November 16, 2020

VIA ELECTRONIC SUBMISSION

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

Re: Anti-Money Laundering Program Effectiveness (Docket Number FINCEN–2020–0011, RIN 1506–AB44)

Ladies and Gentlemen:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to submit this letter to the Financial Crimes Enforcement Network ("FinCEN") on the advance notice of proposed rulemaking (the "ANPRM") and request for comment on potential regulatory amendments to establish that all covered financial institutions subject to an anti-money laundering ("AML") program requirement must maintain an "effective and reasonably designed" AML program.[2]

SIFMA appreciates FinCEN's efforts to revisit and modernize existing AML regulations and applauds the agency for engaging with the financial services industry—through consultation with the Bank Secrecy Act Advisory Group and via this ANPRM process—in advance of publishing a proposed rule. We also recognize and support FinCEN's previous interactions with industry in this space, including through the BSA Value Project. SIFMA strongly supports FinCEN's efforts to provide financial institutions with greater flexibility in how they allocate resources to support their AML programs more effectively and efficiently.

SIFMA further appreciates FinCEN's recognition of the need to account for industry-specific considerations in developing the regulatory framework for AML programs. The securities industry

[1] SIFMA is the leading trade association for broker-dealers, investment banks, and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly one million employees, we advocate for legislation, regulation, and business policy affecting retail and institutional investors, equity and fixed income markets, and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. With offices in New York and Washington, D.C., SIFMA is the U.S. regional member of the Global Financial Markets Association (GFMA).

[2] 85 Fed. Reg. 58023 (Sept. 17, 2020), https://www.govinfo.gov/content/pkg/FR-2020-09-17/pdf/2020-20527.pdf.

is unique in a number of important ways, including the nature and types of AML risks faced, the customer base, the types of products the industry offers, the varying size of securities firms and the way that firms approach existing AML requirements. We believe that these differences need to be considered in determining AML program requirements.

SIFMA also believes that it is important for the new "effective and reasonably designed" standard for AML programs to be defined with sufficient clarity to avoid creating regulatory ambiguity and unintended burdens on financial institutions. Below, we highlight several critical areas under each prong of the proposed regulatory definition of the standard that we believe require further clarification. With respect to the proposed key elements of an "effective and reasonably designed" AML program, SIFMA supports FinCEN's proposals to establish a risk assessment process and issue a list every two years of national AML priorities (the "Strategic AML Priorities"). FinCEN should similarly further clarify these regulatory proposals to ensure the agency's intended goal of providing greater flexibility to firms is achieved.

Finally, SIFMA applauds FinCEN's recognition of the need for coordination with supervisory agencies. We emphasize that, to be effective, any regulatory amendments adopted by FinCEN must ultimately be reflected in changes to supervisory expectations. Without this additional step, FinCEN's amendments risk failing to achieve the objectives that FinCEN has set forth.

SIFMA has provided its main comments in Sections I through V below on the implementation of the "effective and reasonably designed" standard as a general matter and with respect to each prong of the proposed definition. In Section VI, we provide additional detailed comments on the enumerated questions posed in the ANPRM.

I. General Comments on "Effective and Reasonably Designed" Standard.

The ANPRM makes clear that the "effective and reasonably designed" standard is intended to enhance financial institutions' ability to allocate resources more efficiently and would impose minimal additional burden on AML programs.

SIFMA supports fully this objective. SIFMA believes that, to achieve this objective, the "effective and reasonably designed" standard would benefit from being clearly defined and appropriately tailored. The definitions of these terms are not self-evident and are defined inconsistently or not at all under existing AML regulations, as noted in the ANPRM. SIFMA believes that the standard should, in general, allow financial institutions to efficiently deploy resources and enhance existing programs; it should not introduce material new compliance obligations. Accordingly, FinCEN should clearly articulate that the standard should be read in line with the stated purpose of creating more flexibility for financial institutions, in order to avoid the standard being used over time as a basis for imposing more burdensome regulatory or supervisory expectations on financial institutions.

Additionally, FinCEN should make clear that determinations of effectiveness or reasonableness should not be made in hindsight. That is, the occurrence of a single incident or limited set of

breaches, deficiencies or issues should not, without more, support a finding that an AML program as a whole was not "effective" or "reasonably designed."

II. Identifying and Assessing Risks.

A. Risk Assessment Process Requirement.

FinCEN's proposed definition of the "effective and reasonably designed" standard would require the establishment of a risk assessment process in AML programs, as well as require risk assessments to consider FinCEN's Strategic AML Priorities and "money laundering, terrorist financing, and other illicit financial activity risks."

SIFMA agrees that effective AML programs must be risk-based and must encompass a risk assessment. Securities firms generally conduct some form of risk assessment to analyze relevant money laundering and terrorist financing risks related to their activities and the products and services offered to customers, even though they are not currently subject to a requirement to produce a written risk assessment and many firms are able to successfully demonstrate the risk-based nature of their AML programs without a written risk assessment. In practice, different securities firms adopt varying approaches to risk assessments. For example, some firms, instead of employing periodic risk assessments at set intervals, employ more dynamic risk assessment processes that reflect the actual conduct of business activities and relevant changes to such activities.

Although we support the notion that AML programs should be risk-based, we strongly believe that, to be effective, FinCEN's codification of a risk assessment requirement should preserve firms' flexibility to determine the best way to assess and document relevant risks. We urge FinCEN to avoid prescribing a "one-size-fits-all" standard for the risk assessment requirement, including refraining from establishing rigid requirements for the form of a risk assessment or dictating how a firm must evaluate or weigh certain risk factors in a risk assessment. We encourage FinCEN to take a flexible approach to codifying a risk assessment standard that encompasses and allows the various practices by firms already in place and that may develop over time.

Several detrimental consequences would result from imposing an inflexible risk assessment requirement:

- Certain risk assessment factors that may work well in one setting, for example for banks, may be less useful in the securities industry context and, thus, merely create unnecessary regulatory burdens for securities firms.

- Smaller securities firms may have fewer resources available to carry out risk assessments as compared to larger institutions. An inflexible requirement regarding risk assessment methodologies and documentation may impose unfairly heavy burdens on smaller firms, without any particular need or clear benefit.

- Many securities firms determine risk assessment processes based on the specific types of risks faced in their particular business context. For example, a limited purpose broker-dealer would typically have as its customer a distributor of securities, typically another broker-dealer or other financial institution, which would be the entity engaging in transactions with investors. The risk for the limited purpose broker-dealer, which does not process any transactions itself, let alone any transactions raising money laundering or terrorist financing concerns, is very different and much more limited than the risk faced by the actual distributor of the securities. Other firms also face lower money laundering and terrorist financing risks as a result of engaging in only limited institutional business, having only domestic customers in limited locations or providing limited product offerings. Firms should be able to maintain flexibility to determine how most effectively and efficiently to assess money laundering and terrorist financing risks based on their particular activities.

- A broad risk assessment requirement that mandates consideration of all illicit financial activity, rather than allowing a firm to focus on the financial crime risks that are most salient to its activities, would significantly increase burdens on firms and would be neither efficient nor effective.

- More generally, an inflexible risk assessment requirement may become an onerous and self-defeating "check-the-box" exercise that fails to reflect the reality of a firm's risk while occupying important resources that could otherwise by devoted to other AML program activities.

Finally, FinCEN should make clear that the risk assessment process should not generally lead to a determination that an AML program is ineffective solely on the basis that the risk assessment has identified new areas that call for increased focus or allocation of AML program resources. A firm should be permitted, and encouraged, to make adjustments and develop a reasonably designed AML program in light of new learnings or insights gained from a risk assessment. To that end, firms may require time and careful consideration to develop and implement appropriate controls or other measures to address newly identified risks as a result of a risk assessment process. FinCEN should make clear that firms are permitted a reasonable amount of time to design and adopt appropriate controls to address newly identified risks.

B. Strategic AML Priorities.

SIFMA commends FinCEN for its efforts to enhance the information sharing between law enforcement, regulators and industry members by developing a limited number of focused priorities based on law enforcement's true needs. Clear indications of law enforcement priorities empower financial institutions to partner efficiently and effectively with law enforcement in providing useful information.

We suggest that FinCEN make clear that as law enforcement articulates refreshed Strategic AML Priorities, firms have the flexibility to retire former AML priorities and refocus AML program resources away from old priorities. Failing this clarity, priorities may be stacked on each other, creating redundancies and distractions and diverting focus from where it is needed.

We further recommend that FinCEN provide for flexibility with respect to firms' incorporation of the Strategic AML Priorities into AML programs. In particular, FinCEN should confirm that institutions will not be required or expected to fundamentally revise their AML programs based solely on changes to the Strategic AML Priorities as announced every two years. FinCEN should also clarify that regulatory and supervisory expectations recognize and accommodate the practical reality that implementing changes to monitoring systems or risk assessments requires significant expenditures of money and other resources and, perhaps most importantly, requires time.

Additionally, FinCEN should provide express acknowledgement that certain Strategic AML Priorities may be less applicable, or totally unrelated, to a firm's business model, products, services or overall risk profile, and that, in this case, the firm would not be expected to incorporate such Strategic AML Priorities into its AML program. There also may be instances in which Strategic AML Priorities address a particular industry at a general level, but are inapplicable to firms that occupy only a subset of such industry or a particular business line due to the limited set of activities in which these firms engage. FinCEN should similarly provide express acknowledgement that where the Strategic AML Priorities are unrelated to a firm's activities, even if the firm may be in an industry generally addressed by the Strategic AML Priorities, the firm nonetheless would retain flexibility in incorporating the Strategic AML Priorities into its risk framework and AML program and would only be expected to adopt the priorities that the firm believes are relevant to its business.

Finally, as the considerations above make evident, the Strategic AML Priorities should be articulated with sufficient detail and precision to allow financial institutions to understand their implications and adjust program resources as may be appropriate. To facilitate this process, SIFMA urges FinCEN to provide opportunities or channels for financial institutions to submit comments or views on the Strategic AML Priorities before the priorities are finalized.

III. Assuring and Monitoring Compliance with the Recordkeeping and Reporting Requirements of the BSA.

FinCEN's proposal would require an AML program to "assure[] and monitor[] compliance" with BSA recordkeeping and reporting requirements.

Although SIFMA is supportive of FinCEN's efforts to emphasize the risk-based nature of certain AML program requirements, SIFMA would ask FinCEN to use a word other than "assure" for this prong of the proposed AML program standard. As FinCEN well knows, AML programs are designed with the objective of complying with BSA recordkeeping and reporting requirements, but it is impossible for even well-functioning programs to "assure" such compliance in all circumstances. FinCEN should clarify that this prong should not be interpreted to require that an "effective and reasonably designed" AML program *guarantees* a firm's compliance with all recordkeeping and reporting requirements. That standard of perfection is too high a bar.

Also, FinCEN should again make clear that any requirement under this prong regarding compliance with BSA recordkeeping and reporting requirements is not applied in hindsight, and

that later-identified recordkeeping or reporting deficiencies do not automatically result in a determination that an AML program was ineffective or unreasonably designed. That is, even effective and reasonably designed programs may be delayed or otherwise hampered in meeting reporting requirements for a variety of reasons (such as, today, the COVID 19 crisis), which fact FinCEN should recognize and call out.

IV. Providing Information with a High Degree of Usefulness.

FinCEN's proposal would require an AML program to provide "information with a high degree of usefulness to government authorities" consistent with an institution's risk assessment and the Strategic AML Priorities. SIFMA strongly believes the definition of "usefulness" and the measure of an AML program's compliance with this prong requires further explication. FinCEN should clarify this requirement to ensure that regulatory requirements and expectations are practicable and do not create more ambiguity for financial institutions.

For example, the definition of "usefulness" has been the subject of many interactions between industry and regulators in the context of appropriately tailoring suspicious activity report ("SAR") filing requirements for financial institutions, and arriving at a clear and settled understanding by all parties is a continually developing process. Additionally, the method of providing information to government authorities varies from institution to institution. Larger retail or clearing institutions interact regularly with law enforcement by virtue of their business activities, whereas smaller institutions may have less frequent touchpoints. Yet, both types of firms may have effective and reasonably designed AML programs. The expectation that a firm provides useful information to government authorities should be flexible enough to encompass both scenarios.

SIFMA believes that key indicia of whether a firm provides information that is useful to government authorities should, at a minimum, account for the following considerations:

- As mentioned above, the extent of information sharing with government authorities, including law enforcement, varies from firm to firm. Some firms may have a great deal of engagement with law enforcement; other firms may not. In light of the proposed issuance of the Strategic AML Priorities, some firms may have activities that are more directly implicated by Strategic AML Priorities, while others may not. The definition of "usefulness" under this prong should not prejudice firms that do not have robust information sharing touchpoints with government, or whose activities are not implicated by the Strategic AML Priorities or other areas of government focus.

- FinCEN should acknowledge that the concept of "usefulness" extends beyond information that is useful to law enforcement and should encompass information that is generally useful to other government authorities. In particular, firms' provision of information that informs broad trend or risk analyses by regulators, or information that assists in the development of policies by regulators, should also be considered "useful."

- In this vein, it is important for regulators, like FinCEN, as well as law enforcement to provide feedback to institutions as to the information most "useful" to them. Institutions of all sizes,

complexities, and business models share the need for more robust feedback from regulatory authorities and law enforcement as to whether information being submitted is considered valuable for law enforcement or other purposes. For example, at present, firms may file voluntary SARs in a variety of different scenarios, in an attempt to provide "useful" information. We believe FinCEN should indicate which types of voluntary SARs are useful and which SARs a firm may stop filing, in order for firms to provide information with a high degree of usefulness. FinCEN should provide that firms' submission of such information, in the absence of clear guidance and feedback from regulators and law enforcement, should be considered "useful."

- More broadly, we refer again to the ongoing issues that have been raised previously by industry members as to the need for reconsideration of the SAR filing requirements, including the applicable thresholds and standards for filing, to develop a more tailored process for providing information that is truly "useful."[3]

Finally, FinCEN should clarify the different regulatory requirements that would be separately imposed under the second and third prongs of the "effective and reasonably designed" standard. For example, FinCEN should clarify whether, and in what circumstances, a firm that satisfies the second prong regarding compliance with BSA reporting requirements could be in non-compliance with the third prong's requirement to provide information with a high degree of usefulness to government authorities.

V. Coordination with Supervisory Agencies.

FinCEN indicates that an "effective and reasonably designed" AML program requirement would seek to implement a common understanding between supervisory agencies and supervised institutions on the required elements of AML programs.

SIFMA strongly encourages FinCEN to clarify its approach for coordination with the securities regulators to ensure consistent AML program expectations. SIFMA believes it will be essential to ensure supervisory agencies understand and adopt fully the proposed changes. The federal banking regulators have been more proactive in relation to providing guidance on AML requirements, including issuing the recent interagency statement on the evaluation of enforcement actions related to BSA/AML obligations. Guidance from securities regulators, and indications of their understanding and alignment with the proposed regulatory changes, is essential to effecting the aims of FinCEN's proposed amendments.

As FinCEN is well aware, a lack of coordination with supervisory expectations creates significant compliance challenges for financial institutions. In particular, where firms are subject to supervision by multiple regulatory authorities, the need for consistency and cooperation among the different parties is imperative throughout all stages of the supervision process, from

[3] *See*, *e.g.*, SIFMA, Comment Letter on Review of Regulations (July 31, 2017), https://www.regulations.gov/contentStreamer?documentId=TREAS-DO-2017-0012-0069&attachmentNumber=1&contentType=pdf (discussing recommendations for reconsideration of SAR filing thresholds and SAR filing expectations).

examinations to potential enforcement actions. Unless close coordination is achieved, we fear that the impact of the proposed changes will be badly muted.

VI. Responses to FinCEN's Requests for Comment.

In addition to SIFMA's above general comments on FinCEN's proposed regulatory amendments, SIFMA also has considered and provided responses to FinCEN's specific requests for public comment in the ANPRM. Below, for ease of reference, we have reproduced FinCEN's eleven specific issues for comment in ***bold italics***, after which we provide SIFMA's responsive comments.

- ***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?***

  Please see our comments above. SIFMA re-iterates that the concept of an "effective and reasonably designed" AML program should be further clarified to avoid ambiguity or imposition of greater burdens on financial institutions.

- ***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?***

  Please see our comments above.

- ***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?***

  As noted, SIFMA applauds FinCEN's approach. SIFMA also believes that FinCEN should additionally consider addressing revisions to the manner of the conduct of examinations. The proposed regulatory changes reflect a different approach in how firms will design their AML programs going forward, including taking a more risk-based approach reflecting the firm's particular characteristics and risk profile. Accordingly, examinations should similarly be modified to take into consideration the greater flexibility afforded to firms under the proposed changes and should not employ a check-the-box approach that is inconsistent with how AML programs will be designed.

  As discussed above, FinCEN should also consider increasing its role in providing feedback to firms, so that firms may more clearly understand how to provide information with a high degree of usefulness. For example, this may include enhancing FinCEN's provision to industry members of either trend analyses about SARs filed with FinCEN or FinCEN's views on the usefulness of particular types of SARs.

SIFMA also directs FinCEN's attention to SIFMA's 2017 comment letter responding to the Department of the Treasury's request for information in connection with the implementation of Executive Order 13771, *Reducing Regulation and Controlling Regulatory Costs*.[4] Therein, SIFMA provided a number of recommendations for reforming specific aspects of the AML regulatory framework (*e.g.*, risk-based approaches to implementing the Customer Due Diligence ("CDD") Rule, expanding information sharing, expanding SAR sharing and reconsidering SAR filing standards, and improving feedback from regulatory authorities) to enable financial institutions to focus resources most efficiently and effectively.

- ***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?***

  FinCEN should consider the following securities industry-specific issues in determining whether a securities firm's AML program is "effective and reasonably designed":

  - Securities firms do not face the same money laundering and terrorist-financing risks as banks and other financial institutions subject to AML program requirements. In particular, cash is typically not involved in securities transactions; thus, the CTR and structuring issues faced by securities firms normally occur in the context of wire transfers and ACH payments.

  - SIFMA believes it would be very beneficial to the securities industry if FinCEN clarifies that firms may take a risk-based approach to requirements under the Customer Identification Program ("CIP") and CDD Rules. In practice, securities firms often generally apply CIP/CDD regulations without regard to the actual money laundering or terrorist-financing risk exposure, even in cases where there is de minimis risk exposure (*e.g.,* advisory engagements that may involve transactions in securities). This clarification would significantly reduce the administrative burden on securities firms and would be consistent with FinCEN's goal of enabling firms to more efficiently allocate resources.

  - Automated transaction monitoring systems or tools are generally designed and oriented toward banks and typical banking activities. Accordingly, new requirements or expectations for "effective and reasonably designed" AML programs to implement specific types of monitoring or other systems may impose heavier burdens on securities firms and may be inappropriately tailored to money laundering or terrorist financing risks in the securities context.

- ***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***

[4] *Id.*

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?

Please see our comments above. SIFMA strongly believes that any risk assessment requirement must preserve the flexibility of firms to demonstrate the risk-based nature of their AML programs in consideration of the particular risks they face. In particular, expectations for risk assessments for firms such as limited purpose broker-dealers—which, although subject to AML program requirements, have no transactions conducted by, at or through them—or similar entities engaged in only very low-risk types of transactions (*e.g.*, dealings involving solely municipal securities) should take into account the low money laundering or terrorist financing risk faced by these firms in the ordinary course of business.

Additionally, FinCEN should clarify whether the risk assessment requirement will be a procedural requirement, a substantive requirement or both. That is, FinCEN should clarify whether the requirement will only mandate that a firm have in place processes to demonstrate the risk-based nature of its program or whether the requirement will also impose standards for how a financial institution is to evaluate the risk of certain factors. For the reasons discussed above, SIFMA believes that the latter approach would be unworkable and urges FinCEN to preserve firms' flexibility in assessing relevant risks in light of their particular circumstances.

Furthermore, with regard to how securities firms apply risk assessments, firms often use contemporaneous data in risk assessments, which reflects a snapshot of a firm's risk at a single point in time. As mentioned above, FinCEN should provide that isolated deficiencies in a firm's risk assessment that may arise as a result of this process would not result in a determination that the firm's risk assessment process was inadequate as a whole.

- ***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?***

  Please see our comments above. With respect to the interval of the issuance of the Strategic AML Priorities, SIFMA believes that FinCEN should refrain from issuing Strategic AML Priorities more frequently than every two years. Financial institutions need time to incorporate Strategic AML Priorities into their compliance efforts, and more frequent changes may not give firms time to address changed Strategic AML Priorities in a comprehensive and thoughtful manner.

  FinCEN should further clarify its expectations for a reasonable transition period as financial institutions adjust to the issuance of new Strategic AML Priorities, including expectations for conducting new risk assessments and developing new procedures or training resources.

FinCEN also should clarify the difference between the Strategic AML Priorities and other FinCEN advisories or guidance published in the interim between the issuance of the Strategic AML Priorities. FinCEN should set forth regulatory expectations for firms' incorporation of these various forms of guidance in risk assessments or AML programs generally.

Additionally, SIFMA notes that there will be intervening events between the issuance of Strategic AML Priorities. Accordingly, FinCEN should provide flexibility in expectations for firms to allocate resources in light of the Strategic AML Priorities to accommodate for further adjustments for intervening events, new guidance, law enforcement activity, new areas of enforcement emphasis or other issues that may call for increased focus, which may occur between the issuances of the Strategic AML Priorities.

Similarly, and as discussed above, FinCEN should provide flexibility for firms to allocate resources in light of the particular risks faced by a firm. For example, if a firm identifies an internal risk that requires a significant allocation of resources, the firm should retain the flexibility to prioritize its resources based on its determination of its risk profile, and should not be constrained by inflexible requirements pertaining to the Strategic AML Priorities (particularly to the extent that the priorities do not impact the firm's business activities, products or customer base).

- ***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?***

  Please see our comments above.

- ***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?***

  SIFMA believes it is crucial for industry-specific considerations to be taken into account in developing the proposed AML program standard. As discussed in our comments above, compared to other financial institutions, different securities firms engage in different activities and types of transactions, many of which generally pose lower money laundering and terrorist

financing risks. For example, limited purpose broker-dealers or other firms may engage only in transactions posing very low money laundering and terrorist financing risks.

Beyond differences in firms' activities, smaller securities firms vary from larger, more complex securities firms in several significant ways, as also discussed above. Smaller firms may have fewer resources available to carry out risk assessments or implement Strategic AML Priorities as compared to larger institutions, and may face an unduly heavy burden if obligated to comply with inflexible AML program requirements. Additionally, the risk exposure of smaller firms may be very different both in kind and in degree from larger firms, as smaller firms' activities, customer bases, geographic distribution and other circumstances are typically more limited. Similarly, smaller firms may have fewer touchpoints with government authorities or issues of concern to government authorities. SIFMA believes that the proposed AML program requirements should take both the size and particular activities of firms into account.

SIFMA also would not generally consider an "opt-in" choice for smaller institutions to be an effective way to avoid over-burdening these institutions. The process of designing an AML program in light of relevant risks is fluid by nature, which would not be reflected well by a categorical "opt-in" approach. Such a choice may also put firms at undue risk in future supervisory examinations if examiners fail to appreciate the intent of the proposed regulatory amendments or recognize the historical state of a firm's AML program. Instead, SIFMA believes that FinCEN should make clear that firms retain flexibility to carry out their risk assessments and design their AML programs in light of the particular risks faced.

- ***Question 9: Are there ways to articulate objective criteria and/or a rubric for examination 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?***

  Please see our comments above.

- ***Question 10: Are there ways to articulate objective criteria and/or a rubric for independent testing 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?***

  Please see our comments above.

- ***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, as appropriate, be reallocated to higher priority areas?

SIFMA believes that further clarification of the "effective and reasonably designed" standard is required to assess properly the impact to the regulatory burden on financial institutions. Based on the ANPRM's discussion of the standard, SIFMA believes that the regulatory burden on securities firms would generally remain the same or increase as a result of the proposed amendments; however, as indicated above, further clarification as to how firms may reallocate resources is required to assess fully whether the proposed regulatory amendments will achieve the intended outcome of enhancing efficiency and effectiveness.

With respect to FinCEN's intention to provide for firms' reallocation of resources to higher priority areas, SIFMA believes an important element of FinCEN's proposed changes is the objective to discard inefficient practices or regulatory expectations that go above and beyond what is strictly needed or useful in practice. In various engagements with regulators, industry members have highlighted numerous areas in which AML regulatory requirements or expectations can be modernized and streamlined (including, among others, risk assessments and information sharing obligations) or eliminated as duplicative or *pro forma* in practice (including, for example, Section 311 notices and requirements for multiple financial institutions to obtain foreign bank certifications from shared customers). FinCEN should continue to focus efforts on ensuring regulatory requirements reflect and emphasize actual needs and priorities to mitigate the risk of money laundering and terrorist financing, while paring back unnecessary and burdensome expectations for areas of low priority.

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SIFMA commends FinCEN on its efforts to modernize existing AML regulations and its goal of enhancing the efficiency and effectiveness of financial institutions' AML programs. We believe the proposals discussed in the ANPRM have great potential for enabling securities firms to more effectively design risk-based AML programs. Based on our members' experience and feedback, SIFMA has provided its comments on the ANPRM in the interest of ensuring the proposed regulatory amendments can be implemented in a manner that is practicable and achieves FinCEN's intended outcomes. SIFMA looks forward to engaging with FinCEN further on enhancements and clarifications to the proposed regulatory amendments, particularly in the securities industry context.

Thank you for considering these comments. Please feel free to contact the undersigned at 202-962-7300 or SIFMA's counsel on this matter, Satish M. Kini, David G. Sewell or Jonathan R. Wong at Debevoise & Plimpton LLP, at 202-383-8000 with any questions.

Respectfully submitted,

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