February 22, 2021

Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, D.C. 20429

Submitted via email: comments@fdic.gov

Re: **Exemptions to Suspicious Activity Report Requirements**
RIN 3064-AF56

Dear Mr. Feldman:

The purpose of this letter is to express opposition to a proposed rule that would enable the Federal Deposit Insurance Corporation (FDIC) to exempt FDIC-supervised financial institutions from longstanding requirements related to the filing of Suspicious Activity Reports (SARs).[1] The FDIC has never before proposed authorizing itself to exempt individual or whole categories of financial institutions from their SAR obligations. The proposed rule provides no persuasive justification for such authority and no workable standards or process. In addition, the proposed rule fails to acknowledge or take into account new statutory provisions in the Anti-Money Laundering Act (AML Act) directing the FDIC, as well as the Treasury Department, Financial Crimes Enforcement Network (FinCEN), and other federal financial regulators, to address SAR and AML technology issues in other ways.[2]

As currently drafted, the proposed rule is subject to legal challenge as arbitrary, capricious, and unsupported by substantial evidence. This letter respectfully requests that the FDIC withdraw the proposed rule and re-evaluate it in light of the AML Act's new provisions or, alternatively, authorize an additional 90 days for public comment.

A. Background

From 1999 to 2014, I worked for the U.S. Senate Permanent Subcommittee on Investigations on behalf of Senator Carl Levin (D-MI), including over a decade as his subcommittee staff director and chief counsel. During that period, the Subcommittee conducted a number of bipartisan investigations into money laundering and related misconduct at a variety of financial institutions.[3] As part of that work, I reviewed multiple SARs and used those reports

[1] "Exemptions to Suspicious Activity Report Requirements," FDIC, 86 Fed. Reg. 6580 (1-22-2021).
[2] The AML Act was enacted into law as Division F of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, P.L. 116-283 (1-1-2021).
[3] 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); "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); "Private Banking and Money Laundering: A Case Study of Opportunities and Vulnerabilities," S.Hrg. 106-428 (1-9&10-1999).

to investigate and analyze misconduct by both financial institutions and their clients. Over the years, I also gained expertise related to the filing of SARs by financial institutions and the use of SARs by law enforcement.

B. Unfettered Exemptive Authority

The FDIC supervises "State nonmember insured banks," "foreign banks having an insured branch," and "State savings associations," as those terms are defined in 12 U.S.C. § 1813(q)(2).[4] All are required to file SARs under 12 C.F.R. part 353 and § 1020.320(a)(2), regulations issued by the FDIC.[5] The FDIC SAR requirements have an explicit statutory basis under a longstanding law authorizing the U.S. Treasury Secretary to "require any financial institution, and any director, officer, employee, or agent of any financial institution, to report any suspicious transaction relevant to a possible violation of law or regulation."[6]

The proposed rule, for the first time, seeks to authorize the FDIC to exempt a specific financial institution or whole categories of financial institutions from their legal obligations to file SARs. The proposed implementing provision states: "The FDIC may exempt any FDIC-supervised institution from the requirements of this section."[7] The explanatory text states that the rule "would permit the FDIC to exempt a supervised institution from the requirements, in full or in part."[8] The proposal explains further that the provision "would permit the FDIC to exempt any FDIC-supervised institution from the requirements of 12 CFR 353.3."[9]

The proposed exemptive authority contains no limitations or caveats; it is all-encompassing. The plain language would authorize the FDIC to exempt any or all of the financial institutions it supervises from complying with any or all of the FDIC's SAR requirements. On its face, the proposal would enable the FDIC to exempt financial institutions from filing any SARs at all, despite the lack of statutory authority to do so. While the FDIC may not intend the proposed rule to go that far, there is no language precluding that outcome.

Since the FDIC currently supervises 3,270 institutions,[10] the proposal would give the FDIC essentially unfettered authority to exempt thousands of U.S.-based financial institutions from some or all of their existing SAR requirements.

C. No Persuasive Justification

The Administrative Procedure Act ("APA"), which governs the federal rulemaking process and defines the scope of judicial review of new regulations, "requires [courts] to hold unlawful agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in

---

[4] Proposed rule at 6584 and n.18.
[5] Id. at 6581 and n.7.
[6] 31 U.S.C. § 5318(g).
[7] Proposed rule at 6585-6586 (in proposed Sec. 353.3(d)(3)).
[8] Id. at 6582.
[9] Id.
[10] Id. at 6584.

accordance with law' or that is 'unsupported by substantial evidence.'"[11] The Supreme Court has ruled that, to meet the APA's standards, an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[12] As currently drafted, however, the proposed rule fails to provide "relevant data," a "satisfactory explanation," or the "substantial evidence" required to justify its provisions.

The proposed rule acknowledges that for more than 30 years the FDIC has required financial institutions under its supervision to report suspected violations of law to federal law enforcement.[13] It acknowledges that, since 1996, the FDIC has required financial institutions to report those violations by filing SARs in conformance with federal law and regulations promulgated by itself and FinCEN.[14] In all that time, the FDIC never sought authority to exempt any financial institution from any SAR requirement. Yet now, the FDIC seeks to award itself sweeping authority to exempt potentially thousands of financial institutions from the FDIC's existing SAR requirements, a dramatic shift in SAR authority that is not presaged by any congressional direction or founded upon any explicit statutory authority.

Lack of Relevant Data. The FDIC's proposed rule fails to offer any data demonstrating why the FDIC should deviate from more than 30 years of operation and begin offering SAR exemptions. Indeed, it fails to provide some of the basic data needed to evaluate the scope, cost, and impact of the proposed rule, such as the total number of SARs filed by the financial institutions supervised by the FDIC, how those SARs are broken down by the three categories of financial institutions supervised by the FDIC, and the categories of financial institutions that may request SAR exemptions. Instead, the proposed rule admits: "The FDIC does not have the ability to forecast the number of requests for exemptions that FDIC-supervised institutions will file as a result of this rule, or the number of requests that the FDIC will grant."[15]

The proposed rule does provide some cost data, while noting that the figures are uncertain, and both costs and cost savings are likely to be minimal. The proposal explains:

> "The proposed rule is likely to pose some increase in compliance costs associated with submitting an exemption request to the FDIC, however the FDIC believes that the costs are likely to be small. The FDIC expects this proposed rule will result in cost savings for FDIC-supervised institutions that obtain exemptions from SAR filing requirements. However, the cost savings are projected to be relatively modest. For example, using the methodology for calculating the cost associated with filing SARs that FinCEN published in May 2020, the FDIC estimates that FDIC-supervised institutions incurred roughly $3.8 million in costs in the second quarter of 2020 related to reviewing alerts, and drafting, writing, submitting, and storing SAR filings and documentation, which amounts to annual estimated costs of $15.2 million for FDIC-supervised institutions in aggregate. …

---

[11] *Susquehanna International Group v. SEC*, 866 F.3d 442, 446 (D.C. Cir. 2017) (citing 5 U.S.C. § 706(2)(A), (E); *NetCoalition v. SEC*, 615 F.3d 525, 532 (D.C. Cir. 2010)).
[12] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).
[13] Proposed rule at 6581 and n. 1 and 2.
[14] Id. at 6581 and n. 5 and 6.
[15] Id. at 6583.

> The annualized estimated recordkeeping, reporting, and disclosure costs of filing SARs in the second quarter of 2020 do not represent more than 1.9 percent of annual non-interest expense for any FDIC-supervised institution. … Therefore, the economic benefit of this proposed rule on FDIC-supervised institutions is likely to be relatively small."[16]

In addition, shortly after writing that it "does not have the ability to forecast the number of requests for exemptions" in response to the proposed rule, the FDIC nevertheless predicts that only three financial institutions per year would request a SAR exemption.[17] Its explanation for this forecast is as follows:

> "[T]he FDIC assumed that the FDIC-supervised institutions that file the most SARs will be the most likely to request exemptions from SAR filing requirements. There are ten FDIC-supervised institutions that filed 1,000 or more SARs in the second quarter of 2020. The FDIC expects roughly one-third of those institutions to request an exemption per year, so the FDIC expects 3 annual respondents to this information collection."[18]

The FDIC does not explain why it predicts that one-third rather than one-hundred percent of the ten largest SAR filers would request a SAR exemption. Nor does it explain what would prevent all FDIC-supervised institutions from seeking a SAR exemption. The prediction that only 3 out of 3,270 financial institutions would avail themselves of the new exemptive authority seems to have no foundation in data or research.

Technology and Innovation as a Failed Explanation. In addition to insufficient data, the proposed rule fails to "articulate a satisfactory explanation for its action" as required by the APA. It currently offers only one justification for the rule, that SAR exemptions will be needed by "FDIC-supervised institutions that develop innovative solutions to meet BSA requirements more efficiently and effectively."[19] The proposed rule does not explain why or how. Instead, it offers the following paragraphs:

> "As financial technology and innovation continue to develop in the area of monitoring and reporting financial crime and terrorist financing, the FDIC will need the express regulatory flexibility to grant exemptive relief when appropriate in this area.
>
> Moreover, in 2018, the FDIC, the Board of Governors of the Federal Reserve System, the National Credit Union Administration, the Office of the Comptroller of the Currency, and FinCEN issued a statement encouraging banks to take innovative approaches to meet their BSA/Anti-Money Laundering compliance obligations. The statement explained that banks are encouraged to consider, evaluate, and where appropriate, responsibly implement innovative approaches in this area. Today, innovative approaches and technological developments in the areas of SAR monitoring, investigation, and filing may involve, among other things: (i) Automated form population using natural language processing, transaction data, and customer due diligence information; (ii) automated or

---

[16] Id.
[17] Id. at 6584 ("Estimated Number of Annual Respondents: 3.").
[18] Id.
[19] Id. at 6581.

limited investigation processes depending on the complexity and risk of a particular transaction and appropriate safeguards; and (iii) enhanced monitoring processes using more and better data, optical scanning, artificial intelligence, or machine learning capabilities. Requests for exemptive relief pertaining to innovation or other matters may involve, among other things, expanded investigations and SAR timing issues, SAR disclosures and sharing, continued SAR filings for ongoing activity, SAR outsourcing of responsibilities and practices, the role of agents of FDIC-supervised institutions, the use of shared utilities and shared data, and the use and sharing of de-identified data (commonly referred to as anonymized data). The FDIC expects that new technologies will continue to prompt additional innovative approaches related to suspicious activity monitoring and SAR filing."[20]

This portion of the proposed rule, replete with SAR jargon, is difficult to understand. It fails to articulate exactly how or why SAR-related "innovative approaches and technological developments" necessitate SAR exemptions. It does not lay out how SAR requirements impede innovation, especially since SAR-related innovations seem to be proliferating. The proposal fails, for example, to convey exactly how "exemptive relief" would prompt "new technologies" or alleviate any particular SAR innovation or technology problem.

More striking yet is that the proposed implementing language never once mentions fostering innovation or testing new technology as a factor to consider when deciding whether to grant a SAR exemption or when fashioning a specific form of exemptive relief. If the proposed exemptive authority is intended to address situations where a financial institution needs a temporary SAR exemption to test a new SAR technology, that situation is never discussed in the implementing provisions. To the contrary, the proposed implementing section uses the broadest possible language to provide the FDIC with unfettered authority to exempt any and all financial institutions under its supervision from any and all aspects of their SAR obligations.

History of AML and SAR Deficiencies. In addition to failing to articulate a persuasive justification for granting SAR exemptions, the proposed rule fails to explain why SAR exemptions are justified in the context of ongoing U.S. financial institution involvement with money laundering and other misconduct, including some banks under FDIC supervision. For years, the media has reported scandals and U.S. enforcement actions involving federally insured banks.[21] Despite concerted effort, the FDIC has been unable to prevent serious AML

---

[20] Id. at 6582 (footnotes omitted).

[21] See, e.g., In re Apple Bank, New York, NY, FDIC, No. FDIC-19-0201k, Order to Pay (12-16-2020) (imposing a civil fine for AML deficiencies and a failure to comply with a 2015 AML consent order), https://d6jxgaftxvagq.cloudfront.net/Uploads/l/a/v/applebankfdicordertopay_404717.pdf; In re California Pacific Bank, San Francisco, CA, FDIC, No. FDIC-19-0079k, Notice of Assessment of Civil Money Penalty, Findings of Fact and Conclusions of Law, Order to Pay, and Notice of Hearing (10-17-2019) (imposing a civil fine for AML deficiencies and a failure to comply with a 2016 FDIC AML consent order, including the failure to file SARs), https://www.bankersonline.com/sites/default/files/penalty-files/19-0079k%20Notice.pdf; In re Pacific City Bank, Los Angeles, CA, FDIC-California Department of Business Oversight, No. FDIC-19-0025b, Consent Order (4-30-2019), (requiring corrective actions to remedy AML deficiencies, including a failure to file SARs), https://orders.fdic.gov/s/press-release-orders?prYear=2019&prDate=31&prMonth=5; In re Alma Bank, Astoria, NY, FDIC, No. FDIC-17-0133k, Order to Pay Civil Money Penalty (4-4-2019) (imposing a civil fine for AML deficiencies), https://www.bankersonline.com/sites/default/files/penalty-files/17-0133k.pdf; In re Alma Bank, Astoria, NY, New York State Department of Financial Services, Order Issued Upon Consent Pursuant to Section 39

deficiencies, money laundering, and other wrongdoing from affecting financial institutions operating in the United States. Yet the proposed rule fails to acknowledge or grapple with that history or offer any explanation why, in light of that history, the FDIC should award itself sweeping new authority to exempt some or all of the financial institutions it supervises from some or all of their SAR obligations.

Undermining Law Enforcement and National Security. The proposed rule also fails to acknowledge the important role that SARs play in U.S. law enforcement and national security or analyze how SAR exemptions might affect SAR usefulness or law enforcement effectiveness. Just a few months ago, the U.S. Government Accountability Office (GAO) issued a lengthy report on SARs and other filings, such as Currency Transaction Reports, required by the Bank Secrecy Act (BSA). GAO determined that "[m]any federal, state, and local law enforcement agencies use [BSA] reports for investigations" and that a survey of more than 5,000 employees at six federal law enforcement agencies "found that more than 72 percent of their personnel reported using BSA reports to investigate money laundering or other crimes, such as drug trafficking, fraud, and terrorism."[22] In addition, GAO found that bank costs for complying with U.S. AML requirements – costs not isolated to filing SARs, but encompassing the entire panoply of AML requirements – comprised only "about 2 percent of the operating expenses" at smaller banks and "less than 1 percent" at the larger banks reviewed by the study.[23]

Despite that recent, relevant data, the proposed rule does not mention the GAO report. Nor does it examine other SAR-related research or offer its own data analysis of such matters as how many SARs filed by FDIC-supervised financial institutions would be eliminated, altered, or delayed under the proposed rule; what types of SAR exemptions are most likely; or what negative impacts SAR exemptions might have on U.S. law enforcement and national security.

Still another concern not addressed in the proposed rule is what happens once a financial institution is known to be exempt from some or all SAR requirements. The proposed rule does not address, for example, whether criminals might seek out financial institutions with reduced SAR requirements, thereby increasing U.S. law enforcement and national security concerns. The proposal also does not discuss what steps could be taken by the FDIC, affected financial institutions, law enforcement, or others to prevent those types of negative outcomes. In fact, as currently drafted, the proposed rule does not indicate the extent to which the FDIC has consulted with the Department of Justice or other law enforcement, national security, or intelligence agencies about its approach, including possible unintended consequences. The FDIC's failure to present and discuss the law enforcement and national security implications of its granting SAR exemptions is an unacceptable omission from the proposed rule.

---

of the New York Banking Law (6-3-2015) (same), https://www.dfs.ny.gov/system/files/documents/2020/04/ea150603_alma_bank.pdf; In re Banamex USA, Century City, CA, FDIC-California Department of Business Oversight, No. FDIC-14-0259k, Joint Order to Pay Civil Money Penalty (7-22-2015) (imposing a civil fine for AML deficiencies, including a failure to file SARs), https://www.fdic.gov/news/press-releases/2015/banamex.pdf.

[22] "Anti-Money Laundering: Opportunities Exist to Increase Law Enforcement Use of Bank Secrecy Act Reports, and Banks' Costs to Comply with the Act Varied," GAO, No. GAO-20-574, "GAO Highlights" at 1 (9/2020), https://www.gao.gov/products/GAO-20-574.

[23] Id., "GAO Highlights," at 2.

Under the APA, the proposed rule's lack of supporting data, rational explanation of why the rule makes sense, and how the proposal can be managed to avoid undermining U.S. law enforcement and national security objectives leave it vulnerable to legal challenge as arbitrary, capricious, and unsupported by substantial evidence.

D. Insufficient Standards, Criteria, and Process

In addition to poor justification, the proposed rule suffers from a lack of meaningful standards, criteria, and procedures establishing how and when a SAR exemption might be granted. The absence of needed standards, criteria, and procedures renders the proposed rule unworkable and, again, susceptible to legal challenge.

Process Questions. One set of issues involves the proposed rule's failure to detail the process that would be used to grant a SAR exemption. The proposal indicates that a financial institution would initiate the process by submitting "a written request" to the FDIC.[24] The proposed rule fails, however, to provide a sample application form, specify the information to be supplied by the financial institution, or identify where the application should be submitted within the FDIC. It also fails to identify which FDIC office or officials would be responsible for reviewing and making final determinations on the applications as well as any extension requests or revocations, saying only that the "FDIC" will make the decisions. The FDIC is a large, complex agency with over 5,700 employees;[25] its regulations need to provide more procedural specificity than now appears in the proposal.

Exemption Standards. A second set of issues centers on the proposal's failure to provide meaningful standards or criteria to guide FDIC decisionmaking on whether and when to grant a specific SAR exemption. The proposed implementing section provides only the most general guidance to the unnamed FDIC office and officials reviewing applications for SAR exemptions:

> "Upon receiving a written request from an FDIC-supervised institution, the FDIC will determine whether the exemption is consistent with safe and sound banking and may consider other appropriate factors. The FDIC also would seek FinCEN's determination whether the exemption is consistent with the purposes of the Bank Secrecy Act, if applicable."[26]

Neither the proposed rule nor the proposed implementing section contains any further guidance.[27] Neither provides guidance, for example, on how to determine whether a SAR exemption request is "consistent with safe and sound banking." If an FDIC official knows the requesting financial institution has a record of AML violations or deficiencies or has outstanding AML supervisory concerns, the proposal does not indicate what the official should do with that information. Should that history or those outstanding concerns preclude a SAR exemption? The

[24] Proposed rule at 6585 (in proposed Section 353.3(d)(3)).
[25] FDIC Statistics At A Glance, (9-30-2020), https://www.fdic.gov/bank/statistical/stats/2020sep/fdic.pdf.
[26] Proposed rule at 6585-6586 (in proposed Section 353.3(d)(3)).
[27] The explanatory text in the proposed rule adds nothing more; it simply repeats the same wording: "[T]he FDIC in evaluating an exemption request would determine whether the request is consistent with safe and sound banking, and may consider other appropriate factors." Id. at 6582.

proposal does not say. The proposal similarly fails to indicate what to do if a financial institution has a lower management score in its CAMEL rating due to repeated AML deficiencies or mismanagement. Lower CAMEL ratings are usually seen as raising safety and soundness concerns, but the proposed rule offers no guidance on how a lower CAMEL score should affect a SAR exemption request.

The proposed implementing section also fails to provide any useful guidance related to the "other appropriate factors" FDIC officials "may consider" when reviewing a request for a SAR exemption. The explanatory text of the proposed rule identifies only one such factor: whether the financial institution is seeking to develop, test, or implement a SAR-related technology or innovation.[28] The proposed implementing section, however, does not mention that factor or, indeed, provide any examples at all of "appropriate factors" to be considered by FDIC officials reviewing SAR exemption applications. Instead, the proposal leaves that very general phrase completely open to interpretation.

The end result is that decisions on whether to grant SAR exemptions are essentially left to the discretion of individual, unspecified FDIC officials. It is also worth noting that the proposed implementing section provides no process for an internal supervisory review or audit of the SAR exemption decisions being made by those unspecified officials, which means there is no agency process to encourage consistent decisionmaking across the country.

The proposed implementing section does require FDIC officials to seek "FinCEN's determination whether the exemption is consistent with the purposes" of the Bank Secrecy Act.[29] But if FDIC officials are to be guided primarily or perhaps solely by FinCEN's determinations, the question arises as to why the Federal Reserve needs its own exemptive authority in addition to the exemptive authority that already resides with FinCEN. The proposed rule offers no answer to that question.

Specific Exemptive Relief. A related issue is the failure of the proposed rule to provide guidance on how the FDIC, once its officials determine to grant a SAR exemption, should go about fashioning specific exemptive relief for the requesting financial institution. The proposed implementing section provides only this broad statement:

> "An exemption shall be applicable only as expressly stated in the exemption, may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to transactions or classes of transactions."[30]

The provision makes clear that FDIC officials have substantial discretion when drafting SAR exemptive relief, but it offers no guidance at all on the menu of available relief measures or which measures should be used in which circumstances. Given the fact that the FDIC has never before issued a SAR exemption and the proposed implementing section lays out no internal audit process, the failure to delineate the available types of exemptive relief and the criteria for selecting among them threatens to produce inconsistent and even chaotic results.

---

[28] Id.
[29] Id. at 6585-6586 (in proposed Section 353.3(d)(3)).
[30] Id. at 6586 (in proposed Section 353.3(d)(3)).

Extensions and Revocations. The same is true for proposed provisions authorizing the FDIC to extend or revoke SAR exemptions, once granted. The proposed implementing section provides only the following:

> "The FDIC may extend the period of time or may revoke an exemption granted under paragraph (d)(3) of this section. Exemptions may be revoked at the sole discretion of the FDIC. The FDIC will provide written notice to the FDIC-supervised institution of the FDIC's intention to revoke an exemption. The notice will include the basis for the revocation and will provide an opportunity for the FDIC-supervised institution to submit a response to the FDIC. The FDIC will consider the response prior to deciding whether to revoke an exemption, and will notify the FDIC-supervised institution of the FDIC's final decision to revoke an exemption in writing."[31]

The proposal provides unspecified FDIC officials with absolutely no standards or criteria for determining when to extend a SAR exemption granted earlier. On revocations, it states that the decision is "at the sole discretion" of the FDIC, but then requires the FDIC to tell the financial institution the "basis for the revocation" and provide an opportunity for the financial institution to contest the action. At the same time, the implementing section offers no standards, criteria, or guidance related to when a revocation would be appropriate. Again, as with the determinations to grant SAR exemptions, the proposed rule provides no internal audit process to bring consistency to FDIC extension and revocation decisions.

Notification and Consultation Issues. Still another set of process issues involves provisions related to notifying and consulting with other government agencies about a pending SAR exemption request. While the proposed implementing section requires the FDIC to notify and obtain FinCEN's concurrence before granting a FDIC SAR exemption (when the situation would also require an exemption from FinCEN's SAR regulations), the proposed section does not impose a similar requirement with respect to other financial regulators. It states only that the FDIC "may consult with the other state and federal banking agencies before granting any exemption."[32] Nowhere does the proposal indicate the circumstances under which FDIC officials should notify and consult with other state and federal banking agencies regarding a pending SAR exemption request; nor does it acknowledge that FDIC officials may be unaware of AML deficiencies known to other regulators. As to notifying relevant foreign banking regulators, law enforcement agencies, or the U.S. national security or intelligence communities, the proposal is silent. Again, needed guidance is absent.

Coordination with FinCEN. The proposed rule does acknowledge that most of the financial institutions supervised by the FDIC are subject to SAR requirements imposed by both the FDIC and FinCEN. If a financial institution is subject to dual SAR requirements, the proposed rule is clear that the financial institution must gain permission from both the FDIC and FinCEN to secure a SAR exemption. At the same time, the proposed rule contains no FinCEN-related forms, procedures, or standards. It also fails to describe the extent to which FinCEN has provided SAR exemptions in the past and, if it has done so, under what circumstances. In addition, the proposed rule fails to offer any data on such basic issues as how many financial

[31] Id. (in proposed Section 353.3(d)(5)).
[32] Id. (in proposed Section 353.3(d)(3)).

institutions are subject to dual FDIC and FinCEN SAR rules, the types of financial institutions involved, or what stance FinCEN has taken on granting SAR exemptions. The failure to present FinCEN's views, procedures, and standards as part of the proposed implementing section raises additional questions about the viability and practicality of the proposed rule.

E. Premature and Unauthorized

Finally, the proposed rule fails to acknowledge or take into consideration the raft of new provisions enacted by Congress at the beginning of the year to address the very SAR and AML technology concerns that appear to be the animus for the FDIC's proposal.

Sections 6202, 6204, and 6205 of the new AML Act require the Treasury Department, in consultation with the FDIC, other financial regulators, and other specified agencies to conduct a formal review of existing SAR requirements; issue a report by the end of the year on options for creating a more streamlined SAR reporting system; and consider the need for new regulations. All of those steps – mandated by law – should take place before the FDIC grants itself sweeping new SAR exemptive authority that is nowhere authorized by law, including by the new AML Act. At a minimum, the proposed rule needs to acknowledge and explain how its proposed exemptive authority relates to the new SAR requirements mandated by Congress and why the FDIC cannot wait for the new Treasury rulemaking that may address the very same issues.

In addition, Sections 6207-6210 of the AML Act explicitly address the AML technology issues that the FDIC appears to be relying on to justify its new exemptive authority. Among other provisions, Section 6209 requires Treasury to engage in a new rulemaking to develop procedures to test technologies that would facilitate AML compliance. That mandatory rulemaking, which presumably would apply to all federal financial regulators handling AML technology testing, may end up conflicting with the FDIC's proposal. Other AML Act provisions require the FDIC and other financial regulators to conduct a joint AML technology assessment culminating in a report by the end of the year; hire their own BSA Innovation Officers to help analyze AML technology issues; and consider advice from a new BSA Advisory Subcommittee on Innovation and Technology. All of those measures – mandated by law – need to be implemented and should be allowed to get underway before the FDIC grants itself new SAR exemptive authority.

If the SAR or technology rulemakings mandated by the AML Act determine that federal financial regulators need to be able to grant SAR exemptions on a case-by-case basis, the rulemaking should do so with appropriate limits, criteria, and procedures. Those limits should include, for example, that a SAR exemption may be granted only for the purpose of testing a new SAR-related technology, the exemption automatically expires once the testing concludes, the exemption applies only to named financial institutions, and it will not alleviate any financial institution's obligation to file SAR reports with FinCEN throughout the testing period. The criteria should specify, at a minimum, whether an exemption may be given to a financial institution with outstanding AML deficiencies, a lower CAMEL score attributable to AML mismanagement, or a recent history of substandard AML performance. Procedures should include, at a minimum, a template application form specifying the information to be supplied by the financial institution seeking to obtain a SAR exemption such as the type of AML technology

test to be administered, the expected duration of the test not to exceed, perhaps, three months, the financial institution's AML track record, and whether or not FinCEN concurs in the exemption. The procedures should also specify which agency office will make the exemption decisions and establish an internal audit process to ensure exemption decisions apply appropriate standards in a consistent manner across the agency.

Two months ago, Congress enacted sweeping new statutory provisions to deal with SAR and AML technology issues. Nowhere do those provisions authorize the FDIC or any other federal financial regulator, on its own, to award itself unfettered authority to exempt any financial institution from any SAR requirement. Instead, Congress mandated a very different and more limited approach for addressing SAR and AML technology concerns. The FDIC should respect the directions provided by Congress and withdraw its proposal which has no statutory authorization or congressional support.

F. Abbreviated Comment Period

The FDIC is proposing a fundamental, novel change to the U.S. SAR system that may weaken U.S. AML safeguards. Yet it has provided only an abbreviated public comment period occurring in the midst of a transition to a new Administration and implementation of the new AML Act. The 30-day comment period is both insufficient and ill timed.

Conclusion

For decades, financial institutions operating in the United States have been filing Suspicious Activity Reports, and U.S. law enforcement and national security agencies have been using SARs to identify criminals, curb money laundering, and prosecute crime. The 2020 GAO report has documented the extent to which U.S. regulators and law enforcement agencies rely on SARs to carry out their duties. The FDIC offers no compelling reason to enable it to exempt any financial institution from its SAR obligations. Nor does the FDIC discuss what to do if the SAR exemptions it grants were to attract more criminals to U.S. financial institutions, threatening the integrity of the U.S. financial system and U.S. national security.

Due to the problematic wording, support, and timing of the proposed rule, it is respectfully suggested that the best course of action at this point is to withdraw and reconsider the rule's provisions in light of the AML Act. At a minimum, the Federal Reserve should give the AML community additional time to analyze the rule's flaws and suggest improvements.

Thank you for this opportunity to comment on the proposed rule.

Sincerely,

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