



September 3, 2024

Policy Division
Financial Crimes Enforcement Network
U.S. Department of the Treasury
P.O. Box 39, Vienna, VA 22183

Delivered via regulations.gov

**Re: Anti-Money Laundering and Countering the Financing of Terrorism Programs;
Docket Number FINCEN-2024-0013**

The Free Speech Coalition (FSC) appreciates the opportunity to comment on the Financial Crimes Enforcement Network's (FinCEN) notice of proposed rulemaking to, among other things, require financial institutions establish, implement, and maintain effective, risk-based, and reasonably designed Anti-Money Laundering and Countering the Financing of Terrorism (AML/CFT) programs with certain minimum components, including a mandatory risk assessment process.

A. Introduction

The FSC is the non-partisan trade association representing the online adult entertainment industry with the mission of protecting the rights and freedoms of our members. For over thirty years, FSC has been a resource, advocate, and leader in the communities that we serve. An increasingly important matter for our members is the lack of reliable access to basic financial products and services and the growing evidence that FSC members are being subject to systematic de-risking despite FSC members representing no increased risk to the financial system.

B. Background

In May 2023, FSC surveyed its membership and members of the online adult entertainment industry and produced a study entitled, "Financial Discrimination and the Adult Industry."¹ This report collected responses from over 600 industry members to better understand the challenges they are facing in the financial sector. It found that nearly four out of five respondents

¹ Free Speech Coalition, *Financial Discrimination and the Adult Industry*, <https://action.freespeechcoalition.com/wp-content/uploads/2023/08/Financial-Discrimination-and-the-Adult-Industry-Updated-May-2023.pdf>

experienced some form of financial discrimination on account of their participation in this lawful industry, including 63 percent who have had an account closed by bank or other financial services providers – 40 percent in the past year.

While we strongly support efforts to safeguard the financial system, it is vital that FinCEN does so in a manner that does not limit or eliminate access to reliable banking services by small business owners, their employees, workers, consumers, and vulnerable populations. At present, many individuals and companies are blocked from accessing or expelled from financial services altogether. These individuals and companies fall victim to financial institutions' overly broad interpretation of FinCEN guidance around "high risk" activities, which, ironically, introduces risk by excluding these entities from the regulated financial system.

C. De-Risking and Financial Inclusion

We appreciate FinCEN highlighting the importance of effective, risk-based, and reasonably designed AML/CFT programs in promoting financial inclusion and mitigating the effects of de-risking to national security and law enforcement interests. FinCEN's recognition that banks are declining to provide services to entire categories of customers without appropriately considering the risks posed by the particular customer is key to ending this practice. And we believe that further clarification is necessary to ensure that financial institutions' risk programs do not continue to exclude law-abiding citizens engaged in legal conduct.

Financial institutions routinely point to FinCEN guidance, such as the September 2014 *Advisory Guidance on Recognizing Activity that May be Associated with Human Smuggling and Human Trafficking - Financial Red Flags*² and subsequent October 2020 *Supplemental Advisory on Identifying and Reporting Human Trafficking and Related Activity*³ to justify shutting down individuals' and businesses' accounts. In their broad interpretation of FinCEN's guidance, financial institutions examine transactions and generate SARs based on overbroad readings of FinCEN's red-flag indicators and consequently shut down accounts in the name of cost savings and avoidance of *perceived* risk. For example, FinCEN has warned that:

- Human traffickers use third-party payment processors (TPPPs) to transfer funds. Our industry regularly employs third-party payment processors – not to obscure income sources, but because many credit card companies and banks will not work with us directly.

² Financial Crimes Enforcement Network, *Advisory Guidance on Recognizing Activity that May be Associated with Human Smuggling and Human Trafficking - Financial Red Flags*, <https://www.fincen.gov/sites/default/files/advisory/FIN-2014-A008.pdf>

³ Financial Crimes Enforcement Network, *Supplemental Advisory on Identifying and Reporting Human Trafficking and Related Activity*, https://www.fincen.gov/sites/default/files/advisory/2020-10-15/Advisory%20Human%20Trafficking%20508%20FIN%20NAL_0.pdf

- The rapid transfer of funds through accounts – and repeated small-dollar deposits and withdrawals – are a byproduct of banking instability. To minimize the real risk of account closures and frozen assets, content creators frequently remove money as soon as it clears a payment account, resulting – in some cases – in multiple small dollar deposits to an account.
- Human traffickers use “alternative payment methods” like prepaid cards, mobile payment applications, and virtual currencies. Our industry must often rely on these methods as a result of our inability to access traditional payment solutions.

Despite FinCEN’s guidance that “[t]here is no BSA regulatory requirement to terminate a customer relationship after the filing of a SAR or any number of SARs,”⁴ financial institutions frequently shut down accounts that generate SARs due to their overly broad interpretations of the red flags outlined in FinCEN guidance.

Joint guidance issued by FinCEN, the Federal Reserve, FDIC, OCC, and NCUA also provides, “Not all customers of a particular type automatically represent a uniformly higher risk of money laundering, terrorist financing, or other illicit financial activity.”⁵ But, despite these statements, it appears financial institutions are not giving these customers due consideration.

We support the proposed rule’s requirement for every financial institution to review and evaluate reports filed by the institution, such as SARs, CTRs, Forms 8300, and other relevant BSA reports. This important review process could minimize defensive filing and also lessen financial institutions’ overly broad interpretation of FinCEN guidance around “high risk” activities reported.

We encourage FinCEN to refer to the May 15 letter to financial regulators led by Sen. Elizabeth Warren (D-MA) and Rep. Ilhan Omar (D-MN) that recommends the following:⁶

- Affirming that financial inclusion is a public priority for AML/CFT policy through a joint agency statement;
- Creating a formal advisory group on financial inclusion that includes representatives from each of the financial regulatory agencies as well as external stakeholders;

⁴ Financial Crimes Enforcement Network, *Answers to Frequently Asked Questions Regarding Suspicious Activity Reporting and Other Anti-Money Laundering Considerations* (Jan. 19, 2021), <https://www.fincen.gov/resources/statutes-regulations/guidance/answers-frequently-asked-questions-regarding-suspicious>.

⁵ Financial Crimes Enforcement Network, *Joint Statement on the Risk-Based Approach to Assessing Customer Relationships and Conducting Customer Due Diligence* (July 6, 2022), <https://www.fincen.gov/news/news-releases/joint-statement-risk-based-approach-assessing-customer-relationships-and>.

⁶ *Letter to Financial Regulators re. De-Risking Recommendations* (May 15, 2024), <https://www.warren.senate.gov/imo/media/doc/2024.05.15%20Letter%20to%20Financial%20Regulators%20re.%20De-risking%20Recommendations.pdf>.

- Issuing FAQs, advisories, and alerts to keep financial institutions from shutting down or restriction accounts;
- Working with Treasury to amend the annual examiner training to include a discussion on financial inclusion metrics;
- Working with Treasury to put forward guidance that requires banks to provide consumers with pre-clearance mechanisms for transactions that are likely to trigger AML flags; and
- Work with the Consumer Financial Protection Bureau to establish minimum notice and dispute resolution requirements for consumers that experience account closures, particularly when a SAR is not filed.

a. Question 27.b.

FSC encourages FinCEN to use caution when advising financial institutions to utilize innovative technologies for the purposes of complying with BSA requirements. Without a disparate impact analysis and human review as an added component to prevent financial exclusion, automated transaction monitoring systems can further exacerbate the de-risking problem by wrongfully flagging routine transactions the system believes to be “high-risk” due to misinterpretation of FinCEN’s guidance on financial red flags related to human trafficking.

In these cases, banks may send transactions that have been automatically flagged for human review, vastly increasing their own costs

b. Question 29

Banking instability and consequent lack of economic security increase the likelihood of exploitation for members of the online adult entertainment industry. When workers are denied access to basic financial services, such as access to bank accounts, they are forced to entrust third-parties with control of their finances – a FinCEN red flag for potential human trafficking activity and a primary risk factor for exploitation, according to FAST’s Blueprint for Mobilizing Finance Against Slavery and Trafficking⁷.

We encourage FinCEN to consult with industry on best practices to promote economic security in a manner that does not inadvertently misconstrue legal conduct with activity falling under the human trafficking red flags. Our members regularly work with law enforcement and anti-trafficking organizations to help identify, report, and track criminal actors. Additionally, FSC is partnering with leading anti-human trafficking organizations to develop specific guidance and training for adult entertainment workers and businesses to spot the warning signs and report suspected human traffickers to law enforcement.

⁷Liechtenstein Initiative, *A Blueprint for Mobilizing Finance Against Slavery and Trafficking* (Sept. 2019), <https://www.fastinitiative.org/wp-content/uploads/Blueprint-DIGITAL-3.pdf>.

c. Question 41

Requiring a financial institution's board of directors to take a more active role in overseeing AML policies could inadvertently increase the potential for values-based, rather than risk-based, decision-making. This could lead to more discriminatory outcomes against the online adult entertainment industry who have historically faced exclusion from the banking system. Board members may impose their personal or societal values on the institution, perceiving adult entertainment as morally or socially undesirable, rather than evaluating it through a neutral, risk-based lens. This shift from a focus on objective risk assessment to subjective values could exacerbate the marginalization of these workers, further restricting their access to essential financial services.

D. Conclusion

We appreciate the opportunity to comment on the proposed rule and for your attention to these matters. The Free Speech Coalition is committed to working with FinCEN to develop best practices for financial institutions to stop de-risking, clarify that law-abiding workers in the adult industry do not pose increased regulatory or financial risk, and combat human trafficking activity.

Sincerely,

A handwritten signature in black ink, appearing to read "Alison Boden". The signature is fluid and cursive, with the first name "Alison" written in a larger, more prominent script than the last name "Boden".

Alison Boden
Executive Director
Free Speech Coalition