American Bankers Association
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Dear Sir or Madam:

The American Bankers Association (ABA)[1] appreciates the opportunity to comment on the Paperwork Reduction Act (PRA) request for approval of its updated "BSA/AML Quantity of Risk Summary Form" (Form), a form that serves as the foundation for the Bank Secrecy Act /Money Laundering Risk Assessment (MLR) program used by the Office of the Comptroller of the Currency (OCC) to identify Bank Secrecy Act (BSA), money laundering, and Office of Foreign Asset Control (OFAC) risks associated with banks' products, services, customers, and locations In addition, the OCC announces its intent to require that all institutions it supervises complete the form annually [2]

At the outset, ABA opposes the process used to extend the MLR, which had been a supervision tool applicable only to community banks and thrifts, to all institutions supervised by the OCC. In particular, we challenge the agency's "announcement" of this change through the PRA approval process.

Before OCC takes such a significant step, ABA believes that OCC must clearly demonstrate that the costs and burdens associated with the MLR do not outweigh its benefits. In 2013, the Comptroller of the Currency, Thomas J. Curry, testified that, "banks, thrifts, and other financial institutions have had to devote increasingly larger amounts of resources to maintain effective [BSA/AML] programs, and the OCC has likewise significantly increased its attention in this area."[3] ABA agrees that BSA/AML compliance consumes extensive and ever-increasing resources, but we are concerned that many requirements and mandates, including the MLR, are being used and expanded without sufficient validation of their usefulness or success. This is especially important when both the Department of the Treasury Office of Terrorism and Financial Intelligence and the Financial Crimes Enforcement Task Force have been undertaking parallel comprehensive reviews of the BSA system to ensure that it is meeting its goals to protect national interests and the international financial system.

Therefore, it is imperative that the OCC demonstrate how a program, especially one that consumes significant resources, effectively combats money laundering and terrorist financing.

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[1] The American Bankers Association is the voice of the nation's $16 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $12 trillion in deposits and extend more than $8 trillion in loans.
[2] https://www.federalregister.gov/articles/2016/01/04/2015-33023/agency-information-collection-activities-information-collection-extension-with-revision-comment
[3] Testimony of Thomas J. Curry, Comptroller of the Currency, before the Committee on Banking, Housing, & Urban Affairs of the U.S. Senate, March 7, 2013, p. 2

To do so, ABA strongly urges the OCC, at a minimum, to initiate an Administrative Procedure Act rulemaking to ensure it receives and considers a wide range of stakeholder comments – and conducts a rigorous analysis of costs and benefits – on the expansion of the MLR

In addition, ABA believes that the OCC's failure to make the updated Risk Summary Form (Form) publicly available undermines the PRA review process. The PRA was enacted to "ensure the greatest possible public benefit from and to maximize the utility of information collected by the Federal government, and to improve the quality and use of Federal information to strengthen decisionmaking, accountability, and openness in Government and society."[4] Moreover, one of the hallmarks of the AML process is transparency. The failure of the OCC to release the Form with its submission to the Office of Management and Budget (OMB) limits the public's ability to comment and undercuts effective regulatory oversight by OMB. Both seriously undermine transparency and accountability and increase the risk that important information will be left out of regulatory policy decisions.[5]

Before the OCC moves forward with its PRA request for approval of the updated Form and extension of the MLR to all OCC supervised institutions, ABA believes that several key issues must be addressed:

- First, the Form used to conduct the MLR should be made public so that affected financial institutions can evaluate the data collection process and comment.

- Second, although the OCC states that, "[t]he MLR System enhances the ability of examiners and bank management to identify and evaluate Bank Secrecy Act/Money Laundering and Office of Foreign Asset Control (OFAC) sanction risks associated with banks' products, services, customers, and locations,"[6] there is no evidence presented to validate how the tool is used to identify and quantify risks.

- Third, since the MLR is applied only to national banks and Federal thrifts, it is inconsistent with the interagency approach to uniform examinations for BSA compliance established in 2005.[7]

- Fourth, the OCC's burden estimates are inconsistent with the experience of community banks; they vastly understate the resources needed to complete the Form.

- Fifth, community banks currently subjected to the MLR report that it is both time consuming and burdensome with almost no offsetting benefit for the bank. There is nothing to indicate how or if the MLR is coordinated or connected with a bank's own risk assessment, suggesting it is a redundant exercise.

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[4] Paperwork Reduction Act of 1995, Public Law 104-13, Section 3501

[5] ABA has submitted a Freedom of Information Act request to obtain the Form, but a final determination on our FOIA request is still pending and is unlikely to be answered before the comment deadline. In addition, we made several informal requests for the Form, and the agency furnished a link to the Form approved in 2012, not the current Form.

[6] *Federal Register,* volume 81, Monday, January 4, 2016, p. 143

[7] In 2005, the agencies of the Federal Financial Institutions Examination Council introduced the Bank Secrecy Act/Anti-Money Laundering Examination Manual. Last updated in November 2014, the manual has been welcomed as a model of interagency cooperation and consistency for oversight.

- And finally, if the OCC intends to expand the use of the program to all national banks and federal thrifts, that expansion merits a full Notice of Proposed Rulemaking and not a simple PRA notice.

Failure to Make the Form Available to the Public

One of the most troubling aspects of this process is that, even though the OCC has been using the MLR for more than ten years to supervise community national banks, the Form has not been made available to interested stakeholders nor was it published for this PRA approval request. The MLR requires banks to respond in writing to identical questions, which OMB regulations expressly include as "information" subject to the PRA review process when it is sought from 10 or more persons or entities.[8] Nothing in the PRA suggests that Congress contemplated an exemption for information collections made pursuant to a banking agency's supervisory authority.[9]

Federal guidelines implementing the PRA require the submission of a draft information collection as part of a PRA approval request to increase the opportunity for public feedback. Guidelines issued by the Administrator of OMB's Office of Information and Regulatory Affairs state that the "PRA requires that the agency publish a 60-day notice in the *Federal Register* to obtain public comment on the proposed collection, prior to submitting the information collection to OMB. *At the time this notice is published, agencies must have at least a draft survey instrument available for the public to review.*"[10] (Emphasis added). Accordingly, the OCC should not withhold the form or survey instrument until a later date.

The OCCs decision to withhold publication of the MLR form undermines the PRA review process. As noted previously, the PRA was enacted to "ensure the greatest possible public benefit from and maximize the utility of information" collected by the Federal government[11] and to "improve the quality and use of Federal information to strengthen decisionmaking, accountability, and openness in Government and society."[12] Accordingly, OMB requires publication of the draft Form at the time of the first submission because such publication maximizes the opportunity for public comment as well as the agency and OMB's consideration of those comments.

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[8] OMB regulations state, "The PRA applies to collections of information using identical questions posed to, or reporting or recordkeeping requirements imposed on, 'ten or more persons.'" Cass R. Sunstein, Admin., Office of Information & Regulatory Affairs, Office of Management and Budget, Executive Office of the President, Information Collection Under the Paperwork Reduction Act 2 (Apr. 7, 2010), *available at* https://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/PRAPrimer_04072010.pdf (quoting 44 U.S.C. § 3502(3)(A)(i))).

[9] *See* 5 C.F.R. 1320.4 (listing collections of information to which OMB regulations do not apply). We note that the Bureau of Consumer Financial Protection must have concluded that there is no such exclusion. When it used its supervisory authority to gather information and transaction level data on the overdraft practices of institutions subject to its supervisory authority, the Bureau required only nine banks to respond to identical questions and data requests. Similarly, when the Bureau used its information gathering authority under Dodd-Frank Act section 1022, it ordered only nine institutions to respond to questions about debt collection and debt sale practices.

[10] John D. Graham, Admin., Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, Exec. Office of the President, Guidance On Agency Survey & Statistical Info. Collections 3 (Jan. 20, 2006) ("OMB Memorandum"), *available at* https://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/pmc_survey_guidance_2006.pdf

[11] Paperwork Reduction Act of 1995, Pub. L. No. 104-13 (codified at 44 U.S.C. § 3501(2)).

[12] *Id.* (codified at 44 U.S.C. § 3501(4)).

If, as here, the OCC withholds publication of the draft Form until after the first round of comments is received, the OCC will limit the public's and OMB's ability to assist the OCC in producing a Form that will yield information of sufficient quality for its intended purpose. As OMB notes in its guidance, the PRA review process is intended, in part, to ensure that "the proposed collection of information will result in information that will be collected, maintained, and used in a way consistent with the OMB and agency information quality guidelines, or they should not propose to collect the information."[13]

Therefore, ABA urges the OCC to re-submit its PRA request for approval to OMB, submit a draft Form with its information collection request, and re-start the comment deadline to provide the public with the full 60-day comment period afforded by the first round of the PRA review process.

The Benefits of the MLR Should Be Validated

There is a growing concern that the many requirements for BSA compliance may not be the most efficient or effective use of resources available. As recognized by the Director of FinCEN, "I know your institutions are spending a great deal of time and money on compliance programs. I think it is worth it. But we need to pay attention and ask ourselves if the money you are spending is being spent in the right ways."[14] ABA questions whether the MLR assessment satisfies this expectation or attains the effectiveness that the OCC contends that it does. Therefore, before proceeding with continued or expanded use of the MLR, ABA believes it is extremely important for the OCC to explain how the MLR assessment is used, how it is effective, how it supports the examination process, why an independent tool used by only one agency is necessary, and what unique benefits it provides to assist examiners and banks.

The OCC asserts, "The MLR system enhances the ability of examiners and bank management to identify and evaluate Bank Secrecy Act/Money Laundering and Office of Foreign Asset Control (OFAC) sanctions risks associated with banks' products, services, customers, and locations."[15] However, the application of the MLR system, which imposes a one-size-fits-all risk analysis on national banks, is inconsistent with the *FFIEC BSA/AML Examination Manual*. The manual clearly states that, "There are many effective methods and formats used in completing a BSA/AML risk assessment; *therefore, examiners should not advocate a particular method or format. Bank management should decide the appropriate method or format, based on the bank's particular risk profile."* [16]

As recommended by the *BSA/AML Examination Manual*, most banks have developed their own methodology to identify and assess risks. Bankers who are familiar with the process report that completion of the Form is solely for the convenience of the examiners and that it does not adequately apply to their own circumstances. Instead, bankers use their own risk assessments, *as encouraged by the interagency guidelines*, to identify and manage BSA risk. Bankers report that the only reason they complete the Form is because it is required by the agency. Bankers report that it is not particularly helpful for identifying risks, because the form uses elements and parameters that do not mesh with

[13] OMB MEMORANDUM, *supra* note 2, at 14.

[14] Remarks Of Jennifer Shasky Calvery, Director of FinCEN, to the American Bankers Association/American Bar Association Money Laundering Enforcement Conference, November 13, 2012, Washington, DC

[15] *Federal Register*, volume 81, Monday, January 4, 2016, p. 143

[16] *FFIEC BSA/AML Examination Manual,* 11/17/2014, p. 18

bank procedures and, as discussed more fully below, uses a timeline inconsistent with the calendar year followed by most banks. Therefore, it is singularly inappropriate to suggest it benefits banks.

The MLR is Inconsistent with the *FFIEC BSA/AML Exam Manual*

As ABA has noted on several occasions, the use of the MLR system is inconsistent with the overall premise and foundation underlying the adoption and use of the interagency *BSA/AML Examination Manual.* When it was introduced on June 30, 2005, the OCC issued a Transmittal Letter to introduce both the manual and the interagency collaboration that produced it. Along with the other agencies, the OCC stated that, "The Manual is the result of a collaborative effort of the federal banking agencies and the Financial Crimes Enforcement Network (FinCEN), *to ensure consistency in BSA/AML examinations*."[17] (Emphasis added). However, the use of a form to conduct examinations that is by only one agency belies this intention that there be consistent approaches to the examination process.

When the first Manual was introduced, it was seen as a model of interagency cooperation. One of the goals at that time was to ensure that all agencies approached BSA compliance consistently. As the manual was introduced to bankers through a series of training sessions across the United States, examiners from different agencies also were trained simultaneously to ensure that all examiners from the different supervisory agencies heard the same message. In fact, the current Comptroller testified in 2013 that, "[t]he publication of the Interagency BSA/AML Examination Manual (Manual) in 2005 effectively standardized examination procedures for the federal banking agencies."

If one agency departs from this approach, it undermines consistency. We note that in 2012 the OCC was criticized during a Senate Hearing for approaching BSA differently from the other agencies by conducting BSA evaluations as part of the compliance examination rather than as part of the safety-and-soundness exam.[18] As a result, the OCC restructured its approach to BSA evaluations to be consistent with the other agencies.[19] In light of this experience it seems inappropriate for the agency to stray again from the path of uniformity by requiring national banks and federal thrifts to use the MLR.

Moreover, the effort undertaken by bankers compelled to use the MLR applies a quantification process that is designed to permit comparison between banks, even though the FFIEC manual specifically states that, "Examiners should exercise caution if comparing information between banks…."[20] A quantification of different categories also fails to identify critical elements of the process, especially the analysis of mitigating factors that have been applied to address risks.[21] And, it imposes a quantification on what is intended to be a qualitative analysis.

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[17] http://www.occ.gov/news-issuances/news-releases/2005/pub-other-state-2005-64a.pdf

[18] Senate Permanent Subcommittee on Investigations hearing on July 17, 2012, http://www.hsgac.senate.gov/subcommittees/investigations/hearings/us-vulnerabilities-to-money-laundering-drugsand-terrorist-financing-hsbc-case-history

[19] OCC Bulletin 2012-30, *Consideration of Findings in Uniform Rating and Risk Assessment Systems*, issued September 28, 2012 http://www.occ.gov/news-issuances/bulletins/2012/bulletin-2012-30.html

[20] *FFIEC BSA/AML Examination Manual*, 11/17/2014, p. 25.

[21] As stated in the manual at p. 25, "…the examiner should assess whether the controls of the bank's BSA/AML program are appropriate to manage and mitigate its BSA/AML risks."

Limited Resources Must be Used Effectively

In the current environment, and as noted by the Comptroller in Congressional testimony, the need for effective use of resources is critical.[22] One of the key concerns the Comptroller raised in that testimony was the danger presented when resources for compliance are reduced inappropriately. ABA is concerned that re-allocation of resources to the MLR may aggravate instead of alleviate these concerns.

Community banks that have been subjected to the MLR for several years uniformly report that the Form is extremely time-consuming to complete. Providing the information in the format required is a labor-intensive and manual process and one that does not add value to the exam process because the information and data are available to examiners, albeit in a different form. Community banks also express frustration at being asked for much information that is irrelevant to their own operations but must be validated and completed nevertheless. For example, one large bank reports that it takes between five and six months annually to update its risk assessment process at a cost of $150,000 to $200,000 when based on the number of employees involved in the process; based on the bank's comments, use of the MLR would only add to this expense since they already have a comprehensive program in place that has been approved by examiners on more than one occasion. Application of the MLR would only add to the costs and resources consumed by AML compliance efforts without any commensurate benefit.

Community banks also report they are unable to rely on the MLR for their own risk assessment. If, as the OCC suggests, the MLR is a useful tool for identifying risk, then it should be unnecessary for any national bank or thrift to conduct an independent risk assessment. However, the MLR is an inadequate risk assessment. In fact it *omits* many of the factors that impact a bank's BSA/AML risk such as implementation of controls, staffing, audit processes, manual processes or software systems used, whether the institution is located in a HIDTA or HIFCA, and a myriad of other factors. The MLR is simply a quantitative summary that does not provide context or reflect the qualitative elements that are vital for an accurate assessment risk. Given the need for a complete and accurate picture of an institution's BSA risk, the MLR simply becomes a time-consuming exercise with little or no benefit for the bank as it documents its BSA risk assessment.

The MLR Imposes a Rigid Reporting Standard that Is at Variance with its Utility

Contrary to a customized risk-based analysis that focuses on the unique attributes of individual financial institutions and the appropriate controls used to mitigate those risks, the MLR reverts to a one-size fits all approach to analysis.

One problem with the MLR is that it uses categories for products that do not mesh with the banks' actual products and services. As a result, community banks report that it takes considerable time and effort and a labor-intensive process to adjust the bank information to fit within the parameters imposed by the Form. This disparity also handicaps the utility of the Form for the bank's risk assessment.

[22] Testimony Of Thomas J. Curry, Comptroller Of The Currency, before the Committee On Banking, Housing, & Urban Affairs Of The U.S. Senate, March 7, 2013 http://www.occ.treas.gov/news-issuances/congressional-testimony/2013/pub-test-2013-41-written.pdf

A second problem with the MLR is the timeframe used to report information. The schedule for the MLR is inconsistent with most bank operations, since MLR data are compiled as of September 30 while most, if not all, banks operate on a calendar year. As a result of this inconsistency, community banks are unable to pull data easily, adding to the burden, since it requires manual adjustments of information. It also means that the information compiled is incompatible with the bank's own risk assessment.[23]

A third problem with the MLR exists when the OCC develops new categories of activity that the bank must report that were not reported in prior years or that apply different parameters and definitions from those used previously. Over time banks have developed procedures and reporting routines customized to complete the MLR, and the necessary data are accumulated during the year. When the MLR instructions are released in the summer for the report due less than 90 days later, it is not unusual for the OCC to include new or revised categories of information for banks to report with no prior notice. Not only does this present additional burden, it highlights the fact that data required for the Form do not exist in the normal course of business and must be customized and manually collated.

The Burden Estimates are Inconsistent with Community Bank Experience

According to the January 4 *Federal Register* notice there are 1,450 national community banks, which take a total of 8,700 hours annually to complete the MLR. Therefore, the average time that a community bank needs to complete the MLR would be six hours according to the OCC filing. This average is unchanged from prior estimates.[24] The fact that the OCC has failed to reassess or re-evaluate the time needed to complete the form calls into question whether the agency has undertaken a proper evaluation of the burden. Certainly, comments from ABA members that must use the form suggest that the time estimated by the OCC grossly under-estimates what banks must do to complete the MLR.

Because it is a labor-intensive, manual process, ABA has heard anecdotal evidence from members that suggest it easily can take two weeks for one employee to compile the necessary information. Even conservatively, that is far greater than the OCC estimate. ABA believes that, at a bare minimum, a more accurate assessment of the time required would be ten to twelve times what the OCC estimates for community banks.

Not only is the Form time-consuming to complete, community banks also report the OCC often contacts them with follow-up questions on the data submitted, such as why certain activity changed from one year to the next. The time needed to research and respond to these questions also increases the burden, particularly since the OCC's own analysts easily can be misled by the risk profile of a bank given how results are reported.

Also contributing to the confusion are changes in the reporting requirements that OCC has introduced in successive reporting years without seeking OMB clearance. ABA believes that OCC

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[23] OCC examiners have explained to community banks that the timing for the MLR data is for the convenience of the examination process only, further undermining the OCC's assertion that the MLR is useful for individual banks.

[24] When the OCC renewed the MLR in 2010, it had the same burden estimate despite the fact that the data collected have changed in the past three years. *Federal Register,* Vol. 75, No. 11, Tuesday, January 19, 2010, p. 2929. A similar average was presented in 2013, again despite changes to the form and the format.

has failed to satisfy its obligations to maintain the Form as approved, which further fails to satisfy the Congressional mandate of the Paperwork Reduction Act.

If the OCC expands usage of the MLR to large and mid-size national banks, the estimates provided in the PRA notice for large and mid-size banks are also suspect. For large national banks, the OCC estimates that it would take only 80 hours annually to comply.[25] Although larger banks can rely on automated systems to a greater extent and have larger staffs to comply with these requirements, the need to coordinate and adjust system reports to complete the Form is likely to exceed by far what the OCC estimates. ABA believes that the estimates grossly underestimate the burden imposed by the information collection. For mid-size banks, the estimates are even more absurd, since the agency estimates only 25 hours on average would be needed to complete the form.

In no case – not for community, large or mid-size institutions – does the OCC provide anything to substantiate the estimated burdens, leading ABA to question whether there is any basis in fact to support them. ABA believes far more research is needed to validate the burden estimates. We understand that these data are difficult to obtain, but that difficulty does not excuse its absence from an information collection estimate. Moreover, it should be remembered that the responsibility for calculating burden lies with the regulator, not with the regulated.

The Proposal Should Use a Notice of Proposed Rulemaking

Currently, the Financial Action Task Force (FATF) is undertaking a comprehensive review of the risk assessment process used by different countries, as it has been for several years. This underscores the importance of risk-assessment methodologies both here and abroad. Given the current environment, ABA believes that the OCC would be far better served to ensure full and adequate comment on the proposed expansion of the use of the MLR to all national banks.

To ensure that it is given the attention it merits, ABA believes the full MLR document should be published and made available, and that the proposed expansion be published in the *Federal Register* as a full notice of proposed rulemaking. That will ensure that it does not slip by unnoticed, an important measure of transparency and accountability that the law intends.

Conclusion

ABA welcomes tools and resources that the agencies provide to assist banks with their compliance needs. But as the *FFIEC BSA/AML Examination Manual* notes and the robust vendor market illustrates, there are many ways to evaluate BSA risk successfully. Consequently, bank use of agency tools should be voluntary and not mandatory. With the many demands on resources and particularly the resources needed to comply with BSA requirements, it is important to validate the utility of any tools, to consider carefully the costs and benefits whenever these tools are mandated, and to ensure that all regulators take a consistent approach to compliance.

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[25] This is significant less than the 100 hours estimated by the agency in 2013, although there is nothing to explain how it concluded that there would be a significant burden reduction for large institutions. ABA seriously questions the validity of the assertion that the burden would be reduced when all evidence points to the contrary.

As we stated in 2013, ABA firmly believes that use of the Form, which departs from the interagency coordination of BSA compliance, should be discontinued. It does not, as the agency asserts, provide any useful benefit for the industry but is a make-work exercise that homogenizes information for examiners. It is inconsistent with the interagency approach that encourages each bank to develop its own risk profile based on its own unique circumstances. And, while there are no perceived benefits to the use of the MLR for the industry, there are significant costs to recalibrate information to fit the OCC parameters, regardless of bank operations.

In conclusion, ABA believes that the MLR represents the delta that the current Director of FinCEN has identified as the type of regulation that does not support efforts to combat money laundering or terrorist financing.

Sincerely,

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