Supporting Statement
OMB Control Number 1506-0081

Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Investment Advisers Necessitating Collection of Information

1. Circumstances necessitating collection of information.

The Financial Crimes Enforcement Network (FinCEN) is issuing this statement to support its request that the Office of Management and Budget (OMB) approve the collection of information in a rulemaking in support of the Bank Secrecy Act (BSA). Through this rulemaking, FinCEN will require that, with certain exclusions, SEC-registered investment advisers (RIAs) and exempt reporting advisers (ERAs) maintain anti-money laundering/countering the financing of terrorism (AML/CFT) programs, report suspicious activity, and comply with other recordkeeping and reporting requirements under the BSA.

The legislative framework generally referred to as the BSA consists of the Currency and Foreign Transactions Reporting Act of 1970, as amended by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Public Law 107-56 (October 26, 2001), and other legislation, including the Anti-Money Laundering Act (AML Act).[1] The BSA is codified at 12 U.S.C. § 1829b, 12 U.S.C. § 1951–1960, and 31 U.S.C. §§ 5311–5314 and 5316–5336, and includes notes thereto, with implementing regulations at 31 CFR Chapter X. The Secretary of the Treasury (Secretary) is authorized to administer the BSA and to require financial institutions to keep records and file reports that "are highly useful in criminal, tax, or regulatory investigations or proceedings" or in the conduct of "intelligence or counterintelligence activities, including analysis, to protect against international terrorism."[2] The Secretary delegated the authority to implement, administer, and enforce compliance with the BSA and its implementing regulations to the Director of FinCEN.[3]

The U.S. Department of the Treasury (Treasury) has identified material illicit finance risks involving investment advisers. Investment advisers, as gatekeepers to the U.S. financial system, have been used as an entry point by criminal actors to invest in U.S. assets, and by foreign adversaries to access sensitive information and technology from early-stage companies. Currently, thousands of investment advisers overseeing tens of trillions of dollars are generally not subject to comprehensive AML/CFT requirements. While investment advisers transact through banks and broker-dealers, which have their own AML/CFT obligations, those entities may have only partial information about the activities of the advisers or the advisers' underlying clients.

1 The AML Act was enacted as Division F, §§ 6001-6511, of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116-283, 134 Stat 3388 (2021).
2 31 U.S.C. 5311(1).
3 Treasury Order 180–01, Paragraph 3(a) (Jan. 14, 2020), https://home.treasury.gov/about/general-information/orders-and-directives/treasury-order-180-01.

As a result, the rule will require certain investment advisers regulated by the Securities and Exchange Commission (SEC), specifically registered investment advisers (RIAs), subject to certain exclusions, and exempt reporting advisers (ERAs), to establish and maintain risk-based programs, keep certain records, and file certain reports pursuant to the BSA and implementing regulations administered by FinCEN.

The final rule will use a narrower definition of "investment adviser" than set out in the notice of proposed rulemaking (NPRM) to exclude RIAs that register with the SEC solely because they are (i) mid-sized advisers, (ii) multi-state advisers, or (iii) pension consultants, as well as (iv) RIAs that do not report any assets under management (AUM) on Form ADV. For investment advisers that have their principal office and place of business outside the United States, FinCEN is clarifying that the rule applies only to their activities that (i) take place within the United States, including through involvement, directly or indirectly, of U.S. personnel of the investment adviser, or (ii) provide services to or otherwise involve, directly or indirectly, a U.S. person.

The final rule will significantly improve efforts to protect the U.S. financial system from illicit finance risks associated with investment advisers and provide highly useful information to law enforcement authorities and national security agencies, and address a significant gap identified by the Financial Action Task Force (FATF) in its 2016 Mutual Evaluation of the United States.

2. Method of collection and use of data.

The rule will require RIAs and ERAs to develop and implement AML/CFT programs, file suspicious activity reports (SARs) and currency transaction reports (CTRs), record originator and beneficiary information for transactions, respond to section 314(a) requests, and implement special due diligence measures for correspondent and private banking accounts. RIAs and ERAs will be required to develop and implement written AML/CFT programs in the first year that the rule is applicable to them and update, store, and make available the written programs for inspection by FinCEN and the SEC. This information will be collected in accordance with the Paperwork Reduction Act of 1995 (PRA), and its implementing regulations, 5 CFR part 1320.

FinCEN expects Federal, State, Local, and Tribal law enforcement agencies, as well as regulators with memorandums of understanding (MOUs) with FinCEN, will have access to the collected information, through the FinCEN portal, to monitor compliance with the BSA, develop leads, aid in investigations, and support prosecutions and asset recovery efforts around money laundering and associated crimes through investment advisers.

3. Use of improved information technology to reduce burden.

FinCEN expects that compliance with the requirements will necessitate the use of information technology systems to file the information requested by FinCEN. Reports will be filed electronically through the BSA E-Filing System. BSA E-Filing provides a fast, secure, convenient, and cost-effective method for submitting BSA reports.

4. Efforts to identify duplication.

There are no Federal rules that directly and fully duplicate, overlap, or conflict with the final rule.

While some investment advisers may currently implement AML/CFT requirements due to being dually registered as a broker-dealer or chartered as a bank (or a bank subsidiary), or because they are affiliated with a bank or broker-dealer, most of the investment adviser industry is not subject to any comprehensive AML/CFT requirements. For those investment advisers that are already subject to AML/CFT requirements, or are affiliates or subsidiaries of another entity which has extended its AML/CFT program to cover the investment advisers, FinCEN will not require such entities to establish multiple or separate AML/CFT programs so long as a comprehensive AML/CFT program covers all of the entity's applicable legal and regulatory obligations.

Investment advisers do currently have reporting obligations for certain cash transactions. Investment advisers are required to file reports for the receipt of more than $10,000 in cash and negotiable instruments using the joint FinCEN/Internal Revenue Service Form 8300 (Form 8300). The rule will remove that requirement. Instead, investment advisers will be required to file a CTR for a transaction involving a transfer of more than $10,000 in currency by, through, or to the investment adviser, unless subject to an applicable exemption.

FinCEN is aware that requirements within the Advisers Act and other federal securities laws at times impose reporting and recordkeeping requirements upon investment advisers. However, while these existing requirements may provide a supporting framework for implementing certain obligations in the rule, they do not impose the specific AML/CFT measures in the rule in support of the BSA's statutory purposes. For example, investment advisers are not currently required to develop internal policies, procedures, and controls to identify and mitigate the risk that the adviser might be used for money laundering, terrorist financing, or other illicit finance purposes. Nor are they required to appoint an officer responsible for implementing and monitoring the operations and internal controls of their AML/CFT compliance programs, train their employees to comply with AML/CFT requirements, report suspicious activity, maintain certain transaction records, or respond to section 314(a) requests for information on customer accounts or transactions. Unlike existing requirements under the Advisers Act, this rule is designed to prevent illicit actors from using the investment adviser industry to launder the proceeds of crime or finance terrorism.

5. Methods to minimize burden on small businesses or other small entities.

By choosing to apply the requirements of the rule to RIAs and ERAs, FinCEN chose to cover what are considered "larger" investment advisers, which have $110 million or more in regulatory AUM and are required to register with the SEC.[4] The vast majority of investment advisers that are generally understood to be "smaller" investment advisers are generally

4 *See* 17 CFR § 275.203A-1.

registered with one or more state securities authorities and not with the SEC, and are not covered by the final rule.

FinCEN notes that the AML/CFT requirements in the final rule are designed to be risk-based and reasonably designed and their cost is largely based on factors directly correlated with the size of an investment adviser, along with the risk level of its advisory activities and customers. The requirements of this final rule therefore have some inherent flexibility whereby small entities serving a smaller number of customers are likely to have lower costs.

The decision to narrow the definition of investment adviser in the final rule to exclude investment advisers registering as mid-sized advisers with the SEC follows feedback to the NPRM and will reduce the estimated burden of the rule.

6. Consequences to the Federal government of not collecting the information.

Treasury's investment adviser risk assessment along with past National Risk Assessments have identified the illicit finance risk associated with RIAs and ERAs.[5] Including investment advisers as "financial institutions" under the BSA and applying comprehensive AML/CFT measures to these investment advisers are likely to reduce this risk.

Although investment advisers have Form 8300 obligations to report cash transactions above $10,000, they are typically not subject to most of the AML/CFT program, recordkeeping, or reporting obligations that apply to banks, broker-dealers, and certain other financial institutions. Some investment advisers may perform certain AML/CFT functions if the entity is also a registered broker-dealer or is a bank (i.e., a dual registrant), or is an operating subsidiary of a bank; other investment advisers are affiliates of banks or broker-dealers, which may implement an enterprise-wide AML/CFT program that would include that investment adviser. Other investment advisers have voluntarily implemented certain AML/CFT measures, such as Customer Due Diligence (CDD) or other CIP requirements, but because these programs are not required by any BSA regulations, investment advisers have wide discretion in what information to request from their customers. Additionally, RIAs and ERAs are not examined for compliance with voluntary AML/CFT measures not required by law, so the investment adviser may not be made aware of deficiencies or gaps in their programs and more limited enforcement mechanisms against the adviser for failing to implement such measures can be pursued.

The fact that investment advisers are not currently BSA-defined financial institutions also limits the ability of investment advisers to provide highly useful information to law enforcement, regulators, and other relevant authorities. Unless they are also registered brokers-dealers in securities or affiliated with banks, already subject to AML/CFT obligations, RIAs and ERAs are not afforded protection from liability when filing SARs, are unable to receive and respond to law enforcement requests for information under section 314(a) of the USA PATRIOT Act, and are

5 *See* Treasury, *Investment Adviser Illicit Finance Risk Assessment*, https://home.treasury.gov/system/files/136/US-Sectoral-Illicit-Finance-Risk-Assessment-Investment-Advisers.pdf; *see also* Treasury, *2022 National Money Laundering Risk Assessment*, p. 63-66, https://home.treasury.gov/system/files/136/2022-National-Money-Laundering-Risk-Assessment.pdf.

unable to voluntarily share information under section 314(b) of the USA PATRIOT Act. Becoming a BSA-defined financial institution would allow RIAs and ERAs to share information potentially related to money laundering or terrorist financing with, and receive requests from, other financial institutions that already utilize section 314(b).

While investment advisers often do not take possession of financial assets, they nonetheless may have the most direct relationship with the customers they advise and thus are best positioned to obtain the necessary documentation and information from and about the customers concerning their assets that the investment adviser is deploying in public or private financial markets. If some of these assets include the proceeds of illegal activities, or are intended to further such activities, an investment adviser's AML/CFT program could help discover such issues and prevent the customer from further using the U.S. financial system, while reporting such information for law enforcement purposes. Further, an investment adviser may use multiple broker-dealers or banks for trading and custody services, making it difficult for one financial institution to have a complete picture of an investment adviser's activity or to detect suspicious activity involving the investment adviser. Without complete information, such an institution may not have sufficient information to file a SAR, or it may be required to file a SAR that only has partial information concerning the investment adviser's transactions on behalf of a particular customer. This limits the ability of law enforcement to identify illicit activity that may be occurring through investment advisers.

7. Special circumstances requiring data collection to be inconsistent with guidelines.

Under FinCEN regulations (31 C.F.R. § 1010.430(d)), all records that are required to be retained must be retained for a period of five years. The records required by this rule would be subject to this five-year retention period. This retention period is necessary to allow for verification of compliance with the reporting requirement and to keep available records that may be pertinent to other civil penalty actions that are subject to statutes of limitation longer than three years.

8. Consultation with individuals outside of the agency on availability of data, frequency of collection, clarity of Instructions and forms, and data elements.

During the preparation of the Treasury investment adviser risk assessment, Treasury, in coordination with the Federal Bureau of Investigation, conducted an analysis of certain BSA reports filed between 2013 and 2021 that were associated with RIAs and ERAs. That analysis reviewed certain BSA reports associated with or referencing an RIA or ERA, and the extent to which AML/CFT obligations on banks, broker-dealers, and other BSA-defined financial institutions were already collecting information on illicit finance activity associated with investment advisers.

Treasury also consulted with the SEC on the information provided by RIAs and ERAs on Form ADV. Form ADV collects certain information about the adviser, including (depending on the adviser's registration status) its AUM, ownership, number of clients, number of employees, business practices, custodians of client funds, and affiliations, as well as certain disciplinary or

material events of the adviser or its employees. ERAs that are not registered with the SEC or a state securities regulator are only required to file an abbreviated version of Form ADV—they are required to answer fewer client-related questions and provide less information about the services they provide. Form ADV does not require investment advisers to disclose the names of individual clients or investors.

On February 15, 2024, FinCEN published in the Federal Register an NPRM entitled AML/CFT and SAR Filing Requirements for RIAs and ERAs requesting comments on the proposal.[6] The comment period closed on April 15, 2024. FinCEN received 49 comments in response to the NPRM.[7] Of the 49 comments, 16 were from individual commenters; 16 were from trade associations representing various financial services entities (including seven that were a form letter provided by one association); six were from think-tanks or non-governmental organizations (NGOs); and five were from RIAs. FinCEN has made several changes to the final rule as a result. These include: narrowing the definition of "investment adviser" from the proposed rule; clarifying that, for investment advisers that have their principal office and place of business outside the United States, the rule applies only to their activities that (i) take place within the United States, including through involvement of U.S. personnel of the investment adviser, such as the involvement of an agency, branch, or office within the United States, or (ii) are the provision of advisory services to a U.S. person or a foreign-located private fund with an investor that is a U.S. person; allowing an investment adviser to exclude a mutual fund from its AML/CFT program without verifying that the mutual fund in question has an AML/CFT program; providing an exclusion from an investment adviser's AML/CFT program for: (i) bank- and trust company-sponsored collective investment funds that comply with the requirements of 12 CFR § 9.18 or a similar applicable law that incorporates the requirements of 12 CFR § 9.18, and (ii) any other investment adviser subject to this rule that is advised by the investment adviser; and extending the compliance date to January 1, 2026.

The decision to narrow the definition of investment adviser to exclude investment advisers registering as mid-sized advisers with the SEC follows feedback to the NPRM and will reduce the estimated burden of the rule.

During the comment period, FinCEN took feedback from certain industry and civil society organizations. These meetings were held on April 8, 2024, and April 11, 2024. Records of these meetings are available at www.regulations.gov under docket ID 'FINCEN-2024-0006'.

9. Explanation of decision to provide any payment or gift to respondents.

No payments or gifts were made to respondents.

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6 *See* FinCEN, *Anti-Money Laundering/Countering the Financing of Terrorism Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers and Exempt Reporting Companies NPRM*, 89 FR 12108 (Feb. 15, 2024).

7 The comments can be found on www.regulations.gov under docket number FINCEN-2024-0006. *See* Regulations.gov, "Anti-Money Laundering/Countering the Financing of Terrorism Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers and Exempt Reporting Advisers" (Feb. 15, 2024), *available at* https://www.regulations.gov/document/FINCEN-2024-0006-0001/comment.

10. Assurance of confidentiality of responses.

The information collected would be available to Treasury, its designee, and other authorized agencies, along with all other reports required to be reported under the BSA. All such information collections under the BSA must be used by such agencies consistent with a purpose set forth in 31 U.S.C. § 5311, including furthering a criminal, tax, or regulatory investigation, risk assessment, or proceeding, or use in intelligence or counterintelligence activities, including analysis, to protect against terrorism.

11. Justification of sensitive questions.

There are no questions of a sensitive nature in the collection of information. Any personally identifiable information collected under the BSA is strictly controlled as outlined in FinCEN's Privacy Act Systems of Records Notice.[8]

12. Estimated burden.

Frequency: As required; varies depending on the requirement.

Estimated Burden per Respondent: The estimated burden per respondent varies whether the respondent is currently implementing *significant*, *moderate*, or *limited* AML/CFT measures (as those terms are defined in the final rule). FinCEN estimates the average annual burden will be approximately 262 hours per investment adviser over the first ten years—with an average burden of 368 hours in Year 1, 268 hours in Years 2 to 3, and 245 hours in Years 4 to 10.

Estimated Number of Respondents: 19,919 investment advisers. Of these, there are an estimated 14,073 SEC-registered investment advisers and 5,846 exempt reporting advisers.

Estimated Total Annual Burden Hours: FinCEN estimates the annual burden will be 5,217,651 hours for investment advisors over the first 10 years—with an annual burden of 7,330,357 hours in Year 1, 5,347,335 hours in Years 2 to 3, and 4,878,783 hours in Years 4 to 10. This pattern reflects some initial information collection activities, such as developing a written AML/CFT program and documenting an understanding of the nature and purpose of existing customer relationships, that are only anticipated to occur in the first few years of the regulation.

13. Estimated total annual cost burden.

Estimated Total Annual Burden Cost: FinCEN estimates that the annual cost burden will be $298.1 million for investment advisers over the first ten years.

8 FinCEN, Privacy Act of 1974, as Amended; System of Records Notice, 79 FR 20969 (Apr. 14, 2014).

14. Estimated annual cost to the Federal government.

To implement the final rule, FinCEN expects to incur additional personnel costs of approximately $7.5 million per year. This figure reflects costs relating to administering the rule, which includes stakeholder outreach and training, investigative and enforcement activities, and certain incremental increases to pre-existing administrative and logistic expenses. The rule does not create wholly new requirements or reporting forms, but instead applies existing SAR and CTR filing obligations to investment advisers. As a result, the technology and IT costs associated with the additional SAR filings are estimated to be small, at approximately $125,000 per year.

The SEC is also expected to incur additional personnel costs, as two additional staff may be required in the SEC's Division of Investment Management to administer the rule. Based on salaries and overhead adjustments, FinCEN estimates those annual costs to the SEC to be approximately $814,000. Since the SEC receives a significant portion of its revenue from fees on registrants and other market participants, many of these costs would ultimately be paid for through those fees.[9] Additionally, the SEC's Division of Examinations may require increased personnel to conduct examinations for compliance with the rule, but FinCEN does not currently have an estimate of the associated costs.

15. Reason for change in burden.

This is new collection.

16. Plans for tabulation, statistical analysis, and publication.

The information will not be tabulated or compiled for publication.

17. Request not to display the expiration date of the OMB control number.

FinCEN requests that it not be required to display the expiration date so that the regulations will not have to be amended for the new expiration date every three years.

18. Exceptions to the certification statement.

There are no exceptions to the certification statement.

9 *See* SEC, FY 2023 Agency Financial Report, p. 32, https://www.sec.gov/files/sec-2023-agency-financial-report.pdf#chairmessage.