



May 15, 2024

VIA ELECTRONIC SUBMISSION

Andrea M. Gacki
Director
Financial Crimes Enforcement Network
P.O Box 39
Vienna, VA 22183

Re: Financial Crimes Enforcement Network: Anti-Money Laundering/Countering the Financing of Terrorism Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisors and Exempt Reporting Advisers RIN-1506-AB58

Dear Director Gacki:

On February 15, 2024, the Financial Crimes Enforcement Network (FinCEN) published a notice of proposed rulemaking (NPRM) on Anti-Money Laundering/Countering the Financing of Terrorism Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisors and Exempt Reporting Advisers.¹ The proposed rule would include certain investment advisers in the definition of “financial institution” under the Bank Secrecy Act (BSA), prescribe minimum standards for anti-money laundering/countering the financing of terrorism (AML/CFT) programs to be established by covered investment advisers, require covered investment advisers to report suspicious activity to FinCEN pursuant to the BSA and make several other related changes to FinCEN regulations.

The Office of Advocacy is concerned that FinCEN may have underestimated the potential impact of the proposed rulemaking on small entities because it used an inappropriate size standard. The Office of Advocacy recommends that FinCEN prepare a supplemental initial regulatory flexibility analysis that uses the Small Business Administration’s size standards and fully considers the economic impact of the proposed rulemaking on small entities as well as alternatives that may reduce those potential impacts.

¹ 89 Fed. Reg. 12108 (Feb. 15, 2024).

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy (Advocacy) under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA) that seeks to ensure small business concerns are heard in the federal regulatory process. Advocacy also works to ensure that regulations do not unduly inhibit the ability of small entities to compete, innovate, or comply with federal laws. The views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

The Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.⁴ Additionally, section 609 of the RFA requires the Consumer Financial Protection Bureau, the Occupational Safety and Health Administration, and the Environmental Protection Agency to conduct special outreach efforts through a review panel.⁵ The panel must carefully consider the views of the impacted small entities, assess the impact of the proposed rule on small entities, and consider less burdensome alternatives for small entities.⁶ If a rule will not have a significant economic impact on a substantial number of small entities, agencies may certify the rule.⁷ The agency must provide a statement of factual basis that adequately supports its certification.⁸

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁹ The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the *Federal Register* unless the agency certifies that the public interest is not served by doing so.¹⁰ While Advocacy acknowledges that the comment period for this proposed rule closed on February 7, 2024, the agency should still consider Advocacy's comments as required under the Small Business Jobs Act of 2010.

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the

² Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

³ Pub. L. No. 104-121, tit. II, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C. §§601-612).

⁴ 5 U.S.C. § 603.

⁵ *Id.* § 609.

⁶ *Id.*

⁷ *Id.* § 605(b).

⁸ *Id.*

⁹ Small Business Jobs Act of 2010, Pub. L. No. 111-240, §1601, 214 Stat. 2551 (codified at 5 U.S.C. § 604).

¹⁰ *Id.*

nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public.”¹¹

B. The Proposed Rule

On February 15, 2024, FinCEN published an NPRM in the *Federal Register* on Anti-Money Laundering/Countering the Financing of Terrorism Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisors and Exempt Reporting Advisors. The proposed rule would include certain investment advisers in the definition of “financial institution” under the BSA, prescribe minimum standards for anti-money laundering/countering the financing of terrorism programs to be established by covered investment advisers, require covered investment advisers to report suspicious activity to FinCEN and make other changes to FinCEN regulations. FinCEN asserts that the proposal is necessary to address gaps in the existing AML/CFT regulatory framework. The proposal will apply to investment advisers who may be at risk for misuse by money launderers, terrorist financiers, or other actors who seek access to the U.S. financial system for illicit purposes via investment advisers and threaten U.S. national security.¹²

II. The IRFA Does Not Comply with the Requirements of the RFA

FinCEN prepared an initial regulatory flexibility analysis (IRFA) for the proposed rule. In developing a proposed rule, an agency must prepare an IRFA if it determines that a proposal may impose a significant economic impact on a substantial number of small entities. The RFA requires agencies to publish the IRFA, or a summary, in the *Federal Register* at the same time it publishes the proposed rulemaking. The IRFA must include a discussion of each element required by Section 603 of the RFA. The elements of an IRFA are:

1. A description of the reasons why the action by the agency is being considered.
2. A succinct statement of the objectives of, and legal basis for, the proposed rule.
3. A description—and, where feasible, an estimate of the number—of small entities to which the proposed rule will apply.
4. A description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the types of professional skills necessary for the preparation of the report or record.
5. An identification, to the extent practicable, of all relevant federal rules that may duplicate, overlap, or conflict with the proposed rule.
6. A description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes, and minimize any significant economic impact of the proposed rule on small entities.

¹¹ Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

¹² 89 Fed. Reg. 12108.

The principal issues an agency should address in an IRFA are the impact of a proposed rule on small entities, the comparative effectiveness of that proposed rule, and the costs of alternative regulatory options. FinCEN uses an inappropriate size standard in the IRFA. As such, FinCEN fails to provide an accurate description of the small entities to which the proposed rule will apply.

A. The IRFA Fails to Provide an Accurate Description of the Small Entities to Which the Proposed Rule Will Apply

Advocacy asserts that FinCEN used an inappropriate definition of “small entity” in its IRFA. The RFA requires agencies to use the Small Business Administration's definition of a small entity. Section 601 of the RFA sets forth, in relevant part, “[f]or the purposes of this chapter ... the term ‘small entity’ shall have the same meaning as the term ‘small business’”¹³ The term “small business” has the same meaning as the term “small business concern” under Section 3 of the Small Business Act.¹⁴ SBA size standards are for the most part expressed in either millions of dollars (those preceded by “\$”) or the number of employees (those without the “\$”). For the most part, size standards are the average annual receipts or the average employment of a firm set by industry.¹⁵ The SBA size standard for investment advisors, NAICS code 523940, is \$47 million in average annual receipts.¹⁶

Instead of using SBA’s size standards, FinCEN used the Securities and Exchange Commission’s (SEC). The SEC defines small advisors as those who are managing less than \$25 million in customer assets.¹⁷ In the IRFA, FinCEN states that approximately 2.7 percent of all investment advisers impacted by the proposed regulation are estimated to be small entities. Based on this, FinCEN concludes that the proposed rule will not impact a substantial number of small entities.¹⁸

The Investment Adviser Association (IAA) questioned the use of the SEC’s size standard in its comment letter. IAA asserts that it is inappropriate. Indeed, IAA filed a petition for rulemaking to address the SEC’s size standard because IAA does not believe the SEC’s definition represents the industry.¹⁹

¹³ 5 U.S.C. § 601(6).

¹⁴ 15 U.S.C. § 632 (1994); 5 U.S.C. § 601(3). *See also*, *Nw. Mining v. Babbitt*, 5 F. Supp. 2d 9, 14-15 (D.D.C. 1998).

¹⁵ U.S. SMALL BUS. ADMIN., U. S. SMALL BUSINESS ADMINISTRATION TABLE OF SMALL BUSINESS SIZE STANDARDS MATCHED TO NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM CODES 1, https://www.sba.gov/sites/default/files/2023-06/Table%20of%20Size%20Standards_Effective%20March%202017%2C%202023%20%282%29.pdf (effective Mar. 17, 2023).

¹⁶ *Id.* at 26.

¹⁷ 89 Fed. Reg. at 12174.

¹⁸ *Id.*

¹⁹ *Inv. Adviser Ass’n, Comment Letter on Proposed Rule on Anti-Money Laundering/Countering the Financing of Terrorism Program and Suspicious Activity Report Filing Requirements for Registered*

Advocacy asserts that it is inappropriate to use the SEC's small entity definition for this rule. There is a large difference between the SEC's definition of a small advisor and the SBA's investment advisor size standard. The SBA size standard measures the firm's receipts while the SEC size standard measures the firm's assets under management. The SBA size standards are updated every five years to adjust for inflation and other factors,²⁰ and more appropriately define small businesses within the Portfolio Management and Investment Advice industry.

The SEC size standard does not cover most small entities in the industry, and therefore cannot provide an appropriate small entity analysis as required by the RFA. As noted above, under the SEC's size standard, FinCEN asserts that only 2.7 percent of investment advisors are considered small. Using the SBA size standard of \$47 million in annual receipts, over 17,000 entities would be considered small.²¹ There are an estimated 17,510 total investment advice firms using the Census Bureau's Statistics of Businesses. Accordingly, under the SBA size standard, 99% of investment advice entities are small. Considering this large difference between the size definitions, Advocacy urges FinCEN to use the SBA size standard in its analysis to have a more accurate reflection of the impact of this rulemaking on small entities.

B. The RFA Requires FinCEN to Consider Less Costly Alternatives for Small Entities

Accurately assessing the impact of the proposal on small entities is important for considering less costly alternatives. As noted above, the RFA states that an agency must perform an analysis of alternatives, that accomplish the stated objectives of applicable statutes, and which minimize any significant economic impact of the proposed rule on small entities.

Although FinCEN considered alternatives in its IRFA, there are other alternatives that FinCEN should consider to reduce the impact on small entities. For example, the agency could have considered allowing small businesses more time to comply with the rule. In addition, as part of its IRFA, FinCEN solicited additional alternatives to reduce the

Investment Advisors and Exempt Reporting Advisers (Apr. 15, 2024), <https://www.regulations.gov/comment/FINCEN-2024-0006-0023>.

²⁰ U.S. SMALL BUS. ADMIN., SBA'S SIZE STANDARDS METHODOLOGY (Dec. 2023), [2023 Size Standards Methodology White Paper | U.S. Small Business Administration \(sba.gov\)](https://www2.census.gov/programs-surveys/susb/tables/2017/us_6digitnaics_rcptsize_2017.xlsx).

²¹ The NAICS code for this industry changed between the 2017 and 2022 NAICS. The size standard uses the 2022 NAICS (523940). The data available uses the 2017 NAICS. The estimate of small entities uses the 2017 revenue size table for NAICS 523930. https://www2.census.gov/programs-surveys/susb/tables/2017/us_6digitnaics_rcptsize_2017.xlsx. US Census Bureau, Statistics of US Businesses, 2017, Enterprise Receipts Size Table.

impact on small entities from the public. Advocacy encourages FinCEN to consider all alternatives that may reduce the impact on small entities.

IV. The Agencies Should Provide Clear Guidance to Assist Small Entities with Compliance

Given the requirements of the proposed rulemaking, providing clear guidance for complying with the agency's rulemaking will be helpful to small entities and eliminate confusion. Small entities may lack resources to assist them in understanding regulatory requirements and performing the necessary actions to achieve compliance. Advocacy encourages the agency to provide guidance to assist small entities in complying with the requirements of the rulemaking.

V. Conclusion

The IRFA that FinCEN prepared for this rulemaking uses an inappropriate size standard. Advocacy recommends that FinCEN prepare a supplemental initial regulatory flexibility analysis that fully considers the economic impact of the proposed rulemaking on small entities using the correct size standard. Advocacy further recommends that FinCEN consider alternatives that may reduce that burden.

The Office of Advocacy is available to assist FinCEN with its RFA compliance. If you have any questions or require additional information, please contact me or Assistant Chief Counsel Jennifer A. Smith at (202) 205-6943 or by email at Jennifer.Smith@sba.gov. Thank you for the opportunity to comment on this important proposal.

Sincerely,

/s/

Major L. Clark, III
Deputy Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/

Jennifer A. Smith
Assistant Chief Counsel
Office of Advocacy
U.S. Small Business Administration

Copy to: The Honorable Richard L. Revesz, Administrator Office of Information and
Regulatory Affairs Office of Management and Budget