July 22, 2024

VIA ELECTRONIC SUBMISSION

Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

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

Re: Joint Notice of Proposed Rulemaking on Customer Identification Programs for Registered Investment Advisers and Exempt Reporting Advisers (FinCEN Docket Number FINCEN-2024-0011, SEC File Number S7-2024-02, RINs 1506-AB66 and 3235-AN34)

Managed Funds Association ("**MFA**")[1] appreciates the opportunity to provide comments on the joint notice of proposed rulemaking (the "**Proposed Rule**")[2] issued by the Financial Crimes Enforcement Network ("**FinCEN**") and the U.S. Securities and Exchange Commission ("**SEC**") to apply customer identification program ("**CIP**") obligations to investment advisers registered with the SEC ("**RIAs**") and exempt reporting advisers ("**ERAs**," and with RIAs, collectively, "**Covered Advisers**").

MFA strongly supports FinCEN and the SEC's goal of combatting money laundering, terrorist financing, and other illicit financial activity and has long supported FinCEN's anti-money laundering ("**AML**") policy objectives related to investment advisers. To better attain these goals, however, the Proposed Rule, in our view, requires meaningful clarification in several important respects.

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

[2] Customer Identification Programs for Registered Investment Advisers and Exempt Reporting Advisers, 89 Fed. Reg. 44571 (May 21, 2024).

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Below we provide our comments on the Proposed Rule and respond to the FinCEN and SEC specific questions. We submit these comments to enhance the Proposed Rule and ensure it is appropriately tailored to different aspects of the asset management industry—from retail financial planners to managers offering private funds to high-net worth individuals and sophisticated institutional investors such as pension funds, endowments, and large foundations—and other segments of the U.S. private fund community.

We would be pleased to meet with FinCEN or SEC staff to provide additional background on the asset management industry and the context of our comments.

A. Executive Summary

MFA submits the below recommendations and comments to enhance the implementation and effectiveness of the Proposed Rule.

- MFA supports the definitions of "account" in the Proposed Rule such that investors in private funds are not considered "customers" of Covered Advisers.

- With respect to the definition of "Account," the definition should require a customer to have a formal relationship with a Covered Adviser to obtain investment advisory services, and MFA supports excluding from the definition of "account" any accounts that are acquired through acquisition, merger, purchase of assets, or assumption of liabilities. The definition of "account" should not include products or services where a formal relationship for investment advisory services is not established.

- With respect to the definition of "Customer," the definition should not apply to existing customer relationships, persons with authority or control over an account other than the customer, Covered Advisers, mutual funds, and other entities subject to significant regulatory oversight, or that present low risk of money laundering, such as closed-end funds and public pension plans.

- MFA supports the ability of Covered Advisers to rely on other financial institutions for their CIP. The Final Rule should allow for reliance on subsidiaries of financial institutions subject to an AML program requirement where the subsidiary is subject to an enterprise-wide AML program that is designed to comply with the Bank Secrecy Act ("**BSA**").

Section B1 below summarizes our principal comments on the Proposed Rule. In Sections B2 and B3 we provide detailed comments on specific provisions of the Proposed Rule. Lastly, in Section B4 we offer additional comments and address specific questions posed by FinCEN.

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B. Appropriateness of Definitions of "Account" and "Customer"

1. MFA Supports the Definition of "Account" in the Proposed Rule such that Investors in Private Funds are Not Considered "Customers" of Covered Advisers

The Proposed Rule defines "account" as "any contractual or other business relationship between a person and an investment adviser under which the investment adviser provides investment advisory services."[3] The Proposed Rule defines "customer" as a "person that opens a new account."[4] In the preamble to the Proposed Rule, FinCEN clarifies in a footnote that the term customer "does not include the investors in a private fund."[5] MFA strongly agrees with the position taken in the Proposed Rule that, with regard to private funds, private funds (and not the investors in those private funds) will be considered customers of Covered Advisers and subject to the CIP obligation of the Proposed Rule.

Under the definitions of "account" and "customer," private funds advised by Covered Advisers would be considered customers. While Covered Advisers provide investment advisory services to private funds, investors in those private funds generally have no such direct relationship with the Covered Adviser. In most cases, Covered Advisers do not enter into any contractual or other business relationship to provide investment advisory services to investors in those private funds. In other words, investors in private funds do not establish accounts with Covered Advisers and, therefore, are not customers that are subject to a Covered Adviser's CIP obligations.

Legal precedent supports this reading of the definitions of "account" and "customer." In *Goldstein v. SEC*, the D.C. Circuit held that an earlier SEC rule that would have required private fund managers to consider the investors in private fund its clients, thereby requiring the manager to register with the SEC, was arbitrary and in conflict with the purpose of the underlying statute in which the new rule was included.[6] Any other reading of "account" and "customer" would be burdensome, and contrary to the *Goldstein* decision, given that each private fund may have hundreds of investors and many such investors invest through institutions already conducting CIP, such as BSA-regulated financial institutions.

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[3] Proposed Rule, 31 C.F.R. § 1032.100(a).

[4] Proposed Rule, 31 C.F.R. § 1032.100(c).

[5] Proposed Rule, 89 Fed. Reg. at 44591.

[6] 451 F.3d 873, 883 (D.C. Cir. 2006).

2. **The Definition of "Account"**

a. ***The Definition of "Account" Should Require a customer to Have a Formal Relationship with a Covered Adviser to Obtain Investment Advisory Services***

The Proposed Rule defines "account" as "any contractual or other business relationship between a person and a Covered Adviser under which the Covered Adviser provides investment advisory services."[7] This language is different from the bank and broker-dealer CIP rules, which require that a "formal relationship" be established to provide or engage in banking or broker-dealer services.[8] The language "other business relationship" is overly broad. It could be interpreted to mean investment advisory services provided to persons that do not involve a continuous ongoing relationship or one that is formalized by a contract or other agreement. For example, a "business relationship" for investment advisory services may be interpreted to involve services that do not typically involve the management of assets or transactional activity, ongoing interactions between a person and a Covered Adviser or result in a person accessing the U.S. financial markets.

b. ***The Definition of "Account" Should Not Include Products or Services Where a Formal Relationship for Investment Advisory Services is Not Established***

Consistent with the CIP rule applicable to banks, the Final Rule should include a provision clarifying that the term "account" does not include a product or service where a formal relationship for investment advisory services is not established with a person.[9] These services are typically offered to persons once or on an infrequent basis, usually done as a matter of convenience. Similarly, Covered Advisers may also offer persons investment advisory-related products and services to persons that are impersonal in nature, *e.g.*, written materials or oral statements that do not purport to meet the objectives or needs of specific individuals. These products and services—such as newsletters, general research reports, and portfolio management models used for marketing—should be excluded from the definition of "account."

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[7] Proposed Rule, 31 C.F.R. § 1032.100(a) (*emphasis added*).

[8] 31 CFR 1020.100(a)(1) ("*Account* means a formal banking relationship established to provide or engage in services, dealings, or other financial transactions including a deposit account, a transaction or asset account, a credit account, or other extension of credit. *Account* also includes a relationship established to provide a safety deposit box or other safekeeping services, or cash management, custodian, and trust services."); 31 CFR 1023.100(a)(1) ("Account means a formal relationship with a broker-dealer established to effect transactions in securities, including, but not limited to, the purchase or sale of securities and securities loaned and borrowed activity, and to hold securities or other assets for safekeeping or as collateral.").

[9] 31 C.F.R. § 1020.100(a)(2)(i) (the bank CIP rule provides that an account does not include a "product or service where a formal banking relationship is not established with a person, such as check-cashing, wire transfer, or sale of a check or money order.").

c. MFA Supports Excluding from the Definition of "Account" Any Accounts that are Acquired Through Acquisition, Merger, Purchase of Assets, or Assumption of Liabilities

MFA supports that the definition of "account" should exclude accounts that a Covered Adviser acquires through an acquisition, merger, purchase of assets, or assumption of liabilities because such accounts are not "opened" by customers with the acquiring Covered Adviser. This exclusion would also be consistent with the CIP obligations in the CIP rules applicable to other financial institutions.[10]

d. ERISA Accounts Should be Excluded from the Definition of "Account"

The Proposed Rule does not exclude ERISA accounts from the definition of "account" as it does in the CIP rules applicable to banks, broker-dealers, mutual funds, and other financial institutions. The same reasons for exempting ERISA accounts from the CIP rules of these other financial institutions should apply to Covered Advisers. FinCEN and the SEC have previously noted that ERISA accounts pose minimal money laundering and terrorist financing risks. In the broker-dealer CIP rule, FinCEN and the SEC explained that ERISA accounts "are less susceptible to be used for the financing of terrorism and money laundering because, among other reasons, they are funded through payroll deductions in connection with employment plans that must comply with federal regulations."[11] The Proposed Rule makes no mention of any differences with regard to the risks of ERISA accounts held by Covered Advisers rather than banks or broker-dealers. Indeed, identifying information for ERISA plans is already reported to regulators and publicly available. Retirement plans under ERISA are required to complete and file form 5500 with the Internal Revenue Service and the Department of Labor. Form 5500, among other information, includes: (1) name of plan; (2) name, address, and employer identification number ("**EIN**") of plan sponsor; and (3) name, address, and EIN of plan administrator. Accordingly, ERISA accounts should be excluded from the definition of "account."

MFA suggests that the definition of "account" be amended, as follows:

Account. For purposes of § 1032.220:

(1) Account means ~~any contractual or other business~~ **a formal** relationship ~~between a person and an investment adviser under which the investment adviser provides~~ **established to provide** investment advisory services.

(2) *Account* does not include:

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[10] *See generally* 31 C.F.R. § 1023.220 (broker-dealer CIP rule); 31 C.F.R. § 1020.220 (bank CIP rule).

[11] Customer Identification Programs for Broker-Dealers, 68 Fed. Reg. 25113, 25116 (May 5, 2003).

(i) An account that the investment adviser acquires through any acquisition, merger, purchase of assets, or assumption of liabilities.;

(ii) ~~[Reserved]~~ **A product or service where a formal relationship for investment advisory services is not established with a person, such as where the investment advisory services are not ongoing or are impersonal in nature, such as newsletters, general research reports and portfolio management models used for marketing; or**

(iii) An account opened for the purpose of participating in an employee benefit plan established under the Employee Retirement Income Security Act of 1974

3. Definition of "Customer"

a. The Definition of "Customer" Should Not Apply to Existing Customer Relationships

Under the Proposed Rule, a person is not a customer unless they open a new account. FinCEN should clarify in the Final Rule that Covered Advisers are not required to apply their CIP to accounts that predate the effective date of the Final Rule.

b. Persons with Authority or Control Over an Account Should Not be Customers Subject to CIP

MFA supports the fact that the Proposed Rule, consistent with the CIP rules applicable to broker-dealers and banks, does not consider those with authority or control over an account to be customers subject to CIP.[12]

c. Covered Advisers Should be Excluded From the Definition of "Customer"

On February 15, 2024, FinCEN issued a notice of proposed rulemaking that, if finalized, would require Covered Advisers to develop and implement anti-money laundering and counter-terrorist financing ("**AML/CFT**") compliance programs and monitor for and report suspicious activity to FinCEN ("**AML/CFT Program Proposed Rule**") and would include investment advisers in the definition of financial institution.[13]

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[12] We recognize that the Proposed Rule requires that a Covered Adviser's "CIP must address situations where, based on the investment adviser's risk assessment of a new account opened by a customer that is not an individual, the investment adviser will obtain information about individuals with authority or control over such account in order to verify the customer's identity." Proposed Rule, 31 C.F.R. § 1032.220(a)(2)(ii)(C).

[13] 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, 31 C.F.R. § 1010.100(t)(11) (Feb. 15, 2024).

The Proposed Rule makes clear that the proposed definition of "investment adviser" includes both primary advisers and sub-advisers.[14]

MFA requests that FinCEN clarify in the preamble to the Final Rule that where a primary adviser that is a Covered Adviser enters into a sub-advisory relationship with another Covered Adviser, the primary adviser should not be required to apply its CIP to such sub-adviser. That is because such sub-adviser, as a Covered Adviser, would be excluded from definition of "customer" if Covered Advisers are added to the definition of financial institution under the BSA, as is proposed in the AML/CFT Program Proposed Rule.

We understand that although the Proposed Rule considers private funds (and not the investors in those private funds) to be customers, FinCEN is still considering this issue, based on our reading of the questions posed in the Proposed Rule. Thus, to the extent the Final Rule considers investors in private funds to be customers, FinCEN should clarify in the preamble to the Final Rule that sub-advisers are not required to apply their CIP to the investors in a primary adviser's private funds with which the subadviser contracts. That is because the primary adviser is best situated to conduct CIP on the investors in its private funds and the sub-adviser should not be required to duplicate that effort. Moreover, sub-advisers do not typically have any contractual or similar relationship with the investors in those private funds.

Regardless of whether private funds or investors in private funds are considered customers, MFA recommends that the Final Rule preamble make clear that sub-advisers should be permitted to rely upon primary advisers for CIP performed on those funds or investors. The primary adviser is best situated to conduct CIP on its customers and the sub-adviser should not be required to duplicate that effort.

d. Mutual Funds Should be Exempt from the Definition of "Customer" in the Same Way as are Other Financial Institutions

Under the Proposed Rule, Covered Advisers may deem the CIP requirements "satisfied for any mutual fund it advises if the mutual fund has developed and implemented a CIP that is compliant with CIP requirements applicable to mutual funds."[15] If this proposal is finalized without modification, the rule applicable to Covered Advisers would deviate significantly from the CIP rules applicable to other financial institutions, which exclude mutual funds entirely from the definition of customer. Under the Proposed Rule, Covered Advisers would first need to confirm if the mutual fund has a CIP, and that the mutual fund's CIP is compliant with the mutual fund CIP rule, before determining whether to exclude such mutual fund from the Covered Adviser's CIP.[16] Where a Covered Adviser is unable to do so, it would be required to verify the identity of such mutual fund. For the following reasons, we believe this proposal needs to be modified.

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[14] *See* Proposed Rule, 89 Fed. Reg. at 44574 n.30.

[15] Proposed Rule, 89 Fed. Reg. at 44574.

[16] *See* Proposed Rule, 31 C.F.R. § 1032.220(a).

First, the Final Rule should align with the CIP requirements applicable to other financial institutions, such as banks and broker-dealers, which exempt mutual funds entirely from the definition of customer because they are "a financial institution regulated by a Federal functional regulator"—here, the SEC.[17] Mutual funds, which are highly-regulated, present no greater AML/CFT risk to Covered Advisers than they do to banks and broker-dealers and should therefore be treated similarly.

Second, requiring Covered Advisers to conduct an evaluation of the mutual fund's CIP, including to determine whether it is compliant with the mutual fund CIP rule, would be unduly burdensome and may potentially subject a Covered Adviser to liability if it reaches a view different from that of a regulator. In addition, conducting this assessment as to whether a mutual fund's CIP is compliant with the CIP rule would cause Covered Advisers to allocate more resources to a mutual fund's onboarding process than would be needed to collect and maintain identity documentation for that mutual fund. Given that mutual funds are highly regulated financial institutions and present a low AML/CFT risk, the proposed requirement is disproportionate to the relative AML/CFT risk. Further, to the extent a Covered Adviser is required to adopt and implement an AML/CFT program, a Covered Adviser would address the mutual fund's risks through that AML/CFT program.

e. FinCEN Should Exclude from the Definition of "Customer" Other Entities Subject to Significant Regulatory Oversight or that Present Low Risk of Money Laundering

FinCEN should exempt entities that are subject to significant regulatory oversight, and present lower AML/CFT risks, from a Covered Adviser's CIP program. Such entities would include, for example, closed-end funds, which are required to be registered under the Investment Company Act of 1940 and subject to regulatory oversight similar to mutual funds. FinCEN has recognized that closed-end funds "are subject to comprehensive SEC regulation and oversight and typically trade in the secondary market through broker-dealers who have AML/CFT obligations and where there are additional required disclosures and greater transparency."[18] For those reasons, FinCEN explained, closed-end funds are typically considered lower-risk.

In addition, public pension plans should be exempt from a Covered Adviser's CIP program. Like ERISA accounts, public pension plans are less susceptible to be used for money laundering or terrorist financing because they are funded through payroll deductions in connection with employment. Public pension plans are also overseen by trustees that have a fiduciary duty to pensioners.

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[17] 31 C.F.R. §§ 1020.100(c)(2)(i) (bank CIP rule) and 1023.100(d)(2)(i) (broker-dealer CIP rule); *see also* 31 C.F.R. § 1010.100(r)(6)(defining "Federal functional regulator" to include the "Securities and Exchange Commission") and § 1010.100(t)(10)(defining "Financial institution" to include a "mutual fund"). We note that the proposed regulation text at § 1032.100(c)(2)(i) does align with the bank and CIP rules.

[18] AML/CFT Program Proposed Rule, 89 Fed. Reg. at 12126.

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4. Other Comments

a. Covered Advisers Should Not be Required to Collect Date of Formation

The Proposed Rule requires a Covered Adviser to collect the "date of formation" for a customer that is not a natural person, such as an LLC. This requirement deviates from the existing CIP rules applicable to other financial institutions and should be made consistent. Further, this information is not particularly relevant for verifying customer identity or addressing the AML/CFT risks presented by the customer.

b. The Final Rule Should Recognize that Covered Advisers May Utilize Service Providers to Meet Their CIP Obligations

MFA requests that the Final Rule specifically recognize that Covered Advisers may delegate administration of their CIP obligations to third parties, such as administrators to private funds. While the Proposed Rule recognizes that "third-party firms (*e.g.,* fund administrators[)]" currently "assist investment advisers in complying with their regulatory responsibilities and contractual obligations,"[19] the Proposed Rule does not address how these third-parties can be used by Covered Advisers to meet their CIP obligations following implementation of the Final Rule. In contrast, in the AML/CFT Program Proposed Rule, FinCEN recognized that a Covered Adviser may delegate the "implementation and operation of any aspects of its AML/CFT program to another financial institution, agent, fund administrator, third-party service provider, or other entity."[20] MFA requests that the Final Rule preamble include a comparable recognition with regard to the use of administrators as the AML/CFT Program Proposed Rule.

c. Customer Notice Should Not be Required for a Private Fund Formed and Launched by a Covered Adviser

The Proposed Rule requires that a Covered Adviser provide customers with adequate notice that the Covered Adviser is requesting information to verify their identities. The Proposed Rule also provides a sample notice provision that can be provided to the customer. MFA does not object to this notice requirement in general, but suggests that it should not be required with regard to the private funds a Covered Adviser forms and launches, as implementing this requirement for such funds would not make practical sense.

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[19] Proposed Rule, 89 Fed. Reg. at 44582.

[20] AML/CFT Program Proposed Rule, 89 Fed. Reg. at 12125.

d. MFA Supports the Ability of Covered Advisers to Rely on Other Financial Institutions for Their CIP

Under the Proposed Rule, Covered Advisers may rely on another financial institution, including an affiliate, to perform any of the procedures of the Covered Adviser's CIP if: (i) the reliance is reasonable under the circumstances; (ii) the financial institution being relied upon is subject to a rule implementing 31 U.S.C. 5318(h) and regulated by a federal functional regulator; and (iii) the financial institution being relied upon enters into a contract with the Covered Adviser requiring the financial institution to certify annually to the Covered Adviser that it has implemented its AML/CFT program, and that it will perform (or its agent will perform) specified requirements of the Covered Adviser's CIP. MFA supports the ability of Covered Advisers to rely upon other financial institutions to discharge a Covered Adviser's CIP obligations. This promotes efficiency and allows CIP to be conducted by the financial institution with the closest relationship to the customer.

The Proposed Rule allows for reliance on another financial institution where "the financial institution is subject to a rule implementing the AML/CFT compliance program requirements of 31 U.S.C. 5318(h) and regulated by a Federal functional regulator."[21] MFA requests that the Final Rule also allow for reliance on subsidiaries of financial institutions subject to an AML program requirement where the subsidiary is subject to an enterprise-wide AML program that is designed to comply with the BSA, such as an administrator.

e. Requiring Covered Advisers to Comply with Requirements Different from CIP Rules Applicable to Other Financial Institutions Will be Burdensome and Confusing for Dual Registrants

Differences in CIP requirements for Covered Advisers as compared to other financial institutions will be particularly burdensome for dual registrants (*e.g.*, an entity registered as broker dealer and investment adviser) and those using an enterprise-wide AML/CFT program. There should be consistency among the CIP rules applicable to all financial institutions.

f. Responses to FinCEN's Specific Questions

FinCEN requests comment on 18 specific questions in the Proposed Rule. Please see below MFA's responses to the questions presented by FinCEN.

1. Whether the proposed definition of "account" is appropriate and unambiguous, and whether other examples of accounts should be added to the rule text

Yes. See § II(B)(1) and (3) supra discussing the proposed modification to the definition of "account."

[21] Proposed Rule, 89 Fed. Reg. at 44579.

a. Should an account opened for the purpose of participating in an employee benefit plan established under ERISA be excluded from the CIP account definition?

Yes. See § II(B)(4) supra.

b. Are there types of accounts that should be exempted from CIP obligations?

Yes. See § II(B)(1), (3) and (4) supra discussing exempting accounts that do not involve an ongoing relationship and ERISA accounts.

All of the same exemptions that apply to mutual funds, broker-dealers and banks should apply to Covered Advisers. FinCEN has deemed the Proposed Rule to be "generally consistent with existing rules requiring other financial institutions, such as brokers or dealers in securities, open-end investment companies (such as mutual funds), . . . banks, and other financial institutions, to adopt and implement CIPs."[22] FinCEN explains that "[t]he similarity between this [Proposed Rule] and those rules reflects the importance that FinCEN and the SEC assign to the harmonization of CIP requirements, including for the purposes of increasing effectiveness and efficiency for investment advisers that are affiliated with other financial institutions, such as banks, broker-dealers, or open-end investment companies (such as mutual funds) that are already subject to CIP requirements."[23] However, there are several notable ways in which the Proposed Rule diverges from other existing CIP rules applicable to broker-dealers, mutual funds, and banks. These gaps should be closed.

2. The proposed definition of "account" would exclude an account that an investment adviser acquires through an acquisition, merger, purchase of assets, or assumption of liabilities, given that customers do not "open" transferred accounts, and, therefore, the accounts do not fall within the scope of section 326. As discussed above, advisers may be required to apply other sanctions and export compliance and AML/CFT requirements to those accounts. Are there circumstances in which advisers should be required to fulfill identity verification requirements for some transfers?

The definition of "account" should continue to exclude an account that a Covered Adviser acquires through an acquisition, merger, purchase of assets, or assumption of liabilities. See § II(B)(2) supra. Such a definition should be consistent with the CIP obligations applicable to other financial institutions. See discussion in response to Question 1(b) for reasons why the Final Rule should align with the CIP rules applicable to other financial institutions.

22 Proposed Rule, 89 Fed. Reg. at 44573.

23 Proposed Rule, 89 Fed. Reg. at 44573.

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a. Should the rule require advisers to re-verify a customer's identity after a certain period of time (e.g., every year, every other year, or every five years)?

Covered Advisers should not be required to re-verify a customer's identity after a certain period of time (*e.g.*, every year, every other year, or every five years), as doing so would be unduly burdensome. The Final Rule should be consistent with the CIP obligations applicable to other financial institutions, which do not impose such re-verification obligation. See discussion in response to Question 1(b) for reasons why the Final Rule should align with the CIP rules applicable to other financial institutions. To the extent there is any re-verification obligation, it should only be required on a risk-based basis or where facts and circumstances arise that call into question the identity verification previously performed under the CIP. This would align with the existing customer due diligence rules applicable to covered financial institutions.

3. Should the definition of "account" refer to the activities enumerated in 15 U.S.C. 80b-2(a)(11) for the definition of investment adviser? Or is the reference to "investment advisory services" sufficient?

The definition of "account" should not refer to the activities enumerated in 15 U.S.C. 80b-2(a)(11). This provision defines the term "investment adviser" to mean, with certain exceptions, "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities." The types of advisory activities in this definition are too broad and certain of them should be excluded from the definition of "account." For example, investment advisory services should not include investment advice provided through "publications or writings," as well as the issuance or promulgation of analyses or reports concerning securities because these services do present AML/CFT risk.

4. Is the proposed definition of "customer" appropriate? Should other examples of customers be added to the rule text?

See § II supra. The Final Rule preamble should specify that a "customer" includes private investment funds that a Covered Adviser creates, sponsors and advises, as well as separately managed accounts. It should also more explicitly state that it does not include the investors in the private investment funds that a Covered Adviser creates, sponsors and advises.

5. Should the definition of investment adviser apply to non-U.S. advisers registered or required to register with the SEC (for RIAs) or that report to the SEC on Form ADV (for ERAs), as proposed? What would be the logistical challenges of this approach?

The definition of "investment adviser" under the Proposed Rule would include an investment adviser that is registered with the SEC or that files a Form ADV as an ERA and is located outside the U.S. (*i.e.*, does

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not have a branch, office, or staff in the United States) ("**Non-U.S. Adviser**").[24] Applying CIP obligations to a Non-U.S. Adviser would create significant difficulty with respect to conflicts of law with the AML/CFT or other requirements of the jurisdiction where the Non-U.S. Adviser is located. We note that FinCEN has recognized the cross-jurisdictional issues as far back as 2003, when its original proposal to extend AML/CFT requirements to investment advisers whose principal office and place of business is located in the United States and specifically excluded those advisers that lack a U.S. physical presence. MFA agrees, and notes there is no reason for FinCEN to reverse course today from the sound approach taken then.[25] MFA respectfully requests that the Final Rule exclude Non-U.S. Advisers from the CIP Rule.

6. Should terms defined elsewhere within 31 CFR chapter X, such as "U.S. Person", "Non-U.S. Person", and "Taxpayer Identification Number" be defined in the proposed rule as well or are those terms well-understood for CIP purposes?

The terms "U.S. Person,"[26] "Non-U.S. Person"[27] and "Taxpayer Identification Number"[28] are generally well-understood and do not need to be defined again in the Final Rule. It is important that FinCEN incorporate the definitions in the other CIP rules and that these terms be applied consistently across all CIP rules. See discussion in response to Question 1(b) for reasons why the Final Rule should align with the prior CIP rules applicable to other financial institutions.

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24 Proposed Rule, 89 Fed. Reg. at 44574.

25 Anti-Money Laundering Programs for Investment Advisers, 68 Fed. Reg. 23646, 23652 (proposed May 5, 2003), *available here* (proposing AML program requirements for investment advisers).

26 "U.S. Person" is defined as (1) a United States citizen; or (2) a person other than an individual (such as a corporation, partnership or trust), that is established or organized under the laws of a State or the United States. "Non-U.S. Person" is defined as a person that is not a U.S. person. 31 C.F.R. § 1010.100(iii).

27 "Non-U.S. Person" is defined as a person that is not a U.S. person. 31 C.F.R. § 1010.100(iii)(2).

28 "Taxpayer Identification Number" is defined by section 6109 of the Internal Revenue Code of 1986 (26 U.S.C. 6109) and the Internal Revenue Service regulations implementing that section (*e.g.*, social security number or employer identification number). 31 C.F.R. § 1010.100(yy).

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7. To what extent do RIAs and ERAs already require customer identification and verification or otherwise have procedures in the manner proposed in the course of regular business or under other, existing regulatory obligations?

a. To what extent do the customer identification and verification procedures currently implemented by RIAs and ERAs resemble or differ from those required by the proposed rule?

Where the customer is a private fund created and advised by a Covered Adviser, the Covered Adviser will have been involved in the formation and launch of the private fund entity and maintain identifying information for such entity. For example, with regard to private funds established in Delaware, the Covered Adviser would typically handle the filing of the documents with the Secretary of State to form the entity and is typically an authorized person for the private fund.

It is MFA's understanding that the vast majority of its RIA members have had AML programs in place for a number of years. While some RIAs have an in-house AML function, many others delegate the implementation and operation of certain aspects of their AML program to a third party. Often the delegation is made to an administrator. Such administrators are typically subject to AML oversight in their home country, and therefore implement AML procedures both as a contractual matter on behalf of the private fund and as a regulatory requirement.

With regard to investors in private funds, at the outset of the relationship, the administrator or RIA will conduct initial due diligence on the investor at the time of subscription. Industry practice takes into account whether the private fund investor is sending its funds (*i.e.*, monies) from an account in the investor's name at a financial institution that is located in a FATF-member jurisdiction and subject to customer identification procedures and AML requirements of that jurisdiction. If the funds do not originate from financial institutions located in FATF-member jurisdictions, it is customary for enhanced due diligence to be performed.

Investors in private funds are required to complete subscription documents, which include certain AML-related representations and warranties, such as whether the investor is a senior political figure or a foreign shell bank, and that the investment funds are not derived directly or indirectly from illegal activities. The investor is also subject to various screening procedures related to sanctions; negative news; and potential status as a senior foreign political figure. Such screening is also generally conducted on the investor at the time the investor redeems its interests or shares from the private fund. RIAs have also traditionally relied on representations made by other financial institutions with regard to their AML due diligence with respect to investors that that financial institution introduces to private funds.

8. Are there other categories of entities that, like mutual funds, should be exempted from an investment adviser's CIP program? Why or why not?

See § II(C)(5) supra for why entities that are subject to significant regulatory oversight or that present low risk of money laundering should be exempt.

9. Should the exemption for mutual funds be dependent on the nature of the relationship between the investment adviser and its mutual fund customer and the ability of the investment adviser to meet CIP obligations?

Mutual funds should be entirely exempt from the definition of customer, as they are in CIP rules applicable to other financial institutions. See § II(C)(4) supra.

10. Should closed-end registered funds, wrap fee programs, or other types of accounts advised by investment advisers be, on a risk-basis, exempted from an investment adviser's CIP program?

See § II(C)(5) supra.

11. FinCEN also requests comment on the money laundering, terrorist financing, and other illicit finance risks faced by closed-end funds, and how entities with existing CIP requirements, such as banks and broker-dealers, apply those requirements to activity involving closed-end funds.

See § II(C)(5) supra.

12. How would an investment adviser apply the identification and verification requirements at proposed § 1032.220(a)(2) to a private fund customer? What type of information would the adviser use to ask identification questions? We expect that advisers would likely already have this information in respect of private funds that they manage. Do commenters agree?

See § II(A) supra and discussion in response to Question 7a for a discussion on the identification and verification conducted on private fund customers.

Where the customer is a private fund created and advised by a Covered Adviser, the Covered Adviser will have been involved in the formation and launch of the private fund entity and have identifying information for such entity.

13. Proposed § 1032.220(a)(2) would require that an investment adviser verify customer identity within a reasonable time before or after the customer's account is opened. To what extent would an investment adviser provide advisory services prior to verifying customer identity? How much time would an investment adviser reasonably need to verify customer identity (e.g., 30 days)?

Where the customer is a private fund created and advised by a Covered Adviser, the Covered Adviser would know the identity of the private fund before providing advisory services because the Covered Adviser will have been involved in the formation and launch of the private fund entity and have identifying

information for such entity. To the extent a customer involves another person, such as persons with separately managed accounts, it is possible that CIP may be commenced, but not completed, prior to providing investment advisory services to such person.

The Final Rule should leave to the Covered Adviser a determination of the appropriate procedures as to how to respond to situations where a Covered Adviser cannot verify the identity of a customer prior to opening an account. Those procedures should include, consistent with requirements for other financial institutions, and as proposed, procedures for closing an account and filing SARs, as applicable.[29] This will account for the fact that the Covered Adviser may not have time to conclude verification of a customer's identify prior to providing investment advisory services to such customer. Where a Covered Adviser cannot form a reasonable belief that it knows the true identity of a customer, it should close the account and file a suspicious activity report, as appropriate.

14. How do investment advisers currently collect identity information for non-U.S. customers that are not individuals, such as foreign legal entities or other legal persons and legal arrangements?

Covered Advisers typically use third-party service providers, such as administrators, to collect identity information from certain customers, including non-U.S. customers that are legal entities. Such information typically includes basic identifying information, such as name, address and taxpayer identification number, and formation and operational documents. This information is typically shared electronically via email or through a portal in which documents can be uploaded directly to the Covered Adviser or its service provider.

Whether a person is subject to identity verification measures depends on the AML/CFT risk presented by such person. Industry practice takes into account whether such persons is utilizing an account in the person's name at a financial institution that is located in a FATF-member jurisdiction and is subject to customer identification procedures and AML requirements of that jurisdiction.

15. Are the provisions in section 1032.220(a)(6) sufficient to permit an adviser to rely on another financial institution to perform its CIP requirements? Would there be any challenges for advisers with the proposed approach? Do commenters agree that an investment adviser should be required to actively monitor the operation of its CIP and assess its effectiveness in order to rely on another financial institution, or should the adviser not be held responsible by showing it reasonably relied on another financial institution that satisfied all of the conditions set forth in this proposed rule?

See § III(D) supra.

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[29] Proposed Rule, 31 C.F.R. § 1032.220(a)(2)(iii).

A Covered Adviser should not be required to actively monitor the operation of another financial institution's CIP to assess its effectiveness and whether it meets the requirements of the Covered Adviser's CIP in order to rely on the CIP of the other financial institution. A Covered Adviser should be permitted to rely on the fact that the other financial institution is subject to AML rules, which includes an independent testing component, and examined by a federal functional regulator. The reliance requirements applicable to Covered Advisers should not be more onerous than those applicable to other financial institutions. See discussion in response to Question 1(b) for reasons why the Final Rule should align with the CIP rules applicable to other financial institutions.

16. Is the proposed requirement for the other financial institution to enter into a contract with the investment adviser feasible? Does it depend on the size of the investment adviser and its negotiating power? Should we modify this requirement? For example, should we remove or modify the requirement for the other financial institution to certify that it will perform specified requirements of the investment adviser's CIP?

FinCEN and the SEC should modify the reliance provision to eliminate the annual certification requirement where a regulated financial institution is being relied upon. It is burdensome and not necessary where a Covered Adviser is dealing with a regulated financial institution.

Further, the preamble to the Final Rule should clarify that the other financial institution does not need to perform the specified requirements of the Covered Adviser's CIP, but should perform the elements of their own CIP. It should be sufficient that the other financial institution has an AML program and CIP that is designed to comply with the BSA implementing regulations and guidance, and that the financial institution satisfies the other reliance requirements (*i.e.*, reliance is reasonable under the circumstances and the other financial institution is subject to an AML program requirement and supervised by a federal functional regulator). This is consistent with current CIP guidance, which makes clear that that the financial institution being relied upon for CIP may follow its own CIP and not the CIP of the relying financial institution.[30]

Finally, FinCEN should consider permitting an AML representation letter to satisfy the reliance requirement rather than requiring financial institutions to enter into a formal contract governing CIP practices. In fact, it is standard industry practice for Covered Advisers to receive an AML representation letter from a financial institution, adviser, fund and/or administrator regarding the CIP performed on investors introduced to a Covered Adviser's fund. Where a Covered Adviser shares a customer with another BSA-regulated financial institution, an AML representation letter should satisfy the contractual requirement of the CIP reliance provision.

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[30] FinCEN, FAQs: Final CIP Rule, 9 (January 2004) ("The reliance provision does not impose on the other financial institution the obligation to duplicate the procedures in the [relying financial institution's] CIP.").

MFA

17. Does the proposed compliance date (six months after the final rule is issued) give advisers sufficient time to comply with the requirements of the proposed rule? Should the compliance date be staggered based on adviser size?

The Proposed Rule would require Covered Advisers to develop and implement the required CIP six months from the effective date of the Final Rule, but no earlier than the required compliance date of the AML/CFT Program Proposed Rule.[31]

For many Covered Advisers, the Proposed Rule, if adopted, would impose significant new compliance obligations, which will require new and updated policies and procedures, training, additional compliance staffing and close coordination with other parties that all would be burdensome and costly.

MFA suggests that the compliance date be no earlier than 24 months after the Final Rule is published or the required compliance date of the AML/CFT Program Proposed Rule, whichever is later.

18. If an investment adviser cannot form a reasonable belief that it knows the true identity of a customer, should the investment adviser be able to engage in advisory activities on behalf of the customer prior to verifying the customer's identity?

See discussion in response to Question 13.

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[31] Proposed Rule, 89 Fed. Reg. at 44579.

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

Respectfully submitted,

/s/ Jennifer W. Han

Jennifer W. Han
Executive Vice President
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cc: The Honorable Gary Gensler, Chair
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The Honorable Caroline A. Crenshaw, Commissioner
The Honorable Mark T. Uyeda, Commissioner
The Honorable Jaime Lizárraga, Commissioner
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