INVESTMENT ADVISER ASSOCIATION

April 15, 2024

Via Electronic Filing

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

Re: Financial Crimes Enforcement Network: Anti-Money Laundering / Countering the Financing of Terrorism Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers and Exempt Reporting Advisers (FINCEN–2024–0006; RIN 1506–AB58)

Dear Director Gacki:

The Investment Adviser Association (**IAA**)[1] appreciates this opportunity to comment on the Financial Crimes Enforcement Network's (**FinCEN's**) proposal relating to anti-money laundering and counter-terrorist financing (**AML**) compliance by SEC-registered investment advisers and exempt reporting advisers (**SEC Advisers**).[2]

We recognize the importance of detecting and preventing money laundering and terrorist financing in all aspects of the financial system, and thus strongly support the U.S. government's efforts to combat these activities through addressing meaningful gaps in the AML regime. We

[1] The IAA is the leading organization dedicated to advancing the interests of fiduciary investment advisers. For more than 85 years, the IAA has been advocating for advisers before Congress and U.S. and global regulators, promoting best practices and providing education and resources to empower advisers to effectively serve their clients, the capital markets, and the U.S. economy. The IAA's member firms manage more than $35 trillion in assets for a wide variety of individual and institutional clients, including pension plans, trusts, mutual funds, private funds, endowments, foundations, and corporations. For more information, please visit www.investmentadviser.org.

[2] *Financial Crimes Enforcement Network: Anti-Money Laundering / Countering the Financing of Terrorism Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers and Exempt Reporting Advisers*, 89 Fed. Reg. 12108 (Feb. 15, 2024), available at https://www.govinfo.gov/content/pkg/FR-2024-02-15/pdf/2024-02854.pdf (**Proposal**). The Proposal would, among other things, require SEC Advisers to establish AML programs as required by the Bank Secrecy Act (**BSA**) and report suspicious financial activity by filing suspicious activity reports (**SARs**) pursuant to the BSA. The Proposal follows a similar 2015 FinCEN proposal to require certain advisers to establish AML programs. *See Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers*, 80 Fed. Reg. 52680 (Sept. 1, 2015), available at http://www.gpo.gov/fdsys/pkg/FR-2015-09-01/pdf/2015-21318.pdf (**2015 Proposal**). The IAA submitted comments on the 2015 Proposal, some of which are reiterated in this letter. *See* IAA Letter to FinCEN re *Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers* (Nov. 2, 2015), available at https://www.investmentadviser.org/wp-content/uploads/2021/09/151102cmnt.pdf (**2015 IAA Letter**).

appreciate that the intent of the Proposal is to adopt a flexible, risk-based approach to AML compliance that will permit each SEC Adviser to tailor its AML program to match the nature and scope of its advisory business. However, the IAA believes that the Proposal is too prescriptive in certain of its specific requirements which will make it more difficult for SEC Advisers to tailor their programs appropriately.

We also urge FinCEN to reconsider the scope of its proposal. The BSA does not need to be extended to *all* investment advisers with respect to *all* of their activities in order to have a comprehensive AML regime in the United States. The IAA believes that excluding certain clients and activities from the Proposal would strengthen SEC Advisers' AML programs by allowing them to use their finite resources to address higher-risk activities and would avoid situations where imposing AML on SEC Advisers would be duplicative of regulatory efforts where the costs and operational challenges of compliance will significantly outweigh the marginal benefits.

We also recommend that FinCEN carefully consider the many different types of SEC Advisers and the diversity of their advisory activities and client bases and, in addition to the exclusions we recommend, seek to extend the BSA only where doing so would fill a meaningful gap in our nation's AML regime. In many cases, SEC Advisers are only one of a series of financial institutions interfacing with clients, many of which already are required to perform initial and ongoing AML reviews of the client. In other cases, SEC Advisers may have little or no direct contact with the ultimate client (as contrasted with other relevant parties) or may deal with clients whose operations pose little money laundering risk. Certain aspects of the Proposal may not be necessary for SEC Advisers, given that their advisory services and/or client base do not pose AML risks that justify application of the full array of AML program requirements contemplated by the Proposal. Additionally, because the definition of a "Financial Institution" is proposed to be broadened, SEC Advisers will now be included under this category. FinCEN needs to carefully review existing and future regulations that apply to Financial Institutions, and, where appropriate, consult with the investment adviser industry to ensure they are appropriate for SEC Advisers before applying them.

We believe that the changes we recommend will improve the efficiency of the Proposal's intended regulation of SEC Advisers by excluding or exempting from coverage certain firms or certain low-risk activities, enhance the ability of SEC Advisers to tailor the Proposal's AML program requirements to their businesses, and enable SEC Advisers to rely on certain efforts of other AML-regulated entities in the financial system or within an SEC Adviser's own organization. This letter also discusses certain practical and operational implications of the Proposal.

I. Executive Summary

We make the following recommendations:

A. Provide Exclusions or Exemptions from the AML Program Requirement for Certain Types of Advisory Business. With one very limited exception for advice to

open-end registered investment companies (**mutual funds**), the Proposal imposes AML program requirements on all SEC Advisers, irrespective of the nature of their clients or their types of advisory business. However, a significant number of SEC Advisers provide services to clients and/or engage in advisory activities that do not, in the IAA's view, raise money laundering risks that need to be addressed by FinCEN's proposed rules. These services and activities include:

1. **Advisory Services Not Involving Management of Client Assets.** FinCEN should modify the scope of the AML program requirement to exclude services that do not involve management of client assets, such as non-discretionary financial planning and publication of securities-related newsletters or research reports or the provision of "model portfolios."

2. **Advisory Services to AML-Regulated Entities.** FinCEN should not require an SEC Adviser's AML program to be applied to activities undertaken for banking institutions, insurance companies, and registered broker-dealers (such entities, collectively, **AML-Regulated Entities**), similar to and for the same reasons as the proposed exclusion of advisory services provided to mutual funds.

3. **Sub-Advisory Services.** FinCEN should relieve Sub-Advisers from the proposed AML program requirements because they will not possess or have access to information about the end-clients in the Sub-Advisory Arrangement and, therefore, are not well-positioned to conduct a meaningful AML review.

4. **Application of Proposal to Foreign Advisers.** Consistent with the BSA's treatment of foreign bank branches and many other AML-Regulated Entities, the Proposal should clarify that it does not apply to Foreign Advisers.

5. **Advisory Services to Lower-Risk Clients.** FinCEN should recognize the minimal risk presented by certain other types of advisory clients, such as retirement plans, and exclude from the Proposal's AML program requirements SEC Advisers advising only such lower-risk clients.

6. **Application of Proposal to Smaller SEC Advisers.** FinCEN should exclude SEC Advisers with 100 or fewer employees from the AML program requirements of the Proposal, or, at a minimum, exclude SEC Advisers with 20 or fewer employees consistent with FinCEN's treatment of state-registered investment advisers.

B. **Ease the Practical and Operational Burden on Advisers in Implementing AML Programs.** Under the Proposal, every SEC Adviser would be required to establish an AML program that is reasonably designed to prevent the SEC Adviser from being used for money laundering. While we commend FinCEN for taking a more risk-based approach, in light of the wide differences in the size, corporate structures, and business models of SEC Advisers, FinCEN should provide additional flexibility and

address certain other practical and operational issues concerning the manner in which the Proposal requires implementation of the AML program.

1. **Program Approval.** FinCEN should permit approval of the AML program by a member of senior management rather than requiring approval by its board of directors or trustees, or if it does not have a board, by a person that has functions similar to a board of directors.

2. **AML Compliance Officer.** FinCEN should permit any sufficiently senior employee of the adviser (including its Chief Compliance Officer) – or of any affiliate or other entity within the SEC Adviser's organizational structure – to serve as the AML Compliance Officer, as long as such employee meets the other requirements set forth in the Proposal, as modified by our comments herein, that relate to knowledge and authority, and is either a member of, or reports directly to, the SEC Adviser's or its affiliate's senior management.

3. **Independent Testing.** FinCEN should provide flexibility in the independent testing requirement and, to the extent it does not exclude them from the AML program requirements, permit smaller SEC Advisers with 100 or fewer employees to employ an internal testing program that may include employees involved in the AML program and/or ongoing BSA compliance.

4. **Look-Through Obligations of Advisers to Unregistered Pooled Investment Vehicles (Private Funds).** For the same reasons that we recommend that FinCEN exclude Sub-Advisers from the AML program requirements, FinCEN should confirm that an SEC Adviser's obligation to assess money-laundering risks relating to the underlying investors of a private fund applies only when, and only to the extent that, the SEC Adviser is the Primary Adviser or sponsor to that private fund and has access to information about the private fund's underlying investors.

C. **Ease the Practical and Operational Burden on SEC Adviser Affiliates of AML-Regulated Entities.** We support FinCEN's position that an SEC Adviser affiliated with, or a subsidiary of, an entity required to establish an AML program in another capacity does not have to implement multiple or separate programs if the program covers all of the entity's activities and businesses that are subject to the BSA.

D. **Clarify SEC Advisers' Suspicious Activity Report (SAR) Obligations.** FinCEN should clarify the application to SEC Advisers of the proposed SAR filing language "by, at, or through" given that SEC Advisers do not generally have actual custody of client assets and do not enter into transactions with their clients.

E. **Exempt SEC Advisers from the Recordkeeping and Travel Rules and Special Information Sharing Procedures.** FinCEN should not subject SEC Advisers to the Recordkeeping and Travel Rules or Special Information Sharing Procedures as SEC

Advisers do not, as a general matter, receive funds from, or send funds to, investors, nor do they hold investor funds. If these rules are required for SEC Advisers, FinCEN should, at a minimum, clarify how advisers should implement these rules.

F. **Delegate Examination Authority to the SEC.** The IAA supports delegation of examination authority to the SEC and urges FinCEN to require that the SEC publicly release a copy of its relevant AML examination manual to assist SEC Advisers with their compliance efforts.

G. **Extend and Stagger the Implementation Period in Light of the Interrelatedness of the Proposal and Other Rulemakings, and Reopen the Comment Period if Interrelated Rules are Proposed Before this Proposal is Finalized.** Twelve months will not be enough time for SEC Advisers to develop compliant AML programs and put in place the systems, personnel and required disclosures necessary to implement these programs, especially because of the very many other new regulatory requirements SEC Advisers will need to implement concurrently. We recommend that FinCEN provide at least 24 months for larger SEC Advisers to implement the Proposal and, to the extent they are not excluded from the AML program requirements, a longer period of at least 36 months for smaller SEC Advisers with 100 or fewer employees. To ensure a consistent approach, we also request that FinCEN continue coordinating with staff at the SEC regarding potential overlaps, duplications, and inconsistencies between AML program regulations and open or recently adopted SEC rulemakings. We also recommend that if FinCEN does not exempt SEC Advisers from the Recordkeeping and Travel Rules and Special Information Sharing Procedures, these requirements should not be finalized or implemented until FinCEN finalizes and implements customer identification program (**CIP**) requirements for SEC Advisers. Finally, if a CIP rule for SEC Advisers is proposed prior to adoption of final AML program requirements, we urge FinCEN to reopen the comment period for this Proposal to allow commenters to reconsider their comments in light of that rule proposal, which is likely to be highly interrelated.

The IAA urges FinCEN to consider these comments when finalizing the Proposal.

II. Recommendations

A. The Proposal Should Provide Exclusions or Exemptions for Certain Types of Advisory Business

The Proposal imposes AML program requirements on all SEC Advisers, irrespective of the nature of their clients or their types of advisory business. However, a significant number of these SEC Advisers provide services to clients and/or engage in advisory activities that do not, in the IAA's view, raise money laundering risks that need to be addressed by the Proposal. To the extent an SEC Adviser's advisory business is limited to the low risk services and clients discussed below, that SEC Adviser should be excluded from the AML program requirements altogether. While all other SEC Advisers that engage in these activities or serve these types of

clients would still need to establish an AML program, the scope and operational burdens of such programs would be significantly reduced if these activities and clients were carved out.

1. Advisory Services Not Involving Management of Client Assets

The IAA strongly supports the exclusion of non-advisory services from the Proposal's requirements.[3] We believe this same logic should extend to exclude non-management advisory services as well.

Certain SEC Advisers provide non-management advisory services, including, but not limited to, non-discretionary financial planning and publication of securities-related newsletters, "model portfolios," or research reports (**Non-Management Services**). In providing these types of services, advisers are functioning entirely outside of the "payment chain"—the SEC Adviser neither manages, directly or indirectly, the client's assets nor participates in the transmittal of any client funds to or from any recipient. Indeed, many of these activities do not involve an advisory client at all. Accordingly, in these circumstances, there is little to no risk that the SEC Adviser will be an entry point for money laundering or terrorist financing activities. Moreover, the SEC Adviser would not have access to sufficient information about a client's account to detect suspicious financial activity. In many instances, SEC Advisers may not even possess the names of or other identifying information about the investors who receive Non-Management Services. Applying AML regulations to the SEC Adviser in this context would not meaningfully contribute to the AML regime.

We therefore request that FinCEN consider modifying the Proposal to provide that SEC Advisers need not include within the scope of their AML programs those clients or investors to which they provide only Non-Management Services, and that SEC Advisers that provide only Non-Management Services would not need to have an AML program at all.

2. Advisory Services to AML-Regulated Entities

The IAA commends FinCEN for not requiring an SEC Adviser's AML program to be applied to activities undertaken with respect to mutual funds, as mutual funds are already subject to their own comprehensive AML program requirements under the BSA.[4] We believe this logic would also apply to other AML-Regulated Entities.

SEC Advisers serve a diverse range of clients, including, for example, individuals, banks, mutual funds, pension funds, hedge funds, private equity funds, charitable organizations, endowments, corporations, and state or municipal entities. Certain types of advisory clients are themselves AML-Regulated Entities and are already subject to the extensive AML program

[3] Proposal, 89 Fed. Reg. at 12123.

[4] "[B]ecause mutual funds are already defined as 'financial institutions' under the BSA[], and because of the regulatory and practical relationship between mutual funds and their investment advisers, the proposed regulations would also not require investment advisers to apply AML/CFT program or SAR reporting requirements to mutual funds." Proposal, 89 Fed. Reg. at 12108. The IAA requested an exemption for mutual funds in the 2015 IAA Letter.

requirements of the BSA. Moreover, assets that an SEC Adviser manages for a client that is itself an AML-Regulated Entity have already been subject to an AML review before allocation to the SEC Adviser for management. Therefore, requiring an SEC Adviser to conduct an AML review of clients that are AML-Regulated Entities would be needlessly duplicative of AML protections already in place and impose a substantial cost and burden on SEC Advisers without providing a commensurate improvement in the detection and prevention of illicit money laundering activities.

We recommend that the Proposal be amended to provide that an SEC Adviser is not required to include AML-Regulated Entity clients within the scope of its AML program. This requested relief would also be conceptually consistent with the exclusion for activities undertaken with respect to mutual funds.

3. Sub-Advisory Services

One common circumstance where we believe relief is warranted is in the context of sub-advisory relationships, where one SEC Adviser (**Primary Adviser**) takes responsibility for the day-to-day administration of a client's account and client-related account services (such as reporting and recordkeeping), but contracts with one or more SEC Advisers (each, a **Sub-Adviser**) to make investment management decisions for the account or part of the account (collectively, **Sub-Advisory Arrangements**).[5]

Sub-Advisory Arrangements can exist in a number of formats, including managed account "platforms," wrap fee programs, separately managed accounts (**SMAs**), unified managed accounts (**UMAs**), other sub-advised accounts, and collective investment funds where a Primary Adviser sponsors the fund and retains Sub-Advisers to manage all or part of the fund's accounts or investments.[6] Where the Primary Adviser manages a Private Fund, the Private Fund is the Primary Adviser's client, not the underlying investors in the Private Fund. Where the Primary Adviser manages an SMA or UMA, the Primary Adviser's client is the individual or institutional account holder.

In all of these cases, the common factor is that the Primary Adviser or its designated agent(s) (but, importantly, not the Sub-Adviser) is responsible for interacting with its clients, soliciting potential investors and raising capital, collecting information and documentation regarding the clients' or investors' eligibility to invest under securities and other laws and regulations, and liaising with the custodians that will hold clients' assets. Furthermore, the Primary Adviser possesses the authority pursuant to a written agreement to appoint and replace each Sub-Adviser, which functions solely as a service provider that has the discrete responsibility for managing the assets allocated to it under the Sub-Advisory Arrangement.

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[5] We make this point in response to FinCEN's request for comment on whether there are similar arrangements where an SEC Adviser may be sub-contracted to provide services to another SEC Adviser that should or should not be in the scope of an SEC Adviser's AML/CFT program.

[6] The IAA notes that the Private Fund is the SEC Adviser's client, not the underlying investors in the fund.

A Sub-Adviser likely will not possess or have access to information about the end-clients or fund investors in the Sub-Advisory Arrangement and, therefore, is not well-positioned to conduct a meaningful AML review. In some cases, this lack of transparency may indeed be critical to the commercial (e.g., due to competitive concerns) or legal (e.g., due to varying privacy laws applicable to non-U.S. clients) viability of the Sub-Advisory Arrangement. Moreover, as a party involved in only the investment management aspects of the Sub-Advisory Arrangement, the Sub-Adviser typically will have no direct contact with the account holder or investor and will not have investor-level visibility into the circumstances surrounding subscriptions, redemptions, and other cash moves impacting the account. As such, the Sub-Adviser is unlikely to have visibility into the type of client or investor-level account activity that might otherwise trigger suspicious activity reporting obligations.

The foregoing also is true – and the point even more compelling – when clients enter into advisory contracts with an AML-Regulated Entity, which then enters into sub-advisory contracts with SEC Advisers (**AML-Covered Sub-Advisory Arrangements**). In AML-Covered Sub-Advisory Arrangements, the AML-Regulated Entity often acts as the primary point of contact with investors or its clients, is responsible for conducting due diligence and complying with AML program requirements, and has the ability and authority to monitor and collect information about its clients' account activities.

A notable example is the traditional, bundled "wrap fee" program sponsored by a registered broker-dealer. In this arrangement, clients traditionally enter into agreements for brokerage and advisory services with the registered broker-dealer sponsoring the program, which is typically a dually registered broker-dealer and investment adviser and is subject to AML program requirements under the BSA and thus responsible for all client-level services (e.g., recordkeeping, account maintenance, reconciliation, etc.). The broker-dealer then enters into one or more sub-advisory contracts with SEC Advisers to invest the client assets invested in the program, based on the parameters set by the sponsor. Therefore, a Sub-Adviser that provides advisory services under an AML-Covered Sub-Advisory Arrangement has minimal or no contact with the AML-Regulated Entity's customers and is asked to manage assets that have already undergone an AML screening. Further, the Sub-Adviser likely does not possess or have access to information about the AML-Regulated Entity's customers that would permit the Sub-Adviser to conduct an AML review that would add value to the AML review already conducted in the first instance by the AML-Regulated Entity.

The IAA believes that subjecting any Sub-Adviser, whether it contracts with an SEC Adviser or an AML-Regulated Entity, to AML program requirements is likely not the most appropriate or effective means to implement AML protections in a Sub-Advisory Arrangement and could prove disruptive to an important segment of the asset management industry. We therefore request that FinCEN relieve Sub-Advisers and AML-Covered Sub-Advisory Arrangements from the AML program requirements of the Proposal with respect to their sub-advisory activities.

4. Application of the Proposal to Foreign Advisers

FinCEN has asked for comment on whether the Proposal should apply to SEC Advisers that have no place of business inside the United States (**Foreign Advisers**). FinCEN has long recognized that the BSA does not apply to foreign financial institutions, foreign operations of U.S. financial institutions, and foreign bank branches, and has tailored its FAQs and examination manuals accordingly.[7] This jurisdictional approach was reflected in FinCEN's 2003 AML Proposal, which defined "investment adviser" to include only those investment advisers "whose principal office and place of business is located in the United States,"[8] but that refinement was not carried forward into the Proposal. We strongly recommend that any final rule adopt the same jurisdictional approach and exclude Foreign Advisers.

5. Advisory Services to Lower-Risk Clients

Certain advisory clients, although not themselves subject to formal AML program requirements, nonetheless present a lower risk of suspicious activity. Retirement Plans, Employees' Securities Companies (**ESCs**),[9] and publicly traded corporations are notable examples.

Retirement plans are created to secure employees' retirement benefits, are funded by contributions directly from participants' salaries and from the sponsoring employer, and participants are not permitted to withdraw their plan contributions prior to reaching age 59, and will be subject to severe penalties for doing so.[10] ESCs are companies all the outstanding securities of which are beneficially owned by current and former employees of a single employer (or group of affiliated employers), immediate family members thereof, and/or the relevant employer(s), and are established to benefit, reward, and retain employees.[11] Public corporations generate income from active business operations, are subject to significant audits and other regulatory requirements, and are heavily regulated by the SEC. For these reasons, advisory accounts for Retirement Plans, ESCs, and publicly traded corporations present a significantly lower risk of money laundering.

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[7] The definitions of "financial institution" and "bank" in the BSA and its implementing regulations do not encompass foreign offices or foreign investments of U.S. banks or Edge and agreement corporations and "AML policies, procedures, and processes at the foreign office or branch should comply with local requirements." Federal Financial Institutions Examination Council (**FFIEC**), *BSA/AML Manual*, *Program Structures*, available at https://bsaaml.ffiec.gov/manual/ProgramStructures/02.

[8] *See Financial Crimes Enforcement Network; Anti-Money Laundering Programs for Investment Advisers*, 68 Fed. Reg. 23646, 23652 (May 5, 2003).

[9] ESCs are established in accordance with the Investment Company Act of 1940 (**ICA**).

[10] FinCEN has previously recognized that Retirement Plan funds "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." *See Customer Identification Programs for Broker-Dealers*, 68 Fed. Reg. 25113, 25115 (May 9, 2003) (**CIP Rule**). For these reasons, the CIP Rule excludes from the definition of "account" an account opened for the purpose of participating in an employee benefit plan established under ERISA.

[11] *See* ICA Section 2(a)(13); 15 U.S.C. § 80a-2(a)(13).

Several other advisory clients would also fall into this lower-risk category and we recommend that they be treated in a similar manner. These include accounts of government entities, such as municipal or state agencies; governmental pension plans; non-profit organizations; higher education endowment funds; and multi-employer plans. Moreover, as noted above, these accounts are held in custody by a financial institution that is already required to conduct BSA-compliant AML reviews of the account, adding an additional layer of security.

We ask that FinCEN explicitly recognize the minimal risk presented by the types of advisory clients discussed above and exclude from the Proposal's AML program requirements such lower risk clients. If FinCEN declines to adopt our recommendation, however, at a minimum it should clarify that SEC Advisers' AML program requirements under the Proposal with respect to these entities would be minimal under a risk-based approach.

6. Smaller SEC Advisers

FinCEN acknowledges that the Proposal, if adopted as written, will impose a disproportionately greater operational and compliance burden on smaller SEC Advisers. However, like the SEC, FinCEN uses an outdated and totally unrealistic definition of small entity, concluding that only an estimated 2.7% of all SEC Advisers impacted by the Proposal are small entities.[12] Based on this, FinCEN estimates that the proposed rule will not impact a substantial number of small entities.[13] The IAA has long objected to the use of this definition and has asked the SEC through a petition for rulemaking to recognize that most SEC Advisers are small businesses by any rational measure.[14] We urge FinCEN to do the same.

Accordingly, FinCEN should exclude smaller SEC Advisers with 100 or fewer employees from the AML program requirements of the Proposal, or, at a minimum, it should exclude smaller SEC Advisers with 20 or fewer employees.[15] This would be consistent with FinCEN's treatment of state-registered investment advisers, which we support.

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[12] The Proposal, in analyzing the impact on smaller SEC Advisers, applies a definition of "small entity" based essentially on having assets under management of less than $25 million—a definition that excludes substantially all the SEC Advisers covered by the Proposal. According to our most recent report on the SEC Adviser industry, 92% of advisers reported having 100 or fewer non-clerical employees. In fact, the median number of employees reported by SEC Advisers is eight. *See IAA-NRS Investment Adviser Industry Snapshot 2023*, June 2023, p. 23, available at https://www.investmentadviser.org/wp-content/uploads/2023/06/Snapshot2023_Final.pdf.

[13] Proposal, 89 Fed. Reg. at 12174.

[14] The IAA has petitioned the SEC to initiate rulemaking proceedings to amend the definition of small entity for purposes of the Regulatory Flexibility Act of 1980 and use the number of employees of an adviser as the appropriate size standard for purposes of determining the impact of its regulations on small advisers. *See* IAA Letter to SEC re *Petition for Rulemaking to Amend the Definition of "Small Entity" in Rule 0-7 under the Investment Advisers Act of 1940 for Purposes of the Regulatory Flexibility Act* (Sept. 14, 2023), available at https://www.investmentadviser.org/wp-content/uploads/2023/09/IAA-Rulemaking-Petition-9.14.23.pdf?t=650356467cbe3.

[15] As reported in the SEC Adviser's Form ADV Part 1A.

Fiduciary investment advice from SEC Advisers is increasingly important as financial markets become more and more complex. SEC Advisers help individual investors meet their financial goals, including investing for retirement, home ownership, or education, and support their communities in myriad ways. The majority of these SEC Advisers are small businesses, and they are struggling under the weight of the current regulatory agenda. Indeed, new regulations burden smaller SEC Advisers in unique ways and these burdens are only increasing. Smaller SEC Advisers will also face unique challenges under this Proposal.

For example, smaller SEC Advisers, which have limited personnel and other resources, will need to divert resources from client-servicing functions and other compliance requirements to invest in building out an AML program. Additionally, smaller SEC Advisers will likely need to outsource the independent testing requirement to a third party and non-U.S. advisers will need to hire and train staff in the United States.

FinCEN notes in the Proposal that SEC Advisers are currently subject to various requirements under the federal securities laws and expects that advisers would generally be able to adapt existing policies and procedures to meet the Proposal's requirements.[16] We believe that the expectation that SEC Advisers can comply with the proposed requirements by adapting existing policies, procedures and controls and that these requirements will thus not be burdensome or costly may be without a reasonable basis. Among other things, the policies and procedures that SEC Advisers currently are required to implement are principles-based and tailored to their businesses and are designed to prevent violations of the Advisers Act. As such, they are unlikely to include or be easily adaptable to the Proposal's prescriptive requirements for compliance with BSA requirements. Similarly, the annual reviews that advisers must conduct relate to the adequacy and effectiveness of their policies and procedures for compliance with the Advisers Act, and do not necessarily equip SEC Advisers to implement independent testing under the AML program requirement.

We also believe that smaller SEC Advisers generally pose less risk with regard to the proliferation of money laundering and terrorist financing. FinCEN seems to agree with this position and has excluded state-registered investment advisers, stating that including state-registered investment advisers in the Proposal would be "less likely to achieve the same degree of benefits as for other investment advisers, partly because State-registered advisers are smaller, in terms of number of clients and AUM, and their customers tend to be localized."[17] We agree with and support this exclusion and believe that similar reasoning can be applied to smaller SEC Advisers. In our view, the appropriate cutoff for an exclusion is an SEC Adviser with 100 or

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[16] Proposal, 89 Fed. Reg. at 12126.

[17] Proposal, 89 Fed. Reg. at 12171 (emphasis added). A recent report from the North American Securities Administrators Association (**NASAA**) found that 14,079 (83%) state advisers have fewer than 3 employees, 2,771 (16%) have 3-10 employees, 107 (0.6%) have 11-20 employees and only 51 (0.3%) have more than 20 employees. NASAA, *Investment Adviser Section Annual Report*, 2023, available at https://www.nasaa.org/wp-content/uploads/2023/09/2023-IA-Section-Report-FINAL.pdf. As noted above, the median number of employees reported by SEC Advisers is eight. *See IAA-NRS Investment Adviser Industry Snapshot 2023*, *supra* note 12.

fewer employees. At a minimum, however, we urge FinCEN to exclude SEC Advisers with 20 or fewer employees.

B. The Proposal Should be Amended to Ease the Practical and Operational Burden on SEC Advisers Implementing AML Programs

In addition to providing exclusions or exemptions where the risk and thus the potential benefits are small but the burdens are significant, FinCEN should amend the Proposal to address certain practical challenges SEC Advisers are likely to face in implementing AML programs. While the proposed AML program must be reasonably designed to prevent the SEC Adviser from being used for money laundering, and we appreciate the intention that the program be risk-based and tailored to the SEC Adviser, the five minimum requirements that the AML program would be required to meet are highly prescriptive, which will make it difficult for SEC Advisers to adopt a tailored, risk-based program. These are: (i) implementation of internal AML policies, procedures, and controls; (ii) designation of a person(s) responsible for administering the AML program; (iii) ongoing AML program training for appropriate persons; (iv) independent testing of compliance; and (v) implementation of appropriate risk-based procedures for conducting ongoing customer due diligence. We address certain practical issues concerning the way the Proposal requires implementation of the AML program below.

1. Program Approval

The Proposal would require that each SEC Adviser's AML program 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.[18] The IAA agrees that each SEC Adviser should ensure that its AML program receives approval and support at an appropriately high level of management. However, owners and principals may not be the most well-positioned parties to approve AML programs, as they may not be the most familiar with the operational aspects of the SEC Adviser's AML program. We recommend instead that FinCEN's final rules permit approval by a member of senior management. This would be consistent with the corresponding rules for broker-dealers[19] and with the integration of the AML program into the SEC Adviser's existing compliance program.

2. AML Compliance Officer

The Proposal would require that the compliance officer responsible for the AML program be, among other things, knowledgeable and competent regarding FinCEN's regulatory requirements and have the authority to "develop and implement appropriate policies, procedures, and internal controls reasonably designed to prevent the investment adviser from being used for those risks."[20] The Proposal further requires that the compliance officer be an "officer" of the

[18] Proposal, 89 Fed. Reg. at 12125-6.

[19] See FINRA Rule 3310.

[20] Proposal, 89 Fed. Reg. at 12128.

adviser. We note that many SEC Advisers, by virtue of their organizational structures, may not have formally designated corporate "officers" or have officers who are well-suited to serve as the SEC Adviser's AML compliance officer. While we appreciate FinCEN's making clear that an SEC Adviser's Chief Compliance Officer may serve as the AML Compliance Officer,[21] due to the varying organizational structures of SEC Advisers, we urge greater flexibility. Specifically, we recommend that the Proposal be amended to permit any sufficiently senior employee of the SEC Adviser (including its Chief Compliance Officer[22]) – or of any other affiliate or entity within the SEC Adviser's organizational structure – to serve as the AML Compliance Officer, as long as such employee meets the other requirements set forth in the Proposal, as modified by our comments herein, that relate to knowledge and authority, and is either a member of, or reports directly to, the SEC Adviser's or its affiliate's senior management.

The IAA is also concerned that, unless excluded as we recommend, Foreign Advisers, which currently may not have any staff in the United States, would be required to hire staff in the United States to meet the requirements of the Proposal.[23] While we recognize that this is a statutory requirement that is being implemented by the Proposal, we would request that FinCEN analyze how this would impact the costs for Foreign Advisers and also extend the implementation period, as requested below, to allow sufficient time for Foreign Advisers to hire and train staff in the United States.

3. Independent Testing

The Proposal would require SEC Advisers to engage in periodic independent testing of their AML programs, with such testing to be conducted by qualified outside parties or by employees of the SEC Adviser.[24] The Proposal prohibits the personnel tasked with independent testing from being involved in the implementation or oversight of the SEC Adviser's AML program.

We are extremely concerned that this requirement will place a substantial burden on SEC Advisers, especially smaller SEC Advisers that employ a limited number of individuals. For them, the requirement that the testing be independent is tantamount to a requirement to hire an

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[21] Proposal, 89 Fed. Reg. at 12128, fn. 165.

[22] Some SEC Advisers have outsourced all compliance activities to third parties, including the role of their Chief Compliance Officers. Outsourced Chief Compliance Officers may perform key compliance responsibilities, such as updating firm policies and procedures, preparing regulatory filings, and conducting annual compliance reviews. Outsourced Chief Compliance Officers are also listed on the SEC Adviser's Form ADV Part 1 and are subject to the same standards as in-house Chief Compliance Officers. Consistent with our discussion concerning delegation below, the outsourced Chief Compliance Officer should be allowed to serve as the AML Compliance Officer. *See infra*, Section II(F).

[23] The Anti-Money Laundering Act, codified at 31 U.S.C. 5318(h)(5), provides that the duty to establish, maintain, and enforce a financial institution's AML/CFT program shall remain the responsibility of, and be performed by, persons in the United States who are accessible to, and subject to oversight and supervision by, the Secretary of the Treasury and the appropriate Federal functional regulator (the SEC).

[24] Proposal, 89 Fed. Reg. at 12127.

external party. It is unlikely that a smaller SEC Adviser will have employees that are sufficiently knowledgeable about the SEC Adviser's AML program that are not already involved in its implementation or oversight. As a result, they would have to retain qualified outside parties for independent testing. This would likely be a significant cost, with a significant impact and only marginal potential benefits, as these smaller firms are the least financially able to hire outside consultants.

We request that FinCEN provide flexibility in the independent testing requirement and permit smaller SEC Advisers with 100 or fewer employees to employ an internal testing program that may include employees involved in the AML program and/or ongoing BSA compliance. We note that SEC Advisers already are obligated to perform annual compliance reviews under SEC regulations. The Proposal is counterproductive in this respect in that it would prevent SEC Advisers from incorporating AML program requirements into their existing compliance reviews. This is because the knowledgeable staff who conduct these reviews wouldn't be allowed to participate in the separate, independent AML testing required by the Proposal. The IAA believes that this constraint would place an unnecessary burden and expense on SEC Advisers, preventing them from allocating their valuable compliance resources in an optimal manner.[25] Allowing SEC Advisers to use knowledgeable, internal resources would strike a better balance between addressing risk and overly burdening SEC Advisers.

4. Look-Through Obligations of SEC Advisers to Private Funds

The IAA appreciates FinCEN's risk-based approach that permits SEC Advisers to risk-rate their advisory services based on the money-laundering risks associated with particular types of clients.[26] The Proposal notes, in particular, that an SEC Adviser acting as the Primary Adviser to a Private Fund "should gather pertinent facts about the structure or ownership of the fund, including both the extent to which they are provided with relevant information about the investors in that private fund, who may or may not themselves also be customers of the investment adviser, and the nature of such investor-related information that they receive" and should consider the money-laundering risks presented by such investors.[27]

We ask for confirmation that an SEC Adviser's obligation to assess money-laundering risks relating to the underlying investors in a Private Fund applies only when, and only to the extent that, the adviser is the Primary Adviser to that Private Fund (and not in the case of a Sub-Advisory Arrangement, as discussed above) and has access to the relevant information about the

[25] FinCEN's analysis assumes that SEC Advisers can just incorporate AML program requirements into their existing compliance program; however, the independent testing requirement as proposed would prohibit this. The IAA believes that costs and burdens under the Proposal are substantially underestimated.

[26] For example, FinCEN recognizes that, "due to their long-term investment focus and illiquid nature, certain private equity funds may be less likely to be used by money launderers, terrorist financiers, and others engaging in illicit finance." Proposal, 89 Fed. Reg. at 12126.

[27] Proposal, 89 Fed. Reg. at 12126.

Private Fund's underlying investors.[28] An SEC Adviser serving as the Private Fund's Primary Adviser or sponsor will likely, but not necessarily, have information about that Private Fund's underlying investors in the ordinary course. It would not have that information, for example, in an unaffiliated "fund-of-funds" structure. In that case, the SEC Adviser to an *investee* fund in the structure should not be required to "look through" and assess the risks presented by the underlying investors in an investing fund, unless such SEC Adviser also acts as the Primary Adviser to the investing fund and, as such, possesses (or has access to) information about such underlying investors in the ordinary course.

C. The Proposal Should be Amended to Ease the Practical and Operational Burden on SEC Adviser Affiliates of AML-Regulated Entities

As noted in the Proposal, some SEC Advisers may be affiliated with, or subsidiaries of, entities that are either defined as a financial institution under the BSA in other capacities or are otherwise required to establish AML programs. We have some concern that, in situations where an SEC Adviser is affiliated with, or a subsidiary of, a financial institution there is an obvious risk of duplication of effort on the part of both parties. Such duplication will not only increase the compliance and operational burden but could result in less useful information, because FinCEN will need to parse through potentially hundreds of thousands of overlapping and duplicate reports.

We support FinCEN's position that an SEC Adviser affiliated with, or a subsidiary of, an entity required to establish an AML program in another capacity does not have to implement multiple or separate programs if the program is designed to cover all of the entity's activities and businesses that are subject to the BSA. We believe it is reasonable that such a risk-based program be designed to address the different money laundering risks posed by the different aspects of the entity's business. However, the Proposal will nonetheless likely require affiliated and dually registered SEC Advisers to update their compliance programs, similar to other SEC Advisers. FinCEN should consider this when analyzing the Proposal's implementation timeline and costs.

D. FinCEN Should Clarify SEC Advisers' SAR Obligations

The Proposal tracks various other FinCEN rules requiring reporting of suspicious activity by providing for an SEC Adviser to report suspicious transactions "conducted or attempted by, at, or through" the SEC Adviser, if the transaction involves or aggregates funds or other assets of at least $5,000 and the adviser knows, suspects, or has reason to suspect that the transaction is reportable. The Proposal further requires that SEC Advisers "evaluate customer activity and relationships for money laundering, terrorist financing, and other illicit finance risks and design a

[28] As noted above, the Private Fund is the SEC Adviser's client, not the underlying investors in the fund.

suspicious transaction monitoring program that is appropriate for the particular investment adviser in light of such risks."[29]

Subject to the comment below and the exclusions or exemptions from the program requirements we request above, the IAA supports this requirement. As described above, the IAA and its members are committed to preventing money laundering and believe it is appropriate for advisers to assist law enforcement by filing SARs when an SEC Adviser knows or suspects that an investor's activities fall within the reporting requirements.

We ask for clarification, however, regarding the application to SEC Advisers of the proposed SAR filing language "by, at, or through" the SEC Advisers. Although this language appears in the SAR rule for banks, mutual funds and broker-dealers, it is not at all clear how this language reflects the way in which SEC Advisers interact with investors or funds. To say that transactions happen "by, at, or through" an SEC Adviser is not necessarily accurate, as investors transact with broker-dealers, custodians, and funds, not with SEC Advisers, and SEC Advisers generally do not hold and are not the legal owners of investor assets. Further, it is the broker-dealer or custodian that processes transactions and, in the context of Private Funds, it is the fund's administrator that processes subscriptions and redemptions for investors sending money to, or receiving money from, the fund. Accordingly, the IAA proposes that SEC Advisers would be required to file SARs only on suspicious transactions by investors with or through a fund or managed account for which the SEC Adviser acts as Primary Adviser (and the transaction involves or aggregates at least $5,000 and the SEC Adviser knows, suspects, or has reason to suspect the transaction is reportable).[30]

E. FinCEN Should Exempt SEC Advisers from the Recordkeeping and Travel Rules and Special Information Sharing Procedures under Section 314(a)

The IAA is concerned that there may be little additive value to subjecting SEC Advisers to the requirements of the Recordkeeping and Travel Rules and Special Information Sharing Procedures.[31] Unlike for other types of financial service providers, the client relationship for an SEC Adviser does not begin with an initial "deposit." Rather, it begins with the client entering into an investment management agreement with the SEC Adviser, pursuant to which the SEC Adviser agrees to manage the client's assets on a discretionary basis or provide non-discretionary investment advice that clients may implement in their own accounts. In either case, the actual custody of the cash and securities in the client's account is maintained by a "qualified

[29] Proposal, 89 Fed. Reg. at 12131.

[30] The IAA also believes that it would be helpful for FinCEN to provide examples of when SEC Advisers may need to file a SAR, similar to the examples of potentially suspicious activities (red flags) cited in the FFIEC AML Examination Manual.

[31] FinCEN's information-sharing regulations under Section 314(a) enable law enforcement agencies, through FinCEN, to reach out to financial institutions to locate accounts and transactions of persons that may be involved in terrorism or money laundering.

custodian," such as a bank or broker-dealer,[32] and the client merely authorizes that bank or broker-dealer to accept investment management instructions from the SEC Adviser. To the extent the client has also authorized the custodian to accept transmittal of client instructions from the SEC Adviser to send investor funds to a third party, the SEC Adviser typically will initiate instructions to the investor's financial institution to wire funds to the recipient's financial institution. However, while SEC Advisers may participate in this process where authority has been granted, compared with other financial institutions involved in the account opening process, SEC Advisers may not be as well-positioned to view how the client's account is funded, where withdrawals from the account are sent, or whether there is unusual wire activity.[33] In any event, the investor's financial institution and the recipient's financial institution will be involved in the transfer and be subject to the requirements of the Recordkeeping and Travel Rules.

Moreover, even if this information could be easily collected by SEC Advisers, requiring SEC Advisers separately to maintain this information and ensure that transmittal orders "travel" with the funds would largely result in duplication of efforts and provide little, if any, additional information useful to regulators.

For compliance with the Special Information Sharing Procedures, upon receiving an information request from FinCEN, an SEC Adviser would be required to search its records *every two weeks* to determine whether it *maintains or has maintained any account or engaged in any transaction* with an individual, entity, or organization named in the request.[34] As noted in the discussion above, because SEC Advisers do not maintain accounts or engage in transactions with the investors or clients,[35] and the financial institutions that have custody of investor assets and process transactions would already provide this information, we believe that, like the

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[32] SEC Advisers themselves rarely serve as qualified custodians. In 2022, only 324 advisers (~2%) reported that they or a related person acted as a qualified custodian for client assets. *See IAA-NRS Investment Adviser Industry Snapshot 2023*, *supra* note 12 at 81.

[33] The IAA acknowledges that there is significant variation among SEC Advisers with regard to their visibility into, and involvement in, funding and other cash transactions related to their clients' accounts. For example, SEC Advisers to retail clients may be more actively involved in facilitating the account opening and funding process for their clients, including forwarding wire instructions from the client to the custodian, while this may be less common among advisers to institutional clients. However, this does not alter the fundamental requirements under the Advisers Act Custody Rule that SEC Advisers do not hold or transmit any funds or securities and such transactions must be effected through other regulated financial institutions (except in the very limited circumstances where the SEC Adviser is dually registered as a broker-dealer and is itself acting as the client's qualified custodian, which would already be subject to AML regulations). We appreciate that FinCEN recognizes that SEC Advisers operate varying business models and, that where, for example, an SEC Adviser is merely transmitting a wire instruction from a client, the SEC Adviser would not be conducting transactions that meet the definition of "transmittal order." The Proposal notes that, in these cases, the SEC Adviser would not "be reimbursed by debiting an account of, or otherwise receiving payment from," the customer, and thus the SEC Adviser's receipt of instructions from a customer would not meet the definition of transmittal order. Proposal, 89 Fed. Reg. at 12121.

[34] Proposal, 89 Fed. Reg. at 12158 (emphasis added).

[35] A "transaction" is defined to not mean any transaction conducted through an account. 31 C.F.R. § 1010.505(d)(2). Transactions are not conducted through an account at the SEC Adviser.

Recordkeeping and Travel Rules, this would largely result in duplication of efforts and provide little, if any, additional information useful to regulators.[36]

If the Recordkeeping and Travel Rules and Special Information Sharing Procedures are required for SEC Advisers, FinCEN should, at a minimum, explain how it expects SEC Advisers to implement these rules, given that they do not accept or hold investor funds, maintain accounts or engage in transactions with clients or investors.

F. The IAA Supports Delegation of Examination Authority to the SEC

The IAA supports the delegation of examination authority to the SEC related to an SEC Adviser's compliance with the Proposal's requirements. As FinCEN is aware, the FFIEC's BSA/AML examination manual, used in examinations of other financial institutions, is publicly available.[37] The FFIEC publishes the manual to the public to provide a comprehensive source of information that can be used to guide efforts to develop a program that meets BSA requirements. We strongly support this transparency and believe this same reasoning would apply to the SEC. For SEC Advisers to best meet supervisory expectations, the IAA urges FinCEN to require that the SEC publicly release a copy of its relevant AML examination manual as well.[38]

G. FinCEN Should Extend and Stagger the Implementation Period in Light of the Interrelatedness of the Proposal and Other Rulemakings, and Reopen the Comment Period if Interrelated Rules are Proposed Before this Proposal is Finalized

The IAA believes that 12 months will be insufficient for SEC Advisers to develop compliant AML programs and to put in place the systems, personnel and required disclosures necessary to implement their AML programs. Even if the SEC Adviser has voluntarily implemented an AML program, it is unlikely that that program will fully track the prescriptive requirements in the Proposal, and the Proposal will thus require most SEC Advisers to build systems that do not currently exist or make substantial modifications to existing systems. Additionally, as noted above, Foreign Advisers will need to hire and train employees in the United States.

Our concerns regarding the short implementation period have been greatly exacerbated by the sheer scale and speed of rulemaking activities affecting SEC Advisers over the past two

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[36] For the reasons noted above, we would respectfully disagree with the assertion in the Proposal that imposing these requirements on SEC Advisers is likely to increase positive responses for account and transaction information and then support further investigations using other legal tools. *See id.* at 12149.

[37] FFIEC, *BSA/AML Examination Manual*, https://bsaaml.ffiec.gov/manual.

[38] The SEC has published an AML resource for broker-dealers; however, while it references the FFIEC BSA/AML Examination Manual, it does not provide any specific information related to SEC examinations. See Anti-Money Laundering (AML) Source Tool for Broker-Dealers, https://www.sec.gov/about/offices/ocie/amlsourcetool.

years.[39] SEC Advisers will be expected to implement an enormous number of new requirements over a relatively short period of time. The implementation timeline must be considered as part of this bigger picture.

In light of the significant undertaking that will be required of SEC Advisers to comply with the Proposal, and in the context of the exceedingly challenging regulatory landscape, we request that the effective date for the new requirements be at least 24 months from the date the rules are finalized for larger SEC Advisers and at least 36 months for smaller SEC Advisers with 100 or fewer employees, should FinCEN determine not to exclude them from the AML program requirements.[40] In addition, we request that the final rule clarify that the requirement to file SARs applies to transactions initiated after the specified compliance date for the AML program, so there is no confusion regarding whether SARs must be filed as an SEC Adviser begins to implement and test its AML program.

We also note that, with respect to AML program requirements for other financial institutions, FinCEN has not imposed *all* AML requirements at once and has staggered implementation of these requirements, SAR filing requirements, and the Recordkeeping and Travel Rule requirements. It is not realistic to expect SEC Advisers to achieve effective compliance with all these requirements concurrently in the proposed timeframe.[41]

Further, if FinCEN does not exempt SEC Advisers from the Recordkeeping and Travel Rules and Special Information Sharing Procedures, these requirements should not be implemented until FinCEN implements customer identification program (**CIP**) requirements for SEC Advisers. Given that no CIP requirements are currently in effect for SEC Advisers, it would be difficult for SEC Advisers to comply with the Recordkeeping and Travel Rules or Special Information Sharing Procedures.[42] The lack of a CIP requirement would also limit the utility of

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[39] *See* IAA Rulemaking Implementation Chart, https://www.investmentadviser.org/wp-content/uploads/2023/10/SEC-Rule-Chart-Compliance-Dates-Gantt-3.18.2024-with-logo.pdf?t=65f990b0f196d; *see also* IAA Letter to SEC re Adviser Proposals, available at https://www.investmentadviser.org/wp-content/uploads/2023/06/IAA-Comment-Letter-to-Adviser-Proposals-6.17.23.pdf.

[40] We note that the SEC acknowledges the disproportionate burdens facing smaller SEC Advisers and has included staggered implementation periods for smaller SEC Advisers in its recent rulemaking proposals. *See, e.g.*, SEC, *Safeguarding Advisory Client Assets*, 88 Fed. Reg. 14672 (Mar. 9, 2023), available at https://www.govinfo.gov/content/pkg/FR-2023-03-09/pdf/2023-03681.pdf (**Proposed Safeguarding Rule**).

[41] For example, for mutual funds, the AML program requirement became effective in 2002, the SAR filing requirement in 2006, and the Recordkeeping and Travel Rule requirements in 2010. See *Amendment to the Bank Secrecy Act Regulations—Requirement that Mutual Funds Report Suspicious Transactions*, 71 Fed. Reg. 26213 (May 4, 2006) (six months); *Anti-Money Laundering Programs for Mutual Funds*, 67 Fed. Reg. 21117 (Apr. 29, 2002) (90 days); and *Defining Mutual Funds as Financial Institutions*, 75 Fed. Reg. 19241 (Apr. 14, 2010) (270 days for compliance with Recordkeeping and Travel Rule).

[42] *See* 31 C.F.R. § 1010.410(e)(2). The Recordkeeping and Travel Rules effectively require financial institutions processing transmittal orders over $3,000 to perform CIP on the customer; either the transmittal order will be from an "established customer" (whose identities will already have been verified when opening their account at the financial institution) or it will be from a person "other than an established customer" (in which case the financial

mandatory information sharing because SEC Advisers do not maintain accounts and are not currently required to verify the identities of account holders.

The IAA notes that on April 5, 2024, FinCEN submitted its SEC Adviser CIP Program Requirements proposed rule to the White House Office of Management and Budget.[43] As noted in the IAA's comments above, we are concerned about the timing of this imminent rulemaking proposal and whether it may lead to further confusion and potential inconsistency. If a CIP rule for SEC Advisers is proposed prior to adoption of final AML program requirements, the IAA urges FinCEN to reopen the comment period for this Proposal to allow commenters to reconsider their comments in light of that rule proposal, which is likely to be highly interrelated.

The IAA also requests that FinCEN continue to coordinate with staff at the SEC, especially on rulemakings that are interrelated or will have significant implications for one another.[44] For example, the SEC's Proposed Outsourcing Rule would require SEC Advisers to take specific actions related to their outsourcing of certain covered functions and the Proposed Safeguarding Rule proposes highly prescriptive requirements for SEC Advisers' relationships with their custodians. Based on the breadth of services covered by these proposals, delegation of an adviser's AML program could well be covered.[45] These are just two examples of SEC proposals that may overlap with the AML program requirements, and it is unclear how SEC Advisers would address overlapping, duplicative, or even inconsistent requirements.

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We appreciate your consideration of our comments on this important issue. Please do not hesitate to contact the undersigned at (202) 293-4222 if we can be of further assistance.

Respectfully Submitted,

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institution is required to verify the customer's identity). *See also Amendment to the Bank Secrecy Act Regulations Relating to Recordkeeping for Funds Transfers and Transmittals of Funds by Financial Institutions*, 60 Fed. Reg. 220, 222 (Jan. 3, 1995) ("The final rule limits the verification requirements to originators/transmittors and beneficiaries/recipients that are not established customers. An established customer is defined as a person with an account with a financial institution or a person with respect to which the financial institution has obtained and maintains on file the name and address, as well as the customer's taxpayer identification number or, if none, alien identification number or passport number and country of issuance, and to which the financial institution provides financial services relying on that information.").

[43] FinCEN, *Investment Adviser Customer Identification Program Requirements for Registered Investment Advisers and Exempt Reporting Advisers*, RIN 1506-AB66, available at https://www.reginfo.gov/public/do/eoDetails?rrid=479162.

[44] Proposal, 89 Fed. Reg. at 12134 ("This proposed rule has already been sent to the Department of Justice and to the SEC as the Federal functional regulator for investment advisers for interagency consultation, and their input on this issue has been invited.").

[45] *Outsourcing by Investment Advisers*, 87 Fed. Reg. 68816 (Nov. 16, 2022), available at https://www.govinfo.gov/content/pkg/FR-2022-11-16/pdf/2022-23694.pdf **(Proposed Outsourcing Rule)**. The Proposed Outsourcing Rule comprises proposed Rule 206(4)-11 and proposed amendments to the Advisers Act Recordkeeping Rule (Rule 204-2) and Form ADV.

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