BANK POLICY INSTITUTE

October 8, 2024

Via Electronic Mail

Chief Counsel's Office,
Attention: Comment Processing, Office of the Comptroller of the Currency,
400 7th Street SW, Suite 3E-218,
Washington, DC 20219

Ann E. Misback, Secretary,
Board of Governors of the Federal Reserve System,
20th Street and Constitution Avenue NW,
Washington, DC 20551

James P. Sheesley, Assistant Executive Secretary,
Attention: Comments/Legal OES (RIN 3064-AF34), Federal Deposit Insurance Corporation,
550 17th Street NW,
Washington, DC 20429

Melane Conyers-Ausbrooks, Secretary of the Board,
National Credit Union Administration,
1775 Duke Street,
Alexandria, Virginia 22314-3428

Re: Request for Comments Regarding Anti-Money Laundering and Countering the Financing of Terrorism Program Requirements (Docket ID OCC-2024-0005; Docket No. R-1835; RIN No. 7100-AG78; RIN No. 3064-AF34; Docket ID NCUA-2024-0033; and RIN No. 3133-AF45)

Ladies and Gentlemen:

The Bank Policy Institute[1] is writing to comment on the notice of proposed rulemaking issued by

[1] The Bank Policy Institute is a nonpartisan public policy, research and advocacy group that represents universal banks, regional banks, and the major foreign banks doing business in the United States. The Institute

the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the National Credit Union Administration that would "amend the requirements that each Agency has issued for its supervised banks . . . to establish, implement, and maintain effective, risk-based, and reasonably designed Anti-Money Laundering (AML) and Countering the Financing of Terrorism (CFT) programs."[2] The proposed rule is intended to align with concurrent BSA/AML program rule changes proposed by FinCEN, which are mandated by Section 6101 of the AML Act and designed to make fundamental changes to the oversight of the AML/CFT regime and ensure that "banks will not be subject to any additional burden or confusion from needing to comply with differing standards between FinCEN and the Agencies."[3]

The proposed rule will neither implement the intent of Congress in enacting the AML Act nor facilitate a risk-based approach to identifying and disrupting financial crime. At present, the AML/CFT regime purports to be risk-based but tolerates little to no error with respect to even the most mundane, clerical, and low-risk tasks. In practice, examiners are exactingly focused on technical compliance (including, for example, documentation and reverification), rather than on effectiveness. This approach is utterly divorced from a focus on management of true risk. Yet more concerning, the status quo examination oversight of this regime does not expressly instruct institutions to dedicate efforts to *detecting* suspected crime or engaging in innovation to this end—efforts that are surely foundational to the integrity of the banking and financial system.

Strikingly, the proposed rule arbitrarily rewrites the statute the Agencies and FinCEN purport to implement to undercut its core message. The proposed rule states that "[a]n effective, risk-based, and reasonably designed AML/CFT program focuses attention and resources in a manner consistent with the . . . bank's risk profile that takes into account higher-risk and lower-risk customers and activities."[4] In

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produces academic research and analysis on regulatory and monetary policy topics, analyzes and comments on proposed regulations, and represents the financial services industry with respect to cybersecurity, fraud, and other information security issues.

[2] Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and the National Credit Union Administration, Anti-Money Laundering and Countering the Financing of Terrorism Program Requirements, Notice of Proposed Rulemaking, 89 Fed. Reg. 65242 (proposed Aug. 9, 2024) (the "NPRM").

[3] *Id.*at 65243; *see also* Financial Crimes Enforcement Network, Anti-Money Laundering and Countering the Financing of Terrorism Programs, Notice of Proposed Rulemaking, 89 Fed. Reg. 55428, 55432 (proposed July 3, 2024) (the "FinCEN NPRM") (explaining FinCEN's proposed rule is mandated by section 6101 of the AML Act and that FinCEN intends for the proposed rule to work in concert with other sections of the AML Act," including, among others, "sections 6103 (FinCEN Exchange), 6107 (Establishment of FinCEN Domestic Liaisons), and 6206 (Sharing of threat pattern and trend information)").

[4] NPRM, 89 Fed. Reg. at 65261; 65260 ("An effective, risk-based, and reasonably designed AML/CFT program focuses attention and resources in a manner consistent with the national bank's or Federal savings association's risk profile that takes into account higher-risk and lower-risk customers and activities."; 65262 ("An effective, risk-based, and reasonably designed AML/CFT program focuses attention and resources in a manner consistent with FDIC-supervised institution's risk profile that takes into account higher-risk and lower-risk customers and activities."); 65263 ("An effective, risk-based, and reasonably designed AML/CFT program focuses attention and resources in a manner consistent with the federally insured credit union's risk profile that takes into account higher-risk and lower-risk customers and activities.").

contrast, the AML Act's explicit direction is that financial institutions ensure "more attention and resources" are allocated towards "higher-risk customers and activities . . . *rather than toward lower-risk customers and activities*."[5]

To correct the status quo, and the current profound misallocation of examination and compliance resources, the implementing regulation must follow the clear and direct mandates to the Secretary contained in the AML Act.[6] In addition, it is critical that the final rule be substantively identical across all agencies; mere "alignment" is inadequate.[7] FinCEN and the Agencies' rules must be equivalent in both wording and interpretation to ensure consistency in applying and examining against the requirements. As noted in the preamble, "with consistent regulatory text, banks will not be subject to any additional burden or confusion from needing to comply with differing standards between FinCEN and the Agencies."[8] But without uniform language, potentially "incongruent and overlapping" rules would "sow confusion and inhibit [] policy objectives."[9] To that end, we suggest significant changes to the NPRM focused on creating AML/CFT program requirements that would, in conjunction with the AML Act's other important reforms, achieve Congress' goal of making AML/CFT programs, and the country's AML regime, more effective and efficient in combatting and detecting financial crime.[10] These changes are discussed in the Executive Summary below.

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5 Anti-Money Laundering Act of 2020, 31 U.S.C. § 5318(h)(2)(B)(iv)(II) (emphasis added).

6 *See, e.g.*, Anti-Money Laundering Act of 2020, 31 U.S.C. § 6002 (stating that the purposes of the AML Act include, among others, (i) "improv[ing] coordination and information sharing" among financial institutions, regulatory authorities, and law enforcement; (ii) "moderniz[ing]" AML/CFT programs; (iii) "encourag[ing] technological innovation and the adoption of new technology by financial institutions"; (iv) reinforcing that financial institutions shall have risk-based AML/CFT programs).

7 We understand that there will be variations between rules to account for the different banks each agency regulates. However, the substance of the final rule should be consistent between FinCEN and the Agencies. *See* NPRM, 89 Fed. Reg. at 65245 ("The primary reason for the changes is so that the Agencies' BSA compliance program rules will remain aligned with FinCEN's rule to avoid confusion and additional burden on banks."); Interagency Statement on the Issuance of the AML/CFT Program Notices of Proposed Rulemaking (July 19, 2024) ("The Agencies are proposing to make changes to their respective BSA compliance program rules to align those rules with FinCEN's proposed revisions to its existing program rule for banks. In that way, banks would comply with one standard rather than differing program rule requirements between FinCEN and the Agencies."), *available at* https://www.occ.gov/news-issuances/news-releases/2024/nr-ia-2024-82a.pdf.

8 NPRM, 89 Fed. Reg. at 65244.

9 *Id.* at 65251.

10 Ultimately, the Agencies must abide by Administrative Procedure Act ("APA") requirements. The APA directs courts to "set aside agency actions, findings, and conclusions" that exceed the agency's authority, fail to comply with procedural requirements, or are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). As generally discussed throughout this letter, BPI has significant concerns that the proposed rule does not align with the letter and spirit of the AML Act and provides for arbitrary procedural requirements that could render the rule vulnerable to challenge.

I. Executive Summary

As BPI has noted previously,[11] the objectives of the AML Act can be best achieved by empowering banks to allocate resources to Financial Intelligence Units and other endeavors that are most productive in identifying illicit activity. The AML Act accordingly mandates that AML/CFT programs "be effective, risk-based, and reasonable, 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."[12]

To achieve this goal, the regulation must first and foremost provide banks with the discretion necessary to tailor their AML/CFT programs to their unique businesses and risk-profiles, including explicit authority to allocate resources to higher-risk activities and customers and reallocate resources away from lower-risk activities and customers. In our view, this is absolutely fundamental to the constitution of an "effective, risk-based, and reasonably designed AML/CFT program."

Specifically, the final rule should (i) explicitly state in the regulatory text that banks are permitted to allocate and reallocate resources to "higher-risk customers and activities . . . rather than toward lower-risk customers and activities"[13] in accordance with the banks' reasonable determination of risk level and (ii) adopt a qualitative three-prong framework, similar to the one provided in FinCEN's September 2020 ANPRM on enhancing the effectiveness of AML programs, to provide direction on the touchstones of an "effective" risk-based AML/CFT program.[14] With respect to lower-risk customers and activities, it should state that occasional errors in documentation or other faults are to be expected and should not form the

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[11] *See, e.g.*, Bank Policy Institute, Request for Comments Regarding Anti-Money Laundering/Countering the Financing of Terrorism Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers and Exempt Reporting Advisers (FINCEN–2024–0006 and RIN 1506–AB58), p. 5 (Apr. 15, 2024) (arguing that "FinCEN should provide covered investment advisers . . . with significant latitude to apply the risk-based approach. . . ."), *available at* https://bpi.com/bpi-comments-on-fincen-proposal-updating-aml-rules-for-registered-investment-advisers/; Bank Policy Institute, Request for Comments Regarding Anti-Money Laundering Program Effectiveness (Docket No. FINCEN-2020-0011; RIN 1506-AB44), pp. 2–3 (Nov. 16, 2020) (providing recommendations to "enable reallocation to AML program activities that facilitate more effective and efficient identification, assessment and mitigation of illicit finance risks and further the purpose of the BSA of keeping records and filing reports that 'have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, included analysis to protect against international terrorism"), *available at* https://bpi.com/bpi-submits-comment-letter-to-fincen-regarding-aml-program-effectiveness/.

[12] U.S. Department of the Treasury, 2024 National Strategy for Combating Terrorist and Other Illicit Financing (May 2024), *available at* https://home.treasury.gov/system/files/136/2024-Illicit-Finance-Strategy.pdf.

[13] Anti-Money Laundering Act of 2020, 31 U.S.C. § 5318(h)(2)(B)(iv)(II).

[14] *See* Financial Crimes Enforcement Network, FinCEN Seeks Comments on Enhancing the Effectiveness of Anti-Money Laundering Programs (Sept. 16, 2020), *available at* https://www.fincen.gov/news/news-releases/fincen-seeks-comments-enhancing-effectiveness-anti-money-laundering-programs#:~:text=The%20potential%20regulatory%20amendments%20described%20in%20the%20ANPRM,issued%20by%20FinCEN%20consistent%20with%20the%20proposed%20amendments%2C.

grounds for Matters Requiring Attention or other non-public sanctions.[15]

The grave harm of not embracing this specific framework for allocation of resources is the absence of effectiveness. It would preserve improper allocation of resources and leave interpretations of key terms of the statute to various regulatory agencies', and potentially to individual examiners', interpretation of the rule. Furthermore, it would expose banks to significant uncertainty as to how to allocate their resources in a revised regime that on the one hand considers AML/CFT Priorities but on the other hand "takes into account higher-risk and lower-risk customer and activities."[16] For years, banks have focused on lower-risk customers and activities because they are examined on these issues by the Agencies. Now Congress has clearly directed resources go to higher-risk "rather than" lower-risk customers and activities through the AML Act, but the Agencies and FinCEN have rewritten that direction in a way that will only preserve the status quo when Congress clearly intended to change it.

A second essential change to the rule is related to the timing for, and manner of, updating the risk assessment processes. The proposed rule requires banks to update their "risk assessment" on "a periodic basis, including, at a minimum, when there are material changes to the . . . [bank's] money laundering, terrorist financing, and other illicit finance activity risks."[17] The failure to recognize that banks employ various risk assessment processes that may not be incorporated into a single assessment and that may not share the same timelines or triggers for updating will inevitably lead to an ineffective and inefficient use of compliance resources. Moreover, the failure to define the terms "periodic basis" and "material" will inevitably lead to the application of different frequencies and standards for updating risk assessments amongst the regulating agencies. This approach will create undue burden on banking institutions as they attempt to comply with not only their own internal understanding of the rule, but also definitions promulgated by the various supervisory bodies.

To resolve this burdensome process, the Agencies must revise this provision to explicitly leave the timing for and manner of updating risk assessment processes to the discretion of each bank, and clarify what is meant by "material" changes. Materiality, as understood in this regulation, should be triggered by *significant* risks to people, processes, and/or technology requiring meaningful, additional rigor to identify and mitigate the risk.

A third essential change to this rule that the Agencies should make is setting the implementation period for the final rule to at least two years to provide banks and examiners with sufficient time to adopt the final rule's new compliance requirements. We appreciate and share the Agencies' desire to implement these new AML/CFT requirements promptly, but request that sufficient time be provided to allow banking institutions the opportunity to implement these rules effectively and account for the need for both banks and agencies to update trainings, processes, and controls.

A fourth critical change to the proposed rule is the clarification that banks may utilize offshore

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[15] The references in this letter to Matter Requiring Attention or "MRAs" are just examples and should not be interpreted as excluding other supervisory actions that arise in the AML/CFT compliance space (*e.g.*, Supervisory Recommendations, MRIAs, and MRBAs).

[16] NPRM, 89 Fed. Reg. at 65246.

[17] NPRM, 89 Fed. Reg. at 65260; 65261–63.

personnel to carry out AML/CFT functions as part of a bank's global AML/CFT program provided that the U.S. AML/CFT Officer who is invested with the "duty to establish, maintain, and enforce" the AML/CFT program is located within U.S. jurisdiction and subject to oversight by U.S. regulators.[18]

II. Define the principles of the components of an "effective, risk-based, and reasonably designed AML/CFT program" to enable banks to meaningfully reallocate resources consistent with the objectives of the AML Act.

The proposed rule states that banks must "establish, implement, and maintain an effective, risk-based, and reasonably designed AML/CFT program."[19] Yet, the terms "effective" and "risk-based" are not defined in the proposed rule; nor does the proposed rule provide any particular standards for how these terms would be measured or tested. The proposed rule also fails to provide examples of current activities (mandated by agency examiners) that are ineffective or not risk-based. This omission is significant, given that many examples of such activities were provided to Congress as it considered the legislation and to FinCEN through public comments on the Effectiveness ANPRM.[20] Without a minimum standard for evaluating these terms, banks will be forced to construct their AML/CFT programs based on how regulatory agencies and individual examiners decide to examine them or enforce the final rule rather than in response to each banking institution's unique risk profile. Reallocating resources necessarily means tolerating less focus on and less precision and rigor with respect to lower-risk activities and customers. Presently, for example, banks have received MRAs: when an isolated and immaterial inaccuracy is recorded; a periodic review date is missed by an inconsequential period of time; or a function is not fully documented to the satisfaction of the examiner, but where such documentation omissions are de minimis. We do not believe the Agencies intended such an outcome, which would be inconsistent with the Agencies' preamble and supporting commentary to the NPRM, as well as the AML Act.[21] However, without the changes proposed here, there is nothing in the proposed rule to which the bank could point to in its defense when it is managing its inherently limited resources to focus on AML/CFT Priorities over lower-risk customers and activities.

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18 *Id.*

19 *Id.*

20 Financial Crimes Enforcement Network, Anti-Money Laundering Program Effectiveness, 85 Fed. Reg. 58023, 58027 (Sept. 17, 2020) ("Effectiveness ANPRM"), *available at* https://www.federalregister.gov/documents/2020/09/17/2020-20527/anti-money-laundering-program-effectiveness.

21 *See* NPRM, 89 Fed. Reg. at 65246 (saying that subparagraph (B)(2) "is consistent with section 6101(b) of the AML Act," but proposing language that stating that attention and resources be focused in a manner "that takes into account higher-risk and lower-risk customers and activities"); FinCEN NPRM, 89 Fed. Reg. at 55430 ("[T]he purpose of the AML/CFT program requirement, which is to ensure that a financial institution implements an effective, risk-based, and reasonably designed AML/CFT program to identify, manage, and mitigate illicit finance activity risks that: . . . focuses attention and resources in a manner consistent with the risk profile of the financial institution."); Anti-Money Laundering Act of 2020, § 6002(1); *see also* 31 U.S.C. § 5311(5) ("[E]stablish appropriate frameworks for information sharing among financial institutions, their agents and service providers, their regulatory authorities, associations of financial institutions, the Department of the Treasury, and law enforcement authorities.").

i. The Agencies should revise the language of the proposed rule to explicitly allow banks to reallocate resources away from lower-risk activities toward higher-risk activities as codified in the AML Act.

The proposed rule states, in part, that "[a]n effective, risk-based, and reasonably designed AML/CFT program focuses attention and resources in a manner consistent with the . . . [bank's] risk profile that takes into account higher-risk and lower-risk customers and activities. . . ."[22] This language requiring banking institutions to take into account both "higher-risk and lower-risk" directly conflicts with the AML Act's explicit direction that banks ensure "more attention and resources" are directed towards "higher-risk customers and activities . . . *rather than* toward lower-risk customers and activities."[23] The Agencies purport to propose changes to the AML/CFT Program requirement that "reflect the statutory requirements in AML Act section 6101(b)," but somehow omit the critical and unambiguous language permitting the direction of more resources to higher-risk customers and activities, rather than lower-risk, while including word for word other aspects of Congress' language in 6101(b) (*e.g.*, "consistent with the risk profile" of a bank). "If . . . congressional intent is 'clear,'" as it is here, "that is the end of the inquiry"—the agency must effectuate that intent.[24]

As written, however, the language of the proposed rule does not give banks the clear and unambiguous ability to prioritize the allocation of resources for their AML/CFT programs based on risk that Congress intended. Instead, the proposed rule equates high- and low-risk customers and activities. Not only is this result inconsistent with the AML Act, but it is also inconsistent with the Agencies' own commentary supporting the proposed rule.[25] In fact, the Agencies themselves have adopted this inherent understanding of risk allocation when conducting their own risk-focused examinations. As detailed in a 2019 joint statement by FinCEN and the Agencies, "[t]he federal banking agencies generally allocate more resources to higher-risk areas, and fewer resources to lower-risk areas" when deciding how to examine a bank.[26]

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[22] NPRM, 89 Fed. Reg. at 65260; 65261–63.

[23] Anti-Money Laundering Act of 2020, 31 U.S.C. § 5318(h)(2)(B)(iv)(II) (emphasis added).

[24] *Loper Bright Enters.* v. *Raimondo*, 144 S. Ct. 2244, 2254 (2024).

[25] *See* Anti-Money Laundering Act of 2020, 31 U.S.C. § 5318(h)(2)(B)(iv)(II) ("Anti-money laundering and countering the financing of terrorism 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*.") (emphasis added); NPRM, 89 Fed. Reg. 65243, 65246 ("Implicit in the existing requirement that banks implement a program 'reasonably designed' to ensure and monitor compliance with the BSA is the expectation that banks allocate their resources according to their money laundering and terrorist financing (ML/TF) risk."); FinCEN NPRM, 89 Fed. Reg. 55428, 55431 ("The specifics of a financial institution's particular risk assessment process should be determined by each institution based on its own customers and business activities; as stated in section 6101(b) of the AML Act, risk-based programs generally should ensure that financial institutions direct more attention and resources to higher-risk customers and activities.").

[26] Joint Statement on Risk-Focused Bank Secrecy Act/Anti-Money Laundering Supervision (July 22, 2019), https://www.fdic.gov/sites/default/files/2024-03/pr19065a.pdf; *see also* Effectiveness ANPRM, 85 Fed. Reg. at 58027 (FinCEN stated clearly it understood that "[u]nder any proposal to incorporate a requirement for an 'effective and

The AML Act's language explicitly and unambiguously permitting banking institutions to prioritize areas of higher risk must be included in the final rule. Since banks have tailored their current AML/CFT programs to existing examination procedures, many would struggle to strengthen their programs to reallocate resources away from those activities that do not meaningfully mitigate financial crime risk and direct them towards those that do so without risking examiner criticism.[27] Accordingly, we recommend that sections 21.21(b)(2), 208.63(b)(2), 326.8(b)(2), and 748.2(b)(2) adhere to Congress' explicit mandate that "more attention and resources" are "directed" to "higher-risk customers and activities . . . rather than lower-risk customers and activities":[28]

> (a) An effective, risk-based, and reasonably designed AML/CFT program ***directs more resources and attention toward higher-risk customers and activities and away from lower-risk customers and activities*** consistent with the [bank's] risk profile and at a minimum: . . . .

Including this language will ensure banks have the ability to reallocate resources based on the banking institution's reasonable determination of risk level as guided by the AML/CFT Priorities, which is the very definition of a risk-based approach, and remain consistent with the NPRM's stated purpose of aligning AML/CFT program rules with FinCEN's rule, which were promulgated under the AML Act, to avoid any additional burden or confusion. Furthermore, having this specific language is critical to ensuring the intention of the rule is not lost when it is rendered in the FFIEC manual.[29]

To the extent the Agencies are concerned that Congress' formulation would tempt banks simply to take resources away from lower-risk customers and activities without redirecting them to higher-risk customers and activities, they are more than capable of assessing whether banks are meeting that mandate or not through the examination. In fact, being assessed on that issue would be preferred by banks over the current focus on technical compliance because it would incentivize the focus on higher risk customers and activities, fulfill the promise of the risk-based approach, and move towards achieving true effectiveness in combatting financial crime. The Agencies should also establish a feedback loop with FinCEN for banks that would provide input or guidance on judgments relating to the reallocation of resources away from

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reasonably designed' AML program . . . institutions may reallocate resources from other lower-priority risks or practices to manage and mitigate higher-priority risks, including any identified as Strategic AML Priorities").

[27] *See* The Wolfsberg Group, *Demonstrating Effectiveness*, pp. 1–2 (2021) ("Today, however, most [financial institutions] do not focus their AML/CTF risk assessments on government priorities. Instead, and largely in response to supervisory expectations, AML/CTF risk assessments are focused on technical compliance"), *available at* https://db.wolfsberg-group.org/assets/b76e0ef2-381b-443f-9901-62cdd7ff27a7/Wolfsberg%20Group%20Statement%20Demonstrating%20%20Effectiveness.pdf.

[28] Anti-Money Laundering Act of 2020, 31 U.S.C. § 5318(2)(B)(iv)(II).

[29] For example, if the proposed language as currently drafted is incorporated by the FFIEC Manual, it would have far less of an impact than the AML Act's language of directing more resources and attention toward higher-risk customers and activities and away from lower-risk customers and activities. Not adhering strictly to Congress' intent here will risk watering down that language even further in the FFIEC Manual, which the industry and public would have no opportunity to comment on or object to. Since the FFIEC manual is broadly treated as a guidebook for examiners of many agencies in reviewing AML/CFT programs, it is essential that the final rule be as clear as possible so as to not spur confusion when incorporated into the FFIEC manual.

lower-risk activities and towards higher-risk activities. In these instances, the banking agencies should provide appropriate FinCEN staff access to examination reports at the request of the bank.

ii. The Agencies should formally adopt a three-prong approach for qualitatively assessing whether a bank has an effective risk-based AML/CFT program.

To further dispel the above concerns, we believe the Agencies should adopt a slightly revised version of the previously proposed three-prong framework considered in FinCEN's September 2020 Effectiveness ANPRM to provide guidance on how to qualitatively determine whether a bank is operating an "effective" AML/CFT program.[30] By adopting this three-prong approach, the Agencies will be creating a uniform minimum standard that ensures any examination of an "effective" AML/CFT program is not done under a strict liability regime or the whim of the particular examiner. A "risk-based" program is by definition an imperfect system in which "an undetected weakness in a lower risk area is not by default an indication of programme failure, but rather a natural extension of the implementation of a risk-based approach."[31] This understanding, that an "effective" AML/CFT program does not mean an infallible AML/CFT program, must be captured in the language of the rule itself.[32]

Specifically, the Agencies should revise the rule to make clear that a banking institution can be considered to have an "effective" and "reasonably designed" "risk-based" AML/CFT program if it meets the following three principles:

1. Assesses and manages AML/CFT risk as informed by a bank's own risk assessment processes, including the AML/CFT Priorities and the bank's business activities as appropriate;
2. Maintains a reasonably designed program to promote compliance with the record keeping and reporting requirements under the Bank Secrecy Act; and
3. Provides for the reporting of information that the bank reasonably believes is of a high degree of usefulness to government authorities for an institution of its size and risk profile.

By incorporating these principles into the rule, the Agencies can establish a consistent standard to evaluate compliance, while still maintaining the flexibility needed to ensure that these principles can be implemented by diverse banking institutions. This, along with appropriate examiner training reflecting input from FinCEN, would, in turn, allow banks to appropriately tailor their AML/CFT programs and engage in

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30 Effectiveness ANPRM, 85 Fed. Reg. at 58026.

31 *See* The Wolfsberg Group, *supra* n. 19, p. 4 ("Where an [financial institution] has reasonably focused on higher risk areas in line with its assessment of the threats it faces, an undetected weakness in a lower risk area is not by default an indication of programme failure, but rather a natural extension of the implementation of a risk-based approach.").

32 *See also* Bank Policy Institute, Request for Comments Regarding Anti-Money Laundering Program Effectiveness (Docket No. FINCEN-2020-0011; RIN 1506-AB44) p. 7 (Nov. 16, 2020) ("a focus on perfection in all aspects of an AML program is inconsistent with implementing and maintaining a program that is effective in light of an institution's activities and risk profile and applicable AML priorities"), *available at* https://bpi.com/bpi-submits-comment-letter-to-fincen-regarding-aml-program-effectiveness/.

innovation with assurance that the actions they are taking are in compliance with the final rule.

Furthermore, including these clear principles in the final rule is necessary to ensure substantive changes are made to the AML/CFT regime. We strongly disagree with the Agencies' assertion that the "addition of the term 'effective'" will "not be a substantive change for banks" because the term is only a "clarifying amendment."[33] Throughout the preamble, there are references to the fact that the proposed rule merely codifies existing industry practice and that most banks are generally in compliance with its requirements. We are concerned that any subsequent regulations required to be implemented under the AML Act will be for naught unless the final rule codifies a fundamental refocus on risk-based, effective programs—rather than technical compliance—given that the rule functions to provide the principles for how an AML/CFT program should be established and operated. Congress meant for the AML Act's changes to be substantive, for instance by stating that its purpose was "to modernize anti-money laundering and countering the financing of terrorism laws to adapt the government and private sector response to new and emerging threats."[34] When Congress used the term "effective" in the AML Act it intended to fundamentally change the way examiners assess banks' compliance with the AML/CFT program rule, ensuring that examiners focus on the effectiveness outcomes of the AML/CFT program instead of the program's design.[35] This directly alters the examination process, which previously employed a more standardized "check-the-box" approach to ensuring that each bank is technically compliant with its procedures instead of focusing on risk-based practices that actively serve the needs of that bank.[36] By delineating what is considered "effective" in the final rule, examiners will have the guidance necessary to move away from standardized exams and fully embrace the risk-based AML/CFT regime. This in turn will allow banks to reallocate resources and develop stronger AML/CFT programs that directly address the risks particular to that bank.

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[33] NPRM, 89 Fed. Reg. at 65245.

[34] Anti-Money Laundering Act of 2020, § 6002.

[35] NPRM, 89 Fed. Reg. at 65246; *see also* FinCEN NPRM, 89 Fed. Reg. at 55429 (citing H.R. Rep. No. 6395 (2020) at pp. 731–32 (Joint Explanatory Statement of the Committee of Conference), *available at* https://docs.house.gov/billsthisweek/20201207/116hrpt617-JointExplanatoryStatement.pdf) (Congress stated that the AML Act "comprehensively update[s] the BSA for the first time in decades and provide[s] for the establishment of a coherent set of risk-based priorities")).

[36] The goal of substantively moving examiners away from technical compliance is captured throughout the AML Act. For example, section 6307 of the AML Act requires "[e]ach Federal examiner reviewing [BSA] compliance" to "attend appropriate annual training" that includes "the high-level context for why anti-money laundering and countering the financing of terrorism programs are necessary for law enforcement agencies and other national security agencies and what risks those programs seek to mitigate." This training, which the secretary of the Treasury is to design in consultation with the FFIEC and others, is clearly meant to reorient examiners so they focus on reviewing an AML/CFT program for its effectiveness in terms of outcome (*i.e.*, assisting law enforcement and national security agencies in combat illicit financing activities and the mitigation of the bank's unique risk).

This point is underscored by the references in the FinCEN NPRM that there is a need for enhanced training for examiners to "help examiners evaluate whether AML/CFT programs are appropriately tailored to address ML/TF risk rather than focused on perceived check-the-box exercises." FinCEN NPRM, 89 Fed. Reg. at 55433.

Nevertheless, we wish to stress that the use of the phrases "as appropriate," "reasonably designed," and "reasonably believes" are essential to implementing this rule in practice.[37] The removal of these terms or restructuring of these provisions so as to strip these qualifiers would render these standards unworkable. As the Wolfsberg Group has reasoned, the applicability of enforcement priorities and the ability to provide highly useful information to law enforcement "will vary by [bank], depending on its size, business model and geographic scope."[38] The qualifiers detailed here provide the elasticity needed to account for these differences among banks.

iii. The proposed rule would result in inconsistent examination processes and regulatory enforcement; therefore, the final rule should expressly require examinations to follow a risk-based approach.

Without any delineated standard for examiners to follow a risk-based approach, agencies and their individual examiners will create their own criteria for determining whether a bank's "risk-based" AML/CFT programs are "effective." Based on past practice, the likely position would be that while some aspects of a program are more important than others, all are important—and none are sufficiently unimportant to excuse deviation from policy or procedure or other type of occasional error. The AML Act sought to change this approach.

A lack of a clearly delineated standard would lead to the continuation of a "check-the-box" approach, under which banking institutions have to provide evidence of detailed, granular procedures that are not risk-based and that do not effectively control the financial crime risks applicable to that bank's unique business in order to meet a regulator's standards. This outcome would frustrate the intended "flexibility" allotted to banks under the proposed rule and would actively conflict with the intended ability of banks to design their programs based on the range of risks applicable to their unique businesses.

Although the commentary of FinCEN's proposed rule noted it is "developing and implementing examiner training" to establish a common understanding for enforcing the final rule, we strongly doubt that this training alone would be sufficient to resolve the examination and enforcement concerns arising from the unclear and ambiguous language in the NPRM.[39] While we appreciate that the Agencies are implementing this NPRM in an effort to develop consistency across regulatory agencies, we are concerned that banks will not be given adequate insight into regulatory examinations as the rule is implemented and that information from FinCEN's examiner trainings might not be retained or consistently applied over time. To truly resolve the aforementioned enforcement concerns and create transparency between banks and relevant supervisory agencies, the rule itself must have comprehensive and clear guidance for both banks and examiners.

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[37] Bank Policy Institute, Request for Comments Regarding Anti-Money Laundering Program Effectiveness (Docket No. FINCEN-2020-0011; RIN 1506-AB44) p. 9 (Nov. 16, 2020) (arguing "that requiring the program to be reasonable for the relevant institution would . . . facilitate evaluation of an AML program as a whole, including how it generates outputs, rather than how it is structured."), *available at* https://bpi.com/bpi-submits-comment-letter-to-fincen-regarding-aml-program-effectiveness/.

[38] The Wolfsberg Group, *supra* n. 19, pp. 2–3.

[39] FinCEN NPRM, 89 Fed. Reg. at 55432.

iv. The Agencies should provide explicit examples of what is and what is not considered a "risk-based" AML/CFT program.

In addition, consistent with our February 2024 statement issued before the U.S. House Financial Services Committee, we maintain that actual examples of what is and is not considered "risk-based" would be extremely beneficial and aid both the banks and regulatory examiners in accomplishing the goals of the proposed rule.[40] Without these examples, the term "'risk-based' is of little practical use" to banking institutions and regulatory agencies because it provides no meaningful boundaries and could add to the burdens of the existing compliance framework.[41] In particular, we would ask the Agencies to include examples in the rule itself or the preamble aligned with the following, as well as the other examples captured in our 2024 statement:

- A risk-based approach does not permit examiners to utilize or create benchmark, "one-size-fits-all" compliance requirements across banking institutions (*e.g.*, an examination of a bank's risk-based AML/CFT program must take into account unique risks based upon a bank's customer base, geography, etc.).

- A risk-based approach does not permit examiners to second guess the risk-based decisions of the bank's U.S. AML/CFT officer and relevant compliance professionals, including the reallocation of resources toward higher-risk activity (including by discarding inefficient or unnecessary practices), and SAR decisions, where the bank's compliance personnel reasonably determine that doing so is consistent with the bank's activities, risk profile and program design.

- A risk-based approach does not mandate the application of rigid rules or schedules regarding when banks must conduct customer due diligence and enhanced due diligence.

- A risk-based approach allows firms to streamline documentation intensive exercises that historically have been regulatory expectations but do not add significant value in the identification of information with a high-degree of usefulness for government authorities or meaningfully mitigate financial crime risk. For example, the extensive documentation of decisions not to file SARs, manual reviews and documentation following every SAR filed in conducting Continuing Activity Reviews, and, as discussed next, the detailed documentation of AML/CFT risk assessments that is currently still expected on an annual basis, even when the exercise provides very little financial crime risk management value.

- A risk-based approach does not require extensive documentation and resources in connection

[40] Bank Policy Institute, "Oversight of the Financial Crimes Enforcement Network and the Office of Terrorism and Financial Intelligence" (Feb. 14, 2024), *available at* https://bpi.com/bpi-statement-for-the-record-for-house-oversight-hearing-of-fincen-and-the-office-of-terrorism-and-financial-intelligence/.

[41] *Id.*; *see also* Bank Policy Institute, Getting to Effectiveness – Report on U.S. Financial Institution Resources Devoted to BSA/AML & Sanctions Compliance, pp. 1–2 (Oct. 29, 2018) (finding from a study of 19 financial institutions, "with asset sizes ranging from approximately $50 billion to over $500 billion," that these institutions "are employing over 14,000 individuals, investing approximately $2.4 billion and utilizing as many as over 20 different I.T. systems per institution to assist them with BSA/AML compliance"), *available at* https://bpi.com/getting-to-effectiveness-report-on-u-s-financial-institution-resources-devoted-to-bsa-aml-sanctions-compliance/.

with implementing necessary updates and modifications to the banking agencies' model risk management framework for AML/CFT tools. Federal banking agencies should refrain from imposing on AML/CFT programs their generally applicable model risk management 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.[42] In the absence of guidance, banks should be free to innovate.

III. Replace the proposed risk assessment process with a more flexible and holistic approach that recognizes banks utilize a variety of risk assessment processes to create well-designed AML/CFT programs.

The NPRM states in part that banking institutions are to "[e]stablish a risk assessment process that serves as the basis for the . . . [bank's] AML/CFT program."[43] The language in the NPRM fails to capture the flexibility offered in the commentary, which states that "banks would not be required to establish a single, consolidated risk assessment document solely to comply with the proposed rule. Rather, various methods and approaches could be used to ensure that a bank is appropriately documenting its particular risks."[44] Many banks utilize many different risk assessment processes that together provide a tapestry of risk coverage, rather than a singular risk assessment process, to help inform and drive their respective AML/CFT programs. The AML Act, which codified support for imposing a risk assessment requirement, also refers to "risk assessment processes" in the plural.[45] Thus, we recommend that sections 21.21(b)(2)(i), 208.63(b)(2)(i), 326.8(b)(2)(i), and 748.2(b)(2)(i) be revised to explicitly capture risk assessment processes in the plural as follows:

> (1) Establish ***risk assessment processes*** that ***collectively*** serve as the basis for the [bank's] AML/CFT program, including implementation of the components required under paragraphs (b)(2)(ii) through (vi) of this section. The ***risk assessment processes*** must:

Although this point may appear minor, the implications are far reaching. Banks utilize various risk assessment processes (*e.g.*, customer risk assessment, customer escalation and governance forums, prohibited or enhanced due diligence client types, and new business initiative approval forums for new products and services) to identify and control risk. To require that these sometimes distinct and standalone processes be consolidated into a singular risk assessment process or function would not be an efficient or effective use of compliance resources. Capturing the plural form in the rule also aids supervisory regulators by helping set expectations at the onset and ensuring that examiners do not inadvertently require banking

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42 We are looking forward to further rulemaking on the model risk management framework under the AML Act, which provides for the issuance of a rule to specify the "internal processes designed to facilitate compliance" and "the standards by which financial institutions are to test the technology and related technology internal processes." Anti-Money Laundering Act of 2020, 31 U.S.C. § 5318(o)(1).

43 NPRM, 89 Fed. Reg. at 65260–63.

44 *Id.* at 65246.

45 Anti-Money Laundering Act of 2020, 31 U.S.C. § 5318(g)(5)(C).

institutions to capture every aspect of their risk assessment processes into an annual risk assessment, which has historically been a significant drain on business and compliance resources for little benefit. Based on these concerns, the practical application, and the statutory language of the AML Act, we ask that the Agencies revise the rule to capture risk assessment processes in the plural as recommended above.

i. The Agencies should explicitly provide banks with the discretion to determine how, when, and which of the AML/CFT Priorities and business activities provided in the proposed rule to evaluate as part of their risk assessment processes and require examiners to give banks discretion in how they accomplish this.

Under the proposed rule, banks are required to incorporate the "AML/CFT Priorities issued pursuant to 31 U.S.C. 5418(h)(4)" and risks "based on its business activities."[46] This language does not provide the banks with flexibility in how to implement these considerations, nor educate banking institutions and regulatory agencies on how these considerations are to be reviewed in the examination process. As such, we recommend that the Agencies explicitly state in the rule that discretion, subject to the Agencies' oversight, will be given to banking institutions' decisions regarding what components of their business and program are incorporated into the risk assessment processes and how and to what extent they incorporate the AML/CFT Priorities and business activities specified in proposed sections 21.21(b)(2)(i)(A)(1)-(2), 208.63(b)(2)(i)(A)(1)-(2), 326.8(b)(2)(i)(A)(1)-(2), and 748.2(b)(2)(i)(A)(1)-(2).[47] That is, the AML/CFT Priorities and listed business activities should be deemed relevant and incorporated into a bank's risk assessment processes only if such information is deemed significant to a bank's unique business model. Banks, in turn, should be considered compliant with the rule by examiners provided they have a reasonable basis at the time of consideration for excluding certain AML/CFT Priorities or business activity risks. To achieve this, we recommend the Agencies modify the proposed rule in two ways:[48]

(i) include the following language as a separate additional paragraph in sections 21.21(b)(2), 208.63(b)(2), 326.8(b)(2), and 748.2(b)(2):

> The [bank] shall have discretion to determine the manner and extent to which the considerations specified in paragraphs (b)(2)(i)(A)(1)-(3) are implemented into its risk assessment processes. The [bank] may exclude considerations specified in paragraphs (b)(2)(i)(A)(1)-(3) from its risk

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46 NPRM, 89 Fed. Reg. at 65260–63.

47 *See* The Wolfsberg Group, *Principles for Auditing a Financial Crime Risk Management Programme for Effectiveness under the Wolfsberg Factors*, p. 3 (2024) ("An [financial institution ("FI")] must understand (a) the financial crime risk inherent in its business strategy and operating model; (b) the expectations of its regulators; and (c) its own risk appetite. It is only with this full understanding, and with sufficient subject-matter expertise among all three lines of defence . . . that an FI can then design a reasonable set of risk-based controls that are proportionate to the risks it faces and enable it to operate within its own risk appetite."), *available at* https://wolfsberg-group.org/news/64.

48 As detailed in sub-section (III)(ii) below, we recommend that the Agencies remove the requirement that banks consider "[r]eports filed by" the bank in their risk assessment processes. However, if this requirement is retained, our recommended language providing the banks with the necessary discretion to operate a risk-based AML/CFT program must also apply to the "[r]eports filed by" the bank requirement.

> assessment processes if the [bank] reasonably determines that such considerations are not relevant to the bank's specific risk profile.

(ii) include a reference to the above paragraph in sections 21.21(b)(2)(i)(A), 208.63(b)(2)(i)(A), 326.8(b)(2)(i)(A), and 748.2(b)(2)(i)(A) as follows:

> Identify, evaluate, and document the [bank's] money laundering, terrorist financing, and other illicit finance activity risks, including consideration of the following ***pursuant to [the above Proposed Paragraph]***:

Banks and their regulators can best advance the development of effective AML/CFT programs by enabling banks to incorporate the AML/CFT Priorities and business activities into their programs in a way that reflects financial crimes risks, strategic objectives, business plans, and other circumstances unique to that institution. As acknowledged in the AML Act, "[f]inancial institutions are spending private funds for a public . . . benefit, including protecting the United States financial system from illicit finance risks."[49] Accordingly, assuming that the six core components of an AML/CFT program, as proposed, are in place (including a qualified/adequately supported AML/CFT officer), the focus should shift from concerns about technical compliance to supporting banks in combating illicit financial activity and detecting and reporting information with a high degree of usefulness for government authorities as guided by the AML/CFT Priorities.

Within the AML/CFT Priorities, however, banks should be empowered to determine that certain individual Priorities may, in whole or in part, be of less significance or may require adaptation according to their specific risk profile. Furthermore, the Agencies should recognize that not all aspects of the AML/CFT Priorities are necessarily created equal. Banks should have the discretion to prioritize riskier or more impactful aspects of a given AML/CFT Priority and deprioritize other less risky or impactful elements. In the Fraud Priority, for instance, a bank should be able to prioritize elder fraud or pig butchering over low-dollar fraud or attempted new account fraud. Otherwise, the current breadth of the AML/CFT Priorities will render them in conflict with the application of a risk-based approach.

Similarly, banks should be empowered to make their own determinations that particular practices are producing information that would reasonably be considered highly useful to law enforcement or whether such information is not sufficiently useful to warrant inclusion in the risk assessment processes. The most appropriate mechanism for establishing clear examination and supervision standards is to codify this flexibility in the language of the rule. Emphasizing that banking institutions are afforded a degree of discretion, in how, when, and which of these considerations (including the ability to prioritize amongst the relevant AML/CFT Priorities and within the Priorities (*e.g.*, attempted account fraud vs. elder fraud, etc.)) to incorporate into their risk assessment processes will allow banks the ability to proactively tailor their AML/CFT programs in accordance with the rule and intention of the AML Act instead of constructing their

[49] Anti-Money Laundering Act of 2020, 31 U.S.C. § 5318(B)(i).

risk assessment processes based on examination standards. This will ultimately support more effective AML programs and lead to the provision of more useful information to law enforcement.[50]

Without such direction, supervisory regulators likely will continue to focus on technical compliance, which would force banks to adopt AML/CFT Priorities or business activities into their risk assessment processes that are irrelevant to their unique risk profile or business. This would conflict directly with the aim of the proposed rule and the AML Act, which is to have banks focus resources where they will most likely generate public benefits by mitigating money laundering, terrorist financing, and the flow of illicit funds through the banking system.[51] Therefore, it is important that the Agencies also explicitly require that examiners give a certain amount of deference to banking institutions in how they create their risk assessments.

We appreciate that the Agencies have tried to capture this deference for the AML/CFT Priorities by allowing banks to consider these priorities "as appropriate," but we are concerned that such language is not sufficiently clear and is also wholly absent from the consideration of "business activities." This need for deference is particularly important given that the business activities enumerated in the proposed rule are not defined. For example, it is unclear how broadly the term "intermediaries" is meant to be interpreted. Intermediaries could be interpreted to include—though we disagree with instituting such an expansive definition—vendors, stock exchanges, mutual funds, insurance companies, pension firms, investment bankers, financial advisors, and escrow companies, among others.[52] In failing to provide banks with explicit discretion to incorporate the business activities relevant to their risk profiles, it will be nearly impossible for some banks to sufficiently incorporate all the business activities required by the rule. This will lead to improperly tailored AML/CFT programs, burdensome reporting obligations, and elusive examination standards that run contrary to the goals of the proposed rule and AML Act.

Importantly, granting discretion to banks in the rule will not hinder regulatory agencies from using their supervisory authority to address when a bank has inadequate or poor risk assessment processes. Not only will this deference be subject to review by the Agencies, but banks will still be required to apply the considerations that are relevant to their unique risk profiles and maintain an effective and reasonably designed risk-based AML/CFT program. This discretion simply provides banks with the flexibility to create risk assessment processes that actually address the illicit financial activity at issue. Ultimately, supervisory agencies will still have the authority to review these AML/CFT programs, but will be required

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[50] Additionally, the Agencies themselves should liaison with law enforcement and FinCEN in order to understand what it actually means for banks to provide information with a high degree of usefulness to government authorities.

[51] *See* NPRM, 89 Fed. Reg. at 65246; FinCEN NPRM, 89 Fed. Reg. at 55485; Anti-Money Laundering Act of 2020, 31 U.S.C. § 5318(b)(2)(B).

[52] *See* NPRM, 89 Fed. Reg. at 65247 ("The Agencies consider 'intermediaries' to broadly include other types of financial relationships beyond customer relationships that allow financial activities by, at, or through a bank or other type of financial institution. An intermediary can include, but not be limited to, a bank or financial institution's brokers, agents, and suppliers that facilitate the introduction or processing of financial transactions, financial products and services, and customer-related financial activities.").

to do so as directed by the final rule and AML Act, with a focus on whether these programs are effective, reasonably designed, and risk-based.

ii. The Agencies should remove the requirement that "reports filed by the bank" be a consideration in a bank's risk assessment processes in order to comply with the AML Act.

The proposed rule also states that a bank's "risk assessment process must . . . includ[e] consideration of . . . [r]eports filed by the [] bank[] . . . pursuant to the Bank Secrecy Act and the implementing regulations issued by the Department of the Treasury at 31 CFR chapter X."[53] This language, along with the NPRM's commentary that "the proposed rule would require that banks review and evaluate reports filed by the bank with FinCEN," creates an obligation on banks to include, at a minimum, SARs and CTRs in their risk assessment processes.[54] This is contrary to the AML Act, in which Congress mandated that "[r]eports," such as SARs and CTRs, "shall be guided by the compliance program of a covered financial institution with respect to the Bank Secrecy Act, including the risk assessment processes of the covered institution."[55] Since this language conflicts with the intention of the AML Act (*i.e.*, providing that a bank's risk assessment processes should inform SAR/CTR reporting, not that SARs/CTRs should inform risk assessment processes), we recommend the Agencies remove the "[r]eports filed by the [] bank[] . . . pursuant to the Bank Secrecy Act and the implementing regulations issued by the Department of the Treasury at 31 CFR chapter X" language from the rule or, at the very least, mandate that this consideration is left solely to the discretion of the bank as captured in the proposed language above.

Additionally, removing this language will not obstruct a bank's ability to incorporate "detected threat patterns or trends" from SARs/CTRs into their risk assessment processes if desired[56] and furthers the goals of the AML Act by "reduc[ing] any unnecessarily burdensome regulatory requirements" on banking intuitions.[57] Conversely, the risk signals provided by a regulatory mandate in this area may not be instructive as to the true risks that may be facing the institution (*e.g.*, BSA reports previously filed by an institution could provide a backwards-looking view of financial crime activity and/or simply reflect

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53 *Id.* at 65260–63.

54 *Id.* at 65247.

55 Anti-Money Laundering Act of 2020, 31 U.S.C. § 5318(g)(5)(C).

56 NPRM, 89 Fed. Reg. at 65247.

57 Anti-Money Laundering Act of 2020, 31 U.S.C. §§ 5318(B)(i), 6204(a), 6215. Requiring financial institutions to incorporate SARs/CTRs into the risk assessment processes would create a tremendous burden both in added operational complexity and in costs. Financial institutions would need to develop data management systems and tools to ensure that information from the SARs/CTRs are properly fed back into the risk assessment processes. As a general overview, this will require significant additive costs in maintaining the systems, training the necessary staff, updating the policies, procedures, and controls, and ensuring regulatory compliance. *See* Bank Policy Institute, Getting to Effectiveness – Report on U.S. Financial Institution Resources Devoted to BSA/AML & Sanctions Compliance, pp. 1–2 (Oct. 29, 2018) (finding that the 19 financial institutions surveyed "reviewed approximately 16 million alerts, filed over 640,000 [] [SARs] and more than 5.2 million [] [CTRs]" in 2017), *available at* https://bpi.com/getting-to-effectiveness-report-on-u-s-financial-institution-resources-devoted-to-bsa-aml-sanctions-compliance/.

improvements or other changes to transaction monitoring scenarios, CTRs may not be easily incorporated into a bank's risk assessments due to limited feedback from law enforcement on CTR filings, etc.).

If this language is not removed, banks must be afforded discretion in determining what if any reporting elements to include in their risk assessment processes based upon their unique risk profiles. To accomplish this, we recommend incorporating the proposed language offered above in sub-section (III)(i), which would provide banks with the necessary discretion to properly incorporate all three considerations outlined in the rule (*i.e.,* AML/CFT Priorities, business activities, and filed reports).

iii. The Agencies should allow banks to independently determine when their risk assessment processes should be updated.

Moreover, the proposed rule requires banks to update their "risk assessment" on "a periodic basis, including, at a minimum, when there are material changes to the [] bank's . . . money laundering, terrorist financing, and other illicit finance activity risks."[58] As an initial matter, the failure to define the terms "periodic basis" and "material" will inevitably lead to the application of different frequencies and standards for updating risk assessments by the banks themselves and amongst their regulating agencies. This will create undue burden on banking institutions as they attempt to comply with not only their own internal understanding of the rule, but also definitions promulgated by the various supervisory bodies. This burden is compounded by the fact that banks have multiple risk assessment processes, all of which might require their own individual timeline or undergo a material change (*e.g.*, a change to the risks to people, processes and/or technology that are significant) triggering when an update is required. To avoid an unnecessarily burdensome process or inconsistent interpretations of the requirement, we recommend the Agencies revise this provision to explicitly leave the timing for and manner of updating risk assessment processes—either periodically or by material changes, etc.—to the discretion of each bank.

We also disagree with the Agencies' position that "[p]eriodic updates of the risk assessment assist banks in maintaining a risk-based AML/CFT program" and that "an annual risk assessment process would assist the bank in quickly adapting to any change in its ML/TF and other illicit finance activity risk in its profile."[59] Periodic, point-in-time enterprise-wide risk assessments are extremely cumbersome and force banks to expend unnecessary resources to often illustrate unchanged risks. "Given the variety of complexities, risk profiles, and activities," of various banks, there is no one-size fits all approach to risk assessments.[60]

In addition, while we recommend omitting the prescriptive requirement to update risk assessments following "material" changes, if that requirement is maintained, we urge the Agencies to explicitly define in the rule that "material changes" are only triggered by *significant* risks to people, processes, and/or technology that require meaningful, additional rigor to identify and mitigate the risk. Incorporating these revisions will provide banks with the ability to tailor the frequency of updating their risk assessment processes with the risk profile of the institution, align their internal policies, procedures, and controls across

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58 NPRM, 89 Fed. Reg. at 65260–63.

59 *Id.* at 65247–48.

60 *Id.* at 65248.

processes, sufficiently understand the threshold to meet the materiality requirement, and properly allocate the necessary resources and personnel to create a strong AML/CFT program as desired by the proposed rule and AML Act.

Furthermore, granting this discretion will further the provision's goal of encouraging innovation by avoiding instituting outdated AML/CFT program requirements. Similar to the requirements provided in the proposed rule, the FFIEC manual stated back in 2015 that "it is a sound practice for banks to periodically reassess their BSA/AML risks."[61] The FFIEC manual then dispelled of this language in 2020, and expressly stated that a bank "*may* need to update its BSA/AML risk assessment when new products, services, and customer types are introduced. . . . However, *there is no requirement to update the BSA/AML risk assessment on a continuous or specified periodic basis*."[62] Accordingly, the Agencies will be taking a considerable step backwards by mandating periodic and material change-based updates to risk assessment processes in the final rule.

IV. Set the implementation period for the final rule to at least two years to provide banks and examiners with sufficient time to adopt the final rule's new compliance requirements.

The commentary of the proposed rule "request[s] comment on any administrative burdens that the proposed rule would place on [banks] . . . and the benefits of the proposed rule that the Agencies should consider in determining the effective date and administrative compliance requirements for a final rule."[63] We appreciate that the Agencies may wish to strengthen AML/CFT programs quickly and acknowledge that some of the provisions in the proposed rule mirror the AML Act and, therefore, likely have already been internalized by the banks.[64] Nonetheless, it is appropriate to ensure the effective date is sufficiently set to accommodate the needs of the different banks and avoid introducing material operational risks, especially in view of the fact that the revised program rule is intended to be one of many steps the public sector plans to take to implement key changes of the AML Act. In addition, many banks may be implementing technological changes, performing the required reallocation of resources, conducting appropriate configuration and testing, enhancing and incorporating new risk assessment requirements, and establishing the proper policies, procedures, controls, and trainings.

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61 Federal Financial Institutions Examination Council, Bank Secrecy Act/Anti-Money Laundering Examination Manual, Risk Assessment p. 24 (2015), *available at* https://bsaaml.ffiec.gov/docs/manual/BSA_AML_Man_2014_v2_CDDBO.pdf.

62 Federal Financial Institutions Examination Council, Bank Secrecy Act/Anti-Money Laundering Examination Manual pp. 2–3 (March 2020) (emphasis added), *available at* https://bsaaml.ffiec.gov/manual/BSAAMLRiskAssessment/01.

63 NPRM, 89 Fed. Reg. at 65259.

64 BPI understands the desire to promptly implement the NPRM and has been a staunch supporter of FinCEN enacting updated AML measures and pursuing the issuance of an AML rule for years. Given this advocacy background, BPI does not take lightly its request to extend the implementation period to at least [two years]. *See* Bank Policy Institute, "Request for Comment Regarding Anti-Money Laundering Program Effectiveness" (Nov. 16, 2020), *available at* https://bpi.com/fincen-should-focus-on-flexibility-clarity-and-coordination-when-defining-aml-effectiveness/; Bank Policy Institute, "Request for Comments Regarding Beneficial Ownership Information Reporting Requirements" (May 5, 2021), *available at* https://bpi.com/bpi-supports-fincen-aml-rollout-makes-recommendations/.

Furthermore, this time is also needed for the Agencies, so FinCEN can properly coordinate with the banking regulators to update examiner guidance set out in the FFIEC Manual, including FinCEN delivering training designed to "help examiners evaluate whether AML/CFT programs are appropriately tailored to address ML/TF risk rather than focused on perceived check-the-box exercises."[65] Such actions will take time, resources, and critical consideration by banking institutions if the final rule is to be implemented properly so as to result in well-reasoned and modernized AML/CFT programs. Importantly, the regulated community, including banks' internal auditors, would need to have transparency into such changes as they adapt their programs to comply with the final rule. As such, we would ask the Agencies set an implementation period of at least two years.[66]

V. Clarify that banks may utilize offshore personnel to carry out AML/CFT functions as part of a bank's global AML/CFT program, provided that the U.S. AML/CFT Officer who is vested with the "duty to establish, maintain, and enforce" the AML/CFT program is located within U.S. jurisdiction and subject to oversight by U.S. regulators.

The proposed rule mandates that "[t]he duty to establish, maintain, and enforce the AML/CFT program must remain the responsibility of, and be performed by, persons in the United States who are accessible to, and subject to oversight and supervision by" the relevant agency.[67] The language of the proposed rule is clear on its face, only personnel with "[t]he duty to establish, maintain, and enforce the AML/CFT program," are required to remain within U.S. jurisdiction and subject to oversight by United States regulators. Banks have been operating in compliance with this requirement since the enactment of the AML Act, which includes nearly identical language.[68] AML/CFT personnel located outside the U.S. who are responsible for the execution and oversight of certain components of the U.S. AML/CFT program ultimately report up to the BSA/AML Officer who is personally responsible and liable for their adherence to AML/CFT laws. Accordingly, AML/CFT personnel located abroad are indirectly "accessible to, and subject to oversight and supervision by" the appropriate agency through the BSA/AML Officer.

Moreover, as the Agencies recognized in the NPRM preamble, the involvement of offshore AML/CFT personnel serves many vital purposes, including efficiency, appropriate allocation of limited resources, and consistency of approach to managing financial crime on a global, enterprise-wide basis.[69]

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65 FinCEN NPRM, 89 Fed. Reg. at 55433.

66 FinCEN has provided two-year applicability time periods for other AML program amendments. For example, FinCEN provided financial institutions with two full years to effectuate the enacted July 11, 2016 Customer Due Diligence Requirements for Financial Institutions. *See* 31 C.F.R. § 1010.

67 NPRM, 89 Fed. Reg. at 65260–63.

68 *See* Anti-Money Laundering Act of 2020, 31 U.S.C. § 5318(5) ("The duty to establish, maintain and enforce an anti-money laundering and countering the financing of terrorism program . . . shall remain the responsibility of, and be performed by, persons in the United States who are accessible to, and subject to oversight and supervision by, the Secretary of the Treasury and the appropriate Federal functional regulator . . . .").

69 *See* NPRM, 89 Fed. Reg. at 65251 ("The Agencies recognize that banks may currently have AML/CFT staff and operations outside of the United States or contract out or delegate parts of their AML/CFT operations to third-party providers located outside of the United States. This approach may be to improve cost efficiencies, to enhance coordination particularly with respect to cross-border operations, or for other reasons.").

Accordingly, the Agencies should help avoid any unnecessary confusion by clarifying the application of the AML Act language and explicitly stating that a bank's staff may be located in other countries as long as they are subject to oversight by U.S. AML/CFT personnel. By including this clarifying interpretation, the Agencies will be expressly endorsing the plain reading of the regulatory rule and the current practices of banks as they relate to AML/CFT personnel, which will further the NPRM's goals of not subjecting banks to any additional burdens or confusion, ensuring consistency with the AML Act through coordinating rules with FinCEN, and providing clear guidance to examiners on how to enforce this provision.[70] Otherwise, we recommend that the Agencies refrain from incorporating sections 21.21(d), 208.63(d), 326.8(d), and 748.2(d) into the final rule at this time.[71]

VI. Revise the innovation provision to ensure there are no unnecessary restraints placed on a bank's ability to innovate its policies, procedures, and controls.

Under the proposed rule, banks are permitted to incorporate "innovative approaches to meet compliance obligations" in their "internal policies, procedures, and controls . . . as warranted by the [] bank's . . . risk profile and AML/CFT program."[72] The language "as warranted by" can be misread to act as a limiter for when banks are permitted to engage in innovation, which we understand was not the Agencies' intention.[73] It is important that the language of the final rule be clear that the determination of whether it is appropriate to engage in innovation is not dependent on a bank's risk profile.[74] As an alternative, we suggest the "as warranted by" language be removed from the provision to reflect that the decision to adopt innovative approaches rests with the bank.

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70 *See id.* at 65244.

71 *See* Anti-Money Laundering/Countering the Financing of Terrorism Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers and Exempt Reporting Advisers, 31 C.F.R. Parts 1010 and 1032 (Unpublished) ("In light of the comments seeking further guidance regarding the Duty Provision, as well as the July AML/CFT Program NPRM, FinCEN has determined not to include this requirement in this final rule.").

72 NPRM, 89 Fed. Reg. at 65260–63.

73 *Id.* at 65248 ("This provision should not be viewed as restricting or limiting the current ability of banks to consider or engage in responsible innovation consistent with the December 2018 joint statement issued by FinCEN and the Agencies that encouraged banks to take innovative approaches to combat ML/TF and other illicit finance threats.").

74 A bank with a riskier profile and/or a less mature program—but with appropriate resources and expertise—may be well suited to address those risks with appropriate innovations.

The Agencies may want to encourage banks to consider responsibly leveraging AI tools to detect potentially suspicious activity. Utilizing AI tools can help streamline the AML/CFT program, resulting in the identification of unusual activity and a reduction in reporting time and false positives. AI tools have a range of functionalities and can even be used to retrieve and digest media articles to improve the effectiveness and efficiency of transaction monitoring and automatically generate Suspicious Activity Reports ("SARs"). *See* Bank Policy Institute, "Request for Information and Comment on Financial Institutions' Use of Artificial Intelligence, including Machine Learning" (June 25, 2021), *available at* https://bpi.com/wp-content/uploads/2021/06/BPI-Comment-Letter_Interagency-RFI-on-AI_Final-06.25.2021.pdf [bpi.com].

The Agencies should also consider opportunities to promote information sharing relating to innovative approaches, such as AI tools being employed by one or more banks.

In addition, there are no incentives or assurances provided in the proposed rule that would encourage banks to spend resources on or take risks in creating new AML/CFT program processes. We fully support the Agencies' intention of encouraging responsible innovation, but are concerned that the lack of guidance in the proposed rule around what is permitted and the absence of any potential regulatory incentives will prevent this objective from being achieved. It would be meaningful for the Agencies to include language in the preamble to the final rule that makes clear banks should and will be supported by regulatory agencies in seeking reasonable innovation and that potential attempts to innovate (*e.g.,* off-boarding older technological systems, putting together pilot programs, or incorporating AI tools) will not necessarily result in supervisory action if AML/CFT gaps are exposed or discovered.[75] This is vital to modernizing and strengthening AML/CFT programs as the ability of banks to innovate and incorporate emerging technology is at the heart of the AML Act and the articulated goals of the NPRM.[76]

VII. Clarify that the proposed board of directors' oversight responsibilities under the rule do not (i) impose any supplementary documentation requirements on the board, (ii) expand the board's responsibilities to include any managerial responsibilities for day-to-day operations, and/or (iii) limit the board's authority to carry out responsibilities via board committees (including approval of the AML/CFT framework).

The proposed rule requires that a bank's "AML/CFT program and each of its components . . . be documented and approved by the [] bank's . . . board of directors or . . . an equivalent governing body" and subject to that board's "oversight."[77] The language as drafted could be interpreted as conflating the responsibilities of the board of directors with that of management and expanding these responsibilities beyond the board of directors' traditional role of oversight. This is inconsistent with best practices, in which the board of directors is responsible for overseeing the structure and management of a banking institution's AML/CFT program (*e.g.*, reviewing strategic elements of the program, key findings, and the highest level risk policy), establishing a culture of compliance, and holding management accountable for designing and

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[75] *See, e.g.*, FinCEN, *Joint Statement on Innovative Efforts to Combat Money Laundering and Terrorist Financing* (Dec. 3, 2018) ("While the Agencies may provide feedback, pilot programs in and of themselves should not subject banks to supervisory criticism even if the pilot programs ultimately prove unsuccessful. Likewise, pilot programs that expose gaps in a BSA/AML compliance program will not necessarily result in supervisory action with respect to that program. For example, when banks test or implement artificial intelligence-based transaction monitoring systems and identify suspicious activity that would not otherwise have been identified under existing processes, the Agencies will not automatically assume that the banks' existing processes are deficient. In these instances, the Agencies will assess the adequacy of banks' existing suspicious activity monitoring processes independent of the results of the pilot program. Further, the implementation of innovative approaches in banks' BSA/AML compliance programs will not result in additional regulatory expectations."), *available at* https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20181203a1.pdf.

[76] *See generally* Anti-Money Laundering Act of 2020, § 6211(f); FinCEN NPRM, 89 Fed. Reg. at 55429-31; U.S. Department of the Treasury, 2024 National Strategy for Combating Terrorist and Other Illicit Financing (May 2024) ("Responsible innovation in financial technology and services is an important part of safeguarding the U.S. financial system against new and evolving threats to the nation's security and the financial system related to money laundering, terrorist financing, and other serious financial crimes. . . . The use of machine learning and AI can assist the U.S. government and the private sector to improve data analytics and better identify illicit finance risks."), *available at* https://home.treasury.gov/system/files/136/2024-Illicit-Finance-Strategy.pdf.

[77] NPRM, 89 Fed. Reg. at 65260–63.

implementing the AML/CFT framework.[78] To resolve this potential confusion, the Agencies should expressly endorse that the language "each of its components" and "must be documented and approved" does not (i) create any supplementary documentation requirements on the part of the board, (ii) hinder the board of directors from delegating work to managers or committees (including approval of the program by a board committee), and (iii) create an expectation that the board of directors be involved in the day-to-day operations of the AML/CFT program.

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BPI appreciates the Agencies' consideration of its comments. If you have any questions, please contact the undersigned by email at *Gregg.Rozansky@bpi.com*.

Respectfully submitted,

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[78] *See, e.g.*, *In re Caremark Int'l Inc. Derivative Litigation*, 698 A.2d 959, 970 (Del. Ch. 1996) (noting that to fulfill oversight obligations, a board of directors must "exercise a good faith judgment that the corporation's information and reporting system is in concept and design adequate to assure the board that appropriate information will come to its attention in a timely manner as a matter of ordinary operations, so that it may satisfy its responsibility"); *Marchand* v. *Barnhill*, 212 A.3d 805, 824 (Del. 2019) (explaining that *Caremark* "require[s] that a board make a good faith effort to put in place a reasonable system of monitoring and reporting about the corporation's central compliance risks"). *See also* Bank Policy Institute, Guiding Principles for Enhancing U.S. Banking Organization Corporate Governance (Jan. 12, 2001), *available at* https://bpi.com/guiding-principles-for-enhancing-u-s-banking-organization-corporate-governance/.