Testimony of
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the Subcommittee on Financial Institutions and Consumer Credit
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TESTIMONY AS PREPARED

Chairmen Leutkemeyer, Ranking Member Clay, and members of the Subcommittee, I am grateful for the opportunity to appear before you today and to offer testimony concerning the Financial Crimes Enforcement Network's ("FinCEN's") customer due diligence rule (the "CDD Rule"). My name is Carlton M. Greene. I am a partner at the law firm of Crowell & Moring, LLP, in Washington, D.C., and practice in the areas of anti-money laundering ("AML") and economic sanctions laws. I previously served as FinCEN's Chief Counsel in acting and full capacities from 2013 to 2015. Before that, I spent many years at the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC"), where I was responsible for directing targeting and investigation for U.S. sanctions programs relating to Iran, North Korea, Syria, and transnational criminal organizations. I appear today on my own behalf, and not on behalf of any client.

The CDD Rule will provide important new information useful to law enforcement in the detection and prevention of money laundering, terrorism financing, and other financial crime. FinCEN deserves credit for formalizing and setting boundaries to practices that previously had existed only in interpretive guidance. The promulgation of the rule, which has been ten years in the making, and FinCEN's recent, extensive guidance interpreting the rule (in the form of 37 frequently asked questions or "FAQs"), represent an enormous labor and expenditure intellectual effort by the agency, and a substantial achievement. FinCEN also deserves credit for the public hearings and other steps it took to solicit and incorporate industry views on the rule. In addition to changes FinCEN made to the final rule based on public comment, FinCEN also has considered and addressed many of the questions and concerns that industry has raised about the final rule in the 37 FAQs it recently issued. This is the kind of responsive partnership that will best assure the success of the rule in providing information useful for combating financial crime.

The banks and other financial institutions covered by the rule likewise have expended extraordinary effort to inform FinCEN's approach to the rule and to re-organize processes across their enterprises to implement its requirements. Over my last two years in private practice, I have seen the never-ending hard work and professionalism that these institutions apply to understanding and complying with their obligations under the Bank Secrecy Act ("BSA"). Like an iceberg, the majority of these efforts typically go unseen by regulators. I also know the outsized expenditure of resources that so many of these institutions devote to AML compliance and the day-to-day frustrations and burdens that come from ensuring compliance. Despite the burdens they already face under existing AML rules, they have stepped forward to collaborate in developing a CDD Rule that promises to be useful, and to accept the new burdens that come with it.

FinCEN's new FAQs provide important interpretive guidance that has solved a number of questions that threatened implementation or threatened to impose large and unexpected costs on it. I also know, however, that this guidance has generated new questions that create new risks for covered financial institutions. The risks to covered institutions of misunderstanding or not being in a position to comply with the new guidance are heightened by the fact that the new FAQs have arrived so close to the May 11, 2018 implementation date for the rule. These include, for example, questions about: (1) how pooled investment vehicles that are advised or operated by non-financial institutions will be treated under the rule's requirement to obtain beneficial ownership information; (2) what events trigger the requirement to update customer information, especially information apart from beneficial ownership; (3) the types of actions and contact with the customer that must be undertaken as part of such updates, especially with respect to information apart from beneficial ownership; (4) what information must be gathered to reasonably understand the "nature and purpose" of a customer's business, and (5) when a covered institution will be deemed to have "knowledge of facts that would reasonably call into question the reliability" of customer-provided information. To account for these questions, FinCEN should continue to work closely and collaboratively with covered financial institutions to provide clarity wherever possible. It also should show leniency in the early years after the rule's May 11, 2018, implementation date, as institutions adapt to FinCEN's recent guidance and encounter the inevitable but impossible-to-predict obstacles to compliance that come with any new rule of this scale.

Beyond the CDD Rule, I have a broader concern that the current relationship between FinCEN and the federal functional regulators poses risks to FinCEN's mission to detect and combat financial crime. Two facts are important to understanding this issue. First, that FinCEN has delegated examination authority to the federal functional regulators and, second, that these agencies use their own independent authorities to examine for and enforce compliance with the BSA. This has the potential to lead these regulators to create and enforce their own interpretations of or additions to BSA rules, or otherwise to emphasize enforcement in areas that diverge from FinCEN's priorities, potentially complicating FinCEN's ability to establish a coherent approach to AML regulation. Furthermore, the mission of these agencies differs significantly from FinCEN's, and they do not have access to the same threat information and analysis that FinCEN relies on to determine which aspects of BSA compliance are important, at any given period, to obtain vital threat information or put a stop to emerging financial threats. Instead, there is a risk that these differences may lead to overly formalistic enforcement of BSA requirements that requires the regulated community to bear substantial costs on aspects of compliance that do not advance the anti-money laundering goals of the BSA, and which might better be spent advancing that mission.

At the same time, there are important benefits from the current arrangement. FinCEN is a very small agency compared to the federal functional regulators, only a few hundred people, and must regulate a very wide variety of financial institutions ranging from banks and broker-dealers to money services businesses and casinos. It would be difficult for FinCEN, even with a larger staff, to have the depth of knowledge that prudential regulators have acquired over the institutions that they regulate. Nor in any case does it currently have the staff or expertise needed to examine all of the institutions it regulates for AML compliance. As such, the best approach to this situation may be to improve the current partnership rather than to break it.

There have been a number of proposals put forward as to how this might be done, and I am not here to advocate for one in particular. However, I think any viable solution should be one that includes closer collaboration between FinCEN and the federal functional regulators and greater authority for FinCEN to establish BSA examination and enforcement priorities across these agencies and similarly to control interpretations of BSA rules. FinCEN, by design, is uniquely positioned to understand the threats posed by illicit finance and to understand the regulatory trade-offs needed to address those threats. In addition to the benefits to FinCEN's mission, such an approach also could substantially lessen the burdens for regulated financial institutions, and give them greater freedom to innovate and partner with FinCEN to find better solutions to illicit finance threats.

Lastly, I am aware that the money laundering risks associated with the lack of beneficial ownership information extend far beyond the customers of U.S. financial institutions. This includes, for example, companies that are formed in the United States but operate and keep their accounts at overseas financial institutions. International standard-setting bodies in this area, such as the Financial Action Task Force, have pointed to the lack of regulation in this area as a failing of the U.S. approach to AML. Here again, a number of different measures have been proposed to deal with this issue, including efforts to require state authorities to obtain beneficial ownership information at the time of corporate formation. There is more than one viable solution to this issue, but these proposals should be seriously considered and evaluated.

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