American Bankers Association

Ashtyn Landen
Senior Director, Prudential Regulation
202-663-7533
alanden@aba.com

October 30, 2024

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

James P. Sheesley
Assistant Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Chief Counsel's Office
Office of the Comptroller of the Currency
400 7th Street, SW
Washington, DC 20219

Re: Comment on Docket ID OCC-2023-0016, Second Published Request for Comments Under the Economic Growth and Regulatory Paperwork Reduction Act of 1996

Dear Sir or Madam,

The American Bankers Association (ABA)[1] appreciates the opportunity to provide comments on the regulatory burden review under the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA).[2]

As required by EGRPRA, the federal banking agencies (Agencies)[3] must review their regulations at least every ten years to identify outdated or otherwise unnecessary regulatory requirements imposed on insured depository institutions. This process includes providing public notice, gathering comments on specific regulatory categories, and ultimately producing a report for Congress.[4] This report should summarize the key regulatory burdens raised, assess their validity, and recommend whether those issues are best addressed by regulation or legislation.[5]

[1] The American Bankers Association is the voice of the nation's $23.9 trillion banking industry, which is composed of small, regional, and large banks that together employ approximately 2.1 million people, safeguard $18.8 trillion in deposits, and extend $12.5 trillion in loans.

[2] Economic Growth and Regulatory Paperwork Reduction Act, 89 Fed. Reg. 50,123 (Aug. 1, 2024).

[3] The current EGRPRA review includes regulations issued by the Federal Financial Institutions Examination Council, the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), and the Board of Governors of the Federal Reserve System. However, ABA believes it should also include rules issued by the Bureau of Consumer Financial Protection (CFPB) and the Financial Crimes Enforcement Network (FinCEN) to address a broader range of regulatory challenges impacting banks.

[4] *See* 12 USC § 3311.

[5] *Id.*

Ashtyn Landen
Senior Director, Prudential Regulation
202-663-7533
alanden@aba.com

ABA supports the goals and purpose of the EGRPRA and strongly encourages the Agencies to use this third decennial review as an opportunity to provide meaningful regulatory relief for banks, enabling them to better serve their customers. Although ABA provided detailed recommendations in previous EGRPRA reviews, few were adopted by regulators.[6] In response, ABA is now focusing on a broader goal: removing unnecessary regulatory burdens, a priority shared by both regulators and the banking industry. The recommendations and examples below regarding consumer protection and money laundering issues require immediate attention, but they also point to a broader underlying issue. We encourage the Agencies to use the examples below to identify broader rules and requirements that hinder, rather than help, banks in effectively serving their customers.

I. The Regulatory Burden Harms Both Banks and Their Customers

The regulatory burden on banks increased significantly under Dodd-Frank, which nearly doubled the number of regulations for U.S. banks and added approximately $50 billion in annual compliance costs for the industry.[7] Following Dodd-Frank, smaller banks faced particularly steep increases in salary expenses and significant rises in costs related to auditing, consulting, data processing, and legal fees.[8]

As a result, from 2014 to 2024, the number of banks with assets under $10 billion declined from 6,547 to 4,384, marking a loss of over 2,000 banks.[9] This pattern highlights how regulatory costs disproportionately impact smaller banks, often forcing them to close or merge. With fewer community banks, consumer choice is limited, and local economies are affected. The loss of these banks over the last decade underscores the importance of the EGRPRA review. ABA urges the Agencies to use this opportunity to reduce the regulatory burden on banks of all sizes, helping ensure they can continue serving communities nationwide.

A. Consumer Protection (Flood Insurance)

ABA recognizes that the focus of the EGRPRA review is to identify outdated or unnecessary regulatory requirements; however, not all regulatory burden springs from these sources. Another significant obstacle to banks' ability to effectively serve their customers arises from the lack of sufficient regulatory guidance, which leaves bankers uncertain about their compliance

---

[6] *See* ABA's First 2014-2015 EGRPRA Comment Letter at Docket FFIEC-2014-0001-0034; https://www.regulations.gov/comment/FFIEC-2014-0001-0034; ABA's Second 2014-2015 EGRPRA Comment Letter at Docket FFIEC-2014-0001-0077; https://www.regulations.gov/comment/FFIEC-2014-0001-0077; ABA's Third 2014-2015 EGRPRA Letter at Docket FFIEC-2014-0001-0037; https://www.regulations.gov/comment/FFIEC-2014-0001-0037; and ABA's Fourth 2014-2015 EGRPRA Letter at Docket FFIEC-2014-0001-0126; https://www.regulations.gov/comment/FFIEC-2014-0001-0277.

[7] Thomas Hogan, *Cost of Compliance with the Dodd-Frank Act*, Baker Institute for Public Policy (2019).

[8] *Id.*

[9] *See* Quarterly Banking Profile, *Second Quarter 2014*, Fed. Deposit Ins. Corp. (2014); *see also* Quarterly Banking Profile, *Second Quarter 2024*, Fed. Deposit Ins. Corp. (2024).

Ashtyn Landen
Senior Director, Prudential Regulation
202-663-7533
alanden@aba.com

obligations. As ABA has expressed previously, the absence of adequate guidance regarding compliance with the mandatory purchase obligation of the Flood Disaster Protection Act of 1973 (FDPA) continues to pose significant challenges for banks of all sizes.

Flooding continues to be one of the most costly and destructive natural disasters in the United States. Consequently, the banking industry takes compliance with the FDPA's mandatory flood insurance purchase requirements very seriously. However, many of our members report that ensuring compliance with flood insurance regulations is among their most challenging obligations.

This difficulty arises in part because Congress intended banks to play a limited, supporting role in the broader flood management program administered by the Federal Emergency Management Agency (FEMA). Specifically, banks are required to ensure that loans secured by real property in flood zones are covered by flood insurance that meets the National Flood Insurance Program (NFIP) minimum standards throughout the loan's term.

The Agencies' regulations reflect this limited statutory role, focusing primarily on the specific obligations of lenders. FEMA, in contrast, has a much broader mandate, which includes flood damage mitigation through community floodplain management and the administration of the federal flood insurance program. Despite this division of responsibilities, borrowers often have questions about flood insurance, flood zone mapping, and other NFIP-related issues. This results in banks frequently encountering questions on matters that are not addressed in the existing flood regulations. To address these concerns and ensure that lending practices remain compliant, financial institutions have directed hundreds of inquiries to both the Agencies and FEMA seeking clarification.

Although the Agencies took a positive step in May 2022 by publishing updated Interagency Q&As on Flood Insurance,[10] significant areas of confusion persist. ABA therefore reiterates its request for the Agencies to provide clear, comprehensive, and regularly updated guidance. Specifically, we recommend that the Interagency Q&As and other flood insurance guidance be periodically refreshed through a notice-and-comment process to ensure they remain current and responsive to industry needs. Prior to the 2022 update, the previous updates occurred in 2009[11] and 2011.[12] An 11-year gap between updates is unacceptable, especially when the penalties for non-compliance are strictly enforced.

[10] Loans in Areas Having Special Flood Hazards; Interagency Questions and Answers Regarding Flood Insurance, 87 Fed. Reg. 32826 (May 31, 2022), https://www.govinfo.gov/content/pkg/FR-2022-05-31/pdf/2022-10414.pdf.

[11] 74 Fed. Reg. 35914 (July 21, 2009), https://www.federalregister.gov/documents/2009/07/21/E9-17129/loans-in-areas-having-special-flood-hazards-interagencyquestions-and-answers-regarding-flood. The 2009 Interagency Q&As reorganized the initial 1997 Q&As.

[12] 76 Fed. Reg. 64175 (Oct. 17, 2011), https://www.federalregister.gov/documents/2011/10/17/2011-26749/loans-in-areas-having-special-flood-hazardsinteragency-questions-and-answers-regarding-flood.

Ashtyn Landen
Senior Director, Prudential Regulation
202-663-7533
alanden@aba.com

The lack of guidance is further compounded by inconsistent supervision and enforcement of the FDPA's mandatory purchase requirements, underscoring the critical need for the Agencies to provide clear and uniform guidance.

While reducing outdated regulations is critical, the absence of timely and detailed guidance also represents a significant regulatory burden. The Agencies must commit to providing the banking industry with clear, comprehensive, and consistent guidance and supervision. Consistency in both interpretation and enforcement is essential to help financial institutions navigate their compliance obligations effectively and reduce uncertainty.

ABA highlights the following specific concerns regarding the existing flood regulations and guidance materials:

1. Clarification of Flood Determinations for Multiple Structures at One Address

A Standard Flood Hazard Determination Form (SFHDF) is used by a lender to determine whether the building or mobile home offered as collateral security for a loan is or will be located in a Special Flood Hazard Area (SFHA) in which flood insurance is available under the Act.[13] However, our members report growing uncertainty regarding how flood determinations are conducted when multiple buildings or mobile homes are situated at a single address.

Many flood determination companies now offer determinations based on the address, covering every building located there and specifying whether each structure used as collateral falls within an SFHA. In cases where multiple flood zones are indicated, some flood determination companies go further and conduct separate determinations for each building or mobile home. However, examiners have provided inconsistent feedback on whether this practice fully satisfies the FDPA's requirements, leading to confusion in the industry.

To address this, ABA requests that the Agencies update the SFHDF Q&As to clarify that a single flood determination is sufficient to cover all buildings or mobile homes at one address, as long as the determination notice explicitly identifies and accounts for each structure being used as collateral. This clarification would reduce the administrative burden on lenders while still fulfilling the FDPA's objective of determining whether collateral is located in an SFHA.

Allowing one comprehensive determination notice for properties at a single address would streamline compliance efforts for lenders, eliminate unnecessary duplication, and ensure that all buildings or mobile homes securing the loan are accurately evaluated for flood insurance requirements, thus maintaining the integrity of the FDPA's flood protection goals.

2. Clarification on Force Placement Timing for Map Changes

The FDPA and its regulations require that if a lender or servicer determines, at any time during the life of a designated loan, that a building, mobile home, or associated personal property securing the loan is uninsured or underinsured, the lender or servicer must initiate the force

[13] 12 C.F.R. § 22.6(a) (OCC); 12 C.F.R. § 208.25(f)(1) (Board); 12 C.F.R. § 339.6 (FDIC).

Ashtyn Landen
Senior Director, Prudential Regulation
202-663-7533
alanden@aba.com

placement process.[14] Q&A Force Placement 16 specifically addresses this process for "map-ins," or situations where a property is newly mapped into a SFHA. The Q&A states:

> "A loan that is secured by property that was not located in an SFHA does not become a designated loan until the effective date of the map change that remaps the property into an SFHA. Therefore, when a lender or its servicer receives advance notice that a property will be remapped into an SFHA, the effective date of the remapping becomes the date on which the lender or its servicer must determine whether the property is covered by sufficient flood insurance. If the borrower does not purchase a flood insurance policy that begins on the effective date of the map change, the lender or its servicer must send the force placement notice to the borrower to purchase adequate flood insurance."[15]

However, the Q&A lacks clarity on whether the Agencies are suggesting that lenders must align their determination of insurance sufficiency with the future effective date of the map change or whether the lender's determination date itself establishes the effective date for insurance coverage. To provide greater certainty, ABA recommends that the Agencies include an example with specific dates and clearly defined terminology to illustrate the prescribed effective date of coverage following a map change.

Currently, the process involved in making a determination following a map change typically involves:

(1) FEMA releasing flood map data,
(2) The interpretation and processing of that data by flood zone determination companies,
(3) The receipt of portfolio-level data by the lender, and
(4) The lender's efforts to process that data and verify loan-level sufficiency.

This multi-step process requires time and coordination. In line with the guidance in Q&A Force Placement 4, which emphasizes that lenders may not send notices in anticipation of an insurance lapse, we believe a similar approach should be taken for map changes. Specifically, lenders should not be required to align their determination of insurance sufficiency to coincide with the future effective date of a map change. Instead, the process should follow the standard cadence outlined in the Reform Act: the lender determines whether the borrower has sufficient insurance, sends notice if necessary, and, if the borrower does not obtain adequate coverage, force placement occurs.

Requiring lenders to align the timing of their determinations with a future map effective date is impractical due to the inherent delay in processing the data and verifying sufficiency. Furthermore, an example using sample dates would benefit all stakeholders, ensuring consistency in applying these requirements for consumers.

---

[14] 12 C.F.R. § 22.7(a) (OCC); 12 C.F.R. § 208.25(g)(1) (Board); 12 C.F.R. § 339.7(a) (FDIC).

[15] 87 Fed. Reg. at 32892.

Ashtyn Landen
Senior Director, Prudential Regulation
202-663-7533
alanden@aba.com

Additionally, it is important to recognize that if a borrower chooses to procure their own coverage after receiving notice from the lender, this coverage can only be obtained on a prospective basis. Lenders are already considering this when determining the effective date of coverage and any charges to be assessed to borrowers. The Agencies should explicitly acknowledge this in an updated Q&A to ensure that the industry's current practices are in alignment with regulatory expectations.

3. Clarification on Collateral Not Taken as Security in Loan Documentation

Under the FDPA, federally regulated institutions must require borrowers to procure flood insurance when (1) making, increasing, renewing, or extending a loan that is (2) secured by improved real estate or personal property (3) located in a Special Flood Hazard Area (SFHA) (4) in a community that participates in the National Flood Insurance Program (NFIP).[16] Consequently, when a loan is secured by a building and its contents within an SFHA in a participating community, flood insurance must cover both the building and its contents.

However, NFIP policies do not automatically include personal property or contents coverage. Therefore, if a lender takes a security interest in both a building and its contents, the lender must require the borrower to obtain flood insurance for both.

The NFIP Dwelling and General Property Forms provide coverage for buildings under Coverage A and for personal property under Coverage B. Coverage A includes a wide range of items such as awnings, canopies, built-in appliances, plumbing fixtures, and HVAC systems. In contrast, Coverage B addresses personal property such as furniture, machinery, equipment, and inventory used in business operations. To clarify their collateral interests, lenders can use loan documentation that ties the security interest only to property covered under Coverage A, thereby avoiding the need for the borrower to separately purchase flood insurance for personal property or contents under Coverage B.

As indicated in the 2022 Interagency Q&As, the focus of FDPA compliance examinations is on whether the loan documents specify that personal property is securing the loan. If a bank can demonstrate that its loan documents only take a security interest in the building and items covered under Coverage A—and do not include personal property or contents covered by Coverage B—the borrower should not be required to purchase flood insurance for those contents.

Some standard loan documents might take a security interest in all assets, including personal property. However, lenders use riders attached to loan documents for properties located in SFHAs, which amend the loan agreement to explicitly exclude personal property or contents as collateral. This approach should be effective to negate a lender's security interest in any personal property or contents located in a SHFA. With the rider, the lender would not be able to seize personal property or contents in the event of default.

[16] *See* 12 C.F.R. § 22.3(a) (OCC); 12 C.F.R. § 208.25(c) (Board); 12 C.F.R. § 339.3(a) (FDIC).

Ashtyn Landen
Senior Director, Prudential Regulation
202-663-7533
alanden@aba.com

Despite the effectiveness of this approach, some examiners have recently questioned the validity of such riders. ABA recommends that the Agencies update the Q&As, particularly those addressing "Other Security Interests," to clarify that this approach aligns with the FDPA and properly releases security interests in personal property or contents, thus exempting them from the mandatory purchase requirement. This is no different than when a borrower does not own contents in a building. For example, when a borrower does not own the contents in a building—such as when a tenant owns the contents—or if there are no contents in the building, regulators do not require lenders to modify standard security instruments to exclude contents as collateral, nor do they mandate flood insurance coverage for the contents. In such cases, the borrower, not being the owner of the contents, cannot legally grant a security interest in them, nor do they have an insurable interest.

Finally, requiring lenders to disregard legally executed amendments to loan documentation could interfere with the lender's contractual rights. It is essential that lenders be allowed to structure their loan agreements in a way that reflects the true nature of the collateral while remaining compliant with FDPA regulations.

4. Remove the Flood Notice Requirement for Loan Renewals and Extensions

The FDPA requires the Agencies to promulgate regulations prohibiting lenders from making, increasing, renewing, or extending a loan (a MIRE event) secured by improved real estate or a mobile home located, or to be located, in a flood zone unless the building or residence is secured by flood insurance.[17] Lenders are required to provide extensive disclosures to borrowers regarding the availability of flood insurance, the coverage requirements, and how a borrower may obtain a flood policy.[18] The implementing regulations specify that notice must be provided at every MIRE event.[19]

While these disclosures serve a critical function for new loans or modifications that alter the loan amount—potentially changing the required level of flood insurance—applying the same notice requirements to loan renewals and extensions where flood insurance conditions remain unchanged is redundant. ABA recommends that the Agencies revise the regulations to eliminate the flood notice requirement for loan renewals and extensions in cases where the flood insurance obligations are the same as in the original loan.

For such renewals and extensions, where neither the loan amount nor the flood insurance requirements are modified, re-issuing the notice creates unnecessary administrative complexity. This can confuse borrowers and delay otherwise routine renewals or extensions without providing any additional benefit. If lenders have already confirmed that the existing flood

[17] 42 U.S.C. § 4012a(b)(1)(A).

[18] *Id.* § 4012a(b)(6)(A).

[19] 12 C.F.R. § 22.9(a) (OCC); 12 C.F.R. § 208.25(i) (Board); 12 C.F.R. § 339.9(a) (FDIC).

Ashtyn Landen
Senior Director, Prudential Regulation
202-663-7533
alanden@aba.com

insurance remains sufficient, further notice does not enhance borrower understanding or compliance with flood insurance requirements.

A regulatory adjustment could align with recent guidance in Applicability Q&A 11, which clarifies that an automatic extension of a credit facility, as agreed upon in the original loan agreement, does not constitute a triggering MIRE event for flood insurance purposes. By adopting a similar approach, the Agencies can streamline the process for renewals and extensions while maintaining the integrity of flood insurance protections where they are needed most—during new loans or modifications that alter the insurance coverage required.[20]

5. Clarify Use of ACV/RCV Listed on FEMA's Declaration Page for Insurable Value

The FDPA and its implementing regulations state that the amount of coverage required by the Act "must be at least equal to the lesser of the outstanding principal balance of the designated loan or the maximum limit of coverage available for the particular type of property under the Act."[21]

The NFIP caps the amount of insurance available for buildings located in a participating community under the Regular Program. For example, the cap for a single-family dwelling is $250,000. In addition to these caps, the Regulation provides that "flood insurance coverage under the Act is limited to the building or mobile home and any personal property that secures a loan and not the land itself," which is commonly referred to as the "insurable value" of a structure.[22]

The Interagency Q&As explain that the "insurable value" of the building may generally be the same as 100 percent Replacement Cost Value (RCV), which is the cost to replace the building with the same kind of material and construction without deduction for depreciation.[23] The Q&A also states that the lender and borrower may use several approaches to determine the insurable value, including *the replacement cost value listed on the flood insurance policy declarations page*, or any other reasonable approach, so long as it can be supported.

However, the Agencies have published guidance indicating that the RCV listed on the policy cannot be used. For example, in the FAQ Webinar following the release of the 2022 Q&As, the FDIC stated:

> "Lenders should not rely on FEMA's RCV listed on the policy declarations page for NFIP policies as FEMA's RCV is not intended to be used as a basis for determining the property's insurable value. This is because FEMA's RCV is meant to keep the policy premium calculation simple and only considers five factors (zip code, year built, square

[20] 87 Fed. Reg. at 32869.

[21] 12 C.F.R. § 22.3(a) (OCC); 12 C.F.R. § 208.25(c)(1) (Board); 12 C.F.R. § 339.3(a) (FDIC).

[22] *Id.*

[23] 87 Fed. Reg. at 32878.

> footage, number of floors, and number of units). FEMA's RCV is a key rating variable used to price flood insurance premiums more equitably under Risk Rating 2.0."[24]

Additionally, in a Consumer Compliance Outlook publication, in discussing Amount Q&A 2, the Agencies removed the part of the Q&A that lists "the replacement cost value listed on the flood insurance policy declarations page" as a basis for calculating the amount of flood insurance.

> "See Flood Q&A Amount 2 (87 Federal Register at 32878): "In calculating the amount of flood insurance to require, the lender and borrower may choose from a variety of approaches or methods to establish the insurable value. They may use an appraisal based on cost-value (not market-value) approach, a construction-cost calculation, the insurable value based on a hazard insurance policy, or any other reasonable approach so long as it can be supported." See also FEMA's discussion of Replacement Cost Value (RCV)."[25]

The Agencies should clarify whether the ACV/RCV listed on FEMA's declaration page is acceptable for determining the amount of coverage and update the Q&As accordingly.

6. Clarify Detached Structure Exemption for Commercial Properties

The FDPA provides that flood insurance shall not be required, in the case of any residential property, for any structure that is a part of such property but is detached from the primary residential structure of such property and does not serve as a residence.[26] However, there is ambiguity regarding whether this exemption applies solely to residential loans or if it extends to both residential and commercial loans.

The Interagency Q&As states that, for purposes of the detached structure exemption, a "structure that is a part of residential property" refers to structures used primarily for personal, family, or household purposes, and not for agricultural, commercial, industrial, or other business purposes. Additionally, the preamble of the Q&As specify that Agencies cannot create an exemption for detached structures that are part of a commercial property, stating:

> "The Agencies note that Congress established the detached structure exemption in HFIAA. This exemption provides that any structure that is part of a residential property but detached from the primary residential structure and does not serve as a residence is not required to be covered by flood insurance. As this statutory exemption only applies to

[24] Fed. Reserve Sys., 2022 Interagency Flood Insurance Q&As Webinar – Transcript, 16 (July 2022), https://www.consumercomplianceoutlook.org/Outlook-Live/2022/2022-Interagency-Flood-Insurance-Q-and-A-Webinar/.

[25] Fed. Reserve Sys., Commercial Flood Insurance Compliance — Washing Away Common Pitfalls (2022), https://www.consumercomplianceoutlook.org/2022/second-issue/commercial-flood-insurance-compliance/.

[26] 42 U.S.C. § 4012a(c)(3).

American Bankers Association

Ashtyn Landen
Senior Director, Prudential Regulation
202-663-7533
alanden@aba.com

> a detached structure that is part of a residential property, the Agencies cannot create an exemption for detached structures that are part of a commercial property."[27]

Some examiners have interpreted the Q&As to mean the detached structure exemption only applies to residential properties that are not being used for commercial purposes, such as an Airbnb or VBBO property. Other examiners have come to the opposite interpretation, and have stated that the detached exemption could be used for such commercial purposes. For example, one examiner provided the following:

> "The exemption is available for a consumer, business, commercial or agricultural loan, as long as the loan is secured by a residence. For example, a business loan secured by the business owner's home would qualify for this exemption. However, the exemption is only available for "residential property," meaning that the exemption only applies to structures for which there is a residential use. Structures used for commercial, agricultural, or other business purposes are not eligible for the exemption, even if a residence is located on the same parcel. An example of this scenario is a dairy barn that serves as collateral along with a farm house."

Given the inconsistent interpretations of the detached structure exemption, ABA recommends that the Agencies update the Q&As to explicitly clarify whether this exemption applies to commercial properties. Clear and consistent guidance is necessary to ensure that lenders and examiners have a uniform understanding of the exemption's scope, particularly when loans involve a mix of residential and commercial property. This clarification would help prevent misinterpretations and ensure proper application of the FDPA's mandatory flood insurance requirements.

7. Ensure Regulatory Alignment with FEMA's Proposed Changes to SFIP Form

In February 2024, FEMA released a proposal[28] to revise its Standard Flood Insurance Policy (SFIP) form, which defines the coverage, limitations, and exclusions for policies under the National Flood Insurance Program (NFIP). The SFIP includes terms and conditions unique to the NFIP. As part of this proposal, FEMA introduced a new Homeowner Flood Form (the "new Form") to replace the existing Dwelling Form for homeowners of one-to-four family residences. In addition, FEMA proposed five new endorsements designed for use with this new Form.

ABA, in partnership with the Mortgage Bankers Association, submitted comments on the proposal, strongly urging FEMA to collaborate with the regulatory Agencies before finalizing the new Form. [29] This collaboration is critical to ensure that the lending community's

[27] 87 Fed. Reg. at 32840.

[28] *See* National Flood Insurance Program: Standard Flood Insurance Policy, Homeowner Flood Form, 89 Fed. Reg. 8282 (proposed Feb. 6, 2024), https://www.govinfo.gov/content/pkg/FR-2024-02-06/pdf/2024-02204.pdf.

[29] *See* Joint Trades Letter to FEMA on the SFIP Proposal (Apr. 8, 2024), https://www.aba.com/advocacy/policy-analysis/joint-ltr-fema-sfip-proposal-2024.

Ashtyn Landen
Senior Director, Prudential Regulation
202-663-7533
alanden@aba.com

implementation and use of the new Form are aligned with the FDPA and its implementing regulations. ABA reiterates this recommendation to the Agencies here.

It is crucial that the Agencies issue guidance well in advance of the new SFIP's implementation to allow lenders to develop appropriate policies and procedures for a smooth transition. For instance, the prudential regulators must provide clear instructions on how FEMA's expanded definition of "flood" in the new Form will affect compliance with both the mandatory and discretionary acceptance provisions for private flood insurance policies. Similarly, guidance is needed on how the revised definition of "building"—which now includes only "completed" structures—will impact lenders' obligations under the FDPA's mandatory purchase requirement.

Without timely regulatory guidance, lenders may face uncertainty in complying with these significant changes, potentially leading to inconsistent application and confusion. We urge the Agencies to thoroughly review our comments and provide the necessary updates to the Q&As to ensure consistent interpretation and compliance across the industry. By proactively coordinating with FEMA and issuing clear, comprehensive guidance, the Agencies can help mitigate any disruptions in the lending process and ensure that both lenders and borrowers are well-prepared to navigate the new flood insurance requirements under the revised SFIP.

B. Consumer Protection (FDIC Signage)

Another area where the absence of clear guidance is creating burdens for banks is the uncertainty stemming from the recently finalized amendments to the FDIC's Official Sign and Advertising of FDIC Membership regulations under 12 CFR Part 328.[30] Historically, the signage requirements under Part 328 have played an important role in informing consumers about FDIC deposit insurance coverage and helping them distinguish insured deposits from non-insured products. The recent amendments to this section by the FDIC represent a substantial shift, aimed at modernizing these requirements to align with evolving banking practices and the changing needs of consumers, particularly within digital banking environments.

ABA recognizes the importance of clear and consistent signage requirements to help consumers identify FDIC-insured deposits; however, the recent updates to Part 328 risk creating significant confusion for both banks and consumers. Although well-intentioned, these changes introduce ambiguous requirements that are particularly challenging to implement in digital banking environments. While ABA supports the FDIC's goal to modernize Part 328, we have consistently raised concerns about potential consumer confusion, lack of clear guidance, and the compliance timeline.[31]

---

[30] 89 Fed. Reg. 48,444 (July 28, 2024).

[31] *See* ABA, *Comment Letter on FDIC Signage Requirements* (Apr. 7, 2023), https://www.aba.com/advocacy/policy-analysis/joint-letter-fdic-sign; *see also* ABA, *Letter to FDIC Regarding Signage Extension Request* (July 15, 2024), https://www.aba.com/advocacy/policy-analysis/fdic-signage-compliance-extension-ltr.

Ashtyn Landen
Senior Director, Prudential Regulation
202-663-7533
alanden@aba.com

We appreciate the FDIC's decision to grant a four-month extension, moving the compliance deadline from January 1, 2025, to May 1, 2025; however, several critical questions remain unanswered.[32] ABA is hopeful that these issues will be addressed in the forthcoming FDIC Questions and Answers, as resolving these topics is essential to alleviating the compliance burden on banks.

A specific area of concern is the requirement for FDIC official signage on external transfer screens, as it remains unclear whether transferring funds to an external account qualifies as "transacting with deposits." FDIC Digital Signage Question and Answer #9 states that the FDIC sign should not appear on pages where consumers initiate transactions through a third-party payment platform accessed via the bank's website.[33] In contrast, Question and Answer #10 specifies that screens facilitating transfers between deposit accounts within the same bank do require FDIC signage.[34] Many banks, however, offer options beyond these examples, such as pages allowing transfers from non-deposit to deposit accounts or external transfers, which current guidance does not address. Requiring signage on these varied transfer pages could mislead consumers into thinking that all transfers, including those to external accounts, are FDIC-insured. Given the complexity and potential for misinterpretation, ABA requests that the FDIC clarify in its Questions and Answers that the signage requirement on external transfer screens applies only to pages for mobile check deposits and internal transfers between deposit accounts.

There are also uncertainties regarding the signage requirements for ATMs. Specifically, clarification is needed on whether ATMs that do not accept deposits but allow consumers to transfer funds between accounts are considered non-deposit ATMs and therefore fall outside the scope of Part 328.

Banks also face challenges where signage requirements intersect with non-bank affiliates or third-party platforms. For example, banks may link to affiliated non-bank brokerage entities under a shared bank holding company. ABA requests that the FDIC clarify that "non-bank third parties" in § 328.5(g)(2) do not include these affiliates, to ensure consumers are not misled on FDIC coverage in such contexts.

Additionally, as the term "transact with deposits" lacks definition under Part 328, banks are uncertain about which transactions must display FDIC signage. To prevent confusion, ABA

[32] 89 Fed. Reg. 72,317 (Oct. 22, 2024).

[33] Fed. Deposit Ins. Corp., *Questions and Answers Related to the FDIC's Part 328 Final Rule*, https://www.fdic.gov/deposit-insurance/questions-and-answers-related-fdics-part-328-final-rule.

[34] *Id.*

Ashtyn Landen
Senior Director, Prudential Regulation
202-663-7533
alanden@aba.com

seeks confirmation that signage should be required only on pages involving mobile check deposits to insured accounts and internal transfers between a customer's insured accounts.

C. BSA Reforms

ABA appreciates the work by Congress to reform BSA laws with the passage of the Anti-Money Laundering Act of 2020 (AMLA).[35] The AMLA directs Treasury's Financial Crimes Enforcement Network (FinCEN) to revisit Bank Secrecy Act (BSA), anti-money laundering (AML) and countering the financing of terrorism (CTF) regulations in order to adapt, modernize and improve them—including to reinforce a risk-based approach to BSA policies, procedures, and controls.[36] EGRPRA has complementary objectives with the AMLA, as it is intended to help Agencies "identify areas of regulations that are outdated, unnecessary or unduly burdensome."[37]

To implement its responsibilities under the AMLA, in 2021 FinCEN published an advance notice of proposed rulemaking (ANPRM) seeking public comment on potential regulatory amendments to establish that all covered financial institutions subject to an AML requirement must maintain an "effective and reasonably designed" anti-money laundering program.[38] The AMLA directs FinCEN to update the AML/CFT regime, to ensure regulation and guidance promote a risk-based approach, and to improve those that are outdated and redundant.[39] ABA responded to that request with a number of recommendations, highlighting the similarities of the ANPRM request for comment to an EGRPRA review, but also noted the importance of the Agencies, FinCEN, law enforcement and financial institutions committing to ongoing work to promote the effectiveness and efficiency of AML/CFT compliance programs.[40] So the Agencies are aware of ABA's recommendations to FinCEN in 2022, many of which remain relevant to the Agencies' EGRPRA review, we attach the letter and incorporate it by reference.

We encourage the Agencies' and FinCEN's work to implement *all* the reform goals of the AMLA. In addition, we offer the following high-level comments on critical improvements that must be made to existing BSA rules in order to realize the purpose of the AMLA.

---

[35] *See* Anti-Money Laundering Act of 2020, Public Law 116-283.

[36] *Id.* at Div. F § 6002(4).

[37] 89 Fed. Reg. 62679, 62680 (Aug. 1, 2024).

[38] FinCEN Advance Notice of Proposed Rulemaking Anti-Money Laundering Program Effectiveness, 85 Fed. Reg. 58023, 58023 (Sept. 17, 2020); https://www.govinfo.gov/content/pkg/FR-2020-09-17/pdf/2020-20527.pdf.

[39] AMLA, Public Law 116-283 at § 6216.

[40] ABA letter to FinCEN Re: Review of Bank Secrecy Act Regulations and Guidance, Docket Number FINCEN-2021-0008 (Feb. 14, 2022); https://www.aba.com/-/media/documents/comment-letter/clbsa20220214.pdf?rev=1e5cfcc8474843829ad98d10e377bf02.

Ashtyn Landen
Senior Director, Prudential Regulation
202-663-7533
alanden@aba.com

First, as the Agencies and FinCEN continue work on the revised BSA program rule, we advise against elevating a singular formal, written risk assessment process to the first pillar of a bank's approach to BSA compliance and directing it to "serve as the *foundation* for a risk-based AML/CFT program."[41] We want to ensure banks can continue to rely on multiple, individualized risk assessments and that banks are not forced to divert compliance resources to inefficient paperwork and away from the actual threats the priorities are intended to address. We believe this is contrary to FinCEN and the Agencies' objective to encourage dynamic and responsive illicit finance threat detection. Specifically, as identified in our recent comment to the Agencies in response to their program rule notice of proposed rulemaking,[42] we recommend the revised program rule adopt the language of the AMLA and direct that an 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, "**and ensures that more attention and resources should be directed toward higher-risk customers and activities *rather than toward lower-risk customers and activities.***"[43] We believe that a true risk-based approach would reduce excessive focus on mere technical compliance at the expense of effective BSA program operations. Even strong programs do not, and cannot, avoid all technical failures, especially at the expense of a risk-based approach. Focusing on minor issues that have no measurable effect on the quality of a bank's program materially interferes with a risk-based approach.

Second, as we informed FinCEN earlier this year, updating outdated currency transaction reporting (CTR) rules would allow banks to focus resources on actual and emerging threats, and away from collecting, documenting, and reporting non-suspicious currency transactions.[44] In 2022, ABA highlighted to FinCEN the need to streamline and update CTR filing requirements,

---

[41] 89 Fed. Reg. 65242, 65247 (emphasis added; *see also* FinCEN's Notice of Proposed Rulemaking on Anti-Money Laundering and Countering the Financing of Terrorism Programs, 89 Fed. Reg. 55428, 55439 (July 3, 2024) https://www.federalregister.gov/documents/2024/07/03/2024-14414/anti-money-laundering-and-countering-the-financing-of-terrorism-programs (emphasis added).

[42] ABA Letter to the Department of the Treasury, Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation re: Notice of Proposed Rulemaking on Anti-Money Laundering and Countering the Financing of Terrorism Programs, 89 Fed. Reg. 65242 (Aug. 9, 2024); Docket Numbers OCC-2024-0005; RIN 1557-AF14; R-1835, RIN 7100-AG78; RIN 3064-AF34 (Oct. 8, 2024); https://www.aba.com/advocacy/policy-analysis/letter-to-the-agencies-on-the-aml-program-rule-nprm.

[43] 31 U.S.C. § 5318(h)(2)(B)(iv)(II) (emphasis added).

[44] *See* ABA Letter to FinCEN re: Agency Information Collection Activities; Submission for OMB Review; Comment Request; Renewal Without Change of Reports of Transactions in Currency Regulations and FinCEN Form 112, OMB Control Numbers1506-0004, 1506-0005, and 1506-0064, 89 FR 7767 (February 5, 2024) (April 5, 2024); https://www.aba.com/advocacy/policy-analysis/letter-to-fincen-on-ctr-pra-2024 "As a consequence of keeping the $10,000 threshold, CTR reports have proliferated exponentially and have consumed an increasing percentage of bank BSA compliance resources. FinCEN reports that banks filed over 20.5 million CTRs in 2022 alone—reports that are no longer inherently tied to combating financial crime. Moreover, CTR Form 112 includes requests for information that exceed BSA program and CTR regulatory requirements, are burdensome for banks to collect and report, and may even conflict with other legal requirements.").

Ashtyn Landen
Senior Director, Prudential Regulation
202-663-7533
alanden@aba.com

including eliminating unnecessary reporting and burdensome aggregation requirements, and excluding routine, non-suspicious transactions.[45] Two years later, on April 5, 2024 ABA submitted comments to FinCEN regarding FinCEN's mistaken assumptions and substantial underestimate of the burden associated with complying with the nearly 80 year-old, deceptively complicated, and increasingly outdated currency reporting requirement. Unnecessary CTR reporting requirements pale in utility to Suspicious Activity Reports (SARs), and in many cases are intentional duplicates—absent a useful explanation of the suspicious activity. On June 7, FinCEN released year in review statistics for FY 2023, 20.8 million CTRs were filed, as part of reporting from 294,000 registered financial institutions. Of the approximately 15.5% of active FBI investigations "directly linked" to SARs and CTRs —which appears to mean either a SAR or a CTR— fewer than 6,000 subjects of FBI investigations had a related CTR.[46] We also believe that SAR reporting requirements, forms, and guidance must be streamlined to focus on the information that is highly useful to national security, intelligence, and law enforcement purposes, and away from outdated, duplicative, unnecessary, and inefficient reporting. ABA made a number of suggestions regarding ways to streamline SAR reporting to FinCEN in 2022 as well, including simplifying SAR filing requirements, and updating guidance regarding reporting ongoing suspicious activity.[47]

Third, as mandated by the AMLA, we also request that the Agencies and FinCEN improve government feedback to banks regarding priority threats. Banks cannot effectively identify threats to the U.S. financial system without feedback, information and assistance from regulators, law enforcement, and other governmental actors. We request the Agencies work with FinCEN to ensure regional federal law enforcement priorities and trends are provided to financial institutions, on an ongoing and updated basis, while encouraging state and local law enforcement to do the same. Since SAR information reporting represents banks' best efforts to identify suspicious activity but may not actually reflect criminal or other illicit acts—we request that analysis of banks' SAR information reporting be incorporated with reported crime statistics and other information that the government may have about illicit activity. In addition, we recommend prioritizing guidance regarding threats and correlating it with the AML/CFT priorities the guidance is designed to address, as well as re-examining existing advisories to reaffirm, update, or phase them out consistent with the current threat environment. Each of these reforms would help reinforce a risk-based approach.

---

[45] ABA letter to FinCEN Re: Review of Bank Secrecy Act Regulations and Guidance, Docket Number FINCEN-2021-0008 (Feb. 14, 2022) at 2; https://www.aba.com/-/media/documents/comment-letter/clbsa20220214.pdf?rev=1e5cfcc8474843829ad98d10e377bf02.

[46] Financial Crimes Enforcement Network (FinCEN) Year in Review for FY 2023 (June 7, 2024); https://www.fincen.gov/sites/default/files/shared/FinCEN_Infographic_Public_508FINAL_2024_June_7.pdf.

[47] ABA letter to FinCEN Re: Review of Bank Secrecy Act Regulations and Guidance, Docket Number FINCEN-2021-0008 (Feb. 14, 2022) at 3; https://www.aba.com/-/media/documents/comment-letter/clbsa20220214.pdf?rev=1e5cfcc8474843829ad98d10e377bf02.

Finally, with respect to beneficial ownership, as the Agencies and FinCEN work on a revised customer due diligence (CDD) rule, we urge the Agencies and FinCEN to propose revisions that are consistent with Congressional intent. Congress explicitly intended for the beneficial ownership information included in the registry to be accessed by banks (with their customers' consent) for purposes of complying with customer due diligence requirements under applicable law. The revised CDD rule must alleviate burden on banks, not increase it; it must allow banks to seek access to data consistent with CTA requirements, but not mandate it; and FinCEN and the Agencies must provide some form of verification of the submitted data in order to permit banks to rely on it. In addition, it is essential that banks are not required to become de facto regulators of their clients, many of whom do not yet know about this requirement, or FinCEN. It is critical that FinCEN continue to educate the public regarding the novel reporting obligations now shared by approximately 33 million small businesses.

As the Agencies continue review of money laundering regulations, we urge the Agencies to keep in mind the following priorities:

- Reinforce a true risk-based approach to BSA compliance;
- Review and reform BSA reporting requirements, particularly Currency Transaction Reports (CTRs), by improving outdated regulations and guidance;
- Increase the quality and quantity of feedback from the government; and
- Ensure the promise of the Corporate Transparency Act (CTA) to collect "accurate, complete, and highly useful" information to facilitate important national security, intelligence, law enforcement, and bank BSA compliance objectives, while minimizing burdens.

II. Conclusion

ABA looks forward to working with the Agencies to find ways to reduce regulatory burden consistent with the shared goal of ensuring that bank operations are conducted in a safe and sound manner while enhancing the ability of banks to serve their customers. Should you have any questions, please do not hesitate to contact the undersigned at alanden@aba.com or (202) 663- 7533.

/s/

Ashtyn Landen
Senior Director, Prudential Regulation
American Bankers Association

Attachments

American Bankers Association
Building Success. Together.

Robert G. Rowe, III
Vice President & Senior Counsel
Regulatory Compliance and Policy
Phone: 202-663-5029
E-mail: rrowe@aba.com

February 14, 2022

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

Re: Review of Bank Secrecy Act Regulations and Guidance, Docket Number FINCEN–2021–0008

Dear Sir or Madam:

The American Bankers Association (ABA)[1] appreciates the opportunity to comment on FinCEN's initiative to assess ways it might eliminate, modify or streamline its regulations and reduce burden. FinCEN is undertaking this review of its regulations and guidance to update the current anti-money laundering (AML) and countering the financing of terrorism (CFT) regime as well as meet the requirements of the Anti-Money Laundering Act of 2020 (AMLA). The review is similar to the decennial review of regulations conducted by the federal banking regulators under the Economic Growth and Regulatory Paperwork Reduction Act (EGRPRA). ABA welcomes this initiative, which we asked Congress to include in the AMLA.

FinCEN is particularly interested in exploring new and innovative approaches to Bank Secrecy Act (BSA) compliance that promote a risk-based approach to protecting the financial system. The review will also support and complement previous efforts by FinCEN to promote effectiveness and efficiency,[2] which permit banks to focus their efforts on higher risk priorities.

The purpose of the review is to: (1) ensure the appropriate safeguards against illicit finance and terrorist financing are in place to protect national security; (2) ensure that reports and records required by the BSA are highly useful; and (3) identify outdated regulations or those that do not promote a risk-based approach to AML/CFT or that do not meet U.S. commitments to international standards to combat financial crime. Once the review is complete, FinCEN will begin revising regulations, as appropriate, and will submit a report to Congress on its findings.

[1] The American Bankers Association is the voice of the nation's $23.3 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $19.2 trillion in deposits and extend nearly $11 trillion in loans.
[2] *FinCEN Seeks Comments on Enhancing the Effectiveness of Anti-Money Laundering Programs*, September 16, 2020. ABA filed extensive comments on the request and joined other trade associations in a separate letter.

Background

The BSA was enacted in 1970 and has been expanded and revised over the years, most recently by the AMLA. During the last 50 years, while requirements and expectations for the financial sector have steadily increased, FinCEN has never undertaken a focused effort to reconcile the different requirements into a comprehensive whole. And, while numerous provisions in AMLA codify and elaborate existing Treasury efforts to increase the efficiency and effectiveness of BSA/CFT compliance, the statute also adds a number of new requirements. Moreover, advances in technology have led to beneficial financial products and services, but they also have created opportunities for new illicit finance that the existing framework may be poorly suited to identify and prevent.

There is broad consensus among financial institutions that the billions of dollars spent annually on AML/CFT compliance programs – and the regulatory and supervisory structure that oversee these programs – is outdated and ill-suited for identifying and preventing 21st Century criminal activity and terrorist financing. It has, unfortunately, converted what was originally intended as a program to let banks alert law enforcement to unusual transactions into a paperwork and compliance exercise that can frustrate, rather than enhance, AML/CFT efforts.

The banking industry is committed to supporting national and international efforts to combat money laundering and terrorist financing while protecting the integrity and efficiency of the financial system so that it can support and expand economic activity. To achieve these goals, it is critical to ensure that banks apply their limited resources effectively and efficiently. Therefore, we welcome this opportunity to identify outdated and unnecessary elements of the current regulatory framework.

Overview of ABA Comments

ABA offers a number of recommendations for FinCEN to consider. It is, however, important to recognize that this will be an ongoing and evolving process. FinCEN, regulators, law enforcement, and the financial sector must commit to ongoing collaboration to keep up as financial products and services, technology – and even illicit finance – continue to develop and evolve. Due to the dynamic nature of the economy and global finance, this is not a comprehensive list but a set of key recommendations to begin the process. ABA recommends that:

- FinCEN and the banking agencies issue clear guidance for implementing Treasury's Anti-Money Laundering and Countering the Financing of Terrorism National Priorities.[3]
- FinCEN should streamline and update reports and records, including:
    - Eliminate unnecessary Currency Transaction Reporting (CTR) and streamline CTR filings.
    - Eliminate aggregation requirements for transactors.
    - Authorize banks to exercise discretion to exclude certain transactions from structuring reports.
    - Streamline the CTR exemption process.
    - Eliminate the Monetary Instrument Log.
    - Streamline suspicious activity reporting and monitoring.
    - Restore the risk-based focus of account monitoring.

[3] *Anti-Money Laundering and Countering the Financing of Terrorism National Priorities*

    - Streamline and simplify SAR Filings.
    - Update and revise the 2014 guidance on marijuana SAR filings.
    - Clarify SAR safe harbor protections.
    - Update the guidance for reporting ongoing suspicious activity and eliminate the 90-day review of SAR filings.
- Update the Customer Identification Program rules.
    - Clarify the extent to which a bank may rely on work done by another financial institution or utility.
- Expand Information sharing needs to support public-private partnerships.
    - Publish existing guidance in one central location.
    - Improve the 314 process.
    - Expand FinCEN Exchange.
    - Make innovation hours more dynamic and share information about them.
    - Restore FinCEN reports such as the *SAR Activity Review*.
- Take steps to minimize de-risking
- Clarify the personal liability of BSA compliance officers.

Safeguards to Protect the Financial System from Threats

1. *ABA recommends that FinCEN and the banking regulators issue clear guidance for implementing the Treasury's Anti-Money Laundering and Countering the Financing of Terrorism National Priorities.*

The AMLA directs Treasury to identify, on a continuing basis, government-wide priorities to protect the financial system from threats to national security posed by various forms of financial crime.

When FinCEN issued its Anti-Money Laundering and Countering the Financing of Terrorism National Priorities (Priorities) in June 2021, it identified a broad set of criminal schemes and activities, from corruption to fraud, which offer financial institutions guidance for focusing their resources, a step ABA has long supported.[4] When FinCEN and the banking agencies issue guidance describing their expectations for implementing the Priorities, it should to help banks improve the effectiveness of their AML compliance programs. Bankers report that this guidance, coupled with advisories issued by FinCEN, will give banks important tools to help law enforcement combat illicit finance. In addition, when other provisions of the AMLA that require better feedback from law enforcement take effect, such as the pending report from the Department of Justice that requires feedback on how BSA data is used to investigate and prosecute possible criminal activity, banks will be better equipped to support the government's efforts against money laundering, terrorist financing, and other illicit activities.

It is challenging to identify potential gaps, particularly since criminals are adept at exploiting newly discovered vulnerabilities. For example, in recent years, ransomware has become an increasingly serious threat.[5] However, as FinCEN becomes aware of new threats and issues advisories to the financial sector, the financial sector can better focus monitoring and reporting. The key is timely and thorough communication from the government to the private sector; therefore, in addition to periodic publication of the Priorities, we urge FinCEN to publish interim advisories to help banks focus their resources on the areas of highest risk.

---

[4] See, e.g., *A New Framework for Partnership*, issued by the ABA on October 16, 2008
[5] FinCEN Issues Report on Ransomware Trends in Bank Secrecy Act Data, October 15, 2021

ABA urges FinCEN and the banking agencies to provide clear rules on expectations for incorporating the Priorities into individual bank risk assessments and internal controls.[6] However, we also recommend that the rules expressly acknowledge that bankers must be allowed to develop their own programs to manage risk, based on their understanding of their unique markets, customers, products and services, and the geographies in which they operate. Moreover, examiners should not second-guess bankers or substitute their judgment. Rather, the examiner's role should be to assess whether the process a bank uses to assess risk is appropriate, and whether it has instituted controls and systems that will address those risks.

Recommendations for Streamlining and Updating Reports and Records

When enacted in 1970, the BSA was intended to require banks to make financial information more readily available to law enforcement without generating undue burden. Congress recognized that banks were well-positioned to detect strange or unusual transactions and to call them to the attention of law enforcement. Over time, that framework has devolved into regulatory requirements and supervisory expectations that require banks to investigate, analyze, and collect additional information—in other words, do the initial legwork that should be the responsibility of law enforcement agencies. Law enforcement is far better equipped with training and resources to conduct investigations. Moreover, the time it takes financial institutions to conduct investigations delays getting information into the hands of law enforcement.[7]

In 2008, ABA and members wrote *A New Framework for Partnership, Recommendations for Bank Secrecy Act/Anti-Money Laundering Reform (Framework)*,[8] which called for streamlining and validating the utility of reports that are submitted. We reiterate that recommendation today. Far too much information submitted by financial institutions is never used or reviewed. ABA recommends efforts be periodically undertaken to identify reports filed with FinCEN that are seldom analyzed, consulted, or used in connection with a law enforcement investigation or prosecution. Moreover, identifying unnecessary fields in BSA reports would alleviate burden for banks and for law enforcement personnel, permitting banks and law enforcement to apply resources more effectively. This goal is consistent with FinCEN's work to update the reporting process to ensure that the information reaching law enforcement is effective and efficient.

1. *Eliminate unnecessary Currency Transaction Reporting.*

The original focus of the BSA was the Currency Transaction Report (CTR). The concept was that following the money trail would lead to the criminal. At one time, FinCEN published information on its website about the numbers and types of CTRs that were submitted, but those reports have been discontinued. As a first step, in the interest of transparency and better communication with the private sector, ABA urges FinCEN to revive this important reporting mechanism, as discussed more fully below. More important, though, is that one of the very first questions bankers raised when discussing ways to improve the system was whether and if the Currency Transaction Report (CTR) in its current format, which is basically the same as it has been for 50 years, continues to be necessary. Streamlining and simplifying the form, limiting the

[6] Interagency Statement on the Issuance of the Anti-Money Laundering/ Countering the Financing of Terrorism National Priorities, June 30, 2021

[7] This was a concern raised by the Financial Action Task Force (FATF) in its mutual evaluation report on the United States issued in December 2016.

information provided to what is useful for law enforcement, and expanding the use of technology to expedite the process are all important steps that ABA recommends FinCEN take.

In 1992, Congress made a significant change to the BSA when it adopted the Suspicious Activity Report (SAR).[9] When the SAR was introduced in 1993, the theory was that it would become the primary source of information provided by financial institutions to law enforcement – and it has. As noted, that moved the underpinnings for the BSA regime from large cash transactions to suspicious transactions, although suspicious movements of cash certainly will be reported by filing of a SAR. We believe this shifts the burden to law enforcement to demonstrate clearly the value of CTRs.

Since the SAR is now the foundation,[10] what specific information comes from CTRs that is not otherwise available? While law enforcement often asserts CTR data is very helpful, they have never identified precisely the information from CTRs that is helpful. We look forward to reviewing the report required by AMLA section 6201, originally required to be submitted to the Secretary of the Treasury on January 1, 2022.[11] However, one mid-size bank reports that despite filing over 16,000 CTRs in 2021, it only had one law enforcement request all year connected to a CTR. Furthermore, bankers report that it is usually only auditors or examiners who review CTR filings, and then only to see if they meet technical requirements, such as whether the bank has filed within the 15-day deadline for filing. Even then, auditors and examiners only sample a very small percentage of CTRs.

ABA recommends FinCEN address the Congressional mandates of sections 6204 and 6205 of the AMLA that call for streamlining the form (including the format for submitting data) as well as analyzing the CTR threshold as soon as possible. In part, past efforts to revise the threshold were attempts to address the number and volume of CTRs filed annually.[12] Unfortunately, FinCEN no longer publishes the statistics on the number of CTR filings in a format that is readily available.[13]

Former Director of FinCEN Jennifer Shasky Calvery noted that somewhere between 65% and 73% of CTR filings provided useful data for law enforcement, either to identify new subjects or new accounts to pursue in connection with an existing investigation.[14] However, what that information is and why it was only available through CTRs has never been explained or

---

[9] The Annunzio-Wylie Money Laundering Act of 1992 section 1517 added 31 U.S. Code 5314 which requires the reporting of suspicious transactions and created a safe harbor for financial institution reporting.
[10] "Suspicious activity reporting forms the cornerstone of the BSA reporting system." FFIEC BSA/AML Examination Manual
[11] SEC. 6201. ANNUAL REPORTING REQUIREMENTS. (a) ANNUAL REPORT.—Not later than 1 year after the date of enactment of this Act, and annually thereafter, the Attorney General, in consultation with the Secretary, Federal law enforcement agencies, the Director of National Intelligence, Federal functional regulators, and the heads of other appropriate Federal agencies, shall submit to the Secretary a report that contains statistics, metrics, and other information on the use of data derived from financial institutions reporting under the Bank Secrecy Act
[12] Efforts have been made to reduce the number of CTR filings to eliminate unnecessary data. In 1994, the *Money Laundering Suppression Act of 1994* § 402(b), required the Secretary of the Treasury to reduce the number of CTR filings by 30%, a goal that was never achieved. To the contrary, the number of CTR filings continue to climb.
[13] One helpful change would be to require FinCEN to make publicly available information on the numbers of BSA forms filed in the format that is readily available to the public.
[14] *See, e.g.*, Remarks of Jennifer Shasky Calvery, Director, Financial Crimes Enforcement Network

detailed. That also means that there is at least a quarter to a third of information reported through the CTR process that is never accessed, never used, and never analyzed. FinCEN should use its greatly enhanced data processing systems to identify which CTRs are more likely to be truly useful for law enforcement and develop a mechanism to eliminate low value CTR filings that become little more than amassed data. Even eliminating data fields within the form that provide little information helpful for law enforcement would be productive.

2. Recommended improvements to current CTR filing requirements.

As a starting point, ABA recommends replacing the current CTR form with a short form that would meet the BSA goal of providing data to law enforcement but more quickly than the current process allows. Moving to a short form would streamline the process by eliminating data fields that take time to research and delay filing. To develop a short form will require FinCEN to identify which fields on the current CTR are of little or no value. As previously noted, if a currency transaction raises significant questions about suspicious activity, it would be reported through a SAR.

One issue that needs to be resolved is the threshold for CTR filing. When the CTR was originally adopted in 1970, Treasury determined that an appropriate level for financial institutions to report large currency transactions was $10,000. That level has never changed. Adjusted for inflation it would be nearly $72,000 today. Since AMLA requires FinCEN to study this issue, ABA recommends this be done as soon as possible. This will require a full study and discussion with all interested parties, possibly through the Bank Secrecy Act Advisory Group (BSAAG),[15] roundtable discussions, or FinCEN issuing a Request for Information.

3. Eliminate aggregation requirements for transactors.

FinCEN should reconsider the expectation that financial institutions aggregate transactions to determine if the CTR threshold has been exceeded in any one day. One challenge this raises for bankers is how to aggregate funds when joint accounts are involved. Bankers also point out that those with a large number of branch locations find the aggregation process particularly challenging since trying to coordinate all transactions over a large branch network can be resource intensive and time consuming. It is also difficult to aggregate transactions involving foreign (other bank) ATMs. Bankers find the current guidance confusing, and obtaining all the necessary information can be problematic since the initial transaction occurred off-site and outside the control of the reporting bank.

A fundamental problem with aggregation is trying to track the conductors and aggregate those transactions. Software programs do not offer a simple mechanism for tracking since the person conducting the transaction may not be an owner of the deposit account. Bankers report that much of the tracking must be done manually, which is a significant drain of resources that could be deployed more effectively elsewhere.

Absent a clear showing for its relevance, ABA recommends that the requirement that transaction information be aggregated for transactions be eliminated.

[15] Section 1654 of the Annunzio-Wylie Anti-Money Laundering Act of 1992 required Treasury to create the BSAAG. The BSAAG is made up of representatives from federal agencies, financial institutions, and law enforcement representatives. It is the means by which Treasury receives advice on BSA reporting requirements and a vehicle for informing the private sector how that information is used.

4. *Authorize banks to exercise discretion to exclude certain transactions from structuring reports.*

The Money Laundering Control Act of 1986[16] added the concept of structuring as a criminal offense.[17] However, there are many examples of cases where the innocent are accused – and unfairly punished – for conduct that appears to be illegal structuring but is not.[18]

There are many occasions when banks feel compelled to report structuring despite the fact that the bank is reasonably certain the transaction is simply a consequence of the customer's normal business operations. For example, a customer may have restrictions in its insurance coverage that compel it to keep less than $10,000 in cash on its premises; this causes the customer to make deposits as it nears that limit. While it appears to be structuring since all deposits are just below the reporting threshold, it is a consequence of an insurance policy, not structuring. Therefore, we urge FinCEN in collaboration with the banking agencies to issue guidance (after an opportunity for public comment) that redefines structuring and permits banks to exercise discretion to exclude occasions where a series of transactions are not designed or intended to avoid the CTR reporting threshold.

Further reform of structuring rules may be suggested by a thorough cost-benefit analysis by the Government Accountability Office (GAO) of the time and effort needed to report structuring, the consequences for members of the public, and the benefits to law enforcement.

5. *Streamline the CTR Exemption process.*

While FinCEN has greatly improved the process for exempting customers from CTR filings and financial institutions have been making greater use of the process, the exemption process should be streamlined further.

Financial institutions should be permitted to file a simple, short form with FinCEN that identifies a customer and declares that customer exempt from CTR filings. It would be the responsibility of the financial institution to ensure that the customer satisfies established regulatory expectations for exemption. While a financial institution may be expected to conduct an annual review for internal purposes and ensure that the exemption is still applicable, a financial institution should not need to file anything further with FinCEN. Once exempt, a customer would stay exempt until the bank determined otherwise and started filing CTRs for transactions involving that customer. What is important to recognize is that the customer would still be covered by SAR standards.

Another step to eliminate unnecessary CTR filings would be for FinCEN to create a registry of exempt entities. Similar to other registries, the information could be readily accessible to financial institutions through a secure database. Once an entity has been exempted by any financial institution, barring for a decision by FinCEN to remove that entity from the registry, all financial institutions could rely on the information and treat the entity as exempt from CTR reports.

---

[16] 18 U.S. C. §1956 (2016)
[17] Structuring, sometimes called smurfing, is the deliberate effort to keep transactions below the reporting threshold to avoid a CTR.
[18] U.S. Department of the Treasury, *Criminal Investigation Enforced Structuring Laws Primarily Against Legal Source Funds and Compromised the Rights of Some Individuals and Businesses*, Treasury Inspector General Report (March 30, 2017)

Along the same lines, and to help combat concerns over "de-risking," FinCEN should consider adopting a process to exempt certain registered money services businesses (MSBs) from CTR filings. MSBs are cash intensive, which means they present special challenges for financial institutions in the current regulatory and enforcement environment. While all MSBs are cash intensive, the risks they present vary, meaning different expectations for their cash needs and uses should be taken into account by FinCEN and factored into the exemption process.

ABA also recommends that greater flexibility be granted to individual financial institutions to determine which customers are appropriate to exempt. ABA has long advocated for financial institutions to be able to take a risk-based approach to exempting "seasoned customers" that have a track record with the bank and that pose little threat of money laundering or criminal activity. This has the added advantage of underscoring the Treasury's commitment to a risk-based approach to anti-money laundering compliance.

An additional step to consider is the elimination of currency transaction reports for withdrawals from existing customer accounts. A withdrawal from an existing account is already reflected in the financial institution's records, the account and customer have already been screened and monitored, and if there is something untoward about the withdrawal, it can be reported by filing a SAR. The filing of a CTR on such a withdrawal is the type of redundant reporting that offers little for law enforcement.

6. *Eliminate the Monetary Instrument Log.*

Currently, a bank may not issue or sell a bank check or draft, cashier's check, money order, or traveler's check for $3,000 or more in currency, unless it maintains records of certain information. At one time, it might have made sense to maintain a monetary instrument log to ensure the necessary information was maintained in one place for ready access by law enforcement. However, as with the CTR, the threshold for this reporting has gone unchanged for decades and, with changes in technology, the requisite information is often retained in other formats and systems that are easily accessible.

Most important, though, is that the usefulness of the monetary instrument log to law enforcement is highly questionable. Banks uniformly report that law enforcement never asks for the information in the monetary instrument log. In fact, the only time any bank reports being asked for it is when auditors or bank examiners want to verify compliance with the requirement. Therefore, ABA believes that the monetary instrument log is an outdated requirement that could and should be eliminated as unnecessary.

7. *Streamline suspicious activity reporting and monitoring.*

Steps should be taken to make the SAR filing system more efficient in order to get notifications of potentially suspicious transactions to law enforcement more quickly.

First, we recommend that FinCEN address the tendency of examiners to place too great an emphasis on technical compliance. If the true importance of a SAR is to provide useful and useable information for law enforcement, then criticism of a bank for filing a report one day late or for failing to check a specific box is misplaced and can divert resources from more useful endeavors This is a matter of examiner training which should be addressed as the banking regulators implement section 6307 of AMLA, which requires annual examiner training.

When filing a SAR, law enforcement and bankers point to the narrative as the most useful and productive aspect of the report. It provides information that is otherwise missing and can point out for law enforcement steps needed for investigation and prosecution by laying out the elements that determine whether something is suspicious, information that is lacking in mere names and numbers. In the past, FinCEN has provided guidance on producing a useful narrative, and ABA recommends that guidance be updated.

Bankers also suggested that FinCEN compare the United States' SAR system to suspicious activity reporting in other jurisdictions to see if there are elements or steps that could be successfully replicated here to make the system more effective and efficient. This could be done through surveying BSAAG members with international operations or by FinCEN reaching out to other countries which are members of the Egmont Group.[19]

8. *Restore the risk-based focus of account monitoring.*

One of the rationales for the Customer Due Diligence rule is the belief that the more information collected about a legal entity customer, the better a financial institution can identify when a transaction or series of transactions is inconsistent with the customer's business and normal activities.[20] To be effective, however, the process should be risk-based, considering the specific risks of individual customers. Banks can and should be able to assign customers to categories based on a profile.[21] What has happened, that FinCEN needs to help restore, is a blurring between the expectations for high-risk customers, where Enhanced Due Diligence (EDD) is applied, and the diligence due for any customer. The application of EDD expectations to average or even low-risk customers creates an unnecessary use of resources but is something bankers report happens all too frequently.

The risk assessment process is a key part of a bank's AML/CFT compliance management system. While guidance and expectations for this program have improved steadily over the years, financial institutions (especially community banks) still struggle with documenting their risk management process. ABA members report challenges meeting examiner expectations and concerns about examiners filling perceived gaps using subjective decisions about the adequacy of controls. ABA urges FinCEN and the banking agencies to provide more complete guidance by building on and expanding Appendix J of the FFIEC BSA/AML Examination Manual.[22]

For example, our members report that some examiners focus only on the actual risk, ignoring or discounting the mitigating controls that reduce the residual risk. In addition, bankers report that some examiners focus too heavily on negative news accounts as *the* risk factor, again failing to

[19] The Egmont Group is a united body of 167 Financial Intelligence Units (FIUs) that provides a platform for the secure exchange of expertise and financial intelligence to combat money laundering and terrorist financing (ML/TF).
[20] As stated by FinCEN, "It is through CDD that financial institutions are able to understand the risks associated with their customers, to monitor accounts more effectively, and to evaluate activity to determine whether it is unusual or suspicious, as required under suspicious activity reporting obligations." Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. at 29400
[21] In other words, if an average customer opens a standard checking account, the bank should be able to designate or categorize that customer as low-risk and then, absent any evidence to the contrary, continue to maintain that risk assessment. It should not be necessary for a bank to risk assess each and every customer. Other processes will identify problems or potential concerns.
[22] In addition, Appendix H of the manual on *Request Letter Items* provides an example of the type of guidance bankers find useful. *See* FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL, BANK SECRECY ACT ANTI-MONEY LAUNDERING EXAMINATION MANUAL

consider controls. The failure to acknowledge controls encourages banks to close accounts and terminate customer relationships in order to meet examiner expectations and reduce regulatory risk.

9. *Streamline and simplify the SAR system.*

We urge FinCEN to consider whether the current format of the SAR is appropriate in the current environment. The FFIEC BSA/AML examination manual states, "Banks should include all known information on the SAR. A thorough and complete narrative may make the difference in determining whether the described conduct and its possible criminal nature are clearly understood by law enforcement."[23] Unfortunately, examiners have applied this expectation in such a way that bankers feel compelled to conduct an extensive and exhaustive investigation into the conduct in question, pursuing leads and analyzing information in a manner similar to a law enforcement investigation. In fact, many financial institutions hire former law enforcement agents for this purpose. This not only consumes resources, but time consuming investigations delay getting information to law enforcement. The SAR filing regulation allows limited timeframes for filers, but those timeframes may not always correspond with law enforcement needs or international expectations.

As noted above, in the *2016 Mutual Evaluation Report of the United States*,[24] the Financial Action Task Force (FATF) recommended that the United States re-evaluate the timeframes for SAR filings to ensure that suspicious activity is called to the attention of law enforcement sooner. The movement of funds has accelerated steadily to the point that payments are become almost real-time. More important, terrorists can move quickly. The imperative to get information to law enforcement as quickly as possible therefore becomes increasingly important. The goal is finding the balance between the appropriate level of detail needed for law enforcement and an exhaustive and time-consuming investigation by the financial institution. Requirements for SAR filings should be adjusted so that banks provide enough information on a SAR to help law enforcement understand why something is suspicious but not to the point that it delays getting information to law enforcement.

ABA urges FinCEN to re-examine the entire SAR format and determine if a shorter form with simpler, and more concise narrative information would increase the efficiency and speed of getting notice to law enforcement. In this process, FinCEN should recognize that law enforcement always has the opportunity to follow up with the bank to request supporting information.

In a related vein, further guidance on the thresholds for SAR filing also is needed. Currently, there are three different thresholds for filing SARs depending on the subject identified and the nature of the activity. In some cases, it is not easy to identify which threshold applies and whether additional guidance is needed to help financial institutions make that determination. Many bankers believe the current SAR thresholds are too low; the Agencies should consider raising these thresholds. One approach worth consideration would be to institute more calibrated thresholds depending on the activity involved, using more than the existing three categories.

---

[23] Federal Financial Institutions Examination Council, BSA/AML Examination Manual, p. 71
[24] Financial Action Task Force, United States' measures to combat money laundering and terrorist financing (2016)

ABA also recommends that FinCEN re-evaluate the number of boxes used to report the type of activity involved when filing a SAR. As different criminal activities have come into focus, such as elder financial exploitation or human trafficking, new boxes have been added. While the boxes were originally adopted to facilitate identification of certain types of activity for analysis purposes. However, new technologies have made it simpler to search for certain activities in the SAR narrative. It would now be appropriate, in the overall review, to determine whether all the boxes are appropriate and, in fact, whether that is the best way to report suspicious activity.

Similarly, ABA encourages FinCEN to reconsider some of the information required in its recent advisories on certain types of activities. For example, in its recent advisory on ransomware payments[25] the instructions required for SAR filings are extensive and very detailed:

> ***SAR Filing Instructions*** *FinCEN requests that financial institutions reference this advisory by including the key term: "CYBER-FIN-2021-A004" In SAR field 2 (Filing Institution Note to FinCEN) and the narrative to indicate a connection between the suspicious activity being reported and ransomware-related activity. Financial institutions should also select SAR field 42 (Cyber event) as the associated suspicious activity type, as well as select SAR field 42z (Cyber event - Other) while including "ransomware" as keywords in SAR field 42z, to indicate a connection between the suspicious activity being reported and possible ransomware activity. Additionally, financial institutions should include any relevant technical cyber indicators related to the ransomware activity and associated transactions within the available structured cyber event indicator SAR fields 44(a)-(j), (z).*

As more advisories are issued, the number of these requirements continues to add up, making the time and effort expended to file a SAR extensive. ABA questions whether all this detail is truly necessary. Fundamentally, it has to be questioned whether this is, in fact, a good use of limited resources or whether it falls into the trap of technical compliance more for the sake of compliance rather than combatting money laundering.

That being said, bankers find the advisories themselves helpful, , particularly the red flags, since they supplement the information set forth in the priorities[26] with current, up-to-date information.

Finally, bankers report that it would help if there were a mechanism to export information into a SAR rather than having to manually enter data. For example, box 43 asks for IP addresses; instead of manually entering all the IP addresses, it would expedite the process to be able to quickly upload that data from a spreadsheet or other software program.

10. *Update and Revise the 2014 Guidance on Marijuana SAR Filings.*

When Fin/CEN issued guidance on suspicious activity reporting for marijuana-related activity in 2014, the agency created a new "Marijuana Termination SAR" to report the bank was terminating an account relationship solely because a customer was engaged in marijuana production or sales. It also created a "Marijuana Limited SAR" to report the bank was establishing or maintaining an account where the only suspicious activity was the customer's activity as a marijuana-related business. Bankers continue to struggle to determine what is or is not a "marijuana-related business" because that term has never been defined. Banks also

---

[25] Advisory on Ransomware and the Use of the Financial System to Facilitate Ransom Payments, November 8, 2021
[26] *Anti-Money Laundering and Countering the Financing of Terrorism National Priorities*, June 30, 2021

struggle with the nature and consistency of reporting that is expected for a Marijuana Limited SAR. While Congress continues to debate legislation that would provide a safe harbor for banks that offer products and services to businesses connected to marijuana that are legitimate under various state laws, it is important that FinCEN update its eight year old guidance.

11. Update SAR Guidance on MSBs.

Another area that continues to challenge bankers are SARs related to money services businesses (MSBs). Because banks are expected to file a SAR when a MSB fails to register with FinCEN, banks report they feel compelled to file a SAR to report when the registration has expired and the MSB fails to renew its registration, even though it might be an oversight or inadvertent delay. Additional guidance that would allow banks not to file a SAR when it determines there is nothing suspicious involved would be helpful. A useful tool that FinCEN used to offer banks was an MSB renewal calculator[27] but for some reason, it no longer appears to be available, and banks recommend that it be re-instated.

12. Clarify SAR safe harbor protections.

We recommend that FinCEN correct the misinterpretation that some state courts have applied to the safe harbor for SAR filing. The federal statute that confers the safe harbor is clear: when a financial institution reports suspicious activity, it is protected from liability for that report. In addition, the statute is clear that the safe harbor protection is absolute. Unfortunately, some courts have ignored the clear language of the federal law and have layered on a good faith requirement, which requires filers to justify the filing. A clear statement from FinCEN about the breadth and extent of the statutory safe harbor could help correct this misunderstanding.

13. *Update the guidance for reporting ongoing suspicious activity and eliminate the 90-Day review of SAR filings.*

Bankers report that the time and effort needed to conduct a review of SARs 90 days after the original filing is often a time-consuming, but useless, exercise. If the system is truly risk-based and an activity continues or a new alert triggers that ongoing activity has transpired, then it makes sense for a bank to file a new SAR to update what was already filed. However, automatically reviewing a SAR after 90 days is a technical step that should be eliminated.

Another issue that needs to be addressed is whether to maintain an ongoing relationship with a customer once a SAR has been filed. For example, for certain types of fraud, the decision to close an account is automatic. However, clear guidance on when to close an account after the filing of a SAR would be useful.

Apart from the bank's decision to close an account, there are cases where law enforcement may ask a financial institution to keep an account open to let law enforcement track activity. The industry certainly wants to support law enforcement, but clarity is needed for bankers to explain why the account is still open to examiners and auditors. More guidance from FinCEN would help bankers handle these requests from law enforcement.

In other instances, where there is no reason to close the account, financial institutions report that they continue to file SARs on ongoing activity even though law enforcement has expressed no interest in the reports or in pursuing further investigation into the reported activity. Some

[27] See Notice to Registered Money Services Businesses, November 13, 2008

feedback mechanism from law enforcement is needed to eliminate repetitious filing of SARs on the same activity that provides no useful information.

As there is an increasing emphasis on information sharing between financial institutions, the ability to share SARs with other financial institutions also needs to be reconsidered. If two financial institutions are reporting a common transaction or communicating to determine whether or not there is something suspicious, their ability to share SARs as well as SAR information on that unique transaction or series of transactions should be permitted. It should be possible to grant that ability within certain parameters or controls to ensure that the confidentiality of SAR data continues to be properly protected.

14. Customer Identification Program rules need updating.

One regulation that FinCEN should reevaluate is the set of rules adopted nearly 20 years ago under the Customer Identification Program (CIP) requirements. At the time the rules were put into place, the typical format for opening an account was for a customer to go into a branch in person to provide the necessary information and possibly supporting documentation, such as a passport or driver's license, to verify identity. In the intervening years, however, digital transactions have become more and more common to the point where Congress adopted legislation in 2018 to let banks accept digital versions of driver's licenses to verify identity.[28] Since then, new efforts to establish digital identities have been increasing[29] and may offer a more secure form of identification over more traditional approaches.

These changes call into question whether the four pieces of identifying information – name, address, date-of-birth, and identification number – continue to be needed. For example, there have been discussions about whether banks truly need to require the information be provided solely by the customer, and whether a complete Social Security Number is needed as an identifier. Could the last four digits be sufficient as long as the full number is acquired from another reliable source?

Questions about data security also come into play. Since the CIP rules were adopted, they have been incorporated into the Customer Due Diligence rule for beneficial ownership purposes. Because a designated beneficial owner may not be a customer of the bank, providing sensitive personal identifiable information, possibly through a third-party, has generated resistance. As AMLA requires FinCEN to update the CDD rule to conform to new registration requirements, ABA urges FinCEN to take the opportunity to consider the CDD rule and its inter-relationship with CIP, updating both rules as appropriate.

Overall, ABA urges FinCEN to work with the banking agencies and undertake a comprehensive review of the CIP requirements to update them to reflect the many changes in how business is conducted today.

---

[28] Economic Growth, Regulatory Relief, And Consumer Protection Act, PUBLIC LAW 115–174. May 24, 2018, SEC. 213. Making Online Banking Initiation Legal And Easy

[29]See, e.g., FDIC and FinCEN Launch Digital Identity Tech Sprint and FATF *Guidance on Digital Identity*, March 6, 2020

15. *Clarify the extent to which a bank may rely on work done by another financial institution or utility.*

FinCEN can improve and streamline regulatory mandates for customer identification, including customer due diligence for legal entity customers, by clarifying the extent to which a financial institution can rely on the customer due diligence already conducted by another regulated financial institution. For example, a number of private sector vendors, such as SWIFT,[30] have created registries that include much of the data, and the ability to rely on the initial vetting through a single convenient source would save time and resources.

Although the concept of reliance has been included in CIP regulations since 2002, it has never fully been used, even though it is permitted in other countries, and long-standing FATF recommendations approve of reliance in appropriate circumstances.[31] Permitting financial institutions to take advantage of reliance eliminates redundancy in vetting customers.

Therefore, the first step is FinCEN issuance of guidance that validates the use of reliance for CIP and CDD compliance. Along with that, working with the industry, FinCEN should set clear parameters for when it is appropriate for financial institutions to rely on the work of third parties and other financial institutions – both domestic and foreign – in carrying out the steps needed to verify customer identity.

If a trusted financial institution or a trusted and well-respected intermediary has conducted the necessary assessment of a customer or client, it seems unnecessary to replicate that same exercise. Each financial institution would still monitor for suspicious or unusual activity. Existing requirements would still insist that the providers of the information about the customer is a trusted source.[32]

16. *Update the Customer Due Diligence rule.*

Recognizing the fact that the Customer Due Diligence rule will undergo updating in the near future to conform the current rule to the requirements of the beneficial ownership registry, there are several steps that bankers have identified that would be helpful.

First and foremost, when the CDD rule was adopted, it seemed logical to use account opening as a trigger to collect beneficial ownership information. Since then, however, it has become apparent that this creates a great deal of unnecessary work when customers open a series of accounts on the same day or within a short period of time. It also creates confusion for bankers about when to update beneficial ownership information for customers with established account relationships. Instead, it would make far more sense and be much more efficient for bankers to collect beneficial ownership information based on the customer relationship and not account opening.

---

[30] A number of other vendors, such as the Depository Trust Company, are also working on utilities that would provide this information. SWIFT's KYC Registry, which is one example, is a secure, global utility which nearly 4,000 correspondent banks and funds players use to contribute, share and consume a comprehensive set of KYC data and documents. *See* SWIFT, SWIFT Extends KYC Registry Membership to All Supervised Financial Institutions (July 17, 2017)

[31] Financial Action Task Force, International Standards On Combating Money Laundering And The Financing Of Terrorism & Proliferation (2017)

[32] In some ways, this is analogous to credit bureau reports which let financial institutions use information compiled by an independent third party that helps the financial institution evaluate the creditworthiness of a customer.

Second, when conducting initial customer due diligence, there is an expectation that banks outline a profile for expected customer transaction activity during the account relationship. However, as technology develops, it is becoming easier for banks to develop a profile of the customer – a customer footprint – over time. Often, this digital identity based on customer activity is a more accurate and secure method to verify the identity of a customer. Therefore, ABA recommends that the expectation to assess anticipated account activity be minimized at the outset of an account relationship, but then be allowed to develop over time.

Through the examination process, bankers report there has been a steady expansion of what is expected. Of course, this should in part be addressed when the banking regulatory agencies and FinCEN develop updated training for examiners as required by AMLA. However, there is a certain overlap between enhanced due diligence (EDD) procedures and customer due diligence procedures that could be eliminated. For example, in separating those high risk customers subject to EDD, certain transactions may be reviewed twice by investigative teams. Similarly, bankers report that there are occasions when examiners or auditors will suggest that steps outlined for EDD are recommended for standard CDD. Guidance that would let banks coordinate these efforts definitely would streamline the process.

Another issue that is becoming problematic is the expectation for negative news reviews and alerts.[33] Bankers would welcome additional guidance or examples to define when it is appropriate to rely on negative news for rating the risk of certain customers.

Information Sharing needs to be expanded to Support the Public-Private Partnership

There are a number of provisions included in AMLA that will expand the information shared with the private sector, including specific feedback from law enforcement on the use of BSA data to investigate and prosecute possible illicit finance, money laundering, and terrorist finance. ABA recommends that FinCEN take a number of additional steps that will improve this process and help ensure financial institutions provide timely and effective information for law enforcement.

1. *Publish guidance and advisories in one central location.*

To facilitate access to the many helpful advisories and guidance that FinCEN has issued, ABA recommends they be collected and organized in an easily searchable format in one central location on the FinCEN website. While much of the information is there, it is not always readily discoverable. To develop a more user-friendly webpage, we recommend that FinCEN conduct roundtable discussions, survey users, or work through the BSAAG.

2. *Improve the 314 Process.*

FinCEN should make the 314(a) process a two-way street as was intended when the USA Patriot Act was adopted in 2001. As implemented, banks are asked to confirm whether the name of a party of interest provided by a request from FinCEN matches a name in their database. However, the provision was also intended for law enforcement to provide information to the private sector about possible suspected activity and threats. While this option has been

[33] The FFIEC BSA/AML Examination manual section on CDD states that, "The bank should establish policies and procedures for determining whether and/or when, on the basis of risk, obtaining and reviewing additional customer information, for example through negative media search programs, would be appropriate:"

discussed over the years, ABA recommends that FinCEN, possibly working through BSAAG, develop this process so that it becomes a channel for law enforcement to provide information as well as obtain it.

Second, the 314(b) process, which permits financial institutions to share information with each other needs to be improved. ABA welcomes the fact that FinCEN has added this to its regulatory agenda and plans to issue a proposed rule in March 2022.[34] There are a number of factors ABA recommends FinCEN include in the proposal. First, FinCEN should streamline the process for a financial institution to register to be eligible. At the same time, collecting and making available to users of the registry a set of contacts would help. Bankers, particularly community bankers, often report they find it difficult to reach the appropriate contact at another bank to obtain the necessary information and that the time and effort to find the right contact often discourages them from using the process.

Another important step that would help the industry would be a set of templates or model forms to submit requests for information. This would streamline the process and ensure a uniform and easily used system that ensures that a bank receiving the request has the necessary information to research and provide a response. ABA also recommends FinCEN develop a set of FAQs to help guide banks. And, we recommend that that rules incorporate timelines for responding to requests, possibly within 30 days, to ensure that the requesting bank receives feedback that may be needed to file a SAR.

Finally, although this may require statutory change, ABA recommends FinCEN take steps to expand the coverage and availability of the 314(b) system. Currently, it is limited to money laundering and terrorist financing, but as demonstrated by the FinCEN Priorities, there are many other types of criminal activity. Being able to share information about those activities would be useful to the financial sector and help provide information to law enforcement. At the same time, expanding the number of financial institutions that can take advantage of information sharing, including money services businesses and casinos, would also be a welcome step.

3. *Expand FinCEN Exchange.*

In 2017, at the American Bankers Association/American Bar Association Financial Crimes Enforcement Conference, [35] Treasury announced the creation of a new information sharing program, FinCEN Exchange. According to the announcement, “As part of this program, FinCEN, in close coordination with law enforcement, has convened regular briefings with financial institutions to exchange information on priority illicit finance threats, including targeted information and broader typologies. This helps financial institutions better identify risks and focus on high priority issues, and helps FinCEN and law enforcement receive critical information in support of their efforts to disrupt money laundering and other financial crimes.” AMLA section 6103 has codified this requirement.

Bankers who have participated in FinCEN Exchange meetings report they are both productive and helpful. However, to date, the number of bankers who have been able to participate has been limited. ABA encourages FinCEN to find ways to open these sessions to more bankers, particularly community bankers, who would greatly benefit from participation.

---

[34] See the regulatory agenda.

[35] FinCEN Launches “FinCEN Exchange” to Enhance Public-Private Information Sharing, December 4, 2017

At the same time, while limited by confidentiality constraints and the nature of the issues discussed during these sessions, ABA recommends that FinCEN share information about the sessions with the private sector more broadly, possibly through confidential releases using the 314(a) process. To a very limited extent, FinCEN has shared information, but it has been little more than an announcement that the FinCEN Exchanges have taken place;[36] greater detail on the content of the discussions would be productive.

4. *Make Innovation Hours more dynamic and share information about them.*

FinCEN has taken a number of steps to explore new initiatives offered by a variety of software vendors to provide programs that support BSA/AML compliance efforts. As noted by the agency, "Private sector innovation, either by new ways of using existing tools or by adopting new technologies, can help provide new and more efficient means of providing financial services to consumers and businesses, help financial institutions enhance their anti-money laundering (AML) compliance programs, and contribute to more effective and efficient record keeping and reporting under the BSA framework."[37]

However, so far these sessions have been used as an information gathering tool for FinCEN. ABA believes it would greatly improve the process and make it far more useful if FinCEN, provides feedback to the companies that participate.. This also would be consistent with the notion of sandboxes recently advanced by the Acting Director.[38]

In addition, sharing some of the findings from these sessions with the private sector would help banks understand some of the innovations opportunities available. Without disclosing proprietary information, the information shared should be sufficiently specific so that banks can understand the developments and products that may be available.

5. *FinCEN Reports Should be Revived.*

As noted above, there were a number of reports that FinCEN used to publish on its website that banks found helpful. These reports have been discontinued, but in the interests of transparency and improved information sharing, ABA recommends that FinCEN restart and republish them on a regular basis.

The first is information on CTR filings. At one time, FinCEN shared information about CTR data with information about filings by region, by financial institution, and so forth. ABA recommends that FinCEN again share information about CTR filings on its website.

Second, FinCEN should revive the publication of the *SAR Activity Review.* Originally, this was published quarterly to provide information about SAR filings, including information about SAR filing trends along with case studies from law enforcement that shared information about how BSA data was used for investigations and prosecutions. The *SAR Activity Review* also included

---

36 See, e.g., FinCEN Holds FinCEN Exchange on Environmental Crimes and Related Financial Activity, November 16, 2021.

37 FinCEN's Innovation Initiative: Implementation of FinCEN Innovation Hours; Invitation To Request Innovation Hours Meeting, 84 *Federal Register* p. 25120, May 30, 2019.

38 Prepared Remarks of FinCEN Acting Director Him Das, Delivered Virtually at the American Bankers Association/American Bar Association Financial Crimes Enforcement Conference January 13, 2022.

suggested practices from the private sector and regulatory agencies to improve compliance efforts. The publication schedule was adjusted so that the full *SAR Activity Review* was published twice each year, alternating with a streamlined publication *SARs by the Numbers*.[39] However, the *SAR Activity Review* was discontinued in 2013 without explanation. Because it was such a useful tool for communication and information sharing, ABA recommends that FinCEN revive it as soon as possible.

Another publication that is not easily accessible but that bankers find useful are the Marijuana Banking Updates.[40] These provide information about the number of SARs that have been filed involving marijuana-related businesses. Making these reports more readily accessible on the FinCEN website would be helpful.

Take Steps to Minimize De-Risking

The current BSA/AML examination and enforcement environment has encouraged institutions to "de-risk" accounts held by customers, industries and countries that present an increased regulatory risk. Fundamentally, this occurs when institutions have difficulty identifying the risk or when examiners and auditors fail to grant sufficient credit for the controls or mitigating steps institutions take to address the risks. This is especially likely when examiners change standards from exam to exam or when examiners ask banks to adopt a "best practice." Overall, though, the banking industry is responding to the current regulatory environment with appropriate and logical steps, balancing the costs and benefits of maintaining relationships.

ABA urges FinCEN to convene a task force to address the issue.[41] Where there are barriers to continuing account relationships, those barriers must be identified and then appropriate steps to address those barriers identified. Any discussions must include representatives from the financial sector and the prudential banking regulators, since some of the impact is the result of the examination process.

Of utmost importance in this process is that examiners base their assessments on risk-rating and not on technical compliance. ABA recommends a step that would help properly focus this goal: require that when examiners make a recommendation or plan to cite a bank for a compliance issue, the examiner also must clearly articulate how that deficiency undermines the goals of combatting money laundering or terrorist financing.

De-risking has become a significant concern internationally due to the closure of foreign correspondent accounts, not only by banks in the United States but around the world. This is due to a variety of factors, but much responsibility lies in the increasing expectations for monitoring and providing notice to correspondent banks, particularly in connection with the requirements that FinCEN periodically imposes for foreign correspondent relationships and entities or jurisdictions of possible money laundering concern. Two steps that would ease burden would be: (1) if banks were not required to notify their correspondents when FinCEN identifies an institution or jurisdiction of money laundering concern as long as the bank has procedures in place to screen transactions properly; and (2) not required to certify that a foreign

---

[39] While FinCEN does make SAR statistics available on the website, having the agency compile and analyze the data and publish it in readily available formats would improve the process.
[40] Marijuana Banking Updates
[41] Section 6215 of AMLA requires the Government Accountability Office to conduct a study of de-risking in the financial sector and the results of that study might provide a good foundation for the roundtable discussions.

correspondent is not a shell corporation, particularly with the new beneficial ownership registry requirements being finalized. ABA urges Treasury to re-evaluate the expectations that are imposed on foreign account relationships, including a cost-benefit analysis of the regulatory demands.

For example, in October 2016, the OCC issued guidelines[42] that were designed to help banks manage correspondent account relationships. However, those guidelines were issued without extensive discussion, and while the industry found them generally helpful, concerns were also raised about the prescriptive nature and the potential costs associated with the guidance. Some suggested that instead of encouraging foreign correspondent accounts, the guidance might have the opposite effect.

Personal Liability of BSA and Compliance Officers Needs to be clarified

Bankers continue to report challenges filling vacancies for BSA and Compliance Officers. One cause is the Department of Justice's guidance about the personal responsibility and liability of individual employees.[43] When DOJ issued the guidance in 2015, the industry expressed concern that it would have a chilling effect on bank compliance and BSA officers, concerned they would be held accountable for actions beyond their control. Anecdotal evidence suggests that it did have that impact, with a number of seasoned compliance officers retiring or moving to other occupations.

Bankers continue to report challenges filling vacancies, and while personal liability alone is not the only reason, it appears to be a significant contributor. ABA urges FinCEN to update its guidance on the expected culture of compliance to help address this issue since a culture of compliance helps to clarify the responsibilities and liabilities of the compliance officers That guidance, originally issued in 2014, set forth a number of parameters, including the importance of leadership engagement, that business interests should not compromise compliance, and that leadership should provide appropriate resources.[44] Overall, though, it underscored the authority of the BSA officer. The expectations for BSA officers have been recently reinforced by updates to the *FFIEC BSA/AML Examination Manual*[45] but ABA also recommends that FinCEN update its guidance on the culture of compliance after input from the financial sector, prudential regulators, and law enforcement. Even though much of the original guidance is still relevant, it would be helpful to restate it as a reminder it is still current.

Conclusion

ABA appreciates the opportunity to provide our comments as FinCEN looks to streamline and modernize the AML/CFT regime. Clearly, this will be an ongoing process that will evolve over time. Much of it will be accomplished as FinCEN implements the provisions of AMLA, and ABA looks forward to engaging with the agency on this work. ABA also appreciates our engagement with FinCEN through BSAAG, since this is an important advisory group that also works to

---

[42] "Office Of The Comptroller Of The Currency, Bulletin 2016-32, Risk Management Guidance On Periodic Risk Reevaluation Of Foreign Correspondent Banking"
[43] "Individual Accountability for Corporate Wrongdoing," U.S. Department of Justice, September 9, 2015
[44] Advisory to U.S. Financial Institutions on Promoting a Culture of Compliance, FIN-2014-A007, August 11, 2014
[45] "Assessing The BSA/AML Compliance Program," FFIEC BSA/AML Exam Manual, Updated April 15, 2020

address these issues. ABA encourages FinCEN to continue to take steps to improve the effectiveness and efficiency of the system, not only through this RFI but through all its efforts.

Sincerely,

Robert G. Rowe, III
Vice President & Senior Counsel, Regulatory Compliance and Policy