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VIA ELECTRONIC SUBMISSION (www.regulations.gov / www.sec.gov/rules/2024/05/cip)

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: **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)**

The Securities Industry and Financial Markets Association and its Asset Management Group ("AMG") (together, "SIFMA")[1] appreciate this opportunity to provide comments to the Financial Crimes Enforcement Network ("FinCEN") and the U.S. Securities and Exchange Commission (the "SEC") on their joint rule proposal (the "Proposed Rule")[2] that would require SEC-registered investment advisers ("RIAs") and exempt reporting advisers ("ERAs") (together, "Covered Advisers") to establish and maintain customer identification programs ("CIPs").

SIFMA appreciates FinCEN's and the SEC's efforts to engage with stakeholders to ensure the effectiveness of CIP requirements for Covered Advisers and supports the overall policy objective of ensuring that the investment adviser industry is not abused by illicit actors engaged in money laundering, terrorist financing, and other illicit financial activities. SIFMA believes that revisions to the Proposed Rule to ensure consistency with existing CIP requirements and

[1] SIFMA, based in New York and Washington, D.C., is the voice of the nation's securities industry, bringing together the shared interests of hundreds of broker-dealers, banks and asset managers. AMG represents U.S. asset management firms that manage more than 50% of global assets under management. The clients of AMG member firms include, among others, registered investment companies, endowments, state and local government pension funds, private sector Employee Retirement Income Security Act of 1974 pension funds and private funds. SIFMA's Anti-Money Laundering & Financial Crimes Committee comprises a broad range of SIFMA member firms, including global, regional and small securities firms, as well as firms engaged in the institutional, retail, clearing and online segments.

[2] FinCEN and SEC, "Customer Identification Programs for Registered Investment Advisers and Exempt Reporting Advisers," 89 Fed. Reg. 44571 (*proposed* May 21, 2024) ("CIP Proposal").

accurately reflect the investment adviser industry and its attendant risks would enhance this policy objective and are necessary to avoid imposing on Covered Advisers compliance requirements that are overly burdensome or duplicative.

Below, SIFMA provides comments on the Proposed Rule and many of the questions FinCEN and the SEC pose in the proposing release. SIFMA welcomes the opportunity to meet with FinCEN and the SEC to provide additional details pertaining to the industry and context to our comments.

I. Executive Summary

SIFMA's principal comments on the Proposed Rule are as follows.

- **Revisions to Reduce Burden and Duplication:**
    - **Align requirements to those applicable under existing CIP rules.** To achieve the proposing release's stated goal of harmonization, SIFMA urges FinCEN and the SEC to ensure information collection requirements for Covered Advisers do not vary from those applicable to banks, broker-dealers, mutual funds, and other financial institutions currently subject to CIP obligations ("Currently Covered FIs") (e.g., requiring the collection of date of formation for legal entity customers of Covered Advisers, when this data is not required under other CIP rules).
    - **Avoid duplication with respect to Covered Advisers' customers whose assets are held by qualified custodians.** To avoid unnecessary burdens and potential customer confusion, the customers of a Covered Adviser whose assets are held at a qualified custodian (e.g., a U.S. bank or broker-dealer), as required by the U.S. federal securities laws, should be excluded from the scope of Covered Advisers' CIP requirements.
    - **Clarify that neither dual registrants nor affiliated advisers already subject to a CIP will need a separate CIP for their advisory activities.** A final CIP rule for Covered Advisers should make clear that none of the following would be legally required to establish a separate CIP for their advisory activities: (i) a Covered Adviser that is a dual registrant; (ii) a Covered Adviser that is an operating subsidiary of a bank; or (iii) a Covered Adviser that is affiliated with a broker-dealer or bank and is subject to an enterprise-wide anti-money laundering ("AML") program that complies with U.S. AML requirements, including the requirement to implement a CIP.
- **"Accounts" Covered by the Proposed CIP Requirements:**
    - **Clarify the scope of the "accounts" definition to exclude relationships that are not both ongoing *and* tailored to the customer.** More broadly, the reference to any contractual "or other business relationship" in the proposed "account" definition is unclear and should be revised to focus on ongoing, formal relationships under which a Covered Adviser provides investment advisory services tailored to the customer.

The revised definition should clearly **exclude** relationships established to obtain **investment research services** or **services such as financial plans and model portfolios**. Among other relevant factors, the Covered Adviser in such relationships has no involvement with or visibility into customers' access to U.S. markets.

- **Exclude accounts for customers whose assets are held by qualified custodians.** As noted above, advisory customers whose assets are held at custodians with U.S. AML obligations should be excluded from the scope of Covered Advisers' CIP requirements, as these customers are already subject to the custodians' CIP procedures.

  As addressed in our comments on the proposed reliance provision, we do not believe that reliance is an appropriate means to address this concern, as qualified custodians may maintain assets for the advisory clients of thousands of Covered Advisers, do not typically enter into agreements with the Covered Advisers, and could be overwhelmed with requests for reliance agreements and processes to implement annual certification requirements—a highly burdensome regulatory outcome that would not meaningfully mitigate illicit finance risk.

- **Exclude ERISA accounts.** FinCEN and the SEC have long recognized that accounts established to participate in an employee benefit plan under the Employee Retirement Income Security Act of 1974 ("ERISA") are heavily regulated and pose minimal money laundering and terrorist financing risk, and the proposing release provides no indication that this assessment has changed. For this and other reasons described below, such accounts should be excluded from the "account" definition for purposes of a Covered Adviser's CIP obligations.

- **Retain proposed exclusion for transferred accounts, with no regulatory verification obligation.** SIFMA agrees with the proposed exclusion for accounts acquired by a Covered Adviser through acquisition, merger, purchase of assets, or assumption of liability. To ensure consistency with the CIP rules for Currently Covered FIs, no verification obligation should be imposed with respect to such accounts.

- **Do not impose a reverification requirement.** A CIP rule for Covered Advisers should not require periodic reverification of customer identities. Such a requirement would be inconsistent with longstanding regulatory requirements and guidance.

- **"Customers" Covered by the Proposed CIP Requirements:**

  - **Ensure consistency with other CIP regulations.** SIFMA supports the Proposed Rule's approach of applying a "customer" definition for Covered Adviser CIP requirements that is consistent with the CIP rules applicable to Currently Covered FIs (subject to SIFMA's comments on the proposed "account" definition).

- **Retain approach of treating private funds, not underlying investors, as customers.** SIFMA agrees with the Proposed Rule's approach to treat only the fund that a Covered Adviser advises, and not investors in the fund, as the Covered Adviser's customer for CIP purposes. This approach accurately reflects Covered Advisers' relationships in the private fund context and aligns to the SEC's investment adviser regulatory scheme.

- **To the extent that sub-advisers are in scope, affirm that a sub-adviser providing advisory services to a primary adviser should treat that adviser, and not its underlying clients, as the sub-adviser's customer for CIP purposes.** As explained in SIFMA's comments on FinCEN's proposal to impose AML program and suspicious activity report ("SAR") filing requirements on Covered Advisers, SIFMA believes that sub-advisers should not be subject to an AML program requirement to the extent that they lack access to information regarding underlying customers and do not directly manage customers assets. To the extent that sub-advisers are not excluded and would be required to implement a CIP, SIFMA understands the proposed "customer" and "account" definitions to mean that a sub-adviser contracting to provide investment advisory services to a primary adviser would establish a "customer" relationship with the primary adviser only and should treat that adviser, and not its underlying clients, as the "customer" for CIP purposes. We request that the final rule affirm this approach, to the extent that sub-advisers are not otherwise excluded.

- **Retain exclusion for existing accounts, provided a Covered Adviser has a reasonable belief that it knows the customer's true identity.** SIFMA agrees with this exclusion, which is consistent with other CIP regulations.

- **Affirm application to Covered Advisers' CIPs of longstanding regulatory guidance related to existing accounts and treatment of non-ERISA plans.** As explained below, SIFMA requests that FinCEN and the SEC state clearly that interagency guidance interpreting the CIP rule for banks would apply to implementation of a Covered Adviser's CIP.

- **"Customers" Covered by the Proposed CIP Requirements: Add exceptions for closed-end funds, unit investment trusts, and business development companies.** SIFMA requests that, in addition to the "customer" exclusions in the Proposed Rule, FinCEN and the SEC also exclude closed-end funds, unit investment trusts, and business development companies. These entities are subject to rigorous regulatory oversight from the SEC, and requiring Covered Advisers to apply CIP procedures to these entities is unlikely to identify or prevent illicit activity.

- **Non-U.S. Covered Advisers and Activities: Exclude from scope of CIP rule.** SIFMA believes that the scope of the Proposed Rule should be limited to Covered Advisers within the United States to avoid significant conflict of laws and compliance challenges for non-U.S. firms. SIFMA also requests that FinCEN and the SEC explicitly confirm that U.S. Covered Advisers will not be required to apply CIP requirements to their non-U.S. activities.

- **CIP Minimum Requirements: Remove "deemed compliance" language for mutual funds, which are covered by exemption for financial institutions.** As mutual funds already are covered by the exclusion from the "customer" definition for certain financial institutions, SIFMA requests that FinCEN and the SEC remove language from the Proposed Rule stating that a Covered Adviser advising a mutual fund may deem its CIP requirements with respect to the mutual fund satisfied if the mutual fund complies with CIP requirements applicable to it.

- **Customer Identification and Verification Procedures: Remove date of formation requirement and customer notice for sponsored private funds.**

    - ***Date of formation*.** SIFMA requests that the proposed requirement that Covered Advisers collect the date of formation for legal entity customers be removed. The CIP rules for Currently Covered FIs do not include this requirement, and obligating Covered Advisers to collect this information would be costly and inefficient and impede the ability of a Covered Adviser to leverage the reliance provision under the Proposed Rule.

    - ***Customer notice*.** SIFMA requests that FinCEN and the SEC waive the customer notice requirement for private funds created and managed by the relevant Covered Adviser; otherwise, the Covered Adviser would essentially be, needlessly, providing the notice to itself.

- **Reliance:**

    - **Do not require active monitoring.** SIFMA urges FinCEN and the SEC not to impose an "active monitoring" requirement under the proposed reliance provision. Such a requirement would be inconsistent with the CIP rules for Currently Covered FIs and would be burdensome, duplicative, and unnecessary.

    - **Remove the annual certification requirement.** SIFMA would strongly support a decision by FinCEN and the SEC to remove the annual certification requirement to avoid administrative burden and regulatory compliance risk.

- **Proposed Compliance Date: Provide at least two years for compliance.** SIFMA respectfully requests at least a two-year compliance period, including at least six months after the compliance date for any final AML program and SAR filing requirements for Covered Advisers. Considerable time will be needed to implement the CIP requirements, and Covered Advisers may become subject to other compliance obligations imposed by the SEC and FinCEN which, too, will require extensive implementation.

II. Comments on the Proposed Rule

A. Revisions to Reduce Burden and Duplication.

As a general matter, and as addressed below in the context of specific elements of the Proposed Rule, SIFMA believes that any CIP requirement for Covered Advisers should be consistent with existing CIP regulations and should recognize and align with the existing regulatory structure

within which Covered Advisers operate. In addition, a final CIP rule for Covered Advisers should make clear that neither dual registrants nor affiliated advisers would be required to establish a separate CIP for their advisory activities. In particular, a final CIP rule for Covered Advisers should:

- Impose requirements that are consistent with those under existing CIP rules. The proposing release cites the benefits of harmonizing CIP requirements, including for the purposes of increasing effectiveness and efficiency for Covered Advisers affiliated with financial institutions such as banks, broker-dealers and mutual funds that already are subject to CIP rules and may implement enterprise-wide AML programs.[3] The release states further that such affiliated advisers and Covered Advisers that are dual registrants would not be required to establish a separate CIP for their advisory activities.[4]

  SIFMA applauds this approach, which would promote efficiency and avoid the introduction of needless and costly burdens. However, these aims cannot be achieved if the CIP rule for Covered Advisers requires such entities to collect information not required under the CIP rules for other financial institutions. Variations from existing CIP regulations (e.g., requiring the collection of date of formation for legal entity customers of Covered Advisers, when this data is not required under other CIP rules) would obligate financial institutions that currently implement enterprise-wide AML programs to modify their systems, update policies and procedures, and implement different training programs depending on the financial institution to which a customer is onboarded. This would be costly and inefficient for financial institutions, could be confusing for customers whose CIP requirements would vary depending on the type of financial institution with which they do business, and is not necessary to mitigate illicit finance risk given that firms already are able to (and do) collect additional due diligence information as appropriate on a risk basis. Further, imposing CIP requirements for Covered Advisers that are not included in other CIP regulations likely would make it difficult, in practice, for a Covered Adviser to leverage the reliance provision under the CIP rule, as other financial institutions may be unwilling to take on obligations their systems, policies, procedures, and training have not been designed to incorporate.

- Avoid duplication with respect to Covered Advisers' customers whose assets are held by qualified custodians. Investment advisers are unique relative to banks, broker-dealers and other financial institutions in that investment advisers do not maintain customer assets. Specifically, under the Investment Advisers Act of 1940 and SEC regulation, certain client assets over which RIAs have authority must be maintained with "qualified custodians,"[5] a term that includes banks, broker-dealers, and other financial institutions subject to AML requirements under FinCEN's regulations. The advisory client typically

[3] *Id*. at 44573.

[4] *Id*. at 44573 n. 15.

[5] 17 CFR 275.206(4)-2; *see also* SEC, "Safeguarding Advisory Client Assets," 88 Fed. Reg. 14672 (*proposed* March 9, 2023), 88 Fed. Reg. 59818 (reopened comment period August 30, 2023) (proposing a new rule to redesignate and amend the current custody rule to cover a broader array of client assets and advisory activities, enhance the custodial protections that client assets receive, and update recordkeeping and reporting requirements for advisers).

selects and contracts with a qualified custodian to maintain the client's assets and, usually, the investment adviser is not a party to this custodial services agreement between the qualified custodian and the adviser's advisory client.[6]

Where the qualified custodian is a financial institution subject to U.S. AML obligations, the custodian is required by FinCEN's regulations to apply its CIP procedures to the client, and SIFMA believes the Covered Adviser should not be required to duplicate such procedures. As described above, the Covered Adviser collects due diligence information from its clients as appropriate on a risk basis. Requiring the Covered Adviser to apply CIP procedures to clients that already are subject to such procedures under the qualified custodian's CIP would be duplicative and, because such procedures are already applied by the custodian, unnecessarily burdensome to the Covered Adviser. In addition, such duplication would be burdensome for, and potentially confusing to, the relevant clients. Further, if a sub-adviser within the scope of a CIP rule were to contract with both the primary adviser and the advisory client, the Proposed Rule would have the qualified custodian, the primary adviser and the sub-adviser each applying CIP procedures to the same client—a highly burdensome and inefficient exercise that would be of little or no value in mitigating illicit finance risk.

For these reasons, we believe customers whose assets are maintained by qualified custodians should be outside the scope of a Covered Adviser's CIP. Moreover, and as detailed below, we believe the Proposed Rule's reliance provision would not be an appropriate mechanism to address our concerns in this regard, as it would result in further inefficiency and burden, including for qualified custodians (which would have to respond to and manage potentially thousands of reliance requests from the Covered Advisers whose customers maintain assets with the custodian).

Of course, such accounts may be subject to other AML processes implemented by the Covered Adviser, whether pursuant to existing programs implemented by a dual registrant or on an enterprise-wide basis, pursuant to AML programs implemented by the Covered Adviser upon implementation of any final AML rule for Covered Advisers,[7] or otherwise to mitigate money laundering risk.

- Clarify that neither dual registrants nor affiliated advisers already subject to a CIP would be required to establish a separate CIP for their advisory activities. Any final CIP rule for Covered Advisers should make clear that none of the following would be legally required to establish a separate CIP for its advisory activities: (i) a Covered Adviser that is a dual registrant (i.e., that also is a registered broker-dealer or a bank); (ii) a Covered Adviser that is an operating subsidiary of a bank; or (iii) a Covered Adviser that is affiliated with a broker-dealer or bank and is subject to an enterprise-wide AML program that complies with U.S. AML requirements, including the requirement to implement a CIP. Of course,

[6] 88 Fed. Reg. at 14675 n. 18.

[7] FinCEN, "Anti-Money Laundering/Countering the Financing of Terrorism Program and Suspicious Activity Report filing Requirements for Registered Investment Advisers and Exempt Reporting Advisers," 89 Fed. Reg. 12108 (*proposed* February 15, 2024) ("AML Program/SAR Rule Proposal").

a Covered Adviser in any of these three categories may choose to implement its own CIP, but it should not be obligated to do so, and we request that FinCEN and the SEC make this clear in the final CIP rule.

Ensuring that the final CIP rule for Covered Advisers aligns with existing CIP regulations and AML programs ***and*** the SEC regulatory framework to which advisers are subject is necessary to reduce unnecessary burden and inefficiency and avoid duplicative regulatory requirements that provide no added benefit in mitigating illicit finance risk.

B. "Accounts" Covered by the Proposed CIP Requirements.

The Proposed Rule defines an "account" as "any contractual or other business relationship between a person and [a Covered Adviser] under which the [Covered Adviser] provides investment advisory services." The proposed "account" definition excludes accounts that a Covered Adviser acquires through acquisition, merger, purchase of assets, or assumption of liabilities, as customers do not "open" such transferred accounts. Accounts opened to participate in an employee benefit plan established pursuant to ERISA as well as relationships established with a Covered Adviser only to receive investment research services would be included in the definition.[8]

SIFMA respectfully provides the following comments on the proposed "account" definition to provide clarity to industry participants, align to existing CIP regulations, and appropriately reflect illicit finance risks associated with the investment advisory industry:

- Clarify the scope of the definition to focus on formal relationships that are both ongoing *and* tailored to the customer. SIFMA believes that the reference in the proposed definition to "any … other business relationship" is potentially unclear and generally too broad, imposing regulatory and compliance burdens on Covered Advisers in relation to activities that do not involve access to U.S. financial markets. SIFMA requests as a general matter that FinCEN and the SEC revise the "account" definition to focus on formal relationships under which a Covered Adviser provides ongoing investment advisory services that are tailored to the customer. In addition, SIFMA requests that a revised "account" definition makes clear that:

    - *Investment research services are scoped out.* As noted in the proposing release, the proposed "account" definition would include a Covered Adviser's provision of investment research services. However, it is not clear what policy objective would be served by imposing CIP obligations with respect to customers that obtain only investment research services, and we request that such relationships be excluded from the scope of the Covered Advisers' CIP rule.

      The proposing release suggests that imposing CIP requirements with respect to such relationships would offer benefits in relation to identifying criminal activity and preventing illicit proceeds from being legitimized. However, when a formal

[8] CIP Proposal at 44573, 44583.

customer relationship does not include any investment advisory services other than investment research, the Covered Adviser has no visibility into how investment research it provides may be used by the customer and no involvement with the customer's access to U.S. financial markets. The Covered Adviser has no ability to identify criminal—let alone any other—activity by the customer and no insight into what assets the customer may have or what those assets may be used for.

The proposing release also mentions comparing customer identities to those on government lists of known or suspected terrorists or terrorist organizations, which the release suggests would assist investment advisers in identifying and preventing criminal activity and identifying customers who have been newly added to such government lists. Again, there is no activity through accounts pursuant to which customers obtain only investment research services and, thus, no ability for Covered Advisers to identify or prevent criminal activity. Nor has the government published such a list since the USA PATRIOT Act was enacted. Covered Advisers already are obligated to comply with sanctions administered by the Office of Foreign Assets Control, including prohibitions on transactions or dealings with terrorists and other sanctioned persons, and Covered Advisers already obtain the identifying information needed to enable them to screen for sanctions.

- *Services such as financial plans and model portfolios also are outside the scope of the CIP rule.* The "account" definition similarly would appear to apply to a Covered Adviser's provision of financial plans, model portfolios, and other services where the Covered Adviser may have no ongoing relationship with the customer or visibility into the customer's transactional activity. Such customer relationships cannot be used by the customer to "access[] U.S. financial markets to launder money, finance terrorism, or move funds for other illicit purposes."[9] Requiring Covered Advisers to apply CIP procedures to them would create an undue burden for Covered Advisers with little AML benefit, while simultaneously raising accessibility barriers for customers—for example, hurting customers who could benefit from free financial planning services that a Covered Adviser may offer.

Thus, we believe that the "account" definition should be revised to ensure that it applies only to formal relationships and that such relationships where advisory services are not both ongoing and tailored to the customer are excluded from the scope of the regulation.

[9] *See id*. at 44583 (addressing benefits of Proposed Rule).

- Exclude accounts for customers whose assets are held by qualified custodians. As described in Section II.A above, certain client assets over which RIAs have authority must be maintained with qualified custodians and typically the RIAs are not parties to the custodial agreements between their advisory clients and the clients' custodians. Where a client custodies its assets with a qualified custodian that is subject to U.S. AML regulations (e.g., bank, broker-dealer), the custodian applies its CIP procedures to the client, and the Covered Adviser should not be required to duplicate these procedures. As described above, the Covered Adviser collects client information as appropriate on a risk basis, and such accounts would be subject to other AML processes implemented by the Covered Adviser.

- Exclude ERISA accounts. SIFMA urges FinCEN and the SEC to exclude from the "account" definition accounts opened for the purpose of participating in ERISA benefit plans, for the following reasons:

    - FinCEN and the SEC have long recognized that such accounts pose minimal money laundering and terrorist financing risks and are already heavily regulated. In particular, FinCEN and the SEC have cited to the fact that these accounts are funded through payroll deductions in connection with employer plans that must comply with federal regulations, including rules regulating the funding of such accounts and imposing contribution limits and strict distribution requirements.[10]

    - Including such accounts within the scope of the CIP rule for Covered Advisers would impose unnecessary burdens on Covered Advisers, with negligible AML benefit.

        - It may also be infeasible as, in some cases, plan participants may be automatically defaulted into qualified default investment alternatives ("QDIAs") that may be accounts managed by Covered Advisers. QDIAs are options selected by a plan fiduciary for the investment of participant assets in the absence of participant investment direction. In such cases, a Covered Adviser would not have collected the participant's information at the time the participant is defaulted to an account managed by the Covered Adviser or verified the participant's identity account (let alone provided the required customer notice, given that the plan fiduciary would have decided to default the participant to the managed account).

    - There was a considered and thoughtful judgment behind the exclusion for ERISA accounts in the "account" definitions that apply to the CIP rules for Currently

[10] *See* FinCEN and SEC, "Customer Identification Programs for Broker-Dealers," 68 Fed. Reg. 25113, 25115 (May 9, 2003); FinCEN and SEC, "Customer Identification Programs for Mutual Funds," 68 Fed. Reg. 25131, 25134 (May 9, 2003).

Covered FIs,[11] including, as described above, FinCEN's and the SEC's determination that such accounts present low money laundering risk. The proposing release does not provide a rationale for departing from that risk assessment. Taking a different approach for Covered Advisers would be arbitrary, add negligible AML benefit, and cause further lack of harmonization across CIP regulations applicable to different types of financial institutions, concerns addressed in Part II.A above.

- As with accounts for clients with assets custodied at a qualified custodian, ERISA accounts would be subject to other AML processes implemented by a Covered Adviser. The proposing release suggests that ERISA accounts should be covered by a Covered Adviser's CIP to harmonize the applicability of the Proposed Rule with the AML program and SAR filing requirements that FinCEN has proposed for Covered Advisers,[12] "which would require [Covered Advisers] to apply AML/[countering the financing of terrorism] program and SAR reporting requirements to all of their accounts, including accounts opened for the purpose of participating in an employee benefit plan established pursuant to ERISA."[13] We respectfully disagree with this rationale. AML program requirements are intended to prevent the investment adviser from being used for illicit finance activities as a general matter.[14] Further, SAR requirements apply to *transactions* "by, at, or through" an institution, not *accounts* at the institution, and SAR filing obligations do not depend on the existence of an "account," as defined for CIP purposes. Thus—and as is the case for Currently Covered FIs, which are not obligated to treat ERISA accounts as "accounts" for CIP purposes—activity through ERISA accounts would be covered by any AML program and SAR reporting rule implemented for Covered Advisers, regardless of whether such accounts are in scope for CIP.

- <u>Retain proposed exclusion for transferred accounts, with no regulatory obligation to verify accounts</u>. SIFMA agrees with the proposed exclusion for accounts acquired by a Covered Adviser through acquisition, merger, purchase of assets, or assumption of liabilities, and appreciates the consistency of this exclusion with the exclusion available under the CIP rules for other financial institutions.

    - The Proposing Release asks whether there are circumstances in which Covered Advisers should be required to fulfill identity verification requirements for some transfers.[15] SIFMA urges FinCEN and the SEC not to impose such a regulatory

[11] *See* 31 CFR 1020.100(a) (defining "account" for purposes of CIP rule for banks); 31 CFR 1023.100(a) (same for CIP rule for broker-dealers); 31 CFR 1024.100(a) (same for CIP rule for mutual funds); 31 CFR 1026.100(a) (same for CIP rule for futures commission merchants and introducing brokers in commodities).

[12] *See* AML Program/SAR Rule Proposal, *supra* n. 7.

[13] CIP Proposal at 44573.

[14] AML Program/SAR Rule Proposal at 12190.

[15] CIP Proposal at 44579.

obligation and notes that the CIP rules for Currently Covered FIs do not include such a requirement. Of course, financial institutions conduct diligence on customers as appropriate on a risk basis, even when elements of that diligence are not specified by regulation. In addition, as noted in the proposing release, Covered Advisers would apply other required sanctions compliance and AML processes to those accounts.

- Do not impose a reverification requirement. The proposing release asks whether the CIP rule for Covered Advisers 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 (i) does not exist in the CIP rules for Currently Covered FIs, (ii) would be inconsistent with a risk-based CIP and (iii) 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. Rather, as applicable in the CDD context, SIFMA believes that updates to and revalidation of customer information should be risk based and implemented when relevant to assessing the risk posed by a customer.

We believe that incorporating the foregoing comments on the proposed "account" definition would be vital to provide clarity to industry participants, appropriately reflect custody requirements for advisory client assets and risks attendant to the investment advisory industry, and align CIP requirements for Covered Advisers to those applicable to other financial institutions under existing regulations.

C. "Customers" Covered by the Proposed CIP Requirements.

The Proposed Rule generally would define a "customer" to which CIP obligations apply as a person that opens a new "account" (as defined under the Proposed Rule). SIFMA generally agrees with this approach and notes, in particular, that a final CIP rule for Covered Advisers should:

- Ensure consistency with other CIP regulations. Subject to our comments above on the proposed "account" definition, the Proposed Rule's approach to the "customer" definition would be consistent in substance with the CIP rules applicable to other financial institutions. SIFMA agrees with applying a consistent definition to Covered Advisers.

- Retain approach of treating private funds, not their underlying investors, as customers. Under the proposed "customer" definition and as stated in the proposing release, the customer of a Covered Adviser to a private fund would, for CIP purposes, be the fund and not those invested in the fund.[16] SIFMA agrees with this approach, which accurately

[16] *See* CIP Proposal at 44583 ("an 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." (footnote omitted)).

reflects Covered Advisers' relationships in the private fund context and aligns to the SEC's investment adviser regulatory scheme.

- To the extent that sub-advisers are covered by a CIP rule for Covered Advisers, affirm that a primary adviser, not its underlying clients, is the "customer" vis-à-vis a sub-adviser contracted to provide services to the primary adviser. As explained in SIFMA's comments on FinCEN's proposal to impose AML program and SAR filing requirements for Covered Advisers, SIFMA believes that sub-advisers should be excluded from the AML program requirement to the extent that they lack access to information regarding underlying customers and do not directly manage customers assets.[17] If sub-advisers are not so excluded and would be required to implement a CIP, SIFMA understands the Proposed Rule to mean that, where a sub-adviser contracts with the primary adviser and not the primary adviser's underlying client, the sub-adviser's "customer" for CIP purposes would be the primary adviser, which is the entity that "directly open[s] and hold[s]" the account with the sub-adviser (i.e., enters into the contractual relationship under which the sub-adviser provides advisory services). To the extent that a final CIP rule for Covered Advisers includes sub-advisers within its scope, we request that the final rule affirm the approach under the Proposed Rule as we understand it with respect to the sub-adviser's "customer."

- Retain exclusion for existing accounts, provided a Covered Adviser has a reasonable belief that it knows the customer's true identity. SIFMA agrees with this exclusion, which is consistent with other CIP regulations.

    - As explained in the preamble to the final CIP rule for banks, FinCEN implemented this exclusion in response to concerns that verification of existing customers would burden financial institutions and upset existing customers. Commenters recommended that the CIP rule apply prospectively to new customers who previously had no account with the financial institution. FinCEN acknowledged that a verification requirement for existing customers would have unintended consequences and, instead, implemented (as proposed here for Covered Advisers) a risk-based approach that would not require verification for an existing customer if the financial institution had a reasonable belief that it knew the customer's identity.[18]

    - Subsequent guidance issued by FinCEN and the federal banking agencies clarified that a financial institution can demonstrate such reasonable belief through, among other methods, showing that the financial institution has had an active relationship with a particular person, evidenced by such things as a history of services

[17] *See* SIFMA, Comment Letter on AML Program/SAR Rule Proposal (April 15, 2024), pp. 8-9, *available* here; *see also* SIFMA, Comment Letter on Proposed Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers, Docket Number FinCEN–2014–0003 (November 2, 2015), *available* here.

[18] FinCEN et al., "Customer Identification Programs for Banks, Savings Associations, Credit Unions and Certain Non-Federally Regulated Banks," 68 Fed. Reg. 25090, 25095 (May 9, 2003).

performed for the person over a period of time.[19] The regulators' guidance provided additional examples specific to banks and broker-dealers (e.g., history of account statements). We believe that comparable examples for Covered Advisers could include, for example and without limitation, a history of sending regulatory disclosures and collecting fees, and we request that such guidance be included in the preamble to any final CIP rule for Covered Advisers.

- Affirm application to Covered Advisers' CIPs of longstanding regulatory guidance related to treatment of non-ERISA plans. Under the regulatory guidance noted above, in the case of a trust, custodial, or other administrative account established by an employer to maintain and administer assets under a non-ERISA employee retirement, benefit, or deferred compensation plan, the financial institution's "customer" is the trust established by the employer to maintain the assets.[20] If the account is not a trust, the guidance provides that the "customer" for CIP purposes is the employer that establishes the account (noting that the CIP rule would not apply if the relevant employer is exempt from the "customer" definition). The guidance is clear that a participant in or beneficiary of such an account is not the financial institution's "customer," even if a sub-account is maintained in the employee's name or the employee is able to make deposits into the account, provided that such ability to make deposits is limited to rolling over assets from another plan or other specified purposes in accordance with the terms of the plan. We request that the preamble to any final CIP rule for Covered Advisers affirm the applicability of this guidance to such CIP rule.

D. "Customers" Covered by the Proposed CIP Requirements; Proposed Exception.

As noted above, SIFMA appreciates the Proposed Rule's consistency with "customer" definitions under existing CIP rules, including the exclusions for certain "financial institutions" under the Bank Secrecy Act ("BSA"), existing customers and certain governmental entities and companies with publicly listed securities on U.S. securities exchanges.

SIFMA respectfully requests that FinCEN and the SEC also exclude closed-end funds, unit investment trusts, and business development companies. Some of these entities may already qualify for the exclusion for certain publicly traded companies but, in all cases, these entities are subject to rigorous regulatory oversight from the SEC. Requiring a Covered Adviser to collect CIP information and verify the identities of these regulated entities would not help to mitigate the risk of illicit activity through such vehicles, which would be evident only to financial institutions involved in the relevant flows of funds.

[19] FinCEN et al., "Interagency Interpretive Guidance on Customer Identification Program Requirements under Section 326 of the USA PATRIOT Act, FAQs: Final CIP Rule" (April 28, 2005), pp. 8-9.

[20] *Id*. at p. 6.

E. Non-U.S. Covered Advisers and Activities.

The Proposed Rule's requirements would apply on the same basis to Covered Advisers located outside the United States as to those located in the United States. The proposing release asks whether the definition of investment adviser should, as proposed, apply to non-U.S. Covered Advisers registered or required to register with the SEC (for RIAs) or that report to the SEC on Form ADV (for ERAs).[21]

As with respect to FinCEN's proposal to impose AML program requirements on Covered Advisers, SIFMA believes the scope of the Proposed Rule should be limited to Covered Advisers within the United States. Otherwise, the Proposed Rule would create significant conflict of laws and compliance challenges for non-U.S. firms. Non-U.S. Covered Advisers engaging in non-U.S. advisory activities would face challenges in trying to comply with U.S. requirements while simultaneously complying with the AML laws of foreign jurisdictions in which they may be based or operate. For example, non-U.S. Covered Advisers may be subject to customer identification and verification requirements that differ from those under regulations adopted by FinCEN and the SEC.

For these same reasons, if non-U.S. Covered Advisers are included within the scope of the final rule, the CIP obligations of such advisers should be limited to customers in the United States. (Further, any such obligations should be subject in all cases to exceptions and exclusions available for U.S.-based Covered Advisers, including the requested exclusion for accounts of advisory customers whose assets are held at qualified custodians.)

SIFMA also requests that FinCEN and the SEC explicitly confirm that U.S. Covered Advisers will not be required to apply CIP requirements to their non-U.S. activities since the Bank Secrecy Act ("BSA") does not apply extraterritorially.

F. Customer Identification Program Minimum Requirements; Mutual Funds.

The Proposed Rule would provide that a Covered Adviser advising a mutual fund may deem its CIP requirements with respect to the mutual fund satisfied if the mutual fund has developed and implemented a CIP compliant with the CIP requirements applicable to mutual funds.[22] We respectfully request that this language be deleted as unnecessary and potentially confusing.

First, and most significantly, a mutual fund would already be excluded from the types of "customer" that would be subject to CIP under the Proposed Rule, because a mutual fund is a "financial institution [as defined in FinCEN's regulations implementing the BSA] regulated by a Federal functional regulator" (in this case, the SEC).[23] As such, and as is the case under existing

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[21] CIP Proposal at 44579.

[22] *Id*. at 44584.

[23] *See* Section 1032.100(c)(2)(i) and (d) of the Proposed Rule, CIP Proposal at 44595; 31 CFR 1010.100(r) (defining "Federal functional regulators," including SEC).

CIP regulations for Currently Covered FIs, a mutual fund would be excluded from the "customer" definition for purposes of Covered Advisers' CIP requirements.

Second, even if a mutual fund were a customer, its CIP compliance should have no bearing on a Covered Adviser's ability to identify and verify the fund itself, which would be the Covered Adviser's customer, regardless of the fund's compliance with its own AML obligations. (A customer's non-compliance with applicable AML obligations may bear on the risks to a financial institution of the customer relationship, but this risk is addressed through other aspects of an AML program, not CIP.)

G. Customer Identification and Verification Procedures; Date of Formation and Customer Notice.

The Proposed Rule would apply specified CIP obligations on Covered Advisers. For instance, as proposed, Covered Advisers would be required to collect the date of formation for a customer that is not a natural person (in addition to the date of birth for an individual).[24] The Proposed Rule also would require Covered Advisers to provide notice to their customers of the identity verification requirements of the CIP rule.[25] SIFMA offers the following comments on these two proposed requirements:

- Remove requirement to collect date of formation. SIFMA requests that FinCEN and the SEC remove the requirement that Covered Advisers collect the date of formation for a legal entity customer. The CIP rules for Currently Covered FIs do not require the collection of this information. As noted in Section II.A above, such a variation from existing CIP regulations would obligate financial institutions that currently implement enterprise-wide AML programs to modify their systems to add a new data field, which can be expensive and time-consuming to implement. In addition, organizations would need to update policies and procedures and implement different training programs depending on the type of financial institution within the organization to which a customer is onboarded. This would be costly and inefficient, could confuse customers, and is unnecessary to mitigate illicit finance risk. Further, imposing such a requirement for Covered Advisers when it is not included in the CIP rules for Currently Covered FIs would impede a Covered Adviser's ability to leverage the reliance provision under the Proposed Rule, since other financial institutions may be unwilling to take on obligations that their systems, policies, procedures, and training have not been designed to incorporate.

[24] CIP Proposal at 44575.

[25] *Id*. at 44578.

- Waive customer notice requirement with respect to private funds created and managed by the relevant Covered Adviser. SIFMA requests that the customer notice requirement be waived where a Covered Adviser creates and manages a private fund "customer." In this scenario, and as recognized in the proposing release, the Covered Adviser itself would have authority or control over the private fund.[26] Under the BSA, regulations implementing the statute's customer identification and verification requirements must require financial institutions to implement, and customers—after being given adequate notice—to comply with, certain verification procedures.[27] Where a Covered Adviser has created and manages a private fund, the Covered Adviser essentially would be providing the CIP customer notice to itself, which would serve no meaningful statutory or regulatory purpose.

H. Reliance.

The Proposed Rule would allow Covered Advisers, under specified conditions, to rely on certain other financial institutions to perform some or all of the elements of the Covered Adviser's CIP. The conditions are as follows:

- Such reliance is reasonable under the circumstances;
- The other financial institution is subject to an AML program rule implementing the BSA and is regulated by a federal functional regulator; and
- The other financial institution enters into a contract with the Covered Adviser requiring it to certify annually that it has implemented an AML program and will perform specified requirements of the Covered Adviser's CIP.[28]

Active monitoring. SIFMA appreciates the Proposed Rule's inclusion of a reliance provision comparable to that under other CIP regulations. The proposing release asks whether a Covered 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 whether the Covered Adviser "should not be held responsible by showing it reasonably relied on another financial institution" that satisfied the regulatory conditions. SIFMA urges FinCEN and the SEC not to impose an "active monitoring" requirement. Such an approach could lead to duplicative efforts, would impose burdensome and unnecessary requirements on Covered Advisers since the relied-on financial institution already is required to comply with AML requirements, and would be inconsistent with existing reliance provisions under the CIP rules for Currently Covered FIs. Instead, provided that the Covered Adviser's reliance remains reasonable and other regulatory conditions are satisfied, the Covered Adviser should not be held responsible for any CIP failures by the relied-on institution within the scope of the reliance agreement.

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[26] *See id*. at 44583.

[27] 31 U.S.C. § 5318(l)(2).

[28] CIP Proposal at 44579.

Assets maintained by qualified custodians. We reiterate here our recommendation that accounts for customers whose assets are held by qualified custodians subject to BSA obligations be *excluded* from the Covered Advisers' CIP requirement, and we request that FinCEN and the SEC not seek to address that recommendation through the reliance provision. As described above, certain client assets over which RIAs have authority must be maintained with qualified custodians and RIAs usually are not parties to the custodians' agreements with the clients. A qualified custodian subject to BSA obligations is required to apply its CIP to these clients, and it is not typical for a qualified custodian in this circumstance to agree to another institution's reliance on its CIP or certify as to its AML program. Further, addressing this duplication via the reliance provision would impose substantial burdens on qualified custodians, who may maintain custody of the client assets of thousands of Covered Advisers. A rule that would require use of the reliance provision to avoid duplication between qualified custodians and Covered Advisers in this circumstance would require custodians—who typically do not contract directly with the Covered Advisers—to implement processes to manage a significant volume of reliance-related requests, agreements, and annual certifications, if they were even willing to agree to reliance. This immense burden (which would also impact Covered Advisers that would be making and managing these requests to multiple custodians) would serve no risk mitigation purpose, as custodians have direct custodial relationships with the persons whose assets are maintained by them and apply their own CIP procedures to these customers.

Based on the foregoing, we respectfully submit that excluding from the "account" definition a Covered Adviser's advisory relationships with customers whose assets are held by a qualified custodian subject to BSA obligations is the most optimal means of addressing duplication between qualified custodians and Covered Advisers.

However, if FinCEN and the SEC do not implement this approach, we request that, in the alternative, a Covered Adviser's reliance on the qualified custodian be deemed to be "reasonable under the circumstances" for purposes of the reliance provision, without the need for a reliance contract or annual certification, unless the Covered Adviser has reason to believe that such reliance is unreasonable.

Annual certifications. FinCEN and the SEC ask generally in the proposing release whether it is feasible to enter into reliance contracts and whether the annual certification requirement should be removed or modified. Beyond the specific scenario addressed above with respect to assets maintained by qualified custodians, we note generally that the certification requirement under the CIP rules for Currently Covered FIs results in significant administrative burden and can create regulatory compliance risk (including scrutiny from supervisors regarding whether certifications are obtained and maintained), without meaningfully mitigating financial crime risk. We would strongly support a decision by FinCEN and the SEC to remove this requirement.

I. Proposed Compliance Date.

As explained in the proposing release, the proposed compliance deadline would be (1) six months after the effective date of a final CIP rule, which would be 60 days after the date of the final rule's publication in the Federal Register (i.e., approximately eight months), or, *if later*, (2)

the compliance date of FinCEN's proposed AML program and SAR filing requirements for Covered Advisers.[29]

We respectfully request at least a two-year compliance period, as was applied for FinCEN's 2016 rule imposing CDD requirements on financial institutions, including at least six months after the compliance date for any final AML program and SAR filing requirements for Covered Advisers. Implementing the CIP requirements for Covered Advisers will involve developing policies, procedures, and controls tailored to the regulatory requirement or reviewing and ensuring compliance of existing policies, procedures, and controls; procuring and/or developing and deploying necessary information technology systems; and conducting staff training. These implementation activities will take significantly longer than eight months. Further, Covered Advisers may be subject to other compliance obligations from the SEC and FinCEN, including comprehensive AML program and SAR filing requirements under FinCEN's recent proposal, which Covered Advisers may need to address first before building out CIP compliance approaches. Accordingly, the requested two-year compliance period (or, if later, six months after the compliance date applicable to AML program and SAR requirements for Covered Advisers) is appropriate.

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

Respectfully submitted,

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[29] *Id.*