Marcia E. Asquith
Corporate Secretary and
Executive Vice President,
Board and External Relations

April 15, 2024

Financial Crimes Enforcement Network
P.O. Box 39
Vienna, VA 22183

Re: Anti-Money Laundering/Countering the Financing of Terrorism Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers and Exempt Reporting Advisers (FINCEN–2024–0006 and RIN 1506–AB58)

Dear Director Gacki,

The Financial Industry Regulatory Authority, Inc. ("FINRA")[1] welcomes the opportunity to comment on the Financial Crimes Enforcement Network's ("FinCEN's") proposed rulemaking to include certain investment advisers within the definition of ''financial institution'' under the Bank Secrecy Act ("BSA") and require that they implement anti-money laundering/countering the financing of terrorism ("AML/CFT") programs, file Suspicious Activity Reports ("SARs") with FinCEN, and comply with other obligations of financial institutions under the BSA.[2] Through its examinations and enforcement of broker-dealers' compliance with FINRA Rule 3310 (Anti-Money Laundering Compliance Program),[3] FINRA, like FinCEN, works to achieve the goals of the BSA and combat money laundering, terrorist financing, and other illicit financial activity.

FINRA supports the overall proposal—as well as FinCEN's anticipated plans to address investment advisers' collection of beneficial ownership information in a subsequent rulemaking and customer identification program ("CIP") requirements through a joint rulemaking with the Securities and Exchange Commission ("SEC").[4] FINRA does, however, request a clarifying change to ensure that the proposed confidentiality requirements for SARs that would be filed by investment advisers are consistent with the

---

1 FINRA is a not-for-profit, self-regulatory organization ("SRO") that is responsible for regulating its approximately 3,300 member broker-dealers and their associated persons pursuant to the Securities Exchange Act of 1934.

2 Financial Crimes Enforcement Network: 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. 12108 (Feb. 15, 2024) ("Notice").

3 FINRA Rule 3310 (Anti-Money Laundering Compliance Program) requires that each FINRA member firm develop and implement a written AML program that is approved, in writing, by a member of senior management and is reasonably designed to achieve and monitor the firm's compliance with the BSA and its implementing regulations.

4 Notice, *supra* note 2, at 12108, 12117.

access to SARs that FINRA is provided under the BSA. FINRA also suggests that FinCEN consider specifically requiring that SAR narratives describe the roles and involvement of each financial institution when they file joint SARs. In addition, FINRA suggests that FinCEN consider including foreign investment advisers as one of the types of foreign financial institutions whose correspondent accounts are subject to the special due diligence requirements in 31 C.F.R. § 1010.610(a).

FINRA Supports the Overall Proposal to Extend AML/CFT Requirements to Certain Investment Advisers

As FinCEN states in the proposal, investment advisers may control accounts at one or more broker-dealers to hold or trade assets where the broker-dealer, as an intermediary, may have no independent knowledge of the investment advisers' customers.[5] Investment advisers also may select one or more broker-dealers to act as a qualified custodian for purposes of the custody requirements under the Investment Advisers Act of 1940 ("Advisers Act"), pursuant to which an investment adviser may either maintain customer funds and securities in a separate account for each client under that client's name or in a single account under the name of the investment adviser as agent or trustee for its clients.[6] Even if the identities of investment advisers' customers are disclosed to the broker-dealer, the investment advisers are still often in the best position to obtain the necessary documentation and information about the customers that is relevant for AML/CFT purposes, such as the source of customers' assets, the customers' background and the customers' investment objectives.[7]

FINRA believes that extending AML/CFT obligations to investment advisers would close a significant gap in the current regulatory framework. In connection with its oversight of broker-dealers for compliance with AML/CFT requirements,[8] FINRA has observed that investment advisers often have the sole or most direct relationship with customers that may present money laundering or other illicit finance risks. As the investment adviser is better positioned to assess the risks associated with the customer in these circumstances, FINRA believes that extending AML/CFT requirements to investment advisers would help achieve the BSA's statutory purposes, including providing highly useful reports to government authorities and the prevention of money laundering, the financing of terrorism, and other illicit activity.[9]

---

5 Notice, *supra* note 2, at 12113.

6 17 C.F.R. § 275.206(4)-2 (Custody of funds or securities of clients by investment advisers); Dep't of the Treasury, 2024 Investment Adviser Risk Assessment, at p. 12 (Feb. 2024) ("IA Risk Assessment"), https://home.treasury.gov/system/files/136/US-Sectoral-Illicit-Finance-Risk-Assessment-Investment-Advisers.pdf. The SEC has proposed amendments to Advisers Act Rule 206(4)-2. *See* Safeguarding Advisory Client Assets, 88 Fed. Reg. 14672 (Mar. 9, 2023).

7 Notice, *supra* note 2, at 12113; IA Risk Assessment, *supra* note 6, at p. 27.

8 *See, e.g.,* U.S. Gov't Accountability Office, GAO-19-582, *Bank Secrecy Act: Agencies and Financial Institutions Share Information but Metrics and Feedback Not Regularly Provided*, at p. 10 (Aug. 2019) ("2019 GAO Report") ("FINRA conducts the vast majority of BSA/AML examinations of securities firms by SROs."), https://www.gao.gov/assets/gao-19-582.pdf.

9 31 U.S.C. § 5311.

Without AML/CFT requirements for investment advisers, illicit activity may go undetected and unreported. In addition to the illicit finance risks highlighted by FinCEN in the proposal, FINRA also notes that investment advisers may be a source of, or provide the means to engage in, market-related fraud and manipulation. FINRA's review of the referrals that its specialized insider trading, market fraud, and offering review teams made to other regulators and law enforcement between January 1, 2023 and March 14, 2024 suggests that at least 14.5 percent of those referrals related to investment advisers or their customers.

FINRA Requests that FinCEN Clarify the Proposed Confidentiality Requirements for SARs Filed by Investment Advisers to Be Consistent with the Access to SARs that FINRA is Provided Under the BSA

Although FINRA supports the overall proposal, FINRA requests that FinCEN revise proposed 31 C.F.R. § 1023.320(c)(2) to clarify that government authorities' official duties may include disclosing a SAR to FINRA, consistent with FINRA's existing access to SARs under the BSA. As proposed, 31 C.F.R. § 1023.320(c)(2) would state:

> *Prohibition on disclosures by government authorities*. A Federal, State, local, territorial, or Tribal government authority, or any current or former director, officer, employee, or agent of any of the foregoing, shall not disclose a SAR, or any information that would reveal the existence of a SAR, except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act. For purposes of this section, ''official duties'' shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, **to a non-governmental entity** in response to a request for disclosure of non-public information or a request for use in a private legal proceeding, including a request pursuant to 31 CFR 1.11.[10]

Unlike the existing rules addressing the confidentiality of SARs for other types of financial institutions, the proposal inserts the phrase "to a non-governmental entity" before "in response to a request for disclosure of non-public information."[11] FINRA is concerned that this insertion could be misread as restricting FINRA's access to SARs because it is not a governmental entity.[12] However, the BSA specifically provides FINRA with access to SARs and other BSA reports for purposes consistent with the BSA.[13]

---

[10] Notice, *supra* note 2, at 12192 (emphasis added). The proposal states that "[f]or purposes of this rulemaking, 'non-public information' refers to information that is exempt from disclosure under the Freedom of Information Act." Notice, *supra* note 2, at 12133 n. 196.

[11] *See, e.g.*, 31 C.F.R. § 1020.320(e)(2) (for banks); 31 C.F.R. § 1023.320(e)(2) (for broker-dealers); and 31 C.F.R. § 1024.320(d)(2) (for mutual funds).

[12] *See, e.g., Mohlman v. FINRA*, No. 3:19-cv-154, 2020 WL 905269, at *6 (S.D. Ohio Feb. 25, 2020) ("Courts have held without exception that FINRA is a private entity and not a state actor.") (collecting cases), *aff'd*, 977 F.3d 556 (6th Cir. 2020).

[13] *See* USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended 31 U.S.C. § 5319 (2001)) ("The Secretary of the Treasury shall make information in a report filed under this subchapter available to a[] . . . self-regulatory organization registered with the Securities and Exchange Commission or the Commodity Futures Trading Commission, upon request of the head of the agency or organization."); U.S. Gov't Accountability Office, GAO-09-227, *Bank Secrecy Act: Federal Agencies Should Take Action to Further Improve Coordination and*

There are a variety of circumstances in which FINRA's access to SARs filed by financial institutions that are not broker-dealers may be important for FINRA's oversight of broker-dealers' compliance with BSA requirements and the identification of areas of potential AML/CFT risk on which to focus its examinations and investigations.[14] For example, SARs may be important for FINRA's oversight when they are filed by an affiliate of a broker-dealer, filed by another financial institution jointly with a broker-dealer, or otherwise relate to a broker-dealer's customer.

FINRA Suggests that FinCEN Require that Financial Institutions Specifically Disclose Their Respective Roles with Respect to Suspicious Transactions When They Make Joint SAR Filings

In FINRA's experience, when a financial institution files a SAR on behalf of itself and another financial institution such as a broker-dealer, it can be difficult to understand the respective involvement of the different financial institutions that are involved in the transactions from the narrative section of the SAR. As a result, it can be challenging for FINRA to determine the extent of its regulatory interest in the information disclosed in the SAR filing. Therefore, FINRA appreciates that FinCEN has proposed to require that SARs that are filed jointly with investment advisers specifically include the name of each financial institution involved in the transaction and the words "joint filing" in the narrative section.[15] In addition to these requirements, FINRA suggests that FinCEN consider requiring specifically that the SAR narrative describe the respective roles and involvement of each financial institution with respect to the transaction.

FINRA Suggests that FinCEN Consider Including Foreign Investment Advisers Within the Definition of Foreign Financial Institutions that are Subject to Special Due Diligence Programs

Existing regulations implementing section 312 of the USA PATRIOT Act require covered financial institutions to establish due diligence programs ("special due diligence programs") that include appropriate, specific, risk-based, and, where necessary, enhanced policies, procedures, and controls reasonably designed to enable them to detect and report money laundering conducted through or involving any "correspondent account" established by the covered financial institution in the United States for a "foreign financial institution."[16] Special due diligence programs must meet certain minimum requirements, including that the covered financial institution assess the money laundering risk presented by the correspondent account based on a consideration of all relevant factors, including (among others) the nature of the foreign financial institution's business and the market it serves.[17]

Information-Sharing Efforts, at p. 67 (2009) (recommending that FinCEN "expeditiously" finalize data access agreements with FINRA and other SROs that conduct BSA examinations), https://www.gao.gov/assets/gao-09-227.pdf; 2019 GAO Report, *supra* note 8, at pp. 43, 47 (explaining that FinCEN finalized a data-access MOU with FINRA).

[14] *See* 2019 GAO Report, *supra* note 8, at p. 43 (describing how supervisory agencies use BSA data to help scope and conduct their BSA/AML compliance examinations).

[15] Proposed rule 31 C.F.R. § 1032.320(a)(3).

[16] 31 U.S.C. § 5318(i) and 31 C.F.R. § 1010.610(a); Notice, *supra* note 2, at 12135.

[17] 31 C.F.R. § 1010.610(a)(2)(i).

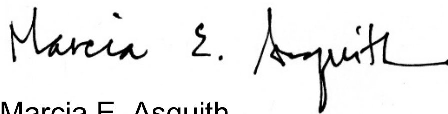
The special due diligence program requirements "help prevent money laundering through accounts that give foreign financial institutions a base for moving funds through the U.S. financial system."[18] Accordingly, FINRA supports FinCEN's proposal to include investment advisers as "covered financial institutions" that must perform special due diligence when foreign financial institutions open correspondent accounts.

However, FINRA encourages FinCEN to also consider whether the definition of "foreign financial institution" should be amended to include foreign investment advisers. Currently, the foreign financial institutions that are subject to the special due diligence programs when they open correspondent accounts include: (1) foreign banks; (2) foreign branches of U.S. banks; (3) businesses organized under a foreign law that, if they were located in the United States, would be a securities broker-dealer, futures commission merchant, introducing broker in commodities, or a mutual fund; and (4) a money transmitter or currency exchanger organized under foreign law.[19] Through its examinations of broker-dealers, FINRA has observed that foreign investment advisers may present similar or more significant illicit finance risks than those presented by the foreign banks and broker-dealers that are currently subject to the special due diligence requirements. As only certain foreign investment advisers would be required to implement AML/CFT requirements under the proposed rulemaking,[20] FinCEN may wish to consider whether the special due diligence program requirements should be extended to correspondent accounts that covered financial institutions open for foreign investment advisers.

Conclusion

We appreciate the opportunity to comment on the proposal and look forward to continued engagement with FinCEN. We would be glad to work with FinCEN to address our comments if that would be helpful. Please let us know if you have any questions or would like to discuss any of these comments further.

Sincerely,



Marcia E. Asquith
Corporate Secretary and
Executive Vice President,
Board & External Relations

---

[18] Financial Crimes Enforcement Network; Anti-Money Laundering Programs; Special Due Diligence Programs for Certain Foreign Accounts, 71 Fed. Reg. 496, 499 (Jan. 4, 2006).

[19] *See* FinCEN, Fact Sheet, Section 312 of the USA PATRIOT Act (Dec. 2005), https://www.fincen.gov/sites/default/files/shared/312factsheet.pdf.

[20] For example, investment advisers that are "foreign private advisers" that are exempt from registration under Sections 203(b)(3) and 202(a)(30) of the Advisers Act would not be required to implement AML/CFT programs under the proposed rulemaking. *See* proposed rule 31 C.F.R. § 010.100(nnn).