July 22, 2024

VIA ELECTRONIC SUBMISSION

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

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

Re: **Notice of Proposed Rulemaking on Customer Identification Programs for Registered Investment Advisers and Exempt Reporting Advisers, Docket Number FINCEN-2024-0011, RIN 1506-AB66**

The American Investment Council ("AIC")[1] appreciates the opportunity to submit comments to the Financial Crimes Enforcement Network ("FinCEN") and the Securities and Exchange Commission ("SEC") regarding their joint notice of proposed rulemaking (the "Proposed Rule")[2] to prescribe a regulation that requires registered investment advisers ("RIAs") and exempt reporting advisers ("ERAs," and, together with RIAs, "Covered IAs") to adopt a Customer Identification Program ("CIP").[3]

We support FinCEN and the SEC's attention to national security concerns and efforts to safeguard the U.S. financial system from illicit use. AIC members take seriously their obligations to comply with applicable sanctions requirements and to combat money laundering and terrorist financing. As such, we respectfully request that FinCEN and the

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[1] AIC is an advocacy, communications, and research organization established to advance access to capital, job creation, retirement security, innovation, and economic growth by promoting responsible long-term investment. In this effort, AIC develops, analyzes, and distributes information about the private equity and private credit industries and their contributions to the U.S. and global economy. Established in 2007, and formerly known as the Private Equity Growth Capital Council, AIC is based in Washington, D.C. AIC's members are the world's leading private equity and private credit firms, united by their commitment to growing and strengthening the businesses in which they invest. For further information about AIC and its members, please visit our website at http://www.investmentcouncil.org.

[2] Customer Identification Programs for Registered Investment Advisers and Exempt Reporting Advisers, 89 Fed. Reg. 44571 (proposed June May 13, 2024).

[3] AIC's membership includes a diverse array of Covered IAs. Many of AIC's members are or are affiliated with Covered IAs that advise private and registered funds, pursue a range of different investment strategies involving equity, credit, real estate, strategic opportunities, and other investment strategies, and involve diversified business models.

SEC clarify certain issues and address certain operational challenges to ensure that Covered IAs have clear standards and/or guidelines to help them understand: (1) which entities fall into the definition of "customers" under the Proposed Rule, (2) whether Covered IAs need to look through feeder vehicles or other intermediary entities, (3) when and to what extent Covered IAs can rely on diligence conducted by a qualified intermediary, and (4) what records Covered IAs need to retain.

Below, we highlight specific areas that would benefit from further clarification, as well as technical comments on the Proposed Rule. We stand ready to assist FinCEN and the SEC in developing a final rule to meet these important objectives to combat money laundering and terrorist financing.

I. Industry Background and Illicit Risks.

As the government establishes an anti-money laundering ("AML") regulatory regime including a required CIP applicable to Covered IAs, FinCEN and the SEC should evaluate the level and potential types of risks associated with any given Covered IA and their respective activities. For example, private equity and private credit funds present a low risk of money laundering and terrorist financing due to several key factors.

First, the long-term nature of the investments that are made in such funds limits the access to and movement of capital, which are the typical tactics used in money laundering.

Second, private capital commitments to funds are typically based on extensive negotiations with prospective limited partners. Those negotiations already involve careful, extended due diligence by fund sponsors with frequent in-person, telephonic, and virtual contact, making licit private funds particularly unattractive for bad actors due to the scrutiny they receive during the fundraising process.

Third, Covered IAs owe duties to their clients—the funds (typically limited partnerships) in which limited partners invest—not to any individual limited partner. This distinction, which is well understood under the Federal securities laws, is no mere technicality: a failure to conduct adequate due diligence or to otherwise fail in complying with applicable AML laws could, depending on the circumstances, expose a Covered IA to accusations that it failed to satisfy its fiduciary duties to the fund if such failings exposed the fund to legal risk or even significant expenses. Consequently, given the risk that an AML error or oversight could create claims of fiduciary breach, Covered IAs are already strongly incentivized to develop and maintain robust AML policies and procedures.

Fourth, more often than not Covered IAs are not holding cash for their fund clients and the underlying investors are not providing cash to the Covered IAs. Instead, the funds will solicit capital from their limited partners, which are usually ***not*** natural persons, to invest in a particular investment opportunity or a series of investment opportunities organized and overseen pursuant to a limited partnership agreement. The investor will sign a subscription agreement with the limited partnership under which the investor commits to

provide the partnership with money at some point in the future when the partnership issues a capital call. Generally, the partnership establishes a custodian account at a regulated financial institution where the limited partner investors will send funds in response to a capital call. Neither the adviser nor the fund will themselves hold the capital. Further, moneys received from private fund investors are almost exclusively wired from and returned to regulated financial institutions, including U.S. banks, which are already subject to AML/countering the financing of terrorism ("CFT") regulations. Under these regulations, these financial institutions are already required to have CIPs in place. Thus, other financial institutions currently serve as an additional gatekeeper, providing additional certainty that private equity and private credit funds do not accept money from illicit actors.

Fifth, many Covered IAs already engage and work closely with entities that are themselves highly regulated and subject to AML/CFT requirements under the Bank Secrecy Act and other laws and regulations. For example, investor funds often can pass through affiliated broker dealers during capital calls or distributions. Investors often enter funds via feeder vehicles or other investment vehicles organized by regulated banks. Further, even when Covered IAs' clients solicit investments from natural person investors, those natural persons typically invest in the fund through a legal vehicle such as a trust, a fund-of-one, an LLC, or a partnership. Additionally, many funds administered by Covered IAs enter into credit agreements (including, for instance, subscription line lending agreements) with regulated banks that themselves are required to identify customers prior to transacting and screen the fund's investors for sanctions and AML/CFT purposes; these lenders act as yet another gatekeeper in addition to diligence already performed by the fund, its custodial bank, and its investors' respective banks. Therefore, many limited partners are already subject to CIP requirements from various financial institutions and subject on a regular basis to the type of scrutiny that the government hopes to obtain with the Proposed Rule, and imposing duplicative obligations on Covered IAs could come at a significant cost but provide little to no incremental benefit.

Given the actual risks posed by the private funds industry, and the long-held and frequently acknowledged view that private funds present a low risk of money laundering and terrorist financing, as the government develops the risk-based approach for its AML/CFT requirements, it is important that the Proposed Rule appropriately addresses the actual risks posed by conduct involving Covered IAs and the practical realities of complying with the Proposed Rule. Consequently, and as discussed below, we encourage FinCEN and the SEC to focus their rulemaking on those aspects of the investment management industry that may present greater illicit finance concerns and to tailor any final AML regulations to the actual risks posed. We also believe that practical guidance on implementation of each component is especially important given how differently situated various Covered IAs might be from one another. Some Covered IAs might be large (when viewed through the lens of assets under management ("AUM")), have sophisticated AML/CFT compliance initiatives and have a range of international touchpoints. By contrast, other Covered IAs might be relatively small (from an AUM perspective), have only limited or no international touchpoints, and have relatively less

sophisticated (but still reasonably tailored) AML/CFT compliance initiatives. Accordingly, we believe FinCEN's adoption of a final rule and any accompanying commentary should be as practical and specific as possible. Such an approach is warranted for both sound policy reasons and to ensure that the costs of any regulation do not exceed the benefits.

II. Scope of Definitions/Duties.

Customer Accounts. The Proposed Rule would require Covered IAs to verify the identity of its customers "upon the opening of each account." Under the Proposed Rule an "account" is defined as any contractual or other business relationship between a person and a Covered IA under which the Covered IA provides investment advisory services. In turn, a "customer" is a person—including a natural person or a legal entity—who opens a new account with a Covered IA. This means the person identified as the accountholder.

Given the commercial realities discussed above, we would appreciate clarification from FinCEN on which transactions, individuals and entities fall within the scope of the CIP required under the Proposed Rule. Specifically, we would request specific confirmation on each of the points below.

1. Confirm that FinCEN and the SEC consider each limited partnership (or fund) a "customer" under the Proposed Rule.

2. Confirm that FinCEN and the SEC do ***not*** consider each limited partner in a limited partnership (or fund) a "customer" under the Proposed Rule.[4]

3. Confirm that constituent parts of a feeder vehicle in a limited partnership are ***not*** "customers" of Covered IAs under the Proposed Rule.

4. Confirm that Covered IAs are ***not*** required to look through limited partners to itemize in their records the investment vehicle's constituent investors, their beneficiaries, or their control persons.

Reliance. We agree that Covered IAs, similar to other regulated financial institutions, should be able to rely on diligence conducted by qualified third parties. For example, when a custodian is holding the money provided as part of a capital call or when a fund receives an investment from a regulated intermediary (whether that intermediary is a fund-of-funds or a financial institution), the fund and the fund sponsor may reasonably rely on the diligence conducted by the intermediary on the relevant parties. In these

[4] This view is consistent with the language in the Benefits and Costs analysis of the Proposed Rule. ("[A]n investment adviser may have a private fund as a customer. In this case, the proposed rule would require that the investment adviser collect the identifying information of the private fund and, in some cases, individuals with authority or control over such private fund, ***but not that of those invested in such fund***."). Customer Identification Programs for Registered Investment Advisers and Exempt Reporting Advisers, 89 Fed. Reg. 44571, 44583 (proposed June May 13, 2024).

contexts, so long as the adviser has representations that the intermediary has followed its own CIP procedures on relevant parties, the adviser should not be required to duplicate such sufficient efforts. Further Covered IAs should not be required to retain duplicate copies of identification documents obtained by the intermediary. Such duplication would serve no purpose.

Given the commercial realities of the operations of Covered IAs and their fund clients, however, we'd urge FinCEN and the SEC to modify the reliance requirement contemplated in the Proposed Rule in two ways. First, Covered IAs should be able to continue to rely on qualified intermediaries that are not financial institutions, such as fund administrators, to conduct customer diligence. Second, in lieu of an annual certification requirement, Covered IAs should be permitted to gather AML comfort letters or similar representations.

Qualified Intermediary

The Proposed Rule should be revised to make it clear that a Covered IA can and is authorized to reasonably rely on the identification diligence conducted by a qualified intermediary under their own CIP, even if that qualified intermediary is not subject to a rule implementing the AML/CFT compliance program requirements of 31 U.S.C. 5318(h) and is not regulated by a Federal functional regulator. Historically, Covered IAs have often utilized fund administrators to handle a fund's CIP. These fund administrators are well equipped to handle the CIP process and many have long-standing relationships with the Covered IAs and funds with which they work. Covered IAs should be permitted to continue using these qualified intermediaries so long as doing so is reasonable under the circumstances (*e.g.*, the Covered IA receives representations from the qualified intermediary that such intermediary will take certain steps to identify customers).

Alternative Certification Requirement

As drafted, in order to satisfy the reliance requirements, a Covered IA would be required to gather, as part of a reliance agreement, an annual certification from the qualified intermediary certifying that the intermediary has implemented its AML/CFT program and will perform the specified requirements of the Covered IA's CIP. This annual certification requirement is unnecessarily burdensome and does not increase the effectiveness of the customer diligence. Instead, FinCEN and the SEC should permit Covered IAs to receive comfort letters from their third parties in lieu of a reliance agreement. Historically, as Covered IAs have not been considered Covered Financial Institutions under the BSA they have not been required to formalize a reliance agreement with an annual certification requirement in order to rely on the diligence conducted by a third party. Instead, the industry has developed a practice of exchanging comfort letters which set out the details of the third party's diligence program and state that the third party will apply that diligence program in connection with diligence conducted on behalf of the Covered IA. These comfort letters are generally not reproduced to the Covered IA on an annual basis. Instead,

the comfort letters are often paired with written representations from the third party confirming that they will maintain their diligence program throughout the life of the agreement and requiring the third party to notify the Covered IA should that representation no longer be true. Covered IAs should be permitted to continue this industry practice.

Monitoring

In addition, the Notice of Proposed Rulemaking asks whether a Covered IA "should be required to actively monitor the operation of its CIP and assess its effectiveness in order to rely on another financial institution," or whether the Covered IA "should not be held responsible by showing it reasonably relied on another financial institution" that satisfied the regulatory conditions. We urge FinCEN and the SEC not to impose an "active monitoring" requirement. Such an approach could lead to duplicative efforts and would impose burdensome and unnecessary requirements on Covered IAs. Instead, provided that the Covered IA's reliance remains reasonable and other regulatory conditions are satisfied, the Covered IA should not be held responsible for any CIP failures by the relied-on institution within the scope of the reliance agreement, comfort letter, or similar document.

Reverification requirement. The Notice of Proposed Rulemaking asks whether the CIP rule for Covered IAs should require them to re-verify a customer's identity after a certain period of time (*e.g.*, every year, every other year, or every five years). We urge FinCEN and the SEC not to impose such a requirement, which does not exist in the CIP rules for banks, broker-dealers and other financial institutions, would be inconsistent with a risk-based CIP and would depart from longstanding guidance in the customer due diligence ("CDD") context that periodic refreshes of customer information are not a regulatory requirement or expectation.[5] Rather, as applicable in the CDD context, we believe that updates to and revalidation of customer information should be risk based and implemented when relevant to assessing the risk posed by a customer.

Duplication. We request that the final CIP rule clarify that neither dual registrants nor affiliated advisers already subject to a CIP requirement would be required to establish a separate CIP for their advisory activities. Any final CIP rule for Covered IAs should make clear that none of the following would be legally required to establish a separate CIP for its advisory activities: (i) a Covered IA that is a dual registrant (i.e., that also is a registered broker-dealer or a bank); (ii) a Covered IA that is an operating subsidiary of a bank; or (iii) a Covered IA that is affiliated with a broker-dealer or bank and is subject to the affiliate's enterprise-wide AML program including a CIP. Of course, a Covered IA in any of these three categories may choose to implement its own CIP, but it should not be

[5] "There is no categorical requirement that financial institutions update customer information on a continuous or periodic schedule. The requirement to update customer information is risk based and occurs as a result of normal monitoring." FIN-2020-G002, *Frequently Asked Questions Regarding Customer Due Diligence (CDD) Requirements for Covered Financial Institutions* (Aug. 3, 2020).

obligated to do so, and we request that FinCEN and the SEC make this clear in the final CIP rule.

Customer notice. Where a Covered IA creates and manages a private fund "customer," we request that the customer notice requirement be waived. In this scenario, and as recognized in the Notice of Proposed Rulemaking, the Covered IA itself would have authority or control over the private fund.[6] Where a Covered IA has created and manages a private fund, the Covered IA essentially would be providing the CIP customer notice to itself, and no meaningful statutory or regulatory purpose would be served.

Recordkeeping. We urge FinCEN and the SEC to provide clarification that for purposes of the recordkeeping requirements in the private fund context, it is sufficient to collect confirmation that the qualified intermediary has gathered and will retain for the required period the required identification information. The Covered IA should keep such confirmation for the required period. Requiring the Covered IA to keep a duplicate copy of the verification documentation creates an unnecessary administrative burden, particularly if the documentation comes from countries with strong data privacy regulations which may require special storage protections.

III. Extra-Territorial Application

We are concerned that the potential extra-territorial application of the Proposed Rule is both a departure from practice in other regulatory regimes, which could engender confusion, and could implicate complex conflict of laws issues that may arise if a Covered IA outside the U.S. is potentially required to comply with both the Proposed Rule and some foreign law. Accordingly, we believe that it would be helpful for FinCEN and the SEC to more precisely identify the territorial reach of the Proposed Rule as confined to Covered IAs organized and operating in the U.S. or to foreign-based or foreign-organized Covered IAs only to the extent they are operating in the U.S. Such a limitation would be consistent with other FinCEN regulations[7] and help mitigate the risk of complicated and complex conflicts with law issues.

IV. Implementation Period.

Given the relationship between this Proposed Rule and the upcoming revisions to the CDD rule we would suggest that the implementation period for both rules be calibrated so both final rules come into effect at the same time. This would limit the resources

[6] "In certain contexts, an investment adviser may itself be the individual with authority or control over the private fund." Customer Identification Programs for Registered Investment Advisers and Exempt Reporting Advisers, 89 Fed. Reg. 44571, 44583 (proposed June May 13, 2024).

[7] *See https://www.fincen.gov/sites/default/files/federal_register_notice/brokerdealersarjuly2002.pdf*

required for Covered IAs to modify existing policies, procedures, and processes to comply with the requirements of both final rules.

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AIC appreciates the opportunity to comment on the Proposed Rule and would be pleased to answer any questions you might have regarding our comments or the private equity, private credit and growth capital industry more generally.

Respectfully submitted,

/s/ Rebekah Goshorn Jurata

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