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the global coalition against corruption

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By electronic submission (via the Federal E-rulemaking Portal)

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Director
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U.S. Department of Treasury
P.O. Box 39
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Re: Advance Notice of Proposed Rulemaking on Anti-Money Laundering Effectiveness, RIN 1506-AB44/Docket No. FinCEN-2020-0011

Dear Director Blanco,

The U.S. office of Transparency International (TI-US) appreciates the opportunity to provide comments on the Financial Crimes Enforcement Network's (FinCEN) Advance Notice of Proposed Rulemaking (ANPRM) on whether to more clearly define and articulate the existing requirement for an "effective and reasonably designed" anti-money laundering (AML) program in Bank Secrecy Act (BSA)[1] regulations.

The U.S. Office of Transparency International (TI-US) is part of the largest global coalition dedicated to fighting corruption. With over 100 national chapters around the world, Transparency International (TI) partners with businesses, governments, and citizens to promote transparency and curb the abuse of power in the public and private sectors. TI chapters across the world today are actively involved in efforts to establish strong, effective, and consequential AML laws as a means of increasing government accountability and building public confidence in the integrity of financial and political systems.[2]

Public attention on the inadequacies of BSA compliance has never been greater. For example, within days of this ANPRM being published a BuzzFeed News exposé known as the "FinCEN Files"[3] provided new and compelling evidence of the significant lapses in our AML rules and our inability to properly police illicit financial activity. American audiences learned, for example, that in the midst of one of the most violent, wrenching humanitarian crises in the world in Venezuela—where three-quarters of the population had lost an average of 20 pounds due to scarcity and suffering—

[1] 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, and 31 U.S.C. 5311–5314; 5316–5332 (authorizing the Secretary of the Treasury to require financial institutions to keep records and file reports that "have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings").
[2] For more information on TI's work on global illicit finance, see Transparency International, "Dirty Money," https://www.transparency.org/en/our-priorities/dirty-money.
[3] On September 20th, 2020, BuzzFeed News and an international coalition of 400 journalists across 88 countries released the results of their year-long analysis of a massive trove of government documents—the "FinCEN Files"—that exposed how $2 trillion in suspected dirty money was laundered through the global banking system, including $1 trillion through U.S. banks.

Venezuelan kleptocrats used U.S. banks to move billions in public money out of the country.[4] U.S financial institutions have profited from trillions of dollars in tainted transactions—transactions that are undetected, and undeterred, by a woefully inadequate compliance system. The need for real, tangible reform has never been more urgent.

Question 2: Are this ANPRM's 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 of an "effective and reasonably designed" AML program in a future notice of proposed rulemaking?

FinCEN is considering regulatory amendments that would explicitly define an "effective and reasonably designed" AML program as one that, in part:

> Identifies, assesses, and reasonably mitigates the risks resulting from illicit financial activity—including terrorist financing, money laundering, and other related financial crimes—consistent with both the institution's risk profile and the risks communicated by relevant government authorities as national AML priorities….

As acknowledged in the ANPRM, the BSA's AML regime must adapt to address the evolving threats of illicit finance, many of which have changed considerably in scope, nature, and impact since the initial passage of the BSA.

Chief among these threats is **the financing of corruption**. Year after year, economists at the International Monetary Fund estimate the cost of corruption to be roughly 2 percent of global gross domestic product.[5] United Nations Secretary-General António Guterres estimated in 2018 that some *$3.6 trillion* is paid in bribes or stolen from the public each and every year.[6] Corruption poses a unique, multidimensional threat to society in that it destabilizes economies, breaks down the rule of law, threatens political stability, and injects rent-seeking behaviors and other inefficiencies into free markets.[7] In short, corruption is a globally resonant problem,[8] and efforts to reduce it can therefore have truly global resonance.[9]

The recognition of corruption and its financing as an immediate and grave threat is conspicuous across international agreements such as the United Nations Convention Against Corruption (to which the United States is a party),[10] multilateral agreements such as the United States-Mexico-

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[4] *See* Vox.com, "Venezuela's economic crisis is so dire that most people have lost an average of 19 pounds," Feb. 22, 2017, https://www.vox.com/world/2017/2/22/14688194/venezuela-crisis-study-food-shortage.
[5] International Monetary Fund, "Corruption Costs and Mitigating Strategies," May 2016, https://www.imf.org/external/pubs/ft/sdn/2016/sdn1605.pdf.
[6] Statement by United Nations Secretary-General António Guterres, December 2018, https://news.un.org/en/story/2018/12/1027971.
[7] *See generally* U.S. Department of State, "International Narcotics Control Strategy Report, Volume II, Money Laundering," March 2019, https://www.state.gov/wp-content/uploads/2019/03/INCSR-Vol-INCSR-Vol.-2-pdf.
[8] Two-thirds of the 180 countries scored on TI's 2019 Corruption Perceptions Index—which scores countries from 0 (very corrupt) to 100 (not corrupt)—received scores below 50. Transparency International, "Corruption Perceptions Index 2019: Overview," https://www.transparency.org/en/cpi/2019.
[9] *See, e.g.,* Matthew S. Morgan, "Money Laundering: The American Law and Its Global Influence," Law & Business Rev. of the Americas, Vol. 3, No. 3 (1997).
[10] Article 14(1)(a) of the Convention obligates parties to:

> Institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions…and, where appropriate, other bodies particularly susceptible to

Canada Agreement (the first U.S. trade agreement to include a chapter on anticorruption),[11] and domestic federal laws such as the USA PATRIOT Act.[12] But it is conspicuously *absent* in FinCEN's proposed elements of an "effective and reasonably designed" AML program.

In its discussion of Question 6, the ANPRM describes what materials the Director may consider when determining Strategic AML Priorities. This includes FinCEN advisories, relevant U.S. Department of the Treasury (Treasury) communications, including National Risk Assessments, and information from law enforcement and other government agencies. A canvassing of over a decade of such advisories, guidance, public statements, National Risk Assessments, and information from law enforcement and other government agencies shows that **corruption is a top illicit finance threat.**[13] In February of this year, for example, Treasury's National Strategy for Combating Terrorist

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> money-laundering, within its competence, in order to deter and detect all forms of money-laundering.

Sections 1 and 2(f) of Article 12 then direct parties to:

> [T]ake measures…to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures [including] [e]nsuring that private enterprises, taking into account their structure and size, have sufficient internal auditing controls to assist in preventing and detecting acts of corruption and that the accounts and required financial statements of such private enterprises are subject to appropriate auditing and certification procedures.

United Nations General Assembly, United Nations Convention Against Corruption, Oct. 31, 2003.

[11] Chapter 27.5(1)(d) of the Agreement states:

> Each Party shall take appropriate measures...to promote the active participation of individuals and groups outside the public sector, such as enterprises...in preventing and combatting corruption in matters affecting international trade or investment, and to raise public awareness regarding the existence, causes, and gravity of corruption, and the threat posed by it.

United States-Mexico-Canada Agreement, Nov. 30, 2018.

[12] For example, section 312(3)(B) states that

> If a private banking account is requested or maintained by, or on behalf of, a non-United States person, then the due diligence policies, procedures, and controls required under paragraph (1) shall, at a minimum, ensure that the financial institution takes reasonable steps…to conduct enhanced scrutiny of any such account that is requested or maintained by, or on behalf of, a senior foreign political figure, or any immediate family member or close associate of a senior foreign political figure that is reasonably designed to detect and report transactions that may involve the proceeds of foreign corruption.

USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

[13] *See, e.g.,* Financial Crimes Enforcement Network, "Updated FinCEN Advisory Warns Against Continued Corrupt Venezuelan Attempts to Steal, Hide, or Launder Money," May 3, 2019, https://www.fincen.gov/news/news-releases/updated-fincen-advisory-warns-against-continued-corrupt-venezuelan-attempts; Financial Crimes Enforcement Network, "FinCEN Advisory Warns of Risks Linked to Corruption in Nicaragua," Oct. 4, 2018, https://www.fincen.gov/news/news-releases/fincen-advisory-warns-risks-linked-corruption-nicaragua; Financial Crimes Enforcement Network, "FinCEN Warns Financial

and Other Illicit Financing identified corruption as one of the most significant illicit finance threats facing the U.S.[14] Six months later, FinCEN issued a statement titled "Addressing the money-laundering threat posed by corruption of foreign officials continues to be a national security priority for the United States."[15] And two years ago this month, in testimony given to the U.S. Senate Banking Committee, FinCEN twice identified corruption as an "important illicit finance and national security issu[e]."[16]

Perhaps most importantly, guarding against the financing of corruption has long been implicitly considered to be part of an "effective and reasonably designed" AML program. For example, twelve years ago a FinCEN guidance on filing Suspicious Activity Reports (SARs) regarding the proceeds of foreign corruption stated:

> Foreign corruption threatens important American interests globally, including security and stability, the rule of law and core democratic values, prosperity, and a level playing field for lawful business activities…Accordingly, consistent with their anti-money laundering obligations pursuant to 31 C.F.R. part 103, financial institutions are reminded of the requirement to implement appropriate risk-based policies, procedures, and processes, including conducting customer due diligence on a risk-assessed basis to aid in the identification of potentially suspicious transactions."[17]

Institutions to Guard Against Corrupt Venezuelan Money Flowing to U.S.," Sept. 20, 2017, https://www.fincen.gov/news/news-releases/fincen-warns-financial-institutions-guard-against-corrupt-venezuelan-money; Financial Crimes Enforcement Network, "Advisory to Financial Institutions and Real Estate Firms and Professionals," Aug. 22, 2017, https://www.fincen.gov/resources/advisories/fincen-advisory-fin-2017-a003; Financial Crimes Enforcement Network, "Certain South Sudanese Senior Political Figures May Seek to Abuse the Financial System," Sept. 6, 2017, https://www.fincen.gov/resources/advisories/fincen-advisory-fin-2017-a004; Financial Crimes Enforcement Network, "FinCEN Issues Advisory on Human Rights Abuses Enabled by Corrupt Senior Foreign Political Figures and Their Financial Facilitators," June 12, 2018, https://www.fincen.gov/news/news-releases/fincen-issues-advisory-human-rights-abuses-enabled-corrupt-senior-foreign#:~:text=FinCEN%20is%20issuing%20this%20advisory,said%20Treasury%20Undersecretary%20Sigal%20Mandelker; Financial Crimes Enforcement Network, "Updated Guidance to Financial Institutions on Recent Events related to the Departure of Victor Yanukovych and Other Ukrainian Officials," Mar. 6, 2014, https://www.fincen.gov/resources/advisories/fincen-advisory-fin-2014-a002; U.S. Department of State, *supra* note 7.

[14] U.S. Department of the Treasury, "National Strategy for Combating Terrorist and Other Illicit Financing," 2020, 8, https://home.treasury.gov/system/files/136/National-Strategy-to-Counter-Illicit-Financev2.pdf.

[15] Financial Crimes Enforcement Network, "Agencies Issue Statement on Bank Secrecy Act Due Diligence Requirements for Customers Who May Be Considered Politically Exposed Persons," Aug. 21, 2020, https://www.fincen.gov/news/news-releases/agencies-issue-statement-bank-secrecy-act-due-diligence-requirements-customers.

[16] Testimony for the Record of Kenneth A. Blanco, Director, Financial Crimes Enforcement Network, U.S. Department of the Treasury, Nov. 29, 2018, https://www.fincen.gov/news/testimony/testimony-fincen-director-kenneth-blanco-senate-committee-banking-housing-and-urban.

[17] *See* Financial Crimes Enforcement Network, "Guidance to Financial Institutions on Filing Suspicious Activity Reports regarding the Proceeds of Foreign Corruption," Apr. 17, 2008, https://www.fincen.gov/resources/statutes-regulations/guidance/guidance-financial-institutions-filing-suspicious-0.

This rule-making, therefore, presents a timely and appropriate opportunity to explicitly incorporate this priority into the regulatory framework by defining an "effective and reasonably defined" AML program as one that:

> Identifies, assesses, and reasonably mitigates the risks resulting from illicit financial activity—including terrorist financing, money laundering, **the financing of corruption,** and other related financial crimes—consistent with both the institution's risk profile and the risks communicated by relevant government authorities as national AML priorities….

Such a change would marry decades of deep, multi-level and cross-agency prioritization with the unprecedented need for serious, focused action against illicit finance threats.

Question 6: 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?

The continuous emergence of ever-more complex and sophisticated financial vehicles and networks makes certain that if the U.S.'s AML regime fails to stay ahead of evolving illicit finance threats, it will be permitting corrupt actors to adapt and thrive outside its reach. As such, any meaningful modernization of BSA compliance must begin by incorporating into the regulatory framework the financing of corruption; absent that, this priority must be the first strategic AML priority that FinCEN issues.

Bigger picture, we support the issuance of Strategic AML Priorities every two years, but urge that each such issued priority *remain* a priority for at least a four-term term.

The Strategic AML Priorities program must be structured to incentivize effectiveness over check-the-box technical compliance. BSA compliance programs can produce incredibly valuable data for law enforcement, regulators, and investigators, but a two-year term—in practice—may be too short of a cycle to incentivize financial institutions to review how their business activities, products, services, customers, and geographic exposure risks interact with a given priority; to make substantial investments in new areas of expertise; to schedule, plan for, and dedicate resources; to design, test, and implement new controls (some financial institutions, faced with a two-year priority window, may simply conclude that their AML programs sufficiently assess and mitigate *enough* of the risks identified); or to build and standardize processes that collect, analyze, and produce an optimal level of valuable data. Instead, a relatively short life cycle might just encourage half-hearted, rushed investments or deviations that produce the same quality of information and assessments that went into their design.

A four-year term would help ensure that financial institutions are effectively adapting and realigning their programs in response to the priorities, including by integrating the priorities into their risk-assessment processes, while leaving FinCEN the opportunity and flexibility to respond to new and evolving threats as they arise.

Question 7: Aside from policies and procedures related to the risk assessment process, what additional changes to AML program policies, procedures, or processes would financial institutions need to implement if FinCEN implemented regulatory changes to incorporate the requirement for an "effective and reasonably designed" AML program, as described in

this ANPRM? Overall, how long of a period should FinCEN provide for implementing such changes?

Legislation known as the Corporate Transparency Act[18] (CTA) was included in the U.S. House of Representatives version of this year's National Defense Authorization Act, and may ultimately be included in the final version of the Act for Congress to vote on later this year. If passed into law, the CTA would usher in an expanded role for BSA compliance programs to provide highly useful information and help protect the U.S. financial system from illicit finance threats, including the financing of corruption.

FinCEN should embrace the many improvements proposed in the CTA, including the collection of beneficial ownership information, which will not only greatly enhance the overall AML regime but also serve as an important additional check for financial institutions, and the conformance of customer due diligence rules to the CTA, which, through improvements like the new definition of beneficial owner, will help to strengthen the overall regime.

Other important improvements include those that require financial institutions, regulators, and law enforcement to share more information. These include the CTA's requirement that at least six FinCEN Domestic Liaisons be appointed to perform outreach to BSA bank officers; its requirement that Treasury review best practices from the private sector to better share information across banks in different countries; and its requirement that Treasury develop recommendations for improving communication between the private sector, FinCEN, and federal agencies. These proposals could lay a foundation for going beyond the FinCEN Exchange and BSA Advisory Group. For example, FinCEN could convene meetings with law enforcement and relevant financial institutions on the financing of corruption in order to strengthen dialogue and feedback loops, bolster financial intelligence sharing partnerships, and help surface additional, related priorities.

Finally, in addition to the reforms proposed in the CTA, FinCEN should consider the following three changes to its current AML program policies, procedures, and processes:

1. Amend money services business (MSB) registration forms to mandate the disclosure of the entity's beneficial—as opposed to simply legal—owners. MSBs are part of roughly one-third of all SARs filed, and this change would remove a significant obstacle to law enforcement agencies being able to successfully investigate and prosecute illicit finance;
2. Publish general guidance regarding what types of SARs—in practice—are the most effective, the most helpful, and/or provide the most useful data;
3. Reject the misguided arguments for raising the Currency Transaction Report (CTR) threshold to account for inflation. A September 2020 report from the U.S. Government Accountability Office found that officials from six federal law enforcement agencies opposed raising the CTR threshold because doing so would "reduce the amount of financial intelligence available to them for investigations, analysis, and prosecutions."[19] Independent experts have also concluded that doubling the threshold would "materially reduce the compliance costs for only the largest banks."[20] These cost savings are not worth the known human costs of corruption.

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[18] H.R. 2513.

[19] U.S. Government Accountability Office, "Opportunities Exist to Increase Law Enforcement Use of Bank Secrecy Act Reports, and Banks' Costs to Comply with the Act Varied," September 2020, https://www.gao.gov/assets/710/709745.pdf.

[20] *See* RegTech Consulting LLC, "FinCEN's Proposed AML Program Effectiveness Rule – Comments of RegTech Consulting LLC," Nov. 7, 2020, https://regtechconsulting.net/aml-regulations-and-enforcement-actions/fincens-proposed-aml-program-effectiveness-rule-comments-of-regtech-consulting-llc/.

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By incorporating the above recommendations, FinCEN can again recognize that guarding against the financing of corruption is part of an "effective and reasonably designed" AML program, and, in doing so, can make a tremendous impact on the threats posed by corruption to U.S. interests both at home and abroad. If you have any questions, or for additional information on TI's work in this regard, please contact Scott Greytak, Advocacy Director for TI-U.S., at sgreytak@transparency.org or 614-668-0258.

Thank you for the opportunity to present these comments.

Respectfully submitted,

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