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Policy Division
Financial Crimes Enforcement Network
P.O. Box 39
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FTA Comment Letter re FinCEN's Anti-Money Laundering and Countering the Financing of Terrorism Programs Proposal
(Docket No. FINCEN–2024–0013)

The Financial Technology Association[1] welcomes the opportunity to respond to the Financial Crimes Enforcement Network's ("FinCEN") proposed rule to revise anti-money laundering and countering the financing of terrorism ("AML/CFT") program requirements for financial institutions subject to the Bank Secrecy Act ("BSA"). FTA members, including banks, MSBs, broker-dealers, and other entities covered by the BSA, recognize the importance of the program rule for setting the parameters of an institution's efforts to detect and deter illicit financial activity. To that end, FTA supports FinCEN's efforts to emphasize the risk-based nature of AML/CFT compliance programs and provide "financial institutions with the flexibility to extend financial services based on their individual evaluation of their ML/TF risks and their ability to manage their customer relationships…"[2]

We particularly support the preamble's emphasis on creating risk-based programs that encourage the use of innovative technologies for compliance, programmatic changes to enhance financial inclusion, and language relating to revising financial institutions' current processes and procedures to make their programs more efficient and effective and redeploy compliance resources to areas of higher risk.

While the proposed rule seeks to harmonize and standardize AML/CFT requirements for financial institutions subject to the BSA and update these expectations as required by the Anti-Money Laundering Act of 2020 ("AML Act"), we believe additional changes to the regulation should be made to enhance the regulatory framework supporting institutions' risk-based programs so that covered institutions have a clear understanding of, and are comfortable calibrating their programs to, a risk-based approach.

[1] FTA is a trade association representing industry leaders shaping the future of finance. We champion the power of technology-centered financial services and advocate for the modernization of financial regulation to support inclusion and responsible innovation.
[2] 89 Fed. Reg. 55432.

To that end, we would recommend the following:

- FinCEN should provide additional language in the regulation on redeploying resources, apply a good-faith standard to program requirements, and limit the U.S.-based duty requirement to the AML/CFT officer;
- FinCEN's approach to incorporating the National AML/CFT Priorities should be narrowed to emphasize further the risk-based nature of a financial institution's AML/CFT program;
- FinCEN's capabilities and law enforcement feedback should be enhanced to increase the utility of AML/CFT reporting; and
- The proposal's effective date should be set two years after the final rule, and any expectations account for updates to the National AML/CFT Priorities.

These recommendations, when taken together, will strengthen the regulation and form a stronger foundation for financial institutions' AML/CFT programs moving forward. Simply adding elements to current AML program rule requirements without providing meaningful language in the regulatory text to reinforce the shift to a legitimate risk-based approach, and examiner training to support it, will only result in maintaining the status quo.

I. FinCEN Should Provide Additional Language in the Regulation on Redeploying Resources, Apply a Good-Faith Standard to Program Requirements, and Limit U.S.-Based Duty Requirements to the AML/CFT Officer

As discussed above, we appreciate the preamble's focus on key elements of the statute, including the risk-based nature of an AML/CFT program and financial inclusion. However, the regulatory text that FinCEN is proposing could do much more to enhance institutions' comfort in addressing and calibrating their programs to account for these important policy considerations. As the regulatory text will form the foundation for financial institution supervision and examination, more explicit guidance relating to these items could further facilitate a risk-based AML/CFT compliance approach.

A. FinCEN Should Provide Additional Language in the Regulation on Redeploying Resources and Apply a Good-Faith Standard to Program Requirements

Currently, financial institutions devote substantial resources to their AML/CFT programs but lack the regulatory clarity and certainty to apply their compliance discretion to redeploy resources from addressing lower risks to items of higher risk within the current supervision and examination environment. While the statute and the proposal's preamble do begin to address these concerns, concrete language in the regulatory text expressly granting covered financial institutions such flexibility will further enable them to rebalance their programs to address higher ML/TF risks. It also will allow regulators to weigh such factors as they examine firms' programs, thereby

increasing regulatory certainty for institutions that they will not be subject to undue scrutiny for making risk-based changes to their program.

However, examiner training and evaluation will also be a critical element of facilitating financial institutions' transition to a genuine risk-based AML/CFT program. Working with the industry, exam guidance and expectations will need to be revised to ensure the appropriate calibration of regulatory assessment frameworks and approaches. Furthermore, given the statute's focus on encouraging the use of innovative technologies, examiners should also receive training on how to interact with new and emerging technologies so as to not stifle their development, but instead encourage their adoption in a responsible manner.

As discussed in the proposal's preamble, AML/CFT compliance has generally been viewed as a "check-the-box" exercise[3] with little discretion provided to institutions in the supervision and exam context to calibrate and resource programs on a risk-basis. While examiner training, law enforcement feedback, and other regulatory changes can help address these concerns, changing the culture relating to how an AML/CFT program is constructed and reviewed by both internal and external parties will require additional indications from the public sector that it is the program as a whole that is subject to evaluation. In addition, there will be less emphasis on extensive documentation of all decision-making, amongst other mundane activities. With these concerns in mind, we would recommend including a statement in the regulatory text that financial institutions' good-faith application of AML/CFT regulatory expectations will ensure that they are found to be in compliance with such requirements by regulators. Anything short of this statement would result in maintaining the status quo as the current rule text does not include enough regulatory certainty to enable financial institutions to rebalance their programs and shift resources.

B. FinCEN Should Limit the Statute's U.S. Duty Requirement to the AML/CFT Officer

Taking into account the AML Act's stipulation that "the duty to establish, maintain and enforce a financial institution's AML/CFT program shall remain the responsibility of, and be performed by, persons in the United States…" we believe it is essential to limit the scope of this requirement in any regulation to the AML/CFT officer or equivalent that maintains the statutory duty for overseeing the program. Other countries, notably the UK, take a similar approach given the global nature of financial products and services, with intercompany agreements or other frameworks leveraged as required to facilitate compliance understandings within such companies. As many FTA members have operations outside of the U.S. or engage third parties to assist with narrow elements of their compliance activities, limiting their ability to organize their programs in this

[3] 89 Fed. Reg. 55433.

manner could have unintended consequences on their efforts to detect and deter illicit finance. Instead, linking the duty requirement to the expectations already placed on the AML/CFT officer would appropriately account for many firms' international operations while maintaining the statute's direction that the duty for the program remain in the United States.

II. FinCEN's Approach to Formulating and Incorporating the National AML/CFT Priorities Should be Narrowed to Further Emphasize the Risk-Based Nature of a Financial Institution's AML/CFT Program

Under FinCEN's proposal, financial institutions will not only be required to implement the National AML/CFT Priorities into their programs, they will also be expected to consider other illicit financial activity in relation to various institutional elements. We believe that this all-encompassing approach is overly broad and will blunt the purpose of priority setting. While we recognize that different products and services may be susceptible to different types of illicit financial activity that may not be listed in the National AML/CFT Priorities, expanding financial institutions' risk assessment considerations to a potentially infinite number of risks is unlikely to facilitate the risk-based approach required by the statute. At the very least, FinCEN should specify that only "significant" risks should be accounted for within this context.

However, with these considerations in mind, we believe that the optimal approach is for FinCEN to reconsider how it establishes and revises National AML/CFT Priorities. The intent of creating a priorities-led regime was to provide financial institutions with guidance on the illicit financial activity that law enforcement is particularly focused on. However, currently, the list of priorities is relatively broad and doesn't provide the level of detail needed for many financial institutions to calibrate their programs effectively.

Instead, we encourage FinCEN to leverage a framework similar to the interagency process used for the National Intelligence Priorities Framework (NIPF). The NIPF "provides the mechanism for the development and communication of overarching national intelligence priorities and the evaluation of IC responsiveness and progress against those priorities."[4] Under this framework, priorities are established from key customers and validated by senior intelligence officials, information collected under them is deemed critical to the intelligence communities' mission, key intelligence questions are identified to assist in driving the collection of the right information, and efforts are undertaken to ascertain who is best placed to get that information. Such a process could be used to specify what illicit financial risks FinCEN wants financial institutions to address, how

[4] Office of the Director of National Intelligence, "Intelligence Community Directive 204: National Intelligence Priorities Framework," (accessed August 26, 2024); *available at* https://www.dni.gov/files/documents/ICD/ICD_204_National_Intelligence_Priorities_Framework_U_FINAL-SIGNED.pdf.

different types of companies can address relevant priorities for their business activities, and provide additional information on relevant bad actors. In turn, financial institutions' suspicious activity and currency transaction reports could be leveraged to identify the types of risks specific to certain financial institutions and activities, allowing FinCEN to measure trends from BSA reporting and work with institutions to address emerging threats.

III. Enhance FinCEN's Capabilities and Law Enforcement Feedback to Increase the Utility of Financial Institution AML/CFT Reporting

In order to make financial institutions' AML/CFT programs more efficient and effective, increasing law enforcement feedback will be critical to limiting the echo chamber that the current AML reporting infrastructure creates within a compliance program. While such reporting can help calibrate an institution's risk assessment, the necessary data required to assist in accurately calibrating monitoring systems and reporting to concrete illicit activity can only be provided by law enforcement.

We recognize that there have been numerous recommendations offered over the years to increase law enforcement feedback - enhanced public-private partnerships, providing mechanisms for law enforcement to simply indicate that a SAR was useful to them (using a thumbs up or thumbs down mechanism), or enhancing feedback to individual institutions. Ultimately, any law enforcement feedback should impact the calibration of reporting requirements. For example, not all SARs are the same, but the current regulatory environment generally treats them the same. Some types of SARs need to be deprioritized and automated, and others, under a risk-based approach, should be prioritized and resourced appropriately as envisioned by the AML Act. Certain types of SARs should also be discontinued (e.g., continuous activity reports). Changes to BSA reporting requirements will not only impact the efficiency and effectiveness of an institution's AML/CFT program, but will also assist institutions in right-sizing programmatic elements for financial inclusion concerns as the current reporting environment contributes to defensive filing and other defensive risk management approaches.

Relatedly, FinCEN should enhance its dissemination of trend information. Currently, financial institutions find trend information from FinCEN and law enforcement useful, but more can be done to strengthen the communication loop between financial institutions, FinCEN, law enforcement, and regulators. In particular, and as described in further detail above, we recommend that FinCEN operate similar to an intelligence collection agency, leveraging key intelligence questions to improve the quality of the information reported and its usefulness to law enforcement.

Finally, enhancing opportunities for engagement with law enforcement across financial institutions, no matter their size, will ultimately support the quality of BSA reporting. While some

law enforcement agencies meet regionally with financial institutions and share priority areas, expanding these engagements and enhancing exchanges on new or novel financial products and services between law enforcement and financial firms could further contribute to a more efficient and effective U.S. AML/CFT regime.

IV. The Proposal's Effective Date Should be Set Two Years After the Final Rule and Any Expectations Account for Updates to the National AML/CFT Priorities

As FinCEN's National AML/CFT Priorities are very broad and financial institutions do not yet have experience calibrating their risk assessments in line with the proposal's parameters, we recommend that FinCEN provide covered institutions with at least two years to comply with any final rule. This will allow institutions to conduct the necessary reviews of their products and services, as well as law enforcement reporting frameworks, to account for the revised expectations. In line with these reviews, various elements of an institution's AML/CFT policies and procedures will also likely need to be revised, with time required to test and calibrate programmatic changes as necessary. Two years is a reasonable timeframe as institutions build internal frameworks for the Program Rule's revisions and is in line with other recent AML/CFT final rules, such as FinCEN's Customer Due Diligence Rule.

Relatedly, we believe that it is important that any final rule also account for potential changes to FinCEN's National AML/CFT Priorities and what that may mean for financial institutions' programs. While the scope of such changes would likely dictate the amount of time needed to comply with them, additional guidance for financial institutions in this final rule as to FinCEN's expectations could be useful. As the AML Act envisions material updates to the National AML/CFT Priorities to account for changes in the risk environment, it would be useful for FinCEN to provide institutions with at least a year to comply with any changes, particularly if they are significant.

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FTA members diligently administer their AML/CFT compliance programs and would welcome the opportunity to work with FinCEN as it seeks to strike the right balance between technical expectations and promoting a risk-based compliance approach through revisions to the AML Program Rule. We would also note that the risk-based approach cannot be limited to just the program rule and continue to support regulators' efforts to review and revise key AML/CFT regulatory requirements to realize a risk-based regime.

We would be happy to discuss our thoughts on these and other AML/CFT issues with FinCEN further, please don't hesitate to reach out to the undersigned at penny@ftassociation.org.

Sincerely,

Penny Lee
President and Chief Executive Officer
Financial Technology Association