Statement for the Record from the Bank Policy Institute

Before the U.S. House Financial Services Committee

"Oversight of the Financial Crimes Enforcement Network and the Office of Terrorism and Financial Intelligence"

February 14, 2024

The Bank Policy Institute welcomes the opportunity to provide input to the Committee on its hearing on "Oversight of the Financial Crimes Enforcement Network and the Office of Terrorism and Financial Intelligence." Over the years, BPI and its members have devoted considerable resources to improving the AML/CFT regime, thus far with little success. We hope today's hearing can serve to jumpstart reform and allow banks to be more innovative, creative and efficient in detecting and reporting illicit activity.

Background

In 2017, BPI, in concert with many noted experts in the field, released a report on the effectiveness of the regime for detecting money laundering and terrorist financing. That report described how examination mandates from the federal banking agencies, and the compliance regime they produced, were significantly impeding the ability of banks to detect illicit activity.

We reported at the time:

> Under the current AML/CFT regime, the nation's financial firms are effectively deputized to prevent, identify, investigate, and report criminal activity, including terrorist financing, money laundering and tax evasion. The largest firms collectively spend billions of dollars each year, amounting to a budget somewhere between the size of the ATF and the FBI. Yet the conclusion of the vast majority of participants in the process is that many if not most of the resources devoted to AML/CFT by the financial sector have limited law enforcement or national security benefit, and in some cases cause collateral damage to other vital U.S. interests – everything from U.S. strategic influence in developing markets to financial inclusion. Thus, a redeployment of those resources has the potential to substantially increase the national security of the country and the efficacy of its law enforcement and intelligence communities, and enhance the ability of the country to assist and influence developing nations.[1]

In a subsequent 2018 report, we presented the first reliable statistics on the extent of the problem: tens of thousands of people employed by the banking agencies, billions being spent, but most of that effort

[1] *A New Paradigm: Redesigning the U.S. AML/CFT Framework to Protect National Security and Aid Law Enforcement* (February 2017) available at 20170216_tch_report_aml_cft_framework_redesign.pdf (bpi.com).

being wasted by a check-the-box, documentation-focused regime driven by an almost total disconnect between the demands of examiners and the needs of law enforcement, intelligence and national security communities with whom they practically never communicated.[2]

This work and resulting testimony[3] helped to shape the Anti-Money Laundering Act of 2020.

Four years since the enactment of the Anti-Money Laundering Act, the AML/CFT examination process remains dysfunctional — focused more on process than substance, more on immaterial matters than material ones. Irrespective of the responsiveness of FinCEN staff and their willingness to promote the exchange of information, the Treasury Department has delegated to the federal banking agencies contrary to Congressional intent, leading to an examination function that has proven resistant to modernization and reform.

The Law

While most attention on the Anti-Money Laundering Act has fallen on the beneficial ownership database whose establishment it mandated, that same Act required the Treasury Department to reform fundamentally the AML/CFT regime: per the stated purposes of the Act, "to encourage technological innovation and the adoption of new technology by financial institutions to more effectively counter money laundering and the financing of terrorism [and] to reinforce that the anti-money laundering and countering the financing of terrorism policies, procedures, and controls of financial institutions shall be risk-based."

To that end, Section 6216 of that Act required the Treasury Department to "undertake a formal review of the regulations implementing the Bank Secrecy Act and guidance related to that Act," including consultation with the end users of BSA/AML data at law enforcement and national security agencies.

More particularly, Section 6202 of the Act required the Treasury Department, "in imposing any requirement to report suspicious activity," to consider "the means by or form in which the Secretary shall receive such reporting, including the burdens imposed by such means or form of reporting on persons required to provide such reporting, the efficiency of the means or form, and the benefits [to] law enforcement agencies and the intelligence community in countering financial crime, including money laundering and the financing of terrorism." The Act also required the Treasury to "establish streamlined, including automated, processes to, as appropriate, permit the filing of noncomplex categories of reports." Section 6204 of the Act required the Treasury Department to streamline requirements for suspicious activity reports and currency transaction reports.

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[2] *Getting to Effectiveness – Report on U.S. Financial Institution Resources Devoted to BSA/AML & Sanctions Compliance* (October 29, 2018) available at Getting to Effectiveness – Report on U.S. Financial Institution Resources Devoted to BSA/AML & Sanctions Compliance - Bank Policy Institute (bpi.com).

[3] *Testimony of Greg Baer, President The Clearing House Association, Before the Senate Committee on Banking, Housing, and Urban Affairs, "Combating Money Laundering and Other Forms of Illicit Finance: Opportunities to Reform and Strengthen BSA Enforcement," (January 9, 2018) available at* https://www.banking.senate.gov/imo/media/doc/Baer%20testimony%201-9-18.pdf.

Notably, Congress was quite specific about areas where streamlining was necessary, as it required the review to include:

> (A) whether the circumstances under which a financial institution determines whether to file a continuing suspicious activity report, including insider abuse, or the processes followed by a financial institution in determining whether to file a continuing suspicious activity report, or both, should be streamlined or otherwise adjusted;
> (B) whether different thresholds should apply to different categories of activities;
> (C) whether the fields designated as critical on the suspicious activity report form, the fields on the currency transaction report form and the number or nature of the fields on those forms should be adjusted;
> (D) the categories, types and characteristics of suspicious activity reports and currency transaction reports that are of the greatest value to, and that best support, investigative priorities of law enforcement and national security agencies; and
> (E) the increased use or expansion of exemption provisions to reduce currency transaction reports that may be of little or no value to the efforts of law enforcement agencies.

The law also required a detailed review of the utility of currency transaction reports and a wide-ranging mandate to spur innovation and greater use of technology in AML/CFT programs.

The Reality

Many of these key provisions of the Act have not been implemented. Meanwhile, the federal banking agencies have ignored the spirit of the Act, as their examinations continue to produce the problems that the Act was designed to solve.

The main focus of the examination/compliance is on unproductive work – for example (and there are many, many more examples):

- Focusing examination resources on reviewing alerts that should have resulted in a SAR filing but did not (as opposed to considering the efficacy of SARs actually filed) and punishing severely any failure to do so, regardless of materiality in terms of number or severity.
- Requiring banks to conduct due diligence for existing customers that open a new account, regardless of whether the bank has an existing relationship with that customer where due diligence was previously conducted.
- Filing currency transaction reports which produce close to a 0 (zero) percent response rate from law enforcement.
- Filing "structuring" SARs (a series of cash deposits that in theory is an attempt to disguise large transactions but in practice is just someone with a cash business), which has close to a 0 percent yield. Notably, more advanced monitoring techniques would likely capture any actual structuring.
- Remediating examiner-issued Matters Requiring Attention for matters of no consequence but which must go through an elaborate, labor-intensive process for remediation – things like:
    - Forgetting to check a box on a report on why a SAR was not filed;
    - Forgetting to include an adequate job description;
    - Including a street address but omitting the apartment number.

And of course banks receive no credit for filing quality SARs for the simple reason that the end users of that information – law enforcement and national security – do not communicate with banking agency examiners.

That said, there are certainly some agency examiners who are more focused on substance than process and who encourage innovation. But the success of an AML/CFT program should not depend on which examiner a bank draws; clear rules and guidance should establish sensible policies that apply across the board.

In that context, it is worth noting one clear lesson from past and current practice: any exhortation or mandate to, or from, the federal banking agencies that an AML/CFT compliance program should be "risk-based" is of little practical use unless subject to meaningful boundaries – including the boundaries set by Congress and described above. In the field, many examiners will treat some risks as more important than others, but they will treat all risks as important – and thus requiring extensive documentation and 100 percent accuracy, with strict liability for any errors.

Good Policy

This Committee should urge the Department of the Treasury to seek comment urgently on how to implement the relevant provisions of the Act. We recognize the current demands that geopolitical events are making on the Treasury Department and FinCEN; however, even an advance notice of proposed rulemaking, which could be only a few sentences long, would advance reform. Furthermore, a notice of proposed rulemaking targeted only at the largest, clearest problems in the current system would take little time and could make a great deal of difference. In essence, any effective proposals must give examples of what a risk-based program need *not* include. Thus, we urge the Treasury Department to propose soon rules that would:

- Require the federal banking agencies to cease and desist from imposing on AML/CFT programs their generally applicable model risk guidance, which was devised for other purposes and impedes innovation in transaction monitoring. Any such guidance should be issued by FinCEN in a notice-and-comment rulemaking, with the goal of enhancing innovation and effectiveness, not auditability. In the absence of guidance, banks should feel free to innovate.
- Clarify that there is no requirement to conduct customer due diligence when an existing customer opens another account – for example, if a deposit customer takes out a mortgage or applies for a credit card.
- Clarify that there is no ongoing requirement for manual review of an account once a SAR is filed, unless a change in circumstance merits it.
- Clarify that as a general matter, a suspicious activity report is not required for attempted application fraud, failed business email compromise schemes and other fraudulent transactions that result in no actual loss but involve only an attempt to gain access to a credit line, deposits or other assets worth more than $5,000.
- Clarify that "parallel runs" are not required when implementing new monitoring or risk-rating technologies.
- Clarify that a risk-based approach does not include aggregating the dollar amount of funds that come into that bank together with the amount that goes out of the bank (i.e., effectively double-counting the total dollar amount) for purposes of identifying or reporting suspicious activity.
- Raise reporting thresholds significantly, to match a level at which law enforcement would at least consider investigating.
- Allow individual banks, with approval by FinCEN, to be permitted to establish further, non-public thresholds (so as not to alert wrongdoers);
- Require any MRA for banks above a certain size threshold to be reviewed by FinCEN; for smaller banks, any proposed enforcement action should be reviewed by FinCEN.

- For internationally active banks, require that all examinations be reviewed and approved by FinCEN, after consultation with law enforcement, national security and intelligence agencies. Everyone involved in that process should have access to the draft and final reports. Through this process, every examination should include an assessment of the utility of SARs actually filed, and the effectiveness of the bank's FIU.
- On a pilot basis, withdraw the delegation of examination authority to the banking agencies for a few internationally active banks and grant that authority to FinCEN. The resource demands on FinCEN would not be great, in part because the examination would focus primarily on material matters and could leverage the experience of law enforcement and national security officials with the bank. It would also be a terrific learning experience for FinCEN and the Treasury Department.
- Make the beneficial ownership information reporting framework under the Corporate Transparency Act useful for bank risk management purposes. In particular, FinCEN should not impose unnecessary burdens that disincentivize use of the registry. This means efficient access to information in the registry (e.g., through APIs), no discrepancy reporting requirements and no blanket requirement to obtain beneficial ownership information directly from both customers and from the registry.

Thank you for the opportunity to present these views.