INVESTMENT COMPANY INSTITUTE

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March 28, 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: Pilot Program on Sharing of Suspicious Activity Reports and Related Information With Foreign Branches, Subsidiaries, and Affiliates; Regulatory Identification Number 1506-AB51; Docket Number FINCEN-2022-0002

Dear Mr. Das:

The Investment Company Institute ("ICI")[1] appreciates the opportunity to provide comments in response to the notice of proposed rulemaking[2] (the "NPRM") issued by the Financial Crimes Enforcement Network ("FinCEN") for the proposed establishment of a limited-duration pilot program ("Pilot Program") to permit a financial institution with a suspicious activity report ("SAR") reporting obligation to share SARs and related information with the institution's foreign branches, subsidiaries, and affiliates for the purpose of combating illicit finance risk, in accordance with Section 6212(a) of the Anti-Money Laundering Act of 2020 ("AML Act").[3]

ICI appreciates that the Pilot Program will be helpful in combatting illicit finance risk, especially during a period where the financial system is becoming increasingly globalized and cross-jurisdictional in nature. Indeed, many mutual fund complexes in the United States are sponsored by investment advisers that are part of global organizations offering a range of financial products, including pooled investment vehicles, to a global client base. These organizations often utilize an

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1 The Investment Company Institute (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 $31.6 trillion in the United States, serving more than 100 million US shareholders, and $10.0 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in Washington, DC, London, Brussels, and Hong Kong.

2 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).

3 Enacted as Division F of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Public Law 116-283, 134 Stat. 3388 (2021).

enterprise risk management and compliance system that requires the sharing of information across the corporate group to be effective. The ability for mutual funds and their investment advisers to share information with affiliated entities outside of the United States would be a positive step in combatting illicit finance activities.

However, the success of the Pilot Program is ultimately dependent on financial institutions, including mutual funds, willingly participating. ICI notes that in establishing the Pilot Program FinCEN must provide a report to Congress including, among other items, "an evaluation of the usefulness of the [Pilot Program], including an analysis of any illicit activity identified or prevented as a result of the [Pilot Program]." It would seem that in order to fully evaluate the usefulness of the Pilot Program and to make proper recommendations FinCEN would need as much data as possible, which can only be achieved by having as many financial institutions as possible participate in the Pilot Program. Given that participation in the Pilot Program is voluntary, promoting participation is a key factor in the Pilot Program's success. In that vein, ICI understands the NPRM is in response to, and the scope of the Pilot Program is necessarily constrained by, the AML Act, but the Pilot Program should nevertheless be structured such that financial institutions are willing to participate. ICI believes that certain aspects of the NPRM may discourage participation and limit the Pilot Program's usefulness.

The NPRM states that FinCEN will notify and consult with a financial institution's regulator regarding each application FinCEN receives. As noted in the NPRM, this requirement is not in the AML Act.[4] ICI believes that adding an additional layer of regulatory oversight not required by the AML Act will add to the complexity of participating in the Pilot Program, which in turn will discourage participation. Accordingly, ICI urges FinCEN to remove this aspect of the rule.

The NPRM also states that FinCEN may require modifications to a financial institution's internal controls based on its own assessment and feedback from primary regulators. Although mutual funds and their service providers appreciate relevant guidance on improving their AML programs, the ability for FinCEN to force changes to a mutual fund's internal controls if they wish to voluntarily participate in the Pilot Program will only serve as a roadblock for mutual funds and their investment advisers from participating. Rather, ICI believes that issuing clear guidance instead of forcing changes through a regulatory approval process would be more effective in promoting participation in the Pilot Program. Indeed, FinCEN's current guidance for sharing SARs and SAR information with a mutual fund's investment adviser and its foreign control persons has been useful and effective in its simplicity. FinCEN may wish to follow suit and provide clear guidance on its expectations for the design of internal controls in order to promote participation in the Pilot Program. Accordingly, ICI urges FinCEN to (i) remove the ability to force changes to a mutual fund's internal controls and (ii) provide clear guidance on what internal controls are sufficient for FinCEN's purposes.

The AML Act and the NPRM acknowledge that SARs contain sensitive information, including personally identifiable information ("PII"). Although ICI does not believe the Pilot Program application process should include consulting with a financial institution's primary regulator, ICI

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4 *See* NPRM at n. 37 ("While there is no consultation requirement in [the AML Act], FinCEN intends to consult with Federal functional regulators with respect to their assessment of the financial institution's suitability for participation in the [Pilot Program].").

nevertheless believes it is critical that FinCEN confer with other federal functional regulators during the rulemaking process itself in crafting guidance and requirements aimed at protecting PII in a way that is consistent with a financial institution's current obligations under applicable law, including, for example, Regulation SP and Regulation S-AM. Any additional obligations imposed on a financial institution relating to the protection of PII could serve as a deterrent for financial institutions to participate in the Pilot Program if such obligations are not consistent with the obligations currently imposed on financial institutions. Accordingly, ICI urges FinCEN to consult with other federal functional regulators to ensure that current obligations to protect PII are taken into consideration when crafting the Pilot Program's requirements.

In addition, ICI notes mutual funds and their investment advisers are already burdened with heavy regulatory and compliance obligations that carry significant costs. Unlike other financial institutions, costs incurred by a mutual fund to meet its regulatory obligations are not internalized. Rather such costs directly affect the mutual fund's investors and create a drag on investors' ability to experience meaningful returns. Costs associated with regulatory compliance obligations are generally treated as a direct expense and are borne by the fund and its shareholders. The mutual fund industry has experienced significant cost burdens over the past several years arising from new recordkeeping and reporting obligations, the implementation of risk and liquidity management programs, and other costs associated with various regulatory initiatives. Yet, the NPRM proposes a number of requirements to participate in the Pilot Program, including requirements to: (i) inform FinCEN of named participant entities and inquire as to their willingness to engage in reciprocal information sharing, (ii) maintain an inventory of requesting entities, their jurisdictions and make available to FinCEN upon request, and (iii) implement a verification mechanism requiring participants to contact FinCEN to verify the existence of a mutual assistance treaty. Any of these features of the Pilot Program, if adopted, would be a significant deterrent to participation due to the added resources and costs associated with their implementation. Thus, ICI believes that the recordkeeping, reporting, and compliance requirements associated with the Pilot Program will discourage participation by mutual funds as they would be voluntarily adding to their current compliance costs while adversely affecting shareholders.

Aside from the barriers to participation noted above, ICI has no other comments on the Pilot Program as it believes the Pilot Program, as described in the NPRM, is appropriately tailored and consistent with FinCEN's mandate under the AML Act.

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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 Joanne Kane (at 202-326-5850 or joanne.kane@ici.org).

Sincerely,

/s/ Joanne Kane

Joanne Kane
Chief Industry Operations Officer,
Investment Company Institute