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 and RIN 1506–AB58.

The Securities Industry and Financial Markets Association and its Asset Management Group ("AMG") (together, "SIFMA")[1] appreciate this opportunity to provide comments to the Financial Crimes Enforcement Network ("FinCEN") on its proposed rule (the "Proposed Rule")[2] to impose certain anti-money laundering ("AML")/countering the financing of terrorism ("CFT") requirements on registered advisers ("RIAs") and exempt reporting advisers ("ERAs") (together, "Covered IAs").

SIFMA applauds FinCEN's efforts to engage with stakeholders to ensure the effectiveness of AML/CFT programs for Covered IAs and supports FinCEN's overall policy objective of ensuring that the investment adviser industry is not abused by money launderers, foreign corrupt officials and other malign actors. SIFMA believes that a well-calibrated final rule, that accurately reflects the investment adviser industry and the AML/CFT risks it faces, is necessary to allow the investment adviser industry to help prevent illicit financial activity from entering the U.S. financial system, without imposing overly burdensome or duplicative compliance requirements on Covered IAs. SIFMA offers comments with the objective of refining the

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1 SIFMA, based in New York and Washington, D.C., is the voice of the nation's securities industry, bringing together the shared interests of hundreds of broker-dealers, banks and asset managers. AMG represents U.S. asset management firms whose combined assets under management exceed $62 trillion. The clients of AMG member firms include, among others, registered investment companies, endowments, state and local government pension funds, private sector Employee Retirement Income Security Act of 1974 pension funds and private funds. SIFMA's Anti-Money Laundering & Financial Crimes Committee comprises a broad range of SIFMA member firms, including global, regional and small securities firms, as well as firms engaged in the institutional, retail, clearing and online segments.

2 FinCEN, "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).

Proposed Rule, with a focus on ensuring its effective risk-based approach and tailored alignment with the diverse practices and business models deployed within the asset management industry.

Below, SIFMA provides comments on the Proposed Rule and many of the questions FinCEN poses in the proposing release. SIFMA welcomes the opportunity to engage in a meeting with FinCEN to provide additional details pertaining to the industry and context to our comments.[3]

I. Executive Summary

This section summarizes SIFMA's principal comments on the Proposed Rule. Section II describes why the underlying risk assumptions in the 2024 Investment Adviser Risk Assessment (the "Risk Assessment"), that investment advisers currently occupy a significant regulatory gap in the AML/CFT space, are misguided and highlights potential consequences for this and future rulemakings related to this misconception.[4] Section III provides detailed comments on specific provisions of the Proposed Rule.

As an over-arching comment, SIFMA urges FinCEN to adopt a tailored approach to incorporating "investment advisers" into the definition of "financial institution" under the Bank Secrecy Act ("BSA"). Investment advisers, as discussed below, have widely varied business models and are positioned very differently from banks, broker-dealers and other BSA financial institutions, which variance we believe is important for FinCEN to recognize as it moves forward with any rulemaking. Recognition of the different business models of advisers should lead to a more precise definition of terms such as "customer" for Covered IAs such that the expected customer due diligence, suspicious activity reporting ("SAR") and section 314(a) requirements for Covered IAs, particularly those that serve as advisers to private funds, will be much clearer than under the Proposed Rule.

- **Definition of Investment Adviser; Scope of the Activities Included in the Covered IA's AML Program**

    - **Non-U.S. Advisers**. SIFMA reiterates its comments, originally offered on FinCEN's 2015 proposed rule,[5] that non-U.S. advisers, as well as the non-U.S. activities of U.S. firms, should be excluded from the final rule because of conflicts-of-laws, other significant compliance challenges and, in many cases, a lack of U.S. nexus of the relevant activities.

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3 SIFMA notes that the customer identification program ("CIP") proposed rule for Covered IAs has been submitted to the Office of Management and Budget for review and is forthcoming. SIFMA believes that industry participants should be given the opportunity to consider the CIP rule proposal in conjunction with the Proposed Rule and to provide additional feedback to FinCEN on the instant rulemaking after considering the CIP rule proposal and its effect on the application of AML requirements to advisers. *See* FinCEN, "Investment Adviser Customer Identification Program Requirements for Registered Investment Advisers and Exempt Reporting Advisers Notice of Proposed Rulemaking," RIN: 1506-AB66 (Apr. 5, 2024).

4 U.S. Treasury Department, "2024 Investment Adviser Risk Assessment" (Feb. 2024).

5 FinCEN, "Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers," 80 Fed. Reg. 52680 (Sept. 1, 2015) (the "2015 Proposal").

- **Subadvisers and Wrap Fee Advisers**. SIFMA submits, as in its comment letter on the 2015 Proposal, that subadvisers and wrap program advisers should be excluded from the AML program requirement because they typically lack access to information regarding underlying investors and do not directly manage investor assets. Indeed, because primary advisers are already covered under the Proposed Rule, applying AML/CFT requirements to subadvisers and wrap fee advisers would result in unnecessarily duplicative efforts.

- **Dual Registrants and Affiliated Advisers**. SIFMA agrees with the Proposed Rule's exemption of Covered IAs that are dually registered as broker-dealers or as banks ("Dual Registrants") and Covered IAs that are affiliated with a broker-dealer or bank ("Affiliated Advisers") and emphasizes that a single comprehensive AML/CFT program is beneficial and more cost-effective. Further, although SIFMA agrees with FinCEN's delegation of examination authority for Covered IAs to the Securities and Exchange Commission ("SEC"), SIFMA also urges that, in the case of dual registrants/affiliated advisers, the SEC should leverage the AML/CFT examination(s) conducted by one or more applicable regulators to appropriately allocate compliance and examination resources and avoid duplicative efforts.

- **Delegation of Responsibilities**

  - **AML/CFT Program Delegation**. SIFMA requests that FinCEN clarify that, while Covered IAs are responsible for their AML/CFT programs, the full-scope of implementation and operation of the programs, including monitoring for suspicious activity and filing SARs and responding to 314(a) requests (to the extent that such responses are mandated), may be delegated to third-party service providers.

  - **Non-U.S. Service Providers**. SIFMA submits that delegation of AML compliance to administrators and other service providers located outside of the United States should likewise be permitted.

    In terms of service-provider oversight, SIFMA urges FinCEN to be mindful of the SEC's currently outstanding proposed rule that would prohibit RIAs from outsourcing certain services or functions without first meeting minimum due diligence requirements (the "Outsourcing Proposal").[6] SIFMA urges FinCEN to avoid imposing duplicative or conflicting outsourcing oversight requirements.

- **Special Standards of Diligence for Correspondent and Private Banking Accounts**. SIFMA believes it would not be appropriate for FinCEN to apply special due diligence requirements for correspondent and private banking accounts to Covered IAs because, unlike custodial banks and broker-dealers, Covered IAs generally do not establish such account relationships or hold investor funds.

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

- **Non-Advisory Activities**. SIFMA supports the exclusion of non-advisory activities from the scope of the Proposed Rule and requests further examples and clarification regarding which other activities are deemed non-advisory services.
  In particular, SIFMA requests that FinCEN clarify that fund investment activity would be considered a non-advisory activity.

- **Risk-Based Diligence on Investors and Intermediaries**. SIFMA agrees with FinCEN in requiring a risk-based approach to the AML/CFT requirement for Covered IAs. To this point, SIFMA requests that FinCEN make clear in the final rule that Covered IAs are not required to adopt formal risk-rating models or methodologies and are instead permitted to apply risk factors as they deem appropriate to their activities and products. SIFMA also believes that FinCEN should acknowledge in the final rule that risk-based diligence on intermediaries acting for underlying investors (whether in funds-of-funds or nominee or other contexts) is likewise appropriate and consistent with this rulemaking.

- **AML Program Approval and Designation of Responsible Person**. SIFMA reiterates its comment on the 2015 Proposal that FinCEN should allow maximum flexibility in the governance of Covered IAs' AML programs to accommodate the wide range of advisory business models.

- **Obligations for Reporting Suspicious Activity**

  - **Reporting of Suspicious Activity**. SIFMA requests that FinCEN clarify the application of the proposed "by, at or through" SAR filing obligation language that it proposes to apply to Covered IAs, given that investment advisers do not typically hold or control client assets. SIFMA further requests clarification as to how this language would apply in the context of a non-U.S. pooled investment vehicle that retains a foreign administrator and whether FinCEN believes a U.S. SAR would be mandated, particularly where there may not be a U.S. nexus for a SAR filing.

  - **Customer Due Diligence/Transaction Monitoring**. SIFMA requests that FinCEN only apply ongoing customer due diligence ("CDD") to Covered IAs after the CDD rule has been finalized and the scope of CDD requirements for Covered IAs is clarified. SIFMA also asks that FinCEN consider Covered IAs' lack of visibility into client fund movements in finalizing transaction monitoring requirements for Covered IAs**.**

  - **SAR Sharing/Confidentiality**. SIFMA appreciates FinCEN's incorporation of its 2015 comment letter request into the Proposed Rule to allow investment advisers to share SARs within their corporate organizational structure. SIFMA further requests that FinCEN allow SAR information-sharing with fund administrators/service providers, as well as with directors and officers of the funds managed by Covered IAs, on the basis that it would be important for them to know that a SAR has been filed on one of the fund's investors.

- **Delegation of SAR Filing Obligations**. SIFMA requests that FinCEN clarify that delegation of SAR filing obligations to offshore administrators, agents and service providers will be permitted.

- **Recordkeeping and Travel Rules**. SIFMA submits that Covered IAs should not be obligated to comply with the Recordkeeping and Travel Rules, as they do not receive funds from, or send funds to third parties; put simply, these rules are inapposite to Covered IAs. If they will be obligated to comply with these requirements under the final rule, FinCEN needs to issue detailed guidance on how Covered IAs should implement these requirements.

- **Information-Sharing Procedures**. SIFMA supports the application of section 314(b) of the USA PATRIOT Act to Covered IAs, as this could help Covered IAs and other financial institutions gain additional insight into customer transactions and activities to better identify and report potential fraud, money laundering or terrorist activities. SIFMA requests, however, that FinCEN either exempt Covered IAs from section 314(a) requirements or elaborate on how such requirements would apply to Covered IAs, particularly in the funds context.

- **Delegation of Examination Authority to the SEC**. SIFMA requests that, in delegating examination authority to the SEC, FinCEN require the SEC to make its AML examination manual publicly available, just as the Federal Financial Institutions Examination Council ("FFIEC") has done with its BSA/AML examination manual.

- **Compliance Date**. SIFMA requests that the proposed compliance date be extended to 24 months from the date that the rule is finalized. Such an extension would provide Covered IAs with the necessary time to implement new and updated systems, expand compliance staffing, coordinate with other relevant parties such as fund administrators, renegotiate or amend contracts with custodial banks and broker-dealers and, if required, develop automated compliance solutions.

II. Industry Background and Illicit Finance Risks

Before providing comments on specific provisions of the Proposed Rule, SIFMA offers feedback on FinCEN's justification for the rulemaking, as discussed in the preamble to the Proposed Rule and the Risk Assessment. SIFMA acknowledges that some investment advisers, depending on the nature of their client relationships, may be able to help identify the integration of illicit proceeds into the U.S. financial system and other illicit finance activity. However, SIFMA respectfully submits that the underlying notion in the preamble and Risk Assessment that investment advisers currently occupy a significant regulatory gap in the AML/CFT space should be reconsidered. SIFMA also believes FinCEN should acknowledge and address the wide variety of business models of Covered IAs, which variance needs to be taken into account to ensure that any final rulemaking is appropriately right-sized and includes obligations that suit the business activities of Covered IAs.

The Risk Assessment identifies several illicit finance threats involving Covered IAs. Specifically, the Risk Assessment states that Covered IAs (i) have served as an entry point into

the U.S. market for illicit proceeds from foreign corruption, fraud and tax evasion, (ii) manage funds ultimately controlled by sanctioned entities, including Russian oligarchs and their associates,[7] (iii) are being used by foreign states to access technology and services with long-term national security implications, as in the case of "state-guided" Chinese actors, and (iv) have defrauded their clients and stolen their funds.

Many of the examples provided involve complicit actors or concealment of ownership, which would not be addressed by the proposed requirements. Other concerns, such as investment advisers serving as an entry point for billions of dollars ultimately controlled by Russian oligarchs, are addressed through existing sanctions compliance obligations. U.S. investment advisers are already fully obligated to meet U.S. sanctions requirements and, if sanctions are imposed on an individual or entity, these investment advisers have and will block and report assets as required under existing U.S. sanctions regulations. Moreover, FinCEN's examples of advisers being complicit in money laundering schemes are addressed by existing criminal money laundering laws, which already apply with full force to advisers (and other actors that may engage in criminal activities). Thus, these examples do not provide adequate support for the instant rulemaking.

Further, the role of investment advisers often is limited in that they do not hold client assets, handle funds transfers or effect securities transactions, which functions are handled by custodial banks, securities broker-dealers and other financial institutions. These other financial industry participants, with which advisers may work closely, appropriately serve as gatekeepers to the U.S. financial system and are subject to BSA requirements. Accordingly, SIFMA believes that the notion that direct access to investment advisers enables illicit actors to avoid detection is overstated, and the Risk Assessment should be recalibrated to the extent that the above supporting examples and analysis animate and undergird FinCEN's proposal.

The distinct role that investment advisers play in comparison to banks and broker-dealers should not only affect FinCEN's risk assessment but also how FinCEN applies AML requirements to advisers. The wholesale inclusion of "investment adviser" in the definition of "financial institution" under the BSA creates meaningful issues of application under the Proposed Rule, as discussed below. While including "investment adviser" in the regulatory definition of financial institution is appealing from a consistency standpoint, this and future rulemakings must account for the differences in the roles and functions of investment advisers from banks and broker-dealers; the failure to account for such differences in business model and risk will not only create confusion for the investment adviser industry but also misapplication of rules that are designed for financial institutions that actually hold and effect transactions in customer assets in ways that advisers do not.

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[7] The preamble to the Proposed Rule and Risk Assessment discusses the SEC's charges against Concord Management LLC for acting as an unregistered investment adviser to a wealthy former Russian political official sanctioned by the European Union and United Kingdom. This case, however, illustrates the potential consequences of a firm violating registration requirements under the Investment Advisers Act of 1940 and evading the SEC's regulatory oversight, rather than the existence of a significant AML/CFT gap in the investment adviser industry.

SIFMA also urges FinCEN to recognize that the investment adviser industry is, itself, a widely varied, diverse and dynamic industry. As FinCEN notes in the preamble to the Proposed Rule, there are over 20,000 Covered IAs that engage in a wide range of fiduciary activities – to give a few examples, this industry includes small advisers to retail clients; pension fund and retirement consultants; advisers to large institutional relationships; sub-advisers that serve other advisers; and advisers to funds (including both publicly offered and private funds). In the latter two categories, the advisers may not have any dealings with underlying advisory clients. Funds too may be organized and operated in the United States and/or in non-U.S. jurisdictions and may offer investment opportunities to U.S. or foreign investors.

The resources, risks and operations of this diverse set of advisers vary significantly, and FinCEN should bear this variance in mind as it moves forward with the rulemaking. Depending on the investment advisers' roles and the nature of their client relationships, various of the obligations proposed to be applied under the Proposed Rule may be impractical or unsuitable. For example, many of the Proposed Rule's requirements would apply to an adviser's "accounts" or "customers" or transactions "by, at or through" the adviser; but, in many cases, advisers may not have accounts for clients and may serve as adviser exclusively to one or more pooled investment vehicles (but not the underlying investors in those vehicles). Even where advisers have direct relationships with an underlying investor, the adviser will not handle the investor's funds, which are placed with a custodial bank or broker-dealer. Covered IAs will, at a minimum, require clarity on how the Proposed Rule's various requirements apply in these contexts.

In evaluating SIFMA's comments and broader industry feedback on the Proposed Rule, FinCEN should closely consider the various types of investment advisers outlined above and reassess its one-size-fits-all approach to applying AML regulations across the industry. Taking into account the diversity of business models within the investment adviser industry will be of particular importance as FinCEN works to finalize the forthcoming CIP and CDD rules.

III. Comments on the Proposed Rule

A. Definition of Investment Adviser; Scope of the Activities Included in the Covered IA's AML Program

The Proposed Rule would apply to investment advisers registered with the SEC under section 203 of the Investment Advisers Act of 1940 (the "Advisers Act") (*i.e.*, RIAs) and advisers exempt from SEC registration under section 203(l) or 203(m) of the Advisers Act, particularly advisers solely to one or more venture capital funds and advisers solely to private funds with less than $150 million in assets under management in the United States (*i.e.*, ERAs).

1. Non-U.S. Advisers

The Proposed Rule's requirements would apply on the same basis to Covered IAs located outside the United States. FinCEN asks in the preamble to the Proposed Rule if the investment adviser definition should apply to non-U.S. advisers. FinCEN further asks what logistical challenges such an approach would have.

In its 2015 comment letter, SIFMA stated that FinCEN should limit the application of AML requirements to RIAs within the United States because of the significant conflicts-of-laws and

compliance challenges that would be created for non-U.S. firms by applying U.S. AML requirements to them. SIFMA also asked FinCEN to clarify that U.S. firms are not required to apply FinCEN's requirements to non-U.S. activities because doing so could cause these firms to violate other laws in the jurisdictions in which they operate.

SIFMA reiterates these same points. Non-U.S. Covered IAs and U.S. firms engaging in non-U.S. advisory activities will face challenges in trying to comply with U.S. requirements while simultaneously complying with the laws of foreign jurisdictions in which they may be based or operate. For example, non-U.S. Covered IAs and U.S. firms operating abroad may not have a U.S. nexus to file SARs with FinCEN and, instead, would file them in foreign jurisdictions in accordance with local laws. In addition, data privacy restrictions in certain jurisdictions may bar foreign SAR and other filings. Indeed, when FinCEN originally proposed AML requirements for investment advisers in 2003, it intended to apply the rules only to advisers located within the United States and not to those advisers without a physical presence in the United States, in apparent recognition of the cross-jurisdictional issues posed.[8] For these reasons, SIFMA believes that non-U.S. advisers and the non-U.S. activities of U.S. firms should be excluded from the final rule.

2. Subadvisers and Wrap Fee Advisers

The Proposed Rule would apply to subadvisory services because FinCEN views them as a subcategory of advisory services, which are captured by the Proposed Rule.[9] Further, FinCEN is not proposing to exempt wrap fee programs from coverage of the Proposed Rule because, according to FinCEN, depending on the structure of the wrap fee program, the investment adviser may be best positioned to spot illicit finance activity.

As in its 2015 comment letter, SIFMA submits that U.S. and non-U.S. subadvisers, as well as wrap program advisers, should be excluded from the AML program requirement to the extent that they lack access to information regarding underlying investors and do not directly manage investor assets. For example, a sub-adviser may be retained to enhance the primary adviser's investment expertise or for other reasons, but it is the primary adviser that owns the client relationship and has access to any information that could be used for suspicious activity monitoring. Additionally, in a wrap fee program, the sponsor of the program (typically a broker-dealer) has the primary relationship with the client, monitors the wrap program advisers' management of client accounts and has access to client information which, under certain arrangements, may be considered proprietary information of the sponsor. In both cases, the sub-adviser generally has limited interaction with and insight into the client and its investors.

If they were made subject to AML requirements, non-U.S. subadvisers that manage foreign asset classes, as well as U.S. subadvisers for non-U.S. accounts, would face considerable challenges not only to obtain underlying investor information, but also to manage conflicts-of-laws and other jurisdictional issues. Applying AML requirements to subadviser relationships would further create a significant cost burden and result in the unnecessary duplication of efforts by

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8 FinCEN, "Anti-Money Laundering Programs for Investment Advisers," 68 Fed. Reg. 23646 (May 5, 2003).

9 89 Fed. Reg. at 12124.

primary advisers and custodians. As such, these types of advisory relationships should be excluded from the AML program requirement. At a minimum, the final rule should be clarified with respect to these relationships to mitigate burdensome requirements where sub-advisers or wrap program advisers would have limited interaction and information regarding underlying investors, and the primary adviser is required to perform AML/CFT diligence on such investors.

3. Dual Registrants and Affiliated Advisers

The Proposed Rule exempts Dual Registrants and Affiliated Advisers from the requirement of establishing multiple or separate AML/CFT programs, so long as the adviser has a comprehensive program covering all relevant business and activities subject to BSA requirements.[10] The Proposed Rule is otherwise not clear on whether Dual Registrants or Affiliated Advisers are included in the SEC's oversight of investment advisers' AML/CFT program examinations.

SIFMA agrees with the Proposed Rule's exemption of Dual Registrants and Affiliated Advisers from multiple program requirements and emphasizes that a single comprehensive AML/CFT program is more beneficial and cost-effective. The SEC examination staff, in assessing an AML/CFT program for compliance with the Dual Registrant's or Affiliated Adviser's advisory activities should leverage the examination(s) of the AML/CFT program conducted by one or more other applicable regulators (*e.g.*, the Office of the Comptroller of the Currency, the Federal Reserve Board, the New York Department of Financial Services and the Financial Industry Regulatory Authority) to appropriately allocate resources and avoid duplication of efforts. This approach would align with the expectations of Congress, the Treasury Department and FinCEN in achieving objectives while efficiently allocating resources and lower the risk of conflicting examination results, expectations and findings, issues with which dual registrants already grapple.

B. Delegation of Responsibilities

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

FinCEN acknowledges in the preamble to the Proposed Rule that investment advisers regularly delegate compliance and other activities to third parties, including fund administrators, and would permit Covered IAs to delegate the implementation and operation of aspects of their AML/CFT program.[11] The Proposed Rule provides that a Covered IA's AML/CFT program must be maintained by persons in the United States but otherwise is not clear on which AML/CFT program elements may be delegated to a third party. In addition, Covered IAs would remain fully responsible and legally liable for the program's compliance with applicable requirements, and the Covered IA would need to ensure that FinCEN and the SEC are able to obtain information and records relating to the AML/CFT program.[12]

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[10] *Id.*

[11] *Id.* at 12125.

[12] *Id.*

SIFMA suggests that FinCEN clarify that, while Covered IAs are responsible for developing the firm's AML/CFT compliance program, the full-scope of the implementation and operation of the AML program may be delegated, because service providers, including offshore administrators, often play a critical role in the administration of Covered IAs' AML controls.[13]

SIFMA further requests that FinCEN clarify that, if such requirements are made applicable to Covered IAs, Covered IAs may appropriately delegate to administrators and other service providers—whether onshore or offshore—the responsibility to respond to 314(a) requests and to monitor for, prepare and file SARs, to the extent that such administrator has the relevant information. Indeed, in certain cases, administrators and service providers (particularly service providers to private funds) may be uniquely positioned to respond to 314(a) requests and file SARs, while the Covered IAs may lack the necessary information and relationships to carry out those responsibilities. Responding to 314(a) requests would also require that Covered IAs develop systems to review FinCEN's bi-weekly notifications via a secure website, search their records for identified subject names and respond to positive matches, a process that would create a significant and ongoing burden for Covered IAs, particularly because most advisers do not maintain accounts or process transactions and may need to depend on custodial banks and broker-dealers to perform searches on their behalf. As such, SIFMA believes that FinCEN should specify that these AML/CFT program elements may also be delegated to third parties.

SIFMA further notes that the SEC issued the Outsourcing Proposal under the Advisers Act that would prohibit RIAs from outsourcing certain services or functions without first meeting minimum due diligence requirements.[14] The Outsourcing Proposal, as to which industry participants have provided significant comments, would also require ongoing monitoring and reassessment of service providers to determine whether RIAs should continue outsourcing services to particular providers.[15] Given that the Outsourcing Proposal is being actively considered by the SEC, FinCEN should not create duplicative or conflicting outsourcing oversight requirements. SIFMA requests that FinCEN be mindful of the requirements contemplated in the Outsourcing Proposal and avoid creating separate standards for delegation of AML/CFT programs to offshore administrators located in jurisdictions with rigorous AML requirements that would create added complexity and burden.

To the extent that FinCEN adopts requirements as to oversight, SIFMA suggests that FinCEN make clear that this obligation can be met through risk-based procedures and controls. For example, in the absence of risk factors, oversight may include regular communication and reviewing policies and procedures.

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[13] In particular, non-U.S. Covered IAs commonly delegate AML/CFT compliance to administrators in their local jurisdictions, and these advisers would face significant operational and implementation challenges if the final rule permits the delegation of only certain program elements to offshore administrators.

[14] *See* 87 Fed. Reg. 68816.

[15] *Id.*

2. Non-U.S. Service Providers

FinCEN acknowledges that Covered IAs may delegate AML compliance to administrators located outside of the United States and, indeed, such offshore administrators play a key role in the administration of a Covered IA's AML controls. Many offshore administrators used by Covered IAs have long been subject to AML requirements imposed by other jurisdictions and are familiar with what is needed to execute a successful AML program. However, FinCEN seems to take a negative view of these offshore administrators and service providers.

SIFMA submits that delegation to offshore administrators and service providers should be permissible, as they maintain effective AML/CFT programs that adhere to high compliance standards and are subject to AML requirements, including ongoing regulatory examination and oversight, imposed by their home jurisdictions (compared to which U.S. service providers are not always subject). FinCEN cites past issues with the AML framework of the Cayman Islands but fails to acknowledge that the Cayman Islands have made material enhancements to their AML regime since early 2019, when prior deficiencies were cited. These changes, including the adoption of a new National AML/CFT Strategy,[16] have resulted in, among other things, the Financial Action Task Force removing the Cayman Islands from its AML "grey list" and increased monitoring process on October 27, 2023, as well as recognizing the significant progress the Cayman Islands have made in aligning their AML regime with global standards.

Investment advisers also maintain controls and perform oversight of their offshore administrators and service providers and take a risk-based approach to entering into such arrangements, further reinforcing that delegation of AML/CFT programs offshore is appropriate. As such, SIFMA requests that FinCEN make clear that it would be permissible for Covered IAs to rely on the AML/CFT programs of fund administrators, including those that are offshore.

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

The Proposed Rule would require Covered IAs maintain due diligence programs for correspondent accounts[17] for foreign financial institutions and for private banking accounts[18] that

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[16] *See* Cayman Islands Monetary Authority, "Anti-Money Laundering and Counter Terrorist Financing Strategy 2019-2022" (published Sept. 2019).

[17] A "correspondent account" is defined generally to mean an account established for a foreign financial institution to receive deposits from, or to make payments or other disbursements on behalf of, such institution or to handle other financial transactions related to such institution. *See* 31 C.F.R. 1010.605(c). The Proposed Rule would expand the definition of "correspondent account" to mean "any contractual or other business relationship established between a person and an investment adviser to provide advisory services." 89 Fed. Reg. at 12190.

[18] A "private banking account" is an account (or a combination of accounts) maintained at a covered financial institution that (1) requires a minimum aggregate deposit of at least $1 million, (2) is established on behalf of or for the benefit of one or more non-U.S. persons who are director or beneficial owners of the account and (3) is assigned to or administered or managed by a relationship manager or other liaison between the financial institution and the direct or beneficial owner of the account. *See* 31 C.F.R. 1010.605(m). The Proposed Rule would include Covered IAs in FinCEN's definition of "covered financial institution." 89 Fed. Reg. at 12135.

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.[19]

FinCEN asks whether it is appropriate to apply the special due diligence requirements for correspondent and private banking accounts to investment advisers and to what extent investment advisers provide advisory services or enter into advisory relationships that are similar to a "correspondent account" relationship as defined at 31 CFR 1010.605.

SIFMA believes that the special due diligence requirements for correspondent and private banking accounts are inapposite to Covered IAs because Covered IAs do not establish such account relationships or, as a general matter, hold investor funds, which, as explained above, are held at accounts maintained by other financial institutions such as banks and broker-dealers. SIFMA requests that FinCEN acknowledge the differences in roles of Covered IAs versus banks and broker-dealers and clarify that Covered IAs do not have "correspondent accounts" and "private banking accounts" or the attendant BSA compliance obligations associated with these relationships.

D. Advisory and Investment 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.[20] Advisory activities subject to the AML/CFT requirement include the management of customer assets, the provision of financial advice and the execution of transactions for customers.[21] Non-advisory services would not be included within such activities.[22]

SIFMA supports the exclusion of non-advisory services from the scope of the Proposed Rule and appreciates FinCEN's helpful example of a non-advisory activity in the private funds context, in which fund personnel make managerial and operational decisions with respect to portfolio companies.[23] SIFMA requests further examples and clarification regarding which activities would not be covered, including clarifying that investment activities conducted *on behalf of a fund* would be considered non-advisory, as such activities do not present money laundering risks sufficient to warrant the application of an AML/CFT program.

To the same end, SIFMA believes that, in the employer-sponsored retirement account context, exclusions may need to be made for advisers to plan participants in 401(k)s (and similar retirement accounts). Customer diligence requirements applied to managed accounts in this

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19 89 Fed. Reg. at 12141.

20 *Id.* at 12123.

21 *Id.*

22 *Id.*

23 *Id.*

context, as one example, may not make much sense given the low risk of retirement plan assets being used for money laundering or other illicit financial activity.

E. Risk-Based Diligence on Investors and Intermediaries

In the Proposed Rule, FinCEN emphasizes that the AML/CFT requirement for investment advisers "is not a one-size-fits-all requirement but rather is risk-based and is intended to give investment advisers the flexibility to design their programs to identify and mitigate the specific risks of the advisory services they provide."[24] FinCEN further acknowledges that illicit finance risks for private funds may vary with the fund's investment strategy, targeted investors and other characteristics and asks how the Proposed Rule should apply to advisers that manage private funds that receive investments from "in-funds" or funds-of-funds.

SIFMA agrees with FinCEN that Covered IAs' AML/CFT programs should be risk-based and that the final rule should provide maximum flexibility to Covered IAs to accommodate their varied business models and risk profiles. To this point, SIFMA requests that FinCEN make clear in the final rule that Covered IAs are not required to adopt formal risk-rating models or methodologies and that advisers have discretion to apply risk factors as they deem appropriate and as suitable for their business activities and products. For example, Covered IAs should be permitted to evaluate lower risk relationships through consideration of "inherent or self-evident information," including the type of customer or type of account, service or product, without any requirement to obtain additional information regarding the customer or the relationship.[25]

SIFMA further submits that investment advisers may have many types of intermediated relationships (including funds-of-funds or intermediary financial institutions investing in nominee name for underlying investors). Covered IAs typically conduct risk-based diligence on 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. In addition, investment advisers typically obtain contractual representations, warranties and undertakings related to the intermediary's application of its AML procedures to underlying investors and other matters. SIFMA urges FinCEN to acknowledge that these practices—including with intermediaries in the private funds context—are appropriate in a risk-based AML program and to make clear that risk-based AML programs will not require Covered IAs to look through and appropriately diligence intermediaries to underlying investors/clients.

F. AML Program Approval and Designation of Responsible Person

Under the Proposed Rule, each Covered IA's AML/CFT program would be required to be approved in writing by its board of directors or trustees, or if it does not have a board, by its sole proprietor, general partner, trustee or other persons that have functions similar to a board of directors.[26] Further, Covered IAs would be required to designate a person (or persons in a

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[24] *Id.* at 12122.

[25] FinCEN, "Frequently Asked Questions Regarding Customer Due Diligence Requirements for Financial Institutions," FIN-2018-G001 (Apr. 3, 2018).

[26] 89 Fed. Reg. at 12190.

committee) to implement and monitor the operations and internal controls of the program. The Proposed Rule specifies that the designated person should be an officer of the investment adviser (or individual of similar authority within the particular corporate structure of the investment adviser) and 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.[27]

As in its 2015 letter, SIFMA's position is that, to accommodate different organizational structures, FinCEN should allow maximum flexibility in the governance of Covered IAs' AML programs to accommodate the wide variety of advisory business models. For example, FinCEN should allow for approval by senior management, and FinCEN should clarify that the person designated as responsible for a firm's AML program need not be a corporate officer. FinCEN should also allow such person to be employed by an affiliate of the investment adviser. Indeed, knowledge regarding BSA/AML compliance may reside outside of the investment adviser in the case of an enterprise-wide AML program, and allowing the requested flexibility would better facilitate FinCEN's objectives.

G. Reporting Obligations for Suspicious Activity

The Proposed Rule would require Covered IAs to file a SAR on 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, meets a SAR filing trigger.[28]

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.[29]

1. Reporting of Suspicious Activity

SIFMA seeks FinCEN's clarification on the application of the proposed "by, at or through" language to Covered IAs. Given that advisers do not typically custody or hold client assets, transactions do not happen "by, at, or through" Covered IAs. Further, in the funds context, investors transact with funds, and Covered IAs (i) do not hold and are not the legal owners of investor assets and (ii) treat the fund (and not individual investors) as the advisory client. In many instances, it is the fund's administrator, not the Covered IA, that processes subscriptions and redemptions for investors that send money to, or receive money from, the fund. Even in the absence of an administrator, it would not be accurate to state that transactions are "conducted or

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[27] *Id.* at 12127–28.

[28] *Id.* at 12191.

[29] *Id.* at 12191–92.

attempted by, at, or through an investment adviser" because the adviser does not take title or custody of the investor's assets.

SIFMA seeks additional clarification from FinCEN as to how it reads the "by, at or through" language in the foreign administrator context and whether FinCEN believes a U.S. SAR would be mandated. If the administrator is a foreign entity, there may not be a U.S. nexus for a SAR and the administrator may instead be required to file a SAR in the administrator's home jurisdiction. SIFMA also requests that FinCEN specify SAR filing procedures and FinCEN's filing expectations where assets are custodied with another entity outside of the Covered IA's control or held in a foreign jurisdiction.

SIFMA welcomes application of the safe harbor from liability for filing SARs to Covered IAs, which will protect Covered IAs from increased legal risk from customers and other counterparties.

2. Customer Due Diligence/Transaction Monitoring

The Proposed Rule would require, including through the obligation to conduct ongoing CDD, 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."[30]

SIFMA requests that if FinCEN apply ongoing due diligence requirements to Covered IAs, it do so only after the CDD rule has been finalized, and the scope of CDD requirements for Covered IAs (along with those of other financial institutions) is clarified. Covered IAs would face significant challenges complying with these requirements in the absence of regulatory clarity.

SIFMA also asks that FinCEN clarify its expectations for transaction monitoring. Specifically, FinCEN estimates in the preamble to the Proposed Rule that RIAs will file an average of approximately 60 SARs per year. That number does not accord with the business model of most Covered IAs, which, unlike banks and broker-dealers, are not involved in client transactional/funds transfer activities. Because investment advisers do not custody or handle client funds, they may have little insight into client fund movements. Therefore, SIFMA is concerned that Covered IAs will not be positioned to monitor for or report on suspicious activity in the same manner or to the same extent as custodial banks or broker-dealers, and requests that FinCEN take this into consideration in finalizing transaction monitoring requirements for Covered IAs.

Moreover, most private funds do not allow open-end subscriptions and redemptions. Rather, such transactions are highly limited. Thus, it seems highly unlikely that advisers to private funds would make that many SAR filings in any given year.

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[30] *Id.* at 12131.

In the absence of transactional activity, Covered IAs (and the funds that they manage) should not have to monitor media reports and similar external events that do not have direct bearing on their relationships with the clients.

Finally, FinCEN should confirm that a Covered IA's transaction monitoring systems need not be automated, as such systems would be costly to implement and would not produce commensurate AML benefits (given the remoteness of Covered IAs from transactional activities that are already monitored by custodial banks and broker-dealers).

3. 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.[31]

SIFMA appreciates FinCEN's incorporation of SIFMA's 2015 comment requesting that FinCEN authorize investment advisers to share SARs within their corporate organizational structures.

SIFMA requests that FinCEN additionally authorize Covered IAs to share SARs with service providers that may need to be informed of SAR filings for compliance monitoring and other purposes. SIFMA further requests that FinCEN clarify that SAR information may be shared with the directors and officers of the funds managed by the Covered IA and the funds' administrator(s) on the basis that the information contained in the SAR would be important for the board of directors of a fund managed by the Covered IA and the fund's officers would need to be aware that a SAR has been filed on one of the fund's investors. In addition, fund administrators may need to be aware of suspicious activity to appropriately monitor the activities of fund investors.

4. Delegation of SAR Filing Obligation

FinCEN appears to acknowledge that a Covered IA may delegate its SAR filing obligations to an agent or a third-party service provider.[32] However, the parameters for such delegation are not specified.

SIFMA requests that FinCEN clarify that delegation to onshore or offshore administrators, agents and service providers will be permitted and avoid creating separate standards for such delegation across jurisdictions with rigorous AML requirements that adhere to global standards.

The Anti-Money Laundering Act of 2020 at 31 U.S.C. 5318(g)(8) requires that FinCEN establish a SAR pilot program, for which the proposed rule remains under consideration, permitting financial institutions with a SAR requirement to share SARs and related information with the

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31 *Id*. at 12192.

32 *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.").

institutions' foreign branches, subsidiaries and affiliates.[33] In recognition of FinCEN's efforts to modernize AML/CFT frameworks through the SAR pilot program and provide foreign affiliates of U.S. financial institutions with a more comprehensive view of enterprise-wide financial crime risk, SIFMA requests that, in this and any future rulemakings relating to SARs, FinCEN refrain from imposing restrictions on Covered IAs' delegation of suspicious activity clearing, early alert reviews and other elements of the SAR process to offshore administrators and service providers, as such restrictions would be inconsistent with the effort to expand SAR sharing for global financial institutions and enhance enterprise-wide AML/CFT compliance efforts.

H. Recordkeeping and Travel Rules

The Proposed Rule would subject Covered IAs to the BSA's Recordkeeping and Travel Rules.[34]

SIFMA does not believe that the application of the Recordkeeping and Travel Rules to investments advisers makes sense in this context. Covered IAs do not receive funds from, or send funds to, investors and do not hold investors' funds, which are held at accounts maintained at a custodian bank or broker-dealer. Banks and broker-dealers, rather than investment advisers, carry out funds and wire transfers.

For these reasons, the Recordkeeping and Travel Rules should be regarded as inapplicable to Covered IAs. If, however, under the final rule compliance is required, FinCEN should issue detailed guidance on how Covered IAs should implement these requirements.

I. Information-sharing Procedures

FinCEN is proposing to require Covered IAs to comply with information-sharing procedures under sections 314(a) and 314(b) of the USA PATRIOT Act.[35] Under section 314(a), Covered IAs would be required to share information with FinCEN related to persons suspected of terrorist acts or other criminal activities, whereas section 314(b) would authorize Covered IAs to participate in voluntary information sharing with each other and other financial institutions.

SIFMA endorses the application of section 314(b) to RIAs, to enable them to share information with other financial institutions under a safe harbor from liability. As FinCEN states in the Proposed Rule, this could help Covered IAs and other financial institutions gain additional insight into customer transactions and potentially provide "a more accurate and holistic understanding" of their customers' activities to better identify and report potential fraud, money laundering or terrorist activities.[36] The application of section 314(b) to Covered IAs would make

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33 FinCEN, "Pilot Program on Sharing of Suspicious Activity Reports and Related Information With Foreign Branches, Subsidiaries, and Affiliates," 87 Fed. Reg. 3719, 3279 (Jan. 25, 2022).

34 89 Fed. Reg. at 12120.

35 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, §§ 314(a) and (b), 115 Stat. 272, 307 (codified at 31 C.F.R. 1010.520 and 1010.540).

36 89 Fed. Reg. at 12112-13.

it easier for them to obtain relevant information from other financial institutions and meet any SAR filing obligations imposed on them in the final rule.

However, SIFMA urges FinCEN to consider the challenges of applying section 314(a) requirements to Covered IAs. Section 314(a) requires financial institutions to search their records to determine whether they maintain any account for, or have engaged in any transaction with, an individual, entity or organization named in a FinCEN request.[37] This requirement does not accord with the advisory business model. Even if a Covered IA has a direct relationship with its advisory client (such as providing advice to a separate account), the client's assets will be custodied at a bank or broker-dealer, which typically would be required to respond to 314(a) requests. In the funds context, a Covered IA's relationship will be with the fund – and not its underlying investors, which may deal exclusively with the fund administrator. In this case, it is unclear precisely how section 314(a) would apply, particularly if the fund and administrator are both based outside the United States.

Accordingly, SIFMA requests that FinCEN either exempt Covered IAs from section 314(a) requirements or elaborate on how the requirements would apply to Covered IAs. In particular, SIFMA submits that a Covered IA should not be obligated to apply 314(a) requests to underlying investors in offshore funds, because such investors are not clients of the Covered IA, are located outside of the United States and may have no U.S. touchpoints. To require otherwise could potentially raise issues regarding the AML program requirement's extraterritorial application, which FinCEN should carefully consider.

SIFMA also requests clarification from FinCEN as to how specific provisions of section 314(a) would apply to Covered IAs. For instance, 31 CFR 1010.100(bbb) and 31 CFR 1010.100(ddd) define the terms "transaction" and "transmittal of funds," respectively, which financial institutions are required to search pursuant to 31 CFR 1010.520(b)(3)(i)(C), and it is not clear how those definitions would apply to Covered IAs that may not have visibility into underlying investors' account information. Finally, SIFMA requests that FinCEN clarify the information that 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).

J. Delegation of Examination Authority to the SEC

FinCEN proposes to delegate examination authority of Covered IAs' compliance with the rule's requirements to the SEC, as FinCEN has done with respect to broker-dealers.[38] While SIFMA does not object to this delegation of authority, SIFMA respectfully requests that FinCEN require the SEC to make its AML examination manual publicly available, just as the FFIEC has done with its BSA/AML examination manual, which has become an important resource for

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[37] 31 CFR 1010.520(b)(3)(i).

[38] 89 Fed. Reg. at 12119.

participants in the banking industry to meet regulatory requirements and expectations and to enhance AML/CFT compliance efforts.[39]

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.[40]

SIFMA wishes to underscore that AML program requirements, suspicious activity monitoring and reporting and recordkeeping requirements are being imposed all at once. For many Covered IAs, implementation of the new rule, as proposed, would require new and updated systems, additional compliance staffing, close coordination with other parties, including fund administrators and other service providers, as well as potential contract renegotiations or amendments with a range of banks and broker-dealers with which Covered IAs may need to delegate or share compliance obligations. Covered IAs would have to designate AML compliance officers and train relevant personnel on the final rule's requirements before the requirements go into effect. As noted in the Proposed Rule, there are 15,391 RIAs and 5,946 ERAs, all of which would need to identify and adequately train AML compliance officers within one year, if finalized as proposed.

Even Covered IAs that maintain voluntary AML/CFT programs may require considerable effort and a substantial amount of time. In addition, if the final rule requires automated solutions, the required timeframe for their development and implementation would likely exceed a year. During the period before the rules come into effect, Covered IAs may also be subject to other compliance obligations from the SEC that will require extensive training and implementation.

Accordingly, SIFMA requests that the proposed compliance date be extended to 24 months from the date the rules are finalized so as to better reflect the significant undertaking that will be required to comply with the Proposed Rule.

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[39] *See* FFIEC, "BSA/AML Examination Manual" (last updated Aug. 2, 2023).

[40] 89 Fed. Reg. at 12191.

SIFMA appreciates the opportunity to comment on the Proposed Rule. Please feel free to contact Bernard Canepa (bcanepa@sifma.org) or Kevin Ehrlich (kehrlich@sifma.org) or our counsel, Satish Kini (smkini@debevoise.com) at Debevoise & Plimpton LLP to answer any questions you may have regarding our comments or any related matters.

Respectfully submitted,

Bernard V. Canepa

Bernard V. Canepa
Managing Director and Associate General Counsel, SIFMA

Kevin Ehrlich

Kevin Ehrlich
Managing Director and Associate General Counsel, SIFMA AMG