

February 14, 2022

Policy Division
Financial Crimes Enforcement Network
P.O. Box 39
Vienna, VA 22183

Re: Request for Information and Comment, Review of Bank Secrecy Act Regulations and Guidance, Docket Number FINCEN-2021-0008

Dear FinCEN,

As the national trade association representing licensed commercial and tribal casino operators and gaming suppliers, the American Gaming Association (“AGA”) appreciates this opportunity to comment in response to the Department of Treasury’s Financial Crimes Enforcement Network’s (“FinCEN”) Request for Information and Comment (“RFI”) on the Review of Bank Secrecy Act Regulations and Guidance.¹

The RFI was issued in response to Section 6216 of the Anti-Money Laundering Act of 2020 (“AML Act”), which requires FinCEN to conduct a formal review of BSA regulations and guidance. In many respects, Section 6216 and other provisions of the AML Act codified FinCEN’s ongoing and preexisting initiative to make BSA compliance and enforcement more effective. In connection with that initiative, FinCEN issued an Advance Notice of Proposed Rulemaking (“ANPR”) in September 2020 seeking comments on measures to make anti-money laundering (“AML”) programs more effective.² Many of the AGA’s comments herein were also made in our November 16, 2020 response to that ANPR.

I. Introduction

The AGA advocates for the U.S. gaming industry, which supports 1.8 million jobs nationwide, has a \$261 billion annual economic impact, and generates \$41 billion annually in tax revenue. The AGA also serves on the Bank Secrecy Act Advisory Group. Our membership spans across the country and consists of 74 commercial and tribal casino operators, U.S.-licensed gaming suppliers, financial institutions, destination marketing organizations, state gaming associations and other key stakeholders in the gaming industry.

Since 1985, state-licensed casinos have been defined as “financial institutions” under the BSA. Since that time, our members have developed and implemented rigorous and sophisticated AML programs and have served an integral role in aiding FinCEN and the law enforcement

¹ 86 Fed Reg. 71201 (Dec. 15, 2021).

² 85 Fed. Reg. 58023 (Sept. 17, 2020).

community in combatting money laundering and illicit financing. Our members dedicate significant time, resources, and staffing to maintain effective risk-based AML compliance programs to comply with applicable BSA requirements and prevent money laundering and other criminal activities through gaming. Each year, our members file tens of thousands of Suspicious Activity Reports (“SARs”) and Currency Transaction Reports (“CTRs”). In addition to maintaining robust AML programs, our members work hand-in-hand with federal, state, tribal, and local law enforcement and regulators on a regular basis. These relationships provide real-time intelligence, foster open two-way channels of communication, and encourage proactive compliance.

The AGA has established a BSA Working Group with representation from all our Title 31 member companies. Within that group, gaming compliance professionals can share best practices, discuss trends, and identify policy and regulatory priorities. In addition, for the past several years, the AGA has published a guide on Best Practices for Anti-Money Laundering Compliance, which we are in the process of updating.³ This guide provides critical guidance on Know Your Customer procedures, risk assessments, training, recordkeeping, and other key facets of a successful AML program. Accordingly, it is a valuable resource for the gaming industry, other financial sectors subject to the BSA, government agencies, and law enforcement to help most effectively and efficiently guide their efforts in protecting the gaming industry and the broader financial system from money laundering and other illicit conduct.

Members of the AGA are committed to taking effective and proactive risk-based measures to prevent and detect financial crime and ensure that the gaming industry is an active and trusted partner with law enforcement and our regulators. Consistent with FinCEN’s and the AML Act’s modernization objectives, the casino industry believes that updating BSA requirements and expectations, as well as AML compliance programs to match today’s financial realities and to focus on efforts and information that are most useful to law enforcement, is the most effective means towards combatting money laundering and terrorist financing. The AGA welcomes the opportunity to engage in ongoing dialogue with FinCEN to present the unique BSA challenges and capabilities presented by the gaming industry that should be taken into consideration during the rulemaking process to achieve these objectives. Towards that end, we would like FinCEN to consider the following comments:

II. Proposed Updates Relating to the Scope of BSA Coverage and Requirements to Promote the Efficiency and Effectiveness of AML Programs in the Gaming Industry and Mitigate Financial Crime Risks

a. Clarify the Roles and Responsibilities of Casinos and Sports Betting Operators under the BSA

Technology advancements and legal developments have led to significant changes in the gaming industry in recent years. Nevertheless, the vast majority of regulations applicable to casinos have

³ American Gaming Association, “Best Practices for Anti-Money Laundering Compliance 2019-2020,” available at https://www.americangaming.org/wp-content/uploads/2019/12/AGA-AML-Best-Practices_12-9.pdf.

not been updated since gaming was solely conducted face-to-face at brick and mortar casinos. With the advent and growth of online gaming and sports betting, regulatory changes or guidance are needed to address novel issues raised by today's gaming realities.

In a letter dated August 12, 2021, the AGA requested that FinCEN issue guidance to address the relative regulatory roles and responsibilities of casinos and sports book or online gaming operators. This continues to be an area where clarification is urgently needed. Under BSA regulations, responsibilities and liability rests with entities that are licensed as casinos by state or tribal authorities. The regulations do not address the BSA responsibilities where a casino grants a license to an online gaming platform or sports book consistent with state gaming law. Although these operators, and not the casino licensee, are responsible for customer relationships and are engaged in the gaming transactions, they generally are not licensed as casinos and have no status under the regulations. Accordingly, the application of BSA regulations to an increasing portion of the gaming industry remains uncertain, making timely guidance or regulatory updates to address this issue of great import.

In addressing the regulatory revisions, we would also urge that FinCEN consider issues that have arisen because of changes to the industry and advances in online gaming technology.

b. Extend BSA Coverage to States Engaged in Gaming as a Business

The current regulatory definition of a casino does not include states that are conducting gaming activity, including lotteries and sports betting, as a commercial activity, which often occurs through contracts with private operators. When a state government agency conducts a non-sovereign function that would otherwise be subject to the BSA, the agency should be subject to the BSA, as any other entity would be, to avoid a gap in the regulatory regime that can present financial crime risk. This approach also levels the regulatory playing field in a manner that better encourages compliance by all and is consistent with analogous precedent of covering the U.S. Postal Service as a Money Services Business for issuing and selling money orders as a commercial activity.⁴

c. Extend SAR Sharing Pilot Program to Foreign Casino Affiliates

On January 25, 2022, FinCEN issued a Notice of Proposed Rulemaking to begin implementing Section 6212 of the AML Act which provides for a pilot program to allow SAR sharing between U.S. financial institutions subject to the BSA and their foreign branches, subsidiaries, and affiliates, with appropriate safeguards.⁵ The AGA is pleased that FinCEN proposed that casinos be included in the financial institutions eligible to participate in this program. Several U.S. gaming entities have casino affiliates outside of the United States and in many cases, a number of their patrons game at both their U.S. and foreign properties. Allowing for SAR sharing among these entities would promote enterprise-wide risk management and provide casinos with a

⁴ 31 CFR § 1010.100 (ff)(6).

⁵ 87 Fed Reg, 3719 (Jan. 25, 2022).

more complete view of patron activity, which in turn would increase the efficiency and effectiveness of casinos' AML compliance programs and enhance their ability to combat illicit finance risks.

d. Extend Non-Documentary Identity Verification to Casinos

Under the BSA regulations, which were developed when gaming was all in-person, casinos are required to view a customer's physical identification document when opening an account.⁶ This requirement has become increasingly burdensome and inconsistent with a risk-based approach as online gaming has continued to expand. The industry appreciated that, on October 19, 2021, FinCEN addressed this issue by granting casinos exceptive relief that allows them to use non-documentary means to verify the identity of a customer if certain measures are taken consistent with the BSA Customer Identification Program ("CIP") requirements for banks and certain other financial institutions.⁷ The AGA requests that this exceptive relief be codified in the BSA regulations to allow casinos the same flexibility to verify identity by documentary or non-documentary means as is afforded to banks.

e. Guidance Regarding Digital Identification

With the continued enhancements of technology and movement away from physical identification documents (i.e. drivers licenses), casinos are being presented in multiple jurisdictions with the offering of digital identification/digital licenses. States have started to roll out this new technology, advertising it as a form of identification that can be used in any context in which someone would normally use their physical identification to verify both their age and/or identity. Casinos are looking for further guidance from FinCEN on the acceptance of this form of identification in compliance with BSA regulations, specifically in terms of verification and record keeping requirements. As this technology continues to advance across the United States (and be accepted in other industries), casinos need to prepare for more and more patrons looking to present this digital/mobile form of identification as their only means of identification.

f. Extend Public-Private Information Sharing Programs to the Casino Industry

A key element of the BSA effectiveness initiative and the AML Act is to enhance the exchange of information between financial institutions and government authorities to promote the identification and reporting of suspicious activity and other information that would be most helpful to combat money laundering and financial crime. The gaming industry is a strong supporter of, and would be a willing participant in, initiatives that further this objective. To this

⁶ 31 CFR § 1021.410(a); 31 CR 1010.312.

⁷ FIN-2021-R001, Exceptive Relief for Casinos from Certain Customer Identity Verification Requirements (Oct. 29, 2021).

end, the gaming industry hopes to be able to participate in the FinCEN Exchange Program and Section 314(a) information sharing in the near future.

1. FinCEN Exchange

Section 6103 of the AML Act formally established the FinCEN Exchange, a voluntary public-private information sharing partnership among government agencies and financial institutions that FinCEN launched in 2017. By invitation from FinCEN, financial institutions participate in meetings with law enforcement to discuss prevalent financial crime typologies and emerging issues, such as ransomware. Given their unique operations and presence in the financial sector, we believe casinos' participation in FinCEN Exchange would be very mutually beneficial to the casino industry, law enforcement, and other financial institutions. The AGA has requested that casinos be allowed to participate in this important program. However, to date, we are not aware of any casinos that have been invited to participate in FinCEN Exchange sessions. We were pleased to see the Financial Crimes Enforcement Network Exchange Improvement Act signed into law, a bill that ensures that private-sector, non-financial entities can participate in FinCEN Exchange. The gaming industry would welcome the opportunity to participate in FinCEN Exchange programs with other financial institutions or in programs specifically for the gaming industry.

2. Section 314(a) Sharing

Pursuant to section 314(b) of the USA PATRIOT Act and associated implementing regulations,⁸ FinCEN periodically sends financial institutions names of individuals or entities being investigated for potential money laundering or terrorist financing for the financial institutions to advise FinCEN by means of a secure network if they have accounts or transactions for those persons. The information that is shared pursuant to Section 314(a) is not only useful to law enforcement, but also to financial institutions which may use these inquiries as helpful risk indicators. If FinCEN requests information about a customer, a financial institution may review the customer's information on file and transactions to identify red flags that may have been previously overlooked and possibly to file additional SARs.

On behalf of our members, for several years, the AGA has requested that casinos be able to participate in Section 314(a) sharing and renews that request here. At a minimum, we urge FinCEN to consider a pilot program with a few larger casinos to be able to evaluate the benefits to law enforcement and the gaming industry of including casinos in Section 314(a) sharing.

III. Proposed Updates to Outdated BSA Regulations to Promote a More Effective and Efficient Risk-Based Regime

a. Increase in CTR and SAR Thresholds

⁸ 31 CFR § 1010.520.

Section 6205 of the AML Act mandates a review of reporting thresholds for CTRs and SARs. The AGA believes that adjustments to the thresholds are long overdue, and that the thresholds could be reasonably increased without sacrificing useful information to law enforcement. The current CTR threshold of \$10,000 was established nearly half a century ago in 1972,⁹ long before there was a requirement to report suspicious activity, and the SAR threshold of \$5,000 was established over 25 years ago. To put that into perspective, adjusted for inflation, the CTR threshold would today be over \$66,000, and the SAR threshold would be nearly \$9,000. Yet, the CTR and SAR thresholds have remained stagnant and are now so low that they often capture transactions that are little or no value to law enforcement, yet require exorbitant resources to investigate and report. Accordingly, today's CTR and SAR thresholds are not only inefficient, but they risk being counterproductive to the extent they demand limited compliance resources and necessarily prevent a risk-based approach for this significant part of a financial institution's BSA/AML program.

In 2015, FinCEN reported that financial institutions were filing approximately 15.5 million CTRs per year, and that each CTR consumed approximately 45 minutes of effort.¹⁰ This results in over 11 million hours annually for the preparation and filing of CTRs and hundreds of millions of dollars in costs. Despite technology advances, the gaming industry continues to shoulder a heavy burden in preparing and submitting CTRs for all currency transactions that exceed \$10,000, when aggregated, over a 24-hour "gaming day," and questions whether the burden is commensurate with the benefit to law enforcement.

In addition, IRS examiners spend valuable time ensuring industry compliance with the current CTR threshold, while the industry may also face regulatory sanctions should they miss reporting transactions that have little or no material value to the government or law enforcement. To alleviate this and similar misallocations of compliance and enforcement resources and in the interest of an efficient risk-based approach, the AGA recommends a reasonable increase in the CTR reporting threshold and aligning it with inflation going forward.

For similar reasons, the AGA also recommends increasing the SAR reporting threshold, and allowing casinos to report at a higher threshold on a risk basis for certain activity, such as chip walking, discussed below.

b. Streamline SAR Reporting

Section 6202 of the AML Act requires streamlined SAR reporting processes for non-complex suspicious transactions to reduce burdens on reporting institutions without diminishing the usefulness of such reports to law enforcement and other government agencies. We believe that streamlined reports that gather basic form data, without the need for narratives, for certain types of non-complex suspicious activity frequently reported by casinos would achieve this mandate.

⁹ 37 Fed. Reg. 6819, 6912 (Apr. 5, 1972) (final rule) (effective July 1, 1972).

¹⁰ 81 Fed. Ref. 5518 (Feb. 2, 2016).

1. Structuring

According to FinCEN, casinos and card clubs filed nearly 55,000 SARs in 2021 and over 22,600 of those SARs were related to structuring. Pursuant to federal law enforcement policy, structuring prosecutions generally are not brought unless there is evidence that the funds came from illegal sources.¹¹ Accordingly, the AGA would recommend allowing streamlined SARs – or a “SAR Lite” – for structuring-related transactions that would not require detailed narratives in the absence of information indicating that the individual’s funds are derived from illegal sources. A SAR Lite would still provide notice to the government of a customer’s structuring conduct should the government otherwise learn that the customer’s funds are derived from illegal sources. In those instances, the government could pursue inquiries with the casino concerning the customer’s financial activity, while the casino would be relieved from undertaking the burdensome narrative preparation for a significant percentage of its SARs. This would significantly enhance AML program effectiveness by allowing the industry to reallocate these resources to higher priority aspects of BSA compliance, including those related to Know Your Customer procedures.

2. Chip Walking

For many years, there has been an expectation that casinos investigate and report chip walking, usually at an established threshold set by the casino. Chip walking is when a patron leaves a casino with a significant number of chips in his or her possession, without the casino being able to verify offsetting chip redemptions or chip buy-ins at another table, and where the casino otherwise does not know the disposition of the chips. The gaming industry filed over 11,200 SARs in 2021 for chip walking. Law enforcement has advised casinos that many of these SARs are of relatively less value to them than other types of SARs.

In and of itself, chip walking is often not suspicious. There are frequently innocent, mundane reasons for this behavior, particularly when the operator reasonably expects the patron will return to the casino in the near future. For example, the patron may be a local customer who is well known to the casino and expected to return soon and use the chips on a subsequent visit. Alternatively, there may be a long line at the cage on the day in question, so the patron chooses to skip the line and use or exchange the chips at a later date.

However, casinos have found that examiners will often dismiss legitimate reasons for a patron to depart from a casino with chips. Furthermore, there seems to be an evolving regulatory expectation that a SAR will be filed for any occurrence of a “chip walk,” usurping the casino’s

¹¹ See Treasury Inspector General for Tax Administration, Criminal Investigation Enforced Structuring Laws Primarily Against Legal Source Funds and Compromised the Rights of Some Individuals and Businesses, Reference Number 2017-30-025, at 2-3 (Mar. 30, 2017) (discussion of IRS and Department of Justice structuring policy). See “Criminal Investigation Enforced Structuring Laws Primarily Against Legal Source Funds and Compromised the Rights of Some Individuals and Businesses,” Treasury Inspector General for Tax Administration (April 4, 2017).

judgment and ability to follow its own risk-based AML compliance criteria, which can distinguish between suspicious and non-suspicious chip walks.

The AGA recommends that in the interest of risk-based compliance, casinos be able to set thresholds for walking with chips reviews at a much higher threshold than the \$5,000 SAR threshold; that they be reported in a streamlined fashion on a SAR Lite; and FinCEN issue guidance to IRS examiners to defer to the judgment of the casino on what is a suspicious chip walk.

c. Incorporate Geolocation Data as an Optional Additional Field in SARs

To increase the effectiveness of AML programs, we suggest expanding SAR data fields for cyber indicators beyond IP address to provide other optional geolocation fields. This would assist in ensuring that SARs provide the most accurate, highly useful and relevant data, as IP addresses are often deficient sources of information considering their dynamic and occasionally inaccurate nature, as well as their ability to be spoofed and anonymized.

Incorporating multi-source, device-based geolocation data collection into a financial institution's onboarding or authentication process acts as a powerful deterrent to bad actors, facilitates the identification and prevention of suspicious activity in real-time, and has been proven to reduce fraud, particularly in novel industries, such as mobile sports wagering and internet gaming. Moreover, many financial institutions already collect multi-source, device-based geolocation data (e.g., GPS, WiFi Triangulation, and GSM). Accordingly, this data is readily available for compliance purposes and could be an optional, additional field within SARs that would further the goals of AML program effectiveness.

d. Eliminate the Negotiable Instrument Log Requirement

Under the BSA regulations, casinos are required to maintain detailed records of customer transactions involving checks and certain monetary instruments of \$3,000 or more, known as the Negotiable Instrument Log, or NIL.¹² No other financial institution is required to keep such a record, and it is an outdated and obsolete requirement for casinos.

The NIL requirement was added to the BSA requirements for casinos in 1993, when many casinos did not have automated currency aggregation systems. In its rulemaking, FinCEN explained that the purpose of the NIL was to facilitate CTR compliance, apparently based on the assumption that all of the instruments would be cashed for currency by the casino. In response to comments that the log would be burdensome or unnecessary, FinCEN stated, “[S]uch a list will provide an important means of checking whether or not large transactions have been accounted for as currency transactions. A chronological log will facilitate compliance reviews by allowing systematic, quick references from a central listing.”¹³ Ever since, casinos have faithfully

¹² 31 CFR § 1021.410(b)(9).

¹³ 58 Fed. Reg. 13538,13542-43 (Mar.12,1993).

maintained NILs, but they do not need or use them to capture checks or monetary instruments cashed for currency for CTR compliance purposes. Such transactions involving the redemption of negotiable instruments for cash are documented on the Multiple Transaction Log (MTL) and for checks issued by the casino, on the casino's check registration log or similar documents. Consequently, the AGA requests that FinCEN remove this burdensome provision that serves no utility from the BSA requirements for casinos.

IV. Proposed Guidance or Regulatory Updates to Enhance the Efficiency and Consistency of BSA Compliance Efforts across the Gaming Industry

a. Maintain Casino Deference for Know Your Customer (“KYC”) Programs

Although not specifically required in the regulations or subject to guidance, for many years, casinos have been expected to maintain KYC programs as part of their AML programs. To the extent any future BSA regulations require KYC or Customer Due Diligence (“CDD”) programs for casinos, casinos should be given the flexibility to apply KYC measures on a risk basis and not necessarily on their largest customers who may not present a significant risk. Similar to banks and other financial institutions subject to CDD requirements, casinos should not be required to update KYC information at certain intervals. FinCEN should issue specific guidance to support the KYC programs of casinos and what risk triggers and relationships should be subject to KYC.

b. Clarify SAR Filing Expectations for Gaming Transactions Involving Owners and Employees of Marijuana-Related Businesses

While marijuana for medical and recreational purposes has become legal in a growing number of states, marijuana remains an illegal controlled substance under Federal law. This conflict in laws continues to present complexities and challenges for many types of financial institutions, including casinos, and a federal legislative solution does not appear likely in the near future.

In 2014, FinCEN issued guidance for financial institutions that provide services to marijuana-related businesses operating in accordance with their local laws, including instructions on SAR reporting for transactions with these businesses.¹⁴ That guidance appears designed primarily for banks and other financial institutions that have customers that are marijuana-related businesses themselves and does not address providing services to the principals of these businesses who may be casino patrons.

Some casinos have policies that prevent gaming when it is determined that a patron's source of funds is a state-legal marijuana business. Others will accept these patrons on a risk basis but are unsure of their BSA responsibilities when conducting transactions with them. Consequently, the AGA requests that FinCEN provide updated guidance regarding SAR filing expectations for individuals associated with state-legal marijuana-related businesses, particularly those who own or are employed by them, and in what situations casinos should or must file SARs on their

¹⁴ FIN-2014-G001, BSA Expectations Regarding Marijuana-Related Businesses. FIN-2014-G001 (Feb 14, 2014).

transactions.

V. Conclusion

The AGA and our members appreciate the opportunity presented by this RFI to provide FinCEN with its industry insights regarding how to modernize and enhance BSA regulations and guidance for the gaming industry to advance our common goal of more efficiently and effectively combatting financial crime.

Thank you for your consideration of our suggestions. We look forward to working closely with FinCEN as you continue forward with AML Act implementation and BSA/AML modernization.

Thank you for your consideration.



William C. Miller Jr.
President and CEO
American Gaming Association