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February 14, 2022

By Electronic Transmission

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

Re: Review of Bank Secrecy Act Regulations and Guidance; Docket Number FINCEN-2021-0008

Dear Mr. Das:

The Investment Company Institute (“ICI”)¹ appreciates the opportunity to provide comments in response to the request for information and comment² (the “RFI”) issued by the Financial Crimes Enforcement Network (“FinCEN”) to modernize and streamline the risk-based regulations and guidance issued pursuant to the Bank Secrecy Act (“BSA”)³ and to review the same pursuant to Section 6216 of the Anti-Money Laundering Act of 2020 (the “AML Act”).

As we have previously done, ICI applauds FinCEN’s ongoing engagement with relevant stakeholders to modernize the U.S. anti-money laundering (“AML”) regulatory regime. In this same vein, because of the unique structural and other differences between open-end investment companies registered under the Investment Company Act of 1940 (“mutual funds”) and other financial institutions, ICI continues to urge FinCEN to appropriately tailor any rulemakings and

¹ The [Investment Company Institute](http://www.ici.org) (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI’s members manage total assets of \$33.1 trillion in the United States, serving more than 100 million US shareholders, and \$9.6 trillion in assets in other jurisdictions. ICI carries out its international work through [ICI Global](http://www.ici.org/global), with offices in Washington, DC, London, Brussels, and Hong Kong.

² Review of Bank Secrecy Act Regulations and Guidance, Request for information and comment, 86 FR 71201 (Dec. 15, 2021).

³ The BSA is codified at 31 U.S.C. § 5311 et seq.

guidance relevant to mutual funds with their unique characteristics in mind. ICI offers the following comments in response to the RFI on behalf of mutual funds.

A. FinCEN Guidance, Interpretive And No-Action Relief Should Be More Industry Specific

ICI appreciates the guidance that FinCEN issues regarding financial institutions' obligations under the BSA and FinCEN's regulations. In certain circumstances, however, ICI believes that FinCEN's guidance does not meaningfully distinguish between the various categories of financial institutions and the different financial services and products that they offer. For example, FinCEN's semi-annual report "SAR Activity Review – Trends, Tips & Issues"⁴ provides useful information and assists financial institutions in identifying new red flags and trends, but these reports are often aimed at the activities of depository institutions and money services businesses. FinCEN could improve these if the reports included information relevant to mutual funds and other financial institutions. Also, banking regulators publish FAQs on a variety of AML topics, including customer identification program ("CIP") and customer due diligence ("CDD") requirements. The FAQs and financial institution letters could be leveraged by FinCEN to provide similarly relevant guidance to mutual funds and their AML compliance personnel, who otherwise must adapt this guidance to mutual funds on their own.⁵

B. CIP/Beneficial Ownership Reliance No-Action Relief Should Be Made Evergreen

Under the CIP Rule⁶ and Beneficial Ownership ("UBO") Rule⁷ (collectively, the "CIP/UBO Rules"), mutual funds and broker-dealers may rely on other financial institutions to perform some or all of their obligations to collect and verify customer and beneficial ownership identification information. Since 2004 (with respect to CIP) and 2018 (with respect to UBO), SEC staff has issued a no-action position that permits broker-dealers to rely on investment advisers to perform a broker-dealer's obligations under the CIP/UBO Rules, provided certain conditions are met.⁸ This no-action position, which broker-dealers (including mutual fund distributors) have come to rely on, must be renewed every two years. ICI urges FinCEN to work with the SEC staff to make this no-action position evergreen until withdrawn. Doing so will alleviate the uncertainty and disruption that arises each time renewal of the relief is needed to permit broker-dealers to rely on their investment adviser partners to perform these functions.⁹

⁴ Each issue of the report is available at: <https://www.fincen.gov/sar-activity-review-trends-tips-issues>.

⁵ Mutual funds are not members of the Financial Industry Regulatory Authority, Inc. ("FINRA"), and the Securities and Exchange Commission ("SEC") no longer publishes AML compliance guidance for mutual funds. As a result, the mutual fund industry is often left without relevant AML compliance guidance written with the unique characteristics of mutual funds in mind.

⁶ 31 C.F.R. § 1023.220 (for broker-dealers) and 31 C.F.R. § 1024.220 (for mutual funds).

⁷ 31 C.F.R. § 1010.230.

⁸ See, e.g., letter from Lourdes Gonzalez, Assistant Chief Counsel, Division of Trading and Markets, to Ms. Aseel M. Rabie, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated December 9, 2020.

⁹ Although not directly applicable to mutual funds, mutual funds are indirectly affected as mutual fund distributors may rely on the no-action relief in connection with fund investors that purchase shares through investment advisers.

C. Section 314(b) Information Sharing With Foreign Affiliates

ICI urges FinCEN to provide guidance or relief to permit financial institutions to share information with affiliates located outside of the United States in reliance on the safe harbor afforded under Section 314(b) of the USA PATRIOT Act. Section 314(b) permits a financial institution to share information with other financial institutions or associations of financial institutions pursuant to a safe harbor when the financial institution “has a reasonable basis to believe that the information shared relates to activities that may involve money laundering or terrorist activity, and it is sharing the information for an appropriate purpose under Section 314(b) and its implementing regulations.”¹⁰

The benefits of information sharing under Section 314(b) have been widely discussed and have been recognized to “help financial institutions enhance compliance with their anti-money laundering/counter-terrorist financing . . . requirements.”¹¹ One limitation of the 314(b) information sharing program is that it cannot be relied upon by financial institutions to share relevant information with affiliates located outside of the United States.¹²

It would be valuable for global organizations to have the ability to share important information regarding potential money laundering or terrorist financing activities across their enterprises, which may include asset management entities, investment fund clients, and their service providers domiciled and doing business in various jurisdictions across the globe. Illicit actors attempting to engage in money laundering and terrorist financing activities are increasingly using regulatory arbitrage to take advantage of a global financial system that is comprised of varying AML standards and regulators that may not always communicate with one another, or are otherwise not well coordinated to most effectively keep up with global money laundering or terrorist financing schemes. Cross-border information sharing among affiliated entities would permit financial institutions to better monitor and combat these activities. ICI appreciates the proposed pilot program for sharing SARs and related information with foreign affiliates.¹³ We urge FinCEN to explore how it can permit financial institutions to rely on the 314(b) safe harbor to share information with affiliates outside of the United States apart from the SAR pilot program.

D. Updating And Modernizing SAR Reporting And Related Guidance

Mutual funds and their service providers have seen an increase in cyber events over the past 10 years, including ransomware attacks and account intrusion events. ICI appreciates FinCEN’s efforts to continuously update its guidance for reporting ransomware attacks in suspicious activity reports (“SARs”).¹⁴ ICI urges FinCEN to continue to provide timely guidance in this regard. We also recommend that FinCEN provide updated guidance regarding when a cyber event (other than a

¹⁰ See Section 314(b) Fact Sheet (December 2020).

¹¹ *Id.*

¹² The safe harbor under Section 314(b) and its implementing regulations is only applicable to “financial institutions,” which do not include those located outside of the United States.

¹³ See Pilot Program on Sharing of Suspicious Activity Reports and Related Information With Foreign Branches, Subsidiaries, and Affiliates, Notice of Proposed Rulemaking, 87 FR 3719 (Jan. 25, 2022).

¹⁴ See, e.g., FinCEN Advisory on Ransomware and the Use of the Financial System to Facilitate Ransom Payments, FIN-2021-A004 (Nov. 8, 2021).

ransomware attack) should be reported in a SAR filing. Cyber events (failed and successful attempts) are occurring on a more frequent and sophisticated basis. SAR reporting guidance regarding cyber events has remained largely unchanged since FinCEN's 2016 guidance, which was not substantially updated from the prior guidance dating back to 2000.¹⁵ The need for updated guidance is especially crucial because the current guidance could be read as requiring all intrusion attempts to be reported, which, in the current environment, creates an impracticable and almost impossible obligation. FinCEN guidance, particularly directed to mutual funds and other financial institutions that do not have the benefit of receiving additional guidance from their primary regulators, would be valuable to clarify mutual funds' reporting obligations in light of these current realities.

E. Consideration of Use of Technology and Artificial Intelligence in Future Rulemakings

ICI urges FinCEN to take account of new technologies and artificial intelligence in its rulemakings and guidance. As technology evolves, any new regulations must be flexible enough such that mutual funds can use new technology tools to assist with and support compliance (e.g., use of distributed ledger technology to perform CIP). ICI supports the U.S. Department of the Treasury's concept of creating a "regulatory sandbox" to test out new technologies for meeting AML obligations.¹⁶ FinCEN should also consider how new technology could affect AML obligations going forward (e.g., use of peer-to-peer payment systems or stable coin). Finally, FinCEN should consider issuing guidance regarding how financial institutions can use new technology and artificial intelligence in meeting their compliance obligations, including testing, verification, and the use of and reliance on results, outputs, and other information produced by such technologies and artificial intelligence.

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¹⁵ See FinCEN Advisory to Financial Institutions on Cyber-Events and Cyber-Enabled Crime, FIN-2016-A005 (Oct. 25, 2016) (citing to Suspicious Activity Report Instructions issued on June 2000, July 2003, and March 2011; SAR Activity Review Trends, Tips, and Issues: Issue 3 (October 2001); FinCEN Advisory FIN-2011-A006 "Account Takeover Activity" (December 2011); and Frequently Asked Questions Regarding the FinCEN SAR (May 2013)).

¹⁶ See A financial System That Creates Economic Opportunities, Nonbank Financials, Fintech, and Innovation, U.S. Department of the Treasury (July 2018) (stating that the regulatory environment should "be flexible so that firms can experiment without the threat of enforcement actions that would imperil the existence of a firm.").

ICI appreciates the opportunity to present our comments in response to the RFI. 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 Joanne Kane (at 202-326-5850 or joanne.kane@ici.org).

Sincerely,

/s/ Susan Olson

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