American Bankers Association
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July 19, 2019

The Honorable Thomas Cotton
326 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Mark Warner
703 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Mike Rounds
502 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Doug Jones
330 Hart Senate Office Building
Washington, D.C. 20510

RE: ''Improving Laundering Laws and Increasing Comprehensive Information Tracking of Criminal Activity in Shell Holdings Act'' or the Illicit Cash Act

Dear Senators Cotton, Warner, Rounds, and Jones:

The American Bankers Association (ABA) appreciates the opportunity to comment on the draft legislation known as the Illicit Cash Act. ABA is the voice of the nation's $17 trillion banking industry, which is composed of small, midsize, regional and large banks that together employ more than 2 million people, safeguard $13 trillion in deposits, and extend nearly $10 trillion in loans. For many years, ABA has worked diligently to help make the United States regime to combat money laundering and terrorist financing more effective and efficient. ABA has served as a member of the Treasury Department's Bank Secrecy Act Advisory Group (BSAAG) since its founding and for nearly 30 years, in conjunction with the American Bar Association, has offered one of the largest anti-money laundering conferences in the United States.

ABA believes that the draft legislation is a step in the right direction to make our anti-money laundering/combating the financing of terrorism (AML/CFT) more efficient. ABA has long advocated steps that would improve communications and feedback from law enforcement, and the bill includes several steps that would do that. ABA also supports provisions in the draft that would adapt new technologies to combat money laundering and terrorism. And finally, the draft bill would include a registry for beneficial owners that would be far more comprehensive, effective, and efficient than relying on individual financial institutions to collect the information and have it available for law enforcement when needed.

Basically, the draft Illicit Cash Act is designed to improve coordination, establish beneficial ownership reporting, modernize AML/CFT laws to respond to new threats, encourage technological innovation and reinforce the risk-based approach. ABA supports these efforts but has the following comments on provisions of the bill that we believe would help improve the final bill.

Title I – Strengthening the Ability of FinCEN to Determine & Implement AML policy
Requires FinCEN and the prudential regulators to take a variety of steps when formulating AML/CFT rules, steps which ABA has emphasized for a long time and which we support, such as recognizing that financial institutions spend private dollars for public and private benefit, that financial inclusion is a policy goal, that privacy must be considered when accessing personal information, and that programs must be risk-based.

Other steps in Title I that ABA supports:

- FinCEN must establish annual examination and supervision priorities, communicate those priorities regularly to prudential regulators and financial institutions, and give and receive feedback from financial institutions.
- FinCEN must maintain an emerging technologies team to encourage the development and application of technology to combat money laundering and terrorist financing.
- Treasury and FinCEN must establish and make public annually the priorities for AML/CFT, a step that ABA has long advocated, and these priorities will become the basis for BSA exams.

Title II – Improving AML/CFT Communication, Oversight & Processes

- §201 requires the Attorney General to submit an annual report on the use of Bank Secrecy Act (BSA) data. ABA has long advocated for this type of feedback and would welcome the information, particularly the description of emerging trends. This type of information helps banks focus limited resources to areas where the information will be most helpful for law enforcement.
- §202 requires FinCEN staff to periodically meet with a financial institution's BSA officer to discuss Suspicious Activity Reports (SARs) filed by that institution. This is a step that is consistent with our long-standing recommendations to provide better feedback to financial institutions on SARs. Given that there are nearly 5,000 commercial banks in the United States, it would be helpful for the regulatory process to establish appropriate procedures to avoid overwhelming FinCEN or financial institutions, but clearly, providing this type of feedback is critically important and long overdue.
- §203 requires a formal interagency review of the Currency Transaction Report (CTR) and SAR filing requirements to reduce unnecessary burden, including whether thresholds can be changed, whether fields designated as critical are appropriate, the increased use of exemptions. ABA has long advocated steps that would improve this process, particularly through a closer examination of which data fields in CTR and SAR filings are most useful to law enforcement. It is also consistent with an existing recommendation created by ABA to allow banks to exempt seasoned customers, or those customers that the bank knows do not present a threat and where filing a CTR makes no sense. It is worth noting that, to some extent, FinCEN is already undertaking some of these steps but codifying it would give it the extra emphasis that has, to date, been lacking.
- §204, in addition to the preceding review, requires Treasury to conduct a detailed study of CTR and SAR thresholds, specifically considering the effect on law enforcement from adjusting the thresholds, the costs incurred or saved by financial institutions, and effects

on privacy. ABA has encouraged FinCEN to take many of these steps, as detailed in our July 31, 2017 letter to Treasury. The current CTR threshold was established by the U.S. Treasury in 1970 but has not changed since. While law enforcement argues that the use of cash in today's society is drastically different than it was in a world where cash was more commonly used in transactions, there is clearly a need to re-examine the CTR threshold after nearly 50 years. While law enforcement and FinCEN suggest there would be a loss of data through an arbitrary increase to the threshold, nothing identifies which data fields are critical, how CTR information is being used, or which elements of the CTR are particularly helpful to investigations and prosecutions. It is also worth noting that when the CTR was adopted in 1970, it served as the primary mechanism for identifying illicit activity. That focus shifted to the SAR in the early 1990s and the prudential regulators have identified the SAR as the foundation of the AML/CFT regime, while the CTR appears to be used as a supplementary tool for investigations and prosecutions. If the CTR continues to be used, then more granular feedback on how it is used is needed.

- §205 requires Treasury and the prudential regulators, in consultation with the Director of National Intelligence and law enforcement to conduct a review process similar to that required of the prudential regulators under the Economic Growth and Paperwork Reduction Act of 1996 (EGRPRA). ABA supports this step as one that would help improve the regulatory process. While we have regularly submitted comments on BSA reform to the prudential regulators during the EGRPRA review process, and the prudential regulators have passed those comments on to FinCEN, requiring FinCEN to conduct a similar review would give it added weight.

Title III – Modernization of the System

- The goal of this title is to encourage technological development. FinCEN would be required to examine software and evaluate its effectiveness. FinCEN would have to establish investigative priorities for financial institutions using approved software, identifying low-risk, medium-risk, and high-risk priorities. FinCEN would provide feedback to the vendor providing the software. A financial institution using approved transaction monitoring software would not be subject to transaction monitoring requirements imposed by its prudential supervisor.
- Section 301 (Approved Transaction Monitoring Software) has the potential to create serious problems with AML/CFT efforts and should be removed from the draft. Requiring regulators, especially FinCEN, to approve transaction monitoring applications or, in fact, any software application would delay the implementation of new and promising technologies and would remove any incentive for the industry to try to implement new strategies. In fact, the provision directly countermands and undermines guidance issued by FinCEN and the prudential regulators last December 3 that encourages innovation. More specifically, the provision does not account for current monitoring programs that are on the market today, fails to define the parties involved with software development and their respective responsibilities, does not define what standards constitute "effective," and fails to consider the dynamic nature of the environment and technological development.

- §302 includes a provision on de-identified personal information that would require the CFPB to develop rules identifying what determines when data has been sufficiently removed so a person cannot be re-identified. Since this provision is inconsistent with other provisions in the draft bill that focus specifically on AML/CFT and since there are other efforts underway to protect consumer privacy interests, ABA recommends this section be deleted.
- §303 sets up a process for no-action letters by FinCEN and the prudential regulators to respond to inquiries about the application of the BSA to specific conduct. Similar no-action letters have been used by the securities industry successfully for many years and could also be useful in this context, provided the appropriate regulatory mechanism is put in place to ensure the process works and provides the necessary guidance for the industry. Therefore, the regulatory structure will be critical to ensure the program does not fail.
- §304 sets up a system that allows sharing of SARs with foreign branches, subject to certain restrictions for appropriate protections of the information. This is similar to provisions in an AML/CFT reform bill, the COUNTER ACT (H.R. 2514) under consideration in the House of Representatives and is a step that ABA has long supported.

<u>Title IV – Beneficial Ownership Disclosure Requirements</u>

- This title would create a federal registry for beneficial owners. The provisions are very similar to the provisions in the Corporate Transparency Act of 2019 (H.R. 2513) under consideration by the House of Representatives. ABA supports the development of a federal registry that is sufficiently comprehensive to ensure that it covers all appropriate legal entities and creates a simple and straightforward mechanism to ensure the collection of beneficial ownership to meet the needs of law enforcement. While the information should not be available to the public at large, the data in the registry should be easily accessible by law enforcement, prudential regulators and financial institutions.
    - In order for a federal registry to successfully work to alleviate burden and confusion, it is important that the existing FinCEN rule on Customer Due Diligence and beneficial ownership be updated to allow banks to rely on the federal registry to collect information instead of obtaining it directly from customers. The purpose of a federal registry is to provide a reliable source about beneficial owners for law enforcement. Banks were required to collect it when there was no federal registry, but the existence of a federal registry should replace that requirement. Otherwise, unnecessary redundancies and unnecessary burdens will exist by requiring banks to duplicate efforts, diverting resources that banks could better assign to investigating suspicious activity. And, it should be clear that the information obtained from the federal registry satisfies a bank's beneficial ownership requirements. Therefore, ABA recommends that a specific provision be included to: (1) require FinCEN to update their regulation consistent with the Illicit Cash act, (2) provide that the federal registry serves as the source for a financial institution to collect beneficial ownership information, and (3) specify

that when a bank obtains beneficial ownership information from the federal registry, it has met the basic requirements of beneficial ownership.

- There is one provision in the definitions that ABA recommends be revised. As defined, the flexibility allowed to identify beneficial owners would be restricted it to a U.S. passport, an identification document issued by a state, tribal, or local government, a non-expired driver's license issued by a state, or a non-expired foreign passport. The current FinCEN rule on beneficial ownership is more expansive and allows a variety of additional documentary methods as well as non-documentary methods to verify an individual's identity. ABA recommends this provision be changed to parallel the existing flexibility permitted by the FinCEN rule.
- The definitions define beneficial owner as one who exercises substantial control or owns 25% or more of the equity interests of the company, similar to the FinCEN rule; ABA supports this definition.
- The exclusions from the definition of beneficial owner are similar to those in H.R. 2513 and would exclude minor children, nominees, employees acting solely in their employment capacity, those whose only interest is through right of inheritance, and creditors. However, among the exclusions is one that is similar to the House bill that ABA recommends be revised. Excluded would be companies with a presence in the U.S. that employ more than 20 employees and have over $5 million in gross annual receipts. While the goal may be to reduce burden on smaller entities, a goal that ABA supports, ABA is concerned that the exemption is so broad that it would eliminate far too many companies from the registration requirement, undermining the very purpose of the registry. ABA therefore recommends a more narrowly tailored exemption.
- Under the draft, a company would report its beneficial owners at time of formation, but the draft eliminates the annual reporting requirement that is included in the H.R. 2513. ABA supports the elimination of the annual report as a redundancy that is unnecessary and burdensome, since companies would be required to report any changes in beneficial ownership at the time they occur, which is appropriate.
- The bill would then require companies that exist at the time the legislation is adopted to file information about their beneficial owners within the first two years. To ensure that there is not an overwhelming onslaught of filings at one time, ABA recommends that regulations be adopted to apply a rolling registration system so that not all companies try to file at once.
- The information required for covered entities and beneficial owners is more prescriptive than what is required in the FinCEN rule. ABA recommends that the provision be revised to reflect the more flexible approach incorporated into the FinCEN rule.
- Under the draft, beneficial ownership information would be available to local, tribal, state, or federal agencies, law enforcement, and financial institutions. However, financial institutions could access the database only *with the consent of the customer.* ABA recommends that the information be available to financial

institutions without requiring customer consent. Safeguards can be incorporated into any regulations that determine appropriate access but requiring customer consent for financial institutions to access the data seems to be an unnecessary burden.

- A new provision would require financial institutions that become aware of discrepancies in beneficial ownership information to report that to FinCEN and notify the customer about the discrepancy. ABA recommends striking this provision. Under the FinCEN rules and normal BSA compliance procedures, if a financial institution discovers a discrepancy, it must resolve that discrepancy. It might be a simple oversight or coding error that is easily resolved and that would be irrelevant to FinCEN or law enforcement. Or, if the bank does detect something more serious, normal procedures for SAR filings would be sufficient to raise the issue to the attention of the appropriate authorities. Including this provision would not add anything but would become unnecessary red tape.
- Another new provision would require financial institutions to periodically send a customer a list of the beneficial owners on file and ask the customer to verify that the list is accurate. Financial institutions would also be required to inform customers of their obligations to report beneficial ownership information. ABA does not believe this provision adds anything to the process and therefore recommends it be stricken.
- Finally, states would be required to notify filers of their reporting requirements. ABA believes this is helpful and encourages it be retained in the final bill.

Additional Suggestions

In addition to the current list of recommendations, ABA would like to offer additional recommendations for your consideration.

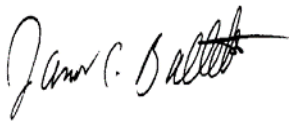
- The USA PATRIOT Act adopted two critical provisions that were designed to facilitate information sharing between law enforcement and the financial sector. The first, §314(a), was designed to facilitate information sharing between law enforcement and financial institutions but, in operation, it has been primarily used for financial institutions to share information with law enforcement and the two-way communications has never developed as envisioned by Congress in 2001. Greater communications from law enforcement to financial institutions is needed to help financial institutions focus resources, and an in-depth study of ways this could be accomplished would help identify how to make the provision work as Congress intended when it was adopted.
- The second provision that was included in the USA PATRIOT Act, §314(b), is designed to facilitate information sharing between financial institutions and yet it has been restricted in its usefulness. FinCEN and law enforcement report that when financial institutions do share information, it produces better information for law enforcement. Currently, information sharing is limited to sharing information on significant cases of money laundering or terrorist financing, but ABA recommends that its scope be expanded in two ways: (1) expand the scope of activities covered to include any of the

existing predicate offenses for money laundering; (2) expand the scope of eligible financial institutions to include all those currently subject to SAR reporting.

- Currently, the prudential regulators apply expectations that banks validate the models used to comply with AML/CFT expectations and yet there are no clear guidelines on what banks are expected to do to validate those models. The current model validation process inhibits the agility necessary to adjust models to identify emerging typologies, which change rapidly. Greater flexibility is needed to permit financial institutions to develop and refine models to account for the current AML/CFT environment.
- One of the most frequently reported suspicious activities involves structuring and yet FinCEN reports this is most often accompanied by a report of another activity. Similarly, bankers tell us that examiners will review account transaction history and point to a series of transactions below the threshold for filing a CTR and require the bank to report structuring even when the bank knows it is not. It would be useful to have GAO examine the structuring reports that have been filed, with consideration to developing a short form report with basic information when structuring is suspected. And, if a bank determines that the activity is not structuring, examiners should not be able to second guess that determination unless the bank has clearly acted unreasonably.
- When a financial institution is cited for any deficiency in an AML/CFT compliance program, the examiner should be explicitly required to explain how the deficiency undermines the goal of AML/CFT. There is a need to distinguish technical violations from serious violations and require an explicit connection between AML/CFT goals and the violation would help; in fact, it would be a benefit if examiners were required to cite to the specific law or regulation associated with the deficiency.

Thank you for the opportunity to comment on this important step to reforming the efficiency and effectiveness of the AML/CFT system. Clearly, the time is ripe to bring the current system, which has not fundamentally changed since the Bank Secrecy Act was adopted in 1970. Although there are other changes that would prove beneficial, ABA believes that the provisions in this particular draft are a good start. We look forward to continuing to work with Congress to improve the AML/CFT program.

Sincerely,



James C. Ballentine

cc: Chairman Mike Crapo, Senate Banking, Housing and Urban Affairs Committee
Ranking Member Sherrod Brown, Senate Banking, Housing and Urban Affairs Committee