



Noah W. Wilcox, *Chairman*  
Robert M. Fisher, *Chairman-Elect*  
Brad M. Bolton, *Vice Chairman*  
Gregory S. Deckard, *Treasurer*  
Alice P. Frazier, *Secretary*  
Preston L. Kennedy, *Immediate Past Chairman*  
Rebeca Romero Rainey, *President and CEO*

*Via electronic submission*

November 16, 2020

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

**RE: RIN 1506-AB44; Docket Number FinCEN-2020-0011**

Dear Sir or Madam:

The Independent Community Bankers of America (“ICBA”)<sup>1</sup> appreciates the opportunity to respond to the Financial Crimes Enforcement Network’s (“FinCEN’s”) Advance Notice of Proposed Rulemaking (“ANPRM”) which seeks public comment on potential regulatory amendments to establish that all covered financial institutions (“FIs”), subject to an anti-money laundering program requirement, must maintain an “effective and reasonably designed” anti-money laundering program.

### **Background**

The Annunzio-Wylie Anti-Money Laundering Act of 1992 required the Secretary of the Treasury to establish a Bank Secrecy Act Advisory Group (“BSAAG”) consisting of representatives from federal regulatory and law enforcement agencies, FIs, and trade groups with members subject to the requirements of the Bank Secrecy Act, 31 CFR 1000–1099 et seq. or Section 6050I of the Internal Revenue Code of 1986. The BSAAG is the means by which the Treasury receives advice on the operations of the Bank Secrecy Act.

---

<sup>1</sup>*The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services. With nearly 50,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding more than \$5 trillion in assets, over \$4.4 trillion in deposits, and more than \$3.4 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers’ dreams in communities throughout America. For more information, visit ICBA’s website at [www.icba.org](http://www.icba.org).*

*The Nation’s Voice for Community Banks.®*

WASHINGTON, DC  
1615 L Street NW  
Suite 900  
Washington, DC 20036

SAUK CENTRE, MN  
518 Lincoln Road  
P.O. Box 267  
Sauk Centre, MN 56378

866-843-4222  
[www.icba.org](http://www.icba.org)

In June 2019, The BSAAG created an Anti-Money-Laundering Effectiveness Working Group (“AMLE WG”) to develop recommendations for strengthening the national AML regime by increasing its effectiveness and efficiency. This ANPR follows the AMLE WG efforts by proposing amendments that “are intended to modernize the regulatory regime to address the evolving threats of illicit finance, and provide financial institutions with greater flexibility in the allocation of resources, resulting in the enhanced effectiveness and efficiency of anti-money laundering programs.”<sup>2</sup>

Specifically, FinCEN is considering regulatory amendments that would explicitly define an “effective and reasonably designed” AML program as one that:

- 1) “Identifies, assesses, and reasonably mitigates the risks consistent with both the institution’s risk profile and the risks communicated by relevant government authorities as national AML priorities;
- 2) “Assures and monitors compliance with the recordkeeping and reporting requirements of the BSA; and,
- 3) “Provides information with a high degree of usefulness to government authorities consistent with both the institution’s risk assessment and the risks communicated by relevant government authorities as national AML priorities.”

This ANPR seeks comment on whether it is appropriate to establish a requirement for an “effective and reasonably designed” AML program in BSA regulations.

### **ICBA’s Comments**

*Does this ANPRM make clear the concept that FinCEN is considering for an “effective and reasonably designed” AML program through regulatory amendments to the AML program rules? If not, how should the concept be modified to provide greater clarity?*

This ANPR, in general, makes clear the *concept* that FinCEN is considering for an “effective and reasonably designed” However, ICBA strongly advises that future rulemaking sufficiently elaborates on what FinCEN considers an “effective” AML program.

*Are the three proposed core elements and objectives of an “effective and reasonably designed” AML program appropriate? Should FinCEN make any changes to the three proposed elements in a future notice of proposed rulemaking?*

---

<sup>2</sup> Advance notice of proposed rulemaking (ANPRM), Docket No. FinCEN-2020-0011], P.1

The three proposed core elements and objectives provide the basis for an effective AML program. However, FinCEN should also consider defining, clarifying, and providing examples on what it considers to be “information of a high degree of usefulness.”

***Are the changes to the AML regulations under consideration an appropriate mechanism to achieve the objective of increasing the effectiveness of AML programs? If not, what different or additional mechanisms should FinCEN consider?***

In order to achieve an “effective and reasonably designed” AML program through regulatory amendments to the AML program rules, modernization should be top of mind. In fact, the ANPR highlights this notion in its statement, “*The overall goal of these initiatives is to upgrade and modernize the national AML regime, where appropriate, and to facilitate the ability of the financial industry and corresponding supervisory authorities to leverage new technologies and risk-management techniques, share information, discard inefficient and unnecessary practices, and focus resources on fulfilling the BSA’s stated purpose of providing information with a high degree of usefulness to government authorities. This ANPRM is intended to further these efforts.*”<sup>3</sup>

Modernization and reform of the BSA will produce more useful information for law enforcement while alleviating one of the most significant and costly sources of community bank compliance burdens. Rather than having banks devote their resources to tasks that are inefficient or redundant, a more efficient and technologically advanced framework would better serve law enforcement and enable community banks to more effectively utilize their resources. ICBA strongly urges FinCEN to consider the following: 1) Update SAR and CTR reporting thresholds; and 2) discard the inefficient and redundant practice of beneficial ownership information collection from banks and place the obligation on the appropriate state or federal government.

As the federal government combats money laundering and terrorist financing, ICBA strongly recommends an emphasis on quality over quantity for all BSA reporting. An emphasis on quality would usher in an effective regime that would result in FIs providing information with a high degree of usefulness to government authorities. Increasing filing thresholds for both suspicious activity reports (“SARs”) and currency transaction reports (“CTRs”) would enable community banks to provide more targeted and valuable information to law enforcement.

Reporting thresholds are significantly outdated and capture far more transactions than originally intended. The CTR threshold, which was set in 1970, should be raised from \$10,000 to \$30,000 with future increases linked to inflation. CTRs are intended to collect information for investigations in tax evasion, money laundering, terrorist financing, and other financial crimes. However, the overwhelming percentage of CTRs related to ordinary business transactions, which

---

<sup>3</sup> Ibid., 6-7

create an enormous burden on FIs that is not commensurate with financial crime investigations. While the BSA provides banks with the ability to exempt certain customers from CTR reporting, a higher threshold would produce more targeted, useful information for law enforcement.

SARs are the cornerstone of the BSA system and were established as a way for banks to provide leads to law enforcement. Because community banks have a strong incentive to file SARs as a defensive measure to protect themselves from examiner criticism, SARs are filed in increasing and vast numbers without a commensurate benefit to law enforcement. As the government combats money laundering and terrorist financing, ICBA strongly recommends an emphasis on quality over quantity for SAR filing. ICBA recommends reforming the SAR process by increasing the reporting thresholds, which have not been adjusted since becoming effective in 1992, and by emphasizing those instances in which an institution may rely on risk-based reporting. ICBA recommends the current SARs threshold should be raised from \$5,000 to \$10,000 which will modernize thresholds by emphasizing quality over quantity in information collection.

In the current regulatory environment, community banks are faced with a cumbersome and overly burdensome process to ensure they are protected and no mistakes are made when examined. They are questioned about the number of SARs filed in relation to the number of accounts and transactions initially identified as suspicious rather than the quality of the bank's monitoring system or investigative process. Additionally, bankers are questioned regarding the total number of SARs filed since the last examination as though a quota is required. As a result, bank employees often file SARs as a defensive measure and to ensure that in hindsight they did not miss or overlook any details and to ensure they filed a requisite number of SARs. The current focus is also a daunting task for banks because it usurps resources by requiring significant time monitoring for thresholds ("quantity") rather than on actual suspicions ("risk").

On May 11, 2018 the beneficial ownership rule, which requires banks to collect and verify information on the beneficial owners of legal entity accounts, became effective. FinCEN defines a legal entity customer as a corporation, limited liability company, or other entity that is created by the filing of a public document with a Secretary of State or similar office, a general partnership, and any similar entity formed under the laws of a foreign jurisdiction, that opens an account.

ICBA has consistently advocated for this rule's obligations to be placed on the appropriate federal or state governmental entity. Placing the responsibility and oversight of collecting this information on FIs is misguided because FIs do not share the beneficial information collected with law enforcement or FinCEN. They simply retain the information until subpoenaed or legally mandated to share and thereby renders FIs as mere collectors and gatekeepers. As such, future rulemaking intended to increase effectiveness of AML programs must consider shifting the obligation to the appropriate governmental entity.

Additionally, collecting and verifying the identity of all-natural person owners of each entity by the appropriate federal and/or state agency in which the entity is formed would provide uniformity and consistency across the United States. Making the formation of an entity contingent on receiving beneficial owner information would create a strong incentive for equity owners and investors to provide such information. Additionally, periodic renewal of an entity's state registration would provide an efficient and effective vehicle for updating beneficial ownership information.

Furthermore, information regarding beneficial owners could be more easily shared between law enforcement and government agencies than between banks and law enforcement. While privacy laws do not permit banks to share personal information with a government agency absent a subpoena or similar directive, inter-agency sharing of personal information is permissible if certain amendments are in place.

***Should regulatory amendments to incorporate the requirement for an “effective and reasonably designed” AML program be proposed for all financial institutions currently subject to AML program rules? Are there any industry-specific issues that FinCEN should consider in a future notice of proposed rulemaking to further define an “effective and reasonably designed” AML program?***

Accommodations should be made based on size, operational complexity, technological capabilities, and product offerings. These accommodations should be granted to those FIs that already maintain an effective BSA compliance program with risk assessments that sufficiently manage and mitigate risks. These same institutions should also have the ability to opt-in to making changes to AML programs as described in this ANPRM.

***Should FinCEN issue Strategic AML Priorities, and should it do so every two years or at a different interval? Is an explicit requirement that risk assessments consider the Strategic AML Priorities appropriate? If not, why? Are there alternatives that FinCEN should consider?***

ICBA supports the issuance of national AML priorities, provided that: 1) matters that are no longer considered a priority are removed from the list; and 2) priorities that are lowered make clear that an FI may reduce, shift, or no longer commit resources to that priority. However, this should not result in a regulatory expectation that a financial institution's AML program look beyond risks pertaining to its own products, services, geographies, and customers. FinCEN should make clear that FIs have autonomy and flexibility to incorporate Strategic AML Priorities.

Enhanced communication among industry, law enforcement and the federal government is vital to achieving an “effective and reasonably designed” AML program, vital to ensuring the most useful information is provided to law enforcement.

Communication and cooperation are critical to an effective working partnership among the government, law enforcement, and financial institutions. Community banks seek most recent information from the federal government to better understand what specific methods of terrorist financing and money laundering they are helping to mitigate so banks can more readily identify and report truly suspicious transactions. This information would also be valuable during a FI's audit as it would allow for a more efficient focus during the process.

Vendors providing technology platforms and solutions used by FIs need to be engaged with FinCEN when national AML priorities are developed to ensure programs are updated in time for FIs to utilize them. A vendor's ability to quickly incorporate national AML priorities would enhance a FI's ability to effectively manage their AML programs. Future rulemaking should consider allowing vendors access to FinCEN's AML priorities process.

***As financial institutions vary widely in business models and risk profiles, even within the same category of financial institution, should FinCEN consider any regulatory changes to appropriately reflect such differences in risk profile? For example, should regulatory amendments to incorporate the requirement for an "effective and reasonably designed" AML program be proposed for all financial institutions within each industry type, or should this requirement differ based on the size or operational complexity of these financial institutions, or some other factors? Should smaller, less complex financial institutions, or institutions that already maintain effective BSA compliance programs with risk assessments that sufficiently manage and mitigate the risks identified as Strategic AML Priorities, have the ability to "opt-in" to making changes to AML programs as described in this ANPRM?***

The ANPR states that the goal of regulatory amendments would seek to make clear that an "effective and reasonably designed" AML program "identifies, assesses, and reasonably mitigates the risks consistent with both the institution's risk profile and the risks communicated by relevant government authorities as national AML priorities." As such, an "institutions risk profile," even those that are smaller, and less complex, would naturally cover the financial institution's widely varying business models and risk profiles.

However, accommodations should be made based on size, operational complexity, technological capabilities, and product offerings. Smaller community banks with less complexity and risk should have flexibility commensurate with their risk, so long as they already maintain effective BSA compliance programs with risk assessments that sufficiently manage and mitigate risks identified as Strategic AML Priorities, within their universe of products, services, geographies, and customers. These same institutions should also have the ability to opt-in to making changes to AML programs as described in this ANPRM.

***A core objective of the incorporation of a requirement for an "effective and reasonably designed" AML program would be to provide financial institutions with greater flexibility to reallocate resources towards Strategic AML Priorities, as appropriate. FinCEN seeks comment on whether such regulatory changes would increase or decrease the regulatory***

***burden on financial institutions. How can FinCEN, through future rulemaking or any other mechanisms, best ensure a clear and shared understanding in the financial industry that AML resources should not merely be reduced as a result of such regulatory amendments, but rather should, as appropriate, be reallocated to higher priority areas?***

ICBA firmly believes that an “effective and reasonably designed” AML program would provide FIs with greater flexibility to reallocate resources away from practices that are not required by law or regulation, that are mechanical, defensive and check the box, in nature, and render little to a financial institution’s overall risk management objectives. By freeing up these resources away from activities that are low priority and reallocating them to address areas of higher risk and national AML priorities is the surest way to achieve an effective and reasonable AML.

Future rulemaking should not only consider this notion of reallocation for FIs, but must also make clear that examiners conduct examinations pursuant to those reallocated resources, and not penalize a financial institution’s decision to re-focus their AML priorities.

Finally, future rulemaking should consider the time and budget needs associated with FIs updating policies and procedures, implementation, and incorporating changes into their BSA software. ICBA recommends a 24-month period for implementation.

ICBA appreciates the opportunity to provide comments in response to this request. If you have any questions, please do not hesitate to contact me at [Rhonda.Thomas-Whitley@icba.org](mailto:Rhonda.Thomas-Whitley@icba.org) or (202) 659-8111.

Sincerely,

/s/

Rhonda Thomas-Whitley  
Vice President and Regulatory Counsel