Congress of the United States

Washington, DC 20515

April 5, 2024

Via electronic submission:
Financial Crimes Enforcement Network
Attn: Policy Division, Docket No. FINCEN-2024-0003
OMB Control Numbers 1506-0004, 1506-0005, 1506-0064
P.O. Box 39
Vienna, VA 22183

Dear Sir or Madame,

We appreciate the opportunity to comment on the Currency Transaction Report (CTR) Proposal that the Financial Crimes Enforcement Network (FinCEN) published in the Federal Register on February 5, 2024. As members of Congress, we are concerned that FinCEN has failed to comply with the statutory deadlines established in the Anti-Money Laundering Act (AML Act) of 2020. At the same time, FinCEN proposes to renew, without change, collection under thresholds established nearly half a century ago. This renewal without change, and future renewals without change, could jeopardize the constitutionality of this valuable law enforcement tool in the future, and FinCEN's failure to comply with related statutory deadlines has inexcusably delayed Congressional efforts to improve or reform this tool.

The Currency and Foreign Transactions Reporting Act of 1970, better known as the Bank Secrecy Act of 1970 (BSA), imposes domestic currency transaction reporting requirements. While the exact dollar threshold at which domestic currency transactions are to be filed is left to the secretary's discretion, the purpose of the legislation is made clear in the House Committee on Banking and Currency's report from the time of passage: *"The deposit and withdrawal of large amounts of currency or its equivalent (monetary instruments) under unusual circumstances may betray a criminal activity."* [1] At issue is whether the current $10,000 threshold for domestic currency transaction reporting accurately reflects Congress' intent to identify large and unusual transactions or is an impermissible violation of the fourth amendment protected right to privacy.

Shortly after the BSA's passage, the courts heard constitutional challenges to the domestic currency transaction reporting requirements. In fact, a sufficiently high threshold implemented through regulation preserved the domestic currency transaction reporting provision through an early challenge to its constitutionality. In the 1974 case of *California Bankers Assn. v. Shultz*, the Supreme Court overturned the lower court's assertion that the Act's domestic currency transaction reporting requirements violated the fourth amendment. Among other concerns, the court had under its consideration an appeal from the Secretary of the Treasury, arguing that the courts ought to consider the implementing regulations when evaluating the constitutionality of

[1] H.R. Rep. No. 91-975 (1970).

the Act, rather than the ambiguous language of the act itself.[2] In Justice Lewis Powell's concurring opinion, he and Justice Blackmun added that while the statute conferred questionable authority to the Secretary, the $10,000 reporting threshold in the implementing regulations were high enough to allay fourth amendment privacy concerns. Powell wrote:

> *"[The Court] must analyze plaintiff's contentions in the context of the Act as narrowed by the regulations. From this perspective, I agree that the regulations do not constitute an impermissible infringement of any constitutional right. A significant extension of the regulations' reporting requirements, however, would pose substantial and difficult constitutional questions for me. In their full reach, the reports apparently authorized by the open-ended language of the Act touch upon intimate areas of an individual's personal affairs. Financial transactions can reveal much about a person's activities, associations, and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy."* [3]

It is our assertion that, due to the forces of inflation and the neglect of secretaries and administrators prior, we have reached the point to which Justice Powell alluded in his *California Bankers* opinion. Previous administrators could have, at any time, sensibly adjusted the threshold to keep it aligned with the original intent of the legislation but have placed usefulness to law enforcement over the financial privacy of American citizens at every turn. If the threshold is left unadjusted from its original value, FinCEN stands to lose the next constitutional challenge to its collection authority and any law enforcement value derived from it will be lost.

We are sympathetic to the legitimate law-enforcement needs that prompted Congress to pass the Bank Secrecy Act half a century ago. However, it is insufficient for FinCEN or the Secretary to simply assume more data is better. If there is a compelling reason to maintain or decrease reporting thresholds beyond the assumption that all bank records are inherently useful, Congress would like to review it. We understand that technology and the nature of criminal activity change over time, requiring banks and law enforcement to integrate new technologies and adapt to trends in criminal behavior. But FinCEN's own year in review report indicates that 84.2% of BSA reports in 2022 did not directly result in any sort of federal investigation, and that CTRs made up the bulk (20.6 million filings) of these reports. [4] In fact, much of the qualitative data that FinCEN has shared with Congress clearly favors suspicious activity reports (SARs) over CTRs. In the same year-end review, FinCEN reported that "many investigations originate wholly from SARs." [5] At the very least, the need to improve the quality of CTRs is clear. While FinCEN and Federal Law Enforcement may be able to leverage new technologies to filter out benign reports, this would reduce FinCEN's incentive to lower filing burdens on smaller institutions and would not address the privacy issues at the root of our concern.

That is why Congress included language in the Anti-Money Laundering Act of 2020 requiring FinCEN to conduct studies on the effectiveness of CTRs and Suspicious Activity

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[2] *See California Bankers Assn. v. Shultz*, 416 U.S. 21 (1974)
[3] *California Bankers,* 416 U.S. 21 (1974) (*See* Powell, L. concurring)
[4] *See* Year in Review for FY 2022, Financial Crimes Enforcement Network (2023, *attached*)
[5] *ibid,* p. 2

Reports (SARs) including whether the current dollar threshold for each requirement is conducive to effective law enforcement. Sections 6204 and 6205 of that Act, now Title LXII of Public Law 116-283, require FinCEN to review and report on the effectiveness of CTRs and SARs within a year of enactment.[6] To date, FinCEN has not provided Congress with these reports and has to our knowledge made no formal request for an extension to the deadline in statute. At the same time, FinCEN has made multiple adjustments to its maximum civil monetary penalty amount and has proposed the rule we write to you about today. It is not sufficient to update the committees of jurisdiction on your progress with these reports. The deadline given in the AML Act was not arbitrary. Congress intended to keep up momentum on a legislative initiative to modernize BSA filing and needed timely insights from FinCEN to inform that initiative. FinCEN's lack of timely reporting across multiple directors has stalled important legislative work raising CTR thresholds and indexing them to inflation, and FinCEN's actions in the intervening period have given us reason to believe that these delays are intentionally designed to confound this bipartisan reform effort.

That is why we ask you to fulfill your obligations under Section 6204 and 6205 *before* finalizing any renewal without change to the CTR filing threshold. While it is regrettable that Congress did not provide the necessary clarity in the Bank Secrecy Act fifty years ago, we stand ready to provide that clarity now. We only ask that you cooperate with Congressional efforts to reform and improve the tools you already use, and if you are so compelled, to make adjustments to the reporting threshold administratively, else we will have no choice but to proceed without the input we've requested from you.

Sincerely,

Barry Loudermilk
Member of Congress

John Rose
Member of Congress

Scott Fitzgerald
Member of Congress

Dan Meuser
Member of Congress

[6] Pub. L. No. 116-283, tit. LXII, 134 Stat. 3388, 4569-70 (2021)

Byron Donalds
Member of Congress