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October 2, 2014

By Electronic Transmission

Jennifer Shasky Calvery
Director, Financial Crimes Enforcement Network
U.S. Department of the Treasury
P.O. Box 39
Vienna, VA 22183

Re: Docket Number FINCEN-2014-0001; RIN 1506-AB25

Dear Director Shasky Calvery:

The Investment Company Institute ("ICI")[1] appreciates the opportunity to comment on the notice of proposed rulemaking issued by the Financial Crimes Enforcement Network ("FinCEN") seeking comment on proposed new customer due diligence ("CDD") requirements for certain financial institutions, including mutual funds (the "NPRM").[2] FinCEN issued the NPRM after the publication of an advanced notice of proposed rulemaking ("ANPRM") in 2012,[3] and following extensive consultation with representatives from the financial services industry, law enforcement and federal financial regulators over a period of several years. The ICI commends FinCEN for the thoughtful and collaborative approach taken in this rulemaking initiative, and is pleased that the NPRM addresses many of the concerns raised by the ICI and its members following the issuance of the ANPRM and the

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1 The Investment Company Institute ("ICI") is the national association of U.S. registered investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of $17.2 trillion and serve over 90 million shareholders.

2 Customer Due Diligence Requirements for Financial Institutions, 79 FR 45,151 (proposed August 4, 2014), available at http://www.gpo.gov/fdsys/pkg/FR-2014-08-04/pdf/2014-18036.pdf ("CDD Proposal" or "NPRM").

3 Customer Due Diligence Requirements for Financial Institutions, 77 FR 13,046 (proposed March 5, 2012), available at http://www.gpo.gov/fdsys/pkg/FR-2012-03-05/pdf/2012-5187.pdf. The ICI submitted comments on the ANPRM and participated in public hearings on the ANPRM. *See, e.g.*, ICI letter to James H. Freis, Jr. (May 2, 2012), available at http://www.ici.org/pdf/26148.pdf ("ICI ANPRM Letter").

guidance that preceded the ANPRM.[4] We offer the following comments on several elements of the NRPM, focusing primarily on those that uniquely impact mutual funds.

A. The Proposed Requirement to Understand the "Nature and Purpose of Customer Relationships" is New for Mutual Funds, and is Impracticable for Mutual Funds to Implement

FinCEN proposes amendments to the anti-money laundering ("AML") program rule for mutual funds to clarify that mutual funds are required to understand "the nature and purpose of customer relationships for the purpose of developing a customer risk profile."[5] In the NPRM, FinCEN states that "financial institutions should already be satisfying this element [of CDD] by complying with the requirement to report suspicious activity, as this element is an essential step in the process of identifying such activity."[6] In addition, FinCEN states that the proposal to understand the "nature and purpose" of customer relationships is consistent with existing rules and regulatory guidance provided by federal financial regulators. Accordingly, FinCEN believes that the proposal does not impose new obligations on mutual funds.

As discussed below, the rule requiring mutual funds to file suspicious activity reports ("SARs") does not require funds to understand the nature and purpose of customer relationships. In addition, mutual funds are not required to understand the nature and purpose of customer relationships pursuant to other existing rules or regulatory guidance. We reiterate the strong concern expressed in our comments on the ANPRM that this proposal mistakenly treats mutual funds as providers of *financial services* rather than as a *financial product*, and is impractical given the nature of the mutual fund industry. Accordingly, we recommend that FinCEN not apply this requirement to mutual funds, as discussed more fully below.

(i) *The Mutual Fund SAR Rule Does Not Require Funds to Understand the Nature and Purpose of Customer Relationships*

The NPRM implies that a financial institution must understand the nature and purpose of customer relationships in order to comply with the requirement in the SAR rules to report a transaction that has "no business or apparent lawful purpose or is not the sort in which the particular customer would

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4 *Guidance on Obtaining and Retaining Beneficial Ownership Information*, FinCEN Guidance, FIN-2010-G001 (March 5, 2010) ("March 2010 Guidance"). *See* Letter from the ICI, the Securities and Financial Markets Association, and the Futures Industry Association to FinCEN Director James H. Freis and staff of the SEC (June 9, 2010), available at http://www.ici.org/pdf/24354.pdf.

5 31 C.F.R. § 1024.210(b)(5)(i) (proposed amendments).

6 NPRM, *supra* note 2, at 45,163.

normally engage."[7] However, FinCEN has recognized as sufficient the more limited amount of information available to mutual funds in the context of interpreting the SAR rule. In comments on the proposed mutual fund SAR rule, ICI asked FinCEN "to recognize that mutual funds have less information available to them in making SAR determinations than other types of financial institutions and that the mutual fund SAR rule is intended to take this operating reality into account."[8] ICI accordingly requested that FinCEN confirm "that mutual funds are expected to file SARs based on the information obtained by the fund, its underwriter or its transfer agent in the normal course of establishing a shareholder relationship or processing transactions." In response, the preamble to the final mutual fund SAR rule stated that funds should file SARs "based on the information obtained in the account opening process or subsequently in the course of processing transactions."[9]

FinCEN later addressed a specific question on whether "a mutual fund [is] expected to obtain additional information (*i.e.*, that it does not already have) to meet the 'knows, suspects, or has reason to suspect' standard" of the mutual fund SAR rule." In response, FinCEN stated that a mutual fund "should be able to meet the 'knows, suspects, or has reason to suspect' standard … based on information available to the mutual fund that was obtained through the account opening process and in the course of processing transactions…."[10]

Accordingly, we strongly believe that the proposed nature and purpose element should not be interpreted as requiring a mutual fund to obtain information it otherwise does not have in the ordinary course of business – such as information about the nature and purpose of customer relationships – in order for a fund to meet its obligations. Such an interpretation would conflict directly with FinCEN's prior SAR guidance to the mutual fund industry.

(ii) *Unlike Other Financial Institutions, Mutual Funds are not Otherwise Required to Understand the Nature and Purpose of Customer Relationships to Comply with Other Regulatory Obligations*

The NPRM notes that certain financial institutions already are expected to obtain information about the nature and purpose of customer relationships in order to comply with other regulatory obligations. For example, the NPRM states that the federal banking regulators expect depository institutions to

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7 *Id.*, *supra* note 2, at 45,163; *see* 31 C.F.R. § 1024.320(a)(2)(iii).

8 Letter from Investment Company Institute to Judith R. Starr, Comments on NRPM – Suspicious Transaction Reporting – Mutual Funds (March 31, 2003), *available at* http://www.ici.org/pdf/15796.pdf.

9 Financial Crimes Enforcement Network; Amendment to the Bank Secrecy Act Regulations — Requirement That Mutual Funds Report Suspicious Transactions, 74 FR 26,213, 26,216 n.29 (May 4, 2006).

10 *See* Frequently Asked Questions, Suspicious Activity Report Requirements for Mutual Funds, FIN-2006-G013 (Oct. 4, 2006), *available at* http://www.fincen.gov/statutes_regs/guidance/pdf/guidance_faqs_sar_10042006.pdf.

"obtain information at account opening sufficient to develop an understanding of normal and expected activity for the customer's occupation or business operations."[11] In addition, the NPRM notes that rules issued by the Commodity Futures Trading Commission and National Futures Association may require futures commission merchants to understand the nature and purpose of certain customer relationships.[12] While certain financial institutions may be required to understand the nature and purpose of customer relationships in other contexts, there is no such requirement for mutual funds.[13] Mutual funds accordingly have a very limited perspective on the "nature and purpose" of a customer relationship.[14]

(iii) *The Proposed Requirement for Funds to Understand the Nature and Purpose of Customer Relationships is Impractical, and Reflects a Fundamental Misunderstanding of the Fund Industry*

We reiterate our strong concern that this proposal misunderstands the nature of mutual funds as a *financial product*, as opposed to a provider of *financial services or investment advice*.[15] Mutual funds are in no better position than any other issuer of securities (*e.g.*, operating companies that issue stocks and bonds) to understand the reasons why a shareholder has decided to make a particular investment. While this information may be known to a provider of financial services (*e.g.*, a shareholder's financial advisor), mutual funds, as a financial product, simply do not have access to this type of information.[16]

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[11] NPRM, *supra* note 2, at 45,163 (quoting the Bank Secrecy Act Anti-Money Laundering Examination Manual issued by the Federal Financial Institutions Examination Council).

[12] *Id.*, at n.51.

[13] We appreciate FinCEN's acknowledgement that, unlike other covered financial institutions, mutual funds are not subject to substantive Bank Secrecy Act/AML rules or requirements imposed by a self-regulatory organization ("SRO") or federal financial regulator (*e.g.*, the Securities and Exchange Commission). Accordingly, the proposed amendments to the AML program rule for mutual funds do not include the new sub-section (c) that is proposed for other covered financial institutions, which proposes to require those financial institutions to comply with the Bank Secrecy Act/AML regulatory requirements of applicable SROs and federal financial regulators.

[14] In contrast, certain intermediaries associated with mutual fund accounts may have additional information about the "nature and purpose" of an account, consistent with an intermediary's obligations under the federal securities and banking laws.

[15] We expressed many of these same concerns in our comments on a similar proposal that appeared in the ANPRM. *See* ICI ANPRM Letter at Section IV.B.

[16] *See* ICI ANPRM Letter at Section IV.B.

(iv) *Recommended Alternative Approach*

We appreciate the statement in the NPRM that "FinCEN does not intend for this element [of CDD] to necessarily require modifications to existing practice or customer onboarding procedures, and does not expect financial institutions to ask each customer for a statement as to the nature and purpose of the relationship or to collect information not already collected pursuant to existing requirements."[17] We also appreciate FinCEN's view that, "in some circumstances an understanding of the nature and purpose of a customer relationship also can be developed by inherent or self-evident information about the product or customer type, or basic information about the customer."[18]

However, because mutual funds have never been required to obtain information about the nature and purpose of customer relationships, and are not in a position to obtain such information, we strongly recommend that FinCEN reconsider applying this element of CDD to mutual funds altogether.[19] Alternatively, we request confirmation that this element of CDD would not require mutual funds to obtain additional information about customer relationships not already obtained by a fund in the course of opening accounts or processing transactions. For example, FinCEN could issue guidance confirming that a mutual fund may assume that the nature and purpose of a customer's decision to invest in a given fund is to gain exposure to the asset class outlined in the fund's investment objective – information that is inherently known to a fund and its service providers.

B. ICI's Comments on the Proposed Beneficial Ownership Rule

The proposed beneficial ownership rule in the NPRM, in our view, is much more manageable and practically workable than what was considered in the ANPRM. We once again commend FinCEN for the unprecedented outreach to industry, law enforcement, and financial regulators that preceded the publication of the proposed beneficial ownership rule. We request that FinCEN consider the following comments when finalizing the rule.

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17 NPRM, *supra* note 2, at 45,163.

18 *Id.*

19 The NPRM specifically seeks comments on whether the language of each AML program pillar should be identical across FinCEN's rules. *Id.*, at 45,167. While we appreciate FinCEN's desire to apply AML regulations in a similar manner for all financial institutions, we believe FinCEN must acknowledge the real differences in services provided by a financial product, such as a mutual fund, as compared with a provider of a broad suite of financial services. We accordingly believe it is appropriate for the AML program rule for mutual funds not to include a requirement to understand the nature and purpose of customer relationships, even if FinCEN determines to keep that pillar in the AML program rule for other covered financial institutions.

(i) *Verification of Identification of Beneficial Owners*

The proposed rule would require covered financial institutions to verify the identity of the natural persons identified as beneficial owners of legal entity customers, but would not require covered financial institutions to verify that the natural persons were, in fact, the beneficial owners of such legal entities. ICI agrees with the approach taken by the proposed rule, and appreciates FinCEN's recognition that financial institutions are unable to reliably verify the *status* of natural persons as beneficial owners of legal entities.

The "general" requirement set forth in sub-paragraph (a) of the proposed rule currently states that covered financial institutions "are required to establish and maintain written procedures that are reasonably designed to identify and verify beneficial owners of legal entity customers."[20] To avoid any confusion, we recommend that the general requirement be revised to make clear that covered financial institutions "are required to establish and maintain written procedures that are reasonably designed to identify and verify *the identity of* beneficial owners of legal entity customers."

In addition, we anticipate that covered financial institutions may have greater difficulty with verifying the identity of beneficial owners as opposed to verifying the identity of a financial institution's customer under the CIP rules. When a financial institution is unable to readily verify the identity of its customer, it can easily contact the customer based on the CIP information provided, and request additional information needed to verify the customer's identity. It is unclear whether a similar approach would work to verify the identity of beneficial owners, particularly since a beneficial owner may not be interfacing directly with the financial institution. Indeed, a beneficial owner may not even know that a legal entity customer is opening an account with a financial institution. A covered financial institution seeking to verify the identity of a beneficial owner also may be concerned about the legal implications (*e.g.*, privacy) of directly contacting a beneficial owner of a legal entity customer to obtain information needed to verify the beneficial owner's identity. Accordingly, we request confirmation that a covered financial institution is expected to engage only with the person providing the information on the standard certification form when opening an account for a legal entity customer.

(ii) *Reliance on Information Provided in Standard Certification Form*

The proposed rule provides that, to identify beneficial owners of each legal entity customer, a covered financial institution must obtain a standard certification form from the individual opening the account on behalf of the legal entity customer.[21] The NPRM also states that "[f]inancial institutions may rely

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[20] 31 C.F.R. § 1010.230(a) (proposed rule).

[21] *Id.* § 1010.230(b)(1) (proposed rule).

on the beneficial ownership information provided by the customer on the standard certification form."[22] ICI supports the use of a standard certification form to obtain information about beneficial owners of legal entity customers, and agrees that financial institutions should be able to rely on the beneficial ownership information provided by the individual opening the account on behalf of a legal entity customer.

There are, however, other parts of the NPRM that suggest that a financial institution may not always rely on the beneficial ownership information provided on the standard certification form. The NPRM states elsewhere that financial institutions should "be able to rely *generally* on the representations of the customer when answering the financial institution's questions about the individual persons behind the legal entity."[23] The NPRM further states that, "[t]o *facilitate reliance* by financial institutions, the form … requires the individual opening the account on behalf of the legal entity customer to certify that the information provided on the form is true and accurate to the best of his or her knowledge."[24]

Because there exists no way for financial institutions to reliably verify beneficial ownership status, ICI believes that financial institutions should be able to rely on the beneficial ownership information provided by the individual opening an account on behalf of a legal entity customer. We request that FinCEN consider adding a "safe harbor" provision to the final rule to ensure that financial institutions are protected when relying on the beneficial ownership information provided on the standard certification form. There is precedent for the recommended approach. In particular, this safe harbor could be similar to the safe harbor found in the rule prohibiting the establishment or maintenance of correspondent accounts for foreign shell banks and requiring records concerning owners of foreign banks.[25] That rule explicitly provides that a covered financial institution "will be deemed to be in compliance with" the requirements of the rule if the covered financial institution obtains the certification or recertification form prescribed by the rule.

Alternatively, we suggest that FinCEN make clear in the preamble to the final rule that covered financial institutions may rely on the information provided on the standard certification form by the individual opening the account on behalf of a legal entity customer.

(iii) *Certifying Party*

The standard certification form asks for the "name of person opening an account" in item "a." Because the term "person" could be either a natural person or a legal entity, there is the possibility of confusion

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22 NPRM, *supra* note 2, at 45,162.

23 *Id.* (emphasis added).

24 *Id.* (emphasis added).

25 31 C.F.R. § 1010.630(b).

for those completing the certification form. We recommend that the item be revised to read "name of *natural* person opening an account on behalf of the legal entity." (Alternatively, this item can be deleted as the name of the person opening the account is also requested at the end of the certification form.) We further request confirmation from FinCEN that the natural person opening the account may be a financial adviser, authorized officer or employee of a legal entity customer, or any other person representing to have the authority to open the account on behalf of a legal entity customer.

(iv) *Definition of Account*

The proposed rule would require covered financial institutions to identify and verify the identity of the beneficial owner(s) of each legal entity customer. The term "legal entity customer" is generally defined as a corporation, limited liability company, partnership or other similar business entity … that opens an *account*."[26]

Although the proposed rule does not define the term "account," we believe FinCEN intended for the term to have the same meaning as the term in the relevant CIP rules for covered financial institutions.[27] We note that the information required in the standard certification form is designed to be "consistent with the information required under the CIP rules for identifying customers that are natural persons."[28] Moreover, the proposed rule would require financial institutions "to verify the identity of beneficial owners consistent with their existing CIP practices."[29] Given the interrelationship between the CIP rules and the proposed beneficial ownership rule, it seems clear that the definition of "account" should have the same meaning in each rule.

This issue is of particular importance to mutual funds, since a significant number of mutual fund accounts are opened for the purpose of participating in an employee benefit plan established under the Employee Retirement Income Security Act of 1974 (ERISA). These accounts are exempt from the definition of "account" under the mutual fund CIP rule, as are accounts acquired through an acquisition, merger or purchase of assets.[30] Similarly, the CIP Guidance provides that, if an

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[26] *Id.* § 1010.230(d)(1) (proposed rule) (emphasis added).

[27] NPRM, *supra* note 2, at 45,156.

[28] *Id.*, at 45,164.

[29] *Id.*, at 45,156.

[30] 31 C.F.R. § 1024.100(a). In addition, FinCEN and the Securities and Exchange Commission previously have confirmed that a shareholder of one mutual fund who has exchange privileges with a second fund in the complex would be considered to have "accounts" with both funds under the mutual fund CIP rule. *See* Questions and Answers Regarding the Mutual Fund CIP Rule, *available at* http://www.sec.gov/divisions/investment/guidance/qamutualfund.htm ("CIP Guidance"). Consistent with the CIP

intermediary opens as account with a mutual fund through the NSCC Fund/SERV system, the intermediary would be the person that opens the new account (and therefore the "customer"), and the intermediary's customers would not be customers of the mutual fund.[31] We accordingly request that FinCEN clarify that the term "account" in the proposed beneficial ownership rule has the same meaning as the term "account" in the applicable CIP rule for covered financial institutions. Therefore, these accounts under the proposed requirement should be handled in the same manner as other customers exempt from the CIP rule. This is consistent with FinCEN's intent that the proposed rule should exempt all types of entities that are exempt from CIP.[32]

(v) *Updating CDD Information*

Although the proposed rule does not require a covered financial institution to update beneficial ownership information after the opening of an account, the NPRM states that "a financial institution should keep CDD information, including beneficial ownership information, as current as possible and update as appropriate on a risk-basis."[33]

We believe that this guidance is inconsistent with the plain wording of the CIP rules, which satisfy the very first element of CDD. The CIP rules were adopted pursuant to Section 326 of the USA PATRIOT Act, which directs FinCEN to prescribe regulations "setting forth the minimum standards for financial institutions and their customers regarding the identity of the customer *that shall apply in connection with the opening of an account at a financial institution.*"[34] Neither the statute nor the implementing CIP rules require a financial institution to update CIP information after the time of account opening. To the contrary, both the statute and the implementing regulations make clear that the requirement to identify and verify the identity of the customer applies in connection with the opening of an account.

We accordingly request that FinCEN clarify the statement in the NRPM that financial institutions should keep CDD information "as current as possible" in light of the requirements of the CIP rules. The preamble to the final rule should acknowledge that neither the CIP rule nor the beneficial ownership rule specifically *require* a financial institution to update CDD information, but that a financial institution *may* update CDD information (*e.g.*, CIP or beneficial ownership information)

Guidance, a legal entity customer that has an account with a mutual fund should be deemed to have an account with all funds in the complex that have exchange privileges with the mutual fund for the purposes of any final rule.

31 *See* CIP Guidance, Question 2.

32 *See* CDD Proposal at 45159.

33 NPRM, *supra* note 2, at 45,162.

34 31 U.S.C. § 5318(l) (emphasis added).

after account opening, consistent with a risk-based approach. We further request that FinCEN affirm that the proposed rule would not impose a requirement that CIP information be updated in order to satisfy the requirements of either the CIP rule or beneficial ownership rule.

(vi) *Definition of Legal Entity Customer*

ICI agrees with the concept of requiring identification and verification of the identity of legal entity customers, as described in the NPRM. We also strongly support FinCEN's treatment of intermediated relationships, which directs a financial institution to regard an intermediary as its legal entity customer if the intermediary is treated as the financial institution's "customer" under the CIP rules and related guidance.[35] We are concerned, however, that inclusion of the term "or other similar business entities" in the definition of legal entity customer will result in a lack of clarity regarding the entities that are covered by the definition. We request that FinCEN clearly specify in the definition any other types of entities that are included.

We also support FinCEN's decision not to regard trusts as legal entity customers under the proposed rule. However, we note that FinCEN interprets the proposed definition of legal entity customer to encompass statutory trusts and other entities formed by a filing with a state office.[36] We believe that financial institutions, as well as representatives of legal entities, may have a difficult time determining whether a particular legal entity was formed pursuant to a filing with a state office. We therefore request that the preamble to the final rule provide additional examples of legal entities formed through a state filing, and thus "legal entity customers" as defined by FinCEN.

In addition, we ask that FinCEN clarify in the preamble to the final rule that, for accounts opened by a trust, financial institutions be required only to verify the identity of the trust under the CIP rules, and not the trustees of the trust. The NRPM notes that, "in addition to identifying and verifying the identity of the trust for purposes of CIP, financial institutions generally also identify and verify the identity of the trustee," and that FinCEN "expects financial institutions to continue these practices as part of their overall efforts to safeguard against money laundering and terrorist financing."[37] Even if

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[35] In the NRPM, FinCEN states that "for purposes of this beneficial ownership requirement, if an intermediary is the customer, and the financial institution has no CIP obligation with respect to the intermediary's underlying clients pursuant to existing guidance, a financial institution should treat the intermediary, and not the intermediary's underlying clients, as its legal entity customer. NPRM, *supra* note 2, at 45,161. We note that, consistent with this directive, a mutual fund will treat the intermediary as the legal entity customer in connection with accounts established through the NSCC Fund/SERV system. *See* CIP Guidance, *supra* note 31.

[36] NPRM, *supra* note 2, at 45,159 ("FinCEN would interpret [the definition of legal entity customer] to include all entities that are formed by a filing with the Secretary of State (or similar office), as well as general partnerships and unincorporated nonprofit associations).

[37] *Id.*, at 45,160.

certain financial institutions do voluntarily verify the identity of trustees when opening an account for a trust, the CIP rules do not require that verification. The preamble to the mutual fund CIP rule clearly states that, for trust accounts, a mutual fund's "customer" is the trust itself, and mutual funds accordingly are required to verify the identity of the trust, not the individual trustees of the trust.[38] Given the statements in the NRPM, we ask that FinCEN re-affirm this longstanding CIP guidance in the preamble to the final rule.

(vii) *Additional Recommendations*

We have the following additional comments on the proposed beneficial ownership rule:

- *Amendments to the Standard Certification Form.* The standard certification form is designed to obtain the full legal name, date of birth, address and social security number (for U.S. persons) of each beneficial owner. The NPRM explains that "[t]his information is consistent with the information required under the CIP rules for identifying customers that are natural persons."[39] However, the CIP rules require that customers provide a "residential or business street address," whereas the standard certification form only requires an "address" for each beneficial owner.[40] In addition, the standard certification form does not clearly require that the "full legal name" be provided for each beneficial owner. We believe that this information is necessary in order to allow a financial institution to reliably verify the identity of a beneficial owner. Accordingly, the standard certification form should incorporate all of the required elements of the CIP rules for identifying customers who are individuals.

- *Notice of Verification Not Required.* The proposed rule requires each covered financial institution to verify the identity of beneficial owners pursuant to procedures that are "identical" to the covered financial institution's procedures for verifying the identity of customers who are individuals under the applicable CIP rule. The CIP rules require that financial institutions notify customers that they are requiring information in order to verify their identities.[41] Because covered financial institutions may not have any direct contact with beneficial owners of legal entity customers, we do not believe it is practicable for covered financial institutions to notify beneficial owners that information is being

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38 Customer Identification Programs for Mutual Funds, 68 Fed. Reg. 25,131, 25,134 (May 9, 2003).

39 NPRM, *supra* note 2, at 45,164.

40 *See, e.g.,* 31 C.F.R. § 1024.100(a)(2)(i)(A)(3). For an individual who does not have a residential or business street address, a financial institution may obtain an Army Post Office (APO) or Fleet Post Office (FPO) box number, or the residential or business street address of next of kin or of another contact individual.

41 *See, e.g., id.*, at § 1024.100(a)(2)(i)(A)(5).

requested in order to verify their identities. Accordingly, we request confirmation that covered financial institutions are not required to notify beneficial owners that information is being requested to verify their identities.

- *Substitute Certification Forms.* We request confirmation that a covered financial institution may adapt the standard certification form in a manner necessary to facilitate the collection and receipt of information required by the form. For example, a covered financial institution that allows customers to establish accounts online, or by phone, should be able to request the same information required by the standard certification form (and provide the same disclosures required by the form) in a way tailored to the manner of collection. Similarly, an institution should be able to incorporate the requested elements into an existing paper form (revised as needed).

- *Treatment of Existing Accounts.* The NPRM seeks comment on whether FinCEN should extend the proposed requirement to collect beneficial ownership information so that it would apply retroactively.[42] We strongly believe that the requirement should apply prospectively, and not retroactively. The costs of applying the rule on a retroactive basis would be extremely high, and it would take financial institutions multiple years to obtain and verify beneficial ownership information on the numerous existing accounts for legal entity customers.

- *Additional Exemptions for Certain Legal Entity Customers and Pooled Investment Vehicles.* We support FinCEN's proposal to exempt certain additional legal entities from the beneficial ownership requirement when opening a new account because their beneficial ownership information is generally available from credible sources. In addition, the NPRM seeks comment on whether pooled investment vehicles operated by financial institutions that are proposed to be exempt from the rule also should be exempt from the beneficial ownership requirement. We believe that it is appropriate to exempt such pooled investment vehicles for the same reason that financial institutions are exempt from the rule. A federal financial regulator regulates each of the financial institutions exempt from the rule, thereby allowing the U.S. government ready access to beneficial ownership information for pooled investment vehicles sponsored or advised by such financial institutions. By exempting these pooled investment vehicles from beneficial ownership requirements, financial institutions will be able to focus their AML resources on higher-risk accounts established by legal entity customers.

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[42] NPRM, *supra* note 2, at 45,166.

C. Other Matters

(i) *Effective Date of the Final Rule and Rule Amendments*

In the NPRM, FinCEN proposes that the final rule and rule amendments become effective one year after publication in the *Federal Register*. Depending on when within the calendar year a final rule is adopted, meeting this deadline could be extremely difficult for mutual funds due to unique end-of-year systems issues, as well as other systems changes necessitated by new regulatory requirements. Specifically, at the end of each year, most mutual funds and transfer agents refrain from implementing material modifications or enhancements to their transaction processing and recordkeeping systems (generally referred to as a "freeze") for varying periods beginning in early December to ensure that systems are in order to handle the heavy number of end-of-year fund and shareholder transactions[43] as well as the preparation of year-end account statements and tax reporting information.[44] These systems "unfreeze" in the subsequent months at various times, after the final year-end tax reporting information is sent to intermediaries or fund shareholders, as appropriate, and to federal and state government authorities by the end of March. When these systems are frozen, transfer agents are not able to make material updates or changes.

In addition, many of our members and fund service providers that will be impacted by this rulemaking already are devoting substantial resources to other rulemaking initiatives (*e.g.*, money market fund reform and FATCA implementation). A longer implementation period will enable mutual funds and their service providers to manage their financial and personnel resources as they implement the CDD rule together with other regulatory changes. We accordingly believe an implementation period of at least 24 months is necessary and appropriate.

(ii) *Rescinding Prior Beneficial Ownership Guidance*

The NPRM states that the "future status of previous guidance related to identifying beneficial owners of legal entity customers, such as the [March 2010 Guidance], will be addressed at the time of the issuance of a final rule."[45] The CDD expectations set forth in the NPRM, including the proposed new beneficial ownership rule, differ significantly from the expectations set forth in the March 2010

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[43] Many shareholder-initiated transactions occur at the end of the year for tax and portfolio rebalancing reasons. We also note that federal income tax rules effectively require mutual funds to distribute essentially all of their calendar year income by December 31st. Therefore, the volume of fund-initiated transactions (dividend and capital gain distributions) increases substantially at year end.

[44] Tax reporting information is sent to intermediaries in January, to shareholders in February and to federal and state authorities in March.

[45] NPRM, *supra* note 2, at 45,156, n.27.

Guidance. We accordingly request that FinCEN and federal financial regulators formally rescind the March 2010 Guidance in connection with the issuance of the final rule and rule amendments.

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We appreciate the opportunity to express our views on the NPRM. If you have any questions about the matters discussed in this letter, please contact Susan Olson (at 202-326-5813 or solson@ici.org) or Eva Mykolenko (emykolenko@ici.org or 202-326-5837).

Sincerely,

/s/ Dorothy M. Donohue

Dorothy M. Donohue
Deputy General Counsel – Securities Regulation

cc: Norm Champ
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