

David S. Cohen

+1 202 663 6205 (t)
+1 202 663 6363 (f)
david.cohen@wilmerhale.com

April 17, 2018

Kenneth A. Blanco
Director, Financial Crimes Enforcement Network
U.S. Department of the Treasury
P.O. Box 39
Vienna, VA 22183

Re: Proposal of Special Measure Against ABLV Bank, AS as a Financial Institution
of Primary Money Laundering Concern, FinCEN—2017—0013, RIN—1506—
AB39

Dear Director Blanco,

ABLV Bank, AS (“ABLV,” or “the Bank”), through counsel, submits the following comment with respect to the Finding and Notice of Proposed Rulemaking (together, the “Notice”) published by the Department of the Treasury’s Financial Crimes Enforcement Network (“FinCEN”) in the *Federal Register* on February 16, 2018.¹

Based on thinly sourced, often dated, and largely conclusory factual assertions, FinCEN labels ABLV a “primary money laundering concern”²—a designation intended to be reserved for those select few foreign financial institutions that pose such a risk that “special” regulatory measures under Section 311 of the USA PATRIOT Act (“311” or “Section 311”)³ are required to protect the U.S. financial system.⁴ FinCEN, however, manifestly fails to support its allegations against ABLV—particularly as ABLV existed in *February 2018*, when FinCEN acted—and thus can neither justify its Finding that ABLV is a primary money laundering concern nor moving forward with a final rule barring U.S. financial institutions from extending correspondent accounts to ABLV.

¹ Proposal of Special Measure Against ABLV Bank, AS as a Financial Institution of Primary Money Laundering Concern, 83 Fed. Reg. 6,986, 6,988–90 (proposed Feb. 16, 2018) (to be codified at 31 C.F.R. pt. 1010) (hereinafter “Notice”).

² *Id.* at 6,988.

³ 31 U.S.C. § 5318A (2012).

⁴ See H.R. REP. NO. 106-728, at 25 (“The Committee expects that the Secretary will not routinely determine that reasonable grounds exist to conclude that a jurisdiction, financial institution or class of international transactions is of primary money laundering concern, but instead will exercise this authority only to combat identified and significant money laundering threats.”); *Dismantling the Financial Infrastructure of Global Terrorism: Hearing Before the H. Comm. on Fin. Services*, 107th Cong. 48 (2001) (statement of Stuart E. Eizenstat, former Deputy Secretary, U.S. Dep’t of Treasury) (“H.R. 1114 and the discussion draft is carefully tailored against real abuse. Actions would be graduated in the sense that the Secretary could act in a manner proportional to the threat.”).

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ABLV does not dispute that, for much of its history, its business model involved relatively high-risk customers resident in high-risk jurisdictions. But at the time of FinCEN's Notice, ABLV was well on its way with a sustained and well-resourced effort to lower its risk profile by transforming its customer base away from higher-risk non-resident clients, pivoting to lower risk products, and enhancing its compliance program and practices. These developments—critical to evaluating whether the Bank presents a *prospective* financial crimes compliance risk, as required by Section 311—are mentioned nowhere in the Notice. Whether this results from FinCEN acting without any prior notice to ABLV or FinCEN apparently relying in part on information supplied by sources of questionable credibility,⁵ it is indisputable that FinCEN fails entirely to take account of ABLV's significant recent improvements in its financial crimes compliance program. As a result, FinCEN ultimately comes nowhere close to supporting its hyperbolic accusation that ABLV “institutionalized money laundering as a pillar of the bank's business practices,” and that it “seeks to obstruct enforcement” of Latvia's anti-money laundering (“AML”) and combating the financing of terrorism (“CFT”) rules.⁶

This comment letter presents a more accurate and complete picture of ABLV as it existed when FinCEN acted than the selective narrative offered by FinCEN in the Notice. First, to set the foundation for an appropriate analysis of FinCEN's Notice, we outline the legal requirements for a valid Section 311 rulemaking under the Administrative Procedure Act. Second, we describe the Latvian banking environment in which ABLV operated and the substantial progress that Latvia generally—and ABLV specifically—have made on AML and sanctions supervision in the last several years. Third, we address FinCEN's specific allegations of wrongdoing and show that FinCEN failed to offer sufficient evidence to support them. As a result, FinCEN has failed to carry its legal burden to come forward with sufficient evidence to justify its Finding and its proposal final rule. Next, we show that FinCEN lacked any justification whatsoever for including an ABLV subsidiary, ABLV Bank, Luxembourg, S.A. (“ABLV Luxembourg”), in the definition of the entity that FinCEN proposes to cut off from the U.S. financial system.⁷ Finally, because ABLV has initiated an irrevocable process of liquidation under Latvian law, we point out that the Bank does not—indeed, cannot—pose a money laundering threat to anyone. Proceeding to a final rule with respect to ABLV at this point would, therefore, serve no practical or lawful purpose.

For all of these reasons, which we elaborate below, ABLV, through counsel, respectfully requests that FinCEN rescind its Finding, withdraw its Notice of Proposed Rulemaking, and not

⁵ Aaron Eglitis, Henry Meyer, and Irina Reznik, *Latvian Central Banker Hits Back in Deepening Bribery Scandal*, BLOOMBERG (Feb. 19, 2018), <https://www.bloomberg.com/news/articles/2018-02-19/latvia-seeks-to-block-ecb-member-from-his-post-amid-graft-probe>.

⁶ Notice, *supra* at note 1, at 6,987.

⁷ *Id.* at 6,991, 6,994.

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move forward with its proposed final rule under Section 311 because doing so would be both unjustified on the record and unwarranted in light of subsequent events.

I. FINCEN'S FAILURE TO MEET ITS BURDEN UNDER THE ADMINISTRATIVE PROCEDURE ACT

Under the Administrative Procedure Act (the "APA"), an agency proposing a rule has an affirmative obligation to provide sufficient notice to "allow for meaningful and informed comment" on the proposal.⁸ The APA thus "requires the agency to make available to the public, in a form that allows for meaningful comment, the data the agency used to develop the proposed rule."⁹ In the circumstances of a proposed rule under Section 311, FinCEN is obligated to disclose "*any* unclassified material that it relies on" and "[a]ny significant factual information or assertions that the agency publicly invokes as a basis for the Rule" even if it is "derived from classified information."¹⁰

In light of the power of Section 311, Congress recognized at the time of the statute's adoption the importance of the "safeguards provided by the Administrative Procedure Act,"¹¹ and the necessity of allowing "appropriate opportunity for comment by affected institutions."¹² This is particularly the case with respect to the "Fifth Special Measure" entailing a termination of correspondent relationships with U.S.-based institutions, which FinCEN proposes to deploy here, and which may proceed "only by regulation."¹³ In designing the Fifth Special Measure, Congress recognized that targets deserve a meaningful opportunity to contest FinCEN's findings through the procedural protections embodied in administrative rulemaking.

The obligation to fully disclose the facts that underlie a proposed rule is only heightened where, as here, the proposed rule involves a designation "focused on one particular entity," and where the rule relies on classified information.¹⁴ In those circumstances, the agency is required

⁸ *Am. Med. Ass'n v. Reno*, 57 F.3d 1129, 1132 (D.C. Cir. 1995); 5 U.S.C. § 553(b)-(c).

⁹ *Am. Med. Ass'n*, 57 F.3d at 1133 (internal quotation marks omitted).

¹⁰ *FBME Bank Ltd. v. Lew*, 209 F. Supp. 3d 299, 312–313 (D.D.C. 2016) (emphasis added). For a similar discussion of due process rights arising in the context of CFIUS proceedings, see *Ralls Corp. v. Committee on Foreign Inv. in U.S.*, 758 F.3d 296, 319 (D.C. Cir. 2014) ("[D]ue process requires, at the least, that an affected party be informed of the official action, be given access to the unclassified evidence on which the official actor relied and be afforded an opportunity to rebut that evidence.").

¹¹ USA PATRIOT Act § 302(a)(5), 31 U.S.C. § 5311 note (2012) (International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001; Findings and Purposes).

¹² *Id.* § 302(a)(6), 31 U.S.C. § 5311 note (2012) (International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001; Findings and Purposes).

¹³ 31 U.S.C. § 5318A(a)(2)(C). Congress provided that the other four special measures, by contrast, may be imposed by "regulation, order, or otherwise as permitted by law." *Id.* § 5318A(a)(2)(B).

¹⁴ *FBME Bank Ltd. v. Lew*, 125 F. Supp. 3d 109, 122 (D.D.C. 2015).

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to disclose “at a minimum” *all* unclassified, nonprivileged information on which it relied.¹⁵ Even then, the touchstone remains “whether the agency has disclosed enough of the evidentiary basis and supporting documentation for its rule to allow parties to comment *meaningfully* and contest the basis on which an agency reached the result that it did.”¹⁶ Thus, even where the agency relies on classified material, it must make some disclosure: “Any significant factual information or assertions that the agency publicly invokes as a basis for the Rule, should be disclosed in time for the public to comment on those purported facts.”¹⁷

As we describe below, FinCEN has failed to live up to its duty to provide a sufficiently detailed factual basis to allow for meaningful comment. As a result, FinCEN not only has deprived ABLV of its rights under the APA to meaningfully respond to the Finding and Notice of Proposed Rulemaking, FinCEN cannot, as a matter of law leave its Finding in place or move forward with its proposed final rule.

II. BACKGROUND ON LATVIAN NON-RESIDENT BANKING AND ANTI-MONEY LAUNDERING AND SANCTIONS REGULATIONS

Before detailing the changes that ABLV made in its AML and sanctions compliance system in the last several years, it is important to situate those changes in the context of Latvia’s history with non-resident banking (“NRB”) and its recent regulatory changes to improve its AML and sanctions supervision. These specific regulatory changes, and the history of Latvia’s financial sector more generally, form the context within which ABLV both developed its NRB business and reformed itself over the last several years. This section will therefore describe the post-Cold War Latvian banking sector and the place of NRB within it, as well as the regulatory changes in Latvia’s AML and sanctions supervision framework that have accelerated substantially since 2015. The following section will describe the improvements in ABLV’s financial crimes compliance framework and concomitant reduction in the risk level of its client base over the same period, which FinCEN omitted from its Notice.

A. Latvia’s Financial Sector and Non-Resident Banking

Latvia became independent in August 1991 after the fall of the Soviet Union, and has since successfully transitioned from a communist government to a democratic society, market economy, and key member of the transatlantic security alliance. Latvia’s feet today are planted firmly in two worlds—Europe and the West on the one hand, and the post-Soviet

¹⁵ *Id.* at 121; *see also* *FBME Bank Ltd.*, 209 F. Supp. 3d at 312.

¹⁶ *FBME Bank Ltd.*, 125 F. Supp. 3d at 122; *see also* *Am. Med. Ass’n v. Reno*, 57 F.3d 1129, 1132–33 (D.C. Cir. 1995).

¹⁷ *FBME Bank Ltd.*, 209 F. Supp. 3d at 313.

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Commonwealth of Independent States (“CIS”) on the other.¹⁸ With a population of fewer than two million people, fully one quarter of Latvians are ethnic Russians and one-third speak Russian.¹⁹ But at the same time as Latvia looks East, it has become fully integrated into the Western strategic and economic ecosystem. In 1992 it joined the International Monetary Fund and the World Bank, and in 1999 it joined the World Trade Organization. It took a significant step in 2004, when Latvia joined the European Union and the North Atlantic Treaty Organization.²⁰ More recently, Latvia adopted the Euro as its currency and joined the EU’s Economic and Monetary Union in 2014, and as it did so it joined the European Banking Union and came under the supervision of the European Central Bank.²¹ And just two years ago, in 2016, Latvia joined the OECD.²²

1. Non-Resident Banking

After the dissolution of the Soviet Union in the early 1990s, individuals in CIS countries sought a more stable location in which to bank than their home countries offered. Even after their transition from communism to capitalism began, many CIS states were not hospitable places to do business. Rampant corruption and other abuses made it more costly and difficult to engage in legitimate cross-border commercial activity, and business owners in CIS countries sought banking relationships in locations where their assets would not be vulnerable to arbitrary deprivation and economic instability. Banking in a different jurisdiction (*i.e.*, non-resident banking) can help protect against these kinds of eventualities. Indeed, in the Notice itself FinCEN observes that “non-resident banking is not inherently suspicious or illicit.”²³

Russia’s 1998 currency crisis, which led to the devaluation of the Ruble and default on public and private debt, is one example of the kind of post-Soviet financial instability that non-resident banking would have protected against.²⁴ Anyone holding Ruble-denominated assets in Russia had the value of those assets eroded during the 1998 crisis. Similar dynamics obtain in

¹⁸ CIS members include Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Uzbekistan, Ukraine. *See Commonwealth of Independent States*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/Commonwealth-of-Independent-States> (last updated Jan. 11, 2018).

¹⁹ *The World Factbook*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/lg.html> (last visited Apr. 3, 2018).

²⁰ *See* ANDERS ASLUND, *LATVIA’S BANKS: THE STORY FROM THE BEGINNING 20* (2017), <http://sites.krieger.jhu.edu/iae/files/2018/03/Final-2-Oct-2017-Latvian-Banks.pdf>.

²¹ *See id.* at 21–22. The Latvian FCMC and European Central Bank supervise the other Latvian banks. *See id.* at 4.

²² *See Latvia’s accession to the OECD*, ORG. FOR ECON. CO-OPERATION & DEV., <http://www.oecd.org/latvia/latvia-accession-to-the-oecd.htm> (last visited Apr. 3, 2018).

²³ Notice, *supra* note 1, at 6,989.

²⁴ *See generally* Abigail J. Chiodo & Michael T. Owyang, *A Case Study of a Currency Crisis: The Russian Default of 1998*, 84 FED. RESERVE BANK ST. LOUIS: REVIEW, no. 6, 2002, <https://research.stlouisfed.org/publications/review/2002/11/01/a-case-study-of-a-currency-crisis-the-russian-default-of-1998/>.

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other parts of the world, where local economic and political instability cause business owners to bank outside their home jurisdictions, which, as FinCEN notes, is not inherently suspicious.²⁵

Because of circumstances like this, an NRB market emerged to serve those who wished to bank outside their home jurisdictions to protect their assets. Consequently, non-resident accounts make up a substantial portion of total deposits in countries like Luxembourg and Switzerland. Given its location and cultural background, Latvia saw a commercial opportunity to meet the demand for these services from CIS states and elsewhere, and it developed an NRB market in the 1990s and 2000s.

There is no question that non-resident banking is high-risk business because it is more difficult for a bank to “know your customer” when that client is not domiciled in its jurisdiction. Recognizing that dynamic, and the financial integrity responsibilities attendant with greater global integration, Latvia as a jurisdiction and ABLV as an institution accelerated the efforts, which started almost two decades ago, to reduce their risk profiles. On the jurisdictional front, this entailed substantial enhancements to the regulatory will and capacity of the government agencies involved in financial supervision. ABLV also took substantial measures to both improve its AML and sanctions controls and reduce the risk profile of its client base. As described below, these efforts included the termination of thousands of “high” and “very high” risk clients, and the systematic reduction of the portion of ABLV’s clients that were shell companies.²⁶

B. *Reforms to Latvia’s AML and Sanctions Compliance Framework*

In parallel with its progressive integration into multilateral bodies like the EU, Latvia repeatedly updated provisions of its legal and regulatory framework related to AML and sanctions supervision;²⁷ its accession to the OECD in 2016 was a particular catalyst for significant reform.²⁸ Accordingly, in 2009 Latvia’s Financial Intelligence Union (“FIU”) joined the Egmont Group. And since 2015, Latvia’s Financial and Capital Market Commission (“FCMC”) has implemented a raft of new financial crimes compliance regulations, including money laundering and terrorist financing risk management regulations,²⁹ regulations governing

²⁵ Notice, *supra* note 1, at 6,989 (“While it may carry certain risks or an additional AML/CFT compliance burden, non-resident banking is not inherently suspicious or illicit.”)

²⁶ See *infra* Sections III.C below for additional detail about client termination activities.

²⁷ *On the Prevention of Money Laundering and Terrorist Financing Prevention Act*, <http://vvc.gov.lv/image/catalog/dokumenti/Prevention%20of%20Money%20Laundering%20and%20Terrorism%20Financing.docx>. The statute was modified twice in 2014, once in 2015, and twice in 2016. See *id.*

²⁸ See ASLUND, *supra* note 20, at 22; ARNIS SAUKA, OVERVIEW OF THE UNOBSERVED ECONOMY, PUBLIC CORRUPTION AND MONEY LAUNDERING IN LATVIA 50 (2017).

²⁹ See Statutory Provisions for The Risk of Money Laundering and Terrorist Financing Risk Management, Regulations of the Financial and Capital Market Commission No. 154 (Sept. 23, 2016),

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enhanced due diligence for credit, licensed payment, and electronic money institutions,³⁰ information technology risk management rules,³¹ and standards governing the collection and provision of information on clients.³² All were implemented with an eye toward ensuring that Latvia's financial sector supervision met global best practices. In November 2016, the FCMC ordered 12 Latvian banks, including ABLV, to be tested against U.S. standards by U.S.-based consultants.³³

Latvia has also greatly reformed its financial crimes supervision and enforcement. In 2015 monetary penalties for non-compliance increased dramatically,³⁴ and in 2016 the FCMC established the Compliance Control Division and increased personnel and onsite bank visits.³⁵

III. ABLV'S ANTI-MONEY LAUNDERING AND SANCTIONS COMPLIANCE IMPROVEMENTS AND REDUCTION OF CLIENT RISK

In 2015, while Latvia was improving its general financial supervision system, ABLV began a series of reforms that were also aimed at reducing risk—reforms that accelerated each year until the Notice in February 2018 sent the Bank into liquidation. These changes were partly a natural consequence of the Bank's maturation, partly a response to regulatory changes and interactions that will be catalogued in detail below, and partly a response to the termination of

<http://likumi.lv/ta/id/284977-noziedzigi-iegutu-lidzeklu-legalizacijas-un-terorisma-finansesanas-riska-parvaldisanas-normativie-noteikumi>.

³⁰ Regulatory Provisions for Credit Institutions and Licensed Payment and Electronic Money Institutions on Enhanced Customer Due Diligence, Regulations of the Financial and Capital Market Commission No. 234 (Dec. 23, 2015), <http://www.fktk.lv/en/law/credit-institutions/fcmc-regulations/5574-regulatory-provisions-for-credit-institutions-and-licensed-payment-and-electronic-money-institutions-on-enhanced-customer-due-diligence.html>.

³¹ Normative Provisions of the Provision of Information Technology Risk Management for Money Laundering and Terrorist Financing, Regulations of the Financial and Capital Market Commission No. 219 (Dec. 26, 2016), <http://likumi.lv/ta/id/287771-noziedzigi-iegutu-lidzeklu-legalizacijas-un-terorisma-finansesanas-riska-parvaldibas-informacijas-tehnologiju-nodrosinajuma>.

³² Regulatory Provisions for the Collection and Provision of Information on Clients of a Credit Institution and Their Transactions to the Financial and Capital Market Commission, Regulations of the Financial and Capital Market Commission No. 197 (Nov. 29, 2016), <http://likumi.lv/ta/id/287040-informacijas-par-kreditiestades-klientiem-un-to-veiktajiem-darījumiem-apkoposanas-un-sniegsanas-finansu-un-kapitala-tirgus>.

³³ Press Release, Financial and Capital Market Committee, Reliability of the Latvian banking sector as a stable cooperation partner in the financial sector to be promoted (Nov. 30, 2016), <http://www.fktk.lv/en/publications/press-releases/6049-reliability-of-the-latvian-banking-sector-as-a-stable-cooperation-partner-in-the-financial-sector-to-be-promoted.html>.

³⁴ SAUKA, *supra* note 28 at 50–51.

³⁵ *See id.* at 50.

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U.S. dollar correspondent relationships in Latvia by large EU and U.S.-based banks.³⁶ The Notice does not account at all for these positive changes at ABLV.

The three main components of this shift were: a sustained engagement by ABLV with the FCMC about ABLV's AML and sanctions compliance activities that led to an Administrative Agreement in 2016; a significant reduction in the risk profile of ABLV's client base; and a revamped compliance program—which the Bank aimed to make consistent with global best practices—to which the Bank devoted significant human and financial resources. All these efforts drew significant attention from the Bank's most senior management and other senior officials over the last several years and, significantly, were ongoing in February 2018 when FinCEN published the Notice.

A. *May 2016 Administrative Agreement with FCMC*

The trends of risk reduction within ABLV and increased Latvian regulatory focus on AML and sanctions supervision were embodied in an Administrative Agreement ABLV reached with the FCMC in May 2016. This Agreement highlights the FCMC's increasing focus on AML and sanctions compliance supervision starting at the end of 2015, as well as the Bank's constructive engagement with its regulators, its recognition of deficiencies, and, most importantly, its commitment to improve its compliance program.

The May 2016 Administrative Agreement—the first that the Bank had reached with FCMC with respect to AML and sanctions issues—resolved concerns the FCMC raised during inspections of the Bank in 2014 and 2015.³⁷ The Agreement focused on a number of practices related to the Bank's customer due diligence and AML activities that limited the Bank's insight into the economic activities of its clients and their related parties.

As part of its resolution with the FCMC, ABLV hired Navigant Consulting, Inc. (“Navigant”) to perform an independent test of ABLV's AML and U.S. Department of the Treasury Office of Foreign Assets Control (“OFAC”) compliance program. Although ABLV, as a Latvian bank with limited U.S. dollar transactions or business involving U.S. persons, was not subject to U.S. jurisdiction for much of its activity, Navigant, at the direction of FCMC, assessed ABLV's AML and OFAC compliance program against U.S. regulatory standards so that it would be comparing the Bank against global best practices.

³⁶ *A crackdown on financial crimes means global banks are derisking*, THE ECONOMIST, July 8, 2017, <https://www.economist.com/news/international/21724803-charities-and-poor-migrants-are-among-hardest-hit-crackdown-financial-crime-means>.

³⁷ See *supra* Section II for a detailed description of AML and sanctions compliance changes and regulatory reforms made in Latvia in recent years.

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In 2016 Navigant prepared a detailed Report for the Bank of recommended changes to its AML and OFAC compliance program (the “Navigant Report” or “Report”). Based on the Report and the May 2016 Administrative Agreement, ABLV undertook changes to its AML and OFAC sanctions program to address identified deficiencies and assigned additional personnel with relevant backgrounds (some specifically hired for the task) to the internal audit department to oversee the design and implementation of the remediation plan.

The reforms adopted in response to the Navigant Report aligned with specific commitments that the Bank made in the May 2016 Administrative Agreement, including governance changes; increases in the staffing and resources devoted to legal and compliance activities; development of an automated client risk scoring system; improvements to its automated transaction monitoring; improvements in its due diligence; and the provision of timely responses to future FCMC document requests.

Of note, the FCMC specifically required that the Bank improve knowledge among its employees of U.S. standards, engage an expert on U.S. AML and sanctions as a permanent employee, and ensure that a number of Bank employees received Anti-Money Laundering Specialist certificates from the Association of Certified Anti-Money Laundering Specialists (“ACAMS”).³⁸ In accordance with the terms of the Agreement, the Bank provided monthly updates to the FCMC about its progress, and committed to spend €6.5 million on compliance through 2017 to implement the Agreement—a commitment ABLV fulfilled. Indeed, in January 2018, ABLV sent a memorandum to its Board stating that it had implemented all the recommendations,³⁹ and notified its regulators that it had done so.

B. *Changes in ABLV’s Business Strategy Away from Non-Resident and Shell Companies*

The May 2016 Administrative Agreement not only helped accelerate reforms in ABLV’s AML and sanctions compliance program, it also required the Bank to review its business model with an eye toward decreasing its compliance risks. The Bank engaged an international consulting firm to assist with the development of a lower risk business model.⁴⁰ The resulting strategy, which was approved in July 2017, acknowledged that ABLV’s previous dependence on non-resident clients was a strategic weakness, and explicitly pivoted the Bank towards a new lower risk business model.⁴¹ The Bank also recognized that its legacy shell company client base was a risk and incorporated into its policies a requirement to reduce the financial assets of shell

³⁸ ABLV personnel were intimately involved in the establishment of the ACAMS Baltic chapter and in the compliance work of the Association of Latvian Commercial Banks.

³⁹ See Exhibit 25, *Memorandum to the Board of Directors, AML Reforms*, Jan. 19, 2018.

⁴⁰ Exhibit 01, *ABLV Presentation to FCMC on Fulfilment of Administrative Agreement*, July 2017, at 18.

⁴¹ Exhibit 02, *ABLV Group’s Business Strategy 2020, STR.010*, Jan. 1, 2018, at 2.

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company clients over the next several years. Accordingly, the target market for the Bank's new strategy focused on medium to large private companies, as well as the owners and executives of the companies. Cognizant of the compliance and reputational risks attendant with its previous client base, ABLV also articulated a desire to "take the lead" in AML and sanctions compliance in the Baltics.⁴²

This is certainly not the sign of a Bank whose "owners and executives have privately expressed an unwillingness to meaningfully alter ABLV's high-risk business practices"—another assertion that FinCEN makes and for which it offers no evidence.⁴³

C. *Changes in ABLV's Client Base to Reduce Risk*

After the FCMC adopted new Customer Due Diligence regulations in December 2015, ABLV initiated sustained programs both to improve its client risk scoring methodology and to exit higher risk client relationships, which resulted in the termination of many shell company accounts.

1. Development of More Nuanced Risk Scoring Methodology

Prior to 2016, ABLV placed its clients into one of two categories—"low risk" or "high risk."⁴⁴ In December 2015, the FCMC passed a rule requiring banks to take into account in their risk score customers' inherent risk (for example, their legal form and reputation); their geographic risk; the risk posed by how their products and services are used by clients; and risks posed by their methods of obtaining clients, and to evaluate customers' risk on a 100-point scale.⁴⁵ In response ABLV created a new risk scoring system that segmented customers into four risk levels—low, medium, high, and very high—based on the FCMC's prescribed 100-point scale and which weighted customer risk based on the required factors.⁴⁶ By May 2017, ABLV had re-scored all of its existing clients based on this revised methodology.

The Bank updated the score values assigned to each risk level on a yearly basis.⁴⁷ As the Bank's risk tolerance decreased in 2017, the Bank lowered the thresholds for a customer to be

⁴² *Id.* at 3.

⁴³ Notice, *supra* note 1, at 6,989.

⁴⁴ Exhibit 03, *ABLV 2015 AML Enterprise-Wide Risk Assessment*, at 6–7.

⁴⁵ Regulatory Provisions for Credit Institutions and Licensed payment and Electronic Money institutions on Enhanced Customer Due Diligence, Regulations of the Financial and Capital Market Commission No. 234 (Dec. 23, 2015), <http://www.fktk.lv/en/law/credit-institutions/fcmc-regulations/5574-regulatory-provisions-for-credit-institutions-and-licensed-payment-and-electronic-money-institutions-on-enhanced-customer-due-diligence.html>.

⁴⁶ See generally Exhibit 04, *Rules for AML/CFT Risk Scoring*, NOT.162, Sept. 11, 2017; Exhibit 05, *ABLV 2016 AML Enterprise-Wide Risk Assessment*, Jan. 2017, at 12.

⁴⁷ Exhibit 04, *Rules for AML/CFT Risk Scoring*, NOT.162, Sept. 11, 2017, at 1, § III.2.

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categorized as medium, high, and very high risk. For example, in 2016, a score of 51 or higher was needed to be designated as high risk; in 2017, only a score of 36 or higher was needed.⁴⁸

The Bank regarded shell companies as particularly risky. Therefore, one factor assessed in the risk scoring process was whether the entity client may be a shell company. Since 2015 Latvian regulation has described a series of indicators that an entity is a shell company,⁴⁹ which were reflected in ABLV's policies. These factors, such as whether a legal entity client does not maintain a place of business in the country where it is incorporated, are taken into account in the onboarding process. If ABLV determined that a legal entity client met at least one indicator of a shell company, the client's Client Risk Score was automatically increased by 20 points, and as of the end of 2016 all shell company clients were rated high risk or very high risk.⁵⁰

In order to ensure that its revised client risk-rating approach was up to standards, in mid-2017 ABLV engaged SIA Ernst & Young Baltic ("EY") to evaluate its risk scoring methodology for compliance with the FCMC regulations. EY assessed whether the methodology was consistent with FCMC regulations and performed testing. In its report, EY made eight low-risk findings on potential improvements for the risk scoring methodology but did not identify any non-compliance with FCMC regulations. The Bank finished implementing EY's recommendations in January 2018,⁵¹ and notified its regulator that it had done so.

2. Reviewing High-Risk Customer Relationships

An equally significant part of the Bank's effort to reduce risk entailed exiting higher risk client relationships over a period of several years. As the Bank's client risk scoring became more sophisticated, the Bank was better able to identify the riskiest client relationships for further review and potential exit. The May 2016 Administrative Agreement with FCMC accelerated and focused those efforts by requiring ABLV to assess its client base and determine whether to continue business with those clients that posed a high AML or sanctions risk. In the fourth quarter of 2016 the Bank developed a separate scoring system to identify clients who historically required additional scrutiny for further review. Each client was scored based on factors like the number of times the Bank had to review the client's activity. The Bank identified 4,515 clients that met that score threshold and reviewed them between October 2016 and March

⁴⁸ *Id.* at 1, § III.3; Exhibit 05, *ABLV 2016 AML Enterprise-Wide Risk Assessment*, Jan. 2017, at 12.

⁴⁹ Regulatory Provisions for Credit Institutions and Licensed Payment and Electronic Money Institutions on Enhanced Customer Due Diligence, Regulations of the Financial and Capital Market Commission No. 234 (Dec. 23, 2015), <http://www.fktk.lv/en/law/credit-institutions/fcmc-regulations/5574-regulatoryprovisions-for-credit-institutions-and-licensed-payment-and-electronic-money-institutions-on-enhancedcustomer-due-diligence.html>.

⁵⁰ Exhibit 08, *Account Terminations and Customer Breakdown by Risk Levels*.

⁵¹ Exhibit 01, *ABLV Presentation to FCMC on Fulfilment of Administrative Agreement*, July 2017, at 9.

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2017. Between February and June 2017, the Bank reviewed remaining clients rated high risk or very high risk under its revised client risk scoring methodology.⁵²

The Client Control Committee (“CCC”), the main ABLV body analyzing client activity for AML and sanctions risk until the end of 2017, received reports on each identified client’s risk score, business, and account activity.⁵³ Through that review, the Bank determined that many of its high-risk clients were designated as such not because of the nature of their business, but because the entities did business in a jurisdiction that, historically, had not met regulatory expectations around transparency or other factors. To reduce risk, ABLV determined that it needed either to convince some clients to transform their business by moving to more transparent and well-governed jurisdictions or to exit the client. For other clients, it was a matter of improving use of the existing data to better understand their business, for example, by obtaining and inputting more data into automatic client risk profiling tools.

If the CCC determined that clients were either very risky or the clients were unwilling to provide sufficient information for ABLV to complete its compliance reviews, the Bank terminated the relationship.⁵⁴ As a result, between the end of 2015 and June 30, 2017, ABLV reduced its client base by 20%,⁵⁵ with almost 1,500 of those closures due to a reputational or AML risk.⁵⁶ By January 31, 2017, 68% of ABLV’s clients were designated low or medium risk using the Bank’s new standards.⁵⁷ It was emphatically not the case, as the Notice wrongly asserts, that “90 percent of ABLV’s customers are high-risk per ABLV’s own risk rating methodology,” in February 2018.⁵⁸

The Bank had planned to continue this de-risking process through 2018, focusing on reducing the proportion of its client assets that belong to shell companies. As part of the November 2017 Administrative Agreement with FCMC, ABLV committed to reduce the proportion of financial assets of shell entities to 35% or less of the total client assets within the Bank by 2020. Accordingly, in December 2017, ABLV reviewed existing policies and enhanced identification of shell companies by approving a new policy, as well as a monthly and quarterly review of this activity.⁵⁹ If clients did not meet the criteria and could not reform appropriately, the Bank would consider terminating the relationship to ensure compliance with requirements of

⁵² Exhibit 10, *Extract from ABLV Bank, AS, and ABLV Group Risk Report Q2 2017*, at 26 (confirming that the special review was completed and the results were reported to FCMC).

⁵³ See, e.g., Exhibit 09, *Example of Special Review Report*.

⁵⁴ Exhibit 11, *ABLV Bank, AS, Public Quarterly Report, January-June 2017*, at 2.

⁵⁵ *Id.*

⁵⁶ See Exhibit 01, *ABLV Presentation to FCMC on Fulfilment of Administrative Agreement*, July 2017, at 13.

⁵⁷ See Exhibit 05, *ABLV 2016 AML Enterprise-Wide Risk Assessment*, Jan. 2017, at 27.

⁵⁸ Notice, *supra* note 1, at 6,989.

⁵⁹ Exhibit 12, *Rules for Control of Money Laundering/Terrorism Financing Indicators, NOT.210*, Dec. 31, 2017.

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the November 2017 Administrative Agreement.⁶⁰ This move away from shell companies was not just aspirational, and is reflected in the numbers: whereas the Bank reduced its clients generally by approximately 10% between September 2016 and June 2017, it reduced the number of shell company clients by approximately 20% in the same time period.⁶¹ These closures meant that by the fourth quarter of 2017, the Bank had reduced its shell company clients to 37% of its total client base,⁶² and had begun reducing the assets from shell companies as a percentage of its total client asset volume. Had it remained in business, the Bank planned to meet its commitment to FCMC to reduce the assets of shell companies to 35% of its total client assets by 2020.⁶³

D. *ABLV's AML and Sanctions Compliance Reforms*

Against the backdrop of the de-risking activities described above, ABLV has also taken significant steps to enhance its financial crimes compliance in the last several years, and particularly since 2015. These enhancements fell into four broad categories, each of which will be described in turn: Governance; Enhanced Policies and Procedures; Internal Controls; and Independent Testing. With respect to all these matters, the Bank was advised by leading global experts in financial crimes compliance. In addition to these governance and operational changes, the Bank also devoted significant human and financial resources to compliance activities. In the last several years, the Bank dramatically expanded its compliance staff, from 39 in 2011 to 109 at the end of 2017 (representing nearly 16% of the Bank's personnel). These steps reflect substantial efforts by the Bank to build a sophisticated AML and sanctions compliance system to address its financial crimes compliance risk—efforts that are not given serious treatment in FinCEN's Notice.

1. Improved Governance of AML and Sanctions Compliance

ABLV set forth its intention to adhere to EU and Latvian law, and to conform to U.S. AML and sanctions laws “to the extent those are applicable” in its foundational AML and sanctions policy adopted in September 2016.⁶⁴ Having done so, ABLV built a governance structure to effectively manage financial crimes compliance risk.

⁶⁰ Exhibit 10, *Extract from ABLV Bank, AS, and ABLV Group Risk Report Q2 2017*, at 26 (“[T]he Bank completed the ‘special client review’ project, during which, based on several ML/TF risk-generating criteria, relationship with clients was terminated.”).

⁶¹ See Exhibit 01, *ABLV Presentation to FCMC on Fulfilment of Administrative Agreement*, July 2017, at 15.

⁶² See *id.* at 16.

⁶³ *Id.*

⁶⁴ Exhibit 14, *AML/CFT and Sanctions Policy, POL.071*, Dec. 29, 2017, at 1. Predecessor AML and sanctions policies have existed since the late 1990s.

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At the apex of the system sit the Board and the Council, the two highest governing bodies of the Bank.⁶⁵ The Council reviews and approves the Bank's AML and Sanctions policy, and also approves the Bank's risk report on a quarterly basis.⁶⁶ The Policy also requires the Council to "ensure[] that independent assessment of the AML/CTF and sanctions internal control system is performed at least once every 18 months," and outlines its general supervisory oversight of the Bank's compliance system.⁶⁷ In addition to the activity of the Council, the Board supervises implementation of the AML and Sanctions Policy, manages human resources related to financial crimes compliance, and reviews and approves risk testing scenarios.⁶⁸ The Bank's AML and Sanctions Policy also outlines roles for senior management with responsibility for supervising the key structures, including a Chief Compliance Officer (CCO) and two officers appointed by the CCO, the Money Laundering Reporting Officer (MLRO) and the Sanctions Officer (SO).⁶⁹ FinCEN's claim in the Notice that "Bank executives and employees are complicit in their clients' illicit financial activities" and that the bank and its employees "orchestrate and engage in money laundering schemes"—another set of allegations offered without any supporting evidence—is profoundly inconsistent with the amount of attention and involvement the Council and Board devoted to financial crimes compliance issues (to say nothing of the management team members responsible for financial crimes compliance on a daily basis).⁷⁰

Next in the structure sit four committees, which have distinct but overlapping responsibilities—the Acceptance Committee (oversight of client onboarding); the AML Committee; the Client Review Committee; and the Politically Exposed Persons ("PEPs") and Institutional Clients Committee.⁷¹ These committees emerged from the CCC and Client Monitoring Committee ("CMC"), which until that time had been charged with oversight over client activities to prevent money laundering and terrorist financing activity at the Bank until the end of 2017. The CCC and CMC were expanded into the four-committee structure to account for the greater specialization required to navigate the Bank's financial crimes compliance risk environment.

Finally, the Compliance Division is responsible for daily operations of financial crimes compliance activities at ABLV. The Compliance Division performs activities related to client

⁶⁵ See *id.* at 4. The Council is akin to the Board of Directors for a U.S.-based corporation, and the Board is akin to the most senior management committee.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 5.

⁷⁰ Notice, *supra* note 1, at 6,988.

⁷¹ Exhibit 14, *AML/CTF and Sanctions Policy, POL.071*, Dec. 29, 2017, at 8. For a more detailed picture of the roles and authorities of each committee, see Exhibit 15, *Regulations on the Acceptance Committee, NOL.070*, Dec. 1, 2017; Exhibit 16, *Regulations on the AML Committee, NOL.071*, Dec. 1, 2017; Exhibit 17, *Regulations on the Client Review Committee, NOL.072*, Dec. 1, 2017; Exhibit 18, *Regulations on the PEP and Institutional Clients Committee, NOL.073*, Dec. 1, 2017.

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onboarding, Customer Due Diligence (“CDD”) updates, investigations, enhancing internal AML and sanctions processes, FIU reporting, responding to inquiries from state authorities (including the FCMC and FIU) and ABLV’s correspondent banking partners, and payment/customer screening. The Compliance Division has six departments: The AML Compliance Department, the Information Rendering Department, the AML/CFT Compliance Methodology Department, the Acceptance Department, the Monitoring Department, and the Payments Supervision and Analysis Department (“PSAD”).

The Monitoring Department and PSAD play a particularly critical role in financial crimes compliance risk management. The Monitoring Department engages in *ex post* client transaction monitoring, performs Enhanced Due Diligence (“EDD”) for high-risk clients, and detects possible suspicious transactions and submits findings to the AML Compliance Department for further investigation, among other activities. The Compliance Division may request additional information or documents from clients through their bankers; obtains information on clients, beneficial owners, and counterparties from all sources; and updates KYC/CDD documents on a periodic basis.⁷² The PSAD screens against applicable sanctions lists and internal watchlists, and does real-time automated transaction monitoring based on money laundering typologies or thresholds.⁷³

2. Enhanced Policies and Procedures

The Bank’s commitment to AML and sanctions compliance reform also is embodied in significant changes to the Bank’s policies and procedures in the last several years. These policies and procedures are designed to protect the Bank during the full life-cycle of money laundering and sanctions risk management—from client onboarding (including CDD and know-your-customer (“KYC”) activities), to ongoing transaction monitoring and sanctions screening, to EDD, and client exit should that become appropriate. There are over 100 distinct policies, procedures, instructions, forms, rules, or standardized documents that cover different components of this lifecycle,⁷⁴ many of which have existed for the last decade and some of

⁷² Exhibit 19, *ABLV Bank, AS, AML/CTF Compliance Framework*, Feb. 13, 2018, at 40.

⁷³ *Id.* at 41.

⁷⁴ See, e.g., Exhibit 14, *AML/CFT and Sanctions Policy*, POL.071, Dec. 29, 2017; Exhibit 15, *Regulations on the Acceptance Committee*, NOL.070, Dec. 1, 2017; Exhibit 16, *Regulations on the AML Committee*, NOL.071, Dec. 1, 2017; Exhibit 17, *Regulations on the Client Review Committee*, NOL.072, Dec. 1, 2017; Exhibit 18, *Regulations on the PEP and Institutional Clients Committee*, NOL.073, Dec. 1, 2017; Exhibit 20, *Zero Tolerance Policy on North Korea*, POL.074; Exhibit 21, *Rules for Due Diligence of Clients and Their Activities*, NOT.112; Exhibit 22, *Rules for Maintenance of Person and Transaction Watch Lists*, NOT.151, Jan. 22, 2018; Exhibit 24, *ABLV Group’s Risk Management Strategy*, STR.012, Dec. 28, 2017. For a complete list of policies and procedures related to controlling financial crimes compliance risk, see Exhibit 26, *List of AML, CFT, and Sanctions Policies*.

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which were adapted after the May 2016 Administrative Agreement and Navigant's October 2016 report.

3. Reforms to Internal Controls

The changes to the Bank's AML and sanctions compliance program have resulted in significant adaptations to the internal controls and daily operations deployed to manage the compliance processes. As noted above, recognizing the need to make significant changes to its pre-existing practices for managing money laundering and sanctions risk, the Bank retained Navigant in early 2016 to assess its AML and OFAC sanctions program to identify any gaps that existed between the Bank's program and U.S. AML laws and regulations, and make recommendations for improvement. Navigant conducted an extensive evaluation of the Bank's program, conducting dozens of interviews and walk-throughs, reviewing thousands of documents, sampling alerts for transaction monitoring and sanctions screening, testing customer due diligence files, and reviewing Suspicious Transaction Reports ("STRs").

Navigant's review covered core components of the Bank's internal control environment for AML and OFAC compliance—including its risk assessment, onboarding, customer due diligence, client risk scoring, customer and transaction monitoring, sanctions screening, and reporting/information sharing processes. Based on the Navigant Report, the Bank created a comprehensive plan of action to remedy identified deficiencies, beginning with the Bank's risk assessment, which became substantially more detailed and thorough in the last several years.⁷⁵ These internal controls were buttressed by the Bank's use of over a dozen world-class technical tools like Siron, Dow Jones, Terrasoft, and WorldCheck in its compliance processes.⁷⁶

By January 2018 the Bank reported to the Board that it had implemented all of the recommendations contained in Navigant's October 2016 Report.⁷⁷ FinCEN nonetheless asserts in the Notice that ABLV continually failed "to implement adequate AML controls commensurate with" its high-risk business activity.⁷⁸ In doing so, FinCEN fails on two counts—first, in not crediting the changes to ABLV's business model over the last several years, the core features of which were to reduce the footprint of offshore and shell company activity as described above; and second, to omit entirely a discussion of the improved controls that ABLV adopted since 2015.

⁷⁵ Cf. Exhibit 03, *ABLV 2015 AML Enterprise-Wide Risk Assessment*; Exhibit 05, *ABLV 2016 AML Enterprise-Wide Risk Assessment*, Jan. 2017.

⁷⁶ Exhibit 19, *ABLV Bank, AS, AML/CTF Compliance Framework*, Feb. 13, 2018, at 47—48.

⁷⁷ Exhibit 25, *Memorandum to the Board of Directors, AML Reforms*, Jan. 19, 2018.

⁷⁸ Notice, *supra* note 1, at 6,988.

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In the last several years the Bank made significant improvements in its client onboarding and due diligence processes. The first step in the process is initial onboarding. ABLV has been required to collect Ultimate Beneficial Owner (“UBO”) information since 2005,⁷⁹ and has used independent due diligence services (at a cost of approximately €500,000 per year) since 2007 to confirm the identity and reputation of the accountholder’s UBO,⁸⁰ among other measures.

ABLV’s enhanced customer risk profiling system (described in greater detail below) produces individual client risk ratings that consider client type (*e.g.*, individual, legal entity, PEP), industry sector, and anticipated product use. With respect to jurisdiction risk, ABLV’s risk profiling system accounts not only for the accountholder’s country of incorporation, but the UBO’s country of citizenship, the location of the client’s primary business activities, and the location of the client’s primary counterparties.⁸¹

ABLV’s risk indicators are codified in a separate policy, and particularly high-risk indicators are flagged with an Initial Enhanced Due Diligence indicator. ABLV has also created a list of the types of clients whose activity poses an unacceptable risk to the Bank.⁸² When ABLV detects one or more high-risk factors during the onboarding process, including PEP status, the potential client is to be subjected to pre-acceptance enhanced due diligence (a risk score greater than 36 on a 100-point scale will also trigger enhanced due diligence). This review includes over a dozen risk factors related to the products and services used by the client, and also includes the client’s business and personal activities, origin of funds, major business partners (including the nature of their business with the client and expected volume), and business licenses or permits.⁸³ If the client’s activities are not connected to Latvia, the Bank’s policies require obtaining information on the client’s motive for opening an account there and on its business in its home country.⁸⁴

Due diligence processes are required to continue after client onboarding to resolve both real time and *ex post* AML alerts, and are updated on a periodic basis determined by the client’s customer risk profile score.⁸⁵ Material variances in customer activity or circumstance (*e.g.*, identified in automated sanctions screens or negative news searches triggered by an alert or on a periodic basis determined by the client’s risk score) also prompt event-driven due diligence updates.⁸⁶ ABLV’s regular due diligence reviews are performed according to a defined schedule, with customers in higher-risk categories receiving more frequent and more elaborate

⁷⁹ See Exhibit 27, *Client Acceptance*, INS.250, Nov. 21, 2016, at 4–7.

⁸⁰ See *id.*

⁸¹ See *id.*

⁸² This includes customers, for example, in the unlicensed weapons trade or that issue cryptocurrency.

⁸³ See *id.* at 6–7.

⁸⁴ See *id.* at 6.

⁸⁵ See Exhibit 21, *Rules for Due Diligence of Clients and Their Activities*, NOT.112, Oct. 23, 2017, at 7.

⁸⁶ See generally Exhibit 29, *Conditions of Regularity Review*, NOT.112.p.01, Oct. 23, 2017.

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due diligence.⁸⁷ The policies call for very high-risk clients and PEP clients to receive complex reviews on at least an annual basis.⁸⁸

These detailed and extensive policies and practices stand in stark contrast to the Notice's unsubstantiated claim that "ABLV does not adequately conduct ... (CDD) on a number of its customers, does not collect or update supporting documentation from its customers to justify transactional activity, and uses fraudulent documentation in some of its CDD files."⁸⁹

ABLV's policies also call for regular customer and transaction monitoring—both in real time and after the fact—to determine whether its clients' activities deserve further scrutiny. This process involves a combination of vendor-supplied systems and manual information collection and analysis to inform monitoring of client activity to detect and interdict potentially suspicious transactions, separate from ABLV's sanctions screening activities. ABLV engages in real-time transaction monitoring for AML purposes, deploying a number of scenarios to stop potentially suspicious transactions pending alert resolution (which may require the collection of information about, for example, a new transactional counterparty involved in large-value transactions with one of ABLV's clients). The transaction monitoring processes are designed to determine whether actual client activity matches the client's risk profile, and to ensure that the client's transactions are consistent with its anticipated activity.⁹⁰ To the extent the client's activity changes, so too does its risk score.

In response to Navigant's Report, ABLV also materially increased the number of AML *ex post* transaction monitoring scenarios it uses to detect potentially suspicious activity. At year-end 2015, ABLV employed only nine *ex post* automated monitoring scenarios. By February 2018, ABLV increased the number of *ex post* transaction monitoring rules, which identify transactions for review, to 26.⁹¹ ABLV also engages in real-time AML transaction monitoring. And yet, the Notice asserts that ABLV's CDD and monitoring of transactions is "insufficient" without explaining why or substantiating that claim in any way.⁹²

⁸⁷ See *id.* at 2.

⁸⁸ See Exhibit 21, *Rules for Due Diligence of Clients and Their Activities*, NOT.112, Oct. 23, 2017, at 7. ABLV maintains detailed procedures designed to detect PEPs amongst its customer base; group PEPs in risk categories; make informed decisions on the business relationship with PEPs; conduct enhanced due diligence of PEP clients; and define a process to terminate a person's PEP status. See generally Exhibit 30, *Identification, Classification, and Registration of a Politically Exposed Person*, PRO.097, Sept. 1, 2017.

⁸⁹ Notice, *supra* note 1, at 6,988.

⁹⁰ See generally Exhibit 32, *Rules for Offline Transaction Review of Client's Transactions*, NOT.182, Jan. 18, 2018; Exhibit 31, *Compliance Rules for Verification of Payments and Authorizations for Payment Processing*, NOT_067.p.11, Dec. 15, 2017.

⁹¹ Exhibit 31, *Compliance Rules for the Review of Payments and Authorizations for Payment Processing*, NOT.067.p.11, Dec. 15, 2017, at 8–21. See Exhibit 32, *Rules for Offline Transaction Review of Client's Transactions*, NOT.182, Jan. 18, 2018, for a description of the actual monitoring rules.

⁹² Notice, *supra* note 1, at 6,988.

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ABLV also screens its customer and transaction data against applicable sanctions lists, as well as its own internal watch lists. The Bank screens all clients and affiliated persons (beneficiaries, authorized persons, additional card users, and identified main counterparties) prior to account opening and daily thereafter; incoming and outgoing client and interbank payments in any currency to/from any country in real time before executing the payment; and counterparties to certain kinds of transactions (*e.g.*, trade financing) before those transactions are executed.⁹³

And despite FinCEN's allegation to the contrary,⁹⁴ ABLV has productive information-sharing relationships with both Latvian state authorities and the financial institutions with which it does business. In 2017, ABLV conducted 151 investigations that led to filing 161 STRs with the Latvian FIU involving 352 clients. In that same year, ABLV also responded to 2,085 requests from the Latvian state authorities.⁹⁵ In 2017, ABLV also received 776 inquiries about transactions from banking partners, to which it responded in a timely manner.⁹⁶ ABLV received follow-up requests for additional information only 27 times in 2017.⁹⁷

This responsiveness stands in stark contrast to FinCEN's claim that it is "aware that ABLV frequently fails to respond to other financial institutions' questions concerning the nature of the transactions ABLV is processing."⁹⁸ It also stands in stark contrast to the profuse thanks conveyed in late 2015 by the U.S. Department of Justice's Legal Attaché in Riga, who wrote to the Bank "[o]n behalf of the United States government" to express the government's "sincerest gratitude for [the Bank's] assistance in the return of victim funds to a United States corporation defrauded by an international criminal enterprise."⁹⁹

4. Independent Testing

Independent testing is a final critical component of an effective AML and sanctions compliance system, and ABLV has also invested in this capability. In 2017 ABLV hired experienced AML and sanctions compliance professionals who had previously served in internal audit functions at other financial institutions to improve its independent testing. It also conducted several focused audits during 2017, including reviews focused on sanctions screening

⁹³ Exhibit 31, *Compliance Rules for the Review of Payments and Authorizations for Payment Processing*, NOT.067.p.11, Dec. 15, 2017, at 5.

⁹⁴ Notice, *supra* note 1, at 6,989.

⁹⁵ Exhibit 35, *Statistics of Compliance Division, 2017, 2016*.

⁹⁶ See Exhibit 36, *List of Banks' Inquiries 2017*.

⁹⁷ Exhibit 37, *Additional Requests 2017*.

⁹⁸ Notice, *supra* note 1, at 6,989.

⁹⁹ Exhibit 51, *Letter from Legal Attaché, U.S. Embassy, Riga, Latvia, November 2015*.

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against relevant lists,¹⁰⁰ and AML and sanctions risk management.¹⁰¹ ABLV had also prepared a comprehensive audit plan for 2018 covering a range of topics, including services to PEPs, IT controls for AML, management of shell company accounts, and other related issues (*e.g.*, data privacy) that had been approved by the Bank's Council on December 11, 2017.¹⁰² An additional audit on sanctions risk was planned for summer 2018.

E. *Applications to Establish a Representative Office in the United States*

At the same time as all these financial crimes compliance reforms were underway in Latvia, ABLV was seeking to enter the U.S. financial market by establishing a representative office in New Jersey. In applying to open this office, ABLV knew that it would subject itself directly to U.S. regulatory oversight, and voluntarily sought to do so. Indeed, that was part of the appeal for ABLV, which noted in its application to the New Jersey Department of Banking and Insurance that the “establishment of a representative office in the United States *will be designed to promote the sharing of information consistent with best practices for AML risk management programs.*”¹⁰³ ABLV opened an Advisory Services office in New York in April 2016 to help prepare its applications for Federal Reserve and New Jersey state banking authorizations,¹⁰⁴ which it submitted in January 2017. The Representative Office applications contained extensive descriptions of the steps ABLV had taken and would continue to take to implement an effective Bank Secrecy Act (“BSA”) and sanctions compliance program.

The Representative Office applications reflect an affirmative choice by the Bank to subject itself to direct U.S. regulation and to adhere to the highest AML and sanctions compliance standards. There was no need for ABLV to do so; it was a path it chose. Doing so would be an odd choice, to say the least, if the Bank's executives, shareholders, and employees had “institutionalized money laundering as a pillar of the bank's business practices” as FinCEN alleges in the Notice.¹⁰⁵

IV. FINCEN'S UNSUBSTANTIATED ALLEGATIONS OF WRONGDOING

As demonstrated above, FinCEN's Notice does not meet the requirements for an APA rulemaking because it fails to set forth a sufficient, unclassified, evidentiary basis for its conclusions and, moreover, deprives ABLV of a meaningful opportunity to respond to the

¹⁰⁰ See generally, *e.g.*, Exhibit 38, *Audit on Clients and Transaction Review: External Restrictive (Control) Lists*, Apr. 28, 2017.

¹⁰¹ See generally, *e.g.*, Exhibit 39, *Audit on ML/TF Risk Management*, Aug. 21, 2017.

¹⁰² See generally Exhibit 40, *Internal Audit Plan for 2018*, Dec. 11, 2017.

¹⁰³ Emphasis added.

¹⁰⁴ Press Release, ABLV Bank, AS, ABLV Represented in USA (Apr. 14, 2016), <https://www.ablv.com/en/press/2016-04-14-ablv-represented-in-usa>.

¹⁰⁵ Notice, *supra* note 1, at 6,988.

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agency's allegations. Instead, the Notice sets forth a series of vague, repetitive, and conclusory allegations from which the Bank is forced largely to guess at the basis for FinCEN's *ipse dixit* allegations of wrongdoing.¹⁰⁶ In many instances, FinCEN has offered *no* evidence whatever, in its Notice or in the material it subsequently disclosed, to support its allegations. Especially given the serious nature of the allegations levelled by FinCEN, that does not offer ABLV a legally sufficient opportunity for comment.

In this section, ABLV will set forth—to the best of its ability given FinCEN's deficient Notice—a more complete account of the agency's principal allegations of wrongdoing.

A. *Allegations Regarding North Korea—Prior to Adoption of Zero Tolerance Policy*

Much of FinCEN's Notice focuses on allegations that ABLV's allegedly weak compliance program permitted financial activity related to North Korea, some occurring before August 2017 when the Bank adopted a "Zero Tolerance Policy" for North Korea (described below) and some of it afterwards. To the extent they can be teased out of its Notice, FinCEN's allegations pertaining to each period will be addressed in turn.

But first, it is important to highlight that FinCEN's legal theory regarding ABLV's "know your customer" obligation is startlingly broad. Notably, FinCEN does not allege that any ABLV customer was itself subject to sanctions for North Korea-related activity. Rather, FinCEN's allegation appears to be that ABLV's "know your customer" policies were deficient because ABLV did not have sufficient insight into transactional activity by ABLV's *customers' customers*. FinCEN describes the conduct it is concerned about inconsistently, appearing at times to fault ABLV for conduct that did not even occur by, at, or through the Bank, such as when it claims that "Certain customers' counterparties have also been designated by OFAC, further demonstrating their links to the DPRK," but without demonstrating any connection between that activity and ABLV.¹⁰⁷ This implied obligation for a bank to know about the transactional activity of its customers' customers that does not itself involve the Bank finds no footing in existing regulatory requirements in the United States or Latvia, nor is it fairly drawn from international standards promulgated by the Financial Action Task Force ("FATF").

The Notice, moreover, neglects to describe the Bank's effort to understand and address the North Korea-related risks to which it was subject. Until the spring of 2017, ABLV did not have any reason to believe that it had atypical risks of exposure to North Korea-related activities.

¹⁰⁶ We note that a substantial portion of the Evidentiary Memorandum purporting to support FinCEN's action is redacted, presumably because it contains classified information. Even assuming that is so, the court in *FBME Bank Ltd. v. Lew* made clear that FinCEN is obligated to "disclose[] enough" unclassified evidence "to allow parties to comment meaningfully and contest the basis on which an agency reached the result that it did." 125 F. Supp. 3d 109, 121 (D.D.C. 2015).

¹⁰⁷ Notice, *supra* note 1, at 6,989.

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The Bank did not solicit North Korean-affiliated clients, and it had been screening transactions against OFAC's SDN list and deploying other AML and sanctions control measures since the early 2000s. In March 2017, however, ABLV—along with a number of other Latvian banks—was summoned to a meeting with the FCMC and other Latvian government officials. During this discussion the banks were asked to look for connections among their clients to Alex Tsai, an individual who had been prosecuted in the United States for violating North Korea sanctions,¹⁰⁸ had done business in the Baltic States, and had been arrested in Tallinn, Estonia. The banks were asked to check their records for links with Tsai. ABLV did so and found none.

A few weeks after this meeting the FCMC contacted ABLV and explained further its belief that clients of the Bank had links to North Korea, providing additional information about these clients and identifying additional issues the Bank needed to address regarding possible links to sanctioned parties. The Bank's response to this new information was prompt, energetic, and multifaceted, and fell into five broad categories— hiring outside experts to evaluate the information with which the Bank was provided and advise on how to reduce North Korea exposure; enhancing its policies and procedures to address North Korea risks; changing its sanctions compliance operations to detect and eliminate (if identified) any North Korea contacts; terminating client relationships with even indirect ties to North Korea; and engaging in a lengthy and constructive dialogue with the FCMC about the concerns the agency presented, which culminated in the FCMC's conclusion that ABLV did not engage in any sanctions violations with respect to North Korea. ABLV also referred the matter to the Latvian Security Police for further investigation.¹⁰⁹

1. Engaging Outside Experts

ABLV hired two outside expert firms to evaluate the information provided by FCMC about its clients—K2 Intelligence, Inc. (“K2”), and the Financial Integrity Network (“FIN”).

K2 is a global investigations, compliance, and cyber defense services firm headquartered in the United States. It conducted a review of transactions by the customers the FCMC identified in its May 13, 2017 letter, in which the FCMC expressed concern that certain ABLV clients had ties to North Korea.¹¹⁰ After conducting its analysis, K2 concluded that there was “no participation of any OFAC SDN in any bank transaction cited in the FCMC letter.”¹¹¹ K2 noted that some ABLV clients had transacted with a few persons designated as SDNs or otherwise

¹⁰⁸ Press Release, Department of Justice, Taiwan Businessman Sentenced to 24 Months for Conspiring to Violate U.S. Laws Preventing Proliferation of Weapons of Mass Destruction (Mar. 16, 2015), <https://www.justice.gov/opa/pr/taiwan-businessman-sentenced-24-months-conspiring-violate-us-laws-preventing-proliferation>.

¹⁰⁹ Exhibit 13, *Letter to Latvian Security Police*, May 24, 2017.

¹¹⁰ Exhibit 43, *K2 OFAC Sanctions Screening Independent Review – 2017*, Jul. 18, 2017, at 4.

¹¹¹ *Id.* at 5.

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identified as linked to North Korea, *but that all of those transactions pre-dated the counterparties' designations.*¹¹² K2 also assessed that a “full review of the Bank’s OFAC Compliance Program, using the FFIEC BSA/AML Examination Manual as a guide, would indicate the program is more than adequate.”¹¹³

ABLV retained FIN in June 2017 and asked for its assistance on two main tasks: first, to help the Bank ensure that it was on the leading edge with respect to North Korea sanctions compliance, which included a risk assessment and adoption of a strategic plan, and led to the creation of the Zero Tolerance Policy; and second, to serve as a resource if and when questions arose regarding the implementation of that Policy after its adoption. As such, the Bank consulted with FIN in the period after the adoption of the Zero Tolerance Policy to ensure that potential links to North Korea would be properly evaluated and addressed.¹¹⁴

FIN was particularly well-suited to advise ABLV on global best practices for financial crimes compliance and to help the Bank build an approach toward managing North Korea risk consistent with those standards. Its three principals were instrumental in creating the legal and policy framework for AML and sanctions in the post-9/11 era through their service in the U.S. Department of the Treasury, where they were all senior leaders, the White House, and the FATF.

2. Adopting and Implementing the Zero Tolerance Policy

The centerpiece of ABLV’s policy response to the FCMC’s concerns was the “Zero Tolerance Policy,” adopted in August 2017.¹¹⁵ In the Policy, the Bank committed that it “will not allow any of [the] Bank’s clients to use ABLV group and its products and services, either directly or indirectly, for the benefit of” North Korea.¹¹⁶ This policy change reflected an important commitment by the Bank to identify and prevent any North Korea links, no matter how attenuated, and to terminate clients that put the Bank at risk of violating that commitment. And the Bank dedicated itself to implementing the policy in earnest. As described below, the Bank reviewed and terminated customer relationships because of the Zero Tolerance Policy, and rolled out a training campaign about the Zero Tolerance Policy within the Bank. This training focused on identifying front companies and other red flags of North Korea activity.

The Bank also adapted its organizational structure to more effectively manage North Korea-related risk, reorganizing a North Korea Sanctions Risk Working Group created in June

¹¹² *See id.*

¹¹³ *Id.*

¹¹⁴ *See generally* Exhibit 41, *FIN Opinion on North Korea Zero Tolerance Policy, 1*, Jan. 8, 2018; Exhibit 42, *FIN Opinion on North Korea Zero Tolerance Policy, 2*, Jan. 18, 2018.

¹¹⁵ *See generally* Exhibit 20, *Zero Tolerance Policy on North Korea, POL.074*, Aug. 29, 2017.

¹¹⁶ *Id.* at 1.

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2017 into three more specialized groups—a North Korea Policy Working Group, a North Korea Investigative Task Force, and an Outreach Liaison Work Group.¹¹⁷

3. Changing AML and Sanctions Compliance Operations

ABLV took a conservative approach toward implementing the Zero Tolerance Policy. To that end, the Bank made a number of changes to its AML and sanctions compliance operations. These included the creation of a new “North Korea watchlist” with names of individuals or entities associated with North Korea beyond those on Latvian, EU, UN, or OFAC sanctions lists,¹¹⁸ commissioning a client and transaction “lookback” (on the conduct of which FIN advised) to detect North Korea-linked activity about which the Bank was previously unaware,¹¹⁹ approving a training plan for the Zero Tolerance Policy,¹²⁰ and others. ABLV also began using geographic and other illicit finance typologies to detect North Korea-related transactions in its screening systems by, for example, identifying ports of origin in China that pose a high risk of being used to circumvent North Korea sanctions.¹²¹ These are exactly the kinds of typologies available to the “public” that FinCEN wrongly implies ABLV ignored in the Notice.¹²²

4. Resolution of FCMC Inspections

A significant component of the Bank’s response to the FCMC was a lengthy, detailed, and productive dialogue with the FCMC about its North Korea concerns. As mentioned above, this dialogue began shortly after the March 2017 meeting when the FCMC provided ABLV additional information about alleged North Korea-related activities of its clients. The dialogue concluded in November 2017 when those concerns were resolved in an Administrative Agreement that, notably, did not contain any finding of sanctions violations by ABLV. During the course of this interaction, ABLV provided the FCMC with substantial amounts of due diligence, ownership, transaction, and other information about the clients on which FCMC was focused, and delivered to FCMC an extensive and detailed presentation about the legal and factual issues surrounding its allegations.

At the conclusion of the process in November 2017, ABLV and the FCMC reached an Administrative Agreement in which the FCMC documented its conclusion that ABLV did not have any improper North Korea ties; did not violate EU, Latvian, or U.S. sanctions; that while the FCMC did identify lapses in the Bank’s AML-related internal controls, the Bank was in the

¹¹⁷ Exhibit 44, *Minutes No. V-52 of Closed Board Meeting*, Aug. 10, 2017, at 2.

¹¹⁸ *Id.*

¹¹⁹ Exhibit 45, *ABLV Bank, AS, North Korea Policy Working Group, Minutes No. 8*, Nov. 13, 2017, at 1–2.

¹²⁰ Exhibit 44, *Minutes No. V-52 of Closed Board Meeting*, Aug. 10, 2017, at 1, 2.

¹²¹ See Exhibit 46, *ABLV Bank, AS, North Korea Policy Working Group, Minutes No. 9*, Dec. 5, 2017, at 2.

¹²² Notice, *supra* note 1, at 6,989.

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process of remediating those lapses and was already fined for them in the May 2016 Administrative Agreement; and that ABLV had met its obligations to that point under the May 2016 Administrative Agreement.

B. *Allegations Regarding North Korea—After Adoption of Zero Tolerance Policy*

FinCEN also alleges that “ABLV facilitated transactions related to North Korea after the bank’s summer 2017 announcement of a North Korea ‘no tolerance’ policy.”¹²³ As with many of its other allegations, FinCEN offers absolutely no evidence for these claims. It also fails to take account of the significant steps that ABLV took to implement the policy, which included consultations with FIN about how to apply it. ABLV did so by requesting advice through a series of hypothetical transactional/relationship scenarios that presented potential *indirect* exposure to North Korea,¹²⁴ in which it sought FIN’s views about how best to manage those kinds of attenuated North Korea risks.

But the changes in the Bank’s policies and procedures also resulted in action taken with respect to the Bank’s clients. In the months after the Zero Tolerance Policy came into effect, the Bank took action with respect to over a dozen client relationships because of indirect links to North Korea.¹²⁵ It learned about these ties through publicly available information about the counterparties of the Bank’s clients, and not through transactional or other activity at the Bank. The Bank’s response included exiting relationships, adding information to internal watchlists,¹²⁶ and filing STRs,¹²⁷ even though ABLV did not confirm sanctions violations by those entities.¹²⁸

After the publication of FinCEN’s Notice ABLV commissioned a further analysis by K2. Specifically troubled by FinCEN’s allegations that the Bank conducted transactions “related to” North Korea after the adoption of the Zero Tolerance Policy, ABLV engaged K2 again to review transactions from the date of its last engagement in June 2017 through to the date of FinCEN’s Notice in February 2018. K2 did not find any instances in which the Bank engaged in transactions with entities on any sanctions lists in this period.¹²⁹

¹²³ *Id.*

¹²⁴ See generally Exhibit 41, *FIN Opinion on North Korea Zero Tolerance Policy, 1*, Jan. 8, 2018; Exhibit 42, *FIN Opinion on North Korea Zero Tolerance Policy, 2*, Jan. 18, 2018.

¹²⁵ See Exhibit 48, *Clients Closed Due to the Zero Tolerance Policy*, Mar. 14, 2017.

¹²⁶ Exhibit 47, *Memorandum to CCC*, Nov. 10, 2017, at 5.

¹²⁷ *Id.*

¹²⁸ See, e.g., *id.*

¹²⁹ Exhibit 28, *K2 Report of ABLV Targeted Review*, Apr. 12, 2018, at 4 (“Based on the results of K2’s screening of customer names, transacting counterparties, shipping companies, vessels, and other affiliated legal entities for potential indicia of economic and trade sanctions violations specific to North Korea, no true positive hits or matches against the Sanctions Lists were identified. Open source research on all identified entities did not yield material negative news related to potential sanctions violations or proximate suspicious activities.”).

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C. *Allegations of Bribery*

FinCEN proceeds to make a litany of vague and conclusory allegations in the Notice that, at best, leave ABLV to guess at the facts to which FinCEN is referring, in violation of FinCEN's legal obligations. The most surprising is FinCEN's utterly unsupported allegation that "ABLV executives and management have used bribery to influence Latvian officials when challenging enforcement actions and perceived threats to their high-risk business."¹³⁰

ABLV categorically denies that anyone in the Bank bribed anyone in the FCMC or any other component of the Latvian Government. Furthermore, the allegation makes no sense on its face. From 2015-2017 the Bank engaged in a sustained dialogue with the FCMC that culminated in the May 2016 and November 2017 Administrative Agreements, both of which are described above. Those Agreements involved multiple people and were both resolved on the merits. The May 2016 Agreement involved a fine that ABLV paid. While the November 2017 Agreement concluded that ABLV committed no sanctions violations, it nevertheless prescribed a list of obligations that the Bank had to fulfil through 2020, including to spend €12 million to transform the Bank's services and client risk management. In both Agreements, ABLV agreed to make changes to its AML and sanctions risk profile, both by improving its controls, and by reducing the high-risk business. It is hard to see why the Bank would do so if, as FinCEN erroneously claims, ABLV bribed Latvian officials to protect that business. Finally, the bribery allegations were so concerning to the Bank's leadership that it sent formal requests to the Latvian State Police and Office of Corruption Prevention requesting a thorough investigation into FinCEN's claims and pledging ABLV's full cooperation—hardly the response one would expect from an institution that had engaged in bribery.¹³¹

D. *Allegations Regarding Serhiy Kurchenko*

The Notice alleges that ABLV "facilitated public corruption," citing as an example that Ukrainian billionaire Serhiy Kurchenko, designated by the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") in 2015, "funneled billions of dollars through his ABLV shell company accounts."¹³² This statement mischaracterizes ABLV's handling of clients linked to Kurchenko.

ABLV began a relationship with companies linked to Kurchenko in 2012.¹³³ The Bank performed extensive due diligence on the finances of these accounts: they were scrutinized under EDD five to six times each year (which was mandated for accounts that turn over €300,000 or

¹³⁰ Notice, *supra* note 1, at 6,988.

¹³¹ Exhibit 23, *Letter to Latvian State Police*, Feb. 14, 2018; Exhibit 33, *Letter to Latvian Corruption Prevention Bureau*, Feb. 14, 2018.

¹³² *Id.* at 6,988.

¹³³ Exhibit 49, *Kurchenko-Related Documents (Examples)*, at 8.

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more per month). The EDD process included having these accounts reported to and reviewed by the CCC at least annually, during which reviews the Bank concluded that it was permissible to continue working with companies linked to Kurchenko. As the episode illustrates, ABLV had procedures in place to manage the risk attendant with serving companies linked to Kurchenko.

In March 2014, the EU imposed restrictive measures on Kurchenko for embezzling Ukrainian state funds and transferring them out of the country.¹³⁴ ABLV promptly blocked the identified accounts,¹³⁵ immediately notified the FCMC,¹³⁶ and initiated an internal investigation.¹³⁷ The AML Compliance Department investigated and escalated certain payments to the Client Control Committee, which directed that earlier transactions should be reported as suspicious.¹³⁸ Thereafter, the FIU, the state police, and the FCMC requested additional information regarding specific transactions involving the companies' accounts, with which ABLV complied. And what's more, ABLV cooperated with the United States Department of Justice in its "investigation into the misappropriation of assets by government officials in Ukraine" by voluntarily providing documents to the U.S. government¹³⁹—cooperation that is notably not mentioned in the Notice.

E. *Allegations Regarding Treatment of Politically Exposed Persons*

The Notice includes a naked assertion that "an Azerbaijani PEP engaged in large-scale corruption and money laundering used a shell company account at ABLV to make a payment."¹⁴⁰ Because the Notice provides no detail on the identities of this PEP, FinCEN once again has failed to meet its statutory obligations to provide ABLV with a meaningful opportunity to comment. However, ABLV notes the following:

First, it is neither illegal nor inappropriate for a bank to service PEPs. This is true not only for U.S.-based banks (which routinely service U.S.-and foreign-based PEPs), but also for EU-based banks. FinCEN's AML regulations only require that in the case of a private banking account for which a PEP is a nominal or beneficial owner, a bank must conduct EDD that is "reasonably designed to detect and report transactions that may involve the proceeds of foreign

¹³⁴ Council Regulation 208/2014, annex I, 2014 O.J. (L66) 1, 7 (EU).

¹³⁵ Exhibit 49, *Kurchenko-Related Documents (Examples)*, at 2.

¹³⁶ *Id.* at 1.

¹³⁷ *Id.* at 8, 9.

¹³⁸ *Id.* at 3, 4.

¹³⁹ Exhibit 34, *Letter from U.S. Department of Justice, October 2014*.

¹⁴⁰ Notice, *supra* note 1, at 6,989.

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corruption.”¹⁴¹ ABLV has a specific body charged with monitoring the Bank’s activities with respect to PEPs,¹⁴² and specific policies designed to manage PEP-related risks.¹⁴³

Second, with respect to FinCEN’s Azerbaijani PEP allegation in particular, the Bank is left to speculate as to the identity and potential issues related to this (apparent) client. If, however, FinCEN has in mind companies linked to the “Azerbaijani laundromat” episode (which were mentioned in reports published by the Organized Crime and Corruption Project (“OCCRP”)),¹⁴⁴ the Notice ignores the Bank’s actions that relate to this episode. In particular, and contrary to the Notice’s suggestion that ABLV intentionally facilitated corruption, the Bank took appropriate steps to investigate and address corruption-related concerns.¹⁴⁵ This includes, in 2015, terminating one client *more than half a year before* receiving a request from the Latvian FIU for information about it. In 2017, ABLV identified additional potential issues with these accounts via its negative news screenings, conducted a lookback, recommended filing STRs in relation to them,¹⁴⁶ and responded to information requests from FCMC and the FIU.

Finally, the Bank has undertaken a years-long effort to reduce its exposure to PEP customers as part of its overall de-risking effort. This effort predates the Notice, and has resulted in the closure of 18 PEP accounts in 2015, 46 PEP accounts in 2016, and 36 PEP accounts in 2017. As of February 20, 2018, ABLV maintained 377 foreign PEP clients (1.4% of its total client population), of which 53 were individual persons and 324 were legal entities that received a PEP designation pursuant to ABLV’s rules. FinCEN’s Notice mentions none of this.

F. *Allegations Regarding Misappropriation of Moldovan Bank Assets*

The Notice alleges that ABLV was “involved” in the theft of over \$1 billion in assets from three Moldovan banks because “criminals took over the three Moldovan banks using a non-transparent ownership structure, partly financed by loans from offshore entities banking at ABLV.”¹⁴⁷ As with the other allegations, the Notice presents only one small slice of what transpired; when viewed more fully, it is evident that ABLV took substantial risk management steps in this case.

The Bank began an investigation into the relevant client in 2013, but there was no public information at that time about any illegal activities. Shortly thereafter, an inquiry from the

¹⁴¹ 31 C.F.R. § 1010.620(c).

¹⁴² See *supra* Section III(D) for a description of the responsibility of the PEP and Institutional Clients Committee.

¹⁴³ See, e.g., Exhibit 18, *Regulations on the PEP and Institutional Clients Committee*, NOL.073, Dec. 1, 2017.

¹⁴⁴ See generally Khadija Ismayilova, Ilgar Agha, & Attila Biro, *The Origin of the Money*, ORGANIZED CRIME & CORRUPTION PROJECT (Sept. 4, 2017), <https://www.occrp.org/en/azerbaijanilaundromat/the-origin-of-the-money>.

¹⁴⁵ See *id.*

¹⁴⁶ Exhibit 50, *Azerbaijani PEPs-Related Documents (Examples)*, at 7–10.

¹⁴⁷ Notice, *supra* note 1, at 6,988.

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Latvian FIU raised the loans in question to the Bank's attention.¹⁴⁸ The investigation and FIU inquiry were escalated to the CCC, which "reviewed monitoring results of [the] customers and made a decision to conduct an investigation related to transactions . . . taking into account the information mentioned in FIU's request."¹⁴⁹ The investigation led the Client Control Committee to review public reporting from Moldovan media in addition to reviewing internal information regarding the transactions.¹⁵⁰ At the conclusion of its investigation, the Bank determined that (i) these loans were issued by the accountholder as part of an effort to purchase a Moldovan bank; (ii) the acquisition of a Moldovan bank would require the approval of the National Bank of Moldova, such that the activity was subject to local regulatory oversight; and (iii) there did not appear to be any signs of a criminal offense under Moldovan law about these transactions.¹⁵¹ Notwithstanding these conclusions, ABLV terminated its relationship.¹⁵²

Second, although the accounts had already been closed, the Bank took additional steps in 2015, after a report into the theft (the "Kroll Report"¹⁵³) was made public and ABLV became aware of additional information—previously unknown to the Bank—about the takeover of the Moldovan bank.¹⁵⁴ These additional steps included an expanded investigation based on newly available information, and ultimately, the recommendation to file an STR with the Latvian FIU.¹⁵⁵

By including incomplete information about events that occurred many years ago and were, in any event, evaluated by the Bank, FinCEN strays from the purpose of 311—providing a tool to manage current and future risk to the U.S. financial system. Section 311 is not meant to punish banks for alleged prior bad acts, as appears to be FinCEN's purpose here.

¹⁴⁸ Exhibit 06, *Documents Regarding Moldova*, at 1. Latvia's FIU contacted ABLV after having received an inquiry from Moldova's FIU. *Id.*

¹⁴⁹ *Id.* at 2.

¹⁵⁰ *Id.* at 2–6.

¹⁵¹ *See id.* at 2, 3, 6.

¹⁵² *See id.* at 6 ("Due to protection of the reputation of the Bank, it was decided to terminate cooperation with the companies involved in this transaction").

¹⁵³ Exhibit 07, *Kroll Report*, Apr. 2, 2015.

¹⁵⁴ Exhibit 06, *Documents Regarding Moldova*, at 14.

¹⁵⁵ *See id.* at 14–16.

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G. *Other Allegations*

FinCEN makes a further set of arbitrarily and capriciously vague allegations for which it offers no evidence whatsoever.

- It claims that ABLV developed a “scheme to assist customers in circumventing foreign currency controls, in which the bank disguised illegal currency trades as international trade transactions.”¹⁵⁶
- It alleges that “ABLV received a substantial amount of funds from a Russia-based bank in a manner consistent with an illicit transfer of assets.”¹⁵⁷
- Finally, it says that “Bank executives and employees are complicit in their clients’ illicit financial activities,” that the bank is “considered innovative and forward leaning in its approaches to circumventing financial regulations,” that it “proactively pushes money laundering and regulatory circumvention schemes to its client base,” and makes several claims about fraudulent documentation at the Bank. Specifically, FinCEN says ABLV “ensures that fraudulent documentation produced to support financial schemes, some of which is produced by bank employees themselves, is of the highest quality;”¹⁵⁸ that the bank used “fraudulent documentation and shell company accounts” to disguise illegal currency trades as international trade transactions;” and that the Bank “uses fraudulent documentation in some of its CDD files.”¹⁵⁹

To be able to present a meaningful response to these allegations, ABLV would need to know the dates on which the alleged activities took place, the clients allegedly involved, and the transactions’ alleged counterparties, among many other salient facts. None of this information can be found anywhere in the Notice or in the heavily redacted Evidentiary Memorandum and select Exhibits that FinCEN posted online. FinCEN thus provides no information to support any of these allegations and ABLV consequently has no opportunity—let alone a meaningful opportunity—to respond to the Agency’s allegations, as the APA requires.

¹⁵⁶ Notice, *supra* note 1, at 6,988.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

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V. FINCEN OFFERS NO BASIS TO APPLY SPECIAL MEASURE FIVE AGAINST ABLV BANK LUXEMBOURG, S.A.

In the Proposed Rule, FinCEN defines “ABLV” as “all subsidiaries, branches, and offices of ABLV Bank, AS operating as a bank in any jurisdiction,” and states that it is “aware of one subsidiary bank ABLV Bank, Luxembourg.”¹⁶⁰ The proposed rule thus purports to impose the fifth special measure on all of ABLV Bank’s subsidiaries, including ABLV Luxembourg. But in doing so, FinCEN proposes to act arbitrarily and capriciously.

None of the allegations contained in the Notice—not a single one—involves ABLV Luxembourg, nor has FinCEN identified any factual support whatever for its conclusion that ABLV Luxembourg itself has a high-risk client base, has a deficient AML or sanctions compliance program, or has itself engaged in any objectionable conduct. The exhibits FinCEN has made public in support of its proposed rule similarly neglect to even mention ABLV Luxembourg other than to note its existence.

Indeed, ABLV Luxembourg is a separately incorporated entity that is subject to the laws, regulations, and supervisory authorities of Luxembourg, not Latvia. It is therefore governed by a wholly different system of AML requirements—and other financial laws and regulations—from ABLV Bank, AS. It also has a separate client base and business model, focused predominantly on wealth management as opposed to corporate banking. And finally, it has separate leadership and compliance personnel, as well as separate compliance policies, from ABLV Bank, AS.

Even though the Notice contains no specific allegations about ABLV Luxembourg, FinCEN seems to suggest that the mere fact that ABLV Luxembourg is a subsidiary of ABLV is sufficient to subject ABLV Luxembourg to the same restrictions as ABLV. But that is wrong as a matter of law. It is well established that a parent-subsidiary relationship between two entities is not enough to establish that one is responsible for the acts of the other.¹⁶¹ Courts recognize that an agency cannot treat a subsidiary and parent as a single entity without developing an adequate evidentiary basis to do so.¹⁶² Indeed, in recent guidance in the context of the U.S. Department of

¹⁶⁰ Notice, *supra* note 1, at 6,991.

¹⁶¹ See, e.g., *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (“It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation . . . is not liable for the acts of its subsidiary.”); *Beverly Enterprises, Inc. v. Herman*, 130 F. Supp. 2d 1, 22 (D.D.C. 2000) (“The relationship between a parent and subsidiary alone is not enough to render a subsidiary liable on a parent’s contract.”).

¹⁶² See, e.g., *Beverly Enterprises*, 130 F. Supp. 2d at 22–23 (remanding case to “agency with instructions to determine whether the plaintiff and its subsidiaries may be considered one entity for purposes of imposing a sanction on the plaintiff”); *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 625–26 (D.C. Cir. 1997) (remanding for further development of the record regarding whether two distinct entities could be treated as single entity for regulatory purposes); cf. *Radio & Television Broad. Technicians Local Union 1264 v. Broad. Serv. of Mobile, Inc.*,

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the Treasury's new CDD rule, FinCEN itself reinforces this point (albeit in a different context), saying that "[w]ith respect to legal entity customers that may share a common owner, unless there is an affirmative reason to believe otherwise, covered financial institutions should presume that different businesses that share a common owner are operating separately and independently from each other and from the common owner."¹⁶³ If FinCEN wants to paint ABLV Luxembourg with the same brush as ABLV, it must at least present facts to support that treatment and allow for comment on the issue.

Because FinCEN has provided no basis whatever to believe that ABLV Luxembourg has a high-risk client base or an inadequate compliance program and procedures or is otherwise a threat in any way to the U.S. financial system, and because ABLV Luxembourg cannot simply be held liable for actions of ABLV on FinCEN's say so, FinCEN must, at the very least, revise its proposed rule to exclude ABLV Luxembourg from its definition of the entity subject to any special regulatory measure under Section 311.

VI. ABLV'S LEGITIMATE BUSINESS IN LATVIA

Section 311 requires FinCEN to consider the extent that ABLV is used for legitimate commercial purposes in the course of evaluating the appropriateness of one of the Section 311 special measures.¹⁶⁴ FinCEN cursorily addresses this statutory requirement, conceding only that "ABLV may be used for some legitimate purposes."¹⁶⁵ But the Notice does not meaningfully describe ABLV's local legitimate business. That includes, for example, the origination and servicing of mortgages for approximately 8,300 Latvian citizens totaling about €300 million (120 of which are young families who acquired affordable housing with government assistance), and commercial financing of approximately €625 million.¹⁶⁶ ABLV also has a charitable foundation, which has invested €5 million in over 350 projects in children and families, education, contemporary art, and the urban environment.¹⁶⁷

380 U.S. 255, 256 (1965) (per curiam) (discussing "[t]he controlling criteria" for determining whether to treat "several nominally separate business entities to be a single employer" under NLRB precedents).

¹⁶³ FINANCIAL CRIMES ENFORCEMENT NETWORK, GUIDANCE: FREQUENTLY ASKED QUESTIONS REGARDING CUSTOMER DUE DILIGENCE REQUIREMENTS FOR FINANCIAL INSTITUTIONS, FIN-2018-G001, at 21 (2018), https://www.fincen.gov/sites/default/files/2018-04/FinCEN_Guidance_CDD_FAQ_FINAL_508_2.pdf (Question 32).

¹⁶⁴ See 31 U.S.C. § 5318A(c)(2)(B)(ii) (requiring the Secretary of the Treasury to consider "the extent to which . . . institutions, transactions, or types of accounts [for which he is proposing a special measure] are used for legitimate business purposes in the jurisdiction").

¹⁶⁵ Notice, *supra* note 1, at 6,989.

¹⁶⁶ *Announcement to the Clients, Employees and Shareholders*, ABLV BANK, AS (Mar. 16, 2018), <https://www.ablv.com/en/legal-latest-news/voluntary-liquidation-of-ablv-bank-as-to-protect-the-interests-of-clients-and-creditors/announcement-to-the-clients-employees-and-shareholders>.

¹⁶⁷ *See id.*

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VII. CONCLUSION

FinCEN has failed on a number of levels to justify its conclusion that ABLV is a “primary money laundering concern” warranting a Section 311 special measure. First and most importantly, by failing to provide sufficient evidence to support its allegations—indeed, in many cases FinCEN failed to provide *any* evidence—the Agency has not met its burden under the APA. For that reason alone, the Notice should be withdrawn.

But FinCEN also failed to paint a complete picture of ABLV’s AML and sanctions compliance system. It neglects to describe the significant improvements the Bank has made in the last several years, including reducing the proportion of non-resident banking activity in its client base. Indeed, ABLV’s efforts to improve its financial crimes compliance posture proceeded apace even in the weeks immediately before FinCEN published the Notice, when the Bank approved a number of additional improvements to its AML and sanctions policies that were slated to go into effect in February and March 2018. FinCEN, moreover, fails to credit the positive changes that took place in the Latvian AML and sanctions compliance framework over a similar period. Altogether, far from a Bank that had “institutionalized” money laundering, as FinCEN alleges, ABLV had taken significant steps to reduce its financial crimes risk since 2015—steps that FinCEN simply ignores.

Furthermore, because ABLV is in the process of liquidation under Latvian law, FinCEN cannot demonstrate that ABLV is “a primary money laundering concern” warranting a Section 311 regulatory action. FinCEN’s Notice began a process that led the European Central Bank, ABLV’s prudential supervisor, to declare ABLV “failing or likely to fail.”¹⁶⁸ This, in turn, led ABLV to initiate a voluntary liquidation process which, under Latvian law, is irrevocable.¹⁶⁹ Accordingly, ABLV today is solely engaged in activities related to winding-up its business, and does not and cannot pose a threat to any U.S. financial institution, much less the U.S. financial system as a whole, and never will. FinCEN therefore should withdraw its Notice and proposed rule and decline to proceed to a final rule.¹⁷⁰

¹⁶⁸ Press Release, European Central Bank, ECB determined ABLV Bank was failing or likely to fail (Feb. 24, 2018), <https://www.bankingsupervision.europa.eu/press/pr/date/2018/html/ssm.pr180224.en.html>.

¹⁶⁹ In accordance with section 127 of the Credit Institution Law, a decision of a credit institution’s shareholders to commence the process of voluntary liquidation cannot be suspended or discontinued. *Credit Institution Law*, § 127, <http://www.fktk.lv/en/law/credit-institutions/laws/4529-credit-institution-law.html>.

¹⁷⁰ In this regard, the present circumstance mirrors that in the Banca Privada D’Andorra (“BPA”) 311 action, in which—after BPA entered liquidation—FinCEN determined that “BPA no longer operates in a manner that poses a money laundering threat to the U.S. financial system,” and therefore withdrew the Finding and did not move forward with a final rule. Financial Crimes Enforcement Network; Withdrawal of Finding Regarding Banca Privada d’Andorra, 81 Fed. Reg. 11,648, 11,649 (Mar. 4, 2016).

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ABLV stands ready to cooperate closely with FinCEN and to provide any additional information that may be useful in its deliberations. We respectfully request that FinCEN rescind the Finding, withdraw its Notice of Proposed Rulemaking, and not move forward with its proposed final rule under Section 311.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Cohen', with a long horizontal flourish extending to the right.

David S. Cohen