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November 16, 2020

Via Electronic Submission

Financial Crimes Enforcement Network
P.O. Box 39
Vienna, VA 22183
Attn: Director Kenneth A. Blanco

Re: Anti-Money Laundering Program Effectiveness
Regulatory Identification Number 1506-AB44
Docket Number FinCEN-2020-0011

Dear Director Blanco:

The Futures Industry Association ("FIA")[1] appreciates the opportunity to comment on the Advanced Notice of Proposed Rulemaking pertaining to Anti-Money Laundering ("AML") Program Effectiveness released by the Financial Crimes Enforcement Network ("FinCEN") on September 17, 2020 that is intended to modernize the AML regulatory regime for covered financial institutions (the "ANPRM" or the "Proposal").[2] We understand that the Proposal is intended to elicit input from the public concerning potential regulatory amendments to the existing AML program rule that would, most notably, require covered financial institutions to maintain an "effective and reasonably designed" AML program as informed by the institution's risk assessment and national AML priorities issued by FinCEN.

FIA strongly supports the efforts of FinCEN in working with financial institutions to implement robust, risk-based AML compliance programs. We are especially appreciative of FinCEN's outreach to the affected industries, and its willingness to engage in open and meaningful

[1] FIA is the leading global trade organization for the futures, options, and centrally cleared derivatives markets, with offices in London, Brussels, Singapore and Washington DC. FIA's mission is to support open, transparent and competitive markets; protect and enhance the integrity of the financial system; and promote high standards of professional conduct. FIA's membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from more than 48 countries, as well as technology vendors, lawyers and other professionals serving the futures industry. FIA's core constituency consists of firms that operate as clearing members in global derivatives markets, including firms registered with the Commodity Futures Trading Commission as futures commission merchants.

[2] ANPRM, Anti-Money Laundering Program Effectiveness, 85 Fed. Reg. 58023, 58025 (Sep. 17, 2012), *available at* https://www.govinfo.gov/content/pkg/FR-2020-09-17/pdf/2020-20527.pdf.

dialogue on this topic prior to issuing a proposed rule. FIA has historically worked with FinCEN on these AML issues, remains committed to continuing our dialogue with FinCEN and welcomes this opportunity to provide input.

Below we highlight for you our key comments with respect to the elements of the ANPRM insofar as they are of particular concern to the futures industry. We look forward to continued dialogue with FinCEN, our regulators, and other members of the financial services industry on this topic in the future.

We note that the Securities Industry and Financial Markets Association ("SIFMA") has also submitted a letter to FinCEN commenting on the ANPRM (the "SIFMA Letter"). We generally support the comments and recommendations in the SIFMA Letter. We also generally endorse the comment letter filed by the Bank Policy Institute.

I. Background

As FinCEN is aware, the futures industry is comprised of futures commission merchants ("FCMs"), introducing brokers in commodities, commodity trading advisers ("CTAs"), commodity pool operators ("CPO's) and floor brokers; involves many types of business models (*e.g.*, retail, institutional, clearing and execution); and offers various and numerous trading products (*e.g.*, futures, options, forex and other derivatives). The AML-related risks introduced by such products are substantially similar. As part of their business, FCMs frequently establish omnibus relationships/accounts with financial intermediaries both inside and outside the United States to engage in futures transactions. Moreover, give-up transactions, which are particularly significant to the futures industry, occur when executing brokers give up trades to a clearing firm. In the clearing context, AML responsibilities have historically been allocated between FCMs and introducing brokers in commodities pursuant to a written allocation agreement in a manner that is unique to the clearing firm regulatory context. The futures industry is a highly regulated industry, and includes among its regulators the Commodity Futures Trading Commission ("CFTC"), the Chicago Mercantile Exchange ("CME") and the National Futures Association ("NFA"). Our comments are focused on the application of the Proposal to the futures industry as a whole.

II. Description of the Proposal

In the ANPRM, FinCEN notes that over "the past several years, there have been significant innovations in the financial sector and the development of new business models, products and services, fuelled in part by rapid technological change." The goal of the ANPRM is, among other things, "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 Bank Secrecy Act's ("BSA's") stated purpose of providing information with a high degree of usefulness to government authorities."[3] FIA is fully supportive of these goals and is committed to working with FinCEN and its other regulators to achieve these goals. Our comments, as expressed below, are designed

[3] *ANPRM, 85 Fed. Reg.* at 58024.

to enable FinCEN to better meet these goals, and to provide FinCEN with the information it seeks in response to the questions it poses to the public. We hope that these goals can be achieved without creating an undue and unnecessary burden to the financial services industry that would divert compliance resources. Moreover, we believe that close coordination between FinCEN and the futures regulators would more effectively allow FinCEN to meet its goals.

III. Summary of Comments

FIA's principal comments with respect to the Proposal are summarized as follows:

FIA agrees with FinCEN that, to accomplish the goal of allocating resources more effectively, the "effective and reasonably designed" standard should be clearly defined for the financial industry generally, and clarified with respect to each industry it affects. FinCEN should also make clear that this new standard will not introduce material new compliance obligations, and that determinations of what constitutes an effective AML program will not be made through examination or enforcement without prior notice of specific identified parameters.

FIA also agrees that effective AML programs must be risk-based and recommends that, prior to proposing a requirement to have a written risk assessment for each financial institution, there be further analysis of whether such requirement is necessary in each industry, after consultation with both the industry and its relevant regulators. Preparation of a written risk assessment may divert time and attention from other important AML issues.

FIA welcomes FinCEN's efforts to focus AML priorities based on law enforcement's needs. FIA asks for clarification as to how institutions will be expected to incorporate the "national AML priorities" into their AML programs, as some AML Priorities may affect different financial institutions more than others, and in different ways. In addition, FIA requests that FinCEN address in a future proposed rulemaking the time period provided to financial institutions to implement revisions to their AML program once new AML Priorities are issued.

FIA also notes that incorporating AML Priorities into AML programs may not be the most efficient method to obtain and share information that has a "high-degree of usefulness to government authorities." FIA suggests alternative ways to address FinCEN's goals, such as modifying the SAR requirement, utilizing the Section 314(a) information sharing program, or utilizing other authorities like geographic targeting orders or Section 311 actions.

The requirement that an AML program "assure[] and monitor[] compliance" with BSA recordkeeping and reporting requirements might be interpreted to require that an "effective and reasonably designed" AML program constitutes a guarantee that the financial institution complies with all recordkeeping and reporting requirements. This would not be a practical outcome. The FIA welcomes more dialogue with FinCEN and futures industry regulators on this point.

Finally, the FIA is supportive of FinCEN addressing the BSAAG committee suggestions and would like to be part of any group formed to consider these suggestions and related issues to provide feedback to FinCEN.

IV. FIA's Key Substantive Points in Response to ANPRM

The following are our primary comments to the ANPRM. We address them in the order they are presented in the ANPRM.

A. Identifying and Assessing Risk

1. FinCEN's "Effective and Reasonably Designed" Standard Would Benefit from Additional Clarification.

FinCEN believes the "effective and reasonably designed" standard will enhance financial institutions' ability to allocate resources more efficiently and will impose minimal additional burdens on AML programs. FinCEN asks the public in Question 1 of the ANPRM whether the ANPRM makes clear the concept that FinCEN is considering an "effective and reasonably designed" AML program standard through regulatory amendments to the AML program rules, and if not clear, how the concept should be modified to provide greater clarity. We agree with FinCEN that, to accomplish its goal, the "effective and reasonably designed" standard should be clearly defined for the financial industry as a whole and clarified with respect to each specific industry it affects.

First, the standard should, in general, enable financial institutions to modify their AML programs to more efficiently use their resources in implementing their AML programs. To avoid simply increasing the burden to the futures industry and other financial institutions, FinCEN should make clear that the new standard is not introducing material new compliance obligations. Moreover, it should identify those AML procedures that are of less importance so that financial institutions can eliminate them under this new AML program regime.

Second, FinCEN should explain how the new standard deviates from the existing standard, and provide information regarding the ways in which it views the current AML program standard as not effective. FinCEN should make clear that determinations of what constitutes an effective AML program should not be made by regulators in hindsight through examination or enforcement, without prior notice of specific identified parameters; nor should it be based on the discovery of minor deficiencies that do not rise to a level of materiality. Finally, the effectiveness standard should allow for flexibility from industry to industry and from institution to institution, after input is received from all parties.

2. The Requirement of a Written Risk Assessment in an "Effective and Reasonably Designed" AML Program Requires Further Specification, as well as Differentiation Between Financial Institutions.

FinCEN proposes that the definition of the "effective and reasonably designed" standard will require the establishment of a risk assessment process in AML programs, as well as require risk assessments to consider FinCEN's Strategic AML Priorities, discussed below. Specifically, FinCEN said it is considering "whether its AML program regulations should be

amended to require the establishment of a risk-assessment process that includes the identification and analysis of money laundering, terrorist financing, and other illicit financial activity risks."

Essential to any AML Program should be the goal of identifying money laundering, terrorist financing, and other illicit financial activity, and protecting the financial institution from engaging in such activity either inadvertently, or through employee or customer malfeasance. To that end, FCMs and other financial institutions, either because of their own regulatory requirements or because of sound best practices, have built their AML programs based on their individual assessment of the AML risks presented in their business and industry, generally. FinCEN's proposal that there should be a written risk assessment for each financial institution should be based upon a further analysis of whether such a requirement is necessary in each industry, after consultation with both the industry and its relevant regulators.

As FinCEN appropriately notes in the ANPRM, not all financial institutions are currently subject to the requirement of a written risk assessment.[4] Specifically, FCMs and other members of the futures industry, like securities firms, are not required to produce a written risk assessment. We recognize and appreciate that an AML program should be risk-based, as they presently are, but we do not believe that a formal requirement to have a written risk assessment is a necessary component to a strong AML program. Before instituting such a requirement across all financial institution industries, FinCEN should first determine whether the absence of such written risk assessments has created any deficiencies in the AML programs in the futures industry and other industries, and whether such a requirement is necessary to a strong AML program, generally. If proposed, it will be a new requirement that will require additional resources.

Our concern is that the preparation of such a document may divert time and attention from other important AML issues. While we recognize that such a requirement exists in the banking industry, many banks, particularly large ones, have multiple types of businesses such as trade finance, dollar-clearing, and loan financing, which have different levels of risk that need to be taken into account as part of the banks' risk assessment and which argue in favor of a written risk assessment for the banking industry. However, FCM's do not generally involve different types of businesses and the AML-related risks inherent in the various trading products offered in the futures industry (*e.g.*, futures, options, forex and other derivatives) are substantially similar. Accordingly, a written risk assessment may not accomplish anything of value in the futures industry or lead to a stronger or improved AML program.

Should FinCEN determine that such a requirement is necessary, codification of a requirement to conduct an AML risk assessment should provide sufficient flexibility for institutions to tailor their processes to specific business activities. Given the breadth of financial institutions subject to the BSA's implementing regulations administered by FinCEN, a "one-size fits all" standard is not appropriate. Moreover, FinCEN should be clear as to the minimum standards that it expects for such risk assessment, and provide examples of such risk assessment to inform the process, so that financial institutions can better assess the regulatory burden involved

[4] ANPRM, 85 Fed. Reg. at 58026 ("Even though a financial institution's risk-assessment process is key to ensuring an effective AML program, it is not an explicit regulatory requirement for all types of institutions. Given the importance of the risk-assessment process to establishing an 'effective and reasonably designed' AML program, FinCEN believes that it warrants explicit incorporation.").

in meeting this requirement. Specifically, FinCEN should clarify whether it will mandate a certain process to be undertaken or whether it will impose standards that a financial institution should meet.

B. Considerations of the Strategic AML Priorities in the Risk Assessment Process

1. FinCEN's Incorporation of Strategic AML Priorities Into AML Programs Requires Clarification on Timing and Scope of Implementation.

FinCEN seeks comment on whether regulatory amendments should be made so that an effective and reasonably designed AML program would require financial institutions to consider and integrate into their risk-assessment process "national AML priorities" that are issued by FinCEN every two years, or more frequently, as appropriate. These national AML priorities would be issued by the Director of FinCEN and called "Strategic Anti-Money Laundering Priorities" (defined herein as "AML Priorities"). FinCEN also raises this issue in Question 6, noted below.

An explanation of AML Priorities is always welcome to enable financial institutions to assess whether there are gaps in their AML programs, and how they can work to assist law enforcement. However, whether there needs to be a specific requirement that these AML Priorities should be incorporated into the AML program requires further clarification and discussion so that incorporation of them into an AML program will sufficiently meet FinCEN's goals in a timely manner.

As an initial matter, FinCEN should explain how institutions will be required or expected to incorporate the AML Priorities into their risk assessments and their AML program based solely on changes to the AML Priorities. For example, does FinCEN expect the change in AML Priorities to require financial institutions to develop and implement new procedures or transaction monitoring alerts?

Second, the AML Priorities should be articulated with sufficient detail to allow financial institutions to understand their implications and adjust resources accordingly. Moreover, there may be various types of AML Priorities which span a broad range of criminal activities (*e.g.*, preventing cybercrime or human trafficking), some of which may be difficult to identify in certain types of financial transactions. For example, while cybercrime may affect all financial institutions to some degree, unusual activity related to human trafficking may be difficult to identify in the futures industry because the futures industry is not generally used to obfuscate this activity. Thus, whereas all AML-related priorities might be relevant to banks, some of them will not reasonably affect the futures industry. So, in issuing its AML Priorities, FinCEN needs to specify for which financial institutions the AML Priorities are relevant.

Third, FinCEN should explain how the AML Priorities relate to the numerous other FinCEN advisories that have been issued, as well as the guidance published by FinCEN, the Financial Action Task Force ("FATF") and other regulators. Many financial institutions presently review this guidance when it is issued and work to incorporate relevant information from the guidance into their AML program. FinCEN should clarify the differences between the AML

Priorities and this other guidance, and how financial institutions should distinguish between them and use them to enhance their policies and procedures, including their training and audit procedures. This explanation will enable financial institutions to best assist FinCEN and law enforcement in meeting their goals. Similarly, FinCEN should consider how and whether AML Priorities affect a financial institution's response to inquiries from law enforcement, including subpoenas and Section 314(a) requests. For example, how should a financial institution evaluate an account that is the subject of inquiries from law enforcement that relate to the AML Priorities?

Further, FinCEN should clarify its expectations for how these AML Priorities lead to revisions to a financial institution's AML program and the time period that financial institutions will have to implement revisions once the new AML Priorities are issued. These expectations should take into account the time period in which financial institutions usually set their budgets. For example, many financial institutions begin their budgeting analyses in the early fall of each year. Thereafter a long process entails in which different parts of the financial institution explain and justify their needs based on the financial institution's profitability. Those decisions require great care and time before budgetary commitments are made. To require that these AML Priorities be added to a financial institution's AML Program outside the time frame of the decision-making process relating to budgetary decisions will make it difficult to incorporate those AML Priorities in a timely manner. Thus, it is important for financial institutions to understand FinCEN's goals in issuing these AML Priorities and the expected timing for such implementation, so that each financial institution industry can meaningfully comment on the effect of the AML Priorities being issued every two years or at different intervals. Even more problematic is the idea that these AML Priorities could be issued more frequently than every two years in order to meet law enforcement's needs. For the reasons discussed, frequent release of AML Priorities at shorter intervals, which would necessitate revisions to AML programs, would be even more difficult from a business perspective.

2. FinCEN's Incorporation of AML Priorities Into AML Programs May Not Be the Most Efficient Method to Obtain Information Needed By Law Enforcement.

FinCEN's goal in focusing the AML program requirement to obtain information that has a "high-degree of usefulness to government authorities consistent with the financial institution's risk assessment and these AML Priorities, among other relevant information" may not be best achieved by requiring financial institutions to incorporate AML Priorities into their AML programs, as the time it would take for a financial institution to meaningfully do so may render stale any reporting that is made to law enforcement as a result. This same goal could be met with a more targeted approach. FIA suggests the following four alternatives. *First*, FinCEN could modify the SAR rule to include an additional prong requiring reporting on transactions conducted by, at, or through a financial institution involving matters identified on an AML Priorities release. This would be similar to the reporting that financial institutions do on cybercrime and cyber-related crime. *Second*, FinCEN could leverage the existing Section 314(a) information sharing program to require the reporting of information related to individuals/accounts identified on an AML Priorities release. *Third*, FinCEN could leverage the existing geographic targeting order authority to issue a targeting order requiring the reporting (for a discrete period of time) of certain transaction-types identified on the AML Priorities release. Similarly, FinCEN could work to

develop a targeting order, like the geographic targeting order, to require such reporting. *Fourth*, as an alternative, FinCEN could designate certain transaction types, much like it designates through Section 311 actions certain jurisdictions, financial institutions or international transactions as being of primary money laundering concern.

Each of these alternatives would function to provide highly useful information to law enforcement swiftly with the goal of eliminating the threat identified in the AML Priorities, based upon the identification by FinCEN and other federal supervisory agencies and law enforcement of these issues. These alternatives would achieve a tangible, concrete result in that financial institutions would report the information that law enforcement needs in a timely manner.

C. Risk Management and Mitigation Informed by Strategic AML Priorities

FinCEN understands that institutions may reallocate resources from other lower-priority risks or practices to manage and mitigate higher-priority risks, including any identified as AML Priorities. In addition, FinCEN recognizes that some financial institutions may determine that their business models and risk profiles reflect limited exposure to risks posed by the threats identified as AML Priorities, but may reflect greater exposure to significant and legitimate risks that may not be identified as AML Priorities.

We appreciate FinCEN's recognition that there are AML compliance requirements that are not as important as others that a financial institution has to undertake and that require significant compliance resources. There are a number of AML compliance requirements that over time have not proved to be sufficiently important for the amount of resources they demand or their role in mitigating money laundering and terrorist financing. These requirements could be scaled back or modified to free up additional resources and personnel. For example, the time devoted by personnel to onboarding and conducting periodic reviews of low-risk customers, or on clearing transaction-monitoring alerts, or documenting "no-SAR filing" decisions, could be better spent on conducting due diligence on high-risk customers or high-risk transactions. Likewise, the time spent determining whether a legal entity customer is a foreign financial institution established in a jurisdiction where its regulator maintains beneficial ownership information in order to determine whether the institution is exempt from the beneficial ownership requirements of the customer due diligence rule is disproportionate to the money laundering risk presented by these regulated foreign financial institutions. It would be more efficient if FinCEN or FATF, or another governing body, provided a list of such foreign regulators and the organizations within their regulatory purview, or a list of such exempt institutions. Further, obtaining and maintaining the Section 313(a)/319(b) certifications from foreign banks every three years are outdated requirements that do not meaningfully mitigate money laundering and terrorist financing risks presented by such institutions.

To the extent that FinCEN's proposal does not affirmatively eliminate or scale-back certain compliance obligations for the sake of adding new ones, and puts the burden on the financial institution to identify lower risk AML procedures, financial institutions will be leery of reprioritizing compliance measures without some assurance from FinCEN and other AML regulators that they will not be subject to enforcement actions for doing so. FinCEN should continue to work with the financial services industry to find ways to scale-back outdated or

disproportionately burdensome requirements to relieve the financial institution industry of adhering to requirements that do not meaningfully mitigate money laundering and terrorist financing risks.

D. Assuring and Monitoring Compliance with the Recordkeeping and Reporting Requirements of the BSA and Incorporation of BSA Recordkeeping Requirements into AML Program Requirements Potentially Creates a Higher Standard than is Presently in the BSA Requirements and Therefore May Increase the Burden on the Financial Industry.

FinCEN's proposal will require an AML program to "assure[] and monitor[] compliance" with BSA recordkeeping and reporting requirements, and solicits information from the financial industry on this aspect. FinCEN also raises this issue in Question 2, noted below.

FIA is concerned that this prong might be interpreted to require that an "effective and reasonably designed" AML program constitutes a guarantee that the financial institution complies with all recordkeeping and reporting requirements. Not only is such an interpretation impractical, but it may also be contradictory to FinCEN's suggestion that these recordkeeping and reporting requirements be based on a risk-based approach. Indeed, a risk-based approach implies some flexibility such that not all AML procedures receive the same attention, thereby making "assurance" of compliance with recordkeeping less likely. Further, FIA is concerned that any requirement under this prong to "assure" compliance would be applied in hindsight during examination and enforcement investigations.

Moreover, the application of a risk-based approach to recordkeeping and reporting, creates confusion, particularly as it relates to the suspicious activity reporting requirement. We suggest that this provision requires more analysis to determine how it be interpreted and applied, especially within the "assure" compliance framework. We would welcome more dialogue with FinCEN and our regulators on this point.

Additionally, FIA is concerned that incorporating compliance with the recordkeeping and reporting requirements of the BSA into the AML program standard would create an additional burden on a futures firm and possibly increase the potential penalty amounts for recordkeeping and reporting violations to the higher AML program failure standard.[5]

E. The Concept of Providing Information With a High Degree of Usefulness to Law Enforcement is Already Embedded in the SAR Rule; Therefore, This Proposal Needs to be Reconciled with the SAR Rule.

FinCEN's proposal will explicitly define the goal of an AML program to provide information with a "high degree of usefulness to government authorities consistent with the financial institution's risk assessment and Strategic AML Priorities, among other relevant information." FinCEN's authority is grounded in the BSA, the purpose of which is "to require

[5] 31 U.S.C. § 5321(a)(1)("For a violation of section 5318(a)(2) of this title or a regulation prescribed under section 5318(a)(2), a separate violation occurs for each day the violation continues and at each office, branch, or place of business at which a violation occurs or continues.").

certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism."[6] Indeed, as FinCEN itself has noted, "the BSA authorizes the Secretary of the Treasury to issue regulations requiring banks and other financial institutions to take a number of precautions against financial crime, including the establishment of AML programs and the filing of reports that have been determined to have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings, and certain intelligence and counter-terrorism matters."[7] That said, there is already an existing mechanism– the SAR filing requirement—to provide such reports. FinCEN's proposal appears to integrate the SAR rule into the AML program rule, and it is not clear why this needs to be done and what deficiency this would be correcting.

To the extent the proposal would require financial institutions to provide 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 AML Priorities, this should be spelled out in the SAR rule or as a new reporting requirement or information-sharing requirement, and should not be folded into the AML program. Indeed, it is not clear how information would be provided to FinCEN under this proposal. FinCEN should evaluate existing reporting and information sharing authorities to determine whether they should be modified to further address the standard of a "high degree of usefulness to government authorities" and to incorporate the AML Priorities.

F. Suggestions by Bank Secrecy Act Advisory Group ("BSAAG") Committee Are Generally Endorsed by the FIA, Which Would Like to be Part of the Discussion.

FinCEN also addresses a number of suggestions raised by a working group composed of BSAAG committee members, including representatives from financial institutions, during discussions leading to the release of the ANPRM. FIA is supportive of FinCEN's addressing these issues in order to properly utilize compliance resources. We note that in the past year FinCEN itself has issued a number of alerts which address some of these topics.[8] Many of these are of importance to the FIA members. Because of its own unique perspectives on these issues, the FIA would like to be part of any group formed to consider these issues and provide feedback to FinCEN. The suggestions made by the BSAAG working group are as follows:

i. Clarifying current requirements and supervisory expectations with respect to risk assessments, negative media searches, customer risk categories and

[6] 31 U.S.C. § 5311.

[7] *See* https://www.fincen.gov/what-we-do.

[8] *See, e.g.,* FinCEN Advisory on Cybercrime and Cyber-Enabled Crimes Exploiting the Covid-19 Pandemic (July 30 2020); FinCEN Issues Guidance Regarding Due Diligence Requirements under the Bank Secrecy Act for Hemp-Related Business Customers (June 29 2020); FinCEN Issues Advisory on Medical Scams Related to Covid-19 and Companion Notice Providing Filing Instructions for Financial Institutions (May 18, 2020); FinCEN Encourages Financial Institutions to Communicate Concerns Related to Coronavirus Disease 2019 (COVID-19) and to Remain Alert to Related Illicit Financial Activity (March 16, 2020).

initial and ongoing customer due diligence. *FIA would like to be part of this discussion.*

ii. Revising existing model risk management guidance to AML systems. *FIA notes that these are not generally applicable in the futures industry*.

iii. Clarifying expectations and updating practices for "keep-open" letters and SAR monitoring and investigation and reporting, including SARs based on grand jury subpoenas or negative media. *Some of these issues are relevant to the FIA.*

iv. Supporting potential automation opportunities for high-frequency/low complexity SARs and CTRs, and exploring the possibility of streamlined SARs on continuing activity. *While this would be less valuable in the futures industry, it could certainly assist other financial institutions*.

v. Forming a BSAAG established working group to recommend national AML priorities and advise on opportunities to communicate typologies, red flags and other information related to national AML priorities. *The FIA would like to be part of such working group.*

vi. Leveraging existing information-sharing initiatives between the public and private sectors, including enhanced use of the BSA's information sharing provisions, sections 314(a) and (b) of the USA PATRIOT Act, and sharing with foreign affiliates and global institutions, as appropriate. *Information sharing issues, and particularly sharing information with affiliated global financial institutions, are important to the FIA and it would like to share its perspective on these issues with FinCEN.*

vii. Assessing options for FinCEN and law enforcement to provide more feedback to financial institutions related to the use and utility of BSA reports. *Such feedback would be very helpful in achieving our joint goals*.

V. FIA's Responses to ANPRM Specific Questions

FinCEN's ANPRM poses a number of specific questions to the financial industry for comment and consideration. As noted below, our discussion above already addresses some of these. To the extent the responses to these questions have been addressed in the discussion above, we so note, and to the extent the questions raise new issues, we have addressed them here.

- **Question 1: 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?**

Response. The concept for an "effective and reasonably designed" AML program is not clear. As discussed above, additional clarification is necessary. Please see comments and discussion in Section IV.A.1. above.

- **Question 2: Are the 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?**

  Response. We understand this question to be whether the three "core elements" identified by FinCEN (to (1) identify, assess and reasonably mitigate risks resulting from illicit financial activity, (2) assure and monitor compliance with the recordkeeping and reporting requirements of the BSA, and (3) provide 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) should be the standard by which FinCEN measures an AML program's effectiveness.

  It is not clear how the effectiveness of an AML program will be judged under this three-pronged standard. For example, if a financial institution routinely files high-quality, relevant, and useful SARs, but does not detect a discrete scenario involving unusual activity, will this AML program be deemed ineffective, and, as a result, lead to a potential enforcement action for a willful failure to have an effective AML program? Likewise, if a financial institution has an independent audit certifying that the AML program is indeed "effective and reasonably designed," and a later deficiency is identified in the AML program, would that constitute a violation of the three-pronged standard?

- **Question 3: Are the changes to the AML regulations under consideration in this ANPRM an appropriate mechanism to achieve the objective of increasing the effectiveness of AML programs? If not, what different or additional mechanisms should FinCEN consider?**

  Response. Please see comments and discussion in Section IV.B.2. above.

- **Question 4: 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?**

  Response. As noted above, the industries regulated by FinCEN are varied, and while they each have the ability to adopt AML programs, and do so, the Proposal could have very different effects on each of them.

- **Question 5: Would it be appropriate to impose an explicit requirement for a risk-assessment process that identifies, assesses, and reasonably mitigates risks in order to achieve an "effective and reasonably designed" AML program? If not, why? Are there other alternatives that FinCEN should consider? Are there factors unique to how certain institutions or industries develop and apply a risk assessment that FinCEN should consider? Should there be carve-outs or waivers to this requirement, and if so, what factors should FinCEN evaluate to determine the application thereof?**

  Response. Please see comments and discussion in Section IV.A.2. above.

- **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?**

  Response. Please see comments and discussion in Section IV.B.1. above.

- **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?**

  Response. Please see comments and discussion in Section IV.B.1. and Section IV.C. above. The futures industry requires, at a minimum, a two year framework in which to implement such changes to their AML programs.

- **Question 8: 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?**

  Response. We appreciate FinCEN's recognition that financial institutions vary considerably in size and complexity, and that FinCEN's actions, which are well intentioned, could impact such a diverse collection of financial institutions with unintended consequences. FinCEN specifically requests input on whether opt-in

decisions make sense and asks whether greater flexibility might present financial crime vulnerabilities and asks how these might be mitigated. The FIA agrees with FinCEN that different thresholds and parameters might be appropriate, and recommends that such opt-in or opt-out measures be the subject of further discussion among FinCEN, the regulators and the financial services industry.

- **Question 9. Are there ways to articulate objective criteria and/or a rubric for <u>examination</u> of how financial institutions would conduct their risk-assessment processes and report in accordance with those assessments, based on the regulatory proposals under consideration in this ANPRM?**

  Response. Examples of risk-assessment matrices and reports, with scoring criteria for risks and mitigants, are needed to inform the financial industry on how examiners will evaluate the risk assessment. We encourage FinCEN to include input from the futures industry regulators on this issue.

- **Question 10. Are there ways to articulate objective criteria and/or a rubric for <u>independent testing</u> of how financial institutions would conduct their risk-assessment processes and report in accordance with those assessments, based on the regulatory proposals under consideration in this ANPRM?**

  Response. These should be communicated during the rulemaking process so that they can be appropriately considered in any regulatory burden analysis and the financial industry has the ability to meaningfully comment on the requirements related to the risk assessment. This proposal should address the following questions:

  - Whether testing of the risk assessment and effectiveness of the AML program is required to be done independently (and separately) from the independent testing of the AML program generally?

  - How frequently should risk-assessments be updated? Annually, biennially, at the introduction of new products/services, material changes to existing products/services (*i.e.*, new transaction limits), new geographies, new customer bases? Is this decision left up to each financial institution as part of its risk assessment?

- **Question 11. 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 be reallocated to higher priority area?**

Response. We are very concerned that the implementation of this Proposal would simply increase the regulatory burden on the financial industry, without really enabling it to reallocate resources. Therefore, we believe it is extremely important for there to be more dialogue between FinCEN, the regulators, and the various financial institution industries on these issues before a proposed rule is issued.

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We again express our appreciation that FinCEN has provided the financial services industry with an opportunity to address FinCEN's concerns in advance of the issuance of a proposed rule. For the reasons set forth above, FIA believes that the Proposal requires further refinement, specificity and modification before a notice of proposed rulemaking is even issued. To that end, we are available to meet with FinCEN staff to discuss these complicated issues, as well as other ways to improve AML compliance.

Thank you for giving FIA the opportunity to comment on the Proposal. We look forward to being part of the continued dialogue between the government and the financial institution industry to strengthen the regulatory structure surrounding futures firms and other U.S. financial institutions. If you have any questions regarding this comment letter or any related issues, please contact Allison Lurton, FIA's General Counsel at (202)772-3057 or at alurton@futuresindustry.org.

Respectfully yours,

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