April 15, 2024

Ms. 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 Report Filing Requirements for Registered Investment Advisers and Exempt Reporting Advisers, RIN 1506-AB58, Docket No. FINCEN-2024-0006

Dear Director Gacki,

Transparency International U.S. ("TI US")[1] appreciates the opportunity to provide comments on the Notice of Proposed Rulemaking ("NPRM" and "Draft Rule")[2] on issues pertinent to the implementation of the Anti-Money Laundering ("AML")/Countering the Financing of Terrorism ("CFT") Program and Suspicious Activity Report ("SAR") Filing Requirements for Registered Investment Advisors ("RIAs") and Exempt Reporting Advisers ("ERAs") published by the Financial Crimes Enforcement Network ("FinCEN") of the U.S. Department of the Treasury ("Treasury"). We offer these comments in order to both commend key aspects of the Draft Rule, as well as to recommend important changes so as to ensure the adoption of final rule that is effective and practicable. As FinCEN works to develop that final rule, please consider us partners in the effort.

Across the world, TI chapters are actively involved in efforts to establish robust, effective, and accountable AML/CFT programs as a means of curbing corruption, increasing government accountability and financial transparency, and building public confidence in the integrity of financial and political systems.[3]

Corruption, money laundering, and terrorism financing pose unique, multidimensional threats to societies and financial systems across the globe. They erode the rule of law, threaten our global

[1] TI US is part of the largest global coalition dedicated to fighting corruption. With over 100 national chapters around the world, Transparency International ("TI") partners with businesses, governments, and citizens to promote transparency and curb the abuse of power in the public and private sectors. For more information about TI US, please see our website at https://us.transparency.org/.
[2] Federal Register, "FinCENAnti-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 (proposed Feb. 15, 2024) (to be codified at 31 C.F.R. pts. 1010 and 1032), available at https://www.federalregister.gov/documents/2024/02/15/2024-02854/financial-crimes-enforcement-network-anti-money-launderingcountering-the-financing-of-terrorism ("Draft Rule").
[3] For more information on TI's work on global illicit finance, *see* TI, "Dirty Money," available at https://www.transparency.org/en/our-priorities/dirty-money.

financial integrity, and destabilize economies.[4] Acknowledging the power, scale, and consequence of corruption, the U.S. National Security Council has, for the first time in U.S. history, designated the fight against foreign corruption as a core U.S. national security interest.[5]

Corruption, money laundering, and terrorism financing are globally resonant problems,[6] and, as such, effective efforts to reduce them—including the adoption of robust AML/CFT programs by U.S. investment advisers and other investment advisers linked to the U.S.—can have correspondingly global impacts.

Background on AML/CFT Programs and Corruption

Corrupt regimes, including Russia, have exploited the exemption of the U.S. private investment industry—valued at $130 trillion[7]—from federal AML/CFT obligations in order to amass vast illicit fortunes in the United States, almost always under the cover of anonymity.[8] Not only do these dangerous loopholes render the U.S. Government's targeted Russian sanctions less effective, but they provide those with close ties to Vladimir Putin with means of funding additional attacks on democracy and the rule of law, among many, many other harms.[9]

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[4] *See generally* Treasury, "2024 Investment Adviser Risk Assessment,", February 2024, available at https://home.treasury.gov/system/files/136/US-Sectoral-Illicit-Finance-Risk-Assessment-Investment-Advisers.pdf ("Treasury 2024 Investment Adviser Risk Assessment"); U.S. Department of State, "International Narcotics Control Strategy Report: Volume II Money Laundering", March 2022, available at https://www.state.gov/wp-content/uploads/2022/03/22-00768-INCSR-2022-Vol-2.pdf.

[5] *See* The White House, "Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest," June 3, 2021, available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest.

[6] For example, more than two-thirds of the 180 countries and territories scored on TI's 2023 "Corruption Perceptions Index"—which scores countries from 0 (very corrupt) to 100 (very clean)—received scores below 50. *See* TI, "Corruption Perceptions Index," January 2023, available at https://www.transparency.org/en/cpi/2023.

[7] Draft Rule at 12143.

[8] *See, e.g.*, TI US, Financial Accountability and Corporate Transparency ("FACT") Coalition, and Global Financial Integrity, "Private Investments, Public Harm: How the Opacity of the Massive U.S. Private Investment Industry Fuels Corruption and Threatens National Security," December 2021, available at https://us.transparency.org/resource/private-investments-public-harm-report.

[9] *See, e.g.*, "Letter from Transparency International U.S. et al., to Hon. Janet Yellen, Secretary, U.S. Dep't of Treasury and Hon. Gary Gensler, Chair, U.S. Sec. and Exch. Comm'n," Apr. 27, 2022, available at https://us.transparency.org/resource/civil-society-letter-urging-the-administration-to-pass-new-anti-corruption-rules-covering-investment-advisers; *see also* Emily R. Siegel & John Holland, "Putin's Billionaires Dodge Sanctions By Financing Lawsuits," Bloomberg Law, Mar. 28, 2024, available at https://news.bloomberglaw.com/litigation-finance/putins-billionaires-sidestep-sanctions-by-financing-lawsuits; Alex Wickham, Jennifer Jacobs & Alberto Nardelli, "US, UK Probe $20 Billion of Crypto Transfers to Russian Exchange," Bloomberg Law, Mar. 28, 2024, available at https://news.bloomberglaw.com/us-law-week/us-uk-probe-20-billion-of-crypto-transfers-to-russian-exchange; James Byrne, Gary Somerville, Joe Byrne, Jack Waitling, Nick Reynolds, and Jane Baker, "Silicon Lifeline: Western Electronics at the Heart of Russia's War Machine," Royal United Services Institute for Defence and Security Studies, August 2022, available at https://static.rusi.org/RUSI-Silicon-Lifeline-final-updated-web_1.pdf (detailing the connection between Western components and Russian weapons used in Ukraine).

Treasury's 2024 Investment Adviser Risk Assessment, in particular, highlights several notable examples.[10]

As the world's largest economy and largest investment adviser sector[11] by number of registered investment advisers, assets under management, and total value of related asset flows, the United States has a unique opportunity to close a loophole with truly global consequences that invites corrupt, terrorist, and illicit fund holders to poison the U.S. and global financial systems. As recognized by Treasury[12] and as made clear in criticisms from the Financial Action Task Force ("FATF")—the international AML standards-setting body that the U.S. co-founded, and which for years has called out the United States over significant gaps in its financial rules[13]—the inadequacy of the U.S.'s current laws contributes to and exacerbates this problem. In doing so, the U.S. provides a safe haven for corrupt, terrorist, and criminal actors and their illicit funds, contributes to the global wealth drain that leaves countries struggling to pay for critical

[10] According to the World Bank and the United Nations Office on Drugs and Crime, anonymous companies were used in over 70 percent of grand corruption cases they reviewed to either carry out the corrupt activity or to hide its proceeds. *See* Emile van der Does de Willebois et al., "The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It," 2011, available at https://openknowledge.worldbank.org/handle/10986/2363; *see also* TI, "Panama Papers Four Years On: Anonymous Companies and Global Wealth," Apr. 9, 2020, available at https://www.transparency.org/en/news/panama-papers-four-years-on-anonymous-companies-and-global-wealth.

[11] See Investment Adviser Association & National Regulatory Services, "Investment Adviser Industry Snapshot 2023," 2023, 37, (accounting for 37.9% of the global investment industry; assets under management (AUM) self-reported industry statistics for the U.S. (15,114 fiduciary investment advisers managing $114.1 trillion in assets for 61.9 million clients)), available at https://investmentadviser.org/wp-content/uploads/2023/06/Snapshot2023_Final.pdf ("Industry Snapshot 2023"). Compare with industry statistics for the world's next largest economies and countries that have the highest number of RIAs not domiciled in the U.S. *See generally* U.S. Library of Congress, "China: Government Issues First Regulation on Private Investment Funds," Aug. 7, 2023, available at https://www.loc.gov/item/global-legal-monitor/2023-08-06/china-government-issues-first-regulation-on-private-investment-funds; (People's Republic of China ("PRC")): as of May 2023, assets under private fund management are 21 trillion yuan (approximately US$2.938 trillion), as reported by Asset Management Association of China); Japan Investment Advisers Association, "Statistical Releases," available at https://www.jiaa.or.jp/toukei_e/index.html (last visited Mar. 31, 2024) (Japan: as of Dec. 2023, total AUM are 592.5 trillion yen (approximately US$3.9 trillion)); Bundesanstalt Fur Finanzdienstleistungsaufsicht, "Annual Report 2022", 2023, available at https://www.bafin.de/SharedDocs/Downloads/EN/Jahresbericht/dl_jb_2022_en.html (Germany: as of Dec. 2022, AUM are approximately US$2.7 trillion); The Investment Association, "Investment Management Survey 2022-23," 2023, available at https://www.theia.org/sites/default/files/2023-10/Investment%20Management%20in%20the%20UK%202022-2023%20-%20Chapter%201.pdf (United Kingdom: as of Dec. 2022, AUM are 8.8 trillion pounds sterling (approximately US$11.1 trillion)); and Monetary Authority of Singapore, "Singapore Asset Management Survey 2022: Singapore—A Leading Asset Management Centre in Asia Pacific," 2023, available at https://www.mas.gov.sg/-/media/mas/news-and-publications/surveys/asset-management/asset-management-survey-report-2022_version-finalised.pdf (Singapore: as of Dec. 2022, AUM are 4.9 trillion Singapore dollars (approximately US$3.65 trillion)).

[12] Draft Rule at 12150.

[13] *See, e.g.*, FATF & Asia/Pacific Group on Money Laundering, "Anti-Money Laundering and Counter-Terrorist Financing Measures, United States, Mutual Evaluation Report," 2016, available at https://www.fatf-gafi.org/content/dam/fatf-gafi/mer/MER-United-States-2016.pdf.coredownload.inline.pdf (e.g., Executive Summary Table E).

government services and rationing access to medicine, clean water, electricity, and more,[14] and, most critically for this Draft Rule, jeopardizes its own national security and safety.[15]

The consequences of corruption, money laundering, and terrorism financing for the United States are familiar to FinCEN, Treasury, and other U.S. agencies. In June 2021, Treasury named combating corruption a government-wide priority for AML/CFT.[16] Since then, and in particular since the February 24, 2022, invasion of Ukraine by Russia, a canvassing of FinCEN advisories, relevant Treasury communications (including National Risk Assessments), and information from federal law enforcement and other U.S. agencies highlight the severity of current and prospective threats to the integrity and resilience of the U.S. financial system by, at, or through investment advisers.[17]

In combination with information available through the Pandora Papers,[18] and without effective and robust AML/CFT obligations implemented by U.S.-linked investment advisers, corrupt, terrorist, and illicit entities and individuals can continue to operate in the U.S. with impunity.[19]

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[14] *See* International Monetary Fund, "2023 Review of the Fund's Anti-Money Laundering and Combating the Financing of Terrorism Strategy," 2023, available at https://www.imf.org/en/Publications/Policy-Papers/Issues/2023/12/05/2023-Review-of-The-Funds-Anti-Money-Laundering-and-Combating-The-Financing-of-Terrorism-542015 (describing the macroeconomic impact of money laundering and terrorism financing).

[15] *See* Treasury 2024 Investment Adviser Risk Assessment.

[16] FinCEN, "Anti-Money Laundering and Countering the Financing of Terrorism National Priorities," 2021, available at https://www.fincen.gov/sites/default/files/shared/AML_CFT%20Priorities%20(June%2030%2C%202021).pdf.

[17] *See* Treasury 2024 Investment Adviser Risk Assessment; FinCEN, "Statement of FinCEN Director Andrea Gacki before the House Committee on Financial Services," Feb. 14, 2024, available at https://www.fincen.gov/news/testimony/statement-fincen-director-andrea-gacki-house-committee-financial-services; *see, e.g.*, Treasury, "NDAA: Russia Illicit Finance Report," 2023, available at https://home.treasury.gov/system/files/136/Treasury-NDAA-Ru-IFR-508.pdf; Treasury, "National Strategy for Combating Terrorist and Other Illicit Financing 2022," 2022, available at https://home.treasury.gov/system/files/136/2022-National-Strategy-for-Combating-Terrorist-and-Other-Illicit-Financing.pdf; FinCEN, "Financial Crimes Enforcement Network, Agencies Issue Statement on Bank Secrecy Act Due Diligence Requirements for Customers Who May Be Considered Politically Exposed Persons," Aug. 21, 2020, available at https://www.fincen.gov/news/news-releases/agencies-issue-statement-bank-secrecy-act-due-diligence-requirements-customers (summarizing jointly issue statement titled "Joint Statement on Bank Secrecy Act Due Diligence Requirements for Customers Who May Be Considered Politically Exposed Persons").

[18] S*ee* International Consortium of Investigative Journalists, "Pandora Papers," available at https://www.icij.org/investigations/pandora-papers.

[19] *See, e.g.*, Forbes, "30 Under 30: Masha Drokova," available at https://www.forbes.com/profile/masha-drokova/?sh=3b390e4a11b8 (Day One Ventures, a Silicon Valley-based entity that invests in startups which, at the time of its founding, listed Russian oligarchs Alexander Mamut and Vladimir Yevtushenkov as investors); Pitchbook, "Almaz Capital," available at https://pitchbook.com/profiles/investor/14144-32; Marina Temkin, "Anti-Russia sanctions spur VCs to unravel ties to 'toxic' money," Pitchbook, Apr. 12, 2022, available at https://pitchbook.com/news/articles/russian-vc-firms-sanctions-almaz-alexander-galitsky (detailing Silicon Valley-based investor Alexander Galitsky's ties with Russia; Galitsky is founder of Almaz Capital which invests in software technologies and contributed to the launch of Russian Quantum Center; Galitsky is a former board member of Alfa-Bank, a U.S.-designated Russian bank); Joseph Menn, "Scrutiny mounts over tech investments from Kremlin-connected expatriates," The Washington Post, Dec. 19, 2022, available at https://www.washingtonpost.com/technology/2022/12/19/russia-expatriates-links-probed (highlighting Almaz

Moreover, the national security implications of these gaps have been made especially clear through how Russian and Chinese[20] interests have continued to seek sensitive American technologies through private investment vehicles.

This threat is global, and only accelerating. For example, in January of this year, one of the most prominent Chinese private equity and venture capital firms operating in the U.S. was placed on the annual "Chinese Military Company" list published on January 31, 2024.[21] This is the first time such a prominent investment company has been placed on the list for funding Chinese military development.[22] Placement on the "Chinese Military Company" list can trigger designation by the U.S. Department of Treasury.[23]

The Draft Rule's AML/CFT obligations on investment advisers, combined with successful ongoing U.S. government efforts to provide highly useful beneficial ownership information ("BOI")[24] to law enforcement, regulators, the financial institutions charged with AML/CFT responsibilities, and others, can help protect the U.S. financial system and ameliorate the consequences of corruption, money laundering, and terrorism financing across the globe. Through this Draft Rule, FinCEN has taken a significant initial step toward strong and effective rules that can meet the seriousness and urgency of these threats.

Capital's investments in software technologies that raise national security concerns and Almaz Capitals' founders' connections with the launch of the Russian Quantum Center); *see also* TI US, FACT Coalition, and Global Financial Integrity, "Private Investments, Public Harm: How the Opacity of the Massive U.S. Private Investment Industry Fuels Corruption and Threatens National Security," November 2021, available at https://us.transparency.org/resource/private-investments-public-harm-report.

[20] *See* Robert McMillan, Dustin Volz, and Aruna Viswanatha, "China is Stealing AI Secrets to turbocharge Spying, U.S. Says," The Wall Street Journal, Dec. 25, 2023, available at https://www.wsj.com/tech/ai/china-is-stealing-ai-secrets-to-turbocharge-spying-u-s-says-00413594 ("The purchase of sensitive technologies is part of the People's Republic of China's (China) stated 'Made in China 2025' goal to direct investments towards developing technology with dual-use capabilities."). Data rooms run by RIAs and ERAs are another entry point for access to sensitive technologies. For an example of how China presents itself to investors, *see* China Briefing, "China's Biopharma Industry: Market Prospects, Investment Paths," Nov. 10, 2022, available at https://www.china-briefing.com/news/china-booming-biopharmaceuticals-market-innovation-investment-opportunities/.

[21] U.S. Department of Defense, "DOD Releases List of People's Republic of China (PRC) Military Companies in Accordance with Section 1260H of the National Defense Authorization Act for Fiscal Year 2021," Jan. 31, 2024, available at https://www.defense.gov/News/Releases/Release/Article/3661985/dod-releases-list-of-peoples-republic-of-china-prc-military-companies-in-accord.

[22] Echo Wong, "China private investment firms face growing U.S. scrutiny, analysts say," Nikkei Asia, Feb. 9, 2024, available at https://asia.nikkei.com/Politics/International-relations/US-China-tensions/China-private-investment-firms-face-growing-U.S.-scrutiny-analysts-say (investments in the U.S. included sensitive autonomous driving technology while investors in IDG Capital included sanctioned entities).

[23] Note that, unlike American companies, Chinese-owned companies are required by their government to support the military through their Military-Civil Fusion (MCF) policy. MCF is the elimination of barriers between the civilian research and commercial sectors and the military and defense industrial sectors, with the goal of developing the People's Liberation Army ("PLA") into a "world-class military" by 2049. *See* U.S. Department of State, "Military-Civil Fusion and the People's Republic of China, available at https://www.state.gov/wp-content/uploads/2020/05/What-is-MCF-One-Pager.pdf.

[24] Corporate Transparency Act, Title LXIV of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283 (2021).

Background on the Draft Rule

On February 15, 2024, FinCEN published its Draft Rule to combat money laundering, including the laundering of the proceeds of corruption, through the investment adviser sector. The Draft Rule details the types of investment advisers covered by the proposal and the associated AML/CFT requirements for those investment advisers.

To begin, our office agrees wholeheartedly with Director Gacki that:

> The current patchwork of AML/CFT requirements creates regulatory gaps that criminals and foreign adversaries exploit to launder money, hide illicit wealth, and compromise American innovation...This Draft Rule would level the regulatory playing field, protect U.S. economic and national security, and safeguard American businesses.[25]

In short, under the Draft Rule, Covered Investment Advisers ("CRAs") would be required to (1) establish AML/CFT programs; (2) file Currency Transaction Reports ("CTRs") and Suspicious Activity Reports ("SARs"); (3) maintain records of originator and beneficiary information for certain transactions; (4) share information with FinCEN and other law enforcement agencies (and authorize sharing with certain financial institutions); and (5) implement special due diligence requirements for private banking and correspondent bank accounts involving foreign persons and special measures under the USA PATRIOT Act[26] and the Combatting Russian Money Laundering Act.[27]

The Draft Rule goes a long way toward responding to the recommendations provided by our office and other civil society organizations.[28] It enhances transparency in the investment adviser

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[25] FinCEN, "FinCEN Proposes Rule to Combat Illicit Finance and National Security Threats in Investment Adviser Sector," Feb. 13, 2024, available at https://www.fincen.gov/news/news-releases/fincen-proposes-rule-combat-illicit-finance-and-national-security-threats.

[26] Draft Rule at 12135; Pub. L. No. 107–56, § 312 (2001); *see also* Pub. L. No. 107–56, § 326 (2001) (Section 326 of the USA PATRIOT Act added subsection (l) to 31 U.S.C. 5318 (the BSA) that requires the Secretary of the Treasury to prescribe regulations setting forth minimum standards for financial institutions that relate to the identification and verification of any person who applies to open an account (i.e., implementation of a Customer Identification Program)).

[27] *See* FinCEN, "FinCEN Identifies Virtual Currency Exchange Bitzlato as a 'Primary Money Laundering Concern' in Connection with Russian Illicit Finance," Jan. 18, 2023, available at https://www.fincen.gov/news/news-releases/fincen-identifies-virtual-currency-exchange-bitzlato-primary-money-laundering (discussed in attached Frequently Asked Questions document); *see also* Pub. L. No. 116–283, § 9714 (also known as the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021; the first and only use of § 9714 to date.

[28] *See* "Letter from TI US et al., to Hon. Janet Yellen, Secretary, U.S. Dep't of Treasury and Hon. Gary Gensler, Chair, U.S. Sec. and Exch. Comm'n," Apr. 27, 2022, available at https://us.transparency.org/resource/civil-society-letter-urging-the-administration-to-pass-new-anti-corruption-rules-covering-investment-advisers (signed by 17 civil society organizations, the letter urges Treasury to adopt an AML/CFT requirement for investment advisers that includes ongoing customer due diligence ("CDD") and suspicious activity reports ("SARs"); the letter states Treasury should immediately promulgate a rule "to require investments advisers and unregistered investment companies to implement robust AML programs with beneficial ownership identification, risk evaluations for investors, suspicious activity reporting to the Financial Crimes Enforcement Network, and ongoing monitoring of accounts…And the SEC should revise Form PF to require investment advisers to conduct risk-based customer due diligence, report beneficial ownership information (including information about any 'politically exposed person' or

sector through its requirements to implement ongoing CDD, file SARs with FinCEN, collect and retain certain information in connection with fund transfers, and ensure that certain information which passes by, at, or through investment advisers and pertains to the transmittal of funds "travel" with the transmittal to the next financial institution in the chain.[29]

The Draft Rule does not, however, require investment advisers to collect or verify basic information about the people behind their corporate clients. We encourage FinCEN, both through this rulemaking and the prospective joint rulemaking with the SEC that FinCEN alludes to, to be consistent with its own recently proposed draft rule to combat money laundering through U.S. residential real estate[30] by including the essential AML/CFT requirement that investment advisers collect and *verify* basic information about their corporate clients' beneficial owners.

FinCEN states that it "anticipates addressing" the CDD and BOI requirements in future joint rulemakings with the SEC, and invites comments as to whether it "should" in fact apply such requirements once the joint rulemaking is completed. We strongly urge FinCEN to do so: Should FinCEN ultimately fail to incorporate this key requirement, it would leave intact serious risks to the U.S. financial system, as well as exacerbate the United States' noncompliant status with the FATF.[31]

How the Legislative History of the BSA Supports an Expansive Rule

By requiring "financial institutions" to establish and maintain systems to monitor transactions, maintain records, and report suspicious transactions, the BSA remains the U.S. Government's most important tool for fighting money laundering and other illicit financial activity in the United States.[32] The BSA was a reaction, in large part, to stringent provisions in foreign jurisdictions that assured the secrecy of financial transactions.[33] Congress justified the BSA's provisions based on the fact that such record keeping was already practiced, in private, by most financial institutions and that the regulations would therefore "impose almost no additional expense upon those affected."[34] The BSA was also justified on the need for financial institutions

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'senior foreign political figure'), and disclose the country of origin of each investor, the source of their funds, and an approximate value of the funds invested").

[29] Draft Rule at 12120.

[30] FinCEN, "Anti-Money Laundering Regulations for Residential Real Estate Transfers," 89 Fed. Reg. 12424 (proposed Feb. 16, 2024), available at https://www.federalregister.gov/documents/2024/02/16/2024-02565/anti-money-laundering-regulations-for-residential-real-estate-transfers.

[31] Draft Rule at 12150 ("If the [Draft Rule] is finalized, it will assist the U.S. in avoiding these consequences and strengthening compliance with the FATF standards.").

[32] *See* Pub. L. No. 91-508, 84 Stat. 1114 (1970).

[33] 116 Cong. Rec. 16,950 (bounded.) May 25, 1970, Amended and passed House, Debated, H. Res. 941 agreed to ("In jurisdictions with secrecy laws our law enforcement agencies are placed in an impossible position. To have any hope of gaining the desired information, officials must subject themselves to long, drawn-out foreign legal processes. Oftentimes the 'evidence' has disappeared. To overcome this problem, and still not unduly interfere with the rights, laws, and sovereignty of foreign nations and their institutions, the bill is directed toward Americans and those doing business in the United States, and the Treasury Department is giving wide administrative flexibility to assure the uninterrupted flow of world commerce and trade. The aim is to place such persons in the same position with regard to his secret foreign transactions as he would be with respect to his domestic transactions.").

[34] *Id.*

to bear some of the burden of the costs of fighting crime which, at the time, was increasingly falling on taxpayers.[35]

The legislative history of the BSA underscores Congress' intent to apply the BSA to a broad swath of the financial services industry. During the House Committee on Banking and Currency's consideration of the bill, Title I of the BSA, which deals with the recordkeeping requirements, was expanded from just banks to include all domestic financial institutions which perform the enumerated functions. Congress felt the expansion was "necessary in that the financial records of institutions other than banks would be equally as helpful and we did not want to drive criminals away from using banks only to the use of other financial institutions who did not have to keep the records required by the regulations."[36]

In particular, under 31 USC 5312(a)(2)(I), the BSA has long covered "investment companies," although no rule has spelled out exactly how to apply that provision. A common-sense interpretation is to cover the investment advisers who work for investment companies, which is exactly what the Draft Rule proposes.

FinCEN and Treasury have detailed at length the realities of illicit fund flows by, at, or through U.S.-linked investment advisers within the U.S. financial system in FinCEN's accompanying justification for the Draft Rule[37] and in Treasury's 2024 Investment Adviser Risk Assessment.[38] U.S.-linked investment advisers play an essential role in the financial services industry whose institutions the BSA directly and legitimately targets. The economic statecraft in which the U.S. engages today requires the deepening of the AML/CFT regulatory framework to address the many, often opaque, layers through which illicit funds travel by, at, or through U.S.-linked investment advisers within the U.S. financial system.

Specific Provisions of the Draft Rule

Throughout this comment, we encourage FinCEN to consider all potential loopholes and ensure comprehensive coverage of all sector entities. In considering any exemption from coverage as raised elsewhere in this comment, we note an experience in the United Kingdom ("UK") that can be instructive: When the UK adopted a beneficial ownership transparency requirement for companies, the law did not initially cover Scottish Limited Partnerships ("SLPs"). Following implementation of the law, the number of registered SLPs increased by over 23,000 (some 430

[35] *Id.* at 16,961 ("Even if there is some additional cost to the financial institutions of this country, even if there will be some burden, even if these institutions do have to do a little more in terms of recordkeeping than they have done, should not they as well as the rest of us bear some of the costs of fighting crime. In these days when all levels and types of crime are mushrooming beyond manageable proportions, the taxpayer is being called up- on to pay more and more money for law enforcement. Surely the banks and other corporations who will be required to keep some additional records or maintain the records they already keep cannot com- plain too loudly about taking on a small portion of this burden. Perhaps the virtue of title I of this legislation is that it is designed to create the climate for more efficient law enforcement. It could serve as a very helpful crime preventive so that the benefits to be gained are far out of proportion to the burden taken.").

[36] *Id.* at 16,954.

[37] Draft Rule at 12114-12, 12116.

[38] *See* Treasury 2024 Investment Adviser Risk Assessment.

percent) between 2007 and 2016.[39] The UK government has since closed the loophole to address the concerns that SLPs were being used to evade the law. FinCEN should not leave a loophole that can be easily exploited by corrupt and criminal actors.

Definition of "Covered Investment Adviser"
Overall, we support FinCEN's proposed definition of "investment adviser" and the inclusion of such investment advisers into the AML/CFT scheme for financial institutions under the BSA. As we outlined in a May 2021 factsheet, AML/CFT rules for investment advisers "should cover the full range of advisers to avoid loopholes that allow for exploitation by bad actors."[40] Thus we commend FinCEN for applying AML/CFT obligations both to investment advisers that are required to register with the SEC, known as RIAs, and to advisers that are exempt from registering with the SEC, known as ERAs".[41] And we agree that this definition of "investment adviser" does not need to extend to investment brokers and dealers or to mutual funds who already have AML/CFT obligations under the BSA.[42]

By including RIAs and ERAs, the Draft Rule is consistent with definitions of "investment advisers" in similarly situated countries, especially countries aligned with the U.S. and that do not pose a national security threat to the U.S.[43] We encourage FinCEN to continue clarifying the definitions and interactions between investment companies and private funds in this and future rulemaking so that AML/CFT obligations reach full coverage.[44]

Omission of Family Offices
We are concerned that FinCEN's definition of "investment adviser" does not cover investment advisers to family offices. A 2023 Global Family Office Report by UBS used data from 230 family offices worldwide to estimate the average net worth of participating families at $2.2

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[39] *See* STV News, "Scot firms with business model tied to $1bn fraud probed," Jan. 11, 2018, available at https://archive.news.stv.tv/politics/1406010-scots-firms-with-business-model-tied-to-1bn-fraud-probed.html.
[40] TI US, "Investment Adviser Factsheet," May 2021, available at https://us.transparency.org/app/uploads/2021/05/Private-Investment-Funds-are-a-High-Risk-for-Money-Laundering-v3-1-1.pdf.
[41] Industry Snapshot 2023 at 29. This becomes all the more important when we recognize, as does Treasury, that pooled investment vehicles are the largest client group based on assets under management.
[42] Draft Rule at 12123.
[43] Among others, the AML legislation in Japan, Singapore, Ireland, India, Hong Kong, and Switzerland covers investment advisers within financial institutions or financial advisory services language. Note that proposed legislation enhances current AML/CFT frameworks for investment advisers in many of the top ten jurisdictions with the highest number of RIAs domiciled outside the U.S. These are the United Kingdom, Canada, Hong Kong, Switzerland, Singapore, Australia, Japan, the PRC, Ireland, and India. Of these top ten countries where RIAs are domiciled, only three (Hong Kong as a Special Administrative Region of the PRC, Switzerland, and the PRC show a decrease in the number of RIAs from 2019 to 2022. The global trend is, therefore, increasing the dominance of the U.S. in the global investment adviser sector.
[44] Note, for example, that the PRC, a country with the eighth highest number of RIAs domiciled outside the U.S., issued its first regulation on private investment fund advisers on July 3, 2023. The Regulation on the Supervision and Administration of Private Funds (Private Fund Regulation) took effect on September 1, 2023. For those who wish to understand the challenges of RIAs implementing AML/CFT obligations outside of the U.S., note that this Private Fund Regulation has a significant section on legal liability. Additional relevant provisions include Article 37, which applies to venture capital funds when they are primarily engaged in transformation of major scientific and technological achievements and Article 61, paragraph 1, which anticipates the formulation of administrative measures for private-fund managers of foreign-invested funds.

billion and the average assets under management at $900 million.[45] The report indicates that family offices hire investment advisors to invest in stocks, bonds, private equity, real estate, hedge funds, and other assets.[46] Nearly half of those investments are in North America.[47] About 9% involve cash or cash equivalents.[48]

There is no reason to believe family offices are free from illicit finance and have no need to screen the persons providing funds or the sources of those funds. Consider, for example, past reports of wealthy U.S. persons holding undeclared accounts in Switzerland,[49] orchestrating billion-dollar cryptocurrency schemes,[50] assisting Russian oligarchs in money laundering or sanctions evasion,[51] and participating in other fraudulent conduct. To flat-out exempt family offices from the investment advisor rule risks creating an exploitable loophole and a roadmap for evading needed AML safeguards. While Treasury has not identified many cases indicating that wealthy wrongdoers used family offices to invest ill-gotten gains, to ensure a comprehensive—and durable—final rule, we urge FinCEN to cover the entire relevant waterfront of risk through this rulemaking.

Inclusion of Subadvisory Services

The Draft Rule recognizes primary advisory activities as subject to AML/CFT obligations (e.g., managing client assets, providing financial advice, executing transactions for clients) and also states that AML/CFT programs would be required to cover subadvisory services, such as making managerial/operational decisions about portfolio companies of a private equity fund.[52] This scope can be especially important for digital advice platforms, as they are increasingly incorporated into services offered by larger investment advisers[53] and for RIAs domiciled in

[45] Global Family Office Report, UBS, 2023, available at https://www.ubs.com/content/dam/assets/wm/static/noindex/gfo/docs/ubs-gfo-report-2023.pdf.
[46] *Id.* at 10.
[47] *Id.* at 20.
[48] *Id.* at 10.
[49] *See. e.g.*, U.S. citizens with $5.6 billion in undeclared Swiss accounts at Pictet Bank, U.S. Department of Justice, "Swiss Private Bank Banque Pictet Admits to Conspiring with U.S. Taxpayers to Hide Assets and Income in Offshore Accounts," Dec. 4, 2023, available at https://www.justice.gov/opa/pr/swiss-private-bank-banque-pictet-admits-conspiring-us-taxpayers-hide-assets-and-income.
[50] *See, e.g.*, U.S. Department of Justice, "United States Attorney Announces Charges Against FTX Founder Samuel Bankman-Fried," Dec. 13, 2022, available at https://www.justice.gov/usao-sdny/pr/united-states-attorney-announces-charges-against-ftx-founder-samuel-bankman-fried; U.S. Department of Justice, "Two Arrested for Alleged Conspiracy to Launder $4.5 Billion in Stolen Cryptocurrency," Feb. 2, 2022, available at https://www.justice.gov/opa/pr/two-arrested-alleged-conspiracy-launder-45-billion-stolen-cryptocurrency.
[51] *See, e.g.*, U.S. Department of Justice, "New York Attorney Pleads Guilty To Conspiring To Commit Money Laundering To Promote Sanctions Violations By Associate Of Sanctioned Russian Oligarch," Apr. 25, 2023, available at https://www.justice.gov/usao-sdny/pr/new-york-attorney-pleads-guilty-conspiring-commit-money-laundering-promote-sanctions; Matthew Goldstein et al., "How Western Firms Quietly Enabled Russian Oligarchs," New York Times, March 9, 2022, available at https://www.nytimes.com/2022/03/09/business/russian-oligarchs-money-concord.html.
[52] Draft Rule at 12124.
[53] Industry Snapshot 2023 at 32.

other countries.[54] To that end, we agree that the final rule should cover all of the advisory services provided, whether in a primary or subadvisory role.

Potential Inclusion of State-registered Investment Advisers

FinCEN has stated that it will obtain additional information on state-registered investment advisers to consider fully whether they should be included within the scope of "financial institution" under the Draft Rule[55] or in a future rulemaking(s). Overall, FinCEN estimates that there are 17,000 state-registered investment advisers.[56] This is especially important because state-registered investment advisers are less likely to have AML/CFT programs in place.[57] Even though state-registered investment advisers have fewer than 3 percent non-U.S. customers,[58] continuing illicit flow events, especially with Russian elites and their associates, clearly show that individuals, including non-U.S. natural persons, are potential risks to the U.S. financial system by, at, or through investment advisers. FinCEN itself states that a handful of examples of misuse of state-registered investment advisers were found in its survey.[59]

We encourage FinCEN to take into account the level to which U.S. states have already emerged as hotspots for those who wish to hide their assets and minimize their tax burdens, especially through trusts.[60] Exempting state-registered investment advisers from AML rules may also drive wrongdoers to employ them rather than covered investment advisers, setting up an unfortunate competition based upon who is exempt from AML safeguards. FinCEN should gather evidence on the risk of money laundering, terrorism financing, and acquisition of sensitive technology by foreign actors by, at, or through investment advisers[61] linked to tribal activities.[62] In short, leaving state-registered investment advisers out of AML/CFT obligations may simply ensure that malicious actors target them as other loopholes close.

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[54] *See, e.g.*, Articles 18 and 170 of the Company Law in the PRC (requiring the establishment of branches of the Chinese Communist Party in primarily state-funded companies with potential managerial control functions and, in practice, dual positions in boards).

[55] Draft Rule at 12117.

[56] *Id*.

[57] *Id*.

[58] *Id.* at 11171 n.329.

[59] *Id.* at 12171 n.328.

[60] *See, e.g.*, Kalena Thomhave & Chuck Collins, "Billionaire Enabler States: How U.S. States Captured by the Trust Industry Help the World's Wealthy Hide Their Fortunes," 2022, available at https://ips-dc.org/release-billionaire-enabler-states/ (identifying Alaska, Delaware, Nevada, and South Dakota in its highest tier of trust-enabling jurisdictions and noting that New Hampshire, Tennessee, and Wyoming—which is the only U.S. state without a law regulating investment advisers—are listed in the second tier of potentially trust-enabling jurisdictions); Will Fitzgibbon, Debbie Cenziper, and Salwan Georges, "Suspect foreign money flows into booming American tax havens on promise of eternal secrecy," International Consortium of Investigative Journalists, Oct. 4, 2021, available at https://www.icij.org/investigations/pandora-papers/us-trusts-offshore-south-dakota-taxhavens/ (identifying Delaware, Florida, Nevada, New Hampshire, and South Dakota as potential global havens).

[61] *See* Treasury 2024 Investment Adviser Risk Assessment.

[62] Internal Revenue Service, "FAQs for Indian Tribal Governments regarding Title 31 (Anti-Money Laundering)," available at https://www.irs.gov/government-entities/indian-tribal-governments/faqs-for-indian-tribal-governments-regarding-title-31-anti-money-laundering (answering questions about AML/CFT obligations under Title 31 for tribal activities including gambling casinos). Indigenous people in the U.S. remain a potentially vulnerable group as loopholes are closed elsewhere within the U.S. financial system.

Inclusion of Foreign Private Advisers

We recommend the Draft Rule include foreign private advisers. The global nature of illicit flows through the U.S. financial system and the capacity of bad actors to use every loophole available clearly shows that even if foreign private advisers remain exempt from other U.S. regulatory mechanisms, they should be subject to the Draft Rule's AML/CFT obligations.

As noted earlier, the legislative history of the BSA specifically targets foreign transactions. FinCEN identified foreign investment vehicles, especially state-funded ones, as potential risks for illicit flows.[63] Also, in 2022, some 38 percent of non-foreign private advisers reported that they had non-U.S. clients or assets from non-U.S. sources, with assets from non-U.S. sources around $28 trillion, or approximately one-quarter of total industry assets; for these advisers, roughly 40 percent of clients and 28 percent of assets were reportedly sourced outside the United States in 2022.[64]

AML/CFT on foreign private advisers is also consistent with FinCEN's authority under Title III of the 2001 USA PATRIOT Act, which extended "the obligation to comply with sanctions lists of the Office of Foreign Assets Control to some foreign banks, particularly through correspondent banking relationships with U.S. banks, thereby increasing the reach of U.S. regulation. Under Section 311 of the USA PATRIOT Act, FinCEN is authorized to impose "special measures"jurisdictions or institutions found to be "of primary money laundering concern."[65]

Elements of AML/CFT Programs

We agree with each of the Draft Rule's AML/CFT requirements, which, if included in the final rule, should bring the U.S. into equivalent status with similarly situated countries around the

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[63] Draft Rule at 12116. Note also that the U.S. has led the world in national security screening mechanisms for foreign investment, an area in which U.S. investment advisers play a dominant role. We note that 60 percent of the OECD's sixty countries now also have a CFIUS equivalent mechanism. *See* OECD, "Freedom of Investment Progress: Investment Policy Developments in 61 Economies Between 16 October 2021 and 15 March 2023," Apr. 2023, available at https://www.oecd.org/daf/inv/investment-policy/Investment-policy-monitoring-April-2023.pdf.

[64] Industry Snapshot 2023 at 37; *see also* Draft Rule at 12150 ("RIAs manage approximately $20 trillion in private fund assets, and as of Q4 2022, this included $284 billion in AUM owned by non-U.S. investors where the RIA did not have the information on hand to identify the beneficial owner because the beneficial interest was held through a chain involving one or more third-party intermediaries.") and McKinsey & Company, "McKinsey Global Private Markets Review 2024: Private Markets in a Slower Era," 2024, available at https://www.mckinsey.com/industries/private-equity-and-principal-investors/our-insights/mckinseys-private-markets-annual-review.

[65] *See* Congressional Research Service, "Overview of Correspondent Banking and De-Risking Issues," Apr. 8, 2022, available at https://crsreports.congress.gov/product/pdf/IF/IF10873.

world.[66] These include AML policies, procedures, and internal controls;[67] ongoing training;[68] independent testing for compliance conducted by company personnel or by a qualified outside party;[69] a designated person or persons responsible for implementing and monitoring the operations and internal control program;[70] and ongoing customer due diligence (CDD).[71]

We support FinCEN's statement that the AML/CFT program requirement "is not a one-size-fits-all requirement but rather is risk based and is intended to give investment advisers the flexibility to design their programs to identify and mitigate the specific risks of the advisory services they provide and the customers they advise."[72] This approach is prudent and in alignment with other federal AML practices. In addition, approximately 75% of investment advisers in the U.S. report that they already voluntarily implement some form of AML/CFT programs.[73] Those existing AML/CFT efforts would also reduce implementation costs for the proposed rule.

We encourage FinCEN in this and future joint rulemaking processes with the SEC to state clearly how an AML/CFT program in the investment adviser sector will be measured to determine compliance with the final rule. Such clarity, now, will help prevent additional ambiguity and opacity.

SARs and CTRs

We commend FinCEN for including the requirement that covered investment advisers file SARs. As FinCEN notes throughout the Draft Rule's preamble, this type of data is a key element of successful law enforcement actions against money laundering and terrorism financing operations.[74]

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[66] Customer due diligence (CDD), for example, is in the national regulatory frameworks of Japan, Switzerland, Singapore, India, and the U.K. For common elements in model laws, *see generally* International Monetary Fund & World Bank, "Financial Intelligence Units: An Overview," 22–23, 2004, available at https://www.imf.org/external/pubs/ft/fiu/index.htm (noting the importance of model AML/CFT laws in country-level legislative drafting such as the United Nations Model Bill on Money Laundering, Proceeds of Crime and Terrorist Financing (2003) (for common law countries), the United Nations Model Legislation on Laundering, Confiscation and International Cooperation in Relation to the Proceeds of Crime (1999) (for civil law countries), the Commonwealth Model Law for the Prohibition of Money Laundering (1996) (for common law countries), and the OAS (Organization of American States) Model Regulations Concerning Laundering Offenses Connected to Illicit Drug Trafficking and Other Serious Offenses (Dec. 2002)).

[67] Draft Rule at 12191.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.* at 12122. We note the emerging trend in countries like the U.K. and New Zealand of including the FATF's List of High-Risk Jurisdictions Subject to a Call for Action into national AML/CFT regulatory frameworks as part of this risk-based flexible approach.

[73] For current advice on the components of a voluntary AML/CFT program, *see* Leor Landa et al., "Advising Private Funds: A Comprehensive Guide to Representing Hedge Funds, Private Equity Funds and their Advisers" § 1:1, Nov. 2021 update (voluntary AML/CFT programs adopted by investment advisers:) and at § 12:4 (detailing the four components of a voluntary AML/CFT program for investment advisers and private funds: (i) creating policies, procedures, and internal controls; (ii) designating an AML compliance officer; (iii) conduct employee training programs; and (iv) investor identification).

[74] Draft Rule at 12108. *See also* FinCEN, "The Value of FinCEN Data," available at https://www.fincen.gov/resources/law-enforcement/case-examples?field_tags_investigation_target_id=677).

Covered investment advisers must evaluate, on a risk-weighted basis, the nature and purpose of customer relationships[75] so that they can identify and report suspicious transactions.[76] This includes relationships with investors who may be introduced to the investment adviser by other intermediary entities who may or may not have their own AML/CFT obligations.[77]

Finally, we support FinCEN's proposal to require investment advisers to file Currency Transaction Reports ("CTRs"). Given existing procedures to track client payments at investment firms and well-established software in the financial industry to file CTR reports, this reporting requirement is a small price to pay for closing the loophole that permits malicious actors to operate by, at or through U.S.-linked investment advisers.

Recordkeeping and Travel Requirements

We strongly support the recordkeeping and travel rules proposed in the Draft Rule. While financial institutions such as banks associated with wealth management services already implement these rules, they are nevertheless necessary to close the loophole through which illicit actors harm the U.S. financial system by, at, or through U.S.-linked investment advisers. We note that these recordkeeping and travel requirements are in essence the bare minimum, and are already in place for many RIAs and ERAs who are not domiciled in the U.S.[78]

Special Measures

We strongly support the Draft Rule's requirement that covered investment advisers implement certain "special measures" under Section 311 of the USA PATRIOT ACT for jurisdictions where the Secretary of the Treasury "finds that reasonable grounds exist to conclude that a foreign jurisdiction, institution, class of transaction, or type of account is a "'primary money laundering concern'"[79] and similar special measures under the Combatting Russian Money Laundering Act,

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[75] For example, Russian oligarch Andrey Beluosov, First Deputy Prime Minister of Russia and owner of a "large state-owned quantum computing system in Russia" was reportedly also an investor in Silicon Valley-based startup investment vehicle Day One Venture. Day One Venture's founder and general partner, Masha Drokova, was working for Andrey Beluosov. Joseph Menn, "Scrutiny mounts over tech investments from Kremlin-connected expatriates," The Washington Post, Dec. 19, 2022, available at https://www.washingtonpost.com/technology/2022/12/19/russia-expatriates-links-probed.

[76] Draft Rule at 12128 and 12191.

[77] *Id.* at 12108. Note also that the IRS maintains a list of 76 countries with approved Know Your Customer ("KYC") rules for Qualified Intermediary agreements in real estate transactions. If the IRS recognizes the sufficiency of KYC in 76 countries, then the U.S. investment adviser sector could be required to abide by the same minimum standards. KYC Rules approved by the IRS for the purpose of Qualified Intermediary arrangements exist in all RIA countries other than Bolivia, Brazil, Grenada, Guam, Guatemala, India, Thailand, and Trinidad and Tobago. *See* IRS, *List of Approved KYC rules*, https://www.irs.gov/businesses/international-businesses/list-of-approved-kyc-rules.

[78] *See* EU information. There are RIAs in 54 countries. These RIAs are already subject to AML/CFT obligations, especially in the European Union (sixteen of the four countries are in the EU). SEC data show RIAs in Argentina; Australia; Bahamas; Belgium; Bermuda; Bolivia; Brazil; British Virgin Islands; Canada; Cayman Islands; Chile; China; Croatia; Cyprus; Denmark; Estonia; France; Germany; Gibraltar; Greece; Grenada; Guam; Guatemala; Guernsey; Hong Kong; India; Ireland; Isle of Man; Israel; Italy; Japan; Jersey; Liechtenstein; Luxembourg; Malta; Mauritius; Mexico; Monaco; Netherlands; New Zealand; Norway; Romania; Russia; Saint Lucia; Singapore; South Africa; South Korea; Spain; Sweden; Switzerland; Taiwan; Thailand; Trinidad and Tobago; UAE; and the U.K. U.S Securities and Exchange Commission, "Information About Registered Investment Advisers and Exempt Reporting Advisers," available at https://www.sec.gov/help/foiadocsinvafoia.

[79] Draft Rule at 12135.

which allows for special measures in the context of Russian illicit finance. Making investment advisers comply with those special measures, in the same way as banks, ensures consistent and effective implementation across the U.S. financial sector.

Law Enforcement Information Sharing
We commend FinCEN's list of special information sharing procedures, including the circumstances under which investment advisers would enter into voluntary 314(a) and 314(b) USA PATRIOT ACT information sharing arrangements. These are critical components of effective AML/CFT in the global investment adviser sector. They function both as substance and as deterrence,[80] similar to the effect on financial institutions from the authorization of secondary sanctions in December 2023[81] which resulted in the closure of Russian-linked accounts in financial institutions around the world.[82]

Compliance
Big picture, we agree that the 12-month compliance period as of the effective date of the final rule[83] is reasonable and necessary for covered investment advisers to be able to implement the requirements effectively.

FinCEN rightly allows covered investment advisers to delegate certain aspects of the implementation and operation of their AML/CFT programs to third parties. The reality is that an investment adviser's operations (including a range of compliance-related activities) may be conducted by agents or third-party service providers, such as broker-dealers in securities (including prime brokers), custodians, transfer agents, and fund administrators.[84] That said, we strongly urge FinCEN to maintain its choice to make covered investment advisers ultimately accountable for compliance[85] by not accepting a mere certification from a third-party vendor.[86] We agree with the requirement that the ultimately responsible AML/CFT person must be "accessible to and subject to oversight and supervision" by FinCEN and its delegates.[87]

Competing compliance measures, especially for RIAs and ERAs domiciled outside the U.S. and for fund administrators who primarily conduct operations outside the U.S., are of course legitimate concerns,[88] especially as the U.S. has expanded its application of AML/CFT

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[80] For a detailed list of gaps in the designation of individuals and legal entities and effective enforcement action, *see, e.g.*, Treasury, "NDAA Russia Illicit Finance Report," Mar. 2023, available at https://home.treasury.gov/system/files/136/Treasury-NDAA-Ru-IFR-508.pdf.
[81] Exec. Order 14, 114, 88 Fed. Reg. 89, 271 (Dec. 22, 2023).
[82] Reuters, "Exclusive: Russia Struggles to Collect Oil Payments as China, UAE, Turkey Raise Bank Scrutiny," Mar. 27, 2024, 7:04 MDT, available at https://www.reuters.com/markets/commodities/russia-struggles-collect-oil-payments-china-uae-turkey-raise-bank-scrutiny-2024-03-27/ (highlighting impact on financial institutions in the PRC, UAE and Türkiye).
[83] Draft Rule at 12108.
[84] *Id*. at 12125.
[85] *Id.* ("would remain fully responsible and legally liable for, and need to demonstrate, the program's compliance with AML/CFT requirements and FinCEN's implementing regulations.").
[86] *Id.*
[87] *Id*. at 12130.
[88] *Id.* at 12137.

regulatory framework to foreign financial institutions.[89] National security and due diligence regulatory frameworks in other countries,[90] can impede compliance by RIAs and ERAs with CDD and law enforcement information sharing.[91]

In the interests of transparency and effective compliance, however, FinCEN should state more clearly which metrics it will use in oversight, examination, and inspection under the Draft Rule. Good instructions may help mitigate any potential de-risking that could accompany the imposition of AML/CFT requirements on investment advisers,[92] among other concerns, and we appreciate FinCEN's sensitivity to this issue and the potential impact on communities made more vulnerable by the corrosive effects of corruption, money laundering, and terrorism financing.

Correspondent Accounts

As noted above, we are keenly aware of the de-risking potential the Draft Rule poses for the investment adviser sector, and agree with FinCEN's assessment that the establishment of AML/CFT in the investment adviser sector will lead to increased benefits in the long-run, especially in high-risk jurisdictions.[93]

Omission of beneficial ownership information obligations

We encourage FinCEN to act swiftly to close the most important omission in the Draft Rule by requiring that covered investment advisers implement an effective customer identification program ("CIP") and collect and verify beneficial ownership information ("BOI") for legal entity clients.

The challenges of beneficial ownership identification and collection are evident in Treasury's delineation of obfuscation of ties with Russia by the leadership of investment firms as a method by which these investors continue to access investments in U.S. technology through venture capital funds.[94] Other examples abound, from Russian oligarch Roman Abramovich's use of a

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[89] CRS Overview at 3 (noting that relevant provisions expanding U.S. jurisdiction over financial institutions cannot accept, as the sole basis of relief from a subpoena, a potential conflict of interest due to the foreign bank's secrecy law obligations in that jurisdiction).

[90] *See* Tham and Pomfret. Typically, RIAs are categorized as General Organizations, although some may be classified as Key Anti-Espionage Organizations by China's Ministry of National Security. Critical Information Infrastructure Operators include those in sectors like energy, communication, finance, transportation, military, among other nationally significant industries. Under Articles 4(3) and 4(4), 'Espionage' encompasses activities such as the theft of national secrets, intelligence, and other sensitive materials**, including data and information tied to national security and interests** [*emphasis added*]. It is therefore possible that in fulfilling AML/CFT obligations, an RIA might collect customer data which could inadvertently include what is deemed Chinese national secrets. Reporting such data to a non-PRC law enforcement authority could be perceived as jeopardizing Chinese national security. In such instances, the RIA might face punishment, including office raids and the detention of local personnel.

[91] The Counter-Espionage Law in the PRC took effect on July 1, 2023.

[92] *Id.*

[93] *Id.* (noting that "concerns on the part of large international banks about regulatory compliance with AML and customer due diligence (CDD) requirements have led some banks to shed their correspondent banking relationships with some smaller banks, often in emerging markets viewed as "high-risk" for AML…rising costs and uncertainty about how far CDD should go to avoid regulatory sanction are cited by banks as among the main reasons for it.").

[94] *See* Treasury 2024 Investment Adviser Risk Assessment at 22. For an example of obfuscating ties with Russia, *see* Joseph Menn, Elizabeth Dwoskin, Douglas MacMillan, and Cat Zakrzewski, "From Russia with money: Silicon

sweeping network of anonymous companies in the U.S. private investment industry to move billions of dollars between major American hedge funds and private equity firms[95] to, in a global context, Singapore's current crisis dealing with illicit inflows tied to an exponential increase in family offices used as shell companies to hide assets.[96] Many other similarly situated countries, unsurprisingly, have already implemented CIP requirements for investment advisers.[97]

Another issue is that pooled investment vehicles and other private funds are currently exempt from both the Corporate Transparency Act and the Customer Due Diligence (CDD) rule. Those exemptions make it all the more critical for FinCEN and the SEC to issue customized beneficial ownership rules for investment advisers that take into account the peculiar structures of pooled investment vehicles. Pooled investment vehicles are often very different from corporations and limited liability corporations (LLCs) created on the state level. While most corporations and LLCs covered by the CTA have fewer than 4 beneficial owners, many pooled investment vehicles may be structured as limited partnerships in which no beneficial owner holds an ownership stake of more than a few percentage points. CTA and CDD beneficial ownership rules now limit disclosure to beneficial owners holding at least a 25% ownership stake in an entity; that approach may not work for pooled investment vehicles. FinCEN and the SEC will have to make that evaluation when designing CIP and CDD rules for the investment advice industry.

The AML objective is to require investment advisers, like banks, to know their customers and understand not only who the beneficial owners are of their legal clients, but also the source of their funds. As far back as 2020, Treasury itself highlighted that for investment advisers:

> [T]he systemic mismatch between AML obligations and the information available to those holding these obligations creates a real risk for the U.S. financial system. For instance, qualified custodians and prime brokers have AML obligations but do not know the source of wealth and identity for clients of an investment adviser they serve. Similarly, while banks are encouraged to identify all beneficiaries of trust accounts, they are not currently required to do so.[98]

Valley distances itself from oligarchs," The Washington Post, Apr. 1, 2022, available at https://www.washingtonpost.com/technology/2022/03/26/silicon-valley-russia-oligarchs (founder and general partner subsequently denied any ties with Russia and issued a public statement condemning Putin's regime).

[95] Matthew Goldstein & David Enrich, "How One Oligarch Used Shell Companies and Wall Street Ties to Invest in the U.S.," N.Y. TIMES (Mar. 21, 2022), available at https://www.nytimes.com/2022/03/21/business/russia-roman-abramovich-concord.html.

[96] Toh Ee Ming, "Singapore's clean image under scrutiny amid money laundering scandal," Al Jazeera, Sept. 18, 2023, available at https://www.aljazeera.com/economy/2023/9/18/singapores-clean-image-under-scrutiny-amid-money-laundering-scandal (noting that single-family offices increased from 700 in 2021 to 1,100 in 2022); *see also* Anshuman Daga, "Singapore steps up scrutiny of shell firms to combat money laundering," Reuters, Aug. 12, 2019, available at https://www.reuters.com/article/us-singapore-cenbank/singapore-steps-up-scrutiny-of-shell-firms-to-combat-money-laundering-idUSKCN1V2231.

[97] BOI and source of funds are required by law covering investment advisers to be collected in, among others, Argentina, Barbados, Brazil, Canada, France, India, Ireland, Japan, Singapore, Switzerland, Thailand, and the U.K. New Zealand joins the list for collection of information about sources of funds.

[98] U.S. Department of Treasury, "NDAA: Russia Illicit Finance Report," 6, 2023, available at https://home.treasury.gov/system/files/136/Treasury-NDAA-Ru-IFR-508.pdf.

It is time for FinCEN to act by making the collection and verification of BOI an express requirement for all covered investment advisers through its final rule.

Cost/Benefit Analysis

The Regulatory Analysis is thorough, and its assumptions easy to follow. FinCEN's analysis frontloads the AML/CFT program implementation cost into the first year of compliance, recognizing forthrightly that this initial cost will be high for some RIAs and ERAs.[99] Appropriately, however, the analysis shows a decreasing cost in future years[100] as the AML/CFT program will be in place and require fewer incremental costs. This analysis takes into account, again appropriately, that an estimated 75 percent of investment advisers already voluntarily implement some form of AML/CFT program.[101]

While we commend this forthright approach, we nevertheless encourage FinCEN to include quantifiable *benefits* that will accrue from this increased cost. The final rule's analysis should make some effort to show clearly that any initial burdens of complying with it will have a lasting benefit for investment advisers and the durable resilience and health of the U.S. financial system.

The benefits listed in the Draft Rule, such as enhanced ability of law enforcement to access information and thus prosecute money laundering crimes, are crucial. However, the absence of a method of quantifying these or other benefits makes the cost/benefit balance much more subjective, both within the proposed scenario (i.e., judging whether the benefits of the scenario truly outweigh the costs depending on the priorities of the interested parties) and between the alternative scenarios (i.e., judging whether the proposed scenario is the most efficient use of resources, regardless of the number of additional benefits that can be listed by spending more money). This element of subjectivity opens the Draft Rule to potential criticism.

To this end, we encourage FinCEN to develop a solid example of quantifiable benefit(s) and to include a graph that visualizes breakeven analysis, framing this, perhaps, as follows:

> We estimate that $X is laundered through IRAs and ERAs every year. If, as we believe, this rule, as a result of the greater SARs reporting and amplified due diligence by over 15,000 investment advisers, prevents even Y% of those funds from being laundered, this would result in a benefit of $Z which, when projected over the next 10 years, recoups the money invested by Year __.

Such an analysis would help address criticisms regarding whether the benefits realistically

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[99] Draft Rule at 12177-78. ("FinCEN also notes that the AML/CFT requirements in the Draft Rule are designed to be risk-based and their cost is largely based on factors directly correlated with the size of an investment adviser, such as the number of customers and transactions, along with the risk level of its advisory activities and customers…The requirements of the Draft Rule therefore have some inherent flexibility whereby small entities serving a smaller number of customers are likely to have lower costs.")

[100] *Id.* at 12108 ("Neither" column in Table 4.28 showing 80 percent of costs remain over the projected 10-year period as $890 million decreases to $620 million in Year 2033). Compare UNODC estimate that up to 2-5 percent of global Gross Domestic Product, approximately $80 billion to $2 trillion, is laundered each year. *See* UNODC, "Money-laundering: Overview," available at https://www.unodc.org/unodc/en/money-laundering/overview.html.

[101] *See* Treasury 2024 Investment Adviser Risk Assessment at 24.

outweigh the costs. We encourage FinCEN to consider this and other kinds of analysis that bolster the efficiency and long-term benefits arguments.

Conclusion

The Biden Administration has stated that the fight against corruption is "essential to the preservation of our democracy" and allows the United States to secure a "critical advantage" for itself and other democracies.[102] We sincerely hope that FinCEN seizes the opportunity currently before it to finalize a comprehensive and durable rule that has the power to effectively counteract corruption, money laundering, and terrorism financing across the world by, at, or through U.S.-linked investment advisers, and that honors and reflects the Administration's designation of the fight against foreign corruption as a national security priority.

If you have any questions, or for additional information on TI US's work in this regard, please contact Scott Greytak, Director of Advocacy for TI US, at sgreytak@transparency.org.

Thank you for the opportunity to present these comments.

Respectfully submitted,

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[102] The White House, "Statement by President Joseph R. Biden, Jr. on the National Security Study Memorandum on the Fight Against Corruption," June 3, 2021, available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/03/statement-by-president-joseph-r-biden-jr-on-the-national-security-study-memorandum-on-the-fight-against-corruption.