November 30, 2020

Director Kenneth A. Blanco
Financial Crimes Enforcement Network
U.S. Department of the Treasury
Submitted via Federal E-rulemaking Portal: http://www.regulations.gov

Re: **Proposed Renewal Without Change of Correspondent and Private Banking AML Due Diligence Programs, Docket Number FINCEN–2020–0012; OMB No. 1506–0046**

Dear Director Blanco:

The purpose of this letter is to express support for the proposed renewal by the Financial Crimes Enforcement Network (FinCEN) of existing anti-money laundering (AML) due diligence program requirements for correspondent banking and private banking accounts,[1] but also to urge that the rules in 31 C.F.R. §§ 1010.610, 1010.620 and 1010.605 be updated, clarified, and strengthened rather than renewed without change.

Specifically, this letter recommends: (1) deleting the expired effective dates, now more than a decade old, in both the correspondent and private banking due diligence rules; (2) strengthening the correspondent banking due diligence rule to require an enhanced due diligence review of every foreign bank rated as high risk by the U.S. financial institution administering the correspondent account; (3) expanding the categories of U.S. financial institutions subject to the correspondent and private banking due diligence rules; and (4) applying the private banking due diligence rule to domestic as well as foreign senior political figures.

Importance of Correspondent and Private Banking Due Diligence. The United States has long known that money launderers, terrorists, corrupt officials, and other criminals seek to infiltrate the U.S. financial system through correspondent and private banking accounts established or managed in the United States. Investigations, for example, by the U.S. Senate Permanent Subcommittee on Investigations, where I worked for more than a decade as staff director and chief counsel for Senator Carl Levin, have extensively documented the misuse of correspondent and private banking accounts at a variety of financial institutions.[2] It was that investigative work which caused Senator Levin to author Section 312 of the Patriot Act of 2001, which is the statutory basis for the rules now being proposed for renewal.

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[1] See "Agency Information Collection Activities; Proposed Renewal; Comment Request; Renewal Without Change of Anti-Money Laundering Programs; Due Diligence Programs for Correspondent Accounts for Foreign Financial Institutions and for Private Banking Accounts," 85 Fed. Reg. 189 (9/29/2020), at 61104.

[2] See, e.g., U.S. Senate Permanent Subcommittee on Investigations, "U.S. Vulnerabilities to Money Laundering, Drugs, and Terrorist Financing: HSBC Case History," S.Hrg. 112-597 (7/17/2012); "Keeping Foreign Corruption Out of the United States," S.Hrg. 111-540 (2/4/2010); "Tax Haven Abuses: The Enablers, The Tools and Secrecy," S.Hrg. 109-797 (8/1/2006); Money Laundering and Foreign Corruption: Enforcement and Effectiveness of the Patriot Act," S.Hrg. 108-633 (7/15/2004); "Role of U.S. Correspondent Banking in International Money Laundering," S.Hrg. 107-84 (3/1-2, 6/2001); and "Private Banking and Money Laundering: A Case Study of Opportunities and Vulnerabilities," S.Hrg. 106-428 (11/9-10/1999).

Recent scandals and U.S. enforcement actions show that the abusive practices which produced Section 312 continue to occur, with hundreds of billions of illicit dollars moving through U.S. correspondent and private banking accounts at Deutsche Bank, JPMorgan Chase, Goldman Sachs, and other financial institutions.[3] The ongoing multi-billion-dollar misuse of U.S. correspondent and private banking accounts shows that the U.S. AML due diligence rules are as important as ever and should not only be renewed, but strengthened.

Correspondent Banking

One of the rules proposed for renewal, 31 C.F.R. § 1010.610, requires covered financial institutions to establish AML due diligence policies, procedures, and controls related to their correspondent accounts as part of their AML programs. Rather than renew this rule "without change" as proposed by FinCEN, this letter respectfully recommends that the rule be updated, clarified and strengthened.

The term "correspondent account" is defined in 31 C.F.R. § 1010.605(c) as an account established for a "foreign financial institution" (sometimes narrowed to a "foreign bank") to "receive deposits from, or to make payments or other disbursements on behalf of, the foreign financial institution, or to handle other financial transactions related to such foreign financial institution." This definition, like others, indicate that § 1010.605's provisions play an integral role in the correspondent banking rule and should be considered as part of the proposed renewal of § 1010.610.

Update Effective Dates. The first and easiest issue has to do with effective dates. Right now, 31 C.F.R. § 1010.610 (e) and (f) specify dates in 2006 and 2008 when the rule's due diligence requirements for correspondent accounts take effect. Since those dates elapsed twelve and fourteen years ago, rather than leave the subsections unchanged, FinCEN should delete the

[3] See, e.g., "Consent Order Under New York Bank Law §§ 39 and 44," (7/6/2020), New York State Department of Financial Services (describing egregious correspondent and private banking deficiencies at Deutsche Bank involving $618 billion in suspect transactions with FBME Bank in Cyprus, $267 billion in suspect transactions with Danske Bank in Estonia, and multimillion dollar private banking transactions with Jeffrey Epstein), https://fm.cnbc.com/applications/cnbc.com/resources/editorialfiles/2020/07/07/ea20200706_deutsche_bank_consent_order.pdf; "Manhattan U.S. Attorney And FBI Assistant Director-In-Charge Announce Filing Of Criminal Charges Against And Deferred Prosecution Agreement With JPMorgan Chase Bank, N.A., In Connection With Bernard L. Madoff's Multi-Billion Dollar Ponzi Scheme," press release by U.S. Department of Justice (DOJ) (1/7/2014)(describing criminal and civil enforcement actions against JPMorgan Chase related to misuse of a private banking account by Bernard Madoff to advance his financial fraud), https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-and-fbi-assistant-director-charge-announce-filing-criminal; United States v. The Goldman Sachs Group, Case No. 20-437 (MKB), Complaint (EDNY Oct. 22, 2020)(describing how billions of dollars in corrupt funds were moved through multiple U.S. correspondent accounts with the assistance of Goldman Sachs), https://www.justice.gov/criminal-fraud/file/1329911/download; "Proposal of Special Measure Against ABLV Bank, AS as a Financial Institution of Primary Money Laundering Concern," notice of proposed rulemaking by FinCEN (2/16/2018), 83 Fed. Reg. 33 at 6986 (describing how a Latvian bank, ABLV Bank, used foreign financial institutions to move billions of dollars in suspect funds through multiple U.S. correspondent accounts), https://www.fincen.gov/sites/default/files/federal_register_notices/2018-02-16/2018-03214.pdf; United States v. Ko Chol Man, Case No. 20-cr-00032-RC, Indictment (DDC Feb. 5, 2020)(indicting 28 North Koreans and five Chinese bankers for allegedly moving $2.5 billion in illicit funds through U.S. correspondent accounts to support North Korea's ballistic missile and weapons of mass destruction programs), https://www.ballardspahr.com/-/media/files/articles/china-korea-indictment.pdf.

expired dates and make clear that § 1010.610's due diligence requirements now apply to all existing and new correspondent accounts established, maintained, administered, or managed in the United States by covered financial institutions.

Subject More High-Risk Foreign Banks to Enhanced Due Diligence. The second issue involves what foreign banks should be subjected to enhanced due diligence reviews when seeking to open a U.S. correspondent account. Currently, 31 C.F.R. § 1010.610(c) requires U.S. financial institutions to conduct enhanced due diligence reviews for three types of foreign banks, those holding (1) an offshore license; (2) a license issued by a foreign country designated by an international body as "non-cooperative" with international AML principles or procedures; or (3) a license issued by a foreign country designated by the United States as "warranting special measures due to money laundering concerns." While all three categories describe high-risk foreign banks that warrant enhanced due diligence, recent correspondent banking scandals indicate that they do not go far enough and should be expanded. Examples identified earlier are FBME Bank in Cyprus, Danske Bank in Estonia, and ABLV Bank in Latvia which collectively moved nearly $900 billion in illicit funds through U.S. correspondent accounts.[4] Yet at the time of their misdeeds, none of those foreign banks fell into the three categories of foreign banks requiring enhanced due diligence under the correspondent banking rule, even though each operated in a high-risk jurisdiction and set up accounts for high-risk clients.

To mitigate that weakness in U.S. correspondent banking safeguards, § 1010.610(c)(2), in particular, should be strengthened by expanding it to apply to all foreign banks that are rated high risk or hold a license issued by a foreign jurisdiction that has been rated as high risk by the U.S. financial institution administering the correspondent account. That change would ensure that more high-risk foreign banks – as determined by the U.S. financial institution's own AML program – would be subject to an enhanced due diligence review.

Expand Rule's Coverage of Financial Institutions. The third and final correspondent banking issue involves what U.S. financial institutions should be subject to the rule's due diligence requirements. Currently, 31 C.F.R. § 1010.610(g) limits application of the correspondent banking due diligence rule to a certain set of U.S. banks, securities brokers-dealers, commodity brokers, and mutual funds as specified in § 1010.605(e)(1). That list of covered financial institutions specified in (e)(1), which was determined more than 14 years ago, fails to take into account subsequent regulatory changes and excludes some key categories of financial institutions that can provide correspondent accounts to high-risk foreign banks. Those excluded categories include "banks that lack a Federal functional regulator,"[5] investment banks and investment companies,[6] "an issuer, redeemer, or cashier of travelers' checks, checks, money

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[4] See note 3, *supra*.

[5] FinCEN now requires "banks that lack a Federal functional regulator" to establish AML programs, so it makes no sense to continue to exclude them from the correspondent due diligence rule for AML programs. See "Financial Crimes Enforcement Network; Customer Identification Programs, Anti-Money Laundering Programs, and Beneficial Ownership Requirements for Banks Lacking a Federal Functional Regulator," final rule promulgated by FinCEN (9/15/2020), 85 Fed. Reg. 179, at 57129, 57131 at note 20, (9/15/2020)(defining the term "banks that lack a Federal functional regulator" as including, but not limited to, "private banks, non-federally insured credit unions, and certain trust companies").

[6] 31 U.S.C. § 5312 (a)(2)(I) financial institutions such as Morgan Stanley, Bank of China, Lazard, and VTB Bank, for example, operate investment banks that can provide correspondent accounts to foreign financial institutions).

orders, or similar instruments,"[7] and "an operator of a credit card system."[8] In connection with its renewal of 31 C.F.R. § 1010.610 and in reliance on 31 U.S.C. § 5318A(e)(1)(B) and (2), FinCEN should modify § 1010.605(e)(1) to include those additional categories of financial institutions and ensure that when they provide accounts to foreign banks, they comply with the correspondent banking due diligence rule.

Private Banking

The second rule proposed for renewal is 31 C.F.R. § 1010.620, which requires covered financial institutions to establish AML due diligence policies, procedures, and controls related to their private banking accounts as part of their AML programs. Again, rather than renew this rule "without change" as proposed by FinCEN, this letter respectfully recommends that the private banking due diligence rule be updated, clarified, and strengthened.

The term "private banking account" is defined in 31 C.F.R. § 1010.605(m) as an account that requires a "minimum aggregate deposit of funds or other assets of not less than $1,000,000;" is established "on behalf of or for the benefit of one or more non-U.S. persons who are direct or beneficial owners" of the account; and is managed by a financial institution's officer, employee, or agent "acting as a liaison between that institution and the direct or beneficial owner of the account." This and other definitions in § 1010.605, again, play a pivotal role in the renewal of the private banking due diligence rule and should be considered as part of the renewal effort.

Update Effective Dates. The first issue here, again, involves the rule's effective date. Like the correspondent banking due diligence rule, the private banking due diligence rule includes outdated provisions related to its effective date. Right now, 31 C.F.R. § 1010.620(e)(1), (2) and (3) specify a date in 2006 when the rule's due diligence requirements for private banking accounts take effect. Since that date elapsed fourteen years ago, rather than leave the subsection unchanged, FinCEN should delete the expired date and make clear that § 1010.620's due diligence requirements now apply to all existing and new private banking accounts established, maintained, administered, or managed in the United States by covered financial institutions.

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[7] 31 U.S.C. § 5312 (a)(2)(K) (issuers of travelers checks, for example, can provide an ongoing supply to a foreign bank). See, e.g., "U.S. Vulnerabilities to Money Laundering, Drugs, and Terrorist Financing: HSBC Case History," S.Hrg. 112-597 (7/17/2012), at 462-484 (documenting how, over a four-year period, HSBC issued $290 million in suspect U.S. dollar travelers checks to Hokuriku Bank in Japan).

[8] 31 U.S.C. § 5312 (a)(2)(L) (a credit card systems operator, for example, can provide credit cards and credit card processing services to foreign banks servicing high-risk clients). See, e.g., "Mastercard Exec Reportedly Linked to Suspect Transactions at Cyprus Bank," Marie Huillet, Cointelegraph (7/28/2020) (indicating that Wirecard, a payments processor, worked with a Mastercard executive at FBME Bank to conceal credit card transactions involving illicit funds), https://cointelegraph.com/news/mastercard-exec-accused-of-money-laundering-cover-up-at-bank-with-ties-to-wirecard; "Transaction Laundering – A Growing Threat in the Payments Industry," report by Infosys (2018) (describing how operators of credit cards and other payments systems are misused to move illicit funds), https://www.infosys.com/industries/financial-services/documents/transaction-laundering.pdf; "Keeping Foreign Corruption Out of the United States," S.Hrg. 111-540 (2/4/2010), at 484-485, 499-504 (showing how HSBC provided U.S. dollar credit card services via correspondent accounts to Banco Africano de Investimentos, a $7 billion, high-risk Angolan bank); "Role of U.S. Correspondent Banking in International Money Laundering," S.Hrg. 107-84 (3/1-2, 6/2001), at 15-21 (showing how a Cayman bank provided U.S. dollar credit cards to U.S. clients to enable them to withdraw illicit funds from their Cayman accounts using the Cayman bank's U.S. correspondent account).

Expand Rule's Coverage of Financial Institutions. The second issue focuses on what U.S. financial institutions should be subject to the private banking rule's due diligence requirements. Like the correspondent banking rule, the private banking rule applies only to a specified set of U.S. financial institutions. Those financial institutions are identified in 31 C.F.R. § 1010.620(e)(4) which applies the private banking due diligence requirements only to the banks, securities brokers-dealers, commodity brokers, and mutual funds specified in § 1010.605(e)(1). The list of covered financial institutions specified in (e)(1), which was determined more than 14 years ago, fails to take into account subsequent regulatory changes and excludes some key categories of financial institutions that can provide private banking accounts to foreign individuals. Those excluded categories include "banks that lack a Federal functional regulator,"[9] investment banks and investment companies,[10] "an issuer, redeemer, or cashier of travelers' checks, checks, money orders, or similar instruments,"[11] and "an operator of a credit card system."[12] In connection with its renewal of 31 C.F.R. § 1010.620 and in reliance on 31 U.S.C. § 5318A(e)(3), FinCEN should also modify § 1010.605(e)(1) to include those additional categories of financial institutions and ensure that when they provide private banking accounts to foreign individuals, they comply with the private banking rule's due diligence requirements.

Add Senior U.S. Political Figures. A third issue involves private banking accounts opened by senior political figures. Currently, 31 C.F.R. § 1010.620(c) requires covered financial institutions to apply "enhanced scrutiny" to private banking accounts in which a senior foreign political figure is a "nominal or beneficial owner." The rule is silent about accounts in which the nominal or beneficial owner is a senior U.S. political figure, even though, for decades, the Financial Action Task Force (FATF) on money laundering, which the United States supports as a founding member, has called on jurisdictions to conduct due diligence reviews of accounts opened by domestic as well as foreign political figures.[13] FATF Recommendation 12 states, in part, that financial institutions should determine whether a domestic political figure is the nominal or beneficial owner of an account and, if so, to conduct a risk assessment of that

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[9] FinCEN now requires "banks that lack a Federal functional regulator" to establish AML programs, so it makes no sense to continue to exclude them from the private banking due diligence rule for AML programs. See "Financial Crimes Enforcement Network; Customer Identification Programs, Anti-Money Laundering Programs, and Beneficial Ownership Requirements for Banks Lacking a Federal Functional Regulator," final rule promulgated by FinCEN (9/15/2020), 85 Fed. Reg. 179, at 57129, 57131 at note 20, (9/15/2020)(defining the term "banks that lack a Federal functional regulator" as including, but not limited to, "private banks, non-federally insured credit unions, and certain trust companies").

[10] 31 U.S.C. § 5312 (a)(2)(I) (investment banks, for example, can provide private banking accounts to wealthy foreign individuals who meet the statute's $1 million minimum).

[11] 31 U.S.C. § 5312 (a)(2)(K) (an issuer of cashiers checks, for example, can issue them to wealthy foreign individuals who meet the statute's $1 million minimum).

[12] 31 U.S.C. § 5312 (a)(2)(L) (a credit card operator, for example can issue special credit cards to wealthy foreign individuals who meet the statute's $1 million minimum). See, e.g., "Scandal-hit former king Juan Carlos faces new criminal investigation over 'opaque credit cards used on London trips' with probe extended to his wife Sofia and some of their grandchildren," Natalia Penza, *Daily Mail* (11/3/2020), https://www.dailymail.co.uk/news/article-8908931/Scandal-hit-former-king-Juan-Carlos-faces-new-criminal-investigation-opaque-credit-cards.html; "Keeping Foreign Corruption Out of the United States," S.Hrg. 111-540 (2/4/2010), at 484-485, 499-504 (showing how HSBC provided U.S. dollar credit card services to Banco Africano de Investimentos, a $7 billion, high-risk private bank in Angola servicing wealthy Angolans).

[13] See FATF Recommendation 12 (October 2020), https://www.cfatf-gafic.org/home-test/english-documents/cfatf-resources/14728-fatf-recommendations-2012-updated-october-2020/file.

individual as well as conduct ongoing enhanced monitoring of the account. To come into compliance with FATF Recommendation No. 12, rather than leave § 1010.620(c) unchanged, FinCEN should update the provision by adding a new subsection related to senior U.S. political figures. That new subsection could require U.S. financial institutions to conduct an initial due diligence review and risk assessment as well as ongoing enhanced account monitoring for private banking accounts in which a nominal or beneficial owner is a senior U.S. political figure. That updated provision would ensure that covered financial institutions carefully review a private banking account opened by a domestic as well as foreign senior political figure.

FinCEN is to be commended for seeking to renew the existing correspondent and private banking due diligence rules, but rather than renew them without change, FinCEN should take this opportunity to update, clarify, and strengthen them. Thank you for this opportunity to comment on the proposed renewal.

Sincerely,

Elise J. Bean
Former Staff Director and Chief Counsel of the
U.S. Senate Permanent Subcommittee on Investigations