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By Electronic Transmission (via <http://www.regulations.gov>)

James H. Fries, Jr.
Director, Financial Crimes Enforcement Network
U.S. Department of the Treasury
P.O. Box 39
Vienna, VA 22183

Re: Docket Number: TREAS-FinCen-2008-0022

Dear Mr. Freis:

The Investment Company Institute¹ (“ICI”) appreciates the opportunity to provide Financial Crimes Enforcement Network (“FinCEN”) with our comments on the proposed rulemaking regarding the confidentiality of suspicious activity reports (the “Proposed Rule”) and the proposed interpretive guidance regarding the sharing of suspicious activity reports by mutual funds with certain U.S. affiliates (the “Proposed Interpretive Guidance” and together, the “Proposals”).² We support FinCEN’s efforts to clarify the rules regarding the reporting of suspicious activity and, in particular, for recognizing the need of mutual funds and other entities to share suspicious activity reports (“SARs”), or information that would reveal the existence of a SAR (together with a SAR, “SAR information”), with other entities within their corporate organization. The ICI and its members have long supported the government’s efforts to combat anti-money laundering activity in the financial services industry.³ Likewise, the ICI and its members have a long-standing commitment to protecting the confidentiality of investor

¹ The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of \$10.18 trillion and serve over 93 million shareholders.

² See Notice of Proposed Rulemaking on Confidentiality of Suspicious Activity Reports (“Proposed Rule”), 74 Fed. Reg. 10,148 (Mar. 9, 2009) and Proposed Interpretive Guidance on Sharing Suspicious Activity Reports by Securities Broker-Dealers, Mutual Funds, Futures Commission Merchants, and Introducing Brokers in Commodities With Certain U.S. Affiliates (“Proposed Interpretive Guidance”), 74 Fed. Reg. 10,161 (Mar. 9, 2009).

³ See, e.g., Letter from Craig S. Tyle, General Counsel, Investment Company Institute, to Judith R. Starr, Chief Counsel, Financial Crimes Enforcement Network, dated May 29, 2002.

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information.⁴ While the Proposals provide some important clarifications, we have the following comments, each of which is discussed in more detail below:

- We recommend revising the rules of construction in Section 103.15 (reports by mutual funds of suspicious transactions) to explicitly permit a mutual fund to share SAR information with a transfer agent or other service provider to whom the mutual fund has contractually delegated SAR responsibility.
- The definition of “affiliate” in the Proposed Interpretive Guidance should incorporate the 2006 guidance.⁵
- A covered entity⁶ should be permitted to share SAR information with an affiliate, either within the United States or outside of the United States, regardless of whether or not the affiliate is subject to SAR reporting.
- A mutual fund’s transfer agent or other service provider to whom the mutual fund has contractually delegated SAR responsibility should be permitted to share SAR information with the service provider’s affiliates that are subject to SAR reporting to the extent permitted by the mutual fund.

Sharing with Transfer Agent or Other Service Provider

FinCEN, in the preamble to the anti-money laundering program rule for mutual funds, explicitly recognizes that virtually all mutual funds are externally managed, with their operations conducted by both affiliated organizations and third party service providers.⁷ Recognizing that “some

⁴ See, e.g., Letter from Craig S. Tyle, General Counsel, Investment Company Institute, to Jonathan G. Katz, Secretary, Securities and Exchange Commission, dated March 31, 2000.

⁵ See Frequently Asked Questions: Suspicious Activity Reporting Requirements for Mutual Funds (Oct. 4, 2006) (“SAR FAQ”), available at http://www.fincen.gov/statutes_regs/guidance/pdf/guidance_faqs_sar_10042006.pdf, at Question 2 regarding confidentiality of reports and Guidance on Sharing of Suspicious Activity Reports by Securities Broker-Dealers, Futures Commission Merchants, and Introducing Brokers in Commodities (Jan. 20, 2006) available at http://www.fincen.gov/statutes_regs/guidance/pdf/sarsharingguidance01202006.pdf (“January 2006 Guidance” and together with the SAR FAQ, the “2006 guidance”).

⁶ The Proposed Interpretive Guidance applies to securities broker-dealers, mutual funds, futures commission merchants, and introducing brokers in commodities (each, a “covered entity”).

⁷ Anti-Money Laundering Programs for Mutual Funds, 67 Fed. Reg. 21,117 (Apr. 29, 2002) (“AML Program Rule”) at 21,118. A mutual fund’s service providers include investment advisers, transfer agents, custodians, principal underwriters, and administrators. Based on their functions, mutual fund service providers typically play a central role in the

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elements of the [anti-money laundering] compliance program will best be performed by personnel of these separate entities,” the preamble provides:

It is permissible for a mutual fund to contractually delegate the implementation and operation of its anti-money laundering program to another affiliated or unaffiliated service provider, such as a transfer agent. . . . However, the mutual fund remains responsible for assuring compliance with this regulation.⁸

There is no requirement that a service provider to whom a mutual fund has contractually delegated responsibility for all or a portion of the fund’s anti-money laundering compliance program itself be subject to the requirements of the Bank Secrecy Act (the “BSA”). Rather, the preamble provides that “any mutual fund delegating responsibility for aspects of its anti-money laundering program to a third party must obtain written consent from the third party ensuring the ability of federal examiners to obtain information and records relating to the anti-money laundering program and to inspect the third party for purposes of the program.”⁹

Confirming this important and unique role of service providers for mutual fund operations, the preamble to the SAR Rule and related SAR guidance also recognize that mutual funds often contract with affiliated or unaffiliated service providers to perform suspicious activity reporting functions and, consequently, must share their SAR information with these service providers.¹⁰ Significantly, FinCEN

implementation and operation of a mutual fund’s compliance with various anti-money laundering rules and regulations. Certain mutual fund service providers are subject to SAR regulation, while others are not.

⁸ AML Program Rule at 21,119. Further, under Rule 38a-1 of the Investment Company Act of 1940 (“1940 Act”), mutual funds must adopt and implement policies and procedures designed to prevent violations of the federal securities laws, including the Bank Secrecy Act, and to provide oversight of compliance by their transfer agents, distributors, administrators, and investment advisers, including approval by the mutual fund’s board of their policies and procedures based on a finding that the policies and procedures are reasonably designed to prevent violations of the federal securities laws. An annual review of the adequacy of the policies and procedures and effectiveness of their implementation is also required. *See* 17 C.F.R. Section 270.38a-1.

⁹ AML Program Rule at 21,119. *See also* footnote 8 above.

¹⁰ *See* Final Rule Amendment to Bank Secrecy Act Regulations – Requirement that Mutual Funds Report Suspicious Transactions, 71 Fed. Reg. 26,213 at 26,215-26,216 (May 4, 2006) (“SAR Rule”). *See also* Proposed Interpretative Guidance at 10,162, footnote 7 (acknowledging role of a mutual fund’s service providers in suspicious activity monitoring, detecting and reporting obligations of a mutual fund); SAR FAQ, at Question 8 regarding reports by mutual funds of suspicious transactions (stating that a mutual fund may contract with an affiliated or unaffiliated service provider to perform the reporting obligation as the fund’s agent).

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has, in fact, recognized that a mutual fund's service provider may be in the "best position to perform the reporting obligation."¹¹

Despite the regulatory recognition that mutual funds may use a service provider to perform suspicious activity reporting, a mutual fund's ability to share SAR information with its service providers is not explicit under the Proposed Rule. Section 103.15(d)(1) provides that "no mutual fund, and no director, officer, employee, or agent of any mutual fund, shall disclose a SAR or any information that would reveal the existence of a SAR." The rules of construction, listing situations that are not covered by the prohibition against disclosure, do not include a provision explicitly allowing a mutual fund to share SAR information with a transfer agent or other service provider to whom the mutual fund has contractually delegated SAR responsibility. Given that FinCEN's rules and guidance permit mutual funds to delegate, and mutual funds do delegate, this responsibility to service providers, we recommend that, to eliminate any ambiguity, the rules of construction specify that a fund is permitted to share SAR information with a service provider to whom it has contractually delegated all or a portion of its SAR responsibility consistent with existing rules and guidance.

Incorporate 2006 Guidance in the Definition of "Affiliate"

The text of the proposed interpretive guidance states that, "for purposes of the guidance, 'affiliate' of a person means any company under common control with, or controlled by, such person."¹² The preamble notes in a footnote that "affiliate" does not include holding companies because sharing with these entities is addressed in guidance issued in 2006.¹³ The 2006 guidance permits securities broker-dealers, futures commission merchants, and introducing brokers in commodities to share SAR information with parent entities and a mutual fund to share SAR information with its investment adviser (domestic or foreign) (including, in the event the corporate structure of an investment adviser includes multiple parent entities, each entity in the chain of control).¹⁴ We believe the definition of "affiliate" in the Proposed Interpretive Guidance should incorporate the 2006 guidance.

We believe the Proposed Interpretive Guidance should incorporate the 2006 guidance into the definition of "affiliate" for the following reasons. First, FinCEN has already recognized that an

¹¹ SAR Rule at 26,216.

¹² Proposed Interpretive Guidance at 10,163 (footnote 1 to text of proposed interpretative guidance).

¹³ Proposed Interpretive Guidance at 10,162, footnote 9. We note that FinCEN does state that nothing in the proposed interpretive guidance for sharing with affiliates supersedes the 2006 guidance or guidance in the adopting release for the mutual fund SAR rule. *Id.* at 10,162.

¹⁴ *See* SAR FAQ at Question 2 regarding confidentiality of reports.

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investment adviser to a mutual fund and a parent entity of a securities broker-dealer, futures commission merchant, or introducing broker in commodities have a valid need to review a covered entity's compliance with legal requirements to identify and report suspicious activity and accordingly permits sharing with such entities.¹⁵ Second, incorporating FinCEN's 2006 position on sharing with parents and a mutual fund's investment adviser with its guidance on sharing with other affiliated entities would avoid any ambiguity or confusion that may result from having such a critical term addressed in more than one place.

Sharing of SAR Information with All Affiliates, Domestic or Foreign

Under existing guidance, a mutual fund is permitted to share SAR information with its domestic or foreign investment adviser and a securities broker-dealer, futures commission merchant and introducing broker in commodities is permitted to share SAR information with its domestic or foreign parent entity, regardless of whether or not those entities are subject to SAR regulation. The Proposed Interpretive Guidance would additionally permit a covered entity to share SAR information with any affiliate (as defined in the Proposed Interpretive Guidance) that is subject to SAR regulation,¹⁶ but would not permit sharing with an affiliate that is not subject to SAR regulation.¹⁷ As discussed below, we believe a covered entity should be allowed to share SAR information with all of its affiliates.¹⁸

Covered Entities Need Discretion to Implement Compliance and Monitoring

Mutual funds are often associated with large financial organizations that have various related financial services entities.¹⁹ Coordinated risk management throughout a financial organization

¹⁵ In the SAR FAQ, FinCEN balanced the need to protect SAR confidentiality with the legitimate need for investment advisers to be able to implement enterprise-wide risk management and compliance functions and determined that the importance of that responsibility was sufficient to outweigh the general prohibition against disclosing that a SAR had been filed. See SAR FAQ at Question 2 regarding confidentiality of reports. See also January 2006 Guidance.

¹⁶ As discussed above, a mutual fund is permitted to share SAR information with its investment adviser. We, therefore, understand the Proposed Interpretive Guidance to allow a mutual fund to share SAR information with a subsidiary, subject to SAR regulation, of the parent company of its investment adviser (such as an insurance company or broker-dealer).

¹⁷ See Proposed Interpretive Guidance at footnote 8 and accompanying text for a list of entities subject to SAR regulation.

¹⁸ As a result, a mutual fund would be permitted to share SAR information with a subsidiary of the parent company of its investment adviser that is not subject to SAR regulation, such as another investment adviser.

¹⁹ As of year-end 2008, 60% of investment company complexes were sponsored by independent fund advisers (which may be affiliated with other fund investment advisers), 6% by brokerage firms, 11% by banks or thrifts, 10% by insurance companies, and 13% by non-U.S. fund advisers. See 2009 Investment Company Fact Book, 49th Edition, p. 13.

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contributes to effective risk monitoring.²⁰ In fact, FinCEN has recognized that sharing SAR information with a parent entity or a mutual fund's investment adviser (including a foreign parent entity or foreign investment adviser) promotes compliance with the BSA by enabling the parent entity or a mutual fund's investment adviser to discharge its oversight responsibilities with respect to enterprise-wide risk management and compliance with applicable laws and regulations.²¹

We strongly believe that maintenance of enterprise-wide BSA programs requires not only the exchange of SAR information with controlling entities, but also, if appropriate and subject to adequate controls, the secure sharing of SAR information within a financial organization. A financial organization needs discretion and flexibility to evaluate and determine, on an enterprise-wide basis, how best to achieve compliance with suspicious activity reporting requirements and to allocate SAR responsibility among its affiliated entities. Responsible parts of an organization need the ability to be informed of enterprise-wide anti-money laundering risks, including risks that have already been identified and reported within an organization, and may need access to an organization's SAR systems in order to effectively fulfill their compliance and risk management responsibilities. Guidance that explicitly recognizes the size and complexity of these organizations, and therefore the range of affiliates within an organization with which it may be appropriate or necessary for a covered entity to share SAR information, will support organizations' efforts to implement and maintain more effective enterprise-wide AML programs and, consequently, help organizations develop more timely and useful information for law enforcement and the intelligence community.

Mechanisms to Maintain Confidentiality of SAR Information

We believe that there are currently strong systems and controls in place to protect the confidentiality of a mutual fund's SAR information. First, financial organizations headquartered or with operations in the United States, including those that sponsor mutual funds, have an obligation under federal law, and in certain cases state law, to protect the confidentiality of their customers'

²⁰ For example, the Federal Financial Institutions Examination Council ("FFIEC") Bank Secrecy Act/Anti-Money Laundering Examination Manual, which applies to banking organizations (which may have affiliated mutual funds) recognizes that anti-money laundering compliance merits the same approach for coordinated risk management across an organization as is applied to consolidated credit, market and operational risk. It provides that, "Aggregating risks on an enterprise-wide basis for larger or more complex organizations may enable an organization to better identify risks and risk exposures within or across specific lines of business or product categories." See FFIEC BSA/AML Examination Manual 2007, at 149-164.

²¹ Proposed Interpretive Guidance at 10,161. See also January 2006 Guidance and SAR FAQ.

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personal financial information.²² In order to comply with their legal obligations, as well as to retain good relations with their customers, these institutions utilize sophisticated policies, procedures and systems to protect the security of confidential information. In addition, the various entities that comprise a large financial organization, even if not themselves subject to SAR regulation, share a common purpose – the success of the financial organization – and, therefore, have a strong vested interest in keeping the SAR information, like other sensitive or private information, confidential.

To bolster these legal and market-based incentives to protect the confidentiality of SAR information, we believe that it would be appropriate to subject affiliates not subject to SAR regulation to the same conditions imposed on sharing arrangements with affiliates that are subject to SAR regulation. For example, to document the obligation to maintain the confidentiality of SAR information, affiliates that are not subject to SAR regulation should be required to enter into written confidentiality agreements with covered entities that require the affiliate to protect the confidentiality of the SAR through appropriate internal controls.²³ Similar to the role of these confidentiality agreements in other SAR sharing contexts, we believe that such an agreement formalizes an organization's responsibility to protect and maintain the confidentiality of SAR information.

Sharing of Underlying Information Only Is Not a Workable Approach

The Proposed Rule permits only the disclosure of “the underlying facts, transactions, and documents upon which a SAR is based...,”²⁴ and prohibits the disclosure of a SAR or any information that would reveal the existence of a SAR. Permitting covered entities to only share limited underlying information, but not the SAR or any information that would reveal the existence of a SAR, is an unworkable approach that does not take into consideration the practical aspects of operating a large financial organization. For example, to demonstrate compliance with SAR requirements, some

²² Title V of the Gramm-Leach-Bliley Act contains wide-ranging consumer financial privacy provisions, including a requirement that federal financial regulators adopt rules to govern the use of consumers' personal information by the financial institutions that they regulate. See Pub. L. No. 106-102, 113 Stat. 1338 (1999). In carrying out this mandate, the Securities and Exchange Commission adopted Regulation S-P. Section 248.30 of Regulation S-P requires every registered broker-dealer, investment company, and investment adviser to adopt policies and procedures that address the administrative, technical, and physical safeguards for the protection of customer records and information. See *Privacy of Consumer Financial Information (Regulation S-P)*, Release No. IC-24543 (June 22, 2000), 65 Fed. Reg. 40,334 (June 29, 2000), codified at 17 CFR Part 248. See also *Privacy of Consumer Financial Information*, Release No. IC-24326 (March 2, 2000), 65 Fed. Reg. 12,354 (March 8, 2000).

²³ See Proposed Interpretive Guidance at 10,163-10,164. See also SAR FAQ, at Question 2 regarding confidentiality of reports (requiring a mutual fund to have a written confidentiality agreement or arrangements in place specifying that the investment adviser must protect the confidentiality of the suspicious activity report through appropriate controls).

²⁴ Proposed Rule at 10,154 (proposed rule text of 31 C.F.R. 103.15(d)(1)(ii)(A)(2)).

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financial organizations maintain records of the various stages of a SAR investigation through the use of specialized computer systems. Since electronic systems are used, requiring covered entities to omit or redact certain information that is included as part of a case file prior to sharing the file with certain affiliates, but not others, imposes a significant administrative and compliance burden.

Permit Sharing with Foreign Affiliates

While sharing SAR information with a non-U.S. entity raises concerns about the ability of the foreign entity to protect the SAR information, we believe that those concerns may be addressed by imposing the same requirements for sharing with foreign affiliates as are currently imposed by FinCEN for sharing with foreign investment advisers and parent entities. The legal and policy rationale of the 2006 guidance for sharing with such foreign entities equally supports sharing with foreign affiliates. We strongly urge FinCEN to reconsider its position as expressed in the Proposed Interpretive Guidance.

Mutual Fund Service Providers Should be Permitted to Share SAR Information with Their Affiliates Subject to SAR Reporting

The Proposed Rule provides that “No . . . agent of any mutual fund shall disclose a SAR or any information that would reveal the existence of a SAR.”²⁵ In our view, a transfer agent or other service provider to whom a mutual fund has contractually delegated SAR responsibility should be permitted to share SAR information with the service provider’s affiliates that are subject to SAR reporting to the extent such sharing is permitted by the mutual fund. Service providers to mutual funds, such as transfer agents, are often affiliated with other entities that are subject to SAR regulation, such as banks or broker-dealers. Consequently, these financial organizations are often subject to broader internal audits, safety and soundness checks, or other reviews of their compliance with risk and compliance monitoring. As described above, FinCEN and others have recognized the importance and value of enterprise-wide risk monitoring and the role of SAR sharing in meeting those responsibilities.

We believe that there are strong mechanisms to help ensure that SAR information is not inappropriately disclosed if shared by a mutual fund’s service provider with its affiliates that are subject to SAR regulation. For example, the service provider’s affiliates that are subject to SAR regulation have an obligation not to disclose SAR information. In addition, these affiliates already have policies and systems in place to protect against the inappropriate disclosure of SAR information. Concerns regarding inappropriate disclosure also can be further abated by requiring service providers to enter into

²⁵ Id. (proposed rule text of 31 C.F.R. 103.15(d)(1)).

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written confidentiality agreements with their affiliates that are substantially similar to the confidentiality agreements FinCEN expects a mutual fund to enter into with its affiliates prior to sharing.²⁶

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If you have any questions, or need additional information, please contact Susan Olson (solson@ici.org or 202-326-5813) or Eva Mykolenko (emykolenko@ici.org or 202-326-5837).

Sincerely,

/s/ Susan M. Olson

Susan M. Olson

Senior Counsel – International Affairs

²⁶ The 2006 guidance does not apply to sharing of SAR information by other mutual fund service providers with their parent or controlling entities. Therefore, the term “affiliate,” as applied in this context, would need to include controlling entities in order to permit a service provider to share with its controlling entity.