Via electronic submission

September 3, 2024

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

RE: Anti-Money Laundering and Countering the Financing of Terrorism Programs – Docket Number FINCEN–2024–0013

Dear Sir or Madam:

The Independent Community Bankers of America ("ICBA")[1] appreciates the opportunity to respond to the Financial Crimes Enforcement Network's ("FinCEN") Notice of Proposed Rulemaking ("Proposed Rule") on strengthening and modernizing financial institutions' ("FIs" or "banks") anti-money laundering and countering the financing of terrorism ("AML/CFT" or "BSA") programs pursuant to a part of the Anti-Money Laundering Act of 2020 ("AML Act" or "Act"). As outlined below, ICBA supports modernization of AML/CFT and BSA programs, however, the subject proposal is ambiguous and creates additional burden on community banks without any demonstrable benefit to combatting money laundering or terror financing.

Background

The AML Act was enacted on January1, 2021, as a legislative amendment to the BSA and required FinCEN to update regulations pertaining to banks' AML/CFT programs. In response to the Act's directive, on June 28, 2024, FinCEN released this Proposed Rule which would require banks to establish, implement, and maintain effective, risk-based, and reasonably designed AML/CFT programs; require a mandatory risk assessment process; require banks to

[1] The Independent Community Bankers of America® has one mission: to create and promote an environment where community banks flourish. We power the potential of the nation's community banks through effective advocacy, education, and innovation. As local and trusted sources of credit, America's community banks leverage their relationship-based business model and innovative offerings to channel deposits into the neighborhoods they serve, creating jobs, fostering economic prosperity, and fueling their customers' financial goals and dreams. For more information, visit ICBA's website at icba.org.

review government-wide AML/CFT priorities ("Priorities") and incorporate them, as appropriate, into risk-based programs; and would provide for certain technical changes to program requirements such as selecting a "qualified" AML/CFT Officer ("BSA Officer").[2]

Banks follow well established rules and regulations to develop, monitor, and maintain effective and reasonably designed programs. Community bankers are committed to supporting balanced, effective measures to prevent the financial system from being used to fund criminal activities and prevent money launderers from hiding the proceeds of criminal activities. However, AML/CFT programs have increasingly charged community banks with complying with outdated, inefficient, and redundant requirements that require community banks to act as de facto law enforcement agencies, while reallocating vast resources internally to AML/CFT programs and away from those that are directly customer-facing.

Since the inception of anti-money laundering laws in 1970 and anti-terrorist financing laws in 2001, the burdens placed on FIs increasingly creates an environment where FIs are tasked with identifying, investigating, policing, stopping, and reporting potential criminal activity. Each year, community banks invest more time, money, and resources to combat this threat, yet the current framework is little more than that of a robotic exercise of submitting forms, maintaining records, and responding to examiner requests. Bank staff spend hours simply documenting low-risk activity to demonstrate to exam teams that the mounting documentary burdens have been met.

ICBA welcomes FinCEN's efforts to modernize the BSA and believes the agency has an excellent opportunity to modernize the current regime in a way that works, fairly, for banks and law enforcement. FinCEN is positioned to help FIs produce more useful information for law enforcement while alleviating one of the most significant and costly sources of community bank compliance burdens. Modernization efforts should not be used as a vehicle to expand unnecessary and duplicitous requirements, yet this Proposed Rule is poised to exacerbate issues which ICBA and community banks advocate against.

As written, the Proposed Rule is additive without any indication of additional efficiencies or methods that will be useful to law enforcement. If finalized, the rule will increase regulatory burden and compliance spending; will increase occurrences of subjective exams due to the lack of guidance; and will keep in place the practice of robotic and mechanical compliance. Furthermore, banks will face increased enforcement risk that result from technical errors.

Request for Comments

Incorporation of AML/CFT Priorities

The AML Act requires FIs to review FinCEN's published Priorities and incorporate them into their AML/CFT programs, as appropriate. FinCEN will enforce this requirement by mandating

[2] *Proposed Rule to Strengthen and Modernize* Anti-Money Laundering and Countering the Financing of Terrorism Programs 2024-14414.pdf (govinfo.gov) (July 3, 2024) P. 55428

banks consider the Priorities as part of their risk assessments process. The Priorities reflect areas of heightened concern that banks should assess and make changes to their AML/CFT programs if appropriate. FinCEN states that the inclusion of the Priorities in the risk assessment process is meant help FIs develop more effective, risk-based, and reasonably designed AML/CFT programs.[3]

The list of Priorities includes: (1) corruption; (2) cybercrime, including relevant cybersecurity and virtual currency considerations; (3) foreign and domestic terrorist financing; (4) fraud; (5) transnational criminal organization activity; (6) drug trafficking organization activity; (7) human trafficking and human smuggling; and (8) proliferation financing. The purpose for issuing the Priorities is appreciated. However, the current list is too broad and covers every AML threat that existed prior to the AML Act, thus begging the question as to what really is a priority? Furthermore, the Priorities and the Proposed Rule both lack any insight as to how FIs should assess and prioritize the listed threats as they conduct their risk assessments.

The Priorities lack guidance in terms of threat examples, typologies and transactional red flags which are factors needed to assess whether the threat exists within an institution. The purpose of a risk assessment process is to uncover risk, and to develop an action plan to manage such risks. Given the overly broad nature of the list, ICBA is concerned that some of our members will encounter significant challenges conducting a full assessment. In fact, members report that while some of the listed Priorities have well documented red flags that they can assess, others — such as transnational criminal organization activity and proliferation financing — lack specific transaction-based examples that trigger further investigation or suspicion. Without additional guidance, assessing listed threats and developing an appropriate mitigation response is nearly impossible and by extension incorporating the Priorities into an AML/CFT program will be difficult.

If FIs are expected to undergo this process without adequate guidance, FinCEN and regulators should expect to see risk assessments and AML/CFT programs that include every Priority listed simply to avoid exam scrutiny or findings (setting up an exercise similar to defensive SAR filings). Furthermore, the defensive approach to including every Priority into a bank's AML/CFT program completely defeats the purpose of resource allocation. Similarly, without guidance, FinCEN could inadvertently exacerbate cases of inconsistent exams and unfair scrutiny for FIs that may conclude that some of the Priorities do not apply to their banks.

Before a final rule is issued, ICBA urges FinCEN to amend the current list to include guidance that entails examples, typologies, case studies, and both transactional and behavioral reg flags. Issuing guidance will assist FIs assess whether the risk exists within the institution; will help banks establish effective, risk-based, and reasonably designed AML/CFT programs; and help fulfill the purpose of resource allocation. Such guidance should also accompany future releases of the Priorities. It is imperative that FinCEN establishes a Priorities regime that

[3] Id at 55438.

meets the purpose for which the AML Act intended and does not expose community banks to regulatory punishment for lack of guidance.

Risk Assessment Process

The Proposed Rule will make risk assessments a fifth pillar for all FIs. Banks will be required to establish a risk assessment process that identifies, evaluates, and documents risks based on: (1) business activities, including products, services, distribution channels, customers, intermediaries, and geographic locations; (2) AML/CFT Priorities; and (3) SAR and other report filings. Under the Proposed Rule, banks are required to update their risk assessment on a periodic basis, including, at a minimum, when there are material changes to the risk profile. FinCEN has previously encouraged banks to adopt risk-based AML/CFT programs, but the Proposed Rule would codify this expectation by expressly adding a requirement for FIs to establish a risk assessment process as a basis for their programs.

Modernizing the BSA should not be interpreted as a license to expand the obligations of banks. Community banks AML/CFT programs are already risk-based and reflect board and management's risk appetite and approach to mitigation, unique to each institution. The proposed risk assessment process, however, will likely result in a more resource consuming exercise due to its expansion and complexity. An example of the additional drain this expansion will cause is in the requirement to assess intermediaries (or third-party vendors).[4] Banks are currently required to undergo a robust vendor management process designed to capture the potential risks associated with third-party providers. Requiring banks to expand their risk assessment process to include this overly broad concept is redundant, resource draining, and adds no additional value.

Despite community bank's established AML/CFT programs which are designed to their respective risk, far too many examiners still evaluate them based on the risk profiles of other banks, impose their own expectations, and ignore banks' unique risk profiles. In April 2020, the Federal Financial Institutions Examination Council ("FFIEC") released an update to the BSA/AML Examination Manual (the "Manual") clarifying that examinations must be risk-based.[5] The update was intended to remind examiners not to take a "one size fits all" approach and remind them to exam each FI's program based on its specific risks. The update was also intended to clarify what standards are regulatory requirements as opposed to supervisory expectations. Nevertheless, four years later, community banks continue to experience exams that are not in compliance with the Manual. As such, ICBA recommends FinCEN codify the

[4] Id at 55438-55439. FinCEN acknowledges that the term intermediaries may be new. According to FinCEN, since banks have relationships with counterparties, such as third-party service providers, they may pose money laundering and terror financing ("ML/TF") risks. FinCEN considers intermediaries to include "broadly other types of financial relationships beyond customer relationships that allow financial activities by, at, or through a financial institution." An intermediary can include, but not be limited to, a FIs' brokers, agents, and suppliers that facilitate the introduction or processing of financial transactions, financial products and services, and customer-related financial activities. ICBA is against the additional requirement of assessing intermediaries since current vendor management requirements are sufficient. We do, however, support a bank's independent decision to incorporate intermediates into their risk assessment process should there be a reason to do so.

[5] FFIEC Manual: Risk-Focused BSA/AML Supervision, p. 3.

risk-based exam provisions established in the Manual, as the final rule. We urge FinCEN to communicate exam expectations with prudential regulars and work with them to align those expectations. ICBA believes that once FinCEN and FFIEC members are aligned in their exam approach, a consistent risk-based exam regime will eventually take hold.

The Proposed Rule seeks input on whether to require FIs to update their risk assessment when there are material changes to their risk profile, or at a regular, specified interval. ICBA supports a process based on a defined approach. For example**,** if the final rule includes a specified interval to update risk assessments, then we recommend a reasonable time frame of 18 – 24 months which aligns with a typical exam schedule and in a bank's ordinary course of auditing risk mitigation. Additionally, if the final rule requires an update based on a material change to the risk profile, then FinCEN must provide guidance on what is deemed "material."[6]

Defining the parameters for risk assessment updates is also crucial considering the Priorities. FinCEN is required to update the Priorities at least once every four years. As of the time of this rulemaking, the list has not been updated since it was released in 2021. The Priorities are to be reviewed and incorporated into AML programs if appropriate. If FinCEN releases its next set of Priorities shortly after a bank undergoes and conclude this new exhaustive risk assessment process, the bank will need a reasonable amount of time to undergo and conclude its update.

Effective, Risk-Based, and Reasonably Designed AML

The Proposed Rule requires banks to develop AML/CFT programs that are "effective, risk-based, and reasonably designed." An effective, risk-based, and reasonably designed program includes a risk assessment process, internal policies, procedures, and controls, a qualified AML/CFT officer, ongoing employee training, and periodic independent testing and other component such as customer due diligence program requirements. This requirement mandates that banks "focus their resources and attention in a manner consistent with the FIs risk profile"[7] and to take into account "higher-risk and lower-risk customers and activities."[8]

Community banks already maintain "reasonably designed" AML/CFT programs based on risk. The "effectiveness" requirement is new and FinCEN has a great opportunity to ensure this term proves valuable to FIs. At a baseline, effectiveness should be defined by FinCEN. The definition should empower FIs to move away from practices that are not required by law/regulation, which are "check-the-box" in nature, and that respond to examiner demand but

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[6] Typically, a material change to a risk profile can occur when new products or services are offered by bank. In some cases, a product could be deemed new by virtue of an update to the product or service. For example, a bank may offer a 3-month certificate of deposit ("CD") that has undergone a full risk assessment. If the bank decides to offer a 4-month CD which only updates the length of the CD by one month, does that constitute a material change? Or is initial risk assessment for the CD product (regardless of how many months) sufficient? Given this example, declining to define "material" will create a gray area subject to various interpretations, will cause additional inconsistent exam approaches, and will cause confusion.

[7] *Proposed Rule to Strengthen and Modernize* Anti-Money Laundering and Countering the Financing of Terrorism Programs 2024-14414.pdf (govinfo.gov) (July 3, 2024) P. 55435

[8] Id.

adds little to an FI's overall AML/CFT objective. The definition should move banks towards a true principles-based, institution specific program. Freeing up resources away from low priority matters and reallocating them to higher risk priorities is the surest way to achieve effectiveness. The final rule should not only address resource reallocation for FIs but must also make clear that examiners are not to penalize a FI's decision to reallocate resources in response to their risk profile.

FinCEN should expressly convey to regulators that effectiveness does not mean perfection. Excluding the expectation for perfection in AML/CFT programs signals to regulators that they are to avoid levying punishment for minor weaknesses, minor deficiencies, and for minor violations that are not indicative of a weak program.[9] As stated previously, community banks share that in their experience, examinations are not risk based as required by the Manual and they feel pressured to comply with technical requirements over common sense precautions. Hence, programs are too frequently manipulated to comply with the expectations of the examiners and in contravention of the intended purpose of a risk-based AML/CFT program.

Metrics for Law Enforcement Feedback

FinCEN is seeking feedback on how to improve the process for providing banks with useful information about their SAR filings. ICBA appreciates this initiative, as members have consistently expressed a need for specific feedback related to the usefulness of their SAR filings. Effective communication between industry, law enforcement, and the federal government is crucial for developing "effective and reasonably designed" AML/CFT programs and ensuring law enforcement receives valuable information. Community banks need the latest information to better understand the methods of terrorist financing and money laundering they are helping to address, enabling them to more accurately identify and report suspicious activities.

For decades, community banks have repeatedly sought input on the value of their filed reports and for decades their quest has not been granted. Yet, community banks are vigilant in their responsibility and continue to undergo what feels like a robotic papering exercise for the sake of avoiding examiner scrutiny. Limited feedback from the stakeholders who require these reports diminishes the value of SARs and feeds into on-going regulatory burden.

Throughout this proposal, FinCEN reminds FIs that they must develop an effective, risk-based, and reasonably designed AML/CFT program. In addition to undergoing a risk assessment process to develop such a program, receiving input from FinCEN and law enforcement on previously filed BSA reports would help ensure that their programs meet this requirement.

Feedback Necessary for Risk Assessments

The Proposed Rule requires an FI's risk assessment process to identify, evaluate, and

[9] FFIEC's BSA/AML Manual expressed this same sentiment when it clarified that AML/CFT programs are to be risk based[9]. See Developing Conclusions and Finalizing the Exam - 508 (ffiec.gov) p.1

document ML/TF risks, including risks associated with SARs. To satisfy these components, a bank must test, monitor, and review transactions and behaviors, as well as determine whether changes in a risk assessment is warranted. What is missing from this Proposed Rule is an acknowledgment of the critical role FinCEN and law enforcement plays in this process. This lack of input impedes FIs ability to fully assess whether changes to a risk profile is warranted.

FinCEN and law enforcement must provide frequent and tailored feedback, separate from the Priorities, on the value and usefulness of SARs. Community banks express that filed SARs seemingly provide little use to law enforcement. Despite this long held and widespread belief, feedback continues to be scarce, law enforcement continues to push for more reports, and FIs remain in the dark as to what is valuable information. To change this dynamic, FinCEN must understand that it has a crucial role beyond just rulemaking – and that is the role of providing timely and tailored feedback. Without this feedback, the risk assessment process, as presented in this Proposal, is incomplete thus impeding resource allocation, and effectiveness.

ICBA urges FinCEN to implement a secure monthly or quarterly reporting structure for local banks, either individually or by geographic cluster. This system should detail the number of filed reports reviewed by law enforcement, indicate whether these reports lead to investigations or prosecutions, and provide estimates on crimes prevented. It should also include information on local and regional financial crime patterns and threats. The reports should identify suspicious activity that is not useful to law enforcement and include an attestation form to exempt banks from filing future SARs under those specific conditions. This form can be used for documentation and provided to prudential regulators if needed. FinCEN should deliver these reports directly to banks. Regular and tailored feedback will help FIs better align resources, identify truly suspicious transactions, and provide more valuable information to law enforcement.

Finally, we submit that creating and executing this frequent and tailored reporting structure might be time consuming for FinCEN and law enforcement. But that amount of time would be saved across thousands of banks while providing FinCEN and law enforcement with a mechanism to highlight important patterns in financial crime reporting.

Qualified AML/CFT Officer

The Proposed Rule requires a bank to designate one or more “qualified” individuals to be responsible for coordinating and monitoring day-to-day compliance with the BSA. A qualified BSA Officer would have to adequately perform the duties of the position, have sufficient knowledge and understanding of the bank, U.S. AML/CFT laws and regulations, and how those laws and regulations apply to the bank and its activities. A BSA Officer with additional job duties or conflicting responsibilities that impact their ability to effectively coordinate and monitor day-to-day AML/CFT compliance generally would not fulfill this requirement.

The designation of a qualified BSA Officer is not a new expectation. However, the notion that a BSA Officer with additional job duties would not be considered qualified is troubling and arbitrary. Just as AML/CFT programs are risk based, bank staffing in the AML/CFT program is

also tailored to risk. By ignoring asset size, market, and delivery channels, the Proposed Rule's one-size-fits-all approach to staffing fails to take into consideration the unique profiles of community banks across the country. It is not uncommon for the BSA Officer at a community bank to also serve as a compliance officer, bank president, teller, loan officer, chief financial officer, or another role, depending on a bank's profile and footprint. Community banks, especially smaller banks, often rely on limited personnel to perform multiple functions within a bank.

As written, the Proposed Rule will invalidate years of competency, training, expertise, and the operational experience of a BSA Officer working in other capacities. The proposal also ignores AML professional certifications such as those from accredited organizations; punish banks, especially small banks, that do not have the additional resources to hire an individual to solely focus on BSA; and will penalize banks over an arbitrary notion that a BSA Officer is not qualified simply because they have additional roles. ICBA is against the idea that a BSA Officer is not qualified if they have additional duties and call on FinCEN to withdraw this proposed sentiment.

Innovative Approaches

One of the AML Act's purposes is to "encourage technological innovation and the adoption of new technology by FIs to more effectively counter money laundering and the financing of terrorism."[10] The Act also calls for a "reduction in obstacles to innovation that may arise from existing regulations, guidance, and examination practices related to [BSA] compliance," which aligns with the federal banking agencies *Joint Statement on Innovative Efforts to Combat Money Laundering and Terrorist Financing* ("Joint Statement").[11] The Joint Statement encouraged banks to consider and implement innovative approaches to meeting their AML/CFT compliance obligations, including by deploying emerging technologies to identify and address vulnerabilities and threats. The Joint Statement was intended to foster innovation without fear of criticism and includes exceptive relief, upon request, to the extent necessary to facilitate the development of new technologies and other innovations.

The Proposed Rule builds upon the Joint Statement, providing for the consideration of innovative approaches to help banks more effectively comply with the BSA. While the Proposed Rule does not require FIs use such approaches, FinCEN asks whether it should consider alternative methods for encouraging innovation in lieu of a regulatory provision. Although ICBA supports balanced and flexible regulations that *facilitate* bank exploration of new technologies, we do not support regulations that would *require* community banks to adopt new technologies. In lieu of a regulatory provision that requires innovation, ICBA believes that FinCEN could encourage innovation through greater use of exceptive relief, as contemplated in the Joint Statement.

[10] AML Act, section 6002(2)– (4)
[11] Joint Statement on Innovative Efforts to Combat Money Laundering and Terrorist Financing (Dec. 3, 2018), available at https://www.fincen.gov/news/news-releases/ treasurys-fincen-and-federal-banking-agenciesissue-joint-statement-encouraging.

Though initially announced four years ago, few community banks have taken advantage of the benefits proffered by the Joint Statement. In part, community banks have expressed that their hesitancy stems from concern that regulators and examiners do not allow FIs to experiment and make errors when utilizing these technologies. Their use will result in exam criticisms and findings.

To encourage community banks to adopt technologies more effectively, FinCEN should provide clear guidance on what it deems acceptable technological innovations that would achieve exceptive relief. This could be accomplished through a No Action Letter ("NAL") program, which FinCEN first contemplated in its 2022 Advance Notice of Proposed Rulemaking ("ANPR"), yet never took action to formally propose or finalize.

A NAL is a type of regulatory enforcement document in which an agency agrees, in writing, that it will provide no-action relief and not take enforcement action against an entity for particular conduct documented in the entity's no-action request. In response to the NAL ANPR, ICBA supported the creation of a NAL process. As we stated, a NAL process could be a significant tool in a community bank's BSA compliance program. This tool could aid community banks by providing clarity, assurance, and protection when seeking to comply with BSA regulatory requirements and expectations pertaining to new and existing products and services, new business lines, and high-risk customers and activities. The NAL could further be used as part of a community bank's risk internal assessment when developing and implementing appropriate internal controls for managing and mitigating BSA/AML risk exposure.

ICBA also recommends that FinCEN codify the Joint Statement on innovation without fear of criticism and include exceptive relief. But instead of providing exceptive relief upon request to the extent necessary to facilitate the development of new technology, ICBA recommends automatic relief for at least two years to allow the bank reasonable time to facilitate the development and test the use of the specific technology.

Board Approval and Oversight

The Proposed Rule requires board or an equivalent governing body ("Board") to oversee a bank's AML/CFT program. According to the proposal, Board approval of the program alone is not sufficient to meet program requirements, since the Board may approve programs without a reasonable understanding of a bank's risk profile or the measures necessary to identify, manage, and mitigate its risks on an ongoing basis. The proposed oversight requirement expects appropriate and effective oversight measures such as governance mechanisms, escalation, and reporting lines. This expectation ensures that the Board can properly oversee whether AML/CFT programs are operating in an effective, risk-based, and reasonably designed manner.

The Proposed Rule will substantially increase burdens on community bank Boards. While extensive, the current level of Board accountability is sufficient. The FFIEC Examination Manual states that the Board of Directors "has primary responsibility for ensuring that the bank

has a comprehensive and effective BSA/AML compliance program and oversight framework that is reasonably designed to ensure compliance with BSA/AML regulation."[12] Under current regulations, Boards are responsible for approving a bank's BSA/AML compliance program and for overseeing the structure and management of the bank's BSA/AML compliance function. The Board is also responsible for ensuring a culture of BSA/AML compliance, establishing policies regarding the management of risks, and ensuring that policies are adhered to. Additionally, Boards review risk assessments and establish risk parameters, review and approve policies and procedures, review and sign off on audits, approve and allocate AML/CFT funding and resources, receive and review reports on SAR filings, and undergo annual training.

Board members can be held civilly and criminally liable for oversight failures. The increase in duties, which add no additional tangible benefits to an AML/CFT program, will discourage individuals from participating on bank Boards. Board governance principles are not intended to encroach on the day-to-day management of a bank, which the proposed rule appears to do.

Congress explicitly instructed FinCEN to identify regulations and guidance that may be outdated, redundant, or otherwise do not promote a risk-based AML/CFT regime for FIs. However, this new requirement adds to the list of redundant requirements that do not enhance the current similar role of a Board. ICBA strongly urges FinCEN against increasing the responsibilities of Board members but supports a bank's risk-based decision to do so.

Effective Date

FinCEN proposes an effective date of 6 months after publication of the final rule. However, this timeframe is insufficient for community banks to update their AML/CFT programs to accommodate the expansion of requirements, modifications to audit schedules, technological and systems changes, as well as recruiting, hiring and training additional staff. ICBA recommends extending the effective date to 18 months.

Conclusion

While AML/CFT laws have not been updated since their inception, the burdens placed on banks has consistently increased. ICBA supports efforts to modernize the AML/CFT regime in a way that alleviates one of the most significant and costly sources of community bank compliance burdens. However, this Proposed Rule, as written, is additive without any indication of additional efficiencies or methods that will be useful to law enforcement.

We appreciate the opportunity to respond to this proposal and welcome further engagement. Please let me know if I can be of further assistance as FinCEN works to create a regime that not only modernizes the AML/CFT requirements but results in regulatory relief for banks

[12] FFIEC BSA/AML Program Structures - BSA/AML Compliance Program Structures (Management and Oversight of the BSA/AML Compliance Program)

without compromising the spirit of the regulation. If you have any questions, please do not hesitate to contact me at Rhonda.Thomas-Whitley@icba.org or (202) 659-8111.

Sincerely,

/s/

Rhonda Thomas-Whitley
Senior Vice President, Senior Regulatory Counsel