



March 28, 2022

Via Electronic Mail

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

Re: Pilot Program on Sharing of Suspicious Activity Reports and Related Information with Foreign Branches, Subsidiaries, and Affiliates (Docket No. FINCEN—2022—0002 and RIN 1506—AB51)

To Whom It May Concern:

The Bank Policy Institute¹ appreciates the opportunity to respond to the Financial Crimes Enforcement Network's proposal to establish a pilot program on the sharing of suspicious activity reports and related information with foreign branches, subsidiaries and affiliates of covered financial institutions under Section 6212(a) of the Anti-Money Laundering Act of 2020.² BPI has long supported such a process and believes that the establishment of a formal pathway for the sharing of SARs and related information with foreign branches, subsidiaries and affiliates of U.S. banks will assist their efforts to holistically detect and deter illicit financial activity. Criminals operate unencumbered by jurisdictional borders and it is important that financial institutions – subject to appropriate controls, protocols and processes to protect the confidentiality of shared information – should be afforded the same opportunity in order to address illicit finance risks on an enterprise-wide basis. We also believe that such a process would allow domestic U.S. financial institutions to further align their practices with their

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 87 Fed. Reg. 3719.

foreign counterparts given that, as FinCEN describes in its rulemaking, there is pre-existing guidance that allows a U.S. branch of a foreign bank to share SARs with its head office.³

Understanding the statutorily mandated time constraints of this program, we support FinCEN's efforts to establish it in a timely manner and offer the following recommendations with both the Congressional parameters and FinCEN's proposal in mind. We also appreciate FinCEN's commitment to provide financial institutions with a response to their pilot program application in a timely manner and encourage the agency and Congress to make sure that FinCEN has the resources necessary to support the pilot and evaluate its impacts, which will be key to facilitating its formal adoption.

I. FinCEN Should Require Pilot Reporting on a Semiannual Basis Given the Manual Nature of Institutional Controls, and Reconsider the Burdens Associated with the Proposed Quarterly Reporting Requirement.

In its proposal, FinCEN indicates that a 90 day reporting cycle for six categories of information "would provide a control to ensure that the sharing of information permitted under the pilot program is in compliance with the statutory requirements" and "will yield critical information and data that should shed light on the effectiveness of the pilot program and inform best practices for information sharing and confidentiality of SARs and related information."⁴ We understand FinCEN's duty to annually update Congress on the pilot's progress and effectiveness and recognize that such a requirement may factor into the frequency of reporting FinCEN is proposing in this rulemaking. However, we would encourage the agency to consider instead requiring reports from pilot institutions on a semiannual basis given (i) the manual nature of bank internal controls that will be stood up to participate in a pilot, (ii) the role that internal audit and examiners play in continuously evaluating AML programs at large financial institutions, which would include the parameters of this program, and (iii) that participating financial institutions will need time to compile meaningful data that can identify patterns and trends in order to support the provision of information on the benefits and challenges of such a pilot.

Given the temporary nature of the pilot program, banks anticipate implementing manual controls to meet most of the pilot's requirements. These manual processes are likely to create scalability challenges for large banks but will be necessary unless internal systems have already been built in a manner that accommodates programmatic requirements. For example, a bank may need to create a flag in a case management tool to identify which U.S. SARs the bank shared with another jurisdiction, which could be costly to develop and may need to be assessed against competing requests for system enhancements. Although banks would seek to leverage existing processes and controls where possible to protect the confidentiality of sensitive information, banks might still be required to enhance controls in a participating jurisdiction in order to comply with FinCEN requirements under the pilot program. Given the statutory limit to the pilot, it may not be feasible for institutions to invest significant financial and personnel resources in more systemic solutions, including automated controls, to comply with the pilot. Developing and using manual processes and controls would significantly

³ 87 Fed. Reg. 3720.

⁴ 87 Fed. Reg. 3723.

impact the time it would take an institution to compile the reports contemplated under this proposal, even if some elements are tracked on an ongoing basis. Therefore, we recommend that FinCEN consider instituting a semiannual, versus quarterly, reporting requirement. We also encourage FinCEN to engage with participating institutions to better understand how useful the pilot program is to their AML/CFT compliance programs and efforts.

For similar reasons, we recommend that FinCEN also revisit the proposal's annual burden estimate of 16 hours for quarterly reporting. As indicated above, many institutions will likely employ new manual processes rather than investing significant financial and personnel resources in systemic solutions during the pilot phase of the program. This would also include developing new governance routines. These manual processes will impose substantially greater burdens on participating banks than more permanent systemic and automated processes. Accordingly, we believe FinCEN's annual burden estimate of 16 hours significantly understates the burden associated with quarterly reporting.⁵ We would also note that regardless of the approach FinCEN takes, applicants will likely be large financial institutions, which typically have robust SAR reporting programs with policies and procedures that are subject to significant oversight from both internal auditors and regulators – meaning that internal resources will also need to be deployed to manage these engagements. In particular, large banks typically have onsite exam teams that continuously monitor and evaluate their AML program. This will further extend institutional capacity and, while the program is voluntary, we encourage FinCEN to consider these elements as it contemplates the optimal reporting frequency and associated burden for pilot participants in light of its statutory obligations.

II. FinCEN Should Address Certain Additional Elements that Would Encourage Financial Institutions to Participate in the Pilot

To effectively evaluate the usefulness of the pilot program and obtain sufficient data to support the development of a related legislative or regulatory proposal for a long-term or permanent extension of the program, as contemplated by the underlying statute,⁶ FinCEN should endeavor to maximize the number of financial institutions that choose to participate in the program. With a view to maximizing participation, we recommend FinCEN address the following elements in any final rule.

First, while we recognize that FinCEN is constrained by the statutory pilot program termination date of January 1, 2024, the Secretary of the Treasury is afforded discretion to extend that date by up to two years. We recommend that FinCEN plan to exercise this discretion as each financial institution that participates in the pilot program will be required to expend significant time and resources on the program, including those described in Section I above. We understand that it will take some time for FinCEN to finalize a pilot program rule, additional time for financial institutions to ensure they have in place the necessary processes and controls, and still further time for financial institutions to apply for and receive FinCEN's approval to participate in the program. In addition, once a bank is approved for

⁵ At least one institution estimates that the burden estimate could be a minimum of 50 hours, but it could be significantly more depending on the complexity of the organization.

⁶ See 31 U.S.C. § 5318(g)(8)(B)(iii).

the program, it will need time to operate under it in order to provide sufficient information to FinCEN to determine the effectiveness of the pilot program. Given those considerations, it is reasonable to believe that the earliest financial institutions may be able to share SARs and related information under the pilot program will be sometime in early to mid-2023. We believe many banks may be reluctant to participate in a program that is effectively less than one year in duration. However, an extension of time will incentivize banks to participate and dedicate resources to such a program and provide them with time to collect and provide FinCEN will more meaningful information to conduct its assessment on the effectiveness of the pilot program. Accordingly, we encourage FinCEN to provide assurances that the pilot will be extended unless the Secretary is unable to conclude that the extension is in the national interest.

Second, we recommend that FinCEN narrow its application requirement that institutions “[p]rovide a description of *all* internal controls in place to protect the confidentiality of and prevent unauthorized disclosures of SARs and related information and ensure data security and confidentiality of personally identifiable information” (emphasis added).⁷ Banks are required by law to have a robust privacy and client confidentiality program that is reviewed by its independent auditors and examiners. The requirement for “all internal controls” is overly broad and will likely require many resources to identify and provide this information as these controls touch multiple parts of a bank’s operations. We suggest FinCEN remove the word “all” and narrow its application request to only those controls that are useful in assessing a bank’s methods for maintaining SAR confidentiality.

Third, once a bank has established the necessary processes and controls to participate in the pilot program, it will not be able to simply “flip-off a switch” at the moment the program terminates. Rather, once the requisite processes and controls are in place, there will need to be a transition period associated with program termination. We understand that FinCEN will have the ability to terminate the pilot program at any time, but given the substantial investment of resources required to participate in the program, we recommend that FinCEN provide banks with time to remediate any issues that may lead to a decision to terminate participation. More generally, we would ask FinCEN to address issues relating to transition periods following program termination in any final pilot program rule.

Fourth, banks recognize the highly sensitive nature of certain information that they may be authorized to share under the pilot program. Indeed, it is quite possible that a participating bank may, for enterprise-wide AML/CFT risk management purposes, believe it is appropriate to share a SAR with a foreign affiliate, but the SAR relates to national security or other highly sensitive matters. Members recognize the potential policy implications of sharing in these circumstances. Accordingly, FinCEN should address in any final rule whether there are situations in which otherwise authorized sharing under the pilot would not be in the national interest and, if so, provide direction to institutions as to how any such situations should be handled. In a similar vein, we recommend that FinCEN also provide direction to institutions on its expectations if a foreign regulator requests production of U.S. SARs that a firm has provided to its affiliate. While we acknowledge that there may be mutual legal assistance

⁷ 87 Fed. Reg. 3727.

treaties that could be utilized for such requests, institutions would appreciate clarity from FinCEN on its expectations.

Fifth, we request that FinCEN provide further clarity on the prohibition included in the rule, and initially set forth in AMLA, that prohibits participating “financial institutions from establishing or maintaining any operation located outside of the United States the primary purpose of which is to ensure compliance with the BSA as a result of the information sharing granted by this pilot program.”⁸ In particular, examples of what types of compliance operations fall within the scope of this prohibition for the purposes of the pilot program would be useful to institutions that are considering submitting an application.

Finally, we encourage FinCEN to work with the federal banking regulators to establish examination expectations for banks participating in the pilot program. In particular, we would ask FinCEN, in coordination with those regulators, to confirm that the Joint Statement on Innovative Efforts to Combat Money Laundering and Terrorist Financing (the “Joint Statement”) encompasses pilot program participation.⁹ Alternatively, consistent with the principles outlined in the Joint Statement, we would ask the agencies to confirm that, provided a bank maintains an effective BSA/AML program commensurate with its risk profile, participation in the pilot program will not result in additional regulatory expectations, alone should not subject the institution to supervisory criticism, and will not necessarily result in supervisory action if BSA/AML compliance program gaps are exposed through participation.

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BPI appreciates FinCEN’s consideration of its comments on this proposal. 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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⁸ 31 U.S.C. 5318(g)(10).

⁹ Joint Statement on Innovative Efforts to Combat Money Laundering and Terrorist Financing (Dec. 3, 2018), available at <https://www.fincen.gov/news/news-releases/joint-statement-innovative-efforts-combat-money-laundering>.