

February 7, 2022

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

Re: Review of Bank Secrecy Act Regulations and Guidance
Docket ID: FINCEN-2021-0008

To Whom It May Concern:

We appreciate the opportunity to comment on the request for information and comment on the Review of Bank Secrecy Act Regulations and Guidance. The Financial Crimes Enforcement Network's effort to streamline, modernize, and update the Bank Secrecy Act (BSA) is an excellent opportunity to improve the financial regulatory framework in the United States. The Cato Institute is a public policy research organization dedicated to the principles of individual liberty, limited government, free markets, and peace, and the Center for Monetary and Financial Alternatives focuses on identifying, studying, and promoting alternatives more conducive to a stable, flourishing, and free society. The opinions we express in this comment letter are our own.

There are many ways to modernize the anti-money laundering and countering the financing of terrorism (AML/CFT) regime in the United States, ranging from discrete reforms to agency regulations to a complete repeal of the BSA. However, in this letter, we will limit our comments to questions B.3, B.7, and C.ii.14 in FinCEN's request for information.¹

Question B.3: Are there BSA reporting or recordkeeping requirements that you believe do not provide information that is highly useful in countering financial crimes?

The requirements of FinCEN could be greatly improved to counter financial crimes. The current information reported to the public by FinCEN fails to properly indicate how many reports lead to secondary investigation, legal action, or conviction.² Such information would be highly useful in

¹ Financial Crimes Enforcement Network, "Review of Bank Secrecy Act Regulations and Guidance," Federal Register, December 15, 2021, <https://www.federalregister.gov/documents/2021/12/15/2021-27081/review-of-bank-secrecy-act-regulations-and-guidance>.

² As noted by the Bank Policy Institute, "there is no established metric for measuring whether financial institutions' BSA reports are "useful" to law enforcement, and little to no feedback from law enforcement on the matter..." Bank Policy Institute, "Getting to Effectiveness—Report on U.S. Financial Institution Resources Devoted to BSA/AML & Sanctions Compliance," Bank Policy Institute, October 29, 2018, <https://bpi.com/wp-content/uploads/2018/10/BPI-AML-Sanctions-Study-vF.pdf>. The lack of reporting is also noted in footnote two of Norbert Michel and David Burton,

countering financial crimes because it would provide a set of baseline metrics for evaluating the success of the BSA. Such an improvement would also increase efficiency by identifying specific weaknesses in the BSA's record keeping and reporting requirements. However, as it stands, the public has largely been left in the dark regarding how many reports lead to conviction and how many of those convictions are simply additional counts against persons charged with other predicate crimes. Worse yet, without any metric for evaluating the program's success, FinCEN risks what might be described as "reporting floods" and "reporting fatigue," both of which risk undermining FinCEN's ability to combat financial crime.

"Reporting floods" can be thought of as overly broad sweeps for information that overwhelm scarce resources (e.g., the employees that file and review reports) and ultimately undermine the credibility of FinCEN, the BSA, and law enforcement. Assuming FinCEN is solely interested in collecting information for the sake of identifying crimes, its sweeps for information should have been refined over time to focus on the information most likely to identify criminal behavior.

Currently, it appears that FinCEN is flooded with meaningless reports year-after-year. That much was made evident when the Bank Policy Institute (BPI) conducted an empirical study in 2018 that found a sample of just 19 financial institutions reviewed approximately 16 million alerts, filed over 633,000 suspicious activity reports (SARs), and filed over 5.2 million currency transaction reports (CTRs).³ Those reports only resulted in a median of 4% of SARs and an average of 0.44% of CTRs that actually warranted additional review from law enforcement.⁴ Even fewer likely resulted in stopping or apprehending criminals. As such, BPI's findings are a clear example of a reporting flood: an overly broad sweep led to millions of unnecessary reports. If the sole purpose of collecting information under the Bank Secrecy act is to catch criminals, then FinCEN has clearly failed.

Those unnecessary reports are only made worse by the fact that reporting floods likely lead to "reporting fatigue." By reporting fatigue, we refer to the scenario in which one is fatigued from filing many reports that they know to be unnecessary. Such busy work risks undermining the entire reporting process. Employees of financial institutions that are monitoring for potential issues face a tradeoff that disproportionately harms smaller institutions: They can either take the time to find and flag only the truly suspicious alerts or they can play it safe and flag any item that causes the slightest concern. The ratio of alerts-to-action found by BPI in 2018 seems to suggest it is the latter that is taking place—and that is the logical course of action for banks to take. It is difficult to correctly assess suspicious activity, and it is safer for a financial institution to

"Financial Privacy in a Free Society," Heritage Foundation, September 23, 2016, <https://www.heritage.org/markets-and-finance/report/financial-privacy-free-society>.

³ Bank Policy Institute, "Getting to Effectiveness—Report on U.S. Financial Institution Resources Devoted to BSA/AML & Sanctions Compliance," Bank Policy Institute, October 29, 2018, <https://bpi.com/wp-content/uploads/2018/10/BPI-AML-Sanctions-Study-vF.pdf>.

⁴ Unfortunately, these numbers only represent follow-up actions by law enforcement, not legal action or conviction. However, the findings are illustrative nonetheless considering both the number of legal actions and the number of convictions would most likely be far less than the number of follow-up actions. Bank Policy Institute, "Getting to Effectiveness—Report on U.S. Financial Institution Resources Devoted to BSA/AML & Sanctions Compliance," Bank Policy Institute, October 29, 2018, <https://bpi.com/wp-content/uploads/2018/10/BPI-AML-Sanctions-Study-vF.pdf>.

mistakenly over report, rather than underreport. The latter can result in fines,⁵ but the former is simply welcomed with open arms. Therefore, rather than operate as a process to collect information for the sake of identifying crimes, the BSA has decayed into a process to collect information, much of which is useless.

Openly sharing success rates, however, has the power to undue this decay. Whether BPI's numbers are indicative of FinCEN's performance or the internal data suggests that their sample is anomalous, being transparent with the public will yield an opportunity to improve the efficiency of the program. In turn, a more targeted program with clear successes offers employees a chance to participate in more than what appears to be busy work.

This critique is not meant to imply that FinCEN completely lacks transparency. The agency did, for instance, publicly announce that, "In fiscal year 2019, more than 20 million BSA reports were filed by more than 97,000 U.S. financial institutions, providing a wealth of potentially useful information to agencies whose mission is to detect and prevent money laundering, other financial crimes, and terrorism."⁶ However, although the number of reports may be impressive in its magnitude, announcements like this one reveal very little substantive information about the ostensible success of the regulatory framework. The key phrase in the announcement is that the information was "potentially useful." It could also be potentially useless. The only way for the public to know the difference is for FinCEN to include not just the number of reports, but also the number of secondary investigations, enforcement actions, and convictions that those reports led to. Without this information, the public is left with no meaningful way of knowing if the program is a worthwhile endeavor. Given that the available data suggests that the AML regime costs between \$4.8 billion to \$8 billion annually (with fewer than 700 convictions annually), it is even more critical that FinCEN also report how many of those convictions are simply additional counts against persons charged with other predicate crimes.⁷

Question B. 7. Would automatically updating certain BSA reporting or recordkeeping requirements streamline or reduce the potential compliance burden without sacrificing the usefulness of the required BSA reports and records in countering financial crimes? If so, what other requirements might benefit from automatic updates? For example, should automatic updates to dollar thresholds for certain BSA reports and records occur to account for inflation adjustments? What other circumstances might necessitate automatic updates?

Adjusting BSA reporting and recordkeeping thresholds to adjust for inflation—both to adjust from the date that the legislation was passed and on an ongoing, annual basis—would streamline and reduce the compliance burden without sacrificing the usefulness of the required BSA reports

⁵ In 2021, Capital One was fined \$390,000,000 for both willful and *negligent* violations of the Bank Secrecy Act. See FinCEN Office of Strategic Communications, "FinCEN Announces \$390,000,000 Enforcement Action Against Capital One, National Association for Violations of the Bank Secrecy Act," FinCEN Press Release, January 15, 2021, <https://www.fincen.gov/news/news-releases/fincen-announces-390000000-enforcement-action-against-capital-one-national>.

⁶ "What is the BSA Data?," Financial Crimes Enforcement Network, <https://www.fincen.gov/what-bsa-data>.

⁷ Norbert Michel and David Burton, "Financial Privacy in a Free Society," Heritage Foundation, September 23, 2016, <https://www.heritage.org/markets-and-finance/report/financial-privacy-free-society>.

and records in countering financial crimes. For example, the \$10,000 reporting threshold for deposits, withdrawals, and exchanges of currency at financial institutions was enacted in 1970.⁸ Since that time, the value of the dollar has decreased dramatically. After adjusting for inflation, \$10,000 in 1970 now has the same purchasing power as roughly \$74,000.

In practice, failure to adjust for inflation has meant that the reporting threshold has become more onerous each year without so much as a notice to the public. If this past Fall's experience with the Treasury Department's proposal for \$600 bank reporting thresholds was any indication of public sentiment,⁹ it should be clear that the American people see little value in an ever-increasing surveillance regime that targets transactions so much smaller than the original BSA reporting threshold. FinCEN should correct this 50-year-old mistake and work towards adopting a new \$75,000 threshold as well as automatic adjustments for annual inflation.

Question C. ii. 14. Are there BSA regulations that impose requirements that are identical to or significantly overlap with requirements imposed under another regulatory regime? If so, which BSA regulations, and which other regulatory framework?

One section of the BSA that significantly overlaps with the requirements imposed under another regulatory regime is 31 U.S.C. Section 5331, reports relating to coins and currency received in nonfinancial trade or business. As recently noted by Abraham Sutherland, "When you file an IRS Form 8300, you're also filing a FinCEN Form 8300."¹⁰ This overlap exists because Congress copied the text directly from the Internal Revenue Code (26 U.S.C. Section 6050I) when expanding government surveillance of commercial transactions in the wake of the 2001 terrorist attacks.¹¹

This overlap is especially concerning because sections 6050I and 5331 of the U.S. Code clearly clash with the protections afforded by the Fourth Amendment to the United States Constitution. Although the third-party doctrine has been used to justify similar financial surveillance through financial institutions, surveillance under sections 6050I and 5331 differ because these are cases where there is no third party involved.¹² Furthermore, when only two private parties are involved in an exchange of goods or services, such cases require individuals to report their own activity—clashing with the Fifth Amendment to the Constitution. There are multiple reasons, therefore, that this regulation should be revoked entirely.

⁸ "Legal Reference for Bank Secrecy Act Forms and Filing Requirements," Financial Crimes Enforcement Network, <https://www.fincen.gov/legal-reference-bank-secrecy-act-forms-and-filing-requirements>.

⁹ Nicholas Anthony, "Why Don't Americans Have Stronger Financial Privacy Rights?," Cato Institute, October 28, 2021, <https://www.cato.org/blog/why-dont-americans-have-stronger-financial-privacy-rights>.

¹⁰ Abraham Sutherland, "Congress Takes Its War on Cash to Digital Assets," Coin Center, December 8, 2021, <https://www.coincenter.org/congress-takes-its-war-on-cash-to-digital-assets/>.

¹¹ 31 U.S. Code § 5331, "Reports Relating to Coins and Currency Received in Nonfinancial Trade or Business," <https://www.law.cornell.edu/uscode/text/31/5331>; and 26 U.S. Code § 6050I, "Returns to Cash Received in Trade or business, etc.," <https://www.law.cornell.edu/uscode/text/26/6050I>.

¹² Supra note 8; and Nicholas Anthony, "The Infrastructure Investment and Jobs Act's Attack on Crypto: Questioning the Rationale for the Cryptocurrency Provisions," Cato Institute, November 15, 2021, <https://www.cato.org/briefing-paper/infrastructure-investment-jobs-acts-undue-attack-crypto>.

Thank you for the opportunity to share our perspective regarding the effort to streamline, modernize, and update the Bank Secrecy Act. We hope FinCEN seriously considers becoming more transparent about its efforts, begins the process toward adjusting thresholds for inflation, and removes the duplicate 6050I legislation.

Yours Respectfully,

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