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By Electronic Transmission

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

Re: *Anti-Money Laundering/Countering the Financing of Terrorism Program and Suspicious Activity Reporting Filing Requirements for Registered Investment Advisers and Exempt Reporting Advisers; Docket Number FINCEN–2024–0006 and OMB Control Number 1506–AB58*

Dear Ms. Gacki:

The Investment Company Institute[1] appreciates the opportunity to provide comments on the proposal to require certain investment advisers to implement anti-money laundering/countering the financing of terrorism (AML/CFT) programs, file suspicious activity reports (SARs) with the Financial Crimes Enforcement Network (FinCEN), and comply with certain other regulations under the Bank Secrecy Act (BSA).[2] ICI strongly supports FinCEN's efforts to protect the U.S. financial system from money laundering and terrorist financing activities, and broadly supports the objectives outlined in the NPRM. ICI appreciates that FinCEN considered and incorporated feedback from commentators on its 2015 investment adviser proposal.[3]

Our comments below focus on aspects of the NPRM that would impact services that investment advisers provide to retail investors. In sum, we strongly support the proposal's exclusion of

[1] The Investment Company Institute (ICI) is the leading association representing regulated investment funds. ICI's mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. ICI's members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in other jurisdictions. Its members manage $34.4 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 100 million investors. Members manage an additional $9.2 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to certain collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has offices in Washington DC, Brussels, and London and carries out its international work through ICI Global.

[2] *FinCEN: Anti-Money Laundering/Countering the Financing of Terrorism Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers and Exempt Reporting Advisers*, 89 Fed. Reg. 12,108 (Feb. 15, 2024) (the "NPRM"), available at https://www.govinfo.gov/content/pkg/FR-2024-02-15/pdf/2024-02854.pdf.

[3] *FinCEN: Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers*, 80 Fed. Reg. 52,680 (Sept. 1, 2015), available at https://www.govinfo.gov/content/pkg/FR-2015-09-01/pdf/2015-21318.pdf.

mutual funds (a term that, as defined by FinCEN, also includes open-end ETFs) from the scope of an investment adviser's AML/CFT program, given that these funds are already subject to similar requirements. We recommend that any final amendments and guidance:

- Allow an investment adviser to exclude from its AML/CFT program any financial institution that it advises that is subject to AML/CFT obligations under the BSA rules, including collective investment trusts (CITs), other investment advisers (e.g., in connection with subadvisory relationships), and wrap fee programs (e.g., where another financial institution acts as the program sponsor);
- *Categorically* exclude mutual funds and other financial institutions subject to AML/CFT obligations to which the adviser provides advisory services (i.e., the exclusion should not be conditioned upon an adviser's determination that these entities have implemented compliant AML/CFT programs);
- *Fully* exempt mutual funds from an investment adviser's AML/CFT program, including from the adviser's requirements under the proposed information sharing rules and rules requiring an adviser to comply with certain due diligence and special measures;
- Recognize that certain non-excluded pooled investment vehicles (e.g., registered closed-end funds and unit investment trusts) present lower AML/CFT risks; and
- Not extend to non-US investment advisers.

Section 1. FinCEN Should Exempt Additional Entities from an Investment Adviser's AML/CFT Program

ICI applauds FinCEN's decision to exempt mutual funds from the scope of an investment adviser's AML/CFT program.[4] As noted in the NPRM, because mutual funds already are subject to separate AML/CFT program requirements, "including a mutual fund within its investment adviser's AML/CFT program would be redundant."[5]

The NPRM solicits comments on "whether there are other categories of entities that, like mutual funds, could be reasonably exempted from an investment adviser's AML/CFT program."[6] The rationale for exempting mutual funds from an investment adviser's AML/CFT program extends to an investment adviser's relationships with other financial institutions subject to an AML/CFT program obligation. FinCEN recognized this when it first proposed an AML/CFT rule for

[4] NPRM at 12,190 (providing that "[t]he investment adviser may deem the requirements in this subpart satisfied for any mutual fund (as defined in 31 C.F.R. 1010.100(gg)) it advises that has developed and implemented an AML/CFT program compliant with the AML/CFT program requirements applicable to mutual funds under another provision of this subpart.").

[5] *Id.* at 12,123-24.

[6] *Id*. at 12,124.

investment advisers in 2003.[7] The 2003 NPRM would have allowed advisers "to exclude from their [AML] programs any investment vehicle they advise that is subject to an [AML] program requirement under BSA rules."[8] FinCEN observed then that such an exclusion would "prevent overlap and redundancy."[9] This is the same rationale cited in the NPRM in support of excluding mutual funds, and it should be applied to an investment adviser's relationships with other financial institutions subject to an AML/CFT program rule under the BSA.

For example, investment advisers advise bank-sponsored CITs that already are subject to the AML/CFT reporting obligations of a CIT's bank sponsor.[10] There is no reason for an investment adviser to apply its AML/CFT program to a CIT which is maintained by a bank and, like a mutual fund, already is required to comply with separate AML/CFT program obligations under the BSA rules applicable to banks.[11]

For the same reasons, an investment adviser should not be required to apply its AML/CFT program to relationships where the adviser is providing advisory services to or through another financial institution subject to AML/CFT program requirements under the BSA. By way of example, the NPRM seeks comment on the extent to which an investment adviser's AML/CFT program should apply to subadvisory relationships.[12] In a typical subadvisory relationship, the primary investment adviser contracts directly with the client, and the subadviser contracts with the primary investment adviser to provide portfolio management services benefiting the client. Because the primary investment adviser will be subject to AML/CFT program obligations once the final regulations are effective, an investment adviser acting as subadviser should be able to exclude its subadvisory relationships from its AML/CFT program.[13] Requiring an investment adviser to apply its AML/CFT program to a subadvisory relationship with another covered

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[7] *FinCEN; Anti-Money Laundering Programs for Investment Advisers*, 68 Fed. Reg. 23,646 (May 5, 2003) ("2003 NPRM"), available at https://www.fincen.gov/sites/default/files/federal_register_notice/352investmentadvisers_fedreg050503.pdf.

[8] *Id.* at 23,648.

[9] *Id.*

[10] A CIT is a pooled investment vehicle that, like a mutual fund, holds commingled assets. CITs are required to be "maintained by a bank" and, as such, are subject to oversight by the CIT bank trustees' primary regulator, the Office of the Comptroller of the Currency (OCC), the Federal Reserve, the Federal Deposit Insurance Corporation, or a state banking regulator, depending on the bank's charter. *See, e.g.*, 12 C.F.R. 9.18. In addition to being subject to the sponsoring bank's AML/CFT program, investors in CITs are limited to certain tax-qualified retirement plans, such as 401(k) and government 457(b) plans. FinCEN previously has recognized that such investors pose minimal money laundering and terrorist financing risks. *See, e.g.*, Customer Identification Programs for Mutual Funds, 68 Fed. Reg. 25,131, 25,134 (May 9, 2003) (noting, for example, that ERISA plans "are less susceptible to use for the financing of terrorism and money laundering").

[11] The 2003 NPRM cited CITs specifically as appropriate for exclusion from an investment adviser's AML/CFT program. 2003 NPRM at n.19.

[12] NPRM at 12,124.

[13] An investment adviser may serve as subadviser for a primary adviser that is located outside of the U.S. and is not subject to BSA requirements. For the same reasons, an investment adviser acting as subadviser in such circumstances should be permitted to exclude the subadvisory relationship from its AML/CFT program if the primary adviser is not located in a high-risk jurisdiction and is subject to equivalent AML/CFT requirements.

investment adviser would create the same redundancies as imposing requirements on both investment advisers and the mutual funds that they advise.[14] Furthermore, when an investment adviser acts as subadviser, it has limited or no access to information about the primary investment adviser's underlying clients. As a practical matter, an investment adviser acting as subadviser would not be in a position to apply most aspects of its AML/CFT program to the subadvisory relationship and generally would be unable to monitor the relationship for suspicious activity. Accordingly, an exemption for subadvisory relationships is both practical and consistent with the goal of reducing redundancy in BSA rulemaking.

Similarly, an investment adviser should be permitted to exclude from its AML/CFT program wrap fee arrangements. In a typical wrap fee arrangement, a broker-dealer or other financial institution acts as program sponsor, and the investment adviser provides portfolio management services to the account. In this case, it would be unnecessary and redundant to require an investment adviser to apply its AML/CFT program to the wrap fee arrangement, as the program sponsor is a broker-dealer or other financial institution subject to its own AML/CFT program obligations under the BSA rules.[15] Furthermore, as with subadvisory relationships, an investment adviser in a wrap fee arrangement often has limited or no access to information about the program sponsor's underlying clients. For the same reasons as discussed with respect to subadvisory arrangements, it would be impractical to require an investment adviser to apply its AML/CFT program to, and monitor for suspicious activity in, wrap fee arrangements.

We accordingly urge FinCEN to follow the approach first outlined in the 2003 NPRM and allow an investment adviser to exclude from its AML/CFT program any financial institution it advises that is subject to AML/CFT obligations under the BSA rules or that is sponsored or administered by a financial institution subject to such rules.

Section 2. Exemption for Mutual Funds and Other Financial Institutions Should Be Categorical

While ICI supports FinCEN's decision to exempt mutual funds from the scope of an investment adviser's AML/CFT program, we are concerned that the language in the proposed rule could effectively negate that exemption in some instances and impose unnecessary burdens on investment advisers.

The proposed rule provides an investment adviser's AML/CFT program requirements are satisfied for a mutual fund "it advises that has developed *and implemented* an AML/CFT

[14] We note that the proposed AML/CFT program rule for investment advisers already would exempt subadvisory relationships benefiting mutual funds, as a subadviser "advises" the mutual fund under the federal securities laws. NPRM at 12,190; *see* 15 U.S.C. § 80a-2(a)(20)(B) (defining an "investment adviser" to a fund to include subadvisers).

[15] Similarly, it would be unnecessary and redundant to require an investment adviser to search its accounts for persons named on requests pursuant to Section 314(a) of the USA PATRIOT Act, since an advisory client's custodian bank is already required to search such accounts in response to a 314(a) request.

program *compliant with* the AML/CFT program requirements applicable to mutual funds…."[16] By its terms, the exemption applies insofar as a mutual fund has "implemented" its AML/CFT program in a manner "compliant" with the AML/CFT program requirements for mutual funds. This language effectively negates the exemption in the rule, as it would make an investment adviser responsible for ensuring that the mutual funds it advises have implemented their AML/CFT programs in a compliant manner. Mutual funds have been subject to their own AML/CFT program requirements for over twenty years. Most of the functions of a mutual fund's AML/CFT program are delegated to the fund's transfer agent, with the mutual fund remaining responsible for ensuring compliance with the program. An investment adviser should not have to separately ensure a mutual fund is in compliance with the fund's AML/CFT program in order to exempt the fund from the investment adviser's AML/CFT program.

To avoid negating the intended exemption, we recommend that FinCEN look to the language of the 2003 NPRM, which provided that an "investment adviser may exclude from its anti-money laundering program any pooled investment vehicle it advises that is subject to an anti-money laundering program requirement under another provision of this subpart."[17] This language would give true effect to FinCEN's intent to allow an investment adviser to exempt a mutual fund from the investment adviser's AML/CFT program.

Section 3. FinCEN Should Fully Exempt Mutual Funds from an Investment Adviser's AML/CFT Program

FinCEN does not propose to exempt mutual funds from an investment adviser's requirements under the proposed information sharing rules (Subpart E) or proposed rules requiring an investment adviser to comply with certain due diligence and special measures (Subpart F).[18] We believe this approach adds unnecessary complexity to an investment adviser's AML/CFT obligations without serving any public policy interest.

Subpart E implements the special information sharing provisions in Sections 314(a) and 314(b) of the USA PATRIOT Act. Of particular relevance here is Section 314(a), which provides for information sharing between financial institutions and government agencies, through FinCEN, relating to subjects of criminal investigations.[19] A financial institution receiving a request for information pursuant to Section 314(a) is required to search its accounts and respond to FinCEN if the financial institution identifies a named suspect. In determining *not* to exempt a mutual fund from an investment adviser's proposed obligations under Section 314(a), FinCEN presumably seeks to ensure that an investment adviser reports to FinCEN if a mutual fund it advises is named in a 314(a) request. Given the highly regulated, public nature of the mutual fund industry, we believe it is implausible that a mutual fund would ever be a named suspect in a 314(a) request. If FinCEN's rationale instead was for an investment adviser to be responsible for searching a

[16] NPRM at 12,190 (emphasis added).

[17] 2003 NPRM at 23,652.

[18] *See, e.g.*, NPRM at n.6.

[19] 31 C.F.R. § 1010.520.

mutual fund's shareholder accounts in response to a 314(a) request, we believe such an obligation is unnecessary. Mutual funds already are responsible for searching their shareholder accounts in response to a 314(a) request. Imposing the same obligation on investment advisers would be redundant.

Subpart F implements special due diligence rules for certain foreign correspondent and private banking accounts, as required by Section 312 of the USA PATRIOT Act, and special measures implemented in response to areas of "primary money laundering concern" involving certain foreign relationships, as required by Section 311 of the USA PATRIOT Act.[20] By their terms, Sections 311 and 312 apply only to relationships outside of the United States – foreign correspondent or private banking accounts under Section 312, or foreign jurisdictions, institutions, classes of transactions or account types under Section 311. Mutual funds, however, are required to be organized under the laws of the United States or of a U.S. state.[21] Accordingly, an investment adviser would never have to apply its AML/CFT obligations under Subpart F to a mutual fund, since mutual funds are not foreign institutions.

For these reasons, we believe FinCEN's decision *not* to exempt mutual funds from an investment adviser's obligations under Subparts E and F creates unnecessary confusion without serving any public policy interest. We accordingly urge FinCEN to clarify that an investment adviser may exempt the mutual funds it advises from all elements of the investment adviser's AML/CFT program.

Section 4. FinCEN Should Recognize Certain Pooled Investment Vehicles Present Low Risks

ICI appreciates FinCEN's recognition, in the NPRM, that registered closed-end funds ordinarily should be treated as lower risk for purposes of an investment adviser's AML/CFT program.[22] This conclusion is consistent with a 2002 report to Congress submitted by the Secretary of the Treasury, the Board of Governors of the Federal Reserve System, and the Securities and Exchange Commission addressing which types of investment companies should be subject to regulation under the BSA (the 2002 Report).[23] The 2002 Report listed a number of other types of investment companies that also presented limited AML/CFT risks, such as unit investment trusts and private funds whose shares are not redeemable, or are redeemable only after a significant holding (or "lock up") period.[24] ICI encourages FinCEN to provide further clarity on those types

[20] *Id.* at § 1010.600, 1010.610, 1010.620.

[21] 15 U.S.C. 80a-7(d). The Securities and Exchange Commission may issue an order to allow a mutual fund to be organized under non-U.S. law, but we are unaware of any mutual fund so organized.

[22] NPRM at 12,126.

[23] Report to Congress In Accordance with § 356(c) of the USA PATRIOT ACT of 2001, Secretary of the Treasury, Board of Governors of the Federal Reserve System and Securities and Exchange Commission (Dec. 31, 2002), *available at* https://www.fincen.gov/sites/default/files/shared/356report.pdf.

[24] 2002 Report at 17-19, 33.

of pooled investment vehicles that present lower risks for purposes of an investment adviser's AML/CFT program.

Section 5. The Proposed AML/CFT Requirements Should Not Extend to Non-U.S. Investment Advisers

FinCEN proposes to extend AML/CFT requirements under the BSA to investment advisers located outside the United States. This action conflicts with the well-recognized jurisdictional limitations of the BSA. When Congress passed the BSA in 1970, it intended to apply BSA requirements only to those financial institutions within the United States. The Department of Treasury historically has embraced this view. For example, in a 1987 report, Treasury noted that the BSA's requirements "do not apply to foreign branches of United States financial institutions or to any other type of financial institution physically located outside of the United States."[25] Moreover, for other financial institutions, FinCEN specifically has limited the application of BSA rules to entities located within the United States. For example, the SAR filing requirements for broker-dealers apply only to broker-dealers within the United States.[26] Finally, the NPRM's reach is inconsistent with the 2003 NPRM, which proposed to extend AML/CFT program obligations only to those advisers "whose principal office and place of business is located in the United States."[27]

Extending BSA regulation to non-U.S. investment advisers will present significant challenges for these firms, because an investment adviser's obligations under the BSA may not be consistent with local privacy rules and other requirements. For example, local law may restrict the ability of a non-U.S. investment advisers to report suspicious activity to FinCEN. We urge FinCEN to reconsider this approach and instead apply the final rules only to investment advisers in the United States.

Section 6. Compliance Date

FinCEN proposes a one-year compliance period for the proposed AML/CFT requirements.[28] We believe that investment advisers will need additional time to develop the systems necessary to implement an AML program, monitor suspicious activity, and file SARs. Accordingly, we request that FinCEN allow investment advisers at least 18 months to comply with the final rules.

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[25] Secretary of the Treasury, Money Laundering and the Bank Secrecy Act: The Question of Foreign Branches of Domestic Financial Institutions (1987).

[26] *See, e.g.*, 31 C.F.R. § 1023.320 (applying the SAR filing requirement to "[e]very broker or dealer in securities *within the United States*….") (emphasis added).

[27] 2003 NPRM at 23,652.

[28] NPRM at 12,130.

We appreciate the opportunity to express our views on the NPRM. If you have any questions, please contact Kelly O'Donnell (at 202-326-5980 or kelly.odonnell@ici.org) or Erica Evans (at 202-218-3573 or erica.evans@ici.org).

Sincerely,

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