April 15, 2024

VIA ELECTRONIC SUBMISSION

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

Re: **Notice of Proposed Rulemaking on Anti-Money Laundering/Countering the Financing of Terrorism Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers and Exempt Reporting Advisers, Docket Number FINCEN-2024-0006, RIN 1506-AB58**

The American Investment Council ("AIC")[1] appreciates the opportunity to submit comments to the Financial Crimes Enforcement Network ("FinCEN") regarding its notice of proposed rulemaking (the "Proposed Rule")[2] to establish anti-money laundering ("AML")/countering the financing of terrorism ("CFT") program and suspicious activity report ("SAR") filing requirements for registered investment advisers ("RIAs") and exempt reporting advisers ("ERAs," and, together with RIAs, "Covered IAs").[3]

We support FinCEN's attention to national security concerns and efforts to safeguard the U.S. financial system from illicit use. AIC members take seriously their obligations to comply with applicable sanctions requirements and to combat money laundering and terrorist financing. As such, we respectfully request that FinCEN clarify certain issues and address the operational challenges to ensure that Covered IA's have clear standards and/or guidelines to help Covered IAs comply with the requirements of: (1) establishing and maintaining an AML/CFT program, (2) identifying and reporting suspicious activities that trigger SAR filings, and (3) determining how best to create and

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

[2] Anti-Money Laundering/Countering the Financing of Terrorism Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers and Exempt Reporting Advisers, 89 Fed. Reg. 12108 (proposed Feb. 15, 2024).

[3] AIC's membership includes a diverse array of Covered IAs. Many of AIC's members are or are affiliated with Covered IAs that advise private and registered funds, pursue a range of different investment strategies involving equity, credit, real estate, strategic opportunities, and other investment strategies, and involve diversified business models. The focus of this comment letter is advisers to private funds, and therefore a subset of "Covered IAs" as defined by the Proposed Rule.

preserve records sufficient to satisfy any new recordkeeping requirements. To best serve FinCEN's policy goals without imposing undue burdens, any final rule should create clear rules of the road and risk-based requirements that reflect the reduced AML/CFT risks of Covered IAs, which do not take cash or process financial transactions like other covered financial institutions. Indeed, Covered IAs tend to be involved in only a narrow set of financial transactions that appear to be of interest to FinCEN: capital flows between a Covered IA's fund client (the investment fund they provide advisory services to) and the client's underlying investors and capital flows out of the Covered IA's client fund in connection with its investment activity.

Given the limited nature of Covered IAs' involvement in financial transactions, Covered IAs are not well situated to be the point of the spear for AML compliance, and the costs the Proposed Rule will impose on Covered IAs seem disproportionate to the potential incremental benefit. Accordingly, we respectfully submit that the requirements of the final rule should recognize these realities and impose compliance obligations that are appropriately tailored to the reduced AML/CFT risks Covered IAs face.

Below, we highlight specific areas that would benefit from further clarification, as well as technical comments on the Proposed Rule. We stand ready to assist FinCEN in developing a final rule to meet these important AML/CFT objectives.[4]

I. Executive Summary.

We summarize here AIC's comments on the Proposed Rule. In Section II, we explain why we believe, consistent with past assessments by the Treasury Department, that private equity and private credit funds present a low risk of money laundering and terrorist financing. In Section III, we offer detailed comments on specific provisions of the Proposed Rule, which we believe require clarification and revision to align with the risks presented and to ensure that compliance obligations imposed are appropriately tailored for private funds and their advisers. We focus on several components of the Proposed Rule:

- **Scope of a Covered IA's AML/CFT Program.** AIC requests FinCEN clarify how Covered IAs in low risk scenarios may meet their AML/CFT program requirements and requests express recognition, including in the examination and enforcement context, of low risk scenarios. We also seek clarification of the treatment of subadvised, intermediated and other relationships.

[4] We note that a proposed customer identification program ("CIP") rule for investment advisers appears imminent, as evidenced by FinCEN sending a proposed rule to the Office of Management and Budget. *See* FinCEN, "Investment Adviser Customer Identification Program Requirements for Registered Investment Advisers and Exempt Reporting Advisers Notice of Proposed Rulemaking," RIN: 1506-AB66 (April 5, 2024). Because of the inter-relationship between this rulemaking and the CIP rule, AIC respectfully requests FinCEN allow further comments on this Proposed Rule after the CIP rule proposal is published.

- **SAR Requirements.** AIC urges FinCEN clarify the Suspicious Activity Reporting ("SAR") obligations in the private fund context. In particular, as proposed, it is unclear how the "by, at, or through" language that triggers SAR filing obligations applies in the context private funds. AIC also requests that FinCEN clarify that, where a fund or fund administrator is organized or based outside of the United States, a U.S. SAR filing is not warranted.

- **Delegation.** AIC respectfully requests that FinCEN acknowledge and clarify that administrators (including those based offshore) may be relied upon and further clarify how various compliance obligations may be met by the use of administrators.

- **Scope of Definitions/Duties.** AIC requests that FinCEN clarify various definitions and requirements. Among other things, AIC believes that requirements applicable to "private banking accounts" and "correspondent accounts" are inapposite in the private fund context, as advisers and sponsors of private funds do not maintain such accounts. AIC also urges FinCEN to provide clarification or issue guidance on the implementation of the Bank Secrecy Act's ("BSA") Recordkeeping and Travel Rules in the private fund context.

- **Extra-Territorial Application.** AIC believes that it would be helpful for FinCEN to more precisely identify the territorial reach of the Proposed Rule as confined to Covered IAs organized and operating in the U.S. or to foreign-based or foreign-organized Covered IAs only to the extent they are operating in the U.S.

- **Implementation Period.** AIC requests FinCEN consider a longer implementation period of at least 18 months to provide Covered IAs with adequate time to modify existing policies, procedures and processes necessary that comply with the final rule's requirements.

II. Industry Background and Illicit Risks.

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

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

Second, private capital commitments to funds are typically based on extensive negotiations with prospective limited partners. Those negotiations already involve

careful, extended due diligence by fund sponsors with frequent in-person, telephonic, and virtual contact, making licit private funds particularly unattractive for bad actors due to the scrutiny they receive during the fundraising process. In addition, as part of that diligence, private funds conduct sanctions screening on fund investors, as they are obligated to do under applicable sanctions requirements.[5]

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

Fourth, moneys received from private fund investors are almost exclusively wired from and returned to regulated financial institutions, including U.S. banks, which are already subject to AML/CFT regulations. Thus, other financial institutions currently serve as an additional gatekeeper, providing additional certainty that private equity and private credit funds do not accept money from illicit actors.

Fifth, many Covered IAs already engage and work closely with entities that are themselves highly regulated and subject to AML/CFT requirements under the BSA and other laws and regulations. For example, some investor funds pass through affiliated broker dealers during capital calls or distributions. Additionally, many funds administered by Covered IAs enter into credit agreements (including, for instance, subscription line lending agreements) with regulated banks that themselves screen the fund's investors for sanctions and AML/CFT purposes; these lenders act as yet another gatekeeper in addition to diligence already performed by the fund, its custodial bank, and its investors' respective banks. Therefore, many limited partners are already subject on a regular basis to the types of scrutiny that FinCEN hopes to obtain with the Proposed Rule, and imposing duplicative obligations on Covered IAs could come at a significant cost but provide little to no incremental benefit.

Sixth, for a variety of reasons, many Covered IAs and their affiliates already maintain robust records of the types of transactions that would be captured by FinCEN's Proposed Rule. For example, many Covered IAs are already subject to Securities and Exchange Commission ("SEC") and/or broker-dealer requirements to maintain

[5] Therefore, to the extent that FinCEN is concerned about Russian oligarch investments, which it cites, those investments would be rejected or blocked and reported under applicable sanctions compliance requirements.

transaction records related to financial transactions between Covered IAs' clients and those clients' investors.

These factors led to past assessments by the Treasury Department that "closed-end funds do not appear to present a risk of money laundering that would be effectively addressed by subjecting them to additional regulation."[6] In first considering AML programs for private funds, FinCEN recognized these factors and specifically proposed to exclude from AML/CFT requirements private funds that had long-term hold periods.[7] AIC appreciates FinCEN repeating this point in the proposed rulemaking, noting that "due to their long-term investment focus and illiquid nature, certain private equity funds may be less likely to be used by money launderers, terrorist financiers, and other engaging in illicit finance,"[8] and suggests that the final rule should appropriately reflect this reality. To that end, the language in the Proposed Rule's preamble, which states that private funds may be "an attractive entry point for illicit proceeds," is at odds with the long-held view that the industry does not present a serious risk of money laundering.

We recognize and appreciate that the incidents cited by FinCEN involving private funds "have featured investment advisers complicit in illegal activity."[9] But such rare examples are not reflective of the conduct of the entire industry and, we struggle to identify ways in which the incidents cited by FinCEN would have been avoided under the Proposed Rule. For example, FinCEN cites to the illicit investment of proceeds of the IMDB scandal to suggest that private advisers could have unearthed the true source of wealth had they been subject to the Proposed Rule, but that argument ignores that those illicit investment proceeds were not introduced into the U.S. economy solely through an investment in a private fund, but necessarily must have been routed through one or more banks required to conduct their own AML/CFT diligence. It is not clear how a Covered IA subject to a similar rule would have been better positioned to unearth fraudulent activity that the other institutions in the flow of that investment were unable to identify. Similarly, FinCEN cites the attempted laundering of proceeds from embezzlement, fraud and bribery in Venezuela through the U.S. as a reason to institute the Proposed Rule, but that situation is even more attenuated. Indeed, FinCEN acknowledges as much by conceding that "the adviser was complicit in the fraudulent scheme,"[10] and therefore already in willful violation of many existing laws. Nevertheless, FinCEN asserts that a client could direct an "unwitting investment adviser to create a private fund to

---

6 Treasury, A Report to Congress in Accordance with [Section] 356(c) of the USA Patriot Act (Dec. 31, 2002), *available* at https://home.treasury.gov/system/files/136/archive-documents/po3721b2.pdf.

7 Anti-Money Laundering Programs for Unregistered Investment Companies, 67 Fed, Reg. 60617, 60619 (proposed Sept. 26, 2002) (stating that "investment company" would include only those companies that give an investor a right to redeem any portion of his or her ownership interest within two years after that interest was purchased). *See also,* 67 Fed. Reg. at 60618 (stating that an "overly expansive definition" would "unnecessarily burden businesses not likely to be used to launder money" while also diverting agency resources that would diminish the overall effectiveness of oversight).

8 89 Fed. Reg. at 12126.

9 89 Fed. Reg. at 12115.

10 89 Fed. Reg. at 12115.

specifications that facilitate money laundering" and the investment adviser might not "have any obligation to evaluate such risks" if it is not required to have an AML/CFT program.[11] As outlined above, though, this is not correct as investment advisers owe duties to their fund clients, and the risk of being complicit in such schemes would be exactly the type of liability risk Covered IAs look to avoid even without the Proposed Rule in effect. Lastly, FinCEN cites situations where "wealthy Russians [were] seeking to obscure their ownership of U.S. assets" after Russia invaded Ukraine.[12] But, as FinCEN acknowledges, those investments were mostly made at a time when those Russian persons were not the subject of economic sanctions and there was nothing illegal about their investments in U.S. assets. And despite not being formally subject to an AML/CFT regime, Covered IAs swiftly and comprehensively worked after Russia's invasion of Ukraine to freeze newly-sanctioned oligarchs that had lawfully invested in their investment funds and to report such actions to the U.S. Treasury and equivalent regulators abroad. In any event, nothing in the Proposed Rule would necessarily address the AML/CFT risks posed by change in law like the one at issue with respect to Russia's invasion of Ukraine.

All told, while we again support the underlying policy objectives of the proposal, we are concerned that FinCEN has not made clear how the Proposed Rule would serve to lessen the AML/CFT risks the Proposed Rule is attempting to address. It is not clear to AIC that the Proposed Rule will unearth new information (e.g., the IMDB example), eradicate the complicity of illegitimate Covered IAs (*e.g.*, the Venezuela example), or presciently allow Covered IAs to predict future AML risks (e.g., Russian oligarchs).

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

[11] 89 Fed. Reg. at 12115.
[12] 89 Fed. Reg. at 12115.

possible. Such an approach is warranted for both sound policy reasons and to ensure that the costs of any regulation do not exceed the benefits.

III. Comments on the Proposed Rule

A. Scope of a Covered IA's AML/CFT Program.

Appropriate Tailoring for Relevant Funds. In the Proposed Rule, FinCEN acknowledges the varying risk profiles presented by Covered IAs and their advisory activities. Accordingly, FinCEN proposes Covered IAs tailor their AML/CFT programs to the specific risks presented by their various activities, and allows certain long-term investment vehicles to be treated as low risk.

We support FinCEN's determination to permit Covered IAs to take a risk-based approach. In light of the risk factors cited above, FinCEN could provide clarity on how Covered IA's in low risk scenarios such as those that (1) any investment fund that, in the ordinary course, restricts its investors from redeeming any part of their ownership interests in the fund within two years after that interest was initially purchased; and (2) an investment adviser that advises only such funds; may meet their AML/CFT program requirements when their risks are already significantly limited.

We recommend that the Proposed Rule expressly recognize that the SEC should not prioritize examination or enforcement activities with respect to Covered IAs 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 un-affiliated U.S.-regulated financial institutions. Instead, we recommend that FinCEN make clear that Covered IAs with a domestic focus will be selected for examination by the SEC only if additional risk factors (*e.g.*, unusual transactions flagged by the banks) are present. The purported risks identified in the Proposed Rule are all international risks and Covered IAs whose work does not extend beyond the United States should not be required to incur costs where the risk is so limited.

Further, AIC notes that through the due diligence required during fund formation, fund general partners become familiar with a Covered IA's AML/CFT program. To the extent that additional AML/CFT requirements would apply to Covered IAs in this space, AIC recommends that FinCEN expressly permit a Covered IA's AML/CFT program to allow the Covered IA to contractually rely on diligence conducted by another covered financial institution or, perhaps even other non-covered financial institutions or entities that are working at the behest of and under the control and supervision of the Covered IA.

Subadvisory Relationships. AIC recommends that FinCEN consider excluding subadvisory activities from the scope of a Covered IA's AML/CFT program. The preamble to the Proposed Rule provides that "[b]ecause subadvisory services are a

subcategory of advisory services, the [P]roposed [R]ule would apply to investment advisers who provide subadvisory services."[13]

As FinCEN recognizes, subadvisory services do not involve a direct relationship with the underlying client or fund. Rather, the primary adviser manages the client's assets directly. Therefore, subadvisers usually do not have insights into the underlying client or fund and have very limited ability to assess the associated AML/CFT risks. Accordingly, the primary adviser is better positioned to implement effective AML/CFT controls. AIC believes that imposing this requirement on a subadviser would be overly burdensome, costly, duplicative and ultimately ineffective.

Intermediary Relationships. To the extent that funds 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. For example, FinCEN should make clear that when a fund receives an investment from a regulated intermediary (whether that intermediary is a fund-of-funds or a financial institution), the fund and the fund sponsor may reasonably rely on the AML/CFT diligence conducted by the intermediary on underlying investors. In these contexts, so long as the adviser has representations that the intermediary has conducted its own diligence on underlying parties, the adviser should not be required to duplicate such sufficient efforts. Such duplication would serve no purpose.

Existing Requirements. Many Covered IAs and their affiliates already maintain significant records of the types of transactions that would be captured by FinCEN's Proposed Rule. To avoid duplication and prevent the expenditure of unnecessary resources, FinCEN should expressly recognize that Covered IAs are already subject to significant recordkeeping obligations and the intention of the AML/CFT program requirement is not to require Covered IAs to create additional records outside of those that are created in the ordinary course.

B. SAR Requirements.

The Proposed Rule would require Covered IAs to report any suspicious transaction (or pattern of transactions) conducted "by, at, or through" the Covered IA involving at least $5,000 in funds or other assets that the Covered IA knows, suspects or has reason to suspect meets certain requirements.[14] AIC urges FinCEN to clarify the applicability of SAR reporting obligations in the private fund context.

As an initial matter, it is unclear how the "by, at, or through" language applies to private funds. In the typical private equity and private credit fund context, investors transact with a fund, and Covered IAs never take title or custody of investor assets. In

[13] 89 Fed. Reg. at 12124.
[14] 89 Fed. Reg. at 12191.

most instances, the fund's administrator, not the Covered IA, processes subscriptions and redemptions for investors sending money to, or receiving money from, the fund. Thus, no activity would be "by, at or through" a Covered IA to trigger any SAR requirement.

Further, absent explicit guidance from FinCEN, it is not clear how Covered IAs could realistically be required to identify "suspicious" activity beyond the addition of an investor to a restricted party list. As a general matter, investors are typically screened prior to their admission into the fund and then subject to re-screening prior to certain events (*e.g.*, capital calls and capital distributions). These screenings generally include, at a minimum, confirmation that the investor is not on a restricted party list. Covered IAs often use third-party tools to run daily or weekly screens against these restricted party lists. Additional diligence, including public media reviews, may be conducted during the initial screening prior to admission for investors and on a periodic basis for certain investors. This type of review is primarily designed to prevent funds from collecting capital calls or paying distributions to restricted parties in violation of the law but may also result in a fund declining to accept an investor.

Without express guidance from FinCEN on the type and frequency of diligence required and the types of activities or conditions that might be considered "suspicious" it is not realistic or appropriate for the burden of uncovering suspicious activities to fall on Covered IAs. As noted above, investing in a fund is a long-term investment. A fund may go months (or longer) without any capital calls or distributions. Investors are not entitled to "withdraw" or "deposit" outside of the fund making a capital call or distribution. Given the relatively infrequent interactions between Covered IAs and investors, the indirect relationship between the two, and the number of investors in each fund, it is not clear what activities FinCEN would consider suspicious in this context and it is not realistic or appropriate to ask Covered IAs to screen every investor every day against other third-party sources (e.g., news aggregators) to detect activity that may or may not be relevant by the time the next distribution is made. While AIC is committed to FinCEN's goal of protecting national security and preventing money laundering, we request additional guidance on what specifically FinCEN is looking for with this proposed requirement and how Covered IAs can satisfy the requirement.

In many instances (for tax and other business reasons), furthermore, a fund may be organized (and the fund's administrator may be based) outside of the United States, even if the fund's adviser or sponsor are U.S.-based. In these cases, applicable transactions may not touch the United States, and the fund/fund administrator typically may have SAR-type filing obligations in the fund/fund administrator's home country. In these cases, FinCEN should clarify that a U.S. SAR filing is not warranted. In this context, U.S. SAR filing obligations may raise a number of complex issues, including: (1) a potential conflict of laws with the requirements of a fund's home jurisdiction; (2) data privacy restrictions on the sharing of information across borders; and (3) the lack of a U.S. nexus for a U.S. SAR filing.

The Proposed Rule would also require that a Covered IA "evaluate customer activity and relationships for money laundering, terrorist financing, and other illicit finance risks and design a suspicious transaction monitoring program that is appropriate for the particular [Covered IA] in light of such risks."[15] It is wrong to think of investors as "customers" of the Covered IA. Private fund sponsors typically have contractual relationships exclusively with the funds they advise, not the investors, i.e., limited partners, in those funds. FinCEN should consider the structure of these relationships in adopting suspicious activity monitoring and other requirements.

We further request that FinCEN clarify that a Covered IA's transaction monitoring systems need not be automated, as such systems would be costly to implement and may not be appropriate in this context given the limited transactional activity of private funds.

Finally, we support the safe harbor from liability for SAR filings and appreciate the application of this safe harbor to Covered IAs' SAR filing activities.

C. Delegation.

In the preamble to the Proposed Rule, FinCEN acknowledges that many Covered IAs delegate AML compliance for private funds to fund administrators, and many administrators may be located outside of the United States. FinCEN seems, however, to take a negative view on these offshore administrators and service providers and cites past issues with the AML framework in the Cayman Islands.[16]

Administrators, including offshore administrators, often play a key role in implementing a private equity or credit fund's AML controls. The vast majority of offshore administrators are subject to equivalent and in many cases more exacting AML requirements imposed by other jurisdictions and are familiar with what is needed to execute a successful AML program. Limited prior issues involving offshore administrators have been largely addressed. For example, the Cayman Islands, in particular, have made material changes to their AML regime since 2019 when prior deficiencies were cited. Specifically, the Cayman Islands have amended their regulations to require financial institutions to apply enhanced due diligence in certain instances and implemented a new National AML/CFT Strategy. There is no current evidence that funds using offshore administrators pose heightened AML/CFT risks or that illicit finance activities have resulted from reliance on the services of such administrators.

We respectfully request FinCEN acknowledge and clarify that administrators (including offshore administrators) may be relied upon and further clarify how various compliance obligations can be met by the use of administrators. For example, if SAR obligations are imposed on private equity and credit funds, it is not clear whether an

---

15 89 Fed. Reg. at 12131 (emphasis added).

16 89 Fed. Reg. at 12114.

administrator (including an offshore administrator) may file a SAR on behalf of the fund. As noted above, only the administrator may have knowledge of the investor's transactions with the fund and, consequently, only the administrator may be positioned to help meet the SAR monitoring and reporting requirements. Secondarily, when SARs are filed, FinCEN should clarify that an administrator (including an offshore administrator) may maintain the appropriate records. Correspondingly, FinCEN should further clarify that the administrator may be able to receive and respond to requests under Section 314(a) of the PATRIOT Act as responding to such requests may not be possible without the administrator's assistance and records.

D. Scope of Definitions/Duties.

Private Banking Account/Correspondent Account. The Proposed Rule would require Covered IAs to maintain due diligence programs for foreign "private banking accounts" and "correspondent accounts" for foreign financial institutions. This proposed requirement would include policies, procedures and controls that are reasonably designed to detect and report any known or suspected money laundering or suspicious activity conducted through or involving such accounts.

FinCEN should clarify that these requirements do not apply in the private fund context. Private fund sponsors, as noted above, have contractual relationships with the funds they advise and not the investors in those funds. Advisers to or sponsors of private funds do not maintain private banking accounts or correspondent banking accounts for foreign financial institutions. Instead, they pool capital received from investors who hold their own accounts, often at banks, and these accounts are not managed by the fund.

314(a) Requirements. We urge FinCEN to clarify the scope of information covered by section 314(a) requests for Covered IAs. Under 314(a), Covered IAs would be required to share information related to persons suspected of terrorist acts or other criminal activities. Unlike banks and broker-dealers that are currently subject to the information-sharing requirements of sections 314(a), private fund advisers may not maintain information on investors (which information instead resides with an administrator or other service provider). Accordingly, AIC requests that FinCEN clarify whether a Covered IA may share a 314(a) request with such a service provider (including when the service provider is based abroad).

Additionally, the names of certain indirect investors may not be known to a Covered IA as the investor may come into the fund via a feeder fund. These feeder funds often consist of clients of reputable financial institutions, such as well-known banks, that are already required to respond to Section 314(a) requests. Requiring Covered IAs to respond to bi-weekly Section 314(a) requests, therefore, is duplicative and imposes a significant administrative burden on Covered IAs without a corresponding benefit.

It is possible that Covered IAs will be required to obtain some of the information FinCEN requests under section 314(a) after the revised Customer Due Diligence ("CDD") Rule is implemented. As noted in the Proposed Rule, FinCEN is required to revise the CDD Rule no later than January 1, 2025 and the revised CDD Rule may "have a significant impact on financial institutions' CDD obligations."[17] Given that the revised CDD Rule has not yet been published, AIC respectfully suggests that it is too early to require final comments related to whether Covered IAs should be required to respond to section 314(a) requests. AIC would instead request that interested parties be given a chance to provide additional comments once the revised CDD Rule is published and interested parties have the benefit of complete context.

Recordkeeping and Travel Rule. We urge FinCEN to provide clarification or issue guidance on the implementation of the BSA's Recordkeeping and Travel Rules in the private fund context. As a general matter, Covered IAs do not receive funds from, or send funds to, investors and do not hold investors' funds. A Covered IA's client – the fund – may receive or send funds to investors as part of a capital call or distribution but the funds themselves are not "financial institutions" in the traditional sense and would not typically be expected to have the types of records FinCEN expects of banks and other traditional financial institutions.

To the extent the purpose of this requirement is to indirectly reach the records kept by the funds of their transactions with investors, these transactions are typically sent or received from the fund via a bank or other covered financial institution that is already required to meet these obligations. Additionally, Covered IAs rarely send investor funds to third parties and, again, banks or other covered financial institutions are involved in any such fund transfers. Given this, the government already has access to information related to the transmittal of funds for capital calls or distributions as collected by the transmitting or receiving bank. If FinCEN wants Covered IAs or their fund clients to send more information to the banks involved in these transfers so the banks can more readily provide information to the government and comply with their recordkeeping and reporting obligations, that is not clear from the Proposed Rule.

Given the above, if compliance is required, we urge FinCEN to provide guidance for private funds to implement these requirements. Specifically, we request FinCEN confirm that it is not asking or requiring Covered IAs to create or share records outside of the ordinary course and not asking Covered IAs to collect or capture information not otherwise required by the Covered IA's AML/CFT program.

E. Extra-Territorial Application.

AIC is concerned that the potential extra-territorial application of the Proposed Rule is both a departure from practice in other regulatory regimes, which could engender confusion, and could implicate complex conflict of laws issues arise if a Covered IA

[17] 89 Fed. Reg. at 12129.

outside the U.S. is potentially required to comply with both the Proposed Rule and some foreign law. Accordingly, AIC believes that it would be helpful for FinCEN to more precisely identify the territorial reach of the Proposed Rule as confined to Covered IAs organized and operating in the U.S. or to foreign-based or foreign-organized Covered IAs only to the extent they are operating in the U.S. Such a limitation would be consistent with other FinCEN regulations[18] and help mitigate the risk of complicated and complex conflicts with law issues.

Moreover, it would be helpful to receive from FinCEN more clarity on how foreign Covered IAs can satisfy the requirement that the "duty to establish, maintain, and enforce [a Covered IA's 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 appropriate Federal functional regulator." For example, it would be helpful if FinCEN could explicitly acknowledge that a foreign Covered IA could accomplish that requirement through retention of a U.S.-based contractor or administrator or through other means (e.g., through a written acknowledgement).

F. Implementation Period.

We appreciate FinCEN's consideration of its prior request for an implementation period of at least one year after the publication of any final rule, especially given the broad scope of the Proposed Rule and the significant resources (such as the hiring of staff and, in some cases, adoption of new technology and systems) that will be required for implementation. We believe, however, that a longer implementation period of at least 18 months should be considered. This longer period would allow Covered IAs the time needed to modify existing policies, procedures, and processes to comply with the final rule's requirements.

* * *

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

Respectfully submitted,

/s/ Rebekah Goshorn Jurata

Rebekah Goshorn Jurata
General Counsel
American Investment Council

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