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November 2, 2015

Policy Division
Financial Crimes Enforcement Network
Department of the Treasury
P.O. Box 39
Vienna, VA 22183
Attn: Director Jennifer Shasky Calvery

Re: Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers; RIN 1506–AB10; Docket Number FinCEN–2014–0003

Dear Director Shasky Calvery:

The Asset Management Group of the Securities Industry and Financial Markets Association ("SIFMA") and SIFMA's Anti-Money Laundering & Financial Crimes Committee[1] appreciate the opportunity to comment on the above-referenced proposal of the Financial Crimes Enforcement Network ("FinCEN") regarding anti-money laundering ("AML") program and suspicious activity report ("SAR") filing requirements for certain investment advisers (the "NPRM" or the "RIA Proposal").[2]

We strongly support FinCEN's goal of safeguarding the financial system against fraud, money laundering, terrorist financing, and other financial crimes. We also appreciate FinCEN's efforts to balance the burdens on firms with other interests, and to give investment advisers the flexibility to design their programs to meet the

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[1] SIFMA is the voice of the nation's securities industry, bringing together the shared interests of hundreds of broker-dealers, banks and asset managers. SIFMA's Asset Management Group ("AMG") represents U.S. asset management firms whose combined assets under management exceed $30 trillion. The clients of AMG member firms include, among others, registered investment companies, endowments, state and local government pension funds, private sector Employee Retirement Income Security Act of 1974 ("ERISA") 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. For more information, visit http://www.sifma.org.

[2] Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers, 80 Fed. Reg. 52,680 (proposed Sept. 1, 2015).

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specific risks of their advisory businesses. As described below, we believe certain modifications to the RIA Proposal would significantly enhance the flexibility and/or mitigate the burdens for covered investment advisers without detracting from FinCEN's ultimate goal of safeguarding the financial system. We also address below the proposed compliance dates and request that they be at least 18 months from the date the rules are finalized.

I. SUMMARY OF KEY SUBSTANTIVE POINTS

This section summarizes our principal comments on the RIA Proposal. A discussion of each of these topics is included in the sections of this letter that follow.

- ***Non-U.S. Advisers and Activities*:** FinCEN should limit the scope of the proposed rules to registered investment advisers within the United States. To do otherwise would be inconsistent with existing requirements and create significant conflict-of-laws and compliance challenges for non-U.S. firms. In addition, FinCEN should clarify that U.S. firms are not required to apply FinCEN's requirements to their non-U.S. activities if compliance would cause these firms to violate other laws in the jurisdictions in which they operate.

- ***Scope of AML Programs*:**

  - Certain advisory activities present little or no risk of money laundering to investment advisers and should be excluded from the proposed rules' AML program requirement. These include:

    - advisory services that do not involve the management of client assets (*e.g.*, publication of research reports, pension consulting and financial planning);

    - advisory services to registered open-end and closed-end funds; and

    - advisory services to employees' securities companies.

  - Sub-advisers and wrap program advisers typically lack access to investor information and do not directly manage investor assets. These types of advisory relationships should thus be excluded from the AML program requirement. At a minimum, the final rules should be clarified with respect to these relationships to mitigate burdensome requirements that would be of limited benefit.

  - The NPRM suggests that investment advisers must "look through" to the ultimate investors in certain pooled investment vehicles, but investor information typically is limited. FinCEN should focus AML programs on

the risks posed by investment advisers' direct clients, or provide clear guidance regarding compliance expectations where access to investor information is limited.

- ***Assessments of Risk***: Current statutory and regulatory provisions do not require customer-by-customer risk assessments, and FinCEN should make clear that assessments may take different forms depending on the facts and circumstances unique to each firm and its advisory business.

- ***AML Program Approval and Designation of Responsible Person***: To accommodate different organizational structures, FinCEN should allow for AML program approval by senior management. In addition, FinCEN should clarify that the person designated as responsible for a firm's AML program need not be a corporate officer, and should allow such person to be employed by an affiliate of the investment adviser.

- ***SAR Sharing***: FinCEN should authorize investment advisers to share SARs within their corporate organizational structures, either in the final rule or in guidance issued at the time of adoption of the final rule. To decline to do so would frustrate enterprise-wide compliance efforts and create a Catch-22 for dually registered firms.

II. THE PROPOSED RULES SHOULD NOT APPLY TO NON-U.S. INVESTMENT ADVISERS, OR TO THE NON-U.S. ACTIVITIES OF U.S. INVESTMENT ADVISERS IF COMPLIANCE WOULD CONFLICT WITH OTHER APPLICABLE LAWS

FinCEN proposes in the NPRM to include investment advisers within the general definition of "financial institution" in the regulations implementing the Bank Secrecy Act (the "BSA")[3] and to require covered investment advisers to establish AML programs and comply with suspicious activity reporting requirements.[4] For purposes of the proposed rules, the term "investment adviser" would be defined as "[a]ny person who is registered or required to register" with the Securities and Exchange Commission (the "SEC") under the Investment Advisers Act of 1940 (the "Advisers Act") (such persons, "RIAs").[5]

[3] Codified at 12 U.S.C. § 1829b, 12 U.S.C. §§ 1951–59, 31 U.S.C. §§ 5311–14 and 31 U.S.C. §§ 5316–32 and notes thereto, with implementing regulations at 31 C.F.R. chapter X. *See* 31 C.F.R. § 1010.100(e).

[4] RIA Proposal, 80 Fed. Reg. at 52,683.

[5] 15 U.S.C. § 80b–1 *et seq*.

As currently proposed, the new rules would apply the AML program and SAR filing requirements to all RIAs, including those that are not within the United States.[6] For such RIAs, this result would conflict with the legislative intent of the BSA and existing regulations and guidance and create significant conflict-of-laws issues and compliance challenges. We thus urge FinCEN to limit the application of the proposed AML program and SAR filing requirements to "financial institutions," as that term would be amended by the RIA Proposal, such that these requirements would apply only to covered investment advisers ***within the United States***. In addition, FinCEN should clarify that U.S. firms would not be expected to apply FinCEN's requirements to their non-U.S. activities if compliance would cause these firms to violate local law.

The BSA was intended to apply only to financial institutions in the United States,[7] and existing BSA/AML requirements are consistent with that jurisdictional limitation.[8] For example, the AML program and SAR filing requirements for broker-dealers apply only to firms within the United States.[9] This approach is consistent

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[6] We understand the RIA Proposal to exclude non-U.S. RIAs from the scope of the requirements related to currency transaction reports ("CTRs"), recordkeeping, transmittal of records, and retention requirements for the transmittal of funds (the "Recordkeeping and Travel Rule"), and requirements related to other specified transactions (together, the "Financial Institution Reporting and Recordkeeping Requirements"). *See*, *e.g.*, 31 C.F.R. § 1010.100(t) (defining "financial institution" as "[e]ach agent, agency, branch, or office ***within the United States*** of any person doing business" in a listed capacity (emphasis added), which would be amended to include RIAs); RIA Proposal, 80 Fed. Reg. at 52,684 n.31 (noting that this general definition "determines the scope of rules that require the filing of CTRs and the creation, retention, and transmittal of records or information on transmittals of funds and other specified transactions").

[7] The U.S. House of Representatives report accompanying the BSA stated, "It is not feasible and it is not the purpose of this bill to attempt to apply American law in foreign countries." H.R. Rep. No. 91-975 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4402, 4404. *See also* SEC'Y OF THE TREASURY, MONEY LAUNDERING AND THE BANK SECRECY ACT: THE QUESTION OF FOREIGN BRANCHES OF DOMESTIC FINANCIAL INSTITUTIONS, at 30 (1987) (noting that the BSA's recordkeeping and currency reporting requirements "do not apply to foreign branches of United States financial institutions or to any other type of financial institution physically located outside the United States").

[8] In the limited circumstances in which FinCEN has applied its BSA/AML rules to entities located outside of the United States, it has done so only with respect to those non-U.S. entities doing business or engaged in activities taking place "wholly or in substantial part within the United States." *See*, *e.g.*, 31 C.F.R. § 1010.100(ff) (defining "money services business"); 31 C.F.R. § 1010.100(lll) (defining "loan or finance company"). *Cf.* Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers, 76 Fed. Reg. 39,645, 39,681 n.515 (July 6, 2011) (noting that the SEC does not apply most of the substantive provisions of the Advisers Act to the non-U.S. clients of non-U.S. RIAs).

[9] *See*, *e.g.*, 31 C.F.R. § 1023.210 (applying broker-dealer AML program requirements to "financial institution[s] regulated by a self-regulatory organization"); 31 C.F.R. § 1010.100(t) (defining the

with statements FinCEN has made in guidance materials regarding the scope of both its SAR filing requirements and its customer identification regulations.[10] Indeed, when FinCEN originally proposed AML requirements for investment advisers, it intended to apply the proposed rules only to advisers within the United States.[11]

If RIAs outside of the United States were included within the scope of the final rules, they would confront significant legal and compliance challenges, including the possibility that they may be unable to comply with the proposed SAR filing requirements without violating local laws. For example, some jurisdictions have "tipping off" provisions that restrict the disclosure of information about suspicious matters. One such jurisdiction is Australia, where section 123 of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 prohibits the disclosure of a suspicious matter that has been communicated to the Australian Transaction Reports and Analysis Centre ("AUSTRAC"), with only limited exemptions.[12] Further, according to guidance from AUSTRAC, the law's exemption for disclosures to government bodies other than AUSTRAC applies only to disclosures pursuant to an Australian legal requirement or to an Australian law enforcement body[13]; no

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term "financial institution" as used in 31 C.F.R. § 1023.210 by reference to agents, agencies, branches and offices located "within the United States"). *See also* 31 C.F.R. § 1023.320 (applying the SAR filing requirement to "[e]very broker or dealer in securities within the United States").

[10] *See*, *e.g.*, FinCEN, Answers to Frequently Asked Bank Secrecy Act (BSA) Questions*, available at* http://www.fincen.gov/statutes_regs/bsa/bsa_faqs.html (last visited Nov. 2, 2015) (noting that "foreign-located operations of U.S. organizations are not required to file SARs"); FinCEN, Guidance on Customer Identification Regulations (Jan. 2004), *available at* http://www.fincen.gov/statutes_regs/guidance/pdf/finalciprule.pdf (last visited Nov. 2, 2015) (noting that the customer identification program rule "does not apply to any part of [a] bank located outside of the United States").

[11] *See* Anti-Money Laundering Programs for Investment Advisers*,* 68 Fed. Reg. 23,646, 23,652 (proposed May 5, 2003) (the "First Proposed Investment Adviser Rule") (proposing to limit the definition of the term "investment adviser" to persons "whose principal office and place of business is located ***in the United States***" (emphasis added)), *withdrawn*, 73 Fed. Reg. 65,568 (Nov. 4, 2008).

[12] *See* Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth.) (Austl.), *available at* https://www.comlaw.gov.au/Details/C2015C00405 (last visited Nov. 2, 2015).

[13] *See* Australian Transaction Reports and Analysis Centre, Suspicious Matter Reports, *available at* http://www.austrac.gov.au/suspicious-matter-reports-smrs (last visited Nov. 2, 2015). In August 2015, AUSTRAC exempted the Australian arm of HSBC from the tipping off provisions in order to allow HSBC to share Australian suspicious matter reports with HSBC's independent compliance monitor. *See* AUSTRAC, Exemption from "tipping off" prohibitions granted to HSBC (Aug. 17, 2015), *available at* http://www.austrac.gov.au/media/media-releases/exemption-"tipping-off"-prohibitions-granted-hsbc (last visited Nov. 2, 2015).

exemption is provided for disclosures outside of Australia. Similarly, RIAs located outside of the United States may be unable to comply with the proposed SAR filing requirements without violating local data privacy laws, such as the European Union's directive on data protection, which restricts the extent to which firms can transmit documents and other information to third countries such as the United States.[14] At a minimum, RIAs located outside of the United States would be required to attempt to reconcile and comply with multiple AML regulatory regimes. In addition, U.S. RIAs could face similar issues (*e.g.*, with respect to advisory services provided to investment vehicles formed in non-U.S. jurisdictions with their own AML regimes).[15]

The proposed application of AML program and SAR filing requirements to RIAs located outside of the United States would conflict with existing requirements and expectations under the BSA/AML regime and put such RIAs in an untenable position. Without adequate justification for this approach, FinCEN should limit the scope of the proposed AML program and SAR filing rules to RIAs ***within the United States***. FinCEN should also clarify that it will not expect U.S. firms to apply FinCEN's requirements to the firms' non-U.S. activities if compliance would cause these firms to violate local law.

[14] *See*, *e.g.*, Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Ch. IV, 1995 O.J. (L 281). The U.S. Department of Commerce, in consultation with the European Commission, established a "safe harbor" framework to bridge differences in approach to privacy between the United States and the European Union and enable the transfer of data, but that approach has recently been invalidated. *See* Welcome to the U.S.-EU & U.S.-Swiss Safe Harbor Frameworks (last updated Oct. 9, 2015), *available at* http://export.gov/safeharbor/index.asp (last visited Nov. 2, 2015).

[15] *Cf.* FinCEN, Guidance on Customer Identification Regulations (Jan. 2004), *available at* http://www.fincen.gov/statutes_regs/guidance/pdf/finalciprule.pdf (last visited Nov. 2, 2015) ("[A]s a matter of safety and soundness, banks are encouraged to implement an effective [customer identification program] throughout their operations, including in their foreign offices, except to the extent that the requirements of the rule would conflict with local law.").

III. FinCEN Should Exclude from the AML Program Requirement Those Advisory Services that Present No Money Laundering Risk to the RIA, and Clarify Requirements and Expectations when RIA Access to Investor Information Is Limited

A. Advisory Activities that Do Not Include the Management of Client Assets Should Be Excluded

The NPRM states that the proposed "investment adviser" definition may include, among others, financial planners, pension consultants, and entities that provide only securities newsletters and/or research reports.[16] FinCEN adds in this regard that different types of investment advisers "may present varying degrees of money laundering and terrorist financing risks" and that it therefore "anticipates that the burden of establishing an AML program would also correspondingly be reduced due to the risk-based nature of the program and the types of advisory services these entities provide."[17] However, the NPRM does not describe what the risks may be with respect to advisory activities that do not include the management of client assets.

Because advisory services that do not involve the management of client assets do not expose firms to any money laundering or terrorist financing risk, we believe firms should be required to include within their AML programs *only* those advisory activities that involve the management of client assets.

By way of example, with respect to securities newsletters and research reports, a firm's personnel develop and publish insights and expectations concerning different securities, other financial instruments or markets, which investors can then use in making their own investment decisions. This type of business does not involve knowledge of clients' investment decisions, let alone the management of client assets. Similarly, advisory businesses such as financial planning and pension consulting may involve providing advice with respect to investment or overall financial objectives and recommendations of asset allocations or specific investments, but the financial planner or pension consultant does not manage client assets.[18] Moreover, as FinCEN has previously recognized, ERISA pension funds "are less susceptible to be used for

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[16] RIA Proposal, 80 Fed. Reg. at 52,684.

[17] *Id*.

[18] *See* SEC, Selecting and Monitoring Pension Consultants: Tips for Plan Fiduciaries (June 1, 2005), *available at* http://www.sec.gov/investor/pubs/sponsortips.htm (last visited Nov. 2, 2015); SEC, Financial Planners (Aug. 20, 2008), *available at* http://www.sec.gov/answers/finplan.htm (last visited Nov. 2, 2015).

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."[19]

As FinCEN appropriately recognized in the First Proposed Investment Adviser Rule in proposing to include assets under management as a component of the "investment adviser" definition,[20] RIAs that do not manage client assets "do not accept funds or hold financial assets directly" and thus "are unlikely to play a significant role in money laundering."[21] The current RIA Proposal describes money laundering as "the processing of criminal ***proceeds*** through the financial system."[22] Without any funds or proceeds at all, it is difficult to see what an AML program would achieve, and any hypothetical benefit would be far outweighed by the costs of compliance. We therefore urge FinCEN to exclude from the proposed rules advisory activities that do not involve the management of client assets, so that advisers subject to the final rules can better focus their compliance resources.

B. Management of Registered Open-End and Closed-End Funds Presents No Money Laundering Risk to RIAs, and Advisory Services to These Investment Vehicles Should Be Excluded

We believe no purpose would be served by including in investment advisers' AML programs the advisory services they provide to registered open-end and closed-end funds, and thus request that such services be excluded in the final rules.

Registered open-end and closed-end funds are subject to a comprehensive SEC registration and regulation regime and ongoing SEC oversight. Shares in open-end funds are purchased from the funds themselves or through broker-dealers, while shares in closed-end funds are offered to the public in an initial offering and then typically trade in the secondary markets. Investment advisers do not sell shares in open-end or closed-end funds, and merely manage the investment portfolios of these vehicles. The advisers to open-end and closed-end funds do not necessarily know

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[19] *See* Customer Identification Programs for Broker-Dealers, 68 Fed. Reg. 25,113, 25,115 (May 9, 2003).

[20] *See* First Proposed Investment Adviser Rule, 68 Fed. Reg. at 23,652. *See also id*. at 23,649 ("Many advisers that manage portfolios for some clients have other clients to whom the firm provides very different services, such as pension consulting, securities newsletters or research reports, or financial planning. Accordingly, in designing its anti-money laundering procedures, an adviser could exclude clients for whom the firm does not manage assets.").

[21] *See id*. at 23,648.

[22] RIA Proposal, 80 Fed. Reg. at 52,682 (emphasis added).

who the investors in these investment vehicles are[23] or have an understanding of these investors' "movement[s] of funds through the financial system."[24] Moreover, open-end funds are themselves subject to AML program requirements.[25]

Due to the lack of money laundering risk posed to investment advisers by the management of the investment portfolios of registered open-end and closed-end funds, we request that FinCEN exclude from the final rules the advisory services that investment advisers provide to these vehicles. If FinCEN declines to exempt advisory services to these vehicles, we request guidance on the typologies and red flags specific to investment advisers' services to these vehicles that advisers should consider in developing their AML programs.

C. Employees' Securities Companies Present No Money Laundering Risk, and Advisory Services to These Vehicles Should Be Excluded

Employees' securities companies ("ESCs") established in accordance with the Investment Company Act of 1940 (the "ICA")[26] present no money laundering risk, so advisory services to these companies should be excluded from the scope of the AML program requirement.

The ICA defines an ESC as "any investment company or similar issuer all of the outstanding securities of which … are beneficially owned (A) by the employees or persons on retainer of a single employer or of two or more employers each of which is an affiliated company of the other, (B) by former employees of such employer or employers, (C) by members of the immediate family of such employees, persons on retainer, or former employees, (D) by any two or more of the foregoing classes of persons, or (E) by such employer or employers together with any one or more of the foregoing classes of persons."[27]

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[23] *See generally* SEC, Mutual Funds (Dec. 14, 2010), *available at* https://www.sec.gov/answers/mutfund.htm (last visited Nov. 2, 2015); SEC, Closed-End Fund Information (Jan. 16, 2013), *available at* https://www.sec.gov/answers/mfclose.htm (last visited Nov. 2, 2015).

[24] RIA Proposal, 80 Fed. Reg. at 52,682.

[25] *See generally* Anti-Money Laundering Programs for Mutual Funds, 67 Fed. Reg. 21,117 (Apr. 29, 2002). *See also* First Proposed Investment Adviser Rule, 68 Fed. Reg. at 23,648 and n.31 (proposing to permit covered investment advisers to exclude from their AML programs "any investment vehicle they advise that is subject to an anti-money laundering program requirement under BSA rules," such as a mutual fund or a bank's common or collective trust fund).

[26] *See* 15 U.S.C. § 80a-1 *et seq*.

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

An ESC is established by a company typically for the benefit of the company's key employees, officers and directors, to provide for capital-building opportunities and thereby facilitate the recruitment and retention of well-qualified professionals. Eligible investors in an ESC may make contributions in exchange for investment units, or their employer may distribute investment units to them as compensation. An ESC is typically managed by an investment adviser affiliated with the company, and the ESC will typically invest in privately offered securities, including privately offered funds that may be managed by the ESC's adviser. The transfer of investment units in an ESC is typically restricted, units may have no or limited redemption rights, and units may be subject to mandatory redemption upon the termination of an investor's employment. Pursuant to Section 6(b) of the ICA, the SEC will exempt an ESC from registration and other requirements of the ICA if and to the extent that an exemption is consistent with the protection of investors.[28]

As described above, interests in an ESC are available to a very limited pool of eligible investors employed by or affiliated with a single employer. These investors have limited opportunities to transfer or redeem units, and there is no public market for these interests. An investment in an ESC does not afford investors the ability to select or change investments in the ESC, which are chosen by the investment adviser managing the ESC. For these reasons, and as FinCEN recognized in its 2002 proposal to impose AML program requirements on unregistered investment companies, ESCs are not the type of company that is "likely to be used for money laundering purposes by third parties given their size, structure and purpose."[29]

We therefore request that FinCEN exclude from the scope of the AML program requirement any advisory services provided to ESCs.

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[28] *See* ICA Section 6(b); 15 U.S.C. § 80a-6(b) ("In determining the provisions to which [] an order of exemption shall apply, the Commission shall give due weight, among other things, to the form of organization and the capital structure of such company, the persons by whom its voting securities, evidences of indebtedness, and other securities are owned and controlled, the prices at which securities issued by such company are sold and the sales load thereon, the disposition of the proceeds of such sales, the character of the securities in which such proceeds are invested, and any relationship between such company and the issuer of any such security.").

[29] *See* Anti-Money Laundering Programs For Unregistered Investment Companies, 67 Fed. Reg. 60,617, 60,620 (proposed Sept. 26, 2002), *withdrawn*, 73 Fed. Reg. 65,569 (Nov. 4, 2008).

D. The Proposed Rules Should Be Modified to Recognize the Limited Information Available to Sub-Advisers and Wrap Program Advisers

The proposed rules "would require an investment adviser providing sub-advisory services to a client to address these services in its AML program and to monitor such services for potentially suspicious activity."[30] Although FinCEN recognizes that wrap fee program advisers "may have more limited access to investor information and transactions" in certain circumstances, FinCEN states such advisers "may still have access to information that would enable [them] to identify money laundering, terrorist financing, or other illicit activity."[31] However, FinCEN does not identify what information that might be.

In the context of both sub-advisory services and wrap programs, investment advisers typically lack access to information regarding the underlying investors and do not directly manage investor assets. As a result, we request that these advisory services be excluded from the scope of the AML program requirement. At a minimum, we request that the final rules clarify the expectations with respect to these relationships in order to minimize duplication of effort and mitigate burdensome requirements that will be of limited benefit in achieving FinCEN's goals.

With respect to sub-advisory relationships, a client (typically a fund) may use a sub-adviser to manage the assets of a particular fund or a portion of a fund's assets. Sub-advisers may be retained to enhance the primary adviser's investment expertise or for other reasons. The primary adviser may contract with the sub-adviser, or the client may contract directly with the sub-adviser.[32] In either scenario, however, the primary adviser owns the relationship with the fund client and has access to any information that could be used to monitor suspicious activity. The sub-adviser typically has limited interaction with and information about the client, let alone its underlying investors, so it is unclear what a firm's AML policy could achieve with respect to sub-advisory relationships.

Similarly, in a wrap fee program, the sponsor of the program (typically a broker-dealer) has the primary relationship with the client and selects program advisers for the client. The program sponsor monitors the wrap program advisers' management of client accounts and has access to client information, which in some arrangements may be considered proprietary information of the sponsor. In

[30] RIA Proposal, 80 Fed. Reg. at 52,687.

[31] *Id*. at 52,688.

[32] *See id*. at 52,683 n.21.

contrast, wrap program advisers have little or no information about the client. The wrap program adviser has little or no visibility into the client's overall investment program and is not in a position to monitor suspicious activity in any meaningful way.

Requiring firms to implement AML programs for these types of relationships would result in the expenditure of compliance resources that would do little to further the objectives of the RIA Proposal and could be better allocated to other activities. We request that FinCEN modify the proposed rules to exclude sub-advisory services and advisory services to wrap programs, at least in situations where the primary adviser or wrap program sponsor is subject to BSA/AML requirements. When the primary adviser or wrap program sponsor is not subject to BSA/AML requirements, any requirements on the sub-adviser or wrap program adviser should recognize the limited information such a firm will have and the limited utility of applying AML requirements.

E. The Suggestion that Investment Advisers "Look Through" to the Ultimate Investors in Unregistered Pooled Investment Vehicles Is Problematic and Should Be Clarified

FinCEN states in the NPRM that an investment adviser that is the primary adviser to a private fund or other unregistered pooled investment vehicle "is required to make a risk-based assessment" of the "risks presented ***by the investors*** in such investment vehicles by considering the same types of relevant factors, as appropriate, as the adviser would consider for clients for whom the adviser manages assets directly."[33] Moreover, "[i]f any of the investors in the private fund or other unregistered pooled investment vehicle … are themselves private funds or some other type of unregistered pooled investment vehicles (an 'investing pooled entity'), the investment adviser will need to assess the … risks associated with these investing pooled entities using a risk-based approach."[34]

We believe the suggestion that investment advisers may be expected to "look through" to the ultimate investors in certain pooled investment vehicles, including investors through fund-of-funds structures, is problematic. FinCEN states in the NPRM that the advisers to pooled investment vehicles "should have access to information about the identities and transactions of the underlying or individual investors,"[35] but that typically is not the case. A pooled investment vehicle is most often held by a qualified custodian – that is, a registered bank or broker-dealer –

[33] *Id*. at 52,688 (emphasis added).

[34] *Id*.

[35] *Id*.

which shields the identities of the underlying investors. In fact, investor-related information typically is subject to strict confidentiality requirements. In addition, when applicable, privacy laws and other legal requirements outside of the United States would pose significant challenges. Requiring the investment adviser to "look through" to the ultimate investors as part of its AML program thus is not feasible.

We request that FinCEN clarify that AML programs should focus on the risks, if any, posed by covered investment advisers' clients – namely, the sponsors of the pooled investment vehicles – rather than the ultimate investors in those vehicles. At a minimum, given the inherent practical challenges, FinCEN should provide guidance on the expectations for AML programs with respect to unregistered pooled investment vehicles.

IV. Advisers Engaged Solely in Exempted Advisory Activities Should Be Excluded from the Scope of the Proposed Rules

We note that RIAs may have multiple lines of business, or they may be formed to engage in a single line of business (*e.g.*, financial planning, pension consulting, or managing an ESC). We request in Section III that certain advisory services be excluded from the scope of the proposed AML program requirement. To the extent that FinCEN excludes certain advisory activities from the AML program requirement, we request that investment advisers engaged only in excluded advisory activities be exempted from the full scope of the RIA Proposal, including the proposed SAR filing requirement and the various Financial Institution Reporting and Recordkeeping Requirements.

V. FinCEN Should Clarify that Risk Assessments May Take Different Forms Depending on a Firm's Unique Facts and Circumstances, and Need Not Be Conducted on a Customer-by-Customer Basis

In the NPRM, FinCEN states that, in developing its AML program, an investment adviser "would need to analyze the money laundering and terrorist financing risks posed *by a particular client.*"[36] Among the factors FinCEN suggests would be significant in this evaluation are, for a client who is an individual, the source of the client's funds and the jurisdiction in which the client is located and, for a client that is not an individual, the client's entity type and jurisdiction and the legal regime of that jurisdiction.[37]

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[36] RIA Proposal, 80 Fed. Reg. at 52,687 (emphasis added).

[37] *Id.*

We note that financial institutions subject to AML requirements are not currently required, pursuant to any statutory or regulatory provision, to assess risks, assign risk ratings or obtain source of funds information on a customer-by-customer basis, and we believe it would be inappropriate to expect that investment advisers do so. Such an expectation would be impractical for broker-dealers that are dually registered as investment advisers or institutions that would apply enterprise-wide programs to their covered investment advisers if these firms do not assess risks on an individual customer basis (absent red flags or other factors). In addition, for some advisory businesses, individual customer risk ratings may not be necessary in order to adequately assess risks. For example, depending on the services a firm provides, it may be sufficient to categorize its customers on the basis of type or status, such as foreign financial institution, senior foreign political figure/politically exposed person, personal investment company, offshore trust, high net worth individual, etc.

In proposing customer due diligence requirements for certain financial institutions last year (the "CDD Proposal"),[38] FinCEN noted its understanding that "it is industry practice to gain an understanding of a customer in order to assess the risk associated with that customer[.]"[39] FinCEN stated in this regard that the CDD Proposal was intended to be consistent with existing rules and related guidance, and recognized that, in some circumstances, a firm could develop an understanding of its customer relationships through "inherent or self-evident information about the product or customer type, or basic information about the customer," "such as the type of customer, the type of account opened, or the service or product offered[.]"[40]

For purposes of the RIA Proposal, we urge FinCEN to confirm that final rules for investment advisers would not be intended to modify existing requirements related to assessments of customer risk, and to make clear that assessments of risk may take different forms depending on the facts and circumstances unique to each financial institution and its relevant businesses and clients.

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[38] Customer Due Diligence Requirements for Financial Institutions, 79 Fed. Reg. 45,151 (proposed Aug. 4, 2014).

[39] *Id*. at 45,163.

[40] *Id*. In comments on the CDD Proposal, SIFMA noted that firms in the securities sector have a long-standing practice of assessing customer risk, but may do so based on categories of customers rather than individual customers. *See* SIFMA Comment Letter on CDD Proposal (Oct. 3, 2014), *available at* http://www.regulations.gov/#!documentDetail;D=FINCEN-2014-0001-0134 (last visited Nov. 2, 2015).

VI. FinCEN Should Provide Greater Flexibility Regarding AML Program Approvals and the Designation of Persons Responsible for AML Programs

A. The Proposed Rules Should Allow an Investment Adviser's AML Program to Be Approved by Senior Management

The RIA Proposal would require the board of directors or trustees of a covered investment adviser to approve the adviser's AML program in writing. An investment adviser without a board would need to obtain the written approval of its sole proprietor, general partner, trustee or other persons performing functions similar to those of a board of directors.[41] According to the NPRM, "[t]his provision of the proposed rule would assure that the requirement to have an AML program receives the appropriate level of attention and is sufficiently flexible to permit an investment adviser to comply with this requirement based on its particular organizational structure."[42]

As an additional alternative to the current proposal, we respectfully request that FinCEN allow an investment adviser to obtain the written approval of a member of senior management – either of the investment adviser itself, or of the relevant affiliated entity if AML programs are managed on an enterprise-wide basis.

Modifying the proposed rule to allow approval by a senior manager, rather than the board of directors, would conform to the requirements applicable to the AML programs of other financial institutions.[43] In addition, this modification would provide flexibility to accommodate different organizational structures. For example, some investment advisers do not have boards of directors or persons performing similar functions. Some investment advisers have boards of directors that perform a business advisory function, and whose members thus may not have the requisite depth of knowledge regarding BSA/AML compliance or be best positioned to review and approve the adviser's AML program. For an investment adviser that will be part

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[41] RIA Proposal, 80 Fed. Reg. at 52,689.

[42] *Id*. *See also id*. at 52,699 (Proposed Rule § 1031.210(a)(2)).

[43] *See*, *e.g.*, 31 C.F.R. § 1023.210(b) (requiring broker-dealers to implement AML programs in compliance with the rules of a self-regulatory organization that have been approved by the appropriate federal functional regulator); Financial Industry Regulatory Authority, Inc. ("FINRA") Rule 3310 (requiring the AML program of each FINRA member firm to be approved in writing by a member of senior management). For an entity that is dually registered as a broker-dealer and an investment adviser, requiring the investment adviser's AML program to be approved by a board of directors would add a requirement that does not currently apply to the same entity in its broker-dealer capacity. *See also* 31 C.F.R. § 1025.210(a) (requiring the AML programs for insurance companies to be approved by senior management).

of a comprehensive enterprise-wide AML compliance program, the person(s) responsible for implementing and maintaining the firm-wide program would likely be best positioned to review and approve those aspects of the program that pertain to the investment adviser.[44] We thus believe that allowing AML program approval by an appropriate member of senior management – of the adviser, or of an affiliated entity in the case of an enterprise-wide AML program – would better align with FinCEN's objectives in requiring written approval.

We note that Rule 206(4)-7 under the Advisers Act, which is the SEC's rule regarding compliance procedures and practices for investment advisers, does not specify who must approve a firm's overall compliance program.[45] Our requested modification would thus be consistent with existing requirements (under the Advisers Act and under FinCEN's regulations for other financial institutions) while accommodating the different organizational structures, and different functions of boards of directors when they do exist, across the investment advisory sector.

B. FinCEN Should Clarify that the Designated Person(s) Responsible for an AML Program Need Not Be Corporate Officers and May Be Employed by an Affiliate of the Investment Adviser

The RIA Proposal would require an investment adviser to designate a person responsible for implementing and monitoring the operations and internal controls of the adviser's AML program, and provides that the adviser may designate a single person or a committee.[46] The NPRM specifies that the designated person(s) "should be knowledgeable and competent regarding FinCEN's regulatory requirements and the adviser's money laundering risks, and should have full responsibility and authority to develop and enforce appropriate policies and procedures to address those risks."[47] The NPRM states that the designated person should be an "officer" of the adviser.[48]

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[44] In discussing dually registered investment advisers and advisers affiliated with entities already subject to AML requirements, FinCEN recognizes the importance of enterprise-wide compliance and states that it would be beneficial and cost-effective for these types of entities to implement a comprehensive, enterprise-wide AML program that includes all activities covered by FinCEN's regulations. RIA Proposal, 80 Fed. Reg. at 52,689.

[45] 17 C.F.R. § 275.206(4)-7.

[46] RIA Proposal, 80 Fed. Reg. at 52,689.

[47] *Id*.

[48] *Id*.

We appreciate the flexibility to designate a single person or a committee, but request clarification regarding the statement in the NPRM that the designated person should be an "officer" of the adviser. Provided that this person has the requisite knowledge, competence, responsibility and authority as described in the NPRM, we believe this person need not be a corporate officer. This interpretation would be consistent with the proposed rule text[49] and with existing requirements for other financial institutions subject to AML program requirements.[50]

In addition, we request clarification that the responsible person(s) need not be employed by the investment adviser itself and may instead be employed by an affiliated entity with responsibility for the adviser's AML program. As noted above with respect to AML program approval, the depth of knowledge regarding BSA/AML compliance may reside outside of the investment adviser in the case of an enterprise-wide AML program, and allowing the requested flexibility would better facilitate FinCEN's objectives.

VII. It Is Critical that FinCEN Permit SAR Sharing No Later than the Date Final Rules Are Adopted

The RIA Proposal specifies that a SAR and any information that would reveal the existence of a SAR are confidential, and provides three rules of construction that clarify the scope of the prohibition against the disclosure of a SAR.[51] The third of these rules of construction "recognizes that investment advisers may find it necessary to share within their corporate organizational structures," but the

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[49] *See id*. at 52,699 (Proposed Rule § 1031.210(b)(3)) (requiring designation of "a person or persons responsible for implementing and monitoring the operations and internal controls of the [AML] program").

[50] *See*, *e.g.*, FINRA Rule 3310(d) (requiring the individual(s) designated by a broker-dealer to be associated person(s), but not corporate officers); National Futures Association ("NFA") Compliance Rule 2-9 (requiring futures commission merchants and introducing brokers in commodities to designate responsible individual(s), without specifying the position(s) that must be held by such individual(s)); NFA Interpretive Notice 9045, NFA Compliance Rule 2-9: FCM and IB Anti-Money Laundering Program (Board of Directors, Apr. 23, 2002; revised Nov. 16, 2006; Jan. 15, 2008; Mar. 28, 2008; Jan. 3, 2012; and Aug. 27, 2013) *available at* http://www.nfa.futures.org/nfamanual/NFAManual.aspx?RuleID=9045&Section=9 (last visited Nov. 2, 2015) (indicating that the designated individual may be the compliance officer responsible for other compliance areas; although this individual need not be a designated principal or associate member, the person should ultimately report to the firm's senior management and must be provided with sufficient authority and resources to effectively implement the AML program).

[51] RIA Proposal, 80 Fed. Reg. at 52,692. *See also id*. at 52,700-01 (Proposed Rule § 1031.320(d)).

proposed rule would not authorize sharing in the absence of further guidance or rulemaking.[52]

We strongly urge FinCEN to authorize investment advisers to share within their corporate organizational structures. As indicated in the NPRM, FinCEN has issued two pieces of interpretive guidance to clarify that banks, broker-dealers, mutual funds, futures commission merchants ("FCMs"), and introducing brokers in commodities can share SARs, subject to specified limitations.[53] As FinCEN noted in connection with its proposal to adopt this guidance and revise SAR rule provisions in 2009, allowing SAR sharing among a financial institution's affiliates benefits the industry in three key ways. It helps financial institutions better facilitate compliance and more effectively implement enterprise-wide risk management programs; helps financial institutions better assess risks; and eliminates inefficiencies in information sharing within corporate organizational structures.[54]

When investment advisers are affiliated with other entities subject to BSA/AML requirements, they usually belong to corporate organizational structures that include the banks, broker-dealers, mutual funds, FCMs and/or introducing brokers in commodities that are currently permitted to share SARs under FinCEN's SAR sharing guidance. As a result, the failure to extend the SAR sharing guidance to investment advisers would impede comprehensive risk assessment efforts and generally frustrate the enterprise-wide compliance programs and objectives of corporate organizations that include investment advisers covered by the final rules.[55]

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[52] *Id*. at 52,692.

[53] *Id*. at 52,690 and n.77 (citing FinCEN, FIN–2010–G005, Sharing Suspicious Activity Reports by Securities Broker-Dealers, Mutual Funds, Futures Commission Merchants, and Introducing Brokers in Commodities with Certain U.S. Affiliates (Nov. 23, 2010), and FinCEN, FIN–2010–G006, Sharing Suspicious Activity Reports by Depository Institutions with Certain U.S. Affiliates (Nov. 23, 2010)).

[54] FinCEN Press Release, FinCEN to Expand Financial Institutions' Ability to Share Information Internally on Suspicious Activity: Proposed rules and guidance would promote greater enterprise-wide risk management (Mar. 3, 2009), *available at* https://www.fincen.gov/news_room/nr/pdf/20090303.pdf (last visited Nov. 2, 2015).

[55] Citing the need for investment advisers to implement enterprise-wide risk management and compliance functions, FinCEN provided guidance in 2006 that allowed a mutual fund to share SARs with its investment adviser, and further allowed the adviser to share mutual fund SARs with each entity in the adviser's "chain of control." *See* FinCEN, FIN–2006–G013, Frequently Asked Questions; Suspicious Activity Reporting Requirements for Mutual Funds (Oct. 4, 2006), *available at* https://www.fincen.gov/statutes_regs/guidance/pdf/guidance_faqs_sar_10042006.pdf (last visited Nov. 2, 2015). We note the incongruous result that an investment adviser may share the SARs of its mutual fund clients – but may not be permitted to share its own SARs – within the adviser's corporate organization. Further, the same guidance expressly references the sharing of

In addition, corporate organizations that may not implement enterprise-wide AML programs but do centralize SAR filing processes would be unable to use those centralized processes for their covered investment advisers, and would need to implement separate SAR filing processes just for their investment adviser entities. Notably, the failure to extend the SAR sharing guidance to investment advisers would create a Catch-22 for any entity dually registered as an investment adviser and a broker-dealer, by subjecting a single legal entity to conflicting approaches.

When FinCEN issued the 2010 SAR sharing guidance referenced in the NPRM,[56] it determined to apply the guidance only to banks, broker-dealers, mutual funds, FCMs and introducing brokers in commodities. FinCEN declined to expand the SAR sharing guidance to all industries subject to a SAR requirement due to concerns about "the disparity in regulatory oversight between those industries with a primary Federal functional regulator," namely, the industries for which guidance was issued, "and those without."[57] However, that rationale does not apply with respect to the SEC-registered investment advisers proposed to be covered by the new rules, and we urge FinCEN to authorize investment advisers to share SARs within their corporate organizational structures. Furthermore, because this important issue would affect how firms design their compliance programs once the investment adviser rules are finalized, we urge FinCEN to authorize sharing either in the final rules or in guidance issued at the time of adoption of the final rules.

SARs with other financial institutions for purposes of joint filing. *See id*. (FinCEN's mutual fund SAR rule "permits the joint filing of a [SAR] and, ***by extension, authorizes the sharing of such a report*** and the information contained therein between financial institutions" (emphasis added)).

[56] *See* RIA Proposal, *supra* n.53.

[57] Notice of Availability of Final Interpretative Guidance—Sharing Suspicious Activity Reports by Depository Institutions and Securities Broker-Dealers, Mutual Funds, Futures Commission Merchants, or Introducing Brokers in Commodities With Certain U.S. Affiliates, 75 Fed. Reg. 75,607, 75,608 (Dec. 3, 2010) (footnote omitted).

VIII. FinCEN Should Revisit Its Proposed Compliance Dates and Time and Cost Estimates to Better Reflect the Significant Undertaking that Will Be Required to Comply with the Proposed Rules

A. Implementation Will Be Time-Consuming and Complex

FinCEN notes in the NPRM that registered investment advisers are currently subject to various requirements under the federal securities laws, and that these firms should be able to "adapt existing policies, procedures, and internal controls in order to comply with the rules FinCEN is proposing[.]"[58] Among other things, FinCEN notes that the Advisers Act prohibits an investment adviser from engaging in fraudulent, deceptive, and manipulative conduct, and that "SEC rules require investment advisers to adopt and implement written policies and procedures reasonably designed to prevent violation of the Advisers Act[.]"[59] Further, "[a]dvisers must conduct annual reviews to ensure the adequacy and effectiveness of their policies and procedures and must designate a chief compliance officer responsible for administering the policies and procedures."[60] In addition, FinCEN notes that investment advisers are required to maintain certain books and records and to complete and submit Form ADV to the SEC.

The Advisers Act and the BSA serve fundamentally different purposes and have little, if any, substantive overlap. As a result, the expectation that investment advisers can comply with the proposed requirements by adapting existing policies, procedures and controls is without a reasonable basis. Among other things, the policies and procedures that advisers currently are required to implement are designed to prevent violations of the Advisers Act by the adviser itself, not to prevent the adviser from being used for money laundering or terrorist financing activities, to monitor for compliance with BSA requirements, or to monitor client activity for potentially suspicious transactions. Similarly, the annual reviews that advisers must conduct relate to the adequacy and effectiveness of their policies and procedures for compliance with the Advisers Act, and do not equip advisers to implement independent testing under the AML program requirement. Nor would the chief compliance officer of an adviser typically "be knowledgeable and competent regarding FinCEN's regulatory requirements and the adviser's money laundering risk,"[61] or would the requirements to maintain certain books and records and to file Form ADV be helpful with respect to compliance with the proposed rules.

[58] RIA Proposal, 80 Fed. Reg. at 52,686.

[59] *Id.*

[60] *Id.*

[61] *Id.* at 52,689.

In fact, the various requirements proposed in the NPRM will impose significant costs on investment advisers, will be time-consuming to implement, and will require new and updated systems that can require significant lead times. Implementation of the proposed requirements is likely to be complex for all types of covered investment advisers, from firms that do not currently have AML programs in place, to firms that may have voluntary AML programs in place but will need to comply with the SAR filing and other additional requirements, to larger institutions that may need to develop policies, procedures and systems for multiple investment advisers and business lines and to modify existing enterprise-wide systems. For firms that are not affiliated with entities that already have sophisticated monitoring and reporting systems in place, the effort to develop and implement the necessary processes and systems will be particularly resource-intensive. Firms will need to develop an understanding of the ways in which investment advisers may be used for money laundering and terrorist financing activity, and will need to assess the risks posed by their clients and business models. In addition, they will need to develop, implement and test the policies, procedures and systems needed to ensure compliance with the new rules. Because systems changes can require long lead times, firms that have already set their budgets for the year following finalization of the rules could face particular challenges as a practical matter.

Firms may also need to negotiate and amend their allocation or other agreements, and larger institutions, in addition to addressing the compliance of their own investment advisers, will need to ensure they have the policies, procedures and systems in place to effectively undertake any duties that their investment adviser clients may seek to delegate. Investment advisers seeking to delegate duties under the new requirements will need to conduct due diligence on third parties, negotiate and execute the necessary agreements, and conduct testing. In addition, firms will need to develop the necessary training for employees, and ensure employees are adequately trained on BSA requirements. For investment advisers with a small number of employees, the allocation of resources across the various work streams required to implement the new requirements will be a significant challenge. Across the industry, the broadly recognized shortage of qualified AML personnel will be particularly challenging.[62]

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[62] *See*, *e.g.*, Dow Jones Risk & Compliance, *2015 Global Anti-Money Laundering Survey Results, Consumer Insights* (Mar. 2015), *available at* http://images.dowjones.com/company/wp-content/uploads/sites/15/2015/03/Dow-Jones-ACAMS-AML-Survey-2015.pdf (last visited Nov. 2, 2015) (the shortage of trained AML staff, identified by 49% of surveyed industry professionals, was the second most commonly identified challenge in 2015); Ian McKendry, *In AML Fight, Banks Encounter a Troop Shortage,* AMERICAN BANKER (Dec. 8, 2014), *available at* http://www.americanbanker.com/news/law-regulation/in-aml-fight-banks-encounter-a-troop-shortage-1071556-1.html (last visited Nov. 2, 2015); Brett Wolf, *American Express recruits college*

B. The Proposed Compliance Dates Should Be Modified to Provide Adequate Implementation Time

The NPRM proposes that the AML program requirement take effect on or before six months from the effective date of the final rules,[63] and that the SAR filing requirement apply to transactions initiated after the implementation of an AML program.[64] The NPRM does not specify when the Financial Institution Reporting and Recordkeeping Requirements or requirement to comply with information sharing requests pursuant to section 314(a) of the USA PATRIOT Act[65] would take effect.

In light of the significant undertaking that will be required of investment advisers to comply with the proposed rules, as noted above, we request that the effective date for the new requirements be at least 18 months from the date the rules are finalized. In addition, we request that the final rules clarify that the requirement to file SARs applies to transactions initiated after the specified compliance date for the AML program, so there is no confusion regarding whether SARs must be filed as an adviser begins to implement and test its AML program.

We note that prior FinCEN rulemakings have not imposed ***all at once*** the AML program requirements, suspicious activity monitoring and reporting requirements, and Financial Institution Reporting and Recordkeeping Requirements to which other financial institutions are subject.[66] It is not realistic to expect investment advisers to achieve effective compliance with all of these requirements in the proposed timeframe.

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students to bolster anti-money laundering ranks, REUTERS (Nov. 17, 2014), *available at* http://blogs.reuters.com/financial-regulatory-forum/2014/11/17/american-express-recruits-college-students-to-bolster-anti-money-laundering-ranks/ (last visited Nov. 2, 2015) (stating qualified AML professionals are in short supply and poaching of talent is the norm).

[63] *See* RIA Proposal, 80 Fed. Reg. at 52,690.

[64] *Id*. at 52,692.

[65] *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 314(a), 115 Stat. 272, 307-8 (codified at 31 C.F.R. § 1010.520).

[66] For example, for mutual funds, the AML program requirement became effective in 2002, the SAR filing requirement in 2006, and the Recordkeeping and Travel Rule requirements in 2010. *See* Amendment to the Bank Secrecy Act Regulations—Requirement that Mutual Funds Report Suspicious Transactions, 71 Fed. Reg. 26,213 (May 4, 2006) (six months); Anti-Money Laundering Programs for Mutual Funds, 67 Fed. Reg. 21,117 (Apr. 29, 2002) (90 days); Defining Mutual Funds as Financial Institutions, 75 Fed. Reg. 19,241 (Apr. 14, 2010) (270 days for compliance with Recordkeeping and Travel Rule).

C. The RIA Proposal Is a Significant Regulatory Action, and FinCEN Should Prepare a Written Cost/Benefit Statement and Consider Regulatory Alternatives

Before an agency promulgates a final rule that may result in the expenditure by the private sector of $100 million or more in any one year, Section 202 of the Unfunded Mandates Reform Act of 1995 (the "UMRA") requires the agency to prepare a written statement containing, among other things, an assessment of the anticipated costs and benefits of the rule.[67] Under Section 205 of the UMRA, the agency must identify and consider "a reasonable number of regulatory alternatives" and "select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the [proposed] rule[.]"[68]

FinCEN estimates that, on average, an investment adviser will spend three hours to establish its AML program, three hours annually to comply with FinCEN's SAR recordkeeping and reporting rules, and one hour per CTR on CTR-related recordkeeping and reporting obligations.[69] Taking into account these time estimates and "conservative estimates of average labor costs," FinCEN has determined that it is not required to prepare a written statement under Section 202 of the UMRA.

We disagree with FinCEN's estimates and its conclusion regarding the written statement required by Section 202 of the UMRA. With respect to labor costs, FinCEN did not provide in the NPRM any information regarding its estimates, which prevents us and other stakeholders from having a meaningful opportunity to review and comment on this aspect of the NPRM.[70] With respect to time estimates, we believe FinCEN significantly underestimates the time that will be needed to establish and maintain the policies, procedures and systems necessary to comply with the proposed rules. As described above in Section VIII.A., implementation will be very time-consuming and complex, likely involving legal, compliance, audit, information technology, and other staff across an organization. On an ongoing basis, additional time will be necessary to ensure processes and systems are performing as expected, to review legal and regulatory developments and make any necessary changes to programs, to ensure ongoing training, and to conduct the necessary testing.

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[67] Unfunded Mandates Reform Act of 1995, Pub. L. 104-4, 109 Stat. 48 (Mar. 22, 1995).

[68] *Id*.

[69] *See* RIA Proposal, 80 Fed. Reg. at 52,696-98.

[70] *See generally* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) (ordering agencies to provide the public with meaningful participation in the regulatory process).

As a general matter, FinCEN's conclusion that the final rules would result in expenditure by the private sector of less than $100 million suggests that implementation and compliance would cost approximately $8,900 per investment adviser. Because we believe this amount would significantly underestimate the expenditures that will be required, we believe FinCEN should reconsider its time and cost estimates and prepare the written statement required by Section 202 of the UMRA. In addition, we urge FinCEN to consider the suggested modifications and comments offered in this letter in analyzing regulatory alternatives as required by Section 205 of the UMRA.

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We appreciate the opportunity to comment on the RIA Proposal and are available to answer any questions you may have regarding our comments or any related matters.

Sincerely,

Aseel M. Rabie
Managing Director and Associate General Counsel