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September 3, 2024

VIA ELECTRONIC SUBMISSION

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

Re: Anti-Money Laundering and Countering the Financing of Terrorism Programs (Docket Number FINCEN-2024-0013; RIN 1506-AB52)

Dear Sir or Madam:

The Institute of International Bankers ("IIB") appreciates the opportunity to submit this letter to the Financial Crimes Enforcement Network ("FinCEN") regarding FinCEN's notice of proposed rulemaking (the "NPRM" or "Proposed Rule") and request for comment on potential regulatory amendments to anti-money laundering and countering the financing of terrorism ("AML/CFT") program rule requirements for covered financial institutions pursuant to the Anti-Money Laundering Act of 2020 ("AML Act"). Among other changes, the Proposed Rule would require financial institutions to establish, implement and maintain "effective, risk-based and reasonably designed" AML/CFT programs with certain minimum components, including a mandatory risk assessment process.[1]

The IIB represents internationally headquartered financial institutions from over 35 countries around the world doing business in the United States. The IIB's members are principally foreign banking organizations ("FBOs") that operate branches, agencies, bank subsidiaries and broker-dealer subsidiaries in the United States. Our members are important participants in the U.S. financial system, injecting billions of dollars each year into state and local economies across the country through direct employment, capital expenditures and other investments.

The IIB welcomes FinCEN's stated objectives in the Proposed Rule to promote "effectiveness, efficiency, innovation, and flexibility" in AML/CFT programs, make AML/CFT programs

[1] FinCEN, Anti-Money Laundering and Countering the Financing of Terrorism Programs, 89 Fed. Reg. 55428 (July 3, 2024).

"more dynamic and responsive" and focus on a "more risk-based, innovative, and outcomes-oriented approach." We appreciate FinCEN's ongoing efforts related to its broader implementation of the AML Act and initiatives to modernize and strengthen AML/CFT programs, and recognize FinCEN's commitment to working with industry and other stakeholders to ensure the necessary regulatory framework and guidance are in place to foster risk-focused examination for compliance with Bank Secrecy Act ("BSA") requirements and enable financial institutions to implement AML/CFT programs that are appropriately tailored to their illicit finance risks. The IIB's members welcome any updates to the U.S. AML/CFT regime that would allow them to focus resources on furthering the important AML/CFT aims of the BSA rather than on inflexible, check-the-box exercises that do not meaningfully mitigate illicit finance risk.

In this regard, the IIB wishes to emphasize to FinCEN that the U.S. operations of FBOs are unique in a number of important ways that should be taken into account under the Proposed Rule. FBOs are subject to international regulatory and supervisory expectations for enterprise-wide risk management and the establishment and maintenance of AML/CFT programs, including risk assessments; thus, it is critical for FinCEN to provide flexibility for FBOs to comply with both U.S. AML/CFT program requirements and other regulatory and supervisory expectations that may be applicable to them. In particular, the AML/CFT-related operations and governance mechanisms of the U.S. operations of FBOs involve essential non-U.S. personnel and resources—as a result, and as discussed further below, any requirement under the Proposed Rule to onshore to the United States significant portions of AML/CFT program functions currently conducted offshore would impose new and extraordinarily burdensome challenges for FBOs, would be impracticable to implement in the near to medium term and could be infeasible from a cost perspective.

The IIB has provided its main comments on the Proposed Rule in Sections I through IV of this letter. In Section V, we provide additional comments on certain of the enumerated questions posed in the NPRM. Below, we provide an executive summary of our main comments:

- Given FinCEN's stated goal in the Proposed Rule of promoting flexibility in AML/CFT programs, FinCEN should avoid imposing a rule that lessens financial institutions' flexibility through one-size-fits-all requirements and clarify that the Proposed Rule is intended to allow financial institutions flexibility to determine on a risk basis what constitutes an effective, risk-based and reasonably designed AML/CFT program.

- The IIB urges FinCEN to clarify how the Proposed Rule interacts with supervisory expectations and liaise with necessary stakeholders before issuance of a final rule to both avoid subjecting financial institutions to inconsistent standards and ensure guidance is provided on compliance expectations for AML/CFT programs.

- Given the significance of the proposed changes, the IIB suggests that FinCEN consider hosting "roundtable" meetings with financial institutions and other stakeholders to obtain feedback on existing processes and potential impacts of the Proposed Rule and to foster alignment on the proposed amendments before they are finalized.

- The IIB strongly believes an effective date of at least two years from the date of issuance of the final rule would be necessary to comply with the proposed changes and urges FinCEN to ensure expectations for how banks will be examined for compliance are published well in advance of the effective date, so that banks can take such guidance into account in their implementation efforts.

- The duty prescribed in section 6101(b)(2)(C) of the AML Act should be limited to requiring that oversight of AML/CFT compliance with respect to U.S. activities be the responsibility of, and performed by, a person or persons in the United States. For U.S. operations of FBOs, onshoring to the United States of a significant portion of non-U.S. AML/CFT functions would impose extraordinarily high costs and provide no meaningful benefit to the effectiveness of AML/CFT programs.

- In light of financial institutions' current risk assessment practices, the IIB urges FinCEN to clarify that (i) the Proposed Rule's risk assessment process requirement could be satisfied by multiple risk assessment processes across an enterprise, (ii) financial institutions retain flexibility in documenting and assessing factors for consideration in their risk assessment processes and (iii) financial institutions retain flexibility in determining how and when various risk assessment processes are updated.

- Under the Proposed Rule's board approval and oversight requirements, financial institutions should have flexibility to determine the appropriate frequency, content and manner of board approval and oversight processes.

I. General comments on ensuring flexibility for financial institutions, aligning supervisory expectations, engaging with industry to understand current practices and potential impacts of the Proposed Rule and providing an appropriate compliance time frame

A. FinCEN should clarify that the purpose of the Proposed Rule, consistent with the purposes of the AML Act, is to allow financial institutions flexibility to determine what constitutes an effective, risk-based and reasonably designed AML/CFT program in light of the particular risks a financial institution faces.

The purpose of the AML Act is to "reinforce that the [AML/CFT] policies, procedures, and controls of financial institutions shall be risk-based," among other purposes.[2] As noted above, we agree with and support fully FinCEN's statement in the Proposed Rule that it seeks to promote "flexibility" in AML/CFT programs. In recognition of these objectives, as well as the practical experiences of the IIB's members in implementing AML/CFT programs, we urge FinCEN to recognize that financial institutions' flexibility in designing and implementing AML/CFT programs is inextricably intertwined with their ability to ensure that their AML/CFT programs are effective, risk-based and reasonably designed.

[2] AML Act, § 6002(4).

In particular, the IIB respectfully urges FinCEN to ensure that it does not impose a rule that undermines the AML Act's purpose of reinforcing financial institutions' risk-based AML/CFT programs by lessening financial institutions' flexibility through one-size-fits-all requirements for risk assessment processes, onshoring of AML/CFT functions or other AML/CFT program components. We request that FinCEN clarify expressly that the Proposed Rule is intended to allow a financial institution to retain flexibility in taking the measures it deems appropriate and necessary in light of its particular risks to establish, implement and maintain its AML/CFT program.

B. FinCEN should clarify how the Proposed Rule interacts with supervisory expectations to avoid subjecting financial institutions to inconsistent standards or expectations that undermine institutions' flexibility to tailor their programs to their particular risks.

We agree fully with the AML Act's and FinCEN's acknowledgement of the "importance of supervision and examination of financial institutions in the success of AML/CFT programs."[3] In light of this acknowledgement, we respectfully request FinCEN to liaise with the necessary stakeholders to develop an appropriate framework for assessing whether programs are "effective, risk-based and reasonably designed" and ensure that supervisory guidance on expectations for AML/CFT programs is published prior to the effective date of any final rule. Doing so would promote consistent regulatory and supervisory expectations and provide critical guidance to financial institutions in understanding how supervisors will expect the AML/CFT program rule amendments to be implemented.

Additionally, we request that FinCEN make explicit that the Proposed Rule's statement of purpose of the AML/CFT program requirement should not serve as the basis for regulatory obligations or supervisory expectations, in order to avoid that statement being used over time to impose more burdensome expectations on financial institutions.

Further, we request FinCEN to make clear that regulatory assessments of effectiveness, risk levels and appropriate risk mitigants or reasonableness in relation to financial institutions' AML/CFT programs should not be made in hindsight. A single incident or limited set of deficiencies or issues should not, without more, support a finding that an AML/CFT program as a whole is not "effective, risk-based and reasonably designed." Similarly, given FinCEN's recognition that AML/CFT program components complement each other, FinCEN should make clear that an isolated deficiency in one program component does not by itself mean an entire AML/CFT program is not "effective, risk-based and reasonably designed."

In this regard, and as a point of reference for underlying rationales animating these requests, we note that guidance on assessing effectiveness of countries' AML/CFT systems issued by the international anti-money laundering standard-setting body, the Financial Action Task Force ("FATF"), draws a sharp distinction between assessing technical compliance with rules and

[3] *Supra* note 1, at 55433.

assessing the effectiveness of AML/CFT systems.[4] In particular, the FATF guidance states that "[a]ssessing effectiveness is based on a fundamentally different approach to assessing technical compliance [and] does not involve checking whether specific requirements are met [but instead] requires a judgement as to whether, or to what extent defined outcomes are being achieved, i.e. whether the key objectives of an AML/CFT/[countering proliferation financing] system . . . are being effectively met in practice."[5] The FATF goes on to define "effectiveness" as the extent to which AML/CFT systems "mitigate the risks and threats of money laundering, and financing of terrorism and proliferation."[6] In accordance with these rationales, the IIB respectfully encourages FinCEN to make clear that regulatory expectations for AML/CFT programs should employ a similar outcomes-oriented approach to assess whether a financial institution's AML/CFT program is effective, risk-based and reasonably designed, rather than focusing solely on technical compliance with specific rules.

Finally, we request that FinCEN clarify expressly that it intends for supervisory expectations to be aligned with AML/CFT program expectations, such that supervisory examinations should be focused on higher-risk areas, where financial institutions are expected to focus their attention and resources, and not lower-risk areas.[7] Absent this clarification, financial institutions will be reluctant to divert AML/CFT resources to higher-risk areas from lower-risk areas for fear of supervisory criticism.

C. Before finalizing the proposed amendments, FinCEN should consider hosting "roundtable" meetings with financial institutions and other stakeholders to discuss the new proposed requirements, their implications for existing processes and supervisory approaches for effective, risk-based and reasonably designed AML/CFT programs.

The IIB strongly supports the AML Act's objective and FinCEN's efforts to modernize and strengthen AML/CFT programs. However, the IIB also recognizes that these modernization efforts will require ongoing, long-term engagement between relevant stakeholders to be effective. In particular, coordination with supervisory and law enforcement expectations and examiner training will be essential to realizing the aims of the AML Act and the Proposed Rule. The IIB wishes to emphasize to FinCEN that implementation of the Proposed Rule will require

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4 *See* FATF, *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT/CPF Systems* 20 (updated Feb. 2024, for effect upon commencement of the fifth round of mutual evaluations), https://www.fatf-gafi.org/content/dam/fatf-gafi/methodology/5th-Round-Revised-Methodology.pdf.

5 *Id.*

6 *Id.*

7 *Cf.* Federal Financial Institutions Examination Council ("FFIEC") BSA/AML Examination Manual, Scoping and Planning (Mar. 2020), https://bsaaml.ffiec.gov/docs/manual/02_ScopingAndPlanning/01.pdf ("The federal banking agencies generally allocate more resources to higher-risk areas and fewer resources to lower-risk areas.").

significant time, attention and resources by all financial institutions, and any lack of alignment between industry, regulatory, supervisory or law enforcement stakeholders on expectations will pose significant challenges to realizing the stated aims of the AML Act and the Proposed Rule.

Given the magnitude and importance of the proposed changes to current AML/CFT program components and the AML/CFT regime, and related impacts on supervision and examination processes, the IIB respectfully proposes that FinCEN consider hosting one or more "roundtable" meetings with a variety of financial institutions (including representatives of U.S. operations of FBOs) to discuss how the proposed AML/CFT program requirements may work in practice and identify potential useful changes or clarifications to the proposed AML/CFT program requirements before finalizing the Proposed Rule.[8] Such roundtable meetings would foster necessary stakeholder alignment on the AML/CFT program rule amendments and enable FinCEN to provide critical clarity to financial institutions and adopt a more effective AML/CFT program rule.

D. FinCEN should provide for an effective date of at least two years from the date of issuance of the final rule.

The IIB strongly believes that an effective date of six months after the issuance of a final rule would be completely unworkable in light of the operational uplift that will be required to ensure all AML/CFT program components comply with the Proposed Rule. Risk assessment processes alone typically can take one year or more to conduct, and significant additional time would be required to redesign existing processes to incorporate the Proposed Rule's new requirements as well as to ensure risk assessment results are integrated in accordance with the Proposed Rule throughout a financial institution's AML/CFT program. Thus, we believe a minimum implementation period of at least two years (as FinCEN provided in connection with the customer due diligence rule) would be necessary for financial institutions to comply with the Proposed Rule's requirements as set out in the NPRM.

Further, even a two-year implementation period would likely be insufficient if FinCEN interprets the duty prescribed in section 6101(b)(2)(C) of the AML Act to require onshoring of a significant portion of AML/CFT processes in the United States (which we respectfully urge FinCEN to avoid, as discussed below). Such a requirement would cause significant disruption to FBOs' current AML/CFT processes and would take significant time and resources to implement.

As noted above, the IIB also respectfully urges FinCEN to ensure that supervisory expectations for how banks will be supervised and examined on their compliance with the Proposed Rule, including their review and incorporation of FinCEN's public government-wide AML/CFT priorities (the "AML/CFT Priorities"), are published well in advance of the effective date of a final rule, so that banks can take the supervisory guidance into account in implementing the rule.

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[8] For example, FinCEN hosted a series of roundtable meetings with financial institutions in connection with the Advance Notice of Proposed Rulemaking for the customer due diligence rule and before issuing the final rule. *See, e.g.*, FinCEN, Summary of Roundtable Meeting: Advance Notice of Proposed Rulemaking on Customer Due Diligence (Oct. 5, 2012), https://www.fincen.gov/news/news-releases/summary-roundtable-meeting-1.

II. AML Act requirement that the duty to establish, maintain and enforce an AML/CFT program remain the responsibility of, and be performed by, persons in the United States

The IIB urges FinCEN to recognize that non-U.S. AML/CFT operations are essential to the day-to-day working of U.S. operations of FBOs and that a requirement to onshore significant portions of a bank's AML/CFT processes would both substantially disrupt financial institutions' current AML/CFT operations and reduce the effectiveness of current AML/CFT processes. Such an approach is not necessary to implement section 6101(b)(2)(C) of the AML Act, which requires only that "[t]he *duty* to establish, maintain and enforce" an AML/CFT program "shall remain the responsibility of, and be performed by, persons in the United States" (emphasis added).

For U.S. operations of FBOs, many AML/CFT risk management processes, operational processes and control functions involve and depend on staff and functions outside of the United States. Coordination, information sharing and centralized, efficient processes involving non-U.S. resources are critical for FBOs to ensure regulatory compliance, meet supervisory expectations and avoid siloed approaches that would diminish their ability to manage and mitigate financial crime risks on an enterprise-wide basis.

Examples of AML/CFT processes for U.S. operations of FBOs that involve non-U.S. operations include, but are not limited to, the following:

- personnel conducting various AML/CFT processes and functions may be based outside the United States, including in relation to (i) customer identification, customer due diligence, transaction monitoring or sanctions screening teams; (ii) customer risk ratings informed by products or services used by a customer globally or other risk data from foreign headquarters (subject to applicable privacy obligations); (iii) model validation functions; (iv) teams responsible for the maintenance or operation of AML/CFT technology or tools; or (v) information technology teams that contribute to the day-to-day operation of AML/CFT processes;

- third-party service providers providing AML/CFT services or technology may be located or use resources outside the United States;

- U.S.-based AML/CFT personnel may report to persons outside the United States within the framework of an FBO's global AML/CFT compliance program; and

- AML/CFT program approval by the board may occur outside the United States.

The above examples are not intended to be an exhaustive list of the various ways that both FBOs and other large financial institutions use resources based outside the United States to ensure that U.S. AML/CFT functions operate efficiently and effectively manage risks on an enterprise-wide basis.

The IIB agrees with FinCEN's recognition that the decades-old U.S. AML/CFT regime does not conform to the sophisticated AML/CFT programs that are operated by financial institutions

today.[9] In line with this recognition, the IIB strongly urges FinCEN, in implementing the statutory language of the AML Act, to recognize that requiring significant onshoring of AML/CFT processes would run counter to the AML Act's and the Proposed Rule's shared aim of ensuring financial institutions manage risks effectively across their enterprises. Current holistic risk management practices for multinational financial institutions necessarily incorporate non-U.S. processes and personnel. The IIB urges FinCEN not to upend current effective AML/CFT practices and to afford financial institutions flexibility to conduct processes in ways they determine are most effective.

Particularly for FBOs, onshoring to the United States of a significant portion of AML/CFT functions currently conducted offshore would require extraordinarily high expenditure for no meaningful benefit to the effectiveness of AML/CFT programs (and even potential detriment to financial institutions' abilities to maintain effective AML/CFT programs and potential supervisory risk in FBOs' home countries). The IIB also believes that a requirement to onshore AML/CFT program components potentially would be inconsistent with FinCEN's express acknowledgment in the NPRM that U.S. operations of FBOs may seek approval of AML/CFT programs from the FBO's board of directors, which may be outside the United States.[10] In this regard, we believe that FinCEN's recognition in the NPRM that U.S. operations of FBOs also may seek approval of AML/CFT programs from delegates acting under the board's express authority reflects and reaffirms the need for FinCEN to provide FBOs flexibility to leverage both offshore and onshore operations to maintain effective, risk-based and reasonably designed AML/CFT programs.[11]

The IIB notes that FinCEN's proposed rule regarding access to beneficial ownership information ("BOI") would have limited redisclosure of BOI to persons "physically present in the United States."[12] However, FinCEN did not implement this broad onshoring requirement.[13] Among other considerations, FinCEN noted, much as the IIB now urges FinCEN to recognize in its present rulemaking, that "[m]any financial institutions operate global compliance programs that apportion responsibilities among different regions and reduce compliance expenses" and that "[r]elocating certain compliance functions to the United States . . . could be very costly, and in many cases might be financially infeasible."[14]

The IIB believes that these same considerations should be taken into account under the Proposed Rule and that FinCEN should again avoid imposing exceedingly high (and potentially infeasible)

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9 *Supra* note 1, at 55429.

10 *Id.* at 55444.

11 *Id.*

12 FinCEN, Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities, 87 Fed. Reg. 77404, 77418 (Dec. 16, 2022).

13 FinCEN, Beneficial Ownership Information Access and Safeguards 88732, 88769 (Dec. 22, 2023).

14 *Id.*

costs in requiring onshoring of AML/CFT processes. We acknowledge FinCEN may have valid concerns with respect to ensuring appropriate oversight or accountability of AML/CFT programs in the United States but believe specific concerns beyond program oversight and accountability should be addressed through tailored controls, rather than an onshoring requirement for significant portions of an AML/CFT program.

In light of these considerations, the IIB respectfully requests that FinCEN interpret the duty prescribed in section 6101(b)(2)(C) of the AML Act to be limited to requiring that *oversight* of AML/CFT compliance with respect to U.S. activities be the responsibility of, and performed by, a person or persons in the United States. The AML Act requires that "[t]he *duty* to establish, maintain and enforce" an AML/CFT program "shall remain the responsibility of, and be performed by, persons in the United States" (emphasis added). The IIB does not believe that FinCEN should impose on this plain meaning the additional obligation that a significant portion of AML/CFT functions overseen by such person(s) in establishing, maintaining and enforcing the U.S. AML/CFT program be conducted by persons in the United States. Accordingly, we request that FinCEN expressly authorize financial institutions to rely on staff, operations and/or third-party service providers outside of the United States, so long as oversight of these staff, operations and third-party service providers for purposes of compliance with U.S. AML/CFT program requirements is conducted by persons in the United States. We also request FinCEN expressly clarify that the AML Act duty (i) would not require U.S. operations of FBOs to onshore AML/CFT processes to the United States and (ii) is not intended to disrupt financial institutions' current AML/CFT operations or increase burdens on financial institutions, in line with the Proposed Rule's stated aims of enhancing effectiveness, efficiency and flexibility of AML/CFT programs.

III. Risk assessment process requirement

A. FinCEN should recognize that financial institutions use an array of different risk assessment processes, which may together serve as the basis for a risk-based AML/CFT program, but which need not be consolidated into a singular, consolidated risk assessment process.

The IIB notes that a number of FinCEN's requests for comment in the NPRM address financial institutions' current risk assessment practices. Accordingly, we describe below several aspects of current risk assessment practices that may be helpful for FinCEN's consideration.

In practice, financial institutions conduct a wide variety of risk assessment processes. For many, if not most, financial institutions, there is no singular risk assessment or risk assessment document that wholly captures all of the risk assessment processes conducted by a financial institution across its business. A consolidated enterprise-wide risk assessment is only one type of risk assessment process, which typically takes one year or more to conduct and requires significant resources across an enterprise to complete. This is particularly true for FBOs, which typically have a number of different risk assessment processes for different lines of business or legal entities in multiple jurisdictions.

For example, financial institutions may conduct coverage assessments on an ad hoc basis for emerging risks or business changes (e.g., new products), which, in many instances, may not be

formally considered to be part of a financial institution's enterprise-wide risk assessment. In addition, financial institutions may consider a number of different factors or different product or transaction types to establish customer risk ratings or transaction monitoring thresholds. Further, the factors taken into consideration under a bank's various risk assessment processes may differ based on the business line (e.g., banks versus broker-dealers).

We urge FinCEN to clarify that the proposed risk assessment process requirement could be satisfied by multiple risk assessment processes across an enterprise, including for different lines of business and different legal entities, consistent with current risk assessment practices. Given the diversity of risk assessment processes that are conducted currently by financial institutions, we request FinCEN to clarify that financial institutions retain flexibility to determine the best way to assess and document their understanding of illicit finance risks specific to their businesses and activities.

As suggested above, we believe industry roundtable meetings would strengthen alignment between FinCEN and financial institutions on the understanding of current practices and implications of the Proposed Rule, and the IIB respectfully reiterates the request that FinCEN host such meetings. As proposed, the rule is not sufficiently clear with respect to how financial institutions may be expected to demonstrate their compliance with the requirement that a singular "risk assessment process" serve as the basis for all AML/CFT program components and, without further clarity, the proposal risks departing substantially from current practices and significantly burdening even financial institutions that currently have robust risk assessment processes. Greater clarity and alignment around financial institutions' existing practices would facilitate FinCEN's ability to adopt an effective risk assessment process requirement and provide more informed and practical guidance to financial institutions on regulatory expectations.

B. **FinCEN should clarify expectations for how financial institutions should document and assess factors for consideration in risk assessment processes to ensure financial institutions retain flexibility in risk assessment processes.**

The IIB also requests that FinCEN provide additional clarity regarding expectations for financial institutions' assessment and documentation of the factors required to be considered in risk assessment processes under the Proposed Rule. We address certain of these factors in turn below.

1. General factors for consideration in risk assessment processes

FinCEN's NPRM is clear that many factors should be considered by financial institutions in assessing their institution-specific risks.[15] However, not all potential risk factors that may be considered will be relevant to a financial institution. Further, although a financial institution may assess many considerations and factors as part of various risk assessment processes, these assessments are not always documented in the same manner. To avoid the Proposed Rule imposing a risk assessment process requirement that becomes a one-size-fits-all, burdensome, check-the-box exercise, financial institutions should retain flexibility over how they document

[15] *Supra* note 1, at 55438.

their assessment of relevant risks and factors for consideration. The IIB believes it is critical for FinCEN and supervisors to recognize the reality of how risk assessment processes are conducted currently and afford financial institutions the flexibility to tailor appropriately their risk assessment processes and documentation as necessary.

Thus, given the wide breadth of potentially relevant factors for a financial institution's risk assessment processes, we request FinCEN to clarify that financial institutions are not required to affirmatively document or provide a rationale for every determination by a financial institution that a particular factor does not apply to the financial institution, including, for example, the AML/CFT Priorities, the financial institution's BSA reports or FinCEN advisories or guidance. We also request FinCEN to clarify that the same flexibility would apply to how financial institutions determine their resource allocation decisions with respect to higher-risk and lower-risk areas. Finally, we reiterate our request above that FinCEN liaise with the necessary stakeholders to ensure supervisory guidance regarding expectations for risk assessment processes is published well in advance of the effective date of any final rule, to avoid inconsistencies in supervisory expectations for financial institutions' risk assessment processes and appropriate guidance for financial institutions.

2. Incorporation of AML/CFT Priorities

Under the Proposed Rule, the issuance of new AML/CFT Priorities would trigger significant operational work for financial institutions, including updating risk assessment processes and carrying through the results of updated risk assessment processes to other AML/CFT program components. To avoid the issuance of new AML/CFT Priorities disrupting completely the day-to-day operations of AML/CFT programs, the IIB requests FinCEN to clarify that financial institutions will have a reasonable transition period to adjust to the issuance of new AML/CFT Priorities, including with respect to updating risk assessments and carrying through any changes to other AML/CFT program components.

Further, in line with FinCEN's recognition in the NPRM that some financial institutions may have limited exposure to the threats identified in the AML/CFT Priorities and to avoid the issuance of new AML/CFT Priorities causing major disruptions to AML/CFT programs, the IIB requests FinCEN to clarify that financial institutions would not be required or expected to fundamentally revise their AML/CFT programs or risk assessments based solely on changes to the AML/CFT Priorities.

Finally, given the importance of the AML/CFT Priorities to financial institutions' risk assessment processes and AML/CFT programs under the Proposed Rule, we also urge FinCEN to articulate AML/CFT Priorities with sufficient detail and precision to allow financial institutions to understand clearly their implications and adjust program resources as may be appropriate.

3. BSA reports

The Proposed Rule is not sufficiently clear on how or to what extent financial institutions would be required to analyze reports filed pursuant to 31 CFR chapter X as part of a financial institution's risk assessment process. Financial institutions, in practice, reasonably may identify

many possible explanations for patterns or trends in reports filed pursuant to 31 CFR chapter X, which may or may not be suggestive of an emerging area of risk on an AML/CFT program level. Financial institutions exercise holistic, risk-based judgments to determine the significance of any particular pattern or trend on the financial institution's illicit finance risk profile on a case-by-case basis. Any expectation or mandate that BSA reports be incorporated in a particular manner in financial institutions' risk assessments poses the risk of creating an inflexible, check-the-box risk assessment process requirement.

Thus, the IIB requests FinCEN to clarify that financial institutions retain flexibility to determine how best to consider and evaluate reports filed pursuant to 31 CFR chapter X for purposes of risk assessment processes. We also request FinCEN to clarify that financial institutions would not be expected or obligated to treat any particular pattern or trend of reports as automatically determinative of an emerging or higher-risk area.

C. FinCEN should clarify expectations for when and how risk assessment processes must be updated to ensure financial institutions retain flexibility to conduct risk assessment processes in a reasonable manner for their business.

The IIB acknowledges and agrees with the benefits of dynamic risk assessment processes. However, we believe the Proposed Rule requires significant clarification with respect to FinCEN's expectations for the scope and frequency of required risk assessment process updates, in order to avoid imposing unnecessary burdens and costs on financial institutions.

For example, if the Proposed Rule's risk assessment process requirement would require a financial institution to update its entire enterprise-wide risk assessment or all risk assessment processes, this requirement would impose significant costs and burdens on financial institutions, and the benefit of such exhaustive efforts would be minimal to the extent unrelated to the actual changes to a financial institution's risk profile. As we noted above, in practice, risk assessments require substantial amounts of time and resources, particularly enterprise-wide risk assessments, and risk assessment processes typically consist of multiple parts that address different areas of risk or focused, ad hoc assessments in response to specific business changes or emerging risks. Additionally, there is a high likelihood that new AML/CFT Priorities will be issued in the midst of an ongoing enterprise-wide risk assessment process, and, absent FinCEN's clarification, the Proposed Rule could be read to require financial institutions to expend significant resources to divert an in-flight enterprise-wide risk assessment process to incorporate the new AML/CFT Priorities, which would cause substantial time delays and additional costs. However, requiring updates to enterprise-wide risk assessments would not meaningfully achieve FinCEN's aim of making risk assessments more dynamic and ongoing—given the time and resources required to complete an enterprise-wide risk assessment, these types of risk assessments often represent a financial institution's risk at a single, static point in time and are not as useful for developing a meaningful understanding of, or allocating resources to, emerging areas of high risk.

Moreover, although the IIB acknowledges and agrees with the need for risk assessments to accurately reflect a financial institution's illicit finance risks, we note that the Proposed Rule is not clear on the definition of a "material change" to a financial institution's risks that would necessitate an update to a financial institution's risk assessment under the Proposed Rule. We also note that it is not clear whether FinCEN interprets the Proposed Rule to implicitly require

financial institutions to update risk assessments for "material changes in their products, services, distribution channels, customers, intermediaries, and geographic locations," even if those changes may not alter the financial institution's illicit finance activity risks.[16]

In light of these considerations set forth above, we respectfully request that FinCEN:

- Clarify that the requirement to update risk assessments would be satisfied by updates to risk assessments pertaining to relevant lines of business or operations, and would not require in every case that a financial institution update all risk assessment processes or its enterprise-wide risk assessment.

- Confirm that existing ad hoc risk assessment processes in response to business changes or emerging risks are sufficient to meet the regulatory expectation for updates to risk assessments for material changes to a financial institution's risks, and expressly provide that institutions are permitted to update risk assessments within a reasonable period of time after the relevant changes.

- Clarify that updates to risk assessments are only required for changes impacting illicit finance activity risks. Stated differently, clarify that updates are not required merely because there are changes to a financial institution's products, services, distribution channels, customers, intermediaries and/or geographic locations, which may or may not impact the financial institution's risks.

- Clarify that financial institutions retain flexibility to determine when and how to update their risk assessment processes as appropriate in light of the particular risks they may face, and that such determinations should not be subject to hindsight second-guessing by regulators.

In furtherance of FinCEN's goal of reinforcing an outcomes-oriented approach for AML/CFT programs, the IIB respectfully proposes that the foregoing comments could be addressed through a regulatory requirement that, instead of including the currently proposed language related to "material changes," calls for financial institutions to update risk assessments as necessary to ensure risk assessments "accurately reflect" their illicit finance risks.[17]

Finally, the IIB notes that in the joint notice of proposed rulemaking released by the federal banking agencies and the National Credit Union Administration (together, the "Agencies")

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[16] *See id.* at 55440 ("At a minimum, financial institutions would be required to have their risk assessment updated using the process proposed in this rule, when there are material changes in their products, services, distribution channels, customers, intermediaries, and geographic locations.")

[17] This "accurately reflects" language and concept are found in the NPRM as well as the FFIEC BSA/AML Examination Manual. *See id.* at 55439 ("Generally, a periodic basis would be frequent enough to ensure the risk assessment process accurately reflects the [money laundering/terrorist financing] risks of the financial institution[.]"); FFIEC BSA/AML Examination Manual, BSA/AML Risk Assessment (Mar. 2020) ("Generally, risk assessments are updated (in whole or in part) to include changes in the bank's products, services, customers, and geographic locations and to remain an accurate reflection of the bank's [money laundering/terrorist financing]and other illicit financial activity risks.").

amending each Agency's rules to align with the Proposed Rule (the "Agencies' Proposed Rule"), the Agencies proposed several options for specified time frames for risk assessment updates (i.e., annually, between supervisory examinations, at least as frequently as the AML/CFT Priorities are updated or a combination of these options).[18] As discussed above, the IIB believes financial institutions should retain flexibility to determine the appropriate frequency and scope for updating their risk assessments.

IV. AML/CFT program approval and oversight

The IIB believes that the Proposed Rule is not sufficiently clear about expectations for financial institutions' board approval and oversight requirements. In practice, AML/CFT programs applicable to U.S. operations of FBOs can cover a variety of different business activities. Thus, the extent to which any particular changes to a financial institution's risks or AML/CFT program components in one area of business may implicate board oversight processes will vary on a case-by-case basis. Further, although FinCEN states that the Proposed Rule may "require changes to the frequency and manner of reporting to the board," we note that FinCEN has not clarified expectations for when or in what circumstances a financial institution must obtain board approval or what type of reporting may be required.

Recognizing that financial institutions reasonably may take differing approaches to implement appropriate board approval and oversight mechanisms, the IIB requests FinCEN to recognize expressly that financial institutions retain flexibility in determining the appropriate frequency, content and manner of board reporting to comply with the Proposed Rule's board approval and oversight requirements.

Further, the Agencies' Proposed Rule indicates the Agencies do not consider board oversight to be a new requirement, based on their experience examining BSA compliance programs.[19] Therefore, we request that FinCEN and the Agencies recognize expressly that the Proposed Rule is not intended to increase regulatory expectations on banks with respect to board oversight of AML/CFT programs. Additionally, as with the AML/CFT program as a whole, we request that FinCEN make clear that a single incident or limited set of deficiencies or issues should not, without more, support a finding that a financial institution's AML/CFT program was not subject to appropriate oversight by the financial institution's board or equivalent governing body.

V. Responses to FinCEN's Requests for Comment

In addition to the IIB's above more general comments on the Proposed Rule, the IIB also has considered and provided responses to certain specific requests for public comment in the NPRM. For ease of reference, we have reproduced certain of FinCEN's specific issues for comment in bold italics, after which we provide the IIB's responsive comments.

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[18] OCC, FRB, FDIC, NCUA, Anti-Money Laundering and Countering the Financing of Terrorism Program Requirements, 89 Fed. Reg. 65242, 65248 (Aug. 9, 2024).

[19] *Id.* at 65250.

A. **Risk Assessment Process**

Question 6: To what extent would the risk assessment process requirement in the proposed rule necessitate changes to existing AML/CFT programs? Please specify how and why. To the extent it supports your response, please explain how the proposed risk assessment process requirement differs from current practices.

Please see discussion above in Section III.

Additionally, in practice, financial institutions require reasonable amounts of time and resources not only to update risk assessment processes, as discussed above, but also to carry through and implement the results of risk assessment processes for internal policies, procedures and controls and other AML/CFT program components. Regulatory expectations should recognize and accommodate the practical reality that implementing necessary updates to internal policies, procedures and controls to ensure they are commensurate with a financial institution's latest risk assessments requires significant expenditures of money and other resources and, perhaps most importantly, requires significant time.

Therefore, we request FinCEN to clarify that financial institutions would have a reasonable period of time after conducting risk assessments to implement results in their internal policies, procedures and controls.

Question 8: Financial institutions may discern there is a difference between a risk assessment and a risk assessment process. What would be those differences? Should the proposed rule distinguish between a risk assessment and a risk assessment process? If not, please comment on what additional information would be useful.

Please see discussion above in Section III. As FinCEN's question suggests, there is a fundamental difference between the technical steps of a risk assessment process and a financial institution's assessment of risks that it faces, which is an outcome of that process. We agree with FinCEN's statement that financial institutions need to understand the risks they face to effectively mitigate illicit finance risks;[20] however, we believe that mandating a risk assessment process and specified components of such process for all financial institutions would only impose generic, inflexible requirements that make the risk assessment process an end in and of itself rather than focusing attention and resources on the key outcome that financial institutions reasonably understand the risks they face.

Instead, the IIB urges FinCEN to reinforce its outcomes-oriented goals and provide express recognition that a financial institution retains flexibility to conduct and document its risk assessment processes in a risk-based manner and as it deems appropriate to enable the financial institution to achieve a reasonable understanding of the risks it faces.

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[20] *Supra* note 1, at 55437.

Question 10: Is the explanation of "distribution channels" discussed in the preamble consistent with how the term is generally understood by financial institutions? If not, please comment on how the term is generally understood by financial institutions.

We request FinCEN to clarify how it interprets the term "distribution channels" in the context of (i) corporate or institutional clients and (ii) correspondent banking business, as well as provide illustrative examples of distribution channels in these contexts.

Question 12: The proposed rule would require financial institutions to consider the reports they file pursuant to 31 CFR chapter X as a component of the risk assessment process. To what extent do financial institutions currently leverage BSA reporting to identify and assess risk? Are there additional factors that should be considered with regard to this proposed requirement?

Please see discussion above in Section III.B.3. We note that suspicious activity report ("SAR") analysis and metrics are captured as part of current risk assessment processes for some financial institutions, with holistic, risk-based judgments made to determine the significance of any particular pattern or trend on the financial institution's risk profile on a case-by-case basis.

B. **Updating the Risk Assessment**

Question 14: Should financial institutions be required to update their risk assessment using the process proposed in this rule, at a regular, specified interval (such as annually or every two years) or based on triggers such as the introduction of new products, services, distribution channels, customer categories, intermediaries, or geographies? Please comment on whether the proposed rule should also specify a particular frequency for the financial institution to update its risk assessment using the process proposed in this rule. If so, what time frame would be reasonable? What factors might a financial institution consider when determining the frequency of updating its risk assessment using the process proposed in this rule? Should financial institutions be required to document, and provide support, what they determine to be an appropriate frequency to update their risk assessments?

Please see discussion above in Section III.C.

Question 15: The proposed rule uses the term "material" to indicate when an AML/CFT program's risk assessment would need to be reviewed and updated using the process proposed in this rule. Does the rule or preamble warrant further explanation of the meaning of the term "material" used in this context? What further description or explanation, if any, would be appropriate?

Please see discussion above in Section III.C.

Question 16: Please comment on whether a comprehensive update to the risk assessment using the process proposed in this rule is necessary each time there are material changes to the financial institution's risk profile, or whether updating only certain parts based on changes in the financial institution's risk profile would be sufficient. If the response depends on certain factors, please describe those factors.

Please see discussion above in Section III.C.

C. Effective, Risk-Based, and Reasonably Designed

Question 19: The AML Act affirms that financial institutions' AML/CFT programs are to be "risk-based, including ensuring that more attention and resources of financial institutions should be directed toward higher-risk customers and activities, consistent with the risk profile of a financial institution, rather than toward lower risk customers and activities." Does the proposed rule address this AML Act provision? If not, please comment on what would be useful to support resource allocation in this way.

In order to address fully this AML Act provision, we request that FinCEN expressly state that financial institutions should not be subject to regulatory criticism or hindsight judgments for allocating resources away from lower-risk areas, even if those areas were deemed previously (or are deemed subsequently) to be higher risk. Additionally, we request that FinCEN include in the text of the final rule a specific recognition, consistent with the language of the AML Act, that a financial institution's effective, risk-based and reasonably designed AML/CFT program may allocate more resources to higher-risk customers and activities and re-allocate resources away from lower-risk customers and activities.

Question 22: How do financial institutions expect the proposed rule [to] affect their current methods or approaches used to support their attention and resource considerations?

Please see discussion above in Section III.B. We reiterate our request that FinCEN clarify that financial institutions retain flexibility over how they document their risks and factors for consideration for purposes of attention and resource allocation decisions.

D. Metrics for Law Enforcement Feedback

Question 26: How should FinCEN approach the requirements in section 6203 of the AML Act to provide financial institutions with specific feedback on the usefulness of their SAR filings? Is there information in FinCEN's "Year in Review" publications that FinCEN should consider as part of particularized SAR feedback?

It would be useful for financial institutions to receive specific feedback from FinCEN as to the types of SARs reviewed by law enforcement as listed in the SAR form check box.

E. Other AML/CFT Program Components

Question 30: The proposed rule would make explicit a long-standing supervisory expectation for certain financial institutions that the AML/CFT officer be qualified and that independent testing be conducted by qualified individuals. Please comment on whether and how the proposed rule's specific inclusion of the concepts: (1) "qualified" in the AML/CFT program component for the AML/CFT officer(s); and (2) "qualified," "independent," and "periodic" in the AML/CFT program component for independent testing, respectively, may change these components of the AML/CFT program.

For many financial institutions, particularly smaller organizations, designated AML/CFT officers may have multiple responsibilities. Accordingly, we request that FinCEN recognize expressly that a person appointed to the role of AML/CFT officer may have additional duties beyond those solely in relation to service as an AML/CFT officer.

We note FinCEN's statement in the NPRM that an AML/CFT officer with additional responsibilities that "adversely impact" the officer's abilities to conduct his or her duties would not satisfy the AML/CFT officer requirement.[21] Therefore, we request FinCEN clarify or provide illustrative examples as to when an AML/CFT officer's responsibilities would "adversely impact" the officer's ability to coordinate and monitor day-to-day AML/CFT compliance.

Additionally, we request FinCEN clarify how the requirement for an AML/CFT officer to be "qualified" should take into account a financial institution's illicit finance risk profile and risk assessment process results. In particular, we request FinCEN clarify the type of changes to a financial institution's risk profile that would cause a financial institution's previously qualified AML/CFT officer to no longer be "qualified," as well as clarify the point in time at which an AML/CFT officer would no longer be considered "qualified" after a change to a financial institution's risk profile for purposes of compliance with the Proposed Rule.

Finally, with respect to the Proposed Rule's independent, "periodic" testing requirement, we note that the Agencies' Proposed Rule contemplates several options for specified testing time frames, as well as considerations as to whether comprehensive or partial testing should be required each time.[22] We request FinCEN and the Agencies clarify that financial institutions retain flexibility to determine the appropriate frequency, manner and scope for conducting independent testing.

F. Duty to establish, maintain and enforce an AML/CFT program in the United States

Question 32: Please address if and how the proposed rule would require changes to financial institutions' AML/CFT operations outside the United States. Some financial institutions have AML/CFT staff and operations located outside of the United States for a number of reasons. These reasons can range from cost efficiency considerations to enterprise-wide compliance purposes, particularly for financial institutions with cross-border activities. Please provide the reasons financial institutions have AML/CFT staff and operations located outside of the United States. Please address how financial institutions ensure AML/CFT staff and operations located outside of the United States fulfill and comply with the BSA, including the requirements of 31 U.S.C. 5318(h)(5), and implementing regulations?

Please see discussion above in Section II.

U.S. operations of FBOs ensure AML/CFT staff and operations located outside of the United States comply with the BSA and its implementing regulations through oversight and governance

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21 *Id.* at 55441.

22 *Supra* note 18, at 65250.

mechanisms for U.S. operations, which may include the involvement of or coordination with non-U.S. staff and operations.

Question 33: The requirements of 31 U.S.C. 5318(h)(5) (as added by section 6101(b)(2)(C) of the AML Act) state that the "duty to establish, maintain and enforce" the financial institution's AML/CFT program "shall remain the responsibility of, and be performed by, persons in the United States who are accessible to, and subject to oversight and supervision by, the Secretary of the Treasury and the appropriate Federal functional regulator." Is including this statutory language in the rule, as proposed, sufficient or is it necessary to otherwise clarify its meaning further in the rule.

Please see discussion above in Section II. As discussed above, the IIB strongly urges FinCEN to clarify the scope and implementation of the statutory language.

For example, the IIB urges FinCEN to clarify that the following would be permitted:

- outsourcing from an FBO's U.S. branch or subsidiary to foreign headquarters or a non-U.S. affiliate of customer identification, due diligence or sanctions screening functions;

- leveraging of risk-based decisions made by foreign headquarters with respect to the onboarding or retention of a client to inform similar decisions in the United States;

- considering a customer's use of high-risk products or other risk elements in non-U.S. jurisdictions to determine a U.S. customer's risk score and/or in making customer onboarding or maintenance decisions for U.S. operations of FBOs; or

- use in global customer risk ratings of account risk data and/or due diligence analysis from multiple jurisdictions (subject to applicable privacy obligations).

Question 34: Please comment on the following scenarios related to persons located outside the United States who perform actions related to an AML/CFT program:

(a) Do these persons who perform duties that are only, or largely, ministerial, and do not involve the exercise of significant discretion or judgment subject to statutory requirements related to the duty of establishing, maintaining, and enforcing financial institutions' AML/CFT programs? What types of functions, ministerial or otherwise, may not be subject to these statutory requirements?

Please see discussion above in Section II. The IIB notes that financial institutions may vary significantly in the nature and extent of their non-U.S. operations for AML/CFT processes, pursuant to each financial institution's own determinations as to how to manage risks effectively across its business.

(b) Do these persons have a responsibility for an AML/CFT program and perform the duty for establishing, maintaining, and enforcing a financial institution's AML/CFT program? Please comment on whether "establish, maintain, and enforce" would also include quality assurance functions, independent testing obligations, or similar functions conducted by other parties.

Please see discussion above in Section II and comments in response to Question 34(a).

Question 35: How would financial institutions expect the requirements in 31 U.S.C. 5318(h)(5) to affect their AML/CFT operations that may be currently based wholly or partially outside of the United States, such as customer due diligence or suspicious activity monitoring and reporting systems and programs?

Please see discussion above in Section II.

Question 36: Please comment on implementation of the requirements in 31 U.S.C. 5318(h)(5) for "persons in the United States"?

(a) What AML/CFT duties could appropriately be conducted by persons outside of the United States while remaining consistent with the requirements in 31 U.S.C. 5318(h)(5)? Should all persons involved in AML/CFT compliance for a financial institution be required to be in the United States, or should the requirement only apply to persons with certain responsibilities performing certain functions? If the requirement should only apply to persons with certain responsibilities performing certain functions, please explain which responsibilities and functions these should be.

Please see discussion above in Section II.

(b) Should "persons in the United States" as established in 31 U.S.C. 5318(h)(5) be interpreted to apply when such persons are performing their relevant duties while physically present in the United States, that they are employed by a U.S. financial institution, or something else?

Please see discussion above in Section II. As discussed above, we respectfully urge FinCEN not to interpret the language at 31 U.S.C. 5318(h)(5) in a manner that would prohibit financial institutions from relying on staff, operations or third-party service providers outside of the United States, so long as oversight is conducted by persons physically based in the United States or employed by U.S. financial institutions. We believe such persons are "accessible to, and subject to oversight and supervision by," Treasury and the federal functional regulators, in accordance with the statutory requirement.

(c) How would a financial institution demonstrate "persons in the United States," as established in 31 U.S.C. 5318(h)(5), are accessible to, and subject to oversight and supervision by, the Secretary and the appropriate Federal functional regulator?

Please see discussion above in Section I.B. and II and comments in response to Question 36(b). The IIB respectfully urges FinCEN to make clear that the language at 31 U.S.C. 5318(h)(5) does not require more than what is currently required of financial institutions under current regulatory expectations for making personnel available for examination purposes. We also urge FinCEN to ensure that its interpretation of the language at 31 U.S.C. 5318(h)(5) is consistent with supervisory expectations to avoid financial institutions being subject to inconsistent standards.

Question 37: Please comment on if and how the requirements in the proposed rule and 31 U.S.C. 5318(h)(5) should apply to foreign agents of a financial institution, contractors, or to

third-party service providers. Should the same requirements apply regardless of whether persons are direct employees of the financial institution?

Please see discussion above in Section II.

G. **Board Approval and Oversight**

Question 42: Should the proposed rule specify the frequency with which the board of directors or an equivalent governing body must review and approve and oversee the AML/CFT program? If so, what factors are relevant to determining the frequency with which a board of directors should review and approve the AML/CFT program?

Please see discussion above in Section IV.

H. **Implementation**

Question 45: Is the proposed effective date of six months from the date of the issuance of the final rule appropriate? If not, how long should financial institutions have from the date of issuance of the final rule, and why?

Please see discussion above in Section I.D.

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We appreciate your consideration of our comments. If we can answer any questions or provide any further information, please contact the undersigned at 646-213-1149 or swebster@iib.org.

Very truly yours,



Stephanie Webster
General Counsel