

November 16, 2020

The Honorable Kenneth A. Blanco
Director
Financial Crimes Enforcement Network
P.O. Box 39
Vienna, Virginia
22183
United States



RE: Anti-Money Laundering Program Effectiveness

Dear Mr. Blanco:

The Institute of International Finance (“IIF”) is grateful for the opportunity to comment on the Financial Crimes Enforcement Network (“FinCEN”) Advanced Notice of Proposed Rulemaking (“ANPR”) on Anti-Money Laundering Program Effectiveness (the “Consultation”)¹. We greatly appreciate FinCEN offering policy recommendations in this important area and we have long supported its work in preventing and mitigating the effects of financial crime in the United States (“US”) and around the world.

We believe the focus of the Consultation on effectiveness is critical and timely. The current global framework for fighting financial crime is not as effective as it could be, and more needs to be done at the international, regional, and national levels to help identify and stem the flow of illicit finance. We agree that changes which help modernize the regulatory regime to address the evolving financial crime threats and provide financial institutions with greater flexibility in the allocation of resources will result in the enhanced efficacy and efficiency of financial crime risk management programs.

As such, we are strongly encouraged by the scope of the Consultation. A clear emphasis on delivery of effective outcomes, as emphasized by the Financial Action Task Force (“FATF”)², is essential to a well-functioning Anti-Money Laundering and Countering the Financing of Terrorism (“AML/CFT”) regime. In order to assist with further refinement of the recommendations in the next stage of the rulemaking, our comments herein reflect upon the questions outlined in the Consultation and focus on two key areas which we believe should be emphasized in future action by FinCEN:

1. Regulatory clarity in financial crime risk management obligations and expectations in line with the risk-based approach; and
2. Information exchange to enhance the intelligence led approach to tackling financial crime.

We believe close attention to these issues - whilst also taking into account wider efforts at reform which encompass technological innovation and regulatory/legislative changes updating the AML/CFT framework - will make a positive difference in combatting economic and financial criminal activity.³

¹ FinCEN, Anti-Money Laundering Program Effectiveness: 31 CFR Chapter X [Docket No. FinCEN–2020–0011] RIN 1506–AB44.

² FATF, *An effective system to combat money laundering and terrorist financing* :<https://www.fatf-gafi.org/publications/mutualevaluations/documents/effectiveness.html>

³ For further information on these issues, please also see: IIF/Deloitte, *The Global Framework for Fighting Financial Crime: Enhancing Effectiveness and Improving Outcomes*, October 2019: <https://www.iif.com/Publications/ID/3606/The-Global-Framework-for-Fighting-Financial-Crime-Enhancing-Effectiveness-Improving-Outcomes>

We also believe that FinCEN should consider cross-agency alignment on the elucidation of expectations in this area as it proceeds with its work. FinCEN, the US supervisory agencies and law enforcement should coordinate closely, and expectations should be clarified in the form of principles developed in consultation with the private sector. This will be particularly important as FinCEN considers elements of the Consultation which will have an immediate impact on financial institutions, including, *inter alia*, the publication of priority areas (and the expectations concerning incorporation of these areas into AML programs) and the proposal for explicit risk assessment requirements.

Lastly, we note that reform to enhance effectiveness in financial crime risk management is currently being pursued in other jurisdictions as well and many of the same concepts discussed in the Consultation and in our letter reflect the international focus of both the public and private sectors on improving outcomes when tackling cross-border financial crime.⁴

As such, we encourage FinCEN and its US government counterparts to work collaboratively with their international partners to develop a common understanding of effective cross-border financial crime risk management and compliance in line with the standards and objectives of the FATF. Leveraging sound practices across jurisdictions - and ensuring consistency in implementation of international requirements - will make it harder for criminals to exploit gaps in AML/CFT protections in one jurisdiction. This will help eliminate one of the incentives criminals have to channel their operations through jurisdictions they know are less resilient than others.

Thank you very much for considering our feedback and if you have any questions, please do not hesitate to contact me or Matthew Ekberg at mekberg@iif.com.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Andrés Portilla', with a stylized flourish at the end.

Andrés Portilla
Managing Director, Regulatory Affairs
Institute of International Finance

⁴ For further examples of AML/CFT reform in both the domestic and multilateral contexts, please see Section 3 of the IIF Staff Paper: *Economic and Financial Crime Risk and the Sharing of Intelligence: Updating and Enabling International and Domestic Cooperation in Combatting Illicit Financial Flows*, October 2020: <https://www.iif.com/Publications/ID/4125/IIF-Staff-Paper-on-Financial-Crime-Intelligence-Sharing>

FinCEN ANPR: Anti-Money Laundering Program Effectiveness

Background:

It is well recognized by FinCEN and the wider regulatory, supervisory, law enforcement and financial services community that a better framework to fight financial crime is a business and societal imperative. This can be achieved through an enhanced means of tackling risk management for money laundering, terrorist financing and other aspects of financial crime and by reviewing systemic effectiveness.

The approach taken by the FATF in this area is critically important. The FATF emphasizes that a “country’s efforts in developing sound laws and regulations and implementing and enforcing them should focus on one goal, the high-level objective of an effective AML/CFT framework”.⁵ However, in many cases, there remains at national level a focus on technical compliance or on particular elements of the AML/CFT regime, rather than ensuring that all of the components are operating well together.

In order to concentrate the efforts of both the public and private sectors on delivering better outcomes, we agree with the assessment of the Wolfsberg Group in their statement on making AML/CFT programs more effective.⁶ Specifically, supervisors and/or relevant government agencies should assess the effectiveness of a financial institution’s AML/CFT program based whether it complies with AML/CFT laws and regulations, provides highly useful information to relevant government agencies in defined priority areas, and establishes a reasonable and risk-based set of controls to mitigate the risks of a financial institution being used to facilitate illicit activity.⁷

We are encouraged that the aspects of an effective AML program outlined in the Consultation closely reflect these principles and that the proposals begin to address key issues in meaningful way. We particularly believe that two specific areas of focus by FinCEN will assist in achieving the aims of a better functioning AML/CFT framework based on the FATF’s effectiveness objectives and the tenets laid out by the Wolfsberg Group: 1. enhanced regulatory clarity in financial crime risk management obligations and expectations in line with the risk-based approach; and 2. improved information exchange to enhance the intelligence led approach to tackling financial crime.

A combination of this type of regulatory reform, coupled with the deployment of new technology⁸, could significantly enhance the work of governments, law enforcement and the financial services industry in tackling threats posed by illicit financial activity.

Recommendations:

1. *Enhance regulatory clarity in financial crime risk management obligations and expectations in line with the risk-based approach.*

A financial institution’s transposition of the regulatory regime governing financial crime into an actionable compliance program can, at times, be hampered by the dissonance between a regulatory expectation

⁵ FATF, *An effective system to combat money laundering and terrorist financing* :<https://www.fatf-gafi.org/publications/mutualevaluations/documents/effectiveness.html>

⁶ The Wolfsberg Group, *Statement on Effectiveness - Making AML/CTF Programs more effective*, 2019.

⁷ IBID

⁸ A focus on technological innovation is central to enhancing effectiveness in AML/CFT regimes globally. For further information on these issues, please see Section 7 of IIF/Deloitte, *The Global Framework for Fighting Financial Crime: Enhancing Effectiveness and Improving Outcomes*, October 2019: <https://www.iif.com/Publications/ID/3606/The-Global-Framework-for-Fighting-Financial-Crime-Enhancing-Effectiveness-Improving-Outcomes>

centered on detection, prevention and disruption of financial crime, and an assessment framework that focuses on the extent to which a financial crime compliance program is technically compliant. This can also be exacerbated in circumstances where a lack of alignment between FinCEN, the supervisory agencies and law enforcement can lead to variable interpretations of AML/CFT regulations.

This emphasis on being technically, or formally, compliant can at times be driven by proscriptive criteria wherein each element in that suite of measures is treated equally and without consideration for the fact that some measures will play a more pivotal role in mitigating financial crime risk than others, and the impact will depend on the financial institution's individual risk profile and differences across types of financial institutions. This can perpetuate a financial crime compliance culture that prioritizes a 'tick-box' compliance exercise rather than one that is driven by, and measured against, the strategic objectives of prevention, detection, and disruption in that financial institution.

To this end, the public sector needs to lead the way on two levels. First, it needs to articulate clearly, consistently and transparently what the regulatory expectations are of financial institutions and how these are translated into the criteria to be used in evaluating whether a financial crime compliance program satisfies not only the financial crime risk management regime, but also its effectiveness in assisting the wider community in meeting strategic financial crime objectives and the objectives of national risk assessments (and this approach must be applied through to the examiner level as well). In the context of this Consultation, this should be included in the Federal Financial Institutions Examination Council's ("FFIEC") Manual. Financial institutions need clear guidance on the expectations of effectiveness for all components of an AML program, in line with the risk-based approach. These concepts should not only be applied to detection/reporting.

Second, regulatory expectation and its evaluation in a financial institution's financial crime compliance framework needs to factor in the evolution of practices that have outpaced regulation as well as technological developments, particularly in terms of the tools that financial crime compliance functions are able to develop and deploy in mitigating their exposure to financial crime and detecting when and where it may be happening. How and what is evaluated when assessing a financial institution's compliance program needs to consider this changing landscape and to do so in a manner that foments and encourages, rather than stifles or impedes, the flexible and innovative approaches that banks may explore in meeting government vision and regulatory expectation. If risk assessments are to be required, the requirement should allow for financial institutions to assess risks in a way that is most effective for their institution.

As FinCEN moves forward with its rulemaking, we believe it is important to keep these concepts at the forefront of discussions. This is particularly imperative in the context of the Consultation's proposed focus on an "effective and reasonably designed" AML program being one that "identifies, assesses, and reasonably mitigates the risks resulting from illicit financial activity—including terrorist financing, money laundering, and other related financial crimes—consistent with both the institution's risk profile and the risks communicated by relevant government authorities as national AML priorities" and one that "assures and monitors record keeping and reporting requirements of the Bank Secrecy Act ("BSA")."⁹

This approach will assist in effectiveness but needs to be balanced to ensure the efficacy of outcomes are highlighted, regulatory expectations are clearly communicated, the technological evolution of risk management programs is considered and the prioritization of national AML risks are clearly expressed

⁹ *Federal Register/Vol. 85, No. 181/Thursday, September 17, 2020/Proposed Rules. 58026*

and measured in line with the overall risk-based approach. The ultimate rulemaking should also keep in mind the differences between supervised financial institutions and must avoid layering-on additional requirements.

2. Improve information exchange to enhance the intelligence led approach to tackling financial crime.

It is widely recognized that the management of economic and financial crime risk can be improved by facilitating the increased sharing of information on financial activity linked to crime and terrorism, both domestically and internationally. Such exchange is important to the proper functioning of AML/CFT and other financial crime prevention policies which address key geopolitical priorities well recognized by the international community. Nevertheless, financial institutions, regulators and law enforcement are often constrained in seeing the full picture of criminal activity which flows across the global financial system, making the mitigation and eradication of criminal elements much more difficult.¹⁰

The degree and scope of information exchange between the public and private sectors can specifically impact the effectiveness of AML/CFT and wider financial crime risk management frameworks. A crucial factor in improving the quality of Suspicious Activity Report (“SAR”) disclosures, for example, would be to increase general and/or specific feedback and information from law enforcement to the reporting institutions.

The absence of feedback provided by law enforcement and Financial Intelligence Units (“FIU”) once a disclosure is made is a common issue and is one that has arisen in most jurisdictions. It is acknowledged that there will be occasions when specific feedback may not be achievable because it takes time for an intelligence picture to be built or there are particular sensitivities which inhibit feedback. However, where little or nothing is communicated back from law enforcement/FinCEN - such as whether disclosures in general by a reporting institution were sufficiently granular, timely, or in an area of a particular law enforcement authority - reporting institutions are less able to refine their own approaches to the identification of suspicious activity or improve the quality of reports filed. As a result, institutions are not made aware of where they may be falling short and, consequently, how they can improve.¹¹

The Consultation proposes that an “effective and reasonably designed” AML program is one that “provides information with a high degree of usefulness to government authorities consistent with both the institution’s risk assessment and the risks communicated by relevant government authorities as national AML priorities.”¹² We generally agree with this assessment¹³, however, in order for the usefulness of information shared with authorities to be enhanced, a greater focus should be on public/private cooperation which emphasizes an intelligence led approach to financial crime risk

¹⁰ For a full review of current issues concerning information sharing and financial crime intelligence, please see: IIF, *Staff Paper: Economic and Financial Crime Risk and the Sharing of Intelligence: Updating and Enabling International and Domestic Cooperation in Combatting Illicit Financial Flows*, October 2020: <https://www.iif.com/Publications/ID/4125/IIF-Staff-Paper-on-Financial-Crime-Intelligence-Sharing>

¹¹ This issue was also recognized by the Bank Secrecy Act Advisory Group’s AML Effectiveness Working Group: *Federal Register/Vol. 85, No. 181/Thursday, September 17, 2020/Proposed Rules. 58025*

¹² IBID, 58026

¹³ We note, however, that when considering the concept of AML priorities, FinCEN should also focus attention where outstanding issues could arise, such as in the operationalization of the concept, when such priorities may or may not apply to all geographies, and whether new priorities supersede previous priorities or whether they are additive.

management. Information with a high degree of usefulness can be a two-way street and as such public/private cooperation is a step toward leveraging both sources of information.

As FinCEN moves forward with its rulemaking, further consideration should thus be given to how to enhance the information feedback loop between FinCEN, supervisory authorities and law enforcement and the regulated sector to ensure the information being shared is useful in line with the objectives of the Consultation. In particular, sharing the learning derived from analysis of complex cases along with efficacy indicators, in addition to wider threat and trend analysis, is critical so that the reporting sector can more effectively focus its resources informed by a better understanding of risk. Instituting this type of communication would also be a mechanism through which risk can be conveyed to firms on an ad hoc basis rather than only through the risk assessment. If feedback was provided, it may offer indicia of something of higher risk where more resources should be allocated.

It is also important that effectiveness in this area is clarified outside of the context of reporting. The ultimate rulemaking should ensure that other areas of an AML program are considered and that the feedback loop includes information not just from FinCEN, but also from law enforcement and the US supervisory agencies. It should also pertain to all areas of an AML program – not just case analysis.

Lastly, the ultimate rulemaking should reflect more closely on how examiners will assess the requirement of providing information with a high degree of usefulness to government authorities, particularly if the feedback loop issues noted herein are not addressed. A lack of clarity can pose regulatory examination risk if expectations are not clear, measurable, and achievable. It is also likely that many financial institutions will not necessarily have a business footprint that aligns with all of the national AML priorities, and this should be taken into account when adjudicating the relevance of information provided.