American Bankers Association

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Via electronic submission to:
www.regulations.gov

The Honorable Steven T. Mnuchin
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Re: Request for Information on Department of the Treasury Regulations that Can Be Eliminated, Modified, or Streamlined

Dear Secretary Mnuchin:

The American Bankers Association (ABA)[1] appreciates the opportunity to comment on the Treasury initiative to assess ways it might eliminate, modify or streamline its regulations to reduce burden.[2] This initiative is in accordance with Executive Orders issued earlier this year which have the goal of reducing regulatory burden and stimulating economic growth. ABA's comments will focus on the rules and regulations of two agencies within Treasury, the Financial Crimes Enforcement Network (FinCEN) and the Office of Foreign Asset Controls (OFAC).

The banking industry is committed to supporting national and international efforts on anti-money laundering and countering the financing of terrorism (AML/CFT) 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 limited resources are used effectively and efficiently. We welcome the opportunity to identify outdated and unnecessary elements of the current regulatory framework. 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on AML/CFT compliance programs – and the regulatory and supervisory structure that oversees these programs – is outdated and ill-suited for identifying and preventing 21st Century criminal activity and terrorist financing.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. Our comments will identify regulatory, and in some cases statutory, changes that ABA believes are necessary to (1) recalibrate the role the financial sector should serve; (2) eliminate unnecessary reporting on routine and legal transactions and focus on producing information that is most helpful to law enforcement; and (3) improve the quality and transparency of feedback by law enforcement to financial institutions to enhance the value of information provided to law enforcement.

[1] The American Bankers Association is the voice of the nation's $17 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $13 trillion in deposits and extend more than $9 trillion in loans.
[2] Review of Regulations, 82 Fed. Reg. 27217 (June 14, 2017).

I. *Summary of Comment*

Shortly before the onset of the financial crisis, ABA released a report that reflected the efforts of a panel of leading Bank Secrecy Act (BSA) experts who were asked to take a fresh look at the BSA system and develop recommendations about how to reform the program to make it more effective, restoring the partnership envisioned at the time of the enactment of the BSA. That report, *A New Framework for Partnership, Recommendations for Bank Secrecy Act/Anti-Money Laundering Reform*,[3] made five core recommendations, which we believe should still serve as the foundation for the review that Treasury is undertaking. Those recommendations are:

1. Create an independent BSA Gatekeeper to oversee and coordinate the BSA regime and to promote system integrity and efficiency;
2. Take a priority-focused approach to compliance;
3. Increase the quality of feedback and transparency;
4. Streamline reporting and validate its utility; and
5. Refrain from criminal sanctions that impose administrative compliance standards and redefine procedures for taking criminal actions against banks.

Each of these recommendations remains relevant today. There is need for coordinated effort among regulators, law enforcement and the private sector towards combatting money laundering and terrorist financing with a single authority that has final authority to determine appropriate steps for compliance. In the current regime, that coordination is lacking; indeed, not only the federal government, but individual states have started to define BSA/AML compliance obligations. The blurred and confusing overlap is counterproductive to combatting financial crimes and terrorist financing. Therefore, ABA continues to believe that the first step in reform efforts is to identify a final arbiter to oversee and coordinate the BSA regime. As discussed more fully below, one possible solution would be to create an independent BSA Ombudsman to serve in this capacity.

Second, BSA/AML regulation should encourage a priority-focused approach to compliance intended to identify and address the greatest risks to the nation and the nation's banks. Bankers must be allowed to develop their own programs to manage risks, based on their unique understanding of their own markets, customers, geographies and circumstances. And, examiners should not second-guess bankers or substitute their judgment but should assess whether the process a bank uses to assess risks is appropriate and whether it has instituted controls and systems that will address those risks.

To that end, the government must identify the key risks of money laundering and terrorist financing. In June 2015, the Treasury Department released two critical reports, the *National Money Laundering Risk Assessment* and the *National Terrorist Financing Risk Assessment.*[4] They built on a Treasury report issued ten years earlier which described the money laundering and terrorist financing methods used in the United States, the risks that these activities pose to the U.S. financial system and national security, and the status of current efforts to combat these

[3] American Bankers Association, *A New Framework for Partnership, Recommendations for Bank Secrecy Act/Anti-Money Laundering Reform,* [hereinafter Recommendations for BSA Reform] available at http://www.aba.com/Compliance/Pages/CCBSA.aspx.

[4] U.S. DEPARTMENT OF THE TREASURY, REPORTS IDENTIFY KEY ILLICIT FINANCE CONCERNS TO THE UNITED STATES; ENABLE THE PUBLIC AND PRIVATE SECTORS TO MORE EFFECTIVELY MANAGE AND COMBAT ILLICIT FINANCE RISKS (2015), available at: https://www.treasury.gov/press-center/press-releases/Pages/jl0072.aspx

methods. [5] ABA supports and encourages Treasury to continue updating these reports more frequently than every ten years.

Third, the need to increase the quality of feedback from law enforcement remains essential. The ability of banks to design and implement effective BSA programs is enhanced if banks understand which reports have been useful to law enforcement. In addition, information from law enforcement of information about indicators of possible suspicious activity helps financial institutions focus scarce resources on the detection and deterrence of criminal activity. For many years, FinCEN published a *SAR Activity Review* that provided that type of feedback, and while limited in scope, it was a helpful publication that the industry would like to see revived.[6] As explained in the *Framework*, "[T]hese undertakings establish a foundation for better trust and partnership and will enable bank regulatory agencies, law enforcement, and the banking industry to strengthen the interdependence upon which the BSA regime depends."[7]

Along with the need to improve communication from law enforcement to the regulated community is a need to facilitate communications within and among different financial institutions. Current barriers to communication and sharing information, including suspicious activity reports (SARs), hinder AML/CFT efforts. While privacy and data security must be protected, greater latitude is needed for information sharing.

The fourth recommendation of the *Framework,* the need to streamline and validate the utility of reporting, also applies today. Far too much information submitted by financial institutions is never used or reviewed. ABA recommends efforts be regularly 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 enforcement to refocus resources more effectively.

Additionally, an important step to move away from the current compliance-regime mentality would be to assess penalties for non-compliance only in connection with violations that abetted criminal activity. The system needs to be recalibrated so that "the punishment fits the crime." In the current environment, bankers report examiners apply a near-zero tolerance level for error that emphasizes recordkeeping and that elevates process over performance. For example, a penalty should not be imposed for the failure to file a single SAR unless the omission was egregious or connected with a crime. This emphasis on process, coupled with the belief that bankers will be held responsible for identifying each and every suspicious transaction of a customer, has encouraged "de-risking" that works to the disadvantage of financial institutions, their customers, and law enforcement.

Building on this foundation*,* ABA recommends the following.

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[5] BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, U.S. DEPARTMENT OF HOMELAND SECURITY, U.S. DEPARTMENT OF JUSTICE, U.S. DEPARTMENT OF THE TREASURY & UNITED STATES POSTAL SERVICE, U. S. MONEY LAUNDERING THREAT ASSESSMENT (2005), available at https://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/mlta.pdf
[6] When it was discontinued, there was virtually no discussion about its elimination. The last issue was published in May 2013. *See,* FINANCIAL CRIMES ENFORCEMENT NETWORK, SAR ACTIVITY REVIEW – TRENDS,TIPS & ISSUES, available at: https://www.fincen.gov/sar-activity-review-trends-tips-issues
[7] Recommendations for BSA/AML Reform, supra note 3 at 2.

II. *General Principles for Reform*

a) Return to Basics

As enacted in 1970, the BSA was intended to require that banks 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 when such anomalies were noticed, call them to the attention of law enforcement. ABA is concerned that regulatory requirements and supervisory expectations increasingly require banks to investigate and determine the specific criminal activity or crime that has occurred, well outside of banks' expertise. Banks should not be expected to serve as law enforcement agents. Law enforcement agencies are far better equipped with training and resources to conduct investigations.

Instead of notifying law enforcement as quickly as possible, financial institutions are expected to investigate, analyze, and collect additional information – in other words, do the initial legwork that should be left to law enforcement agencies. The time it takes financial institutions to conduct investigations also delays getting information into the hands of law enforcement.

b) Promote Consistency

One complaint that bankers often raise is the "creativity" applied by examiners who impose expectations that are nowhere to be found in regulatory mandates or guidelines. This regulatory creep not only adds burden but is completely *ad hoc* and counter-productive because bankers do not know what to expect. Examiners should focus on reviewing the processes that banks adopt to meet their AML/CFT requirements rather than devote attention to second-guessing a financial institution's decisions.

Efforts to combat such arbitrariness and inconsistent approaches to AML/CFT compliance is one reason the federal banking agencies, working in collaboration with Treasury, law enforcement, and the private sector, created the Federal Financial Institutions Examination Council (FFIEC) BSA/AML Examination Manual. When the manual was first introduced in 2005, it was hailed as a model of interagency cooperation. It also established the critical foundation for a uniform national approach to combat money laundering in the banking sector. When the manual was being introduced, the federal banking agencies conducted a series of training sessions around the United States for both bankers and examiners. Although it was a major effort, it ensured that bankers and examiners worked from a common set of understandings on the regulatory expectations for BSA compliance. Equally important, holding a series of uniform training sessions insured the same message was delivered by all agencies and across regions within agencies.

Since then, disparities have crept into the system. In different regions, among different agencies, and by different examiners a variety of standards are applied, even though they are based on one single legal regime. For example, different agencies and examiners might apply varying expectations for the documentation needed to validate a decision not to file a SAR.[8]

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[8] Another example of this disparity among regulators is the Office of the Comptroller of the Currency's (OCC) Money Laundering Risk Assessment System (MLRS). Bankers find the exercise a time-consuming effort that does little to help the bank or achieve AML/CFT goals. No other agency has applied a similar tool. This is a regulatory requirement that should be seriously considered for elimination as an unnecessary bureaucratic exercise that diverts resources from productive activity.

To help eliminate the inconsistencies that have crept into the examination process, ABA urges FinCEN and the banking agencies to conduct uniform training for bankers and examiners modeled on the 2005 training.[9]

c) Create an Independent Ombudsman

In the 2008 *Framework*, ABA suggested that it would help to have a "gatekeeper" to manage all the BSA data produced by the financial sector. As with any risk-based system, the keys to success rely on judgment calls based on bank knowledge of its customers, its products and services, the markets it serves, and its own strengths. However, in making those judgment calls, it would be extremely useful for the private sector to have access to a resource that could answer questions about matters not directly addressed in existing guidance or regulation.

For example, as bankers work to implement the new Customer Due Diligence rule, a number of questions have arisen such as how to handle sub-accounts, how to consider beneficial ownership information in the context of sanctions programs, and how frequently to update beneficial ownership information. It also would be extremely helpful to have one source across the agencies to turn to for that guidance. In other words, the ombudsman could serve as the knowledge-base for AML/CFT issues.

Another benefit from such a resource is that it would be a single source to collect all the questions being raised by both bankers and examiners. The ombudsman could then identify issues that require additional guidance from regulators and could also post the questions and answers on a website where they are accessible to all as a resource.

The ombudsman also could serve as a resource to settle disputes between examiners and bankers and between agencies. Having an independent expert to address these situations would go a long way to eliminate the disparities that have crept into the system in the last twelve years while also expediting the flow of relevant and useful information to enforcement agencies to fight crime.

III. Specific Recommendations

a) Streamline CIP and CDD Mandates

From the moment a customer or potential customer walks through the door, AML/CFT requirements are triggered. Between the requirements under the Customer Identification Program (CIP) and the new Customer Due Diligence (CDD) expectations, the process of establishing account relationships has been unduly complex. ABA urges Treasury to work with industry to simplify the process; this kind of collaboration worked well when the CIP rules were adopted in 2002 but over time, unnecessary complications have crept into the process without careful thought. Moreover, with new technologies coming into play and customer demand for quick access to financial services, what worked in 2002 needs updating. The entire process of customer verification should be risk-based with latitude granted to banks to adjust their risk assessment once accounts have been opened and operating instead of a one-size-fits-all approach. And, as discussed more fully in the next section, bankers should be allowed to rely on trusted third-parties to conduct some of the elements associated with understanding an individual customer.

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[9] We have made this suggestion to FinCEN and the banking agencies on other occasions, and FinCEN officials have been receptive, but the training has never been carried out. *Id*.

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

One area where additional steps could be taken to improve the process and streamline regulatory mandates for customer identification, including customer due diligence for legal entity customers, would be to clarify the extent to which a financial institution can rely on the customer due diligence already conducted by another regulated financial institution.

With the recent announcement by SWIFT[10] of a registry that includes much of those data, ability to rely on the initial vetting at 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 Financial Action Task Force (FATF) recommendations approve of reliance in appropriate circumstances.[11] Permitting financial institutions to take advantage of reliance eliminates redundancy in vetting customers.

Therefore, the first step is FinCEN issuing 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.[12]

A critical part of these efforts would be support for third-party "know your customer" (KYC) utilities. These third party utilities would collect necessary identification information from a legal entity and make it available to any financial institution with which the legal entity seeks to do business. The concept is similar to credit bureaus maintaining information on the creditworthiness of customers in one location. SWIFT recently introduced a KYC utility, and there are other companies that are investigating and testing protocols which would serve this

[10] 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), available at: https://www.swift.com/news-events/press-releases/swift-extends-kyc-registry-membership-to-all-supervised-financial-institutions

[11] Financial Action Task Force, INTERNATIONAL STANDARDS ON COMBATING MONEY LAUNDERING AND THE FINANCING OF TERRORISM & PROLIFERATION (2017), available at: http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf

[12] 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.

purpose. ABA urges Treasury to support these efforts and help eliminate resistance on the part of the banking regulators.[13]

c) Offer guidance on the new Customer Due Diligence Rule

To address criticisms from international authorities, along with growing concerns about the use of shell companies to hide nefarious transactions, and after extensive discussions with law enforcement, regulators and the private sector, FinCEN issued a new rule that will require financial institutions to obtain information about the owners and controllers of their legal entity customers.[14]

Additional guidance is needed to answer the many questions raised by the financial sector as they work to implement the requirement. While FinCEN has agreed to issue additional answers to frequently asked questions, only one basic set of FAQs were issued shortly after the final rule was published. More is needed. At the same time, the federal banking agencies have not issued examination procedures, depriving the industry of another source of guidance. ABA urges both FinCEN and the banking regulators to issue the needed guidance to help banks meet the requirements.[15]

One of the fundamental flaws with the customer due diligence rule is that it places responsibility for identifying the beneficial owners of a legal entity on the financial sector. As we pointed out in our comments when the rule was being considered, there are a number of issues with this approach that do not solve the fundamental problem. First, a financial institution has no way to verify the information provided by a legal entity customer, since there are no registries or databases that a financial institution can consult. One way to address this would be to permit reliance on the types of utilities discussed above. Second, even if the information provided is accurate, the financial institution has no way to know if and when it changes unless informed by the customer. ABA believes that since it is the government that creates these entities, the government bears a responsibility to oversee them.

A preliminary solution is the reliance on utilities, discussed above. However, there is a need for a more long-term and reliable solution. One approach that FinCEN and Treasury advanced as a companion to the issuance of the final rule is a database established and maintained by FinCEN. It is important to have a readily accessible database for law enforcement. Requiring the financial sector to collect the data on beneficial owners is only a half-step that does not fully address the criticisms from international authorities but which will be a costly proposition for the industry. Therefore, it is important that Treasury actively support efforts to develop government registries for these government-created entities.

d) 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

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[13] There is no good explanation for why each financial institution must replicate the effort. It is almost as though each time someone wanted to use a bridge to cross a river, the rules said that even though that's a nice bridge, well-constructed and properly maintained, you must build your own bridge for the crossing.

[14] Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. 29398 (May 11, 2016) (to be codified at 31 C.F.R. pts. 1010, 1020, 1023, 1024 & 1026)

[15] In today's environment, where terrorists and criminals, particularly cybercriminals, can move with incredible speed, regulatory delays for providing guidance and information to the industry becomes a significant handicap for national security. This is another supporting argument for a single source or ombudsman who can quickly and expediently provide answers to the financial sector.

transaction or series of transactions is inconsistent with the customer's business and normal activities.[16] 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[17] . 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.[18]

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 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.

This is an area where improvements are needed to ensure consistency among examiners. As noted above, when the BSA/AML exam manual was introduced in 2005, regional training programs were conducted on an interagency basis for both examiners and bankers to ensure consistency in the use and application of the manual. In the intervening ten years, there has been a great deal of personnel turnover at both the Agencies and the banks. We encourage FinCEN and the banking agencies to conduct a similar training exercise to ensure consistency and eliminate misperceptions that have crept into the use of the risk assessment process.

Another area to address with respect to the risk assessment process, and to AML/CFT compliance more broadly, is the interplay between compliance and technology. As compliance mandates have become increasingly demanding, bankers report that examiners "recommend" adoption of new technologies and software packages to aid compliance. The first step, then, would be to have FinCEN validate that banks make their own determinations on using

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[16] 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

[17] 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.

[18] 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 SECRECTY ACT ANTI-MONEY LAUNDERING EXAMINATION MANUAL, available at: https://www.ffiec.gov/bsa_aml_infobase/pages_manual/manual_online.htm

technology to meet compliance needs.[19] The second step, discussed below, is to provide greater clarity about how banks should determine that technologies which have been adopted properly serve the needs of compliance.

In addition, examiners expect bankers to validate the models and the application of the models, often at considerable expense.[20] Despite requests from ABA to provide guidance on the model validation process over the past four years, there has been little or no guidance from the federal banking regulators or FinCEN. Accordingly, an explicit and well-articulated guidance on the use of models and the expectations to validate those models is needed, with careful consideration as to how that helps achieve the mission of combatting money laundering and terrorist financing.[21]

There are some valuable developments in technology, both to help banks serve their customers and to help with their compliance efforts. As technology develops, it can certainly be applied to AML/CFT efforts both to reduce burden and to help bankers make more efficient use of limited resources. However, little thought appears to be given to how these changes will impact or affect AML/CFT. There is a definite need for consultation between FinCEN, banking regulators, law enforcement, and the private sector to explore how technology can be used and to identify where guidance is needed. For example, one option worth exploring that has shown promise in other areas would be if Treasury and FinCEN encouraged individual institutions to explore possible solutions in a risk-free environment, sometimes called a "sandbox."

e) *Eliminate unnecessary Currency Transaction Reporting*

When the BSA was adopted to fight financial crime in 1970, the original focus was the Currency Transaction Report (CTR). The concept was that following the money trail would lead to the criminal, and that there was a significant physical bottleneck problem for criminals seeking to move cash. At that time, 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 approximately $64,000 today. Moreover, cash is much less of the bottleneck it once was for criminals seeking to move financial assets. ABA recommends Treasury give immediate consideration to revising the threshold for CTR filings and evaluate where it should be set in today's environment, after consultation with the financial sector, law enforcement, and regulatory agencies.

In part, past efforts to revise the threshold were attempts to address the number and volume of CTRs filed annually.[22] Unfortunately, FinCEN no longer publishes the statistics on the number of CTR filings in a format that is readily available.[23] However, the volume is significant, which

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[19] Regulators should provide information about different technologies and how they can be used for compliance but not mandate the use of any one technology for compliance.
[20] For example, one community bank with assets of just under $500 million reports that it must hire an outside consultant to conduct this audit annually at a cost of $20,000 to $30,000. Other banks repeat similar costs.
[21] Since Treasury has been given the lead responsibility on AML/CFT issues, it would be appropriate as well as help ensure consistency, for Treasury to coordinate better understanding about how technology can be used, how it should be applied, and what steps are needed to ensure that it is working properly.
[22] 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.
[23] 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.

raises two questions. First, is all that information helpful or appropriate? Because the Suspicious Activity Report is now the primary focus of the BSA database, is the CTR still a useful tool, or can suspicious cash movements, of whatever quantity, be captured by SAR reporting while avoiding useless reporting of routine cash transactions by law-abiding customers?

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.[24] That 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. That quantity impedes rather than facilitates law enforcement. FinCEN's greatly enhanced data processing systems would suggest an initial, useful step. FinCEN should use those 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 a productive initiative.

More fundamentally, however, serious consideration should be given to the utility of the CTR itself. In 1992, Congress made a significant change to the BSA when it adopted the Suspicious Activity Report (SAR).[25] As noted, that moved the underpinnings for the BSA regime from large cash transactions to suspicious transactions, which certainly comprehends suspicious movements of cash.[26] This raises a question which needs to be carefully discussed: if the real focus is suspicious transactions as reported on the SAR, does the CTR still serve a useful purpose? Indeed, the burden is now shifted to law enforcement to demonstrate clearly the value of the CTR program.

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. Again, any currency transaction that raises significant other questions would certainly come under SAR standards.

f) Eliminate aggregation requirements for transactors

One issue that has created a great deal of problem that FinCEN should address is the expectation that financial institutions aggregate transactions to determine if the CTR threshold has been exceeded in any one day. Frequently, armored carriers and other couriers will deliver cash transactions for a variety of customers. Current rules require the information to be aggregated based on the person delivering the funds but often that leads to awkward situations accumulating irrelevant information on the person making the delivery and unnecessary

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[24] *See, e.g*., Remarks of Jennifer Shasky Calvery, Director, Financial Crimes Enforcement Network, available at: https://www.fincen.gov/news/speeches/remarks-jennifer-shasky-calvery-director-financial-crimes-enforcement-network-10

[25] 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.

[26] As stressed by the federal banking agencies in the latest version of the *FFIEC BSA/AML Examination Manual,* "Suspicious activity reporting forms the cornerstone of the BSA reporting system. It is critical to the United States' ability to utilize financial information to combat terrorism, terrorist financing, money laundering, and other financial crimes. " See Financial Crimes Enforcement Network, FFIEC BSA/AML Exam Manual, November 2014, p. 60

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

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

The Money Laundering Control Act of 1986[27] added the concept of structuring as a criminal offense.[28] 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.[29]

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, which cause 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 to issue guidance (and request comment on it) 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.

h) *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. Again, the activities of this and other customers would still be covered by SAR standards.

Another step to eliminate unnecessary CTR filings would be for FinCEN to create a registry of exempted 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

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[27] 18 U.S. C. §1956 (2016)

[28] Structuring, sometimes called smurfing, is the deliberate effort to keep transactions below the reporting threshold to avoid a CTR.

[29] 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), available at: https://www.treasury.gov/tigta/press/press_tigta-2017-05.htm

financial institutions could rely on the information and treat the entity as exempt from CTR reports.

Along the same lines, and to help combat concerns over “de-risking,” FinCEN should consider a mechanism 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 the ability of financial institutions 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.

i) Streamline suspicious activity reporting and monitoring

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

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.”[30] 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.

In its *2016 Mutual Evaluation Report of the United States*, issued in December 2016,[31] 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. When terrorist activity can move quickly, this imperative becomes increasingly important. The goal is finding the balance between the appropriate level of detail

[30] Federal Financial Institutions Examination Council, BSA/AML Examination Manual, at 71
[31] Financial Action Task Force, United States’ measures to combat money laundering and terrorist financing (2016), available at: http://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-united-states-2016.html

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 Treasury 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, Treasury 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.

j) Clarify SAR safe harbor protections.

Another issue that must be addressed is correcting 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. The statutory language is clear that the safe harbor protection that 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 Treasury about the breadth and extent of the statutory safe harbor could help correct this misunderstanding.

k) Issue additional guidance on expectations for reporting ongoing suspicious activity.

Financial institutions continue to have questions about expectations for reporting ongoing activity after an initial SAR has been filed. Although recent interagency guidance has helped, more clarity – particularly about timing – would be useful.

The issue concerns whether to maintain the ongoing relationship with the customer. For example, for certain types of fraud, the decision to close an account is automatic. Yet in some cases, 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 feedback mechanism from law enforcement is needed to eliminate repetitious filing of SARs on the same activity that provides no useful information.

Therefore, ABA urges Treasury to establish clear guidelines, in consultation with the industry, law enforcement and regulators, on the proper steps to address ongoing activity.

l) Enhance legal certainty regarding SAR sharing.

ABA supports the need for SAR confidentiality and the critical need to protect SAR data. Clearly, keeping SAR information confidential is important for many reasons, such as protecting ongoing investigations and the identity of those filing reports.[32] While much needed flexibility has been introduced in recent years to allow appropriate sharing of SAR information, there are two areas where additional sharing of the actual SAR form would be appropriate and ABA urges Treasury and FinCEN to permit this type of sharing.

First, financial institutions should be given greater latitude to share SARs with affiliates that are part of the same corporate enterprise. There is a growing expectation for financial institutions to manage risk on an enterprise-wide basis, and freedom to share SARs internally is critical to the ability of financial institutions to meet these expectations. Data management systems and centralized filing processes also run into artificial barriers imposed by the current restrictions. ABA believes that the ability to share SARs with affiliates should be similar to the ability to share SARs with home offices.

The industry recognizes that there are certain foreign jurisdictions where it would be counter-productive to share the SAR itself, since the information would then be open to that country's government authorities. However, bankers believe that if the appropriate safeguards are built into the system, including the ability of financial institutions themselves to make judgments about when those data should not be shared, the process would be far more efficient than it is today.

Second, 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.

m) Promote information sharing with law enforcement and other financial institutions

ABA has long advocated for better information sharing, and we were a strong proponent of section 314 of the USA PATRIOT Act. In fact, FinCEN found that information sharing provided a benefit for law enforcement.[33]

Unfortunately, the statute has never worked as intended. The first part of the provision, section 314(a), is designed to encourage communication between law enforcement and financial institutions. While a communications database was created over ten years ago, it is only used for law enforcement to identify possible matches of persons of interest (those identified as associated with money laundering or terrorist financing) and financial institutions. The other side of the coin, sharing information from law enforcement to the financial sector, has never materialized.

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[32] One of the dangers from disclosing SARs publicly is that banks and individual bank employees can be targeted by individuals who are the subject of a SAR.

[33] In an article published in the May 2013 issue of the *SAR Activity Review,* FinCEN reported that information sharing helped provide more useful information for law enforcement. *See* FINANCIAL CRIMES ENFORCEMENT NETWORK, THE SAR ACTIVITY REVIEW, TRENDS, TIPS & ISSUES (2013), available at: https://www.fincen.gov/sites/default/files/shared/sar_tti_23.pdf

ABA recommends that steps be taken to encourage information sharing from law enforcement to the private sector. While we recognize the need to protect investigations, sharing information about patterns of behavior or other red flags would be extremely helpful for banks to partner in the efforts to achieve BSA purposes. Giving banks better information about what to look for would help focus limited bank resources and produce better information for law enforcement.

For many years, FinCEN produced a publication that included information about cases in which law enforcement relied on BSA data to investigate or prosecute financial crimes. While not as comprehensive as the industry might have liked, it offered some feedback about law enforcement use of the BSA data. The *SAR Activity Review* was also a vehicle for regulators, law enforcement, and industry to discuss specific issues or consider pointers on AML/CFT compliance. However, the last issue was released in May 2013 and then that channel of communication from law enforcement was closed, to the disappointment of the private sector. ABA encourages revival of this helpful resource, along with other data and summaries of BSA information. One suggestion that would help bankers is the identification of filings that a bank submitted, whether CTRs or SARs, that were consulted by law enforcement.

The second part of the USA PATRIOT Act information sharing provision, section 314(b), permits information sharing between financial institutions, within certain parameters. Unfortunately, that section has also not worked as well as it could. Although application of the provision has improved, the red tape associated with the process discourages bankers.

First, financial institutions need a simple means to identify whether another financial institution is registered and eligible for sharing and, along with that, a way to identify the right contact at that institution to contact with a request.

Although it would require a statutory change, ABA also supports expanding the type of information that can be shared under section 314. Currently, the statute restricts sharing to information associated with significant money laundering or possible terrorist financing. The industry believes that it would help to expand the coverage to allow information to be shared on any potential criminal activity contemplated by the statute.[34]

Currently, and underscoring the importance of information sharing, FATF, is undertaking a review of the information sharing process for possible improvements. As FATF points out, "[e]ffective information-sharing is one of the cornerstones of a well-functioning AML/CFT framework. Constructive and timely exchange of information is a key requirement of the FATF standards."[35]

n) OFAC

Complying with the challenges of economic sanctions mandates is a responsibility that increases steadily, particularly as sanctions policy expectations become less specific and apply

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[34] When initially proposed by ABA, the idea was to find a simple way for banks to share information safely about possible rogue employees. In many instances, possible employee malfeasance may involve amounts that fall below the threshold prosecutors set for investigation and prosecution. As a result, minor crimes go unreported. The employee can move on to another financial institution and commit similar crimes because the first company had no safe way to communicate that information to the other company.

[35] Financial Action Task Force, Public Consultation on the Draft Guidance for Private Sector Information Sharing (2017), available at: http://www.fatf-gafi.org/publications/fatfrecommendations/documents/public-consultation-guidance-info-sharing.html

to sectors of an economy instead of designating specific entities or individuals. As a result, the ability to identify blocked transactions clearly or to verify a positive match can be difficult. Verifying a true match often requires further research and also may raise questions requiring further information or guidance to be answered.

Over the years, the communication between OFAC and the private sector has been steadily improving. The popularity of the private outreach programs that the Office has been conducting over the past few years attests to that. These programs provide a useful forum for OFAC to communicate with the industry about key priorities, such as efforts involving Iran, Syria, Ukraine, and Cuba.

However, a constant complaints from bankers is that there are times when they need assistance with determining whether or not a transaction truly falls under a sanctions program. This has been especially true since the prior Administration adopted “sectoral sanctions” which apply more broadly than do a single designated entity or individual. Similarly, financial institutions have found it challenging to determine whether a customer or potential customer is 50% or more owned by a sanctioned entity or individual, something that has also increased with the sanctions involving Ukraine.

Although OFAC offers a hotline and its leadership encourages the financial sector to reach out to the Office, the lag in response time has been extremely frustrating for the industry. Trade transactions and the speed of international commerce in today’s environment is incompatible with the time OFAC takes to respond. To help bankers reach the right contacts at OFAC to answer questions, particularly since some might be uniquely qualified to answer questions involving a particular jurisdiction, ABA urges OFAC to develop and maintain a directory of contacts at the agency.

ABA recommends two additional steps. First, allocate additional resources and staff to respond to OFAC hotline questions. Second, provide some mechanism or safe harbor that applies if a financial institution has in good faith reached out to OFAC for guidance but has not received a response. A safe harbor from liability should apply as long as the institution acts reasonably and based on the information available at the time.

In addition, we urge OFAC to post answers to frequently-asked-questions on its website. Too often, the only guidance or response to a question is verbal, making it difficult to use while undermining consistent policy.
Another source of unnecessary burden stems from requiring each entity in the chain of a transaction to rescreen for sanctions. ABA recommends OFAC change the rules to designate the port of entry as the logical point for screening sanctions. In other words, the financial institution that first handles a transaction crossing the border into the United States would be responsible for screening the transaction. At the same time, for outgoing transactions, the first financial institution that handles an outgoing transaction would conduct the screening. That institution has the relationship with the customer and is in the best position to screen for sanctions and to resolve any questions or doubts before the transaction is processed. The current process requiring constant rescreening may be a failsafe but it also consumes limited resources that could be put to better use.

ABA recommends that, as a step to alleviate burden, OFAC create a threshold below which screening is not needed. For example, if a transaction is under $500 or even as low as $100, then screening is unnecessary.

o) 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.

One example of what this problem creates is the humanitarian concerns from the inability to transmit funds to Somalia. From a humanitarian standpoint, it is important to move funds through remittances and wire transfers to Somali residents who need the money. From the banking perspective, though, the lack of transparency and the inability to verify that funds are going to deserving citizens and not terrorists makes banks extremely reluctant to send funds. Added to this are the liability and the reputation risks for a misstep by a bank. If the humanitarian needs are deemed sufficiently significant by policy makers, steps are needed to ensure that banks know what they can do to transfer funds without the fear of liability for guessing incorrectly.

ABA urges Treasury to convene a task force to address the issue. 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. A perfect example is the impact that Operation Choke Point had.

One area where de-risking has become a significant concern internationally is 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. 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, last October, the OCC issued guidelines[36] 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.

p) *Marijuana and Banking.*

More than 20 years ago, the state of California authorized the use of marijuana for medicinal purposes. In the intervening years, 29 states have allowed the use of marijuana for medicinal purposes, and 8 jurisdictions permit the use of marijuana for recreational purposes. Despite that, the federal Controlled Substances Act makes possession and distribution of marijuana a

[36] OFFICE OF THE COMPTROLLER OF THE CURRENCY, BULLETIN 2016-32, RISK MANAGEMENT GUIDANCE ON PERIODIC RISK REEVALUATION OF FOREIGN CORRESPONDENT BANKING, available at: https://www.occ.gov/news-issuances/bulletins/2016/bulletin-2016-32.html

federal crime. The banking industry is caught in the middle of this conflict between state and federal law. State authorities want banks to offer banking services to marijuana-related businesses so that they do not have to rely solely on cash, yet federal law clearly states that processing funds associated with marijuana is money laundering.

During the previous Administration, there were attempts by the Department of Justice and FinCEN to offer guidance to banks on how they could comply with state laws that were in conflict with federal laws, while still reminding banks that activities associated with marijuana, including handling funds, were illegal under federal law. However, those attempts at guidance have been not resolved the issue. More significantly, the federal banking regulators have been notably silent.

Moreover, the FinCEN guidance addresses how to report suspicious activity for transactions that are legal under state law, but the guidance is silent on how banks should handle peripheral issues such as addressing a customer that is a vendor or supplier for a marijuana business, is an employee of a state-authorized marijuana dispensary, or is a landlord with a tenant that is a state-registered marijuana dispensary.

ABA urges Treasury to work with the industry and Congress to resolve this conflict.

q) Adopt FBAR Proposed Amendments

In 2016, FinCEN proposed a number of amendments to the regulations governing the Reporting of Foreign Bank and Financial accounts (FBAR) using Form 114.[37] In May 2016, ABA filed comments[38] on the proposal, which we continue to support. As Treasury reviews regulations, ABA continues to recommend that these changes be implemented.

First, the signature authority exemption should be expanded to accommodate employees of financial institutions. Under the proposal, the exemption for financial institutions employees and officers would depend on whether the account must be reported under the FBAR regulations,[39] either by the entity or by another entity within the same corporate structure. Not all accounts maintained by a financial institution are required to be reported, and so narrowing the exemption in the way proposed would require bank, broker-dealer, and asset management employees to report thousands of accounts that are currently exempt, without providing useful information. Therefore, we recommend that the existing exemption be maintained.

The rule should also clarify that the exemption applies not just to officers, employees, or agents of U.S. entities, but also to employees of their U.S. or non-U.S. affiliates with respect to signature authority over accounts maintained by the employer or any other entity within the same corporate structure.

Second, ABA believes that the proposed employee list requirement is burdensome and unnecessary. To take advantage of the proposed signature authority exemption, financial institutions would have to keep records for five years on the officers, employees and agents with

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[37] FINANCIAL CRIMES ENFORCEMENT NETWORK, REPORT OF FOREIGN BANK AND FINANCIAL ACCOUNTS, available at: https://bsaefiling1.fincen.treas.gov/lc/content/xfaforms/profiles/htmldefault.html
[38] American Bankers Association Comment Letter from Phoebe Papageorgiou to Jennifer Shasky Calvery (May 9, 2016 (on file with the American Bankers Association) , available at: http://www.aba.com/Advocacy/commentletters/Documents/ABASIFMAAMGJointCommentLettertoFinCENReFBAR.pdf
[39] 31 CFR 1010.350 et seq.

signature authority over foreign financial accounts. It would be very challenging to create and maintain accurate lists of numerous persons with signature authority over accounts, because these employees work in various groups and would change frequently as a result of staff changes. We therefore recommend eliminating the list creation and maintenance requirement, at least for financial institutions and their affiliates as well as for publicly-traded entities. FinCEN should, instead, let financial institutions create and furnish a list for FinCEN on request.

Third, the special rule that applies to twenty-five or more accounts should be maintained, as it is a helpful and reasonable way to reduce burden on reporting institutions. Because the filings do not identify the clients, the added information will provide no discernible value to warrant the burden on financial institutions. If FinCEN wants to review detailed data from a particular financial institution, it can always request the information under the existing rule.

There are other requirements under FBAR that should be modified. For example, the FBAR account maximum value reporting requirements should be modified and simplified to allow reporting institutions to use the value disclosed in relevant account statement(s), or if no statement is available, the year-end balance on the account.

Furthermore, FinCEN should create a reporting exemption for segregated accounts maintained by a U.S bank, as recommended in a June 2011 ABA letter.[40] These accounts arise in a non-U.S. market when a client opens an account at a U.S. bank and then the U.S. bank facilitates the client's accounts outside the U.S. in the name of the client as opposed to an omnibus account in the name of the U.S. bank. Even though the account may be in the name of the client, the client cannot access the account without going through the U.S. bank. Therefore, since the client has no control over the funds, reporting the information on the account is unnecessary.

Conclusion

The United States' AML/CFT regime was built on a solid foundation when it was created in 1970. While it has evolved over the years, the pace of change, the rapid growth of technology, and the new and unique threats facing the nation requires a good hard look at today's programs to be sure that financial institutions are equipped with the resources needed to combat money laundering, terrorist financing and other financial crimes more effectively.

The first step is to focus on the goals and mission and eliminate the secondary distractions that have gotten in the way. The key should be to facilitate the ability of banks to provide useful information quickly and efficiently to law enforcement. To do that, it is critical that law enforcement provide better feedback to the banking industry. Second, regulators and examiners should support that mission, relying upon banker judgments unless the bank has flawed processes or programs that fail to meet the AML/CFT mission. Third, there is a desperate need for clear and consistent guidance, and uniform training for all would help. Finally, when questions arise, it should be the mission of regulators to resolve them as quickly as possible, in writing, so that the entire industry can benefit, consistency promoted.

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[40] American Bankers Association Comment Letter from Phoebe Papageorgiou to Jamal El-Hindi (June 10, 2011) (on file with the American Bankers Association), available at: http://www.aba.com/archive/Comment_Letter_Archive/Comment%20Letter%20Archive/cl-FBAR2011June.pdf

ABA looks forward to working in collaboration with law enforcement and Treasury to take the steps needed to bring the AML/CFT and sanctions regimes into the 21st century.

Sincerely,

Virginia O'Neill

Virginia O'Neill
Senior Vice President, Center for Regulatory Compliance