

September 3, 2024

Ms. Andrea Gacki
Director
Financial Crimes Enforcement Network
U.S. Department of the Treasury
P.O. Box 39
Vienna, VA 22183

Re: Anti-Money Laundering and Countering the Financing of Terrorism Programs, Docket Number FINCEN-2024-00213

Dear Director Gacki,

Transparency International U.S. (“TI US”)¹ appreciates the opportunity to offer comments on the Notice of Proposed Rulemaking (“NPRM” and “Draft Rule”) for strengthening and modernizing financial institutions’ anti-money laundering (“AML”) and countering the financing of terrorism (“CFT”) programs pursuant to the Anti-Money Laundering Act of 2020 (“AML Act”), as published by the Financial Crimes Enforcement Network (“FinCEN”) of the U.S. Department of the Treasury (“Treasury”).² We provide these comments to commend the overall approach as well as specific pieces of the Draft Rule, and to recommend a handful of important changes that would help ensure the adoption of a final rule that is maximally effective and responsive to unique illicit finance risks posed by corruption. As FinCEN works to develop that final rule, please consider us partners in the effort.

TI chapters across the world have long led efforts to establish robust, comprehensive, and accountable AML program requirements as a means of preventing corruption, increasing government accountability, and boosting public confidence in the integrity of political systems.³ Corruption, and the laundering of funds acquired through corruption, pose unique and multidimensional threats to societies and financial systems across the globe: They erode the rule of law, destabilize governments and economies, and fundamentally undermine the generative potential of democracies, among many other associated threats—the power, scale, and severity of which are reflected in the White House’s designation of the fight against corruption as a core

¹ 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 citizens, businesses, and governments to promote transparency and end the abuse of power for private gain in both the public and private sectors. For more information about TI US, please see our website at <https://us.transparency.org/>.

² See U.S. Department of the Treasury, “Anti-Money Laundering and Countering the Financing of Terrorism Programs,” July 3, 2024, available at <https://www.regulations.gov/document/FINCEN-2024-0013-0001>.

³ See, e.g., TI, “Dirty Money,” available at <https://www.transparency.org/en/our-priorities/dirty-money>.

U.S. national security interest.⁴ And as recognized by Treasury, and made clear in consistent criticisms by the Financial Action Task Force (“FATF”)—the international AML standards-setting body that the U.S. co-founded and that for years has criticized the U.S. over significant gaps in its AML regime—the inadequacy of the current U.S. AML framework continues to permit our country to serve as a safe-haven destination for dirty money. Such notoriety makes the United States a knowing and active participant in the global wealth drain that leaves countries across the world, and particularly in the Global South, struggling to provide critical government services and rationing the availability of medicines, clean air and water, public safety, and more, and that jeopardizes our own national security and our ability to credibly assert global leadership.

Yet just as such threats have engendered globally resonant problems, efforts to address them, including the adoption of effective and responsive AML and CFT program requirements, can produce correspondingly positive global impacts. In short, the United States possesses a unique power and ability to prevent corrupt officials and other criminals from continuing to sow desperation and distrust across the world, and a consequent obligation to maximize such capacities for good.

AML/CFT Program Requirements & Priorities

The Bank Secrecy Act (“BSA”), in requiring financial institutions to establish and maintain systems to monitor transactions, maintain records, and report suspicious transactions, remains the U.S. Government’s most important tool for fighting money laundering and other illicit financial activity.⁵

⁴ See The White House, “Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest,” June 3, 2021, available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest>.

⁵ See Pub. L. No. 91-508, 84 Stat. 1114 (1970). The BSA was a reaction, in large part, to stringent provisions in foreign jurisdictions that assured the secrecy of financial transactions. 116 Cong. Rec. 16, 950 (bounded.), May 25, 1970, Amended and passed House, Debated, H. Res. 941 agreed to (“In jurisdictions with secrecy laws our law enforcement agencies are placed in an impossible position. To have any hope of gaining the desired information, officials must subject themselves to long, drawn-out foreign legal processes. Oftentimes the ‘evidence’ has disappeared. To overcome this problem, and still not unduly interfere with the rights, laws, and sovereignty of foreign nations and their institutions, the bill is directed toward Americans and those doing business in the United States, and the Treasury Department is giving wide administrative flexibility to assure the uninterrupted flow of world commerce and trade. The aim is to place such persons in the same position with regard to his secret foreign transactions as he would be with respect to his domestic transactions.”). Congress justified the BSA’s provisions, in part, on the fact that such record keeping was already practiced, in private, by most financial institutions and that the BSA would therefore “impose almost no additional expense upon those affected.” *Id.* at 16, 961. The BSA was also justified on the need for financial institutions to bear some of the burden of the costs of fighting crime which, at the time, was increasingly falling on taxpayers. *Id.* (“Even if there is some additional cost to the financial institutions of this country, even if there will be some burden, even if these institutions do have to do a little more in terms of recordkeeping than they have done, should not

Building on these tools, the AML Act, which amended the BSA in part, states that AML/CFT programs must safeguard national security, and generate significant “public benefits,” by preventing the flow of illicit funds and by assisting law enforcement and national security agencies with the identification and prosecution of persons who are attempting to launder money and undertake other illicit finance activity through the U.S. financial system.⁶

As discussed in the Draft Rule, the AML Act further states that AML/CFT programs must be “reasonably designed to assure and monitor compliance” with BSA requirements and its implementing regulations, as well as be “risk-based.”⁷ Toward these ends, the Draft Rule now proposes formally requiring financial institutions to have “effective, risk-based, and reasonably designed” AML/CFT programs, and lists the minimum components necessary for such programs to in fact be effective, risk-based, and reasonably designed.

Finally, the AML Act provides that each financial institution also review and incorporate AML/CFT Priorities—which FinCEN must update at least every four years—into their programs. Such a requirement, we believe, appropriately reflects the need for the BSA’s AML regime to continually adapt in order to effectively address illicit finance threats, many of which have changed considerably in scope, nature, and impact in the 50-plus years of the BSA. Importantly, the incorporation of these Priorities will now be treated as a measure on which financial institutions are supervised and examined for compliance with their obligations under the BSA and other AML/CFT laws and regulations.⁸ Doing so, as the Draft Rule lays out, will help ensure that financial institutions “understand their exposure” to evolving and emerging risks “that are of particular importance at a national level.”

As we also discussed throughout our November 2020 comment in response to FinCEN’s Advance Notice of Proposed Rulemaking (“ANPRM”) on whether to more clearly define and articulate the existing requirements for an “effective and reasonably designed” AML program,⁹ we fully support such a delineated—and now, thanks to the AML Act’s inclusion of a “risk-based” component—adaptive and responsive framework for AML/CFT effectuation, and we encourage FinCEN to maintain the Draft Rule’s approach in its final rule.

they as well as the rest of us bear some of the costs of fighting crime. In these days when all levels and types of crime are mushrooming beyond manageable proportions, the taxpayer is being called upon to pay more and more money for law enforcement. Surely the banks and other corporations who will be required to keep some additional records or maintain the records they already keep cannot complain too loudly about taking on a small portion of this burden. Perhaps the virtue of title I of this legislation is that it is designed to create the climate for more efficient law enforcement. It could serve as a very helpful crime preventive so that the benefits to be gained are far out of proportion to the burden taken.”).

⁶ 31 U.S.C. 5318(h)(2)(B)(iii).

⁷ 31 U.S.C. 6101(b)(2)(B)(ii).

⁸ 31 U.S.C. 5318(h)(4)(E).

⁹ See TI US, “Comment to FinCEN: How to Help Ensure That Anti-Money Laundering Programs Are Effective,” Nov. 16, 2020, available at <https://us.transparency.org/resource/comments-on-the-fincen-advance-notice-of-proposed-rulemaking-anprm/>.

This being said, we believe that AML/CFT programs would be even more effective at safeguarding core U.S. national security interests as they exist today, at generating significant public benefits, and at responding to risks that are of particular importance at a national level, if they were expressly required to address the financing of corruption.

Agreements such as the United Nations Convention Against Corruption (to which the United States is a party) and the United States-Mexico-Canada Agreement (the first U.S. trade agreement to include a chapter on anticorruption),¹⁰ as well as federal laws such as the USA PATRIOT Act, the Global Magnitsky Human Rights Accountability Act, the Corporate Transparency Act, and the Foreign Extortion Prevention Act, reflect a maturing understanding of the centrality of corruption and its financing in both safeguarding core U.S. national security interests and generating significant public benefits.¹¹ This maturation has of course been evident in FinCEN and Treasury's recent illicit finance workstreams as well: In June 2021, for example, Treasury named combating corruption a government-wide priority for AML. And a canvassing of over a decade of FinCEN advisories, relevant Treasury communications (including National Risk Assessments), information from federal law enforcement and other U.S. agencies, and media and similar reports, reflect the reality that the financing of corruption has become a leading illicit finance threat.

Perhaps most informative for purposes of the Draft Rule, guarding against the financing of corruption has long been *implicitly* considered to be a part of AML program requirements. As but one example, sixteen years ago FinCEN guidance on filing Suspicious Activity Reports ("SARs") regarding the proceeds of foreign corruption stated that:

Foreign corruption threatens important American interests globally, including security and stability, the rule of law and core democratic values, prosperity, and

¹⁰ 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.

¹¹ For example, section 312(3)(B) of the PATRIOT Act states:

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).

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.¹²

While express requirements addressing the financing of corruption may not, for now, be able to claim the same singular statutory justifications as other program requirements, we nevertheless strongly encourage FinCEN and Treasury to seriously consider the body of support that could justify their inclusion, from President Biden's designation of the fight against corruption as a core national security interest to the White House's subsequent and comprehensive "U.S. Strategy on Countering Corruption",¹³ to Treasury's listing of combating corruption as a government-wide priority for AML, and truly unprecedented and consistent enactment of bipartisan legislation targeting corruption and its financing. Such inclusion would marry deep, multi-level, cross-agency, Executive-Legislative, bipartisan prioritization with the now unprecedented need for adaptive and focused action against the financing of corruption.

In the absence of such a formal programmatic requirement, **we would strongly encourage FinCEN to identify corruption as its lead AML/CFT priority**, and to issue clear and constant guidance on trends and typologies financial institutions should be incorporating to minimize their exposure to such risk. This includes encouraging innovation, exploration, and the development of best practices to address these risks, which can then be shared among financial institutions. The domestic liaisons created by the Corporate Transparency Act could be particularly useful for furthering these aims and helping to build strong and durable financial institution resiliencies to such risks.

Finally, FinCEN must ensure that its ensuing Priorities are structured to incentivize *effectiveness* over check-the-box compliance from financial institutions. Critical to this effort will be maintaining a discrete, limited number of such Priorities. BSA compliance programs can produce incredibly valuable data for law enforcement, regulators, and investigators, but, simply put, every additional priority listed will potentially undermine focus and investment in the others, thus foreseeably incentivizing financial institutions to limit their overall effectiveness in order to attain equal "prioritization." Instead, truly targeted Priorities would permit financial institutions to review how their business activities, products, services, customers, and geographic exposures 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; and to build and standardize processes that collect, analyze, and produce an optimal level of valuable data. A laundry list of priorities, on the other hand, will almost ensure half-hearted, rushed investments that result in similarly low-quality information and outcomes.

¹² See FinCEN, "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>.

¹³ See The White House, "United States Strategy on Countering Corruption," December 2021, available at <https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf>.

For these reasons, we encourage FinCEN to both limit its resulting Priorities, and to designate the financing of corruption as chief or first among them.

Compliance and Final Rule Effective Date

FinCEN proposes an effective date of six months from the date of issuance of the final rule in order to provide sufficient time for review and implementation. We agree that a six-month compliance period as of the final rule's effective date is reasonable, and very likely necessary for financial institutions to be able to implement these requirements effectively. Competing compliance measures are of course legitimate concerns, especially as the U.S. has expanded its application of the AML/CFT regulatory framework to foreign financial institutions. National security and due diligence regulatory frameworks in other countries could impede compliance by financial institutions.

This being said, in the interests of both transparency and effective compliance, we encourage FinCEN to state more clearly which metrics it will ultimately rely on when it comes to oversight, examination, and inspection under the final rule. Good instruction in this regard may help mitigate any potential de-risking that could accompany the imposition of program requirements, among other concerns, and we appreciate FinCEN's sensitivity to such issues, including the potential impact on communities made vulnerable by the effects of corruption, money laundering, and other crimes.

Cost/Benefit Analysis

We find FinCEN's accompanying costs and benefits analysis to be thorough, and its assumptions easy to follow. While we commend this overall approach, we nevertheless encourage FinCEN to include more-quantifiable benefits that will accrue from the costs: In particular, the final rule's analysis should make greater efforts to show clearly that initial and ongoing compliance costs will, at the least, have a lasting benefit for the durable resilience and health of the U.S. financial system. The absence of such a method for quantifying these benefits and others makes the cost/benefit balance appear more subjective than it need be. This element of subjectivity, unsurprisingly, exposes the Draft Rule to potential criticism.

To this end, we encourage FinCEN to develop a solid example of quantifiable benefits, and, if possible, to include a graph that visualizes breakeven analysis, framing this, perhaps, as follows:

We estimate that \$X is laundered through U.S. financial institutions every year. If, as we believe, this rule, as a result of the adoption of such AML/CFT program requirements, prevents even Y% of those funds from being laundered, this would result in a benefit of \$Z, which, when projected over the next 10 years, recoups the money invested by [year XXXX].

Such an analysis would help preempt and address criticisms regarding whether the AML/CFT program benefits realistically outweigh the costs. We encourage FinCEN to consider this and other kinds of analyses that bolster the long-term benefits arguments.

Conclusion

The Biden Administration has made clear that the fight against corruption allows the United States to secure a "critical advantage" for itself and other democracies. Through this Draft Rule,

FinCEN has taken a significant step toward realizing an AML/CFT framework that can meet the urgency and consequence of this assessment. This effort, especially if responsive to our above comments, will help fuel the United States's commitments to serving as a force for good in the global fight against corruption.

If you have any questions, or for additional information on TI US's work in this regard, please contact Scott Greytak, Director of Advocacy for TI US, at sgreytak@transparency.org.

Thank you for the opportunity to present these comments.

Respectfully submitted,

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