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Policy Division
Financial Crimes Enforcement Network
Department of the Treasury
P.O. Box 39
Vienna, VA 22183
Attn: Director Jennifer Shasky Calvery

Re: Customer Due Diligence Requirements for Financial Institutions
RIN 1506-AB25
Docket Number FinCEN-2014-0001

Dear Director Shasky Calvery:

The Securities Industry and Financial Markets Association ("SIFMA") and its Anti-Money Laundering and Financial Crimes Committee[1] appreciate the opportunity to comment on the above-referenced proposal of the Financial Crimes Enforcement Network ("FinCEN") regarding customer due diligence ("CDD") requirements for financial institutions (the "NPRM" or the "Proposal").[2]

SIFMA strongly supports FinCEN's goals of creating greater transparency and safeguarding the financial system against illicit use. We appreciate FinCEN's extensive efforts to engage the financial industry on the topic of customer due diligence as a means to facilitate these goals and to address many of the concerns that commenters raised in response to the 2012 advance notice of proposed rulemaking

[1] SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit http://www.sifma.org. SIFMA's Anti-Money Laundering and Financial Crimes Committee comprises a broad range of member firms, including global, regional and small securities firms, as well as firms engaged in the institutional, retail, clearing and online segments.

[2] Customer Due Diligence Requirements for Financial Institutions, 79 Fed. Reg. 45,151 (proposed Aug. 4, 2014).

("ANPRM") regarding CDD requirements.[3] We remain committed to continuing our dialogue with FinCEN on this topic and welcome this opportunity to provide input.

FinCEN has identified four key elements of CDD: (i) identifying and verifying the identity of customers; (ii) identifying and verifying the identity of beneficial owners of legal entity customers; (iii) understanding the nature and purpose of customer relationships; and (iv) conducting ongoing monitoring to maintain and update customer information and to identify and report suspicious transactions.[4] FinCEN has stated that the first element of CDD is already satisfied by existing customer identification program ("CIP") requirements,[5] and has further expressed the view that only the second element (identifying and verifying the identity of beneficial owners) would impose new regulatory obligations.[6]

We greatly appreciate FinCEN's clarification regarding the first element of CDD and FinCEN's revisions to the proposed beneficial ownership requirement. With respect to the proposed third and fourth elements of CDD, we respectfully submit that certain aspects of these elements appear likely to impose substantial additional obligations on the securities industry without furthering the stated goals of the Proposal.

We provide specific comments regarding the second, third and fourth proposed CDD elements in turn below. In addition, we address the proposed effective date and request that it be at least 24 months from the date of adoption for the second, third and fourth elements of CDD. We also address the future status of previously issued beneficial ownership guidance and request new guidance specific to our industry.[7]

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[3] Customer Due Diligence Requirements for Financial Institutions, 77 Fed. Reg. 13,046 (proposed Mar. 5, 2012).

[4] NPRM at 45,152.

[5] *E.g.*, 31 C.F.R. § 1023.220 (2014) (customer identification programs for broker-dealers) (the "CIP Rule").

[6] NPRM at 45,155-56; 45,156 ("FinCEN believes that the beneficial ownership requirement is the only new requirement imposed by this rulemaking.").

[7] *See* Joint Guidance on Obtaining and Retaining Beneficial Ownership Information, FIN-2010-G001 (Mar. 5, 2010) (the "Joint Guidance").

I. Beneficial Ownership

A. The Definition of "Legal Entity Customer" Should Be Clarified in Certain Respects, and the Proposed Exemptions Should Be Expanded

1. FinCEN should clarify the meaning of "other similar business entity"

FinCEN proposes to require covered financial institutions to establish and maintain written procedures that are reasonably designed to identify and verify the beneficial owners of legal entity customers. FinCEN proposes to define the term "legal entity customer" for purposes of the proposed requirement as "[a] corporation, limited liability company, partnership or other similar business entity (whether formed under the laws of a state or of the United States or a foreign jurisdiction) that opens a new account" after the effective date of the beneficial ownership requirement.[8]

With respect to this definition, we request that FinCEN clarify the meaning of the phrase "other similar business entity." In particular, it would be helpful if FinCEN could provide examples of business entities other than those already listed in the proposed definition (i.e., corporations, limited liability companies, and partnerships) that would constitute "similar business entities" for purposes of the proposed rule. Examples could be used by financial institutions as they train personnel on CDD requirements, and any additional information that FinCEN makes available concerning the scope of the rules would better enable operations, legal, and risk personnel to administer their anti-money laundering programs.

2. FinCEN should explicitly exclude certain trusts from the definition of "legal entity customer"

FinCEN indicates in the Proposal that the definition of "legal entity customer" would exclude "trusts other than those that might be created through a filing with a state (e.g., statutory business trusts)."[9] We support this exclusion for the reasons described in the NPRM, but note that the exclusion for trusts is not included in the text of the proposed rule. We request that FinCEN make the exclusion for trusts clear in the text of any

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[8] *See* NPRM at 45,170 (proposed 31 C.F.R. § 1010.230(d)(1)).

[9] *Id.* at 45,159.

final rules adopted pursuant to this rulemaking, in order to promote consistent regulatory expectations and facilitate financial institutions' compliance with the rule.

3. FinCEN should exempt certain non-U.S. entities, financial institutions and governmental organizations from the definition of "legal entity customer"

SIFMA appreciates that FinCEN has offered exemptions and exclusions from the definition of "legal entity customer." For example, FinCEN proposes to exempt from the beneficial ownership requirement those types of entities, such as publicly held companies listed on certain U.S. stock exchanges, that are exempt from CIP requirements under the CIP Rule. Under section 1010.230(d)(2) of the proposed rule, FinCEN would also exempt certain other entities, such as those registered with the U.S. Securities and Exchange Commission ("SEC") under the Securities Exchange Act of 1934, that are not currently exempt under the CIP Rule. We note, however, that the proposed exemptions are limited to U.S. entities and entities subject to specified U.S. laws.[10] For the reasons described below, we believe FinCEN should also exempt non-U.S. entities that are publicly traded, foreign financial institutions that are already addressed by other FinCEN rules and regulations, and certain non-U.S. government agencies, non-U.S. state-owned enterprises, and supranational organizations.

a) FinCEN should broaden the exemptions from the beneficial ownership requirement to cover "publicly traded" non-U.S. entities

As noted above, under the Proposal, various types of entities registered with the SEC would be exempt from the "legal entity customer" definition, and therefore from the beneficial ownership requirement.[11] The justification for exempting these U.S. entities from the beneficial ownership requirement of the proposed CDD rule is that "their beneficial ownership information is generally available from other credible sources."[12]

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10 *See, e.g., id*. at 45,170 (proposed 31 C.F.R. § 1010.230(d)(2)(iii) ("An issuer of a class of securities registered under section 12 of the Securities Exchange Act of 1934 or that is required to file reports under section 15(d) of that Act"); proposed 31 C.F.R. § 1010.230(d)(2)(iv) ("An investment company, as defined in section 3 of the Investment Company Act of 1940, that is registered with the Securities and Exchange Commission under that Act")).

11 *See id*. at 45,159.

12 *Id.*

Recognizing that certain non-U.S. stock exchanges also have the potential to provide credible beneficial ownership information about their listed companies, we propose that FinCEN add to the list of exemptions "publicly traded"[13] companies listed on certain non-U.S. stock exchanges, in countries that have regulatory regimes comparable to the U.S. regime.

Comparable regulatory regimes could be those whose securities regulators are members of the International Organization of Securities Commissions ("IOSCO") and/or those that are members of the Financial Action Task Force ("FATF"). IOSCO is an international body that seeks to develop, implement, and promote adherence to internationally recognized standards for securities regulation, oversight, and enforcement in order to protect investors, maintain fair, efficient and transparent markets, and seek to address systemic risks, while FATF is a multilateral body dedicated to setting standards and promoting effective implementation of legal, regulatory, and operational measures for combating money laundering, terrorist financing and related threats to the integrity of the international financial system. The United States is one of 36 FATF members, and the SEC and U.S. Commodity Futures Trading Commission are members of IOSCO.

Alternatively, if non-U.S. publicly traded companies are not excluded from the "legal entity customer" definition, we strongly urge FinCEN to adopt an approach whereby covered financial institutions would be required to obtain beneficial ownership information for such companies under the control prong only of the beneficial owner definition. As with publicly traded companies listed in the United States, ownership of non-U.S. publicly traded companies may change rapidly, making it difficult to identify beneficial owners under the ownership prong of the beneficial owner definition. It could also be difficult to obtain identifying information such as date of birth and passport number for individuals who own 25 percent or more of a non-U.S. publicly traded company, as the company itself may not have or be able to obtain such information.

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[13] *See* 31 C.F.R. § 1010.610(b)(3) (2014), which requires covered financial institutions to determine the identity of each owner and the nature and extent of each owner's ownership interest for any foreign bank with a correspondent account whose shares are not publicly traded. For this purpose, the regulations define "publicly traded" to mean "shares that are traded on an exchange or organized over-the-counter market that is regulated by a foreign securities authority as defined in section 3(a)(50) of the Securities Exchange Act of 1934." *See also* 15 U.S.C. § 78c(a)(50) (2014) ("The term 'foreign securities authority' means any foreign government, or any governmental body or regulatory organization empowered by a foreign government to administer or enforce its laws as they relate to securities matters.").

b) FinCEN should broaden the exemptions from the beneficial ownership requirement to cover foreign financial institutions that are addressed by other FinCEN requirements

Section 313 of the USA PATRIOT Act[14] requires covered financial institutions to keep records of the owners of certain non-U.S. banks whose shares are not publicly traded and of their authorized agents for service of process. Separately, Section 312 of the USA PATRIOT Act[15] requires covered financial institutions to establish specified due diligence and enhanced due diligence programs for foreign financial institutions and their correspondent accounts, to include, among other things, assessments of the nature of the foreign financial institutions' businesses and markets, the anti-money laundering and supervisory regime of their jurisdictions, and their anti-money laundering records. Through these provisions and their implementing regulations, Congress and FinCEN have already considered the risk posed by foreign financial institutions and specified the steps that covered financial institutions must take to address that risk. SIFMA believes that Sections 312 and 313 and their implementing regulations strike an appropriate balance between the burden to the financial industry and the promotion of financial transparency, and we therefore request that FinCEN include an exemption from the beneficial ownership requirement for any "foreign financial institution"[16] and "foreign bank"[17] with respect to which compliance with the requirements of Sections 312 and 313 is already required.[18]

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14 *See* USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 313, 115 Stat. 272, 306 and its implementing regulation, 31 C.F.R. § 1010.630.

15 *See* USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 312, 115 Stat. 272, 304 and its implementing regulation, 31 C.F.R. § 1010.610.

16 *See* 31 C.F.R. § 1010.605(f) (2014).

17 *See* 31 C.F.R. § 1010.100(u) (2014).

18 We note that FinCEN has already provided for this type of treatment with respect to one aspect of the Section 312 requirements, concerning enhanced due diligence for certain foreign banks with payable-through accounts. *See* NPRM at 45,158-59 ("[T]he new [beneficial ownership] requirements would not apply to the beneficial owner of funds or assets in a payable-through account of the type described in [31 C.F.R.] § 1010.610(b)(1)(iii) . . . . In such instances, compliance with the information requirements included in § 1010.610(b)(1)(iii) will suffice, and the particulars of this new requirement, such as use of a certification form with respect to the beneficial owner of funds or assets in a payable-through account, would not apply.").

c) FinCEN should broaden the exemptions from the beneficial ownership requirement to cover certain non-U.S. government agencies, non-U.S. state-owned enterprises, and supranational organizations

The proposed rule would also exclude from the definition of "legal entity customer":

> (i) a department or agency of the United States, of any State, or of any political subdivision of any State; and
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> (ii) any entity established under the laws of the United States, of any State, or of any political subdivision of any State, or under an interstate compact between two or more States, that exercises governmental authority on behalf of the United States or any such State or political subdivision.[19]

SIFMA believes this type of exemption should be extended to certain departments, agencies, and political subdivisions of non-U.S. governments, as well as to non-U.S. state-owned enterprises and supranational organizations, such as the World Bank and European Union, that are not otherwise viewed as high risk by financial institutions. None of these entities would have beneficial owners under the ownership prong of the proposed beneficial owner definition, and obtaining passport numbers or comparable identification numbers from control persons of such entities would be extremely difficult. Among other reasons, covered U.S. financial institutions might not have a direct relationship with such control persons, and the control persons may be located overseas.

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[19] *See* 31 C.F.R. §1020.315(b)(2) and (3) (2014); NPRM at 45,170 (proposed 31 C.F.R. § 1010.230(d)(2)(ii) (exempting from the "legal entity customer" definition those persons described in 31 C.F.R. § 1020.315(b)(2) through (5))).

4. FinCEN should confirm the applicability of exemptions in the context of intermediated relationships

SIFMA greatly appreciates FinCEN's clarification that existing guidance would continue to apply. With respect to intermediated relationships, we note there may be situations in which existing guidance[20] would not apply and financial institutions would therefore be required to apply both CIP and the proposed beneficial ownership requirement to an intermediary's underlying clients. In these situations, we request that FinCEN confirm that any exemption available in the context of a direct customer relationship with a legal entity would similarly be available with respect to the intermediary's underlying clients.

B. FinCEN Should Clarify the Applicability of Existing Exemptions for Certain "Accounts" and Should Add an Exemption for Other Retirement Accounts

The beneficial ownership requirement under the proposed rule would be triggered when a specified "legal entity customer" opens a "new *account*," yet the Proposal does not define the term "account" or address how existing definitions of the term may apply in the CDD context. Under existing FinCEN rules, "account" for purposes of CIP is defined to exclude:

> (i) An account that the [financial institution] acquires through any acquisition, merger, purchase of assets, or assumption of liabilities; and
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> (ii) An account opened for the purpose of participating in an employee benefit plan established under the Employee Retirement Income Security Act of 1974 [("ERISA")].[21]

We request that the final rules clarify that the existing definition of "account," including the above exclusions for acquired accounts and ERISA accounts, would

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[20] *See* Guidance from the Staffs of the Department of the Treasury and the U.S. Securities and Exchange Commission, Question and Answer Regarding the Broker-Dealer Customer Identification Program Rule (31 CFR 103.122) (October 1, 2003), *available at* http://www.fincen.gov/statutes_regs/guidance/html/20031001.html.

[21] *See, e.g.*, 31 C.F.R. § 1023.100(a)(2) (2014) (definitions applicable to FinCEN's rules for brokers or dealers in securities).

apply in the context of the new beneficial ownership requirement. Thus, legal entity customers opening new ERISA accounts or whose accounts are acquired in a merger or other relevant transaction would not be subject to the proposed beneficial ownership requirement. "Account" is currently defined in the general definitions sections of the relevant parts of FinCEN's regulations,[22] and thus would seem to apply for purposes of the proposed rules, but it would be helpful for FinCEN to clarify the applicability of the definition of the term "account" in the final rules.

Furthermore, we note that the exemption for ERISA accounts is based on recognition that such accounts present low risk of money laundering.[23] Under the same logic, we request that FinCEN consider broadening the ERISA exemption to other retirement plans that, like ERISA plans, present a similarly low risk profile.[24] Such plans might include public pension funds (*e.g.*, those of federal, state, and local governments and agencies) and labor union pension plans.

C. The Final Beneficial Ownership Rule Should Apply Only to New Accounts

FinCEN has requested comment on whether it should extend the proposed requirement that covered financial institutions collect beneficial ownership information to apply retroactively to legal entity accounts established before the implementation date of the final rule.[25] SIFMA strongly urges FinCEN not to adopt such an extension. Extending

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22 *See, e.g.*, 31 C.F.R. § 1023.100(a) (2014) (definitions applicable to FinCEN's rules for brokers or dealers in securities), 31 C.F.R. § 1024.100(a) (2014) (definitions applicable to FinCEN's rules for mutual funds).

23 *See* Customer Identification Programs for Broker-Dealers, 68 Fed. Reg. 25,113, 25,115 (May 9, 2003) ("These [ERISA-governed] accounts are less susceptible to be used for the financing of terrorism and money laundering because, among other reasons, they are funded through payroll deductions in connection with employment plans that must comply with federal regulations.").

24 Because retirement funds do not accept cash, they are of little use in the placement stage of money laundering. Nor are retirement funds useful in the layering stage because they are not liquid and typically are bound by statutory contribution and withdrawal limits. Participants also have limited ability to change investments, which are chosen by trustees, so there is little risk of manipulation. We believe the primary money laundering risk with respect to retirement funds is at the integration stage, where the company setting up the retirement fund is a bad actor. Applying the proposed beneficial ownership rule to the fund itself would not mitigate this risk.

25 NPRM at 45,166-67.

the rule in this way would effectively require covered financial institutions to conduct a look-back to determine the beneficial ownership of all of their existing legal entity customers. Such a look-back would be costly and time-consuming, especially for financial institutions with large numbers of existing legal entity customers. Rather, we agree with FinCEN's current proposal to require the identification of beneficial owners only for legal entity customers that open new accounts. This would allow financial institutions with longstanding customer relationships to rely on the history of those relationships, while still having the option to identify beneficial ownership on a risk basis when events, such as the detection of suspicious activity, make this approach prudent.

D. Covered Financial Institutions Should Be Required to Identify Beneficial Owners of Pooled Investment Vehicles under the Control Prong Only

In the NPRM, FinCEN recognizes the challenge of obtaining beneficial ownership information for pooled investment vehicles, such as hedge funds. In response to FinCEN's request for comment on this issue, SIFMA urges FinCEN to adopt a requirement that, for pooled investment vehicles, financial institutions collect beneficial ownership information *only* under the control prong of the beneficial ownership test. As FinCEN acknowledges in the NPRM, ownership of hedge funds and other pooled investment vehicles "may continuously fluctuate."[26] In addition, investors in this type of vehicle typically do not make investment decisions for the vehicle itself, and they are held to the investments outlined in the offering memorandum or prospectus. Moreover, they typically exercise no control over the day-to-day operations of the investment vehicle. Accordingly, it would be burdensome and of little value for covered financial institutions to attempt to identify beneficial owners of these customers under the ownership prong. To the extent that pooled investment vehicles are made subject to the proposed beneficial ownership requirement, we urge FinCEN to make clear that pooled investment vehicles would have to identify beneficial owners under the control prong only.

Furthermore, owing to the importance of this issue to the securities industry, we strongly urge FinCEN to include this clarification in the final rule – rather than in subsequent guidance – because it would be a key element of securities firms' compliance efforts and will affect the design of their programs under the new requirements. We also request that FinCEN clarify that this treatment would also

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[26] *Id.* at 45,161.

apply to pooled investment vehicles other than hedge funds (*e.g.*, non-U.S. mutual funds, private equity funds, and retirement funds not otherwise exempted from the beneficial ownership requirements).

E. Proposed Certification Form

1. The certification form should be accepted in electronic format

SIFMA supports the clarity and objectivity that a certification process may provide. In addition, however, SIFMA believes that firms should have flexibility to obtain the required beneficial ownership information in a way that allows their particular businesses to meet CDD requirements. For example, online brokerages and firms that open accounts for non-U.S. entities should have the option of allowing their customers to complete and sign the beneficial ownership certification form digitally, as the customers are not physically present at account opening. We therefore suggest that FinCEN make clear that a physically signed form is not required for compliance with the new beneficial ownership element of the proposed rule.

2. FinCEN should provide a safe harbor to financial institutions that use the model certification form and should expressly permit other means of obtaining substantially the same information

Because there is currently no reliable way for financial institutions to verify an individual's status as a beneficial owner, financial institutions will have to rely on the information that their customers provide on beneficial ownership certification forms. In order to facilitate such reliance, FinCEN should provide a safe harbor, similar to that provided for foreign bank certifications, to financial institutions that use any model certification that is adopted as part of the final rule. With respect to foreign bank certifications, FinCEN's rules explicitly provide that a covered financial institution "will be deemed to be in compliance" if it obtains the certification or recertification form prescribed by the rule.[27]

In addition, institutions should be allowed to use forms substantially similar to the model certification or to incorporate the required information from the certification

[27] *See* 31 C.F.R. § 1010.630(b) (2014) (providing safe harbor to financial institutions that obtain, at least once every three years, a foreign bank certification).

form into their existing account opening processes and documentation. This approach would allow financial institutions to have confidence that they are in compliance with the proposed beneficial ownership rule if they use the model certification, but would also give firms the flexibility to use their own processes and forms that capture substantially the same information as that required under the proposed rule, as well as other information that could be useful to their firms.

3. Address requirements should comport with CIP

Under the CIP Rule, an individual customer who has a residential or street address must provide that residential or street address rather than a post office box, under most circumstances.[28] In contrast, the Proposal, despite its many references to CIP requirements, does not specify whether a legal entity customer must provide an address that meets the CIP requirements when filling out the beneficial ownership certification form. That form requires only an "address," but does not define the term "address" or refer to the address requirements in the CIP Rule.

This has the potential to lead to confusion if examiners interpret the beneficial ownership rule to require street addresses on the beneficial ownership certification form, even though the language of the NPRM, as currently written, would seem to permit post office boxes.[29] We request that FinCEN clarify whether it intends to apply the same standard as CIP with respect to the address information that financial institutions would be required to collect under the new beneficial ownership rule. If FinCEN intends to apply the same standard, we request that FinCEN revise the certification form accordingly.

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[28] *See, e.g.*, 31 C.F.R. § 1023.220(a)(2)(i)(A)(3) (2014). *But see* FinCEN, *Customer Identification Program Rule – Address Confidentiality Programs*, FIN-2009-R003 (Nov. 3, 2009) (carving out an exception for customers participating in an address confidentiality program).

[29] The word "address" is not defined in the body of the NPRM, in the model certification at Appendix A of the NPRM, or in the general definitions in Title 31 of the *Code of Federal Regulations*.

II. Understanding the Nature and Purpose of Customer Relationships

A. FinCEN Should Clarify that It Does Not Intend to Require Institutions to Gather Additional Information Regarding "Nature and Purpose" Beyond the Information They Currently Gather

FinCEN has proposed amending existing anti-money laundering program rules to require covered financial institutions to include in their anti-money laundering programs risk-based procedures for conducting ongoing customer due diligence, to include "[u]nderstanding the nature and purpose of customer relationships for the purpose of developing a customer risk profile."[30] In the NPRM, FinCEN notes its understanding that "it is industry practice to gain an understanding of a customer in order to assess the risk associated with that customer to help inform when the customer's activity might be considered 'suspicious.'"[31]

FinCEN also states in the NPRM that the proposed third element would not necessarily require modifications to existing practices or customer onboarding procedures, and would not require financial institutions to ask customers about the nature and purpose of their relationships or to collect information that is not already collected.[32] FinCEN recognizes, moreover, that "inherent information about a customer relationship, such as the type of customer, the type of account opened, or the service or product offered, may be sufficient to understand the nature and purpose of the relationship."[33] With respect to the customers of securities firms, FinCEN specifically recognizes that "expected activity can vary significantly over time based on numerous factors, and that prior transaction history or information obtained from the client upon account opening may not be a reliable indicator of future conduct."[34] We appreciate this discussion in the NPRM and request that FinCEN confirm these understandings in the final CDD

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30 *See, e.g.*, NPRM at 45,173 (proposed 31 C.F.R. § 1023.210(b)(5)(i) (rules for brokers or dealers in securities)).

31 *Id*. at 45,163.

32 *Id*.

33 *Id.*

34 *Id*. Indeed, unlike traditional banking activity, a customer's volume and frequency of securities trading may fluctuate significantly based on external news, investor sentiment, or other market dynamics, and institutional clients may decide to change the amount of business they give to one securities firm over another based on the quality of trade executions or other factors.

rules. In particular, we request that FinCEN modify the proposed rule text to make clear that understanding the nature and purpose of customer relationships may take different forms depending on the facts and circumstances unique to each financial institution and its customers.[35] We believe this modification would enable effective risk-based implementation of CDD regulatory expectations.

Furthermore, we urge FinCEN to clarify the statement that the proposed third element of CDD is an essential step in the process of identifying suspicious activity.[36] Transaction monitoring methodologies in securities firms take many different forms depending on the typology of suspicious activity that the monitoring is designed to identify. For example, surveillance systems designed to identify market manipulation (such as marking the open, marking the close, spoofing, and others) may require little or no customer information to identify manipulation; rather, the surveillance systems are designed to identify known characteristics associated with the suspicious behavior irrespective of customer information. Surveillance systems designed to monitor money movements may use limited customer information to help identify potential suspicious behavior; such information would generally be broad-based (such as the type of the customer) in order to target surveillance on particular customer behaviors or to establish peer groups for monitoring purposes. Additionally, as noted in the NPRM, long-standing customers of financial institutions may have a robust history of activity that could be relevant in understanding future expected activity for purposes of monitoring and identifying aberrational activity.

For these reasons, and consistent with the risk-based approach that is proposed to be expressly set out in the fifth pillar,[37] we strongly urge FinCEN to provide in the final rules that "nature and purpose" information is not required to be used for transaction monitoring purposes. We believe that to do otherwise would impose substantial additional obligations on the securities industry without furthering the stated goals of the Proposal.

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35 *See id*. at 45,163 (recognizing that "nature and purpose" information will in each case depend on "the facts and circumstances unique to the financial institution and its customers").

36 *Id*.

37 *See, e.g., id*. at 45,173 (proposed 31 C.F.R. § 1023.210(b)(5) (requiring "[a]ppropriate risk-based procedures for conducting ongoing customer due diligence, to include" the proposed third and fourth elements of CDD) (rules for brokers or dealers in securities)).

B. FinCEN Should Clarify What It Means by the Term "Customer Risk Profile"

As noted above, the proposed third element of CDD would require firms to "[u]nderstand[] the nature and purpose of customer relationships *for the purpose of developing a customer risk profile*."[38] Securities firms have policies and procedures in place to assess the risks posed by different customers or categories of customers, and have a long-standing practice of assessing customer risk. However, there is not a common approach to these assessments across firms in the industry, and it is not clear from the NPRM what FinCEN expects with respect to a "customer risk profile." We therefore strongly urge FinCEN to define this term. If FinCEN is proposing to impose a new requirement for a "customer risk profile," as that term may be defined by FinCEN, we believe it would make sense to adopt a risk-based approach and would welcome the opportunity to engage in a dialogue with FinCEN to understand the expectations and appropriately tailor the requirement to the securities industry.

III. Ongoing Monitoring to Maintain and Update Customer Information and to Identify and Report Suspicious Transactions

The fourth element of the proposed CDD requirements has two aspects. The first is a requirement to conduct ongoing monitoring for the purpose of maintaining and updating customer information. The second is a requirement to conduct ongoing monitoring for the purpose of identifying and reporting suspicious activity. We understand that the latter would simply codify in FinCEN's anti-money laundering program regulations the existing obligation of covered financial institutions to conduct monitoring in support of their suspicious activity reporting obligation. However, there is currently no requirement for securities firms to monitor for changes to customer information. Nor is there a requirement for firms to periodically refresh or update information obtained at account opening. Therefore, any requirement to conduct ongoing monitoring for the purposes of maintaining and updating customer information would be a new requirement.

We ask that FinCEN modify this element of the proposed AML program rule to read "Conducting ongoing monitoring to identify and report suspicious transactions," so as not to require financial institutions to conduct ongoing monitoring to maintain and update customer information and to ensure consistency in implementing and enforcing

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[38] *See, e.g., id.* (proposed 31 C.F.R. § 1023.210(b)(5)(i) (emphasis added) (rules for brokers or dealers in securities)).

CDD regulatory expectations. If FinCEN declines to do so, we would appreciate the opportunity to discuss with FinCEN the expectations for updating customer information through ongoing monitoring so we can ensure they are appropriate for our industry and can comply accordingly.

IV. Other Comments

A. FinCEN Should Provide Adequate Time for Implementation

The new requirements to obtain beneficial ownership information for legal entity customers at account opening and verify that information will impose significant costs on financial institutions in the form of updates to documentation and training, system modifications to feed the beneficial ownership information to verification vendors, increases to storage capacity for retaining additional information, systems testing, and other implementation actions. In addition, beyond the time and expense that will be involved in implementing the necessary changes to *collect* beneficial ownership information, it will be costly and time-consuming to *integrate* beneficial ownership information into systems for monitoring, investigations, and reporting, regardless of any additional requirements that may be imposed pursuant to the proposed fifth pillar. If in fact FinCEN is proposing new requirements with respect to the third and fourth elements of CDD, and not just in the form of a new beneficial ownership rule, that would of course add to the complexity of implementation and would therefore require a longer timeframe.

FinCEN has proposed that the final rule would become effective one year from the date it is finalized, yet updating systems can require much longer lead times. As a practical matter, this could pose significant challenges for firms that have already set their budgets for the following year. We therefore request that the effective date for implementation of the final rules adopting the second, third and fourth elements of CDD be at least 24 months from the date the rules are finalized.

B. FinCEN Should Reconsider Previously Issued Guidance and Issue New Guidance

We appreciate FinCEN's willingness to address the applicability of previously issued guidance going forward.[39] As we noted in our comment letter in response to the ANPRM,[40] the Joint Guidance on Obtaining and Retaining Beneficial Ownership Information[41] has created, and continues to cause, confusion in the securities industry. This would no doubt continue if the Joint Guidance remains in effect following the finalization of CDD rules, particularly because the NPRM represents an evolution from, provides more detail on, and in some cases provides different approaches to, CDD obligations than the Joint Guidance. For those reasons, we strongly urge FinCEN to reconsider the Joint Guidance upon the finalization of CDD rules.

Furthermore, we note that the NPRM contains numerous references to "regulatory expectations."[42] We respectfully reiterate our previous requests for FinCEN to work with the SEC and FINRA to publish guidance to assist the securities industry in understanding regulatory expectations for our industry, and to help the industry design programs that comply with these expectations. This guidance would be beneficial to both regulators and the industry if it sets forth clear examination expectations because it would promote consistency across examination teams and firms. In the absence of guidance specific to our industry, firms are left trying to glean compliance standards from speeches, presentations at conferences, enforcement actions, and examinations.

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Thank you again for your extensive engagement with the industry on customer due diligence requirements and for the significant changes that have been made to the requirements originally proposed in the ANPRM. We appreciate the opportunity to comment on the Proposal and look forward to continuing our dialogue and working

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39 *See id.* at 45,156 n.27 ("The future status of previous guidance related to identifying beneficial owners of legal entity customers, such as the *Joint Guidance on Obtaining and Retaining Beneficial Ownership Information*, FIN-2010-G001 (March 5, 2010), will be addressed at the time of the issuance of a final rule.")

40 *See* Letter from SIFMA to FinCEN re: Customer Due Diligence Requirements for Financial Institutions, RIN 1506-AB15 (June 8, 2012) at 2 n.3.

41 Joint Guidance, *supra* n. 7.

42 *See, e.g.*, NPRM at 45,153, 45,156, 45,162, 45,164.

with FinCEN to bring greater transparency and security to the financial system. Please feel free to contact me if you have any questions regarding our comments or any related matters.

Sincerely,

Ira D. Hammerman