

February 14, 2022

Himamauli Das
Acting Director
Financial Crimes Enforcement Network
U.S. Department of the Treasury
P.O. Box 39
Vienna, VA 22183

RE: Docket Number FINCEN-2021-0008

Dear Director Das,

I write in response to the request for information and comment (RFI) from the Financial Crimes Enforcement Network (FinCEN) of the U.S. Department of the Treasury (Treasury) titled “Review of Bank Secrecy Act Regulations and Guidance.”¹ Ensuring the integrity of our financial system through a robust anti-money laundering (AML) and countering the financing of terrorism (CFT) framework is vital to U.S. national security. To that end, the administration must implement robust beneficial ownership transparency measures, extend strong AML/CFT requirements to several types of gatekeepers to the financial system, and address additional deficiencies in our financial safeguards outlined below.

America and our allies are now engaged in a clash of civilizations—pitting democracy and the free market on one side against kleptocracy and corruption on the other. Enemies of the rule of law—kleptocrats, narco-traffickers, and other criminals—seek rule of law protection for their illicit money. To gain that protection, they need anonymity. Regrettably, as Secretary Yellen noted in December, “there’s a good argument that, right now, the best place to hide and launder ill-gotten gains is actually the United States.”² There are gaping holes in our financial defenses in this clash, and it is time to close them.

Congress took an important step last year when we passed the Corporate Transparency Act (CTA) and the broader Anti-Money Laundering Act (AML Act)—exposing the true owners of anonymous shell companies, extending AML/CFT safeguards to antiquities dealers, and initiating this review process, among other updates to our AML/CFT safeguards.³ I was proud to

¹ “Review of Bank Secrecy Act Regulations and Guidance; Request for Information and Comment,” 86 Federal Register 238 (15 December 2021), pp. 71201-71207, <https://www.federalregister.gov/documents/2021/12/15/2021-27081/review-of-bank-secrecy-act-regulations-and-guidance>.

² Janet Yellen, “Remarks by Secretary of the Treasury Janet L. Yellen at the Summit for Democracy,” U.S. Department of the Treasury, December 9, 2021, <https://home.treasury.gov/news/press-releases/jy0524>.

³ The Corporate Transparency Act (CTA) is Title LXIV of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Public Law 116-283 (January 1, 2021). Division F of Public Law 116-283 is the Anti-Money Laundering Act of 2020 (AML Act), which includes the CTA.

lead the effort in Congress to pass these reforms. Still, more must be done “to protect the financial system from threats, including money laundering and the financing of terrorism and proliferation, to national security posed by various forms of financial crime.”⁴

Beneficial Ownership Transparency

Corporate Transparency Act

The first and most important step involves the timely and robust implementation of the CTA with all implementing rules completed by the end of 2022. The CTA reporting requirements proposal is promising,⁵ but—as I previously noted—FinCEN should strengthen the rule further while remaining vigilant as you turn to related proposals around access to the beneficial ownership directory and customer due diligence.⁶ Successful implementation of the CTA will improve U.S. compliance with “international standards to combat money laundering, financing of terrorism, serious tax fraud, or other financial crimes,” as required by the AML Act.⁷

Money Transmitting Businesses

Treasury should strengthen the beneficial ownership transparency requirements in its registration form for money transmitting businesses (MTBs) under 31 U.S.C. 5330. FinCEN currently administers an MTB database with information on over 25,000 registered MTBs,⁸ many of which pose AML risks. The MTB registration form requires MTBs to provide identifying information for an “owner or controlling person,” but also allows an MTB, in some circumstances, to name an entity rather than an individual as its owner or controlling person.⁹ Treasury notes that “[o]wners or employees of registered money transmitters may help money launderers avoid reporting requirements by falsifying records to make it appear as though a large amount of laundered money was derived from a series of small transactions.”¹⁰ It is therefore essential that FinCEN know who is behind each MTB. FinCEN should revise the MTB registration form to bring its information requirements in line with those of the beneficial ownership registry. That revision would be particularly appropriate, since the CTA exempts MTBs from filing with the registry due to the registration forms they already file with Treasury.¹¹

⁴ See AML Act § 6216(a)(1)(A).

⁵ “Beneficial Ownership Information Reporting Requirements; Notice of Proposed Rulemaking,” 86 Federal Register 233 (8 December 2021), pp. 69920-69974, <https://www.federalregister.gov/documents/2021/12/08/2021-26548/beneficial-ownership-information-reporting-requirements>.

⁶ See Sheldon Whitehouse and Ron Wyden, “Letter to the Financial Crimes Enforcement Network,” sent February 7, 2022, <https://www.whitehouse.senate.gov/imo/media/doc/CTA-NPRM-Letter-Feb-2022-FINAL.pdf>. The recommendations in that comment are incorporated by reference.

⁷ See AML Act § 6216(a)(1)(C)(ii).

⁸ “MSB Registrant Search,” FinCEN, last modified February 11, 2022, https://www.fincen.gov/financial_institutions/msb/msbstateselector.html.

⁹ “Owner or Controlling Person,” FinCEN, accessed February 12, 2022, <https://www.fincen.gov/owner-or-controlling-person>.

¹⁰ U.S. Department of the Treasury, *Money Laundering Threat Assessment, December 2005*, <https://home.treasury.gov/system/files/246/mlta.pdf>, p. 11.

¹¹ 31 U.S.C. 5336(a)(11)(B)(vi).

Investment Advisers and Investment Companies

While our banking sector has long been subject to AML/CFT safeguards, there are still too many opportunities for the world's thieves to hide money, and too many private interests facilitate that dark trade. This is particularly true of the opaque, \$11 trillion private investment industry—encompassing private equity, venture capital, and hedge funds (among others)—where investment advisers and investment companies are subject to minimal (if any) AML/CFT obligations. The Federal Bureau of Investigation notes that such funds “are being used as vehicles for laundering money at scale.”¹² Expert groups echo such concerns,¹³ and the Financial Action Task Force (FATF) lists applying “appropriate AML/CFT obligations... [t]o investment advisers” as a priority action to improve the U.S. AML/CFT framework.¹⁴

In 2015, FinCEN proposed, but never finalized, regulations to classify investment advisors as financial institutions and subject them to AML/CFT reporting requirements.¹⁵ I was pleased to see President Biden included “[p]rescribing minimum reporting standards for investment advisors and other types of equity funds” as a specific line of effort in the recent U.S. Strategy on Countering Corruption.¹⁶ Following through on that commitment by applying robust AML/CFT program, currency transaction reporting (CTR), and suspicious activity reporting (SAR) requirements to investment advisers and investment companies must be a priority.

Designated Non-Financial Businesses and Professions

Too often, American professionals—including real estate agents, lawyers, and accountants—that fall outside of the traditional definition of “financial institution” aid and abet our enemies by helping them hide their ill-gotten gains in the United States. Unfortunately, most of these designated non-financial businesses and professions (DNFBPs) do not have AML/CFT obligations. FATF notes that, in the United States, “there is a lack of comprehensive preventive measures by DNFBPs (other than casinos and dealers in precious metals and stones), including

¹² Timothy Lloyd, “FBI concerned over laundering risks in private equity, hedge funds - leaked document,” *Reuters*, July 14, 2020, <https://www.reuters.com/article/bc-finreg-fbi-laundering-private-equity/fbi-concerned-over-laundering-risks-in-private-equity-hedge-funds-leaked-document-idUSKCN24F1TP>.

¹³ “Private Investments, Public Harm: How the Opacity of the Massive U.S. Private Investment Industry Fuels Corruption and Threatens National Security,” the FACT Coalition, Global Financial Integrity, and Transparency International U.S. Office, published December 2021, https://thefactcoalition.org/wp-content/uploads/2021/12/TI_Private-Investments-Public-Harm-10.pdf.

¹⁴ “United States: Anti-money laundering and counter-terrorist financing measures; Mutual Evaluation Report,” The Financial Action Task Force and the Asia/Pacific Group on Money Laundering, published December 2016, <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf>.

¹⁵ “Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers; A Proposed Rule by the Financial Crimes Enforcement Network,” 80 Federal Register 169 (1 September 2015), <https://www.federalregister.gov/documents/2015/09/01/2015-21318/anti-money-laundering-program-and-suspicious-activity-report-filing-requirements-for-registered>.

¹⁶ “The United States Strategy on Countering Corruption: Pursuant to the National Security Study Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest,” the White House, published December 2021, <https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf>.

those exposed to higher risks.”¹⁷ The United States fails several FATF standards related to DNFBPs.¹⁸

Real Estate

The United States must cease aiding and abetting our adversaries by allowing anonymous transactions in the \$60 trillion U.S. real estate market.¹⁹ FATF lists taking “appropriate action to address the ML risks in relation to high-end real estate” as a priority action the U.S. should take to improve its AML/CFT framework.²⁰

In November, I you to initiate a rulemaking to expand AML/CFT safeguards to the real estate sector,²¹ and I commend you for initiating such a process.²² I look forward to commenting further on FinCEN’s real estate proposal in the coming days. Finalizing this rulemaking by the end of 2022 should be a top priority for FinCEN, alongside implementation of the CTA and AML/CFT obligations for investment advisers and investment companies.

Traders in Art and Antiquities

While the art and antiquities markets are smaller than others discussed in this comment, terrorists and kleptocrats still use them to launder illicit proceeds, evade sanctions, and raise funds illegally.²³ The AML Act extended AML/CFT responsibilities to any “person engaged in the trade of antiquities, including an advisor, consultant, or any other person who engages as a business in the solicitation or the sale of antiquities.”²⁴ I was pleased to see FinCEN initiate its

¹⁷ “United States: Anti-money laundering and counter-terrorist financing measures; Mutual Evaluation Report,” p. 6.

¹⁸ The U.S. receives a non-compliant rating from FATF on four recommendations: 24 (“Transparency and beneficial ownership of legal persons”), 22 (“DNFBPs: customer due diligence”), 23 (“DNFBPs: Other measures”), and 28 (“Regulation and supervision of DNFBPs”). See “United States: Anti-money laundering and counter-terrorist financing measures; 3rd Enhanced Follow-up Report & Technical Compliance Re-Rating,” The Financial Action Task Force, published March 2020, <https://www.fatf-gafi.org/media/fatf/documents/reports/fur/Follow-Up-Report-United-States-March-2020.pdf>.

¹⁹ Zillow estimates that the total value of private, residential real estate in the U.S. is worth \$43.4 trillion, while the National Association of Real Estate Investment Trusts estimates that commercial U.S. real estate is worth \$16 trillion. See Treh Manhertz, “U.S. Housing Market has Doubled in Value since the Great Recession, Gaining \$6.9 Trillion in 2021,” Zillow, Jan. 27, 2022, <https://www.zillow.com/research/us-housing-market-total-value-2021-30615/>; and Alexandra Thompson, “Total Size of U.S. Commercial Real Estate Estimated Between \$14 and \$17 Trillion,” National Association of Real Estate Investment Trusts, July 9, 2019, <https://www.reit.com/news/blog/market-commentary/total-size-of-us-commercial-real-estate-estimated-between-14-and-17-trillion>.

²⁰ “United States: Anti-money laundering and counter-terrorist financing measures; Mutual Evaluation Report.”

²¹ Senator Sheldon Whitehouse, “Letter to the Financial Crimes Enforcement Network,” sent November 12, 2021, <https://www.whitehouse.senate.gov/imo/media/doc/GTO%20Letter.pdf>.

²² “Anti-Money Laundering Regulations for Real Estate Transactions; A Proposed Rule by the Financial Crimes Enforcement Network,” 86 Federal Register 233 (8 December 2021), <https://www.federalregister.gov/documents/2021/12/08/2021-26549/anti-money-laundering-regulations-for-real-estate-transactions>.

²³ Art Basel and UBS pegged global art and antiquities sales at \$50 billion in 2020. See Press Release, “The Art Market 2021 reveals market shifts during a year of exceptional challenges with extraordinary growth of online sales,” *The Art Basel*, March 16, 2021, <https://artbasel.com/stories/art-market-report-2021>.

²⁴ AML Act § 6110.

rulemaking on the matter,²⁵ and look forward to the timely finalization of a strong rule. FinCEN should also move forward with a rulemaking that extends AML/CFT safeguards to the art market.

Businesses Engaged in Vehicle Sales

Kleptocrats, criminals, and terrorists routinely utilize expensive goods—including cars, airplanes, and yachts—as vehicles for transferring, parking, or enjoying their ill-gotten-gains.²⁶ For example, stolen funds tied to Malaysia’s 1MDB corruption scandal were invested in a \$250 million yacht and \$35 million jet, among other luxury goods;²⁷ the son of the kleptocratic dictator of Equatorial Guinea channeled hundreds of millions of dollars in corrupt funds into yachts, jets, and luxury cars, among other items;²⁸ and dozens of American used car dealerships were implicated in a terror financing scheme tied to Hezbollah.²⁹

Congress extended AML/CFT requirements to any “business engaged in vehicle sales, including automobile, airplane, and boat sales” in 2001,³⁰ but FinCEN immediately granted a temporary exemption from this requirement to “enable FinCEN to study the affected industries and consider the extent to which anti-money laundering program requirements should be applied to them, taking into account the specific characteristics of the various entities defined as financial institutions by the [Bank Secrecy Act].”³¹ This “temporary” exemption remains in effect 20 years later.³² Failing to apply AML/CFT requirements to businesses engaged in the sale of vehicles poses a risk to U.S. national security. It is time for FinCEN to close this loophole and implement the law as Congress intended.

Additional DNFBS

²⁵ “Anti-Money Laundering Regulations for Dealers in Antiquities; Advance Notice of Proposed Rulemaking,” 86 Federal Register 183 (24 September 2021), pp. 53021-53024, <https://www.federalregister.gov/documents/2021/09/24/2021-20731/anti-money-laundering-regulations-for-dealers-in-antiquities>.

²⁶ “Luxury Goods Dealers Do Too Little To Limit Sales To The Corrupt,” Transparency International, published April 3, 2017, <https://www.transparency.org/en/press/luxury-goods-dealers-do-too-little-to-limit-sales-to-the-corrupt>.

²⁷ Elizabeth A. Harris and Alexandra Stevenson, “A Yacht, a Monet, a See-Through Piano: The U.S. Collects on a Fugitive’s Shopping Spree,” *The New York Times*, December 9, 2018, <https://www.nytimes.com/2018/12/09/arts/jho-low-1mdb-assets-piano.html>.

²⁸ Lauren Pfeifer, “9 insane things Teodorin Obiang spent his allegedly embezzled money on,” *ONE*, January 29, 2020, <https://www.one.org/international/blog/9-insane-things-teodorin-obiang-spent-his-allegedly-embezzled-money-on/>.

²⁹ Richard Esposito and Cindy Galli, “American Used Car Dealers Funding Terrorists: Feds,” *ABC News*, December 16, 2011, <https://abcnews.go.com/Blotter/american-car-dealers-funding-terrorists-feds/story?id=15170802>.

³⁰ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Public Law 107-56 (October 26, 2001), <https://www.congress.gov/107/plaws/publ56/PLAW-107publ56.pdf>

³¹ “Financial Crimes Enforcement Network; Anti-Money Laundering Programs for Businesses Engaged in Vehicle Sales,” 68 Federal Register 36 (24 February 2003), <https://www.federalregister.gov/d/03-4173/p-9>.

³² 31 C.F.R. § 1010.205(b)(iv).

The lack of AML/CFT safeguards for lawyers, accountants, company and trust formation agents, and public relations firms (among other professionals) remains a serious concern. FATF lists applying “appropriate AML/CFT obligations... to lawyers, accountants, trust and company service providers” as a priority action the U.S. should take to improve its AML/CFT framework.³³ While I understand that further Congressional action may be required to extend AML/CFT safeguards to such professionals, I am committed to working with you to introduce and advance legislation on this matter.³⁴

Trade-Based Money Laundering

As we extended AML/CFT responsibilities to various sectors over the years, kleptocrats, drug traffickers, and other criminal actors increasingly turned to sophisticated trade-based money laundering (TBML) schemes to hide their ill-gotten gains. A recent Government Accountability Office (GAO) report concluded that TBML is a primary mechanism criminal organizations and others use to launder illicit proceeds, and transnational criminal organizations exploit these same vulnerabilities for other trade-related financial crimes.³⁵

The report found that current federal efforts to combat TBML exclude some key agencies involved in overseeing trade, and that information on suspicious financial and trade activity is siloed and not adequately shared among different agencies. I urge Treasury and the Department of Homeland Security to act on GAO’s recommendation to ease data sharing between agencies.³⁶

Virtual Currencies

I am concerned about the money laundering risks tied to emerging technologies such as virtual currencies. The pseudonymous nature of these transactions combined with the large and growing size of virtual currency markets and the absence of gatekeepers subject to AML/CFT obligations present ample opportunity for abuse. The Drug Enforcement Administration found that “virtual currency is becoming more commonly used by international money launderers to transfer proceeds across borders on behalf of transnational criminal organizations.”³⁷

I appreciate that FinCEN appropriately clarified that an administrator or exchanger of virtual currencies is a money services business subject to appropriate AML/CFT obligations.³⁸

However, FinCEN and the Internal Revenue Service should take further steps to comply with GAO’s recommendation to “require[e] kiosk operators to submit the locations, including

³³ “United States: Anti-money laundering and counter-terrorist financing measures; Mutual Evaluation Report.”

³⁴ “United States: Anti-money laundering and counter-terrorist financing measures; Mutual Evaluation Report.”

³⁵ U.S. Government Accountability Office, Countering Illicit Finance and Trade: Better Information Sharing and Collaboration Needed to Combat Trade-Based Money Laundering, GAO-22-447 (Washington, DC, 2021), accessed February 14, 2022, <https://www.gao.gov/products/gao-22-447>.

³⁶ “Countering Illicit Finance and Trade: Better Information Sharing and Collaboration Needed to Combat Trade-Based Money Laundering.”

³⁷ U.S. Government Accountability Office, Virtual Currencies: Additional Information Could Improve Federal Agency Efforts to Counter Human and Drug Trafficking, GAO-22-105462 (Washington, DC, 2021), accessed on February 14, 2022, <https://www.gao.gov/assets/gao-22-105462.pdf>, p. 26.

³⁸ “Application of FinCEN’s Regulations to Persons Administering, Exchanging, or Using Virtual Currencies,” Financial Crimes Enforcement Network, issued March 18, 2013, <https://www.fincen.gov/resources/statutes-regulations/guidance/application-fincens-regulations-persons-administering>.

physical addresses of kiosks they own or operate, upon MSB registration, and update this information upon reregistration or other appropriate interval.”³⁹ FinCEN should also consider requiring every business regularly handling virtual currency transactions to obtain the public and private keys of every client involved in such transactions and turn that information over to law enforcement upon request, in the same way that banks now turn over bank account numbers. More must be done to ensure the integrity of this emerging market, and I look forward to working with FinCEN to explore additional regulatory and legislative solutions to these concerns.

Prepaid Access Devices Reporting Thresholds

I am concerned about hasty efforts that might increase the monetary thresholds for SARs and CTRs—or index such thresholds to inflation—without carefully considering the potential negative implications such actions could pose to law enforcement and U.S. national security. While SAR/CTR thresholds were established decades ago, it is arguably cheaper to carry out a terrorist attack today than it was a generation ago. For example, the attacks on September 11, 2001 “cost al Qaeda somewhere in the range of \$400,000–500,000.”⁴⁰ In recent years, lone wolf style terrorist attacks have become more common and can be carried out far less expensively. One expert notes:

[T]he ‘new normal’ of terrorist plots is the low-budget attack. Successful terrorist attacks are now being carried out with instrumentalities that are part of our everyday life: a knife or a van. In these ‘lone wolf’ or the errant jihadist types of attacks, the incurred costs are low such as buying the weapon or renting a car. The cost for such instrumentality is low—a few hundred U.S. dollars.⁴¹

At the same time, technological innovations like online banking, smartphones, and mobile payment technologies have made it easier for one person to structure large transactions across multiple financial institutions, geographic jurisdictions, and platforms. Technological advances have also reduced the costs for financial institutions to file such reports. The current U.S. SAR/CTR thresholds are generally in line with international allies,⁴² and to the extent that

³⁹ U.S. Government Accountability Office, *Virtual Currencies: Additional Information Could Improve Federal Agency Efforts to Counter Human and Drug Trafficking*, GAO-22-105462 (Washington, DC, 2021), accessed on February 14, 2022, <https://www.gao.gov/products/gao-22-105462>.

⁴⁰ John Roth, Douglas Greenburg, and Serena Wille, “National Commission on Terrorist Attacks Upon the United States: Monograph on Terrorist Financing,” accessed February 14, 2022, https://govinfo.library.unt.edu/911/staff_statements/911_TerrFin_Monograph.pdf.

⁴¹ “Written Testimony of Seamus Hughes: Low Cost, High Impact: Combatting the Financing of Lone-Wolf and Small-Scale Terrorist Attacks,” Program on Extremism, accessed February 14, 2022, <https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/HughesLowCostHighImpact.pdf>.

⁴² For example, the U.S. has a \$10,000 CTR threshold, Canada has a CA\$10,000 threshold, Australia has a A\$10,000 threshold, and the European Union recently proposed banning any currency transactions over €10,000. See “Notice to Customers: A CTR Reference Guide,” FinCEN, last modified June 10, 2016, <https://www.fincen.gov/sites/default/files/shared/CTRPamphlet.pdf>; “Financial transactions that must be reported,” Financial Transactions and Reports Analysis Centre of Canada, last modified June 1, 2021, <https://www.fintrac-canafe.gc.ca/reporting-declaration/rpt-eng>; “Reporting transactions of \$10,000 and over: Threshold transaction reports (TTRs),” AUSTRAC, last modified April 19, 2021, <https://www.austrac.gov.au/business/how-comply-guidance-and-resources/reporting/cash-transactions-over-10000-ttr>; and Press Release, “Beating financial crime:

foreign allies have adjusted thresholds in recent years it has been to *lower* rather than *raise* them.⁴³ The costs associated with increasing thresholds could be catastrophic, while the benefits associated with a reduction in compliance burden are likely modest and diminishing. As such, FinCEN should refrain from proposing increases to existing thresholds.

Conclusion

The United States and our allies must act swiftly and decisively to end the reliance of kleptocrats and criminals on rule-of-law financial systems to stow their pelf. How we respond will determine the safety of our nation, the success of the rule of law, and America's place of leadership in the world.

Thank you, again, for the work you do to combat money laundering, transnational drug trafficking, and other illicit uses of the U.S. financial system that fuel global corruption and kleptocratic regimes.

Sincerely,



SHELDON WHITEHOUSE
United States Senator

CC: The Honorable Janet Yellen, U.S. Secretary of the Treasury
The Honorable Alejandro Mayorkas, U.S. Secretary of Homeland Security
The Honorable Charles Rettig, U.S. Commissioner of Internal Revenue

Commission overhauls anti-money laundering and countering the financing of terrorism rules," *European Commission*, July 20, 2021, https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3690.

⁴³ For example, the 4th E.U. Anti-Money Laundering Directive lowered cash transaction thresholds from €15,000 to €10,000. See Roberta Holland, "EU Firms Face New AML Rules, Beneficial Ownership Registry," *Compliance Week*, February 11, 2015, <https://www.complianceweek.com/eu-firms-face-new-aml-rules-beneficial-ownership-registry/12636.article>.