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DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

31 CFR Parts 1010 and 1032

RIN: 1506-AB58

Financial Crimes Enforcement Network: Anti-Money Laundering/Countering the Financing of Terrorism Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers and Exempt Reporting Advisers

AGENCY: Financial Crimes Enforcement Network (FinCEN), Treasury.

ACTION: Final rule.

SUMMARY: FinCEN, a bureau of the U.S. Department of the Treasury (Treasury), is issuing a final rule to include certain investment advisers in the definition of “financial institution” under the Bank Secrecy Act (BSA), prescribe minimum standards for anti-money laundering/countering the financing of terrorism (AML/CFT) programs to be established by certain investment advisers, require certain investment advisers to report suspicious activity to FinCEN pursuant to the BSA, and make several other related changes to FinCEN regulations. These regulations will apply to certain investment advisers who may be at risk for misuse by money launderers, terrorist financers, or other actors who seek access to the U.S. financial system for illicit purposes and who threaten U.S. national security.

DATES: This rule is effective January 1, 2026.

FOR FURTHER INFORMATION CONTACT: The FinCEN Regulatory Support Section at 1–800–767–2825 or e-mail frc@fincen.gov.

SUPPLEMENTARY INFORMATION

I. Introduction

In this final rule, FinCEN is adding certain investment advisers to the definition of "financial institution" to regulations issued pursuant to the BSA, prescribing minimum standards for AML/CFT programs to be established by certain investment advisers, requiring certain investment advisers to report suspicious activity to FinCEN pursuant to the BSA, and making several other related changes to FinCEN's regulations that implement the BSA. This final rule follows FinCEN's notice of proposed rulemaking on AML/CFT program and suspicious activity report (SAR) requirements for investment advisers released on February 15, 2024 (referred to as the IA AML NPRM or proposed rule).[1]

This rule aims to address and prevent money laundering, terrorist financing, and other illicit finance activity through the investment adviser industry. As detailed in an investment adviser illicit finance risk assessment (Risk Assessment) published concurrently with the release of the IA AML NPRM, Treasury has identified several illicit finance threats involving investment advisers.[2] Investment advisers have served as an entry point into the U.S. financial system and economy for illicit proceeds associated with foreign corruption, fraud, and tax evasion, as well as billions of dollars ultimately controlled by sanctioned entities including Russian oligarchs and their associates. Investment advisers—including those exempt from Securities and Exchange Commission (SEC) registration—and their private funds, particularly venture capital funds, are also being used by foreign states, most notably the People's Republic of China (PRC) and Russia, to access certain technology and services with long-term national security implications through investments in early-stage companies. Finally, there are

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[1] FinCEN, *Anti-Money Laundering/Countering the Financing of Terrorism Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers and Exempt Reporting Advisers*, Notice of Proposed Rulemaking, 89 FR 12108 (Feb. 15, 2024).

[2] *See* Treasury, *US Sectoral Illicit Finance Risk Assessment Investment Advisers* (also titled *2024 Investment Adviser Risk Assessment*) (2024), available at https://home.treasury.gov/about/offices/terrorism-and-financial-intelligence/terrorist-financing-and-financial-crimes/office-of-strategic-policy-osp.

numerous examples of investment advisers defrauding their customers and stealing their funds.

To address these risks, this rule adds "investment adviser" to the definition of "financial institution" at 31 CFR 1010.100(t) and defines investment advisers to be SEC-registered investment advisers (RIAs) and exempt reporting advisers (ERAs). However, FinCEN is narrowing the definition of "investment adviser" from the proposed rule to exclude RIAs that register with the SEC solely because they are (i) mid-sized advisers, (ii) multi-state advisers, or (iii) pension consultants, as well as (iv) RIAs that do not report any assets under management (AUM) on Form ADV. For investment advisers subject to this rule that have their principal office and place of business outside the United States, FinCEN is clarifying that the rule applies only to their activities that (i) take place within the United States, including through the involvement of U.S. personnel of the investment adviser, such as the involvement of an agency, branch, or office within the United States or (ii) provide services to a U.S. person or a foreign-located private fund with an investor that is a U.S. person. Given that the risk of money laundering, terrorist financing, and other illicit finance activity is generally lower for State-registered advisers, FinCEN, as proposed in the IA AML NPRM, is not applying this rule to State-registered advisers at this time. However, FinCEN will continue to monitor activity involving State-registered investment advisers for indicia of money laundering, terrorist financing, or other illicit finance activity, and may take appropriate steps to mitigate any such activity. As in the proposed rule, this final rule also does not cover foreign private advisers or family offices.

With respect to the minimum standards for an investment adviser's AML/CFT program, FinCEN is adopting the minimum requirements largely as proposed in the IA AML NPRM, with several changes. In line with the proposed rule, the final rule maintains the exclusion of mutual funds from the requirements of an investment adviser's AML/CFT program requirements. It includes modified text, however, to permit an investment adviser to categorically exclude any mutual fund from an investment adviser's AML/CFT program

requirements without obligating the adviser to verify that such mutual fund has implemented an AML/CFT program. Additionally, FinCEN is expanding the exclusion from the AML/CFT program to also apply to (i) bank- and trust company-sponsored collective investment funds that comply with the requirements of 12 CFR 9.18 or a similar applicable law that incorporates the requirements of 12 CFR 9.18, and (ii) any other investment adviser subject to this rule that is advised by the investment adviser. With respect to the requirement to establish, maintain, and enforce a financial institution's AML/CFT program that is the responsibility of, and must be performed by, persons in the United States who are accessible to, and subject to oversight and supervision by, the Secretary of the Treasury and the appropriate Federal functional regulator (the Duty Provision), as discussed further below, FinCEN has determined to not include this requirement in this final rule.

With respect to this rule's other requirements, FinCEN is adopting the SAR filing provisions largely as proposed. The final rule does not exempt investment advisers from the requirements to file Currency Transaction Reports (CTRs), adhere to the Recordkeeping and Travel Rules, or other general recordkeeping requirements.[3] Following the proposed application of the information sharing provisions of sections 314(a) and 314(b) under the USA PATRIOT Act,[4] the final rule is applying both requirements as proposed, but is clarifying that investment advisers may deem these requirements satisfied for any mutual funds, bank- and trust company-sponsored collective investment fund, or any other investment adviser they advise subject to this rule that is already subject to AML/CFT program requirements. With respect to the proposal to implement special due diligence requirements for correspondent and private banking accounts and special measures under section 311 of the USA PATRIOT Act,[5]

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[3] *See* 31 CFR 1010.310 through 1010.315 (CTR), 31 CFR 1010.410(e) and (f) (Recordkeeping and Travel Rules), and 31 CFR 1010.415 through 110.440.

[4] *See* 31 CFR 1010.520, 1010.540.

[5] As discussed further below, in addition to special measures under section 311 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), investment advisers must also comply with actions taken under section 9714(a) of the Combating Russian Money Laundering Act, codified as a note to 31 U.S.C. 5318A, and section 7213A of the Fentanyl Sanctions Act, codified at 21 U.S.C. 2313a. *See infra* Section III.G.2.

investment advisers may deem these requirements satisfied for any mutual fund, bank- and trust company-sponsored collective investment fund, or any other investment adviser they advise subject to this rule that is already subject to AML/CFT program requirements. FinCEN is also extending the proposed date for compliance to January 1, 2026, meaning that no later than this date, investment advisers must have implemented AML/CFT programs, commenced filing SARs when required, and begun complying with the other reporting and recordkeeping requirements in this final rule.

II. BACKGROUND

A. Statutory Authority

Enacted in 1970, the Currency and Foreign Transactions Reporting Act—which, along with its amendments and the other statutes relating to the subject matter, is generally referred to as the BSA—is designed to combat money laundering, the financing of terrorism and other illicit finance activity, and to safeguard the national security of the United States.[6] This includes "through the establishment by financial institutions of reasonably designed risk-based programs to combat money laundering and the financing of terrorism," as well as "to facilitate the tracking of money that has been sourced through criminal activity or is intended to promote criminal or terrorist activity."[7] The Secretary of the Treasury (Secretary) is authorized to administer the BSA and to require financial institutions to keep records and file reports that "are highly useful in … criminal, tax, or regulatory investigations, risk assessments, or proceedings" or "intelligence or counterintelligence activities, including analysis, to protect against terrorism."[8] The Secretary may also "establish appropriate

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[6] *See* 31 U.S.C. 5311. Certain parts of the Currency and Foreign Transactions Reporting Act, its amendments, and the other statutes relating to the subject matter of that Act, have come to be referred to as the BSA. The BSA is codified at 12 U.S.C. 1829b, 12 U.S.C. 1951-1960, and 31 U.S.C. 310, 5311-5314, 5316-5336, and including notes thereto, with implementing regulations at 31 CFR Chapter X.

[7] 31 U.S.C. 5311(2), (3).

[8] 31 U.S.C. 5311(1).

frameworks for information sharing among financial institutions and service providers, their regulatory authorities, associations of financial institutions, the [Treasury], and law enforcement authorities to identify, stop, and apprehend money launderers and those who finance terrorists."[9] The Secretary delegated the authority to implement, administer, and enforce the BSA and its implementing regulations to the Director of FinCEN.[10]

Pursuant to this authority, FinCEN may define a business or agency as a "financial institution" if such business or agency engages in any activity determined by regulation "to be an activity which is similar to, related to, or a substitute for any activity" in which a "financial institution" as defined by the BSA is authorized to engage.[11] Additionally, the BSA requires financial institutions to establish programs to combat money laundering and the financing of terrorism that include certain minimum standards. The BSA explicitly authorizes the Secretary—and thereby FinCEN—to "prescribe minimum standards" for such AML/CFT programs.[12] Similarly, under the BSA, Treasury—and thereby FinCEN—"may require any financial institution . . . to report any suspicious transaction relevant to a possible violation of law or regulation."[13] This provision authorizes FinCEN to require the filing of SARs.[14] FinCEN also has authority under the BSA to authorize the sharing of financial information by financial institutions[15] in specified circumstances, and to require financial institutions to keep records and maintain procedures to ensure compliance with the BSA and its implementing regulations or to guard against money laundering, terrorist financing, or other illicit finance activity.[16]

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[9] 31 U.S.C. 5311(5).
[10] Treasury Order 180–01, paragraph 3(a) (Jan. 14, 2020), available at https://home.treasury.gov/about/general-information/orders-and-directives/treasury-order-180-01; *see also* 31 U.S.C. 310(b)(2)(I) (providing that FinCEN Director "[a]dminister the requirements of subchapter II of chapter 53 of this title, chapter 2 of title I of Public Law 91–508, and section 21 of the Federal Deposit Insurance Act, to the extent delegated such authority by the Secretary."
[11] 31 U.S.C. 5312(a)(2)(Y).
[12] 31 U.S.C. 5318(h)(1), (2).
[13] 31 U.S.C. 5318(g)(1).
[14] 31 U.S.C. 5318(g)(1).
[15] *See* USA PATRIOT Act, Pub. L. 107–56, sec. 314(a), (b).
[16] *See* 12 U.S.C. 1953; 31 U.S.C. 5318(a)(2).

B. Investment Adviser Industry and Regulation

1. Investment Adviser Industry

The investment adviser industry in the United States consists of a wide range of business models geared towards providing advisory services to many different types of customers.[17] The Investment Advisers Act of 1940 (Advisers Act) and its implementing rules and regulations form the primary Federal framework governing investment advisory activity, along with other Federal securities laws and their implementing rules and regulations, such as the Investment Company Act of 1940 (15 U.S.C. 80a *et seq.*) (Company Act), the Securities Act of 1933 (15 U.S.C. 77a et seq.) (Securities Act), and the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (Exchange Act). The Advisers Act also defines an investment adviser as a person or firm that, for compensation, is engaged in the business of providing advice to others or issuing reports or analyses regarding securities.[18]

Since the Advisers Act was amended in 1996 and 2010, generally only investment advisers who have at least $100 million in AUM or advise a registered investment company[19] may register with the SEC.[20] Advisers solely to private funds are only required to register with the SEC if they have least $150 million in AUM in the United States.[21] Advisers to only venture capital funds are exempt from registration with the SEC regardless of the amount of

[17] This final rule uses the term "customers" for those natural and legal persons who enter into an advisory relationship with an investment adviser. This is consistent with the terminology in the BSA and FinCEN's implementing regulations. FinCEN acknowledges that the Advisers Act and its implementing regulations primarily use the term "clients," and so that term is used in specific reference to Advisers Act requirements; otherwise, the term "customers" is used.

[18] *See* 15 U.S.C. 80b-2(a)(11) for this definition of "investment adviser." The statute excludes some persons and firms: certain banks, certain professionals, certain broker-dealers, news publishers, persons who advise on or analyze only Treasury-designated exempt securities, statistical ratings agencies, and family offices. *See* 15 U.S.C. 80b-2(a)(11)(A)–(G).

[19] *See* 15 U.S.C. 80a-3 (defining investment company). If an investment company meets the definition of an investment company under 15 U.S.C. 80a-3(a) and cannot rely on an exception or an exemption from the definition of investment company, generally it must register with the SEC under the Company Act and must register its public offerings under the Securities Act.

[20] Investment advisers with more than $100 million AUM *may* register with the SEC, and investment advisers with more than $110 million in AUM *must* register with the SEC, unless eligible for an exception. *See* 17 CFR 275.203A-1.

[21] *See* 15 U.S.C. 80b-3(m)(1); 17 CFR 275.203(m)-1(a), (b).

AUM. Other investment advisers typically register with the State in which the adviser maintains its principal place of business.

SEC-Registered Investment Advisers. Unless eligible to rely on an exemption, investment advisers that manage more than $110 million AUM must register with the SEC, as well as submit a Form ADV and update it at least annually.[22] Besides having AUM above $110 million, additional criteria may require an investment adviser to register with the SEC.[23] Unless a different exception applies, investment advisers with AUM under $100 million are prohibited from registering with the SEC,[24] but must register instead with the relevant State securities regulator. The SEC administers and enforces the Federal securities laws applicable to such RIAs. As of July 31, 2023, there were 15,391 RIAs, reporting approximately $125 trillion in AUM for their clients.[25]

Exempt Reporting Advisers. An ERA is an investment adviser that would be required to register with the SEC but is statutorily exempt from that requirement[26] because: (1) it is an

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[22] *See* 17 CFR 275.203A-1.; 17 CFR 275.204-1; *see also* 15 U.S.C. 80b-3(*l*) (venture capital fund adviser exemption), 15 U.S.C. 80b-3(m) (private fund adviser exemption). Investment advisers register with the SEC by filing Form ADV and are required to file periodic updates. Form ADV collects certain information about the adviser, including (depending on the adviser's registration status) its AUM, ownership, number of clients, number of employees, business practices, custodians of client funds, and affiliations, as well as certain disciplinary or material events of the adviser or its employees. A detailed description of Form ADV's requirements is available at https://www.sec.gov/oiea/investor-alerts-bulletins/ib_formadv.html.

[23] Other exceptions to the prohibition on SEC registration include: (1) an adviser that would be required to register with 15 or more States (the multi-State exemption); (2) an adviser advising a registered investment company; (3) an adviser affiliated with an RIA; and (4) a pension consultant. Persons satisfying these criteria and the definition of "investment adviser" are required to register as investment advisers with the SEC. *See* Form ADV: Instructions for Part IA, Item 2. Advisers with a principal office and place of business in New York and over $25 million AUM are required to register with the SEC.

[24] 17 CFR 275.203A-1. Note that if an RIA's AUM falls below $90 million as of the end of such RIA's fiscal year then it must withdraw its registration with the SEC, unless otherwise eligible for an exception to the prohibition on SEC registration. *Id.*

[25] The number of RIAs and corresponding AUM, and the number of ERAs, are based on a Treasury review of Form ADV information filed as of July 31, 2023, as described in the IA AML NPRM. This Form ADV data is available at Frequently Requested FOIA Document: *Information About Registered Investment Advisers and Exempt Reporting Advisers*, http://www.sec.gov/foia/docs/invafoia.htm. The $125 trillion in AUM includes approximately $22 trillion in assets managed by mutual funds, which are advised by RIAs and are subject to AML/CFT obligations under the BSA and its implementing regulations. FinCEN reviewed investment adviser Form ADV filings through June 4, 2024, to assess whether to update the industry data used in the IA AML NPRM. FinCEN found approximately 10 fewer RIAs and ERAs as of June 4, 2024 compared to July 31, 2023. Out of approximately 19,900 entities subject to the final rule, this is not a substantial change.

[26] An adviser that is eligible to file reports as an ERA may nonetheless elect to register with the SEC as an RIA so long as it meets the criteria for registration. An investment adviser that relies on one of these exemptions must still evaluate the need for State registration.

adviser solely to one or more venture capital funds;[27] or (2) it is an adviser solely to one or more private funds and has less than $150 million AUM[28] in the United States.[29] Private funds are privately offered investment vehicles that pool capital from one or more investors to invest in securities and other investments.[30] Private funds do not register with the SEC, and advisers to these funds often categorize the fund by the investment strategy they pursue. These include hedge funds, private equity funds, and venture capital funds, among others. Even though they are not required to register with the SEC, ERAs must still file an abbreviated Form ADV—they are required to answer fewer client-related questions and provide less information about the services they provide—and the SEC maintains authority to examine ERAs. As of July 31, 2023, there were 5,846 ERAs with total gross assets of $5.2 trillion that were exempt from registering with the SEC but had filed an abbreviated Form ADV.[31]

State-Registered Investment Advisers. State-registered investment advisers are generally prohibited from registering with the SEC and instead register with and are supervised by the relevant State authority, unless they meet certain exceptions or their State does not supervise these entities.[32] State-registered investment advisers also file a Form ADV, which they submit

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[27] *See* 17 CFR 275.203(*l*)-1 (defining "venture capital fund").

[28] Form ADV uses the term "regulatory assets under management" (RAUM) instead of "assets under management." Form ADV describes how advisers must calculate RAUM and states that in determining the amount of RAUM, an adviser should "include the securities portfolios for which [it] provide[s] continuous and regular supervisory or management services as of the date of filing" the form. *See* Form ADV, Instructions for Part 1A, Instruction 5.b.

[29] *See* sections 203(*l*) and 203(m) of the Advisers Act and 17 CFR 275.203(m)-1, respectively. ERAs are exempt from registration with the SEC, but are required to file reports on Form ADV with the SEC and are subject to certain rules under the Advisers Act.

[30] Section 202(a)(29) of the Advisers Act defines the term "private fund" as an issuer that would be an investment company, as defined in section 3 of the Company Act (15 U.S.C. 80a-3), but for section 3(c)(1) or 3(c)(7) of that Act. Section 3(c)(1) excludes from the definition of investment company a privately-offered issuer having fewer than a certain number of beneficial owners. Section 3(c)(7) excludes from the definition of investment company a privately-offered issuer the securities of which are owned exclusively by "qualified purchasers" (generally, persons and entities owning a specific amount of investments).

[31] The number of ERAs is derived from a Treasury review of Form ADV information filed as of July 31, 2023. *See supra* note 25. ERAs do not report assets under management on Form ADV, but instead report gross assets for each private fund they advise.

[32] *See* 17 CFR 275.203A-2; *see also supra* note 23.

to the relevant State regulator. As of December 31, 2022, there were 17,063 State-registered investment advisers reporting approximately $420 billion in AUM.[33]

Foreign-Located Investment Advisers. Foreign-located advisers whose principal offices and places of business are outside the United States, but who solicit or advise "U.S. persons," are subject to the Advisers Act and must register with the SEC unless eligible for an exemption. One of those exemptions is the "foreign private adviser" exemption, and an adviser relying on this exemption is not required to make any filings with the SEC.[34] The SEC does not apply the substantive provisions of the Advisers Act to a non-U.S. investment adviser that is registered with the SEC with respect to its non-U.S. clients.[35] Non-U.S. investment advisers may also file with the SEC as ERAs if they meet the requirements to report as ERAs.

2. Investment Adviser Regulation

Oversight of the investment adviser industry by Federal and State securities regulators is focused on protecting investors and the overall securities market from fraud and manipulation. Most investment advisers are subject to certain reporting requirements and the extent of those requirements depends on whether the investment adviser is an RIA, registered at the State level, exempt from registration as an ERA, or otherwise not required to register with the SEC or State securities regulator.[36] RIAs are subject to the Advisers Act and various SEC rules and regulations thereunder that govern, among other things, their marketing and disclosures to clients, best execution for client transactions, reporting of AUM, a code of ethics

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[33] *See* North American Security Administrators Association, *NASAA Investment Adviser Section 2023 Annual Report* 3, available at https://www.nasaa.org/wp-content/uploads/2023/09/2023-IA-Section-Report-FINAL.pdf.

[34] The "foreign private adviser" exemption is available to an adviser that (i) has no place of business in the United States; (ii) has, in total, fewer than 15 clients in the United States and investors in the United States in private funds advised by the adviser; (iii) has aggregate assets under management attributable to such clients and investors of less than $25 million; and (iv) does not hold itself out generally to the public in the United States as an investment adviser. *See* 15 U.S.C. 80b-2(a)(30), 80b-3(b)(3).

[35] *See* SEC, *Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers*, Final Rule, Investment Advisers Act Release No. 3222 (Jun. 22, 2011); 76 FR 39645, 39667 (Jul. 6, 2011).

[36] For instance, an investment adviser may be exempt from both Federal and State registration requirements if it had less than $25 million AUM and fewer than six clients in a State. Such advisers are not required to register, nor are they ERAs.

requirement (including reporting of securities holdings), and ownership in public securities, ensuring compliance with SEC rules governing trading, and disclosures of conflicts of interest and disciplinary information. State-registered investment advisers may have similar requirements under State securities laws and regulations.[37] While ERAs are not required to register with the SEC, they must still file an abbreviated Form ADV with the SEC, and the SEC maintains authority to examine ERAs. ERAs are not subject to some of the Advisers Act provisions that apply to RIAs. However, ERAs have fiduciary responsibilities to their clients and must abide by certain other compliance requirements applicable to all investment advisers, including anti-fraud requirements of the Advisers Act.[38] Investment advisers, depending on their registration status, are also generally subject to examination by the SEC or State securities regulators. In some circumstances, Federal securities, tax, or other rules and regulations may impose on investment advisers' information collection or disclosure obligations similar to some AML/CFT measures.

While some of these obligations mitigate illicit finance risks to the investment adviser industry, these obligations are not explicitly designed for that purpose, and the SEC generally does not have existing authority to apply AML/CFT specific requirements to investment advisers. Some investment advisers may nonetheless already apply AML/CFT requirements, for example, if they are also banks (or are bank subsidiaries), are registered as brokers and dealers in securities (broker-dealers), or advise mutual funds, but this is not consistent across the industry.[39] Further, some investment advisers have voluntarily implemented certain

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[37] For example, in California, the California Corporation Code assigns to the Commissioner of the Department of Financial Protection and Innovation authority to issue specific rules and regulations. *See* Cal. Corp. Code, Ch.3, sec. 25230–25238; Cal. Code Regs. tit. 10, sec. 260.230–260.238.
[38] *See* 15 U.S.C. 80b-6. *See also* 17 CFR Part 275.206(4)-8 (prohibiting fraudulent practices by an investment adviser to a pooled investment vehicle with respect to any investor or prospective investor in the pooled investment vehicle).
[39] Investment advisers that are banks (or bank subsidiaries) subject to the jurisdiction of the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (FRB), the Federal Deposit Insurance Corporation (FDIC), and the National Credit Union Administration (collectively, the Federal Banking Agencies, or FBAs) are accordingly also subject to applicable FBA regulations imposing AML/CFT requirements on banks. *See, e.g.*, 12 CFR 5.34(e)(3) and 5.38(e)(3) (OCC requirements governing operating subsidiaries of national banks and Federal savings associations).

AML/CFT measures. But implementation of such measures is generally not subject to comprehensive enforcement or examination. This means that providers of the same financial services may be subject to different AML/CFT obligations (if any), and an investor or customer seeking to obscure the origin of its funds or identity can choose an investment adviser that does not apply AML/CFT measures to its customers and activities.[40]

Overall, there is currently no comprehensive set of obligations directly applicable to most investment advisers that is explicitly designed to address illicit finance risks in this industry.

C. Illicit Finance Risk

As noted above, concurrent with the publication of the IA AML NPRM, Treasury released the Risk Assessment.[41] The Risk Assessment found that, while the degree of risk is not uniform across the sector, RIAs and ERAs pose a material risk of misuse for illicit finance.[42]

First, as already noted, the lack of comprehensive AML/CFT regulations directly and categorically applicable to investment advisers means they are not required to understand their customers' ultimate sources of wealth or identify and report potentially illicit activity to law enforcement. The term "investment adviser" is not presently included in the definition of "financial institution" under the BSA or its implementing regulations. This means that, although they have obligations to report cash transactions above $10,000 via the FinCEN/Internal Revenue Service Form 8300, investment advisers are typically not subject to most of the AML/CFT program, recordkeeping, or reporting obligations that apply to banks, broker-dealers, and certain other financial institutions. Investment advisers that are not dually registered as a bank or a broker-dealer are not required to maintain an AML/CFT program nor satisfy customer due diligence (CDD) or customer identification program (CIP) obligations.[43]

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[40] For instance, FinCEN research identified two investment advisers with a focus on Russian customers that advertised investment structures that would allow customers to avoid "know your customer" procedures.
[41] *See* Risk Assessment, *supra* note 2.
[42] *Id.* at 32.
[43] *See infra* Section II.E (providing a summary of the proposed rule to apply CIP requirements to RIAs and ERAs).

Investment advisers, because they are not defined as a "financial institution" under the BSA, are also prevented from participating in the USA PATRIOT Act 314(a) and 314(b) information sharing programs, meaning investment advisers cannot provide useful information on suspected illicit finance activity to law enforcement or to other financial institutions participating in 314(b) information sharing associations. As they are not presently included in the BSA definition of "financial institution," investment advisers are also not afforded the protection from liability (safe harbor) that applies to financial institutions when filing SARs.[44] Even though investment advisers are currently able to file voluntary SARs, without the safe harbor they could face increased legal risk from customers or other counterparties. The current patchwork of AML/CFT program implementation by some RIAs and ERAs may also create arbitrage opportunities for illicit actors by allowing them to find RIAs and ERAs with weaker or non-existent customer diligence procedures when these actors seek to access the U.S. financial system.

Second, where AML/CFT obligations apply to investment adviser activities, the obliged entities (such as custodian banks, broker-dealers, and some fund administrators providing services to investment advisers and the private funds that they advise) do not necessarily have a direct relationship with the customer or, in the private fund context, the underlying investor in the private fund.[45] Further, these entities may be unable to collect relevant investor information

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[44] 31 U.S.C. 5318(g)(3)(A).

[45] FinCEN notes that, in the private fund context, the adviser's customer is typically the private fund itself, and not underlying investors in that private fund. However, in many cases an adviser has a relationship (in some cases contractual) with underlying investors and has access to information about underlying investors. Indeed, the SEC requires RIAs and ERAs to report information regarding underlying investors. For instance, Question 13 on SEC Form ADV asks an investment adviser for the approximate number of the private fund's beneficial owners. *See* SEC Form ADV, Part 1A at 51 (Aug. 2022). In addition, Question 16(m) on SEC Form PF requires SEC-registered private fund advisers to identify, with respect to each private fund it advises, the approximate percentage of the private fund's equity that is beneficially owned by different types of investors, including "Investors that are *United States persons,*" "Investors that are not *United States persons,*" and, acknowledging that an adviser may not have complete beneficial ownership information in certain circumstances, "Investors that are not *United States persons* and about which the foregoing beneficial ownership information is not known and cannot reasonably be obtained because the beneficial interest is held through a chain involving one or more third-party intermediaries." SEC Form PF, Section 1b, at 7 (Dec. 2023) (emphasis original). In addition, Congress, in the Corporate Transparency Act (enacted into law on January 1, 2021, as part of the Anti-Money Laundering Act of 2020), recognized that advisers to private funds file information related to private fund ownership on Form ADV and accordingly that private fund advisers have such information. *See* 31 U.S.C. 5336(a)(10) and (11)(B)(xi), (xviii).

from the RIA or ERA to comply with the entities' existing obligations (either because the adviser is unwilling to provide, or has not collected, such information). Additionally, an adviser may use multiple custodians or broker-dealers, so that these entities may not have a complete picture of transactional activity facilitated by the investment adviser for their customers. Investment advisers, while not taking possession of financial assets, often have the most direct relationship with the customers they advise and thus may be best positioned to obtain the necessary documentation and information. In some cases, an investment adviser may be the only person or entity with a complete understanding of the source of a customer's invested assets.

Third, the existing Federal securities laws and regulations are not designed to comprehensively detect illicit proceeds or other illicit activity that is "integrating" into the U.S. financial system through an RIA or ERA.[46] These laws and regulations are not designed to explicitly address the risk that an RIA or ERA may be used to move proceeds or funds tied to money laundering, terrorist financing, or other illicit activity. They do not incorporate AML/CFT purposes, do not require an understanding of relevant illicit finance risks and activity, and do not include requirements for processes to report suspicious activity. In turn, existing laws do not provide any Federal regulatory body with comprehensive authority to monitor whether investment advisers are meeting any AML/CFT objectives.

Fourth, RIAs and ERAs routinely rely on third parties, some of whom may be located outside of the United States, for administrative and compliance activities. These entities—particularly offshore entities—are subject to varying levels of AML/CFT regulation. The due diligence and verification practices of these fund administrators are not uniform and may vary

[46] Generally, money laundering involves three stages, known as placement, layering, and integration. At the "placement" stage, proceeds from illegal activity or funds intended to promote illegal activity are first introduced into the financial system. The "layering" stage involves the distancing of illegal proceeds from their criminal source through a series of financial transactions to obfuscate and complicate their traceability. "Integration" occurs when illegal proceeds previously placed into the financial system are made to appear to have been derived from a legitimate source.

based upon the requirements of the local regulatory regime as well as the requirements imposed by the fund's adviser.

Fifth, particularly for private funds, it is routine for investors to invest through layers of legal entities that may be registered or organized outside of the United States, making it challenging—under existing frameworks—to collect information relevant to understanding illicit finance risks.[47]

Regarding investment adviser-related illicit finance risks and threats, Treasury's analysis showed that 15.4 percent of RIAs and ERAs were associated with or referenced in at least one SAR filed between 2013 and 2021.[48] The number of SAR filings associated with or referencing an RIA or ERA increased by approximately 400 percent between 2013 and 2021—a far greater increase than was observed in relation to sectors with a SAR filing obligation.[49] This analysis, along with a review of law enforcement cases and other information available to the U.S. government, identified cases of the investment adviser industry having served as an entry point into the U.S. financial system for illicit proceeds associated with foreign corruption, fraud, and tax evasion. The analysis further showed that certain advisers manage billions of dollars ultimately controlled by sanctioned entities including Russian oligarchs and their associates who help facilitate Russia's illegal and unprovoked war of aggression against Ukraine.[50]

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[47] For examples of how these private funds are structured, *see* Risk Assessment, *supra* note 2, at 8–10. In its review of law enforcement cases and BSA reporting conducted for the Risk Assessment, FinCEN found several instances where advisers to private funds had ongoing contact or relationships with underlying investors in those funds, to include discussing investment strategies or fund distributions.

[48] *Id.* at 16. SARs are not themselves conclusive evidence of illicit conduct but can generate important information about potential criminal activity that can prompt or assist a law enforcement investigation or support the identification of threats or vulnerabilities in the U.S. financial system.

[49] *Id*

[50] *Id.*

Finally, certain RIAs and ERAs and the private funds they advise are also being used by foreign states, most notably the PRC and Russia, to access certain technology and services with long-term national security implications through investments in early-stage companies.[51]

D. IA AML NPRM

In the IA AML NPRM released on February 15, 2024, FinCEN proposed to designate certain investment advisers as "financial institutions" under the BSA and subject them to AML/CFT program requirements and SAR filing obligations, as well as other BSA requirements.[52] Specifically, the IA AML NPRM would have added "investment adviser" to the definition of "financial institution" at 31 CFR 1010.100(t), and then would have defined investment advisers to mean RIAs registered or required to register with, or ERAs that report to, the SEC. Accordingly, RIAs and ERAs would have then been required to comply with several AML/CFT requirements.

The proposed rule would also have required RIAs and ERAs to keep records relating to the transmittal of funds (Recordkeeping and Travel Rules) and to meet other obligations of financial institutions under the BSA. The proposed rule would also have applied information-sharing provisions between and among FinCEN, law enforcement, government agencies, and certain financial institutions, and would have subjected investment advisers to certain "special measures" imposed by FinCEN pursuant to section 311 of the USA PATRIOT Act.[53]

In the IA AML NPRM, FinCEN did not propose to include a CIP requirement for investment advisers, nor did it propose to require investment advisers to collect beneficial ownership information for legal entity customers. FinCEN has proposed to apply CIP

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[51] *Id.* Foreign state-funded investment vehicles may seek to hide their involvement in an effort to gain access to sensitive technology, processes, or knowledge that can enhance their domestic development of microelectronics, artificial intelligence, biotechnology and biomanufacturing, quantum computing, and advanced clean energy, among others. *See* Risk Assessment, *supra* note 2, at 21. Exploitation of this access can advance foreign-state economic and military capabilities at the expense of the United States. *See Safeguarding Our Innovation*, National Counterintelligence and Security Center 1 (Jul. 24, 2024), available at https://www.dni.gov/files/NCSC/documents/products/FINALSafeguardingOurInnovationBulletin.pdf.
[52] *See* 89 FR 12108 (Feb. 15, 2024).
[53] *See also* section 9714(a) of the Combating Russian Money Laundering Act; 21 U.S.C. 2313a.

requirements to investment advisers via a joint rulemaking with the SEC (described below, Section II.E) and intends to address the requirement to collect beneficial ownership information for legal entity customers in a subsequent rulemaking.

The proposed rule would have allowed an investment adviser to exclude any mutual fund that it advised from the investment adviser's AML/CFT program and SAR filing requirements, provided that the mutual fund had developed and implemented an AML/CFT program compliant with the relevant regulations governing mutual funds.[54] The proposed rule would also have removed the existing requirement that investment advisers file reports for the receipt of more than $10,000 in cash and negotiable instruments using Form 8300. Investment advisers would have instead been required to file a CTR for a transaction involving a transfer of more than $10,000 in currency by, through, or to the investment adviser, unless subject to an applicable exemption.

Finally, FinCEN proposed to delegate its examination authority to the SEC given the SEC's expertise in the regulation of investment advisers and the existing delegation to the SEC of authority to examine broker-dealers and certain investment companies for AML/CFT compliance.

E. Customer Identification Program NPRM

In the IA AML NPRM, FinCEN noted that it intended to address the application of a CIP requirement for investment advisers through a joint rulemaking with the SEC.[55] On May

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[54] As used in this release, "mutual fund" has the same definition as in FinCEN's regulations, and refers to an "investment company" (as the term is defined in section 3 of the Company Act (15 U.S.C. 80a–3)) that is an "open-end company" (as that term is defined in section 5 of the Company Act (15 U.S.C. 80a–5)) that is registered or is required to register with the SEC under section 8 of the Company Act (15 U.S.C. 80a–8). *See* 31 CFR 1010.100(gg). Exchange-traded funds (ETFs) are a type of exchange-traded investment product that must register with the SEC under the Company Act and are generally organized as either an open-end company ("open-end fund") or unit investment trust. The SEC's ETF Rule (rule 6c-11 under the Company Act), issued in 2019, clarified ETFs are issuing "redeemable securit[ies]" and are generally "regulated as open-end funds within the meaning of section 5(a)(1) of the [Investment Company] Act." FinCEN's definition of a mutual fund under 1010.100(gg) applies to an ETF that is registered as an "open-end company" (as the term is defined in section 5 of the Company Act).

[55] 89 FR at 12129.

21, 2024, FinCEN and the SEC published a joint NPRM to apply CIP requirements to RIAs and ERAs (IA CIP NPRM).[56]

As proposed in the IA CIP NPRM, RIAs and ERAs would be required to establish, document, and maintain written CIPs appropriate for their respective sizes and businesses. The CIPs would include risk-based procedures to identify and verify the identity of their customers[57] to the extent reasonable and practicable within a reasonable time before or after the customer's account is opened. The procedures would have to enable RIAs and ERAs to form a reasonable belief that the adviser knows the true identity of their customers. RIAs and ERAs would be required to obtain certain identifying information with respect to each customer, such as the customer's name, date of birth or date of formation, address, and identification number. The proposed rule would also require procedures for, among other things, maintaining records of the information used to verify the person's identity, notifying customers that the adviser is requesting information to verify their identifies, and consulting lists of known or suspected terrorists or terrorist organizations provided to the RIA or ERA financial institution by any government agency to determine whether a person seeking to open an account appears on any such list.[58] CIP requirements are a long-standing, foundational component of a financial institution's AML/CFT requirements and they are required for banks, broker-dealers, futures commission merchants and introducing brokers in commodities, and mutual funds.

The comment period for the IA CIP NPRM closed on July 22, 2024, and FinCEN and the SEC received 36 comments. Treasury and the SEC are reviewing comments and are working toward finalizing the CIP rule. As FinCEN and the SEC noted in the IA CIP NPRM,

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[56] *See* FinCEN and SEC, *Customer Identification Programs for Registered Investment Advisers and Exempt Reporting Advisers*, Notice of Proposed Rulemaking, 89 FR 44571 (May 21, 2024).

[57] The IA CIP NPRM proposed to define a customer as a person who opens a new account with an investment adviser. *Id.* at 44573.

[58] The IA CIP NPRM proposed to define "account" for these purposes as "any contractual or other business relationship between a person and an investment adviser under which the investment adviser provides investment advisory services," with limited exclusions. *Id.*

adoption of CIP requirements for RIAs and ERAs would depend on—and not occur unless—investment advisers are first designated as "financial institutions" for purposes of the BSA.[59]

F. General Summary of Comments

FinCEN received 49 comments on the IA AML NPRM. Of the 49 comments, 16 were from individual commenters; 16 were from trade associations representing various financial services entities (including seven that were a form letter provided by one association); six were from think-tanks or non-governmental organizations (NGOs); and five were from RIAs. For the remainder, one comment letter was from a law firm, one comment letter was from a self-regulatory organization, one comment letter was from an association of state securities regulators, one comment letter was from a service provider to investment advisers, one comment letter was from an office within another federal government agency, and one comment letter was from seven U.S. Senators.

Several commenters noted support for the proposed rule and the application of comprehensive AML/CFT requirements to RIAs and ERAs, noting that it would address illicit finance risks or other illicit activity involving investment advisers. Several other commenters, including a self-regulatory organization, an association of state securities regulators, seven U.S. Senators, several financial transparency NGOs and a think-tank, and some financial services trade associations, supported adoption of the proposed rule, but had suggested changes. These changes included expanding the scope of coverage to include State-registered investment advisers, family offices, and foreign private advisers, as well as modifying certain exemptions or requirements in the proposed rule. Other commenters who generally supported the rule requested that FinCEN apply CIP requirements and the obligation to collect beneficial ownership information for legal entity customers as soon as possible. These proposed changes are discussed below.

[59] *Id*. at 44572, note 11.

Another group of commenters, including several financial services trade associations and some RIAs, noted that they generally supported the objectives of the proposed rule, but thought that the rule as drafted was overly broad and/or too prescriptive and would impose significant costs on investment advisers without a corresponding benefit to efforts to combat illicit finance. They suggested several more significant changes that would exempt certain categories of advisers or advisory activities from the proposed rule and instead focus on what they considered higher-risk activities. They also suggested not applying certain requirements that may be duplicative of obligations applied by other financial institutions, such as broker-dealers and banks, which are involved in advisory activities, as well as modifying requirements of the proposed rule in the context of private funds activity. These commenters' proposed changes are discussed below.

Several commenters opposed the rule, primarily highlighting the potential burden on investment advisers and that the requirements in the proposed rule were duplicative of AML/CFT requirements imposed on broker-dealers and custodians that facilitate transactions for investment advisers and their clients. One commenter noted that AML/CFT measures, along with measures related to sanctions issued by Treasury's Office of Foreign Assets Control (OFAC), were implemented by the fund administrator for their hedge fund. Another commenter indicated that foreign-located fully regulated RIAs and ERAs are already subject to extensive AML/CFT and anti-bribery requirements by their home country regulators.

Regarding the burden, one commenter noted that advisers, especially those that advise private funds, were already facing additional costs to implement recently finalized or proposed SEC requirements. Other commenters also highlighted the potential costs for smaller investment advisers.

Two commenters noted their opposition to applying the proposed rule to venture capital advisers. One of those commenters stated that the requirements of the proposed rule would have a significant and adverse effect on venture capital advisers and the innovative start-ups

they advise. The other commenter claimed that the identified risks did not justify applying AML/CFT rules to venture capital advisers, would produce less valuable information because of the limited interactions that venture capital advisers have with limited partner investors, and would not lead to a more effective AML/CFT regime.

One commenter reasoned that, given the focus on the risks posed by private funds, the rule should be narrowed to address those higher-risk activities, and not apply to advisers that manage assets for individual investors. Two commenters requested that FinCEN address concerns raised in the comments with respect to private fund advisers and venture capital advisers, respectively, and issue a revised NPRM.

III. DISCUSSION OF FINAL RULE

A. Illicit Finance Risk

Commenters expressed varying views on the illicit finance risks associated with RIAs and ERAs that were discussed in the IA AML NPRM and Risk Assessment. Several commenters agreed that illicit actors, including corrupt officials, have exploited the U.S. investment adviser sector, particularly the private funds sector, to hide or obscure illicit proceeds, and that the lack of AML/CFT requirements for investment advisers presented illicit finance and national security risks. One commenter described how corrupt officials had exploited the U.S. private investment industry and would continue to do so unless effective and robust AML/CFT controls were applied. Another commenter concurred with the findings of the Risk Assessment and wrote that it was consistent with the commenter's own research, which found significant foreign ownership in private funds that are managed by advisers who report to the SEC. This commenter's research suggests that this level of foreign ownership in private funds presents a challenge to the United States' ability to effectively monitor foreign investment. Other commenters agreed with the national security risks identified and provided

additional examples of misuse, including narcotics trafficking and laundering proceeds of corruption or funds from authoritarian regimes.

One commenter observed that while broker-dealers may hold or trade assets controlled by an investment adviser, they may have no independent knowledge of the investment adviser's customers, and that investment advisers are often in the best position to obtain information about their customers that is relevant for AML/CFT purposes. Finally, another commenter, a non-profit coalition, agreed that, given the growth of the private funds industry and investment advisers' role in critical sectors of the economy, investment advisers should be held to the same standard as other financial market participants.

However, several other commenters took issue with the findings regarding the level of illicit finance risk facing investment advisers. Several commenters disagreed that the case examples cited provided adequate support for the rulemaking, noting that the examples involved concealment of ownership, complicit actors whose activity would not be addressed by the requirements of the proposed rule (but that were addressed by laws criminalizing money laundering, or anti-fraud provisions of the Federal securities laws), or compliance failures at financial institutions already subject to AML/CFT requirements. They also claimed that the case examples were too few to justify the cost associated with the proposed rule's requirements. One commenter said that the cases also demonstrated that BSA requirements for banks and broker-dealers were already identifying illicit activity. One commenter questioned the accuracy of the analysis of SARs included in the Risk Assessment and felt that they lacked context or that findings tied to SARs were not proof of illicit activity.

Other commenters noted that existing OFAC sanctions requirements addressed the examples and data on illicit finance tied to Russian oligarchs, and that the blocking of assets owned by sanctioned Russian parties demonstrated those sanctions were effective in mitigating this illicit finance risk. Another commenter stated that most investments made by Russian oligarchs occurred prior to their designation, that there was nothing illegal about their

investments in U.S. assets, and that the proposed requirements would thus not have addressed the AML/CFT risks arising from Russia's invasion of Ukraine.

Regarding risks associated with private funds, one commenter claimed that private funds generally present a low risk of money laundering and terrorist financing due to several key factors, including the long-term nature of the investments made in such funds and the existing due diligence by funds into potential investors (including sanctions screening). Another commenter disagreed with the money laundering risk associated with hedge funds, noting that, at the hedge fund where they worked, the transfer agent would "perform KYC [know your customer procedures] and check OFAC and sanctions lists before admitting a new investor or paying a redemption" and "are required to report suspicious activities."

Regarding venture capital funds, in particular, two commenters stated that none of the examples in the preamble of incidents in which illicit finance was uncovered included venture capital funds or advisers and therefore such examples do not illustrate the need for the adoption of AML/CFT programs by venture capital advisers. These commenters claimed that illiquidity and long-term focus are standard features of venture capital funds that make them poor targets for money launderers. One commenter argued that FinCEN acknowledges this in the release accompanying the proposed rule, but nevertheless proposes AML requirements for venture capital advisers. One commenter alleged that the proposed rule does not focus on the use of venture capital funds by foreign actors (including foreign governments) to facilitate illicit finance activity, but on attempts to access sensitive or dual-use technology by potentially hostile foreign state interests. The commenter claimed that this threat would not be addressed through the application of AML/CFT requirements to venture capital funds, and are more appropriately addressed through other government authorities, such as the Committee on Foreign Investment in the United States (CFIUS). One commenter indicated that FinCEN does not provide evidence or disclose essential facts that might support a decision to extend the

AML/CFT program requirement to venture capital advisers and that such inclusion would amount to an arbitrary and capricious application of the rule.

Regarding the vulnerabilities discussed in the IA AML NPRM, some commenters stated that investment advisers were much less likely to serve as channels to the U.S. financial system that can be taken advantage of by criminal actors, as compared to other financial institutions that are already subject to AML/CFT requirements under the BSA.

Several commenters noted that RIAs and ERAs rely heavily on banks, broker-dealers, custodians, and other financial institutions that are already subject to AML/CFT requirements to custody customer and investor monies, process funds transfers, or effect securities transactions on behalf of advisers. Commenters also noted that banks and broker-dealers regularly request AML/CFT and sanctions-related representations and affirmations from RIAs and ERAs as part of their diligence processes. One commenter also noted that RIAs and ERAs and their affiliates already maintain robust records of the types of transactions that would be captured by the proposed rule, such as adviser or broker-dealer requirements applicable to maintaining transaction records related to financial transactions between advisers' customers and those customers' investors. Another commenter opined that "a failure to conduct adequate due diligence or to otherwise fail in complying with applicable AML laws could … expose a Covered IA to a fund to accusations that it failed to satisfy its fiduciary duties [to the fund]… [and] given the risk that an AML error or oversight could create claims of fiduciary breach, Covered IAs are already strongly incentivized to develop and maintain robust AML policies and procedures."

FinCEN responds below to these comments. Following consideration of comments, for the reasons discussed below, FinCEN continues to assess that there is a material risk that RIAs and ERAs can be abused for illicit finance activity, although the degree of risk is not uniform across the sector. Regarding the case examples, as FinCEN noted in the IA AML NPRM, some of the examples both in the NPRM and in the Risk Assessment involve complicit individuals at

a financial institution.[60] FinCEN notes that other commenters provided additional research confirming the risks associated with foreign investors in private funds that were identified in the Risk Assessment, as well as additional examples of misuse.[61] Further, the Financial Industry Regulatory Authority (FINRA), a Self-Regulatory Organization (SRO) responsible for regulating member broker-dealers, conducted a review of referrals that its specialized insider trading, market fraud, and offering review teams made to other regulators and law enforcement between January 1, 2023 and March 14, 2024. This review suggests that at least 14.5 percent of those referrals related to investment advisers or their customers.

These cases are intended to be illustrative, and, as FinCEN noted in the proposed rule, "an investment adviser may be unwittingly complicit in this type of activity if they are not required to understand the origin of funds or nature of their owner. A customer wishing to launder money could ask an investment adviser to establish a private fund to certain specifications without informing the adviser of the customer's broader scheme."[62] In addition, the IA AML NPRM referenced the comprehensive Treasury review contained in the Risk Assessment, which included substantial information beyond the case examples, including a review of BSA reporting, materials derived from civil enforcement actions, analysis provided by U.S. government agencies, and other non-public information that demonstrated investment advisers could be misused to help launder illicit proceeds. What the case examples in the IA AML NPRM and Risk Assessment demonstrate is that a range of illicit actors view investment advisers as potential entry points into the U.S. financial system, and have sought to exploit them.

Further, without an AML/CFT program requirement or an obligation to file SARs, an investment adviser has no obligation to evaluate the risk of money laundering, terrorist

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[60] *See* 89 FR at 12114–12115.
[61] Several commenters from think tanks and non-governmental organizations provided additional examples of misuse, while one commenter provided a report titled *Private Investments, Public Harm: How the Opacity of the Massive U.S. Private Investment Industry Fuels Corruption and Harms National Security*. The report is available at https://thefactcoalition.org/wp-content/uploads/2021/12/TI_Private-Investments-Public-Harm-10.pdf.
[62] *See* 89 FR at 12115.

financing, or other illicit finance activity associated with its advisory customers and activities. As discussed below, FinCEN understands, as some commenters have explained, that investment advisers often conduct certain due diligence and screen against sanctions lists, that they may provide AML/CFT and sanctions-related representations and affirmations regarding their clients at the request of banks or broker-dealers, and that an adviser's fiduciary duty requires it to act in the best interest of its clients. At the same time, FinCEN notes that investment advisers to private funds are most commonly compensated based on a combination of (i) management fees that are based on total AUM invested in (or committed to be invested in) the private fund and (ii) performance-based compensation based on the private fund's performance. These compensation arrangements incentivize private fund advisers to add new investors and grow their private fund assets.[63] This incentive may lead to some advisers refraining from voluntarily conducting a robust review of illicit finance risk, as such review could lead to the adviser turning away certain AUM, and thus lead to less compensation for the adviser. As described in the IA AML NPRM, this can lead an investment adviser to unwittingly assist in illicit finance activity.[64]

This rule will require investment advisers to adopt a risk-based approach pursuant to which they must ask questions and analyze potential money laundering, terrorist financing, and other illicit finance risks—steps that will make it more likely that an investment adviser will detect illicit finance activity. The reporting and recordkeeping requirements of the BSA, especially SAR filing obligations, are intended, among other things, to assist federal law enforcement in the enforcement of existing money laundering statutes, including by identifying instances of money laundering activity to help facilitate investigation and prosecution. In addition, AML/CFT requirements can serve as a separate basis for civil or criminal enforcement action.

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[63] Other investment advisers, who are often compensated as a percentage of AUM even if they do not also receive performance-based compensation, are similarly incentivized in general to increase their assets under management.
[64] *See* 89 FR at 12115.

The Risk Assessment's conclusions were also supported by an analysis of SARs. This analysis included approximately 12,000 SARs filed over seven years where the investment adviser was identified either as a subject of the SAR or in the narrative section of the SAR (with the number of SAR filings in the analysis increasing 400 percent over the review period). FinCEN agrees with the statement made by one commenter that SARs are not by themselves proof of illegal activity, but are intended to assist law enforcement in identifying potential violations of law. FinCEN also notes that the SAR trend and pattern analysis undertaken to support development of the Risk Assessment can be valuable in helping the public and private sectors identify and address illicit finance trends and systemic vulnerabilities. For example, in section 6206 of the Anti-Money Laundering Act of 2020 (AML Act), Congress mandated that FinCEN publish semiannual threat pattern and trend information derived from BSA filings.[65] Such efforts will only be enhanced by requiring investment advisers to file SARs as well, which will provide additional relevant information for FinCEN to analyze.

Regarding illicit finance tied to Russian oligarchs, FinCEN recognizes that, as noted by some commenters, many of these investments were made prior to the designation of these individuals and entities by OFAC. Many investment advisers, along with other financial institutions, took action to freeze assets linked to designated Russian individuals and entities. However, even prior to their designation, many of these individuals and entities were publicly known to be linked to corruption, other criminal activity, or Russian malign influence campaigns; yet they were still able to make investments through the U.S. financial system.[66] By engaging in such activities these individuals and entities may be violating U.S. law and engaging in sanctionable conduct even if they are not yet designated. Additional AML/CFT requirements may have helped identify—or even mitigate the extent of—assets or accounts that were owned, controlled, or otherwise linked to criminal or sanctionable activities *before* the

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[65] *See* 31 U.S.C. 5318(g)(6). *See also* FinCEN's Financial Trend Analyses, issued pursuant to section 6206 of the AML Act of 2020, available at https://www.fincen.gov/resources/financial-trend-analyses.
[66] *See* 89 FR at 12115–12116.

relevant individuals were designated by forcing investment advisers to adopt a risk-based approach to working with these individuals. More broadly, such AML/CFT requirements are likely to help identify additional assets or accounts that are owned, controlled, or otherwise linked to designated persons, in turn supporting effective sanctions enforcement efforts.[67]

FinCEN agrees with the point raised by some commenters that certain characteristics of private funds, such as longer lock-up periods or limited opportunities to make withdrawals, may make these funds less attractive for certain illicit finance activity that seeks to rapidly enter and exit a financial product. However, as noted in the NPRM, these requirements are unlikely to deter certain illicit actors who have a medium- to long-term investment horizon and do not need immediate access to invested capital, such as corrupt foreign officials, financial facilitators for transnational criminal networks, or those acting on behalf of designated persons, especially because of the potential for high returns in these private funds.[68] In addition, some illicit actors may see private fund investments, in combination with the use of a trust or other legal arrangement, as an alternative if they are unable to launder or obscure funds directly through a bank or brokerage account.[69] FinCEN acknowledges that while private fund advisers may perform sanctions or politically exposed person (PEP) screening as part of their investor diligence, such efforts are only one part of effective AML/CFT compliance. In addition, because such advisers are not subject to consistent supervision for AML/CFT compliance measures they may undertake, such measures may not be applied consistently, and any deficiencies in these measures may not be identified or remediated.

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[67] *See* FIN–2023–Alert002, *FinCEN Alert on Potential U.S. Commercial Real Estate Investments by Sanctioned Russian Elites, Oligarchs, and Their Proxies* (Jan. 25, 2023) (noting that investors seeking to evade sanctions may lower their interest in an investment fund to just below the threshold set by a financial institution's CDD standards to avoid detection).

[68] For instance, one subset of SARs analyzed for the Risk Assessment found that RIAs that advised private funds were associated with or referenced in SARs at twice the rate of RIAs that did not advise private funds. The higher rate of filing tied to private funds may result from custodians and other entities with SAR filing obligations lacking insight into the identity and source of wealth of underlying investors in the fund, even where those filers may pursue additional diligence.

[69] *See* Risk Assessment, *supra* note 2, at 16 & 27.

For venture capital funds in particular, FinCEN notes that the threat of misuse is not only for purposes of illicit technology transfer through investments in portfolio companies of venture capital funds, but also to facilitate the laundering and growth of illicit proceeds. As noted in the IA AML NPRM and Risk Assessment, a Treasury review of select BSA reporting filed between January 2019 and June 2023 identified more than 20 private fund advisers located in the United States where the adviser was identified as having significant ties to Russian oligarch investors or Russian-linked illicit activities. The vast majority of those private fund advisers advised investment funds that held themselves out as pursuing a venture capital strategy. Some of these Russian oligarch-linked investors may have been attracted to investing in venture capital funds because, like other venture capital investors, they had a medium-to-long term investment horizon and were willing to accept higher risk for higher investment returns.[70]

FinCEN also notes that while the BSA and its reporting and recordkeeping requirements were originally developed to combat money laundering, Congress has added to the purpose of the BSA over time an objective to combat terrorism,[71] as well as addressing other threats to U.S. national security.[72] Illicit technology transfer—that is, the transfer of technology in violation of sanctions, export controls, or other applicable laws—is both a threat to national security and may be linked to money laundering and other forms of illicit finance. For instance, in 2022 and 2023 FinCEN issued a series of joint alerts with the Department of Commerce's Bureau of Industry and Security (BIS) to assist financial institutions in detecting

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[70] A Treasury review of select BSA reporting identified several U.S. venture capital firms with significant ties to Russian oligarch investors that invested in firms developing emerging technologies with national security applications. These include autonomous vehicle technology and artificial intelligence systems, as well as contractors to the U.S. military, intelligence, and other government agencies. *See* Risk Assessment at 21-22.

[71] *See* 31 U.S.C. 5311(2) (preventing the financing of terrorism). Section 358 of the USA PATRIOT Act added to the purposes of the BSA to require reporting or recordkeeping highly useful in "intelligence or counterintelligence activities, including analysis, to protect against international terrorism." Pub. L. 107–56, sec. 358(a).

[72] *See* 31 U.S.C. 5311(4) (safeguarding the national security of the United States). Section 6101 of the AML Act amended the purposes of the BSA to include "assess the money laundering, terrorism finance, tax evasion, and fraud risks to financial institutions, products, or services to…safeguard the national security of the United States." Pub. L. 116-283, Div. F, sec. 6101(a).

transactions linked to Russian attempts to acquire military or dual-use technology.[73] These alerts reflect the reality that money laundering and other forms of illicit finance may be part of illicit technology transfer because adversaries must conceal their illegal attempts to obtain technology. FinCEN assesses that applying AML/CFT measures to RIAs and ERAs will assist in combating these and other threats to the U.S. financial system and national security.

FinCEN does not believe that the comments regarding the absence thus far of an adviser to a venture capital fund engaging in illicit finance in the IA AML NPRM requires any change to the final rule. The examples cited in the preamble are meant only to be illustrative of the risks and do not lay out the full evidence available to FinCEN, and these comments rely upon a particularly narrow framing of the evidence presented in the IA AML NPRM. The IA AML NPRM states that "according to the FBI, the PRC government routinely conceals its ownership or control of investment funds to disguise efforts to steal technology or knowledge and avoid notice to CFIUS."[74] As one commenter acknowledges, the IA AML NPRM discusses state-guided or -owned venture capital funds acting on behalf of the PRC and Russia.[75] Furthermore, as noted by other commenters, there are public reports of specific venture capitalists with ties to Russian oligarchs or Russian government-backed institutions.[76] Indeed, a recent bulletin published by the National Counterintelligence and Security Center highlights how foreign threat actors can exploit venture capital and other private investment to undermine U.S. national security.[77] For these reasons, FinCEN's assessment that venture capital funds pose illicit finance risk is supported by the available evidence.

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[73] *See* FIN-2022-Alert003, *FinCEN and the U.S. Department of Commerce's Bureau of Industry and Security Urge Increased Vigilance for Potential Russian and Belarusian Export Control Evasion Attempts* (Jun. 28, 2022); *see also* FIN-2023-Alert004, *Supplemental Alert: FinCEN and the U.S. Department of Commerce's Bureau of Industry and Security Urge Continued Vigilance for Potential Russian Export Control Evasion Attempts* (May 19, 2023).
[74] 89 FR at 12116.
[75] *Id.*
[76] *See, e.g.*, Joseph Menn et al., *From Russia with money: Silicon Valley distances itself from oligarchs*, Washington Post (Apr. 1, 2022); Giacomo Tognini, *Russian Oligarch Roman Abramovich Invested In Startups That Received U.S. Government Contracts*, Forbes (June 9, 2023).
[77] *See Safeguarding Our Innovation* at 1, *supra* note 51. This bulletin highlighted common tools that foreign threat actors use to penetrate the U.S. financial system, including complex ownership structures, investments through

In response to the suggestion that these threats would be better addressed through other government authorities like CFIUS, FinCEN seeks to clarify fundamental differences between the CFIUS process and the AML/CFT obligations set out in this rule. FinCEN notes that CFIUS reviews are focused on certain transactions involving foreign investment in the United States and certain real estate transactions by foreign persons, in order to determine the effect of such transactions on the national security of the United States.[78] Whereas CFIUS reviews lawful investments, this rule is aimed at combating illicit activity, whether in the form of money laundering and other illicit finance, or in the form of technology transfer in violation of applicable law. CFIUS jurisdiction has well-established limits, and many common financial transactions, such as certain loans or passive fund investments, are not subject to CFIUS jurisdiction.[79] By Executive Order, CFIUS mitigation agreements may only address national security risks "not adequately addressed by other provisions of law," such as the BSA.[80] Within its jurisdiction, CFIUS has a broad mandate to assess the effect of a covered transaction on national security; it need not find any violation of law in order to recommend the transaction to the President who has the authority to block or unwind a transaction, as appropriate under CFIUS legal authorities.[81] The connection between CFIUS and the final rule would therefore be limited: SARs identifying potential unlawful activity will assist CFIUS in identifying transactions linked to such activity that may raise national security concerns, and recordkeeping and other requirements may facilitate the collection of additional information on certain participants in CFIUS transactions who may seek to obscure their role through private funds.

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intermediaries, and limited partner investments. *Id.* at 2. For example, one firm identified in the bulletin that had been added to the Department of Defense's list of "Chinese military companies" in January 2024 is an ERA that has made investments in more than 1,600 companies, including several U.S. firms.

[78] *See* Executive Order (E.O.) 11,858, as amended, sec. 6(b), 73 FR 4677, 4678 (Jan. 23, 2008) ("The Committee shall undertake an investigation of a transaction in any case … in which … the transaction threatens to impair the national security of the United States and that the threat has not been mitigated.").

[79] 31 CFR 800.302(b), 800.306(a).

[80] 50 U.S.C. 4565(d)(4)(B); E.O. 11858, sec. 7(a) as amended by E.O. 13456.

[81] *See, e.g.*, 50 U.S.C. 4565(b), (d).

In the IA AML NPRM and Risk Assessment, FinCEN considered the existing requirements under the Advisers Act and its implementing regulations, the extent to which AML/CFT requirements were applied to advisory activities, and how other rules and regulations, such as those issued by OFAC to implement sanctions requirements,[82] may mitigate the identified illicit finance risks. While AML/CFT obligations for banks, broker-dealers, and other financial institutions can assist in detecting some illicit activity, these entities may not directly interact with an adviser's underlying customers. Moreover, these entities may not be in the best position to obtain the necessary documentation and information about the customers that is relevant for AML/CFT purposes, such as the source of customers' assets, the customers' backgrounds, and the customers' investment objectives. One commenter observed that in connection with oversight of broker-dealers for compliance with AML/CFT requirements, investment advisers often have the sole or most direct relationship with customers and possess knowledge of the full spectrum of transactions effected through broker-dealers and other custodians that may present money laundering or other illicit finance risks. Another commenter noted that investment advisers in some cases already provide other financial institutions with AML/CFT and sanctions-related representations and affirmations regarding customers they advise (including private funds), which underscores the fact that advisers often have more information on their customers than banks or broker-dealers have. Further, requiring RIAs and ERAs to apply AML/CFT measures may lead to earlier notification of illicit finance activity via SAR filings, and reduce the time law enforcement needs to receive relevant information and take action against illicit actors.

While existing requirements under the Advisers Act and its implementing regulations, including recordkeeping, compliance, and reporting requirements, can assist in implementation

[82] While OFAC sanctions requirements are separate from AML/CFT requirements, investment advisers, like other U.S. persons, must comply with OFAC sanctions. AML/CFT requirements and OFAC sanctions also share a common national security goal, apply a risk-based approach, and rely on similar recordkeeping and reporting requirements to ensure compliance. For this reason, many financial institutions view compliance with OFAC sanctions as related to AML/CFT compliance obligations and may include sanctions compliance and AML/CFT compliance in a single enterprise-wide compliance program.

of AML/CFT measures, they do not require the collection of the same information as do the AML/CFT requirements. The illicit finance risks documented in the IA AML NPRM and Risk Assessment remain, despite such existing requirements and the assertions in comments about existing fiduciary duty, and thus FinCEN has determined that the final rule is necessary and appropriate to mitigate those risks. Further, while FinCEN recognizes that an adviser involved in facilitating illicit finance activity could face contractual liability on a variety of bases, these violations generally result in civil liability to private parties. This is not an adequate substitute for the comprehensive government civil and criminal enforcement mechanisms available for violations of AML/CFT laws, and the range of effective, proportionate, and dissuasive penalties that can be applied. These measures are necessary to address the public harm resulting from illicit finance activity that may occur through investment advisers.

B. Definition of "Financial Institution" and "Investment Adviser"

1. Defining Investment Advisers as "Financial Institutions"

Proposed Rule: FinCEN proposed to add "investment adviser" to the definition of "financial institution" under the regulations implementing the BSA because FinCEN has determined that investment advisers engage in activities that are "similar to, related to, or a substitute for" financial services that other BSA-defined financial institutions are authorized to engage in.

Comments Received: FinCEN received comments that both supported and did not support including investment advisers within the definition of "financial institution" under the regulations implementing the BSA and including RIAs and ERAs within the definition of "investment adviser." Three commenters noted that the proposed definition is a proactive step to address gaps in existing AML/CFT framework and called for FinCEN to retain a comprehensive definition in the final rule. One commenter called for FinCEN to also include foreign private advisers, family offices, and advisers to real estate investment funds within this definition.

Nine commenters disagreed with adding "investment adviser" to the definition of "financial institution" in the regulations issued pursuant to the BSA. Several of these commenters asserted that doing so would apply redundant and unnecessary AML/CFT requirements to investment advisers, as the entities that process cash and securities transactions, such as broker-dealers and banks, are already subject to AML/CFT requirements.

One commenter claimed that as investment advisers are not specifically enumerated in the statutory definition of "financial institution" under the BSA, FinCEN may not have the authority to define investment advisers as "financial institutions" under the BSA without additional Congressional action. This commenter also disagreed with FinCEN's determination that investment advisers engaged in activities that were "similar to, related to, or a substitute for" activities in which any of the enumerated financial institutions are authorized to engage. The commenter stated that BSA-defined financial institutions, such as banks and broker-dealers, are required to apply AML/CFT requirements because of their status as banks and broker-dealers, and not because they engage in particular activities.

This commenter also asked whether FinCEN intended to include within the definition of "financial institution" other professions or entities that are authorized to make investment or other financial decisions on behalf of a principal. The commenter argued that the proposed rule could raise questions about whether trustees, attorneys, executors of estates, receivers in bankruptcy proceedings, or others similarly situated are substituting for the activities of BSA-defined financial institutions and are covered by the proposed rule.

Another commenter stated that entities defined as "financial institutions" under the BSA have in common the fact that they have custody over customer's funds. The commenter noted that investment advisers, by contrast, do not take custody of a customer's funds, and must act in conjunction with other financial institutions to transact on behalf of their clients. The commenter suggested that if the proposed rule were to be finalized, the definition of "investment adviser" must be narrowed to capture only advisers who engage in activities that

arguably more closely resemble financial institution activities. Another commenter suggested that FinCEN apply AML/CFT requirements to private funds rather than to the investment advisers to those funds, noting that the fund itself has the contractual relationship with the investor and receives customer due diligence information.

Two other commenters raised questions about the impact of including "investment adviser" in the definition of "financial institution" in the regulations that implement the BSA. These two commenters indicated that FinCEN must account for the differences in the roles and functions of investment advisers from banks and broker-dealers in existing and future BSA rulemakings, and should consult with investment advisers before applying general AML/CFT requirements for "financial institutions" to investment advisers.

Final Rule: For the reasons described in the IA AML NPRM, FinCEN is adding "investment adviser" to the definition of "financial institution" under the regulations implementing the BSA, as proposed, because FinCEN has determined that investment advisers engage in activities that are "similar to, related to, or a substitute for" financial services that other BSA-defined financial institutions are authorized to engage in.

While the BSA has an enumerated list of entities that are "financial institutions,"[83] the statute also explicitly provides the Secretary of the Treasury with the authority to add entities to that list upon determining, "*by regulation*," that any business or agency is engaged in "an activity *similar to, related to, or a substitute for any activity*" in which any of the enumerated financial institutions are authorized to engage.[84] This language provides Treasury with the statutory authority to define additional entities as financial institutions as business and organizational structures, and risks, in financial services evolve and illicit actors seek to exploit

[83] 31 U.S.C. 5312(a)(2), (c)(1).

[84] 31 U.S.C. 5312(a)(2)(Y) (emphasis added). FinCEN may also designate businesses "whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters" as financial institutions. 31 U.S.C. 5312(a)(2)(Z).

potential gaps in AML/CFT regulation, as FinCEN has observed with respect to investment advisers.

FinCEN continues to see ample evidence that investment advisers engage in activities "similar to, related to, or a substitute for" activities in which other financial institutions are authorized to engage. As noted in the IA AML NPRM, investment advisers work closely with financial institutions when they direct broker-dealers to purchase or sell client securities, and therefore engage in activities that are closely related to the activities of covered financial institutions. An RIA must use a qualified custodian—such as a bank or broker-dealer—to take custody of client assets, even when advising private funds.[85] In addition, investment advisers are frequently owned by or under common ownership with banks, broker-dealers, and other financial institutions. Broker-dealers may conduct certain similar advisory activities for their customers[86] and investment advisers must compete with other financial institutions that provide investment opportunities, such as banks and broker-dealers, to attract investor funds.

There is ample evidence that RIAs and ERAs who advise private funds engage in activities "similar to, related to, or a substitute for" activities in which other financial institutions are authorized to engage. The services provided by RIAs and ERAs advising private funds are closely related to the services provided by broker-dealers who buy and sell securities on their behalf. Private fund advisers may be under common ownership with banks, broker-dealers, or other financial institutions. Broker-dealers, like RIAs or ERAs advising private funds pursuant to the Advisers Act, may "advis[e] others…as to the value of securities or as to the advisability of investing in, purchasing, or selling securities."[87] And an RIA or ERA advising private funds must also compete with other financial institutions that offer investment opportunities for investor assets.

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[85] *See* 17 CFR 275.206(4)-2; *see also* 12 CFR 225.125(a) (FRB determining that investment adviser activities "to be so closely related to banking or managing or controlling banks as to be a proper incident thereto").
[86] *See* 15 U.S.C. 80b-2(a)(11)(C).
[87] 15 U.S.C. 80b-2(a)(11). *See also* SEC, *Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion From the Definition of Investment Adviser*, Interpretation, 84 FR 33681 (Jul. 12, 2019).

FinCEN's statutory authority to designate investment advisers as financial institutions is confirmed by clear evidence of Congressional intent. The legislative history during the drafting of the USA PATRIOT Act supports that Congress viewed RIAs as sufficiently similar to certain other financial institutions that Treasury could require them to file SARs.[88] Congress reaffirmed this view more recently when, in connection with appropriations legislation passed in December 2022, Congress highlighted the illicit finance concerns associated with "investment advisers such as hedge fund managers" and encouraged FinCEN "to update and finalize its 2015 investment adviser rule as soon as possible."[89]

FinCEN also notes that having custody or directly holding customer funds is not a prerequisite for being included within the definition of "financial institution" in the regulations issued pursuant to the BSA. For example, the BSA defines an "investment company" and an "operator of a credit card system," as a "financial institution," and neither of these institutions routinely custody or directly hold customer funds.[90] In addition, an "investment banker" and "persons involved in real estate closings and settlements" are also defined in the BSA as financial institutions, but may not directly receive, send, or transmit any customer funds. While broker-dealers and banks provide custodial services to their customers, they are also authorized to engage in a range of other financial services—such as extending credit—that do not involve taking custody of client funds, but are nonetheless subject to AML/CFT requirements. In sum, the statutory language authorizes Treasury to define as a financial institution any business that engages in activity similar to any activity in which the enumerated financial institutions are authorized to engage, not just specific activities involving the transfer or custody of customer funds.

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[88] House Report 107-250(I), *Financial Anti-Terrorism Act of 2001*, 2001 WL 1249988 at *66 (Oct. 17, 2001); *see also* Pub. L. 107-31, Title III, sec. 321 (Oct. 26, 2001) (section of USA PATRIOT Act adding futures commission merchants, commodity trading advisors, and commodity pool operators to the definition of "financial institutions" for purposes of 31 U.S.C. 5312(a)).

[89] *See* Consolidated Appropriations Act, 2023, Pub. L. 117-328, 136 Stat. 4459, Joint Explanatory Statement (Division E), p.1156, available at https://www.congress.gov/117/cprt/HPRT50347/CPRT-117HPRT50347.pdf.

[90] 31 U.S.C. 5312(a)(2)(L), (M).

In response to the comment asking whether FinCEN intends to regulate other entities or professions that act as agents for a principal and whether this would create ambiguity for those entities and professions, FinCEN notes that the rule would only apply to RIAs and ERAs, categories of entities that are clearly defined under the Advisers Act. If FinCEN were to regulate such other entities or professions in the same manner as in the final rule, this would occur through a new rulemaking on which any affected person could comment. An attorney, trustee, executor, or other person in a principal-agent relationship therefore has no reason to find the scope of the final rule ambiguous as applied to them; they merely need to know if they have registered (or are required to register) or have filed with the SEC as an RIA or ERA.

Regarding whether to apply AML/CFT obligations to private funds rather than the advisers to those funds, FinCEN notes that in many cases the adviser to a private fund will have a relationship (in some cases contractual) with underlying investors and has access to information about underlying investors. Indeed, the SEC requires RIAs and ERAs to report information regarding underlying investors on Form ADV and Form PF.[91] Further, private funds also typically lack employees, and are reliant upon their service providers, such as their advisers, to satisfy the private fund's legal and compliance obligations. Accordingly, the adviser, rather than the fund, is best positioned to apply the full range of AML/CFT measures beyond customer due diligence. FinCEN also acknowledges the point made by commenters that there are AML/CFT requirements that may be applied to all BSA-defined financial institutions, which if amended, would also change the obligations of investment advisers.[92] If FinCEN were to amend these AML/CFT requirements, it anticipates considering the specific attributes of investment advisers when deciding whether and how to apply such requirements

[91] *See supra* note 45.
[92] For instance, FinCEN did not include "investment adviser" in the proposed rule to amend the AML/CFT program requirements for other types of BSA-defined financial institutions. *See* FinCEN, *Anti-Money Laundering and Countering the Financing of Terrorism Programs*, Notice of Proposed Rulemaking, 89 FR 55428 (Jul. 3, 2023).

to investment advisers.

2. Registered Investment Advisers

Proposed Rule: FinCEN proposed to include SEC-registered investment advisers (RIAs) in its definition of investment adviser with regard to the proposed changes to the definition of financial institution under 31 CFR 1010.100.

Comments Received: Six commenters commented on the proposed definition of "investment adviser" and the impact it would have on smaller RIAs. One commenter stated that smaller advisers generally pose less illicit finance risk and should be excluded for the same reasons that FinCEN had proposed to exclude State-registered advisers, namely their lower AUM, fewer customers, and that their customers tend to be localized. Another commenter asserted that the reliance on AUM as the sole determinant for regulatory thresholds overlooks the practical considerations of the size and capacity of RIAs, particularly smaller firms, and that AUM may not accurately reflect the complexity or scale of a firm, especially when AUM is primarily derived from a small number of clients. They suggested that regulatory thresholds be evaluated based on a combination of factors, including the number of employees and average AUM per client.

Two commenters suggested advisers with fewer than 20 employees should be exempt from the requirements of the proposed rule, while one commenter suggested that firms with fewer than 100 employees should be exempt from the requirements of the proposed rule. These commenters claimed that smaller advisers would need to divert resources from client-servicing functions and other compliance requirements to invest in building out an AML/CFT program, and would need to outsource the independent testing requirement to a third party, which would create additional burden.

One commenter requested that investment advisers who do not manage client assets be excluded from the proposed rule. That commenter contended that applying AML/CFT requirements to these investment advisers would produce no valuable information for law

enforcement or regulators, as these advisers are not involved in the management of client assets or funds transfer activity. Another commenter suggested that RIAs whose client's investments are held by an account custodian should be exempt from the proposed regulation.

Final Rule: FinCEN is modifying the definition of "investment adviser" from the proposed rule to exempt certain types of RIAs in response to comments.[93] Accordingly, these types of RIAs will not be subject to the final rule. FinCEN recognizes the concerns raised by commenters regarding the impact of the proposed rule on smaller RIAs, based on AUM or other applicable criteria. As noted in the IA AML NPRM, FinCEN is mindful of the effect of new regulations on small businesses, given their critical role in the U.S. economy and the special consideration that Congress and successive administrations have mandated that Federal agencies should give to small business concerns. FinCEN would like to reiterate that the AML/CFT requirements in this rule are designed to be risk-based and that their cost will vary with the size of the business, along with the risk level of its advisory activities and customers. This means that smaller advisers would be expected to adopt AML/CFT programs that are consistent with their (often) simpler, more centralized organizational structures and so would be more likely to have lower implementation-related costs, absent other high-risk attributes for illicit finance risks.

In reviewing the comments that addressed this issue, FinCEN sought to identify an approach that would balance concerns about the burden on smaller RIAs as well as ensure that such an approach is easily understood by advisers subject to the final rule, systematically addresses illicit finance risk in the investment adviser sector, and is administrable in practice by FinCEN and the SEC (and other relevant regulators). Regarding the proposal to exempt advisers with fewer than either 20 or 100 employees, FinCEN notes that the number of employees that an adviser has is not necessarily aligned with the types of advisory customers, activities, or other factors relevant to the illicit finance risk of an adviser. Some advisers may

[93] These changes reflect, in part, comments received in response to the IA AML NPRM.

manage significant assets from a small number of customers, while other advisers may manage small accounts held by a large number of customers, requiring additional employees to service those accounts. To create a threshold for application of AML/CFT requirements based on employee numbers alone would be inconsistent with Treasury's understanding of risk in the sector. For example, an adviser managing significant assets, but with few employees, is of greater risk of being used by malign actors to launder large sums of money than an adviser with more employees but a small amount of assets under management. Further, imposing such a threshold could lead to perverse outcomes where RIAs are incentivized to hirer fewer non-revenue staff, such as those responsible for AML/CFT compliance. A threshold could also raise questions with respect to other BSA-defined financial institutions, which typically do not have such thresholds. FinCEN therefore declines to apply the proposed exemption for RIAs with fewer than either 20 or 100 employees.

However, FinCEN has sought to appropriately tailor the scope of entities covered by the final rule to balance commenters' concerns about the potential burden on smaller advisers with the investment adviser sector-wide identified illicit finance risks. FinCEN also sought to, while considering the diversity of business models in the advisory business, fashion the rule in a way that can be clearly applied and examined by the SEC, and that is transparent to RIAs and ERAs subject to the rule. Therefore, FinCEN is exempting from the definition of "investment adviser" RIAs that register with the SEC because they are (i) Mid-Sized Advisers, (ii) Multi-State Advisers, and (iii) Pension Consultants, as well as (iv) RIAs that do not report any AUM on Form ADV. The final rule's exemptions apply, however, only to investment advisers that are registered with the SEC on only one or more of the above listed bases, and have no other basis for registration.[94] For example, an investment adviser that registers (or could register)

[94] *See* 31 CFR 1010.100(nnn)(ii)(1) (exempting an investment adviser that is registered "only" because it meets the conditions of being is either a mid-sized adviser, a pension consultant, or a multi-state adviser). For the avoidance of doubt, an investment adviser that is registered because it meets the conditions of more than one of these exemptions, but that is not otherwise required to register, is also exempt from the definition of "investment adviser."

with the SEC both because: (a) it has AUM of more than $110 million (and so registers as a "large advisory firm" on Form ADV) and (b) it would otherwise be required to register with more than 15 states, will not be eligible for the exemption.

As described below and in the Risk Assessment, FinCEN assessed State-registered advisers as generally lower-risk for money laundering, terrorist financing, or other illicit finance activity. Therefore, FinCEN has chosen not to apply the proposed rule to State-registered advisers at this time. At the same time, FinCEN notes that there are certain types of RIAs that resemble State-registered advisers because they would otherwise be prohibited from registering with the SEC but are required to or choose to do so because they satisfy the conditions of certain exemptions from the prohibition on SEC registration.

First, there are certain RIAs who have AUM between $25 million and $100 million but who either: (i) are not required to be registered as an adviser with the state securities authority in the state where they maintain their principal office and place of business; or (ii) are not subject to examination as an adviser by the state in which they maintain their principal offices and places of business (Mid-Sized Advisers).[95] These Mid-Sized Advisers are required to register with the SEC.[96] According to a review of information filed on Form ADV, there are 468 Mid-Sized Advisers who, on average, have $54.6 million in AUM, 6 employees, and 129 customers, 97 percent of which are natural persons.[97]

Second, advisers who would otherwise be required to register in more than 15 states, but have less than $100 million in AUM, can choose instead to register with the SEC (Multi-State Advisers).[98] According to a review of the information filed on Form ADV, in 2023 there were 90 Multi-State Advisers who, on average, have $27.6 million in AUM, 28 employees, and

[95] *See* 15 U.S.C. 80b-3a(a)(2). On Form ADV, these Mid-Sized Advisers check the box in Item 2.A noting they are a "mid-sized advisory firm." *See* Form ADV, Instructions for Part 1A, available at https://www.sec.gov/about/forms/formadv-instructions.pdf.
[96] *See* 15 U.S.C. 80b-3a(a)(2); Form ADV, Instructions for Part 1A, available at https://www.sec.gov/about/forms/formadv-instructions.pdf.
[97] This information is derived from a Treasury review of Form ADV information filed as of July 31, 2023. *See supra* note 25.
[98] *See* 17 CFR 275.203A-2(d).

1,300 customers.[99] While the majority of Multi-State Advisers' customers are legal entities, approximately 90 percent of these customers are United States persons. These firms have a larger number of employees and customers than the average State-registered adviser, but relatively small AUM.[100] FinCEN has decided to exempt these two categories of advisers because their advisory activities and customers are generally lower-risk,[101] more closely resembling State-registered advisers than RIAs who satisfy the general requirements for registration, to address some of the concerns regarding possible burden on smaller advisers that were raised by commenters.

Along with these two categories of RIAs, FinCEN also identified two categories of RIAs that do not directly manage client assets and, as discussed below, pose little or no risk of being used as an entry point into the U.S. financial system for illicit proceeds. First, there are some RIAs who do not manage client assets as part of their advisory activities, and report zero AUM on Form ADV.[102] According to information derived from Form ADV, as of July 2023 there were 655 RIAs who report zero AUM on Form ADV.[103] These RIAs have, on average, 73 employees and 640 customers, and 90 percent of their customers were United States persons.[104] Services provided by these advisers may include non-discretionary financial planning (such as fee-only advice) and publication of securities-related newsletters, "model portfolios," or research reports.

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[99] This information is derived from a Treasury review of Form ADV information filed as of July 31, 2023. *See supra* note 25.
[100] This exemption was designed to allocate regulatory responsibility to the SEC for larger investment advisers, whose activities are likely to affect national markets, and to relieve these advisers of the burdens associated with multiple state regulations. *See* SEC, *Exemption for Investment Advisers Operating in Multiple States; Revisions to Rules Implementing Amendments to the Investment Advisers Act of 1940; Investment Advisers with Principal Offices and Places of Business in Colorado or Iowa*, Final Rule, 63 FR 39708, 39709 (Jul. 24, 1998).
[101] This determination is based on the tailored BSA analysis on this subset of RIAs described *infra*.
[102] *See supra* note 28 (for additional information on how AUM is calculated). The Form ADV instructions provide general criteria for determining whether an investment adviser provides continuous and regular supervisory or management services. For example, the instructions to Item 5.F state that an investment adviser provides such services if it has "discretionary authority over and provide[s] ongoing supervisory or management services," and the Form ADV Glossary of Terms defines "discretionary authority" for these purposes. The Form ADV instructions are available at https://www.sec.gov/about/forms/formadv-instructions.pdf.
[103] This information is derived from a Treasury review of Form ADV information filed as of July 31, 2023. *See supra* note 25.
[104] *Id*.

FinCEN agrees with commenters that such advisers are generally unlikely to have sufficient information about a customer's source of funds, background, and investment objectives to detect suspicious financial activity, and, in some instances, may lack even the names of individual customers. While these advisers may have more employees and customers than the average State-registered adviser, as described above, these advisers' activities are unlikely to be used for illicit finance activity, these advisers may not be able to provide useful information to law enforcement or other government authorities, and, to the extent their customers effect financial transactions in the United States on the basis of the services received from the investment adviser (*e.g.*, trading based on reading research reports), they likely do so as direct customers of a BSA-regulated financial institution, such as through a brokerage account.

FinCEN also identified 186 RIAs who register with the SEC because they are "pension consultants" as that term is defined under the Advisers Act regulations.[105] According to a review of information filed on Form ADV, these RIAs have, on average, 334 employees, and over 20,000 customers.[106] Advisers registered as pension consultants advise at least $200 million in assets held by certain employee benefit plans subject to, or described in, the Employee Retirement Income Security Act of 1974 (ERISA).[107] As FinCEN understands, many of these advisers do not exercise investment discretion over assets they advise, but generally assist other investment advisers or ERISA plan fiduciaries in designing investment lineups for employee benefit plans.[108] In addition, as noted by commenters, employee benefit

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[105] An investment adviser is a "pension consultant" for purposes of rule 203A-2(a)(2) if it provides investment advice to (i) any employee benefit plan described in section 3(3) of ERISA, (ii) any governmental plan described in section 3(32) of ERISA, or (iii) any church plan described in section 3(33) of ERISA (29 U.S.C. 1002(33)). 17 CFR 275.203A-2(a)(2).

[106] This information is derived from a Treasury review of Form ADV information filed as of July 31, 2023. *See supra* note 25.

[107] 17 CFR 275.203A-2(a)(1).

[108] *See Rules Implementing Amendments to the Investment Advisers Act of 1940*, Final Rule, 76 FR 42950, 42959 (Jul. 19, 2011) ("[P]ension consultants typically do not have "assets under management," but we have required these advisers to register with [the SEC] because their activities have a direct effect on the management of large amounts of pension plan assets."); *Rules Implementing Amendments to the Investment Advisers Act of 1940*, Final Rule, 62 FR 28112, 28117 n. 60 (May 22, 1997) ("[A] pension consultant has substantially less control over client

plans are generally subject to strict contribution and withdrawal limits, are usually available to only employees of a participating company, and are subject to other requirements under ERISA (or similar state laws) and/or the Internal Revenue Code (IRC).[109]

While these are not, on average, "smaller" advisers, they exclusively engage in certain activities that are less likely to be used for, or to generate useful information for law enforcement about, illicit finance activity. For instance, their advisory activities on behalf of these employee benefit plans are subject to additional disclosures and restrictions on compensation arrangements under ERISA and other relevant statutes that limit their incentive to facilitate the movement of illicit proceeds. While the misuse of employee benefit plans has been linked to certain types of financial crime, such as fraud or account takeover activity,[110] these plans, whether defined benefit plans or defined contribution plans, are less likely to be misused to obscure illicit proceeds generated from a separate criminal scheme. While defined benefit plans may invest plan assets in private funds, there is not the same uncertainty as to beneficial ownership and source of wealth as with other private fund investors.[111] For defined benefit plans, the funds are typically derived from the employer contributions to the defined benefit plan. In addition, these advisers are less likely to have unique information or knowledge about plan activities or assets to identify and report suspicious activity. As such, FinCEN assesses that these advisers will likely not generate relevant information to assist government authorities in combating illicit finance and subjecting these advisers to the rule's coverage would not meaningfully advance the rule's objectives.

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assets than an adviser that has assets under management."). *See also* SEC, *Staff Report Concerning Examinations of Select Pension Consultants*, 1 (May 16, 2005), available at https://www.sec.gov/news/studies/pensionexamstudy.pdf.

[109] *See, e.g.,* 29 CFR 2520 (rules and regulations for reporting and disclosure for ERISA plans).

[110] *See, e.g.*, FBI, *IC3 2023 Elder Fraud Report*, at 14, 19, available at https://www.ic3.gov/Media/PDF/AnnualReport/2023_IC3ElderFraudReport.pdf.

[111] For the avoidance of doubt, the absence of uncertainty as to beneficial ownership and source of wealth is the case only when the investment in a private fund comes from a defined benefit plan. When an investment adviser directs investment into a private fund, the risk of any other investments directed into the private fund must be evaluated separately. An investment adviser who is not a pension consultant and advises a private fund that receives investments from a defined benefit plan may not exclude such private fund from its obligations under this rule, although, as explained below, such an adviser may account for the source of such investment in determining which policies, procedures, and controls to apply to the fund on a risk basis.

FinCEN, in coordination with federal law enforcement, reviewed BSA reporting associated with these four groups of RIAs (*i.e.*, Mid-Sized Advisers, Multi-State Advisers, pension consultants, and advisers who report zero AUM on Form ADV). This analysis found that 5.5 percent of these RIAs were associated with, or referenced in, at least one SAR (*i.e.*, they were identified either as a subject or in the narrative section of the SAR) between 2013 and 2023. That is substantially less than the 15.4 percent of all RIAs and ERAs that were associated with or referenced in at least one SAR between 2013 and 2021. When considering this information with other information on illicit finance threats available to FinCEN, and the structural factors discussed above that may make these subgroups of RIAs less vulnerable to misuse for illicit finance, FinCEN has determined that exempting these groups of RIAs from the final rule would be consistent with the objective of this rule.

Therefore, for all of the reasons noted above, FinCEN has determined to exempt from the definition of "investment adviser" investment advisers that register with the SEC solely on the basis that they are Mid-Sized Advisers, Multi-State Advisers, pension consultants, and advisers who report zero AUM on Form ADV. FinCEN notes that, should the registration status of an RIA change such that the RIA would no longer be exempt from the definition of "investment adviser," the adviser will become subject to the AML/CFT requirements in this rule as of its next annual updating amendment to Form ADV.[112] The scope of such advisers exempted from the final rule's definition of "investment adviser" is reflected in the regulatory text added at 1010.100(nnn)(ii).

3. Exempt Reporting Advisers

Proposed Rule: FinCEN proposed to include Exempt Reporting Advisers (ERAs) in its definition of "investment adviser" with regard to the proposed changes to the definition of financial institution under 31 CFR 1010.100.

[112] Under the Instructions to Form ADV, Item 2 of Part 1A, which addresses an investment adviser's basis for registration with the SEC, must be updated annually.

Comments Received: Four commenters supported FinCEN's proposal to include ERAs in the definition of "investment adviser," noting the significant illicit finance risks present in this subset of the investment adviser sector and the "loophole" that would be created by subjecting RIAs but not ERAs to the proposed regulations. Some of these commenters noted that the Risk Assessment found that the risks were higher amongst ERAs than RIAs. One commenter stated that ERAs should be subject to the requirements in the proposed rule because they were already subject to rules and prohibitions under the Federal securities laws designed to root out misconduct in financial markets, and that the rationale for applying these requirements supports applying AML/CFT requirements to ERAs.

However, other commenters were generally opposed to the rule's scoping-in of ERAs, with one commenter asserting the outsized regulatory impact of the proposed regulation on ERAs was not merited given the low number of examples provided regarding illicit finance risk amongst ERAs. Another commenter stated that FinCEN lacked statutory authority to include ERAs in the scope of the proposed regulation. One commenter claimed that FinCEN had failed to put forward an adequate reason for the expansion of AML/CFT requirements to ERAs beyond citation to the Risk Assessment and further claimed that the Risk Assessment does not identify ERAs as particularly vulnerable to illicit finance risks. One commenter suggested that ERAs below a certain threshold of U.S. AUM be exempt from the proposed rule, and that this AUM threshold should be measured similar to the private fund adviser exemption in the Advisers Act and its implementing regulations. The commenter claimed that this would be consistent with the goal of the SEC to avoid imposing U.S. regulatory and operational requirements on a foreign-located adviser's foreign-located advisory business.

Final Rule: FinCEN is implementing this part of the definition of "investment adviser" without change from the proposed rule. Accordingly, each ERA will be subject to the final rule. For the reasons stated above, in Section III.B.1, FinCEN has determined that it has legal authority to determine that ERAs are "financial institutions" for BSA purposes. Including

ERAs in scope of the regulation, as proposed, is supported by the findings of the Risk Assessment as well as the responses from several commenters supporting inclusion of ERAs demonstrating the illicit finance and national security risks posed by ERAs. As noted by a commenter, while ERAs are not subject to certain requirements under Federal securities laws, they are subject to many of the requirements designed to prevent misconduct in financial markets, for instance. In addition, FinCEN agrees with the point made by several commenters that exempting ERAs could create a loophole through which illicit actors would be able to access a range of private funds without being directly subject to AML/CFT requirements. The Risk Assessment found that, within the investment adviser sector, ERAs bear the highest risks as they solely advise either private funds or venture capital funds, both of which were found in the Risk Assessment to be involved in illicit finance and other criminal investigations carried out by U.S. law enforcement.[113] In addition, private funds are more likely than other types of customers to be based in jurisdictions with weaker and less effective AML/CFT controls, making it more difficult for the ERA to assess the risk posed by the relationship or prevent abuse.[114]

Through the course of its advisory activities, an ERA may collect information about either the private fund it advises (the customer of the ERA) or the underlying investors in that private fund that may alert the ERA to illicit activity. FinCEN has also assessed that ERAs,

[113] *See supra* note 47 and accompanying text (discussing the analysis of BSA reporting linked to private fund advisers). *See also* Risk Assessment, *supra* note 2, at 20–22, 26–28 (noting that private funds, including those advised by ERAs, have served as an entry point into the U.S. financial system for sanctioned Russian oligarchs and their associates, and as back door for hostile nation-state actors to acquire assets of interest in the United States, such as equity stakes in companies developing critical or emerging technologies).

[114] Only 52 percent of the total net asset value of private funds managed by U.S. investment advisers is held by funds domiciled in the United States. Of the remaining 48 percent held in offshore funds, most is held by funds domiciled in the Cayman Islands (33 percent) and the remainder is held by funds in Luxembourg (5 percent), Ireland (4 percent), Bermuda (1 percent), British Virgin Islands (1 percent), United Kingdom (1 percent), and other jurisdictions (4 percent). *See* SEC, Private Fund Statistics, Third Calendar Quarter 2023, Page 13, Table 11, https://www.sec.gov/files/investment/2023q3-private-funds-statistics-20240331.pdf. These figures come from publicly available data provided by the SEC aggregating periodic filings made on Form PF. While this data represents only the subset of RIAs required to file Form PF (RIAs that manage at least $150 million in private fund AUM), this accounts for a substantial amount of overall private fund assets and FinCEN assesses the geographic distribution of fund domiciles is generally consistent for ERAs. *See also* 89 FR at 12114 (discussion on the effectiveness of foreign AML/CFT supervision for private funds domiciled in certain jurisdictions).

along with RIAs advising private funds, are exposed to higher money laundering, terrorist financing, or other illicit finance risks compared to advisers who do not advise private funds.[115] Adding ERAs to the definition of "investment adviser" is therefore consistent with the categorization of other entities as a financial institution and with FinCEN's authority to make changes to the list of financial institutions under FinCEN's regulations implementing the BSA in order to combat illicit activity.

FinCEN also declines to limit the applicability of the proposed rule to only certain ERAs with assets exceeding a specified threshold, such as $100 million AUM, as was proposed by one commenter. FinCEN considered setting such a threshold and understands that many RIAs below this threshold will not be subject to the rule, given the rule's definition of "investment adviser." However, as noted above, FinCEN has concerns that such a threshold would mean that ERAs advising funds with fewer assets but carrying material illicit finance risks would remain out of scope of AML/CFT controls. The Risk Assessment and some of the underlying examples analyzed for the Risk Assessment show that private funds with relatively small AUM may still bear substantial illicit finance risk.[116] Such a threshold would also be challenging to administer; for example, ERAs do not currently report AUM on Form ADV.[117] In addition, a threshold based on AUM or similar metric would mean that an ERA hovering just above or below the threshold would come in and out of coverage based on market returns, making it more challenging for the SEC and FinCEN to accurately assess systemic money laundering, terrorist financing, or other illicit finance risk among ERAs.

FinCEN also declines to categorically exclude ERAs reporting zero private fund assets on Form ADV. FinCEN notes that ERAs do not report regulatory AUM on Form ADV, and

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[115] *See supra* Section III.A; Risk Assessment, *supra* note 2, at 20–22, 32.

[116] *See* Risk Assessment, *supra* note 2, at 18, 20, and 31 (noting the highest illicit finance risk in the sector is for ERAs). Several of the 20 private fund advisers identified as having significant ties to Russian oligarch investors or Russian-linked illicit activities managed private funds with less than $100 million in AUM.

[117] ERAs do not report AUM on Form ADV, but instead report gross assets for each private fund they advise. However, they only report gross assets for a private fund if that fund is not reported by an RIA or ERA in its own Form ADV; therefore, some ERAs report zero gross assets because all of the funds they advise are also reported by an RIA or ERA. *See* Form ADV, Instructions for Part 1A.

that the information they do report—gross assets of each private fund they advise—does not necessarily distinguish between ERAs that manage client assets from those that do not. ERAs that report zero gross assets for private funds they advise may still have discretion for customer assets and thus present the risk of being misused for illicit finance activities.[118] FinCEN therefore declines to exclude ERAs reporting zero gross assets for private funds they advise from the requirements of the final rule.

Regarding the applicability of the requirements of the final rule to the activities of foreign-located ERAs, those are discussed in the next section. FinCEN notes the concerns raised by some commenters about the specific burden that may apply to ERAs but reiterates that the AML/CFT requirements in this rule are designed to be risk-based and their cost will vary with the size of the business, along with the risk level of its advisory activities and customers. FinCEN will work with the SEC staff so that any examinations of ERAs for compliance with requirements of the final rule take into account the risk-based nature of AML/CFT programs.

4. Foreign-Located Investment Advisers

Proposed Rule: In the proposed rule, FinCEN noted that the proposed definition of "investment adviser" would include certain foreign-located investment advisers that are physically located abroad (*i.e.*, whose principal office and place of business is outside the United States) but nonetheless are: (i) registered or required to register with the SEC (for RIAs), or (ii) file reports with the SEC on Form ADV (for ERAs). FinCEN therefore proposed that the rule's requirements would "apply on the same basis" to such foreign-located advisers as to domestic advisers.[119] FinCEN requested comment on any challenges for foreign-located advisers in taking this approach, including any potential conflicts with domestic or foreign law.

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[118] *See* 17 CFR 275.203(m)-1(d)(1) (excluding from the calculation of regulatory AUM, for purposes of the private fund adviser exemption, assets associated with certain types of private funds). *See also* Risk Assessment, *supra* note 2, at 18, 20.
[119] 89 FR at 12130.

Comments Received: FinCEN received eight comments regarding the application of the proposed rule to foreign-located investment advisers. One commenter stated that the proposed scope of application of the proposed rule conflicts with Congress' intent during its original passage of the BSA in 1970. Other commenters raised concerns about the application of the proposed rule deviating from past positions of FinCEN regarding BSA regulation and the SEC regarding Advisers Act regulation. One commenter suggested an AUM threshold for foreign-located ERAs that would draw from the SEC's AUM thresholds for RIAs and its approach to measuring AUM for foreign-located private fund RIAs, specifically suggesting that foreign-located ERAs with less than $100 million of U.S. AUM be exempt from the proposed rule.

Several commenters raised concerns that foreign-located investment advisers will face significant challenges in adhering to the proposed BSA requirements. First, commenters indicated that obligations under the BSA may not be consistent with local privacy rules and other requirements, potentially creating "conflict-of-laws and compliance challenges." Another commenter suggested that applying this rule to foreign-located advisers would "deprive U.S. clients and investors from [sic] the expertise of foreign-located investment advisers" due to additional compliance burdens and "make it less likely that non-U.S. investment advisers hire U.S.-based employees or engage in other economic activity in the United States." One commenter noted that the substantive provisions of the Advisers Act do not apply to "a non-U.S. adviser's relationship with its non-U.S. clients and non-U.S. funds (including funds with U.S. investors)" and recommended that for non-U.S. advisers, this rule not apply "with respect to their non-U.S. clients, including non-U.S. private funds, even if such non-U.S. private funds have U.S. investors."

Commenters called for FinCEN to provide clarification on the reach of the proposed rule to foreign-located advisers. One commenter called on FinCEN to clarify that application of the proposed rule would be confined to investment advisers "organized and operating in the U.S., or to foreign-based or foreign-organized [investment advisers] only to the extent they are

operating in the U.S." One commenter called for foreign-located ERAs from Financial Action Task Force (FATF)-compliant jurisdictions to be excluded from the rule and another raised concerns about the proposal's application to foreign-located subadvisers. Several commenters called for FinCEN to fully exempt foreign-located advisers from the proposed rule.

Final Rule: FinCEN is applying the requirements of the proposed rule to foreign-located investment advisers, and is clarifying the scope of their advisory activities that are subject to the requirements in the final rule. Accordingly, the final rule will define "investment adviser" to include foreign-located investment advisers that are registered or required to register with the SEC (RIAs, subject to the exemptions set forth in 1010.100(nnn)(ii) for certain types of RIAs) or that file reports with the SEC on Form ADV (ERAs). Including foreign-located investment advisers in this final rule is consistent with the BSA's express authorization for the Secretary to, by regulation, determine new types of financial institutions[120] as well as the BSA's intelligence, national security, and counter-intelligence purposes, which are inherently international in nature.[121] Moreover, this interpretation of authority granted by the BSA is aligned with FinCEN's existing approach applying BSA obligations to certain types of foreign-located BSA-defined financial institutions that have a nexus to the United States. FinCEN has considered the illicit finance risks arising from foreign-located investment advisers and the funds they advise, as well as the alternatives for mitigating these risks consistent with the purposes of the BSA enumerated at 31 U.S.C. 5311. For these reasons, FinCEN has determined that the requirement of a U.S. nexus provides a lawful basis for this rule to apply to foreign-located investment advisers.

Section 1032.110 of the final rule defines a "foreign-located investment adviser" as an "investment adviser whose principal office and place of business is outside the United States." Section 1032.111 of the final rule sets forth the scope of a foreign-located investment adviser's

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[120] 31 U.S.C. 5312(a)(2)(Y).
[121] *See* 31 U.S.C. 5311.

obligations, stating that the requirements of part 1032 apply to a foreign-located investment adviser only with respect to its advisory activities that (i) take place within the United States, including through involvement of U.S. personnel of the investment adviser, such as the involvement of an agency, branch, or office within the United States, or (ii) provide advisory services to a U.S. person or a foreign-located private fund with an investor that is a U.S. person.[122] With respect to services provided to a foreign-located private fund with an investor that is a U.S. person, as described below, the rule incorporates SEC definitions and standards for identifying investors that are U.S. persons in foreign-located private funds.

To determine whether an investment adviser is a foreign-located investment adviser (as defined at section 1032.110), the adviser must look to its "principal office and place of business," which FinCEN considers to be the executive office of the investment adviser from which the officers, partners, or managers of the investment adviser direct, control, and coordinate the activities of the investment adviser.[123] RIAs and ERAs are required to identify their principal office and place of business on Form ADV, making it clear which investment advisers consider themselves to be "foreign-located investment advisers" for the purposes of this final rule.

Moreover, all foreign-located advisers subject to the final rule have a U.S. nexus with certain advisory activities such that they are required to or have chosen to register with or file reports with the SEC, and therefore are subject to SEC regulation. The Advisers Act requires registration of investment advisers that have a minimum amount of assets under management[124] and who "make use of the mails or any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser," unless subject to an exemption,

[122] In contrast, an adviser with its principal office and place of business in the United States must comply with the final rule with respect to all of its advisory activities.
[123] This definition is consistent with that used by the SEC in regulations applicable to investment advisers. *See* 17 CFR 275-222.1(b).
[124] Certain other investment advisers that make use of the mails or any means or instrumentality of interstate commerce in connection with their business as an investment adviser may also be permitted or required to register with the SEC. See footnote 23, *supra*.

such as ERAs,[125] and the scope of the registration requirement has been further refined in SEC regulations and guidance as discussed above. Moreover, de minimis ties to the United States do not automatically make a foreign-located investment adviser subject to the final rule, particularly because foreign private advisers as defined pursuant to the Advisers Act are not subject to the requirements of the final rule. An adviser may be a foreign private adviser if it: (i) has no place of business in the United States; (ii) has, in total, fewer than 15 clients in the United States and investors in the United States in private funds advised by the adviser; (iii) has aggregate assets under management attributable to these clients and investors of less than $25 million; and (iv) does not hold itself out generally to the public in the United States as an investment adviser.[126] Foreign-located RIAs and ERAs covered by the final rule therefore not only have sufficient nexus to the United States to trigger SEC registration or filing requirements, but also a U.S. nexus too great to qualify as a foreign private adviser (or have voluntarily chosen to be regulated as RIAs or ERAs).[127]

As noted above, a foreign-located investment adviser's advisory activities must also have a U.S. nexus to be subject to the requirements of the final rule. Under section 1032.111, foreign-located investment adviser's advisory activities are subject to the requirements of the rule if the advisory activities: (i) take place within the United States, including through involvement of U.S. personnel of the investment adviser, such as the involvement of an agency, branch, or office within the United States, or (ii) provide advisory services to a U.S. person or a foreign-located private fund with an investor that is a U.S. person (subject to specified definitions of "foreign-located private fund," "investor," and "U.S. person").

For the purposes of section 1032.111, U.S. personnel means, regardless of citizenship, any director, officer, employee, or agent of the investment adviser conducting advisory

[125] 15 U.S.C. 80b-3(a), (l), (m).
[126] *See* 15 U.S.C. 80b-2(a)(30), 80b-3(b)(3).
[127] Certain RIAs or ERAs may opt to register or report to the SEC despite the fact that they could rely on the foreign private adviser definition; such investment advisers have chosen to subject themselves to the U.S. regulatory requirements and supervision applicable to such advisers, and so will be subject to this final rule.

activities from a U.S. agency, branch, or office of the investment adviser. U.S. personnel would be involved in advisory activities if, for example, an employee of the investment adviser manages assets of a client from a U.S. office or other U.S. workplace of the investment adviser, or if the employee works remotely from the United States on a regular basis. Conversely, a U.S. citizen employee of the investment adviser managing assets of a client from a non-U.S. office of the foreign-located investment adviser would generally not constitute U.S. personnel involved in advisory activities for this purpose.[128] The term "agency, branch, or office" of the investment adviser is not exclusive, and the rule would apply to any location in the United States from which U.S. personnel of the foreign-located investment adviser perform advisory activity. For the avoidance of doubt, personnel that perform activity that is clerical or administrative in nature are not involved in advisory activity for purposes of the final rule.[129]

For a foreign-located investment adviser, the final rule also applies to the provision of advisory services to a U.S. person or a foreign-located private fund with an investor that is a U.S. person. This includes, but is not limited to, providing investment advice to a U.S. person, regardless of the location from which such investment advice is provided. A foreign-located investment adviser would be providing advisory services to a U.S. person if, for example, the investment adviser manages assets from an office outside of the United States on behalf of an individual U.S. person.

For purposes of determining a foreign-located investment adviser's activities subject to this rule, the final rule defines "U.S. person" as a person meeting the definition in 17 CFR 230.902(k), which is part of Regulation S under the Securities Act. The SEC relied on this definition for purposes of the foreign private adviser exemption because it provides specific

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[128] However, a U.S. employee (of a foreign-located investment adviser) whose advisory activities are undertaken from a non-U.S. office for the purpose of evading the final rule or as part of a course of conduct the employee undertook while based in the United States, would constitute U.S. personnel involved in advisory activities and be covered by the final rule.

[129] This discussion of "clerical or administrative" activity is intended to apply to foreign-located investment advisers only and is not intended to apply for any other purpose. This is because it aligns with the reporting of "clerical workers" on Item 5.A of Form ADV with which investment advisers are already familiar and enhances consistency with SEC regulation in a portion of the final rule that references several SEC regulations.

rules when applied to various types of legal structures.[130] FinCEN adopts the Regulation S definition for this reason, consistency with other SEC regulations cross-referenced in section 1032.111, and administrability because this definition is already familiar to investment advisers. This definition also includes an element designed to mitigate potential evasion concerns.[131]

With respect to a foreign-located investment adviser's advisory activities to a foreign-located private fund, the final rule requires a foreign-located investment adviser to determine whether any foreign-located private fund that it advises has at least one investor who is a U.S. person.[132] This determination must be made with respect to every investor in that foreign-located private fund in accordance with SEC requirements familiar to private fund advisers. If a foreign-located private fund has at least one U.S. person investor, the foreign-located investment adviser must apply the final rule with respect to that foreign-located private fund. This standard is designed to be both administrable—it incorporates SEC standards for identifying investors that are U.S. persons in private funds—and tailored to address risks to the U.S. financial system through foreign-located private funds, which FinCEN has identified as presenting significant illicit finance risk.

The final rule defines "foreign-located private fund" by reference to section 202(a)(29) of the Advisers Act, which defines "private fund" to mean "an issuer that would be an investment company, as defined in section 3 of the [Company Act] (15 U.S.C. 80a–3), but for section 3(c)(1) or 3(c)(7) of that Act." The "foreign-located" aspect of the definition refers to a fund that is a legal entity or arrangement that is incorporated or organized outside the United States and therefore is not a U.S. person for purposes of the final rule. This definition therefore

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[130] *See* 76 FR 39645, 39697-39678 (Jul. 6, 2011).

[131] 17 CFR 230.902(k)(1)(viii) (encompassing any corporation or partnership formed by a U.S. person principally for the purpose of investing in unregistered securities unless owned or incorporated by accredited investors who are not natural persons, estates or trusts).

[132] A U.S.-located private fund advised by a foreign-located investment adviser is itself a U.S. person under this definition, and so a foreign-located investment adviser will also be required to apply the final rule with respect to any U.S.-located private fund it advises, irrespective of the presence or absence of any U.S. person investors in such U.S.-located private fund.

covers the types of foreign-located private funds advised by ERAs and that FinCEN has identified as giving rise to illicit finance risks. It is also commonly used by investment advisers in complying with the federal securities laws, including, for example, in completing multiple portions of Form ADV.[133]

The final rule defines "investor" by reference to Advisers Act Rule 202(a)(30)–1(c)(2), under which a foreign private adviser can determine whether private funds it advises have more than 14 "investors in the United States." That rule, in turn, refers to sections 3(c)(1) and 3(c)(7) of the Company Act, which generally exclude certain issuers from the definition of investment company based on the number of beneficial owners or qualifications of their security holders, respectively.[134] Consistent with statements by the SEC and its staff and the SEC's underlying authorities,[135] depending upon the facts and circumstances, persons other than the nominal holder of a security issued by a private fund may be counted as the beneficial owner under section 3(c)(1), or be required to be a qualified purchaser under section 3(c)(7).[136] For purposes of section 3(c)(1), if a company owns 10 percent or more of the outstanding voting securities of the issuer (the prospective private fund), and is, or but for section 3(c)(1) or 3(c)(7) of the Company Act, would be an investment company, the issuer must "look through" that investing

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[133] *See* Form ADV Glossary, defining Private Fund to mean "An issuer that would be an investment company as defined in section 3 of the Investment Company Act of 1940 but for section 3(c)(1) or 3(c)(7) of that Act."
[134] Section 3(c)(1), 15 U.S.C. 80a-3(c)(1), excludes from the definition of investment company a privately-offered issuer having fewer than a certain number of beneficial owners. Section 3(c)(7), 15 U.S.C. 80a-3(c)(7) excludes from the definition of investment company a privately-offered issuer the securities of which are owned exclusively by "qualified purchasers" (generally, persons and entities owning investments whose value exceeds a specified threshold).
[135] *See, e.g.*, 76 FR 39645, 39676 (Jul. 6, 2011); *Privately Offered Investment Companies*, Final Rule, 62 FR 17512, 17519, 17524 (Apr. 9, 1997) ("The Commission understands that there are other forms of holding investments that may raise interpretative issues concerning whether a Prospective Qualified Purchaser 'owns' an investment. For instance, when an entity that holds investments is the 'alter ego' of a Prospective Qualified Purchaser (as in the case of an entity that is wholly owned by a Prospective Qualified Purchaser who makes all the decisions with respect to such investments), it would be appropriate to attribute the investments held by such entity to the Prospective Qualified Purchaser."); *see also* Cornish & Carey Commercial, Inc., SEC Staff No-Action Letter (June 21, 1996) (staff discussed the application of section 3(c)(1)(A) to an issuer relying on section 3(c)(1)), available at https://www.sec.gov/divisions/investment/noaction/1996/cornishcarey022696.pdf.
[136] Section 3(c)(1)(A) of the Company Act requires a private fund relying on section 3(c)(1) to "look through" any company that owns 10 percent or more of the company's voting securities. "Voting security" is defined in section 2(a)(42) of the Company Act, 15 U.S.C. 80a2(a)(42). In contrast, this 10 percent look-through is not required for purposes of section 3(c)(7).

company to the holders of the company's securities.[137] In the context of this rule, a foreign-located investment adviser is required to perform the same look through with respect to any private fund it advises that relies on section 3(c)(1) of the Company Act with two modifications: (1) the foreign-located investment adviser must count beneficial owners of a private fund's commercial paper as investors (consistent with Advisers Act Rule 202(a)(30)-1(c)(2)); and (2) a person who is considered a beneficial owner for purposes of section 3(c)(1) will be considered an "investor" in the private fund despite holding its interests indirectly. If this look through results in a U.S. person being considered an investor in the private fund, the foreign-located private adviser must apply the requirements of the final rule to that fund.

Similarly, for purposes of both section 3(c)(1) and section 3(c)(7), a foreign-located investment adviser will be required to "look through" any entity that is formed for the purpose of investing in a foreign-located private fund it advises.[138] For purposes of the final rule, if a foreign-located investment adviser determines that an investing entity has been formed for purposes of investment in the private fund, such an adviser must look through the entity to determine whether it has U.S. person investors. Consistent with statements by the staff of the SEC and the SEC's underlying authorities,[139] a foreign-located investment adviser's determination that an entity is formed for the specific purpose of investing in a foreign-located private fund will depend upon an analysis of all of the surrounding facts and circumstances (including any knowledge that the foreign-located adviser has regarding the identity of its customers). Thus, to the extent that a foreign-located investment adviser determines that there

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[137] *See* 15 U.S.C. 80a-3(c)(1)(A).

[138] *See, e.g.*, 17 CFR 270.2a51-3(a) (discussing an entity formed for the purpose of acquiring securities of an issuer relying on section 3(c)(7)); Cornish & Carey Commercial, Inc., SEC Staff No-Action Letter (June 21, 1996) (staff discussing an entity formed for the purpose of acquiring securities of an issuer relying on section 3(c)(1)), available at https://www.sec.gov/divisions/investment/noaction/1996/cornishcarey022696.pdf. For purposes of section 3(c)(1), SEC staff guidance states that if a company or fund invests more than 40 percent of its assets in a 3(c)(1) fund, it is potentially formed for the purpose of investing in a 3(c)(1) fund. For purposes of section 3(c)(7), 17 CFR 270.2a51-3(a) requires an investment adviser to determine whether the beneficial owners of the entity formed for purposes of investment in the fund are also qualified purchasers.

[139] *See, e.g.,* American Bar Association Section of Business Law, SEC Staff No-Action Letter (Apr. 22, 1999) at 19-20 (describing circumstances under which an entity would be deemed to be formed for the specific purpose of acquiring securities in a private fund that relies on section 3(c)(7)), available at https://www.sec.gov/divisions/investment/noaction/1999/aba042299.pdf.

is an underlying U.S. person investor (by conducting a look-through or because of other information available to the foreign-located investment adviser), the foreign-located investment adviser must apply the final rule with respect to the foreign-located private fund in which the U.S. person is indirectly invested.

These tests are incorporated into the final rule in order to address the illicit finance risks posed by foreign-located investment advisers. The greatest risks arise, as discussed above, from private funds advised by foreign-located investment advisers. The requirement of a U.S. nexus in the form of at least one investor that is a U.S. person is consistent with FinCEN's desire to focus on risks to the U.S. financial system. The presence of a U.S. person investor increases the likelihood that illicit finance risk associated with a private fund affects the U.S. financial system and the likelihood that U.S. persons might be involved in the underlying illicit finance activity. Although the presence of one investor that is a U.S. person requires the investment adviser to apply the requirements of the final rule to the entirety of a private fund, FinCEN notes that the fund as a whole is the customer of the foreign-located investment adviser. By their nature, private funds involve the commingling of investor assets in a pooled vehicle. As previously detailed in the Risk Assessment, the pooled nature of such funds may be used to obscure ownership of investments (which may present the possibility of higher returns on capital) by illicit actors who seek stable returns and do not need immediate access to capital.[140]

While FinCEN considered other thresholds for establishing an appropriate U.S. nexus, including whether or not to apply the rule's obligations with respect to non-U.S. private funds with U.S. investors, FinCEN balanced addressing the relevant illicit finance risks to the U.S. financial system (such as arising from investments by illicit actors in non-U.S. private funds that are commingled with funds from U.S. investors and enter the U.S. financial system[141]), the purposes of the BSA, and administrability. FinCEN also considered, as noted by a commenter,

[140] *See* Risk Assessment, *supra* note 2, at 16.
[141] *Id*. at 16-20.

the SEC's approach in applying substantive provisions of the Advisers Act and the purposes underlying that approach. FinCEN further considered other SEC rules and practices, such as the foreign private adviser exemption and Advisers Act Rule 202(a)(30)-1(c)(2). The SEC standards incorporated in section 1032.111 are used to focus on illicit finance risks associated with private funds specifically and are familiar to foreign-located investment advisers from SEC regulations.[142] By setting a clear minimum standard of at least one U.S. private fund investor defined by reference to Advisers Act Rule 202(a)(30)-1(c)(2), this places clear limits on the ability of investment advisers or illicit actors seeking to obscure their ownership or control of certain assets through a private fund to avoid application of the final rule by admitting U.S. persons as indirect investors through intermediate entities. Advisers must "look through" nominee and similar arrangements to the underlying holders of private fund-issued securities to determine whether the private fund has an investor that is a U.S. person.

Moreover, a foreign-located investment adviser retains the option of availing itself of foreign private adviser status if it has limited U.S. ties and does not wish to apply the requirements of the final rule to private funds with lower levels of U.S. investment. Given this option, FinCEN anticipates it is unlikely that a significant number of foreign-located investment advisers will be required to apply the requirements of the rule on the basis of having a small number of investors that are U.S. persons or small amount of U.S. investment. When a foreign-located investment adviser's activities involving a private fund fall within the scope of the final rule, the foreign-located investment adviser will be expected to subject its advisory activities with respect to the fund to internal policies, procedures, and controls reasonably

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[142] The standards for determining beneficial ownership of investments in private funds, including by U.S. persons, should be familiar to investment advisers from SEC reporting requirements and determining the status of such funds under the Company Act. *See* Instructions to Form PF, Section 2b Item 16 (requiring reporting of a fund's equity that is beneficially owned by various categories of investors, including individuals who are U.S. persons); Question 16 of Section 7.B.(1) of Schedule D to Form ADV (requiring the reporting of the percentage of a private fund's beneficial owners that are non-U.S. persons); 15 U.S.C. 80b-2(a)(30) and 17 CFR 275.202(a)(30)-1 (foreign private adviser exemption). *See also* 76 FR 39645, 39678 (Jul. 6, 2011) ("A non-U.S. adviser would need to count the same U.S. investors [as in connection with Investment Company Act exclusions] (except for holders of short-term paper with respect to a fund relying on section 3(c)(1)) in order to rely on the foreign private adviser exemption. In this respect, therefore, the look-through requirement of the foreign private adviser exemption will generally not impose any new burden on advisers to non-U.S. funds.").

designed to prevent the investment adviser from being used for money laundering, terrorist financing, or other illicit finance activities and to achieve compliance with the applicable provisions of the BSA and implementing regulations. Advisers are often involved in implementing such internal policies, procedures, and controls for their funds for both AML/CFT requirements (if the fund implements such requirements voluntarily or to comply with the AML/CFT laws of a foreign jurisdiction) as well as requirements under securities or other corporate laws. Therefore, foreign-located investment advisers should be able to apply the requirements of this final rule, including applicable internal policies, procedures, and controls, to advisory activities with respect to these private funds, and doing so will help prevent these funds from becoming gateways into the U.S. financial system for illicit finance activity.

Certain of a foreign-located investment adviser's advisory activities are not subject to the final rule. This is similar to the SEC's regulation of investment advisers pursuant to the Advisers Act: non-U.S. advisers are not required to apply the substantive provisions of the Advisers Act when advising non-U.S. clients.[143] While taking into account the distinct purposes of the BSA, FinCEN believes that the final rule's requirements should not apply to a foreign-located adviser when it: (i) provides services exclusively to a foreign-located person,[144] and (ii) the personnel providing such advisory services are all outside of the United States as discussed above.

To ensure that activities within the scope of the rule are properly included, a foreign-located investment adviser should (i) determine to the extent reasonable and practicable whether its customers and the investors in its private funds are within the scope of this rule based upon the regulatory text as clarified in this preamble and any relevant future guidance

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[143] *See, e.g.*, 76 FR 39645, 39681 (Jul. 6, 2011); SEC No-Action Letter, *Uniao de Bancos Brasileiros S.A. (Unibanco)*, 1992 WL 183054 at *3 (Jul. 28, 1992), available at https://www.sec.gov/divisions/investment/noaction/1992/uniaodebancos072892.pdf. The SEC's approach considers the location of the client. The final rule does not modify the SEC's position on the application of the Advisers Act to non-U.S. investment advisers.

[144] Other than a private fund with a U.S person investor, as described above.

that FinCEN might issue, and (ii) ensure that it does not provide advisory services to its private fund customers in a manner that results in the adviser being unable to identify a potential U.S. customer or investor.

The final rule states that upon request, a foreign-located investment adviser must make available to FinCEN or the SEC (in its capacity as delegated examiner for this rule) records and reports required under this rule and any other records that it has retained regarding the scope of its activities covered by this rule. As discussed below, the records that an investment adviser—including a foreign-located investment adviser—is required to maintain to comply with the requirements of the final rule include those required when developing and implementing an AML/CFT program as required under section 1032.210, including but not limited to a written AML/CFT program that includes internal policies, procedures, and controls, as well as those required by subpart D of the final rule, which are generally records of certain transactions and transfers of funds.

As for any investment adviser subject to this final rule, for a foreign-located investment adviser, properly scoping the advisory activities covered by its AML/CFT program is an important part of ensuring that its AML/CFT program is reasonably designed to prevent the investment adviser from being used for money laundering, terrorist financing, or illicit finance activities, and of achieving and monitoring compliance. As part of establishing a risk-based and reasonably designed AML/CFT program, and to comply with other requirements in this final rule, a foreign-located investment adviser should generate records to reflect how it properly scoped the advisory activities covered by the final rule. A foreign-located adviser must provide such records to FinCEN and the SEC upon request.

The final rule's treatment of foreign-located investment advisers broadly is consistent with how FinCEN has treated other foreign-located financial institutions, such as foreign-located money service businesses (MSBs) and broker-dealers. Specifically, the definition of MSBs under FinCEN's regulations includes persons engaged in specified activities "wherever

located, doing business … wholly or in substantial part" within the United States.[145] "This includes but is not limited to the maintenance of any agent, agency, branch, or office within the United States."[146] FinCEN's 2011 MSB final rule explained that whether a person engages in MSB activities is based on "all of the facts and circumstances," including whether U.S. persons are obtaining services from the foreign-located MSBs.[147] FinCEN applies the same principles taking into account all of the facts and circumstances of a foreign-located investment adviser's activities, tailored as described above to the investment adviser sector, in this rule.

Foreign-located broker-dealers that are registered or required to be registered with the SEC are similarly subject to BSA requirements. FinCEN regulations define a "broker-dealer" as a "person registered or required to be registered with the SEC under the Exchange Act, except persons who register pursuant to 15 U.S.C. 78o(b)(11)."[148] Foreign located broker-dealers may be required to register with the SEC,[149] and if they are required to register, such broker-dealers are required to comply with applicable BSA requirements for broker-dealers, including the maintenance of an AML/CFT program and compliance with BSA recordkeeping requirements.[150] While broker-dealers registered with the SEC that are located outside the United States are not required to file SARs,[151] this is a policy choice that FinCEN made for broker-dealers based on the relevant considerations for that sector and does not reflect an interpretation of FinCEN's authority to require such reporting.[152]

Although MSBs and broker-dealers located abroad have been subject to FinCEN's regulations under the BSA, some commenters suggested that the final rule's application to

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[145] 31 CFR 1010.100(ff).
[146] *Id.*
[147] FinCEN, Bank Secrecy Act Regulations; Definitions and Other Regulations Relating to Money Services Businesses, Final Rule, 76 FR 43585, 43588 (Jul. 21, 2011).
[148] *See* 31 CFR 1023.100(b). The BSA regulations also use the related term "broker or dealer in securities," which is defined based on the same provisions of the Securities and Exchange Act. 31 CFR 1010.100(h).
[149] *See* SEC, *Registration Requirements for Foreign Broker Dealers*, Final Rule, 54 FR 30013, 30016 (Jul. 18, 1989); Guy P. Lander, Registration requirement and jurisdiction, 3 U.S. Sec. Law for Financial Trans. § 13:2 (2d ed.).
[150] 31 CFR 1023.210, 1023.400, 1023.410.
[151] *See* 31 CFR 1023.320(a)(1).
[152] *Amendment to the Bank Secrecy Act Regulations—Requirement that Brokers or Dealers in Securities Report Suspicious Transactions*, Final Rule, 67 FR 44048, 44052 (Jul. 1, 2002).

foreign-located investment advisers would contravene longstanding territorial limits on the application of the BSA. The BSA authorizes the Secretary of the Treasury (since re-delegated to FinCEN) to define financial institutions and does not place territorial limitations on that authority. The BSA does not define the term "financial institution" in general and simply lists the types of businesses that may be financial institutions at 31 U.S.C. 5312(a)(2) without specifying where they may be located.[153] FinCEN has interpreted this authority to enable regulation of foreign-located institutions that operate within the United States or provide services to persons in the United States. Moreover, as discussed above, the BSA authorizes the Secretary to determine, by regulation, new types of financial institutions[154] and the final rule is an exercise of that authority. The BSA confers authority to apply significant obligations of the final rule—notably the AML/CFT program and SAR requirements—to all "financial institutions" as defined by FinCEN.[155] FinCEN therefore interprets the statutory authority to determine investment advisers as a financial institution to impose such obligations on certain foreign-located investment advisers in the final rule.

Certain requirements of the final rule, however—in particular the recordkeeping obligations of subpart D and the special measures of subpart F—apply to "domestic financial institution" as defined in the BSA (also sometimes referred to as a "domestic financial agency").[156] The BSA describes the term "a domestic financial institution" as applying to "an action in the United States of a financial agency or institution."[157] Congress thus defined a domestic financial institution based on where an institution *acts* rather than where it is organized or headquartered. FinCEN interprets, as it has in the past, "an action in the United States" to include actions with a nexus to the United States.

[153] 31 U.S.C. 5312(a)(2).
[154] *See* 31 U.S.C. 5312(a)(2)(Y).
[155] *See, e.g.*, 31 U.S.C. 5318(g)(1) (SARs); 31 U.S.C. 5318(h)(1) (AML/CFT program).
[156] *See, e.g.*, 31 U.S.C. 5318(a)(2) (recordkeeping); 31 U.S.C. 5318A(a)(1) (special measures).
[157] 31 U.S.C. 5312(b)(1).

While the final rule's AML/CFT program and SAR requirements rest on FinCEN's broader authority to define "financial institutions," through its focus on a U.S. nexus, the final rule's approach with respect to foreign-located financial institutions is consistent with the reach of "domestic financial institution" as defined in the BSA. Requirements for foreign-located investment advisers apply when a foreign-located investment adviser engages in advisory activities with a U.S. nexus, whether by having staff in the United States or advising U.S. persons or advising foreign-located private funds with an investor who is a U.S. person. FinCEN took a similar approach with regard to foreign-located MSBs in requiring them to comply with its regulations for activities with a U.S. nexus even if some portion of the activity occurs in a foreign jurisdiction (such as transmitting funds to the United States from abroad). Thus, in accord with existing practice, FinCEN is regulating foreign-located investment advisers with a U.S. nexus based upon Congress' authorization of the Secretary to determine financial institutions by regulation and to regulate foreign-located institutions acting within the United States.[158]

Nonetheless, one commenter argued that Congress intended to limit the application of the BSA to financial institutions located in the United States when it passed the Currency and Foreign Transactions Reporting Act in 1970 (the "1970 Act"), which later became part of the BSA. At the outset, the text of the 1970 Act is not limited in this manner nor is FinCEN aware that Congress otherwise intended it to be. Section 203 of the 1970 Act, which defines the term "financial institution," states that "the term 'domestic', used with reference to institutions or agencies, limits the applicability of the provision wherein it appears to the performance by such institutions or agencies of functions within the United States."[159] Similar to the term "domestic financial institution" in the current BSA, this use of the term "domestic" grants jurisdiction based upon where a financial institution acts—in the 1970 Act, by performing certain

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[158] *See* 31 U.S.C. 5312(a)(2)(Y); 31 U.S.C. 5312(b)(1).
[159] P.L. 91-508, Title II, sec. 203(e), (f).

functions—rather than where it is located. Even if Congress intended to limit the reach of the 1970 Act with regard to foreign located financial institutions, the 1970 Act was a distinct statute focused on ensuring that banks and other institutions maintained sufficient records to assist government investigations.[160]

While maintaining certain records to assist in government investigations remains one of the purposes of the BSA, Congress has repeatedly amended the BSA to expand its scope, including the Money Laundering Control Act of 1986;[161] the Annunzio-Wylie Anti-Money Laundering Act of 1992;[162] the USA PATRIOT Act of 2001,[163] and the AML Act.[164] For example, Title III of the USA PATRIOT Act of 2001—styled the International Money Laundering Abatement and Anti-Terrorist Financing Act—amended the BSA to address the threat of international terrorism,[165] including the BSA's AML program and SAR filing requirements.[166] The AML Act amended the purposes of the BSA to include addressing a number of international phenomena, including the facilitation of "intelligence and counterintelligence activities…to protect against terrorism" and assessments to "safeguard the national security of the United States."[167] These amendments to the BSA since 1970, among others, demonstrate that the BSA is intended to protect the United States against international threats to the financial system and national security, among other purposes, which may involve regulating some conduct occurring only in part within the United States.

Commenters further argue that FinCEN has changed its position on the scope of the BSA. In so doing, they point to a Treasury report from 1987,[168] the SAR requirements applicable to broker-dealers, and the 2003 investment adviser NPRM. These sources are

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[160] *Id.* at § 202.
[161] P.L. 99-570, Title I, Subtitle H.
[162] P.L. 102-550, Title XV.
[163] P.L. 107-56, Title III.
[164] P.L. 116-283, Div. F.
[165] P.L. 107-56, Title III, sec. 358(a), (b).
[166] *See, e.g.*, *id.* at sec. 351-52.
[167] *See id.* at 6101(a) (codified at 31 U.S.C. 5311).
[168] Secretary of the Treasury, *Money Laundering and the Bank Secrecy Act: The Question of Foreign Branches of Domestic Financial Institutions* (Jul. 29, 1987).

inapposite to the final rule. The 1987 report was issued in response to a statutory requirement to inform Congress regarding BSA regulation of the foreign branches of U.S. banks at the time.[169] The concept of a foreign "branch" of a U.S. bank has a specific legal meaning tied to how banks are supervised and regulated that is not applicable in the context of investment advisers, which are a different type of financial institution.[170] Moreover, the 1987 report was written before the Annunzio-Wylie Anti-Money Laundering Act of 1992,the USA PATRIOT Act of 2001, and the AML Act expanded the scope and purposes of the BSA as mentioned above. Similarly, another type of financial institution—broker-dealers—are not required to file SARs when located abroad. This is a policy choice that FinCEN made for broker-dealers based on the relevant considerations for that sector and does not reflect an interpretation of FinCEN's authority to require such reporting.[171] Moreover, foreign-located investment advisers currently represent a significant proportion of the market and therefore account for significant illicit finance risks as discussed above.

FinCEN has also determined not to apply the language of its 2003 proposed rule for investment advisers and fully exempt all foreign-located RIAs and ERAs from the requirements of the proposed rule.[172] The approach taken in the final rule is consistent with FinCEN's 2015 proposed rule for investment advisers[173] and results from the significant growth of foreign investment into the United States from offshore financial centers and identified misuse of the investment adviser sector by transnational illicit finance threats (as identified in the Risk Assessment) in the two decades since the 2003 proposed rule was issued.

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[169] *See id.* at 30–33.
[170] The term "branch" is used in the final rule for its plain meaning rather than this specific concept in banking law.
[171] 67 FR 44048, 44052 (Jul. 1, 2002).
[172] *See* FinCEN, *Anti-Money Laundering Programs for Investment Advisers*, Notice of Proposed Rulemaking, 68 FR 23646, 23652 (May 5, 2003). The 2003 proposed rule would have defined an investment adviser to be only persons "whose principal office and place of business is located in the United States."
[173] FinCEN, *Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers*, Notice of Proposed Rulemaking, 80 FR 52680, 52684 (Sept. 1, 2015). The 2015 proposed rule would have defined an investment adviser to be any person "who is registered or required to register with the SEC under section 203 of the Investment Advisers Act of 1940" and, accordingly, would have applied to foreign-located investment advisers.

One commenter stated that foreign-located advisers could face conflict of laws and compliance concerns due to local laws where they are based, particularly data protection laws that limit the transfer of personal data. The commenter does not cite any example of a law that would create such a conflict, and FinCEN has not encountered such a conflict in the course of regulating other financial institutions located outside the United States. FinCEN expects investment advisers, like other BSA-defined financial institutions, to comply with their obligations under the BSA, and further believes foreign jurisdictions are unlikely to interpret their laws to conflict with or otherwise impede the final rule because the rule is consistent with FATF standards and the global interest in reducing illicit finance.[174] Nonetheless, while FinCEN expects financial institutions to comply with obligations under the BSA as a matter of course, financial institutions seeking guidance on this rule may submit requests for guidance to FinCEN if they encounter unexpected difficulties in doing so.[175]

Although one commenter said that regulating foreign-located advisers would "deprive" investors that are U.S. persons of their skills through higher costs and incentivize foreign-located advisers to avoid U.S. ties, FinCEN does not believe that this is the case. The United States is the world's largest and most competitive financial market and the requirements of this rule with respect to foreign-located investment advisers are substantially similar to the BSA requirements applicable to other non-U.S.-based financial institutions, which have not unduly impeded access by investors that are U.S. persons to financial institutions located abroad or inhibited foreign financial institutions from developing ties to the United States. And even if there are some effects along these lines, this would be outweighed by the increased protection of the U.S. financial system and U.S. national security due to the scope of the final rule.

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[174] *See, e.g.*, FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, the FATF Recommendations (Updated November 2023)*, at 10, available at www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html, (FATF Recommendation 2, stating that national AML/CFT policies and procedures should "ensure the compatibility of AML/CFT/CPF requirements with Data Protection and Privacy rules and other similar provisions").

[175] For questions regarding the BSA and FinCEN's implementing regulations, investment advisers may contact FinCEN's Regulatory Support Section at 1–800–767–2825 or e-mail frc@fincen.gov.

These benefits also outweigh the remaining concerns raised by commenters about covering foreign-located advisers. Commenters argued that foreign-located advisers located in FATF-compliant jurisdictions, or certain similar AML/CFT regimes such as in the United Kingdom and the European Union, should be exempt from the requirements of the final rule. While a jurisdiction's compliance with FATF standards is helpful to the international effort against illicit finance, it is not a replacement for U.S. regulation where the institutions have significant links to the U.S. financial system. For instance, without a SAR filing obligation, under certain circumstances U.S. law enforcement would have to rely on information from foreign authorities to detect U.S.-based illicit activity involving foreign-located investment advisers. Another commenter raised concerns about foreign-located subadvisers' ability to comply with the requirements of the final rule. FinCEN addresses the application of the final rule to subadvisers (both U.S. and foreign-located) below. If such a foreign-located investment adviser cannot exclude subadvisory activity from its AML/CFT program, it may work with the primary adviser and others to address these issues.

FinCEN believes that concerns raised by commenters are not sufficient to justify reducing the scope of the final rule to exclude foreign-located investment advisers or to re-issue the rule to seek further comment on this issue. As described above with respect to RIAs and ERAs generally, FinCEN has considered potential AUM thresholds, including a $100 million U.S. AUM threshold for foreign-located ERAs, and appreciates commenters' concerns about the potential burden on relatively smaller entities to comply with the rule. Indeed, FinCEN has excluded from the final rule certain smaller and mid-sized RIAs. FinCEN similarly has considered comments encouraging FinCEN to focus on U.S. AUM and U.S. activities and operations, which informed FinCEN's determination to limit the scope of foreign-located advisers' advisory activities subject to the rule and to exclude foreign private advisers. However, as described above with respect to ERAs generally and as reflected in the Risk Assessment, FinCEN has determined that smaller ERAs present generally higher illicit finance

risks than RIAs that do not advise private funds, especially those RIAs with lower or zero AUM excluded from the scope of this rule. Moreover, for ERAs, lower gross asset value of private funds advised in many cases does not correspond to lower illicit finance risk. FinCEN is concerned that an AUM threshold for smaller ERAs, including smaller foreign-located ERAs, would also be challenging to administer, for similar reasons described above.[176]

5. State-registered Investment Advisers

Proposed Rule: FinCEN did not include State-registered investment advisers in the scope of the proposed rule but requested comment on the illicit finance risk for State-registered investment advisers and whether they should be included in the scope of the final rule.

Comments Received: Some commenters questioned FinCEN's exclusion of State-registered investment advisers from the expanded application of the rule. Three commenters requested that State-registered investment advisers be added to the definition of "investment adviser" in the proposed rule. The commenters claimed that excluding State-registered investment advisers from the requirements of the proposed rule may permit bad actors to exploit inadequate technology or perceived weaknesses in the oversight or regulation of State-registered investment advisers to circumvent AML/CFT controls at financial institutions. One commenter noted that certain state financial institutions have already emerged as hotspots for those who wish to hide their assets and minimize their tax burdens, especially through trusts. One commenter also recommended that, despite increased costs, State-registered investment advisers be subject to the proposed rule and be required to register with the SEC, and asserted that increasing costs may be "partly offset by taxes on money that may have been laundered." Two commenters also suggested that FinCEN assess illicit finance activity involving investment advisers linked to Tribal activity.

Two commenters agreed with FinCEN's approach to not apply the proposed rule to State-registered investment advisers, but advised that FinCEN continue to monitor State-

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[176] *See supra* Section III.B.3.

registered investment advisers for illicit finance risks. One commenter stated that money laundering risk posed by State-registered advisers should be lower than for RIAs and ERAs as State-registered advisers have lower AUM than RIAs. This commenter also stated that State-registered advisers are often comprised of a single person and thus know their customers personally.

Final Rule: In the final rule, FinCEN is not including State-registered investment advisers in the definition of "investment adviser." FinCEN notes that while State-registered investment advisers may be misused to facilitate illicit finance activity, FinCEN continues to assess they are at lower risk for such activity than RIAs or ERAs. As noted by one commenter, State-registered advisers are smaller, in terms of customers, and tend to be localized. In addition, Treasury's Risk Assessment found few examples of State-registered investment advisers being used to move illicit proceeds or facilitate other illicit finance activity. Furthermore, including State-registered investment advisers within the scope of the definition of "investment adviser" would create significant challenges in monitoring compliance with AML/CFT requirements, as the SEC currently has no authority to examine them for compliance with the Advisers Act or the rules thereunder.

Given State-registered advisers' lower risk and the potentially disproportionate cost of imposing AML/CFT requirements on such advisers, FinCEN assesses that the final rule is less likely to achieve the same degree of benefits as for RIAs and ERAs. However, FinCEN will continue to monitor activity involving State-registered investment advisers for indicia of money laundering, terrorist financing, or other illicit finance activities and may consider regulatory measures if appropriate.

6. Foreign Private Advisers and Family Offices

Proposed Rule: FinCEN's proposed regulation did not apply to foreign private advisers or family offices because such entities are not RIAs or ERAs pursuant to the Advisers Act and

its implementing regulations. FinCEN sought comment on whether any excluded entities, in particular family offices, should be included in the scope of the proposed rule.

Comments Received: Five commenters opposed the exclusion of foreign private advisers and family offices from the scope of the proposed regulation, arguing that the definitions under the Advisers Act that exclude foreign private advisers and family offices from SEC regulation bear little relevance to FinCEN's mandate to reduce illicit finance risks and the purposes of the proposed regulation. These commenters expressed concern that excluding foreign private advisers and family offices would simply lead some entities, including those engaged in illicit activity, to "re-classify" as family offices or foreign private advisers, thereby reducing the regulation's utility.

Other commenters noted the growth of the family office sector, noting one study of global family offices that found the average AUM for family offices was $900 million, and that these family offices had approximately half of their investments in North America. Another commenter cited cases demonstrating illicit finance risks involving family offices. Regarding foreign private advisers, one commenter noted that in 2022, foreign private advisers reported that roughly 40 percent of clients and 28 percent of assets were reportedly sourced outside the United States. On this basis, these commenters proposed that FinCEN amend the proposed regulation to include such entities, despite the scope of the Advisers Act and the SEC's current examination authority.

Final Rule: FinCEN recognizes that foreign private advisers and family offices may face illicit finance risks that could be mitigated through their inclusion in the rule. However, the risks are not identical to those posed by other investment advisers. For example, family offices, as defined pursuant to regulations issued under the Advisers Act, cannot have advisory clients outside of family members and certain additional "family clients."[177] This makes it easier to ascertain the source of funds for such customers and less attractive for those seeking

[177] 17 CFR 275.202(a)(11)(G)-1.

to obscure their identity or their source of funds. Foreign private advisers, to qualify for the exclusion from SEC registration, have fewer U.S. clients and fewer ties to the U.S. financial system than RIAs and ERAs.[178] Both types of entities are statutorily exempted from the requirements of the Advisers Act and its implementing regulations.[179] Including them within the scope of the definition of "investment adviser" would therefore create challenges in monitoring compliance with AML/CFT requirements, primarily because the SEC currently has no authority to examine them. In regard to family offices specifically, FinCEN notes that other jurisdictions with economies and AML/CFT regimes similar to the United States have also excluded family offices or similar entities from the scope of AML/CFT regulations impacting entities providing investment adviser-like advisory services.[180] This exclusion is also consistent with international AML/CFT standards set by the FATF, which do not require such entities be subject to AML/CFT requirements.

FinCEN will continue to monitor activity involving foreign private advisers and family offices for indicia of the risks of money laundering, terrorist financing, or other illicit finance activities and may take regulatory action if appropriate.

7. Other Comments Related to the Definition of "Financial Institution" and "Investment Adviser"

One individual commenter suggested Treasury change regulations applying to certain state-chartered banks as part of the final rule. The commenter claimed that "some states may have inadequate oversight regulations (sometimes intentional) that will allow local banks to skirt more strict oversight" and serve as an entry point for private equity funds seeking to move

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[178] *See* 15 U.S.C. 80b-2(a)(30), 80b-3(b)(3); *see also supra* note 34.

[179] *See* 15 U.S.C. 80b-2(a)(11)(G) (excluding family offices as defined by the SEC from the Advisers Act definition of "investment adviser"); 15 U.S.C. 80b-3(b)(3) (exempting foreign private advisers from registration with the SEC).

[180] For example, in Germany, the Money Laundering Act refers to the Banking Act for definitions of obliged entities, and the Banking Act does not require licensing for single-family offices. *Hinweise zur Erlaubnispflicht gemäß KWG und KAGB von Family Offices*, sec. 4(c), BaFin (updated Jul. 12, 2018), https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Merkblatt/mb_140514_familyoffices.html. Hong Kong exempts most single-family offices from licensing requirements. *Family Offices FAQ*, Securities and Futures Commission of Hong Kong (last updated Sep. 8. 2020), available at https://www.sfc.hk/en/faqs/intermediaries/licensing/Family-Offices.

funds through the international financial system, as these banks may offer investment management services similar to investment advisers. The commenter recommended that state-chartered banks be required to be federally chartered to operate across state lines, and that a state-chartered bank must clear through a Federal Reserve Bank any funds that are received from or sent to a foreign jurisdiction.

Two commenters suggested that FinCEN explicitly include real estate-focused investment funds in the scope of the proposed regulation. These commenters claimed that while real estate funds are generally not covered by the Advisers Act because real estate held in fee simple ownership is not considered a "security" by the SEC, pooled real estate investment vehicles are structured similarly to other private funds and can pose illicit finance risks, including money laundering, public corruption, and potential national security risks.

Another commenter noting the preamble discussion on AML/CFT requirements applicable to dual registrants and affiliates and wishing to avoid duplication of resources and jurisdictional conflicts between the SEC and other federal functional regulators, suggested modifying the definition of "investment adviser" to exclude "persons that are subject to enterprise-wide BSA regulation at a depository institution or trust company."

Regarding regulatory changes to state-chartered banks, FinCEN notes that state-chartered banks are subject to comprehensive supervision, including for AML/CFT requirements.[181] This mitigates the need to include state-chartered banks within the final rule, and making the suggested change would involve considerations beyond their potential investment management activities, as well as consultations with other state and Federal regulators. As such, FinCEN declines to pursue that recommendation as part of this rulemaking.

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[181] *See, e.g.*, FDIC, *The Bank Secrecy Act: A Supervisory Update* (Jun. 2017, last updated Apr. 6, 2023), at 23, n. 5-6, available at https://www.fdic.gov/regulations/examinations/supervisory/insights/sisum17/sisummer2017-article02.html.

Regarding real estate-focused funds, FinCEN notes that it has focused AML/CFT regulatory efforts at the level of the adviser rather than any specific customer or service. To the extent real estate investment funds are advised by an investment adviser or an investment adviser is otherwise involved in their operation, there will be a BSA-defined financial institution involved in their operation. Separately, FinCEN has also proposed a rule to require the reporting of buyer and seller information for certain residential real estate transactions.[182] Both factors are likely to reduce the risks associated with real estate-focused funds. Therefore, FinCEN declines to explicitly focus this final rule on any real estate-focused investment activity.

FinCEN also declines the suggestion to modify the definition of "investment adviser" to exclude "persons that are subject to enterprise-wide AML/CFT regulation at a depository institution or trust company." Doing so would remove a significant group of covered advisers from SEC examination[183] and limit the ability of the SEC, as the federal functional regulator for investment advisers, to identify and mitigate potential systemic illicit finance risks that might arise in the sector. FinCEN noted in the IA AML NPRM and reiterates below, a depository institution or trust company with an investment adviser subsidiary or affiliate is not required to develop a separate AML/CFT program for its adviser subsidiary or affiliate if the depository institution or trust company's existing program addresses the identified money laundering, terrorist financing, and other illicit finance risks for the adviser. FinCEN believes this flexibility appropriately balances the benefits to having cost-effective enterprise-wide AML/CFT programs with ensuring that all relevant Federal functional regulators have the appropriate authority to supervise institutions conducting activities within their supervisory mandate.

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[182] *See* FinCEN, *Anti-Money Laundering Regulations for Residential Real Estate Transfers,* Notice of Proposed Rulemaking, 89 FR 12424 (Feb. 16, 2024).

[183] According to a Treasury analysis of Form ADV data as of December 31, 2022, only four percent of RIAs reported being affiliated with a bank or trust company, but they held over 40 percent of total AUM reported on Form ADV.

C. Recordkeeping and Travel Rules and Currency Transaction Reports

Proposed Rule: FinCEN proposed to apply to investment advisers certain BSA recordkeeping regulations that apply broadly to financial institutions, codified as 31 CFR part 1010, subpart D (sections 1010.400 through 1010.440). Subject to specified exceptions, such application would require investment advisers to comply with the Recordkeeping and Travel Rules, which are codified at 31 CFR 1010.410(e) and 31 CFR 1010.410(f), respectively, and require financial institutions to create and retain records for extensions of credit and cross-border transfers of currency, monetary instruments, checks, investment securities, and credit in amounts exceeding $3,000. The proposed rule would allow investment advisers to deem the requirements of these recordkeeping requirements satisfied with respect to any mutual fund that it advises. FinCEN also proposed that RIAs and ERAs be required to report transactions in currency over $10,000. Currently, all investment advisers report such transactions on Form 8300. Under the proposed rule, a CTR would replace Form 8300 for RIAs and ERAs.

Comments Received: FinCEN received nine comments on the proposed requirement that investment advisers file CTRs and proposal to apply the Recordkeeping and Travel Rules to investment advisers. Two commenters stated their support for both FinCEN's proposal to require investment advisers to file CTRs and comply with the Recordkeeping and Travel Rules requirements. A commenter asserted that while financial institutions such as banks associated with wealth management services already implement these rules, the rules are still necessary to close the potential gaps or loopholes for bad actors. The commenter also asserted that these Recordkeeping and Travel Rule requirements should be considered the bare minimum for investment advisers and that similar requirements are already in place for many RIAs and ERAs not domiciled in the U.S.

Other commenters questioned whether many advisers can logistically comply with the CTR, Recordkeeping, and Travel Rule requirements in the proposed rule. Several commenters stated that advisers who do not manage customer assets typically do not touch currency or

other funds outside of the advisory or subscription fees received for their services. One commenter asserted that such advisers have no visibility into their customers' investment activities or their movement of funds and securities, all of which takes place through financial institutions such as banks or broker-dealers that are already subject to the CTR, Recordkeeping, and Travel Rules. In these commenters' view, applying these requirements to investment advisers would be duplicative and provide no new information to law enforcement. One commenter claimed that while a customer may authorize a bank or broker-dealer to accept investment management or transactional instructions from an adviser in some cases, compared with other financial institutions involved in the funds transfer process, the adviser may not be as well-positioned to view how the client's account is funded, where withdrawals from the account are sent, or whether there is unusual wire activity. One commenter called on FinCEN to either exempt advisers from this rule, or delay implementation until a new CIP requirement for investment advisers may be adopted, while another commenter claimed that other financial institutions subject to AML program requirements are exempt from the Recordkeeping and Travel Rules.

Several commenters asked for additional clarification from FinCEN on the scope of the Recordkeeping and Travel Rules as applied to investment advisers. One commenter requested that FinCEN explain how it expects advisers to implement these rules, given that these advisers do not accept or hold investor funds, maintain accounts, or engage in transactions with clients or investors. Another commenter asked how these rules would impact private funds. Another requested that FinCEN confirm that it is not asking or requiring advisers to create or share records outside of the ordinary course of business, and that FinCEN is not asking advisers to collect or capture information not otherwise required by the adviser's AML/CFT program.

Final Rule: The final rule does not exempt RIAs and ERAs from the requirement to file CTRs or adhere to the Recordkeeping and Travel Rules. Accordingly, RIAs and ERAs will be required to file CTRs and create and retain records for transmittals of funds.

Under the Recordkeeping and Travel Rules, financial institutions must create and retain records for transmittals of funds and ensure that certain information pertaining to the transmittal of funds "travels" with the transmittal to the next financial institution in the payment chain.[184] When a financial institution accepts and processes a payment sent by or to its customer, then the financial institution would be the "transmittor's financial institution" or the "recipient's financial institution," respectively. The transmittor's financial institution must obtain and retain the name, address, and other information about the transmittor and the transaction.[185] The Recordkeeping Rule also requires the recipient's financial institution (and in certain instances, the transmittor's financial institution) to obtain or retain identifying information on the recipient.[186] The Recordkeeping and Travel Rules apply to transmittals of funds that equal or exceed $3,000.

The term "transmittal of funds" includes funds transfers processed by banks, as well as similar payments where one or more of the financial institutions processing the payment (*e.g.*, the transmittor's financial institution, an intermediary financial institution, or the recipient's financial institution) is not a bank.[187] There are exceptions that are designed to exclude transmittals of funds from the Recordkeeping and Travel Rules' requirements when certain categories of financial institutions are the transmitter and recipient.[188] The final rule will add investment advisers to the list of institutions among which transfers are excepted from the travel rule. This means that investment advisers will be treated in the same manner—and with

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[184] 31 CFR 1010.410(e), (f); 31 CFR 1020.410(a). Financial institutions are also required to retain records for five years. *See* 31 CFR 1010.430(d).
[185] 31 CFR 1010.410(e)(1)(i), (e)(2).
[186] 31 CFR 1010.410(e)(1)(iii), (e)(3) (information that the recipient's financial institution must obtain or retain).
[187] *See* 31 CFR 1010.100(ddd) (defining "transmittal of funds"); *see also* 31 CFR 1010.100(aa), (qq), (ggg) (defining "intermediary financial institution," "recipient's financial institution," and "transmittor's financial institution" to include both bank and nonbank financial institutions).
[188] *See* 31 CFR 1010.410(e)(6), (f)(4); 31 CFR 1020.410(a)(6). As relevant here, section 1010.410(e)(6)(i) excludes from the requirements of the Recordkeeping Rule "[t]ransmittals of funds where the transmitter and the recipient" are certain types of listed financial institutions. Section 1010.410(f)(4) excludes these same transmittals from the Travel Rule. This rule amends section 1010.410(e)(6) to add "investment adviser" to its list of financial institutions.

the same exceptions for transfers to certain other financial institutions—as banks, broker-dealers, futures commission merchants, introducing brokers in commodities, and mutual funds.

The primary requirements for investment advisers under the Recordkeeping and Travel Rules will be when they act as transmittor or recipient in transactions other than these excepted transfers. While many RIAs and ERAs do not engage in the type of transactional activity covered by these requirements, this is not uniform among all RIAs and ERAs. For instance, one commenter identified that there is significant variation among RIAs and ERAs with regard to their visibility into, and involvement in, funding and other cash transactions related to their clients' accounts, noting that advisers to retail clients may be more actively involved in facilitating the account opening and funding process for their clients, including forwarding wire instructions from the client to the custodian, while this may be less common among advisers to institutional clients. FinCEN agrees with the commenters who noted that these similar requirements are already in place for many RIAs and ERAs who are not domiciled in the U.S. due to the requirements of foreign laws.[189] Further, as noted by commenters, investment advisers can meet this reporting requirement with minimal additional costs, while providing law enforcement with useful AML/CFT information.[190]

As requested by several commenters, FinCEN is providing some additional guidance on what information it expects advisers to collect to comply with the Recordkeeping and Travel Rules. First, FinCEN notes that in circumstances where an adviser's customer has a direct account relationship with a qualified custodian that is subject to AML/CFT requirements,

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[189] For example, a financial institution located in a foreign country may serve as a "qualified custodian," 17 CFR 275.206(4)-2(d)(6)(iv), and most, if not, all, such foreign institutions would be subject to similar AML/CFT requirements under the laws and regulations of their home country jurisdiction. For instance, FATF Recommendation 11 requires financial institutions to maintain certain transactional and customer due diligence records for at least five years, while FATF Recommendation 16 requires originators and beneficiaries to maintain records of customer information for certain wire transfers. FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, the FATF Recommendations (Updated November 2023)*, at 15, 17, available at www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html. Over 175 jurisdictions around the world have implemented these requirements into domestic law or regulation. *See* FATF, Consolidated Assessment Ratings (Jul. 18, 2024), available at https://www.fatf-gafi.org/en/publications/Mutualevaluations/Assessment-ratings.html.

[190] This is because, under 17 CFR 275.204-2, RIAs are already required to collect and maintain such information under the Books and Records Rule.

including the Recordkeeping and Travel Rules, such as a bank or broker-dealer, and requests that such qualified custodian initiate a funds transfer or transmittal of funds, the adviser would generally not be required to comply with the requirements of the Recordkeeping and Travel Rules. In this circumstance, the qualified custodian would have the obligation to comply with the Recordkeeping and Travel Rules as the entity that received the instruction and transmitted the funds. This would likely apply to many RIAs advising retail customers that custody customer assets with a qualified custodian. However, for RIAs advising private funds, as well as ERAs, their authority and discretion over the fund and customer assets in the fund may make them more likely to have to comply with the Recordkeeping and Travel Rules. In terms of the information that advisers may have, FinCEN notes that under 17 CFR 275.204-2 (the Books and Records Rule), RIAs are required to maintain "originals of all written communications received and copies of all written communications sent by such investment adviser relating to . . . Any receipt, disbursement or delivery of funds or securities."[191] This requirement may assist RIAs in satisfying their obligations to identify relevant information that may be required to be collected under the Recordkeeping and Travel Rules in those circumstances where an RIA is a transmittor's financial institution or recipient's financial institution.

Regarding CTRs, in instances where investment advisers are not involved in one or more related transactions in currency of more than $10,000, an investment adviser will generally not need to file CTRs.[192] However, all investment advisers are currently required to file reports for the receipt of more than $10,000 in currency and certain negotiable instruments using joint FinCEN/Internal Revenue Service Form 8300.[193] This means that many advisers

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[191] *See* 17 CFR 275-204-2(a)(7)(ii).

[192] For purposes of 31 CFR 1010.311 and 1010.313, the term "transaction in currency" means a transaction involving the physical transfer of currency from one person to another. A transaction, which is a transfer of funds by means of bank check, bank draft, wire transfer, or other written order, and does not include the physical transfer of currency, is not a transaction in currency for this purpose. *See* 31 CFR 1010.100(bbb)(2).

[193] 31 CFR 1010.330; 26 CFR 1.6050I–1. "Currency" includes cashier's checks, bank drafts, traveler's checks, and money orders in face amounts of $10,000 or less, if the instrument is received in a "designated reporting transaction." 31 CFR 1010.330(c)(1)(ii)(A). A "designated reporting transaction" is defined as the retail sale of a consumer durable, collectible, or travel or entertainment activity. 31 CFR 1010.330(c)(2). In addition, an investment adviser would need to treat the instruments as currency if the adviser knows that a customer is using the instruments to avoid the reporting of a transaction on Form 8300. 31 CFR 1010.330(c)(1)(ii)(B).

likely have some procedure in place for recording information for transactions above this threshold. FinCEN also agrees with the commenter noting that a wide variety of U.S. financial institutions have been filing CTRs for decades and minimize the reporting burden through widely available automated software. In addition, FinCEN would like to clarify that an adviser is not required to purchase any software to file a CTR; CTR filing is available for free via the FinCEN BSA E-Filing System.

D. Applicability of AML/CFT Program Requirements

As discussed above, the BSA authorizes Treasury—and thereby FinCEN—to prescribe minimum standards for AML/CFT programs.[194] Section 5318(h)(2) of the BSA further provides that in prescribing these minimum standards, Treasury take into account, among other factors, that AML/CFT programs should be reasonably designed to assure and monitor compliance with the requirements of the BSA and regulations issued thereunder, as well as risk-based, including ensuring that more attention and resources of financial institutions should be directed towards higher-risk customers and activities, consistent with the financial institution's risk profile, rather than lower-risk customers and activities.[195]

In light of the BSA's clear direction, FinCEN reiterates that the AML/CFT program requirement is not a one-size-fits-all requirement but is risk-based and must be reasonably designed. The risk-based and reasonably designed approach of the rule is intended to give investment advisers the flexibility to design their programs so that they are commensurate with the specific risks of the advisory services they provide and the customers they advise as described in section 5318(h)(2) of the BSA.[151] For example, large firms may assign

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[194] 31 U.S.C. 5318(h)(1)-(2) (authorizing Treasury, after consultation with the appropriate Federal functional regulator (for investment advisers, the SEC), to prescribe minimum standards for AML/CFT programs, and setting forth factors to be taken into account in doing so). In developing this final rule, FinCEN consulted and coordinated with SEC staff, including with respect to the statutorily specified factors set out in 31 U.S.C. 5318(h)(2)(B).

[195] 31 U.S.C. 5318(h)(2).

[151] The legislative history of the BSA reflects that Congress intended that each financial institution should have some flexibility to tailor its program to fit its business, considering factors such as size, location, activities, and risks or vulnerabilities to money laundering. This flexibility is designed to ensure that all firms, from the largest to

responsibilities to the individuals and departments carrying out each aspect of the AML/CFT program, such as AML/CFT employee training, SAR filing, and CDD, while smaller firms would be expected to adopt procedures that are consistent with their (often) simpler, more centralized organizational structures (for instance integrating aspects of AML/CFT compliance with other compliance or monitoring functions). This flexibility is designed to ensure that all investment advisers subject to FinCEN's AML/CFT program requirements, from the smallest to the largest, and the simplest to the most complex, have in place internal policies, procedures, and controls appropriate to their advisory business to prevent the investment adviser from being used to facilitate money laundering, terrorist financing, or other illicit finance activities and to achieve and monitor compliance with the applicable provisions of the BSA and FinCEN's implementing regulations.

Because investment advisers operate through a variety of different business models, one generic AML/CFT program for this industry is not possible; rather, each investment adviser must develop a program based upon its own business structure. This requires that each investment adviser identify its exposure to money laundering, terrorist financing, and other illicit finance activity risks; understand the BSA requirements applicable to it; identify the risk factors relating to these requirements; design the internal policies, procedures and controls that will be required to reasonably assure compliance with these requirements; and periodically assess the effectiveness of the procedures and controls.

An investment adviser (other than a foreign-located investment adviser) will be required to apply an AML/CFT program to all advisory services provided to all customers, other than with respect to mutual funds, collective investment funds, and other investment advisers subject to the rule. Advisory services subject to an AML/CFT program would

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the smallest, have in place policies and procedures appropriate to monitor for money laundering. *See* USA PATRIOT Act of 2001: Consideration of H.R. 3162 Before the Senate, 147 Cong. Rec. S11039-11041 (Oct. 25, 2001) (statement of Sen. Sarbanes); Financial Anti-Terrorism Act of 2001: Consideration Under Suspension of Rules of H.R. 3004 Before the House of Representatives, 147 Cong. Rec. H6938–39 (Oct. 17, 2001) (statement of Rep. Kelly) (provisions of the Financial Anti-Terrorism Act of 2001 were incorporated as Title III in the Act).

include, for example, the management of customer assets and the submission of customer transactions for execution. The adviser will not be required to apply its AML/CFT program to non-advisory services. One example of non-advisory services would be in the context of private funds, including venture capital funds: an adviser's personnel may play certain roles with respect to the portfolio companies in which its customer fund invests. Generally, activities undertaken in connection with those roles (*e.g.*, making managerial/operational decisions about the activities of portfolio companies) would not be "advisory activities."

Moreover, in response to comments regarding an investment adviser's obligation with regard to portfolio companies, as discussed further below, the objective standard that an investment adviser must file a SAR when it "knows, suspects, or has reason to suspect" certain suspicious transactions parallels the language of the rule for mutual funds, with which many investment advisers are familiar.[196] As clarified in guidance for mutual funds, this standard should not require regulated entities to collect additional information beyond that available "through the account opening process and in the course of processing transactions, consistent with the mutual fund's required anti-money laundering procedures."[197] Similarly, an investment adviser therefore should be able to satisfy this requirement with regard to a portfolio company through the information available to it in the course of directing investments in the securities of a portfolio company, such as the due diligence it conducts before directing an investment, and the measures provided in its AML/CFT program regarding the adviser's advisory activities. The final rule does not require an investment adviser to collect additional information from portfolio companies about their activities. But if the information the investment adviser already possesses or obtains as part of its processes for directing investment in the securities of a portfolio company or through its AML/CFT

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[196] 31 CFR 1024.320(a)(2).

[197] FinCEN, *Frequently Asked Questions Suspicious Activity Reporting Requirements for Mutual Funds* (Oct 4, 2006), available at https://www.fincen.gov/resources/statutes-regulations/guidance/frequently-asked-questions-suspicious-activity-reporting.

program means that the adviser "knows, suspects, or has reason to suspect" that there is suspicious activity occurring at a portfolio company, it is required to file a SAR.

Under the risk-based approach, an investment adviser should tailor its AML/CFT program according to the specific risks presented by its various services and customers. Factors that may indicate a service or a customer is lower risk include the jurisdiction of registration of legal person customers, and whether the legal person customer is subject to other U.S. AML/CFT regulatory requirements.

As described below and consistent with the risk-based approach, FinCEN will permit investment advisers to exclude mutual funds, collective investment funds, and other investment advisers that they advise that are also subject to the rule from their AML/CFT programs (and other requirements of the final rule) in light of existing AML/CFT program requirements under the BSA. FinCEN declines to further limit the scope of AML/CFT requirements for other wrap-fee programs and separately managed accounts, but notes that the flexibility in the risk-based approach can allow an investment adviser that is a portfolio manager in a wrap-fee program or provides advisory services to a separately managed account to appropriately adjust its application of AML/CFT measures based on the presented risk.

1. Mutual Funds and Collective Investment Funds

Proposed Rule: FinCEN proposed to exclude activities of investment advisers in advising mutual funds from the rule's AML/CFT program requirements. Specifically, FinCEN proposed to exempt advisers from having to include mutual funds customers in their AML/CFT programs, and by extension the reporting and recordkeeping requirements of part 1032, subparts C and D. FinCEN, however, did not propose to allow investment advisers to exclude mutual fund customers from the information sharing, due diligence, and special measures requirements of part 1032, subparts E and F. Moreover, the proposed exclusion applied only to mutual funds that "developed and implemented an AML/CFT program compliant with the

AML/CFT program requirements applicable to mutual funds under another provision of this subpart."

As explained in the IA AML NPRM, FinCEN proposed the AML/CFT program exclusion to recognize that mutual funds "typically do not have their own independent operations," and "are entirely operated, and compliance with their legal obligations is undertaken, by their service provider entities, foremost among them their investment advisers."[198] FinCEN also stated that "including a mutual fund within its investment adviser's AML/CFT program would be redundant."[199]

FinCEN did not explicitly address the status of collective investment funds, which are sometimes also referred to as collective investment trusts, in the IA AML NPRM.

Comments Received: Three commenters supported the proposed rule's exclusion of mutual funds, including open-end exchange-traded funds (ETFs), from the scope of an investment adviser's AML/CFT program. These comments noted that mutual funds, including open-end ETFs that are open-end management investment companies, are already subject to similar AML/CFT requirements, and concurred with FinCEN's reasoning for the proposed exclusion.

One of these three commenters supported the intent of the proposed exclusion—noting that mutual funds have already been subject to similar AML/CFT program requirements—but took issue with the scoping and structure of this proposed exclusion. This commenter expressed that, as written, this proposal would make the investment adviser responsible for ensuring that the mutual funds it advises are compliant with their AML/CFT program obligations, and suggested that an investment adviser should not have to ensure the extent of a mutual fund's compliance with mutual fund AML/CFT program obligations as a basis for exempting them

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[198] 89 FR at 12123.
[199] *Id.* at 12123-24 ("In particular, we expect that the investment adviser to a mutual fund will have both (1) access to the exact same information concerning the mutual fund or its investors that is available to the mutual fund, in part in connection with its AML/CFT obligations and (2) a significant role generally in the operations of the mutual fund's regulatory responsibilities, including its AML/CFT program.").

from the investment adviser's AML/CFT program. As an alternative, the commenter recommended that FinCEN adopt the exemptive language from the 2003 proposal, which provided that "an investment adviser "may exclude from its anti-money laundering program any pooled investment vehicle it advises that is subject to an anti-money laundering program requirement under another provision of this subpart."

One individual commenter recommended bringing mutual funds under these provisions as well, but did not acknowledge the long-standing application of AML/CFT program obligations to mutual funds.

Two commenters also suggested that FinCEN exclude bank-sponsored collective investment trusts from the scope of the proposed rule because collective investment trusts are subject to the AML/CFT reporting obligations of a collective investment trust's bank sponsor and are available only to/through institutional retirement plans, making them inherently low-risk from an AML/CFT perspective.

Final Rule: FinCEN agrees with commenters who support the proposed exclusion of mutual funds from the requirements of an investment adviser's AML/CFT program, given that mutual funds have long had their own AML/CFT program requirements. Accordingly, the final rule maintains an exclusion of mutual funds from the requirements of an investment adviser's AML/CFT program requirements. This exclusion is permissive and not mandatory; an investment adviser could decide to include the mutual funds it advises in complying with any aspect of the final rule. An adviser could also integrate its overall AML/CFT program and any mutual fund specific program if doing so is risk-based and reasonable manner.

FinCEN also recognizes that, as drafted in the IA AML NPRM, the proposed regulation text may have limited the practical utility of the exclusion by making the investment adviser responsible for ensuring that the mutual funds it advises have "implemented" their AML/CFT programs in a "compliant" manner. The exclusion was not intended to require an investment adviser to separately ensure a mutual fund's AML/CFT program is in compliance with the

fund's AML/CFT program rule requirements for mutual funds in order to exempt the fund from the investment adviser's AML/CFT program. FinCEN has therefore decided to modify the text of the regulation to categorically permit an investment adviser to exclude any mutual fund from its AML/CFT program without the adviser having to verify that such a mutual fund has implemented an AML/CFT program. The modified text is reflected at section 1032.210(a)(2).

Regarding collective investment funds, FinCEN notes that collective investment funds are investment vehicles administered by a bank or trust company that hold commingled assets.[200] Each collective investment fund is established under a plan that details the terms under which the bank or trust company manages and administers the fund's assets. The bank or trust company acts as a fiduciary for the collective investment fund and holds legal title to the fund's assets as trustee. However, in some cases an RIA may be hired to provide advisory services to the collective investment fund. Participants in a collective investment fund are the beneficial owners of the fund's assets.

As noted by commenters, the banks and trust companies that sponsor and serve as trustees of a collective investment fund are already subject to AML/CFT reporting obligations under the BSA, and are the entities best situated to identify and assess risk associated with the participants in a collective investment fund, report suspicious activity, and implement other AML/CFT requirements. Commenters also noted that collective investment funds themselves are available only to institutional retirement plans or to other eligible discretionary fiduciary accounts of the bank, making them inherently low risk from an AML/CFT perspective.

FinCEN agrees that applying the AML/CFT requirements of the proposed rule to collective investment funds would be duplicative of existing requirements applicable to bank and trust company sponsors of collective investment funds. These AML/CFT obligations

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[200] *See* OCC, *Comptroller's Handbook* (Collective Investment Funds) (May 2014), available at https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-handbook/files/collective-investment-funds/pub-ch-collective-investment.pdf. Collective investment funds administered by national banks are governed by OCC regulations at 12 CFR 9.18.

would be applied by the bank or trust company to the collective investment fund and its underlying participants, and would assess and mitigate any illicit finance risk arising from either the fund or its underlying customers. While collective investment funds, unlike mutual funds, are not separate legal entities, they are fiduciary accounts that serve a very similar purpose and function and are only available to participants who meet specific criteria in OCC regulations and other applicable laws. Therefore, FinCEN is expanding the exclusion from the AML/CFT program requirement to include both mutual funds and collective investment funds sponsored by a bank or trust company subject to the BSA.

FinCEN notes that collective investment funds can be sponsored not only by national banks, federal savings associations, and trust companies chartered by the OCC, but also by state-chartered banks and trust companies that are supervised by the FRB, the FDIC, or state bank regulators. Collective investment funds established by national banks and federal savings associations[201] are subject to requirements for such collective investment funds detailed in OCC regulations at 12 CFR 9.18. While these regulations only apply to collective investment funds established by national banks and federal savings associations, they have served as a model for many state statutes governing collective investment funds, many of which cross-reference 12 CFR 9.18.[202] In addition, collective investment funds of state-chartered banks and trust companies that seek tax-exempt status under IRC section 584 must comply with the OCC requirements in 12 CFR 9.18.[203] Compliance with IRC section 584 is necessary for the fund to qualify for favorable tax treatment—namely, taxation only at the participant level and not at the fund level.[204] Therefore, FinCEN has determined to define collective investment funds for the purposes of this exclusion by reference to OCC regulations at 12 CFR 9.18.

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[201] Federal savings associations are subject to 12 CFR 150, which requires compliance with 12 CFR 9.18 if establishing and administering a collective investment fund under 12 CFR 150.260(b).
[202] *See Comptroller's Handbook* (Collective Investment Funds) at p.3.
[203] *See* 26 U.S.C. 584(a)(2).
[204] *See* 26 U.S.C. 584(b)-(d).

FinCEN has also added in a reference to "other applicable law that incorporates the requirements of 12 CFR 9.18," so that the exclusion includes collective investment funds formed pursuant to state law or regulation, or other applicable law such as ERISA, so long as those other applicable laws incorporate the requirements of 12 CFR 9.18. FinCEN expects, however, that almost all collective investment funds established by a national or state bank or trust company subject to the BSA would meet these requirements. This additional text is reflected at section 1032.210(a)(2).

2. Requests to Exempt Certain Customers and Activities

Proposed Rule: FinCEN proposed to apply the requirements of the proposed rule to the full range of advisory services provided by an investment adviser, including advisory services that do not include the management of customer assets or knowledge of customers' investment decisions, as well as when an investment adviser acts as a "subadviser" in certain advisory activities. FinCEN requested comment on whether specific services provided by investment advisers should be included or excluded from coverage of this proposed rule, as well as alternative approaches for addressing compliance with the proposed rule when advisers provide particular services, such as subadvisory services, as well as other similar services. Thirteen commenters provided views on a range of advisory activities and customers. These generally related to three issues: (1) the treatment of subadvisory services under the proposed rule, (2) the treatment of certain customers under the proposed rule, and (3) the treatment of certain advisory services provided by investment advisers that do not involve the management of customer assets.

a) Comments on Subadvisory Services, Wrap Fee Programs, and Separately Managed Accounts

Comments Received: 11 commenters asserted that an investment adviser acting as subadviser should be able to exclude its subadvisory relationships from its AML/CFT program. As noted by one commenter, "Sub-Advisory Arrangements can exist in a number of formats,

including managed account 'platforms,' wrap fee programs, separately managed accounts (SMAs), unified managed accounts (UMAs), other sub-advised accounts, and collective investment funds where a Primary Adviser sponsors the fund and retains Sub-Advisers to manage all or part of the fund's accounts or investments." Some commenters limited their comments to certain subadvisory relationships, such as separately managed accounts or wrap fee programs, while others referenced different types of subadvisory relationships.

These commenters stated that requiring an investment adviser to apply its AML/CFT program to a subadvisory relationship with another investment adviser (the primary adviser) would be duplicative of the requirements applied by the primary adviser. In addition, several commenters indicated that when an investment adviser acts as subadviser, it has limited or no access to information about the primary investment adviser's underlying clients and does not have direct contact with those clients or account holders, and so would not be in a position to apply most aspects of its AML/CFT program to the subadvisory relationship and generally would be unable to monitor the relationship for suspicious activity. One commenter noted that in most subadvisory relationships, the primary adviser possesses the authority pursuant to a written agreement to appoint and replace each subadviser, which functions solely as a service provider to the primary adviser. Two commenters both noted the considerable challenges for non-U.S. subadvisers that manage foreign asset classes, as well as for U.S. subadvisers for non-U.S. accounts or fund structures, in implementing the proposed requirements. These commenters generally stated that FinCEN should exclude subadvisory activities from the scope of the proposed rule, and that responsibility for applying AML/CFT requirements should be with the primary adviser.

Commenters also recommended how FinCEN should treat subadvisory relationships if it decides not to exclude them from an investment adviser's AML/CFT program. Three commenters suggested FinCEN permit primary advisers and subadvisers to allocate applicable AML/CFT program and SAR reporting obligations to the primary adviser or sponsor, and that

FinCEN should confirm that subadvisers would not be required to obtain any additional information about clients enrolled in managed account programs in order to discharge their AML/CFT program or SAR reporting obligations.

Two commenters recommended that the final rule should cover all of the advisory services provided, whether in a primary or subadvisory role. One commenter argued that in the private funds context, exempting subadvisers, who often make managerial and operational decisions for private funds, could encourage complex contractual arrangements to enable investment advisers to circumvent their AML/CFT obligations, and that subadvisers are treated as investment advisers under the Advisers Act. Both commenters also noted that including advisory activities may be especially important for digital advice platforms, as they are increasingly incorporated into services offered by larger investment advisers and for RIAs domiciled in other countries.

Final Rule: FinCEN recognizes the potential for duplication, which may also occur with other BSA-defined financial institutions that provide similar services to the same customers. FinCEN notes that subadvisory services, wrap-fee programs, and separately managed accounts can vary in structure and the allocation of services among participating financial institutions (depending on how these programs are structured and the role of other BSA-defined financial institutions). In addition, subadvisory services or wrap-fee arrangements are not defined by regulation but are industry terms applied to a range of advisory relationships. Further, there are some investment advisers, such as State-registered investment advisers, that are not covered by this rule, and RIAs and ERAs may enter into subadvisory or similar relationships with such uncovered advisers. These factors make it challenging to apply a categorical exemption or treatment to a type of advisory relationship for the purposes of this rule.

However, consistent with the exclusion for mutual funds and collective investment funds from an investment adviser's AML/CFT program described above, FinCEN assesses that permitting investment advisers to exclude certain advisory customers rather than particular

advisory services from their AML/CFT programs strikes the appropriate balance between avoiding unnecessary duplication and limiting illicit finance risk. This duplication of AML/CFT measures by an investment adviser is particularly salient when an investment adviser is advising another investment adviser subject to this rule, and lacks a direct relationship with the underlying customer of the investment adviser, such as in the context of certain subadvisory relationships. In these circumstances, any illicit finance risk or useful information for law enforcement would be addressed by the AML/CFT program and reporting and recordkeeping obligations of the other investment adviser. Therefore, FinCEN is permitting an investment adviser to exclude from its AML/CFT program any investment adviser that is advised by the adviser and that is subject to this rule. This additional text is reflected at section 1032.210(a)(1)(iii).

As applied to subadvisers, this exclusion will permit an investment adviser (acting as subadviser) to exclude from its AML/CFT program another investment adviser (the primary adviser) to which it provides subadvisory services where the subadviser has a direct contractual relationship with the primary adviser and not with the underlying customer of that primary adviser. The investment adviser may also be able to exclude wrap-fee programs, separately managed accounts, or other advisory relationships, so long as the customer is another investment adviser as defined at section 1010.100(nnn) and the adviser does not have a direct contractual relationship with the underlying customer of the other investment adviser. FinCEN recognizes that this exclusion would not permit an investment adviser to exclude from its AML/CFT program advisory customers who are BSA-defined financial institutions other than an investment adviser, such as a broker-dealer or bank, and so would not address all of the duplication described by commenters.[205] For instance, an adviser would not be able to exclude from its AML/CFT program: (1) wrap-fee programs where a BSA-defined financial institution

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[205] In the case of a dual registrant who is a customer of an investment adviser, the investment adviser could only exclude the dual registrant to the extent the dual registrant was acting as an investment adviser, and not as a broker-dealer.

other than an investment adviser, such as a broker-dealer, is the sponsor; (2) any subadvisory relationships where the primary adviser is an investment adviser not covered by this rule, such as a State-registered adviser or exempt as a foreign private adviser; or (3) those customers with which the investment adviser has a direct contractual relationship governing the provision of advisory services, even if that contract calls for the investment adviser to act as a subadviser. In these circumstances, where the contractual relationship is with the underlying customer, an adviser acting as a subadviser would be better positioned to assess the risk of the customer and to request appropriate information from the customer. FinCEN therefore declines to exempt such activities from the final rule.

For subadvisory relationships that are not subject to this exclusion, an investment adviser is required to include those activities in the scope of its AML/CFT program. FinCEN notes that there is inherent flexibility in the risk-based approach required by the BSA, and that such flexibility can allow an investment adviser to appropriately adjust its application of AML/CFT measures based on the presented risk. For instance, subject to the requirements discussed below regarding delegation, an adviser could contractually delegate certain AML/CFT measures to a broker-dealer in a wrap-fee program where it is more appropriate for the broker-dealer to implement those measures. As discussed below, delegation will require the investment adviser to remain fully responsible and legally liable for, and need to demonstrate, compliance with AML/CFT requirements. Such delegation would not alleviate the obligation of the adviser to remain accountable for its own compliance with the BSA.

In addition, some AML/CFT requirements in this rule, such as the reporting of suspicious activity, can be effectively implemented by an investment adviser even where the filing institution does not have a direct customer relationship with the subject of the SAR. FinCEN notes that it is common for two or more BSA-defined financial institutions to provide different services and establish different types of relationships with the same customer, and both entities can still effectively implement their own AML/CFT requirements. At the same

time, in establishing and implementing an AML/CFT program that is risk-based and reasonably designed to address the specific risks of the advisory services it provides and the customers it advises, an investment adviser can incorporate into its program a consideration of the role played by other financial institutions with respect to those services and customers, and the AML/CFT obligations of those financial institutions.

b) Certain Advisory Customers

Comments Received: One individual commenter suggested FinCEN exclude investment advisers that sub-advise European SICAVs,[206] which the commenter described as essentially foreign-located mutual funds, noting that these are subject to European Union (EU) AML/CFT regulations. Five commenters requested that either investment advisers providing advisory services to retirement plan participants, such as participants in participant-directed defined contribution retirement plans established under IRC Sections 401(k), 403(b), and 457, be exempt from the proposed rule or that such services be exempt from the requirements of the proposed rule. These commenters noted earlier guidance from Treasury that such plan participant accounts were lower risk for money laundering, and that advisers providing services to plan participants have no ability to monitor participant contributions or withdrawals. Commenters further stated that retirement plans necessarily require the involvement of other regulated entities that are independently subject to AML/CFT requirements, that those requirements would be applied to plan participants and their transactional activity, and that employer-sponsored retirement plans are also subject to other requirements under ERISA.

One commenter suggested that the final rule make clear that participants in employer-sponsored retirement plans are not the "customer" and, for CIP and beneficial ownership requirements, make clear that the definition of "account" does not include an account opened

[206] SICAV (Société d'investissement à Capital Variable) is a type of collective investment fund commonly used in Europe.

for the purpose of participating in an employer-sponsored retirement plan, and that the requirements of the proposed rule should only apply at the plan level.

Another commenter requested that exchange-traded closed-end funds be exempt from the final rule as relevant customer and transaction information is held by the transfer agent (and any broker-dealer used to purchase the shares) and not the RIA or ERA.

One commenter suggested FinCEN explicitly recognize certain types of advisory customers who categorically present a lower risk of money laundering and exclude them from the AML/CFT program requirements. These include retirement plans; employee securities corporations; publicly-traded corporations; accounts of government entities, such as municipal or state agencies; governmental pension plans; non-profit organizations; higher education endowment funds; and multi-employer plans. The commenter reasoned that these accounts are held in custody by a financial institution that is already subject to AML/CFT requirements. As an alternative, the commenter suggested that FinCEN clarify that investment advisers' AML/CFT program requirements with respect to these entities would be minimal under a risk-based approach.

Three commenters suggested that FinCEN exempt investment products offered by, or advisory services provided to, another financial institution subject to comprehensive AML/CFT requirements. These commenters argued that the rationale for exempting mutual funds from an investment adviser's AML/CFT program extends to an investment adviser's relationships with other financial institutions subject to an AML/CFT program obligation, which would also be consistent with FinCEN's 2003 proposed rule. One of these commenters proposed that to the extent the investment products are covered in any AML/CFT program requirement, FinCEN should make clear that a sound AML/CFT program can, and is authorized to, rely on the diligence conducted by a regulated intermediary.

Final Rule: Regarding European SICAVs or other pooled investment vehicles administered by foreign financial institutions, FinCEN declines to exempt such entities from

the scope of the proposed rule. FinCEN acknowledges that such pooled investment vehicles may be subject to comparable AML/CFT regulation by foreign supervisory authorities, but that those regulations may not specifically address illicit finance risks to the U.S. financial system or provide relevant information directly to U.S. regulators or law enforcement. FinCEN notes that the application of foreign AML/CFT requirements to a pooled investment vehicle administered by a foreign financial institution can be a factor in determining risk associated with a particular type of foreign-located customer.

Regarding retirement plans, FinCEN recognizes the point made by several commenters that such plans are subject to regulation and supervision under ERISA as well as other laws and regulations governing retirement plans, and are generally only available through a BSA-regulated financial institution or an entity regulated under another federal framework. FinCEN declines to categorically exclude such plans from coverage under the proposed rule, however, because doing so would leave a material gap in addressing illicit finance risks. Such plans may not be offered directly through a financial institution with AML/CFT program, SAR, and recordkeeping obligations under the BSA, and applying AML/CFT requirements to investment advisers to such plans, such as SAR filing requirements, may help identify illicit activity involving the theft or misappropriation of plan assets. Moreover, the potential for duplication and any accompanying burden is reduced by the exemption for advisers to such plans who register with the SEC only as "pension consultants" as discussed above.

FinCEN declines to exempt the other types of advisory customers raised by commenters—such as employees' securities companies and other BSA-regulated financial institutions—for similar reasons. Advisory relationships with customers that are not themselves BSA-regulated financial institutions may not necessarily involve any institution other than the investment adviser with AML/CFT program and related obligations under the BSA. When there is another such institution—such as when investment advisers provide advisory services to another BSA-regulated financial institution—these institutions' AML/CFT programs may

not be tailored to the specific risks posed by an advisory relationship and these institutions may lack the expertise of an investment adviser in monitoring the investment advisory relationship. Excluding such advisory customers would therefore leave a material gap in addressing illicit finance risks. However, investment advisers may take into account the nature of advisory relationships with such customers in determining the level of risk they pose, which, when the particular relationship is lower risk, will reduce the burden of including such customers in the investment advisers' AML/CFT programs.

Regarding exchange-listed registered closed-end funds, while they are not categorically excluded from an adviser's AML/CFT program under the final rule, such funds are typically offered to retail investors through a broker-dealer, which performs customer identification and verification as well as CDD, with the investment adviser managing the investment portfolio of the fund. As described further below, FinCEN would expect that, absent actual indicia of high-risk activity tied to such funds in specific circumstances, an adviser could treat these funds as lower risk for purposes of its AML/CFT program.

c) Certain Advisory Activities

Comments Received: Six commenters provided comments on how the requirements of the proposed rule should apply to advisory services that do not involve the management of customer assets. These commenters supported the proposed exclusion of non-advisory services from the proposed rule, and suggested that advisory activities that do not involve the management of customer assets, such as non-discretionary financial planning and publication of securities-related newsletters, "model portfolios," or research reports, should also be excluded, and that advisers that provide these only services would be exempt from the requirements of the proposed rule.

One commenter noted that these activities are entirely outside of the "payment chain"—the adviser neither manages, directly or indirectly, the customer's assets nor participates in the transmittal of any customer funds to or from any recipient. The same commenter noted that

many of these activities do not involve an advisory customer at all. Another commenter noted that advisers who do not manage customer assets are less likely to have information about customer specific activity that could facilitate SAR or CTR filings. Another commenter noted that an adviser providing model portfolio services to a financial services provider has no legal, advisory, or fiduciary relationship with the financial services provider's own customers or any information regarding the customers themselves, and so that adviser is in no position to fulfill the AML/CFT requirements that are outlined in the IA AML NPRM.

Two other commenters requested further examples and clarification regarding which non-advisory activities would not be covered, including clarifying that investment activities conducted on behalf of a fund would be considered non-advisory. Two commenters requested that non-U.S. activities of U.S. firms should be excluded from the final rule. The commenters noted that inclusion of a U.S. investment adviser's non-U.S. activities in the final rule could lead to conflict of laws and compliance challenges. One of the commenters requested that FinCEN clarify that U.S. firms are not required to apply the requirements of the proposed rule to non-U.S. activities if compliance would cause these firms to violate other laws in the jurisdictions in which they operate.

Final Rule: FinCEN agrees with the view of commenters that advisers that provide only services that do not involve the management of customer assets (and so report no AUM on Form ADV) are unlikely to have any relevant information on illicit finance risk or suspicious activity involving their customers. In addition, there is a lower risk that these advisers will be used as an entry point into the U.S. financial system for illicit proceeds. For the reasons described above, FinCEN has decided to exempt such RIAs from the definition of "investment adviser" in the final rule and therefore from the broader AML/CFT requirements of the final rule.

However, when an RIA both manages client assets and provides other advisory services that do not involve the management of client assets, FinCEN declines to exclude the "non-

management" services from coverage of the rule's requirements. FinCEN notes that when provided along with the management of a customer's assets, these services may lead to an adviser learning relevant information about a customer for purposes of understanding customer risk or identifying suspicious activity. Further, there is the risk that exempting non-management services from the requirements of the final rule for RIAs that also manage client assets could potentially encourage some advisers to attempt to evade the requirements of the rule by re-branding certain activities as non-management activities. For example, customers that would prefer increased anonymity or want to directly avoid being subject to AML/CFT requirements could request such a re-branding for activities on their behalf. FinCEN would expect that in most circumstances, non-management services would be lower risk for money laundering, terrorist financing, or other illicit finance activity, and accordingly, an investment adviser could treat as lower risk its customers that receive only these services.

FinCEN does not believe that further clarification of the concept of non-management services is necessary. The methodology for determining when an RIA has regulatory AUM for purposes of Form ADV is well-developed under SEC regulations and RIAs are familiar with it in that context.[207] An investment adviser can use this methodology to help determine its "non-management" services.

FinCEN also does not believe that further clarification of the concept of non-advisory activities is required. Advisers have been required to determine when they provide services that require registration or other regulatory compliance measures since the passage of the Advisers Act in 1940.[208] With respect to private funds, FinCEN does not believe that all investment activities on behalf of a fund are necessarily non-advisory. When such activities involve

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[207] *See* Instructions to Item 5.F of Form ADV (17 CFR 279.1).

[208] Existing judicial precedent interprets whether a person is advising others (or acting as an "investment adviser" under the Advisers Act), and the SEC and SEC staff have issued guidance on what services qualify. *See, e.g.*, *Abrahamson v. Fleischner,* 568 F.2d 862, 869-72 (2d Cir. 1977), cert. denied, 436 U.S. 913 (1978); *Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and other Persons Who Provide Investment Advisory Services as a Component of Other Financial Services*, SEC Statement of Staff Interpretation, Advisers Act Release No. 1092 (Oct. 8, 1987).

directing investment, they pose substantially similar risks to other advisory activities. FinCEN therefore declines to clarify that such investment activities on behalf of funds are non-advisory.

3. Dual Registrants and Affiliates

Proposed Rule: FinCEN proposed that an investment adviser also registered as a broker-dealer or a bank (*i.e.*, a dual registrant), or who is an operating subsidiary of a bank, would be included in the scope of the proposed regulation and subject to SEC examination for compliance with the regulation. However, in the IA AML NPRM, FinCEN clarified that it would not require such investment advisers to establish multiple or separate AML/CFT programs so long as a comprehensive AML/CFT program covers all of the investment adviser's applicable legal and regulatory obligations.

Comments Received: Commenters generally supported the language of the proposed rule that an investment adviser that is dually registered as a broker-dealer or is a bank (or is a bank subsidiary) does not need to establish multiple or separate AML/CFT programs so long as a comprehensive AML/CFT program covers all of the entity's relevant business and activities that are subject to BSA requirements. Similarly, commenters also generally agreed that an investment adviser affiliated with, or that is a subsidiary of, another entity required to establish an AML/CFT program in another capacity should not be required to implement multiple or separate programs. However, some expressed concern that FinCEN's proposal to delegate examination authority to the SEC for investment advisers would create duplication given the existing examination obligations on dual registrants.

One commenter, while supporting the proposed rule, requested that the final rule text should specifically afford investment advisers affiliated with a bank or bank holding company flexibility to leverage any aspect of the bank or bank holding company's AML/CFT program. The commenter argued that stating this in the rule text would require relevant supervisory agencies and staff to adhere to this approach. The commenter noted that failure to do so could

result in costly inefficiencies and additional operational risk in being unable to achieve a cohesive, enterprise-wide approach to AML/CFT compliance.

One commenter stated that requiring separate programs may increase the compliance and operational burden but could result in less useful information because of overlapping and duplicate reports that could be filed. One commenter recommended that supervision for a dual registrant's AML/CFT program remain with the firm's prudential regulator. Another commenter recommended that the SEC examination staff should leverage AML/CFT examinations conducted by other functional regulators, as well as FINRA and the New York Department of Financial Services. The commenter claimed this approach would align with the expectations of Congress, Treasury, and FinCEN in achieving objectives while efficiently allocating resources and lower the risk of conflicting examination results, expectations and findings.

Final Rule: FinCEN is implementing this requirement without change from the proposed rule. Accordingly, any investment adviser is subject to the requirements of the final rule, even if it is dually registered as a broker-dealer or is a bank (or is a bank subsidiary). As explained in the IA AML NPRM, such an adviser does not need to establish a separate AML/CFT program so long as a comprehensive AML/CFT program covers all of the investment adviser's relevant activities. Such a comprehensive program should be designed to address the different money laundering, terrorist financing, or other illicit finance activity risks posed by the different aspects of the overall business's activities and accordingly satisfy each of the risk-based AML/CFT program requirements to which it is subject in its capacity as both an investment adviser and broker-dealer or bank.

In addition, an investment adviser affiliated with, or a subsidiary of, another entity required to establish an AML/CFT program will not be required to implement multiple or separate programs and instead may elect to extend a single program to all affiliated entities that are subject to the BSA, so long as such AML/CFT program is designed to identify and mitigate

the different money laundering, terrorist financing, and other illicit finance activity risks posed by the different aspects of each affiliate's (or subsidiary's) business(es) and satisfies each of the risk-based AML/CFT program and other BSA requirements to which the entities are is subject in all of their BSA-regulated capacities, as for example an investment adviser and a bank or insurance company.[209]

FinCEN does not believe that further clarification of the AML/CFT program requirements for dual registrants, or how supervisors will conduct examination of the final rule, is currently necessary. The final rule provides adequate flexibility for investment advisers to incorporate its requirements into existing AML/CFT programs at an enterprise level and to tailor their programs to their circumstances in a risk-based manner. Financial institutions involved in multiple lines of business have long been subject to regulation by multiple agencies and FinCEN has worked with other agencies in regulatory and supervisory contexts. Based on this experience, FinCEN does not believe special instructions to examiners to coordinate their examinations touching on the final rule is necessary or appropriate. FinCEN anticipates working with SEC staff to communicate with relevant regulatory agencies that currently supervise relevant entities about the requirements of the final rule.

4. Delegation of AML/CFT Requirements

Proposed Rule: FinCEN proposed to permit an investment adviser to delegate contractually the implementation and operation of certain aspects of its AML/CFT program. However, the investment adviser would remain fully responsible and legally liable for the program's compliance with the proposed rule. The investment adviser also would be required

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[209] FinCEN notes that certain insurance companies are required to establish and implement AML programs and report suspicious activity. S*ee* 31 U.S.C. 5312(a)(2)(M); 31 CFR part 1025. However, the term "insurance company" is not included within the general definition of financial institution under FinCEN's regulations. *See* 31 CFR 1010.100(t). Therefore, such insurance companies are not required to file CTRs with FinCEN or comply with certain recordkeeping requirements. Accordingly, FinCEN would not expect an insurance company that is affiliated with or owns an investment adviser to design an enterprise-wide AML/CFT compliance program that would subject the insurance company to AML/CFT requirements not otherwise required by FinCEN's regulations. Conversely, FinCEN would expect a bank, which is subject to the full panoply of FinCEN's regulations implementing the BSA, to design an enterprise-wide AML/CFT compliance program that would subject an affiliated or controlled investment adviser to the AML/CFT requirements required by the final rule.

to ensure that FinCEN and the SEC are able to obtain information and records relating to the AML/CFT program. The proposed rule noted that, because investment advisers operate through a variety of different business models, each investment adviser may decide which aspects (if any) of its AML/CFT program are appropriate to delegate.

FinCEN requested comment on the practical effect of permitting an investment adviser to delegate some or all of the requirements in the proposed rule, as well as comment on various aspects of how foreign-located fund administrators may implement these requirements.

a) General Comments on Delegation

Comments Received: Seven commenters expressed views on the delegation of AML/CFT activities to third party service providers, including fund administrators. In general, these commenters suggested that FinCEN recognize that many investment advisers delegate administrative and compliance responsibilities to third parties, and that such delegation for AML/CFT responsibilities should be permissible under the proposed rule. Some commenters stated that, given a proposed SEC rule to apply minimum requirements to the outsourcing of services (including for compliance), FinCEN should be cautious about additional guidance on delegation prior to the SEC issuing a final rule.

One commenter requested that FinCEN include a safe harbor for investment advisers whose client utilizes a single qualified custodian to hold the client's advised assets, and allow the investment adviser to rely on the qualified custodian that is performing all AML/CFT obligations with respect to any client assets the custodian has in its custody. The commenter added that this would leverage the existing AML/CFT requirements for banks and broker-dealers while avoiding unnecessary duplication.

The same commenter also requested that investment advisers be permitted to rely on a service provider's certification of AML/CFT compliance so long as the investment adviser performs and documents periodic oversight of the service provider's operations at least annually. One commenter requested that FinCEN expressly permit an investment adviser's

AML/CFT program to contractually rely on diligence conducted by another covered financial institution or, perhaps, even other non-covered financial institutions or entities that are working on behalf of, and under the control and supervision of, the adviser. Another commenter asserted that the proposed rule rejected the suggestion that investment advisers should be able to rely upon the AML/CFT efforts of intermediaries, and requested FinCEN permit investment advisers to rely on the AML/CFT controls of intermediaries. The commenter added that such reliance is consistent with current best practices. Another commenter requested that FinCEN clarify in the rule text that delegation of AML/CFT requirements is expressly permitted.

One commenter suggested FinCEN clarify that, while advisers are responsible for developing the firm's AML/CFT compliance program, the full scope of the implementation and operation of the AML/CFT program may be delegated to service providers, including to offshore fund administrators. The commenter requested that this could include the responsibility to respond to 314(a) requests and to monitor for, prepare, and file SARs, to the extent that such administrator has the relevant information.

Two commenters stated that FinCEN should not prescribe additional standards or requirements with respect to such permissible delegation, as such additional requirements could conflict with the SEC's proposed rule on Outsourcing by Investment Advisers (Outsourcing Rule), which, would impose minimum due diligence and outsourcing requirements with regard to service providers. [210] These commenters recommended FinCEN wait for the Outsourcing Rule process to finalize before mandating any requirements for delegation of AML functions.

One commenter stated that if FinCEN chooses not to allow delegation of all AML/CFT responsibilities, then FinCEN should clarify which aspects of an AML/CFT program may be delegated to third parties. The commenter also requested that FinCEN provide guidance on measures advisers should take to ensure effective delegation of an AML/CFT program to a

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[210] *See* SEC, *Outsourcing by Investment Advisers*, Notice of Proposed Rulemaking, Advisers Act Release No. 6176 (Oct. 26, 2022), 87 FR 68816 (Nov. 16, 2022).

third party. The commenter recommended that such measures could include having the adviser conduct due diligence on the third party's AML/CFT policies and determining whether they meet the adviser's standards; a written agreement with the third party containing appropriate representations and covenants, including that the third party will maintain and adhere to effective AML/CFT policies, procedures and controls and update the adviser if there are any deficiencies identified in the third-party's audit; and having the adviser's periodically monitor compliance with such requirements.

As FinCEN noted in the IA AML NPRM, it is common in the advisory business for an investment adviser to delegate a range of compliance, administrative, and other activities to third-party providers. FinCEN also notes that other BSA-defined financial institutions routinely delegate, subject to relevant BSA and non-BSA regulatory requirements governing the delegation of activities to service providers, aspects of their AML/CFT compliance programs to third parties. Therefore, FinCEN will permit an investment adviser to delegate contractually the implementation and operation of some or all aspects of its AML/CFT program to a third-party provider, including a fund administrator. Because investment advisers operate through a variety of different business models, each investment adviser must decide which aspects of its AML program are appropriate to delegate. Based on current practice within the investment adviser sector for both AML/CFT and other regulatory requirements, and how other financial institutions delegate AML/CFT responsibilities, FinCEN believes it is unnecessary to include rule text explicitly permitting such delegation.

However, if an investment adviser delegates the implementation and operation of any aspects of its AML/CFT program, the investment adviser will remain fully responsible and legally liable for, and be required to demonstrate to examiners, the program's compliance with AML/CFT requirements and FinCEN's implementing regulations. The investment adviser also will be required to ensure that FinCEN and the SEC are able to obtain information and records relating to the AML/CFT program. The investment adviser would still be required to identify

and document the procedures appropriate to address its vulnerability to money laundering and terrorist financing, and then undertake reasonable steps to assess whether the service provider would carry out such procedures effectively.

For example, it would not be sufficient to simply obtain a certification from a service provider that the service provider "has a satisfactory anti-money laundering program." However, an investment adviser could take into account such a certification as part of the investment adviser's periodic oversight of the service provider's operations with respect to the delegated obligations. The appropriate frequency of that oversight would depend on the adviser's overall risk profile for money laundering, terrorist financing, or other illicit finance activities, and the types of AML/CFT responsibilities delegated to the service provider. Such oversight measures could include, for example, having the adviser conduct due diligence on the third party's AML/CFT policies and determining whether they meet the adviser's standards; a written agreement with the third party containing appropriate representations and covenants, including that the third party will maintain and adhere to risk-based and reasonably designed AML/CFT policies, procedures and controls and update the adviser if there are any deficiencies identified in the third-party's audit (if any); and/or having the adviser periodically monitor compliance with such requirements. FinCEN would like to note that this list of examples is illustrative based on information provided by commenters, and other measures could be used to conduct oversight of a service provider.

Regarding the SEC's proposed Outsourcing Rule,[211] FinCEN notes that the Outsourcing Rule would impose certain minimum requirements on an RIA's oversight of service providers to that RIA. However, given that the rule has not yet been finalized and would also only apply only to RIAs, FinCEN does not believe that delaying this aspect of the final rule is appropriate and FinCEN is providing the guidance above on how advisers may monitor their service providers' implementation of AML/CFT requirements contained in the final rule.

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[211] *Id.*

Regarding certain suggestions that FinCEN permit advisers to expressly rely on diligence or AML/CFT measures by other financial institutions, service providers, or other intermediaries, FinCEN declines to do so.[212] When the adviser is outsourcing AML/CFT compliance responsibilities with respect to its own customers and advisory activities, the adviser will be best positioned to assess illicit finance risks and identify and report suspicious activity, and design and oversee an AML/CFT program that can do so. Therefore, when the adviser delegates the implementation and operation of some or all aspects of its AML/CFT program to a service provider, the adviser will remain responsible for overall compliance with these requirements.

b) Comments on Delegation to Foreign-Located Service Providers

Comments Received: Seven commenters specifically addressed the issue of delegation to foreign-located service providers, including foreign-located fund administrators. All seven indicated that the IA AML NPRM had a negative view of how foreign-located fund administrators may apply AML/CFT requirements, and that view was inconsistent with their experience in working with foreign-located fund administrators. These commenters generally agreed that investment advisers should be able to delegate AML/CFT compliance measures to foreign-located fund administrators, so long as the investment adviser maintained responsibility for oversight of the AML/CFT program. Several commenters also requested that FinCEN expressly clarify that delegation of AML/CFT responsibilities to foreign-located fund administrators is permissible.

One investment adviser noted that they delegate AML compliance responsibilities to foreign-located service providers, and that these service providers are subject to supervision and oversight of a U.S.-based financial crimes compliance team. The adviser requested explicit guidance clarifying that it is permissible to rely on AML/CFT programs developed,

[212] FinCEN interprets these suggestions to mean that express reliance would remove the investment adviser's liability for compliance with the obligation.

implemented, and maintained by offshore fund administrators when such reliance is subject to contractual agreements and a risk-based approach to oversight. Another commenter noted that foreign-located RIAs and ERAs commonly delegate AML/CFT compliance to administrators in their local jurisdictions, and these advisers would face significant operational and implementation challenges if the final rule permits the delegation of only certain elements to offshore administrators.

Another commenter claimed that the SEC does not require a U.S. entity to be appointed to ensure that other rules implementing Federal securities laws are met, and that AML/CFT programs could easily, and should, be treated in the same way. The commenter noted requiring foreign-located advisers to outsource AML/CFT compliance to a U.S.-based entity would create additional risks, especially where robust internal functions designed to comply with the requirements of other FATF-compliant jurisdictions are already in place.

Three commenters noted that many foreign-located fund administrators are familiar with what is needed to execute a successful AML/CFT program, and in jurisdictions such as Ireland, Luxembourg, and the Cayman Islands, have been subject to longstanding AML requirements. Regarding the Cayman Islands in particular, the commenter noted that while the Cayman Islands has been criticized for weaknesses in AML/CFT supervision, it has made substantial strides to address these deficiencies.[213]

Three commenters requested FinCEN clarify how various compliance obligations can be met by the use of offshore administrators, including permitting onshore or offshore administrators, agents and service providers to engage in suspicious activity clearing, early alert reviews and other elements of the SAR process. Another commenter requested that FinCEN clarify if there were jurisdictions where delegation would not be permitted.

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[213] In October 2023, the FATF announced that the Cayman Islands would no longer be subject to increased monitoring by the FATF (a process that is externally referred to as the "grey list"). *See* FATF*, Jurisdictions Under Increased Monitoring* (Oct. 27, 2023), available at https://www.fatf-gafi.org/en/publications/High-risk-and-other-monitored-jurisdictions/Increased-monitoring-october-2023.html.

FinCEN appreciates the detailed information provided by commenters on how foreign-located service providers, including offshore administrators, can effectively implement the AML/CFT requirements contained in the proposed rule. Commenters generally noted that foreign-located service providers have implemented these requirements on behalf of investment advisers and other financial institutions for years, and that these service providers are routinely subject to U.S.-based supervision and oversight. FinCEN would like to clarify that it is permissible for an RIA or ERA to delegate the implementation and operation of some or all aspects of its AML/CFT program and other AML/CFT measures to foreign-located service providers, including fund administrators.[214] As with any delegation to a service provider (whether located in the United States or outside the United States), the delegation must be subject to contractual agreements and a risk-based approach to oversight described above, the RIA or ERA must remain responsible for overall implementation and ensure that FinCEN and the SEC are able to obtain information and records relating to the AML/CFT program.

E. Minimum AML/CFT Program Requirements

As mentioned above, the BSA provides that Treasury may prescribe minimum standards for AML/CFT programs that include, at a minimum, (1) the development of internal policies, procedures, and controls; (2) the designation of a compliance officer; (3) an ongoing employee training program; and (4) an independent audit function to test the programs.[215] FinCEN accordingly is adopting the requirement that investment advisers establish an AML/CFT program that meets certain minimum requirements as provided in section 5318(h) of the BSA. Section 1032.210(a)(1) of the final rule will require each RIA and ERA to develop and implement a written AML/CFT program that is risk-based and reasonably

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[214] FinCEN recognizes that in certain circumstances an offshore fund administrator may be in the best position to perform certain aspects of an investment adviser's AML/CFT program requirements, including monitoring for suspicious activity. Accordingly, an investment adviser may delegate contractually to an offshore fund administrator to monitor for suspicious activity, provide the details of such activity to the investment adviser, and file SARs on behalf of the adviser. However, the adviser remains fully responsible and legally liable for compliance with AML/CFT requirements.

[215] 31 U.S.C. 5318(h)(1)-(2).

designed to prevent the investment adviser from being used for money laundering, terrorist financing, or other illicit finance activities. Each RIA and ERA will also be required to make its AML/CFT program available for inspection by FinCEN and the SEC. The minimum requirements for the AML/CFT program are set forth in section 1032.210(b) of the final rule and discussed in greater detail below.

1. General Comments

Comments Received: One commenter wrote that it served as a qualified custodian for customer accounts managed by RIAs and required customers of RIAs to establish brokerage accounts (thus making the RIA customers their direct customers). The commenter wrote that these accounts (and the account holders) are subject to and covered by its AML policies and procedures. The commenter also stated that it was unclear why, in its view, a duplicative process at the RIA would provide additional protection against illicit finance activity. Another commenter agreed with FinCEN that advisers' AML/CFT programs should be risk-based and that the final rule should provide maximum flexibility to advisers to accommodate their varied business models and risk profiles.

One commenter noted that the requirements in the proposed rule do not duplicate existing requirements under the Advisers Act. The commenter wrote that the requirements serve different purposes and the information gathered to carry out each set of objectives is not necessarily comparable. For example, the commenter stated that regulations issued pursuant to Federal securities laws and the Advisers Act define beneficial ownership differently than the BSA and require collection of different data.[216] In addition, the resulting information collected under such regulations is not necessarily accessible to the same regulators or law enforcement personnel.

[216] *See, e.g.*, 17 CFR 240.13d-3 (governing determination of beneficial ownership pursuant to the Securities Exchange Act of 1934).

One commenter wrote that while the AML/CFT program must be risk-based and tailored to the adviser's business, the five minimum requirements (four of which are required by statute) for AML/CFT programs are highly prescriptive, making it difficult, in the commenter's view, for RIAs and ERAs to adopt a tailored, risk-based program.

One commenter agreed that AML/CFT programs should be risk-based and that risk-based programs may rely on appropriate vetting of intermediaries and other funds (and not require a "look through" to underlying investors), and requested that the final rule permit existing practices undertaken by advisers with regards to intermediaries acting for underlying investors, for an adviser to a private fund to be compliant with the risk-based AML/CFT program requirements.

One commenter requested that the final rule explicitly clarify that, in instances where an investment adviser has no direct customer relationship, AML risks inherently are lower and investment advisers should have significant latitude to apply the risk-based approach. For example, the commenter suggested that advisers, which provide "non-advisory" products and services to other advisers, with no direct relationship to the investors, should have the discretion to exclude such products and services from the definition of "account" or "customer."

Final Rule: The application of the risk-based approach means that an adviser may focus aspects of its AML/CFT program on activities or customers that it considers higher risk, and may comply with the BSA by applying more limited measures to those customers or activities that it identifies as lower risk. Regarding the five components of an AML/CFT program specified in section 1032.210(b) of the final rule, FinCEN disagrees that these are highly prescriptive, as each can be adjusted to address the specific risks and advisory activities of the adviser. For example, an adviser that services specific types of institutional customers (such as university endowments or municipal accounts) may have more tailored employee training than

an adviser that has a broader customer base composed of both retail and institutional customers.

FinCEN also reiterates the discussion in both the IA AML NPRM and Risk Assessment regarding the limited overlap between AML/CFT regulations and the requirements of the Advisers Act. The Advisers Act and its implementing regulations are not designed to explicitly address the risk that an RIA or ERA may be used to move proceeds or funds tied to money laundering, terrorist financing, or other illicit activity; they are instead designed to protect customers against fraud, misappropriation, or other illegal conduct by an investment adviser.[217] The diversity of customer relationships covered by the final rule can be addressed through a risk-based framework rooted in the risks posed by the adviser's business and FinCEN addresses some specific customer relationships and their risk throughout this document.

2. Internal Policies, Procedures, and Controls

Proposed Rule: Proposed section 1032.210(b)(1) would have required an investment adviser to establish and implement internal policies, procedures, and controls reasonably designed to prevent the investment adviser from being used for money laundering, terrorist financing or other illicit finance activities. The proposed rule noted that some types of customers or customer activities would pose greater risks for these money laundering, terrorist financing, or other illicit finance activities than others. Generally, under the proposed rule, an investment adviser would have been required to review, among other things, the types of advisory services that it provides and the nature of the customers that it advises to identify the investment adviser's vulnerabilities to money laundering, terrorist financing, and other illicit finance activities. It would also have needed to review investment products offered, distribution channels, intermediaries that it may operate through, and geographic locations of customers and advisory activities.

[217] *See* 89 FR at 12113; Risk Assessment, *supra* note 2, at 29–30.

The proposed rule also discussed how an investment adviser's AML/CFT program may address the money laundering, terrorist financing, or other illicit finance risks that may be presented by certain specific types of advisory customers, as well as how an adviser's program may address the risks presented by certain specific advisory services provided to those customers.

Comments Received: Two commenters asked for additional clarity regarding the application of the adviser's AML/CFT program to private fund customers. One commenter asked for confirmation that an adviser only needs to assess money laundering risks for underlying investors in a private fund when that adviser is the primary adviser to a private fund and has access to the relevant information about the underlying investors, and not when acting as a subadviser. The commenter stated that an adviser serving as the primary adviser or sponsor to a private fund will likely, but not necessarily, have information about that private fund's underlying investors in the ordinary course. The commenter claimed that the adviser would not have that information, for example, in an unaffiliated "fund-of-funds" structure. In those instances, the commenter suggested that the investee fund in the structure should not be required to "look through" and assess the risks presented by the underlying investors in an investing fund, unless the adviser is also the primary adviser to the investing fund and has access to information about underlying investors in the ordinary course.

The second commenter asked for clarity on how an adviser may meet its AML/CFT program requirements for (1) a fund that restricts its investors from redeeming any part of their interests in the fund within two years after that interest was initially purchased; and (2) an investment adviser that advises only such funds. A third commenter suggested FinCEN to provide further clarity on those types of pooled investment vehicles that present lower risks for purposes of an investment adviser's AML/CFT program.

Final Rule: The final rule maintains the proposed requirement that an investment adviser establish and implement internal policies, procedures, and controls reasonably designed

to prevent the investment adviser from being used for money laundering, terrorist financing, or other illicit finance activities and to achieve compliance with the applicable provisions of the BSA and implementing regulations. FinCEN is making a technical edit to the regulatory text at 1032.210(b)(1) to add the term "internal" to the "policies, procedures, and controls" so that the regulatory and statutory text for this requirement is consistent.[218] FinCEN notes this edit is not intended to affect the substance of the requirement.[219]

In establishing such internal policies, procedures, and controls, an investment adviser will be required to review, among other things, the types of advisory services that it provides and the nature of the customers that it advises to identify the investment adviser's vulnerabilities to being used for money laundering, terrorist financing, and other illicit finance activities. It will also need to review investment products offered, investment recommendations, distribution channels, intermediaries that it operates through, and geographic locations of customers and advisory activities. Accordingly, an investment adviser's assessment of the risks presented by the different types of advisory services that it provides to such customers would need to, among other factors, consider the types of accounts offered (*e.g.*, managed accounts), the channel(s) through which such accounts are opened, and the types of customers opening such accounts and related information about such customers, including their geographic location, sources of wealth, and investment objective. The following paragraphs discuss the final rule's treatment of internal policies, procedures, and controls as relating to registered closed-end funds and private funds.

Registered Closed-End Funds. As contemplated in the IA AML NPRM, FinCEN is not categorically exempting registered closed-end companies ("registered closed-end funds") from the AML/CFT requirements in the final rule.[220] Accordingly, an investment adviser's

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[218] *See* 31 U.S.C. 5318(h)(1)(A) (stating that AML/CFT programs should include, at a minimum, "the development of *internal* policies, procedures, and controls" (emphasis added)).
[219] For example, an enterprise-wide AML/CFT program's policies, procedures, and controls would still be "internal" with respect to the investment adviser.
[220] A closed-end company is a management company other than an open-end company*, see* 15 U.S.C. 80a-5(a)(2), and includes interval funds that rely on rule 23c-3 under the Company Act.

AML/CFT program will have to take into account any registered closed-end funds advised by the investment adviser. FinCEN notes that, absent other indicators of high-risk activity, an investment adviser may treat exchange-listed, registered closed-end funds as lower risk for purposes of their AML/CFT programs. An exchange-listed registered closed-end fund may be treated as lower risk given that exchange-listed closed-end funds generally (a) do not offer their shares continuously or redeem their shares on demand; (b) issue a fixed number of shares, which typically trade at negotiated prices on a stock exchange or in the over-the-counter market; (c) typically do not have an account relationship with their investors; and (d) have shares that are purchased and sold through broker-dealers or banks, which are already subject to AML/CFT requirements under the BSA (including the performance of CIP and CDD on their customers that purchase shares on exchanges).

Private Funds. As noted in the IA AML NPRM, the money laundering, terrorist financing, or illicit finance activity risks for private funds may vary by the individual fund's investment strategy, targeted investors, jurisdiction, and other characteristics. When determining its risk profile, an investment adviser may wish to consider, with respect to any private fund that it advises, among other things, minimum subscription amounts, restrictions on the type of investors, restrictions on redemptions or withdrawals, and the types of currency transactions conducted with investors. For advisers who exclusively advise funds with restrictions on redemptions or withdrawals, FinCEN does not assess that such funds can be categorically treated as lower risk, as there are other factors regarding the fund and its underlying investors that are relevant to illicit finance risk, which may vary significantly for each adviser or fund.

FinCEN expects an investment adviser that is the primary adviser to a private fund or other unregistered pooled investment vehicle to make a risk-based assessment of the money laundering, terrorist financing, and illicit finance activity 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 customers for whom the adviser manages assets directly. As noted above, the risk-based approach of the rule is intended to give investment advisers the flexibility to design their programs to meet the specific risks presented by their customers, including any funds they advise. In assessing the potential risk of a private fund under the rule, investment advisers generally should gather pertinent facts about the structure or ownership of the fund, including the extent to which the adviser is provided with relevant information about the investors in that private fund, who may or may not themselves also be customers of the investment adviser, and the nature of such investor-related information that they investment adviser receives.

Where an investment adviser attempts to and is unable to obtain identifying information about the investors in a private fund as part of its risk-based evaluation of the private fund, the adviser may determine that such private fund poses a higher risk for money laundering, terrorist financing, or other illicit finance activity. When a private fund's potential vulnerability to such money laundering, terrorist financing, or other illicit finance activity is high, the adviser's procedures would need to take reasonable steps to address these higher risks to prevent the investment adviser from being used for money laundering, the financing of terrorist activities, or other illicit activity, and to achieve and monitor compliance with the BSA (including to obtain sufficient information to monitor and report suspicious activity).

FinCEN recognizes that certain private funds and other unregistered pooled investment vehicles may present lower risks for money laundering or terrorist financing than others. Consequently, FinCEN would not expect an investment adviser to risk-rate the advisory services that it provides to a pooled investment vehicle that presents a lower risk in the same way it might rate the advisory services that it provides to other types of pooled investment vehicles that may present higher risks for attracting money launderers, terrorist

financers, or other illicit actors.

3. Independent Testing

Proposed Rule: Proposed section 1032.210(b)(2) would have required that an investment adviser provide for independent testing of the AML/CFT program by the adviser's personnel or a qualified outside party. As explained in the IA AML NPRM, the independent testing, as proposed, could be conducted by employees of the investment adviser, its affiliates, or unaffiliated service providers, so long as those same employees are not involved in the operation and oversight of the AML/CFT program. The frequency of the independent testing would depend upon the money laundering, terrorist financing, and other illicit finance risks of the adviser and the adviser's overall risk management strategy.

Comments Received: One commenter expressed concern that the requirement for an independent audit of the AML/CFT program would significantly burden investment advisers with few employees. The commenter stated that most of these advisers would have to hire an outside contractor to comply with this requirement. The commenter requested that FinCEN permit advisers with 100 or fewer employees to employ an internal testing program that may include employees involved in the AML/CFT program and/or ongoing AML/CFT compliance. The commenter indicated that without this modification, advisers would not be able to incorporate AML/CFT program requirements into their existing Federal securities compliance reviews, as staff who conduct these reviews would not be allowed to participate in the independent AML/CFT testing required by the proposed rule.

Final Rule: FinCEN is implementing this requirement without change from the proposed rule. The final rule, like the proposed rule, permits independent testing to be conducted by the investment adviser’s personnel or a qualified outside party. FinCEN recognizes the potential burden from using an external party to conduct the required independent testing.

Although the final rule permits the use of an investment adviser's personnel with certain restrictions, FinCEN declines to accept the recommendation that an individual involved in implementing the adviser's AML/CFT program may participate in the independent testing of such a program. Doing so would undermine the very purpose of this requirement, which is to allow an *independent* party to verify whether the AML/CFT program is functioning effectively. While investment advisers may use trained internal staff who are not involved in the function being tested, the AML/CFT officer or any party who directly, and in some cases, indirectly reports to the AML/CFT officer, or an equivalent role, generally would not be considered sufficiently "independent" for these purposes.[221] Any individual conducting the testing, whether internal or external, would be required to be independent of the function being tested in the investment adviser's AML/CFT program, including its oversight. Investment advisers with less complex operations, and lower money laundering, terrorist financing, or other illicit finance activity risk profiles may consider utilizing a shared resource as part of a collaborative arrangement with similarly less complex and lower risk profile advisers to conduct testing, as long as the testing is independent.[222]

4. AML/CFT Officer

Proposed Rule: Proposed section 1032.210(b)(3) would have required that an investment adviser designate a person or persons to be responsible for implementing and monitoring the operations and internal controls of the AML/CFT program. The IA AML

[221] This is consistent with current 31 CFR 1022.210, which provides that independent review may be conducted by an officer or employee of an MSB so long as the tester is not the AML/CFT officer. Similarly, current 31 CFR 1025.210, 1029.210, and 1030.210 provide that independent testing at insurance companies, loan or finance companies, and housing government sponsored enterprises, respectively, may be conducted by a third party or by any officer or employee of the financial institution, other than the AML/CFT officer. Likewise, 31 CFR 1027.210 and 1028.210 provide that independent testing of a dealer in precious metals, precious stones, or jewels or an operator of a credit card system, respectively, can be conducted by an officer or employee of the institution, so long as the tester is not the AML/CFT officer or a person involved in the operation of the AML/CFT program. The criteria to meet the "independent requirement" for independent testing at U.S. operations of foreign financial institutions may include a review of the reporting arrangements between the party conducting the independent testing and the AML/CFT officer, or equivalent management function such as a head of business line or a general manager, to assess any conflicts of interests and the level of independence with the party conducting the independent testing.

[222] *See* Interagency Statement on Sharing Bank Secrecy Act Resources (Oct. 3, 2018), available at https://www.fincen.gov/news/news-releases/interagency-statement-sharing-bank-secrecy-act-resources.

NPRM explained that the designated person or persons should be knowledgeable and competent regarding AML/CFT requirements, the adviser's relevant internal policies, procedures, and controls, as well as the adviser's money laundering, terrorist financing, and other illicit finance risks. A person designated as a compliance officer should be an officer of the investment adviser (or individual of similar authority within the particular corporate structure of the investment adviser) and someone who has established channels of communication with senior management demonstrating sufficient independence and access to resources to implement a risk-based and reasonably designed AML/CFT program.

Comments Received: Four commenters requested FinCEN modify this requirement to provide additional flexibility given the varying organizational structures of investment advisers. Three commenters requested that an investment adviser be able to designate an employee of the adviser's affiliate as its AML/CFT officer, provided that the employee is sufficiently qualified to perform this role, including possessing the appropriate level of authority, independence, access to information, and resources to perform the responsibilities of compliance with BSA/AML regulatory obligations.

Another commenter suggested that any sufficiently senior employee of the adviser (including its chief compliance officer)—or of any other affiliate or entity within the investment adviser's organizational structure—be permitted to serve as the AML/CFT officer so long as (i) such employee meets the other requirements set forth in at 1032.210(b)(2); and (ii) is either a member of, or reports directly to, the advisers or its affiliate's senior management. The reason for this suggestion was that investment advisers may not have formally designated corporate "officers" or have officers who are well-suited to serve as the adviser's AML/CFT compliance officer. Another commenter echoed the recommendation but suggested that an adviser also be able to designate a third-party expert.

Final Rule: FinCEN is implementing this requirement without change from the proposed rule. The final rule, like the proposed rule, will require an investment adviser to

designate a person or persons responsible for implementing and monitoring the internal policies, procedures, and controls of the adviser's AML/CFT program. Inherent in the requirement that an investment adviser designate an AML/CFT officer is the expectation that the designated individual is qualified to oversee the investment adviser's compliance with the BSA and FinCEN's implementing regulations. Accordingly, for an AML/CFT program to be risk-based and reasonably designed to achieve compliance with the BSA, the compliance officer must be sufficiently qualified. Whether an individual is sufficiently qualified as an AML/CFT officer will depend, in part, on the investment adviser's risk profile. Among other criteria, a qualified AML/CFT officer must have the expertise and experience to adequately perform the duties of the position, including having sufficient knowledge and understanding of the investment adviser and the risks of its use for money laundering, terrorist financing, or other illicit finance activities, the BSA and its implementing regulations, and how those laws and regulations apply to the investment adviser and its activities. Additionally, the AML/CFT officer's position in the financial institution's organizational structure must enable the AML/CFT officer to effectively implement the adviser's AML/CFT program. And, as explained in the proposed rule, an investment adviser may designate a single person or persons (including in a committee) to be responsible for compliance.

Given these necessary qualifications and the comments received, FinCEN clarifies that for purposes of compliance with the final rule, the actual title of the individual responsible for day-to-day AML/CFT compliance is not determinative, and the AML/CFT officer for these purposes need not be an "officer" of the adviser. The individual's authority, independence, and access to necessary AML/CFT compliance resources, however, are critical. Importantly, an AML/CFT officer should have decision-making capability regarding the AML/CFT program and sufficient stature within the organization to ensure that the program meets the applicable requirements of the BSA. The AML/CFT officer's access to resources may include the following: adequate compliance funds and staffing with the skills and expertise appropriate to

the investment adviser's risk profile, size, and complexity; an organizational structure that supports compliance and effectiveness; and sufficient technology and systems to support the timely identification, measurement, monitoring, reporting, and management of the investment adviser's illicit finance activity risks. An AML/CFT officer that has multiple additional job duties or conflicting responsibilities that adversely impact the officer's ability to effectively coordinate and monitor day-to-day AML/CFT compliance generally would not fulfill this requirement.[165]

FinCEN clarifies that, as noted by the comments received, so long as the AML/CFT officer fulfils these qualifications and requirements, the officer may be an employee of the adviser's affiliate, or of an entity within an adviser's organizational structure. However, while an investment adviser may delegate the implementation and operation of certain aspects of its AML/CFT program to a third party or outside consultant (as discussed above), that individual or group of individuals cannot serve as the adviser's AML/CFT officer. Said differently, the designated AML/CFT officer must be an employee of the investment adviser or of its affiliate. This approach is consistent with FinCEN's treatment of equivalent requirements for the designated officers of other financial institutions.

5. Employee Training

Proposed Rule: Section 1032.210(b)(4) would have required that an investment adviser's AML/CFT program provide ongoing training for appropriate persons. The IA AML NPRM explained that such training may be conducted through, among other things, outside or in-house seminars, and may include computer-based or virtual training. The nature, scope, and frequency of the investment adviser's training program would be determined by the responsibilities of the employees and the extent to which their functions would bring them in

[165] An RIA that is subject to the SEC's Compliance Rule (17 CFR 275.206(4)-7) could designate its chief compliance officer under the Compliance Rule to be responsible for this provision of this final rule. The final rule does not, however, require that an investment adviser designate the same person.

contact with AML/CFT requirements or possible money laundering, terrorist financing, or other illicit finance activity.

Comments Received: No comments were received regarding employee training.

Final Rule: FinCEN is implementing this requirement without change from the proposed rule. As noted in the proposed rule, to carry out their responsibilities effectively, employees of an investment adviser (and of any agent or third-party service provider that is delegated with administering any portion of the investment adviser's AML/CFT program) must be trained in AML/CFT requirements relevant to their functions and to recognize possible signs of money laundering, terrorist financing, and other illicit finance activity that could arise in the course of their duties. Such training may be conducted through, among other things, outside or in-house seminars, and may include computer-based or virtual training. The nature, scope, and frequency of the investment adviser's training program should be determined by the responsibilities of the employees and the extent to which their functions would bring them in contact with AML/CFT requirements or possible money laundering, terrorist financing, or other illicit finance activity. Consequently, the training program should provide a general awareness of overall AML/CFT requirements and money laundering, terrorist financing, and other illicit finance risks, as well as more job-specific guidance tailored to particular employees' roles and functions with respect to the entities' particular AML/CFT program.[223] For those employees whose duties bring them in contact with AML/CFT requirements or possible money laundering, terrorist financing, or other illicit finance risks, the requisite training would have to occur when the employee assumes those duties. Moreover, these employees should receive periodic updates and refreshers regarding the AML/CFT program.[224]

[223] *See, e.g.,* DWS Investment Management Americas Inc., Investment Company Act Rel. No. 6431, ¶ 28 (Sept. 25, 2023) (noting DWS' failure to conduct AML training that was specific to the DWS Mutual Funds or the risks applicable to mutual funds for those employees with mutual fund responsibilities).

[224] The frequency of these periodic updates and refreshers would depend upon the money laundering, terrorist financing, and other illicit finance risks of the adviser and the adviser's overall risk management strategy.

6. Ongoing Customer Due Diligence

Proposed Rule: Proposed section 1032.210(b)(5) would have required that an investment adviser implement appropriate risk-based procedures for conducting ongoing CDD that includes (i) understanding the nature and purpose of customer relationships for the purpose of developing a customer risk profile; and (ii) conducting ongoing monitoring to identify and report suspicious transactions and, on a risk basis, to maintain and update customer information.

As described in the IA AML NPRM, these are two of the four core elements of CDD. The other two elements of CDD are: (1) identifying and verifying the identity of customers; and (2) identifying and verifying the identity of the beneficial owners of legal entity customers opening accounts. As stated in the IA AML NPRM, FinCEN will address the customer identification and verification element of CDD in a separate joint rulemaking with the SEC. On May 21, 2024, FinCEN and the SEC issued the IA CIP NPRM to apply CIP requirements to investment advisers.[225]

Regarding the identification and verification of the identity of the beneficial owners of legal entity customers opening accounts, in the proposed rule FinCEN noted it would take the first step towards incorporating this element by including investment advisers in the definition of "covered financial institution" under 31 CFR 1010.605(e)(1). However, as discussed in the IA AML NPRM, given that FinCEN expects to revise the CDD Rule as mandated by the Corporate Transparency Act, investment advisers would not be required to apply the current requirements to identify and verify the beneficial owners of legal entity customer accounts until the effective date of the revised CDD Rule.[226] FinCEN requested comment on various aspects of the CDD requirement in the proposed rule.

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[225] *See Customer Identification Programs for Registered Investment Advisers and Exempt Reporting Advisers*, Notice of Proposed Rulemaking, 89 FR 44571 (May 21, 2024).

[226] *Customer Due Diligence Requirements for Financial Institutions*, Final Rule, 81 FR 29398 (May 11, 2016); *see also Revisions to Customer Due Diligence Requirements for Financial Institutions*, available at https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202404&RIN=1506-AB60.

Comments Received: Seven commenters provided comments on various aspects of the proposed CDD obligation.

One commenter asked FinCEN to clarify that investment advisers are not required to adopt formal risk-rating models or methodologies and that advisers have discretion to apply risk factors as they deem appropriate and as suitable for their business activities and products. The commenter stated that advisers should be permitted to evaluate lower risk relationships through consideration of "inherent or self-evident information," including the type of customer or type of account, service or product, without any requirement to obtain additional information regarding the customer or the relationship.

That same commenter asked that FinCEN clarify its expectations for transaction monitoring, noting that the number of SARs used to help estimate certain costs related to transaction monitoring in the proposed rule may not accord with the business model of many investment advisers. The commenter requested that FinCEN clarify that (i) in the absence of transactional activity, advisers should not have to monitor media reports and similar external events that do not have direct bearing on their relationships with the clients; and (ii) advisers' transaction monitoring systems need not be automated.

Another commenter requested that CIP requirements and the requirement to identify the beneficial owners of legal entity customers either (i) not apply to subadvisers, particularly where the sponsor or primary adviser represents or confirms that it has independent CIP and CDD obligations under the BSA's implementing regulations; or that (ii) FinCEN permit subadvisers to allocate CIP and CDD rule responsibilities to the sponsor. Another commenter requested that RIAs for employer-sponsored retirement plans be exempt from having to collect information or verify the beneficial ownership information relating to employer-sponsored retirement plans.

Regarding the timing for implementing the various elements of CDD, three commenters indicated that the decision to split the timeline for implementation of these requirements could

be problematic, particularly if there are delays in finalizing any related regulatory proposals. Two commenters requested that the CDD requirements in the proposed rule be deferred until a CIP Rule for investment advisers is finalized and the CDD Rule is revised. The commenter claimed that it would be difficult for advisers to conduct ongoing CDD without a CIP obligation and when the full scope of the CDD Rule has not been clarified, as well as costly if they have to implement and then alter a CDD program to align it with a CIP requirement and revised CDD Rules.

Two commenters supported the timing for CDD obligations in the proposed rule. One commenter encouraged FinCEN to propose and finalize a joint CIP rule and the revised CDD Rule as soon as possible so investment advisers would be required to implement the other two core elements of the CDD Rule. Another commenter also strongly supported swiftly applying the requirement for investment advisers to obtain beneficial ownership information for legal entity customers.

Three commenters raised questions about applying CDD requirements in the context of private funds and other pooled investment vehicles. One of these three commenters stated that advisers do not usually carry out the investor onboarding functions that yield information relevant for customer risk, as these functions are typically carried out by the placement agent, who is already subject to AML requirements, or the administrator on behalf of the fund. The commenter asserted that this means advisers would not be best placed to identify activity that would potentially support filing a SAR.

One commenter requested that FinCEN acknowledge certain existing due diligence practices—including with intermediaries in the private funds context—are appropriate in a risk-based AML/CFT program and to make clear that risk-based AML/CFT programs will not require investment advisers to conduct diligence on underlying investors or customers that are represented by intermediaries. Another commenter requested additional clarification on who would be the “customer” for an adviser when the adviser manages a pooled investment vehicle

and has an advisory relationship with the pooled vehicle and not the investors in the vehicle, and how the adviser is expected to apply its due diligence procedures to the pooled vehicle and its investors where the adviser does not have a direct relationship with the investors.

Final Rule: FinCEN is implementing this requirement without change from the proposed rule. Accordingly, an investment adviser's AML/CFT program must implement appropriate risk-based procedures for conducting ongoing customer due diligence. In addition, "investment adviser" will be included in the definition of "covered financial institution" under 31 CFR 1010.605(e). FinCEN notes that this rule does not require the categorical collection of beneficial ownership information for legal entity customers of investment advisers. FinCEN may consider a subsequent rulemaking imposing such an obligation on investment advisers. Rather, an investment adviser should make a risk-based determination as to whether it needs to collect beneficial ownership information based on the customer's risk profile. Regarding CIP, FinCEN will address issues related to the application of CIP requirements to certain advisory customers or activities in a CIP final rule for investment advisers, but reiterates that the IA CIP NPRM proposed a provision permitting investment advisers to rely on other financial institutions to perform CIP subject to certain conditions, including when the financial institution is subject to a rule implementing the AML/CFT compliance program requirements of 31 U.S.C. 5318(h) and is regulated by a Federal functional regulator.[227]

FinCEN acknowledges the impact of a staggered implementation of the CDD requirements in this rule, the CIP requirements that would be applied in a final CIP Rule, and a potential future obligation to apply a requirement for investment advisers to collect the beneficial ownership information of legal entity customers. Recognizing the interrelationship of these rulemakings, FinCEN intends for this rule and a CIP final rule to have the same compliance date, and that any obligation for investment advisers to collect the beneficial

[227] 89 FR at 44578-79 (discussing section 1032.220(a)(6) of the proposed CIP rule).

ownership information of legal entity customers to not be effective until a CIP rule is finalized and until the CDD Rule applicable to covered financial institutions is revised.

Understand the Nature and Purpose of Customer Relationships to Develop Customer Risk Profiles. As is the case for banks, broker-dealers, and mutual funds, the term "customer risk profile" for investment advisers refers to information gathered—typically at the time of account opening or, in the case of an RIA or ERA, at the onset of an advisory relationship—about a customer to develop the baseline against which customer activity is assessed for suspicious activity reporting and to develop appropriate risk-based procedures for conducting ongoing customer due diligence.

Under the final rule, and as discussed below, investment advisers are obligated to report certain suspicious transactions by filing SARs. Suspicious transactions are those that, among other things, have no business or apparent lawful purpose or are not the sort in which the particular customers would normally be expected to engage. Fulfilling this proposed requirement will necessitate that an investment adviser gathers sufficient information to form an understanding of the nature and purpose of the customer relationship for the purpose of developing a customer risk profile, which informs the baseline against which the investment adviser can identify aberrant, suspicious transactions. In some circumstances, an understanding of the nature and purpose of a customer relationship can also be sufficiently developed by inherent or self-evident information about the product or customer type, such as the type of customer or the service or product offered, or other basic information about the customer, and such information may be sufficient to understand the nature and purpose of the relationship. This information may include the customer's explanation about its initial decision to seek advisory services from the adviser and may be reflected in the particular type of advisory service the customer seeks, as well as information already collected by the investment adviser, such as investment objective, net worth, domicile, citizenship, or principal occupation or business.

FinCEN is clarifying that, although investment advisers may determine that formal risk-rating models or methodologies assist them in complying with this requirement, advisers may comply with this requirement through other approaches and have discretion to apply risk factors appropriate for their business activities and products. These approaches should be informed by an investment adviser's assessment of overall risk for its advisory business and should be sufficiently detailed to distinguish between significant variations in the illicit finance risks of its customers. FinCEN further notes that there are no required risk profile categories, and the number and detail of these risk characterizations will vary based on the adviser's size and complexity. As explained above, FinCEN is also clarifying that, consistent with existing BSA regulatory guidance for other financial institutions, an investment adviser can evaluate certain lower risk relationships through consideration of "inherent or self-evident information," including the type of customer or type of account, service or product.[228]

For investment advisers, the risks associated with a particular type of customer may vary significantly. For instance, key risk factors for a natural person customer may include the source of funds, the jurisdiction in which the customer resides, the customer's country(ies) of citizenship, and the customer's status as a PEP,[229] among other things. For a legal entity customer, key risk factors an investment adviser may consider may include the type of entity (*e.g.*, limited partnership, limited liability company, trust), the jurisdiction in which it is domiciled and located, and the statutory and regulatory regime of that jurisdiction with respect to corporate formation and other financial transparency requirements, if relevant. The investment adviser's historical experience with the customer or entity and the references of other financial institutions may also be relevant factors.

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[228] *See* FIN-2020-G002*, Frequently Asked Questions Regarding Customer Due Diligence (CDD) Requirements for Covered Financial Institutions* (Aug. 3, 2020), https://www.fincen.gov/sites/default/files/2020-08/FinCEN_Guidance_CDD_508_FINAL.pdf; *see also* FFIEC BSA/AML Examination Manual, *Customer Due Diligence -Overview* https://bsaaml.ffiec.gov/manual/AssessingComplianceWithBSARegulatoryRequirements/02.

[229] *See generally* Joint Statement on Bank Secrecy Act Due Diligence Requirements for Customers Who May Be Considered Politically Exposed Persons (Aug. 21, 2020), https://www.fincen.gov/sites/default/files/shared/PEP%20Interagency%20Statement_FINAL%20508.pdf.

In understanding the nature and purpose of customers that are private funds, FinCEN notes that investment advisers can (1) create and administer a private fund; or (2) provide advice to a private fund that is created and administered by a third party—for example, a financial intermediary. While the particular role played by the investment adviser will affect the type of information the adviser reasonably can collect about the investors in such a fund, in either case the adviser should collect sufficient information to develop a customer baseline for suspicious activity reporting regarding the private fund.

FinCEN expects advisers to subject non-intermediary legal entity customers that are not BSA-defined financial institutions with their own AML/CFT requirements to a different assessment than intermediary customers that are BSA-defined financial institutions in order to understand the nature and purpose of the customer relationship. For example, FinCEN expects that an investment adviser would assess the risks of a customer that is a registered broker-dealer, and therefore a financial institution, as different from the risks of an unregulated operating company or private holding company. The final rule's requirement to assess customer risk must be understood in this context.

FinCEN recognizes that certain information regarding underlying investors initially may not be collected by investment advisers to private funds, and that the investment adviser may not always have a direct relationship with the investors in its legal entity or private fund customers. Those investors may be introduced to the adviser by other entities who may or may not have their own AML/CFT obligations (such as a bank, broker-dealer, other investment adviser, or other intermediary). Even though investment advisers would not be required to collect beneficial ownership information on all legal entity customers, investment advisers should collect sufficient information such that they are able to detect and report suspicious activity associated with intermediaries or nominee holders representing underlying investors, as

well as activity related to underlying investors.[230] FinCEN acknowledges that advisers to private funds may already engage in AML/CFT due diligence practices, including diligence on intermediaries representing underlying investors in a fund. In some instances, depending on the risk associated with the private fund, an investment adviser may determine that it does not need to conduct additional diligence on underlying investors or customers that are represented by intermediaries. However, in other instances when an investment adviser assesses a private fund or its investors presents higher risk, the investment adviser may need to collect additional information about the underlying investors to develop a customer baseline for suspicious activity reporting regarding the private fund.

Ongoing Monitoring to Identify Suspicious Transactions and Update Customer Information. Similar to the CDD obligations for mutual funds,[231] under the proposed section1032.210(b)(5)(ii), investment advisers would have been required to implement appropriate risk-based procedures to conduct ongoing monitoring to identify and report suspicious transactions and, on a risk basis, to maintain and update customer information. FinCEN is implementing this requirement without change from the proposed rule. Accordingly, the final rule will require an investment adviser's AML/CFT program to implement appropriate risk-based procedures for conducting ongoing monitoring to identify and report suspicious transactions and, on a risk basis, to maintain and update customer information. This element of CDD will oblige investment advisers to perform ongoing monitoring, drawing on customer information, as well as to file SARs in a timely manner in accordance with their reporting obligations.[232] As proposed, the obligation to update customer information will generally only be triggered when the investment adviser becomes aware of information relevant to assessing the potential risk posed by a customer; it does not impose a

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[230] *See Customer Due Diligence Requirements for Financial Institutions*, Notice of Proposed Rulemaking, 79 FR 45141, 45161 (Aug. 4, 2014).

[231] 31 CFR 1024.210(b)(5)(ii); *see also* 81 FR at 29424.

[232] The proposed SAR filing obligations being adopted for investment advisers are discussed below.

categorical requirement to update customer information on a regularly occurring, pre-determined basis.

Ongoing monitoring may be accomplished in several ways, any of which can be included in an investment adviser's AML/CFT program. Customer information may be integrated into the investment adviser's transaction monitoring system and may be used after a potentially suspicious transaction has been identified, as one means of determining whether the identified activity is suspicious. An investment adviser may also utilize the information sharing provisions under section 314(b) of the USA PATRIOT Act to request relevant information from other financial institutions that may hold relevant information, such as the qualified custodians of customer funds.

FinCEN would also like to clarify, as discussed in detail in the Regulatory Analysis at Section V, that the estimated number of SARs to be filed by each investment adviser is intended to assist FinCEN in estimating the costs associated with identifying and reviewing alerts and cases that may eventually lead to a SAR filing. There is no regulatory expectation or obligation that an investment adviser file a certain minimum number of SARs to be in compliance with the requirements of the final rule.

Regarding transaction monitoring, FinCEN is clarifying that investment advisers are not categorically required to perform media searches or particular screenings for all customers, but they should conduct risk-based monitoring of such reports and events.[233] In circumstances where a customer presents certain risk indicators, an adviser may need to collect additional information to better understand the customer relationship and monitor for material changes based on external developments. For example, an investment adviser may need to do additional

[233] As stated in previous FinCEN guidance on the CDD Rule, compliance with the CDD Rule does not categorically require the performance of media searches or particular screenings. *See* FIN-2020-G002, *Frequently Asked Questions Regarding Customer Due Diligence (CDD) Requirements for Covered Financial Institutions* (Aug. 3, 2020). *See also*, FinCEN, *Answers to Frequently Asked Questions Regarding Suspicious Activity Reporting and Other Anti-Money Laundering Considerations*, (Jan. 19, 2021), available at https://www.fincen.gov/sites/default/files/2021-01/Joint%20SAR%20FAQs%20Final%20508.pdf, at questions 4 and 5.

research, including open-source media searches, where a customer claims their funds are derived from a source of wealth that is inconsistent with the adviser's understanding of the customer's financial activities and sources of funds. Similarly, if an adviser knows, or reasonably should know, that a customer has ties to a jurisdiction, or legal or natural person, that is subject to OFAC sanctions, an adviser should regularly confirm that the customer themselves has not been designated or otherwise been made subject to OFAC sanctions. Regardless of the approach that an investment adviser follows with respect to media searches and similar screenings, the adviser should reassess and update customer risk profiles based on material information that personnel in customer-facing roles identify in the course of performing their duties or that the customer discloses as part of an ongoing customer relationship—even if not specifically undertaken to support the adviser's AML/CFT program.

FinCEN also notes that this rule does not require investment advisers to implement automated transaction monitoring systems. The type of transaction monitoring system used by an investment adviser should be commensurate with its risk profile; rather than any particular technology solution, the adviser should have reasonable internal policies, procedures, and controls to monitor and identify unusual activity, and adequate resources to identify, report, and monitor suspicious activity. RIAs, including smaller RIAs, whose customer funds are custodied with a qualified custodian that may employ its own transaction monitoring system, may not have a need for their own transaction monitoring systems, and so may delegate certain aspects of transaction monitoring to the qualified custodian, although such RIAs remain legally responsible for such transaction monitoring, and, if applicable, reporting to FinCEN on suspicious transactions identified through such monitoring.

As FinCEN noted in the preamble to the CDD Rule, the ongoing monitoring obligation is intended to apply to "all transactions by, at, or through the financial institution,"[234] and not just those that are made by direct customers of the financial institution. Given that risks posed

[234] 81 FR at 29424.

by each customer differ, FinCEN believes that the level of risk posed by a customer relationship with a legal entity customer that is a pooled investment vehicle should be a factor influencing the decision to request information regarding underlying investors, and if the legal entity customer does not provide such information, how the investment adviser should adjust the risk profile of that legal entity customer.

7. AML/CFT Program Approval

Proposed Rule: Proposed section 1032.210(a)(2) would require that each investment adviser's AML/CFT program be approved in writing by its board of directors or trustees, or if it does not have a board, by its sole proprietor, general partner, trustee, or other persons that have functions similar to a board of directors. The proposed rule would require an investment adviser's written program to be made available for inspection by FinCEN or the SEC.

Comments Received: Three commenters asserted that, as owners and principals of advisers may not be most familiar with operational aspects of an adviser's AML/CFT program, the final rule should permit approval by a member of senior management. The commenters noted this would be consistent with the corresponding rules for broker-dealers and with the integration of the AML program into the adviser's existing compliance program.

Final Rule: The final rule retains the proposed requirement without change. FinCEN recognizes that some investment advisers might have other individuals or groups with similar status or functions as a board of directors or trustees, including sole proprietor, general partner, trustee, or other persons that have functions similar to a board of directors and are able to approve the AML/CFT program. FinCEN agrees with the points raised by several commenters and notes that, in such circumstances (where an adviser does not have a board of directors or trustees but has individuals or groups with similar status or functions to such a board), other members of senior management may also be appropriately suited to approve the AML/CFT program. Such individuals may include the Chief Executive Officer, Chief Financial Officer, Chief Operations Officer, Chief Legal Officer, Chief Compliance Officer, Director, and other

senior management with similar status or function. In addition, groups with oversight responsibilities may include board committees such as compliance or audit committees as well as a group of some, or all of these individuals with aforementioned titles, as senior management that can provide effective oversight of the AML/CFT program to comply with the rule. Accordingly, under the circumstances noted above, an investment adviser may comply with this provision of the final rule by having its program approved in writing by any of the foregoing persons or groups.

8. Other Comments Regarding AML/CFT Program Requirements

One commenter suggested FinCEN expressly recognize that investment advisers are already subject to significant recordkeeping obligations and the intention of the AML/CFT program requirement is not to require advisers to create additional records outside of those that are created in the ordinary course.

One commenter suggested that FinCEN create an AML examination team for activities or entities that may be subject to AML/CFT regulation but do not have a primary Federal regulator. The commenter suggested this could include family offices, real estate funds, title insurers, escrow agents, and money services businesses. The commenter stated that other AML conduct regulators around the world have similarly done so. The same commenter recommended that the SEC and CFIUS strengthen oversight of private funds, and that CFIUS should be reviewing more foreign investments in sensitive economic sectors, aided by the SEC.

As FinCEN stated in the IA AML NPRM, investment advisers are subject to a range of reporting obligations under Federal securities laws.[235] Those laws and regulations, however, only have limited overlap with the purposes and requirements of AML/CFT laws and regulations. FinCEN further acknowledges the suggestion to create an AML examination team for other types of activities (some of which may relate to investment advisers), but has determined that they apply to a broader set of activities beyond the scope of the proposed rule

[235] 89 FR at 12110-11.

and declines to address them further at this time. Regarding the scope of CFIUS reviews and CFIUS oversight of private funds, FinCEN notes that this is outside the scope of the current rulemaking.

9. Duty Provision

Proposed Rule: As noted in the IA AML NPRM, section 6101(b)(2)(C) of the AML Act, codified at 31 U.S.C. 5318(h)(5), provides that the duty to establish, maintain, and enforce a financial institution's AML/CFT program shall remain the responsibility of, and be performed by, persons in the United States who are accessible to, and subject to oversight and supervision by, the Secretary of the Treasury and the appropriate Federal functional regulator (the "Duty Provision"). Proposed section1032.210(d) would have incorporated this statutory requirement with respect to investment advisers' AML/CFT programs by restating that the duty to establish, maintain, and enforce the AML/CFT program must remain the responsibility of, and be performed by, persons in the United States who are accessible to, and subject to oversight and supervision by, FinCEN and the financial institution's appropriate Federal functional regulator (*i.e.,* for investment advisers, the SEC). FinCEN requested comment on a variety of potential questions or challenges that may arise for financial institutions as they address this requirement and noted that it would consider whether additional interpretive language would be appropriate in a final rule.

Comments Received: FinCEN received four comments on the proposal that an investment adviser's AML/CFT program be based in the United States. Commenters questioned how foreign advisers without U.S.-based staff could implement the AML/CFT program located in the U.S. One commenter called for FinCEN to acknowledge that a foreign adviser could accomplish that requirement through retention of a U.S.-based contractor or administrator or through other means. Another commenter called for FinCEN to exclude foreign-located investment advisers from the rule or eliminate the obligation of foreign-located investment advisers to have persons implementing the AML/CFT program located in the

United States. A third commenter asked that FinCEN analyze the impacts on foreign-located advisers and extend the implementation period to allow sufficient time for foreign-located advisers to hire and train staff in the United States. Another commenter requested that the final rule expressly permit foreign-located persons to participate in AML/CFT compliance oversight.

Final Rule: FinCEN has determined not to include this requirement in this final rule as discussed below. The statutory text of the Duty Provision[236] came into effect for all BSA-defined financial institutions on January 1, 2021, as part of the National Defense Authorization Act for Fiscal Year 2021.[237] At the same time, the Duty Provision previously has not been incorporated into a FinCEN regulatory requirement. FinCEN acknowledges the comments seeking further guidance, an exemption from, or a delay in implementation for, foreign-located investment advisers regarding the Duty Provision, as well as the comment requesting use of a U.S.-based contractor or service provider to comply with this requirement. FinCEN has recently sought comment on a proposed regulation incorporating the Duty Provision for existing BSA-defined financial institutions as a part of broader updates to the AML/CFT Program requirements issued on July 3, 2024 (July AML/CFT Program NPRM).[238] In light of the comments seeking further guidance regarding the Duty Provision, as well as the July AML/CFT Program NPRM, FinCEN has determined not to include this requirement in this final rule. FinCEN continues to take the Duty Provision under advisement and may consider incorporating the Duty Provision in a subsequent rulemaking applicable to investment advisers.

10. Statutory Factors Considered in Applying AML/CFT Program Requirements

The BSA authorizes FinCEN, after consultation with the appropriate Federal

[236] 31 U.S.C. 5318(h)(5).
[237] P.L. 116-283, Div F, Title LXI 6101(b).
[238] *Anti-Money Laundering and Countering the Financing of Terrorism Programs*, Notice of Proposed Rulemaking, 89 FR 55428 (Jul. 3, 2024).

functional regulator (for investment advisers, the SEC), to prescribe minimum standards for such AML/CFT programs.[239] In developing this final rule, FinCEN consulted and coordinated with SEC staff, including with respect to the statutorily specified factors set out in 31 U.S.C. 5318(h)(2)(B). These factors are:

- financial institutions are spending private compliance funds for a public and private benefit, including protecting the United States financial system from illicit finance risks;
- the extension of financial services to the underbanked and the facilitation of financial transactions, including remittances, coming from the United States and abroad in ways that simultaneously prevent criminal persons from abusing formal or informal financial services networks are key policy goals of the United States;
- effective anti-money laundering and countering the financing of terrorism programs safeguard national security and generate significant public benefits by preventing the flow of illicit funds in the financial system and by assisting law enforcement and national security agencies with the identification and prosecution of persons attempting to launder money and undertake other illicit activity through the financial system;
- anti-money laundering and countering the financing of terrorism programs should be—
  - reasonably designed to assure and monitor compliance with the requirements of the BSA and regulations promulgated under the BSA; and
  - risk-based, including ensuring that more attention and resources of financial institutions should be directed toward higher-risk customers

[239] 31 U.S.C. 5318(h)(2)(A).

and activities, consistent with the risk profile of a financial institution, rather than toward lower-risk customers and activities.

FinCEN has considered these factors in section 5318(h)(2)(B) in the drafting of this final rule. In finalizing this rule, FinCEN has considered the fact that comprehensive AML/CFT requirements for investment advisers, which will require investment advisers to have effective AML/CFT programs and subject them to SAR reporting requirements, will aid in preventing the flow of illicit funds in the U.S. financial system and in assisting law enforcement and national security agencies with the identification and prosecution of those who attempt to launder money and undertake other illicit finance activity through the financial system. Additionally, FinCEN recognizes that AML/CFT programs at an investment adviser should be reasonably designed and risk-based consistent with the investment adviser's respective risk profile, and therefore is adopting an AML/CFT program rule that requires internal policies, procedures, and controls reasonably designed to prevent the investment adviser from being used for money laundering, terrorist financing, or other illicit finance activities, as well as risk-based procedures that consider an investment adviser's risk profile. Further, as discussed in the Regulatory Impact Analysis, FinCEN has analyzed the financial costs to investment advisers in imposing AML/CFT obligations, including AML/CFT program requirements and SAR filing requirements, and has determined that the public and private benefit to this proposed rule would outweigh the private compliance costs.[240]

F. Suspicious Activity Reporting

The BSA authorizes Treasury—and thereby FinCEN—to require "any financial

[240] Further discussion relevant to each factor may be found at: Factor (i): the regulatory impact analysis at Section V and other discussions of the costs and benefits of the rule; Factor (ii): we believe that this factor is not relevant to the rule because investment advisers generally do not provide services to the unbanked, process remittances, or participate in informal financial networks. This may be inferred from the risk discussion at Section II.C and accompanying discussions of the structure of the investment advisory industry; and Factor (iii): the risk analysis at Section II.C; Factor (iv): the risk analysis at Section II.C and the discussion of building upon existing requirements and examination programs in this Section and at Section III.D.

institution, and any director, officer, employee, or agent of any financial institution, to report any suspicious transaction relevant to a possible violation of law or regulation."[241] Existing FinCEN regulations issued under this authority require banks, casinos, card clubs, money services businesses, broker-dealers in securities, mutual funds, insurance companies, futures commission merchants, introducing brokers in commodities, and loan or finance companies to report suspicious activity by submitting SARs to FinCEN.[242] As discussed further below, in this final rule, FinCEN is subjecting covered investment advisers to suspicious activity reporting requirements similar to those previously issued by FinCEN.

Proposed Rule: Proposed section 1032.320 would have required investment advisers to file SARs for any suspicious transaction relevant to a possible violation of law or regulation and as otherwise defined.

Proposed section 1032.320(a) set forth the criteria for which an investment adviser would be obligated to report any suspicious transactions in line with those imposed on other financial institutions. Under this proposal, filing a report of a suspicious transaction would not relieve an investment adviser from the responsibility of complying with any other reporting requirement imposed by the SEC.

Proposed section 1032.320(a)(1) contained the general statement of the obligation to file reports of suspicious transactions. The obligation would have extended to transactions conducted or attempted by, at, or through an investment adviser. Proposed section 1032.320(a)(2) would have required the reporting of any suspicious activity transaction that involves or aggregates at least $5,000 in funds or other assets. Furthermore, proposed section 1032.320(a)(1) would have permitted an investment adviser to report voluntarily any transaction the investment adviser believes is relevant to the possible violation of any law or regulation but that is not otherwise required to be reported by this proposed rule. As proposed,

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[241] 31 U.S.C. 5318(g)(1).

[242] *See* 31 CFR 1020.320, 1021.320, 1022.320, 1023.320, 1024.320, 1025.320, 1026.320, and 1029.320.

such voluntary reporting would be subject to the same protection from liability as mandatory reporting pursuant to 31 U.S.C. 5318(g)(3).

Proposed section 1032.320(a)(2)(i) through (iv) would have specified that an investment adviser would be required to report a transaction if it knows, suspects, or has reason to suspect that the transaction (or a pattern of transactions of which the transaction is a part): (i) involves funds derived from illegal activity or is intended or conducted to hide or disguise funds or assets derived from illegal activity as a part of a plan to violate or evade any Federal law or regulation or to avoid any transaction reporting requirement under Federal law or regulation; (ii) is designed, whether through structuring or other means, to evade the requirements of the BSA; (iii) has no business or apparent lawful purpose, and the investment adviser knows of no reasonable explanation for the transaction after examining the available facts; or (iv) involves the use of the investment adviser to facilitate criminal activity. Proposed section 1032.320(a)(3) would have provided that where more than one investment adviser, or another financial institution with a separate suspicious activity reporting obligation,[243] is involved in the same transaction, only one report jointly filed on behalf of all involved financial institutions would be required.

Comments Received: 11 commenters commented on the requirement for investment advisers to file SARs. Commenters generally supported applying the SAR filing requirement and the safe harbor from liability, but requested clarification on how the SAR filing obligation would apply to advisory activities in general and in certain circumstances, noting the difference between advisers' role in funds transfers and those of other financial institutions. Some commenters supported the proposed obligation as an important way to prevent abuse of the investment adviser sector and to provide law enforcement with useful information to combat illicit finance. Regarding the proposal to allow for joint filing of SARs, a number of

[243] Other BSA-defined financial institutions, such as broker-dealers in securities, mutual funds, and banks have separate reporting obligations that may involve the same suspicious activity. *See* 31 CFR 1023.320, 1024.320, 1020.320.

commenters suggested that the regulation require specifically that the SAR narrative describe the respective roles and involvement of each financial institution with respect to the reported transaction.

However, other commenters expressed skepticism about the utility of this obligation given the limited information available to some investment advisers considering their access to the information necessary to file SARs and the low number of reported SARs involving investment advisers to date. One commenter requested that FinCEN clarify its expectations of investment advisers regarding the volume of SARs to be filed. Finally, several commenters noted the importance of clarifying that foreign-located investment advisers should not be required to file SARs where doing so creates a conflict of law with the law of the jurisdiction in which the entity is located. The subsections below address some of the specific issues raised by commenters related to the SAR filing obligation as well as the other provisions in the SAR filing requirement.

1. Scope of the SAR Filing Obligation

Comments Received: One commenter requested that FinCEN revise the SAR threshold upwards from $5,000 to $25,000. One commenter requested FinCEN clarify that the requirement to file SARs applies to transactions initiated after the specified compliance date for the AML/CFT program, so there is no confusion regarding whether SARs must be filed as an adviser begins to implement and test its AML program. One commenter suggested that the proposed rule sought to transform the SAR requirement into a tool to assist CFIUS efforts and asked FinCEN to confirm that the SAR filing obligation require reports where the adviser knows, suspects, or has reason to suspect that the activity or transaction in question involves a violation of law.

FinCEN is implementing this requirement without change from the proposed rule. FinCEN declines to revise the SAR threshold for this specific requirement as applied to investment advisers. FinCEN is currently reviewing the threshold for SARs and other

applicable BSA reports for all covered financial institutions, as required by sections 6204 and 6205 of the AML Act, and will consider potential changes in the context of that review, as appropriate.

FinCEN is also clarifying in this final rule that while investment advisers are not required to file SARs until after the compliance date of the final rule, some SAR filings triggered by activity after the compliance date may implicate transactions that occur on behalf of a customer prior to the compliance date. In this circumstance, an adviser should not exclude relevant information from a SAR filing even where the information is about activity that occurred prior to the compliance date. However, FinCEN does not expect investment advisers to look back through activity prior to the compliance date to identify conduct that may warrant filing a SAR.

As set out in 1032.320, the SAR filing obligation requires reporting where the adviser knows, suspects, or has reason to suspect a possible violation of law or regulation. Contrary to one commenter's suggestion, FinCEN does not seek to transform or change SAR filing obligations in order to assist the CFIUS process. Rather, as discussed further below, FinCEN is adopting SAR filing obligations for advisers similar to existing SAR regulations.

2. Transactions "By, At, or Through" Investment Advisers

Proposed Rule: Section 1032.320(a)(1) of the proposed rule stated that a transaction "requires reporting if it is conducted or attempted by, at, or through an investment adviser."

Comments Received: Seven commenters requested clarification about the language "by, at, or through" investment advisers in section 1032.320(a)(1), claiming it was a broad and ambiguous definition, and that it did not correspond with the role played by investment advisers in the management of funds or processing of transactions. Commenters believed that this language was more appropriate for banks or other financial institutions that directly hold funds or process transactions. Commenters also expressed concern about the prospect of being required to file SARs in relation to the underlying changes in a fund's portfolio or for the

portfolio companies in which their funds are invested. One commenter suggested narrowing the reporting obligation to transactions by, at, or through a pooled investment vehicle or account for which an investment adviser acts as adviser given an investment adviser would be better able to file a SAR in relation to transactions involving these customers. Two commenters requested FinCEN clarify that for an adviser advising a fund serviced by a foreign-located fund administrator that is subject to SAR filing or similar obligations under their home country AML/CFT regulations is not required to file a SAR in the United States, which could otherwise raise data privacy and conflicts of laws issues.

Final Rule: FinCEN is implementing this requirement without significant change from the proposed rule. FinCEN has added "Advisers Act" to this provision to clarify that filing a SAR does not relieve an investment adviser from the responsibility of complying with any other reporting requirements that may be imposed directly by the Advisers Act, as well as SEC rules and regulations that implement the Advisers Act or other Federal securities laws. FinCEN clarifies that section 1032.320(a)(1) contains the general statement of the obligation to file reports of suspicious transactions, and the obligation extends to transactions conducted or attempted *by, at, or through* an investment adviser. FinCEN interprets "transactions conducted or attempted by, at, or through" to encompass an investment adviser's advisory activities on behalf of its clients. In response to comments that the rule text for the SAR filing obligation is more appropriate for banks or other financial institutions, FinCEN is providing additional detail below on suspicious transactions that may occur by, at, or through an investment adviser, as well as suspicious transactions involving a portfolio company in which an advised fund is invested.

The requirement to file SARs for transactions conducted or attempted by, at, or through an investment adviser parallels the language of the BSA regulations for money service

businesses, broker-dealers, and mutual funds.[244] Investment advisers may be familiar with applying this requirement if they are affiliated with a broker-dealer or otherwise transact through them, or in the context of mutual funds they advise.[245] Examples of activities occurring by, at, or through an investment adviser include: when an investment adviser's customer provides an instruction to an investment adviser for the investment adviser to pass on to the custodian (*e.g.*, an instruction to withdraw assets, to liquidate particular securities, or a suggestion that the adviser purchase certain securities for the customer's account) or an adviser instructs a custodian to execute transactions on behalf of its client. However, an adviser's obligation to file a SAR does not extend to activity that is outside the scope of their AML/CFT program.

Because investment advisers are already subject to the anti-fraud and anti-manipulation provisions of the Advisers Act and other Federal securities laws, they should already have in place policies and procedures to prevent and detect fraud by the investment adviser or its supervised persons, including the identification of suspicious activities that may be conducted by employees of an investment adviser as it they relate to discretionary client or proprietary investment decisions made by an investment adviser's employees. In either case, the investment adviser should ensure it has systems in place to determine if suspicious transactions are being conducted "by" an investment adviser via client or proprietary investments.

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[244] *See* 31 CFR 1022.230(a)(2) (money service businesses); 31 CFR 1023.320(a)(2) (broker-dealers); 31 CFR 1024.320(a)(2) (mutual funds).

[245] For instance, pursuant to the Securities Industry and Financial Markets Association (SIFMA) No-Action Letter under which the staff of the SEC's Division of Trading and Markets stated that it would not recommend enforcement action against broker-dealers, an investment adviser must promptly disclose to the broker-dealer potentially suspicious or unusual activity detected as part of the CIP and/or beneficial ownership procedures being performed on the broker-dealer's behalf in order to enable the broker-dealer to file a suspicious activity report, as appropriate based on the broker-dealer's judgment. *See* SEC, Letter to Mr. Bernard V. Canepa, Associate General Counsel, Securities Industry and Financial Markets Association (SIFMA), Request for No-Action Relief Under Broker-Dealer Customer Identification Program Rule (31 CFR 1023.220) and Beneficial Ownership Requirements for Legal Entity Customers (31 CFR 1010.230) (Dec. 9, 2022), https://www.sec.gov/files/nal-sifma-120922.pdf [hereinafter SIFMA No-Action Letter]. This request for No-Action Relief was originally issued in 2004 and has been periodically reissued and remains effective. Any SEC staff statements cited represent the views of the SEC staff. They are not a rule, regulation, or statement of the SEC. Furthermore, the SEC has neither approved nor disapproved their content. These SEC staff statements, like all SEC staff statements, have no legal force or effect: they do not alter or amend applicable law; and they create no new or additional obligations for any person.

Some of the types of suspicious activity transactions an investment adviser may identify and report are transactions designed to hide the source or destination of funds and fraudulent activity. Other suspicious activity tied to private funds, particularly venture capital funds, could, for example, involve an investor in such a fund requesting access to detailed non-public technical information about a portfolio company the fund is invested in that is inconsistent with a professed focus on economic return, in a potential case of illicit technology transfer in violation of sanctions, export controls, or other applicable law. As such, the activity would be eligible for reporting in a SAR. A money launderer also could engage in placement and layering by funding a managed account or investing in a private fund by using multiple wire transfers from different accounts maintained at different financial institutions or requesting that a transaction be processed in a manner to avoid funds being transmitted through certain jurisdictions. Suspicious activity could also include other unusual wire activity that does not correlate with a customer's stated investment objectives; transferring funds or other assets involving the accounts of third parties with no plausible relationship to the customer, transfers of funds or assets involving suspicious counterparties—such as those subject to adverse media, exhibiting shell company characteristics, or located in jurisdictions with which the customer has no apparent nexus; the customer behaving in a manner that suggests that the customer is acting as a "proxy" to manage the assets of a third party; or an unusual withdrawal request by a customer with ties to activity or individuals subject to U.S sanctions following or shortly prior to news of a potential sanctions listing. Additionally, suspicious activity could include potential fraud and manipulation of customer funds directed by the investment adviser. These typologies can consist of insider trading, market manipulation, or an unusual wire transfer request by an investment adviser from a private fund's account held for the fund's benefit at a qualified custodian.

FinCEN notes, however, that the techniques of money laundering, terrorist financing, and other illicit finance activity are continually evolving, and there is no way to provide a

definitive list of suspicious transactions. A determination to file a SAR should be based on all the facts and circumstances relating to the transaction and the customer in question.

FinCEN recognizes that an investment adviser's own proprietary investments may be lower risk in comparison to discretionary investment decisions made on behalf of clients. However, FinCEN further clarifies that it is the investment adviser's responsibility to assess the risk of its own proprietary investment activity and determine the level of monitoring necessary to be commensurate with the investment adviser's assessment of the risks associated with its proprietary investments.

For foreign-located investment advisers (as defined in the final rule), the SAR filing requirements would apply to advisory activities covered by this rule, which are advisory activities that (i) take place within the United States, including through involvement of U.S. personnel of the investment adviser, such as the involvement of an agency, branch, or office within the United States, or (ii) provide advisory services to a U.S. person or a foreign-located private fund with an investor that is a U.S. person. In these circumstances, regardless of whether AML/CFT, administrative, or other advisory services are delegated to a non-U.S. fund administrator by the adviser, a foreign-located investment adviser would be subject to the SAR filing requirement with respect to activities covered by the final rule—including the reporting of suspicious transactions involving a foreign-located private fund with an investor that is a U.S. person. FinCEN would also note that while commenters reported potential data privacy or conflicts of laws issues, no specific jurisdictions or statutes were identified where this is a significant challenge.

Additionally, private fund advisers may have limited involvement in and visibility into the operation of their portfolio companies, including "material non-public technical information." However, there are times when an adviser may be required to file a SAR on a portfolio company, such as where the adviser: (i) is approached by a limited partner or other investor in a fund about unusual access to particular technology or processes being developed

by a portfolio company, (ii) becomes aware that such a limited partner or investor has reached out to a portfolio company for such information, or (iii) is asked to obscure participation by an investor in a particular transaction to avoid notification to government authorities; FinCEN would consider such activity to be potentially relevant to a possible violation of law or regulation or otherwise indicative of suspicious activity, and an adviser should consider filing a SAR. The preceding examples are not an exhaustive list and are provided for illustrative purposes only, and private fund advisers' determinations to file a SAR should be based on all the facts and circumstances relating to the transaction and the customer in question.

FinCEN acknowledges the comments regarding investment advisers' potentially limited visibility into the portfolios of funds that they do not advise (such as funds of funds) and the activities of portfolio companies. In response to these comments, FinCEN has decided to clarify the extent of SAR obligations in these contexts. The requirement for reporting of suspicious transactions by, at, or through an investment adviser focuses on the activities of the adviser, and as discussed above, the SAR filing obligation does not extend to activities outside the scope of an adviser's AML/CFT program. This excludes non-advisory activities such as staff of the adviser occupying management roles at portfolio companies. In addition, section 1024.320(a)(2) of the final rule limits the SAR filing obligation to transactions where the adviser "knows, suspects, or has to reason to suspect" enumerated types of illicit activity. This is an objective standard that focuses on the evidence available to an adviser in the particular facts and circumstances of a transaction.

FinCEN applies the same standards in existing SAR regulations, such as those for broker-dealers and mutual funds.[246] The release adopting the broker-dealer rule states that "this is a flexible standard that adequately takes into account the differences in operating realities among various types of broker-dealers," some of which, such as clearing brokers, may have

[246] 31 CFR 1023.230; 31 CFR 1024.320

less information about their customers.[247] Similarly, FinCEN has issued guidance stating that "mutual funds should be able to meet the 'knows, suspects, or has reason to suspect' standard … based on information available to the mutual fund that was obtained through the account opening process and in the course of processing transactions, consistent with the mutual fund's required anti-money laundering procedures."[248] Thus, the standard takes into account both the operational realities of different kinds of financial institutions and the information that they typically collect, including through their AML/CFT procedures.

FinCEN intends the SAR filing requirement to function in a similar fashion with regard to investment advisers. The information that an investment adviser has access to depends upon the operational realities of an adviser in its portion of the market, which includes whether it advises the fund at issue and whether it has portfolio companies over which it exercises significant influence. The standard is not intended to require investment advisers to gather additional information beyond what an adviser in their position would normally possess and what is required by their AML/CFT program. The information such an adviser would have is based upon the due diligence and other information they obtain as an adviser. As discussed above, non-advisory activities—such as having common employees with a portfolio company—are not covered by the SAR filing obligation.

FinCEN emphasizes that this does not mean that investment advisers may disregard indications of suspicious transactions by, at, or through the adviser because they involve funds that the adviser does not advise (such as funds of funds) or portfolio companies. As FinCEN has stated with regard to mutual funds, even if personnel of another entity are better positioned to file a SAR under certain circumstances, a financial institution remains responsible for meeting its SAR obligations.[249] Thus, if under the relevant facts and circumstances, the

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[247] 67 Fed. Reg. 44048, 44053-54 (Jul. 1, 2002).

[248] FinCEN, *Frequently Asked Questions Suspicious Activity Reporting Requirements for Mutual Funds* (Oct. 4, 2006), available at https://www.fincen.gov/sites/default/files/shared/guidance_faqs_sar_10042006.pdf (internal citation omitted).

[249] *Amendment to the Bank Secrecy Act-Requirement that Mutual Funds Report Suspicious Transactions*, Final Rule, 71 Fed. Reg. 26213, 26216 (May 4, 2006).

investment adviser has information causing it to know, suspect, or have to reason to suspect suspicious transactions by, at, or through the investment adviser that involve funds it does not advise or portfolio companies, it is required to file a SAR.

3. Filing and Notification Procedures

Proposed Rule: Section 1032.320(b)(1) through (4) of the proposed rule sets forth the filing and notification procedures investment advisers would need to follow to make reports of suspicious transactions. Within 30 days of initial detection by the investment adviser of facts that may constitute a basis for filing a SAR, the adviser would have needed to report the transaction by completing and filing a SAR with FinCEN in accordance with all form instructions and applicable guidance. The investment adviser would have also needed to collect and maintain supporting documentation relating to each SAR separately and make such documentation available to (1) FinCEN, (2) any Federal, State, or local law enforcement agency, and (3); or any Federal regulatory authority, such as the SEC, that examines the investment adviser for compliance with the BSA under the proposed rule, upon request of that agency or authority. If no suspect is identified on the date of such initial detection, an investment adviser may delay filing a SAR for an additional 30 calendar days to identify a suspect, but in no case shall reporting be delayed more than 60 calendar days after the date of such initial detection. Under the proposed rule with respect to SAR filing obligations for investment advisers, which are in line with existing SAR regulations for other BSA-defined financial institutions, any supporting documents filed with the SAR would have needed to be disclosed to those authorities or agencies to whom a SAR may be disclosed. For situations requiring immediate attention, such as suspected terrorist financing or ongoing money laundering schemes, investment advisers would have been required under section1032.320(b)(4) to notify immediately by telephone the appropriate law enforcement

authority in addition to filing a timely SAR.

Comments Received: No comments were received on this issue.

Final Rule: FinCEN is adopting the requirements regarding SAR filing and notification as proposed.

4. Retention of Records

Proposed Rule: Section 1032.320(c) would have required that investment advisers maintain copies of filed SARs and the underlying related documentation for a period of five years from the date of filing. Supporting documentation would have needed to be made available to FinCEN and the prescribed law enforcement and regulatory authorities, upon request.

Comments Received: No comments were received on this issue.

Final Rule: FinCEN is adopting the requirements regarding SAR filing and retention of records as proposed.

5. SAR Sharing and Confidentiality

Proposed Rule: Section 1032.320(d) would have required that a SAR and any information that would reveal the existence of a SAR are confidential and shall not be disclosed except as authorized in section 1032.320(d)(1)(ii). Section 1032.320(d)(1)(i) generally would have provided that no investment adviser, and no current or former director, officer, employee, or agent of any investment adviser, shall disclose a SAR or any information that would reveal the existence of a SAR. This provision of the proposed rule would have further provided that any investment adviser and any current or former director, officer, employee, or agent of any investment adviser that is subpoenaed or otherwise requested to disclose a SAR or any information that would reveal the existence of a SAR, would decline to produce the SAR or such information and would be required to notify FinCEN of such a request and any response thereto. Investment advisers would be prohibited from disclosing voluntary as well as required SARs.

Section 1032.320(d)(1)(ii) of the proposed rule would have provided three rules of construction that clarify the scope of the prohibition against the disclosure of a SAR by an investment adviser and closely parallel the rules of construction in the suspicious activity reporting rules for other financial institutions. The proposed rules of construction would have primarily described situations that are not covered by the prohibition against the disclosure of a SAR or information that would reveal the existence of a SAR contained in section 1032.320(d)(1). The rules of construction proposed would have remained qualified by, and subordinate to, the statutory mandate that revealing to one or more subjects of a SAR of the SAR's existence would remain a crime.

The first rule of construction, in section 1032.320(d)(1)(ii)(A)(*1*), would have authorized an investment adviser, or any director, officer, employee or agent of an investment adviser, to disclose a SAR, or any information that would reveal the existence of a SAR, to various authorities—FinCEN; any Federal, State or local law enforcement agency; or a Federal regulatory authority that examines the investment adviser for compliance with the BSA—provided that no person involved in the reported transaction is notified that the transaction has been reported. As discussed above, FinCEN is proposing to delegate its examination authority for compliance by investment advisers with FinCEN's rules implementing the BSA to the SEC.

The second rule of construction, in section 1032.320(d)(1)(ii)(A)(*2*), would have provided two instances where disclosures of underlying facts, transactions, and documents upon which a SAR was based would be permissible: in connection with (i) preparation of a joint SAR or (ii) certain employment references or termination notices.[250] This would enable an investment adviser to share the underlying facts, transactions, and documents upon which a SAR is based with certain entities consistent with existing FinCEN guidance where the investment adviser and the recipient entity or entities are jointly filing a SAR. Similarly, an

[250] To the extent permitted by existing FinCEN regulations and guidance, this would include non-U.S. financial institutions.

investment adviser, or any current or former director, officer, employee, or agent of an investment adviser would not be prohibited from disclosing the underlying facts, transactions, and documents upon which a SAR is based in connection with certain employment references or termination notices, to the full extent authorized in 31 U.S.C. 5318(g)(2)(B). The third rule of construction, in section 1032.320(d)(1)(ii)(B), would authorize sharing of a SAR within an investment adviser's corporate organizational structure for purposes consistent with the BSA as determined by regulation or in guidance.

Section 1032.320(d)(2) would also incorporate the statutory prohibition against disclosure of SAR information by government authorities that have access to SARs other than in fulfillment of their official duties consistent with the BSA.[251] The paragraph would clarify that official duties do not include the disclosure of SAR information in response to a request by a non-governmental entity for non-public information[252] or for use in a private legal proceeding, including a request under 31 CFR 1.11.[253] Accordingly, the provision would not permit such disclosure by government users in response to these requests or uses.

Comments Received: Four commenters stated that advisers should be able to share SARs with affiliates, noting the benefits to industry-wide efforts to identify and reduce illicit finance risks. Two of the four commenters recommended that advisers be permitted to share SARs with (1) affiliates; (2) the directors and officers of the funds managed by the adviser; and (3) the funds' administrator(s). One commenter requested that FinCEN authorize advisers to share SARs with service providers that may need to be informed of SAR filings for compliance monitoring and other purposes. One commenter requested FinCEN clarify how an RIA would oversee compliance with a qualified custodian that it had delegated responsibility for SAR filing to if any SAR the third-party files is by definition kept confidential from the adviser.

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[251] 31 U.S.C. 5318(g)(2)(ii).
[252] For purposes of this rulemaking, "non-public information" refers to information that is exempt from disclosure under the Freedom of Information Act.
[253] 31 CFR 1.11 is Treasury's regulation governing demands for testimony or the production of records of Treasury employees and former employes in a court or other proceeding.

Final Rule: FinCEN is implementing this requirement without change from the proposed rule.[254] FinCEN understands that investment advisers may find it necessary to share SARs within their organizational structures to fulfill reporting obligations under the BSA, and to facilitate more effective enterprise-wide BSA compliance. FinCEN will consider issuing additional guidance, consistent with SAR sharing guidance finalized in 2010 and applicable to other BSA-defined financial institutions, that would permit investment advisers to share SARs with certain U.S. affiliates, provided the affiliate is subject to a regulation providing for the confidentiality of SARs issued by FinCEN or by the affiliate's Federal functional regulator.[255]

FinCEN would like to reiterate that, as outlined in section 1032.320(d)(1)(ii)(A)(*2*) of the final rule, an investment adviser, or any director, officer, employee, or agent of an investment adviser, is not prohibited from disclosing the underlying facts, transactions, and documents upon which a SAR is based, including but not limited to, disclosures of such information to another financial institution or any director, officer, employee, or agent of a financial institution, for the preparation of a joint SAR, provided that no person involved in the reported transaction is notified that the transaction has been reported. For example, this would permit a qualified custodian engaging in transaction monitoring on behalf of an investment adviser to share any underlying information with an investment adviser for activity involving both institutions, so long as the SAR did not involve suspected misconduct by the adviser or its employees.

a) Sharing with other Regulators

Comments Received: One commenter requested that proposed section 1032.320(c)(2) be revised to clarify that government authorities' official duties may include disclosing a SAR

[254] This provision as proposed, and as set out in the final rule, is consistent with the notification prohibitions for suspicious activity reporting provided in the BSA. 31 U.S.C. 5318(g)(2).

[255] *See, e.g.*, 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); FIN-2010-G006, *Sharing Suspicious Activity Reports by Depository Institutions with Certain U.S. Affiliates* (Nov. 23, 2010).

to an SRO, consistent with the SRO's existing access to SARs. The commenter noted that, unlike existing rules addressing the confidentiality of SARs for other types of financial institutions, the proposal inserts the phrase "to a non-governmental entity" before "in response to a request for disclosure of non-public information." The commenter was concerned that this insertion could be misread as restricting the SRO's access to SARs, because SROs are not governmental entities. The commenter also noted that it may be important for SROs to have access to SARs filed by financial institutions for oversight of broker dealers' compliance with BSA requirements and the identification of areas of potential AML/CFT risk.

Final Rule: FinCEN is implementing this requirement with one change to the proposed rule, in response to comments. FinCEN does not intend that the requirements of this rule interfere with any existing access to BSA information. This includes access to BSA information for SROs that may have delegated authority to examine other BSA-defined financial institutions, including broker-dealers and future commission merchants. Therefore, FinCEN has removed the words "to a non-governmental entity" in the regulatory text.[256]

b) Filings by More than One Financial Institution

Proposed Rule: Section 1032.320(a)(3) would have provided that more than one investment adviser may have an obligation to report the same suspicious transaction and that other financial institutions may have separate obligations to report suspicious activity with respect to the same transaction pursuant to other provisions in the BSA. The provision would clarify that no more than one report would be required to be filed by all financial institutions (including investment advisers) involved in the transaction, under specified conditions.

Comments Received: Three commenters commented on SAR filing obligations when more than one financial institution is associated with the same suspicious activity. Two commenters asked for clarification on how advisers should manage SAR filings obligations for

[256] For the avoidance of doubt, the final rule is not intended to change SROs' confidentiality obligations pursuant to 31 USC 5318(g) or pursuant to other provisions of this chapter.

custodians of client accounts, as well as with fund administrators, service providers, and other third parties. One commenter agreed that SARs filed jointly with investment advisers should specifically include the name of each financial institution involved in the transaction and the words “joint filing” in the narrative section, and that FinCEN should also consider requiring specifically that the SAR narrative describe the respective roles and involvement of each financial institution with respect to the transaction.

Final Rule: FinCEN is implementing this requirement without change from the proposed rule. FinCEN would like to clarify that section 1032.320(a)(3) of the final rule provides that the obligation to identify and report a suspicious transaction rests with the investment adviser “by, at, or through” which the transaction occurs. However, where more than one investment adviser, or another financial institution with a separate SAR obligation, is involved in the same transaction, only one report is required to be filed. FinCEN recognizes that other financial institutions, such as broker-dealers in securities, mutual funds, and banks have separate reporting obligations that may involve the same suspicious transaction.[257] Therefore, in those instances, when an investment adviser and another financial institution, such as a broker-dealer, are involved in the same transaction, only one report for the transaction is required to be filed. It is permissible for either the investment adviser or the other financial institution to file a single joint report provided it contains all relevant facts and that each institution maintains a copy of the report and any supporting documentation. In filing a joint SAR, the filing entities should include the name of each financial institution involved in the transaction, their role in the transactions, and the words “joint filing” in the narrative. A single jointly filed SAR will satisfy both financial institutions’ independent filing obligations so long as each institution maintains a copy of the SAR filed, along with any supporting documentation. Although financial institutions are permitted to file a joint SAR, they may also choose to file their own individual SARs instead.

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[257] *See* 31 CFR 1023.320, 1024.320, and 1020.320.

c) Sharing with other government agencies

In the IA AML NPRM, FinCEN stated that SAR filing requirements for investment advisers, particularly venture capital advisers, may help CFIUS agencies identify certain transactions that could pose national security risks. One commenter stated that mandating SAR filing to support CFIUS efforts would be a major departure from standard practice under the BSA. The commenter indicated that requiring venture capital advisers to submit SARs filings to supplement CFIUS reviews would impose a significant burden, and FinCEN should consider more targeted regulatory options besides AML/CFT requirements.

FinCEN notes that CFIUS member agencies may already have access to BSA information as part of their normal duties. FinCEN is also clarifying that it is not requesting venture capital advisers file SARs for the purpose of supplementing notices or declarations submitted to CFIUS. Rather, and as explained elsewhere in this document, an adviser's SAR filing obligations may provide information that is relevant for CFIUS, specifically in the case of technology transfers. In identifying the potential relevance of information in filings related to technology transfers, FinCEN is simply providing more targeted guidance to such advisers as to circumstances specific to venture capital activity where a SAR filing may be required.

6. Limitation of Liability

Section 1032.320(e) of the proposed rule will would have provided protection from liability, also known as a safe harbor, for making either required or voluntary reports of suspicious transactions, or for failures to provide notice of such disclosure to any person identified in the disclosure to the full extent provided by 31 U.S.C. 5318(g)(3).[258] This

[258] To encourage the reporting of possible violations of law or regulation and the filing of SARs, the BSA contains a safe harbor provision that shields financial institutions making such reports from civil liability. In 2001, the USA PATRIOT Act clarified that the safe harbor also covers voluntary disclosure of possible violations of law and regulations to a government agency and expanded the scope of the safe harbor to cover any civil liability which may exist under any contract or other legally enforceable agreement (including any arbitration agreement). *See* USA PATRIOT Act, sec. 351(a). Pub. L. 107-56, Title III, 351, 115 Stat. 272, 321 (2001); 31 U.S.C. 5318(g)(3).

protection would extend to an investment adviser and any current or former director, officer, employee, or agent of an investment adviser under the conditions of this regulation.

Comments Received: No comments were received on this issue.

Final Rule: FinCEN is adopting the requirements regarding limitations of liability for SAR filing as proposed.

7. Compliance

Under section 1032.320(f) of the proposed rule, FinCEN or its delegates would have examined compliance by investment advisers with the obligation to report suspicious transactions. The section also would provide that failure to comply with the proposed rule may constitute a violation of the BSA and FinCEN's regulations. As discussed above, pursuant to 31 CFR 1010.810(a), FinCEN has overall authority for enforcement and compliance with its regulations, including coordination and direction of procedures and activities of all other agencies exercising delegated authority. Further, pursuant to section 1010.810(d), FinCEN has the authority to impose civil penalties for violations of the BSA and its regulations.

Comments Received: No comments were received on this issue.

Final Rule: FinCEN is adopting the requirements regarding compliance by investment advisers with the obligation to report suspicious transactions as proposed.

8. Consultation with Federal and State Authorities

Under section 6202 of the AML Act (codified at 31 U.S.C. 5318(g)(5)), in imposing any requirement to report any suspicious transaction under this subsection, the Secretary of the Treasury, in consultation with the Attorney General, appropriate representatives of State bank supervisors, State credit union supervisors, and the Federal functional regulators, shall consider items that include—

- the national priorities established by the Secretary;
- the purposes described in section 5311 of the BSA; and

- the means by or form in which the Secretary shall receive such reporting, including the burdens imposed by such means or form of reporting on persons required to provide such reporting, the efficiency of the means or form, and the benefits derived by the means or form of reporting by Federal law enforcement agencies and the intelligence community in countering financial crime, including money laundering and the financing of terrorism.[259]

These items have been considered by the Treasury as described elsewhere in this final rule.[260] The AML/CFT National Priorities include, among other considerations, combating corruption, fraud, and transnational crime.[261] For example, as discussed above and in the Risk Assessment, the absence of AML/CFT requirements for investment advisers, including SAR filing requirements, enables criminals to gain access to the U.S. financial system for purposes of fraud, laundering the proceeds of corruption, and other forms of transnational crime. For these reasons, and the risk of foreign adversaries using investment advisers to gain access to U.S. technology, requiring investment advisers to file SARs will be highly useful for criminal and regulatory investigations and intelligence or counterintelligence activities to combat terrorism, and are otherwise consistent with the purposes set forth in section 5311 of the BSA.

During the drafting of the IA AML NPRM, the comment period for that NPRM, and this final rule, Treasury has consulted with the relevant State and Federal regulators. The IA AML NPRM and final rule were sent to the Department of Justice and to the staff of the SEC as the Federal functional regulator for investment advisers for interagency consultation. Federal banking regulators were also invited to comment on all aspects of this proposed rule. Treasury also reached out to the Conference of State Banking Supervisors as a representative of State

[259] 31 U.S.C. 5318(g)(5).
[260] *See supra* Section III.A and *infra* Section IV.A.4.
[261] *See* FinCEN, *Anti-Money Laundering and Countering the Financing of Terrorism National Priorities* (Jun. 30, 2021), https://www.fincen.gov/sites/default/files/shared/AML_CFT Priorities (June 30%2C 2021).pdf.

banking and credit union supervisors and the North American Securities Administrators Association (NASAA) as a representative of state securities regulators.

G. Information Sharing, Special Due Diligence, and Special Measures

1. Sections 314(a) and 314(b)

Proposed Rule: Proposed sections 1032.500, 1032.520, and 1032.540 would expressly subject investment advisers to FinCEN's rules implementing the special information-sharing procedures to detect money laundering or terrorist activity of sections 314(a) and 314(b) of the USA PATRIOT Act.[262] These provisions generally would require an investment adviser, upon request from FinCEN, to expeditiously search its records for specified information to determine whether the investment adviser maintains or has maintained any account for, or has engaged in any transaction with, an individual, entity, or organization named in FinCEN's request. An investment adviser would then be required to report any such identified information to FinCEN. Further, investment advisers would be able to participate in voluntary section 314(b) information sharing arrangements, through which they would be able to gather additional information from other financial institutions.

Comments Received on Section 314(a): Three commenters were supportive of applying these requirements, as the requirements had been applied by other BSA-defined financial institutions for the past twenty years and doing so with investment advisers would ensure consistent and effective implementation across the U.S. financial sector.

Five commenters opposed applying section 314(a) requirements, stating that advisers do not maintain accounts or engage in transactions with the investors or clients, and that custodians and other financial institutions involved in the activity already have to comply with section 314(a) information requests, and would have any relevant transactional information. One commenter asserted that RIAs and ERAs lack insight into client account information,

[262] *See* 31 CFR part 1010, subpart E, including 31 CFR 1010.520 and 1010.540.

while another commenter indicated that requiring RIAs and ERAs to respond to bi-weekly section 314(a) requests would be duplicative and impose a significant administrative burden without a corresponding benefit. Another commenter requested that, as information collected under the CDD Rule is relevant for complying with section 314(a) requests, FinCEN wait to apply this requirement to investment advisers until the CDD Rule is revised so parties may comment on how that revision will impact 314(a) requests.

Three commenters requested that if these requirements are applied to RIAs and ERAs, that FinCEN offer guidance on how advisers should comply with 314(a) requests, such as for specific requirements related to funds transfer information. Two commenters requested confirmation that section 314(a) requests can be delegated to offshore fund administrators and other service providers.

Regarding private funds, one commenter requested that an adviser not be directly responsible for reviewing underlying investors in funds because the adviser has effectively delegated this function to the administrator, while two commenters requested that an RIA or ERA be exempt from applying 314(a) requests to underlying investors in foreign-located funds because such investors are not clients of the adviser, are located outside of the United States, and may have no U.S. touchpoints. These commenters also asked for clarification on how the requirements would apply to foreign-located advisers and their foreign-located customers.

Comments Received on Section 314(b): FinCEN received five comments on permitting RIAs and ERAs to enter into information sharing arrangements under section 314(b) of the USA PATRIOT Act. All five commenters supported allowing RIAs and ERAs to enter into information sharing arrangements under Section 314(b), noting that this would assist RIAs and ERAs in detecting and reporting suspicious activity. One commenter recommend that FinCEN provide a clear procedure for sharing relevant information under 314(b) in the final rule.

Applicability to Mutual Funds: One commenter also requested that FinCEN exempt investment advisers from having to apply the information sharing, due diligence, and special

measures requirements of part 1032, subparts E and F, to their mutual fund customers. The commenter noted that a mutual fund is highly unlikely to be named in a section 314(a) request, and that the shareholders of mutual fund accounts would be covered by section 314(a) obligations applicable to mutual funds. Regarding the due diligence and special measures requirements of subpart F, the commenter noted that as all mutual funds must be organized under U.S. law, mutual funds would never be a foreign institution subject to those requirements.

Final Rule: FinCEN is implementing this requirement with one substantive change from the proposed rule in response to comments. Regarding section 314(a), FinCEN will include the proposed requirement in the final rule. FinCEN recognizes that implementing this will impose some burden on investment advisers to implement this requirement, but that given the binary nature of the response (yes or no as to whether the adviser has an account for the subject), FinCEN believes such a burden is manageable. In addition, the nature of the request is also something an adviser can answer with existing information. Further, while responding to a 314(a) request requires access to the FinCEN Secure Information Sharing System (SISS), this need not require the purchase of additional technology.

FinCEN recognizes that investment advisers will not necessarily have, as a matter of course, all the information that is considered part of an account when reviewing relevant information to include as funds transfers records that may be maintained by a custodian in response to a section 314(a) request. However, certain information, such as instructions collected from customers or financial information collected to understand the customer's investment objectives, may still be useful for a law enforcement investigation involving the subject of such a request.

Additionally, FinCEN would like to clarify that, for purposes of section 314(a) requests, FinCEN would not expect investment advisers to have "accounts" for the underlying investors in a private fund unless the adviser has a separate advisory relationship with that underlying

investor, and, as described above, an investment adviser is not at this time categorically required to collect beneficial ownership information for private funds. Therefore, when responding to a section 314(a) request for a private fund, an investment adviser would generally be expected to respond for the fund, and not for the underlying investors in the fund.

Regarding section 314(b), FinCEN will include, at section 1032.540, a reference to 1010.540, which will permit investment advisers to enter into voluntary information sharing agreements under section 314(b). As described in the proposed rule, under the final rule, investment advisers will now be able to participate in voluntary section 314(b) information sharing arrangements, through which they can gather additional information from other financial institutions, which would enable broader understanding of customer risk and filing of/or file more comprehensive SARs, for example.[263] FinCEN will further consider whether existing guidance on section 314(b) information sharing arrangements is sufficient, or if investment advisers require additional guidance specific to their activities.[264]

Regarding mutual funds, FinCEN also agrees with the arguments raised by the commenter regarding the application of section 314(a) information requests and the implementation of special due diligence and special measures applicable under the sections 311 and 312 of the USA PATRIOT Act. FinCEN agrees with the commenter that a mutual fund is highly unlikely to be named in a section 314(a) request, and, as also noted by the commenter, a mutual fund covered by this exclusion generally could not be a “foreign financial institution” subject to the special due diligence and special measures under sections 311 and 312. Therefore, FinCEN has modified the proposed rule text to permit investment advisers to exclude mutual funds from these requirements at subpart E and subpart F, which is reflected at section 1032.500 and 1032.600, respectively. This exclusion will also apply to (a) collective

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[263] FinCEN, *Section 314(b) Fact Sheet* (Dec. 2020), available at https://www.fincen.gov/sites/default/files/shared/314bfactsheet.pdf.

[264] *Id.*

investment funds sponsored by a bank or trust company subject to the BSA and (b) any other investment adviser subject to the final rule that is advised by the investment adviser.

2. Special Due Diligence and Special Measures

Proposed Rule: FinCEN proposed to implement special due diligence requirements for correspondent and private banking accounts, as well as certain prohibitions on correspondent banking and special measures under section 311 of the USA PATRIOT Act and section 9714 of the Combating Russian Money Laundering Act,[265] including by amending the definitions in 31 CFR 1010.605 for "account" and "covered financial institutions" so that these would apply to investment advisers. FinCEN proposed to add a general cross reference, proposed 1032.600, that would state that investment advisers are subject to the "special standards of due diligence; prohibitions; and special measures" already applicable to covered financial institutions, with no exclusion for business activities involving mutual funds advised by the investment adviser.

Comments Received: FinCEN received a range of comments on these proposals. Some commenters supported the proposals without qualification, stating that imposing these requirements on investment advisers would help prevent abuse of the U.S. financial system from criminals and malign actors. One commenter also proposed that FinCEN consider including foreign investment advisers as "within the definition of foreign financial institutions that are subject to special due diligence programs" under 31 C.F.R. 1010.610(a), noting that such foreign investment advisers may "present similar or more significant illicit finance risks than those presented by foreign banks and broker-dealers that are currently subject to those requirements."

However, one commenter suggested that these requirements should not apply to an adviser to, or sponsor of, a private fund, because private funds are not in a position to provide

[265] FinCEN is clarifying that in addition to special measures under section 311 of the USA PATRIOT Act, investment advisers must also comply with actions taken under section 9714(a) of the Combating Russian Money Laundering Act, codified as a note to 31 U.S.C. 5318A, and section 7213A of the Fentanyl Sanctions Act, codified at 21 U.S.C. 2313a.

the information required by these requirements regarding details of transactions and the corresponding beneficiaries and originators, unlike a bank providing a correspondent account. Further, some commenters suggested that FinCEN exempt mutual funds from an investment adviser's requirements to apply certain due diligence and special measures to relevant aspects of their business activities because sections 311 and 312 of the USA PATRIOT ACT (which supply the statutory authority for these requirements) apply only to relationships outside of the United States, while mutual funds are required to be organized under the laws of the United States or of a U.S. state.

Final Rule: FinCEN is implementing this requirement with one substantive change from the proposed rule in response to comments. Under the final rule, investment advisers may exclude from these requirements mutual funds, collective investment funds, and other investment advisers they advise that are subject to this rule. Accordingly, investment advisers will be subject to the special standards of diligence, prohibitions, and special measures requirements with respect to their customers that are not mutual funds, or collective investment funds, or other investment advisers that they advise.

This approach will maintain the requirements in the proposed rule with regard to special due diligence and special measures requirements given the final rule's intent to bring the investment advisers' AML/CFT obligations on the investment adviser sector in line with those imposed on other comparable financial institutions.[266] As discussed in the IA AML NPRM and in line with some comments received, applying these measures to investment advisers would assist RIAs and ERAs in managing risk and identifying illicit activity in certain intermediated advisory relationships. In response to the comment that certain private funds may not have the information necessary to conduct such due diligence, FinCEN recognizes the differing role that many investment advisers play in the movement and storage of funds relative to other financial

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[266] *See Special Due Diligence Programs for Certain Foreign Accounts*, Final Rule, 71 FR 496 (Jan. 4, 2006), available at: https://www.federalregister.gov/documents/2006/01/04/06-5/financial-crimes-enforcement-network-anti-money-laundering-programs-special-due-diligence-programs.

service providers such as banks. Consistent with the approach taken in prior rules regarding special due diligence and special measure requirements, only covered investment advisers that offer accounts that provide financial institutions with a conduit for engaging in ongoing transactions in the U.S. financial system are subject to this requirement.[267]Accordingly, this requirement is intended to be limited to those types of relationships that provide ongoing services, excluding isolated or infrequent transactions.[268] FinCEN will work with the SEC staff with respect to implementation and examination of this requirement and may issue guidance, if deemed necessary.

With respect to the special due diligence requirements for private banking accounts, FinCEN would like to clarify that in the context of private funds, the term "minimum aggregate deposit of funds" would apply to the assets in the private fund, if held by the adviser. In other words, the rule applies where an investment adviser manages more than the minimum aggregate deposit of funds for a customer (which may be a private fund or another type of customer).

Regarding the comment suggesting to include foreign "investment adviser" within the definition of "foreign financial institution" under 31 CFR 1010.610(a) in order to require that special due diligence program requirements apply to correspondent accounts that covered financial institutions open for foreign investment advisers, FinCEN declines to do so because it assesses at this time that illicit finance risks to the U.S. financial system are adequately addressed by the application of the final rule to the U.S. advisory activities of certain foreign-located investment advisers, as described above. As a result a financial institution will not need to apply these requirements with respect to accounts for foreign investment advisers; instead, a financial institution (including an investment adviser under the final rule) will would still need to apply its overall AML/CFT program (regardless of special due diligence program

[267] *Id.*

[268] Other requirements, such as suspicious activity reporting and recordkeeping, however, apply to such transactions as set out in this final rule.

requirements) to a foreign investment adviser, as it would any other customer covered by the AML/CFT program.

H. Delegation of Examination Authority to the SEC

Proposed Rule: FinCEN proposed to delegate its examination authority for investment advisers to the SEC given the SEC's expertise in the regulation of investment advisers and the existing delegation to the SEC of authority to examine broker-dealers and mutual funds for compliance with FinCEN's regulations implementing the BSA.

Comments Received: FinCEN received four comments pertaining to the delegation of examination authority to the SEC. One commenter supported the delegation of authority. Two commenters called on FinCEN to require that the SEC publicly release a copy of its relevant AML examination manual as the FFIEC has done with its BSA/AML examination manual. A commenter recommended that the final rule expressly recognize that the SEC should not prioritize examination or enforcement activities with respect to investment advisers who work with fund clients that (1) predominantly engage in investment activities in the U.S. and (2) predominantly accept subscriptions from domestic sources or through unaffiliated U.S.-regulated financial institutions. Instead, the commenter asked FinCEN to make clear that investment advisers with a domestic focus in their operations will be selected for examination by the SEC only if additional risk factors (*e.g.*, unusual transactions flagged by the banks) are present. One commenter called on FinCEN to ensure, to the fullest extent possible, that agencies avoid duplication of examination activities, reporting requirements, and requests for information, and called on the SEC as the functional regulator of investment advisers, to leverage the work of other BSA/AML examiners.

Final Rule: FinCEN is implementing this provision without change from the proposed rule. The final rule maintains the proposed rule's delegation of examination authority to the

SEC over investment advisers' compliance with the rule.[269] This delegation reflects FinCEN's recognition that the SEC is best equipped to handle such examinations given the existing SEC regulatory and examination apparatus with respect to investment advisers. FinCEN declines to expressly adopt the comments suggesting that the SEC should not prioritize its examination activities for those investment advisers "predominantly engaged in investment activities in the U.S. and predominantly accept subscriptions from domestic sources or through unaffiliated U.S.-regulated financial institutions" absent other risk factors. In recognizing that the SEC is best equipped to handle such examinations, FinCEN has determined that the SEC is best able to determine its own examination procedures and priorities.

FinCEN also declines to publish an AML/CFT examination manual for investment advisers. FinCEN notes that the SEC has not published an investment adviser examination manual. FinCEN does note that the SEC maintains a compilation of relevant resources on AML/CFT for both broker-dealers and mutual funds, and FinCEN will discuss with the SEC whether to prepare something similar for investment advisers.[270] Regarding the commenter request that the SEC leverage the work of other BSA/AML examiners, FinCEN notes that, as with other types of entities that may have more than one Federal functional regulator, supervisory coordination with regard to investment advisers is important to maintain efficiencies and avoid duplication.

I. Compliance Date

Proposed Rule: Proposed section 1032.210(c) would have required an investment adviser to develop and implement an AML/CFT program and comply with the other AML/CFT requirements of the proposed rule on or before 12 months after the effective date of the regulation.

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[269] *See also* 31 CFR 1010.810(b)(6) (FinCEN's delegation of examination to determine compliance with requirements of Chapter X for brokers and dealers in securities and investment companies to the Securities and Exchange Commission).

[270] *See* SEC, *Anti-Money Laundering (AML) Source Tool for Broker-Dealers*, https://www.sec.gov/about/offices/ocie/amlsourcetool and *Anti-Money Laundering (AML) Source Tool for Mutual Funds*, https://www.sec.gov/about/offices/ocie/amlmfsourcetool.

Comments Received: Several commenters expressed concern about the proposed compliance date, stating that FinCEN had underestimated the overall impact of complying with the regulation. Several commenters requested that the compliance date be extended to 18 or 24 months (the majority of commenters recommended 24 months) from the effective date of the regulation to take into account the burden of complying with the regulation, with one also suggesting that this extended timeline would allow FinCEN to align the effective date of the proposed rule and the pending CIP rule. Some commenters noted that a 12-month compliance date would have a disproportionate impact on smaller entities, with one suggesting that advisers with 100 or fewer staff be given 36 months to comply should they remain in scope of the final rule. Two commenters noted that many advisers may need to renegotiate or amend contracts with a range of banks and broker-dealers to whom investment advisers may need to delegate or with whom they may need to share compliance obligations. One commenter also noted that there exist relatively few custodians, prime brokers, trading counterparties, and fund administrators that are responsible for revising all of these agreements on behalf of the entire universe of RIAs.

Final Rule: FinCEN will require that an investment adviser must be in compliance with the final rule on or before January 1, 2026. FinCEN recognizes that the final rule will create new burdens on investment advisers, that investment advisers have other new regulatory obligations in addition to existing regulatory obligations, and that some advisers may need to develop, build, and integrate technology solutions to comply with certain requirements of final rule.

However, based on FinCEN's experience issuing regulations for other financial institutions requiring them to meet similar requirements, FinCEN believes that a compliance date of January 1, 2026, provides an adequate amount of time to comply with the regulation. As noted by two commenters, FinCEN recognizes that advisers may need to renegotiate or amend contracts with a range of banks and broker-dealers, as well as fund administrators and

other market participants, to whom investment advisers may need to delegate or with whom they may need to share compliance obligations. Given that the effective dates of these agreements may vary throughout the industry, FinCEN wants to ensure advisers have at least a full calendar year to adjust any contractual arrangements with custodians, broker-dealers, fund administrators, or other service providers.

J. Other Issues

1. Extend Comment Period

FinCEN received one comment asking for an extended comment period, saying that the IA AML NPRM, by coming in the first quarter of the year (specifically, February) coincided with a time when RIAs are required to update Form ADV as well as oversee audited financials and the preparation of tax statements.

FinCEN declines to re-open or otherwise extend the comment period, believing those options to be unnecessary, given the number of comments received, the wide array of content in the comments received, and the various types of advisers and organizations who submitted comments during this comment period.

2. Use of Legal Entity Identifiers

One commenter suggested that FinCEN "leverage existing collection procedures from the SEC" to require investment advisers to collect the legal entity identifier (LEI)[271] of their legal entity customers as part of this rule. The commenter stated that the LEI is "an open and non-proprietary identifier [that] increases transparency and promotes information sharing among financial regulators" The commenter noted that the SEC had already included the LEI in other proposed rules applicable to investment advisers, including amending forms for required filings to include LEI.

[271] The LEI is an identification number based on the International Organization for Standardization ("ISO") 17442-1 standard that uniquely identifies a legal entity. As noted by the commenter, the SEC requires an adviser to provide an LEI, if it has one, on Item 1.P on Form ADV.

FinCEN recognizes that using uniform entity identifiers such as an LEI may assist investment advisers and law enforcement agencies in detecting illicit finance activity, such as by assisting in ongoing monitoring of legal entity customer activity. However, not all customers of investment advisers have an LEI. Moreover, FinCEN aims to offer investment advisers flexibility in implementing the proposed requirements while maintaining consistency with how AML/CFT requirements are applied to other financial institutions. Therefore, it will not require investment advisers to collect the LEI of their legal entity customers. Notwithstanding the absence of an LEI requirement, advisers may still collect LEIs from customers or third party advisers if they believe it is helpful in assessing and mitigating illicit finance risk or complying with specific requirements in the proposed rule.

3. Use of Foreign Jurisdiction Compliance

FinCEN received two comments calling on FinCEN to exempt from the final rule foreign-located advisers who are compliant with the AML/CFT laws of other jurisdictions. One comment noted that there is global acceptance of and adherence to FATF requirements, adding that the SEC and the Commodity Futures Trading Commission are signatories to the International Organization of Securities Commissions (IOSCO) Multilateral Memorandum of Understanding Concerning the Consultation and Cooperation and the Exchange of Information (MMoU).[272] Another commenter stated that foreign-located investment advisers based in the United Kingdom and EU are already subject to similar AML/CFT laws and regulations and the burden of applying the proposed rule to foreign-located investment advisers would be disproportionate and duplicative.

FinCEN recognizes the importance of consistency and international coordination in applying and supervising for AML/CFT requirements on financial institutions active in

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[272] Per the IOSCO, the MMoU sets an international benchmark for cross-border co-operation among its signatories. Established in 2002, the MMoU provides securities regulators with the tools for combating cross-border fraud and misconduct. *See* IOSCO, *Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information* (May 2002; rev'd May 2012), available at https://www.iosco.org/library/pubdocs/pdf/IOSCOPD386.pdf.

multiple jurisdictions. As described above, the requirements of the final rule with respect to foreign-located investment advisers will apply only with respect to certain advisory activities with a nexus to the United States. This is consistent not only with the SEC's own supervisory authority under the Advisers Act, but also with AML/CFT supervision of other types of financial institutions, including foreign-located advisers, which are subject to AML/CFT supervision by regulators in multiple jurisdictions. Further, as noted by the commenters, supervisors are able to make use of established fora and mechanisms, such as IOSCO's MMoU, to coordinate their activities and help minimize the burden on regulated entities. Therefore, FinCEN declines to exempt from the rule foreign-located advisers on the basis that they are compliant with the AML/CFT laws of other jurisdictions.

4. Interaction of Proposed Rule with Other Investment Adviser or AML/CFT Rulemakings

Commenters raised several questions pertaining to the interaction of the proposed rule with other rulemakings. Several commenters discussed the plan to issue CIP requirements for investment advisers jointly with the SEC. Commenters noted confusion over the plan for the SEC to issue new CIP rules allowing for adherence to this rulemaking. Several comments called on FinCEN to reopen the comment period for this proposed rule if a joint CIP rule were proposed prior to this rule being finalized. One commenter also requested that FinCEN continue to coordinate with staff at the SEC, especially on rulemakings that are interrelated or will have significant implications for one another, including on the SEC's proposed Outsourcing[273] and Safeguarding[274] rules. One commenter stated that given the overlap between CIP and some of the requirements in the proposed rule—such as the Recordkeeping and Travel Rules and Special Information Sharing Procedures FinCEN should not implement those requirements until the CIP rule is finalized.

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[273] *Outsourcing by Investment Advisers*, Proposed Rule, 87 FR 68816 (Nov. 16, 2022).
[274] *Safeguarding Advisory Client Assets*, Proposed Rule, 88 FR 14672 (Mar. 9, 2023).

Another commenter raised concerns that if the CDD Rule is applied as currently written, many funds would potentially not have to report the identities of any of their beneficial owners as limited partner investors will be below the 25 percent ownership reporting threshold. One commenter also suggested that FinCEN consider requiring investment advisers to begin customer and beneficial ownership identification and verification within a set timeframe, not specifically linked to the CDD update. The commenter also noted that given some of the unique issues related to pooled investment vehicles, FinCEN should not rely solely on an updated CDD rule to implement these requirements for pooled investment vehicles.

FinCEN recognizes and has considered the potential challenges that may arise with multiple rulemaking processes that could affect investment advisers' AML/CFT requirements. As such, FinCEN intends to carefully coordinate on these rulemakings to ensure consistency in how investment advisers, as well as other financial institutions, are treated under these rules. Regarding CIP, as noted above, FinCEN and the SEC intend to align the compliance dates for both AML/CFT Program and SAR Rule as well as a potential final CIP rule. Regarding the revisions to the CDD Rule, FinCEN is considering how any such revisions may impact investment advisers and, as required by the Corporate Transparency Act, intends to issue a notice of proposed rulemaking, which would be subject to public comment. FinCEN will continue to coordinate with the SEC on these and other rulemakings.

IV. SEVERABILITY

In the IA AML NPRM, FinCEN proposed that if any provision of the final rule, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions, or application of such provisions to other persons or circumstances, that can be given effect without the invalid provision or application. FinCEN did not receive any comments on this issue.

FinCEN adopts this position without change and, separately, incorporates this position

into the text of the rule at section 1032.112 for the avoidance of doubt. FinCEN also clarifies its intent regarding the severability of specific parts of the final rule. It is FinCEN's position that if any of the provisions of this final rule, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions, or application of such provisions to other persons or circumstances, that can be given effect without the invalid provision or application. Each provision of the final rule and application thereof serves an important, related, but distinct purpose; provides a distinct benefit separate from, and in addition to, the benefit provided by other provisions and applications; is supported by evidence and findings that stand independent of each other; and is capable of operating independently such that the invalidity of any particular provision or application would not undermine the operability or usefulness of other aspects of the final rules. Based on its analysis, FinCEN believes that although more limited application would change the magnitude of the overall benefit of the final rule, it would not undermine the important benefit of, and justification for, the final rule's application to other persons or circumstances. The qualitative and quantitative benefits of the rule outweigh the costs for all persons and circumstances covered by the final rule.

For example, but without limitation, if application of the final rule to any subcategory of investment advisers, such as foreign-located advisers, private fund advisers, or venture capital fund advisers, is held to be invalid, it is FinCEN's intent that the final rule remain in effect as to all other subcategories of investment advisers. The purpose of the final rule is to reduce the risk that investment advisers may be misused by money launderers, terrorists, or other actors who seek access to the U.S. financial system for illicit purposes and who threaten U.S. national security; and it is consistent with this purpose to cover some, but not all, investment advisers as defined in the final rule if the application of the rule to a subcategory of investment advisers is held to be invalid. Furthermore, subcategories of investment advisers generally do not depend on each other to comply with the requirements of the final rule and

may continue to reduce illicit finance risk even if another subcategory of advisers is no longer covered by the final rule.

The substantive requirements of this final rule—the AML/CFT program, SAR filing, recordkeeping, special standards of diligence, and other requirements—are likewise severable. FinCEN intends for investment advisers to implement each requirement regardless of whether another requirement is held to be invalid, and if the application of a requirement is held to be invalid in certain circumstances, to continue to apply a requirement to the extent it can be given effect in circumstances where it has not been held invalid. Many of the requirements are unaffected if another requirement is held to be invalid. While some substantive requirements facilitate compliance with another requirement of the final rule, no substantive requirement is unworkable if another requirement is invalidated or has its application limited. For example, but without limitation, an investment adviser may continue to maintain an AML/CFT program even if it is not obligated to file SARs or maintain special standards of diligence, which is already the case for certain categories of financial institutions under the BSA.[275] Thus, although an AML/CFT program establishes a structure to facilitate SAR filing, an investment adviser may still report suspicious activity even if it is not required to have an AML/CFT program as set out under the final rule. FinCEN therefore intends for each substantive requirement of the rule to be severable from each of the others and to be applied to the extent possible if its application is limited.

V. REGULATORY ANALYSIS

In accordance with Executive Orders 12866, 13563, and 14094 (*i.e.*, E.O. 12866 and its amendments), this regulatory impact analysis (Impact Analysis) is composed of assessments of the anticipated impacts of the final rule—in particular, the final rule's

[275] *See, e.g.*, 31 CFR Part 1027 (dealers in precious metals, precious stones or jewels); 31 CFR 1023.230(a)(1) (foreign-located broker-dealers not required to file SARs).

expected costs and benefits to affected parties. This analysis also includes assessments of the rule's impact on small entities pursuant to the Regulatory Flexibility Act (RFA) and of its reporting and recordkeeping burdens under the Paperwork Reduction Act (PRA), as well as consideration of whether an assessment under the Unfunded Mandates Reform Act of 1995 (UMRA) is required and of the implications of the Congressional Review Act for the final rule.

This Impact Analysis finds that the impact associated with the final rule would primarily affect investment advisers (specifically, covered RIAs and ERAs) and U.S. Federal agencies, and estimates that the total present value of costs of the final rule over a 10–year time horizon ranges from $4.3 billion to $8.7 billion, with a primary estimate of $7.4 billion, using a 2 percent discount rate. The annualized costs over a 10–year time horizon range from $470 million to $950 million, with a primary estimate of $810 million, using a 2 percent discount rate.[276] This final rule has been determined to be a "significant regulatory action" under section 3(f) of Executive Order 12866 and significant under section 3(f)(1) because it may have an annual effect on the economy of $200 million or greater.

Table 1 summarizes the benefits and costs of the final rule. The potential benefits are difficult to quantify—and thus are unquantified in this Impact Analysis—but are reported alongside the monetized costs:

Table 1. Summary of Benefits and Costs of the Final Rule

Category	Primary Estimate ($M)	Low Estimate ($M)	High Estimate ($M)	Dollar Year	Discount Rate	Time Horizon
BENEFITS						
Annualized Monetized Benefits	N/A	N/A	N/A	2022	2%	10 years
Unquantified Benefits	• Increase access for law enforcement to relevant information for complex financial crime investigations and asset forfeiture. • Enhance the ability of law enforcement to identify and prosecute money laundering and other financial crimes.					

[276] All aggregate figures are approximate and not precise estimates unless otherwise specified.

	• Enhance interagency understanding of priority national security threats and their associated financial activity. • Enhance the ability of national security personnel to protect against priority national security threats. • Improve financial system transparency and integrity. • Align with international financial standards to strengthen the U.S. financial system from abuse by illicit actors.					
COSTS						
Annualized Monetized Costs	$810	$470	$950	2022	2%	10 years
Unquantified Costs	N/A					

Category	Effects	Notes
Effects on State, Local, or Tribal Governments	No estimated impact to State, local, or Tribal governments.	
Effects on Small Businesses	Estimated annualized cost burden of $40,000 for small investment advisers, approximately 4.7 percent of average revenues or 0.8 percent of assets under management.	Annualized cost burden estimated over 10 years using a 2 percent discount rate.
Effects on Wages	The final rule is not anticipated to have significant impacts on wages.	
Effects on Growth	Investment advisers are likely to pass on the increased costs of managing accounts to clients through higher fees, which may reduce earnings on investments.	

FinCEN has chosen to issue the final rule applying AML/CFT requirements to RIAs and ERAs (with certain exemptions) instead of two regulatory alternatives: (1) applying AML/CFT requirements to RIAs, ERAs, and State-registered investment advisers, and (2) merely requiring private funds to collect beneficial ownership information on legal entity investors. The first alternative would expand the regulatory requirements of the BSA applied to nearly twice as many entities (as compared to the final rule) at a greater overall cost but provide a similar level of benefits (with only limited incremental benefits attributable to the inclusion of State-registered investment advisers in the definition of financial institution). The second alternative would reduce the costs of the regulation (as compared to the final rule) while providing fewer benefits and only achieving a small proportion of the objectives of the BSA in the investment adviser industry.

FinCEN has conducted a final regulatory flexibility analysis (FRFA) pursuant to the

RFA. In response to the findings in the initial regulatory flexibility analysis and public comments on the IA AML NPRM, for the final rule FinCEN has specifically exempted RIAs that register with the SEC as mid-sized advisers to reduce the potential regulatory burden on small entities.

As detailed in the PRA analysis, for the private sector, the final rule is estimated to result in a one-time, upfront information collection burden of 6.83 million hours and an average annual information collection burden of 4.86 million hours thereafter. The estimated one-time, upfront information collection cost is approximately $408 million, and the estimated average annual recurring information collection cost is approximately $278 million thereafter. These costs are included in the Impact Analysis.

Pursuant to its UMRA-related analysis, FinCEN has not anticipated any expenditures for State, local, and Tribal governments. FinCEN anticipates expenditures by the private sector of more than $177 million, the current UMRA threshold.[277] The UMRA-related analysis for private sector entities has been incorporated into this Impact Analysis.

A. Executive Orders 12866, 13563, and 14094

As detailed below, Treasury assesses that RIAs and ERAs pose a material risk of misuse for illicit finance. Including investment advisers as “financial institutions” under FinCEN regulations issued under the BSA and applying comprehensive AML/CFT measures to these investment advisers are likely to reduce this risk.

Executive Order 12866, as amended by Executive Order 14094, directs agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to

[277] As explained below in the section V.D, the UMRA threshold is $100 million adjusted annually for inflation. The U.S. Bureau of Economic Analysis reported the annual value of the gross domestic product (GDP) deflator in 1995 (the year in which UMRA was enacted) as 71.823, and in 2022 as 127.215. *See* U.S. Bureau of Economic Analysis, Table 1.1.9, “Implicit Price Deflators for Gross Domestic Product,” available at https://apps.bea.gov/iTable/?reqid=19&step=2&isuri=1&categories=survey%23eyJhcHBpZCI6MTksInN0ZXBzIjpbMSwyLDMsM10sImRhdGEiOltbIkNhdGVnb3JpZXMiLCJTdXJ2ZXkiXSxbIk5JUEFfVGFibGVfTGlzdCIsIjEzIl0sWyJGaXJzdF9ZZWFyIiwiMTk5NSJdLFsiTGFzdF9ZZWFyIiwiMjAyMSJdLFsiU2NhbGUiLCIwIl0sWyJTZXJpZXMiLCJBIl1dfQ. Thus, the inflation adjusted estimate for $100 million is 127.215 divided by 71.823 and then multiplied by 100, or $177 million.

select regulatory approaches that maximize net benefits (including potential economic, environmental, and public health and safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This final rule has been designated a "significant regulatory action" under section 3(f) of Executive Order 12866 and significant under section 3(f)(1). Accordingly, this final rule has been reviewed by the Office of Management and Budget (OMB).

1. Discussion of Comments to the Initial Impact Analysis

Seven commenters commented on the initial impact analysis accompanying the proposed rule. Three of these seven commenters commented on the initial impact analysis's cost estimates; all seven commented on the analysis's estimated benefits; and two commented on the analysis's estimates regarding the frequency of SAR filing. As explained below, in response to these comments, FinCEN increased its estimates of costs and expanded its discussion of benefits in the final Impact Analysis, but left the initial SAR estimates unchanged.

(a) *Comments Related to Costs*

Comments Received: Three commenters provided views on the estimated costs in the initial regulatory analysis. Two commenters argued that advisers would not be able to easily adapt existing policies and procedures to comply with the requirements of the proposed rule, suggesting that the initial impact analysis had thus underestimated the proposed rule's costs by assuming that some such existing policies and procedures could be so adapted. The commenters stated that existing requirements are principles-based and designed to prevent violations of the Advisers Act, and that there is little overlap between those requirements and the purpose and substantive requirements of the BSA that the proposed rule would impose on investment advisers. One commenter also indicated that the annual reviews that investment advisers must conduct for compliance with the Advisers Act do not necessarily equip them to

implement the independent testing under the AML/CFT program requirement that the proposed rule would impose.

Regarding those AML/CFT programs that some investment advisers do already have, one commenter noted that even affiliated and dual registered advisers would need to update their compliance programs under the proposed rule. The commenter also noted that advisers with a voluntary AML/CFT program would still need to modify their program, as it is unlikely that their existing program (and systems developed to implement that program) would fully track the requirements in the proposed rule.

In addition, one commenter asserted that FinCEN had underestimated the costs for several specific requirements of the proposed rule, including the costs of implementing an AML/CFT program (particularly for unaffiliated RIAs with limited existing measures), training employees, and filing SARs. The commenter indicated these burdens may be particularly significant for small firms. The commenter also disagreed that a "risk-based" program will manage the costs of these requirements for investment advisers, as many financial institutions feel pressure to implement more extensive controls than strictly required to minimize potential regulatory risk. The commenter further reasoned that some firms may decide to not take on customers that may make compliance more difficult, and that this hesitancy may hinder innovation and competition in financial markets, a difficult-to-quantify cost.

One commenter stated that FinCEN had failed to estimate the degree to which ERAs currently implement AML/CFT requirements, which the commenter suggested compromises FinCEN's ability to estimate the rule's compliance costs for ERAs. The commenter believed that FinCEN's failure to do so also would "inevitably affect" FinCEN's ability to accurately estimate the compliance costs for many RIAs as well, but without explaining why this would be so.

Two commenters indicated that the proposed rule would have costs on the broader venture capital ecosystem, as venture capital advisers would be forced to take time away from

their work supporting businesses in which they invest to instead address compliance with the proposed rule. One commenter concluded that higher costs for smaller venture capital advisers would gradually price them out of the market, leaving only the large institutional advisers who already dominate most asset classes, and suggested that FinCEN consider not only the actual costs of implementation, but the consequences of these costs for investors and the overall innovation ecosystem.

Final Impact Analysis: FinCEN recognizes that there are both substantive and procedural differences in the requirements under the Advisers Act and those being applied in this final rule. As such, FinCEN has not sought to discount or adjust the potential costs of the rule based on existing technology systems, staff, or processes designed to meet requirements of the Advisers Act or other Federal securities laws. Thus, because FinCEN's initial estimates did not generally assume that investment advisers would be able to readily adapt such existing Advisers Act programs to comply with the rule's requirements, no broad change to these estimates is required. FinCEN would note, however, that having organizational experience with complying with certain requirements of the Advisers Act, such as those related to recordkeeping and anti-fraud measures, may help an adviser determine how to best apply similar customer-specific or enterprise-wide recordkeeping or reporting obligations under the final rule.

FinCEN agrees with commenters' conclusion that even dual registrants or affiliates may incur additional costs in conforming their existing AML/CFT programs to the requirements of the rule, despite FinCEN's initial assessment that a dual registrant or affiliate was highly likely to be already applying a significant number of AML/CFT measures. Therefore, FinCEN has increased its estimate of the cost of the rule to these entities in this final Impact Analysis. FinCEN also agrees with commenters that advisers with a voluntary AML/CFT program may still need to adjust their voluntary programs to comply with the requirements of the final rule,

but FinCEN assesses that these costs were already accounted for in FinCEN's initial impact analysis, and thus that adjustment to this estimate is not required.

Regarding comments that FinCEN is underestimating the cost of specific requirements and is unable to determine the degree to which ERAs already implement certain AML/CFT measures, FinCEN recognizes that there is some uncertainty about specific costs and about the number of entities already applying certain AML/CFT measures. All estimates of a rule's potential impact, however, involve some level of uncertainty—indeed no commenter identified costs with certainty—and FinCEN's uncertainty analysis in this final Impact Analysis is intended to help address those concerns. Moreover, the commenters who claimed FinCEN was underestimating the cost of these requirements did not provide an alternative estimate for those costs. Regarding concerns that investment advisers will minimize regulatory risk by implementing extensive measures to comply with this rule, FinCEN reiterates that the AML/CFT framework does not utilize a zero tolerance philosophy, and that any enforcement action taken is dependent on the facts and circumstances of each situation.[278] FinCEN has also, in coordination with Federal functional regulators, continued to emphasize that financial institutions should manage customer relationships and mitigate risks based on customer relationships, rather than decline to provide financial services to entire categories of customers.[279]

In response to one commenter, FinCEN recognizes that there may be additional impact from this rule on general investment activities, including those associated with venture capital advisers, but notes that given the relatively small number of private funds that such exempt

[278] *See, e.g.*, *Joint Fact Sheet on Foreign Correspondent Banking: Approach to BSA/AML and OFAC Sanctions Supervision and Enforcement* (Aug. 30, 2016), available at https://home.treasury.gov/system/files/136/archive-documents/Foreign-Correspondent-Banking-Fact-Sheet.pdf; *see also* Joint Statement on Enforcement of Bank Secrecy Act/Anti-Money Laundering Requirements (Aug. 13, 2020), available at https://www.fdic.gov/sites/default/files/2024-03/pr20091a.pdf.

[279] *See Joint Statement on the Risk-Based Approach to Assessing Customer Relationships and Conducting Customer Due Diligence* (Jul. 6, 2022), available at https://www.fincen.gov/sites/default/files/2022-07/Joint%20Statement%20on%20the%20Risk%20Based%20Approach%20to%20Assessing%20Customer%20Relationships%20and%20Conducting%20CDD%20FINAL.pdf.

venture capital advisers service, such costs will not be significant for each individual adviser, and these requirements will be consistently applied for all investors seeking to invest in private funds advised by venture capital or other exempt reporting advisers. Thus, contrary to the fears raised by commenters, FinCEN does not expect that this rule's costs will drive smaller investment advisers out of the market or fundamentally alter the broader venture capital ecosystem.

(b) *Comments Related to Benefits*

Comments Received: Seven commenters commented on the benefits of the proposed rule. Four commenters agreed with FinCEN's initial assessment of these benefits. One commenter noted that adding regulations to financial advisors would make it harder for money laundering operations to operate, and thus reduce the lucrative nature of crime in general. Another commenter argued that the proposed rule could assist the IRS in addressing tax evasion through private funds, while another commenter noted that the proposed rule's benefits would significantly outweigh the costs, especially considering the size of the investment advisory market and that some advisers already voluntarily implemented AML/CFT requirements. An individual commenter also provided data from the U.S. Sentencing Commission indicating that over 1,000 people were charged with money laundering in fiscal year 2022, and that the median offense was for over $300,000, to stress the importance of controlling money laundering through regulations like the proposed rule and the benefits that may be obtained by doing so.

Several commenters, however, stated that the proposed rule had no quantifiable benefit despite imposing billions of dollars in costs on investment advisers. One commenter accordingly encouraged FinCEN to quantify the proposed rule's benefits and to include a graph that visualizes a breakeven analysis of the rule. In addition, two commenters specifically disagreed with FinCEN's assessment of benefits. These commenters argued that the proposed rule should consider only the incremental benefit to law enforcement from the application of

the proposed rule to venture capital advisers, given the existing AML/CFT obligations to which financial institutions that interact with venture capital funds are already subject. One of those commenters also argued that the initial impact analysis's explanation of benefits was broad and suffered from a lack of specificity, while the other commenter noted that transactional and customer information held by RIAs and ERAs is already available to law enforcement if a warrant has been obtained, or to regulators through their examination process, thereby suggesting that the proposed rule would not provide significant new information to law enforcement.

Final Impact Analysis: In response to these comments on benefits, FinCEN has expanded the discussion on certain benefits in the final Impact Analysis and has added additional detail as to why FinCEN is choosing to not quantify the benefits of this final rule. In particular, FinCEN added additional discussion and detail on benefits associated with measures designed to combat crime, including money laundering, terrorist financing, and other types of illicit finance activity. FinCEN also expanded the Analysis's discussion of benefits associated with international regulatory cooperation for AML/CFT, a type of benefit on which recently updated OMB guidance places an increased emphasis.[280] In response to comments, FinCEN also provided additional discussion on some of the challenges with quantifying the benefits from AML/CFT regulations, such as the deterrent and detection effects of such rules. FinCEN added some additional guidance from OMB on difficulties in quantifying benefits in certain rulemakings as well.

As further explained in the final Impact Analysis, however, the rule does have clearly identifiable benefits, even if those benefits cannot be readily quantified given their nature: difficulty quantifying a rule's benefits does not indicate that the rule lacks benefits or that its benefits are unimportant. Moreover, the final Impact Analysis expressly acknowledges that existing legal requirements provide similar benefits to the rule in some circumstances, but also

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[280] *See* OMB Circular No. A-4 (2023).

highlights significant gaps in the existing requirements, and explains how the rule will create new benefits by filling those gaps and more comprehensively promoting AML/CFT compliance in the investment adviser industry.

(c) *Estimate of Suspicious Activity Reports*

Comments Received: FinCEN's initial impact analysis used the number of SARs currently filed by dual registrants to estimate the number of SARs that RIAs would submit under the proposed rule. One commenter claimed that, by doing so, FinCEN significantly overstated the frequency with which RIAs would submit SARs under the proposed rule, as the vast majority of RIAs do not execute transactions in the way that dual registrants do, but instead rely on custodians. Another commenter stated that the number of SARs that may be filed under the proposed rule should not be used as a proxy for effectiveness of the rule.

Final Impact Analysis: In the final Impact Analysis, FinCEN continues to use the estimated number of SARs to be filed by each investment adviser to assist FinCEN in estimating the costs associated with identifying and reviewing alerts and cases that may eventually lead to a SAR filing, as well as the costs associated with investment advisers documenting cases where SARs are not filed. FinCEN agrees with the commenters that the frequency with which dual registrants file SARs may differ from the frequency with which all RIAs file SARs under the rule: for example, dual registrants may have significantly more transactional activity than entities that are solely investment advisers and may encounter suspicious activity that they would not if they were serving solely as an investment adviser. Thus, by relying on the frequency with which dual registrants file SARs, FinCEN's Impact Analysis may overestimate the number of SARs that RIAs will file under the rule, and thus may overestimate the related costs that the rule would impose. Nonetheless, FinCEN is keeping this estimate given the difficulty of otherwise reliably estimating the frequency of SAR filing and to avoid underestimating time and labor costs associated with the SAR filing process.

FinCEN agrees that the number of SARs a financial institution files does not, in and of itself, necessarily indicate whether that institution has an effective AML/CFT program. FinCEN thus clarifies that there is no regulatory expectation that an investment adviser file a certain number of SARs to be in compliance with the requirements of the final rule. FinCEN recognizes that the amount of potentially suspicious transactions that occur by, at, or through an investment adviser will vary significantly with its AUM, advisory activities, and the risk profile associated with its customers. As such, some advisers may file several hundred SARs per year, while many other advisers, particularly smaller advisers who have fewer customers, may file few if any SARs in a given year. FinCEN also notes that in other sectors subject to SAR filing obligations, a small number of entities are responsible for a large number of total SAR filings for those institutions.[281]

2. Final Regulatory Impact Analysis

In accordance with OMB guidance, this Impact Analysis contains, as follows: (1) a statement of the need for the regulatory action; (2) a clear identification of a range of regulatory approaches; and (3) an estimate of the benefits and costs—quantitative and qualitative—of the final regulatory action and its alternatives.

(a) *Statement of the Need for, and Objectives of, the Final Rule*

The primary purpose of the final rule is to address identified illicit finance risks among investment advisers (*i.e.*, RIAs and ERAs). Currently, investment advisers are not required by regulation to apply measures designed to address money laundering, terrorist financing, and other illicit finance risks similar to those to which other financial institutions are subject. For example, investment advisers are generally not required to establish an AML/CFT program, to conduct customer due diligence, or to report suspicious customer activity to FinCEN. This means that tens of thousands of investment advisers overseeing the investment of hundreds of

[281] *See* FinCEN, *Year in Review for FY 2022* (Apr. 21, 2023), p.3 (noting that the top 10 SAR filers filed approximately 52 percent of all SARs in FY 2022), available at https://www.fincen.gov/sites/default/files/shared/FinCEN_Infographic_Public_2023_April_21_FINAL.pdf.

trillions of dollars into the U.S. economy currently do not face regulatory sanction for failing to implement the above-mentioned measures, creating a material weakness in the United States's framework to combat illicit finance.

As described in detail above, investment advisers work closely with and provide services that are similar or related to, services authorized to be provided by other BSA-defined financial institutions.[282] While investment advisers do not usually custody customer assets, they generally must understand their customers' financial background and investment goals to provide advisory services, and they direct banks and broker-dealers to execute transactions and disperse funds to support their customers' investment objectives.

Under the current AML/CFT regulatory framework applicable to investment advisory activities, the financial institutions that engage in trading or transactional activities on behalf of investment advisers or their customers, such as banks and broker-dealers, are subject to AML/CFT reporting and recordkeeping obligations. However, for many of these financial institutions, the investment adviser, and not the investment adviser's customers, is their customer. Consequently, they may rely solely on an investment adviser's instructions and lack independent knowledge of the adviser's customers. In some cases, an investment adviser may be the only person or entity with a complete understanding of the source of a customer's invested assets, background information regarding the customer, or the objectives for which the assets are invested. Additionally, an investment adviser may use multiple broker-dealers or banks for trading or custody services.

As a result, one financial institution may not have the complete picture of an adviser's activity or information regarding the identity and source of wealth of the advisers' customers, and thus may not be well-positioned to assess whether funds managed by the adviser may be derived from illicit proceeds or associated with a criminal or other illicit finance activity. Without more complete information, such an institution may not have sufficient information to

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[282] *See supra* Section II.B.

warrant filing a SAR, or may be required to file a SAR that only has limited information concerning the investment adviser's transactions on behalf of a particular customer. This limits the ability of law enforcement to identify illicit activity that may be occurring through investment advisers.

As discussed in the preamble, the final rule addresses this gap by requiring covered RIAs and ERAs to implement AML/CFT programs, which include risk-based procedures for conducting ongoing customer due diligence, and report suspicious activity to FinCEN, among other requirements. These RIAs and ERAs will be subject to examination for compliance with these requirements by the SEC. FinCEN expects this will reduce instances of investment advisers' unwittingly laundering illicit proceeds on behalf of clients and increase the likelihood that authorities detect illicit activity occurring through unwitting investment advisers. It also allows law enforcement to better detect complicit investment advisers that knowingly facilitate money laundering, terrorist financing, or other illicit finance activity. The final rule will also bring the investment adviser industry more in line with its counterparts in the U.S. financial sector and around the world.

(b) *Summary of the Final Rule*

The final rule adds "investment adviser" to the definition of "financial institution" at 31 CFR 1010.100(t) and adds a new provision to section 1010.100 defining the term "investment adviser" to mean RIAs (except for those RIAs exempted as described below) and ERAs. The final rule also clarifies that for certain "foreign-located investment advisers" (RIAs and ERAs that have their principal office and place of business outside the United States), the requirements of the final rule only apply to certain advisory activities with a nexus to the United States.

With these changes to 31 CFR 1010.100, the final rule then subjects such "investment advisers" to AML/CFT requirements applied to financial institutions, including requiring them to: (i) develop and implement an AML/CFT program; (ii) file SARs and CTRs; (iii) record

originator and beneficiary information for transactions (Recordkeeping and Travel Rules); (iv) respond to section 314(a) requests; and (v) implement special due diligence measures for correspondent and private banking accounts.

AML/CFT Program. These investment advisers are required to maintain an AML/CFT program under the final rule, including: (i) developing internal policies, procedures, and controls to comply with the requirements of the BSA and address money laundering, terrorist financing, and other illicit finance risks; (ii) designating an AML/CFT compliance officer; (iii) instituting an ongoing employee training program; (iv) soliciting an independent test of AML/CFT programs for compliance; and (v) implementing risk-based procedures for conducting ongoing customer due diligence. As discussed above, FinCEN has determined that investment advisers can exempt from their AML/CFT programs any (i) mutual fund, (ii) collective investment fund, or (iii) investment adviser that they advise and that is subject to the final rule. Also as noted above, FinCEN has determined to not include the Duty Provision in this final rule.

File SARs and CTRs. Investment advisers are required to file a report of any suspicious transaction relevant to a possible violation of law or regulation with FinCEN. In addition, investment advisers are required to report transactions in currency over $10,000. Currently, all investment advisers report such transactions on Form 8300.Under the final rule, a CTR replaces Form 8300 for RIAs and ERAs meeting the rule's definition of "investment adviser."

Recordkeeping and Travel Rules. Under the final rule, investment advisers are required to obtain and retain originator and beneficiary information for certain transactions and pass on this information to the next financial institution in certain funds transmittals involving more than one financial institution.

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

Requests contain subject and business names, addresses, and as much identifying data as possible to assist the financial industry in searching their records. The final rule allows these requests to be made to investment advisers.

Special Due Diligence Measures for Correspondent and Private Banking Accounts. The final rule requires investment advisers to maintain due diligence measures that include policies, procedures, and controls that are reasonably designed to enable the investment adviser to detect and report, on an ongoing basis, any known or suspected money laundering or suspicious activity conducted through or involving any correspondent or private banking account that is established, maintained, administered, or managed in the United States for a foreign financial institution.

(c) *Discussion of Concurrent/Overlapping/Conflicting Regulations*

There are no Federal rules that directly and fully duplicate, overlap, or conflict with the final rule. The majority of the investment adviser industry is not subject to any comprehensive AML/CFT requirements. FinCEN is aware that requirements within the Advisers Act and other Federal securities laws impose requirements upon investment advisers that in some instances are similar to the requirements in the final rule and perform similar roles (*i.e.*, improving the integrity of the U.S. financial system and protecting customers). FinCEN also recognizes that the Advisers Act and its implementing regulations authorize the SEC to regulate the investment adviser industry for compliance with these requirements.

However, while these existing requirements are important, and may provide a supporting framework for implementing certain obligations in the final rule, they do not impose the specific AML/CFT measures in the final rule in support of the BSA's statutory purposes. Specifically, investment advisers are not required to develop internal policies, procedures, and controls to identify and mitigate the risk that the adviser might be used for money laundering, terrorist financing, or other illicit finance purposes. Currently, investment advisers are not required to appoint an AML/CFT officer or train their employees to comply with AML/CFT

requirements. They are not required to report suspicious activity, maintain certain transaction records, or respond to section 314(a) requests for information on customer accounts or transactions. The existing rules and regulations under the Advisers Act are designed to prevent adviser fraud or theft of client assets and otherwise protect investors, maintain fair, orderly and efficient markets, and facilitate capital formation. Preventing illicit actors from using the investment adviser industry to launder the proceeds of crime or finance terrorism is not contemplated in existing obligations on the industry.

FinCEN recognizes that investment advisers that are dually registered as broker-dealers or are chartered as banks (and bank subsidiaries) are already subject to AML/CFT requirements. As noted above, FinCEN is not requiring such entities to establish multiple or separate AML/CFT programs so long as a comprehensive AML/CFT program covers all of the entity's applicable legal and regulatory obligations. The program should be designed to address the different money laundering, terrorist financing, or other illicit finance activity risks posed by the different aspects of the overall business's activities and satisfy each of the risk-based AML/CFT program requirements to which it is subject in its capacity as both an investment adviser and a broker-dealer or bank. Similarly, an investment adviser that is affiliated with, or a subsidiary of, another entity required to establish an AML/CFT program in another capacity is not required to implement multiple or separate programs and instead may elect to extend a single program to all affiliated entities that are subject to the BSA, so long as it is designed to identify and mitigate the different money laundering, terrorist financing, and other illicit finance activity risks posed by the different aspects of each affiliate's (or subsidiary's) business(es) and satisfies each of the risk-based AML/CFT program and other BSA requirements to which the entities are subject in all of their regulated capacities.

FinCEN is likewise aware that investment advisers serve as advisers to mutual funds, which have their own AML/CFT program requirements, and bank-and trust-company sponsored collective investment funds, as well as to other investment advisers covered by the

final rule (including as subadvisers). For the reasons described above, FinCEN is mandating under the final rule that an RIA advising a mutual fund or collective investment fund may deem satisfied its AML/CFT program requirements with respect to such mutual fund, collective investment fund, or another investment adviser the adviser advises so long as the mutual fund, collective investment fund, or investment adviser is subject to an AML/CFT program requirement applicable under another provision of 31 CFR chapter X.

FinCEN is also aware that the SEC already examines certain investment advisers for compliance with the Advisers Act and implementing regulations. FinCEN anticipates that the SEC's examination of RIA and ERA compliance with the final rule's new requirements will be incorporated into its risk-based examination program.

(d) *Report Organization*

This Impact Analysis is structured as follows. Section 3 assesses the nature and characteristics of the entities and their business that will be affected by the final rule. Section 4 then identifies the expected benefits of the final rule, and section 5 then assesses the expected costs of the final rule to both the private sector and government and explains the methodology for doing so. Finally, Section 6 assesses potential regulatory alternatives to issuing the final rule. Following the Impact Analysis are the regulatory analyses required by the RFA, PRA, and UMRA. These analyses rely on certain calculations in the Impact Analysis.

3. Affected Entities

This section identifies and characterizes the population of investment advisers that are likely to be impacted by the final rule. The final rule covers both RIAs (with certain exemptions) and ERAs. These groups generally may vary in terms of their business structure, AUM, number of employees, and number of client relationships. As explained below, these differences affect the estimated burden of the final rule, in part, because depending on their business structure, some RIAs and ERAs may already be implementing AML/CFT measures to some degree.

To establish a pre-regulation baseline, this section provides a profile of investment advisers likely to be affected by the final rule. First, it describes which investment advisers will be affected by the final rule and on what basis. Next, it describes how RIAs and ERAs are categorized based on business structure, in ways that align with the expected costs of the final rule. Next, it describes the baseline level of economic activity for each type of entity. Finally, it describes other characteristics of the regulated population, including the number of small businesses.

(a) *Universe of Investment Advisers Impacted by the Final Rule*

The Advisers Act defines an investment adviser as a person or firm that, for compensation, is engaged in the business of providing advice to others or issuing reports or analyses regarding securities.[283] The final rule would cover two subsets of such investment advisers: RIAs, who register or are required to register with the SEC (with certain exemptions); and ERAs, who are exempt from registration but must report certain information to the SEC. Each RIA and ERA must submit the Uniform Application for Investment Adviser Registration (commonly known as Form ADV) and update it on an annual basis with the SEC.[284] Form ADV is an SEC-administered self-disclosure form that collects certain information about each RIA and ERA. On Form ADV, RIAs must report ownership, clients, employees, business practices, custodians of client funds, and affiliations, as well as any disciplinary events of the adviser or its employees, and marketing and certain disclosure reporting materials it provides to clients. ERAs report a subset of this information.

i. SEC Registration and Reporting Criteria

Unless eligible to rely on an exemption, investment advisers that manage more than $110 million must register with the SEC, rather than a State authority, as well as submit a Form

[283] *See* 15 U.S.C. 80b-2(a)(11) for this definition of "investment adviser." The statute excludes some persons and firms, such as certain banks, certain professionals, certain broker-dealers, publishers, statistical ratings agencies, and family offices. *See* 15 U.S.C. 80b-2(a)(11)(A)-(G).

[284] *See* 17 CFR 275.203-1 and 204-4. A detailed description of Form ADV's requirements is available at https://www.sec.gov/oiea/investor-alerts-bulletins/ib_formadv.html.

ADV and update it at least annually.[285] Besides having AUM above $110 million, additional criteria may result in an investment adviser registering with the SEC.[286] For example, investment advisers with AUM of at least $100 million but less than $110 million are allowed, but not required, to register with the SEC. Unless a different exception from the prohibition on registration applies, investment advisers with AUM under $100 million are prohibited from registering with the SEC,[287] but must register instead with the relevant State securities regulator.

An ERA is an investment adviser that would be required to register with the SEC but is statutorily exempt from such requirement because: (1) it is an adviser solely to one or more venture capital funds, or (2) it is an adviser solely to private funds and has AUM in the United States of less than $150 million.[288] ERAs are required to report to the SEC on Form ADV.

Based on FinCEN's initial regulatory flexibility analysis and public comments submitted on the proposed rule, in the final rule, FinCEN has exempted several classes of investment advisers from the rule's requirements. FinCEN is making these adjustments to the definition of "investment adviser" to reduce the regulatory burden on small advisers and appropriately tailor the final rule to balance regulatory burden, identified illicit finance risk, and the range of advisory activities in clearly understood and administrable fashion. First, the final rule exempts RIAs that report $0 in AUM. Second, the final rule also exempts RIAs that

[285] Exceptions to this registration requirement include (1) venture capital advisers, (2) private fund advisers with AUM under $150 million, (3) advisers to life insurance companies, (4) foreign private advisers, (5) advisers to charitable organizations, (6) certain commodity trading advisers, (7) advisers to small business investment companies, and (8) advisers to rural business investment companies. *See* 15 U.S.C. 80b-3(b).

[286] Other exceptions to the prohibition on SEC registration include: (1) an adviser that would be required to register with 15 or more States (the multi-State exemption); (2) an adviser advising a registered investment company; (3) an adviser affiliated with an RIA; and (4) a pension consultant. Persons satisfying these criteria and the definition of "investment adviser" are required to register as investment advisers with the SEC. *See* Form ADV: Instructions for Part IA, Item 2. Advisers with a principal office and place of business in New York and over $25 million AUM are required to register with the SEC.

[287] 17 CFR 275.203A-1. Note that if an RIA's AUM falls below $90 million as of the end of such RIA's fiscal year, then it must withdraw its registration with the SEC, unless otherwise eligible for an exception to the prohibition on SEC registration.

[288] *See* sections 203(*l*) and 203(m) of the Advisers Act and 17 CFR 275.203(*l*)-1 and 275.203(m)-1, respectively.

register with the SEC (as indicated on their Form ADV) solely for one or more of the following reason(s):

- Mid-Sized Adviser [Item 2.A.(2)]
- Pension Consultant [Item 2.A.(7)]
- Multi-state Adviser [Item 2.A.(10)]

In addition, FinCEN has clarified how the rule will apply to foreign-located investment advisers (RIAs and ERAs that have their principal office and place of business outside the United States). As described at section 1032.111, the rule will apply only to advisory activities of foreign-located investment advisers that (i) take place within the United States, including through the involvement of U.S. personnel of the investment adviser, such as the involvement of an agency, branch, or office within the United States or (ii) provide services to a U.S. person or a foreign-located private fund with an investor that is a U.S. person. As of July 31, 2023, there were 830 RIAs and 2,145 ERAs with their principal office and place of business outside the United States.[289] No ERAs are exempt from the final rule.

As of July 31, 2023, there were 212 small RIAs[290] that would have been subject to the final rule had it then been in effect. Based on information in the IA CIP NPRM, FinCEN estimates that, due to SEC registration thresholds, the only small ERAs that would be subject to the final rule would be those that maintain their principal office and place of business outside the United States.[291] Thus, FinCEN estimates there are 173 small ERAs.[292] Therefore,

[289] According to Form ADV data as of July 31, 2023. FinCEN is not able to determine from available information which particularly advisory activities of the 830 RIAs and 2,145 ERAs that may be foreign-located investment advisers would be subject to the rule, so for the purposes of this cost-benefit analysis, it is assuming all their advisory activities would be subject to the rule.

[290] As noted below, FinCEN is relying on the small entity definition under the Advisers Act rule adopted for purposes of the RFA. Under SEC regulations implementing the Advisers Act, which FinCEN is relying on for its analysis under the Regulatory Flexibility Act, an investment adviser is considered a small entity if (i) it has, and reports on Form ADV, less than $25 million in AUM; (ii) it has less than $5 million in total assets on the last day of its most recent fiscal year; and (iii) it does not control, is not controlled by, and is not under common control with another investment adviser that is not a small entity. *See* 17 CFR 275.0-7.

[291] *See* 89 FR 44571 (May 21, 2024).

[292] There are no direct data indicating which ERAs that maintain their principal office and place of business outside the United States are small entities because, although ERAs are required to report in Part 1A, Schedule D, the gross asset value of each private fund they manage, advisers with their principal office and place of business

approximately 385 investment advisers, or 1.9 percent of all investment advisers, impacted by the final rule are estimated to be small advisers.

ii. Size of the Regulated Population

The number of RIAs and ERAs is well-defined based on the number of Form ADV filings. The four subcategories of RIAs that are exempted from the final rule, noted above, account for 1,318 entities as of July 31, 2023. Table 3.1 shows the number of RIAs and ERAs as of July 31, 2023, subject to the final rule. For this Impact Analysis, one additional RIA was omitted because it reported an implausibly high number of total clients.

Table 3.1. Estimated Population of RIAs and ERAs Subject to the Final Rule[293]

	RIAs	**ERAs**	**Total Investment Advisers**
Number of Investment Advisers	14,073	5,846	19,919

In total, there are 14,073 RIAs subject to the final rule. These firms manage a total of $119 trillion in assets and have roughly 861,000 total employees.[294] Additionally, there are 5,846 ERAs subject to the final rule with total gross assets of $5.2 trillion (ERAs do not report the number of employees to the SEC).[295] With limited exceptions, the final rule does not apply to RIAs with respect to their mutual fund or collective investment fund customers, or when

outside the United States may have additional AUM other than what they report in Schedule D. Therefore, to estimate how many of the ERAs that maintain their principal office and place of business outside the United States could be small entities, an analysis was conducted from a comparable data set: SEC-registered investment advisers. According to Form ADV data as of July 31, 2023, there are 67 small RIAs with their principal office and place of business outside the United States and 830 total RIAs with their principal office and place of business outside the United States (67 ÷ 830 = 8.1%). Based on Form ADV data, there are approximately 2,145 ERAs with their principal office and place of business outside the United States. Applying the same percentage (8.1%) to ERAs, FinCEN estimates there are 173 ERAs that are small entities.

[293] Based on a Treasury review of Form ADV information filed as of July 31, 2023. *See supra* note 23. The sum across individual categories for RIAs and ERAs is greater than the total because each investment adviser may belong in more than one category.

[294] *See supra* note 25.

[295] ERAs report gross assets for each fund they advise, but only if that fund is not reported by another adviser in its own Form ADV; therefore, some ERAs report zero gross assets because all of the funds they advise are also reported by another adviser. *See* Form ADV, Instructions for Part 1A.

they advise other investment advisers subject to this rule.[296] ERAs do not advise mutual funds or collective investment funds. Therefore, as a practical matter, RIAs that exclusively advise such funds or other investment advisers subject to this rule are exempt from most of the requirements of this rule.[297] Details on cost estimates for these advisers are provided in the next sub-section.

(b) *Categorizing the Regulated Population Based on Business Structure*

The economic impact of the final rule will depend on an adviser's business structure and the extent to which such an adviser is already implementing some AML/CFT requirements. FinCEN assesses that RIAs and ERAs dually registered as broker-dealers or banks, are a subsidiary or affiliate of a bank or broker-dealer are more likely to already apply a *significant* or *moderate* number of the requirements of the final rule. Additionally, as described below, survey data indicate that some RIAs are already implementing certain requirements of the final rule.

RIAs and ERAs are also subject to a variety of regulations and reporting requirements, such as those under Federal securities laws, in addition to the final rule. In some cases, compliance with existing regulations under Federal securities laws may reduce the burden of the final rule. In addition, RIAs and ERAs rely on third-party entities to execute business services, and those entities may be required to comply with AML/CFT regulations. Depending on the business structure of an RIA or ERA, such third-party relationships may also reduce the burden of the final rule.

Therefore, FinCEN categorized RIAs and ERAs based on their likelihood of having existing AML/CFT measures in place, and the extent of those measures. This subsection first details the justification for the categorization, based on the regulatory structure of the

[296] *See, e.g.*, section1032.210(a) *infra*. *See supra* Section III.D.1 for additional detail on the treatment of mutual funds and collective investment funds under the final rule.
[297] But an RIA would still be required to designate an AML/CFT officer, for example.

investment adviser industry and associated institutions. The subsection then describes each category of the regulated population.

i. Dual Registrants and AML/CFT-Compliant Entities Associated with RIAs and ERAs

Some RIAs and ERAs are dually registered as, subsidiaries of, or affiliated with entities that are already subject to AML/CFT obligations and, therefore, may already be applying such obligations to their advisory activities, although they may not be legally obligated to do so.[298] For instance, dual registrants may seek to provide customers with both brokerage and advisory services, and apply AML/CFT measures across their businesses rather than incurring greater costs by duplicating measures across each business. Additionally, some AML/CFT measures, such as employee training and initial customer due diligence, can be designed to apply across a firm rather than to specific activities.

Further, in past Treasury outreach to financial institutions, those that have a financial subsidiary subject to AML/CFT program obligations as well as a subsidiary investment adviser have indicated they choose to typically apply an enterprise-wide AML/CFT program extending to all their subsidiaries and their customers so that all business lines or entities in their corporate enterprise are subject to consistent risk practices and procedures.

In other circumstances, an RIA or ERA may perform AML/CFT functions via contract with a broker-dealer or other financial institution, such as when the adviser advises a mutual fund, or the adviser may have voluntarily implemented certain AML/CFT measures, such as due diligence or identification requirements.[299] Many RIAs and ERAs also frequently use the services of certain third-party entities that are required to comply with AML/CFT regulations, namely, prime brokers, qualified custodians (*e.g.*, banks), and in some circumstances, fund administrators.

[298] *See* Treasury, *2022 National Money Laundering Risk Assessment*, pp. 63–66, https://home.treasury.gov/system/files/136/2022-National-Money-Laundering-Risk-Assessment.pdf.
[299] *See id. See also* Managed Funds Association, Sound Practices for Hedge Fund Managers (2009), Chapter 6 (Anti-Money Laundering) (recommending voluntary implementation).

ii. Existing Laws and Regulations

The Advisers Act and its implementing rules and regulations form the primary existing framework governing investment adviser activity. Some rules and regulations that apply to RIAs are relevant to AML/CFT compliance and may lower the cost of compliance, including, as discussed further below: (1) the Custody Rule, which governs the custody of client funds and securities, often through relationships with qualified custodians who are often subject to AML/CFT requirements; and (2) the Compliance Rule, which governs policies and procedures designed to prevent violations of the Advisers Act, and establishes a procedural and organizational framework that RIAs may be able to build upon to implement AML/CFT measures, thus lowering the cost of compliance with the final rule.

Custody Rule. The Custody Rule requires that client funds or securities over which an RIA has custody be held at a qualified custodian.[300] The qualified custodian may hold the funds or securities in separate accounts for each client under that client's name; or in accounts under the name of the RIA as agent or trustee for clients, with only client funds and securities inside. Qualified custodians can be banks, registered broker-dealers, futures commission merchants, or certain foreign entities. Because such qualified custodians are BSA-defined financial institutions (or their equivalents under foreign law) that must comply with AML/CFT regulations, accounts maintained on behalf of an RIA—and the associated client relationships—are subject to AML/CFT requirements.

Compliance Rule. Under the Compliance Rule,[301] an RIA must adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder. RIAs must review their policies and procedures at least annually and designate a chief compliance officer to administer the policies and procedures. Although these policies and procedures do not include requirements that an RIA comply with the BSA, having

[300] *See* 17 CFR 275.206(4)-2.
[301] *See* 17 CFR 275.206(4)-7.

written policies in place may reduce the time needed to develop and review specific AML/CFT policies and procedures. Alternatively, having a framework in place for establishing policies and procedures may be useful for RIAs in complying with the final rule. Additionally, the presence of a chief compliance officer may reduce costs associated with designating an AML/CFT compliance officer, for example by dual-hatting the current chief compliance officer.

Other Requirements. Certain private fund advisers also fill out Form PF, which requires disclosure of limited beneficial ownership information for private funds; for example, the percentage of the private fund's equity owned by broker-dealers, pension plans, and U.S. and foreign-located persons.[302] Some investment advisers may have policies and procedures to comply with OFAC sanctions, which similarly may provide a framework for implementing certain AML/CFT measures included in the final rule.

Due to these information collection requirements, RIAs and ERAs already compile varying amounts of information that could be useful in AML/CFT compliance—particularly information related to the identity and citizenship of various clients. Such information collection activities would lower the burden of the final rule on covered RIAs and ERAs.

iii. RIA and ERA Categories for Cost Analyses

As described above, some RIAs and ERAs are already applying some AML/CFT requirements (although there is no legal requirement to do so). This is primarily because of their registration as or affiliation with another type of BSA-defined financial institution (such as a broker-dealer). Therefore, the baseline level of AML/CFT measures for an RIA or ERA may vary with their business structure. For the purposes of the cost analysis, FinCEN categorized RIAs and ERAs based on business structure and likelihood of having existing AML/CFT measures in place in the baseline.

[302] *See* 17 CFR 279.9.

Based on discussions with industry, information from the 2016 Investment Management Compliance Testing Survey (IMCT Survey),[303] and the framework described above, FinCEN assessed that dual registrants are most likely to already have a *significant* number of AML/CFT measures in place. An RIA or ERA with a *significant* number of AML/CFT measures in place is assessed to be applying most requirements in the final rule, including filing SARs, recordkeeping, information sharing, and special due diligence measures. Any modifications to existing policies or procedures, such as training programs, are likely to be less burdensome than developing new policies and procedures as some processes could be incorporated into existing routine maintenance, review, and updating procedures.

FinCEN also assessed that the majority of RIAs and ERAs affiliated with a bank or broker-dealer are most likely to have a *moderate* number of AML/CFT measures, though they are less likely than dual registrants to have a *significant* number AML/CFT measures in place. An RIA or ERA with a *moderate* number of AML/CFT measures in place are assessed as more likely to implement internal recordkeeping, annual training programs, and initial customer due diligence. However, these RIAs and ERAs are less likely to meet SAR filing, ongoing due diligence, information sharing, and special due diligence requirements under the BSA. These additional measures would need to be implemented under the final rule.

Finally, FinCEN assessed that while most RIAs or ERAs that are not dually registered or affiliated with a bank or broker-dealer are currently implementing a *limited* number of AML/CFT measures, a minority of that subgroup are currently implementing a *moderate* number of—rather than a *limited* number of—AML/CFT measures. An RIA or ERA with a *limited* number of AML/CFT measures in place would need to implement most of the requirements in the final rule, except that they are likely to be collecting some customer

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[303] *Investment Management Compliance Testing Survey*, Investment Adviser Association (2016) [hereinafter 2016 IMCT Survey], Executive Summary available at https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/publications/2016IMCTexsummary.pdf, Results available at https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/publications/2016IMCTresults.pdf.

information at the beginning of the client relationship and filing reports (Form 8300) that are substantially similar to CTRs.

First, RIAs and ERAs were categorized into three types of entities based on business structure: advisers that are dually registered as broker-dealers or as banks ("dual registrants"); advisers that are affiliated with a broker-dealer or bank ("affiliated advisers"); and all others that are not affiliated advisers or dual registrants (*i.e.*, "other advisers"). Because broker-dealers and banks must comply with AML/CFT requirements, dual registrants are more likely than other investment advisers to have a *significant* number of AML/CFT measures in place, and this is reflected in the baseline. Similarly, affiliated advisers are more likely than other advisers to have a *moderate* number of AML/CFT measures in place in the baseline. Formally, FinCEN defined each group based on Form ADV filings as follows:

- *Dual registrants*. RIAs or ERAs that report to the SEC that they are actively engaged in business as a broker-dealer or bank, responding "Yes" to Item 6.A.(1) and/or Item 6.A.(7).[304] As of July 31, 2023, there were 376 dually registered RIAs and 44 dually registered ERAs that would have been subject to the final rule had it then been in effect.
- *Affiliated advisers*. RIAs or ERAs that report to the SEC that they have a related person that is a broker-dealer or bank (responding "Yes" to Item 7.A.(1) and/or Item 7.A.(8)) and are not also dual registrants.[305] As of July 31, 2023, there were 2,083 affiliated RIAs and 288 affiliated ERAs that would have been subject to the final rule had it then been in effect.
- *Other advisers*. All RIAs or ERAs that are neither dual registrants nor affiliates of broker-dealers or banks. As of July 2023, there were 11,614 RIAs and 5,514 ERAs that

[304] Items 6.A.(1) and 6.A.(7) on Form ADV require an investment adviser to identify whether it is actively engaged in a particular business. This response does not necessarily mean that the investment adviser is registered as a broker-dealer or regulated as any particular kind of bank. The phrase "dual registrant" should be interpreted on this basis for purposes of this analysis.

[305] A related person is any advisory affiliate (as defined for purposes of Form ADV) of and any person that is under common control (as defined for purposes of Form ADV) with the investment adviser. *See* Form ADV, Glossary of Terms.

would have been subject to the final rule had it been in effect that were neither a dual registrant nor an affiliated adviser.

FinCEN then divided the RIAs and ERAs in each of these categories into subgroups based on the proportion estimated to be implementing a *significant*, a *moderate*, or a *limited* number of AML/CFT measures in the baseline. Because the exact distribution is unknown, FinCEN relied on different assumptions to generate lower and upper bounds and identify a primary estimate. In this case, "lower bound" means more RIAs and ERAs are assumed to have a *significant* or *moderate* number of AML/CFT measures in place and will have to implement relatively fewer additional measures under the final rule, while "upper bound" means more RIAs and ERAs are assumed to have a *limited* number of AML/CFT measures in place and will have to implement relatively more additional measures under the final rule. Although the size of each initial group, *i.e.*, dual registrants, affiliated advisers, and other advisers, is well-defined based on Form ADV data, the extent of existing AML/CFT measures within each group is uncertain and may vary considerably.

For this analysis, FinCEN used information from the 2016 IMCT Survey as a benchmark. The 2016 IMCT Survey collected information from approximately 700 RIAs on their existing implementation of AML/CFT measures.[306] According to the 2016 IMCT Survey, as of 2016, approximately 40 percent of RIAs had already adopted AML/CFT policies consistent with FinCEN's 2015 NPRM to apply AML Program and SAR filing requirements to RIAs (2015 NPRM).[307] An additional 36 percent of RIAs adopted some AML/CFT policies and procedures, but those were not in line with those in the 2015 NPRM. Therefore,

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[306] *See* 2016 IMCT Survey, *supra* note 301 . The 2024 IMCT Survey, which was published on July 16, 2024, was the first IMCT Survey since 2016 to ask detailed questions about AML policies and procedures. The 2024 IMCT Survey reported a slight drop in the percentage of respondent RIAs with AML policies and procedures that would comply with the requirements of this rule (from 40 percent to 38 percent), and a slight increase in with AML policies and procedures that did not comply with all the requirements of this rule (36 percent to 40 percent). Given this minimal change, FinCEN has determined it is not necessary to adjust its baseline for those investment advisers with *significant*, *moderate,* or *limited* AML/CFT measures. *See Investment Management Compliance Testing Survey*, Investment Adviser Association (2024), available at https://www.investmentadviser.org/wp-content/uploads/2024/07/2024_IMCT-Survey.pdf.

[307] 2016 IMCT Survey, *supra* note 301 ; *see also* 80 FR 52680 (Sept. 1, 2015).

approximately 76 percent of RIAs had at least some AML/CFT measures in place as of 2016. More granularly, 49 percent had annual employee AML/CFT training, 24 percent had a designated an AML/CFT compliance officer, and 40 percent performed independent testing of their AML/CFT program annually. Similar information was not available for ERAs, and FinCEN thus lacks information on the extent to which ERAs are already implementing AML/CFT measures. Therefore, FinCEN assumed the proportion of dual-registered, affiliated, and other ERAs implementing AML/CFT measures was the same as for RIAs across all scenarios.

FinCEN assumed in the baseline that a minority of RIAs and ERAs had a *significant* number of AML/CFT measures in place consistent with the requirements of the final rule, including filing SARs, recordkeeping, information sharing, and special due diligence measures. However, that proportion likely varies across the three groups defined above. As discussed in the uncertainty analysis, based on the 2016 IMCT Survey this figure could be as high as 40 percent. For this group, modifications to existing policies or procedures, such as training programs, are likely to be less burdensome than developing new policies and procedures as some processes could be incorporated into existing routine maintenance, review, and updating procedures. Based on discussions with industry and the framework described above, for the primary estimate FinCEN assessed only dual registrants—*i.e.*, the 376 RIAs and 44 ERAs cited above or approximately two percent of all investment advisers—are likely to already have a *significant* number of AML/CFT measures in place (even if such measures are not required for their advisory activities).

FinCEN then assessed that the majority of affiliated advisers implement a *moderate* number of AML/CFT measures, though they are less likely than dual registrants to have a *significant* number of AML/CFT measures in place. For RIAs and ERAs with a *moderate* number of AML/CFT measures in place, FinCEN assessed that existing programs most likely include internal recordkeeping, annual training programs, and initial customer due diligence.

However, these entities are less likely to meet SAR filing, ongoing due diligence, information sharing, and special due diligence requirements under the BSA. Therefore, they would need to implement additional measures under the final rule. For the primary estimate, FinCEN assumed that 75 percent of affiliated RIAs, amounting to 1,562 entities, have implemented a *moderate* number of AML/CFT measures. FinCEN further assumed that 25 percent of affiliated RIAs, amounting to 521 entities have implemented a limited number of AML/CFT measures. The same percentages are applied to ERAs.

Finally, FinCEN assessed that while most "other advisers" are currently implementing a *limited* number of AML/CFT measures, a minority are currently implementing a *moderate* number of AML/CFT measures. The RIAs and ERAs with just a *limited* number of AML/CFT measures in place would need to implement most of the additional AML/CFT requirements under the final rule. However, FinCEN assessed that all RIAs and ERAs, even those in the "other advisers" group, are likely to be collecting some customer information at the beginning of the client relationship and filing reports[308] that are substantially similar to CTRs. If 40 percent of RIAs have a significant or moderate number of AML/CFT measures, as reported in the 2016 IMCT Survey, the above estimates for dual registrants and affiliated advisers imply that 32 percent of other RIAs are implementing a moderate number of AML/CFT measures. This suggests that 68 percent of other RIAs have just a *limited* number of AML/CFT measures. The same percentages are applied to ERAs. Overall, this implies that a slightly higher proportion of ERAs have a *limited* number of AML/CFT measures, and a slightly lower proportion of ERAs have a *significant* or *moderate* number of measures, relative to RIAs because fewer ERAs are dually registered or affiliated.

As the true distribution of investment advisers implementing a *significant*, a *moderate*, or a *limited* number of AML/CFT measures is unknown, FinCEN presents an uncertainty

[308] Investment advisers are currently required to file reports for the receipt of more than $10,000 in cash and negotiable instruments using joint FinCEN/Internal Revenue Service Form 8300. *See supra* note 191 .

analysis using upper and lower bound estimates. For the upper bound estimate, FinCEN assumed that the AML/CFT measures implemented by RIAs and ERAs (either under the current regulatory framework or voluntarily) would not meet the requirements of the final rule, and that therefore all RIAs not dually registered would have to implement for the first time the complete set of AML/CFT measures under the final rule. Based on that assumption, all covered RIAs and ERAs except dually registered entities are assumed to have implemented a *limited* number of AML/CFT measures. Thus, about two percent of all covered entities (376 RIAs and 44 ERAs) are estimated to have a *significant* number of AML/CFT measures, and the remaining 98 percent (13,697 RIAs and 5,802 ERAs) are estimated to have a *limited* number of AML/CFT measures. For the lower bound estimate based on the 2016 IMCT Survey, FinCEN first assumed that approximately 40 percent of all covered RIAs are implementing a *significant* number of AML/CFT measures. This includes dually registered RIAs, 75 percent of affiliated RIAs, and 32 percent of other RIAs. Next, FinCEN assumed that approximately 36 percent of all covered RIAs are implementing a *moderate* number of measures. This includes 25 percent of affiliated RIAs and 39 percent of other RIAs. The remaining 24 percent of all covered RIAs (or 29 percent of "other" RIAs) are assumed to have a *limited* number of AML/CFT measures. The same percentages are applied to ERAs.

Classification of RIAs Advising Mutual Funds, Collective Investment Funds, and Other Investment Advisers. As discussed above, RIAs that exclusively advise mutual funds, collective investment funds, or other investment advisers subject to this rule are largely exempt from the requirements of the final rule. However, these RIAs have not been identified specifically through the Form ADV data. FinCEN assumed these advisers were most likely in the other advisers group. Because the clients (mutual funds and, collective investment funds, other investment advisers subject to this rule) of these RIAs are subject to comprehensive AML/CFT obligations, FinCEN assessed these advisers as having a *moderate* number of AML/CFT measures in place.

Table 3.2 shows the resulting size of the population for each of the scenarios described above.

Table 3.2. Number of RIAs and ERAs, by Scenario[309]

Scenario	Baseline AML/ CFT Measures	Registered Investment Advisers			Exempt Reporting Advisers			Total
		Dual Registrants	Affiliated Advisers	Other Advisers	Dual Registrants	Affiliated Advisers	Other Advisers	
Lower Bound	*Significant*	376 (100%)	1,562 (75%)	3,692 (32%)	44 (100%)	216 (75%)	1,753 (32%)	**7,643 (38%)**
	Moderate	0	521 (25%)	4,546 (39%)	0	72 (25%)	2,158 (39%)	**7,297 (37%)**
	Limited	0	0	3,376 (29%)	0	0	1,603 (29%)	**4,979 (25%)**
	Total	**376 (100%)**	**2,083 (100%)**	**11,614 (100%)**	**44 (100%)**	**288 (100%)**	**5,514 (100%)**	**19,919 (100%)**
Primary Estimate	*Significant*	376 (100%)	0	0	44 (100%)	0	0	**420 (2%)**
	Moderate	0	1,562 (75%)	3,692 (32%)	0	216 (75%)	1,753 (32%)	**7,223 (36%)**
	Limited	0	521 (25%)	7,922 (68%)	0	72 (25%)	3,761 (68%)	**12,276 (62%)**
	Total	**376 (100%)**	**2,083 (100%)**	**11,614 (100%)**	**44 (100%)**	**288 (100%)**	**5,514 (100%)**	**19,919 (100%)**
Upper Bound	*Significant*	376 (100%)	0	0	44 (100%)	0	0	**420 (2%)**
	Moderate	0	0	0	0	0	0	**0 (0%)**
	Limited	0	2,083 (100%)	12,652 (100%)	0	288 (100%)	5,514 (100%)	**19,499 (98%)**
	Total	**376 (100%)**	**2,083 (100%)**	**11,614 (100%)**	**44 (100%)**	**288 (100%)**	**5,514 (100%)**	**19,919 (100%)**

Scenario	Baseline AML/ CFT Measures	Registered Investment Advisers			Exempt Reporting Advisers			Total
		Dual Registrants	Affiliated Advisers	Other Advisers	Dual Registrants	Affiliated Advisers	Other Advisers	

[309] Parentheses indicate the percentage of entities within a given category by scenario. Totals may not sum precisely due to rounding.

Lower Bound	*Significant*	376 (100%)	1,562 (75%)	3,692 (32%)	44 (100%)	216 (75%)	1,753 (32%)	**7,643 (38%)**
	Moderate	0	521 (25%)	4,546 (39%)	0	72 (25%)	2,158 (39%)	**7,297 (37%)**
	Limited	0	0	3,376 (29%)	0	0	1,603 (29%)	**4,979 (25%)**
	Total	**376 (100%)**	**2,083 (100%)**	**11,614 (100%)**	**44 (100%)**	**288 (100%)**	**5,514 (100%)**	**19,919 (100%)**
Primary Estimate	*Significant*	376 (100%)	0	0	44 (100%)	0	0	**420 (2%)**
	Moderate	0	1,562 (75%)	3,692 (32%)	0	216 (75%)	1,753 (32%)	**7,223 (36%)**
	Limited	0	521 (25%)	7,922 (68%)	0	72 (25%)	3,761 (68%)	**12,276 (62%)**
	Total	**376 (100%)**	**2,083 (100%)**	**11,614 (100%)**	**44 (100%)**	**288 (100%)**	**5,514 (100%)**	**19,919 (100%)**
Upper Bound	*Significant*	376 (100%)	0	0	44 (100%)	0	0	**420 (2%)**
	Moderate	0	0	0	0	0	0	**0 (0%)**
	Limited	0	2,083 (100%)	12,652 (100%)	0	288 (100%)	5,514 (100%)	**19,499 (98%)**
	Total	**376 (100%)**	**2,083 (100%)**	**11,614 (100%)**	**44 (100%)**	**288 (100%)**	**5,514 (100%)**	**19,919 (100%)**

(c) *Baseline Economic and Financial Characteristics of Regulated Population*

This subsection describes the economic and financial profiles of RIAs and ERAs subject to the final rule in the baseline, including the number of employees and customer relationships with legal entities, natural persons, and pooled investment vehicles (PIVs)—and annual changes in these numbers.

i. Number of Employees

RIAs report employment figures on their Form ADV, while ERAs do not. To estimate the number of employees at ERAs, FinCEN assumed that the number of employees was similar to those at RIAs with the same number of private funds. In particular, the number of ERA

employees was approximated as follows. First, FinCEN focused on RIAs with private funds only. FinCEN calculated deciles for the number of funds among each RIA category: dual registrants, affiliated RIAs, and other RIAs. Then, for each category of ERA, FinCEN calculated the average number of employees for the decile of the corresponding distribution of RIAs, based on the number of private funds advised by that ERA. This served as the approximation for the total number of ERA employees in the cost calculation. Table 3.3 shows the average number of employees for each category of investment adviser.

Table 3.3: Average Number of Employees, by Type of Investment Adviser[310]

Investment Adviser Type	RIAs	ERAs
Dual Registrant	828	27
Affiliated Adviser	152	26
Other Adviser	20	11

ii. Number of Clients

On Form ADV, RIAs report the number of clients, enumerated for specific types of clients.[311] As described in section 3 of this Impact Analysis, certain costs of the final rule vary depending on the type of client, across three categories of clients: individual persons including high-net worth individuals, collectively known as "natural persons"; PIVs; and various other types of clients collectively denoted as "legal entities." Table 3.4 shows the average number of clients of each type, based on the RIA categories defined above.

Table 3.4: Average Number of Clients per RIA, by Client Type and Category

Investment Adviser Type	Natural Persons	Legal Entities	PIVs
Dual Registrant	46,198	932	13
Affiliated Adviser	11,444	224	20
Other Adviser	701	143	4

[310] Based on a Treasury review of Form ADV information filed as of July 31, 2023. *See supra* note 23. RIAs report total employees in Item 5.A. ERA data come from FinCEN calculations of the median employment among RIAs that report only private fund clients.

[311] *Id*. Clients are reported in Item 5.D. Natural persons are calculated as the sum of 5.D.(a).(1) and 5.D.(b).(1). PIVs are reported in 5.D.(f).(1), and exclude investment companies and business development companies. Legal entities are the sum of the remaining rows of column 1 of Item 5.D. Numbers are rounded to the nearest integer.

ERAs report the number of private funds they advise (*i.e.,* an ERA's clients), including the number of funds for which another investment adviser already reports fund-specific information. Table 3.5 reports the average number of funds reported per ERA, based on the investment adviser categories described above.

Table 3.5: Average Number of Private Funds per ERA, by Category[312]

Investment Adviser Type	Average Number of Private Funds Reported
Dual Registrant	4
Affiliated Adviser	63
Other Adviser	5

(d) *Other Characteristics of Regulated Entities*

This section describes the industry classification and business size of RIAs and ERAs to be regulated under the final rule.

i. Industry Classification by NAICS Code

In general, businesses may be categorized under multiple industries due to having multiple lines of revenue or multiple business functions. Many RIAs and ERAs, including but not limited to dual registrants, accordingly, may report multiple lines of revenue on their Form ADV, and it is occasionally challenging to identify their primary line of business. Using the North American Industry Classification System (NAICS), the standard classification system used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data on U.S. businesses, FinCEN assesses that most (if not all) RIAs and ERAs are classified within the NAICS subsector 523 (Securities, Commodity Contracts, and Other Financial Investments and Related Activities)—with most entities classified in the national industry NAICS 523940 (Portfolio Management and Investment Advice). However, that subsector may not account for the primary line of business

[312] *Id*. The total number of funds is calculated as the sum of the number of funds reported in Schedule D, sections 7.B.(1) and 7.B.(2). Numbers are rounded to the nearest integer.

of all investment advisers, and some may be classified under NAICS 522 (Credit Intermediation and Related Activities) or NAICS 525 (Funds, Trusts, and Other Financial Vehicles).

ii. Small Entities

To assess the prevalence of small businesses affected by the final rule, FinCEN relied on the small entity definition under the Advisers Act rule adopted for purposes of the RFA. Under this definition, an investment adviser is considered a small entity if (i) it has, and reports on Form ADV, less than $25 million in AUM; (ii) it has less than $5 million in total assets on the last day of its most recent fiscal year; and (iii) it does not control, is not controlled by, and is not under common control with another investment adviser that is not a small entity.[313]

RIAs report whether they meet the conditions listed above in items 5.F and 12 of Form ADV.[314] As of July 31, 2023, there were 212 small entities RIAs that would have been subject to the final rule had it then been in effect. ERAs are not required to report regulatory AUM on Form ADV; therefore, it is not feasible to determine whether they meet the conditions above. Based on information in the IA CIP NPRM, FinCEN estimates that due to SEC registration thresholds, the only small entity ERAs that would be subject to the final rule would be those that maintain their principal office and place of business outside the United States.[315] Thus, FinCEN estimates there are 173 small entity ERAs.[316] Table 3.6 reports the estimated number of small entities subject to the final rule.

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[313] 17 CFR 275.0-7 (defining “small business” or “small organization” for purposes of the Advisers Act).
[314] Based on a Treasury review of Form ADV information filed as of July 31, 2023. *See supra* note 25. An RIA qualifies as a small entity under the SEC’s definition if it has fewer than $25 million in regulatory AUM (Item 5.F.(2)(c)) and answers “No” to each of the questions in Item 12.
[315] 89 FR 44571, 44592-44593, n.131 (May 21, 2024).
[316] There are no direct data indicating which ERAs that maintain their principal office and place of business outside the United States are small entities because although ERAs are required to report in Part 1A, Schedule D the gross asset value of each private fund they manage, advisers with their principal office and place of business outside the United States may have additional AUM other than what they report in Schedule D. Therefore, to estimate how many of the ERAs that maintain their principal office and place of business outside the United States could be small entities, an analysis was conducted from a comparable data set: SEC-registered investment advisers. According to Form ADV data as of July 31, 2023, there are 67 small RIAs with their principal office and place of business outside the United States and 830 total RIAs with their principal office and place of business outside the United States (67 ÷ 830 = 8.1 percent). Based on Form ADV data as of July 31, 2023, there are

Table 3.6: Number of Small Entities, by Type of Investment Adviser

Investment Adviser Type	RIAs	ERAs	Total
Dual Registrant	1	2	3
Affiliated Adviser	17	14	31
Other Adviser	194	157	351
Total	**212**	**173**	**385**

For comparison, Table 3.7 shows the characteristics of small RIAs versus all other RIAs.

Table 3.7: Characteristics of RIAs by Business Size[317]

Characteristic	Small Entity RIAs	All Other RIAs
Avg. Assets Under Management	$5.3M	$8.6B
Avg. No. Employees	4	62
Percent that Advise Private Funds	34%	56%
Avg. No. Individual Clients	2,341	3,524
Avg. No. PIV Clients	0	7
Avg. No. Legal Entity Clients	1	179

4. Assessment of Benefits

The benefits assessed here are more difficult to quantify than the costs, but the final rule is nonetheless anticipated to add substantial value directly and indirectly through effects that can contribute to detection, deterrence, and broader policy goals.[318] The principal direct benefits of the final rule are expected to accrue primarily in the public sector, most notably to U.S. law enforcement and the national security community, as well as certain Federal

approximately 2,145 ERAs with their principal office and place of business outside the U.S. Applying the same percentage (8.1 percent) to ERAs, FinCEN estimates there are 173 ERAs that are small entities.

[317] Based on a Treasury review of Form ADV information filed as of July 31, 2023. See tables above for details on the Form ADV items used to calculate each table entry. Numbers are rounded to nearest whole number or percent.

[318] In OMB Circular No. A-4 (2023), OMB acknowledges that some regulatory measures may incur costs or benefits that are highly uncertain or cannot be quantified, *e.g.*, for lack of data or methods. Among other challenges in the context of this rule, the so-called dark figure of crime, which is typically defined as the difference between reported or known and actual crime, further complicates the assessment of both illicit activity and the potential effects of changes in policy and regulation. Specifically, faced with criminals' active concealment, one can neither directly observe the true dimensions of the criminal activity (*i.e.*, the baseline) nor unambiguously interpret some common indicators of change. For example, an increase in reported crime can reflect better enforcement, an increase in criminal activity, or a combination of the two. Provisions of this rule will improve the availability of information about financial activity that could make estimation less challenging in the future.

functional regulators, and to the investment adviser industry. Further, the identification of illicit activity in the investment adviser industry by applying program, reporting, and recordkeeping obligations to those industry participants, *i.e.*, covered RIAs and ERAs, that have direct access to customer information would enhance detecting, investigating, and prosecuting illicit finance activity occurring through the industry and contribute to deterrence, which will benefit society more generally though a range of economic, security, and other effects.[319]

The AML/CFT requirements in the final rule will help address existing information gaps regarding suspicious activity reporting discussed in section 1, with potentially significant implications for detection and deterrence.[320] They will also help harmonize AML/CFT requirements between investment advisers and similarly situated financial institutions that must comply with these requirements, which would mean greater parity among them, and between the United States and its allies.

As noted in the Risk Assessment, investment advisers manage tens of trillions of dollars in assets.[321] While some of these assets are subject to AML/CFT requirements, others are not. For instance, as of Q3 2023, RIAs manage approximately $20 trillion in private fund assets, and this included $243 billion owned by foreign-located investors where the RIA did not have the information on hand to identify the beneficial owner because the beneficial interest was held through a chain involving one or more third-party intermediaries.[322] ERAs managed approximately $5 trillion in AUM in private funds.

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[319] Economists have long argued that increasing the costs and risks of law breaking, *e.g.*, by increasing the likelihood of detection and punishment, makes law breaking less attractive. For the seminal work in this area, see Gary S. Becker, "Crime and Punishment: An Economic Approach," Journal of Political Economy, Mar.-Apr. 1968, pp. 169-217, which has given rise to a vast and still expanding literature.

[320] OMB guidance has addressed such benefits in an analogous context: "For some regulations, costs are associated with activity that does not itself yield benefits, but instead may prompt intermediate actions that connect those effects with ultimate beneficial outcomes. For instance, a regulation may require collection and dissemination of information related to safety practices; the information itself does not make anyone safer, but its greater availability may prompt more widespread use of effective safety practices." OMB Circular No. A-4 (2023), p. 40.

[321] *See* Risk Assessment, *supra* note 2, at 2.

[322] *See* SEC, Private Fund Statistics, Third Calendar Quarter 2023, available at https://www.sec.gov/files/investment/2023q3-private-funds-statistics-20240331.pdf.

In addition to the specific direct benefits discussed further below, each provision in the final rule will also convey benefits indirectly by forming part of a comprehensive framework for identifying and reporting money laundering, terrorist financing, or other illicit finance activity. For instance, the requirement for employee training and independent testing will help ensure that the systems and employees who will identify whether an investment adviser is being used for illicit finance activity are best positioned to do so.

Specific direct benefits from the final rule include (a) increasing access for law enforcement to relevant information for complex financial crime investigations, (b) enhancing interagency understanding of priority national security threats and their associated financial activity, (c) improving financial system transparency and integrity to strengthen the U.S. financial system from abuse by illicit actors, and, relatedly, (d) aligning with international financial standards and supporting international regulatory cooperation, including information sharing, with and among allies.[323] Through these direct benefits, crucial indirect benefits will accrue to the public at large by reducing money laundering, which can distort legitimate markets, countering the financing of terrorism and other illicit finance activity, and protecting national security.

(a) *Strengthening law enforcement investigations of certain financial crimes*

Requiring covered RIAs and ERAs to file SARs and keep certain customer records makes that information more readily available to law enforcement authorities, assisting those authorities in detecting, investigating, and prosecuting financial crimes. The FBI reported that 36.3 percent of active complex financial crimes investigations and 27.5 percent of public corruption investigations involved BSA reporting.[324] However, for other types of criminal

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[323] OMB guidance highlights the relevance of international cooperation, "Consistent with Executive Order 13609, agencies often engage in international regulatory cooperation (IRC), which can include information exchange, work sharing, scientific collaboration, pilot programs, and alignment of regulatory requirements . . . . [I]nclusion of the foreign effects of a regulation in your primary analysis will often be appropriate when such analysis would help inform cooperative efforts with foreign regulators that aim to minimize unnecessary regulatory differences and meet shared challenges." OMB Circular No. A-4 (2023), p. 9.

[324] *See* FinCEN, *Year in Review for FY 2022* (Apr. 21, 2023), p.2, available at https://www.fincen.gov/sites/default/files/shared/FinCEN_Infographic_Public_2023_April_21_FINAL.pdf.

investigations, the percentage of criminal investigations supported by BSA reporting was even higher. For example, 46 percent of transnational organized crime investigations were supported by BSA reporting.[325] SAR filing by RIAs and ERAs may increase BSA information availability to support investigations into corruption, fraud, and tax evasion, the criminal activities that the Risk Assessment identified as being most prominently tied to illicit proceeds moving through investment advisers.[326]

Information from the reporting of suspicious activity and recordkeeping by covered RIAs and ERAs may benefit specific types of law enforcement financial crime investigations, particularly those involving the proceeds of foreign corruption, along with other transnational financial crimes. For instance, according to the FBI, in the 1MDB criminal investigation, at least $1 billion traceable to the conspiracy was laundered through the United States,[327] including through private funds advised by at least one RIA, and used to purchase assets in the United States.[328] In another case involving the misuse of private funds, the defendant established fake private equity investment funds in the British Virgin Islands to launder approximately $400 million in proceeds of a large international pyramid fraud scheme called OneCoin.[329]

These examples demonstrate that investment advisers and the funds they advise have been implicated in certain financial crimes and suggest the scope of potential benefit from covering RIAs and ERAs under this proposal. They provide concrete evidence that investment advising relationships can create openings that can be and have been leveraged as conduits in substantial financial crimes that bear on the provisions of this rule. The additional visibility that

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[325] *Id.*
[326] *See* Risk Assessment, *supra* note 2, at 16.
[327] *See* FBI, "U.S. Seeks to Recover $1 Billion in Largest Kleptocracy Case to Date," (Jul. 20, 2016), available at https://www.fbi.gov/news/stories/us-seeks-to-recover-1-billion-in-largest-kleptocracy-case-to-date.
[328] *See* Verified Compl. for Forfeiture (Dkt. 3) ¶ 760, United States v. Real Property Located in London, United Kingdom Titled in the Name of Red Mountain Global Ltd., No. 19-cv-1326, (C.D. Cal. Feb. 22, 2019), https://www.justice.gov/opa/press-release/file/1134376/ download
[329] *See* Department of Justice, "Former Partner Of Locke Lord LLP Convicted In Manhattan Federal Court Of Conspiracy To Commit Money Laundering And Bank Fraud In Connection With Scheme To Launder $400 Million Of OneCoin Fraud Proceeds," (Nov. 21, 2019), available at https://www.justice.gov/usao-sdny/pr/former-partner-locke-lord-llp-convicted-manhattan-federal-court-conspiracy-commit-money.

the final rule will convey may discourage such leveraging and will provide law enforcement with information that it needs to uncover it.

Further, requiring RIAs and ERAs to respond to section 314(a) requests is likely to increase the number of positive responses for law enforcement when trying to locate accounts and transactions of persons that may be involved in terrorism or money laundering activity. In FY 2022, 66 law enforcement agencies made 519 requests under section 314(a) to over 14,000 financial institutions, which resulted in 37,835 positive responses.[330] Adding RIAs and ERAs to these requests is likely to increase positive responses for account and transactions information and then support further investigations using other legal tools.

(b) *Improve understanding of priority national security threats*

Applying AML/CFT obligations to RIAs and ERAs may help increase U.S. government understanding of two priority national security threats: (1) funds moving through the U.S. financial system that may be associated with Russian oligarchs and (2) investment activity that may be tied to foreign-state efforts to invest in early-stage companies developing critical or emerging technologies with national security implications.

SAR filings or information collected by RIAs and ERAs in the CDD process could improve the U.S. government's understanding of how illicit funds linked to Russian oligarchs may be accessing the U.S. financial system. According to a 2022 FinCEN Financial Trend Analysis, BSA data provides significant financial intelligence about the movement of oligarch-related funds and assets with a nexus to the United States around the time of Russia's unprovoked military invasion of Ukraine, including likely attempts by Russian oligarchs and elites to conceal their assets, property, and financial activities.[331] Treasury and FinCEN guidance has identified typologies Russian oligarchs and elites have used to access U.S.

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[330] *See* FinCEN, *Year in Review for FY 2022* (Apr. 21, 2023), p.2, available at https://www.fincen.gov/sites/default/files/shared/FinCEN_Infographic_Public_2023_April_21_FINAL.pdf
[331] *See* FinCEN, *Trends in Bank Secrecy Act Data: Financial Activity by Russian Oligarchs in 2022* (Dec. 2022), available at https://www.fincen.gov/sites/default/files/2022-12/Financial Trend Analysis_Russian Oligarchs FTA _Final.pdf.

investment opportunities and the financial system through private funds or other PIVs, to avoid disclosing their identities to other parties.[332]

However, FinCEN currently receives only limited information from investment advisers and the securities industry in general regarding illicit Russian financial activity. For instance, of 454 SARs reviewed as part of a FinCEN Financial Trend Analysis on U.S. financial activity linked to Russian oligarchs, only 11, or less than 3 percent, were filed by the securities and futures industry.[333]

Applying SAR filing, CDD, and other recordkeeping requirements to RIAs and ERAs may also assist the U.S. government in identifying foreign-linked investments in certain U.S. companies that could raise national security issues. This could be beneficial for CFIUS and potentially other programs. In particular, while there are certain transactions where notification to CFIUS is required, most transactions reviewed by CFIUS are filed voluntarily.[334] To complement the largely voluntary nature of the CFIUS process, Treasury (as chair of CFIUS) along with certain member agencies invest staff time and resources in identifying transactions that may be a covered transaction and may raise national security considerations, and assessing whether to request that the parties file with CFIUS.[335] CFIUS transactions that originate through this process (referred to as the non-notified process) remain among the most complicated that CFIUS considers, and often require mitigation measures to address national security risks.[336] SAR filing obligations may help identify these transactions earlier on (such as prior to the closing of a transaction).

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[332] *See* Department of the Treasury, *Global Advisory on Russian Sanctions Evasion Issued Jointly by the Multilateral REPO Task Force*, p. 3 (Mar. 9, 2023), available at https://home.treasury.gov/system/files/136/REPO_Joint_Advisory.pdf; *see also* FinCEN, *Alert on Potential U.S. Commercial Real Estate Investments by Sanctioned Russian Elites, Oligarchs, and Their Proxies,* p. 4, (Jan. 25, 2023), available at https://www.fincen.gov/sites/default/files/shared/FinCEN Alert Real Estate FINAL 508_1-25-23 FINAL FINAL.pdf.

[333] *See supra* note 329.

[334] *See* Treasury, "Remarks by Assistant Secretary for Investment Security Paul Rosen at the Second Annual CFIUS Conference," (Sept. 14, 2023), available at https://home.treasury.gov/news/press-releases/jy1732.

[335] *See id*.

[336] Committee on Foreign Investment in the United States - Annual Report to Congress CY 2022, p. 52, available at https://home.treasury.gov/system/files/206/CFIUS%20-%20Annual%20Report%20to%20Congress%20CY%202022_0.pdf.

Assessing the national security consequences of investments into early-stage companies developing emerging technology can be particularly challenging.[337] Requiring ERAs, particularly venture capital advisers, to submit SARs may help Treasury and some CFIUS member agencies identify transactions where investors affiliated with foreign governments are attempting to use an investment to acquire technology or know-how with national security implications. This could include providing information about transactions CFIUS was unaware of, or providing new information about investors or other parties to transactions already before CFIUS. In addition, law enforcement agencies involved in CFIUS reviews could use section 314(a) information sharing authorities to engage venture capital advisers or other RIAs or ERAs on particular technologies or concerning foreign investors, consistent with CFIUS statutory obligations to protect confidentiality of relevant information.[338]

(c) *Protect the U.S. financial system from abuse*

Applying AML/CFT obligations to RIAs and ERAs will also strengthen the ability of the Federal Government and private sector to better protect the U.S. financial system from being misused for illicit finance. First, the final rule applies a set of AML/CFT obligations to RIAs and ERAs (with certain exemptions), and those investment advisers are subject to enforcement actions for failure to comply with those requirements. Those investment advisers are required to, as described above, implement AML/CFT programs, conduct due diligence on customers, report suspicious activity, and keep certain records, among other obligations. In doing so, these obligations imposed on investment advisers will help identify, prevent, and deter bad actors from using investment advisers to further illicit finance activity, as investment advisers will be required to obtain information from customers to comply with these requirements.

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[337] *See* The Washington Post, “Scrutiny mounts over tech investments from Kremlin-connected expatriates” (Dec. 19, 2022), available at https://www.washingtonpost.com/technology/2022/12/19/russia-expatriates-links-probed/; *see also* The Wall Street Journal, “Government ‘SWAT Team’ Is Reviewing Past Startup Deals Tied to Chinese Investors” (Jan. 31, 2021), available at https://www.wsj.com/articles/government-swat-team-is-reviewing-past-startup-deals-tied-to-chinese-investors-11612094401.

[338] *See* 50 U.S.C. 4565(c).

Moreover, the final rule also strengthens the ability of RIAs, ERAs, and other financial institutions to identify and report illicit activity. Covered RIAs and ERAs are able to coordinate with broker-dealers and banks to file joint SARs, and voluntarily share information on illicit activity under section 314(b) of the USA PATRIOT Act. Such reporting by financial institutions under the BSA—and their broader efforts to implement effective AML/CFT programs—are fundamental to the government's effort to detect and prevent illicit finance activity and to protect the integrity of the financial system as a whole.

(d) *Improve alignment with international standards*

The final rule also helps bring the United States into full compliance with several international AML/CFT standards established by the FATF. In the 2016 FATF Mutual Evaluation Report (MER) of the United States, the United States was rated (and remains rated) "partially compliant" or "non compliant" on eight of the 40 FATF Recommendations.[339] These included partially compliant ratings on Recommendations 1, 12, and 20 for the failure to apply AML/CFT requirements to investment advisers, among other reasons.[340]

As a result of its MER, the United States was put in "enhanced follow-up."[341] For countries in enhanced follow-up, the FATF can take several actions, including "issuing a formal FATF statement to the effect that the member jurisdiction is insufficiently in compliance with the FATF Standards, and recommending appropriate action."[342] These

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[339] *See* FATF (2016), *Mutual Evaluation of the United States*, pp. 255-258, available at https://www.fatf-gafi.org/content/dam/fatf-gafi/mer/MER-United-States-2016.pdf.coredownload.inline.pdf. The U.S. was re-rated from "partially compliant" to "largely compliant" on Recommendation 10, and from "non compliant" to "largely compliant" on Recommendation 24. *See* FATF (2024), *Anti-money laundering and counter-terrorist financing measures – United States, 7th Enhanced Follow-up Report & Technical Compliance Re-Rating*, available at https://www.fatf-gafi.org/content/dam/fatf-gafi/fur/USA-FUR-2024.pdf.coredownload.inline.pdf; *see also* FATF (2020), *Anti-money laundering and counter-terrorist financing measures – United States, 3rd Enhanced Follow-up Report & Technical Compliance Re-Rating* [hereinafter 2020 US FUR], available at https://www.fatf-gafi.org/content/dam/fatf-gafi/fur/Follow-Up-Report-United-States-March-2020.pdf.

[340] *See* FATF (2016), *Mutual Evaluation of the United States*, pp. 255-258, available at https://www.fatf-gafi.org/content/dam/fatf-gafi/mer/MER-United-States-2016.pdf.coredownload.inline.pdf. A "partially compliant" rating is generally not considered an acceptable rating for purposes of the FATF Follow-Up Process. *See* FATF (2023), Procedures for the FATF Fourth Round of AML/CFT Mutual Evaluations [hereinafter FATF Fourth Round Procedures], pp. 22–23, available at http://www.fatf-gafi.org/publications/mutualevaluations/documents/4th-round-procedures.html.

[341] *See* 2020 US FUR, *supra* note 337, at 1.

[342] *See* FATF Fourth Round Procedures, *supra* note 338, at 24.

statements and other actions by the FATF can have material consequences on the economy of a jurisdiction.[343] The final rule will assist the U.S. in avoiding these consequences and strengthening compliance with the FATF standards.

In addition to the benefits of increased U.S. compliance with the FATF standards, the final rule will also support international regulatory cooperation, including information sharing, with and among allies. For instance, FinCEN could use information from investment adviser reporting requirements to support illicit finance typology work at the FATF and multilateral information sharing at the Egmont Group of Financial Intelligence Units.[344] This information sharing could increase allies' visibility into relevant financial activity that could both aid their enforcement efforts and feedback into U.S. efforts, all of which would contribute to more robust, mutually beneficial efforts to combat financial crimes globally. The final rule could also strengthen coordination between SEC and foreign securities and financial regulators in identifying and addressing AML/CFT supervisory challenges in the investment adviser sector.

5. Assessment of Costs

This section assesses the potential costs to RIAs and ERAs, their clients, and government agencies associated with the final rule. Specifically, this Impact Analysis estimates the one-time, upfront costs and recurring administrative and maintenance costs incurred by RIAs and ERAs to establish or modify an existing AML/CFT program, which includes conducting ongoing CDD, filings SARs, and the other requirements of the final rule. It also estimates costs to customers to provide additional information to RIAs and ERAs and to the government to enforce those requirements. This Impact Analysis estimates the incremental costs of the final rule over a 10-year period.

[343] *See* Julia Morse, *The Bankers Blacklist: Unofficial Market Enforcement and the Global Fight against Illicit Financing* 131–138 (Cornell University Press 2021) (discussing the consequences of FATF listing).
[344] The Egmont Group of Financial Intelligence Units (FIUs) is an international body that facilitates and prompts the exchange of information, knowledge, and cooperation amongst member FIUs.

Some RIAs and ERAs may have reduced costs because they may already perform certain AML/CFT functions because they are dual registrants or affiliated advisers, as described in section 2, although, depending on the entity and its structure, may not currently be required to do so. Under the final rule, RIAs that are dual registrants or affiliated advisers are not legally required to establish a separate AML/CFT program for their advisory activities, provided that an existing comprehensive AML/CFT program covers all of the investment adviser's applicable legal and regulatory obligations, as described above. RIAs are also exempt from having to apply most of the regulatory requirements with respect to the mutual funds, collective investment funds, and other investment advisers they advise. As described above mutual funds have their own AML/CFT program requirements, must file SARs, and are otherwise required to comply with the other reporting and recordkeeping requirements included in the final rule. Similarly, other investment advisers subject to this rule are also required to implement the same requirements. Collective investment funds, while not separate legal entities, are subject to the AML/CFT requirements of the bank or trust-company that administers the fund. Certain RIAs and ERAs may also already collect and verify and certain information in performing AML/CFT functions provided by customers via contract for a joint customer with another financial institution or through a voluntary AML/CFT program. To the extent that information pertains to a customer of both the investment adviser and the other financial institution, the investment adviser may enjoy reduced costs; in any case, the investment adviser already has a process in place that can be applied to satisfy its new requirements under the final rule.

This section is organized as follows. First, it describes and compiles relevant cost information associated with these activities. Based on this information, it estimates the costs likely to be incurred by RIAs and ERAs. It then describes government implementation costs for oversight and enforcement. Finally, it summarizes the total costs of the final rule.

(a) *Cost Methodology*

This section describes and compiles relevant cost information for this Impact Analysis. Based on this information, FinCEN estimates the typical costs RIAs and ERAs are anticipated to incur to comply with the requirements of the final rule. The cost information consists of the amount of time (in hours) and hourly labor cost of staff involved in compliance activities, such as developing and updating AML/CFT policies and procedures and training staff on new requirements, as well as costs associated with third party software licensing and independent testing. The implementation and scope of these activities, however, will vary widely and depend on a number of factors, such as the degree of automation of compliance activities and level of filer sophistication.

All costs are reported in 2022 dollars. For transparency, all costs in this section are reported on an undiscounted basis. At the end of this section, costs are also reported on a discounted basis and the annualized costs of the final rule are calculated. To estimate the value of time associated with various compliance activities, FinCEN identified roles and corresponding staff positions involved in reviewing regulatory requirements; developing policies and procedures; filling out forms; transmitting data; conducting training; and maintaining, updating, and obtaining written approval of AML/CFT programs. FinCEN calculated the fully loaded (*i.e.*, wages plus benefits, leave, *etc.*) hourly labor cost for each of these roles by using the median hourly wage estimated by the U.S. Bureau of Labor Statistics and computing an additional factor accounting for fringe benefits as reported in Table 5.1.[345]

The final rule requires, at a minimum, that an investment adviser designate an AML/CFT compliance officer to implement and monitor its AML/CFT program. This Impact Analysis does not include the direct cost of hiring a full-time equivalent AML/CFT compliance

[345] U.S. Bureau of Labor Statistics, May 2022 National Industry-Specific Occupational Employment and Wage Estimates for NAICS 523000 – Securities, Commodity Contracts, and Other Financial Investments and Related Activities. The adjustment factor for fringe benefits is calculated as 1 + ($18.26 per hour in total benefits ÷ $36.57 per hour in wages and salaries) = 1.50. Based on U.S. Bureau of Labor Statistics, Table 4. Employer Costs for Employee Compensation for Private Industry Workers by Occupational and Industry Group – Financial Activities Industry, June 2022.

officer, which is not required by the final rule.[346] RIAs must already designate a chief compliance officer responsible for administering policies and procedures to comply with the Advisers Act and the rules thereunder. In smaller banks and broker-dealers, compliance or legal officers are often dual-hatted as AML/CFT compliance officers. Similarly, FinCEN assumes many RIAs and ERAs will appoint or dual hat a compliance or legal officer as their AML/CFT compliance officer. Therefore, this Impact Analysis accounts directly for the fully loaded hourly labor costs (*i.e.*, salary plus fringe benefits) for each compliance activity that would be performed by this individual rather than by calculating an annual salary, to avoid double-counting labor costs for each requirement.

Table 5.1 Hourly Labor Costs (in 2022 dollars)

Occupation	**Median Hourly Wage[347]**	**Adjustment Factor for Fringe Benefits for Private Industry[348]**	**Fully Loaded Hourly Labor Cost**
Chief Executives	$115.00	1.50	$172.42
Financial Managers	$100.28	1.50	$150.35
Compliance Officers	$39.66	1.50	$59.46
New Accounts Clerks	$23.17	1.50	$34.74
Financial Clerk	$23.10	1.50	$34.63
All Employees	$47.45	1.50	$71.14

FinCEN estimates that, in general and on average, each role would spend different amounts of time on each portion of the compliance burden associated with the final rule. These assumptions are provided in detail below for each compliance activity.

In addition to incurring labor costs, RIAs and ERAs will likely need to invest in new technology to comply with the final rule, including purchasing software and entering into

[346] This is consistent with how FinCEN assesses burden hours and costs associated with the designation of a BSA officer, whereby the costs are assessed individually across other BSA regulatory requirements that the designated officer may implement. *See* FinCEN, *Agency Information Collection Activities; Proposed Renewal; Comment Request; Renewal Without Change of Anti-Money Laundering Programs for Certain Financial Institutions*, 85 FR 49418 (Oct. 13, 2020).
[347] *See* U.S. Bureau of Labor Statistics, May 2022 National Industry-Specific Occupational Employment and Wage Estimates for NAICS 523000 - Securities, Commodity Contracts, and Other Financial Investments and Related Activities. The BLS website notes that the median wage for chief executives in this subsector is greater than or equal to $115 per hour.
[348] *See* U.S. Bureau of Labor Statistics, Table 4. Employer Costs for Employee Compensation for Private Industry Workers by Occupational and Industry Group – Financial Activities Industry, June 2022.

licensing agreements with third party vendors. Although financial institutions are not required to use software to meet their AML/CFT requirements, most entities currently subject to the BSA use specialized AML/CFT software for this purpose. It is challenging to allocate technology costs to specific provisions of the final rule as technology may be used to implement and automate several processes.[349] This Impact Analysis uses estimates derived from a 2020 Government Accountability Office (GAO) report assessing the costs of financial institutions to comply with the BSA to quantify these technology costs.[350] GAO documented a wide range of compliance costs across a diverse group of banks. For estimating technology and other costs in this Impact Analysis, FinCEN relied on the reported values for "Large Community Bank B," for which the costs were assessed to be most similar to the costs likely to be incurred by the entities affected by the final rule. Table 5.2 reports selected characteristics for this benchmark.

Table 5.2 Characteristics of Selected Financial Institution Benchmark[351]

Characteristic	**Value (in 2018)**
Financial Institution Type	Community bank
Total Assets Under Management	$401 million to 4500 million
Total Noninterest Expenses	$20.1 million to $30 million
Number of Employees	101 to 500
Number of New Accounts Opened	1,001 to 5,000
Number of SARs filed	51
Number of CTRs filed	73

Table 5.3 reports the estimated compliance costs for specialized AML/CFT software and an independent annual audit to test the AML/CFT program. The costs are based on values

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[349] GAO, *Anti-Money Laundering: Opportunities Exist to Increase Law Enforcement Use of Bank Secrecy Act Reports, and Banks' Costs to Comply with the Act Varied* (GAO-20-574), (Sept. 2020), available at https://www.gao.gov/products/gao-20-574 [hereinafter 2020 GAO BSA Report]. The 2020 GAO BSA Report noted that it reported software costs separately and did not allocate them by requirement because the banks reviewed commonly used the same software to meet multiple BSA/AML requirements.
[350] *Id.*
[351] *Id.* at Table 111: Selected Characteristics of Large Community Bank B, 2018.

for the financial institution benchmark described in the previous paragraph adjusted for inflation to 2022 dollars using the GDP implicit price deflator.[352]

Table 5.3 Estimated Compliance Costs for Independent Testing, Software, and Other Third-Party Technology Vendors (in 2022 dollars)[353]

Compliance Activity	Average Annual Cost
AML/CFT Software Costs	$12,400
Independent Testing	$17,000

(b) Compliance Costs to Industry by Regulatory Provision

As described in section 3, the regulated universe for purposes of the final rule consists of RIAs and ERAs, which vary in terms of their business structure, size, client relationships, and degree of existing AML/CFT measures already in place. Across these advisers, several characteristics vary across groups that directly impact the magnitude of the estimated costs, including the average number of employees and the number/type of customer relationships. However, the most significant cost determinant is the extent of existing AML/CFT measures in place: RIAs and ERAs with established AML/CFT programs in place will likely incur relatively fewer costs under the final rule, while those with few AML/CFT measures in place may incur potentially more significant costs.

For the purposes of estimating the cost impacts of the final rule, this Impact Analysis has sub-divided RIAs and ERAs into groups based on: (1) whether they are dual registrants, affiliated advisers, or other advisers (as described in section 2); and (2) whether they have a *significant*, *moderate*, or a *limited* number of AML/CFT measures already in place (see Table 3.2). FinCEN believes that these sub-divisions are the best available method of estimating the cost impacts.

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[352] Bureau of Economic Analysis, National Income and Product Accounts Tables, Table 1.1.9. Implicit Price Deflators for Gross Domestic Product, https://www.bea.gov/itable/national-gdp-and-personal-income.
[353] *See* 2020 GAO BSA Report, *supra* note 347, at Table 113.

i. AML/CFT Program Costs

RIAs and ERAs subject to the final rule will need to implement and maintain an AML/CFT program that meets the minimum requirements of the BSA. This includes developing internal policies, procedures, and controls to comply with the requirements of the BSA and address money laundering, terrorist financing, and other illicit finance risks. Entities that do not already have an AML/CFT program in place will incur costs to establish such a program. In addition, those entities will incur costs for maintaining, updating, storing, and producing upon request the written AML/CFT program. Dual registrants or affiliated advisers do not have to establish multiple AML/CFT programs, provided that an existing comprehensive AML/CFT program would cover all of the entity's advisory businesses. Entities that already have an existing AML/CFT program will need to review and/or modify their AML/CFT program to ensure it complies with the requirements of the final rule.

Based on public comments on the 2015 NPRM,[354] FinCEN estimates it will take approximately 120 hours for affiliated or other RIAs and ERAs that have a *limited* number of existing AML/CFT measures in place to develop the necessary policies, procedures, and controls to establish an AML/CFT program. Once established, FinCEN estimates annually it will take approximately 1 hour to maintain and update the existing AML/CFT program plus an average of 10 minutes to store and produce upon request the written AML/CFT program. In response to public comments on the draft Impact Analysis, FinCEN acknowledges that RIAs and ERAs with existing AML/CFT policies, procedures, and controls will likely need to update those measures as their current measures may not be fully consistent with BSA requirements. Therefore, for the final Impact Analysis FinCEN assumes that the cost burden for dually registered entities covered by an existing AML/CFT program and entities that have a *significant* or *moderate* number of AML/CFT measures in place to update their existing

[354] *See* Public Comments, Docket ID FINCEN-2014-0003, available at https://www.regulations.gov/docket/FINCEN-2014-0003/comments.

AML/CFT policies, procedures, and controls will be approximately 25 percent of the estimated burden for entities without an existing AML/CFT program, or about 30 hours. FinCEN assumes the vast majority of entities would develop or update a written program within the first year after the promulgation of the regulation. Table 5.4 reports the average costs of establishing and maintaining an AML/CFT program to comply with the BSA requirements.

Table 5.4. Average Cost of Establishing and Updating AML/CFT Program

Activity	Financial Manager		Compliance Officer		Total Hours	Total Cost per Entity
	% Time	Hourly Cost	% Time	Hourly Cost		
Develop New AML/CFT Program					120	$8,226
Update or Modify Existing AML/CFT Program					30	$2,057
Maintain and Update Written AML/CFT Program	10%	$150.35	90%	$59.46	1.0	$69
Store Written AML/CFT Program					0.0833	$6
Produce Written AML/CFT Program Upon Request					0.0833	$6

In addition, the AML/CFT program must be approved in writing by an RIA's or ERA's board of directors or trustees.[355] FinCEN estimates that it will take approximately 4 hours for a trustee or director to review and approve a written AML/CFT program the first year it is implemented and approximately 2 hours each subsequent year to review the program.[356] For this activity, FinCEN uses an average hourly wage based on the minimum BLS estimate for a chief executive as a proxy for a trustee of director's hourly compensation. Therefore, using the fully loaded labor cost of $172.42 per hour, the estimated labor cost for program review and

[355] If an RIA or ERA does not have a board, then the program must be approved by the adviser's sole proprietor, general partner, trustee, or other persons that have functions similar to a board of directors. And, as explained above in Section III.D.5 other members of senior management may also be appropriately suited to approve the AML/CFT program.

[356] FinCEN notes that this estimate reflects the time spent by one trustee/director, and that for those RIAs or ERAs with a full board of directors, there could be incremental cost for each additional director.

approval is approximately $690 for a new AML/CFT program and $345 for an existing AML/CFT program. This represents an upfront and recurring cost for RIAs and ERAs that do not have an existing AML/CFT program, but only a one-time cost for RIAs and ERAs that currently have a *significant* or *moderate* number of AML/CFT measures in place.

Further, RIAs and ERAs will need to implement an AML/CFT training program for employees.[357] FinCEN estimates approximately two-thirds of employees will need to be trained on the AML/CFT program requirements, and assumes that such training could occur annually.[358] FinCEN assesses that RIAs and ERAs with a *significant* or *moderate* number of AML/CFT measures in place are already training staff and will not incur additional training costs under the final rule—with the exception of reviewing and updating the training materials to ensure they cover all of the regulatory requirements. For RIAs and ERAs with a *limited* number of AML/CFT measures in place, FinCEN estimates it will initially take 50 hours to develop an AML/CFT training program. For entities that have an existing AML/CFT training program (those entities with a *significant* or *moderate* number of AML/CFT measures in place), FinCEN estimates the one-time burden to review and update training materials will be 10 hours. Some RIAs and ERAs may choose to use a third-party consultant or external training event to conduct trainings, but this would not be required under the final rule.[359] FinCEN estimates the training will take approximately 1 hour for each employee, assuming such training occurs annually.[360] Table 5.5 reports the estimated average cost of developing and

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[357] Employees of an investment adviser (and of any agent or third-party service provider that is charged with administering any portion of the AML/CFT program) have to be trained in AML/CFT requirements relevant to their functions and to recognize possible signs of money laundering, terrorist financing, or other illicit finance activity that could arise in the course of their duties.

[358] The frequency of the investment adviser's training program is determined by the responsibilities of the employees and the extent to which their functions bring them in contact with AML/CFT requirements or possible money laundering, terrorist financing, or other illicit finance activity.

[359] The 2020 GAO BSA Report estimated the average cost per employee trained ranged between $20 and $400 with a mean estimate of approximately $116 per employee (measured in 2022 dollars). For "Large Community Bank B" the average estimated cost per employee trained was approximately $130 (measured in 2022 dollars). *See* 2020 GAO BSA Report, *supra* note 349.

[360] *See id.* at p. 52.

conducting AML/CFT program compliance training annually. The number of total hours is estimated based on the average number of employees for each type of RIA or ERA.

Table 5.5. Average Cost of AML/CFT Program Compliance Training[361]

Activity	Financial Manager		Compliance Officer		All Employees		Total Hours[1]	Total Cost per Entity[2]
	% Time	Hourly Cost	% Time	Hourly Cost	% Time	Hourly Cost		
Develop AML/CFT Program Training (one-time cost)	10%	$150.35	90%	$59.46			50	$3,428
Review and Update AML/CFT Program Training (one-time cost)	10%	$150.35	90%	$59.46			10	$686
Conduct Annual Training			100%	$59.46			1	$59
Costs for Employees to Attend Training								
RIA, Affiliated					100%	$71.14	100	$7,087
RIA, Other					100%	$71.14	13	$924
ERA, Affiliated					100%	$71.14	17	$1,209
ERA, Other					100%	$71.14	7	$522

Notes:
(1) For annual training, total hours include 1 hour per employee whose duties require knowledge of the BSA requirements. FinCEN assumes approximately two-thirds of employees will require training each year.
(2) Total cost may differ from hourly cost multiplied by total hours shown in table due to rounding.

In addition, all RIAs and ERAs will need to implement independent testing of their AML/CFT program. As described in the previous section, FinCEN estimates the average cost of such testing will be approximately $17,000.[362] This reflects a new recurring cost for all RIAs and ERAs affected by the final rule with the exception of dually registered entities, which are assumed to already use independent auditors.

[361] For annual training, total hours includes 1 hour per employee. FinCEN assumes approximately two-thirds of employees will require training each year, to include periodic updates and refresher training. Total cost may differ from hourly cost multiplied by total hours shown in table due to rounding.
[362] *See* 2020 GAO BSA Report, *supra* note 349, at Table 113.

Table 5.6 summarizes the average incremental costs per entity of developing or maintaining and updating an AML/CFT program by type and characteristics of each RIA or ERA.

Table 5.6. Average Cost of AML/CFT Program[363]

Investment Adviser Type	Upfront Cost (Year 1)	Recurring Cost (Year 2+)
Dual Registrant	$3,000	$0
RIA, Affiliated Adviser, with a *moderate* number of AML/CFT measures	$20,000	$17,000
RIA, Affiliated Adviser, with a *limited* number of AML/CFT measures	$37,000	$25,000
RIA, Other, with a *moderate* number of AML/CFT Measures	$20,000	$17,000
RIA, Other, with a *limited* number of AML/CFT Measures	$30,000	$18,000
ERA, Affiliated Adviser, with a *moderate* number of AML/CFT measures	$20,000	$17,000
ERA, Affiliated Adviser, with a *limited* number of AML/CFT measures	$31,000	$19,000
ERA, Other, with a *moderate* number of AML/CFT Measures	$20,000	$17,000
ERA, Other, with a *limited* number of AML/CFT Measures	$30,000	$18,000

ii. Customer Due Diligence Costs

The final rule requires RIAs and ERAs to implement appropriate risk-based procedures for conducting ongoing customer due diligence. Specifically, RIAs and ERAs are required to (1) understand the nature and purpose of customer relationships for the purpose of developing a customer risk profile; and (2) conduct ongoing monitoring to identify and report suspicious transactions and, on a risk basis, to maintain and update customer information.

[363] Costs are rounded to the nearest thousand dollars.

FinCEN assumes that all RIAs and ERAs have some existing information on their customers and processes to identify and conduct additional diligence on certain customers. For instance, in reviewing the data from the 2016 IMCT Survey, in addition to the 40 percent who had implemented a full AML/CFT program consistent with the requirements of the 2015 NPRM, an additional 36 percent of RIAs implemented some AML/CFT measures.[364] Based on this information as well as industry input about some of the voluntary AML/CFT measures firms have in place, it is more common for firms to develop voluntary CDD programs as part of their onboarding process as compared to other AML/CFT measures.[365] Therefore, FinCEN assumes that any covered RIAs and ERAs with a *moderate* number of AML/CFT measures in place will likely not need to modify their existing ongoing CDD measures, while covered RIAs and ERAs with a *limited* number of AML/CFT measures in place will need to perform additional customer review for existing customers and at the time of account opening for new customers. Since investment advisers generally already collect some of this information, the estimated cost burden is less than implementing a fully comprehensive customer review at the time of account opening, and accounts primarily for the costs of modifying existing procedures. FinCEN assumes the cost of modifying existing CDD procedures will be approximately 25 percent of the full cost for initial customer review and risk profiling.

Covered RIAs and ERAs with a *limited* number of AML/CFT measures in place will need to collect additional information to develop a customer risk profile. Table 5.7 documents key assumptions regarding the number of customer accounts at affiliated and other RIAs and ERAs. ERAs only have legal entity customers—therefore, they have no natural person customers. Based on an analysis of Form ADV Filings, as of July 31, 2023, RIAs had approximately 49.3 million natural person customers, 2.5 million legal entity customers, and 96,000 PIV accounts. FinCEN estimates the average number of customer accounts will grow at

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[364] *See* 2016 IMCT Survey, *supra* note 303 at Question 15.
[365] *See, e.g.*, Managed Funds Association, Sound Practices for Hedge Fund Managers (2009), Ch. 6 (Anti-Money Laundering).

an annual rate of 9.5 percent—and PIV accounts will grow at an annual rate of 6 percent—based on average industry growth in individual and PIV accounts from 2018 to 2023.[366]

Table 5.7 Average Number of Customer Relationships (as of July, 31 2023)[367]

	Registered Investment Advisers			Exempt Reporting Advisers		
	Dual Registrant	**Affiliated**	**Other**	**Dual Registrant**	**Affiliated**	**Other**
Avg. Number of Natural Person Relationships	46,198	11,444	701	0	0	0
Avg. Number of Legal Entity Relationships	933	224	143	4	63	5
Avg. Number of PIV Accounts	13	20	4	0	0	0

Affiliated and other covered RIAs and ERAs with a *limited* number of existing AML/CFT measures will also need to collect and review customer information to implement risk-based procedures for conducting ongoing CDD. As described above, FinCEN estimates the costs associated with modifying existing customer diligence information and procedures will be significantly less than the full cost for developing the initial customer risk profile. In this Impact Analysis, FinCEN estimates the average cost of collecting additional information for new accounts to develop a customer risk profile will be approximately 25 percent of the total estimated cost of this information collection (30 minutes per natural person or 1 hour per legal entity).[368] Thus, the estimated cost of information collection is approximately 7.5 minutes per natural person or 15 minutes per legal entity. For this activity, FinCEN uses an average hourly labor cost of $34.76 for a new account clerk. Therefore, the estimated labor cost to develop a risk profile is approximately $4.34 for per natural person and $8.68 per legal entity. In addition to new accounts, FinCEN anticipates that covered RIAs and ERAs will need to conduct this information collection for existing accounts. FinCEN estimates this information

[366] *See* Investment Adviser Association, *Investment Adviser Industry Snapshot 2023* (Jul. 2023), p.26, available at https://investmentadviser.org/wp-content/uploads/2023/06/Snapshot2023_Final.pdf.
[367] *See supra* note 25.
[368] *See* 81 FR at 29448.

collection for existing accounts will be conducted over the first three years after the promulgation of the final rule.[369] The costs to build and maintain technology and information systems to house this customer information is not reflected here but is included in the annual costs of software licensing described elsewhere in this Impact Analysis. These costs are multiplied by the average number of natural persons, legal entities, and PIV accounts, respectively, for each covered RIA and ERA.

In addition to the costs to the adviser, this requirement likely represents an information collection burden for legal entities that hold accounts with investment advisers. FinCEN estimates it would take between approximately 15 and 30 minutes, or an average of 22.5 minutes, for legal entity customers to provide any additional data required for this information collection. Since these customers are not employees of the regulated entities, but rather other investment advisers in most cases, FinCEN uses an hourly burden estimate of $49.17 that is representative of the customer base.[370] Therefore, the average information collection cost is approximately $18.44 per customer. This average cost is multiplied by the number of legal entity customers for each covered RIA or ERA.

Table 5.8 summarizes the average ongoing CDD costs per entity by type and characteristics of each covered RIA or ERA. The relatively higher costs in the first three years reflects the compliance burden associated with data collection activities to develop a customer risk profile for existing customer accounts and new customer accounts, while the ongoing costs after 2026 reflect the burden associated with data collection for only new customer accounts.

Table 5.8. Average Cost of Ongoing Customer Due Diligence[371]

Year	RIAs and ERAs with a	RIAs, Affiliated,	RIAs, Other, with a *Limited*	ERAs, Affiliated,	ERAs, Other, with a

[369] Current industry practices suggest customers are often re-rated for risk purposes. Industry input suggests high-risk customers, which make up a small portion of many RIAs customer base, are re-rated at least annually or when SARs are filed, while medium- or low-risk customers are re-rated less frequently.
[370] This estimate is based on a population-weighted average of $32.79, which represents the median salary for all employees in NAICS 522, 523, and 525, multiplied by an adjustment factor for fringe benefits of 1.50.
[371] Costs are rounded to the nearest thousand dollars for RIAs and to the nearest hundred dollars for ERAs.

	Significant **or *Moderate*** **Number of AML/CFT Measures**[372]	**with a *Limited*** **Number of AML/CFT Measures**	**Number of AML/CFT Measures**	**with a *Limited*** **Number of AML/CFT Measures**	***Limited*** **Number of AML/CFT Measures**
2024	$0	$17,000	$2,000	$400	$300
2025	$0	$22,000	$2,000	$500	$300
2026	$0	$23,000	$2,000	$500	$300
2027	$0	$6,000	$1,000	$300	$200
2028	$0	$7,000	$1,000	$300	$200
2029	$0	$7,000	$1,000	$300	$200
2030	$0	$8,000	$1,000	$300	$200
2031	$0	$9,000	$1,000	$300	$200
2032	$0	$10,000	$1,000	$300	$200
2033	$0	$10,000	$1,000	$300	$200

iii. Suspicious Activity Report Filing Costs

As part of their AML/CFT program, RIAs and ERAs will be required to conduct ongoing monitoring of customers' transactions and file SARs when appropriate. FinCEN assumes that RIAs and ERAs that are dually registered as a broker-dealer or bank are already submitting SARs. The extent of SAR filing by affiliated or other advisers is uncertain. Therefore, FinCEN assumes that all RIAs and ERAs that are not dually registered as a broker-dealer or bank would have to begin filing SARs due to the final rule. To the extent that some RIAs and ERAs in this category are already filing SARs, this may overestimate the costs of the final rule.

Based on an analysis of dual registrant's SAR filings between 2018 and 2022, FinCEN estimates that RIAs will each file an average of approximately 60 SARs per year.[373] Since no information was available for ERAs, FinCEN applies the same estimate of 60 SARs per year. Several public comments on the draft Impact Analysis indicated this figure was too high, particularly for smaller investment advisers. Because the estimated costs include time spent reviewing alerts to determine whether a SAR is merited and documenting cases that do not

[372] This category includes dual registrants that are applying a significant number of AML/CFT measures and affiliated advisers that are applying a moderate number of AML/CFT measures.
[373] Dual registrants were assessed to be the population of investment advisers most likely to file SARs and best represent an investment adviser subject to SAR filing obligations.

become SARs, FinCEN chose to retain this estimate to avoid underestimating the burden associated with this review process and those cases that result in new SARs.

SARs can be submitted as initial or continuing, discrete or batch, and standard or extended in different combination, *e.g.*, initial/discrete/standard, initial/discrete/extended, initial/batch/standard. Without a more detailed breakdown available, FinCEN assumes that an average of 60 SARs per investment adviser will be proportionally distributed across each category as follows:[374]

- 51 (85 percent) would be initial SARs and 9 (15 percent) would be continuing SARs.
- 51 (85 percent) would be discrete SARs and 9 (15 percent) would be batch SARs.
- 55 (92 percent) would be standard SARs and 5 (8 percent) would be extended SARs.

Each type of filing is expected to have a different reporting burden because of differences in the cost per hour and/or the number of hours needed for completion.

In addition, the estimated costs of ongoing monitoring in (Table 5.8 above) include the review of alerts that do not result in a SAR being filed. FinCEN previously estimated that approximately 42 percent of suspicious activity alerts were turned into SARs.[375] Therefore, for each case filed as a SAR, approximately 1.4 cases were not filed. Table 5.9 reports the average cost of determining whether a SAR is needed and filing SARs. While the burden estimates are based on FinCEN's previous analysis,[376] in this Impact Analysis the burden is attributed primarily to a compliance officer rather than a financial clerk or teller due to the smaller size of RIAs and ERAs relative to banks and to avoid potentially underestimating the average hourly labor costs associated with these activities. To the extent that a portion of this work can be completed by clerical staff that report to a compliance officer, this may slightly overestimate

[374] Based on summary statistics of SAR filings by dual registrants from 2018 to 2022.
[375] *See* FinCEN, *Proposed Renewal: Reports by Financial Institutions of Suspicious Transactions*, 85 FR 31598, 31605 (May 26, 2020).
[376] *See id*.

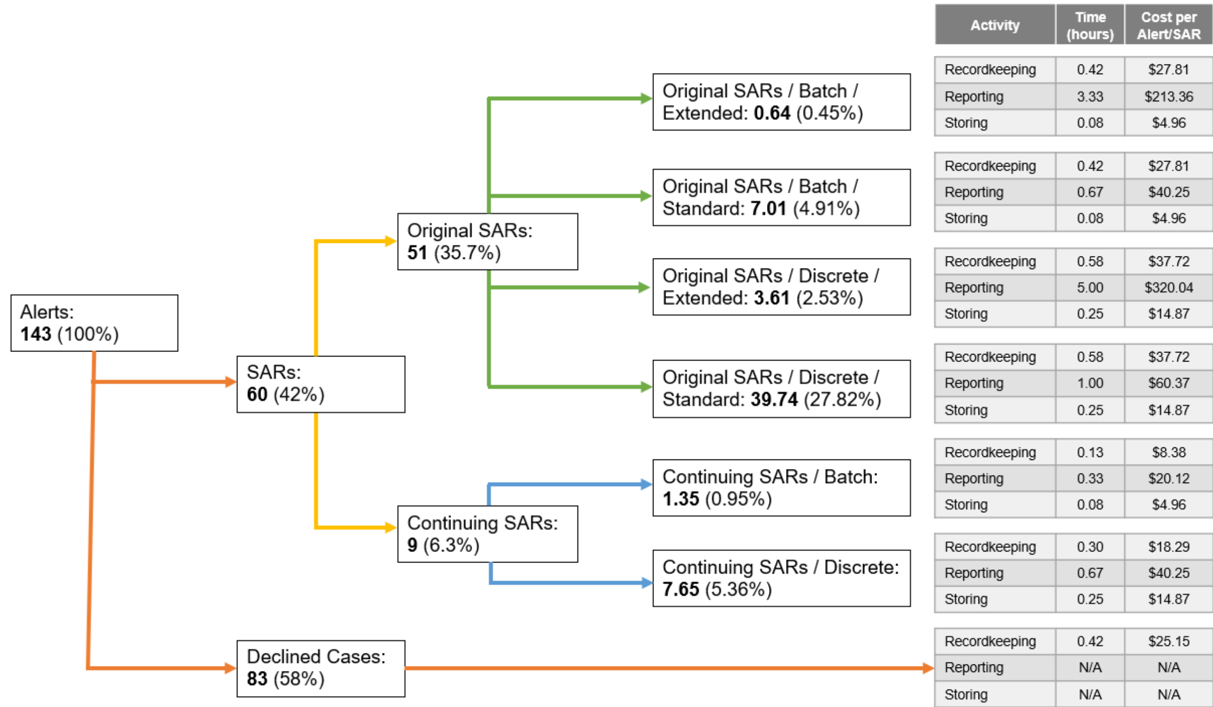
certain costs. The licensing cost for transaction monitoring software is not reflected here but is included in the software costs described elsewhere in this Impact Analysis.

Table 5.9. Weighted Average Hourly Cost of Reviewing Alerts and Drafting, Writing, and Submitting a Suspicious Activity Report

Activity	Financial Manager		Compliance Officer		Weighted Average Hourly Cost
	% Time	Hourly Cost	% Time	Hourly Cost	
Determining Whether a SAR is Merited	10%	$150.35	90%	$59.46	$68.55
Documenting Cases not Submitted as SARs	1%	$150.35	99%	$59.46	$60.37
Drafting, Writing, and Submitting SARs (standard content)	1%	$150.35	99%	$59.46	$60.37
Drafting, Writing, and Submitting SARs (extended content)	5%	$150.35	95%	$59.46	$64.01
Storing SARs and Supporting Documentation	0%	$150.35	100%	$59.46	$59.46

Figure 5.1 illustrates FinCEN's estimates regarding the average number and distribution of SARs, including for suspicious activity alerts that do not result in a SAR being filed, as well as the hourly recordkeeping, reporting, and storing burden estimates by type of filing. As an example, the average number of original/discrete/standard SARs is estimated as follows: (1) an average of 143 alerts results in 60 SARs (42% of alerts), (2) approximately 51 of 60 (or 85%) are original SARs, (3) approximately 43 of 51 (85%) are discrete SARs, and (4) approximately 40 of 43 (92%) are standard SARs. Therefore, of the 143 alerts, approximately 40 of 143 alerts (28%) are estimated to result in original/discrete/standard SARs compared with 83 of 143 (58%) estimated to result in a declined case. The remaining SAR categories comprise a smaller proportion of all suspicious activity alerts.

Figure 5.1. Average Number and Distribution of Suspicious Activity Alerts and Estimated Burden by Type of Filing per Investment Adviser[377]



Based on this information, the average annual cost of SAR filings is estimated to be approximately $10,000 per entity for any RIA or ERA that does not have a full AML/CFT program in place. No incremental costs are estimated for dual registrants because those entities are already submitting SARs in the baseline.

iv. Other Compliance Costs

As discussed above, there are certain costs associated with the final rule that may be spread across several of the regulatory requirements. It is challenging to allocate those expenditures to specific provisions of the final rule described above. These include software licensing and general recordkeeping costs.

Dual registrants, affiliated, and other RIAs and ERAs that already apply a *significant* or *moderate* number of AML/CFT measures are expected to already be using specialized AML/CFT software as part of their AML/CFT program. Affiliated or non-affiliated entities

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[377] Information on the number and distribution of SARs by type of filing based on an analysis of SAR filings. Information on the number of alerts and burden estimates based on FinCEN, *Proposed Renewal: Reports by Financial Institutions of Suspicious Transactions*. 85 FR 31598 (May 26, 2020).

that have a *limited* number of AML/CFT measures in place will likely have to invest in this type of software to implement an AML/CFT program. FinCEN estimates that annual licensing fees for specialized AML/CFT software will be approximately $12,400.[378]

The final rule requires RIAs and ERAs to comply with certain recordkeeping obligations (under the Recordkeeping and Travel Rules),[379] including recording and maintaining originator and beneficiary information for certain transactions. FinCEN assumes that RIAs and ERAs that are dually registered as a broker-dealer or as a bank with a *significant* number of AML/CFT measures in place are already in compliance with the recordkeeping requirements, while other RIAs and ERAs would have to take additional steps to comply with these measures. FinCEN estimates the annual recordkeeping burden per RIA or ERA for these requirements is 50 hours.[380] Table 5.10 summarizes the average cost associated with these recordkeeping requirements.

Table 5.10. Average Cost Associated with AML/CFT Recordkeeping Requirements

Activity	Financial Manager		Compliance Officer		Financial Clerk		Total Hours	Total Cost per Entity
	% Time	Hourly Cost	% Time	Hourly Cost	% Time	Hourly Cost		
Creating and Maintaining Records	5%	$150.35	15%	$59.46	80%	$34.63	50	$2,207

In addition, the final rule requires RIAs and ERAs to implement the information sharing procedures contained in section 314(a) of the USA PATRIOT Act.[381] Upon receiving an information request from FinCEN, an RIA or ERA will be required to search its records to determine whether it maintains or has maintained any account or engaged in any transaction with an individual, entity, or organization named in the request. Covered financial institutions

[378] *See* 2020 GAO BSA Report, *supra* note 349, at Table 113.
[379] *See* 31 CFR 1010.410(a), (e).
[380] FinCEN, *Proposed Renewal: Renewal Without Change of Regulations Requiring Records to be Made and Retained by Financial Institutions, Banks, and Providers and Sellers of Prepaid Access*, 85 FR 84105 (Dec. 23, 2020).
[381] FinCEN, *Special Information Sharing Procedures to Deter Money Laundering and Terrorist Activity*, Final Rule, 67 FR 60579 (Sept. 26, 2002).

are instructed not to reply to the 314(a) request if a search does not uncover any matching of accounts or transactions. Currently, all 314(a) responses are filed using automated technology.[382] FinCEN assumes that dually registered entities with a *significant* number of AML/CFT measures in place are already complying with these requirements, while most other RIAs and ERAs will likely incur additional reporting costs to comply with these measures. FinCEN estimates the average burden will be approximately 4 minutes per 314(a) request for 365 reports per year per investment adviser, an average of one request per calendar day.[383] Therefore, the estimated burden is approximately 24 hours (4 minutes × 365 reports = 1,460 minutes) per year per investment adviser. The information technology costs associated with 314(a) requests are assumed to be included within the overall software costs. Table 5.11 summarizes the information collection costs for 314(a) measures.

Table 5.11. Average Cost for Section 314(a) Measures

Activity	Financial Manager		Compliance Officer		Financial Clerk		Total Hours	Total Cost per Entity
	% Time	Hourly Cost	% Time	Hourly Cost	% Time	Hourly Cost		
Research and Respond to 314(a) Requests	10%	$150.35	60%	$59.46	30%	$34.63	24.33	$1,487

As "covered financial institutions" under FinCEN regulations, RIAs and ERAs will also be required to maintain due diligence measures that include policies, procedures, and controls that are reasonably designed to detect and report any known or suspected money laundering or other suspicious activity conducted through or involving any correspondent or private banking account that is established, maintained, administered, or managed in the United States for a foreign financial institution. FinCEN estimates the annual hourly burden of maintaining and updating the due diligence program for such correspondent or private banking accounts would be approximately two hours for each RIA and ERA – one hour to maintain and update the

[382] FinCEN, *Proposed Renewal: Renewal Without Change on Information Sharing Between Government Agencies and Financial Institutions*, 87 FR 41186 (Jul. 11, 2022).
[383] *Id.*

program and one hour to obtain the approval of senior management.[384] Information technology costs associated with this requirement are included within the overall software costs. Table 5.12 summarizes the cost burden associated with special due diligence measures.

Table 5.12. Average Cost Associated With Updating and Maintaining Special Due Diligence Measures

Activity	Trustee or Director		Financial Manager		Compliance Officer		Total Hours	Total Cost per Entity
	% Time	Hourly Cost	% Time	Hourly Cost	% Time	Hourly Cost		
Maintain and Update Special Due Diligence Program			10%	$150.35	90%	$59.46	1	$68.55
Obtain Written Approval	100%	$172.42					1	$172.42

Under the final rule, RIAs and ERAs must also comply with special measures procedures and prohibitions contained in section 311 of the USA PATRIOT Act.[385] Section 9714 of the Combating Russian Money Laundering Act[386] allows for similar special measures in the context of illicit Russian finance, as does section 7213A of the Fentanyl Sanctions Act in connection with illicit opioid trafficking.[387] Generally, these special measures grant FinCEN the authority, upon finding that reasonable grounds exist for concluding that a foreign jurisdiction, financial institution, class of transactions, or type of account is of "primary money laundering concern," to require domestic financial institutions and financial agencies to take one or more "special measures," which impose additional recordkeeping, information collection, and reporting requirements on covered U.S. financial institutions. Among other authorities, these sections also authorize FinCEN to impose prohibitions or conditions on the opening or maintenance of certain correspondent accounts. Currently, such prohibitions are in

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[384] FinCEN, *Proposed Renewal: Due Diligence Programs for Correspondent Accounts for Foreign Financial Institutions and for Private Banking Accounts*, 85 FR 61104 (Sep. 9, 2020).

[385] 31 U.S.C. 5318A; FinCEN, *Special Information Sharing Procedures to Deter Money Laundering and Terrorist Activity,* Final Rule, 67 FR 60579 (Sept. 26, 2002).

[386] Section 9714 (as amended) can be found in a note to 31 U.S.C. 5318A.

[387] This provision, codified at 21 U.S.C. 2313a, was added to the Fentanyl Sanctions Act by the Fentanyl Eradication and Narcotics Deterrence Off Fentanyl Act, Pub. L. No. 118-50, 3201(a), 138 Stat 895, 940 (2024).

place under section 311 for four foreign financial institutions and three foreign jurisdictions, and one foreign financial institution under section 9714.[388] The special measures under section 311 require financial institutions to provide notice to foreign account holders and document compliance with the statute. FinCEN assumes that dually registered RIAs and ERAs with a *significant* number of AML/CFT measures in place are already complying with these requirements, while most other RIAs and ERAs will likely incur additional costs to comply with these special measures. FinCEN estimates the average burden will be approximately 1 hour per special measure.[389] Therefore, the estimated burden is approximately 6 hours. Table 5.13 summarizes the average cost for implementation section 311 special measures.

Table 5.13. Average Cost for Section 311 Special Measures

Activity	Financial Manager		Compliance Officer		Financial Clerk		Total Hours	Total Cost per Entity
	% Time	Hourly Cost	% Time	Hourly Cost	% Time	Hourly Cost		
Section 311 Special Measures	10%	$150.35	60%	$59.46	30%	$34.63	6	$367

Finally, in addition to filing SARs, financial institutions must file CTRs under the BSA's reporting obligations. Currently, all investment advisers are required to report transactions in currency over $10,000 on Form 8300, which is being replaced by the CTR.[390]

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388 These foreign financial institutions and jurisdictions subject to prohibitions under section 311 are: (1) Bank of Dandong, (2) Burma, (3) Commercial Bank of Syria, including Syrian Lebanese Commercial Bank, (4) FBME Bank Ltd., (5) Al-Huda Bank, (6) Islamic Republic of Iran, and (7) Democratic People's Republic of North Korea. *See* FinCEN, Special Measures for Jurisdictions, Financial Institutions, or International Transactions of Primary Money Laundering Concern, https://www.fincen.gov/resources/statutes-and-regulations/311-and-9714-special-measures. The foreign financial institution subject to prohibitions under section 9714 is Bitzlato Limited. *See* FinCEN, *Imposition of Special Measure Prohibiting the Transmittal of Funds Involving Bitzlato*, 88 FR 3919 (Jan. 23, 2023). While section 9714 allows for the imposition of similar prohibitions to section 311, it does include an explicit notification requirement, so FinCEN is not including an estimated burden for compliance with the section 9174 action for Bizlato Limited. Similarly, while Burma is subject to a section 311 prohibition, FinCEN granted exemption relief for U.S. financial institutions to maintain correspondent accounts for Burmese banks under certain conditions. *See* FIN-ADMINX-10-2016, *Exception to Prohibition Imposed by Section 311 Action against Burma* (Oct. 7, 2016).

389 *See, e.g.*, FinCEN, *Proposed Renewal: Imposition of a Special Measure against Bank of Dandong as a Financial Institution of Primary Money Laundering Concern*, 88 FR 48285, 48286 (Jul. 26, 2023).

390 FinCEN, Proposed Renewal: *Renewal Without Change of the Bank Secrecy Act Reports of Transactions in Currency Regulations at 31 CFR 1010.310 Through 1010.314, 31 CFR 1021.311, and 31 CFR 1021.313, and FinCEN Report 112-Currency Transaction Report*, 85 FR 29022 (Jul. 13, 2020).

Therefore, FinCEN estimates that the incremental cost for RIAs and ERAs to use the CTR is *de minimis*.[391]

Based on this information, the average annual cost of other compliance measures not characterized elsewhere in this Impact Analysis are estimated to be approximately $4,000 for affiliated or other RIAs and ERAs with a *moderate* number of AML/CFT measures already in place and approximately $16,000 for affiliated or other RIAs and ERAs with a *limited* number of AML/CFT measures already in place.

(c) *Costs to Government*

This section describes the costs to Federal Government agencies to implement and enforce the final rule.

i. Costs to FinCEN

Administering the regulation is estimated to entail costs to FinCEN as well as other government agencies. In terms of technology and IT costs, the final rule does not create new kinds or requirements or new reporting forms, and instead applies existing SAR and CTR filing obligations to investment advisers. As a result, technology and IT costs are estimated to be small but are included in this analysis for comprehensiveness. The primary costs that FinCEN and other government agencies are expected to incur with respect to administering this final rule relate to personnel costs for enforcing compliance with the regulation, as well as providing guidance and engaging in outreach, training, investigations, and policy development in support of this regulation. FinCEN estimates the total annual personnel cost relating to administering this final rule to be $7.5 million, as reflected in Table 5.14, with continuing recurring annual costs of roughly the same magnitude for ongoing outreach, policy, and enforcement activities thereafter.

Table 5.14 Estimated Personnel Costs to FinCEN Related to Administering the Final Rule (in 2022 dollars)

[391] In the 2015 NPRM, FinCEN estimated each investment adviser would file an average of one CTR per year, at a time cost of one hour per CTR. Incorporating these costs in the model would change the total hour and dollar burden by less than one percent.

Division	Grade	Number of Employees	Average Annual Salary[392]	Adjustment Factor for Fringe Benefits and Overhead for Federal Employees[393]	Fully Loaded Hourly Labor Cost
Policy (PD)	GS-12	1	$108,000	2.0	$217,000
	GS-13	1	$129,000	2.0	$258,000
Global Investigations (GID)	GS-13	2	$129,000	2.0	$258,000
	GS-14	1	$152,000	2.0	$304,000
Counsel (OCC)	GS-15	2	$184,000	2.0	$367,000
Strategic Operations (SOD)	GS-13	4	$129,000	2.0	$258,000
	GS-14	1	$152,000	2.0	$304,000
Enforcement and Compliance (ECD)	GS-12	10	$108,000	2.0	$217,000
	GS-13	4	$129,000	2.0	$258,000
	GS-14	2	$152,000	2.0	$304,000
	GS-15	1	$184,000	2.0	$367,000
Total		**29**	**$3,770,000**		**$7,540,000**

In addition, FinCEN estimates the average technology and IT costs associated with receiving SAR filings will be approximately $0.10 per SAR. Based on an average estimate of 60 SARs per entity per year, FinCEN anticipates it will receive approximately 1,245,420 SARs each year from RIAs and ERAs that do not currently have most AML/CFT measures in place. This estimate excludes SAR filings for dually registered entities because those entities are expected to be submitting SARs in the baseline. Therefore, the incremental technology and IT costs to FinCEN associated with the SAR filing requirement are estimated to be approximately $125,000 per year. Enforcement of this regulation will involve coordination with law enforcement agencies, which will incur costs (time and resources) while conducting investigations into non-compliance. FinCEN does not currently propose an estimate of these costs.

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[392] U.S. Office of Personnel Management, Salary Table 2023 Incorporating the 4.1 percent General Schedule Increase and a Locality Payment of 32.49 percent for the Washington-Baltimore-Arlington area, available at https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2023/DCB.pdf. Rounded to three significant digits.

[393] The Department of Health and Human Services recommends using an adjustment factor of 2 to account for fringe benefits and overhead when agency-specific financial data are unavailable. *See* Department of Health and Human Services, Guidelines for Regulatory Impact Analysis (2016), p. 30, available at https://www.aspe.hhs.gov/sites/default/files/migrated_legacy_files//171981/HHS_RIAGuidance.pdf.

ii. Costs to SEC

The SEC is also estimated to incur costs, primarily relating to additional staff needed to examine for compliance with the requirements of the final rule, and to provide any needed regulatory guidance or analysis. Costs associated with implementing the final rule are expected to primarily affect the Division of Investment Management and the Division of Examinations, though certain potential costs may also be incurred by the Division of Enforcement. In addition, as the SEC receives a significant portion of its revenue from fees on registrants and other market participants, many of these costs would ultimately be paid for through those fees.[394]

The SEC's Division of Investment Management administers the Advisers Act and develops regulatory policy for investment advisers, among other responsibilities. The Division of Investment Management may require two additional staff to provide regulatory guidance or analysis related to the final rule. The average salary for a GS-15 equivalent is approximately $203,500 based on the SEC's SK series adjusted for the locality pay area of Washington, DC.[395] Applying an adjustment factor of 2.0 for fringe benefits and overhead yields an estimated fully loaded labor cost of approximately $407,000. Therefore, FinCEN estimates the total annual personnel cost to the SEC relating to administering this final rule to be approximately $814,000.

RIAs are subject to examination by SEC staff in the SEC's Division of Examinations. Within the Division of Examinations, the Investment Adviser/Investment Company (IA/IC) Examination Program completed more than 2,300 examinations of SEC-registered investment advisers in FY22.[396] The SEC maintains authority to examine ERAs as well. While the

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[394] *See* SEC, *FY 2023 Agency Financial Report*, p. 32, available at https://www.sec.gov/files/sec-2023-agency-financial-report.pdf.
[395] This estimate is based on the midpoint salary for a GS-15 equivalent of $153,600 multiplied by the locality pay rate of 32.49 percent for Washington, DC. *See* SEC, SEC Compensation Program (Apr. 9, 2024), available at https://www.sec.gov/about/careers-securities-exchange-commission/sec-compensation-program.
[396] *See* SEC, *FY 2024 Congressional Budget Justification*, p. 22, https://www.sec.gov/files/fy-2024-congressional-budget-justification_final-3-10.pdf.

Division of Examinations may conduct examinations for compliance with the requirements of the final rule within its existing examination program, this may require additional examination staff. FinCEN does not currently have an estimate of the additional costs the SEC's Division of Examinations may incur for these activities.

(d) *Summary of Costs*

This section reports the total costs of the final rule on a per entity basis and in aggregate, by type and characteristics of each RIA or ERA. As described in section 3, the regulated universe consists of RIAs and ERAs that vary in terms of business structure, number of employees, number of accounts, and the extent that existing AML/CFT measures are being applied (*e.g. significant*, *moderate*, *limited*). Table 5.15 summarizes the total number of entities by type and characteristics of each RIA and ERA.

Table 5.15. Number of Affected Investment Advisers by Type

Baseline AML/CFT Measures	Registered Investment Advisers			Exempt Reporting Advisers			Total
	Dual Registrant	Affiliated	Other	Dual Registrant	Affiliated	Other	
Significant	376	0	0	44	0	0	420
Moderate	0	1,562	3,692	0	216	1,753	7,223
Limited	0	521	7,922	0	72	3,761	12,276
Total	**376**	**2,083**	**11,614**	**44**	**288**	**5,514**	**19,919**

i. Average Cost per Private Entity and Total Costs by Category of Investment Adviser

This section describes the estimated average cost per entity and total costs by type and characteristics of each RIA and ERA. The average costs per RIA and ERA are multiplied by the number of impacted entities to estimate the aggregate cost burden of the final rule, by category of RIA and ERA. Table 5.16 summarizes the estimated costs for RIAs and ERAs that are dually registered as a broker-dealer or a bank with a *significant* number of AML/CFT measures in place. The estimated costs for dually registered entities are minimal because most firms are expected to have an existing AML/CFT program in place. The relatively small

incremental costs are associated with RIAs and ERAs maintaining and updating a written AML/CFT program and reviewing and updating AML/CFT training to ensure they cover the activities of all RIAs and ERAs and meet the requirements of the BSA.

Table 5.16. Total Costs for Dually Registered Entities with a *Significant* Number of AML/CFT Measures in Place, by Year (in 2022 dollars)[397]

Year	Number of Entities	Average Cost per Entity	Total Costs ($M)
2024	420	$3,000	$1.2
2025-2033	420	$0	$0.0

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Table 5.17 summarizes the estimated costs for affiliated RIAs with a *moderate* number of AML/CFT measures in place.

Table 5.17. Total Costs for RIAs, Affiliated, with a *Moderate* Number of AML/CFT Measures in Place, by Year (in 2022 dollars)

Year	Number of Entities	Average Cost per Entity	Total Costs ($M)
2024	1,562	$33,000	$52.1
2025-2033	1,562	$30,000	$47.3

Table 5.18 summarizes the estimated costs for affiliated RIAs with a *limited* number of AML/CFT measures in place.

Table 5.18. Costs for RIAs, Affiliated, with a Limited Number of AML/CFT Measures in Place, by Year (in 2022 dollars)

Year	Number of Entities	Average Cost per Entity	Total Costs ($M)
2024	521	$80,000	$41.5
2025	521	$73,000	$37.9
2026	521	$73,000	$38.1
2027	521	$56,000	$29.4
2028	521	$57,000	$29.7
2029	521	$58,000	$30.0
2030	521	$58,000	$30.4
2031	521	$59,000	$30.8

[397] For Tables 5.16 to 5.37, costs are rounded to the nearest thousand dollars or two significant digits.

2032	521	$60,000	$31.2
2033	521	$61,000	$31.7

Table 5.19 summarizes the estimated costs for other RIAs with a *moderate* number of AML/CFT measures in place.

Table 5.19. Costs for RIAs, Other, with a *Moderate* Number of AML/CFT Measures in Place, by Year (in 2022 dollars)

Year	Number of Entities	Average Cost per Entity	Total Costs ($M)
2024	3,692	$33,000	$123.1
2025-2033	3,692	$30,000	$111.7

Table 5.20 summarizes the estimated costs for other RIAs with a *limited* number of AML/CFT measures in place.

Table 5.20. Costs for RIAs, Other, with a Limited Number of AML/CFT Measures in Place, by Year (in 2022 dollars)

Year	Number of Entities	Average Cost per Entity	Total Costs ($M)
2024	7,922	$58,000	$456.9
2025	7,922	$46,000	$365.7
2026	7,922	$46,000	$366.1
2027	7,922	$45,000	$355.1
2028	7,922	$45,000	$355.4
2029	7,922	$45,000	$355.8
2030	7,922	$45,000	$356.3
2031	7,922	$45,000	$356.8
2032	7,922	$45,000	$357.3
2033	7,922	$45,000	$357.9

Table 5.21 summarizes the estimated costs for ERAs, affiliated, with a *moderate* number of AML/CFT measures in place.

Table 5.21. Total Costs for ERAs, Affiliated, with a *Moderate* Number AML/CFT Measures in Place, by Year (in 2022 dollars)

Year	Number of Entities	Average Cost per Entity	Total Costs ($M)
2024	216	$33,000	$7.2

2025-2033	216	$30,000	$6.5

Table 5.22 summarizes the estimated costs for ERAs that are affiliated with a bank or broker-dealer with a *limited* number of AML/CFT measures in place.

Table 5.22. Costs for ERAs, Affiliated, with a *Limited* Number of AML/CFT Measures in Place, by Year (in 2022 dollars)

Year	Number of Entities	Average Cost per Entity	Total Costs ($M)
2024	72	$57,000	$4.1
2025-2033	72	$45,000	$3.2

Table 5.23 summarizes the estimated costs for other ERAs with a *moderate* number of AML/CFT measures in place.

Table 5.23. Costs for ERAs, Other, with a *Moderate* Number of AML/CFT Measures in Place, by Year (in 2022 dollars)

Year	Number of Entities	Average Cost per Entity	Total Costs ($M)
2024	1,753	$33,000	$58.5
2025-2033	1,753	$30,000	$53.0

Table 5.24 summarizes the estimated costs for other ERAs with a *limited* number of AML/CFT measures in place.

Table 5.24. Costs for ERAs, Other, with a *Limited* Number of AML/CFT Measures in Place, by Year (in 2022 dollars)

Year	Number of Entities	Average Cost per Entity	Total Costs ($M)
2024	3,761	$56,000	$210.0
2025-2033	3,761	$44,000	$165.2

ii. Estimated Burden of the Final Rule to Industry

Table 5.25 summarizes the total costs of the final rule on an undiscounted basis.

Table 5.25. Total Estimated Burden of the Final Rule by Entity Type, by Year ($ Millions, 2022)

Year	SEC-registered Investment Advisers	Exempt Reporting Advisers	Customers	Federal Agencies	Total
2024	$670	$280	$24.0	$8.5	$990
2025	$560	$230	$2.2	$8.5	$800
2026	$560	$230	$2.4	$8.5	$800
2027	$540	$230	$2.7	$8.5	$780
2028	$540	$230	$2.9	$8.5	$780
2029	$540	$230	$3.2	$8.5	$780
2030	$550	$230	$3.5	$8.5	$790
2031	$550	$230	$3.9	$8.5	$790
2032	$550	$230	$4.2	$8.5	$790
2033	$550	$230	$4.6	$8.5	$790

Table 5.26 summarizes the total costs of the final rule by entity and business structure for dual registrants, affiliated advisers, and other advisers on an undiscounted basis.

Table 5.26. Total Estimated Burden of the Final Rule by Entity and Business Structure, by Year ($ Millions, 2022)

Year	Dually Registered Entities	Affiliated Entities	Neither	Customers	Federal Agencies	Total
2024	$1.2	$100	$850	$24.0	$8.5	$990
2025	$0	$95	$700	$2.2	$8.5	$800
2026	$0	$95	$700	$2.4	$8.5	$800
2027	$0	$86	$680	$2.7	$8.5	$780
2028	$0	$87	$690	$2.9	$8.5	$780
2029	$0	$87	$690	$3.2	$8.5	$780
2030	$0	$87	$690	$3.5	$8.5	$790
2031	$0	$88	$690	$3.9	$8.5	$790
2032	$0	$88	$690	$4.2	$8.5	$790
2033	$0	$89	$690	$4.6	$8.5	$790

iii. Discounted Estimated Burden of the Final Rule

In regulatory impact analyses, discount rates are used to account for differences in the timing of the estimated benefits and costs. Benefits and costs that accrue further in the future are more heavily discounted than those impacts that occur today. Discounting reflects, among other things, individuals' general preference to receive benefits sooner rather than later (and defer costs) and recognizes that costs incurred today are more expensive than future costs

because businesses must forgo an expected rate of return on investment of that capital.[398] OMB recommends using a discount rate of 2 percent.[399] This represents the real (inflation-adjusted) rate of return on long-term U.S. government debt over the last 30 years, calculated between 1993 and 2022, and is a reasonable approximation of the social rate of time preference.

Table 5.27 summarizes the total costs of the final rule using a 2 percent discount rate. As shown in the table, RIAs account for approximately 71 percent of the annualized costs to industry, while ERAs account for the remaining 29 percent.

Table 5.27. Total Estimated Burden of the Final Rule by Entity Type, by Year ($ Millions, 2022) using a 2 percent Discount Rate

Year	SEC-registered Investment Advisers	Exempt Reporting Advisers	Customers	Federal Agencies	Total
2024	$670	$280	$24.0	$8.5	$990
2025	$550	$220	$2.2	$8.3	$790
2026	$540	$220	$2.4	$8.1	$770
2027	$510	$210	$2.5	$8.0	$740
2028	$500	$210	$2.7	$7.8	$720
2029	$490	$210	$2.9	$7.7	$710
2030	$480	$200	$3.1	$7.5	$700
2031	$480	$200	$3.4	$7.4	$680
2032	$470	$190	$3.6	$7.2	$670
2033	$460	$190	$3.9	$7.1	$660
10-Year Undiscounted Cost	**$5,600**	**$2,300**	**$53.0**	**$85.0**	**$8,100**
10-Year Present Value	**$5,200**	**$2,100**	**$50.0**	**$78.0**	**$7,400**
Annualized Cost	**$560**	**$230**	**$5.5**	**$8.5**	**$810**

Table 5.28 summarizes the total costs of the final rule by entity and business structure for dual registrants, affiliated advisers, and other advisers using a 2 percent discount rate. As shown in the table, entities that are dual registrants account for less than 0.1 percent, affiliated advisers account for approximately 11 percent, and other advisers account for approximately 89 percent of the annualized costs to industry.

[398] U.S. Office of Management and Budget, Circular A-4 (Nov. 9, 2023) at 75.
[399] *Id*. at 76-77.

Table 5.28. Total Estimated Burden of the Final Rule by Entity and Business Structure, by Year ($ Millions, 2022) using a 2 percent Discount Rate

Year	Dually Registered Entities	Affiliated Entities	Neither	Customers	Federal Agencies	Total
2024	$1.2	$100	$850	$24.0	$8.5	$990
2025	$0	$93	$680	$2.2	$8.3	$790
2026	$0	$91	$670	$2.4	$8.1	$770
2027	$0	$81	$650	$2.5	$8.0	$740
2028	$0	$80	$630	$2.7	$7.8	$720
2029	$0	$79	$620	$2.9	$7.7	$710
2030	$0	$78	$610	$3.1	$7.5	$700
2031	$0	$76	$600	$3.4	$7.4	$680
2032	$0	$75	$590	$3.6	$7.2	$670
2033	$0	$74	$570	$3.9	$7.1	$660
10-Year Undiscounted Cost	**$1.2**	**$910**	**$7,000**	**$53.0**	**$85.0**	**$8,100**
10-Year Present Value	**$1.2**	**$830**	**$6,500**	**$50.0**	**$78.0**	**$7,400**
Annualized Cost	**$0.13**	**$91**	**$700**	**$5.5**	**$8.5**	**$810**

(e) *Uncertainty Analysis*

As described in section 3, the number of RIAs and ERAs is well-defined based on the number of Form ADV filings. However, there is uncertainty about the extent of existing AML/CFT measures within each group. While an uncertainty analysis could layer various assumptions about the percentage of RIAs and ERAs that have in place certain AML/CFT measures to address each individual requirement – and the degree to which those measures would have to be reviewed and modified to comply with the requirements of the final rule – such information is unavailable and the existing framework described in the section presents a simpler approach to account for this uncertainty by varying certain assumptions around the categorization of RIAs and ERAs. Specifically, this Impact Analysis estimates the impact of varying assumptions regarding the distribution of RIAs and ERAs into categories of significant, moderate, and limited AML/CFT measures in place. This provides a lower and upper bound estimate of the potential costs of the final rule. The costs presented earlier in this section represent FinCEN's primary estimate of the burden of the final rule.

i. Lower Bound Estimate

The lower bound estimate assumes that a greater proportion of RIAs and ERAs have a *significant* or *moderate* number of AML/CFT measures in place and will have to implement relatively *fewer* additional measures under the final rule. Table 5.29 summarizes the total number of entities according to the business type and characteristics of each RIA and ERA. This represents an optimistic, but not implausible, scenario based on self-reported assessments indicating that approximately 40 percent of RIAs already have AML/CFT policies and procedures consistent with the BSA.[400] For the lower bound estimate, FinCEN assumes the same proportion of affiliated ERAs and other ERAs have a *significant* number of AML/CFT measures as the corresponding RIA groups. Thus, this estimate is optimistic in that the number of ERAs with policies and procedures similar to those of RIAs is highly uncertain – although it is still likely to be less than the overall percentage of RIAs.

Table 5.29. Number of Affected Investment Advisers by Type (Lower Bound)

Baseline AML/CFT Measures	Registered Investment Advisers			Exempt Reporting Advisers			Total
	Dual Registrant	Affiliated Advisers	Other	Dual Registrant	Affiliated Advisers	Other	
Significant	376	1,562	3,692	44	216	1,753	7,643
Moderate	0	521	4,546	0	72	2,158	7,297
Limited	0	0	3,376	0	0	1,603	4,979
Total	**376**	**2,083**	**11,614**	**44**	**288**	**5,514**	**19,919**

Table 5.30 summarizes the total costs of the final rule in the lower bound scenario using a 2 percent discount rate. As shown in the table, although the overall costs of the final rule are lower, the distribution of costs between RIAs and ERAs is similar to the primary estimate.

Table 5.30. Total Estimated Burden of the Final Rule by Entity Type, by Year ($ Millions, 2022) using a 2 percent Discount Rate (Lower Bound)

Year	SEC-registered	Exempt Reporting Advisers	Customers	Federal Agencies	Total

[400] *See* 2016 IMCT Survey, *supra* note 303.

	Investment Advisers				
2024	$380	$170	$9.1	$8.4	$570
2025	$300	$140	$0.9	$8.3	$450
2026	$300	$130	$0.9	$8.1	$440
2027	$290	$130	$1.0	$7.9	$430
2028	$280	$130	$1.0	$7.8	$420
2029	$280	$120	$1.1	$7.6	$410
2030	$270	$120	$1.2	$7.5	$400
2031	$270	$120	$1.3	$7.3	$390
2032	$260	$120	$1.4	$7.2	$390
2033	$260	$120	$1.5	$7.0	$380
10-Year Undiscounted Cost	**$3,100**	**$1,400**	**$21.0**	**$84.0**	**$4,600**
10-Year Present Value	**$2,900**	**$1,300**	**$19.0**	**$77.0**	**$4,300**
Annualized Cost	**$310**	**$140**	**$2.1**	**$8.4**	**$470**

Table 5.31 summarizes the total costs of the final rule by entity and business structure for dual registrants, affiliated advisers, and other advisers in the lower bound scenario using a 2 percent discount rate. As shown in the table, in the lower bound scenario a greater proportion of the costs (approximately 95 percent) are attributed to other advisers.

Table 5.31. Total Estimated Burden of the Final Rule by Entity and Business Structure, by Year ($ Millions, 2022) using a 2 percent Discount Rate (Lower Bound)

Year	Dually Registered Entities	Affiliated Entities	Neither	Customers	Federal Agencies	Total
2024	$1.2	$25	$520	$9.1	$8.4	$570
2025	$0	$18	$420	$0.9	$8.3	$450
2026	$0	$17	$410	$0.9	$8.1	$440
2027	$0	$17	$400	$1.0	$7.9	$430
2028	$0	$17	$390	$1.0	$7.8	$420
2029	$0	$16	$380	$1.1	$7.6	$410
2030	$0	$16	$380	$1.2	$7.5	$400
2031	$0	$16	$370	$1.3	$7.3	$390
2032	$0	$15	$360	$1.4	$7.2	$390
2033	$0	$15	$360	$1.5	$7.0	$380
10-Year Undiscounted Cost	**$1.2**	**$190**	**$4,300**	**$21.0**	**$84.0**	**$4,600**
10-Year Present Value	**$1.2**	**$170**	**$4,000**	**$19.0**	**$77.0**	**$4,300**
Annualized Cost	**$0.13**	**$19**	**$440**	**$2.1**	**$8.4**	**$470**

ii. Upper Bound Estimate

The upper bound estimate assumes that a greater proportion of RIAs and ERAs have *limited* number of AML/CFT measures in place and will have to implement relatively *greater* additional measures under the final rule. Table 5.32 summarizes the total number of entities by type and characteristics of each RIA and ERA.

Table 5.32. Number of Affected Entities by Type (Upper Bound)

Baseline AML/CFT Measures	Registered Investment Advisers			Exempt Reporting Advisers			Total
	Dual Registrant	Affiliated Advisers	Other	Dual Registrant	Affiliated Advisers	Other	
Significant	376	0	0	44	0	0	420
Moderate	0	0	0	0	0	0	0
Limited	0	2,083	11,614	0	288	5,514	19,499
Total	**376**	**2,083**	**11,614**	**44**	**288**	**5,514**	**19,919**

Table 5.33 summarizes the total costs of the final rule in the upper bound scenario using a 2 percent discount rate. As shown in the table, although the overall costs of the final rule are higher, the distribution of costs between RIAs and ERAs is similar to the primary estimate.

Table 5.33. Total Estimated Burden of the Final Rule by Business Type, by Year ($ Millions, 2022) using a 2 percent Discount Rate (Upper Bound)

Year	SEC-registered Investment Advisers	Exempt Reporting Advisers	Customers	Federal Agencies	Total
2024	$840	$320	$40.0	$8.5	$1,200
2025	$670	$250	$3.7	$8.3	$940
2026	$660	$250	$4.0	$8.1	$920
2027	$600	$240	$4.3	$8.0	$850
2028	$590	$240	$4.6	$7.8	$840
2029	$580	$230	$5.0	$7.7	$820
2030	$570	$230	$5.3	$7.5	$810
2031	$560	$220	$5.7	$7.4	$800
2032	$550	$220	$6.1	$7.2	$780
2033	$540	$210	$6.6	$7.1	$770
10-Year Undiscounted Cost	**$6,700**	**$2,600**	**$91.0**	**$85.0**	**$9,500**
10-Year Present Value	**$6,200**	**$2,400**	**$86.0**	**$78.0**	**$8,700**
Annualized Cost	**$670**	**$260**	**$9.3**	**$8.5**	**$950**

Table 5.34 summarizes the total costs of the final rule by entity and business structure for dual registrants, affiliated advisers, and other advisers in the upper bound scenario using a 2 percent discount rate. As shown in the table, although the overall costs of the final rule are higher, the distribution of costs between the different types of RIAs and ERAs is similar to the primary estimate.

Table 5.34. Total Estimated Burden of the Final Rule by Business Structure, by Year ($ Millions, 2022) using a 2 percent Discount Rate (Upper Bound)

Year	Dually Registered Entities	Affiliated Entities	Neither	Customers	Federal Agencies	Total
2024	$1.2	$180	$980	$40.0	$8.5	$1,200
2025	$0	$160	$760	$3.7	$8.3	$940
2026	$0	$160	$750	$4.0	$8.1	$920
2027	$0	$120	$720	$4.3	$8.0	$850
2028	$0	$120	$710	$4.6	$7.8	$840
2029	$0	$120	$690	$5.0	$7.7	$820
2030	$0	$120	$680	$5.3	$7.5	$810
2031	$0	$120	$670	$5.7	$7.4	$800
2032	$0	$120	$650	$6.1	$7.2	$780
2033	$0	$120	$640	$6.6	$7.1	$770
10-Year Undiscounted Cost	**$1.2**	**$1,500**	**$7,900**	**$91.0**	**$85.0**	**$9,500**
10-Year Present Value	**$1.2**	**$1,300**	**$7,200**	**$86.0**	**$78.0**	**$8,700**
Annualized Cost	**$0.13**	**$150**	**$790**	**$9.3**	**$8.5**	**$950**

iii. Comparison of Costs in the Lower and Upper Bound Estimates

As described in this section, FinCEN estimates the cost of the final rule to regulated entities will be approximately $810 million on an annualized basis. In comparison to alternative assumptions about the degree of existing AML/CFT measures among RIAs and ERAs subject to the final rule, FinCEN's primary estimate is relatively conservative in that it assumes a greater proportion of RIAs and ERAs have only a *moderate* or *limited* number of existing AML/CFT measures in place in comparison to input provided by industry suggesting that figure may be lower. Therefore, the primary estimate is closer to the upper bound than the lower bound. Under the most pessimistic assumptions regarding the degree of existing

AML/CFT measures, the final rule is estimated to cost approximately $950 million on an annualized basis. This scenario is highly improbable because more than 520 RIAs (out of 690 surveyed) indicated that they already have a *significant* or *moderate* number of AML/CFT measures in place. Under more optimistic assumptions about the proportion of RIAs with a *significant* or *moderate* number of AML/CFT measures in place, FinCEN estimates the cost of the final rule will be approximately $470 million on an annualized basis. Table 5.35 provides a comparison of the estimated costs of the final rule under each of these scenarios.

Table 5.35. Comparison of Compliance Costs using Lower and Upper Bound Estimates Relative to the Primary Estimate ($ Millions, 2022) using a 2 percent Discount Rate

Year[1]	**Lower Bound**	**Primary Estimate**	**Upper Bound**
2024	$570	$990	$1,200
2025	$450	$790	$940
2026	$440	$770	$920
2027	$430	$740	$850
2028	$420	$720	$840
2029	$410	$710	$820
2030	$400	$700	$810
2031	$390	$680	$800
2032	$390	$670	$780
2033	$380	$660	$770
10-Year Undiscounted Cost	**$4,600**	**$8,100**	**$9,500**
10-Year Present Value	**$4,300**	**$7,400**	**$8,700**
Annualized Cost	**$470**	**$810**	**$950**

iv. Alternative Higher Third-Party Vendor Cost Scenario

While the estimated costs of the final rule are not highly sensitive to several of the unit cost assumptions described in this section—in part because most of the labor costs are generally estimated in hours rather than days or weeks—two of the major cost drivers are software licensing fees and independent testing. Therefore, FinCEN compared how the

estimated costs changed if third-party vendor costs increased by 100 percent.[401] The estimated costs are relatively sensitive to assumptions regarding third-party fees for certain AML/CFT functions because these comprise a large share of the overall costs for RIAs and ERAs with a *moderate* or *limited* number of existing AML/CFT measures in place. Table 5.36 reports alternative cost assumptions for third-party vendor costs that are double the primary estimate.[402] FinCEN assessed that the average technology costs used in the primary estimate are more likely to be representative of the costs likely to be incurred by RIAs and ERAs, which are typically much smaller than the bank benchmark in the 2020 GAO BSA Report. Smaller banks generally reported lower technology costs. However, for direct comparison this regulatory impact analysis reports higher estimated technology costs as an alternative scenario.

Table 5.36 Alternative Compliance Costs for Independent Testing, Software, and Other Third-Party Technology Vendors (in 2022 dollars)

Compliance Activity	Primary Estimate Cost Assumption	Alternative Cost Assumption
AML/CFT Software Costs	$12,400	$24,800
Independent Testing	$17,000	$34,000

Table 5.37 provides a comparison of the estimated costs of the final rule under the higher technology cost scenario. Overall, the estimated costs would be approximately 60 percent higher under this scenario relative to the primary estimate. FinCEN ascribes a low probability to the average technology/third-party vendor costs being this high given the typical size of RIAs and ERAs affected by the final rule.

Table 5.37. Comparison of Compliance Costs using Higher Technology Cost Relative to the Primary Estimate ($ Millions, 2022) using a 2 percent Discount Rate

Year[1]	Primary Estimate	High Technology

[401] Independent testing under the final rule can be conducted by an adviser's employees and is not required to be conducted by a third-party vendor. The costs identified here could be less than estimated to the extent employees (and not third-party vendors) are used.
[402] The alternative third-party vendor costs are more in line with the cost estimates in the 2020 GAO BSA Report for "Large Community Bank A" ($501 million to $600 million in assets) and "Large Credit Union A" ($101 million to $201 million in assets). In comparison, the primary cost estimates are based on "Large Community Bank B" ($401 million to $500 million in assets) in the same report. *See* 2020 GAO BSA Report, *supra* note 349.

		Cost Estimate
2024	$990	$1,500
2025	$790	$1,300
2026	$770	$1,200
2027	$740	$1,200
2028	$720	$1,200
2029	$710	$1,100
2030	$700	$1,100
2031	$680	$1,100
2032	$670	$1,100
2033	$660	$1,100
10-Year Undiscounted Cost	**$8,100**	**$13,000**
10-Year Present Value	**$7,400**	**$12,000**
Annualized Cost	**$810**	**$1,300**

6. Regulatory Alternatives

This section evaluates the potential benefits and costs of regulatory alternatives in comparison to the final regulation. This regulatory impact analysis considers two alternatives as described below.

(a) *Alternative 1: Inclusion of State-Registered Investment Advisers*

In the first alternative, FinCEN considered including State-registered investment advisers in the final rule. This alternative would bring all investment advisers that file Form ADV and register with a Federal *or State* regulatory authority under the scope of the final rule. FinCEN estimates there are approximately 17,000 State-registered investment advisers, based on reports from the North American Security Administrators Association (NASAA).[403] Table 6.1 summarizes their characteristics.

Table 6.1: Characteristics of State-registered Investment Advisers[404]

Characteristic	Value
Number of Investment Advisers	17,063

[403] *NASAA Investment Adviser Section: 2023 Annual Report*, p.2, https://www.nasaa.org/wp-content/uploads/2023/09/2023-IA-Section-Report-FINAL.pdf.
[404] *See id*. The average number of employees per investment adviser was calculated as a weighted average of the bins reported on page 5 of the report, using the following employees for each respective bin: 2 [0-2 employees], 6.5 [3-10 employees], 15 [11-20 employees], 25 [>20 employees].

Average No. Employees	2.9
Avg. No. Individual Clients	46
Avg. No. PIV Clients	0.1
Avg. No. Legal Entity Clients	1.1
Avg. AUM	$24.7 million

FinCEN assumed that the costs of the rule would apply to State-registered investment advisers in the same way as for RIAs that are "other advisers." If State-registered investment advisers are less likely than RIAs to have any AML/CFT measures in the baseline, then this assumption would understate the costs of the rule for State-registered investment advisers. Under the assumptions of the cost model in section 3, Table 6.2 summarizes the total costs of Alternative 1 for State-registered investment advisers in addition to the other entities subject to regulation.

Table 6.2. Total Estimated Burden of Alternative 1 by Entity Type, by Year ($ Millions, 2022)

Year	Registered Investment Advisers	Exempt Reporting Advisers	State-registered Investment Advisers	Customers	Federal Agencies	Total
2024	$670	$280	$830	$24.0	$8.5	$1,800
2025	$560	$230	$690	$2.2	$8.5	$1,500
2026	$560	$230	$690	$2.4	$8.5	$1,500
2027	$540	$230	$690	$2.7	$8.5	$1,500
2028	$540	$230	$690	$2.9	$8.5	$1,500
2029	$540	$230	$690	$3.2	$8.5	$1,500
2030	$550	$230	$690	$3.5	$8.5	$1,500
2031	$550	$230	$690	$3.9	$8.5	$1,500
2032	$550	$230	$690	$4.2	$8.5	$1,500
2033	$550	$230	$690	$4.6	$8.5	$1,500

FinCEN assesses the potential benefits of including State-registered investment advisers in the definition of "financial institution" are significantly smaller relative to the likely benefits of including RIAs and ERAs. Although the overall benefits may exceed those of the final regulation because the requirements extend to a larger number of entities, the limited

incremental benefits of applying the requirements to State-registered investment advisers suggest this would be a less cost-effective approach to regulation.

Specifically, including State-registered investment advisers nearly doubles the cost of the final rule, because of the large number of State-registered investment advisers. But such inclusion is less likely to achieve the same degree of benefits as for other investment advisers, partly because State-registered advisers are smaller, in terms of number of clients and AUM, and their customers tend to be localized. The Risk Assessment found few examples of State-registered investment advisers being used to move illicit proceeds or facilitate other illicit activity.[405] Further, the vast majority of their clients are natural persons who are not high net-worth customers and are U.S. persons.[406] Therefore, FinCEN rejected this regulatory alternative in favor of the more cost-effective approach in the final regulation.

(b) *Alternative 2: Requirements for Private Fund Advisers to Conduct Risk-Based Customer Due Diligence and Amendments to Form PF for Reporting Beneficial Ownership Information for the Private Funds Being Advised*

In the second alternative, FinCEN considered whether to limit the rule requirements to only certain reporting requirements among private fund advisers. In particular, the alternative rule would require private fund advisers to conduct risk-based customer due diligence and to report beneficial ownership information.

Under Alternative 2, investment advisers would incur compliance costs associated with the following requirements: (1) identifying beneficial ownership for new legal entity and PIV accounts and (2) developing a customer risk profile for legal entities. Investment advisers would be exempt from other requirements of the BSA, including developing and maintaining an AML/CFT program, filing SARs, and other recordkeeping requirements. Investment advisers that do not advise private funds would also be exempt from any requirement.

[405] *See* Risk Assessment, *supra* note 2, at 33.

[406] A survey of select State securities regulators found that for State-registered investment advisers they supervised, on average, less than 3 percent of their customers were non-U.S. persons.

Alternative 2 would limit both the covered population and the number of requirements, relative to the final rule. FinCEN estimates there are approximately 8,800 RIAs advising private funds, as well as all ERAs. Some RIAs and ERAs already have measures in place that would meet the requirements of Alternative 2.

FinCEN estimated the cost of Alternative 2 based on the same cost methodology as in section 3, in this case only for investment advisers that report private funds in Form ADV. As described in sections 3 and 5, FinCEN's cost analysis assumed that RIAs and ERAs with a *significant* or *moderate* number of AML/CFT measures would already meet the requirements of Alternative 2; those RIAs and ERAs would have zero cost burden under this alternative. Therefore, the costs are borne only by RIAs and ERAs with a *limited* number of AML/CFT measures in the baseline. FinCEN used Form ADV data for those advisers that advise private funds, and Table 6.3 summarizes the total costs of Alternative 2. For Alternative 2, there are no estimated Federal agency costs attributed to the CDD requirement.

Table 6.3. Total Estimated Burden of Alternative 2 by Entity Type, by Year ($ Millions, 2022)

Year	Registered Investment Advisers	Exempt Reporting Advisers	Customers	Total
2024	$29.0	$1.4	$24.0	$54.0
2025	$7.9	$1.1	$2.2	$11.0
2026	$8.2	$1.1	$2.4	$12.0
2027	$4.9	$1.0	$2.7	$8.6
2028	$5.3	$1.0	$2.9	$9.2
2029	$5.7	$1.0	$3.2	$9.9
2030	$6.1	$1.0	$3.5	$11.0
2031	$6.6	$1.0	$3.9	$11.0
2032	$7.1	$1.0	$4.2	$12.0
2033	$7.7	$1.0	$4.6	$13.0

FinCEN rejected this regulatory alternative in favor of the final regulation because, although it is a less costly rule, it is less likely to provide a similar level of benefits and thus would not achieve FinCEN's objectives in addressing the illicit finance risk for investment

advisers. The absence of mandatory SAR filing in this regulatory alternative would limit the potential benefits to law enforcement to investigate financial crimes and interagency cooperation on national security threats and their associated financial activity. Further, the lack of information sharing authorities would limit the ability of law enforcement and other agencies, as well as other financial institutions, to provide more specific information on illicit finance threats. This alternative would also not be sufficient for the U.S. to be in compliance with the international AML/CFT standards established by the FATF.

(c) *Comparison*

Table 6.4 reports the costs for each of the regulatory alternatives in comparison to the final regulation.

Table 6.4. Comparison of Costs of Regulatory Alternatives to the Final Rule ($ Millions, 2022) using a 2 percent Discount Rate

Year[1]	Alternative 1	Final Rule	Alternative 2
2024	$1,800	$990	$54.0
2025	$1,500	$790	$11.0
2026	$1,400	$770	$11.0
2027	$1,400	$740	$8.1
2028	$1,400	$720	$8.5
2029	$1,300	$710	$9.0
2030	$1,300	$700	$9.5
2031	$1,300	$680	$10.0
2032	$1,300	$670	$11.0
2033	$1,200	$660	$11.0
10-Year Undiscounted Cost	**$15,000**	**$8,100**	**$150.0**
10-Year Present Value	**$14,000**	**$7,400**	**$140.0**
Annualized Cost	**$1,500**	**$810**	**$16.0**

Table 6.5 provides a detailed summary of the costs and benefits associated with each regulatory alternative (annualized using a 2 percent discount rate over 10 years).

Table 6.5. Summary of Benefits and Costs of Regulatory Alternatives ($ Millions, 2022)

	Alternative 1	Final Rule	Alternative 2
Number of Covered Entities	36,982	19,919	13,628

Annualized Monetized Benefits (2%)	N/A	N/A	N/A
Unquantified Benefits	• Increase access for law enforcement to relevant information for complex financial crime investigations and asset forfeiture. • Enhance interagency understanding of priority national security threats and their associated financial activity. • Improve financial system transparency and integrity and align with international financial standards to strengthen the U.S. financial system from abuse by illicit actors.	• Increase access for law enforcement to relevant information for complex financial crime investigations and asset forfeiture. • Enhance the ability of law enforcement to identify and prosecute money laundering and other financial crimes. • Enhance interagency understanding of priority national security threats and their associated financial activity. • Enhance the ability of national security personnel to protect against priority national security threats. • Improve financial system transparency and integrity and align with international financial standards to strengthen the U.S. financial system from abuse by illicit actors.	• Improve financial system transparency and integrity for certain investment advisers.
Annualized Monetized Costs, millions (2%)	$1,500	$810	$16
Annualized monetized net benefits, millions (2%)	-$1,500	-$810	-$16
Change from the Final Rule	-$690	N/A	+$794

B. Final Regulatory Flexibility Analysis

The RFA[407] requires an agency either to provide a final regulatory flexibility analysis (FRFA) with a final rule or certify that the final rule would not have a significant economic impact on a substantial number of small entities. This section, VI.B, contains the FRFA prepared pursuant to the RFA.

1. Discussion of Comments to the Initial Regulatory Flexibility Analysis

Two commenters provided comments on the initial regulatory flexibility analysis. Both commenters objected to FinCEN's use of the SEC definition of small entity. One commenter noted that the definition was outdated, that most investment advisers are small businesses, and that FinCEN should use a different definition of small entity. The commenter noted that according to a recent report, approximately 92 percent of advisers reported having 100 or fewer non-clerical employees, and that the median number of employees was eight. The same commenter also requested that FinCEN delay the compliance date for an additional year for those investment advisers with less than 100 employees.

The second commenter, the Small Business Administration (SBA) Office of Advocacy, requested that FinCEN prepare a supplemental regulatory flexibility analysis that uses the SBA size standards to better assess the impact of the proposed rule on small entities. The SBA Office of Advocacy noted that the SBA size standards measure a firm's receipts, while the SEC size standards measures a firm's AUM, and that over 90 percent of investment advisers would be considered small entities using the SBA size standards. The SBA Office of Advocacy also requested that FinCEN consider other alternatives to reduce the impact on small entities, to include additional time for compliance, as well as to provide guidance to assist small entities in complying with the requirements of the rule.

As described in the IA AML NPRM, FinCEN determined to use the definition of "small business" or "small organization" under the Advisers Act rule adopted for purposes of the

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[407] 5 U.S.C. 601 *et seq.*

RFA, in lieu of using the SBA definition.[408] FinCEN continues to assess that using this standard is the most appropriate way to ensure regulatory harmonization and consistency in how the impacts of this and other AML/CFT regulations, including the IA CIP NPRM, are understood, providing the advisory industry with a uniform standard. Using the SEC standard also allows FinCEN to use information from Form ADV that is individualized to each investment adviser and updated annually. In contrast, information on business revenue is derived from the U.S. Economic Census, is not individualized, likely includes firms not covered by this rule, and is only updated every five years. Further, as noted in the IA AML NPRM, using a standard tied to AUM is consistent with how Congress (in the 2010 Dodd-Frank Act) and SEC regulations distinguish between small, mid-sized, and large investment advisers and how other regulatory requirements are applied to investment advisers.[409] In addition, FinCEN's use of the SEC's definition of small entity will have no material impact upon the application of this rule to the advisory industry. Given its intention to continue to use the SEC small entity standard, FinCEN also declines the SBA Office of Advocacy suggestion to issue a supplemental initial regulatory flexibility analysis.

Regarding alternatives that would lessen the impact on small entities, as described above, FinCEN has determined to exempt from the definition of "investment adviser" (and so from the scope of the final rule) mid-sized and multi-state advisers (among others). FinCEN has decided to exempt these entities in response to the concerns raised by SBA Office of Advocacy and other commenters, while also addressing the identified risk in the investment adviser sector and ensuring any exemption for smaller entities does not cause additional challenges in administering the AML/CFT requirements in the rule. These exemptions have

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[408] *See* 13 CFR 121.201.

[409] *See* SEC, *Rules Implementing Amendments to the Investment Advisers Act of 1940* (June 22, 2011) (implementing regulatory changes required by the Dodd-Frank Act)(. As described above, SEC registration is generally determined by AUM. *See supra* note 26. In addition, investment advisers filing Form PF are required to provide additional information if they have more than $1.5 billion in hedge fund assets under management or more than $2 billion in private equity fund assets under management. *See* Form PF Instructions on p. 2 and 3 at https://www.sec.gov/files/formpf.pdf.

reduced the number of small RIAs subject to the rule from 573 to 212, significantly reducing the impact of these small entities.

As noted above, FinCEN is not choosing to exempt advisers with fewer than 20 or 100 employees, as was suggested by two commenters.[410] To consider a threshold for application of AML/CFT requirements based on employee numbers alone would be inconsistent with Treasury's understanding of risk in the investment adviser sector. Regarding the suggestion to delay the compliance date for advisers with less than 100 employees, FinCEN declines to do so. FinCEN is concerned that applying a later compliance date for small advisers could incentivize illicit actors or others seeking to avoid compliance with AML/CFT measures to seek services from smaller advisers. In addition, as noted above, FinCEN is concerned that an employee threshold for application of the rule would lead to advisers hiring fewer compliance staff. FinCEN will consider if additional guidance targeted at small entities is necessary to facilitate compliance with the final rule.

2. Statement of the Need for, and Objectives of, the Final Rule

As described above in Sections II.C and III.A, FinCEN is finalizing this regulation to address identified illicit finance risks in the investment adviser industry. The final rule will apply AML/CFT program, recordkeeping, and reporting requirements to RIAs and ERAs.

3. Small Entities Affected by the Final Rule

FinCEN is defining the term small entity in accordance with the definition of "small business" or "small organization" under the Advisers Act rule adopted by the SEC for purposes of the RFA, in lieu of using the SBA's definition.[411]

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[410] *See supra* Section III.B.2.

[411] *See* 13 CFR 121.201. FinCEN consulted with the SBA Office of Advocacy in determining to use this definition. In their comments to the proposed rule, the SBA Office of Advocacy asserted that it is inappropriate for FinCEN to use the SEC's small entity definition for this rule and urged FinCEN to use the SBA size standard in its analysis to have a more accurate reflection of the impact of this rulemaking on small entities. While taking into account the SBA Office of Advocacy's comment, for the reasons described in this FRFA, FinCEN is relying on the SEC's small entity definition.

Relying on the SEC's definition, which it has adopted by regulation, has the benefit of ensuring consistency in the categorization of small entities for the SEC's purposes,[412] as well as providing the advisory industry with a uniform standard. Using the SEC standard also allows FinCEN to use the most current and precise data about investment advisers. Investment advisers must update Form ADV, including whether they qualify as a "small entity," at least annually. Because Form ADV information is individualized to each investment adviser, FinCEN can identify the specific entities qualifying as "small entities" under the SEC standard.

In contrast, information on business revenue is derived from the Economic Census, and the most recent Economic Census data reflect business information for 2017. These data are not individualized to specific firms and as detailed below, likely include other firms that are not covered by the final rule, requiring FinCEN to make additional assumptions. The data represent the average revenues of all firms, not just RIAs and ERAs, with less than $50 million in annual receipts rather than firms with AUM of less than $25 million. This is likely to be an underestimate because those firms that are required to register with the SEC tend to be larger and some of the firms reported in the SUSB, particularly State-registered investment advisers, would not be subject to the final rule. Given the data limitations, it is not feasible to directly estimate the average annual revenues of investment advisers that fall under the definition of "small entity" described above.

Further, using a standard tied to AUM is consistent with how Congress (in the 2010 Dodd-Frank Act) and SEC regulations distinguish between small, mid-sized, and large investment advisers and how other regulatory requirements are applied to investment advisers.[413] Using this standard would also be consistent with the standard applied by FinCEN

[412] As noted above, FinCEN is amending section 1010.810 to include investment advisers within the list of financial institutions that the SEC would examine for compliance with the BSA's implementing regulations.
[413] *See* SEC, *Rules Implementing Amendments to the Investment Advisers Act of 1940* (June 22, 2011). As described above, SEC registration is generally determined by AUM. *See supra* note 26. In addition, investment advisers filing Form PF are required to provide additional information if they have more than $1.5 billion in hedge fund assets under management or more than $2 billion in private equity fund assets under management. *See* Form PF Instructions on p. 2 and 3 at https://www.sec.gov/files/formpf.pdf.

in the 2015 NPRM and the SEC in recent rulemakings for investment advisers.[414] This is a well-known, common-sense understanding of investment adviser size based on AUM (*e.g.*, small advisers are those managing less than $25 million in customer assets). Further, FinCEN notes that over 80 percent of advisers covered by the final rule manage at least $110 million in customer assets and accordingly would not be understood to be small entities. In addition, FinCEN's use of the SEC's definition of small entity will have no material impact upon the application of the final rule to the advisory industry.

Under SEC rules under the Advisers Act, for the purposes of the RFA, an investment adviser generally is a small entity if it: (i) has, and reports on Form ADV, AUM of less than $25 million; (ii) has less than $5 million in total assets on the last day of its most recent fiscal year; and (iii) does not control, is not controlled by, and is not under common control with another investment adviser that has AUM of $25 million or more, or any person (other than a natural person) that had total assets of $5 million or more on the last day of its most recent fiscal year.[415]

As of July 31, 2023, there are 573 RIAs who meet the SEC definition of small entity. These RIAs, have on average, $5.3 million in AUM and 4 employees. As of July 24, 2024, there were 8,126 state-registered investment advisers who report $25 million or less in AUM and 5,041 that did not report AUM—these entities account for more than 75 percent of all state-registered investment advisers. As noted above in Table 6.1, state-registered investment advisers have, on average, $24.7 million in AUM and 3 employees. Those that report $25 million or less in AUM have, on average, $7.6 million in AUM and 1.3 employees.

Generally, only large advisers, having $110 million or more in AUM, are required to register with the SEC.[416] The final rule would not affect most investment advisers that are small

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[414] *See* 80 FR at 52695; *see also* SEC, *Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews*, Final Rule, Investment Advisers Act Release No. 6383 (Aug. 23, 2023) 88 FR 63206, 63381-3, (Sep. 14, 2023).
[415] 17 CFR 275.0–7(a).
[416] *See* 17 CFR 275.203A-1.

entities ("small advisers") because they are generally registered with one or more State securities authorities and not with the SEC, and as noted above, the final rule does not apply to state-registered investment advisers. Under section 203A of the Advisers Act, most small advisers are prohibited from registering with the SEC and therefore most small advisers are regulated by State regulators.[417] Therefore, these small advisers are unlikely to be required to register with the SEC absent a statutory change to the SEC registration requirements, and so are being excluded from the small entity population for this FRFA.

Based on FinCEN's initial regulatory flexibility analysis and public comments submitted on the proposed rule, for the final rule FinCEN has exempted several additional classes of investment advisers to reduce the regulatory burden on small advisers. First, the final rule additionally exempts RIAs that report $0 in AUM. Second, the final rule additionally exempts RIAs that register with the SEC (as indicated on their Form ADV) solely because the RIA is for one or more of the following:

- a Mid-Sized Adviser [Item 2.A.(2)]
- a Pension Consultant [Item 2.A.(7)]; or
- a Multi-State Adviser [Item 2.A.(10)]

No ERAs are exempt from the final rule.

Based on data as of July 31, 2023, there would be 212 small RIAs subject to the final rule.[418] ERAs are not required to report regulatory AUM on Form ADV; therefore, it is not feasible to determine whether they meet the conditions above. Based on information in the IA CIP NPRM, FinCEN estimates that, due to SEC registration thresholds, the only small ERAs that would be subject to the final rule would be those that maintain their principal office and place of business outside the United States.[419] Thus, FinCEN estimates there are 173 small

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[417] Based on Form ADV data as of July 31, 2023, *see supra* note 25. To determine the number of RIAs that were "small entities," Treasury reviewed responses to Items 5.F. and 12 of Form ADV.
[418] As noted above, the exemptions for certain RIAs in the final rule have reduced the number of small RIAs subject to the rule from 573 to 212.
[419] 89 FR 44571, 44592 & n.131 (May 21, 2024).

ERAs.[420] Therefore, approximately 385 investment advisers, or 1.9 percent of all investment advisers covered by the final rule, impacted by the final regulation are estimated to be small advisers. Assuming that all stated-registered investment advisers that reported $25 million or less in AUM and those that did not report AUM are small entities implies that approximately 13,430 or 36.3 percent of all investment advisers, including state-registered investment advisers, are small entities. However, the 385 small investment advisers noted above—the only small entities covered by the final rule—account for just 1.0 percent of all investment advisers (including state-registered investment advisers). Based on a review of Form ADV data between 2018 and 2023, FinCEN calculates that the overall population of investment advisers has grown by about 1.6 percent per year. The population of investment advisers that are not dually registered or affiliated with a bank or broker-dealer—the group that is most likely to be a small entity—has grown by about 2.5 percent per year. Assuming that the population of small entities were to grow at the same rate as all non-affiliated investment advisers suggests that the population of small investment advisers could increase from 385 to approximately 500 over 10 years from 2024 to 2033. Based on this figure, FinCEN estimates that the final rule will not impact a substantial number of small entities.

Regarding the economic impact on small advisers, Form ADV does not collect revenue information. Therefore, additional information on investment advisers was obtained from the U.S. Economic Census. The Economic Census, conducted every five years by the U.S. Census Bureau, is the U.S. Government's official measure of American businesses, representing most

[420] There are no direct data indicating which ERAs that maintain their principal office and place of business outside the United States are small entities because although ERAs are required to report in Part 1A, Schedule D the gross asset value of each private fund they manage, advisers with their principal office and place of business outside the United States may have additional AUM other than what they report in Schedule D. Therefore, to estimate how many of the ERAs that maintain their principal office and place of business outside the United States could be small entities, an analysis was conducted from a comparable data set: SEC-registered investment advisers. According to Form ADV data as of July 31, 2023, there are 67 small RIAs with their principal office and place of business outside the United States and 830 total RIAs with their principal office and place of business outside the United States (67 ÷ 830 = 8.1 percent). Based on Form ADV data, there are approximately 2,145 ERAs with their principal office and place of business outside the U.S. Applying the same percentage (8.1 percent) to ERAs, FinCEN estimates there are 173 ERAs that are small entities.

industries and geographic areas of the United States and Island Areas.[421] It provides information on business locations, employees, payroll, and revenues. The most recent Economic Census data reflect business information for 2017. These data are reported in the U.S. Census Bureau's annual Statistics of U.S. Businesses (SUSB).

Based on data from the 2017 SUSB, the average firm in NAICS 523930 had approximately $2.7 million in annual revenue adjusted for inflation to 2022 dollars using the GDP price deflator.[422] According to that data, approximately 99 percent of firms had less than $50 million in annual receipts, with average revenues of approximately $850,000 measured in 2022 dollars. Table B.1 reports the distribution of firms by firm revenue size.

Table B.1. Average Annual Receipts and Employment by Firm Size in 2017 for NAICS 523930

Firm Size (based on 2017 receipts)	Percent of Firms	Average Annual Receipts ($2022)	Average Employment
<$100,000	24.3%	$58,000	1
$100,000-$499,999	46.7%	$300,000	2
$500,000-$999,999	14.6%	$830,000	3
$1,000,000-$2,499,999	8.5%	$1,800,000	5
$2,500,000-$4,999,999	2.3%	$4,000,000	10
$5,000,000-$7,499,999	0.7%	$6,500,000	12
$7,500,000-$9,999,999	0.4%	$9,400,000	18
$10,000,000-$14,999,999	0.4%	$13,000,000	28
$15,000,000-$19,999,999	0.3%	$16,000,000	32
$20,000,000-$24,999,999	0.2%	$22,000,000	35

[421] U.S. Census Bureau, Economic Census, webpage, last updated on Aug. 31, 2023, https://www.census.gov/programs-surveys/economic-census.html.

[422] Data accessed at https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html.The NAICS code for this industry changed between 2017 and 2022. The U.S. Small Business Administration's size standard for this industry applies to the 2022 NAICS code 523940. The SUSB firm revenue size data use the 2017 NAICS code 523930.

$25,000,000-$29,999,999	0.1%	$26,000,000	50
$30,000,000-$34,999,999	0.1%	$33,000,000	65
$35,000,000-$39,999,999	0.1%	$19,000,000	62
$40,000,000-$49,999,999	0.1%	$41,000,000	47
$50,000,000-$74,999,999	0.2%	$38,000,000	82
$75,000,000-$99,999,999	0.1%	$18,000,000	53
$100,000,000+	1.0%	$180,000,000	245
All Firms <$50,000,000	**98.8%**	**$850,000**	**3**
All Firms $50,000,000+	**1.2%**	**$160,000,000**	**215**
Total	**100.0%**	**$2,700,000**	**5**

Importantly, as discussed above regarding the limitations with Economic Census data, the $850,000 figure is an imperfect proxy for the annual revenues of investment advisers subject to the final rule that meet the SEC's definition of a small entity.

As further detailed in the section below, using information from the SUSB for firms with revenues below $50 million, FinCEN estimates that the annualized cost burden of the final rule would be approximately 4.7 percent of revenues or 0.8 percent of AUM for a small investment adviser. FinCEN is unable to conclusively determine whether such a cost burden would be "significant" for purposes of the RFA, and so it is unable to certify that the final rule would not "have a significant economic impact on a substantial number of small entities." Therefore, FinCEN is conducting this FRFA.

4. Compliance Costs

To examine the potential impact of the final rule on small entities, FinCEN estimates the average compliance costs for a small firm and compares those costs to small firms' average annual revenues and AUM. As described above, 212 RIAs and 173 ERAs would be considered small entities under the SEC definition. All small firms affected by the final rule will bear

upfront costs to revise their internal policies, procedures, and controls to establish or update an existing AML/CFT program. Small firms that do not already have a *significant* or *moderate* number of AML/CFT measures in place would need to adopt additional measures, such as collecting additional information to develop a customer risk profile for new and existing clients and conducting ongoing CDD, filing SARs, acquiring AML/CFT software licenses, complying with other information collection requests, and general recordkeeping activities. To estimate these costs for small advisers, FinCEN relies on the methodology described in the Impact Analysis applied to the subset of small advisers and their relevant financial characteristics. Table B.2 reports the financial characteristics of small RIAs compared with all other RIAs impacted under the final rule based on information reported in their Form ADV filings.[423] Since information on small ERAs is not directly available, estimates of average AUM and number of legal entity clients for RIAs are also applied to ERAs to develop representative cost estimates for small advisers.

Table B.2: Characteristics of RIAs by Business Size

Characteristic	Small Entity RIAs	All Other RIAs
Avg. Assets Under Management	$5.3M	$8.6B
Avg. No. Employees	4	62
Percent that Advise Private Funds	34%	56%
Avg. No. Individual Clients	2,341	3,524
Avg. No. PIV Clients	0	7
Avg. No. Legal Entity Clients	1	179

Based on this information, the average cost of the final rule for a small investment adviser (*i.e.*, those managing up to $25 million in client assets) would be approximately $48,000 in the first year of the regulation and $39,000 in subsequent years. These costs vary slightly across the different categories of RIAs described in the Impact Analysis, with a small

[423] This information is reported in Table 3.7 of the Impact Analysis.

number of dual registrants likely to incur around $3,000 in compliance costs. Table B.3. reports the average costs per small entity by compliance activity in the first year and subsequent years of the final regulation.

Table B.3: Average Costs Per Small Entity (in 2022 dollars)[424]

Activity	Year 1	Years 2-10
AML/CFT Program	$26,000	$17,000
Customer Due Diligence	$1,300	$900
SAR Filings	$9,000	$9,000
Recordkeeping	$2,200	$2,200
314(a) Requests	$1,500	$1,500
Software Licensing	$7,700	$7,700
Section 311 Measures	$370	$370
Total	**$48,070**	**$39,070**

Therefore, the average annualized cost of the final rule for a small investment adviser over the first 10 years would be approximately $40,000. This suggests the annualized cost burden of the final rule would be approximately 4.7 percent of revenues or 0.8 percent of AUM for a small investment adviser when using information from the SUSB for firms with revenues below $50 million. However, this estimate assumes that less than 1 percent of small investment advisers have a *significant number of* AML/CFT measures in place and more than 60 percent have a *limited* number of AML/CFT measures in place and would have to develop a full AML/CFT program and initial and ongoing CDD measures. If the assumed distribution was overly pessimistic and more small investment advisers had a *significant* or *moderate* number of existing AML/CFT measures in place in the baseline, the average cost burden would be lower. Based on the lower bound estimate discussed in section 3, the average annualized cost of the final rule for a small investment adviser would be approximately $24,000, suggesting the average cost burden would be approximately 2.8 percent of revenues or 0.4 percent of AUM. If fewer small investment advisers had a *significant* or *moderate* number of existing AML/CFT

[424] *See supra* Section IV.A.5, supra, for details on how costs of the rule were calculated.

measures in place in the baseline, the average annualized cost of the final rule for a small investment adviser would be approximately $46,000, suggesting the average cost burden would be approximately 5.4 percent of revenues or 0.9 percent of AUM. Table B.4 reports the number of small entities, annualized cost, and compliance cost as a percentage of revenue and AUM for small advisers, broken down by adviser type.

Table B.4. Average Annualized Cost of the Final Rule for Small Entities

Investment Adviser Type	**Number of Small Entities**	**Average Annualized Cost**	**Compliance Cost as Percentage of Annual Revenue**	**Compliance Cost as Percentage of Assets Under Management or Total Gross Assets**
Dual Registrants	3	$3,000	<0.1%	<0.1%
Affiliated or Other Advisers with a *Moderate* Number of AML/CFT Measures	135	$30,000	3.6%	0.6%
Affiliated Advisers with a *Limited* Number of AML/CFT Measures	8	$49,000	5.8%	0.9%
Other Advisers with a *Limited* Number of AML/CFT Measures	239	$47,000	5.5%	0.9%
All Small Entities	**385**	**$40,000**	**4.7%**	**0.8%**

5. Duplicative, Overlapping, or Conflicting Federal Rules

As described above in section V.A.2, there are no Federal rules that directly and fully duplicate, overlap, or conflict with the final rule. While some investment advisers implement AML/CFT requirements because they are dually registered as broker-dealers, as a bank, or affiliated with a bank or broker-dealer, the majority of the investment adviser industry is not subject to any comprehensive AML/CFT requirements. FinCEN is aware that requirements within the Advisers Act and other Federal securities laws impose requirements upon investment advisers that in some instances are similar to the requirements within this rule and perform similar roles (*i.e.*, improving the integrity of the U.S. financial system and protecting customers). However, while these existing requirements may provide a supporting framework

for implementing certain obligations in the final rule, they do not impose the specific AML/CFT measures in the final rule.

6. Significant Alternatives That Reduce Burden on Small Entities

FinCEN considered the burden this approach would have on investment advisers subject to the final rule. FinCEN is mindful of the effect of new regulations on small businesses, given their critical role in the U.S. economy and the special consideration that Congress and successive administrations have mandated that Federal agencies should give to small business concerns. FinCEN considered an alternative scenario in the Impact Analysis above (Alternative 2) that would apply a much more limited information collection requirement to only those RIAs that advise private funds and ERAs. In this scenario, advisers to private funds would be required to conduct risk-based customer due diligence and to report beneficial ownership information.

Table B.5: Average Cost of Information Collection for Ongoing CDD

Activity	New Account Clerk		Total Hours	Total Cost per Customer
	% Time	Hourly Cost		
Develop a Customer Risk Profile for a Legal Entity	100%	$34.74	0.25	$8.68
Collect Beneficial Ownership Information for a Legal Entity	100%	$34.74	0.5	$17.37
Collect Beneficial Ownership Information for a Pooled Investment Vehicle	100%	$34.74	3.0	$104.22

Based on the cost information in the table above and the number of legal entity and PIV customers of small entity RIAs identified in Table 3.7 of the Impact Analysis, FinCEN estimates that the cost of this alternative for each small entity would be less than $1,000 on average.

Despite the significantly lower cost of this alternative, FinCEN determined that this alternative would not accomplish the objectives of the final rule. As noted above, the absence of a SAR filing requirement would limit the potential benefits to law enforcement to investigate financial crimes and the potential benefits to interagency cooperation on national security threats and their associated financial activity. Further, without being defined as financial institutions and thereby being able to receive and share information under sections 314(a) and 314(b), investment advisers would be unable to access useful information to help mitigate illicit finance risks.

As another alternative to reduce the burden on small entities, FinCEN considered limiting the applicability of the final rule to investment advisers with AUM above a certain threshold, as reported on Form ADV. Investment advisers with AUM below the threshold would be exempt from the requirements of the final rule.

FinCEN decided not to pursue this alternative because doing so would not apply a risk-based approach to the industry. AUM by itself, without considering the attributes of a particular customer (such as legal entity v. natural person, or U.S. v. foreign-located person), is not a useful indicator of potential risk.[425] Such an exemption could also create a subset of "smaller" investment advisers who may actually be *more* vulnerable to illicit finance because they can offer the same services as other advisers, but without any AML/CFT requirements. Electing instead to use a risk-based approach, for the final rule FinCEN has exempted RIAs that report $0 in AUM, or are mid-sized advisers, pension consultants, and multi-state advisers, as indicated by their reporting on Form ADV.

FinCEN also notes that the AML/CFT requirements in the final rule are designed to be risk-based and their cost is largely based on factors unrelated to AUM, such as the number of customers and transactions, along with the risk level of its advisory activities and customers. For instance, according to the 2020 GAO BSA Report, the two most costly requirements for

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[425] *See supra* note 98 and accompanying text.

banks as a percentage of total AML/CFT compliance costs were the customer due diligence and SAR filing requirements, accounting for approximately 60 percent of total costs.[426] The cost of other requirements in the final rule, such as employee training and designating an AML/CFT officer, are also likely to vary with the size of the business. The requirements of the final rule therefore have some inherent flexibility whereby small entities serving a smaller number of customers are likely to have lower costs.

C. Paperwork Reduction Act

The reporting requirements in the final rule have been approved by OMB in accordance with the Paperwork Reduction Act of 1995 (PRA) and assigned control number 1506-0081.[427] Under the PRA, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB. In accordance with requirements of the PRA, 44 U.S.C. 3506(c)(2), and its implementing regulations, 5 CFR part 1320, the following information concerns the collection of information as it relates to the final rule.

The PRA analysis included herein is for the sections of the final rule requiring RIAs and ERAs to (a) establish AML/CFT programs, to include risk-based procedures for conducting ongoing customer due diligence; (b) report suspicious activity and file CTRs; (c) maintain records of originator and beneficiary information for certain transactions; (d) apply information sharing provisions with the government and between financial institutions; and (e) implement special due diligence requirements for correspondent and private banking accounts and special measures under section 311 of the USA PATRIOT Act.

Reporting and Recordkeeping Requirements: The final rule would require RIAs and ERAs to develop and implement AML/CFT programs, file SARs and CTRs, record originator and beneficiary information for transactions, respond to section 314(a) requests, and implement

[426] 2020 GAO BSA Report, *supra* note 347, at 3.
[427] 44 U.S.C. 3506(c)(2).

special due diligence measures for correspondent and private banking accounts. The AML/CFT programs must be written (first year only), and updated, stored, and made available for inspection by FinCEN and the SEC. The AML/CFT program must also be approved by the investment adviser's board of directors or trustees.

OMB Control Numbers: 1506–0081.

Frequency: As required; varies depending on the requirement.

Description of Affected Public: investment advisers, as defined in the final rule.

Estimated Number of Respondents: 19,919 investment advisers. Of these, there are an estimated 14,073 SEC-registered investment advisers and 5,846 exempt reporting advisers. 1,275,990 clients of investment advisers in the first year and up to 250,544 new clients in each subsequent year, although this figure will vary from year to year.

Estimated Total Annual Reporting and Recordkeeping Burden: FinCEN estimates that during Year 1 the annual burden will be 6,851,861 hours for investment advisers and 478,496 hours for their clients. That burden will decrease after the first year because several information collection activities will only result in costs for these entities in Year 1. Specifically, investment advisers that do not already have a written AML/CFT program will have to develop one in the first year. In addition, entities that do not already conduct customer due diligence activities consistent with the requirements under the BSA will have to implement those information collection activities in the first year. FinCEN estimates that several of these costs will be incurred only in the first year of the regulation, but information collection activities related to understanding the nature and purpose of all existing customer accounts will likely be incurred over the first few years due to the large number of accounts—in this case, FinCEN assumes these costs will be spread over the first three years of the final rule.

Furthermore, FinCEN assesses that the information collection burden associated with customer due diligence will increase over time because the total number of clients is expected to grow each year. The number of clients and therefore the total costs associated with due

diligence measures are expected to grow over time. Thus, there will be stepwise decrease in burden hours in Year 2 and Year 4, but a gradual increase in burden hours in Year 3 and Years 5 through 10 due to growth in the number of clients. In Year 10, FinCEN estimates the annual burden of the final rule will be 4,883,961 hours for investment advisers and 93,954 hours for new clients, with no additional burden for existing clients.

Estimated Total Annual Reporting and Recordkeeping Cost: As described in section 3, FinCEN calculated a weighted fully loaded hourly labor cost based on the roles, hourly wage rates, and burden distribution of staff involved in each information collection activity. FinCEN estimates that during Year 1 the annual cost will be $409,508,089 for investment advisers and $23,526,799 for their clients. In Year 10, FinCEN estimates the total cost of the final rule will be $278,696,966 for investment advisers and $4,619,547 for their clients.

Table C.1 reports the total number of investment advisers, burden hours, and costs by information collection activity. Burden hours and costs are calculated by multiplying the number of entities by the hours/costs per entity for each information collection activity. Burden hours and costs are summarized for Year 1 and Year 10.

Table C.2 reports the total number of clients, burden hours, and costs by information collection activity. Burden hours and costs are calculated by multiplying the number of clients by the hours per entity. Burden hours and costs are summarized for Year 1 and Year 10.

Table C.3 reports the total cost of information collection by year.

Tables C.4 through C.10 report additional detail for each subset of entities, including information on the distribution of the information collection burden across different groups. These tables summarize the number of entities, burden hours per entity, total burden hours, average cost per entity, and total cost.

Table C.11 reports the total cost of information collection for the customers of investment advisers. This table summarizes the number of customers, burden hours per customer, total burden hours, average cost per customer, and total cost.

Table C.1. Total Burden and Cost for Investment Advisers (in 2022 dollars)

Number of Entities	Year 1		Year 10	
	19,919		19,919	
Information Collection	**Burden Hours**	**Cost**	**Burden Hours**	**Cost**
Develop AML/CFT Program	1,473,120	$100,984,944	0	$0
Maintain and Update Written AML/CFT Program	229,290	$15,718,229	12,276	$841,541
Store the Written AML/CFT Program	0	$0	1,023	$70,128
Produce Written AML/CFT Program Upon Request	0	$0	1,023	$70,128
Obtain Written Approval of AML/CFT Program	63,550	$10,957,379	24,552	$4,233,290
Customer Identification and Verification	586,003	$20,357,258	345,190	$11,991,599
SAR Case Review and Filing (1010.320)	2,908,926	$179,352,883	2,908,926	$179,352,883
CTR Recordkeeping and Reporting (1010.315)	0	$0	0	$0
Recordkeeping and Travel Requirements (1010.410(a) through (c) and 1010.410(f))	974,950	$43,038,556	974,950	$43,038,556
Information Sharing Arrangements (1010.510)	474,476	$28,991,953	474,476	$28,991,953
Special Due Diligence and Special Measures (1010.610 and 1010.620)	24,552	$2,958,186	24,552	$2,958,186
Section 311 Special Measures	116,994	$7,148,701	116,994	$7,148,701
TOTAL	**6,851,861**	**$409,508,089**	**4,883,961**	**$278,696,966**

Table C.2. Total Burden and Cost for Clients (in 2022 dollars)

Number of Entities	Year 1		Year 10	
	1,275,990		250,544	
Information Collection	**Burden Hours**	**Cost**	**Burden Hours**	**Cost**
Provide Customer Information	478,496	$23,526,799	93,954	$4,619,547
TOTAL	478,496	$23,526,799	93,954	$4,619,547

Table C.3. Total Information Collection Cost by Year (in 2022 dollars)

Year	Information Collection Burden (Hours)	Information Collection Cost ($M)
2024	7,330,357	$433.0
2025	5,337,243	$295.1
2026	5,357,427	$295.9
2027	4,793,526	$276.3
2028	4,817,728	$277.3
2029	4,844,228	$278.3
2030	4,873,247	$279.4
2031	4,905,022	$280.6
2032	4,939,816	$281.9
2033	4,977,915	$283.3
TOTAL	**52,176,509**	**$2,981.0**

Table C.4. Total Burden and Cost for Dual Registrants

Number of Entities	**420**							
Information Collection	**Year 1**				**Year 10**			
	Hours Per Entity	**Burden Hours**	**Cost Per Entity**	**Cost**	**Hours Per Entity**	**Burden Hours**	**Cost Per Entity**	**Cost**
Develop and Implement Written AML/CFT Program	0	0	$0	$0	0	0	$0	$0
Maintain and Update Written AML/CFT Program	30	12,600	$2,056.55	$863,752	0	0	$0	$0
Store the Written AML/CFT Program	0	0	$0	$0	0	0	$0	$0
Produce Written AML/CFT Program Upon Request	0	0	$0	$0	0	0	$0	$0
Obtain Written Approval of AML/CFT Program	0	0	$0	$0	0	0	$0	$0
Customer Identification, Verification, and Recordkeeping	0	0	$0	$0	0	0	$0	$0
SAR Case Review and Filing (1010.320)	0	0	$0	$0	0	0	$0	$0
CTR Recordkeeping and Reporting (1010.315)	0	0	$0	$0	0	0	$0	$0
Recordkeeping and Travel Requirements (1010.410(a) through (c) and 1010.410(f))	0	0	$0	$0	0	0	$0	$0
Information Sharing Arrangements (1010.510)	0	0	$0	$0	0	0	$0	$0
Special Due Diligence and Special Measures (1010.610 and 1010.620)	0	0	$0	$0	0	0	$0	$0
Section 311 Special Measures	0	0	$0	$0	0	0	$0	$0
TOTAL	**30.00**	**12,600**	**$2,056.55**	**$863,752**	**0**	**0**	**$0**	**$0**

Table C.5. Total Burden and Cost for Affiliated and Other RIAs

Number of Entities	**5,254**							
Information Collection	**Year 1**				**Year 10**			
	Hours Per Entity	**Burden Hours**	**Cost Per Entity**	**Cost**	**Hours Per Entity**	**Burden Hours**	**Cost Per Entity**	**Cost**
Develop and Implement Written AML/CFT Program	0	0	$0	$0	0	0	$0	$0
Maintain and Update Written AML/CFT Program	30	157,620	$2,056.55	$10,805,126	0	0	$0	$0
Store the Written AML/CFT Program	0.000	0	$0.00	$0	0	0	$0	$0
Produce Written AML/CFT Program Upon Request	0.000	0	$0.00	$0	0	0	$0	$0
Obtain Written Approval of AML/CFT Program	2	10,508	$344.84	$1,811,804	0	0	$0	$0
Customer Identification, Verification, and Recordkeeping	0	0	$0	$0	0	0	$0	$0
SAR Case Review and	149.18	783,809	$9,198.06	$48,326,583	149.18	783,809	$9,198.06	$48,326,583

Filing (1010.320)								
CTR Recordkeeping and Reporting (1010.315)	0	0	$0	$0	0	0	$0	$0
Recordkeeping and Travel Requirements (1010.410(a) through (c) and 1010.410(f))	50	262,700	$2,207.22	$11,596,727	50	262,700	$2,207.22	$11,596,727
Information Sharing Arrangements (1010.510)	24.33	127,847	$1,486.84	$7,811,873	24.33	127,847	$1,486.84	$7,811,873
Special Due Diligence and Special Measures (1010.610 and 1010.620)	0	0	$0	$0	0	0	$0	$0
Section 311 Special Measures	6	31,524	$366.62	$1,926,215	6	31,524	$366.62	$1,926,215
TOTAL	**261.52**	**1,374,009**	**$15,660.13**	**$82,278,328**	**229.52**	**1,205,881**	**$13,258.74**	**$69,661,399**

Table C.6. Total Burden and Cost for Affiliated RIAs with a *Limited* Number of AML/CFT Measures in Place

Number of Entities	521							
Information Collection	Year 1				Year 10			
	Hours Per Entity	Burden Hours	Cost Per Entity	Cost	Hours Per Entity	Burden Hours	Cost Per Entity	Cost
Develop Written AML/CFT Program	120	62,520	$8,226.21	$4,285,855	0	0	$0	$0
Maintain and Update Written AML/CFT Program	0	0	$0.00	$0	1	521	$68.55	$35,715
Store the Written AML/CFT Program	0	0	$0.00	$0	0.083	43	$5.71	$2,976
Produce Written AML/CFT Program Upon Request	0	0	$0.00	$0	0.083	43	$5.71	$2,976
Obtain Written Approval of AML/CFT Program	4	2,084	$689.69	$359,326	2	1,042	$344.84	$179,663
Customer Identification, Verification, and Recordkeeping	495.51	258,158	$17,213.44	$8,968,204	291.88	152,070	$10,139.71	$5,282,789
SAR Case Review and Filing (1010.320)	149.18	77,725	$9,198.06	$4,792,187	149.18	77,725	$9,198.06	$4,792,187
CTR Recordkeeping and Reporting (1010.315)	0	0	$0	$0	0	0	$0	$0
Recordkeeping and Travel Requirements (1010.410(a) through (c) and 1010.410(f))	50	26,050	$2,207.22	$1,149,961	50	26,050	$2,207.22	$1,149,961
Information Sharing Arrangements (1010.510)	24.33	12,678	$1,486.84	$774,645	24.33	12,678	$1,486.84	$774,645
Special Due Diligence and Special Measures (1010.610 and 1010.620)	2	1,042	$240.97	$125,547	2	1,042	$240.97	$125,547
Section 311 Special Measures	6	3,126	$366.62	$191,008	6	3,126	$366.62	$191,008
TOTAL	**851.02**	**443,383**	**$39,629.05**	**$20,646,733**	**526.56**	**274,340**	**$24,064.24**	**$12,537,469**

Table C.7. Total Burden and Cost for Other RIAs with a *Limited* Number of AML/CFT Measures in Place

Number of Entities	**7,922**							
Information Collection	**Year 1**				**Year 10**			
	Hours Per Entity	**Burden Hours**	**Cost Per Entity**	**Cost**	**Hours Per Entity**	**Burden Hours**	**Cost Per Entity**	**Cost**
Develop Written AML/CFT Program	120	950,640	$8,226.21	$65,168,029	0	0	$0	$0
Maintain and Update Written AML/CFT Program	0	0	$0	$0	1	7,922	$68.55	$543,067
Store the Written AML/CFT Program	0	0	$0	$0	0.083	660	$5.71	$45,256
Produce Written AML/CFT Program Upon Request	0	0	$0	$0	0.083	660	$5.71	$45,256
Obtain Written Approval of AML/CFT Program	4	31,688	$689.69	$5,463,689	2	15,844	$344.84	$2,731,844
Customer Identification, Verification, and Recordkeeping	41.13	325,867	$1,428.98	$11,320,354	24.23	191,955	$841.75	$6,668,341
SAR Case Review and Filing (1010.320)	149.18	1,181,830	$9,198.06	$72,866,995	149.18	1,181,830	$9,198.06	$72,866,995
CTR Recordkeeping and Reporting (1010.315)	0	0	$0	$0	0	0	$0	$0
Recordkeeping and Travel Requirements (1010.410(a) through (c) and 1010.410(f))	50	396,100	$2,207.22	$17,485,586	50	396,100	$2,207.22	$17,485,586
Information Sharing Arrangements (1010.510)	24.33	192,769	$1,486.84	$11,778,771	24.33	192,769	$1,486.84	$11,778,771
Special Due Diligence and Special Measures	2	15,844	$240.97	$1,908,989	2	15,844	$240.97	$1,908,989

(1010.610 and 1010.620)								
Section 311 Special Measures	6	47,532	$366.62	$2,904,354	6	47,532	$366.62	$2,904,354
TOTAL	**396.65**	**3,142,270**	**$23,844.58**	**$188,896,767**	**258.91**	**2,051,116**	**$14,766.28**	**$116,978,459**

Table C.8. Total Burden and Cost for Affiliated and Other ERAs

Number of Entities	1,969							
Information Collection	Year 1				Year 10			
	Hours Per Entity	Burden Hours	Cost Per Entity	Cost	Hours Per Entity	Burden Hours	Cost Per Entity	Cost
Develop Written AML/CFT Program	0	0	$0	$0	0	0	$0	$0
Maintain and Update Written AML/CFT Program	30	59,070	$2,056.55	$4,049,351	0	0	$0	$0
Store the Written AML/CFT Program	0	0	$0	$0	0	0	$0	$0
Produce Written AML/CFT Program Upon Request	0	0	$0	$0	0	0	$0	$0
Obtain Written Approval of AML/CFT Program	2	3,938	$344.84	$678,995	0	0	$0	$0
Customer Identification, Verification, and Recordkeeping	0	0	$0	$0	0	0	$0	$0
SAR Case Review and Filing (1010.320)	149.18	293,742	$9,198.06	$18,110,971	149.18	293,742	$9,198.06	$18,110,971
CTR Recordkeeping and Reporting (1010.315)	0	0	$0	$0	0	0	$0	$0
Recordkeeping and Travel Requirements (1010.410(a) through (c) and 1010.410(f))	50	98,450	$2,207.22	$4,346,013	50	98,450	$2,207.22	$4,346,013
Information Sharing Arrangements (1010.510)	24.33	47,912	$1,486.84	$2,927,594	24.33	47,912	$1,486.84	$2,927,594
Special Due Diligence and Special Measures (1010.610 and 1010.620)	0	0	$0	$0	0	0	$0	$0
Section 311 Special Measures	6	11,814	$366.62	$721,872	6	11,814	$366.62	$721,872
TOTAL	**261.52**	**514,926**	**$15,660.13**	**$30,834,798**	**229.52**	**451,918**	**$13,258.74**	**$26,106,451**

Table C.9. Total Burden and Cost for Affiliated ERAs with a *Limited* Number of AML/CFT Measures in Place

Number of Entities	**72**							
Information Collection	**Year 1**				**Year 10**			
	Hours Per Entity	**Burden Hours**	**Cost Per Entity**	**Cost**	**Hours Per Entity**	**Burden Hours**	**Cost Per Entity**	**Cost**
Develop Written AML/CFT Program	120	8,640	$8,226.21	$592,287	0	0	$0	$0
Maintain and Update Written AML/CFT Program	0	0	$0	$0	1	72	$68.55	$4,936
Store the Written AML/CFT Program	0	0	$0	$0	0.083	6	$5.71	$411
Produce Written AML/CFT Program Upon Request	0	0	$0	$0	0.083	6	$5.71	$411
Obtain Written Approval of AML/CFT Program	4	288	$689.69	$49,657	2	144	$344.84	$24,829
Customer Identification, Verification, and Recordkeeping	5.27	379	$182.96	$13,173	3.10	223	$107.78	$7,760
SAR Case Review and Filing (1010.320)	149.18	10,741	$9,198.06	$662,260	149.18	10,741	$9,198.06	$662,260
CTR Recordkeeping and Reporting (1010.315)	0	0	$0	$0	0	0	$0	$0
Recordkeeping and Travel Requirements (1010.410(a) through (c) and 1010.410(f))	50	3,600	$2,207.22	$158,920	50	3,600	$2,207.22	$158,920
Information Sharing Arrangements (1010.510)	24.33	1,752	$1,486.84	$107,053	24.33	1,752	$1,486.84	$107,053
Special Due Diligence and Special Measures (1010.610 and 1010.620)	2	144	$240.97	$17,350	2	144	$240.97	$17,350
Section 311 Special Measures	6	432	$366.62	$26,397	6	432	$366.62	$26,397
TOTAL	**360.78**	**25,976**	**$22,598.57**	**$1,627,097**	**237.79**	**17,121**	**$14,032.31**	**$1,010,326**

Table C.10. Total Burden and Cost for Other RIAs with a *Limited* Number of AML/CFT Measures in Place

Number of Entities	**3,761**	
Information Collection	**Year 1**	**Year 10**

	Hours Per Entity	Burden Hours	Cost Per Entity	Cost	Hours Per Entity	Burden Hours	Cost Per Entity	Cost
Develop Written AML/CFT Program	120	451,320	$8,226.21	$30,938,773	0	0	$0	$0
Maintain and Update Written AML/CFT Program	0	0	$0	$0	1	3,761	$68.55	$257,823
Store the Written AML/CFT Program	0	0	$0	$0	0.083	313	$5.71	$21,485
Produce Written AML/CFT Program Upon Request	0	0	$0	$0	0.083	313	$5.71	$21,485
Obtain Written Approval of AML/CFT Program	4	15,044	$689.69	$2,593,907	2	7,522	$344.84	$1,296,954
Customer Identification, Verification, and Recordkeeping	0.42	1,598	$14.76	$55,527	0.25	942	$8.70	$32,709
SAR Case Review and Filing (1010.320)	149.18	561,079	$9,198.06	$34,593,887	149.18	561,079	$9,198.06	$34,593,887
CTR Recordkeeping and Reporting (1010.315)	0	0	$0	$0	0	0	$0	$0
Recordkeeping and Travel Requirements (1010.410(a) through (c) and 1010.410(f))	50	188,050	$2,207.22	$8,301,349	50	188,050	$2,207.22	$8,301,349
Information Sharing Arrangements (1010.510)	24.33	91,518	$1,486.84	$5,592,017	24.33	91,518	$1,486.84	$5,592,017
Special Due Diligence and Special Measures (1010.610 and 1010.620)	2	7,522	$240.97	$906,300	2	7,522	$240.97	$906,300
Section 311 Special Measures	6	22,566	$366.62	$1,378,853	6	22,566	$366.62	$1,378,853
TOTAL	**355.94**	**1,338,697**	**$22,430.37**	**$84,360,613**	**234.93**	**883,586**	**$13,933.23**	**$52,402,862**

Table C.11. Total Burden and Cost for Clients

Number of Entities	Year 1	Year 10

	1,275,990				250,544			
Information Collection	**Hours Per Entity**	**Burden Hours**	**Cost Per Entity**	**Cost**	**Hours Per Entity**	**Burden Hours**	**Cost Per Entity**	**Cost**
Provide Customer Information	0.375	478,496	$18.44	$23,526,799	0.375	93,954	$18.44	$4,619,547
Total	**0.375**	**478,496**	**$18.44**	**$23,526,799**	**0.375**	**93,954**	**$18.44**	**$4,619,547**

D. Unfunded Mandates Reform Act

UMRA (section 202(a)) requires Federal agencies to prepare a written statement, which includes an assessment of anticipated costs and benefits, before issuing "any rule that includes any Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year." The current threshold after adjustment for inflation is $177 million, using the 2022 GDP price deflator.[428] The final rule would result in an expenditure in at least one year that meets or exceeds this amount.

The total annualized cost of the final rule is estimated to be approximately $980 million to the private sector in the first year. The annualized cost of the final rule after the first year is estimated to be approximately $710 million to the private sector. The final rule does not foreseeably impose costs or other compliance burden that would impact any State, local, or Tribal government. FinCEN believes that the Impact Analysis provides the analysis required by UMRA.

E. Congressional Review Act

Pursuant to the Congressional Review Act (CRA), OMB's Office of Information and Regulatory Affairs has determined that this rule meets the requirements of 5 U.S.C. 804(2).

List of Subjects

31 CFR Part 1010

Administrative practice and procedure, Anti-money laundering, Banks, Banking, Brokers, Brokerage, Investment advisers, Money laundering, Mutual funds, Reporting and recordkeeping requirements, Securities, Suspicious transactions, Terrorist financing.

31 CFR Part 1032

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[428] U.S. Bureau of Economic Analysis, National Income and Product Accounts Tables, Table 1.1.9. Implicit Price Deflators for Gross Domestic Product.

Administrative practice and procedure, Anti-money laundering, Banks, Banking, Brokers, Brokerage, Investment advisers, Money laundering, Mutual funds, Reporting and recordkeeping requirements, Securities, Small business, Suspicious transactions, Terrorist financing.

For the reason set forth in the preamble, FinCEN amends 31 CFR chapter X as follows:

PART 1010—GENERAL PROVISIONS

1. The authority citation for part 1010 continues to read as follows: Authority: 12 U.S.C. 1829b and 1951–1959; 31 U.S.C. 5311–5314 and 5316–5336; title III, sec. 314, Pub. L. 107–56, 115 Stat. 307; sec. 701, Pub. L. 114–74, 129 Stat. 599; sec. 6403, Pub. L. 116–283, 134 Stat. 3388.

2. Section 1010.100 is amended by:

a. Removing the word ‘‘or’’ at the end of paragraph (t)(9);

b. Removing the period at the end of paragraph (t)(10), and adding in its place ‘‘; or’’; and

c. Adding paragraphs (t)(11) and (nnn).

The additions read as follows:

§ 1010.100 General definitions.

* * * * *

(t) * * *

(11) An investment adviser.

* * * * *

(nnn) *Investment adviser*. (1) Any person, other than a person identified in (ii), wherever located, who is registered or required to register with the SEC under section 203 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3(a)), or any person who is exempt from SEC registration under section 203(l) or 203(m) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3(l), (m)).

(2) For the purposes of this subpart, investment adviser does not include:

(i) any person who is registered or required to register with the SEC under section 203 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3(a)) only because such person is an investment adviser that meets the conditions of (a) mid-sized adviser, as set forth in Section 203A(a)(2)(B) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3a(a)(2)(B)), (b) a pension consultant, as defined under 17 CFR 275-203A-2(a), or (c) multi-state adviser, as defined under 17 CFR 275-203A-2(d).

(ii) any person who is registered or required to register with the SEC under section 203 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3(a)) and does not report any assets under management, as defined under Section 203A(a)(3) of the Act (15 U.S.C. 80b-3a(a)(3)), on its most recently filed initial Form ADV or annual updating amendment to Form ADV (17 CFR 279.1).

3. Section 1010.410 is amended by:

a. Removing the word ''or'' at the end of paragraph (e)(6)(i)(I);

b. Removing the word ''and'' at the end of paragraph (e)(6)(i)(J) and adding in its place ''or''; and

c. Adding paragraph (e)(6)(i)(K).

The addition reads as follows:

§ 1010.410 Records to be made and retained by financial institutions.

* * * * *

(e) * * *

(6) * * *

(i) * * *

(K) An investment adviser; and

* * * * *

4. Section 1010.605 is amended by:

a. Removing the word ''and'' at the end of paragraph (c)(2)(iii);

b. Removing the period at the end of paragraph (c)(2)(iv) and adding in its place ‘‘; and’’;

c. Adding paragraph (c)(2)(v);

d. Removing the word ‘‘and’’ at the end of paragraph (e)(1)(iii);

e. Adding the word ‘‘and’’ at the end of paragraph (e)(1)(iv); and

f. Adding paragraph (e)(1)(v).

The additions read as follows:

§ 1010.605 Definitions.

* * * * *

(c) * * *

(2) * * *

(v) As applied to investment advisers (as set forth in paragraph (e)(1)(v) of this section) means any contractual or other business relationship established between a person and an investment adviser to provide advisory services.

* * * * *

(e) * * *

(1) * * *

(v) An investment adviser except that an investment adviser shall not be considered a covered financial institution for the purposes of § 1010.230.

* * * * *

5. Section 1010.810 is amended by revising paragraph (b)(6) to read as follows:

§ 1010.810 Enforcement.

* * * * *

(b) * * *

(6) To the Securities and Exchange Commission with respect to brokers and dealers in securities, investment advisers, and investment companies as that term is defined in the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.);

* * * * *

6. Add part 1032 to read as follows:

PART 1032— RULES FOR INVESTMENT ADVISERS

Sec.
Subpart A—General Provisions
1032.100 Definitions.
1032.110 Foreign-located investment adviser.
1032.111 Scope of application to foreign-located investment advisers.
1032.112 Severability

Subpart B—Programs
1032.200 General.
1032.210 Anti-money laundering/countering the financing of terrorism programs for investment advisers.
1032.220 [Reserved]

Subpart C—Reports Required To Be Made by Investment Advisers
§ 1032.300 General.
§ 1032.310 Reports of transactions in currency.
§ 1032.311 Filing obligations.
§ 1032.312 Identification required.
§ 1032.313 Aggregation.
§ 1032.314 Structured transactions.
§ 1032.315 Exemptions.
§ 1032.320 Reports by investment advisers of suspicious transactions.

Subpart D—Records Required To Be Maintained by Investment Advisers
§ 1032.400 General.
§ 1032.410 Recordkeeping.

Subpart E—Special Information-Sharing Procedures To Deter Money Laundering and Terrorist Activity
§ 1032.500 General.
§ 1032.520 Special information-sharing procedures to deter money laundering and terrorist activity for investment advisers.
§ 1032.530 [Reserved]
§ 1032.540 Voluntary information-sharing among financial institutions.

Subpart F—Special Standards of Diligence, and Special Measures for Investment Advisers
§ 1032.600 General.
§ 1032.610 Due diligence programs for correspondent accounts for foreign financial institutions.
§ 1032.620 Due diligence programs for private banking accounts.

Authority: 12 U.S.C. 1829b and 1951-1959; 31 U.S.C. 5311-5314 and 5316-5336; title III, sec. 314, Pub. L. 107-56, 115 Stat. 307.

Subpart A—General Provisions

§ 1032.100 Definitions.

Refer to § 1010.100 of this chapter for general definitions not noted in this part.

§ 1032.110 Foreign-located investment adviser.

A foreign-located investment adviser is an investment adviser whose principal office and place of business is outside the United States.

§ 1032.111 Scope of application to foreign-located investment advisers.

(a) The requirements of this part 1032 apply to a foreign-located investment adviser only with respect to its advisory activities that:

(1) Take place within the United States, including through involvement of U.S. personnel of the investment adviser, such as the involvement of an agency, branch, or office within the United States, or

(2) Provide advisory services to a U.S. person or a foreign-located private fund with an investor that is a U.S. person.

(3) For purposes of this § 1032.111,

(i) "Foreign-located private fund" means any foreign-located issuer that is a private fund as that term is defined under 15 U.S.C. 80b-2(a)(29);

(ii) "Investor" means any investor as that term is defined at 17 CFR 275.202(a)(30)-1(c)(2); and

(iii) "U.S. person" means any U.S. person as that term is defined in 17 CFR 230.902(k).

(b) For avoidance of doubt, upon request, a foreign-located investment adviser shall make records and reports required under this part, and any other records it has retained regarding the scope of its activities covered by this part, available for inspection by FinCEN or the Securities and Exchange Commission.

§ 1032.112 Severability

If any provision of this part, or any provision of §§ 1010.100, 1010.410, 1010.605, or 1010.810 of this chapter referencing investment advisers, is held to be invalid, or the application thereof to any person or circumstance is held to be invalid, such invalidity shall not affect other

provisions, or application of such provisions to other persons or circumstances, that can be given effect without the invalid provision or application.

Subpart B—Programs

§ 1032.200 General.

Investment advisers are subject to the program requirements set forth and cross-referenced in this subpart. Investment advisers should also refer to subpart B of part 1010 of this chapter for program requirements contained in that subpart that apply to investment advisers.

§ 1032.210 Anti-money laundering/countering the financing of terrorism programs for investment advisers.

(a) *Anti-money laundering/countering the financing of terrorism program requirements for investment advisers*. (1) Each investment adviser shall develop and implement a written anti-money laundering/countering the financing of terrorism (AML/CFT) program that is risk-based and reasonably designed to prevent the investment adviser from being used for money laundering, terrorist financing, or other illicit finance activities and to achieve and monitor compliance with the applicable provisions of the Bank Secrecy Act (as defined in 31 CFR 1010.100(e)) and the implementing regulations promulgated thereunder by the Department of the Treasury. The investment adviser may deem the requirements in this subpart satisfied for any:

(i) Mutual fund (as defined in 31 CFR 1010.100(gg)),

(ii) Collective investment fund that is subject to the requirements of 12 CFR 9.18 (or other applicable law that incorporates the requirements of 12 CFR 9.18), or

(iii) Any other investment adviser (as defined in 31 CFR 1010.100(nnn)), provided that such mutual fund, collective investment fund, or other investment adviser is advised by the investment adviser and subject to an AML/CFT program requirement under this chapter.

(2) Each investment adviser's AML/CFT program must be approved in writing by its board of directors or trustees, or if it does not have one, by its sole proprietor, general partner, trustee, or other persons that have functions similar to a board of directors. An investment

adviser shall make its anti-money laundering/countering the financing of terrorism program available for inspection by FinCEN or the Securities and Exchange Commission.

(b) *Minimum requirements*. The AML/CFT program shall at a minimum:

(1) Establish and implement internal policies, procedures, and controls reasonably designed to prevent the investment adviser from being used for money laundering, terrorist financing, or other illicit finance activities and to achieve compliance with the applicable provisions of the Bank Secrecy Act and implementing regulations in this chapter;

(2) Provide for independent testing for compliance to be conducted by the investment adviser's personnel or by a qualified outside party;

(3) Designate a person or persons responsible for implementing and monitoring the operations and internal controls of the program;

(4) Provide ongoing training for appropriate persons; and

(5) Implement appropriate risk-based procedures for conducting ongoing customer due diligence, to include, but not be limited to:

(i) Understanding the nature and purpose of customer relationships for the purpose of developing a customer risk profile; and

(ii) Conducting ongoing monitoring to identify and report suspicious transactions and, on a risk basis, to maintain and update customer information.

(c) *Effective date*. An investment adviser must develop and implement an AML/CFT program that complies with the requirements of this section on or before January 1, 2026.

§ 1032.220 [Reserved]

Subpart C—Reports Required To Be Made by Investment Advisers

§ 1032.300 General.

(a) Investment advisers are subject to the reporting requirements set forth and cross-referenced in this subpart. Investment advisers should also refer to subpart C of part 1010 of this chapter for reporting requirements contained in that subpart that apply to investment advisers.

The investment adviser may deem the requirements in this subpart satisfied for any: (i) mutual fund (as defined in 31 CFR 1010.100(gg)), (ii) collective investment fund that is subject to the requirements of 12 CFR 9.18 (or other applicable law that incorporates the requirements of 12 CFR 9.18), or (iii) any other investment adviser (as defined in 31 CFR 1010.100(nnn)), provided that such mutual fund, collective investment fund, or other investment adviser is advised by the investment adviser and subject to reporting requirements under this chapter.

§ 1032.310 Reports of transactions in currency.

The reports of transactions in currency requirements for investment advisers are located in subpart C of part 1010 of this chapter and this subpart.

§ 1032.311 Filing obligations.

Refer to § 1010.311 of this chapter for reports of transactions in currency filing obligations for investment advisers.

§ 1032.312 Identification required.

Refer to § 1010.312 of this chapter for identification requirements for reports of transactions in currency filed by investment advisers.

§ 1032.313 Aggregation.

Refer to § 1010.313 of this chapter for reports of transactions in currency aggregation requirements for investment advisers.

§ 1032.314 Structured transactions.

Refer to § 1010.314 of this chapter for rules regarding structured transactions for investment advisers.

§ 1032.315 Exemptions.

Refer to § 1010.315 of this chapter for exemptions from the obligation to file reports of transactions in currency for investment advisers.

§ 1032.320 Reports by investment advisers of suspicious transactions.

(a) *General*. (1) Every investment adviser shall file with FinCEN, to the extent and in the manner required by this section, a report of any suspicious transaction relevant to a possible violation of law or regulation. An investment adviser may also file with FinCEN a report of any suspicious transaction that it believes is relevant to the possible violation of any law or regulation, but whose reporting is not required by this section. Filing a report of a suspicious transaction does not relieve an investment adviser from the responsibility of complying with any other reporting requirements imposed by the Advisers Act or the Securities and Exchange Commission.

(2) A transaction requires reporting under this section if it is conducted or attempted by, at, or through an investment adviser; it involves or aggregates funds or other assets of at least $5,000; and the investment adviser knows, suspects, or has reason to suspect that the transaction (or a pattern of transactions of which the transaction is a part):

(i) Involves funds derived from illegal activity or is intended or conducted in order to hide or disguise funds or assets derived from illegal activity (including, without limitation, the ownership, nature, source, location, or control of such funds or assets) as part of a plan to violate or evade any Federal law or regulation or to avoid any transaction reporting requirement under Federal law or regulation;

(ii) Is designed, whether through structuring or other means, to evade any requirements of this chapter or any other regulations promulgated under the Bank Secrecy Act;

(iii) Has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the investment adviser knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction; or

(iv) Involves use of the investment adviser to facilitate criminal activity.

(3) More than one investment adviser may have an obligation to report the same transaction under this section, and other financial institutions may have separate obligations to

report suspicious activity with respect to the same transaction pursuant to other provisions of this chapter. In those instances, no more than one report is required to be filed by the investment adviser(s) and other financial institution(s) involved in the transaction, provided that the report filed contains all relevant facts, including the name of each financial institution and the words ‘‘joint filing’’ in the narrative section, and each institution maintains a copy of the report filed, along with any supporting documentation.

(b) *Filing and notification procedures*—(1) *What to file*. A suspicious transaction shall be reported by completing a Suspicious Activity Report (‘‘SAR’’) and collecting and maintaining supporting documentation as required by paragraph (c) of this section.

(2) *Where to file*. The SAR shall be filed with FinCEN in accordance with the instructions to the SAR.

(3) *When to file*. A SAR shall be filed no later than 30 calendar days after the date of the initial detection by the reporting investment adviser of facts that may constitute a basis for filing a SAR under this section. If no suspect is identified on the date of such initial detection, an investment adviser may delay filing a SAR for an additional 30 calendar days to identify a suspect, but in no case shall reporting be delayed more than 60 calendar days after the date of such initial detection.

(4) *Mandatory notification to law enforcement*. In situations involving violations that require immediate attention, such as suspected terrorist financing or ongoing money laundering schemes, an investment adviser shall immediately notify by telephone an appropriate law enforcement authority in addition to filing timely a SAR.

(5) *Voluntary notification to the Financial Crimes Enforcement Network or the Securities and Exchange Commission*. Investment advisers wishing to voluntarily report suspicious transactions that may relate to terrorist activity may call the Financial Crimes Enforcement Network's Financial Institutions Hotline at 1–866–556–3974 in addition to filing timely a SAR if

required by this section. The investment adviser may also, but is not required to, contact the Securities and Exchange Commission to report in such situations.

(c) *Retention of records*. An investment adviser shall maintain a copy of any SAR filed by the investment adviser or on its behalf (including joint reports), and the original (or business record equivalent) of any supporting documentation concerning any SAR that it files (or that is filed on its behalf) for a period of five years from the date of filing the SAR. Supporting documentation shall be identified as such and maintained by the investment adviser, and shall be deemed to have been filed with the SAR. An investment adviser shall make all supporting documentation available to FinCEN or any Federal, State, or local law enforcement agency, or any Federal regulatory authority that examines the investment adviser for compliance with the Bank Secrecy Act, upon request.

(d) *Confidentiality of SARs*. A SAR, and any information that would reveal the existence of a SAR, are confidential and shall not be disclosed except as authorized in this paragraph (d). For purposes of this paragraph (d) only, a SAR shall include any suspicious activity report filed with FinCEN pursuant to any regulation in this chapter.

(1) *Prohibition on disclosures by investment advisers*—(i) *General rule*. No investment adviser, and no current or former director, officer, employee, or agent of any investment adviser, shall disclose a SAR or any information that would reveal the existence of a SAR. Any investment adviser, and any current or former director, officer, employee, or agent of any investment adviser that is subpoenaed or otherwise requested to disclose a SAR or any information that would reveal the existence of a SAR shall decline to produce the SAR or such information, citing this section and 31 U.S.C. 5318(g)(2)(A)(i), and shall notify FinCEN of any such request and the response thereto.

(ii) *Rules of construction*. Provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported, this paragraph (d)(1) shall not be construed as prohibiting:

(A) The disclosure by an investment adviser, or any current or former director, officer, employee, or agent of an investment adviser of:

(*1*) A SAR, or any information that would reveal the existence of a SAR, to FinCEN or any Federal, State, or local law enforcement agency, or any Federal regulatory authority that examines the investment adviser for compliance with the Bank Secrecy Act; or

(*2*) The underlying facts, transactions, and documents upon which a SAR is based, including but not limited to, disclosures:

(*i*) To another financial institution, or any current or former director, officer, employee, or agent of a financial institution, for the preparation of a joint SAR; or

(*ii*) In connection with certain employment references or termination notices, to the full extent authorized in 31 U.S.C. 5318(g)(2)(B); or

(B) The sharing by an investment adviser, or any current or former director, officer, employee, or agent of the investment adviser, of a SAR, or any information that would reveal the existence of a SAR, within the investment adviser's corporate organizational structure for purposes consistent with Title II of the Bank Secrecy Act as determined by regulation or in guidance.

(2) *Prohibition on disclosures by government authorities*. A Federal, State, local, territorial, or Tribal government authority, or any current or former director, officer, employee, or agent of any of the foregoing, shall not disclose a SAR, or any information that would reveal the existence of a SAR, except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act. For purposes of this section, ''official duties'' shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, in response to a request for disclosure of non-public information or a request for use in a private legal proceeding, including a request pursuant to 31 CFR 1.11.

(e) *Limitation on liability*. An investment adviser, and any current or former director, officer, employee, or agent of any investment adviser, that makes a voluntary disclosure of any

possible violation of law or regulation to a government agency or makes a disclosure pursuant to this section or any other authority, including a disclosure made jointly with another institution, shall be protected from liability to any person for any such disclosure, or for failure to provide notice of such disclosure to any person identified in the disclosure, or both, to the full extent provided by 31 U.S.C. 5318(g)(3).

(f) *Compliance*. Investment advisers shall be examined by FinCEN or its delegates for compliance with this section. Failure to satisfy the requirements of this section may be a violation of the Bank Secrecy Act and of this chapter.

Subpart D—Records Required To Be Maintained by Investment Advisers

§ 1032.400 General.

Investment advisers are subject to the recordkeeping requirements set forth and cross referenced in this subpart. Investment advisers should also refer to subpart D of part 1010 of this chapter for recordkeeping requirements contained in that subpart which apply to investment advisers. The investment adviser may deem the requirements in this subpart satisfied for any: (i) mutual fund (as defined in 31 CFR 1010.100(gg)), (ii) collective investment fund that is subject to the requirements of 12 CFR 9.18 (or other applicable law that incorporates the requirements of 12 CFR 9.18), or (iii) any other investment adviser (as defined in 31 CFR 1010.100(nnn)), provided that such mutual fund, collective investment fund, or other investment adviser is advised by the investment adviser and subject to recordkeeping requirements under this chapter.

§ 1032.410 Recordkeeping.

For regulations regarding recordkeeping, refer to § 1010.410 of this chapter.

Subpart E—Special Information-Sharing Procedures To Deter Money Laundering and Terrorist Activity

§ 1032.500 General.

Investment advisers are subject to the special information-sharing procedures to deter money laundering and terrorist activity requirements set forth and cross-referenced in this

subpart. Investment advisers should also refer to subpart E of part 1010 of this chapter for special information-sharing procedures to deter money laundering and terrorist activity contained in that subpart which apply to investment advisers. The investment adviser may deem the requirements in this subpart satisfied for any: (i) mutual fund (as defined in 31 CFR 1010.100(gg)), (ii) collective investment fund that is subject to the requirements of 12 CFR 9.18 (or other applicable law that incorporates the requirements of 12 CFR 9.18), or (iii) any other investment adviser (as defined in 31 CFR 1010.100(nnn)), provided that such mutual fund, collective investment fund, or other investment adviser is advised by the investment adviser and subject to special information sharing procedures under this chapter.

§ 1032.520 Special information-sharing procedures to deter money laundering and terrorist activity for investment advisers.

For regulations regarding special information-sharing procedures to deter money laundering and terrorist activity for investment advisers, refer to § 1010.520 of this chapter.

§ 1032.530 [Reserved]

§ 1032.540 Voluntary information-sharing among financial institutions.

For regulations regarding voluntary information-sharing among financial institutions, refer to § 1010.540 of this chapter.

Subpart F—Special Standards of Diligence, and Special Measures for Investment Advisers

§ 1032.600 General.

Investment advisers are subject to the special standards of diligence, prohibitions, and special measures requirements set forth and cross referenced in this subpart. Investment advisers should also refer to subpart F of part 1010 of this chapter for special standards of diligence, prohibitions, and special measures contained in that subpart, all of which apply to investment advisers. The investment adviser may deem the requirements in this subpart satisfied for any: (i) mutual fund (as defined in 31 CFR 1010.100(gg)), (ii) collective investment fund that is subject to the requirements of 12 CFR 9.18 (or other applicable law that incorporates the requirements of

12 CFR 9.18), or (iii) any other investment adviser (as defined in 31 CFR 1010.100(nnn)), provided that such mutual fund, collective investment fund, or other investment adviser is advised by the investment adviser and subject to special standards of diligence and special measures under this chapter.

§ 1032.610 Due diligence programs for correspondent accounts for foreign financial institutions.

For regulations regarding due diligence programs for correspondent accounts for foreign financial institutions, refer to § 1010.610 of this chapter.

§ 1032.620 Due diligence programs for private banking accounts.

For regulations regarding due diligence programs for private banking accounts, refer to § 1010.620 of this chapter.

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