American Bankers Association

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October 8, 2024

Acting Comptroller of the Currency Michael J. Hsu
C/O Chief Counsel's Office
Attention: Comment Processing
Department of the Treasury
Office of the Comptroller of the Currency
400 7th Street SW, Suite 3E-218
Washington, DC 20219

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

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

RE: Notice of Proposed Rulemaking on Anti-Money Laundering and Countering the Financing of Terrorism Programs, 89 Fed. Reg. 65242 (August 9, 2024); Docket Numbers OCC–2024–0005, RIN 1557–AF14; R-1835, RIN 7100-AG78; RIN 3064-AF34

Dear Acting Comptroller Hsu, Secretary of the Board Misback, and Assistant Executive Secretary Sheesley:

The American Bankers Association (ABA)[1] appreciates the opportunity to comment on the notice of proposed rulemaking published by the U.S. Department of the Treasury's Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (FRB); the Federal Deposit Insurance Corporation (FDIC); and the National Credit Union Administration (NCUA) (collectively, the Agencies). The Agencies seek comment on a proposed rule that would amend the Bank Secrecy Act (BSA) program rules each Agency has issued for its supervised banks, requiring them to establish, implement, and maintain "effective, risk-based, and reasonably designed" anti-money laundering (AML)/countering the financing of terrorism (CFT) programs with certain minimum components, including a now-mandatory risk assessment process.[2]

[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 more than 2.1 million people, safeguard $18.8 trillion in deposits and extend $12.5 trillion in loans.

[2] Notice of Proposed Rulemaking on Anti-Money Laundering and Countering the Financing of Terrorism Program Requirements, 89 Fed. Reg. 65242, 65244 (Aug. 9, 2024); https://www.federalregister.gov/documents/2024/08/09/2024-16546/anti-money-laundering-and-countering-the-financing-of-terrorism-program-requirements.

If finalized, the Agencies' revised program rule would align with Treasury's Financial Crimes Enforcement Network (FinCEN's) proposed program rule revisions, require financial institutions to consider government-wide AML/CFT Priorities;[3] and make certain other technical changes.[4]

ABA supports the reform goals of the Anti-Money Laundering Act (AMLA), including to reinforce a risk-based approach to BSA policies, procedures, and controls,[5] as well as the Agencies' objective to amend their respective rules in a way that "aligns with the rule concurrently proposed by FinCEN."[6] However, as originally explained more fully in our September 3 comment letter to FinCEN on its BSA program rule proposal —which we attach, incorporate by reference, and respectfully address all points therein to the Agencies[7]— we disagree that formalizing a new pillar to codify a nearly universal bank practice – producing and periodically updating a single written risk assessment, based on a formal risk assessment process – and elevating it to become the foundation of all BSA compliance will bring about meaningful reform, as intended by Congress.

As primary bank supervisors and examiners who have deep experience with bank BSA compliance programs, we anticipate the Agencies agree that focusing on a single written risk assessment process document is not the best way to bring about important reforms, nor is it the best way to efficiently adapt to changing risks, operations, and conditions. As the Agencies have stated: "[a]s part of safe and sound operations, the Agencies have guided banks to use risk *assessments* to structure their risk-based compliance programs."[8] Instead, as originally outlined in our letter to FinCEN, we request Agencies make important changes to the program rule:

- Formalize as a mandatory pillar requirement banks' ability to redirect resources toward higher risk customers and activity and away from lower risk customers and activity. Specifically, 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***."[9]
- Ensure banks can continue to rely on multiple, individualized risk assessments and not forcing banks to divert compliance resources to inefficient paperwork and away from the actual threats the priorities are intended to address. 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"[10] is contrary to the

[3] FinCEN Anti-Money Laundering and Countering the Financing of Terrorism National Priorities (June 30, 2021); https://www.fincen.gov/sites/default/files/shared/AML_CFT%20Priorities%20(June%2030%2C%202021).pdf.
[4] 89 Fed. Reg. 65242, 65244.
[5] *See* AMLA, Public Law 116-283, Div. F § 6002.
[6] 89 Fed. Reg. 65242, 65248.
[7] ABA Letter to FinCEN on its Notice of Proposed Rulemaking on Anti-Money Laundering and Countering the Financing of Terrorism Programs, 89 Fed. Reg. 55428 (July 3, 2024); Docket Number FINCEN–2024– 0013; RIN 1506-AB52 (Sept. 3, 2024); https://www.aba.com/advocacy/policy-analysis/letter-to-fincen-on-aml-nprm.
[8] 89 Fed. Reg. 65242, 65246 (emphasis added).
[9] 31 U.S.C. § 5318(h)(2)(B)(iv)(II) (emphasis added).
[10] 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)

Agencies' objective to encourage dynamic and responsive illicit finance threat detection. This formal risk assessment process will not result in an agile, constantly evolving assessment that creates an up-to-date snapshot of the evolving threat environment;

- 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 suspicious activity reporting (SAR) 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 government may have about illicit activity. Updating outdated currency transaction reporting (CTR) rules would allow to banks to focus resources on actual and emerging threats, and away from collecting, documenting, and reporting non-suspicious currency transactions.[11] 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;
- 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; and
- Allow banks two years to implement these changes, by establishing an effective date of two years from the issuance of the final rule.

In addition to these five primary recommendations, as discussed further in our letter to FinCEN,[12] which we also attach and incorporate by reference, we have three additional requests of the Agencies discussed below:

First, as a general principle, all BSA program rule requirements and supervisory expectations for banks should not just be consistent, but identical. We recognize the Agencies have independent

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https://www.federalregister.gov/documents/2024/07/03/2024-14414/anti-money-laundering-and-countering-the-financing-of-terrorism-programs (emphasis added).

[11] *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.").

[12] ABA Letter to FinCEN on its Notice of Proposed Rulemaking on Anti-Money Laundering and Countering the Financing of Terrorism Programs, 89 Fed. Reg. 55428 (July 3, 2024); Docket Number FINCEN–2024– 0013; RIN 1506-AB52 (Sept. 3, 2024); https://www.aba.com/advocacy/policy-analysis/letter-to-fincen-on-aml-nprm.

authority to prescribe BSA compliance procedures separate and apart from the authorities delegated to FinCEN,[13] but we believe it essential that the Agencies and FinCEN speak with one voice in the exercise of these independent authorities. The Agencies and FinCEN should collectively establish one set of BSA-based regulatory standards and supervisory expectations for banks. We appreciate the Agencies' decision to amend their respective rules to adopt much of the identical language as FinCEN's proposed program rule.[14] We also support the Agencies' decision to formally incorporate customer due diligence rules as a required component of the Agencies' AML/CFT program rule requirements to "eliminate confusion for banks concerning the differences with FinCEN's AML/CFT program rule."[15] However, even minor remaining inconsistencies between the Agencies BSA rules and those promulgated by FinCEN (applicable to the banks the Agencies regulate)[16] add to the confusion and burden the Agencies seek to avoid.[17] To that end, we request the Agencies review and resolve the remaining discrepancies between their BSA rules and FinCEN's, as well as review and consider ABA's September 3, 2024 comment letter to FinCEN regarding its program rule NPRM.[18] In addition, to avoid examiner confusion, we request the Federal Financial Institutions Examination Council's BSA/AML Manual[19] to be updated in a timely manner, reinforcing these requirements and expectations, and ensure that examiners are effectively trained on these requirements.

Second, we request the Agencies unequivocally release banks from any requirement or supervisory expectation to establish a single written risk assessment document solely to comply with this revised rule. Effectively reinforcing the "risk-based" approach intended by Congress[20] means not just explicitly ensuring that banks allocate greater compliance resources to higher-risk customers

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[13] *Id.* ("The Agencies have independent authority to prescribe regulations requiring banks to establish and maintain procedures reasonably designed to assure and monitor the compliance of banks with the requirements of subchapter II of chapter 53 of title 31, under 12 U.S.C. 1818(s) and 1786(q), and are proposing to amend their rules concurrently with FinCEN. The intent of the Agencies is to have their program requirements for banks remain consistent with those imposed by FinCEN.")

[14] For example, Agencies currently require a bank's BSA compliance program to be in writing, approved by the board of directors, and "noted" or "reflected" "in the minutes." *See e.g.*, 12 C.F.R. § 208.63(b)(1); 12 C.F.R. § 326.8(b)(1); 12 C.F.R. § 21.21(c)(1). With Agencies' proposed change, this particularized requirement that differs from FinCEN's rule would be eliminated.

[15] 89 Fed. Reg. 65242, 65250.

[16] For example, FinCEN's proposed § 1020.210(b) states that the documentation and approval of a bank's AML/CFT compliance program by its board of directors or equivalent governing body "must be made available to FinCEN or its designee upon request." This is not a requirement included or referenced in the rules proposed by OCC (*see* 12 C.F.R. § 21.21(c) at 89 Fed. Reg. 65242, 65260), FRB (*see* 12 C.F.R. § 208.63(c) at 89 Fed. Reg. 65242, 65261), or the FDIC (*see* 12 C.F.R. § 326.8(c) at 89 Fed. Reg. 65242, 65262).

[17] As one example of confusion that can result from different standards, consider SAR filing standards. Although banks' requirement to file suspicious activity reports is established by separate BSA-based rules promulgated individually by FinCEN and the Agencies, the Agencies' proposed program rule NPRM requires banks to consider the BSA reports they file. The Agencies' SAR filing standards include a $25,000 filing threshold (12 C.F.R. § 21.11 and 12 C.F.R. § 163.180 (OCC); 12 C.F.R. § 208.62, 211.5(k), 211.24(f), and 225.4(f) (FRB); 12 C.F.R. § 353 (FDIC)) that does not appear in FinCEN's SAR filing regulation applicable to banks (31 C.F.R. § 1020.320), even though the Agencies direct banks to file SARs with FinCEN, using FinCEN's form.

[18] ABA Letter to FinCEN on its Notice of Proposed Rulemaking on Anti-Money Laundering and Countering the Financing of Terrorism Programs, 89 Fed. Reg. 55428 (July 3, 2024); Docket Number FINCEN–2024– 0013; RIN 1506-AB52 (Sept. 3, 2024); https://www.aba.com/advocacy/policy-analysis/letter-to-fincen-on-aml-nprm.

[19] FFIEC's BSA/AML Manual; https://bsaaml.ffiec.gov/manual/BSAAMLRiskAssessment/01_ep.

[20] S*ee* AMLA, Public Law 116-283, Div. F § 6002.

and activities and away from lower-risk customers and activities.[21] It also means relieving banks of an obligation to generate counterproductive and burdensome paperwork. We anticipate the Agencies agree that banks should not be forced to divert compliance resources into generating redundant and duplicative documentation. As the Agencies note, the intention of the rule is to permit a bank to "retain flexibility in how it would document the results of its risk assessment process. As proposed, *banks would not be required to establish a single, consolidated risk assessment document solely to comply with the proposed rule*."[22] However, without stating that in the regulatory text, we are concerned this could become a supervisory expectation. After all, it is not clear how a bank would adequately show and document to an examiner that the bank's "existing risk assessment processes"[23] already include consideration of all the newly mandatory inputs, including: 1) the eight AML/CFT Priorities, 2) the bank's specific illicit finance activity risks based on prescribed categories, and 3) the banks' full range of filed BSA reports.[24] Banks need a clear statement confirming that a single, consolidated risk assessment document will not be a requirement or expectation. The Agencies could further assist banks by providing specific examples of approaches and methods that meet regulator and examiner expectations, while not wasting bank resources on unnecessary documentation and paperwork.

Third, we request that the Agencies provide additional specific and clear indicia of ways a bank can reasonably meet the new program rule requirements. We commend the Agencies for providing some examples of supervisory expectations regarding a "qualified AML/CFT officer." However, banks need additional guidance from the Agencies. Without creating counterproductive and inflexible requirements, it would help banks for Agencies to list indicia of relevant job responsibilities the Agencies expect to see —for example clarifying that a qualified AML/CFT officer should be responsible for directly briefing the bank's board of directors.

At the same time, we are concerned about the statement that "additional job duties or conflicting responsibilities" may "adversely impact the officer's ability to effectively coordinate and monitor day-to-day AML/CFT compliance."[25] It is not unusual for community bank BSA compliance officers to have additional responsibilities. It would be far more productive for regulators to provide examples of what they expect AML/CFT compliance officers to accomplish in their roles, rather than issuing a blanket warning against a very common practice among community banks.

Similarly, when addressing the requirements of section 6101(b)(2)(C) of the AMLA, the Agencies already explicitly recognize that "banks may currently have AML/CFT staff and operations outside the United States" or relationships with third-party providers outside the United States.[26] The Agencies' program rule and guidance can and should clarify that permissible operations can be conducted outside the United States consistent with this understanding and the AMLA.

We appreciate the opportunity to comment on the Agencies' proposed reforms to banks' program rule obligations. We stand ready to help the Agencies make the improvements necessary to achieve

[21] 89 Fed. Reg. 65242, 65245.
[22] *Id.* at 65246.
[23] *Id.* at 65247.
[24] *Id.* at 65246.
[25] *Id.* at 65249.
[26] *Id.* at 65251.

the important reforms Congress intended. If you have any questions, please contact Heather Trew at (202) 663-5151 or htrew@aba.com.

Sincerely,

s//Heather Trew
Heather Trew
Senior Vice President & Counsel
Bank Secrecy Act, Anti-Money Laundering, Sanctions
Regulatory Compliance and Policy