



**Testimony of Greg Baer  
President  
The Clearing House Association**

**“Examining the BSA/AML Regulatory Compliance Regime”**

**House Financial Services Subcommittee on  
Financial Institutions and Consumer Credit**

**June 28, 2017**

Chairman Luetkemeyer, Ranking Member Clay, and members of the Subcommittee, my name is Greg Baer and I am the President of the Clearing House Association and General Counsel of the Clearing House Payments Company. Established in 1853, we are the oldest banking payments company in the United States. Our Association is a nonpartisan advocacy organization dedicated to contributing quality research, analysis and data to the public policy debate. Over the past year, we have devoted substantial resources to the topic we are discussing today, including working with members of the Committee on beneficial ownership legislation.

### *Introduction*

Our current anti-money laundering/counter-terrorist financing (AML/CFT) system is broken. It is extraordinarily inefficient and outdated, and driven by perverse incentives. Fundamental change is required to make that system an effective law enforcement and national security tool, and reduce the collateral damage it is doing to global development, financial inclusion, and other U.S. policy interests. As I'll describe further, we believe the Department of the Treasury must take the lead here, and fortunately it has already begun that process with a public request for input on how it can regulate better, both in this area and others.

For a better appreciation of how the current system malfunctions, I will begin with an analogy. Imagine an army where officers are not evaluated based on how they or their units behave in battle, or how well they lead their troops. Rather, the officers are considered for promotion based on audits of the accuracy and punctuality of their expense reports. The auditors also track unit casualties, with repeated casualties resulting in demerit, demotion or court martial for the responsible officers. The auditors do not have sufficient seniority or clearance to be briefed on the battles that have occurred, or read any after-action reports. Thus, their audits reflect only the losses suffered by the unit itself, not the casualties it inflicted upon the enemy.

What sort of an army would this system produce? Certainly, one hesitant to take risk. While a patriotic desire to defeat the enemy would remain strong, officers would know that outside-the-box thinking or risky advances could result in casualties and audit lapses, and eventually end their careers. Promotion would come for those who entrenched their positions, adhered to the rules, and excelled at paperwork. This army inevitably would end up being led by a George McClellan (whom Lincoln famously described as “having a terminal case of the slows”), not an Eisenhower or Patton. Morale among the troops would plunge.

The U.S. AML/CFT regulatory regime, circa 2017, is not dissimilar. It is a system in which banks have been deputized to act as quasi law-enforcement agencies and where the largest firms collectively spend billions of dollars each year, amounting to an annual budget somewhere between that of the ATF and the FBI.<sup>1</sup> However, in talking to senior executives at banks large and small, I have never heard a single one of them complain about how much money they *spend*. Rather, they complain about how much money they *waste*. And that waste derives from a series of perverse incentives that are embedded in our current system.

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<sup>1</sup> See PwC Global Anti-Money Laundering, available at: <http://www.pwc.com/gx/en/services/advisory/consulting/forensics/economic-crime-survey/anti-money-laundering.html> (“According to new figures from WealthInsight, global spending on AML compliance is set to grow to more than \$8 billion by 2017”); FBI FY 2017 Budget Request at a Glance, available at: <https://www.justice.gov/jmd/file/822286/download>; ATF FY 2017 Budget Request at a Glance, available at: <https://www.justice.gov/jmd/file/822101/download>.

To appreciate how misdirected that system has become, it's helpful to first consider what kind of incentives *should* be at its heart. From a public policy perspective, any rational approach to AML/CFT would be risk-based, devoting the greatest majority of resources to detecting the most dangerous financial crimes and illicit activity. For example, law enforcement and national security officials would prefer that banks allocate significant resources to so-called financial intelligence units (FIUs) – basically, in-house think tanks devoted to finding innovative ways to detect serious criminal misconduct or terrorist financing.

Unfortunately, our AML/CFT regulatory system is focused elsewhere. Large banks have been pushed away from risk-based approaches, because their performance is not examined and graded by law enforcement or national security officials, but rather by bank examiners, who are not permitted to know of their successes.<sup>2</sup> Instead, those examiners focus on what they know and control: policies, procedures, and quantifiable metrics – for example, the number of computer alerts generated, the number of suspicious activity reports (SARs) filed, the number of compliance employees hired.

### *Specific Problems with the Status Quo*

A key obligation of banks under the current AML regime – and the key area of focus by bank examiners – is the filing of SARs. The comprehensive SAR reporting regime originated in 1992 as a way for banks to centrally provide leads to law enforcement. The process typically begins with an alert generated by a bank's monitoring system, with a SAR filed in the event the activity looks to be suspicious. For example, negative media reports on an existing bank customer trigger an alert, prompt an investigation by a bank compliance department, and can result in a SAR filing.

In the current regulatory and enforcement climate, bank compliance officers have powerful incentives to trigger as many alerts and file as many SARs as possible, because those “defensive” SAR filings protect them (and their examiners) in the event that the bank is used by the companies or individuals ultimately found to have committed a crime. What gets measured gets done, and providing valuable intelligence to law enforcement or national security agencies does *not* get measured; writing policies and procedures and filing SARs does get measured. So, almost two million SARs are filed per year.<sup>3</sup>

Worse yet, SAR filing rules and metrics fail to consider the relative severity of the offense. SAR dollar thresholds have not been raised in 21 years, and there is no dollar threshold for so-called insider abuse (say, a teller stealing a small amount of money).<sup>4</sup> No federal law

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<sup>2</sup> See article by Bob Werner and Sabreen Dogar, “Strengthening the Risk-Based Approach,” in TCH Q3 2016 *Banking Perspectives* issue; available at: <https://www.theclearinghouse.org/research/banking-perspectives/2016/2016-q3-banking-perspectives/strengthening-the-rba>.

<sup>3</sup> See “SAR Stats,” available at: <https://www.fincen.gov/fcn/Reports/SARStats>. The total number of SARs filed in 2016 was 1,975,644. Accessed June 27, 2017.

<sup>4</sup> See 12 CFR 208.62, 211.5(k), 211.24(f), and 225.4(f) (Board of Governors of the Federal Reserve System) (Federal Reserve); 12 CFR 353 (Federal Deposit Insurance Corporation)(FDIC); 12 CFR 748 (National Credit Union Administration)(NCUA); 12 CFR 21.11 and 12 CFR 163.180 (Office of the Comptroller of the Currency)(OCC); and 31 CFR 1020.320 (FinCEN) for federal SAR regulations. The SAR requirement became effective April 1, 1996 and dollar thresholds have not been raised since.

enforcement agency would ever prosecute the large and growing majority of offenses that are reported in SAR filings, but the filings continue apace.

(One sometimes hears the argument that even a minor offense could be the “last piece in the puzzle” for a law enforcement agency trying to make a larger case, and there are undoubtedly cases where that is true. In the same way, someone arrested for jaywalking could turn out to be a wanted fugitive. The important question, though, is what the opportunity cost for that puzzle piece is – whether resources allocated elsewhere couldn’t produce large and fully formed puzzles of their own.)

To be clear, this is not a criticism of the examiners, but rather of the role the current system forces them to play. From a political and personal risk perspective, they are in a no-win situation. On the one hand, they are excluded when the bank they examine is pursuing real cases with law enforcement, national security or intelligence community officials, and therefore receive no credit when those cases are successful. But if something goes wrong – if a corrupt official or organization turns out to be a client of the bank they examine – the examiner faces blame. Thus, from an examiner and banking agency perspective, the only possible safe harbor is to demand more policies and procedures, ensure that a lot of SARs are filed, encourage the bank to jettison any client that presents significant risk, and take swift and long-lasting enforcement action whenever something goes wrong. While all other aspects of banking – for example, credit risk management – have risk tolerances, for AML/CFT, there is none. And because reward and risk tend to go together, the system suffers.

Enforcement trends have only served to exacerbate the impact of the perverse incentives underlying our system; AML/CFT-related fines on U.S. banks have increased exponentially over the past five years. Certainly, there have been some egregious cases where enforcement action was warranted, but many enforcement actions taken involve *no actual money laundering*. Rather, they are based on a banking agency finding that an insufficient number of alerts were being generated by bank systems or that not enough SARs were filed. But the primary problem with the system is not the size and number of fines that are imposed periodically, but rather how those fines and accompanying consent orders incentivize financial firms to allocate their AML/CFT resources. Such orders uniformly result in the hiring of more compliance personnel, the retention of consultants, the drafting of more policies and procedures, and the direct involvement of the board of directors. They tend not to spur innovation.

### *The Great Opportunity Being Lost*

This lack of focus on the goals of the system is especially disheartening in an age in which emerging technology has the potential to make the AML/CFT regime dramatically more effective and efficient. Artificial intelligence (AI) and machine learning could revolutionize this area, and banks continue to discuss various concepts for greater sharing of information. Unfortunately, SAR filers receive almost no meaningful feedback on whether a given SAR has proven useful to law enforcement. In the 1970s, when relatively few reports were filed, each SAR was read by someone in law enforcement. Now, with banks and other financial institutions employing tens of thousands of people and using computer monitoring to

flag potentially suspicious activity, almost two million SARs are filed per year.<sup>5</sup> Law enforcement generally reads SARs only if they are specifically flagged by the institution, or if a word search identifies it as relevant to an existing investigation.

Thus, the role of a SAR in law enforcement has changed completely, which is not necessarily a bad development. Because so much more data is available, there is extraordinary potential for the use of AI and machine learning to improve the system. But those strategies require feedback loops, which do not exist in the current system. Worse yet, several AML executives have reported that efforts to construct novel approaches to detecting illegal behavior have resulted in examiner criticism because such innovative approaches were deemed to lack sufficient documentation, and therefore were not auditable by bank examiners. Banks will be reluctant to invest in systems unless someone in the government can tell them that such systems will meet the banking examiners' expectations. Thus, we have a database created for one purpose and being used for another. Innovation awaits regulatory reorganization and leadership.

### *The Example of De-Risking*

Nowhere is this set of perverse incentives more clear than in the push for banks to eliminate clients in countries or industries that could end up creating political risk to examining agencies.

The causes of de-risking are not difficult to discern. For example, in June 2014, the Office of the Comptroller of the Currency (OCC) published an enforcement action against Merchants Bank of California that contained broad statements indicating that the bank needed to treat all of its money services business (MSB) clients as high risk and take extraordinary measures when dealing with them.<sup>6</sup> When the bank, which was servicing Somali remitters, later left the MSB business entirely, the Somali community in the U.S. was left without a reliable channel controlled by ethnic Somalis for sending remittances home. Of course, the OCC has subsequently denied imposing any pressure on banks to de-risk, and issued a statement asserting that it does not characterize all money services businesses as “uniformly” high risk.<sup>7</sup> For banks, though, (enforcement) actions speak far louder than words.<sup>8</sup> And of course public statements by regulators are not necessarily consistent with examiner queries to bank compliance officers to provide assurances that high risk businesses or countries have received heightened due diligence and will never present a problem – with strong suggestions that any future problems inconsistent with such assurances could result in personal ruin for those providing them.

Thus, faced with unlimited potential liability (both institutional and personal) if something goes wrong in a jurisdiction or line of business identified by regulators as high risk,

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<sup>5</sup> SAR Stats, *supra* note 3.

<sup>6</sup> See OCC Consent Order 2014-084; available at: <https://www.occ.gov/static/enforcement-actions/ea2014-084.pdf>.

<sup>7</sup> See OCC “Statement on Risk Management,” released November 19, 2014, available at: <https://www.occ.gov/news-issuances/bulletins/2014/bulletin-2014-58.html>.

<sup>8</sup> For a broader discussion of this trend, see article by Clay Lowery and Vijaya Ramachandran, “Unintended Consequences of AML Policies,” in TCH Q3 2016 *Banking Perspectives* issue; available at: <https://www.theclearinghouse.org/research/banking-perspectives/2016/2016-q3-banking-perspectives/aml-unintended-consequences>.

the rational response for a financial institution is to “de-risk” – that is, fire its customers in that business or country.

Of course, there are major costs of de-risking: business loss suffered by the bank from de-risking, certainly, but more broadly and importantly a blinding of the intelligence community to overseas jurisdictions as illicit finance moves to shadow markets or foreign banks; a loss of political influence for the nation’s diplomats; a loss of allies for national defense; and human suffering in countries cut off from correspondent banking, remittances, and other access points to the global financial system. An IMF report recently noted, “[p]ressure on correspondent banking relationships could disrupt financial services and cross-border flows, including trade finance and remittances, potentially undermining financial stability, inclusion, growth and development goals.”<sup>9</sup> A survey carried out by the World Bank in 2015 found that 75% of large global banks are withdrawing from correspondent banking relationships, with U.S. banks being the most active.<sup>10</sup>

Similarly, domestically, banks of all sizes report that customer due diligence requirements have dramatically increased the cost of opening new accounts, and now represent a majority of those costs. Of course, this makes low-dollar accounts for low- to moderate-income people much more difficult to offer and price. While the connection is not immediately apparent, AML/CFT expense now is clearly an obstacle to banking the unbanked, and a reason that check cashers and other forms of high-cost, unregulated finance continue to prosper.

The problem, of course, is that bank examiners and federal prosecutors seeking record fines do not internalize those costs. And those in the government who do internalize those costs play no role in examining the performance of financial institutions.

### *The Beginning of a Solution*

Fortunately, a remarkable number of stakeholders, including foreign policy, development and technology experts, have been focusing on all these issues. Their goal is not to save banks money or embarrassment. Their goal is to do what is best for our country. We convened a group of these experts at two symposia in 2016, and the result is the report attached to my testimony, along with a list of some of the key participants.

You will see numerous recommendations in that report. The most important one, though, is for the Department of the Treasury to accept – or, better yet, claim – responsibility for the system. That includes convening on a regular basis the end users of SAR data – law enforcement, national security and others affected by the AML/CFT regime including the State Department – and setting goals and priorities for the system. We also believe it means the Treasury Department, through FinCEN, should assume supervisory authority for certain banks.

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<sup>9</sup> See IMF Staff Discussion Note by Michaela Erbenová, Yan Liu, Nadim Kyriakos-Saad, et al, “The Withdrawal of Correspondent Banking Relationships: A Case for Policy Action,” IMF 2016; available at: <http://www.imf.org/~media/websites/imf/imported-full-text-pdf/external/pubs/ft/sdn/2016/sdn1606.ashx>.

<sup>10</sup> See “Withdraw from Correspondent Banking: Where, Why, and What to do About It,” World Bank Group 2015; available at: [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2015/11/24/090224b083395501/3\\_0/Rendered/PDF/Withdraw0from000what0to0do0about0it.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2015/11/24/090224b083395501/3_0/Rendered/PDF/Withdraw0from000what0to0do0about0it.pdf).

In particular, reform must recognize that of the roughly one million SARs filed annually by depository institutions (banks and credit unions), *approximately half are filed by only four banks*. These are the same banks that are internationally active, and also present the most difficult policy questions with respect to de-risking. Whereas a small to mid-sized bank might file a handful of SARs per year, the largest banks file roughly *one SAR per minute*. Certainly, reform is warranted for smaller firms, where the cost of filing that handful of SARs is wildly disproportionate to its benefit. But if the goal is to catch dangerous criminals, identify terrorist activity, and reduce collateral damage to U.S. interests abroad, FinCEN need focus its examination energy on only a very few firms. This creates an extraordinary opportunity.

We estimate that an examination team of only 25-30 people at FinCEN could replicate the existing work of the federal banking agencies and the IRS (for the largest MSBs) at the largest, most internationally active institutions. More importantly, a dedicated FinCEN exam team for this small subset of large institutions could receive appropriate security clearances, meet regularly with end users and other affected parties, receive training in big data and work with other experts in government. They in turn would be supervised by Treasury officials with law enforcement, national security, and diplomatic perspectives on what is needed from an AML/CFT program – not senior bank examiners with no experience in any of those disciplines. And when FinCEN turned to writing rules in this area, it would do so informed by its experience in the field. Returning to our original analogy, it would see the whole battlefield, and promote innovative and imaginative conduct that advanced law enforcement and national security interests, rather than auditable processes and box checking.

*Remarkably, this arrangement is exactly what Congress intended and authorized.* In the Bank Secrecy Act, Congress granted FinCEN, *not* the banking agencies, authority to examine for compliance. However, over 20 years ago, FinCEN delegated its supervisory authority to the federal banking agencies, while retaining enforcement authority. At the time the delegation was made, FinCEN's decision was logical, even inevitable. The agency had few resources, and insufficient knowledge of the banking system. Furthermore, the nation had over 10,000 banks, and those banks were more alike than different.<sup>11</sup> Restrictions on interstate banking meant that there were no truly national banks, and U.S. banks generally were not internationally active. As a result, there was no real basis by which FinCEN could have distinguished among banks. Given the choice between supervising 10,000 banks or none, it logically chose none, effectively subcontracting its statutory duties in this area to the banking agencies.<sup>12</sup>

Whether for those few financial institutions, or the thousands that would continue to be examined by financial regulators, we believe the result of FinCEN assuming some supervisory authority would be a massive *cultural* change, as the focus shifted to the real-world effectiveness of each institution's AML/CFT program, rather than the number of SARs filed or number of

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<sup>11</sup> See Commercial Banks in the U.S., Economic Research of the Federal Reserve Bank of St. Louis; available at: <https://fred.stlouisfed.org/series/USNUM>.

<sup>12</sup> In addition, in 1986, Congress granted the federal banking agencies authority to prescribe regulations requiring banks to comply with the Bank Secrecy Act, and examine for such compliance. See 31 C.F.R. § 1010.810. See also “[o]verall authority for enforcement and compliance, including coordination and direction of procedures and activities of all other agencies exercising delegated authority under this chapter, is delegated to the Director, FinCEN.” *Id.* § 1010.810(a). See also 12 U.S.C. § 1818(s).



policies written. That change would start with those banks under direct FinCEN supervision, but would eventually spread to all institutions.

Empowered and informed leaders also could weigh these important factors and tackle some very difficult questions that are not currently addressed in a balkanized system. While a general goal of the BSA/AML system is to deny access to the financial system to potentially bad actors, are there cases where it benefits national security to have them in the system, where they can be monitored by regulated banks with sophisticated techniques, potentially leading to more useful information for law enforcement? Or is it better to push illicit actors out to overseas banks or non-banks, where law enforcement has little line of sight and a much harder time tracking illicit funds? Is any law enforcement or counter-terrorism gain worth exacerbating poverty in countries that harbor terrorists by using the blunt force of pressuring U.S. banks to “de-risk” those countries by ending correspondent relationships? Are the vast quasi-law enforcement resources of the banks better deployed marching in lock step, under rigid policies and procedures set by regulators, or by developing innovative techniques for detecting money laundering? Should banks be filing more SARs under a low standard for what constitutes suspicious activity, or instead be filing fewer SARs under a higher standard focused on plausible evidence of serious wrongdoing? A strong AML/CFT regulatory system would thoughtfully consider these questions after receiving input from all the relevant stakeholders, and clearly communicate answers to the financial institutions that implement it.

Finally, as I noted at the outset, one important change to the current system that requires new legislation is ending the use of shell companies with anonymous ownership. Here, the United States trails the rest of the world, and has been criticized by the Financial Action Task Force for being a shelter for criminals or cryptocrats seeking to launder money by adopting the corporate form and cloaking their ownership.<sup>13</sup> There may be valid reasons why corporate owners would want to keep their ownership secret from the broader public; however, it is difficult to imagine a valid reason why corporate owners would want to keep their ownership secret from the state incorporating them, law enforcement, and a financial institution that is legally obligated to determine that ownership in the exercise of its BSA/AML obligations. The Clearing House strongly urges Congress to adopt such legislation promptly, and is pleased to see bicameral, bipartisan support for it.

In conclusion, I thank you for inviting me today and focusing Congressional attention on such an important but easily overlooked topic. I look forward to your questions.

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<sup>13</sup> See FATF Anti-money laundering and counter-terrorist financing measures, Mutual Evaluation of the United States, December 2016, pg. 18; available at: <http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016>.



# **Attachments**



**For Immediate Release:**

**Date:** February 16, 2017

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**The Clearing House Publishes New Anti-Money Laundering Report**

*Leading experts and practitioners recommend reforms to improve AML/CFT effectiveness*

Washington, D.C. – Today, the Clearing House released a report entitled [\*A New Paradigm: Redesigning the U.S. AML/CFT Framework to Protect National Security and Aid Law Enforcement\*](#). The paper analyzes the current effectiveness of the AML/CFT regime, identifies fundamental problems with that regime, and proposes a series of reforms to remedy them.

The report reflects conclusions reached in two closed-door symposia, in April and October 2016, that convened approximately 60 leading experts in this field. The group included senior former and current officials from law enforcement, national security, bank regulation and domestic policy; leaders of prominent think tanks in the areas of economic policy, development, and national security; consultants and lawyers practicing in the field; FinTech CEOs; and the heads of AML/CFT at multiple major financial institutions. The first meeting focused on problems with the current regime; the second focused on a review of potential solutions. The conclusions on both are set forth in the report.

Said Greg Baer, President of the Clearing House Association, “Today’s report reflects a remarkable consensus on how to substantially increase the effectiveness of the AML/CFT regime. Those participating in the effort come from a wide range of disciplines and reflect a variety of interests, but have reached a common diagnosis of the problems with the current regime and in their prescription for reform.”

Among those participating in the symposia and supporting the report are the following individuals, acting in their personal, non-institutional, capacity:

- *H. Rodgin Cohen*, senior chairman of Sullivan & Cromwell;
- *David D. DiBari*, managing partner of Clifford Chance, Washington office;
- *James H. Freis, Jr.*, former Director of FinCEN; chief compliance officer, Deutsche Börse Group;
- *Aaron Klein*, policy director, Center on Regulation and Markets, Brookings Institution;
- *Sharon Cohen Levin*, former Chief, Money Laundering and Asset Forfeiture Unit, U.S. Attorney’s Office, Southern District of New York; partner, WilmerHale;
- *Joseph Myers*, former Director, International Financial Affairs in the Office of Combating Terrorism, National Security Council; vice president, Western Union;

- *Chip Poncy*, former senior Treasury official; President, Financial Integrity Network; Senior Adviser, Center on Sanctions and Illicit Finance;
- *Vijaya Ramachandran*, senior fellow, Center for Global Development;
- *Elizabeth Rosenberg*, senior fellow, Center for a New American Security;
- *Gary Shiffman*, CEO, Giant Oak; and
- *Juan C. Zarate*, former senior Treasury official; former Deputy National Security Adviser; Chairman, Financial Integrity Network; Chairman, Center on Sanctions and Illicit Finance.

In addition, the Center on Sanctions and Illicit Finance (CSIF) at the Foundation for Defense of Democracies has also endorsed the report.

The report identifies eight reforms for immediate action:

- The Department of Treasury, through its Office of Terrorism and Financial Intelligence (TFI), should take a more prominent role in coordinating AML/CFT policy across the government;
- FinCEN should reclaim sole supervisory responsibility for large, multinational financial institutions that present complex supervisory issues;
- Treasury/TFI/FinCEN should establish a robust and inclusive annual process to establish AML/CFT priorities;
- Congress should enact legislation, already pending in various forms, that requires the reporting of beneficial owner information at the time of incorporation, preventing the establishment of anonymous companies;
- Treasury TFI should strongly encourage innovation, and FinCEN should propose a safe harbor rule allowing financial institutions to innovate in an FIU “sandbox” without fear of examiner sanction;
- Policymakers should incentivize banks to work on investigations and reporting of activity of high law enforcement or national security consequence;
- Policymakers should further facilitate the flow of raw data from financial institutions to law enforcement to assist with the modernization of the current AML/CFT technological paradigm;
- Regulatory or statutory changes should be made to the safe harbor provision in the USA PATRIOT Act (Section 314(b)) to further encourage information sharing among financial institutions, and the potential use of utilities to allow for more robust analysis of data; and
- Policymakers should enhance the legal certainty regarding the use and disclosure of SARs.

**About The Clearing House.** The Clearing House is a banking association and payments company that is owned by 25 of the largest commercial banks and dates back to 1853. The Clearing House Payments Company L.L.C. owns and operates core payments system

infrastructure in the United States and is currently working to modernize that infrastructure by building a new, ubiquitous, real-time payment system. The Payments Company is the only private-sector ACH and wire operator in the United States, clearing and settling nearly \$2 trillion in U.S. dollar payments each day, representing half of all commercial ACH and wire volume. Its affiliate, The Clearing House Association L.L.C., is a nonpartisan organization that engages in research, analysis, advocacy and litigation focused on financial regulation that supports a safe, sound and competitive banking system.



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A New Paradigm:  
Redesigning the  
U.S. AML/CFT  
Framework to  
Protect National  
Security and Aid  
Law Enforcement

February 2017



# A New Paradigm: Redesigning the U.S. AML/CFT Framework to Protect National Security and Aid Law Enforcement

February 2017

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# Introduction

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In April and October 2016, a group of approximately 60 experts came together to discuss how to improve the U.S. framework for anti-money laundering/countering the financing of terrorism (AML/CFT) as it applies to financial institutions. The group included senior former and current law enforcement, national security, bank regulatory and domestic policy officials; leaders of prominent think tanks in the areas of economic policy, development, and national security; consultants and lawyers practicing in the field; FinTech CEOs; and the heads of AML/CFT at multiple major financial institutions. The first meeting focused on problems with the current regime; the second focused on a review of potential solutions. The consensus on both is set forth in this paper. It was prepared with the assistance of The Clearing House's special counsel, Wilmer Cutler Pickering Hale and Dorr LLP.

The stakes here are high. The United States leads the world in shaping and enforcing international standards of financial integrity and accountability and has demonstrated the importance of the AML/CFT regime to combating and preventing financial crime and protecting international

security. Nevertheless, substantial challenges to the systemic effectiveness and sustainability of the current regime have emerged and require urgent attention.

Under the current AML/CFT regime, the nation's financial firms are effectively deputized to prevent, identify, investigate, and report criminal activity, including terrorist financing, money laundering and tax evasion. The largest firms collectively spend billions of dollars each year, amounting to a budget somewhere between the size of the ATF and the FBI.<sup>1</sup> Yet the conclusion of the vast majority of participants in the process is that many if not most of the resources devoted to AML/CFT by the financial sector have limited law enforcement or national security benefit, and in some cases cause collateral damage to other vital U.S. interests – everything from U.S. strategic influence in developing markets to financial inclusion. Thus, a redeployment of those resources has the potential to substantially increase the national security of the country and the efficacy of its law enforcement and intelligence communities, and enhance the ability of the country to assist and influence developing nations.

# Executive Summary

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The current AML/CFT statutory and regulatory framework is outdated and thus ill-suited for apprehending criminals and countering terrorism in the 21st century. In particular, the following are core problems with the current AML/CFT regime that must be resolved:

## STRATEGIC PROBLEMS

- » **ABSENCE OF PRIORITIZATION.** Law enforcement, national security and development officials have little to no input into how financial institutions allocate their AML/CFT resources. Rather, compliance is assessed primarily by bank examiners, essentially functioning as auditors, who are focused on preventing the institutions they supervise from suffering financial loss or reputational embarrassment, and ensuring that there is rigorous adherence to all written policies and procedures. Thus, for example, while financial intelligence units within the banks are of great benefit to law enforcement and national security officials, and focus on real risks, the examination process tends to result in banks prioritizing other, more readily auditable processes.
- » **ABSENCE OF OVERARCHING PURPOSE.** For approximately the past 15 years, regulators described “preserving the integrity of the financial system” as the primary goal of the AML/CFT regime, but the notion has no statutory basis or clear definition. It implies an overarching goal of keeping money out of the financial system, but another goal

should be and sometimes is the tracking of money once it is in the financial system and providing financial services to developing nations and underserved U.S. communities. Thus, the current examination and enforcement regimes have encouraged financial institutions to exclude (or “de-risk”) accounts from a customer, industry or country that is perceived to have heightened risk of engaging in criminal activity; meanwhile, those concerned with international development and diplomacy, and financial inclusion, have little voice in the examination process.

- » **OUTDATED SAR REGIME.** The original purpose of the suspicious activity report (SAR) regime was for financial institutions to provide leads to law enforcement agencies, but government agencies now could develop the technical resources and sophistication to mine financial data, significantly reducing the need for SARs as they are currently constructed. Yet the SAR remains the focus of the system.

## OPERATIONAL PROBLEMS

- » **COUNTERPRODUCTIVE EXAMINATION STANDARDS AND PROCESSES.** National security, law enforcement, and intelligence agencies—the end users of AML/CFT information—focus on the quality of information they receive from financial institutions, while those who grade the financial institutions focus on auditable processes. Thus, there are disincentives for financial institutions to develop innovative methods

for identifying criminal behavior. Firms receive little or no credit for proactive, aggressive cooperation with law enforcement – focusing on real risk – because examiners generally are unaware of such actions and in any event have no method for weighing such behavior against any policy or operational shortcomings within the confines of the examination framework.

- » **SIGNIFICANT BARRIERS TO INFORMATION SHARING.** Existing rules prevent efficient and effective sharing of information among financial institutions and between financial institutions and law enforcement.
- » **INEFFICIENCIES.** Financial institutions devote vast resources to activities that could easily be performed centrally by government or some other party or not at all – for example, constant monitoring of media for adverse stories about customers, or multiple firms engaging in customer due diligence on the same customers. With these tasks de-prioritized or executed collectively, resources could be deployed to more sophisticated and productive approaches designed to detect real risks.

Set forth below are clear and actionable responses to these problems, divided into two groups: areas for immediate reform and areas for further study.

### Areas for Immediate Reform

- The Department of Treasury, through its Office of Terrorism and Financial Intelligence (TFI), should take a more

prominent role in coordinating AML/CFT policy across the government;

- The Financial Crimes Enforcement Network (FinCEN) should reclaim sole supervisory responsibility for large, multinational financial institutions that present complex supervisory issues;
- Treasury/TFI/FinCEN should establish a robust and inclusive annual process to establish AML/CFT priorities;
- Congress should enact legislation, which was proposed in various forms during the 114th Congress and is expected to be re-introduced in the 115th Congress, that requires the reporting of beneficial owner information at the time of incorporation;
- Treasury TFI should strongly encourage innovation, and FinCEN should propose a safe harbor rule allowing financial institutions to innovate in a Financial Intelligence Unit (FIU) “sandbox” without fear of examiner sanction;
- Policymakers should de-prioritize the investigation and reporting of activity of low law enforcement or national security consequence;
- Policymakers should further facilitate the flow of raw data from financial institutions to law enforcement to assist with the modernization of the current AML/CFT technological paradigm;
- Regulatory or statutory changes should be made to the safe harbor provision in

the USA PATRIOT Act (Section 314(b)) to further encourage information sharing among financial institutions; and

- Policymakers should enhance the legal certainty regarding the use and disclosure of SARs.

### Areas of Reform Requiring Further Study:

- Enhancing information sharing through the establishment of AML/sanctions utilities.
- Establishing better protections from discovery for SAR information;

- Clarifying and balancing responsibility for AML/CFT between the public and private sector;
- Establishing a no action letter-like system within the regime to assist with AML/CFT compliance;
- Providing financial institutions with clearer AML/CFT standards;
- Allowing for better coordination of AML/CFT and sanctions policy goals, supervision and enforcement; and
- Modernizing the SAR regime.

## Assessment of the Existing Regime

### BACKGROUND

The current AML/CFT regulatory framework is an amalgamation of statutes and regulations that generally derive from the Bank Secrecy Act, which was passed by Congress in 1970 with iterative changes since, and added to (but not reformed by) the USA PATRIOT Act, which was passed in 2001. This 45-plus year regime has not seen substantial changes since its inception and is generally built on individual, bilateral reporting mechanisms (i.e. currency transaction reports and suspicious activity reports), grounded in the analog technology of the 1980s, rather than the more interconnected and technologically advanced world of the 21st century.

In particular, the Bank Secrecy Act imposes requirements that can be in tension with each

other and need to be considered in tandem as part of a risk-based system. Financial institutions are required to (i) report on suspicious activity and (ii) keep out customers that could generate suspicious activity. These conflicting requirements are further magnified by the wide-reaching and complex network of state and federal government actors who are responsible for implementing, enforcing and utilizing the information produced by the regime.<sup>2</sup> Generally, each entity has different missions and incentives, which has led to the development of competing and sometimes conflicting standards for institutions to follow.

Outlined below are what was determined by the group as fundamental problems with the current regime as well as recommendations for reform and items for further study.

## FUNDAMENTAL PROBLEMS

Participants in the first symposium identified several fundamental problems with the current AML/CFT regime:

**ABSENCE OF PRIORITIZATION.** In law enforcement, it is routine for the Justice Department and other agencies to establish priority enforcement areas, set qualitative and dollar thresholds for the cases they are willing to bring, and generally manage the process of law enforcement. Aware of their limited budgets, these agencies choose which crimes to prosecute and which ones to let pass. However, financial institutions operating AML/CFT compliance programs receive little guidance on these matters, and are not able to exercise sufficient discretion within the current regulatory framework to themselves identify priorities. Thus, although the government may want financial institutions to prioritize cases involving, for example, terrorist financing, nuclear proliferation and human trafficking, in practice, there is little to no policy guidance to the financial sector on these priorities.<sup>3</sup> The reason is simple: the representatives of government that face financial institutions and have the ability to set the AML/CFT priorities for these institutions (most frequently, bank examiners) are not engaged with the law enforcement or intelligence communities, and thus lack the knowledge and authority to set such priorities on their behalf. Rather, they are focused on preventing the institutions they supervise from suffering financial loss or reputational embarrassment, establishing auditable policies and procedures, and ensuring rigorous adherence to those policies and procedures. This focus, plus a near-zero tolerance for error, necessarily focuses financial institutions on recordkeeping rather

than developing imaginative and innovative approaches to identifying important threats to our country.

**OUTDATED NATURE OF THE SAR REGIME.** When it was first established in the 1990s, the goal of the SAR regime was for financial institutions to provide leads to law enforcement agencies; those agencies had little insight into the financial system, and no technical ability to mine data. Today, government agencies could develop resources to mine financial data, and rely less on financial institutions to provide robust, individual reports on suspicious activities or transactions. Also, as financial institutions have been incentivized by regulatory enforcement actions to file increasing numbers of suspicious activity reports (SARs), a declining percentage provide value to law enforcement.<sup>4</sup> Yet those regulators examining banks for AML compliance continue to emphasize the importance of financial institutions developing carefully crafted, highly-detailed SARs, with little to no feedback provided on such submissions, either from themselves or those government authorities who utilize the data.

**COUNTERPRODUCTIVE EXAMINATION STANDARDS.** Although financial institutions have been developing innovative methods for identifying criminal behavior, they face regulatory criticism for taking unconventional or innovative actions that seemingly deviate from policy and may not be readily auditable. The job of examiners is to check compliance against current standards, and they tend to disfavor imaginative deviation from those standards – particularly as they are cut off from information about the benefits of such deviations, given that law enforcement and national security officials

do not include them in investigations. As a result, financial institutions have begun to innovate less. Law enforcement and national security officials most value the work done by FIUs at financial institutions, which are laboratories dedicated to developing new and frequently outside-the-box methods of detecting illegal or dangerous conduct. Yet, several institutions reported shifting resources away from FIUs towards compliance staff, because of explicit or implicit examiner insistence that resources be devoted to demonstrating compliance with existing policies and procedures and ensuring the auditability of those mechanisms. Compliance officers, in turn, have received increasing pressure to ensure 100% compliance, and are increasingly at risk of personal liability or dismissal in the event of deviation from regulatory expectations; they thus have greater incentives to “work to the rule” rather than encourage innovation.

In sum, under the current regime, national security, law enforcement, and intelligence agencies—the end users of AML/CFT information—focus on outcomes, while those who grade the financial institutions for compliance focus on auditable processes.

#### **BROADER CONFLICTING POLICY INTERESTS.**

The examination and enforcement regimes for the Bank Secrecy Act have incentivized financial institutions to exclude (or “de-risk”) accounts from any customer, industry, or country that has relatively higher potential to engage in criminal activity: for example, to de-risk money service businesses or correspondent banks in developing or high-risk countries where public corruption, narcotics, or terrorist activity is prevalent. On the other hand, policymakers concerned with income inequality want banks to serve poor

and underserved populations; development experts want multinational U.S. banks to serve developing countries; intelligence officials and law enforcement want multinational U.S. banks to stay engaged abroad in order to establish leads on nefarious activity; and national security and diplomatic officials want multinational U.S. banks to remain engaged abroad, rather than ceding those markets to other, less transparent, actors. Because a bank’s AML/CFT regime is evaluated solely by bank examiners, these other policy interests generally are not considered. When they have been considered – for example, in recent OCC guidance – the response has been to require banks to develop policies and procedures for documenting their decision to de-risk rather than to encourage them to manage the risk more effectively.

#### **BARRIERS TO INFORMATION SHARING.**

Significant barriers to information sharing are embedded in the system – for example, rules or interpretations limiting the ability of financial institutions to share within their own corporate structure, and with other financial institutions. These barriers block the flow of relevant information among financial institutions and between financial institutions and law enforcement. Some of these barriers serve legitimate privacy concerns that must be balanced against any potential benefits from greater sharing, but in many instances the barriers are simply the result of basic policy errors that have not been remedied over time.

**INEFFICIENCIES.** Financial institutions devote vast resources to activities that could easily be performed centrally by government or some other party. One example is the lack of an established reporting requirement for

beneficial owners of corporations, forcing financial institutions to research such information when it should be readily available upon incorporation. Another is filing SARs on activity that existing prosecution handbooks make clear will never be prosecuted – for example, low-dollar crimes committed against banks. A third is the tracking of politically exposed persons (PEPs), the definition of which is subject to multiple and changing standards across agencies and jurisdictions.

## ALTERNATIVE APPROACH TO INFORMATION SHARING

The group also reviewed an alternative approach to information sharing that offered real promise: the UK's Joint Money Laundering and Intelligence Task Force (JMLIT).<sup>5</sup> JMLIT brings together financial institutions, law enforcement, and trade associations to discuss current AML/CFT risks and is underpinned by legislation that enables the UK National Crime Agency (NCA) to act as the gatekeeper for the information provided, and facilitate the exchange of information between the public and private sectors. Following completion of a one-year pilot program, an independent review determined that JMLIT had met its core objective to prevent, detect, and disrupt money laundering.

The JMLIT process has attributes that could help to resolve several problems identified with the current U.S. regime. The current SAR regime fails to provide feedback from law enforcement to the private sector about SAR efficacy, while JMLIT allows banks to follow-up on SAR activity. In addition, the JMLIT structure provides the dialogue about prioritization that U.S. financial institutions currently do not receive.

Furthermore, JMLIT uses an operational priority structure which focuses on "(i) understanding and disrupting the funding flows linked to bribery and corruption; (ii) understanding and disrupting trade based money laundering; (iii) understanding and disrupting the funding flows linked to organized immigration crime and human trafficking; and (iv) understanding key terrorist financing methodologies." While U.S. policymakers might choose different priorities, and those priorities might change over time, they currently do not communicate any priorities with this degree of clarity.

## POTENTIAL REFORMS

Set forth below are reforms that would: (i) make the AML/CFT regime more effective as a tool for law enforcement and national security; and (ii) reduce the collateral damage imposed by the current AML/CFT regime—generally, needlessly—on other important national priorities such as the projection of U.S. influence globally, the alleviation of poverty in less developed countries, and the availability of banking services in underserved communities in the United States. Possible reforms can be divided into two groups:

**AREAS FOR IMMEDIATE REFORM:** These reforms are clearly warranted and are of high priority. On these reforms, there was clear consensus of symposium participants on both the immediate need for the reforms and their wisdom.

**AREAS OF REFORM REQUIRING FURTHER STUDY:** These reforms warrant further consideration, because potential solutions may involve difficult tradeoffs or would benefit from the input of other stakeholders.



# Areas for Immediate Reform

## I. RATIONALIZE THE SUPERVISION OF MULTINATIONAL, COMPLEX FINANCIAL INSTITUTIONS

- A. FinCEN should reclaim sole supervisory authority for large, multinational financial institutions that present complex supervisory issues.

**BACKGROUND.** FinCEN was granted authority to examine for compliance with the Bank Secrecy Act. However, over 20 years ago, it delegated its supervisory authority to the federal banking agencies, while retaining enforcement authority. In addition, in 1986, Congress granted the federal banking agencies authority to prescribe regulations requiring banks to comply with the Bank Secrecy Act, and examine for such compliance.<sup>6</sup>

At the time the delegation was made, FinCEN's decision was logical, even inevitable. The agency had few resources, and insufficient knowledge of the banking system. Furthermore, the nation had over 10,000 banks,<sup>7</sup> and those banks were more alike than different. Restrictions on interstate banking meant that there were no truly national banks, and U.S. banks generally were not internationally active. As a result, there was no real basis by which FinCEN could distinguish among banks. Given the choice between supervising 10,000 banks or none, it logically chose none.

### RECOMMENDATION.

- (1) FinCEN should revoke its delegation of

examination authority for large, internationally active financial institutions<sup>8</sup> and any others it designates as presenting important and significant issues with respect to national security, law enforcement, and global development priorities. This would include not only banks but also large money service businesses and other significant non-bank financial institutions. As discussed below, FinCEN should assemble sufficient staff to conduct rigorous Bank Secrecy Act examinations of such institutions.<sup>9</sup>

(2) FinCEN, in coordination with relevant Treasury Department offices (i.e. TFI, Domestic Finance, and International Affairs), should create a multi-agency advisory group to: (i) establish priorities for each financial institution on an annual basis; (ii) review progress with the institutions on a quarterly basis; and (iii) oversee any examination of the institutions.

(3) The advisory group should include senior officials representing the FBI, DHS (Secret Service and other relevant personnel), OFAC, State Department, Defense Department, the intelligence community, and select financial regulators.

**BENEFITS.** The advantages of centralizing supervision and examination of AML/CFT compliance for complex institutions would be numerous:

- » It would allow for the creation of a core, centralized examination team that could

work cooperatively with law enforcement, national security, and diplomatic officials, receiving the necessary security clearances (which bank examiners currently lack) and establishing the necessary trust, to understand the full picture.

- » Such an examination team would reward rather than hinder innovation, emphasizing results rather than process. Financial institutions would be instructed to shift resources away from box checking and reporting petty offenses toward law enforcement, national security and global development priorities. As one participant in the symposium noted, “what gets measured gets done.”
- » Performance evaluations for a FinCEN examination team would be driven by the quality of the information identified and reported by its supervised institutions, and the strength of their analyses, rather than the auditability of its processes, or the number of alerts generated or SARs filed by the institutions. These evaluations would include feedback given by senior national security and law enforcement officials who are now absent from that process.
- » The examination team should be well trained in technological innovations, including big data, and work across the financial services industry to leverage those concepts to detect illegal or threatening activity. Such a team could draw on resources at the Defense Advanced Research Projects Agency and elsewhere in the U.S. government.

- » The examination team should be fully engaged in the whole range of AML/CFT activities at the institutions it supervises, including working with other agencies to support the institutions’ investigations. It would also be knowledgeable about international financial services and money laundering typologies.
- » Finally, a centralized supervision and examination function for large, internationally active institutions would contribute to the tailoring of the AML/CFT regulatory regime to participating institutions’ risk profiles.

**ISSUES.** A centralized examination team would require resources. One alternative would be appropriated funds, which would be money well spent. Another would involve FinCEN assessing financial institutions for examination costs in the same way as banking regulators; existing statutory authority appears to allow for such an assessment.<sup>10</sup> Affected institutions would see a corresponding reduction in the assessment they currently pay to prudential regulators for supervision of this function. A third alternative would be to establish a centralized team funded *pro rata* by each of the affected agencies but reporting directly and solely to the Director of FinCEN.

Alternatively, but not ideally, each regulatory agency could designate personnel to serve as members of a joint team to conduct a review of Bank Secrecy Act compliance on its behalf.<sup>11</sup> This approach could leverage the existing cooperation model of the Federal Financial Institutions Examination Council (FFIEC) to create a joint national exam team for AML/

CFT and sanctions issues. The team would still report to FinCEN and would otherwise function as described above. There would also necessarily be some coordination among the exam team and the other regulators, who would remain responsible for safety and soundness examination.

**B. FinCEN should institute a process to establish AML/CFT priorities for all covered institutions.**

The multi-agency advisory group described above, and led by Treasury and FinCEN, should also establish priorities for the many institutions, including non-banks, that are not subject to centralized exams. FinCEN should communicate that guidance to those regulators that continue to exercise delegated authority for their use in establishing examination standards for the coming year. In addition, FinCEN should meet regularly with the regulators to review progress on priorities.

## **II. ENACT BENEFICIAL OWNERSHIP LEGISLATION**

Federal regulations require financial institutions to know their customers and conduct ongoing monitoring of account information. FinCEN's new customer due diligence rule will soon require financial institutions to collect beneficial ownership information from certain legal entity customers. Yet there is currently no requirement that states record the beneficial ownership of the legal entities they incorporate. This makes it easier for money launderers and terrorist financiers to obscure their identities from both law enforcement and the financial institutions

with which they deal. Indeed, the Financial Action Task Force ("FATF") recently criticized the gaps in the legal framework in the United States that prevent access to accurate beneficial ownership information in a timely manner and recommended that the United States take "steps to ensure that adequate, accurate and current [beneficial ownership] information of U.S. legal persons is available to competent authorities in a timely manner, by requiring that such information is obtained at the Federal level."<sup>12</sup> Due to the lack of easily accessible beneficial ownership information, financial institutions allocate significant resources to investigating the ownership of their customers.

Congress should enact legislation—forms of which were pending in both the House and Senate during the 114th Congress and are expected to be re-introduced in the 115th Congress—that would require the collection of beneficial ownership information at the time of incorporation and whenever such information changes, and ensure that such information is provided to relevant stakeholders including FinCEN and law enforcement. In addition, any legislation should clarify that financial institutions performing customer due diligence can obtain access to reported beneficial ownership information upon account opening and on an ongoing basis, and can rely on that information in complying with any obligation to know their customers. Under the current regime, many if not most of the resources devoted to identifying money laundering and terrorist financing are provided by financial institutions; denying them access to this important information would significantly undermine the goals of any bill.

### III. ESTABLISH A CLEAR MANDATE IN SUPPORT OF INNOVATION

**BACKGROUND.** Financial institutions are motivated to assist the government in understanding and identifying financial crime and are constantly developing new methods to thwart money laundering and terrorist financing. One significant example is the establishment of FIUs within large financial institutions. FIUs are often staffed by former law enforcement personnel with significant expertise and strong motivations to help their former colleagues in the government. They generally have broad mandates to evaluate client relationships and the risks they may pose to the institution and the financial system itself. FIUs are most effective when they can be agile and adapt in real-time to threats as they develop. FIUs should be given latitude by regulators to operate outside the compliance regime, giving them the agility needed to aid law enforcement.

**RECOMMENDATION.** To this end, FinCEN should propose a rule stating that financial institutions are encouraged to innovate in an FIU “sandbox,” and that FIUs may operate outside the strictures of regular policies and procedures.

**BENEFITS.** This proposal may be superfluous for financial institutions designated for FinCEN supervision, as the establishment of priorities and direct communications with the end users of SAR data would naturally cause such institutions to shift resources to priority areas like FIUs. But for any firms not so designated, the current need for prioritization would continue.

### IV. DE-PRIORITIZE THE INVESTIGATION AND REPORTING OF ACTIVITY OF LIMITED LAW ENFORCEMENT OR NATIONAL SECURITY CONSEQUENCE

**BACKGROUND.** The goal of the SAR regime is to provide useful information about money laundering and terrorist financing to law enforcement. The ideal SAR is a well-researched, carefully-written summary of suspicious activity, which is likely to require significant time and energy on behalf of a financial institution’s staff. Unfortunately, the current regime promotes the filing of SARs that may never be read, much less followed up on as part of an investigation.<sup>13</sup> Any diversion of resources from creating quality SARs does not truly serve the interest of law enforcement. The SAR regime should produce SAR filings that actually advance law enforcement and other national security goals.

There are two embedded issues: the first is the type of conduct that merits a SAR filing; the second is the level of suspicion or evidence of that conduct that should trigger a filing. We make recommendations with regard to the former here because there was consensus on the reforms needed. The latter is a more complicated question, and is discussed in the next section as an area in need of further review.

Presently, financial institutions are required to file a SAR on two broad categories of conduct. The first encompasses criminal violations that: (i) involve insider abuse; (ii) total at least \$5,000 in which a suspect can be identified; or (iii) total at least \$25,000, regardless of whether a suspect can be identified. The second encompasses transactions totaling at least \$5,000 if the financial institution knows, suspects, or has

reason to suspect that the transaction: (i) may involve money laundering or other illegal activity; (ii) is designed to evade the Bank Secrecy Act or its implementing regulations (e.g. structuring); or (iii) has no business or apparent lawful purpose or is not of the type in which the customer would be expected to engage (and, after examining the available facts, the financial institution knows of no reasonable explanation for the transaction).

**RECOMMENDATION:**

- » The SAR dollar thresholds, which were set in 1996, should be raised.
- » The standards for insider abuse should be eliminated. Financial institutions are the victims of these crimes, and therefore have an incentive to report any serious misconduct. Under the current standard, however, they allocate significant resources to investigating employee misconduct leading to termination and establishing a paper trail to justify a decision not to file a SAR, or an investigative record in support of a SAR. As no federal prosecutor will ever follow up on such a SAR, these resources are misallocated.<sup>14</sup>
- » FinCEN should review all existing SAR guidance to ensure it establishes appropriate priorities. For example, FinCEN should reconsider its just-issued guidance requiring SAR filings for cyber attacks. Large financial institutions experiencing cyber attacks are already in regular, and frequently real-time communication with law enforcement and other government organizations. They are members of the Financial Services Information Sharing and

Analysis Center, which is designed to facilitate cyber and physical threat intelligence analysis and sharing between stakeholders. The relevant governmental organizations will derive few incremental benefits from the filing of a post-hoc SAR; other governmental organizations will make no use of it. But financial institutions will now be taking resources away from responding to cyber attacks to documenting them in regulatory filings that may never be read.

## V. PROVIDE MORE RAW DATA TO FINCEN AND FEEDBACK TO FINANCIAL INSTITUTIONS

**BACKGROUND.** FinCEN's e-filing system provides a common format for suspicious activity reporting, but additional data that could be useful to law enforcement are not provided in a consistent format or in real time. Furthermore, in choosing which information to include in a SAR, financial institutions necessarily bias the data available to law enforcement. For example, since each bank uses different procedures for filing SARs, the combined data set has massive amounts of noise and little information of use to law enforcement. To date, the database is used for federated searches only, and a different approach could identify strategic trends of value to law enforcement and national security personnel.

Furthermore, financial institutions generally provide underlying raw data only at law enforcement request following a SAR filing, but a better approach would facilitate real-time information flow and analysis using modern data capabilities, while adhering to privacy and civil liberty concerns as well as

managing for other risks. The provision of raw data has been considered before – though in a limited capacity. In 2006, FinCEN published a Congressional report on the *Feasibility of a Cross-Border Electronic Funds Transfer Reporting System under the Bank Secrecy Act* in compliance with Section 6302 of the Intelligence Reform and Terrorism Prevention Act of 2004. At the time, the report found that simply implementing a cross-border funds transfer reporting requirement would require significant investment from both the public and private sectors. In particular, it was estimated that FinCEN would need approximately \$32.6 million and three and a half years to make sure its system was capable of receiving such information. However, in 2015, FinCEN completed an IT Modernization Project that has likely impacted that original estimate.<sup>15</sup>

The ideal outcome is not each bank analyzing bulk data for a given customer and using resources to draft an elaborate and heavily audited SAR narrative. Rather, a middle ground would be a utility that allows banks to share bulk data and have it analyzed. But the best outcome would be to have bulk data deposited at FinCEN and analyzed by law enforcement and intelligence community professionals, with a mechanism for regular feedback to be provided to institutions to enable them to target their internal monitoring and tracking mechanisms to better serve the goals of law enforcement and intelligence officials.

**RECOMMENDATION.** Facilitate the flow of raw data from financial institutions to law enforcement, and between financial institutions, under safe harbor protections. FinCEN should require a financial institution to provide a

broader set of raw data once the institution has determined that the underlying activity is suspicious. For instance, raw data about the parties to a transaction, including transaction history and such information on their other counterparties, could be shared to form clearer pictures of complex relationships, and the attributes of the parties to the transaction. Any such proposal would need to be crafted with privacy issues in mind: any potential solution would require scrubbing the data of personal identifying information, and inserting a generic identifier in its place. Current technology allows for the sharing of encrypted or hashed unique identifiers, allowing analytical integrity to be preserved while protecting personally identifiable information.

**BENEFITS.** Providing such data in bulk, directly to FinCEN upon the filing of a SAR, would modernize the SAR regime from one built for the 20th century, where financial institutions were comparatively better equipped to filter data, to one appropriate for the 21st century, where big data analytics could enable law enforcement to effectively sift through large quantities of data without requiring as much assistance from financial institutions in investigating illicit activity. Financial institutions could then reallocate associated resources to FIUs or other higher value activities.

## VI. CLARIFY AND EXPAND THE SCOPE OF INFORMATION SHARING UNDER SECTION 314(B)

**BACKGROUND.** Section 314(b) of the USA PATRIOT Act provides an avenue for financial institutions to share with each other information relevant to potential money laundering or

terrorist financing investigations. In 2009, FinCEN issued guidance explaining that financial institutions are covered by the provisions of Section 314(b) when they participate in a program that “share[s] information relating to transactions that the institution suspects may involve the proceeds of one or more specified unlawful activities (“SUAs”)” as long as the purpose of the information sharing is to identify and report activities that may involve terrorist activity or money laundering.<sup>16</sup> In a 2012 administrative ruling, FinCEN elaborated on this guidance and distinguished between information sharing that satisfies the purpose requirement and other sharing arrangements that are not covered by Section 314(b).<sup>17</sup> However, the current standard requiring that information shared pursuant to 314(b) must relate to potential money laundering or terrorist financing is vague and limited given the current illicit finance risks facing financial institutions and would benefit from additional clarification.

**RECOMMENDATION.** Regulatory or statutory changes should encourage additional use of the 314(b) safe harbor.

- » FinCEN should clarify that financial institutions can share information about clients as part of their attempt to identify suspicious activity. Such sharing should be permissible even before there is already-formed, formal suspicion of money laundering or terrorist financing. This would not be a wholesale license for financial institutions to broadly share information, but rather would be useful in situations in which one financial institution has incomplete information about a custom-

er’s AML/CFT risk and another can provide additional information that produces a fuller picture of the situation – for example, with respect to client on-boarding.

- » Congress should expand the 314(b) safe harbor to cover the sharing of information related to illicit finance activities beyond money laundering or terrorist financing. For example, the safe harbor could be revised to permit sharing also for the purpose of identifying and reporting a specified unlawful activity (as defined in 18 U.S.C. 1956(c)(7)). As the Federal crimes listed in 18 U.S.C. 1956(c)(7) include crimes related to computer fraud and abuse, such a revision would protect sharing regarding cybercrimes and identity theft without requiring that financial institutions first determine whether the crime also involves money laundering or terrorist financing.
- » Congress should also expand the safe harbor to cover technology companies and other nondepository institutions, to provide greater freedom to experiment with information-sharing platforms.

## VII. ENHANCE LEGAL CERTAINTY REGARDING THE USE AND DISCLOSURE OF SARs

To facilitate better information flow on suspicious activity among public and private institutions, financial institutions must be confident in the current confidentiality regime for SAR-related data, including at the enterprise-wide level and across borders.

**BACKGROUND.** FinCEN regulations generally prohibit the disclosure of SARs and information



that would reveal the existence of a SAR (“SAR information”), with an exception for sharing “within the bank’s corporate organizational structure for purposes consistent with Title II of the Bank Secrecy Act as determined by regulation or guidance.”<sup>18</sup> In 2006, FinCEN and the federal banking agencies issued guidance providing that a U.S. depository institution may share SAR information with its controlling company (whether foreign or domestic), and that a U.S. branch or agency of a foreign bank may share SAR information with its foreign head office.<sup>19</sup> FinCEN reaffirmed portions of this guidance in 2010 when it issued new guidance permitting U.S. depository institutions to share SAR information with affiliates subject to U.S. SAR regulations (i.e., U.S.-based affiliates).

FinCEN regulations explicitly provide that depository institutions are not prohibited from disclosing the underlying facts, transactions, and documents upon which a SAR is based within the bank’s corporate organizational structure.<sup>20</sup> Thus, on its face, the regulations would appear to permit depository institutions to share such information with foreign branches and foreign affiliates. Such sharing should be allowed, particularly where the foreign affiliates are subject to confidentiality agreements or located in FATF-member countries. However, FinCEN guidance does not permit U.S. depository institutions to share SAR information with foreign branches, and, in light of commentary by FinCEN on this topic, the scope of the exception for disclosing underlying information is not entirely clear. For example, in a 2010 final rule, FinCEN indicated that “[d]ocuments that may identify suspicious activity but that do not reveal whether a SAR exists (e.g., a document

memorializing a customer transaction, such as an account statement indicating a cash deposit or a record of a funds transfer), should be treated as falling within the underlying facts, transactions, and documents upon which a SAR may be based, and should not be afforded confidentiality.”<sup>21</sup> Yet, other language in the Supplementary Information might be read as limiting the exception to information produced in the ordinary course of business.<sup>22</sup> Thus, there is confusion about the extent to which the exception covers facts, descriptions of transactions, and documents that both: (i) underlie a SAR; and (ii) are recited or referenced in, or attached to, a SAR, including with respect to sharing such underlying facts, transactions, and documents with foreign branches and foreign affiliates.<sup>23</sup>

The issue here is not limited to lack of clarity in the U.S. regime, and negotiation with foreign regulators would be important to rationalizing the process.

**RECOMMENDATION.** FinCEN should:

- » By regulation, clearly authorize U.S. depository institutions to share SARs with a foreign branch or affiliate if the branch or affiliate is located in a country that is a member of the FATF.
- » For non-FATF countries, establish a clear standard (or list of approved or disapproved countries) that would allow institutions to share SARs within such a country if the U.S. depository institution enters into a written confidentiality agreement with the branch or affiliate that is consistent with the 2006 interagency guidance for SAR

sharing with controlling companies and head offices.<sup>24</sup> While there may be countries of sufficient concern that any information shared could be interdicted and misused, the general presumption should be towards information sharing within an institution.

- » By regulation, clearly authorize U.S. depository institutions to share the underlying facts, transactions, and documents upon which a SAR is based with foreign branches and foreign affiliates.
- » Encourage other FATF-jurisdictions to adopt policies that apply a substantially consistent standard.<sup>25</sup>

**BENEFITS.** A less restricted flow of AML information within a banking enterprise would result in:

- better transaction monitoring;
- higher quality SARs;
- better information for law enforcement investigations;

- better knowledge of international money laundering and terrorist financing trends;
- easier implementation of a risk-based, enterprise-wide approach to AML, including mitigating the risk of illicit actors abusing different entities within multinational institutions; and
- efficiencies in the process of preparing SARs, greater uniformity in SARs filed by a banking enterprise, and minimization of duplicative SAR filings.

**ISSUES.** The major concerns motivating SAR-sharing restrictions relate to the importance of protecting the confidentiality of SARs, which is a legitimate policy goal. However, globally active banking organizations are able and required to employ increasingly sophisticated controls to protect the confidentiality of sensitive information, and those controls have proven effective. Thus, the benefits of allowing institutions to share SARs within their organizations and information that would reveal the existence of a SAR clearly outweigh the risks of such information being inappropriately released.

## Areas of Reform Requiring Further Study

The following are reforms that would bring substantial benefits, but warrant further study and the input of a wide array of stakeholders. In some cases—for example, the standard for

SAR filings—the issue is extremely complex; in others—for example, the use of utilities — concerns with privacy and data security would need to be resolved.

## I. ENHANCE INFORMATION SHARING

**BACKGROUND.** The theory behind the SAR regime is that financial institutions have vast amounts of information about their customers and are thus best positioned to identify and report suspicious activity. However, the current system encourages stove-piping of information that inhibits the dynamic flow of information among authorities and institutions and limits the ability of any one institution to see the bigger picture. Visibility into information from authorities and peer institutions would provide helpful context to financial institutions and law enforcement.

**RECOMMENDATION.** Establish AML/Sanctions utilities for information sharing beyond 314(b) sharing. A utility-like database of AML and/or sanctions information gathered from multiple public and private sources has the potential to make the sharing of information among financial institutions and law enforcement more efficient and effective. An AML/sanctions utility would facilitate the bulk screening of transactions against sanctioned and suspect parties and the detection of patterns of potentially suspicious transactions on a real-time basis across multiple financial institutions. This model could have a government agency, such as FinCEN, at the center, or it could rely on a private-sector actor or consortium acting as a clearinghouse. To support such a utility and other outcomes, consideration should be given to the creation of industry forums through which banks and other stakeholders may share resources and collaborate to:

- (i) address new risks and regulations in a consistent, cost effective manner;
- (ii) engage in efforts to benchmark with each other, share ideas, and harmonize standards; and

- (iii) incubate and test collaboration and utility ideas. Such forums could also serve as the vehicle for public/private cooperation on the development of industry utilities.

**BENEFITS.** Both public and private sector participants have suggested that AML or sanctions utilities have the potential to: (i) better detect illicit or prohibited activity by looking at a wider set of data, including, for example, by examining both sides of a transaction or comparing transactions across multiple financial institutions; (ii) allow the industry to shift resources to more productive uses; and (iii) improve efficiency and enable more consistent compliance approaches across financial institutions of all sizes. A KYC utility could, for instance, be responsible for running adverse media searches on clients, rather than imposing such a duty on every financial institution at which the relevant party holds an account; such an approach would be more efficient, cost-effective, and allow for resources to be allocated to more fruitful investigations.

**ISSUES.** While there has already been some success in implementing utilities such as Clariant and SWIFT's KYC Registry, efforts to establish utilities have been hampered by regulatory concerns, implementation and operational challenges, and liability concerns as well as the need for further regulatory support and oversight.

- » **REGULATORY CONCERNS.** One regulatory concern is reliance. In order to be effective, financial institutions must be able to rely on the information and functions provided by a utility. Time and resources required

to re-validate information or re-perform functions coming from a utility will reduce efficiency, which is a key benefit of utilities. Another is potential regulatory criticism. Financial institutions should be afforded an opportunity to experiment with processes and controls that leverage collaboration and utility models. Without some regulatory flexibility and protection of experimentation, the long-term gain that could be achieved by a utility may be stifled by short-term regulatory risk. Potential solutions to this problem include placing the KYC utility within FinCEN's jurisdiction or making it a government entity.

- » **IMPLEMENTATION AND OPERATIONAL CHALLENGES.** The purpose and functionality of a utility must be clearly defined to ensure the utility will be more efficient than individual, in-house systems. Financial institutions must resolve differences in standards, definitions, and processes, and align on technology and data in order for utilities to operate efficiently.
- » **LIABILITY CONCERNS.** One possible issue with either a public or private database is potential liability associated with inaccurate information, including in the context of negative news. The impact of such inaccurate information may be multiplied by the tacit endorsement it would receive from its inclusion in the utility or the reports generated by the utility. A safe harbor could be of help here.
- » **REGULATORY SUPPORT AND OVERSIGHT.** Utilities will not be effective unless regulators provide meaningful assurance

that financial institutions can rely on the information provided by utilities for the fulfillment of certain of their compliance obligations. Regulatory encouragement of and oversight over utilities would provide confidence to the financial services industry and facilitate reliance on such a system. The FFIEC's Multi-Regional Data Processing Servicer program could serve as a model for regulatory oversight of an AML/sanctions utility.

## II. PROVIDE BETTER PROTECTION FROM DISCOVERY FOR SAR INFORMATION

**BACKGROUND.** As the agencies have stated in the FFIEC BSA/AML Examination Manual, under the current regime, the provision of suspicious activity information by financial institutions "is critical to the United States' ability to utilize financial information to combat terrorism, terrorist financing, money laundering, and other financial crimes. . . . [and] the quality of SAR content is critical to the adequacy and effectiveness of the suspicious activity reporting system."<sup>26</sup> The effectiveness of this monitoring and reporting system depends in large part on the confidentiality restrictions and protections afforded SARs and related materials.<sup>27</sup> Banks take seriously their obligation to help law enforcement, but to perform their job under the current regulatory framework, they need to prepare investigatory materials for the purpose of identifying suspicious activity and determining whether to file a SAR ("SAR Investigatory Materials"). SAR Investigatory Materials include, but are not limited to:

- documents representing drafts of SARs;

- documents memorializing communications that are a part of the investigation of unusual or potentially suspicious activity;
- reports of or internal communications related to unusual or potentially suspicious activity on which SAR reporting may be required (whether generated automatically or manually);
- documents and forms generated by a bank as part of its internal process of determining whether to file a SAR;
- documents relating to a bank’s monitoring and investigations to detect unusual or potentially suspicious activity, including descriptions of SAR filing procedures and descriptions of suspicious activity monitoring and investigation policies, procedures, methods and models;
- information about technology and about system alerts used by a bank for suspicious activity monitoring;
- any documents created for the purpose of informing, assessing or reporting (internally) on the bank’s SAR investigatory process; and
- pre- and post-SAR communications with law enforcement, including hold harmless letters, law enforcement requests for back-up documentation, and grand jury subpoenas.

Several courts have interpreted “information that would reveal the existence of a SAR” to

mean more than documents that indicate whether a SAR has been filed, but others continue to misinterpret this standard on the mistaken belief that documentation produced in the ordinary course of business is not entitled to confidentiality protection even if the business at hand is investigating suspicious activity or potential SAR filings.<sup>28</sup> Therefore, banks are increasingly wary that information about their efforts to identify criminal behavior will be revealed, including through litigation or arbitration. Further, these decisions are likely to ultimately: (i) inhibit the robust investigative processes that banks undertake today in an effort to make their SARs as useful as possible to law enforcement; and (ii) undermine the industry’s ability to effectively detect and report suspicious activity by revealing the techniques and processes they use.

**RECOMMENDATION.** Congress should enact legislation making clear that SAR Investigatory Materials are to be treated as confidential, particularly in private litigation.<sup>29</sup> An alternative approach could be the issuance of guidance to this end by FinCEN jointly with the federal financial regulators.

**BENEFITS.** The disclosure of SAR information in private litigation could undermine the ability of financial institutions to effectively combat financial crimes by compromising ongoing investigations, chilling financial institutions’ willingness to file detailed SARs, and revealing the financial institution’s process for analyzing and reporting such data. Thus, this legislation could help both to allow financial institutions to continue filing the most helpful SARs possible, and protect bad actors from discovering their methods for doing so.

**ISSUES.** Some believe that litigants and others have a right to information potentially contained in SAR Investigatory Materials for a variety of reasons, some of which could be considered in the proposed legislation.<sup>30</sup>

### III. CLARIFY AND BALANCE THE RESPONSIBILITY OF THE PUBLIC AND PRIVATE SECTOR TO DETECT AND PREVENT FINANCIAL CRIME

**BACKGROUND.** The current AML/CFT statutory and regulatory regime does not clearly allocate responsibility for detecting and preventing financial crime between the public and private sectors. The current system creates incentives for financial institutions to de-risk, thereby withdrawing financial services to already underserved populations and pushing transactions out of the traditional financial services sector into shadow banking channels that are not monitored for suspicious activity. The result of this de-risking is to deprive law enforcement of valuable intelligence. De-risking may also perpetuate political and economic instability in already unstable regions, potentially giving rise to terrorism and criminal activity in the absence of legitimate economic opportunities.

Government intervention is needed to reverse the de-risking trend and better allocate money laundering and terrorist financing risk. For instance, in recent months, Treasury and the federal banking agencies have issued a joint fact sheet on foreign correspondent banking and AML/CFT and sanctions supervision and enforcement.<sup>31</sup> The OCC followed with a Bulletin on *Risk Management Guidance on Periodic Risk Reevaluation of Foreign*

*Correspondent Banking.*<sup>32</sup> These statements indicate a recognition of the problems caused by de-risking, but do not provide a workable solution. Rather than providing assurances that an enforcement action will not result from maintaining accounts for customers based in countries considered high risk, these proposals could be read as imposing, without a basis in law, a new legal obligation, and potential liability: not to de-risk.

As noted above, the most effective way to reduce inappropriate de-risking is to change the way internationally active banks are supervised, giving voice to the numerous government agencies that would prefer that U.S. banks remain engaged abroad – whether in correspondent banking, facilitating payments through money-service businesses, or supporting NGOs. We believe that step is necessary and may even be sufficient. However, the below initiatives could also better align responsibility and encourage innovation in the financial sector.

### IV. ESTABLISH A PROCEDURE AND RESOURCES FOR NO-ACTION LETTERS

**BACKGROUND.** There is no established mechanism by which financial institutions can query FinCEN about certain actions and receive, if warranted, confirmation that no enforcement would be initiated if they are undertaken. The SEC has established such a procedure, the no-action letter, to ensure that the financial institutions it regulates have access to the government's perspective on complicated issues.<sup>33</sup>

**RECOMMENDATION.** FinCEN should provide a no-action letter mechanism for financial institutions to pose compliance questions in a format designed to promote efficiency. Regulators would be empowered to grant a prospective shield from liability on a question posed, provided that the facts represented are substantially accurate and any conditions set are followed. In considering the response, regulators and law enforcement would discuss the merits of particular inquiries.

**BENEFITS.** While rulemaking and the issuance of guidance are cumbersome processes that do not always promote innovation or dialogue with the industry, a no-action letter process could be more effective. It would (i) allow individual financial institutions to ask particular questions about actions they plan to take, thereby spurring innovation; (ii) provide quick answers, thereby promoting dynamism; and (iii) increase the flow of information from industry to FinCEN about new technologies and procedures, thereby improving information for FinCEN's rulemaking and enforcement purposes.

**ISSUES.** Although such a proposal would protect against the risk of enforcement by FinCEN, OFAC, and the federal examiners for potential violations of the Bank Secrecy Act or OFAC sanctions, it would not necessarily eliminate liability from state or foreign regulatory authorities. However, coordination through bilateral negotiations or forums such as the FATF might encourage global cooperation that would provide real assurance to financial institutions willing to certify their AML compliance programs. In addition, FinCEN would likely need to be provided with additional resources to implement such a

mechanism – though such a change would ultimately achieve efficiency gains for the broader regime. Consideration should also be given to whether there are areas where state law should be preempted.

## V. PROVIDE CLEAR STANDARDS TO FINANCIAL INSTITUTIONS

**BACKGROUND.** Financial institutions currently operate under a strict liability, post-hoc regulatory standard that is both opaque and constantly changing. As a result, they have been forced, in many cases, to deemphasize innovation and the pursuit of real AML/CFT risk, and instead focus on adherence to examiner-approved policies and procedures. They “work to the rule” in the worst sense, because this is the best way to insulate themselves from liability. The AML/CFT regime should be geared toward law enforcement outcomes, not only compliance processes.<sup>34</sup>

In addition to the above proposed reforms to the supervision of financial institutions, other steps could be taken.

### RECOMMENDATION.

1. FinCEN should establish by regulation a clearer definition of what constitutes a reasonable AML/CFT program, including what conduct will result in an enforcement action or prosecution. If a financial institution engages in compliance conduct that a regulator deems acceptable ex ante and illicit financial activity still occurs, the issue can be addressed through discussions between financial institutions and their regulators, with no enforcement action taken.



2. FinCEN could also provide clear assurances that any sanction imposed will come only after a holistic review of the financial institutions' overall performance, and in no case be based on the failure to file a single SAR, unless the failure to file was found to be willful. Rather, any significant sanction should be based on a pattern or practice of noncompliance.

Additional, detailed guidance from FinCEN is necessary with respect to the following topics:

- **DUE DILIGENCE ON CUSTOMERS OF CUSTOMERS.** Although FinCEN's recent customer due diligence rule explains the circumstances in which financial institutions must identify beneficial owners of legal entity customers, there is still considerable confusion about the extent of due diligence financial institutions must conduct on the customers of their customers in order to conduct what examiners consider a reasonable AML compliance program.
- **RELIANCE.** Similarly, FinCEN could clarify the extent to which a financial institution can reasonably rely on work done by another financial institution, or by a utility or collection of institutions; absent a clear safe harbor, the examination process is likely to nullify any efficiency gains by requiring that work be duplicated.
- **MONITORING FOR CONTINUING SUSPICIOUS ACTIVITY.** FinCEN has issued guidance on when financial institutions should file SARs on suspicious activity of a continuing nature, but the financial

industry would benefit from additional, more detailed guidance about FinCEN's expectations for ongoing monitoring for the purpose of detecting and reporting continuing suspicious activity. In other words, what specific monitoring, if any, should financial institutions do, above and beyond their regular transaction monitoring once they have filed a SAR on a given customer or account, in order to determine whether the activity reported in the initial SAR is of a continuing nature.

- **WHEN DOES A FINANCIAL INSTITUTION HAVE REASON TO SUSPECT A TRANSACTION IS SUSPICIOUS?** Financial institutions are required to file SARs when they "know, suspect, or have reason to suspect" that a transaction is suspicious. But if a financial institution does not actually know or suspect that a transaction is suspicious, under what circumstances can a regulator infer that the financial institution had reason to suspect a transaction was suspicious? FinCEN should provide guidance on this important issue.

**BENEFITS.** Unclear standards result in financial institutions devoting compliance and legal resources to divining regulators' meaning, instead of focusing on investigating and reporting suspicious activity. Such unclear standards lead any rational actor to err on the side of caution, resulting in the defensive filing of SARs at the expense of higher value compliance activities and law enforcement outcomes. These concerns are sharpened in the current enforcement environment, which increasingly focuses on holding individuals liable for alleged programmatic issues.

## VI. BETTER COORDINATE AML/ CFT AND SANCTIONS POLICY GOALS, SUPERVISION AND ENFORCEMENT

**BACKGROUND:** The AML and sanctions compliance regimes are increasingly interdependent, even if their aims are not always consistent. Regulators treat AML and OFAC compliance as related, as demonstrated by the FFIEC BSA/AML Examination Manual, which contains a section on OFAC compliance and examination procedures. A recent regulation issued by the New York State Department of Financial Services addresses both AML transaction monitoring programs and OFAC filtering programs.<sup>35</sup> Examiners and auditors often test both AML and sanctions compliance programs together, and enforcement actions frequently allege violations of both the Bank Secrecy Act and OFAC sanctions.

This has led many large financial institutions to treat AML and OFAC compliance as related disciplines that, along with anti-bribery and corruption, fall within the realm of financial crimes compliance. They employ similar tools to deal with both AML and OFAC compliance. For example, customer due diligence procedures must address screening customers against sanctions watch lists and for indicia of money laundering or terrorist financing risk.

At the U.S. Treasury, both FinCEN and OFAC are housed within TFI, reporting to its undersecretary. Prior to 2002, when Section 361 of the USA PATRIOT Act made FinCEN a separate bureau of the Treasury, both FinCEN and OFAC were sister offices within Main Treasury. Today,

FinCEN is a bureau, while OFAC is still a Main Treasury office. The Office of Terrorist Financing and Financial Crimes (TFFC)—also a component of TFI within Main Treasury—is responsible for coordinating policy with respect to the full spectrum of illicit finance threats. Over time, some of the prior synergies between FinCEN and OFAC may have been lost as FinCEN has become increasingly independent.

Additionally, the aims of the sanctions and AML/ CFT regimes can, at times, also work at cross-purposes, excluding from the financial system the very bad actors most likely to conduct suspicious activity that is ultimately reported to law enforcement.

**RECOMMENDATION:** Better coordination would help reconcile competing U.S. government priorities and align their effect on financial institutions, while creating efficiencies.

For example, Treasury could speak with one voice regarding regulatory expectations with respect to illicit finance, helping to better address the competing policy goals of excluding certain bad actors from the financial system while also providing valuable financial intelligence to law enforcement.

As noted above, one way to accomplish these aims would be to strengthen TFI, particularly with respect to its oversight of FinCEN and OFAC. Empowering TFI to truly coordinate policy and enforcement across both FinCEN and OFAC would ensure that Treasury policy goals all move in one direction with little drag. TFI could also be given a more visible role in industry outreach.

## VII. MODERNIZE THE SAR REGIME

**BACKGROUND.** As described in an earlier recommendation, standards for SAR filings have incentivized filing SARs on activity that prosecutors are unlikely to pursue. We recommend changing the type of activity that merits a SAR filing. An equally important, but more complicated question, is the level of suspicion of that activity that should merit a filing. Obviously, that could vary from merest suspicion to absolute certainty, and it is a difficult but important task to determine where on that spectrum the standard should be set.

**RECOMMENDATION.** Another approach would be for FinCEN to further elaborate on the reporting criterion for what is deemed “suspicious” – whether it be illicit activity, criminal activity, or activity that is clear evidence of one of these categories. Furthermore, it would be helpful if the aforementioned guidance also

provided contours for SARs that should not be filed. Further elaboration of the SAR-filing standard would relieve financial institutions of the need to file SARs on activity that is merely suspicious without an indication that such activity is illicit. Whether a financial institution perceives an activity as “suspicious” is inherently subjective, and a bright-line approach would take the subjective guesswork out of SAR filing. However, there are some significant drawbacks, requiring SAR filings only in cases of a more objective standard—such as illicit or criminal activity—requires legal analysis that is not currently required and may actually prove to be more burdensome than the current regime.

Changing the SAR filing thresholds would also require modifying multiple statutes, including the Bank Secrecy Act and the Federal Deposit Insurance Act, and implementing regulations thereunder.

## Conclusion

As described above, the stakes are high. Under the current AML/CFT statutory and regulatory regime, the nation’s financial firms play an integral role in preventing, identifying, investigating, and reporting criminal activity, including terrorist financing, money laundering and tax evasion. Yet, today, most of the resources devoted to AML/CFT compliance by the financial sector have limited law

enforcement or national security benefit, and in some cases cause collateral damage to other vital U.S. interests. A redeployment of these resources could substantially increase the national security of the country and the efficacy of its law enforcement and intelligence communities, and enhance the ability of the country to assist and influence developing nations.

# Endnotes

- 1 See PwC Global Anti-Money Laundering, available at: <http://www.pwc.com/gx/en/services/advisory/consulting/forensics/economic-crime-survey/anti-money-laundering.html> (“According to new figures from WealthInsight, global spending on AML compliance is set to grow to more than \$8 billion by 2017”); FBI FY 2017 Budget Request at a Glance, available at: <https://www.justice.gov/jmd/file/822286/download>; ATF FY 2017 Budget Request at a Glance, available at <https://www.justice.gov/jmd/file/822101/download>.
- 2 See The Center for Global Development’s report entitled “Unintended Consequences of Anti-Money Laundering Policies for Poor Countries,” Table 1, found on Page 8, for a sampling of some of the federal government entities involved in AML/CFT. In addition, many state government entities are imposing standards.
- 3 While various documents are released by governmental and multinational entities providing guidance on AML/CFT issues or further elaborating on the current state of AML/CFT risks, like the U.S. Treasury’s 2015 *National Money Laundering Risk Assessment*, diffuse FinCEN guidance and FATF typologies, none provides a clear set of priorities for U.S. financial institutions as they seek to assist law enforcement in their AML/CFT efforts.
- 4 Multiple participants reported that examiners have developed expected ratios of alerts to SARs, though such ratios have never been published for notice and comment.
- 5 See National Crime Agency, Joint Money Laundering Intelligence Taskforce, <http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/economic-crime/joint-money-laundering-intelligence-taskforce-jmlit>. While in the United States, the Treasury Department has a Bank Secrecy Act Advisory Group (BSAAG), it has not taken on an operational role.
- 6 See 31 C.F.R. § 1010.810. “Overall authority for enforcement and compliance, including coordination and direction of procedures and activities of all other agencies exercising delegated authority under this chapter, is delegated to the Director, FinCEN.” *Id.* § 1010.810(a). See also 12 U.S.C. § 1818(s).
- 7 See Commercial Banks in the U.S., Economic Research of the Federal Reserve Bank of St. Louis, available at: <https://fred.stlouisfed.org/series/USNUM>.
- 8 While FinCEN would be free to adopt its own definition and decision, existing banking law already provides ways of making such a determination; in other words, this is not a novel concept.
- 9 It should be noted that even if FinCEN were to revoke its delegated exam authority, the federal banking agencies would have additional statutory authorities under which they would likely still be required to conduct exams for AML/CFT compliance. However, in order to further streamline and centralize the examination of large multinational institutions, there appears to be no reason why they would not be able to delegate such authorities to FinCEN.
- 10 The Independent Offices Appropriation Act provides general authority for a government agency to assess user fees or charges by administrative regulation, based on the value of the service to the recipient. See 31 U.S.C. § 9701. OMB Circular No A-25 provides further guidance regarding “user fees” (“A user charge . . . will be assessed against each identifiable recipient for special benefits derived from Federal activities beyond those received by the general public.”). See OMB Circular No. A-25 Revised.
- 11 See, e.g., 12 U.S.C. §§ 1786(q), 1818(s)(2).
- 12 See FATF Anti-money laundering and counter-terrorist financing measures, Mutual Evaluation of the United States, December 2016, pg. 11; available at: <http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf>. FATF also noted that “deficiencies in [customer due diligence] requirements (in particular [beneficial ownership] requirements) can undermine the usefulness of SARs,” FATF 2016 Mutual Evaluation of the United States, pg. 58.
- 13 As noted in note 12, FATF found that “deficiencies in [customer due diligence] requirements (in particular [beneficial ownership] requirements) can undermine the usefulness of SARs” in the United States. FATF 2016 Mutual Evaluation of the United States, pg. 58.
- 14 An alternative mechanism for reporting insider abuse to the banking regulators could be established, as necessary.
- 15 In a speech in October 2015, former FinCEN Director Jennifer Shasky Calvery stated that through the IT modernization program “(1) we assumed responsibility for maintaining our own data in a FinCEN system of record; (2) we supported a significant shift from the paper filing of BSA reports to the electronic filing of BSA data; (3) we developed a new IT system for our many law enforcement and regulatory partners to search, slice, and dice BSA data; and (4) we provided advanced analytics tools to FinCEN’s analysts to enhance their capabilities to make sense of the data. Available at: <https://www.fincen.gov/news/speeches/jennifer-shasky-calvery-director-financial-crimes-enforcement-network-4>.”
- 16 FinCEN, *Guidance on the Scope of Permissible Information Sharing Covered by Section 314(b) Safe Harbor of the USA PATRIOT Act*, FIN-2009-G002 (June 16, 2009).
- 17 FinCEN, *Administrative Ruling Regarding the Participation of Associations of Financial Institutions in the 314(b) Program*, FIN-2012-R006 (July 25, 2012) (“[I]nformation shared for the purposes of identifying fraud or other specified unlawful activity that is not related to a transaction involving the possibility of money laundering and/or terrorist financing is not covered by the statutory safe harbor.”).
- 18 31 C.F.R. § 1020.320(e)(1)(ii)(B).
- 19 Interagency Guidance, *Sharing Suspicious Activity Reports with Head Offices and Controlling Companies* (Jan. 20, 2006).
- 20 31 C.F.R. § 1020.320(e)(1)(ii)(A)(2).

- 21 75 Fed. Reg. 75593, 75595 (Dec. 3, 2010).
- 22 *Id.* at n. 13 (“As one commenter correctly suggested, information produced in the ordinary course of business may contain sufficient information that a reasonable and prudent person familiar with SAR filing requirements could use to conclude that an institution likely filed a SAR (e.g., a copy of a fraudulent check, or a cash transaction log showing a clear pattern of structured deposits). Such information, alone, does not constitute information that would reveal the existence of a SAR.”)
- 23 For avoidance of doubt, please note that this group is not requesting guidance with respect to the confidentiality of SARs themselves, or even draft SARs, or documents produced in the course of a depository institution’s transaction surveillance procedures or investigation of whether to file a SAR – all of which are confidential under 31 C.F.R. § 1020.320(e)(1)(i).
- 24 Interagency Guidance, Sharing Suspicious Activity Reports with Head Offices and Controlling Companies (January 20, 2006).
- 25 FATF has advised the U.N. Security Council that the need for enhanced information sharing globally is critical in order to enhance the ability to combat terrorism and, in particular, to defeat ISIL. See <http://www.fatf-gafi.org/publications/fatfgeneral/documents/importance-urgent-action-to-implement-fatf-standards-counter-terrorist-financing.html>
- 26 FFIEC BSA/AML Examination Manual (2014), 60.
- 27 See 31 U.S.C. § 5318(g)(2) and 31 C.F.R. § 1020.320(e); 12 C.F.R. § 21.11(k).
- 28 See 31 C.F.R. § 1020.320(e); 12 C.F.R. § 21.11(k). FFIEC BSA/AML Examination Manual (2014), 73 (“A SAR and any information that would reveal the existence of a SAR, are confidential, except as is necessary to fulfill Bank Secrecy Act obligations and responsibilities. For example, the existence or even the non-existence of a SAR must be kept confidential, as well as the information contained in the SAR to the extent that the information would reveal the existence of a SAR”). See also *Cotton v. PrivateBank & Trust Co.*, 235 F. Supp. 2d 809, 814-15 (N.D. Ill. 2002) (holding that documents representing drafts of SARs or other work product or privileged communications that relate to the SAR itself are confidential); *Whitney National Bank v. Karam*, 306 F. Supp. 2d 678, 683 (S.D. Tex. 2004) (holding that SAR confidentiality protects “discussions leading up to . . . the preparation of filing of a SAR or other form of report of suspected or possible violations.”); but see *First Am. Title Ins. Co. v. Western Bank, No. 12-CV-1210*, 2014 U.S. Dist. LEXIS 121063 at \*5 (E.D. Wis. August 29, 2014) (allowing production of fraud alerts, including information automatically generated by fraud monitoring software, because “[n]ot all means or methods a bank may use to detect fraud or other financial irregularity are privileged simply because they might culminate in a SAR.”); *Freedman & Gersten, LLP v. Bank of America, N.A.*, 09-cv-5351, 2010 U.S. Dist. LEXIS 130167 at \*10 (D.N.J. Dec. 8, 2010) (holding that “general policies and procedures concerning the handling of suspicious activity,” and “any memoranda or documents drafted in response to the suspicious activity” are not entitled to protection because they merely reflect the bank’s “standard business practice” for investigating suspicious activity).
- 29 The term “bank” as used in this section has the meaning given to it in 31 C.F.R. § 1010.100(d).
- 30 See, e.g., *Wultz v. Bank of China*, 56 F. Supp. 3d 598, 602-603 (S.D.N.Y. 2014) (case brought by Wultz family against Bank of China for terrorist-related death of family member, alleging that a customer of BOC, Said al-Shurafa (“Shurafa”), was a senior operative of the terrorist group responsible for the bombing and that BOC assisted Shurafa by executing dozens of wire transfers on his behalf totaling several million dollars).
- 31 See “Joint Fact Sheet on Foreign Correspondent Banking,” August 30, 2016. Available at: <https://www.treasury.gov/press-center/press-releases/Documents/Foreign%20Correspondent%20Banking%20Fact%20Sheet.pdf>.
- 32 See OCC Bulletin 2016-32, “Risk Management Guidance on Foreign Correspondent Banking,” October 5, 2016. Available at: <https://www.occ.gov/news-issuances/bulletins/2016/bulletin-2016-32.html>.
- 33 FinCEN has established a process for issuing “administrating rulings.” FinCEN has explained that “[i]n conformance with the procedures outlined at 31 CFR § 1010.710-717, we will issue administrative rulings interpreting regulations contained in Chapter X either unilaterally or in response to specific requests made and submitted to us consistent with the procedures outlined at 31 CFR § 1010.711. Administrative letter rulings . . . are issued pursuant to our authority as the administrator of the Bank Secrecy Act, if the facts and circumstances, issues, and analyses that appear in an administrative letter ruling are of general interest to financial institutions then the letter ruling is published on our website. Published letter rulings often express an opinion about a new issue, apply an established theory or analysis to a set of facts that differs materially from facts or circumstances that have been previously considered, or provide a new interpretation of Title 31 of the United States Code, or any other statute granting FinCEN authority. See <https://www.fincen.gov/sites/default/files/shared/regrelease.pdf>. By contrast, the SEC has explained that “[a]n individual or entity who is not certain whether a particular product, service, or action would constitute a violation of the federal securities law may request a “no-action” letter from the SEC staff. Most no-action letters describe the request, analyze the particular facts and circumstances involved, discuss applicable laws and rules, and, if the staff grants the request for no action, concludes that the SEC staff would not recommend that the Commission take enforcement action against the requester based on the facts and representations described in the individual’s or entity’s request.” See <https://www.sec.gov/answers/noaction.htm>
- 34 In its Mutual Evaluation of the United States, FATF concluded that “there is a need for more and ongoing guidance from supervisors to industry on their regulatory expectations.” FATF 2016 Mutual Evaluation of the United States, pg. 135.
- 35 See New York State Register Notice, *Regulating Transaction Monitoring and Filtering Systems Maintained by Banks, Check Cashers and Money Transmitters*, New York Department of Financial Services, July 20, 2016.

## **ABOUT THE CLEARING HOUSE**

The Clearing House is a banking association and payments company that is owned by the largest commercial banks and dates back to 1853. The Clearing House Association L.L.C. is a nonpartisan organization that engages in research, analysis, advocacy and litigation focused on financial regulation that supports a safe, sound and competitive banking system. Its affiliate, The Clearing House Payments Company L.L.C., owns and operates core payments system infrastructure in the United States and is currently working to modernize that infrastructure by building a new, ubiquitous, real-time payment system. The Payments Company is the only private-sector ACH and wire operator in the United States, clearing and settling nearly \$2 trillion in U.S. dollar payments each day, representing half of all commercial ACH and wire volume.







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Greg Baer is President of The Clearing House Association and Executive Vice President and General Counsel of The Clearing House Payments Company, the oldest and largest private sector payments operator in the United States. The Clearing House Association represents the interests of The Clearing House's commercial bank ownership on a diverse range of regulatory and legislative matters through position papers, academic research, comment letters, and *amicus curiae* briefs. Mr. Baer oversees the legal, compliance, and litigation functions for the organization's payments business and leads the strategic agenda and operations of the Association.

Prior to joining The Clearing House, Mr. Baer was Managing Director and Head of Regulatory Policy at JPMorgan Chase, working to analyze the impact of regulatory developments, formulate and present positions to regulatory authorities globally, and engage in capital policy and planning. He previously served as General Counsel for Corporate and Regulatory Law at JPMorgan Chase, supervising the company's legal work with respect to financial reporting, global regulatory affairs, intellectual property, private equity and corporate M&A, and data protection and privacy.

Mr. Baer previously served as Deputy General Counsel for Corporate Law at Bank of America, and as a partner at Wilmer, Cutler, Pickering, Hale & Dorr. From 1999 to 2001, Mr. Baer served as Assistant Secretary for Financial Institutions at the U.S. Department of the Treasury, after serving as Deputy Assistant Secretary. Prior to working for the Treasury Department, Mr. Baer was managing senior counsel at the Board of Governors of the Federal Reserve System.

Mr. Baer received his J.D. cum laude from Harvard Law School in 1987, and served as managing editor of the *Harvard Law Review*. He received his A.B. with honors from the University of North Carolina at Chapel Hill in 1984. He is the author of two books: *The Great Mutual Fund Trap* (Random House, 2002) and *Life: The Odds (And How to Improve Them)* (Penguin-Putnam, 2003).