EVERSHEDS SUTHERLAND

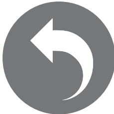
Horizon Scanner
Financial Crime - US developments

September 2024

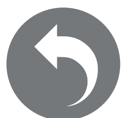
Immediate impact

Short term impact

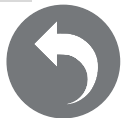
On the horizon



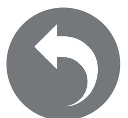
Legal issue/risk	When?	What's next?	Supporting information
Tri-Seal Compliance Note issued regarding obligations of foreign-based persons to comply with U.S. sanctions and export control laws On March 6, 2024, the U.S. Department of Commerce, Department of the Treasury, and Department of Justice jointly issued a tri-seal compliance note addressing foreign-based persons' obligations to comply with U.S. sanctions and export control laws." The Tri-Seal Compliance Note identified typical violations by non-U.S. persons, including: • Obscuring or omitting reference to the involvement of a sanctioned party or jurisdiction to a financial transaction involving a U.S. person in transaction documentation; • Misleading a U.S. person into exporting goods ultimately destined for a sanctioned jurisdiction; or • Routing a prohibited transaction through the United States or the U.S. financial system, thereby causing a U.S. financial institution to process the payment in violation of OFAC sanctions.	March 6, 2024	The Tri-Seal Compliance Note reiterated that the United States principally enforces its authorities against foreign financial institutions and other foreign persons for causing U.S. persons to violate OFAC sanctions or indirectly exporting services from the United States. Therefore, foreign persons with touchpoints to the United States should consider whether their existing compliance programs are sufficient to prevent and detect conduct that may cause violations of U.S. sanctions and export control law.	U.S. Department of Commerce, Department of the Treasury, and Department of Justice Tri-Seal Compliance Note: Obligations of foreign-based persons to comply with U.S. sanctions and export control laws, March 6, 2024
OFAC continues to target global financial institutions and companies for U.S. transactions involving sanctioned persons and countries The Office of Foreign Assets Control (OFAC) recently reached a civil enforcement settlement with a foreign financial institution for causing or engaging in apparent violations of multiple OFAC sanctions programs. On March 14, 2024, OFAC reached a $3,740,442 settlement with a global private banking group based in Switzerland (Swiss Banking Group), related to the apparent violations of Cuba, Russia and Narcotics	March 14, 2024	U.S. sanctions risks arise when U.S. firms lack direct insight into the sub-accounts held under omnibus accounts. Foreign financial institutions with U.S. omnibus accounts should screen their customers against OFAC's SDN List and conduct due diligence to identify persons with a potential sanctions nexus. Omnibus accountholders should promptly communicate with the U.S. firms when there is an apparent sanctions nexus so U.S. firms can also impose appropriate controls.	OFAC Settles with EFG International AG for $3,740,442 Related to Apparent Violations of Multiple Sanctions Programs, March 14, 2024



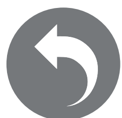
Legal issue/risk	When?	What's next?	Supporting information
Kingpin sanctions programs, among others. The apparent violations involved the Swiss Banking Group's subsidiaries in several countries purchasing and selling securities held in omnibus accounts by U.S. market participants. The trades executed through omnibus accounts were generally made in the name of the Swiss Banking Group, rather than the underlying foreign clients, and as a result, the U.S. market participants had no knowledge that they were processing transactions on behalf of sanctioned persons.		OFAC has issued sanctions compliance guidance for U.S. securities firms in Frequently Asked Question (FAQ) 335, providing the following best practice risk mitigation measures: "(1) making customers and counterparties aware of the firm's U.S. sanctions obligations; (2) conducting due diligence to identify higher-risk clients, including through the use of questionnaires and certifications; (3) imposing restrictions or heightened controls on high risk clients; (4) gathering additional information on non-proprietary accounts; and (5) monitoring accounts and clients for suspicious activities."	
DOJ Criminal Division issues Voluntary Self-Disclosure Program for individuals Earlier this year, the Criminal Division launched a new Pilot Program that will allow certain individual participants in criminal misconduct to receive a Non-Prosecution Agreement if they voluntarily self-disclose their misconduct and if other conditions are met. As with other voluntary self-disclosure policies, the pilot program requires the individual to provide original, non-public information that the Division was not aware of prior to the report, to fully cooperate, and to return any ill-gotten gains, among other things. The program is available to individuals who make disclosures involving: (1) Schemes involving financial institutions; (2) Schemes related to the integrity of financial markets;	April 22, 2024	On its face, the Pilot Program will primarily benefit individuals. This Pilot Program and the new Whistleblower Pilot Program (described *infra*) both spur the race to be first in the door and further incentivize companies to report promptly. In fact, the DOJ has explained that the Pilot Program is intended to "further encourage companies to create compliance programs that help prevent, detect, and remediate misconduct."	Criminal Division Pilot Program On Voluntary Self-Disclosures For Individuals Criminal Division's Voluntary Self-Disclosures Pilot Program for Individuals



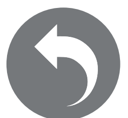
Legal issue/risk	When?	What's next?	Supporting information
(3) Foreign corruption schemes; (4) Health care fraud and kickback schemes; (5) Federal contract fraud schemes; and (6) Certain domestic corruption schemes. Importantly, CEOs, CFOs, high-level foreign officials, domestic officials, and those who organized or led the scheme are not eligible.			
Statute of limitations for many sanctions violations and recordkeeping requirements are extended from five to 10 years On April 24, 2024, the President signed into law the 21st Century Peace Through Strength Act, which extended the statute of limitations for civil and criminal violations of the International Emergency Economic Powers Act or Trading with the Enemy Act from five years to 10 years. On July 22, 2024, the U.S. Department of Treasury Office of Foreign Assets Control (OFAC) issued guidance stating that they may now commence an enforcement action within 10 years of the latest date of the violation if such date was after April 24, 2019. As foreshadowed in the guidance, OFAC issued an interim final rule on September 11, 2024, extending recordkeeping requirements for certain transactions from five years to 10 years consistent with the expanded statute of limitations. The interim final rule is effective March 12, 2025.	April 24, 2024 October 15, 2024 March 12, 2025	Companies can likely expect increased OFAC enforcement activity, as the extended statute of limitations gives OFAC a longer runway to pursue potential wrongdoing. Companies also should keep the longer statute of limitations period in mind when conducting internal investigations, as they may need to expand the scope of sanctions-related investigations. The extended recordkeeping requirements are effective March 12, 2025. Companies should begin assessing whether their procedures are sufficient to comply with the new 10-year recordkeeping requirement. In addition, companies may wish to comment on the interim final rule. OFAC will accept comments until October 15, 2024.	OFAC Guidance on Extension of Statute of Limitations, July 22, 2024 OFAC Interim Final Rule to Amend the Reporting, Procedures and Penalties Regulations, September 11, 2024
OFAC expands secondary sanctions and targets architecture of Russian financial system On June 12, 2024, the United States government took several far-reaching sanctions enforcement actions against third-country companies and institutions accused of supporting Russia's military-industrial base. The U.S. Department of Treasury and U.S.	June 12, 2024	Any transaction involving an individual or entity that has been designated under Russia-related sanctions presents a secondary sanctions risk for non-U.S. persons engaged in "significant" transactions with sanctioned persons.	As Russia Completes Transition to a Full War Economy, Treasury Takes Sweeping Aim at Foundational Financial Infrastructure and Access



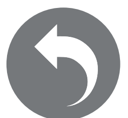
Legal issue/risk	When?	What's next?	Supporting information
Department of State together sanctioned over 300 entities and individuals located in Asia, the Middle East, Europe and elsewhere, for providing goods and services in support of Russia's war efforts. OFAC targeted the architecture of Russia's financial system by designating the Moscow Exchange, as well as the National Clearing Center and the National Settlement Depository which operate "Russia's largest public trading markets for equity, fixed income, derivative, foreign exchange, and money market products, as well as Russia's central securities depository and the country's largest clearing service provider." OFAC issued General Licenses 99A and 100A to authorize wind down transactions with these pillars of the Russian financial system until October 12, 2024.			to Third Country Support, June 12, 2024 General License 100A Authorizing Certain Transactions Related to Debt or Equity or the Conversion of Currencies Involving MOEX, NCC, or NSD, August 2, 2024 General License 99A Authorizing Certain Transactions Related to Debt or Equity or the Conversion of Currencies Involving MOEX, NCC, or NSD, August 2, 2024
Congress amends the Foreign Extortion Prevention Act Congress recently passed the Foreign Extortion Prevention Technical Corrections Act (FEPTCA), which amended the Foreign Extortion Prevention Act (FEPA). FEPA. FEPA, which was signed into law in December 2023, criminalizes the "demand side" of bribery and created a new offense that makes it unlawful for foreign officials to corruptly demand, seek, receive, accept, or agree to accept bribes. FEPA is intended to close the gap in the Foreign Corrupt Practices Act (FCPA), which solely focuses on the "supply side" of foreign bribery (*i.e.*, companies and individuals who offer, promise, or pay bribes to foreign government officials). On July 30, 2024, Congress passed FEPTCA to remedy a few inconsistencies between FEPA and the FCPA. While characterized as technical, these amendments were intended to resolve substantive differences and bring FEPA in closer alignment with the FCPA in terms of its jurisdictional reach; its definition of foreign	July 30, 2024	The DOJ has emphasized its continued focus on foreign corruption, and FEPA provides them with a new enforcement tool. Companies should consider assessing the effectiveness of their anti-bribery and corruption compliance program and makes changes, as appropriate. This should include a careful review of reporting mechanisms, as the DOJ has expressly encouraged whistleblowers to come forward with information about foreign corruption.	Foreign Extortion Prevention Act Foreign Extortion Prevention Technical Corrections Act Congressional Record 170, Vol. 118



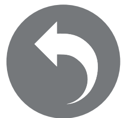
Legal issue/risk	When?	What's next?	Supporting information
official; and its language regarding purpose of the improper payment. FEPA imposes strict penalties for violations, authorizing fines of up to $250,000 or three times the monetary equivalent of the thing of value and/or imprisonment for up to 15 years.			
DOJ Corporate Whistleblower Pilot Program takes effect As of August 1, 2024, "eligible" individuals who have original knowledge about corporate wrongdoing can blow the whistle to the Department of Justice (DOJ), potentially earning a payout in return. The award may be up to 30% of the first $100 million in net proceeds forfeited and up to 5% of any net proceeds forfeited between $100 million and $500 million. The Whistleblower Pilot Program, which will run for three years, covers submissions of original, non-public information concerning one of the following four areas: (1) certain crimes involving financial institutions and their employees; (2) foreign corruption involving privately held companies and others that are not issuers of U.S. securities (include the newly-enacted FEPA); (3) domestic corruption involving companies; and (4) health care fraud schemes targeting private insurers not subject to qui tam recovery under the False Claims Act. The whistleblower program only applies if there is not an existing financial disclosure incentive (e.g., SEC and CFTC whistleblower programs). Eligibility for a reward depends on a number of factors. For example, an individual is not eligible for a reward if the individual is a public official, or if the individual	August 1, 2024	The new Corporate Whistleblower Pilot Program incentivizes certain individuals to timely and voluntarily self-disclose potential criminal activity. Companies will now face additional pressure to self-disclose more quickly if they would like to obtain self-disclosure credit, resulting in a "race to the DOJ." At the beginning of an internal investigation, companies should consider the risk of a whistleblower reporting to the government. Companies also may want to take this opportunity to carefully review the effectiveness of their whistleblower hotline and other reporting mechanisms.	DOJ Corporate Whistleblower Pilot Program Guidance DOJ Corporate Whistleblower Pilot Program Fact Sheet More carrots, more sticks – DOJ announces agency-wide whistleblower pilot program Temporary Amendment to Corporate Enforcement and Voluntary Self-Disclosure Policy

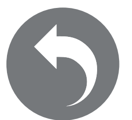


Legal issue/risk	When?	What's next?	Supporting information
"meaningfully" participated in the wrongdoing reported, and the information provided must lead to criminal or civil forfeiture in excess of $1 million.			
Court upholds IRS assessment of $2.9 million in willful FBAR penalties; holds amount not excessive under the Eighth Amendment In *United States v. Rund*, Case No. 1:23-cv-00549 (E.D. Va. Aug. 6, 2024), the court upheld $2.9 million in willful penalties assessed against Richard Rund, finding that he willfully failed to file a completed Report of Foreign Bank and Financial Accounts (FBAR) disclosing numerous foreign bank accounts over multiple years. Further, the court held that the FBAR penalties assessed against Rund did not violate the Eighth Amendment's Excessive Fines Clause. Rund argued that he was only subject to the far less harsh non-willful penalties under the statute because he believed that he was not required to report the unreported accounts as they were not in his name and he did not have signature authority over them. However, the court found that whether they were in his name or he had signature authority over them was beside the point. The court found that he made requests for funds from the accounts, directed transfers, was listed as the beneficial owner, and generally enjoyed considerable control over the direction of the accounts' assets. Accordingly, the court found that he either should have known that he had a reporting obligation or at the very least, should have asked his tax preparers if he had a reporting obligation. In addition, the court rejected Rund's argument that the penalty assessed against him violated the Eighth Amendment's Excessive Fine Clause. Under the Constitution, a fine is excessive if it is grossly disproportional to the gravity of defendant's offense. However, for two reasons, the court found that the FBAR penalty was not excessive. First, the amount	August 6, 2024	Taxpayers should revisit with their tax advisor whether they have properly disclosed all of their interests in foreign accounts. FBAR reporting obligations are not always clear, and a failure to properly report financial interests could result in significant penalties.	United States v. Rund

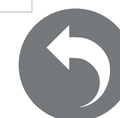


Legal issue/risk	When?	What's next?	Supporting information
assessed fell far below the statutory maximum as it was assessed based on the highest aggregate balance of the accounts in one year—$5.8 million in 2014—and the statute would have allowed the IRS to assess a penalty that included 50% of the unreported balances for each year, and there were multiple years with unreported accounts. Second, the court found that the FBAR penalties at issue were not out of line with the statute's criminal penalties. Rund would have faced a criminal fine of $2 million. Accordingly, the $2.9 million penalty fell far short of the disproportionality prohibited under the Constitution.			

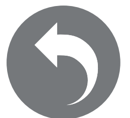




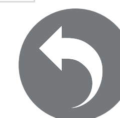
Legal risk	When?	What's next?	Supporting information
Treasury appeals ruling that Corporate Transparency Act is unconstitutional Effective January 1, 2024, pursuant to the Corporate Transparency Act (CTA) companies created or registered to do business in the United States must report information about their beneficial owners to FinCEN unless they fall within an exemption. In March 2024, the US District Court for the Northern District of Alabama issued an opinion holding that the CTA exceeds Congress's legislative power and is therefore unconstitutional. This issue arose in a lawsuit filed by the National Small Business Association and an individual member seeking an injunction against FinCEN enforcing the CTA. The government argued that several sources of constitutional authority supported Congress's power to enact the CTA, namely: its authority to regulate interstate commerce under the Commerce Clause, and its ability under the Necessary and Proper Clause to enact laws necessary and proper to the exercise of other enumerated powers (here, taxation, and foreign affairs and national security). The Court, however, rejected each of these arguments, and granted summary judgment in favor of the plaintiffs. The US Department of the Treasury quickly appealed, and the case is scheduled for oral argument on September 27, 2024.	September 27, 2024	Interested parties should continue to monitor this appeal, as well as other lawsuits that have been filed challenging the constitutionality of the CTA. In the meantime, companies must comply with the CTA's beneficial ownership information reporting requirements. • Companies created or registered to do business in the United States before January 1, 2024 have until January 1, 2025 to file their initial beneficial ownership information reports. • Companies created or first registered to do business in the United States between January 1, 2024 and December 31, 2024 have 90 days to report. • Companies created or first registered to do business in the United States on or after January 1, 2025 will only have 30 days to report.	Dkt. 51-52, *Nat'l Small Bus. United v. Yellen*, No. 5:22-CV-1448-LCB, 2024 WL 899372 (N.D. Ala. Mar. 1, 2024) Dkt. 54, *Nat'l Small Bus. United v. Yellen*, No. 5:22-CV-1448-LCB, 2024 WL 899372 (N.D. Ala. Mar. 11, 2024) Oral Argument Calendar The Corporate Transparency Act is unconstitutional – For some, and for now
IRS publishes tax reporting obligations for brokers of digital assets On July 9, 2024, the IRS published final regulations that create reporting obligations for brokers of digital assets. The regulations are intended to help taxpayers more easily pay their taxes owed with respect to digital asset	January 1, 2025	Digital asset market participants should determine whether and to what extent the digital asset reporting regulations apply to them and formulate a compliance plan. The IRS has provided welcome transitional relief while the new reporting regime is implemented. However, like many reporting regimes, these	Gross Proceeds and Basis Reporting by Brokers and Determination of Amount Realized and Basis for Digital Asset Transactions IRS Notice 2024-56



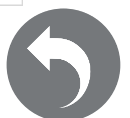
Legal risk	When?	What's next?	Supporting information
transactions and give the IRS the information it needs to combat tax evasion risks presented by digital assets. The final regulations require digital asset brokers to file information returns and furnish payee statements reporting gross proceeds and the adjusted basis on dispositions of digital assets by customers in certain sale or exchange transactions. Brokers' obligation to report gross proceeds from digital asset sales begins with all transactions occurring on or after January 1, 2025. Their obligation to report the basis for digital assets begins with transactions occurring on or after January 1, 2026. Contemporaneously, the IRS issued Notice 2024-56, which provides transitional relief from penalties for brokers who make a good faith effort to properly report in accordance with the regulations. The Notice also provides relief from the liability for the payment of backup withholding tax and the penalties for failure to pay that tax.		regulations are extraordinarily complex and will take time to prepare for compliance.	



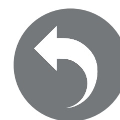
Legal risk	When?	What's next?	Supporting information
Congress proposes repeal of Corporate Transparency Act Less than a year after the CTA came into effect, both the US House of Representatives and the US Senate have introduced bills titled "Repealing Big Brother Overreach Act," which would completely repeal the CTA, thereby removing the reporting obligation for thousands of companies formed or registered to do business in the United States. To date, these bills have not advanced from committee.	Ongoing	Although the likelihood that either bill passes during this legislative session remains uncertain, reporting companies should continue to monitor this and similar legislation.	S.B. 4297 H.B. 8147
US Supreme Court strikes down *Chevron* deference doctrine In June 2024, the US Supreme Court overturned a decades-old doctrine that required courts to defer to administrative agencies' reasonable interpretation of ambiguous statutes. The Court reasoned that courts, rather than the administrative state, are best suited under the Constitution and by experience to interpret ambiguous laws. The *Chevron* doctrine arose from the 1984 decision in *Chevron v. Natural Resources Defense Council*. Under that doctrine, courts have sided with the agencies and upheld their rules in thousands of challenges, resulting in what many viewed as an undue expansion of Executive Branch authority. In *Loper Bright Enterprises*, the Supreme Court overturned *Chevron*, explaining that agencies, unlike courts, do not have the necessary competence to resolve statutory ambiguities, and deferring such an exercise of power runs afoul of both the Administrative Procedure Act and the separation of powers doctrine. As a result, *Chevron* could not stand.	Ongoing	*Chevron*'s demise is likely to limit the power of federal agencies in designing their regulatory programs and is accordingly expected to constrain on administrative authority going forward. Yet what that impact might look like in practice remains unclear, as there is particular uncertainty regarding how courts will handle challenges to regulations interpreting ambiguous statutes in the absence of *Chevron.* Although its departure also removes a familiar analytical device from the judicial toolbox, it did not remove all of them—the doctrine of *Skidmore* deference, for example, ostensibly remains intact. It is therefore possibly that likely that the absence of *Chevron* will lead to a return to *Skidmore* deference. Relatedly, the Court also decided *Corner Post v. Board of Governors of the Federal Reserve System* and held that the statute of limitations on an APA action does not start to run until the plaintiff is injured by final agency action. This later claim accrual may lead to more lawsuits challenging agency actions. Regulated parties and the	Loper Bright Enterprises et al. v. Raimondo



Legal risk	When?	What's next?	Supporting information
		legal community alike should monitor future litigation in this area.	
FinCEN proposes rule that would amend financial institutions' AML/CFT compliance program requirements On June 28, 2024, FinCEN proposed a new rule that would explicitly require financial institutions to implement anti-money laundering and countering the financing of terrorism (AML/CFT) programs that are effective, risk-based, and reasonably designed. To that end, the rule would expressly require the AML/CFT program to conduct a risk assessment. The proposed rule specifically requires the risk assessment process to identify, evaluate, and document the financial institution's risks, including consideration of: (1) AML/CFT identified by FinCEN; (2) the financial institution's money laundering and terrorist financing risks, based on an evaluation of its business activities, including its products, services, channels, customers, intermediaries, and geographic locations; and (3) the reports filed by financial institutions pursuant the regulations under the Bank Secrecy Act. In addition, the proposed rule would require financial institutions to designate a qualified AML/CFT officer, among other things.	June 28, 2024	Although the proposed rule makes several changes, the rule aligns the regulatory framework with existing expectations, at least in several respects. For example, it's been an expectation for some time that the AML/CFT program is risk-based and effective. Comments on the proposed rule were due September 3, 2024, so financial institutions should await further information from FinCEN on next steps. In the meantime, financial institutions subject to the BSA may wish to review their existing AML/CFT compliance programs against the new framework.	Federal Register: Anti-Money Laundering and Countering the Financing of Terrorism Programs FinCEN Fact Sheet, FIN-2024-FCT1, June 28, 2024 Federal Register:: Anti-Money Laundering and Countering the Financing of Terrorism Program Requirements FinCen Issues Proposed Rule to Strengthen and Modernize Financial Institutions' AML/ FT Programs
FinCEN issues final rule bringing investment advisers within the Bank Secrecy Act's scope On August 28, 2024, FinCEN issued a final rule adding SEC-registered investment advisers and exempt reporting advisers (collectively, IAs) to the Bank Secrecy Act's definition of "financial institutions," thereby subjecting them to various BSA requirements. These requirements include, among others, (i) implementing a risk-based and reasonably designed AML/CFT program; (ii) filing	January 1, 2026	The final rule subjecting IAs to the BSA is effective January 1, 2026. IAs should consider reviewing their compliance program and controls to ensure that they are well-positioned to comply with the BSA's requirements. They also should continue to monitor rulemaking regarding CIP requirements.	Federal Register :: 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 FinCEN IA Final Rule Fact Sheet



Legal risk	When?	What's next?	Supporting information
suspicious activity reports; (iii) maintaining certain records related to transmittal of funds; and (iv) sharing information with FinCEN upon request. This rule follows another notice of proposed rulemaking issued by FinCEN and the Securities and Exchange Commission in May 2024, which, if finalized, would require IAs to implement a written Customer Identification Program (CIP) sufficient to form a reasonable belief that they know the identity of each customer.			Notice of Proposed Rulemaking on CIP for IAs, 89 Fed. Reg. 44571 (May 21, 2024) FinCEN and SEC propose Customer Identification Program requirements for investment advisers



For more information, please contact:

Sarah Paul
Partner – Co-Global Head of Corporate Crime & Investigations

T: +1 (212) 301 6587
sarahpaul@
eversheds-sutherland.com

0

Andrea Gordon
Counsel

T: +1 (202) 383 0955
andreagordon@
eversheds-sutherland.com

Jessica Rodgers
Associate

T: +1 (202) 383 0152
jessicarodgers@
eversheds-sutherland.com

Reid Tomasello
Associate

T: +1 (202) 383 0296
reidtomasello@
eversheds-sutherland.com

Lamine Hardaway
Senior Attorney

T: +1 (202) 383 0272
laminehardaway@
eversheds-sutherland.com

Service Excellence

Driving service excellence through well-designed, tech-enabled legal service delivery

Excellence in service delivery

Legal technology solutions

Legal project management

Client-facing knowledge

© Eversheds Sutherland 2023. All rights reserved.
Eversheds Sutherland (International) LLP and Eversheds Sutherland (US) LLP are part of a global legal practice, operating through various separate and distinct legal entities, under Eversheds Sutherland. For a full description of the structure and a list of offices, please visit www.eversheds-sutherland.com.

This document is intended as a general overview and discussion of the subjects dealt with. The information provided here was accurate as of the day it was created; however, the law may have changed since that date. This information is not intended to be, and should not be used as, a substitute for taking legal advice in any specific situation. The authors are not responsible for any actions taken or not taken on the basis of this publication. Where references or links are made to external publications or websites, the views expressed are those of the authors of those publications or websites which are not necessarily those of the authors of this document, who accept no responsibility for the contents or accuracy of those publications or websites.