April 15, 2024

VIA ELECTRONIC SUBMISSION

Policy Division
Financial Crimes Enforcement Network
P.O. Box 39
Vienna, VA 22183

Re: Notice of Proposed Rulemaking on Anti-Money Laundering/Countering the Financing of Terrorism Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers and Exempt Reporting Advisers, Docket Number FINCEN-2024-0006, RIN 1506-AB58

MFA[1] appreciates the opportunity to provide comments on the notice of proposed rulemaking (the "Proposed Rule")[2] issued by the Financial Crimes Enforcement Network ("FinCEN") to establish anti-money laundering ("AML")/countering the financing of terrorism ("CFT") program and suspicious activity report filing requirements for registered investment advisers ("RIAs") and exempt reporting advisers ("ERAs," and, together with RIAs, "Covered IAs").

MFA strongly supports FinCEN's goal of combatting money laundering, terrorist financing, and other illicit financial activity and has long supported FinCEN's AML rulemaking efforts related to investment advisers. However, MFA believes that FinCEN misapprehends the AML/CFT risks it cites in the preamble to the Proposed Rule and urges FinCEN to not allow this misapprehension to guide FinCEN's policy approach.

The Proposed Rule also requires meaningful clarification in several important respects. Several of the clarifications are necessitated because Covered IAs that manage pooled investment vehicles have an advisory relationship with the funds that they manage, and not the investors in funds: the manager's client

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[1] Managed Funds Association (MFA), based in Washington, DC, New York, Brussels, and London, represents the global alternative asset management industry. MFA's mission is to advance the ability of alternative asset managers to raise capital, invest, and generate returns for their beneficiaries. MFA advocates on behalf of its membership and convenes stakeholders to address global regulatory, operational, and business issues. MFA has more than 180 member fund managers, including traditional hedge funds, credit funds, and crossover funds, that collectively manage over $3.2 trillion across a diverse group of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time.

[2] Financial Crimes Enforcement Network: Anti-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), *available* here.

is the fund, not an investor in the fund.[3] As written, the Proposed Rule assumes and seems predicated on a direct relationship between Covered IAs and investors, the absence of which leads to questions about how AML/CFT responsibilities of Covered IAs should be discharged. MFA therefore encourages FinCEN to issue a re-proposed version of the Proposed Rule for further review and comment. The re-proposal should consider these gaps and incorporate clarifications to address how the AML/CFT requirements will apply in the private funds context. This step will allow for more fulsome and considered comments and a subsequent rulemaking that is tailored to the funds context and the specific AML/CFT risks posed by the varying and numerous investment advisers that constitute Covered IAs. A well-considered and appropriately tailored rule benefits both FinCEN and Covered IAs in providing clear guidelines and requirements to shield against the AML/CFT risks that can arise in the private fund industry.[4]

Below, we provide comments on the Proposed Rule and respond to some of the questions FinCEN poses in the proposing release. We note that the Proposed Rule reflects a marked improvement over FinCEN's prior proposal concerning AML program and suspicious activity report ("SAR") filing requirements for RIAs (the "2015 Proposal"),[5] in response to which MFA commented extensively (the "MFA 2015 Comment Letter")[6]

We submit these comments to enhance the Proposed Rule and ensure it is appropriately risk-based and tailored to different aspects of the asset management industry, which as the Staff can appreciate, is incredibly diverse and serving all segments of the U.S. private fund community—from retail financial planners to managers serving institutional investors and, as with MFA's members, offering private fund investments to sophisticated institutional investors such as pension funds, endowments, and large foundations.

We would be pleased to meet with FinCEN Staff to provide additional background on the industry and context for our comments.

I. Executive Summary

In Part II below, we provide relevant background on the operation of Covered IAs within the private fund industry and highlight a few problematic elements of FinCEN's risk assessment as compared with

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[3] *See Goldstein v. SEC*, 451 F.3d 873, 883 (D.C. Cir. 2006) (holding an earlier SEC rule that in effect would have required private fund managers to consider the investors of the private fund its clients, thereby requiring the manager to register with the SEC, was arbitrary and in conflict with the purpose of the underlying statute in which the new rule was included).

[4] *See* Anti-Money Laundering Programs for Investment Advisers, 68 Fed. Reg. 23646 (proposed May 5, 2003) (proposing AML program requirements for investment advisers); Anti-Money Laundering Programs for Unregistered Investment Companies, 67 Fed. Reg. 60617 (proposed Sept. 26, 2002) (proposing AML program requirements for certain unregistered investment companies, such as hedge funds, commodity pools, and similar investment vehicles).

[5] Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers, 80 Fed. Reg. 52680 (proposed Sept. 1, 2015).

[6] Comment Letter of MFA (Nov. 2, 2015) ("MFA 2015 Comment Letter"), *available* here.

actual AML/CFT risks posed by private funds. We then provide detailed comments on specific provisions of the Proposed Rule in Part III. Below is a summary of our principal comments on the Proposed Rule.

- Regarding the scope of Activities Covered by the Covered IA's AML/CFT Program, as we discuss below:
    - Covered IAs that are private fund managers generally do not directly engage with the fund investor when making the investment: their client is the fund, not any investor, and as such Covered IAs should be permitted to delegate any suspicious activity report (SAR) filing requirements to the fund's administrator as appropriate and,
    - In instances where the Covered IA acts as a subadviser to another, principal adviser, the Covered IA lacks information regarding the ultimate investor that would be required for due diligence and SAR filing purposes, and the Covered IA should not be subject to duplicative efforts for which the primary adviser would already be subject.
- With respect to the delegation of AML/CFT program requirements to third parties, MFA recommends that:
    - FinCEN revise the rule to expressly state that, although Covered IAs are responsible for developing the firm's AML/CFT compliance program, all aspects of the implementation and operation of the program may be delegated, including to offshore administrators, and
    - FinCEN should defer to the anticipated adoption by the Securities and Exchange Commission (the "SEC") of its currently outstanding proposal regarding outsourcing by advisers (the "Outsourcing Proposal").[7]
- MFA recommends that FinCEN revise the proposed rule to reflect the lack of relationship between Covered IAs and investors in funds, making it unnecessary to require Covered IAs to maintain due diligence programs for correspondent accounts for foreign financial institutions or private banking accounts.
- The Proposed Rule is premised on a mistaken presumption that all Covered IAs have direct privity with investors where, in the case of a private fund investment, the Covered IA does not, and as such it is unnecessary to require the Covered IA to "look through" intermediaries to underlying investors.
- MFA requests that the rule afford the Covered IA the flexibility to select the individual(s) best-positioned to act as its AML/CFT officer, regardless of whether the individual is an employee or third party, and regardless of where located (including offshore), and should be approved in writing by the Covered IA.
- The SAR/CFT obligations should only apply to Covered IAs that accept cash investments, which private funds by and large do not.

[7] Outsourcing by Investment Advisers, 87 Fed. Reg. 68816 (proposed Nov. 16, 2022).

- Because the flow of funds will be to and from custodians, banks, and broker-dealers, it would be inappropriate to subject Covered IAs to the Bank Secrecy Act ("BSA")'s Recordkeeping and Travel Rules.
- MFA endorses the information sharing requirements of Section 314(b) of the USA PATRIOT Act to RIAs but urges FinCEN to provide guidance applicable to investors in funds (and particularly offshore funds that do not otherwise touch the United States), and in particular, funds that engage an offshore administrator.
- If FinCEN moves forward with delegating examination authority to the SEC, FinCEN should require the SEC to publish its relevant AML examination manual and provide an opportunity for public input to improve the SEC's examination processes.
- MFA urges that the proposed compliance date be extended to at least 24 months after the issuance of the rule considering various factors weighing on the temporal cost of compliance and the time needed to adopt and implement an AML/CFT program, and potentially longer to align with the compliance date of the anticipated joint FinCEN/SEC rulemaking regarding customer identification programs (CIP Proposal).[8]

II. Industry Background and Illicit Finance Risks

Before delving into detailed comments on specific provisions of the proposed rule, we thought it would first be useful to provide background on the private fund industry and highlight what we believe to be the problematic elements of FinCEN's risk assessment for the investment adviser industry. It is important for FinCEN to understand the industry that it is now seeking to regulate and to accurately assess the AML/CFT risks that the industry faces.

A. Description of the Private Fund Industry

Generally, private funds are pooled investment vehicles sponsored and managed by a single investment adviser registered with the SEC. In the typical private fund structure, there will be both a domestic fund organized under U.S. law and an offshore fund organized under the laws of another country, such as the Cayman Islands.[9] The same general investment strategy will be followed for both the domestic and offshore fund.[10] Investors in the domestic fund tend to be U.S. individuals and entities subject to

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[8] In addition, in the Proposed Rule FinCEN notes that it expects to address customer identification program ("CIP") requirements in a future joint rulemaking with the SEC. FinCEN recently sent a draft of this joint rulemaking to the Office of Management and Budget, suggesting that a CIP proposal is forthcoming. *See Pending EO 12866 Regulatory Review, RIN 1506-AB66*, OFF. OF MGMT. AND BUDGET, *available* here (last visited Apr. 12, 2024). Given that both the Proposed Rule and a CIP proposal would have implications for how Covered IAs implement their overall AML/CFT programs, FinCEN should allow further comments on the Proposed Rule once the CIP proposal is issued.

[9] *See, e.g.*, SEC. AND EXCH. COMM'N DIV. INV. MGMT., PRIVATE FUNDS STATISTICS SECOND CALENDAR QUARTER 2023 13 (2024), *available* here.

[10] Some RIAs for private funds also advise single-investor funds or managed accounts for a single investor. The investment strategy employed on behalf of such single-investor vehicles generally mirrors the strategy followed for the RIA's larger private funds.

taxation in the United States, while the offshore fund's investors generally tend to be comprised of non-U.S. individuals and entities and tax-exempt U.S. investors, including U.S.-based pension plans, endowments, foundations and other charitable organizations.[11] It is typical for an RIA to be affiliated with private funds and to manage several affiliated funds (referred to herein as a "Fund" or "Funds").

To be eligible to invest in private funds under the federal securities laws, an investor generally must qualify either as an "accredited investor" or a "qualified purchaser," depending on the type of fund. An accredited investor is defined as individuals with a net worth of at least $1 million (not including the individual's primary residence) or annual income of at least $200,000 in the past two years, and institutions with assets in excess of $5 million.[12] A qualified purchaser is defined as individuals with at least $5 million in investments or institutions with at least $25 million in investments.[13] Almost all Funds have minimum subscription amounts with a common amount being $1 million.

Investor monies are pooled together and become assets of the Fund, which is usually organized as a limited partnership or limited liability company. In return, an investor acquires an ownership interest (e.g., a limited partnership interest) in the Fund in proportion to its contribution. Investors participate in the gains and losses of the Fund through their respective ownership interests. The investor in a private fund is not the client of a private fund manager – rather, the private fund is the client of the private fund manager, and the investor is just that – and investor in the private fund, but not a client of the investment manager.[14]

In contrast to mutual funds, which offer daily liquidity to their investors, investors in hedge funds—a type of private fund—are permitted to redeem their ownership interest (in whole or in part) only at specified intervals, which vary by hedge fund (e.g., quarterly or annually), subject to a minimum notice period generally ranging from 30 to 90 days. Investors also may be subject to an initial "lock up" period (e.g., one or two years), during which they are not permitted to withdraw any portion of their investment. Some private equity funds may offer even less opportunity for the redemption of funds, thus rendering them "less likely to be used by money launderers, terrorist financiers, and others engaging in illicit finance."[15] Investments made into some private equity and/or private credit funds are typically long-term, often with lock-up periods of seven to ten years (or more), which hinders access to and movement of capital for the investor and makes them particularly unattractive vehicles for money laundering.

Private fund investors include individuals and entities that are investing for their own account ("direct investors") and also include entities that are investing as intermediaries on behalf of a number of other unrelated investors ("investor intermediaries"). Investor intermediaries may include, by way of

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[11] *See* Sec'y Treasury, Bd. Gov. Fed. Rsrv. Sys. & Sec. and Exch. Comm'n, A Report to Congress in Accordance with § 356(c) of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act) 21–22 (2002), *available* here.

[12] *See* 17 C.F.R. 230.501(a)(5) and (6) (setting forth the requirements applicable to individual investors); 17 C.F.R. 230.501(a)(3) and (7) (setting forth the requirements applicable to institutions).

[13] *See* 15 U.S.C. § 80a-2(a)(51).

[14] *See Goldstein*, *supra* note 3.

[15] *See* 89 Fed. Reg. at 12126.

example, a fund-of-funds,[16] a U.S. or foreign financial institution offering an alternative investment product to its customers, an asset aggregator or other type of pooled investment vehicle. Most private fund assets under management come from institutional investors, predominately funds-of-funds, public pension plans, private pension plans, endowment plans and foundations.[17]

Importantly, RIAs that manage private funds typically do not have a contractual or direct investment advisory relationship with the Fund's investors. While the manager may provide information and materials to the investor, the manager's client is the fund, not the investor. The fund administrator has principal responsibility with onboarding the client and arranging the transfer of funds from the investor's bank to the manager's custodian. Rather, the RIA enters into investment advisory agreements with the private fund it manages, and the RIA is paid management fees and other compensation by the Fund. Although the RIA is responsible for investing and managing the Funds' assets, the adviser does not hold investor funds, which are held at accounts maintained by the Funds at different financial institutions, including bank or broker-dealer prime brokerage accounts.[18] There are no financial transactions directly between the RIA and the investor; rather, when making its investment into a Fund, the investor sends its money to the Fund's bank account, and when the investor redeems its interest, the Fund wires the redemption proceeds from the Fund's bank account to the investor's bank account.

Typically, there are very few transactions between the investor and the Fund during the life of an investment. The transactions are typically limited to (i) the initial investment, or "subscription;" (ii) in some cases, add-on investments; and (iii) the payment of redemption proceeds by the Fund when the investor liquidates a portion of its investment or exits the investment entirely or the Fund terminates its life.

RIAs take seriously their compliance obligations, including their obligations to comply with securities laws, U.S. and other applicable economic sanctions and other legal requirements. Many RIAs maintain AML programs, which incorporate U.S. sanctions compliance elements, and, in many cases, delegate the implementation and operation of certain aspects of their AML program to a third party that is better positioned and better equipped to perform a particular AML-related function. Most often the delegation is made to the Fund's administrator, which is an independent third party that provides valuation, administrative and other services to the Fund and its investors, such as, for example, calculating the management and performance fee; maintaining books and records; acting as the registrar and transfer

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[16] A "fund-of-funds" is an investment fund that invests its clients' money in multiple underlying funds. *See* Anti-Money Laundering Programs for Unregistered Investment Companies, 67 Fed. Reg. 60617, 60621 n.30 (proposed Sept. 26, 2002); *see also* Withdrawal of the Notice of Proposed Rulemaking; Anti-Money Laundering Programs for Unregistered Investment Companies, 73 Fed. Reg. 65569 (Nov. 4, 2008) (withdrawing the proposal).

[17] *See, e.g.*, SEC. AND EXCH. COMM'N OFF. INV. EDUC. AND ADVOCACY, INVESTOR BULLETIN: HEDGE FUNDS 1 (2013), *available* here.

[18] In fact, the RIA is not permitted to hold investor funds under rule 206(4)-2 of the Advisers Act, as client funds and securities must be held at a "qualified custodian." *See* 17 C.F.R. 275.206(4)-2. A "qualified custodian" includes generally any U.S. bank, U.S. registered broker-dealer, U.S. futures commission merchant (limited to holding client funds and security futures and any other securities incidental to client futures transactions) and foreign financial institution that customarily holds customer assets and that segregates customer assets from its own assets. *See* 17 C.F.R. 275.206(4)-2(d)(6).

agent for shares held by investors; and handling the receipt of subscriptions and the payment of redemptions (i.e., collecting funds from, and disbursing funds to, investors). Administrators are often the best party to perform AML (and sanctions) diligence because they interface with Fund investors in these roles and receive subscriptions from investors. Such administrators, which are often based outside the United States, are typically subject to AML oversight in their home country and, therefore, implement AML procedures both as a contractual matter on behalf of the Fund and as a regulatory requirement.[19] Since AML delegation is performed on behalf of the Fund by contract, there is no reason the administrator could not apply AML controls consistent with the proposed AML/CFT program rule.

B. Problematic Elements of FinCEN's Risk Assessment for the Investment Adviser Industry

MFA supports FinCEN's objectives in proposing an AML/CFT program rule for Covered IAs, but notes that private funds present relatively limited money laundering risks. When we consider the three phases of money laundering, none seems a particular risk:

- Laundering of cash proceeds is not a significant concern, as the minimum subscription amounts make the use of currency impractical for investors and, in any event, Funds prohibit the receipt of currency. Additionally, subscription funds are typically wired from financial institutions, such as banks and broker-dealers, typically located in jurisdictions that are members of the Financial Action Task Force and subject to strict AML requirements and that have adopted commensurate controls.
- Nor are private funds efficient vehicles for layering or integration of illegal proceeds. Post-investment transactional activity is extremely limited, occurring only when an investor seeks to (a) transfer the investor's interest in the Fund; or (b) redeem (in whole or in part) the investor's interest in the Fund. Investors generally are not permitted to transfer their interest in the Fund without the express approval of the Fund (or the general partner of the Fund, which is typically an affiliate of the RIA), which affords the Covered IA the opportunity to conduct diligence on, and obtain appropriate AML (and sanctions) representations from, the proposed transferee. Redemptions must be processed by the Covered IA or the Fund administrator; the investor cannot unilaterally withdraw its funds. As a matter of prudent risk management, most Funds require that, when an investor requests a redemption, the redemption proceeds be wired to an account in the investor's name, unless the investor has provided a satisfactory explanation why the proceeds should be transferred somewhere else.[20] In these instances, it is common for additional due diligence to be conducted. As a result, it is rare for an investor to effectuate a transfer (either of the investor's interest in the Fund or of redemption proceeds) to a third party.

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[19] For example, the Cayman Islands Monetary Authority is the regulator of Cayman Islands-based administrators. Such administrators are subject to The Proceeds of Crime Law (rev. 2008), The Companies Management Law (rev. 2003), The Monetary Authority Law (rev. 2013) and the Companies Law (rev. 2013).

[20] Moreover, the SEC further incentivizes RIAs to take measures to ensure that investor money is not directed to third parties. *See* Identity Theft Red Flags Rules, 78 Fed. Reg. 23638, 23642 (Apr. 19, 2013) (codified at 17 C.F.R. Part 248). RIAs that do permit investor funds to be directed to third parties must implement a written identity theft prevention program. *Id.*

FinCEN's risk assessment asserts to the contrary that: (i) Covered IAs have served as an entry point into the U.S. market for illicit proceeds from foreign corruption, fraud, and tax evasion; (ii) Covered IAs manage funds ultimately controlled by sanctioned entities, including Russian oligarchs and their associates; (iii) Covered IAs are being used by foreign states to access technology and services with long-term national security implications; and (iv) Covered IAs have defrauded their clients and stolen their funds.

MFA respectfully disagrees. Many of the cases FinCEN relies on in describing these threats involve complicit actors or concealment of ownership—neither of which would be addressed by the proposed requirements. Further, other concerns cited by FinCEN are addressed through existing sanctions compliance obligations. For example, FinCEN cites a U.S. Treasury Department review of select reports filed under the requirements of the BSA between January 2019 and June 2023 revealing more than 20 U.S. investment advisers advising private funds where the adviser was identified as having "significant ties" to Russian oligarch investors or Russian-linked illicit activities.[21] However, to the extent that such investors are subject to U.S. sanctions, existing sanctions compliance obligations already address potential ramifications for investment advisers having connections with such investors.[22] And, to this end, many advisers and the private funds they manage have blocked property interests of sanctioned Russian parties and have filed appropriate blocking reports with the Office of Foreign Assets Control or other appropriate sanctions authority. In other words, sanctions work.

Overall, the cases and examples identified in the proposing release should not falsely color FinCEN's views of the AML/CFT risks posed by Covered IAs' activities. The risks that FinCEN identifies are atypical of the industry and already addressed by other requirements to which Covered IAs are subject (i.e., sanctions compliance requirements) or involve deliberate cases of adviser complicity in unlawful activities, which are outlier situations and as to which the U.S. criminal code (including 18 U.S.C. §§ 1956 and 1957) provides ample disincentives, in addition to the anti-fraud prohibitions under federal securities laws.

Additionally, as a necessity for conducting their regular business, many Covered IAs rely heavily on banks, broker-dealers, custodians, and other highly regulated financial institutions that have long been subject to the BSA's AML/CFT requirements.[23] For example, investor monies are typically custodied at banks, and funds transmitted by investors will come through banks subject to the BSA's requirements. As such, many limited partner investors in Funds are already subject to AML/CFT scrutiny of the same kind FinCEN seeks to impose via the Proposed Rule, creating duplicative AML/CFT monitoring obligations on

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21 89 Fed. Reg. at 12115.

22 For example, in September 2023, the SEC filed an action against a New York entity, as well as its owner and principal for acting as unregistered investment advisers to their sole client, a wealthy former Russian official with political connections to the Russian Federation. *See* Press Release, Sec. and Exch. Comm'n, SEC Charges New York Firm Concord Management and Owner with Acting as Unregistered Investment Advisers to Billionaire Former Russian Official (Sept. 19, 2023), *available* here. The former Russian official was subject to sanctions in the European Union and the United Kingdom. *Id.*

23 As SEC Commissioner Peirce noted, "[i]t is hard to conceive of an adviser-related activity that would not fall within the regulatory ambit of some or all of those covered financial institutions. The regulatory gap described, therefore, is more optical than substantive …." *See* Comment Letter from SEC Commissioner Hester Peirce (April 12, 2024) (*available* here).

Covered IAs. In addition, banks and broker-dealers regularly request representations and affirmations from Covered IAs as part of their diligence processes to ensure those financial institutions that they are not exposed to AML and sanctions risks from dealings with Covered IAs. We believe it is important that FinCEN acknowledges these strong, well-established, existing controls and take account of them in any final rulemaking.

III. Comments on the Proposed Rule

With the above background on the private funds industry and the limited AML risks it may face, MFA offers specific comments on the Proposed Rule.

A. Definition of Investment Adviser; Scope of the Activities Covered by the Covered IA's AML/CFT Program

1. Inclusion of Other Activities

Under the Proposed Rule, a Covered IA's AML/CFT program would be required to cover all advisory activities, except for activities undertaken with respect to mutual funds.[24] FinCEN indicates that advisory activities would include, for example, the management of customer assets, the provision of financial advice, the execution of transactions for customers and other advisory activities.[25] Non-advisory services, such as activities undertaken in connection with roles fund personnel may play with respect to the portfolio companies (*e.g.,* making managerial and/or operational decisions about portfolio companies), are not included within such activities.[26]

An RIA's investment activity on behalf of a Fund (*i.e.,* its client) should not be covered by the RIA's AML program. However, it is not clear from the preamble to the Proposed Rule and the text of the Proposed Rule itself whether FinCEN incorporated this point. An RIA's primary function is to invest the assets of the Funds it manages. Accordingly, the RIA is responsible for making these investment decisions, not the investors. Investments that RIAs make take a variety of forms, such as trading in the U.S. and foreign securities markets, participating in initial public offerings and the purchase of private equity positions in portfolio companies both in the United States and abroad.

While RIAs are and should be attentive in their investment activities to their obligations under the federal money laundering statutes[27] and their obligations under the economic sanctions programs administered by OFAC, an RIA should not include within its AML/CFT program its investment activities conducted *on behalf of a Fund*. Such activities do not present money laundering risks sufficient to justify the extension of the AML/CFT program to cover them. Accordingly, MFA recommends that a Covered IA's investment activity on behalf of a private fund not be covered by the Covered IA's AML/CFT Program.

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24 89 Fed. Reg. at 12123.

25 *Id.*

26 *Id.*

27 18 U.S.C. §§ 1956 and 1957.

2. Subadvisory Activities.

The Proposed Rule would also apply to subadvisory services because they are a subcategory of advisory services, which the Proposed Rule would capture.[28] Covered IAs should not be required to apply AML/CFT Programs to subadvisory relationships due to the limited availability of information required for due diligence and SAR filing purposes and unnecessary duplication of efforts of primary advisers: a subadviser's relationship is exclusively with the principal adviser, and a subadviser typically will not possess any information regarding the principal adviser's underlying investors. MFA therefore recommends that the Proposed Rule be revised to reflect the fact that the AML/CFT obligations remain with the primary adviser, not the subadviser.[29]

3. Non-U.S. Advisers.

The definition of "investment adviser" under the Proposed Rule would include non-U.S. investment advisers that are registered with the SEC or that file Forms ADV as ERAs and are physically located abroad (i.e., they do not have a branch, office, or staff in the United States).[30]

Applying the requirements of a U.S. AML/CFT program to non-U.S. advisers would create significant difficulty with respect to conflicts of law with the AML/CFT or other requirements of a home jurisdiction. For example, it is unclear if data privacy and data transfer restrictions applicable to the foreign clients of such a non-U.S. adviser would permit the adviser to file a U.S. SAR. It moreover is unclear why a U.S. SAR would be warranted (or required) if the applicable conduct does not touch the United States. The adviser may be required to, and may, file a SAR in its home jurisdiction.

We note that FinCEN recognized the cross-jurisdictional issues as far back as 2003, when its original proposal to extend AML/CFT requirements to investment advisers whose principal office and place of business is located in the United States and specifically excluded those advisers that lack U.S. physical presence. MFA agrees, and notes there is no reason for FinCEN to reverse course today from the sound approach taken then. [31] Further, if non-U.S. advisers are included within the scope of the rule, such advisers would need to designate an agent within the United States to carry out its AML obligations—a requirement that would be unduly burdensome and inconsistent with AML requirements elsewhere.

For all these reasons, MFA respectfully requests that the rule exclude non-U.S. investment advisers from its scope.

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[28] 89 Fed. Reg. at 12124.

[29] We note that in the context of subadvisers to separately managed accounts, it is not uncommon for the investment advisory relationship to be documented with a tri-party agreement that is executed by the client, the principal adviser, and the subadviser. In such agreements, the obligations of the subadviser are limited principally to implementing the trading strategy, risk monitoring and reporting, and expressly exclude the subadviser from know-you-customer activities, which remain with the primary adviser (or fund manager) or its third-party delegate. Such relationships should similarly be excluded from AML/CFT requirements given the obligations of the primary adviser.

[30] *Id.* at 12119.

[31] *See* 68 Fed. Reg. at 23652.

B. Delegation of AML/CFT Program Requirements to Third Parties

FinCEN acknowledges in the Proposed Rule that Covered IAs regularly delegate compliance and other activities to third parties, including fund administrators, and would permit investment advisers to delegate the implementation and operation of aspects of their AML/CFT program.[32] MFA welcomes this recognition, as Covered IAs with various business models and clientele, all rely heavily on other financial services participants to conduct the adviser's business. The investment adviser would remain fully responsible and legally liable for the program's compliance with applicable requirements, and the investment adviser would need to ensure that FinCEN and the SEC are able to obtain information and records relating to the AML/CFT program.[33]

1. Program Elements That May Be Delegated.

Despite FinCEN's acknowledgement that Covered IAs regularly delegate compliance and other activities to third parties, the Proposed Rule is not clear on which AML/CFT program elements may be delegated to a third party. MFA asks FinCEN to clarify that, although Covered IAs may be responsible for developing the firm's AML/CFT compliance program, any and all aspects of the implementation and operation of the program may be delegated, including, to the extent required by a Covered IA's program, conducting due diligence on prospective investors, determining when enhanced due diligence is required on high-risk investors and conducting such enhanced due diligence, processing subscription documents from investors, processing redemptions and transfers, updating due diligence on investors, monitoring for suspicious activity and preparing and filing SARs. MFA recommends that FinCEN revise the rule text to expressly permit delegation (i.e., not just in the preamble) to third parties and/or affiliates, so Covered IAs know what is required when functions are delegated.

2. Criteria for Delegation.

The rule should clearly allow delegation as described above, but MFA suggests that FinCEN should not prescribe additional standards or requirements with respect to such permissible delegation. Doing would likely duplicate (at best) or conflict (at worst) with the SEC's Outsourcing Proposal, which, in addition to prohibiting RIAs from outsourcing certain services or functions without first meeting minimum due diligence requirements, also would require ongoing monitoring and reassessment of the service provider.[34] MFA and others potentially impacted put forward significant comments on the Outsourcing Proposal, as its implications, should it become final, would have a substantial impact on RIAs' operations.[35] Accordingly, MFA recommends that FinCEN wait for the Outsourcing Proposal process to finalize before mandating any requirements for delegation of AML functions. As RIAs will need to comply with a finalized version of the Outsourcing Proposal and a final AML/CFT rule, both regimes must operate in tandem to avoid duplicative, conflicting, and unnecessarily burdensome requirements on RIAs.

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32 89 Fed. Reg. at 12125.

33 *Id.*

34 *See* 87 Fed. Reg. at 68816.

35 Comment Letter of MFA (Dec. 20, 2022), *available* here.

3. Offshore Administrators.

FinCEN requests comment on the quality of AML/CFT programs implemented by offshore fund administrators, the extent to which these fund administrators are able to collect and provide information on investors in offshore pooled investment vehicles when requested by a U.S. investment adviser, the ability of the U.S. investment adviser to effectively monitor the implementation of AML requirements by fund administrators, and the quality of suspicious activity or suspicious transaction reports submitted by those fund administrators. As explained above, many Covered IAs delegate AML compliance to administrators located outside of the United States; such offshore administrators pay a key role in the administration of a Covered IA's AML controls. The vast majority of offshore administrators used by Covered IAs have been subject to formal AML and SAR requirements imposed by other jurisdictions for many years and are familiar with what is needed to execute a successful AML/CFT program. For those Covered IAs that use offshore administrators, the investors in the Covered IA's funds are often extremely sophisticated institutional investors that insist on strong AML controls of the Covered IA (and any of the third parties to whom the Covered IA delegates AML functions).

Despite this reality, the Proposed Rule appears to express an inappropriately negative view of these offshore administrators and service providers. Many MFA members use offshore administrators based on Ireland, Luxembourg and the Cayman Islands, all of which have been subject to longstanding AML requirements, inclusively of requirements for the private fund industry. FinCEN expresses particular skepticism as to the Cayman Islands' AML program requirements but does not acknowledge that the Cayman Islands have made substantial strides to address past shortcomings, including by adopting a new National AML/CFT Strategy.[36] FinCEN also notes negatively that fund administrators in the Cayman Islands filed only 37 SARs in 2017; yet, FinCEN does not acknowledge that, in light of the lack of transactional activities in private funds (as described above such activity may be limited), this SAR number may be entirely appropriate given the limited AML risk posed by private funds, rather than evidence a lack of monitoring for or review of suspicious activities.[37]

Considering these factors, it is important for FinCEN to clarify and acknowledge that Covered IAs' delegation of compliance obligations to offshore administrators, including those that may be based in the Cayman Islands, is permissible and appropriate.

C. Special Standards of Diligence for Correspondent and Private Banking Accounts

The Proposed Rule would require Covered IAs to maintain due diligence programs for correspondent accounts for foreign financial institutions and for private banking accounts that include policies, procedures and controls that are reasonably designed to detect and report any known or suspected money laundering or suspicious activity conducted through or involving such accounts.[38]

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36 *See AML/CFT Strategy*, CAYMAN ISLANDS MONETARY AUTH., *available* here (last visited Mar. 27, 2024).

37 89 Fed. Reg. at 12114, n.67.

38 *Id.* at 12141.

As we discuss above, private fund sponsors have a contractual relationship with the funds they advise, and not investors in those funds. Thus, these requirements would not apply, and be simply inapposite, to the typical private fund structure. MFA accordingly recommends that FinCEN exclude Covered IAs to private funds from these requirements.

D. Risk-Based Approach to Investor Diligence/Intermediaries

In issuing the Proposed Rule, FinCEN calls for the implementation by Covered IAs of risk-based AML/CFT programs.[39] FinCEN also notes that illicit finance risk for private funds may vary with the fund's investment strategy, targeted investors and other characteristics.[40] Regarding this point, FinCEN asks how the Proposed Rule should apply to advisers that manage private funds that receive investments from "in-funds" or funds of funds.[41]

MFA agrees with FinCEN that AML/CFT programs at Covered IAs should be risk-based and that risk-based programs may rely on appropriate vetting of intermediaries and other funds (and not require a "look through" to underlying investors). As part of their regular business, Covered IAs already conduct risk-based diligence on investments by intermediaries acting for underlying investors, including consideration of the identity of the relevant intermediary, its AML record and the AML regime of the jurisdiction in which it operates. Additionally, Covered IAs typically obtain contractual representations, warranties and undertakings related to the intermediary's application of its AML procedures to underlying investors and other matters. Accordingly, MFA respectfully requests that FinCEN acknowledge these approaches in any final rule as permissible for a Covered IA to a private fund, consistent with its risk-based AML/CFT program.

E. AML/CFT Program Governance

1. Requirement That AML/CFT Compliance Officer Be an Officer of the Covered IA or Similar.

The Proposed Rule would require that a Covered IA "[d]esignate a person or persons responsible for implementing and monitoring the operations and internal controls of the [Covered IA's AML/CFT] program."[42] Per the proposing release, "a person designated as a compliance officer should be an officer of Covered IA (or individual of similar authority within the particular corporate structure of the [Covered IA])" and should be someone "who has established channels of communication with senior management demonstrating sufficient independence and access to resources to implement a risk-based and reasonably designed AML/CFT program."[43]

MFA notes that Covered IAs generally have few individuals who hold officer positions and requests that the rule require only that a Covered IA designate as its AML/CFT compliance officer a person

39 *Id.* at 12117.

40 *Id.* at 12126.

41 *Id.* at 12127.

42 *Id.* at 12191.

43 *Id.* at 12127–28.

"competent and knowledgeable regarding applicable [BSA] requirements and money laundering risks" and "empowered with full responsibility and authority to develop and enforce appropriate policies and procedures." We also believe that, in some cases, it may be appropriate for the AML compliance officer to be a third-party expert. Some advisers may not be large enough and have sufficient activity to warrant hiring an AML compliance officer, and any person they might hire may not have sufficient depth of knowledge about AML and financial crimes risks. The efficacy of advisers' AML controls would benefit from being able to draw upon and retain an outsider with greater experience and expertise, and advisers may be able to retain such expertise even if they are associated with a third party.[44] We note that advisers increasingly rely on third parties to perform compliance and surveillance functions, including outsourcing chief compliance or chief investment officer functions, and advisers should similarly be able to outsource the AML compliance officer function, with the adviser of course remaining fully responsible for the overall AML compliance program. MFA thus recommends that any final rule make clear that the Covered IA is permitted to appoint the most suitable AML compliance officer(s) based on its business model and client base, regardless of where the compliance officer is located and regardless of whether the person(s) are employees of the Covered IA.

2. Group/Committee Option for AML/CFT Compliance Oversight.

The Proposed Rule gives Covered IAs the option to designate a single person as the AML/CFT compliance officer or a group of persons, including in a committee, to perform the same function.[45] However, it is not clear whether all members of the group or committee also would be required to be officers or similar of the Covered IAs, as specified above, or whether they would need to be employees of the Covered IA or located in the United States. MFA respectfully requests that the rule incorporate flexibility as to whom a Covered IA may select, including individuals from a third-party service provider or affiliate.

Further, under the Proposed Rule, only persons in the United States who are accessible to and subject to oversight by FinCEN and the SEC could be responsible for establishing and maintaining a Covered IA's AML/CFT program. It is unclear whether multiple persons designated to be responsible for the AML/CFT program would all need to be in the United States. This requirement may be impossible to meet for some RIAs—particularly RIAs and ERAs that are based abroad—given that it would essentially require non-U.S. Covered IAs to employ a person based in the United States exclusively for this purpose, which person may be otherwise disconnected with all the other operations of the adviser. Accordingly, MFA recommends that FinCEN expressly permit non-U.S. persons to participate in AML compliance oversight and, as discussed above, eliminate non-U.S. RIAs and ERAs from the rulemaking.

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[44] *See, e.g.*, Anti-Money Laundering Programs for Insurance Companies, 70 Fed. Reg. 66754, 66759 (Nov. 3, 2005) (stating that "[t]he person or persons should be competent and knowledgeable regarding applicable Bank Secrecy Act requirements and money laundering risks, and should be empowered with full responsibility and authority to develop and enforce appropriate policies and procedures"); Anti-Money Laundering Programs for Operators of a Credit Card System, 67 Fed. Reg. 21121, 21125–26 (April 29, 2002) (noting the same).

[45] 89 Fed. Reg. at 12127.

3. AML/CFT Program Approval

The Proposed Rule would require each Covered IA's AML/CFT program to be approved in writing by the Covered IA's "board of directors or trustees, or if it does not have one, by its sole proprietor, general partner, trustee, or other persons that have functions similar to a board of directors."[46] Covered IAs may not have boards of directors or persons with similar functions. MFA therefore recommends that the rule mirror the requirements applicable to broker-dealers[47] and insurance companies[48] in requiring that the Covered IA's AML/CFT program be approved in writing by the Covered IA's senior management, as such individuals have the requisite level of authority and responsibility within the Covered IA to manage the Covered IA's day-to-day activities.

F. Reporting Obligations for Suspicious Activity

The Proposed Rule would require Covered IAs to report on a SAR any suspicious transaction (or pattern of transactions) "conducted by, at, or through" the Covered IA involving at least $5,000 in funds or other assets and that the Covered IA knows, suspects or has reason to suspect (i) involves funds derived from illegal activities or is intended or conducted to hide or disguise funds or assets derived from illegal activity as part of a plan to violate or evade any federal law or regulation or to avoid any transaction reporting requirement under federal law or regulation; (ii) is designed, whether through structuring or other means, to evade BSA requirements; (iii) has no business or apparent lawful purpose, and the Covered IA knows of no reasonable explanation for the transaction after examining the available facts; or (iv) involves the use of the Covered IA to facilitate criminal activity.[49] Violations that require immediate attention (e.g., suspected terrorist financing or ongoing money laundering schemes) require immediate notification to appropriate law enforcement, in addition to timely filing a SAR.[50]

1. Reporting of Suspicious Activity and Transaction Monitoring.

MFA seeks clarification on the application of the proposed "by, at, or through" language to Covered IAs.[51] It is not accurate that transactions happen "by, at, or through" Covered IAs. As explained above, investors transact with funds, and Covered IAs do not hold and are not the legal owners of investor assets. Additionally, it typically is the fund's administrator, not the Covered IA, that processes subscriptions and redemptions for investors sending money to, or receiving money from, the Fund. The "by, at, or though" language is inapplicable in the private fund context.

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46 *Id.* at 12190.

47 *See* FINRA Rule 3310 ("Each member's anti-money laundering program must be approved, in writing, by a member of senior management.").

48 *See* 31 C.F.R. § 1025.210(a) ("[An insurance company's AML] program must be approved by senior management.").

49 89 Fed. Reg. at 12191.

50 *Id.* at 12191–92.

51 *See* 2015 MFA Comment Letter, *supra* note 6.

It furthermore is imperative that FinCEN limit the scope of the SAR filing obligation to activity involving investors to ensure transaction monitoring is not expected with respect to securities, derivatives and other transactions on behalf of funds.[52]

Additionally, the Proposed Rule would require that a Covered IA "evaluate customer activity and relationships for money laundering, terrorist financing, and other illicit finance risks and design a suspicious transaction monitoring program that is appropriate for the particular [Covered IA] in light of such risks."[53] In the proposal, FinCEN suggests that it expects Covered IAs to average 60 SARs per year—a figure based on SAR filings by dual registrants between 2018 and 2022.[54] In FinCEN's view, dual registrants are the "population of investment advisers most likely to file SARs" and, as such, "best represent an investment adviser subject to SAR filing obligations."[55] MFA believes that this is a strikingly high figure that improperly imputes the SAR volume applicable to one type of Covered IA to advisers operating in the private fund industry. As we note above, the U.S. investment advisory industry is incredibly varied. It does not follow that, simply because dual registrants interact directly with investors and accept and disburse cash and investments directly from investors, all Covered IAs pose the same AML risk as dual registrants. First, given the limited transactional activity that investors have with private funds (as discussed above), it is highly unlikely that advisers to private funds would make that many SAR filings; indeed, MFA submits that private fund advisers may well have fewer than 1/10th that number of SAR filings in any given year. For private fund advisers that manage private credit or other funds holding illiquid investments with multi-year lock-up periods, MFA suggests that the number of SAR filings in any given year would likely be even less. As discussed above, many private fund strategies with years-long lock-up periods are exceedingly unattractive targets for money launderers. In addition, because private funds have limited numbers of transactions with fund investors, there simply is no need for Covered IAs to invest in developing and implementing automated transaction monitoring systems. Such systems would be costly to implement and would not align with investor activity, given the limited transactional activity in the private fund context. MFA respectfully requests that FinCEN clarify its expectations in this regard.

Finally, MFA welcomes and appreciates FinCEN's inclusion of a safe harbor from liability for SAR filings and its application to Covered IAs filing SARs. MFA recommends that the safe harbor be expressly preserved in any final rule adopted by FinCEN.

2. SAR Sharing/Confidentiality.

The Proposed Rule permits SARs to be shared by a Covered IA or any current or former director, officer, employee or agent thereof "within the [Covered IA's] corporate organizational structure for purposes consistent with Title II of the BSA as determined by regulation or guidance."[56] MFA recommends that FinCEN allow Covered IAs to share SAR information with (1) affiliates; (2) the directors and officers of

52 *See id.*

53 *Id.* at 12131.

54 *Id.* at 12156.

55 *Id.* at 12156 n.299.

56 *Id.* at 12192.

the funds managed by the Covered IA; and (3) the funds' administrator(s) on the basis that the information contained in the SAR would be clearly important for an affiliate with its own relationship with an investor or for the board of directors of a fund managed by the Covered IA and the fund's officers and service providers to ensure appropriate monitoring and ongoing investor diligence.

3. Delegation of SAR Filing Obligation.

FinCEN appears to acknowledge in the Proposed Rule that a Covered IA may delegate its SAR filing obligations to an agent or a third-party service provider.[57] As noted above, these offshore administrators may handle investor subscriptions and redemptions and be best positioned to spot suspicious activities, and therefore best positioned to determine whether a SAR should be filed. However, the parameters for such a delegation are not specified. MFA recommends that FinCEN allow Covered IAs to delegate the SAR filing obligation to offshore administrators, agents, or service providers.

Additionally, when these administrators are based and/or organized outside of the United States, they may already be subject to SAR or similar obligations under their home country AML/CFT laws and/or regulations. MFA therefore recommends that, in such cases, FinCEN not require a U.S. SAR filing. A requirement that a SAR be filed by an off-shore administrator (often handling investments into and out of an off-shore fund) is apt to create conflicts of law and run afoul of data privacy restrictions on sharing certain types of information across borders.

G. Recordkeeping and Travel Rules

The Proposed Rule would subject Covered IAs to the BSA's Recordkeeping and Travel Rules.[58] However, generally, Covered IAs do not receive funds from, or send funds to, investors and do not hold investors' funds. Rather, this activity typically runs through a qualified custodian already subject to BSA obligations, including the Recordkeeping and Travel Rules.

Additionally, investor redemptions are rarely sent to third parties, and banks that are already subject to the BSA's Recordkeeping and Travel Rules are involved in any funds transfers. Further, the requirements under the BSA's Recordkeeping and Travel Rules do not apply to all financial institutions that fall under the BSA's scope.[59] Accordingly, MFA recommends that Covered IAs be excluded from these requirements. If compliance is required, MFA recommends that FinCEN issue guidance on how to implement these requirements in the private fund context.

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[57] *See id.* at 12125 ("Similarly, if an investment adviser delegates the responsibility for suspicious activity reporting to an agent or a third-party service provider, the adviser remains responsible for its compliance with the requirement to report suspicious activity, including the requirement to maintain SAR confidentiality.").

[58] *Id.* at 12120.

[59] For example, transmittals of funds where the transmitter and the recipient are a bank, a wholly owned domestic subsidiary of a bank chartered in the United States, a broker-dealer, a wholly owned domestic subsidiary of a broker-dealer, a futures commission merchant or an introducing broker in commodities, a wholly owned domestic subsidiary of a futures commission merchant or an introducing broker in commodities, the United States, a state or local government; or a Federal, State or local government agency or instrumentality; or a mutual fund are not subject to the Recordkeeping and Travel Rules. 31 C.F.R. 1010.410(e)(6).

H. CTR Filing Obligations

FinCEN seeks comment on the accuracy of its estimate that since all investment advisers are required to report transactions in currency over $10,000 on Form 8300, the incremental cost for Covered IAs to use the CTR would be *de minimis*. Covered IAs in the private fund industry rarely—if ever—receive currency from, or disburse currency to, investors, thus rendering compliance with the CTR filing requirement not materially different from complying with the Form 8300 requirement (i.e., minimal to no filings in either case). Accordingly, MFA requests that Covered IAs be excluded from the CTR requirement to the extent the Covered IA prohibits the direct receipt of cash.

I. Section 314 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("USA PATRIOT Act")

FinCEN seeks comment on whether the Proposed Rule should apply the special information sharing procedures under 31 C.F.R. 1010.520 and 1010.540 implementing Sections 314(a) and 314(b) of the USA PATRIOT Act[60] to investment advisers.

MFA continues to endorse the application of Section 314(b) of the USA PATRIOT Act to RIAs, to enable them to share information with other financial institutions under a safe harbor from liability to better identify and report potential money laundering or terrorist activities.[61] MFA generally takes the same position with respect to the Proposed Rule. MFA also seeks clarity on how Section 314(a) would work in the case of investors in offshore funds that do not otherwise touch the U.S. Specifically, MFA seeks confirmation that the Covered IA would not be directly responsible for reviewing underlying investors in funds because the Covered IA has effectively delegated this function to the administrator.

1. Direct Requests of Fund Administrators.

As noted above, fund administrators frequently implement AML/CFT procedures and controls on behalf of private funds. MFA accordingly requests that FinCEN clarify that a Covered IA may send Section 314(a) requests to the fund's administrator, even if that administrator is based in a foreign jurisdiction, assuming a confidentiality agreement is in place.

2. Information to Be Requested.

Given that Covered IAs do not engage in transactions with investors, and that investors are not their clients, MFA requests that FinCEN clarify what information would be requested of the Covered IA when FinCEN makes a Section 314(a) request (since Section 314(a) requests are predominantly focused on client account information and funds transfers).

To this end, FinCEN should clarify its expectations regarding investors in non-U.S. funds. Such investors may be investing an off-shore fund and dealing with the fund's non-U.S. administrator, which will

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60 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 314(a) and (b), 115 Stat. 307, (2001) (codified at 31 U.S.C. § 5311(a) and (b)).

61 2015 MFA Comment Letter, *supra* note 6.

process the investor's subscription/redemption into and out of the fund. Application of Section 314(a) in this context, as with SARs, raises cross-border and jurisdictional issues that FinCEN needs to address before finalizing this requirement.

J. Delegation of Examination Authority to the SEC

The Proposed Rule delegates to the SEC examination authority over a Covered IA's compliance with the rule's requirements.[62] While this delegation of authority is expected, MFA respectfully requests that FinCEN require the SEC to publish its relevant AML examination manual. It should do so just as the Federal Financial Institutions Examination Council ("FFIEC")'s BSA/AML examination manual used by the federal banking agencies is publicly available.[63] The SEC's investment adviser examination staff has limited experience examining for AML/CFT issues and, given the diversity of the investment adviser community, the efficacy of the SEC's examination program could benefit heavily from public input. Moreover, Covered IAs would gain a much better sense of the SEC's expectations regarding AML/CFT programs generally and would be able to design more effective programs.

K. Compliance Date

The Proposed Rule would require a Covered IA to develop and implement a compliant AML/CFT program no later than 12 months after the effective date of the final rule.[64] The Proposed Rule also would require that Covered IAs designate an AML compliance officer and also train relevant personnel on the final rule's requirements before they go into effect.

For many Covered IAs, implementation of a new rule will require new and updated systems, additional compliance staffing and close coordination with other parties, including fund administrators. The Proposed Rule would affect over 20,000 Covered IAs—including many of the smaller ones, which may not currently have AML compliance officers. It will thus take Covered IAs some time to hire and train such officers before they are required to be in compliance with the rule.

We also note that of the 20,000-plus Covered IAs, virtually all of them have custodial, prime brokerage, trading, administrator, and financial institution agreements that would require amendment to bring them into compliance with any rule FinCEN adopts. There exist relatively few custodians, prime brokers, trading counterparties, and fund administrators that are responsible for revising all of these agreements on behalf of the entire universe of registered advisers. In short, the contract amendment process itself will take considerable time, due to no fault of the Covered IAs.

Finally, a final version of the Outsourcing Proposal is currently expected in the second quarter of 2024.[65] As discussed above, some of the requirements of a finalized Outsourcing Proposal may have implications for a final version of the Proposed Rule. In connection with both a finalized Outsourcing

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62 *Id.* at 12119.

63 *See BSA/AML Examination Manual*, FFIEC BSA/AML INFOBASE, *available* here (last visited Mar. 12, 2024).

64 89 Fed. Reg. at 12191.

65 *See Outsourcing by Investment Advisers*, OFF. INFO. AND REGUL. AFFS. OFF. OF MGMT. AND BUDGET, *available* here (last visited Mar. 12, 2024).

Proposal and a final version of the Proposed Rule, Covered IAs will need to amend their contracts with counterparties, banks, custodians, administrators and others. Each of these contractual parties will require considerable time to work through the amendment process, as each may have thousands of agreements to revise given the number of advisers and the limited number of counterparties, banks, custodians, administrators and others. This will be a time-consuming and laborious process, with much of it out of the control of the Covered IA as to timing. Accordingly, it is important that FinCEN work with the SEC to coordinate the compliance date(s) of the finalized Outsourcing Proposal with any final Proposed Rule that FinCEN ultimately adopts.

As stated above, MFA respectfully encourages FinCEN to re-propose rules regarding AML/CFT programs for Covered IAs that considers the gaps and clarifications identified herein. Our comments herein are also subject to reconsideration based upon the impending joint FinCEN/SEC CIP Proposal. MFA's comments herein may change, depending on the CIP proposal. However, if FinCEN proceeds to finalization of the Proposed Rule without a re-proposal, MFA suggests that the compliance date be extended to a date that is at least 24 months after the issuance of a final rule considering the factors identified in this section and aligned with the compliance date of any adopted CIP Proposal.

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MFA reiterates its strong support FinCEN's goals of combatting money laundering, terrorist financing, and other illicit financial activity and has long supported FinCEN's AML rulemaking efforts related to investment advisers. We appreciate the opportunity to provide these comments to FinCEN in response to the Proposed Rule. If you have any questions about these comments, or if we can provide further information, please do not hesitate to contact Jeff Himstreet (jhimstreet@mfaalts.org) or the undersigned (jhan@mfaalts.org).

Respectfully submitted,

/s/ Jennifer W. Han

Jennifer W. Han

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