants that engage in the same activity with the same illicit finance risk characteristics, regardless of a particular participant's status as a bank, money services business, or other type of financial institution.

- *Rulemaking regarding cryptocurrency wallets*. FinCEN should proceed with the rulemaking initiated by its December 2020 Notice of Proposed Rulemaking. That rulemaking would impose obligations on banks and money services businesses to conduct reporting, recordkeeping, and customer verification on certain cryptocurrency transactions involving an unhosted wallet or otherwise covered wallet (*e.g.*, a wallet held at an institution not subject to BSA/AML regulation and/or located in certain foreign jurisdictions identified by FinCEN).[92]

- *Travel Rule compliance*. The "Travel Rule" generally requires financial institutions, including certain cryptocurrency market participants, engaged in transmittals of funds involving $3,000 or more, to transmit certain transaction and customer details to the next institution in the chain of payment.[93] We appreciate FinCEN and the Federal Reserve's 2020 Notice of Proposed Rulemaking that would address, among other things, the application of recordkeeping requirements and the Travel Rule to cryptocurrencies,[94] and we recommend that FinCEN engage with cryptocurrency market

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91 31 C.F.R. § 1010.100(ff)(5)(ii)(F).

92 Financial Crimes Enforcement Network, Requirements for Certain Transactions involving Convertible Virtual Currency or Digital Assets, Notice of Proposed Rulemaking, 85 Fed. Reg. 83840 (Dec. 23, 2020).

93 31 C.F.R. § 1010.410(f).

94 Board of Governors of the Federal Reserve System, Financial Crimes Enforcement Network, Threshold for the Requirement To Collect, Retain, and Transmit Information on Funds Transfers and Transmittals of

participants regarding, and encourage solutions that facilitate, Travel Rule compliance. A complete information trail regarding transaction originators and beneficiaries may be available only if those participants, and not solely banks, comply.

B. FinCEN should narrow the exception from the definition of "money transmitter" for payment processors.

Under FinCEN's regulations, a person is not a "money transmitter," and is therefore not required to register as a "money services business," if the person acts only "as a payment processor to facilitate the purchase of, or payment of a bill for, a good or service through a clearance and settlement system by agreement with the creditor or seller" (the so-called "Payment Processor Exemption").[95] We recommend that FinCEN engage in a comprehensive review of the Payment Processor Exemption and update the exemption to clarify its application to new business models that emerge from technological innovation. We believe that the Payment Processor Exemption should not apply to the following still relatively new business models, among any others that FinCEN determines should not be covered by the exemption: (1) a processor that facilitates non-face-to-face payments for goods and services but is not operating solely through clearance and settlement systems that admit only BSA-regulated institutions; and (2) a processor that maintains and allows the public to create profiles or accounts in order to transact, even if the processor operates solely through clearance and settlement systems that admit only BSA-regulated institutions.

We recommend further that, even before completing such a review and updating of the Payment Processor Exemption, FinCEN address the illicit finance risks presented by certain businesses that may qualify for the exemption. FinCEN could consider, for example, (1) until the scope of the Payment Processor Exemption is updated and clarified, extending SAR safe harbor provisions[96] to SARs voluntarily filed by any person operating under the Payment Processor Exemption and/or (2) requiring each person that operates under the Payment Processor Exemption to register with FinCEN in an "exempt" category of money services businesses and, at the time of registration, provide a brief description of why its operations and business model are covered by the exemption.

Funds That Begin or End Outside the United States, and Clarification of the Requirement To Collect, Retain, and Transmit Information on Transactions Involving Convertible Virtual Currencies and Digital Assets With Legal Tender Status, Joint Notice of Proposed Rulemaking, 85 Fed. Reg. 68005 (Oct. 27, 2020).

95 31 C.F.R. § 1010.100(ff)(5)(ii)(B); *see also* Financial Crimes Enforcement Network, Application of FinCEN's regulations to Certain Business Models Involving Convertible Virtual Currencies, FIN-2019-G001, at 21-23 (May 9, 2019) (describing the application of the Payment Processor Exemption).

96 *See* 31 U.S.C. § 5318(g)(3); *see also, e.g.*, 31 C.F.R. § 1022.320(e).

VI. Recommendations regarding updates to other requirements and guidance

A. FinCEN should perform a comprehensive review of its guidance, remove outdated guidance, and develop processes to keep guidance current.

In addition to our recommendation in Section III.A.3 above related to suspicious activity reporting guidance, we recommend that FinCEN, working with the federal banking agencies and other authorities, perform a holistic review of all outstanding BSA/AML guidance, including advisories, to evaluate whether any such guidance should be withdrawn because it has become outdated or addresses a lower-priority AML/CFT activity. To increase the impact and usefulness of FinCEN's guidance, FinCEN should also develop processes to keep guidance current. In particular, FinCEN should review and, as necessary, update or withdraw advisories that address financial crime information and typologies, so that institutions are better able to focus on, and allocate AML resources to, higher-priority activities. FinCEN should also undertake to complete a review of regulations implementing the BSA and related guidance, similar to the review under Section 6216 of the AML Act, at least once every ten years, and consider whether to report the findings and determinations of each such review to Congress.

We also recommend that FinCEN use its website and other resources to collect guidance related to specific topics in one location, to further a clearer understanding of the guidance, and related expectations, that are in place at any time. Such a resource would be of greater usefulness to financial institutions and other affected parties if it is organized by topic, is searchable, includes the date that each piece of guidance was initially issued, and is updated as new guidance is issued.[97]

B. FinCEN should continue to state prominently that guidance does not have the force and effect of law, and should promulgate a rule addressing how it will use guidance.

We appreciate FinCEN's express statement that it "will not treat noncompliance with a standard of conduct announced solely in a guidance document as itself a violation of law."[98] Financial institutions have, however, been subject to extensive criticism from examiners for failing to "comply" with expectations expressed and activities described solely in guidance. To make clear that guidance does not have the force and effect of law, including as described above in Sections I.A and II, FinCEN should promulgate a rule regarding its use of guidance in administering the BSA.[99]

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97 Such a resource could be similar to the website providing information on frequently asked questions issued by the Treasury Department's Office of Foreign Assets Control. *See* Frequently Asked Questions, https://home.treasury.gov/policy-issues/financial-sanctions/faqs.

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

99 Such a rule could be similar to rules regarding supervisory guidance, and associated statements, promulgated by the federal banking agencies. *See, e.g.*, 12 C.F.R. §§ 4.81 *et seq.*, 262.7 & App. A to Part 262, Part 302, 791.19 *et seq.*, 1074.2 *et seq.*

C. FinCEN should proceed with a rulemaking to establish a no-action letter process.

BPI appreciates the diligent and extensive assessment that FinCEN completed, in consultation with numerous other regulatory authorities and in accordance with Section 6305 of the AML Act, regarding whether FinCEN should establish a process for the issuance of no-action letters.[100] We agree with FinCEN's conclusion that it would be beneficial for FinCEN to establish a no-action letter process through rulemaking. FinCEN should proceed with this rulemaking, and we look forward to engaging further with FinCEN through the rulemaking process.

D. FinCEN should simplify definitions of certain terms for purposes of the Travel Rule.

As described above in Section V.A, FinCEN's "Travel Rule" generally requires financial institutions engaged in transmittals of funds involving $3,000 or more to transmit certain transaction and customer details to the next institution in the chain of payment, which aids law enforcement and national security authorities by maintaining an information trail regarding transaction originators and beneficiaries.[101] The application of the Travel Rule, however, is often complicated because definitions of applicable terms are, in many cases, drawn from the Uniform Commercial Code. As examples, the definitions of "funds transfer," "payment order," "sender," "transmittal of funds," "transmittal order," and "transmittor," each of which impacts the application of the Travel Rule, are based on definitions in the Uniform Commercial Code. These definitions are complex and may be difficult to apply, for example, in the context of complex commercial transactions and transactions involving emerging technologies, such as cryptocurrencies.[102]

We recommend that FinCEN replace these definitions with definitions that use "plain English"—that is, that are more readily understood and avoid ambiguity, particularly when applied in circumstances that may not fit clearly into the existing definitions (such as wire transfers relating to loan disbursements, syndicated lending, and transactions that institutions perform on their own behalf or as part of legal agreements that do not involve an explicit payment instruction from a customer). Updating these definitions would provide clarity to financial institutions regarding the transactions that the Travel Rule applies to.[103]

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100 Financial Crimes Enforcement Network, A Report to Congress Assessment of No-Action Letters in Accordance with Section 6305 of the Anti-Money Laundering Act of 2020 (June 28, 2021), *available at* https://www.fincen.gov/sites/default/files/shared/No-Action%20Letter%20Report%20to%20Congress%20per%20AMLA%20for%20ExecSec%20Clearance%20508.pdf.

101 31 C.F.R. § 1010.410(f).

102 These definitions also apply to the recordkeeping rules issued jointly by FinCEN and the Federal Reserve, *see, e.g.*, 31 C.F.R. § 1020.410(a); 12 C.F.R. § 219.21 *et seq.*, and we recommend that FinCEN coordinate with the Federal Reserve so that updates to applicable definitions, as described in this section, would also apply to applicable recordkeeping rules.

103 We believe that the definitions adopted by the Financial Action Task Force ("FATF") in Interpretive Note to Recommendation 16 (Wire Transfers) of "originator" (*i.e.*, "the account holder who allows the wire

E. FinCEN should finalize the proposed rule that would apply requirements under the BSA to registered investment advisers, including an AML program obligation.

In 2015, FinCEN issued a Notice of Proposed Rulemaking that would include registered investment advisers in the definition of "financial institution" for purposes of FinCEN's regulations,[104] and add a new Part 1031 to FinCEN's rules. Under this new Part, registered investment advisers would be required to, among other things, maintain an AML program, file SARs and CTRs, and retain certain records.[105] FinCEN proposed that registered investment advisers would have "flexibility to design their programs to meet the specific risks of the advisory services they provide and the clients they advise," therefore recognizing the diversity that exists among investment advisers and permitting them to tailor their AML programs in a manner consistent with the risks presented.[106]

We believe applying an AML program requirement and other obligations under the BSA to registered investment advisers would promote the overall purposes of the BSA, including to "prevent the laundering of money and the financing of terrorism" through the establishment of "reasonably designed risk-based programs,"[107] and therefore recommend that FinCEN finalize this proposed rule.

F. FinCEN should complete the rulemaking process that would apply requirements under the BSA for certain persons involved in non-financed real estate transactions.

In December 2021, FinCEN issued an Advance Notice of Proposed Rulemaking that would require certain persons participating in transactions involving non-financed purchases of real estate to

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transfer from that account, or where there is no account, the natural or legal person that places the order with the ordering financial institution to perform the wire transfer") and "wire transfer" (*i.e.*, "any transaction carried out on behalf of an originator through a financial institution by electronic means with a view to making an amount of funds available to a beneficiary person at a beneficiary financial institution, irrespective of whether the originator and the beneficiary are the same person") would be more straightforward and include more readily understood terminology than the comparable definitions in FinCEN's rules. *See* Financial Action Task Force, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, The FATF Recommendations, at 82-83 (updated Oct. 2021), *available at* https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf.

Updating the definitions should not modify the overall scope of the Travel Rule, which does not apply to transmittals of funds governed by the Electronic Funds Transfer Act or made through ATM or point-of-sale systems. *See* Financial Crimes Enforcement Network, Funds "Travel" Regulations: Questions & Answers, FIN-2010-G004 (Nov. 9, 2010).

104 31 C.F.R. § 1010.100(t).

105 Financial Crimes Enforcement Network, Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers, Notice of Proposed Rulemaking, 80 Fed. Reg. 52680 (Sept. 1, 2015).

106 *Id.* at 52686.

107 31 U.S.C. § 5311(2).

collect, report, and retain information.[108] We appreciate this proposal and BPI members would welcome direct engagement with FinCEN as the rulemaking process continues, especially given its potential effects on existing financial institution due diligence activities.

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BPI appreciates FinCEN's consideration of its feedback and recommendations. If you have any questions, please contact the undersigned by phone at 202-589-1935 or by email at *Angelena.Bradfield@bpi.com.*

Respectfully submitted,

Angelena Bradfield

Angelena Bradfield
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Bank Policy Institute

[108] Financial Crimes Enforcement Network, Anti-Money Laundering Regulations for Real Estate Transactions, Advance Notice of Proposed Rulemaking, 86 Fed. Reg. 69589 (Dec. 8, 2021).

Annex I

BANK POLICY INSTITUTE

February 7, 2022

Via Electronic Mail

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

Re: Request for Comments Regarding Beneficial Ownership Information Reporting Requirements (Docket No. FINCEN-2021-0027; RIN 1506-AB49)

To Whom It May Concern:

The Bank Policy Institute[1] appreciates the opportunity to comment on the Financial Crimes Enforcement Network's notice of proposed rulemaking to implement the beneficial ownership information reporting provisions of the Corporate Transparency Act (the "CTA").[2] BPI has been and remains a strong supporter of ending the use of anonymous shell companies and modernizing the U.S. anti-money laundering/countering the financing of terrorism ("AML/CFT") regime. BPI appreciates FinCEN's efforts to implement the CTA and the Anti-Money Laundering Act of 2020 (the "AML Act") in a manner that maximizes efficiency and effectiveness while minimizing unnecessary burdens on impacted entities. BPI also appreciates FinCEN's continued devotion of significant time and resources to carefully considering the many issues raised by the CTA and the AML Act and FinCEN's transparency with regard to the rulemaking process. BPI has a keen interest in the complex issues associated with accessing the beneficial ownership information collected by FinCEN under the authority of the CTA and in potential

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1 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.

2 Financial Crimes Enforcement Network, Beneficial Ownership Information Reporting Requirements, Notice of Proposed Rulemaking, 86 Fed. Reg. 69920 (Dec. 8, 2021) (the "NPRM").

future related revisions to FinCEN's Customer Due Diligence Rule ("CDD Rule").[3] Accordingly, BPI looks forward to continued engagement with FinCEN as efforts to implement the CTA and the AML Act advance, and supports direct and transparent engagement between FinCEN and financial institutions and their trade associations, including on the uniquely complex issue of financial institution access to the information reported to FinCEN.

This letter addresses elements of the proposed rule that are of particular importance to BPI members, bearing in mind the existing CDD Rule, banks' experiences complying with that rule, and potential revisions to that rule. Although FinCEN intends to undertake separate rulemakings both for CDD Rule revisions and for regulations governing access to and disclosure of beneficial ownership information reported to FinCEN,[4] the final rule that results from this NPRM will necessarily have a substantive impact on the nature and content of those future rulemakings. As such, we address in this letter the importance of harmonizing reporting requirements under the CTA with financial institutions' obligations under the CDD Rule and future revisions to that rule. BPI is concerned that significant disparities between beneficial ownership reporting under the CTA and the requirements of the CDD Rule may undermine the ability of FinCEN's new beneficial ownership registry to serve as an "accurate, complete, and highly useful" registry of beneficial ownership information.[5] We believe that, if the registry does not serve this function, it would frustrate congressional intent not only with respect to the registry but also with respect to revisions to the CDD Rule, which are supposed to bring that rule "into conformance with [the AML Act] and the amendments made by [the AML Act]."[6] At the same time, BPI strongly encourages FinCEN to balance data accuracy, reliability, and utility with compliance burdens.[7] Indeed, the CTA mandates that FinCEN, in revising the CDD Rule, "reduce any burdens on financial institutions . . . that are, in light of the enactment of [the AML Act] and the amendments made by [the AML Act], unnecessary or duplicative."[8]

For these reasons, BPI continues to believe that (i) the beneficial ownership registry mandated by the CTA, which FinCEN proposes to implement as the "Beneficial Ownership Secure System" (the "FinCEN Registry" or the "registry"), should serve as a centralized source of beneficial ownership

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3 31 C.F.R. § 1010.230; *see* Financial Crimes Enforcement Network, Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. 29398 (May 11, 2016).

4 William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021("NDAA 2021"), § 6403(d), Pub. L. No. 116-283, 134 Stat. 3388, 4624.

5 31 U.S.C. § 5336(b)(4)(B)(ii).

6 NDAA 2021, § 6403(d)(1)(A).

7 For additional information, *see* BPI's Comment Letter, dated May 5, 2021, in response to FinCEN's April 5, 2021 Advance Notice of Proposed Rulemaking (the "ANPRM") regarding beneficial ownership information reporting requirements *available at* https://bpi.com/wp-content/uploads/2021/05/BPI-Comment-Letter-to-FinCEN-re-Beneficial-Ownership-Reporting-Requirements-ANPR-2021.05.05.pdf.

8 NDAA 2021, § 6403(d)(1)(C); *see also* NPRM at 69929.

information about reporting companies that is designed to provide highly useful information to all authorized users of the registry, (ii) banks should be able to rely on information in the registry to facilitate compliance with applicable customer due diligence requirements, and (iii) banks should not be subject to a duplicative requirement to separately collect and verify beneficial ownership information from customers who are also required to report to FinCEN under the CTA.

With the foregoing objectives in mind, and as detailed in the sections that follow, BPI's recommendations in this letter address four principal topics: (i) encouraging harmonization between a final beneficial ownership information rule and the CDD Rule, principally by modifying aspects of the proposal in the NPRM to align with the CDD Rule; (ii) modifying the proposed rule to provide clarity to reporting companies and reduce unnecessary or duplicative burdens on those companies and banks; (iii) structuring the registry to promote its usefulness to authorized users; and (iv) establishing processes for verifying reported beneficial ownership information and permitting authorized users of the registry, including banks, to rely on that information.

Ultimately, our recommendations are intended to improve the usefulness of reported beneficial ownership information for all authorized registry users, including law enforcement, intelligence and national security agencies, banks, and federal functional regulators.[9] Simultaneously, as contemplated by the CTA, our recommendations are aimed at reducing unnecessary or duplicative burdens on reporting companies and banks.[10] As the registry continues to take shape, BPI looks forward to working with FinCEN to facilitate a design that achieves the CTA's goals and observes the CTA's mandates.

I. FinCEN should encourage harmonization between a final beneficial ownership information rule and the CDD Rule, principally by modifying aspects of the proposal in the NPRM to align with the CDD Rule.

As FinCEN crafts a final beneficial ownership reporting rule under the CTA, we believe that FinCEN should harmonize, to the greatest extent possible, that rule with the CDD Rule, including future revisions to the CDD Rule. Harmonization, including consistent requirements under the two inarguably related rules, will create a clear, coherent framework for mitigating relevant illicit finance risks. Consistency is also important to prevent reporting companies and banks from facing unnecessary and duplicative burdens. We appreciate that complete harmonization between the rules may not be appropriate in all contexts, but believe that FinCEN should not create divergence between the two rules except where necessary to promote a risk-based approach to beneficial ownership information reporting and customer due diligence,[11] provide clarity, and reduce unnecessary burdens. Below, we

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9 *See* 31 U.S.C. § 5336(b)(1)(F)(iv)(I)–(II).

10 *Id*. § 5336(b)(1)(F)(iii), (b)(4)(B)(i); NDAA 2021, § 6403(d)(1)(C).

11 *See* NDAA 2021, §§ 6002(4), 6403(d)(3)(A).

address the importance of aligning specific provisions in the CTA beneficial ownership reporting rule with the CDD Rule, including future modifications to that rule.

A. FinCEN should align the definition of beneficial owner with the definition in the existing CDD Rule.

Definitional inconsistencies between the rule resulting from this NPRM and the CDD Rule, including any revised CDD Rule, have the potential to significantly increase burdens on reporting companies and compliance burdens for banks. Inconsistencies may result in reporting companies being required to report different information to FinCEN under the former rule than is collected from those same companies by a bank pursuant to the latter rule; this would necessarily lead to discrepancies in beneficial ownership information that may need to be understood and explained. Accordingly, FinCEN should use consistent definitions and apply consistent requirements across the two rules.

Further, the substantial control and ownership elements of the beneficial ownership definition proposed in the NPRM would themselves impose significant unnecessary burdens on reporting companies and banks. The elements FinCEN has proposed are complex. Applying those elements would require a level of sophistication that many front-line employees and reporting companies would not, without substantial training or education, possess. These complex elements are likely to create confusion and uncertainty, and potentially divergent interpretations and approaches to compliance, making it challenging to collect consistent, accurate, complete, and reliable information.

Given the complexity of the proposed elements and the civil and criminal penalties for reporting violations,[12] reporting companies—even those with simple structures—may conclude they need to hire attorneys or other third-party advisors to assist with beneficial ownership information reporting. In addition, the potential that a large number of persons meet the standards for substantial control and ownership interest would likely result in more frequent changes to an entity's beneficial owners than under the current CDD Rule. The applicability of a number of the exemptions to any given entity would also necessarily vary from year to year, including the exemption for large operating companies. We submit that, in light of the complexity of the proposed elements and the need that many reporting companies will have to monitor for and report changes, FinCEN's estimates in the NPRM that each reporting company will expend $45 and 70 minutes to prepare and submit its initial report and $19 and 30 minutes to prepare and submit updates are substantially too low.

The proposed substantial control and ownership elements would also impose significant unnecessary costs on banks, especially if there is a lack of alignment between the rule resulting from this NPRM and the CDD Rule, including any revised CDD Rule. For example, banks would need to create new due diligence and screening measures to address the increased complexity, which may divert resources

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12 *See* 31 U.S.C. § 5336(h)(1).

that could be more effectively deployed elsewhere in a bank's BSA/AML program. In a similar vein, banks would also need to make significant updates to policies and procedures, including developing and implementing substantial training for front-line employees. In addition, a variety of technological changes, which typically have even longer timelines to complete than other changes, would be necessary to accommodate the greatly expanded number of individuals meeting the definition of beneficial owner. Not all technology is bank-owned and on occasion vendors may be unable to complete updates in required timeframes. In the experience of BPI members, when technological changes have been dependent on vendors, banks have had to institute temporary processes when delays occur. Finally, banks would inevitably face challenges and associated unnecessary burdens that stem from the difference in timing between when a reporting company must report beneficial ownership information to FinCEN (within 14 calendar days of entity creation or registration and within 30 calendar days of an exemption ceasing to apply or a change in reported information) and when such information is provided to a bank for CDD Rule purposes. These challenges will likely be exacerbated if FinCEN adopts the more complex ownership and substantial control standards proposed in the NPRM, including because they would result in more frequent changes to beneficial ownership information.

Accordingly, FinCEN should not compound the unnecessary burdens that will likely result from misalignment with the CDD Rule by adopting in any final rule the substantial control and ownership elements proposed in the NPRM. Importantly, even if FinCEN believes that there is a need for the definitions of beneficial owner in the two rules to diverge, we do not believe that the elements proposed in the NPRM would result in "highly useful" information; rather, in our view, as described below, they would impose unnecessary burdens that are disproportionate to the potential benefits.

- *Substantial control*. As proposed in the NPRM, reporting companies would be required to identify as beneficial owners all individuals who exercise substantial control directly or indirectly over the entity.[13] Indicators of substantial control would include: (i) service as a senior officer of a reporting company; (ii) authority over the appointment or removal of any senior officer or dominant majority of the board of directors (or similar body) of a reporting company; and (iii) direction, determination, or decision of, or substantial influence over, important matters of a reporting company.[14] Critically, the proposed substantial control element is not limited to a single individual. Rather, as proposed, many entities would likely have multiple individuals who exercise substantial control. This contrasts with the existing CDD Rule, which defines beneficial owner to include "a single individual" with significant

[13] NPRM, Proposed 31 C.F.R. § 1010.380(d).

[14] *Id*. § 1010.380(d)(1).

responsibility to control, manage, or direct the entity.[15]

In the experience of BPI members, even the current, less complex control prong of the CDD Rule has presented significant implementation challenges and required clarifications through FinCEN answers to frequently asked questions and other guidance. Adopting an even more complex substantial control element that would likely require in many cases the identification of multiple individuals would, as described above, inevitably result in additional uncertainty and unnecessary burden for both reporting companies and banks. The proposed NPRM would also impose more stringent requirements than the recommendations of the Financial Action Task Force ("FATF"), which provide for "cascading measures, with each to be used where the previous measure has been applied and has not identified *a* beneficial owner."[16] Under those recommendations, a legal entity's beneficial owners should be determined, in the first instance, by identifying the individual or individuals holding controlling ownership interests in the entity.[17] If no such person is identified, FATF recommends identifying a beneficial owner on the basis of his or her exercise of control or, if that fails, identifying a senior managing official as beneficial owner.[18] Further, as FinCEN described in the preamble for the final CDD Rule, requiring the identification of a single individual as a beneficial owner on the basis of control "ensures that financial institutions will have a record of at least one natural person associated with the legal entity, which will benefit law enforcement and regulatory investigations" and "that the challenges associated with identifying and verifying additional natural persons outweigh any incremental benefit of the information."[19] We therefore encourage FinCEN to adopt a definition that aligns with the control prong of the CDD Rule, which we believe would be consistent with the language of the CTA.[20]

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15 *Compare* 31 U.S.C. § 5336(a)(3)(A)(i) (''The term beneficial owner means, with respect to an entity, an individual who . . . exercises substantial control over the entity.'') *with* 31 C.F.R. § 1010.230(d)(2) (defining ''beneficial owner'' to include ''a single individual with significant responsibility to control, manage or direct a legal entity customer'').

16 Financial Action Task Force, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, The FATF Recommendations, at 65-66, n. 34 (updated Oct. 2021) (emphasis added), *available at* https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf.

17 *Id*.

18 *Id*. at 66.

19 81 Fed. Reg. at 29411-12.

20 The CTA defines "beneficial owner" as meaning, with respect to an entity "*an* individual who . . . exercises substantial control over the entity" (emphasis added). 31 U.S.C. § 5336(a)(3)(A)(i). We submit that the

- *Ownership*. As proposed in the NPRM, in accordance with the requirements of the CTA,[21] reporting companies would also be required to identify all individuals who directly or indirectly own or control 25 percent of a reporting company's ownership interests.[22] The NPRM would define "ownership interest," a term not defined in the CTA, to include both equity in the reporting company and other types of interests, such as capital or profit interests (including partnership interests) or convertible instruments, warrants or rights, or other options or privileges to acquire equity, capital, or other interests in a reporting company.[23] Certain debt instruments would also be included.[24] This complex standard contrasts with the comparatively straightforward ownership prong in the CDD Rule.[25] Although markedly more straightforward, the CDD Rule's ownership prong has nevertheless presented implementation challenges for banks and legal entities and required numerous clarifications through FinCEN answers to frequently asked questions and other guidance. The substantially more complex standard proposed in the NPRM would only markedly increase those challenges and the need for FinCEN guidance. Given those challenges and the additional uncertainty and unnecessary burden that would likely inure to both reporting companies and banks, we recommend that FinCEN interpret the term "ownership interest" in the CTA to incorporate a definition of ownership that aligns with the ownership prong of the existing CDD Rule.

For these reasons, we recommend that FinCEN adopt less complex standards than those proposed in the NPRM for determining substantial control and ownership. More specifically, we believe that FinCEN should align the standards for substantial control and ownership interests to their equivalents in the existing CDD Rule. We would also ask FinCEN to remain cognizant of the resource demands potential updates, technological changes, and change management challenges may present, not only if the two rules are not harmonized, but also if the standards proposed in the NPRM carry the day.[26]

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reference to "an" individual provides FinCEN to adopt a substantial control element that would identify only one individual.

21 *Id.* § 5336(a)(3)(A)(ii).

22 NPRM, Proposed 31 C.F.R. § 1010.380(d).

23 *Id.* § 1010.380(d)(3)(i).

24 *Id.*

25 31 C.F.R. § 1010.230(d)(1) (defining beneficial owner as an individual who directly or indirectly "owns 25 percent or more of the equity interests of a legal entity customer").

26 Ultimately, the full impact to banks from the proposed definitions in the NPRM and/or a lack of alignment between the final beneficial ownership reporting rule and the CDD Rule is unknown given the potential technological, logistical, and privacy concerns associated with accessing FinCEN's registry.

B. FinCEN should align the addresses that must be reported to FinCEN with those required under existing Customer Identification Program requirements.

As with the standards for substantial control and ownership, we recommend that FinCEN modify the addresses that beneficial owners (and certain company applicants) and reporting companies must report to FinCEN in order to align with the address requirements of the existing CDD Rule, which incorporate by reference the requirements of the Customer Identification Program Rule (the "CIP Rule"). We believe that these modifications to the proposed rule would reduce unnecessary burdens; improve the ability of reporting companies to understand the scope of reporting requirements; foster harmony between the beneficial ownership reporting rule and the CDD Rule; and, ultimately, enable authorized users of the registry to better verify reported information.

- *Addresses of beneficial owners*. As proposed in the NPRM, FinCEN would require reporting companies to report, with respect to each beneficial owner (and certain company applicants), an address that is the individual's "residential street address . . . for tax residency purposes."[27] In contrast, the existing CDD Rule, by reference to the CIP Rule, permits beneficial owners to provide "a residential or business street address."[28] The CTA employs the CIP Rule's language in requiring reporting companies to identify beneficial owners by their "residential or business street address."[29]

  Based on the experience of BPI members, any potential law enforcement benefit of knowing a beneficial owner's residential street address for tax residency purposes is, we believe, outweighed by the complexities and unnecessary burdens that would result from requiring that specific address. As an initial matter, an individual's residential street address for tax residency purposes may not be reflected in a driver's license or passport. To verify that address, whether under a revised CDD Rule or otherwise, a bank may need to undertake a time-consuming collection and review of tax documentation, raising not only burden-related concerns for both banks and reporting companies, but also privacy concerns. Further, the individual providing reporting to FinCEN may not have ready access to a beneficial owner's residential street address for tax residency purposes. The related burden may be compounded if the reporting entity must provide for each beneficial owner not only a correct residential or business street address, as required under the existing CDD Rule, but also a residential street address for tax residency purposes. The absence of symmetry

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27 NPRM, Proposed 31 C.F.R. § 1010.380(b)(1)(ii)(C)(2).

28 *E.g.*, 31 C.F.R. § 1010.230(b)(2); 31 C.F.R. § 1020.220(a)(2)(i)(A)(3)(i).

29 31 U.S.C. § 5336(b)(2)(A)(iii).

between the rules may also create confusion and inconsistencies in compliance.[30] For these reasons, we recommend that FinCEN modify the proposed rule so that individuals are generally required to report a residential or business street address, in line with the existing requirement under the CDD Rule and CIP Rule.

Indeed, requiring reporting companies to report to FinCEN each beneficial owner's residential street address for tax residency purposes, as proposed, would create a dissymmetry with the beneficial ownership information that banks have collected for years. To address this inconsistency, if FinCEN proceeds with the address requirement as proposed in the NPRM, there should be no expectation that banks afforded access to the registry will address discrepancies between a beneficial owner's address reported to FinCEN and the address in the bank's records. Instead, beneficial owner address information in bank records compiled in compliance with the existing CDD Rule should be grandfathered.

- *Address of reporting companies*. As proposed in the NPRM, FinCEN would require reporting companies to report their "business street address."[31] We believe this formulation is subject to a variety of interpretations, with some reporting companies treating a Post Office box or registered agent address as their business street address. Such addresses would not be as useful for law enforcement and national security purposes as a physical street address. We recommend FinCEN clarify in the final rule that such addresses may not be reported. Further, we recommend that FinCEN require reporting companies to provide an address for "a principal place of business, local office, or other physical location," as required under the CIP Rule.[32] We believe the CIP Rule's formulation would provide more clarity to reporting companies on the address that must be provided.

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30 This confusion will likely be compounded where an individual has to provide different addresses to satisfy similar requirements. If, for example, an individual has a personal account at a bank, is the beneficial owner of a reporting company that also has an account at the bank, and is the company applicant with respect to that reporting company, under FinCEN's proposal, that individual may be required to provide: (i) to the bank, the individual's residential or business street address for CIP Rule purposes; (ii) to FinCEN, the residential street address the individual uses for tax residency purposes; and (iii) to FinCEN, the business street address of the business. In addition to potential confusion for individuals, banks may be subject to compliance risk if auditors and examiners identify differences in the information a bank has in its records and the information reported to FinCEN.

31 NPRM, Proposed 31 C.F.R. § 1010.380(b)(1)(i)(C).

32 *E.g.*, 31 C.F.R. § 1020.220(a)(2)(i)(A)(3)(iii).

C. FinCEN should align the identification numbers that must be reported to FinCEN and the identification numbers that must be collected under the CDD Rule.

The proposal in the NPRM would require each reporting company to report to FinCEN one of certain types of identification numbers and would require each individual beneficial owner to provide a unique identifying number from one of certain documents. BPI recommends that FinCEN harmonize the identification numbers that must be collected under a rule resulting from this NPRM and the CDD Rule (the relevant requirements of which generally apply by reference to the CIP Rule), including to address situations that may arise where identification numbers are not available.

- *Reporting companies*. The NPRM proposes that each reporting company would have to report to FinCEN its Taxpayer Identification Number ("TIN") or, if a TIN has not yet been issued for the entity, a separate Dun & Bradstreet Data Universal Numbering System ("DUNS") number or a Legal Entity Identification ("LEI").[33] FinCEN acknowledges in the NPRM that during the 14-day period in which an entity is required to provide an initial report to FinCEN, it may not yet have received a TIN, DUNS or LEI.[34] Accordingly, we recommend that FinCEN make any final rule consistent with the CIP Rule, and therefore the CDD Rule; that is, if a legal entity has applied for a TIN, evidence of that application should be provided.[35] Further, even if a TIN (or evidence of application for a TIN) is submitted, a DUNS or LEI could also provide useful information for authorized users of the registry, and we recommend that FinCEN permit reporting companies to provide these identifiers on a voluntary basis.

- *Beneficial owners without an acceptable identification document*. Under the proposed rule in the NPRM, each individual beneficial owner (and company applicant) of a reporting company would be required to provide a unique identifying number for that individual that is from (i) a non-expired U.S. passport; (ii) a non-expired identification document issued by a state, local government, or Indian tribe; (iii) a non-expired driver's license issued by a state; or (iv) if the individual does not possess any of the foregoing documents, a non-expired foreign passport.[36] However, certain beneficial owners, especially those located outside the United States, may not possess any of the required identifying documents. FinCEN should

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33 NPRM, Proposed 31 C.F.R. § 1010.380(b)(1)(i)(E).

34 NPRM at 69932. In the experience of BPI members, it can take up to 30 days to receive a TIN or a DUNS, and obtaining an LEI is contingent upon verification with a local source.

35 *See* Financial Crimes Enforcement Network, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union Administration, Office of the Comptroller of the Currency, Office of Thrift Supervision, U.S. Department of the Treasury, FAQs: Final CIP Rule 9 (Apr. 28, 2005), *available at* https://www.fincen.gov/sites/default/files/guidance/faqsfinalciprule.pdf.

36 NPRM, Proposed 31 C.F.R. § 1010.380(b)(1)(ii)(D).

exercise its interpretive authority under the CTA or its exceptive authority to address situations where an individual is a beneficial owner, but does not have one of the listed identifying documents. For example, for a non-U.S person that does not have one of these documents, FinCEN should accept one of the identification numbers permitted under the CIP Rule, including another form of government-issued document evidencing nationality or residence and bearing a photograph or similar safeguard.[37]

- *Beneficial owner Social Security number reporting*. As described in the previous bullet, FinCEN does not propose in the NPRM that the unique identifying number that a beneficial owner (and company applicant) must provide is a TIN, which for many individuals is their Social Security number ("SSN"). Instead, FinCEN proposes that reporting companies may *voluntarily* report the TINs of their beneficial owners (and company applicants) to FinCEN, provided that the reporting company has the consent of the relevant individual.[38] In contrast, under the CDD Rule, by incorporation of the requirements of the CIP Rule, a bank generally *must* obtain the TIN for each U.S. person that is a beneficial owner of a legal entity customer.[39] The requirement that banks collect TINs, especially full TINs (as opposed to only the last four digits of an SSN), from individuals for CDD Rule and CIP Rule purposes imposes substantial burdens, including due to consumer privacy and data security concerns.[40] Based on Congress's apparent determination in the CTA that reporting a TIN as a unique identifying number for individuals is not necessary to address relevant illicit finance risks,[41] we believe that collecting a full TIN should not be required under the CDD Rule or CIP Rule.[42] We therefore recommend that FinCEN, in revisions to the CDD Rule and/or through the issuance of exceptive relief, align the requirements of the CDD Rule and CIP Rule with those

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37 *See* 31 C.F.R. § 1020.220(a)(2)(i)(A)(4)(ii).

38 NPRM, Proposed 31 C.F.R. § 1010.380(b)(2).

39 *See* 31 C.F.R. § 1010.230(b)(2) (incorporating, for example, the requirements of 31 C.F.R. § 1020.220(a)(2)(i)(A)(4)(i)). A TIN is among several specified identification numbers that can be obtained for a non-U.S. person. *See id.* (incorporating, e.g., 31 C.F.R. § 1020.220(a)(2)(i)(A)(4)(ii)).

40 These concerns have been raised consistently with respect to the requirements in the CIP Rule that banks collect full SSNs, including in connection with the initial promulgation of the CIP Rule in 2003. *See, e.g.*, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Financial Crimes Enforcement Network, National Credit Union Administration, Office of the Comptroller of the Currency, Office of Thrift Supervision, Customer Identification Programs for Banks, Savings Associations, Credit Unions and Certain Non-Federally Regulated Banks, 68 Fed. Reg. 25090, 25091, 25098 (May 9, 2003).

41 *See* 31 U.S.C. § 5336(a)(13) (defining "unique identifying number"); *see also id.* § 5336(a)(1) (defining "acceptable identification document").

42 This is especially so as various non-bank financial services companies have developed processes to obtain only the final four digits of an SSN from a customer, and obtain the remainder from other trusted and secure sources.

of the CTA and eliminate the unnecessarily burdensome requirement under those rules that TINs, especially full SSNs, be collected from individuals.

D. FinCEN should align the reporting company exemptions with exemptions under the CDD Rule.

It is also important that the exemptions from the definition of "reporting company" for purposes of beneficial ownership reporting to FinCEN be harmonized with the exemptions from the definition of "legal entity customer" in the CDD Rule, including any revisions to that rule.[43] Such harmonization would minimize unnecessary burdens on reporting companies and banks and further the AML Act's requirement that, in prescribing minimum standards for BSA/AML programs, FinCEN consider that such programs should be "risk-based, including ensuring that more attention and resources of financial institutions should be directed toward higher-risk customers and activities, consistent with the risk profile of a financial institution, rather than toward lower risk customers and activities."[44] If the exemptions under the two rules are not aligned, an entity that is expressly determined to be sufficiently low risk that it is not required to provide beneficial ownership information to a bank under the CDD Rule, for example, could nonetheless be subject to the burdens associated with collecting and providing that information to FinCEN under the reporting rule.[45]

With a view to alignment, we recommend that FinCEN make the following revisions to the proposed rule and to the CDD Rule, respectively.

- *State-chartered banks*. Under the CDD Rule, a "legal entity customer" does not include any bank regulated by a state bank regulator.[46] In contrast, under the CTA and the proposal in the NPRM, a state-chartered bank or trust company could be a reporting company if it does not engage in certain activities, including taking deposits or exercising fiduciary powers, that would make it a "bank" for purposes of the CTA.[47] We respectfully submit that, because all state-chartered banks "are generally subject to substantial Federal or state regulation under which their beneficial ownership may be known,"[48] they should be exempted by regulation

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43 *See* 31 C.F.R. § 1010.230(e)(2).

44 31 U.S.C. § 5318(h)(2)(B)(iv)(II).

45 The converse is equally true.

46 31 C.F.R. § 1010.230(e)(2)(i).

47 *See* 31 U.S.C. § 5336(a)(11)(B)(iii) (defining a "bank" as a bank as defined in Section 3 of the Federal Deposit Insurance Act, Section 2(a) of the Investment Company Act of 1940 or Section 202(a) of the Investment Advisers Act of 1940); NPRM, Proposed 31 C.F.R. § 1010.380(c)(2)(iii) (same).

48 NPRM at 69939.

in FinCEN's final beneficial ownership reporting rule.[49]

- *Large operating companies.* The CTA reflects Congress's determination that large operating companies—generally, companies that employ more than 20 employees on a full-time basis in the United States, generate more than $5 million in annual gross receipts or sales, and have an operating presence at a physical location in the United States—do not present the kind of illicit finance risk that merits requiring the collection of beneficial ownership information. In revisions to the CDD Rule or through the exercise of FinCEN's exceptive authority, FinCEN should similarly exclude such large operating companies from the definition of "legal entity customer." They would, as a result, not be subject to the burdensome requirement that banks "identify and verify [their] beneficial owners."[50]

II. FinCEN should modify certain provisions in the proposed rule to provide clarity to reporting companies and reduce unnecessary burdens.

Based on their experiences in implementing the CDD Rule with respect to legal entity customers, BPI members believe that several of the provisions proposed in the NPRM could be difficult for reporting companies to apply or otherwise impose unnecessary burdens on those companies and banks. Accordingly, we recommend that FinCEN modify these provisions in the final rule resulting from the NPRM. In the following subsections, we address recommendations with respect to (i) adding an exemption from the definition of "reporting company"; (ii) reporting by terminated reporting companies and exempt companies; (iii) reporting of identification numbers; and (iv) applying beneficial ownership reporting requirements to trusts.

A. Recommendation with respect to an additional "reporting company" exemption

Under the CTA, the Secretary of the Treasury, with the written concurrence of the Attorney General and the Secretary of Homeland Security, may exempt certain classes of entities for which requiring beneficial ownership information reporting "would not serve the public interest" and "would not be highly useful" for national security and law enforcement agencies. We recommend that FinCEN coordinate with the Treasury Secretary and other applicable officials to adopt such an exemption for pension plans established under the Employee Retirement Income Security Act of 1974 ("ERISA"). An account opened for the purpose of participating in such a plan is excluded from the definition of "account" for purposes of the CDD Rule.[51] Indeed, FinCEN has determined that "accounts established to

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[49] Given the supervision of these banks and trust companies by a state regulator and the requirements under which their beneficial ownership may be known, an exemption would be consistent with the authority in the CTA to grant exemptions from the term "reporting company," which is described further in Section II.A. *See* 31 U.S.C. § 5336(a)(11)(B)(xxiv).

[50] 31 C.F.R. § 1010.230(a).

[51] 31 C.F.R. § 1010.230(c) (incorporating by reference the meaning set forth in 31 C.F.R. § 1020.100(a)).

enable employees to participate in retirement plans established under ERISA are of extremely low money laundering risk."[52] For these reasons, ERISA pension plans would satisfy the requirements for granting an exemption under the CTA and should be exempt from the definition of reporting company.

B. Recommendations with respect to reporting by terminated and exempt entities

We believe that the usefulness of the registry would be significantly enhanced for authorized users if it contained information about entities that are no longer required to report beneficial ownership information and entities that are exempt from reporting such information. Accordingly, BPI strongly supports a requirement that reporting companies that have terminated their legal existence report the fact of their termination to FinCEN.[53] We also strongly support FinCEN's suggestion that exempt entities may be permitted to voluntarily file exemption certificates with FinCEN.[54]

C. Recommendations with respect to trusts

We appreciate FinCEN's consideration of the unique features of trusts in the NPRM.[55] We recommend that FinCEN modify certain aspects of the proposed rule to further address particular circumstances that can arise where a trust holds ownership interests in a company. These circumstances are particularly relevant to BPI members with corporate trust functions.

- *Trusts with an exempt entity as corporate trustee*. In accordance with the CTA,[56] the rule proposed in the NPRM would exempt from the definition of "reporting company" any entity the ownership interests of which are "controlled or wholly owned, directly or indirectly, by one or more entities" that are otherwise exempted (other than under certain specified exemptions).[57] Where an entity's ownership interests are controlled or wholly owned, directly or indirectly, by a single or multiple trusts, each of which has a bank (which is a category of exempted entity[58]) as the corporate trustee, the corporate trustee bank(s) play a control role with respect to that entity that is analogous to the role a parent entity plays with respect to its subsidiary. As a consequence, these entities may present lower illicit finance risk. For this reason, we request that FinCEN consider whether they, too, should be

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52 81 Fed. Reg. at 29413.

53 NPRM at 69947.

54 *Id.* at 69941.

55 NPRM, Proposed 31 C.F.R. § 1010.380(d)(3)(ii)(C); NPRM at 69935-36.

56 31 U.S.C. § 5336(a)(11)(B)(xxii).

57 NPRM, Proposed 31 C.F.R. § 1010.380(c)(2)(xxii).

58 31 U.S.C. § 5336(a)(11)(B)(iii); NPRM, Proposed 31 C.F.R. § 1010.380(c)(2)(iii).

treated as exempt.

- *Directed trusts*. In a directed trust, a third-party individual or entity (often referred to as the investment adviser) is authorized to direct a trustee in implementing actions for the trust. For example, an investment adviser may, in accordance with a trust instrument, direct a corporate trustee to form an entity to be owned by the trust, with the corporate trustee having no discretion as to the formation or activities of the newly formed entity. With respect to these trusts where a trustee lacks investment discretion, we recommend that FinCEN clarify in any final beneficial ownership reporting rule that the trustee should not be considered a "company applicant" solely by acting on the investment adviser's instruction to form, or cause to be formed, a new legal entity. Further, for these trusts, the trustee does not have "authority to dispose of trust assets."[59] Accordingly, we recommend that FinCEN also clarify that the investment adviser, and *not* the trustee, owns or controls any ownership interest that the trust holds, directly or indirectly, in a legal entity.

III. FinCEN should structure the registry and related processes to maximize usefulness to authorized users, including banks.

To maximize usefulness of the registry to authorized users, including banks, we offer several recommendations for FinCEN's consideration in structuring the registry and related processes. Although these recommendations may appear more relevant to FinCEN's future rulemakings related to accessing the registry and revising the CDD Rule, the final rule that results from this NPRM will necessarily have a substantive impact on the nature and content of those future rulemakings. Accordingly, we would encourage FinCEN to bear these recommendations in mind in formulating a final beneficial ownership reporting rule.

A. FinCEN should afford banks access on receipt of customer consent and flexibility in obtaining that consent.

The CTA provides that a bank may access beneficial ownership information in the FinCEN Registry only by making a request to FinCEN "with the consent of a reporting company."[60] Although we acknowledge the complexity of issues involving access to the registry, to ensure the registry is highly useful, FinCEN should provide a bank that has secured customer consent with full and immediate access to the customer's registry information. Moreover, FinCEN should facilitate flexibility in the mechanisms through which reporting companies may provide, and banks may elicit, the necessary consent.

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59 NPRM, Proposed 31 C.F.R. § 1010.380(d)(3)(ii)(C)(1).

60 31 U.S.C. § 5336(c)(2)(B)(iii).

B. FinCEN should consider ease-of-use as it develops the registry.

If banks are not able to query the registry easily and rely on the data therein, they may simply opt not to use the registry, which would run counter to Congressional intent. We encourage FinCEN to develop the means for banks to search the registry in real time, with respect to reporting companies for which they have consent, and to pull data in bulk (perhaps through an application programming interface ("API")) so that a bank's due diligence processes can readily integrate the data in the registry.

C. FinCEN identifiers should be designed to make them informative.

The NPRM does not address the potential structure or content of the FinCEN identifier. To increase the usefulness of the identifier, BPI recommends that FinCEN consider structuring it to include content that complements other beneficial ownership information. FinCEN may wish to consider, for example, including in the identifier additional information about the individual or entity, such as a location and country code, as are incorporated in Bank Identification Codes and International Bank Account Numbers.

D. FinCEN should clarify permissible uses by banks of registry information.

FinCEN should clarify the permissible uses of information by banks of information in the registry. Under the CTA, FinCEN may disclose information in the registry to a bank subject to customer due diligence requirements only based on a request that would "facilitate the compliance of the financial institution with customer due diligence requirements under applicable law."[61] FinCEN should clarify that this limitation does not require that registry information be used solely for CDD Rule compliance, but instead that it may be used, to the extent a customer has provided consent, for the broader range of customer due diligence activities that an institution may undertake, which include understanding the nature and purpose of customer relationships, conducting ongoing monitoring of transactions to identify and report suspicious transactions, and maintaining and updating customer information. By confirming that institutions may access the registry for these and other specified due diligence-related purposes (provided they have consent of the relevant entity), FinCEN would facilitate broader usefulness of the registry in mitigating relevant illicit finance risks and improving the efficiency of relevant AML processes.

IV. FinCEN should establish processes to verify reported beneficial ownership information and allow financial institutions to rely on that information.

As BPI discussed in its comment letter responding to the ANPRM,[62] to make the registry an effective tool for national security, intelligence, law enforcement agencies, financial institutions, and federal functional regulators, FinCEN should ensure that the registry is an "accurate, complete, and

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61 *Id*.

62 *See* note 7, above.

highly useful" source of beneficial ownership information about reporting companies.[63] To accomplish this objective, we believe FinCEN should establish processes that enable verification of reported beneficial ownership information included in the registry. Further, banks should be expressly permitted (but not required) to *rely on* the information in the registry in satisfying their obligations to identify and verify the identity of beneficial owners under the CDD Rule, including any revised CDD Rule. Permitting bank reliance on the information in the registry would, in accordance with the CTA's instruction, minimize burdens on banks that are unnecessary or duplicative in light of the CTA's enactment.

A. Verification of reported information by FinCEN is critical.

1. Absent FinCEN verification, authorized users will lack sufficient assurances the information in the registry is accurate.

BPI respectfully submits that processes for FinCEN verification are necessary to "ensure the beneficial ownership information reported to FinCEN is accurate, complete, and highly useful."[64] In our view, absent verification, authorized registry users—be they law enforcement or national security officials, regulators, or banks—will lack sufficient assurances that the information in the registry is accurate. To that end, we suggest that FinCEN undertake regular assessments of its verification processes, which would promote confidence in the utility of the registry.

Without sufficient assurances as to accuracy, users will be less willing and, ultimately, less likely to rely on the registry. User reluctance to rely on the registry is inconsistent with the statutory directive that the information reported to FinCEN be "highly useful." Moreover, at least insofar as there is symmetry between the final rule resulting from this NPRM and a revised CDD Rule, FinCEN verification has the potential to reduce unnecessary or duplicative burdens on banks and minimize burdens on reporting companies by obviating the need for each bank at which a reporting company opens an account to separately verify the same beneficial ownership information.[65] If FinCEN does not establish

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63 31 U.S.C. § 5336(b)(4)(B)(ii).

64 *Id.*

65 In any event, the verification responsibility should not be assigned to banks via a revised CDD Rule or otherwise. As described in Section 1.A, banks have struggled in applying the CDD Rule to determine who should (or should not) be considered a beneficial owner, and the CDD Rule's prongs pertaining to beneficial ownership are much cleaner to apply than the components of the definition proposed in the NPRM. If the proposed components prevail, any requirement or expectation that banks verify the information reported to the registry would compound this already challenging problem and run directly counter to Congress' mandate that the CDD Rule be revised "to reduce unnecessary or duplicative burdens on financial institutions and legal entity customers." Ultimately, if banks are required to separately identify and verify the identity of beneficial owners of legal entity customers that also must report to FinCEN under the CTA, banks may decline to utilize the registry, reasonably concluding that it does not provide meaningful information that outweighs the substantial burdens associated with reconciling information discrepancies discussed in Section IV.C.

processes to verify information in the registry, individual authorized users—including law enforcement and national security agencies, as well as banks—will be required to independently undertake their own verification processes before using the information in the registry. Bank verification of reported information will impose unnecessary burdens on reporting companies because banks would likely need to collect from the reporting company the same information that company already reported to FinCEN. The burden would be compounded for customers with accounts at multiple banks.

According to the NPRM, FinCEN is "continu[ing] to evaluate options for verification" of reported beneficial ownership information. BPI is strongly supportive of these efforts and would welcome direct engagement with FinCEN as it considers its options, especially in light of members' significant experience and expertise in performing automated and other types of verification of customer information. This experience may also help inform FinCEN's evaluation of the costs associated with verifying beneficial ownership information, as required under Section 6502(b)(1)(C) of the CTA.

2. Collecting identification documents is important, but insufficient on its own.

As recognized by the NPRM, one potential verification tool is the collection of identification documents. As proposed by FinCEN, reporting companies would be required to submit to FinCEN a scanned copy of a non-expired identification document for each beneficial owner. This requirement would provide significant efficiencies for law enforcement and national security officials, banks, and their customers, particularly if, as described in section IV.B.1, banks are permitted to rely on the reported information. As FinCEN develops processes for identification document collection, we believe that FinCEN should consider how it will implement data quality standards, mitigate fraud risks, and develop appropriate consent and data privacy practices.

3. Requiring certifications of reported information is not a substitute for verification.

BPI supports the proposed requirement in the NPRM that filers certify their submissions to FinCEN.[66] Combined with the CTA's penalties for reporting violations, including providing false or fraudulent beneficial ownership information, these certifications should provide all authorized registry users with additional confidence in the information reported to FinCEN and foster the utility of the information. Requiring certifications, however—whether alone or coupled with FinCEN's collection of identification documents—would not provide sufficient assurances of accuracy or serve as an adequate substitute for FinCEN verification.

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66 NPRM, at 69930.

4. Verification sufficient to support reliance by registry users can be performed by FinCEN in a centralized, efficient, and effective manner.

BPI respectfully submits that only verification by FinCEN will "ensure the beneficial ownership information reported to FinCEN is accurate, complete, and highly useful."[67] In our view, neither the collection of identification documents by FinCEN nor a certification requirement—alone or in combination—provides verification of the reported beneficial ownership information sufficient to support reliance by registry users. Sufficient verification could be performed by FinCEN in a centralized, efficient, and effective manner, either alone or in combination with collecting identification documents and certifications. In particular, FinCEN could automate verification, in whole or in substantial part, which has the potential to not only improve the accuracy of the information in the registry but also reduce the aggregate burden that would otherwise be imposed on FinCEN (and, ultimately, other authorized registry users).

For instance, FinCEN could consider implementing one or more APIs that directly connect to systems or databases maintained by other federal agencies and/or secretaries of state and, through those APIs, implement automated processes to verify the beneficial ownership information reported to FinCEN. FinCEN could also consider leveraging automated non-documentary tools that are commercially available and already in use by many banks to verify the identity of beneficial owners. Through use of APIs, commercially available tools, or other automated tools, human intervention could be limited to addressing material inconsistencies identified through the automated processes. Given members' extensive experience with verification tools and APIs, BPI members would welcome direct engagement with FinCEN concerning verification means that would improve the accuracy and usefulness of the registry, support reliance by authorized registry users, and address FinCEN objectives, including regarding effectiveness and efficiency.

B. Banks should be permitted, but not required, to rely on beneficial ownership information in the registry.

The CTA contemplates, but does not mandate, bank reliance on the registry and requires FinCEN to consider reliance when revising the CDD Rule to align with the CTA.[68] Given this intersection, it is important that the registry be designed and implemented in such a way that banks may, but are not

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67 31 U.S.C. § 5336(b)(4)(B)(ii).

68 *See* 31 U.S.C. § 5336(b)(1)(F) ("In promulgating the regulations required . . . the Secretary of the Treasury shall, to the greatest extent practicable . . . collect [beneficial ownership] information in a form and manner that ensures the information is highly useful in . . . confirming beneficial ownership information provided to financial institutions to facilitate the compliance of the financial institutions with anti-money laundering, countering the financing of terrorism, and customer due diligence requirements under applicable law."). *See also id*. § 5336(c)(2)(B)(iii) (authorizing disclosure of beneficial ownership pursuant to a request by a financial institution to facilitate compliance with customer due diligence requirements).

required to, satisfy any obligation under the CDD Rule, including any revised rule, to identify and verify the beneficial owners of a legal entity customer by relying on information in the registry.[69] Indeed, Congress clearly contemplated that FinCEN would create and manage a comprehensive nationwide system for reporting beneficial ownership information, and did so for the purpose of improving the U.S. AML/CFT regime.[70] In our view, not permitting bank reliance would be inconsistent with the notion of such a regime. Further, as described above, in addition to promoting the registry's usefulness, the ability of banks to rely on beneficial ownership information in the registry will reduce the burden on reporting companies, who might otherwise have to provide information regarding beneficial owners to multiple sources.

1. Permitting reliance would better enable banks to refocus CDD activities on the basis of risk.

The CTA directs FinCEN to revise the CDD Rule in such a way as to maximize resource efficiency in order to more effectively counter illicit financial activity.[71] Although FinCEN is not permitted to "repeal the requirement that financial institutions identify and verify beneficial owners of legal entity customers," in making revisions to the CDD Rule, FinCEN must consider both the "degree of reliance by financial institutions" on the registry for purposes of obtaining and updating beneficial ownership information and the "use of risk-based principles for requiring reports of beneficial ownership information."[72] Congress's contemplation of both reliance and risk-based principles in aligning the CDD Rule with the CTA suggests that any obligation to obtain beneficial ownership information, or the beneficial ownership information that must be obtained, should turn, at least in meaningful part, on risk.[73] Permitting banks to rely on the registry in satisfying any obligation under the CDD Rule, including any revised rule, to identify and verify the identity of beneficial owners of a legal entity customer would

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69 In addition, FinCEN should clarify that there is no expectation that a bank leverage beneficial ownership information in the registry unless and until any such leveraging is addressed in a revised CDD Rule. FinCEN should also consider establishing a safe harbor for institutions that rely on beneficial ownership information in the registry. Such a safe harbor could, for example, provide that institutions will be deemed to comply with any obligations under the CDD Rule, including any revised rule, to identify and verify a legal entity customer's beneficial owners if they retrieve that customer's reported information in the registry.

70 *See* NDAA 2021, § 6402(5).

71 *See id.* § 6402(8).

72 *Id*. § 6403(d)(3)(A)–(B).

73 For example, if banks are not able to rely on the information in the registry, whether because they lack sufficient assurances that it is accurate or because FinCEN does not permit reliance, they should have substantially more latitude in connection with any obligation under the CDD Rule, including any revised rule, to identify or verify the identity of beneficial owners.

better enable those banks to refocus their CDD activities on the basis of risk, thereby maximizing resource efficiency in order to more effectively counter illicit financial activity.

In a similar vein, if banks are permitted to rely on the beneficial ownership information reported to the registry, the NPRM's requirement that reporting companies file updated reports with FinCEN when there are changes in reported information has the potential to better enable banks to refocus CDD efforts on the basis of risk.

More specifically, permitting reliance on verified beneficial ownership information reported to the registry, including changes to that information, would eliminate the need under the current CDD Rule, or any revised rule, for banks to re-collect beneficial ownership information at each new account opening. The CDD Rule's new account requirements are, in practice, extremely burdensome, particularly in situations where a bank routinely opens multiple accounts for a customer on the same day or within a short period of time. Further, the cost of complying with the new account requirements does not appear to come with any corresponding benefit. There is no reason to believe that opening a new account, in and of itself, is an indication of changed beneficial ownership information. BPI members also are not aware of any feedback from law enforcement that re-collection on this basis has made a difference in addressing illicit finance risks. The efforts now focused on re-collection activities—efforts that would become both unnecessary and duplicative for banks and increase burdens on reporting companies—could then be redirected at true illicit finance risks.

Of course, regardless of whether reliance on the FinCEN Registry is permitted, banks would continue to undertake ongoing monitoring of their customers on the basis of risk, which may warrant collecting, updating, or re-verifying beneficial ownership information. They, however, should be given the flexibility in how they do so.

2. An inability of banks to rely on the registry will result in substantial burdens that are inconsistent with the purposes of the CTA.

As described above, if information in the registry is not verified by FinCEN, banks would need to separately verify the beneficial ownership information for each legal entity customer that opens an account at the bank. This would create duplicative burdens, especially for customers that open accounts at multiple banks. Similarly, if banks may not rely on the information in the registry to satisfy their obligations under the CDD Rule to identify and verify the identity of beneficial owners—whether because the information in the registry has not been validated or because FinCEN does not permit reliance—they would need to undertake identification and verification measures independent of the registry. As a consequence, reporting companies would be subjected to unnecessary additional burdens by being required to report beneficial ownership information to FinCEN and to separately report such information to each bank at which they open an account. For the reasons described in Section I.A above, these burdens would be amplified if FinCEN were to adopt the proposed substantial control and

ownership elements of the proposed rule in the NPRM and/or if FinCEN were not to harmonize requirements under the final beneficial ownership reporting rule and the CDD Rule, including revisions to that rule.

The resulting costs associated with not permitting banks to rely on the registry would be inconsistent with the CTA's instruction that FinCEN "seek to minimize burdens on reporting companies associated with the collection of the information . . . in light of the private compliance costs placed on legitimate businesses."[74] For these reasons, FinCEN should permit banks to ultimately not only access, but also rely on, the beneficial ownership information in the registry.

C. If banks are not permitted to rely on the registry, they should not be responsible for reconciling or reporting discrepancies.

If banks are not permitted to rely on the registry for beneficial ownership information and are instead required under the CDD Rule, including any revised rule, to separately identify and verify the identity of the beneficial owners of legal entity customers—a requirement that we firmly believe FinCEN should not impose—institutions could be compelled to expend enormous resources resolving discrepancies identified between the beneficial ownership information they collect under the CDD Rule and the information in the registry.

It is inevitable that discrepancies will occur between the information in the registry and the information collected by banks, and the scale of these discrepancies will likely increase substantially if there are significant discrepancies between requirements for beneficial ownership reporting to FinCEN and under the CDD Rule. In any case, we expect that discrepancies will arise for numerous legitimate reasons and banks afforded access to the registry should not be required or expected to reconcile or report those discrepancies. Any such requirement or expectation would unnecessarily divert time and resources away from efforts to identify and report illicit financial activity. Implementing the CTA, including the registry and a revised CDD Rule, in a manner that would lead institutions to devote significant resources to chasing down discrepancies—what would essentially be a "check-the-box" exercise—rather than focusing on identifying and reporting illicit activity would be inconsistent with Congress's instructions to FinCEN in promulgating the beneficial ownership reporting rule and revising the CDD Rule.[75] Banks afforded access to the registry should instead be permitted, if they identify a discrepancy between the beneficial ownership information in the registry and the bank's information, to

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74 31 U.S.C. § 5336(b)(1)(F)(iii).

75 NDAA 2021, § 6402(8) (FinCEN shall, in promulgating the beneficial ownership reporting rule, "seek to minimize burdens on reporting companies associated with the collection of beneficial ownership information"); *id.* § 6403(d)(1)(C) (FinCEN shall, in revising the CDD Rule, "reduce any burdens on financial institutions and legal entity customers that are, in light of the enactment of this division and the amendments made by this division, unnecessary or duplicative").

determine appropriate actions on the basis of risk, including by leveraging their own risk-based customer due diligence review processes.

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BPI appreciates FinCEN's consideration of its comments. If you have any questions, please contact the undersigned by phone at 202-589-1935 or by email at *Angelena.Bradfield@bpi.com.*

Respectfully submitted,

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