The Asset Management Industry
SERVING INDIVIDUAL INVESTORS
INVESTMENT COMPANY INSTITUTE
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By Electronic Transmission

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

Vanessa Countryman
Secretary, U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: *Customer Identification Programs for Registered Investment Advisers and Exempt Reporting Advisers; Docket Number FINCEN-2024-0011; SEC File Number S7-2024-02*

Dear Ms. Gacki and Ms. Countryman:

The Investment Company Institute[1] is writing to provide comments on the notice of proposed rulemaking (NPRM) that would require certain investment advisers to implement customer identification programs (CIPs).[2] The NPRM was issued only weeks after the comment deadline on a separate, but related, proposal that would require certain investment advisers to establish programs to thwart money laundering, terrorist financing and other illicit finance risks (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).[3]

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[1] The Investment Company Institute (ICI) is the leading association representing the asset management industry in service of individual investors. 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 $35.2 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 100 million investors. Members manage an additional $9.4 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] *Customer Identification Programs for Registered Investment Advisers and Exempt Reporting Advisers*, 89 Fed. Reg. 44,571 (May 21, 2024), *available at* https://www.govinfo.gov/content/pkg/FR-2024-05-21/pdf/2024-10738.pdf.

[3] These proposed requirements are contained in a single FinCEN Notice of Proposed Rulemaking and are referred to collectively herein as the "Adviser Program Rule." *Anti-Money Laundering/Countering the Financing of Terrorism Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers and Exempt*

ICI strongly supports the SEC's and FinCEN's efforts to protect the U.S. financial system from money laundering and financing of terrorist activities.[4] We cannot support this NPRM, however, because we do not know how the proposed CIP requirements will fit within the yet to be finalized requirement that advisers create and maintain an overall AML/CFT program. We do not even know which investment advisers would be subject to a final Adviser Program Rule or the nature of their regulatory obligations. Simply put, the pace and sequencing of FinCEN's AML/CFT-related proposals make it practically impossible to provide informed comments on this NPRM. Accordingly, we recommend that FinCEN withdraw the NPRM and repropose any CIP-related requirements for investment advisers after FinCEN finalizes the Adviser Program Rule.

In the event that FinCEN determines to move forward on the NPRM, we offer several recommendations, which we summarize below.

- The scope of any final rule should be significantly narrowed to exclude advisory clients whose identities are already required to be verified by another entity that has CIP obligations under the BSA and is involved in the investment advisory relationship.

- Any final rule should be harmonized with CIP rules applicable to mutual funds.

- Any release accompanying the final rule should clarify the NPRM's discussion of mutual funds.

FinCEN Should Withdraw the NPRM and Repropose any Necessary CIP Requirements After It Finalizes an Adviser Program Rule

FinCEN should not propose new AML/CFT obligations for investment advisers before adopting a final Adviser Program Rule because interested parties will not be able to provide informed comments on this NPRM without first knowing which investment advisers would be subject to a final Adviser Program Rule and the nature of their regulatory obligations. FinCEN received numerous comments on the proposed Adviser Program Rule, including comments on the scope of the rule (*i.e.*, which investment advisers should be subject to the proposed AML/CFT obligations) and which advisory clients could be excluded from an investment adviser's AML/CFT program. By way of example, ICI commented that the Adviser Program Rule should not apply to investment advisers located outside of the United States, and that an investment adviser should be allowed to exclude any financial institution it advises that is subject to

Reporting Advisers, 89 Fed. Reg. 12,108 (Feb. 15, 2024), *available at* https://www.govinfo.gov/content/pkg/FR-2024-02-15/pdf/2024-02854.pdf.

[4] FinCEN and the SEC jointly issued the NPRM. For simplicity, this letter will use the term "FinCEN" to refer to both FinCEN and the SEC.

AML/CFT obligations under the BSA rules or that is sponsored or administered by a financial institution subject to such rules.[5]

ICI appreciates FinCEN's acknowledgement that "any change to the scope of the [Adviser Program Rule], as finalized, would also be reflected in this [CIP] rule, to ensure that the scope of both rules remain consistent."[6] Nevertheless, we agree with SEC Commissioner Uyeda that the interrelatedness of these rules is precisely why a two-step process should be followed – first adopting the Adviser Program Rule, and then proposing the CIP rule for investment advisers.[7]

For these reasons, ICI respectfully requests that FinCEN withdraw this NPRM and repropose it, if necessary, after FinCEN has an opportunity to evaluate the comments on the Adviser Program Rule proposal and issue any appropriately calibrated final regulations.

Should FinCEN nevertheless decide to proceed with this rulemaking, then at a minimum, the comment period on the NPRM should be re-opened following adoption of the Adviser Program Rule so that interested parties have an opportunity to consider the Adviser Program Rule and address questions and issues on the NPRM that inevitably will be raised. Moreover, it is imperative, that when adopting any of the proposed (or anticipated to be proposed) AML-related requirements for investment advisers, FinCEN provide advisers a sufficiently lengthy time to responsibly comply with multiple, related new obligations.[8] Commenters on the Adviser Program Rule proposal did not have the benefit of knowing that FinCEN intended to propose additional BSA rules for investment advisers on an expedited schedule – prior to even finalizing the Adviser Program Rule. ICI previously requested at least 18 months for compliance with the Adviser Program Rule. Given the pace, volume, and interconnectedness of the rulemakings, FinCEN should also provide at least 18 months to comply with the proposed investment adviser CIP rule. In addition, FinCEN should properly sequence the compliance dates of the rulemakings

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[5] Letter from Kelly O'Donnell, Director, Operations and Transfer Agency, ICI, to Andrea Gacki, Director, FinCEN, dated April 12, 2024, *available at* https://downloads.regulations.gov/FINCEN-2024-0006-0019/attachment_1.pdf.

The BSA defines "financial institutions" broadly to include, among other types of entities: commercial banks; agencies and branches of foreign banks in the United States; thrift institutions, credit unions, and private bankers; trust companies; securities brokers and dealers registered with the SEC; investment companies; and futures commission merchants. FinCEN also has authority to define, by regulation, additional types of businesses as "financial institutions" and has proposed to designate certain investment advisers as "financial institutions" under the BSA as part of the Adviser Program Rule proposal. *See* NPRM at 44,572.

[6] NPRM at 44,573-74.

[7] *Statement on Customer Identification Programs for Registered Investment Advisers and Exempt Reporting Advisers*, SEC Commissioner Mark T. Uyeda (May 13, 2024), *available at* https://www.sec.gov/newsroom/speeches-statements/uyeda-statement-cip-registered-investment-advisers-exmpt-reporting-advisers-051324. In a letter to the SEC, ICI and many other trade associations pointed out the importance of the SEC evaluating how proposed regulatory changes could overlap and potentially impact each other. Joint Association Letter to Chair Gensler re: *Importance of Appropriate Length of Comment Periods* (Apr. 5, 2022), *available at* https://www.ici.org/system/files/2022-04/22-ici-letter-to-sec-chair-gensler.pdf.

[8] These include the NPRM and the Adviser Program Rule proposal, as well as any future rulemaking that would impact investment adviser AML/CFT obligations, including the anticipated proposal regarding customer due diligence requirements with respect to the beneficial ownership of legal entity customers.

such that investment advisers are required to first implement the Adviser Program Rule, followed by implementation of a CIP.

The NPRM is Duplicative, Because Regulated Qualified Custodians Already Verify the Identity of Most Investment Adviser "Customers"

The typical investment advisory relationship involves multiple financial institutions: the investment adviser, which manages the client's assets, and the qualified custodian, which holds and safeguards the client's assets.[9] The vast majority of advisory client assets are held in accounts of qualified custodians that are federally regulated banks. Banks in the United States have been required to verify the identity of their clients since the initial adoption of CIP rules following the passage of the USA PATRIOT Act.[10] Subjecting investment advisers to CIP obligations is therefore duplicative and serves no meaningful purpose because the qualified custodian already has verified the identity of such advisory clients.[11] Accordingly, FinCEN should not require an investment adviser to apply its CIP to a customer if the customer's identity is already required to be verified by another BSA-regulated financial institution involved in the investment advisory relationship. This approach would be consistent with FinCEN's intent to minimize duplicative regulatory requirements.[12]

We recognize that the NPRM would permit investment advisers to rely on other institutions, such as qualified custodians, to perform CIP obligations if certain conditions are met ("reliance provision"). However, the proposed reliance provision is unworkable because it would require written agreements between the investment adviser and the qualified custodian or other applicable entity. This requirement would be highly burdensome to implement, in part because we understand that, under current market practice, investment advisers generally do not contract directly with qualified custodians. The proposed reliance provision would therefore cause significant administrative burden for little, if any, benefit. Investment advisers would be forced to negotiate a potentially large number of entirely new agreements that would obligate the other institutions to conduct identity verifications that they are already otherwise doing. Accordingly, we believe the more administratively feasible and cost-efficient approach would be to simply exclude a customer from the scope of an investment adviser's CIP if the customer's identity is

[9] 17 C.F.R. § 275.206(4)-2. The SEC has proposed to expand this requirement to apply to all client "assets" (beyond funds and securities) over which an investment adviser is deemed to have custody. *See Safeguarding Advisory Client Assets*, 88 Fed. Reg. 14,672 (Mar. 9, 2023).

[10] *Customer Identification Programs for Banks, Savings Associations, and Credit Unions*, 67 Fed. Reg. 48,290 (July 23, 2002).

[11] For this reason, we believe the NPRM's statement that the FinCEN has "not identified any federal rules that would duplicate, overlap, or conflict with the proposed rule" should be reconsidered in the context of assessing the costs and benefits of the proposed rule. *See* NPRM at 44,593.

[12] *Id.* at 44,575 ("[W]e are proposing not to require investment advisers to mutual funds to include those mutual funds within the investment advisers' own CIP programs, as doing so would be redundant.").

already required to be verified by another BSA-regulated financial institution involved in the investment advisory relationship.[13]

CIP Rules for Advisers Should be Harmonized with CIP Rules Applicable to Mutual Funds

FinCEN acknowledges in the NPRM the "importance that FinCEN and the SEC … assign to the harmonization of CIP requirements" across the financial services industry.[14] FinCEN and the federal functional regulators have long recognized the importance of a single standard for CIP obligations across regulated industries. Indeed, the preambles to the initial CIP rules applicable to banks, broker-dealers and mutual funds made clear that the same standards under each CIP rule are designed to apply across financial institutions. For example, the preamble to the broker-dealer CIP rule states:

> Final rules governing the applicability of section 326 to certain other financial institutions, including banks, thrifts, credit unions, mutual funds and futures commission merchants, are being issued separately. Treasury, the SEC, the CFTC and the banking agencies consulted extensively in the development of all joint rules implementing section 326 of the [USA PATRIOT] Act. ***These participating agencies intend the effect of the final rules to be uniform throughout the financial services industry***.[15]

The NPRM unfortunately departs from this principle by proposing CIP obligations for investment advisers that differ from those applicable to other financial services firms. For example, the proposed CIP rule would require an adviser to obtain "the date of formation for any person other than an individual." No other CIP rule includes this requirement. We do not believe that investment advisers should be held to a higher (or lower) CIP standard than is applicable to banks, broker-dealers, mutual funds or other financial institutions.

The definition of "account" proposed in the NPRM covers any "contractual or other business relationship between a person and an investment adviser."[16] This definition is the same definition used in the CIP rule applicable to mutual funds.[17] We accordingly expect investment advisers will look to the regulatory history of the mutual fund CIP rule and guidance provided to mutual funds subsequent to the rule's adoption, when interpreting the scope of the investment adviser's CIP obligations under any final CIP rule issued by FinCEN. However, the CIP rule applicable to mutual funds exempts from the definition of "account" an employee benefit plan established pursuant to the Employee Retirement Income Security Act of 1974 (ERISA). In contrast, the

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[13] For a discussion of the potential costs associated with requiring advisers to negotiate written contracts with qualified custodians, see Letter from Dorothy M. Donohue, Deputy General Counsel, ICI, to Vanessa Countryman, Secretary, SEC, dated May 8, 2023, *available at* https://www.ici.org/system/files/2023-05/23-cl-sec-safeguarding-advisory-client-assets.pdf.

[14] NPRM at 44,573.

[15] *Customer Identification Programs for Broker-Dealers*, 68 Fed. Reg. 25,113, 25,114 (May 9, 2003).

[16] 31 C.F.R. § 1032.100(a) (proposed rule).

[17] 31 C.F.R. § 1024.100(a).

proposed investment adviser CIP rule would not exclude ERISA accounts from the definition of "account." There is no basis for treating ERISA accounts with investment advisers differently than ERISA accounts with mutual funds, particularly given FinCEN's acknowledgment that:

> [ERISA accounts with mutual funds] are less susceptible to use for the financing of terrorism and money laundering, because, among other reasons, they are funded through payroll deductions in connection with employment plans that must comply with federal regulations that impose various requirements regarding the funding and withdrawal of funds from such accounts, including low contribution limits and strict distribution requirements.[18]

Accordingly, we believe ERISA accounts should be excluded from the investment adviser CIP rule for the same reasons they are excluded from the mutual fund CIP rule.

The proposed CIP rule also would require an investment adviser to request alternative government-issued documentation certifying the existence of any entity that is a non-U.S. person, other than an individual, if such person does not have an identification number.[19] Once again, this proposed requirement departs from the CIP rules applicable to all other financial institutions. Moreover, this proposal conflates the concepts of identification and verification. The NPRM states that "this specific requirement is being included here to account for changes in how financial institutions now routinely ***verify the identity*** of non-U.S. persons that are not individuals."[20] In both the NPRM and in the preambles to the other CIP rules, FinCEN and the federal functional regulators have made clear that verification of identity should be performed pursuant to "risk-based procedures" that allow a financial institution to form a "reasonable belief that it knows the true identity" of its customer. Requiring an investment adviser to request government-issued documentation from certain customers is inconsistent with the CIP rules applicable to other financial institutions and with the principle that financial institutions have flexibility in determining how best to verify a customer's identity.

For these reasons, we recommend that any CIP rules applicable to investment advisers be harmonized with the CIP rules applicable to other financial institutions.[21]

FinCEN Should Address Confusion Raised by the Discussion of Mutual Funds in the NPRM

The NPRM's discussion of mutual funds has unnecessarily created uncertainty about the scope of an investment adviser's proposed CIP responsibilities.

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[18] *Customer Identification Programs for Mutual Funds*, 68 Fed. Reg. 25,131, 25,134 (May 9, 2003).

[19] 31 C.F.R § 1032.220(a)(2)(i) (proposed rule).

[20] NPRM at 44,576.

[21] Like in the CIP rules covering other financial institutions, the proposed definition of "customer" excludes a person with an existing account "provided the investment adviser has a reasonable belief that it knows the true identity of the person." 31 C.F.R. § 1032.100(c)(2)(iii) (proposed rule). FinCEN should confirm that this "reasonable belief" may be formed by an investment adviser's existing client records, and does not require an investment adviser to identify and verify the identity of its client in a manner similar to what is envisaged by the proposed CIP rule.

The CIP rules require a financial institution to verify the identity of its "customer" – that is, the person that opens an account with a financial institution. Consistent with the CIP rules applicable to other financial institutions, the NPRM makes clear that "an investment adviser … would only be required to verify the identity of the named accountholder."[22]

When an investment adviser enters into an investment advisory contract with a mutual fund, the mutual fund is the investment adviser's "customer" (*i.e.*, the named accountholder). Because a mutual fund is "[a] financial institution regulated by a Federal functional regulator," it is exempt from the definition of "customer" under all CIP rules – including the CIP rule for investment advisers proposed in the NPRM.[23] Accordingly, an investment adviser would not be required to apply its CIP to its mutual fund customers.

Nevertheless, the NPRM includes a separate discussion about situations when an investment adviser may "deem these [CIP] requirements satisfied for any mutual fund it advises ***if the mutual fund has developed and implemented a CIP that is compliant with CIP requirements applicable to mutual funds…."***[24] This language has raised unnecessary confusion about regulatory expectations, as it is very clear that mutual funds already are exempt from CIP requirements applicable to banks, broker-dealers and all other financial institutions because they are regulated by a federal functional regulator. The NPRM nevertheless suggests that an investment adviser is allowed to exempt a mutual fund it advises from its CIP "***if***" the mutual fund has developed and implemented its own CIP – a seemingly heightened burden not found in other CIP rules.

We accordingly request clarification that an investment adviser, like all other financial institutions subject to a CIP rule, may exclude ***any*** mutual fund from its CIP because the mutual fund is regulated by a federal functional regulator –irrespective of whether the fund has developed and implemented its own CIP.

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We appreciate the opportunity to express our views on the NPRM. If you have 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,

Kelly O'Donnell
Director, Operations and Transfer Agency
Investment Company Institute

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[22] NPRM at 44,574.

[23] 31 C.F.R. § 1032.100(c) (proposed rule).

[24] NPRM at 44,574-75 (emphasis added).

cc: The Honorable Gary Gensler
The Honorable Hester M. Peirce
The Honorable Caroline A. Crenshaw
The Honorable Mark T. Uyeda
The Honorable Jaime Lizárraga

Natasha Vij Greiner, Director
Sarah ten Siethoff, Deputy Director
Division of Investment Management