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FinCEN Amends Regulations Under Bank Secrecy Act Applicable to Mutual Funds

BY THE INVESTMENT MANAGEMENT PRACTICE

Revised rules replace Form 8300 filings with CTR filings, subject mutual funds to the Recordkeeping and Travel rule, define mutual funds as financial institutions, and clarify agency oversight responsibility with regard to mutual funds.

Overview and Compliance Date

The Financial Crimes Enforcement Network ("FinCEN") has issued amendments to its rules (the "Rules") implementing the Bank Secrecy Act ("BSA")¹ which impact the application of certain of these Rules to mutual funds.² The rule amendments, which are described in further detail below, (1) "streamline" the BSA filing requirements applicable to mutual funds that receive greater than \$10,000 in currency; (2) relieve mutual funds from requirements to report transactions involving certain negotiable instruments; and (3) subject mutual funds to requirements on the creation, retention, and transmittal of records or information for transmittals of funds.

Mutual funds must be in compliance with these new rules on May 14, 2010, with the exception that the compliance date for the Recordkeeping and Travel Rule amendments is January 10, 2011.

Currency Transaction Reports

While mutual funds are currently required to have anti-money laundering and customer identification programs, and must report suspicious activity, FinCEN thus far has not defined them as "financial institutions" subject to certain currency transaction reporting requirements. The revised Rules now include mutual funds within the definition of "financial institution".³ As a result of this definitional change, mutual funds will no longer be required to file a Form 8300, which is reserved for "trades and businesses", when accepting more than \$10,000. Instead, mutual funds must file a Currency Transaction Report (CTR), for a transaction involving a transfer of more than \$10,000 in currency by, through, or to the mutual fund. Specifically, mutual funds must file a CTR for any transaction involving the transfer of more than \$10,000 in currency on a single business day by or on behalf of the same person. Mutual funds should be aware of the following differences between the reporting requirements of a CTR and Form 8300:

- "Currency" is defined differently for CTR purposes than for Form 8300 purposes and therefore funds should be sure to adjust their procedures accordingly⁴. The definition of "currency" includes cash for both the purposes of Form 8300 and the CTR rule, while the definition of "currency" for the purposes of Form 8300 also includes certain negotiable instruments such as

cashier's checks, bank drafts, traveler's checks and money orders. Unlike Form 8300, CTRs are required only when accepting cash, not negotiable instruments such as money orders.

- The CTR filing obligation covers incoming, outgoing, and exchange transactions in currency that occur within a single business day. Financial institutions filing a CTR must treat multiple transactions as a single transaction if the financial institution has knowledge that the transactions are conducted by or on behalf of the same person on the same day.

The "Recordkeeping and Travel Rule" and Related Recordkeeping Requirements

The inclusion of mutual funds in the definition of "financial institution" under the BSA regulations also subjects mutual funds to requirements on the creation and retention of records for transmittals of funds, and the requirement to transmit information on these transactions to other financial institutions in the payment chain, essentially requiring that the fund assist in allowing the information to "travel" with the transmittal order.⁵ The "Recordkeeping and Travel Rule" applies to transactions involving the transmittal of funds in an amount that equals or exceeds \$3,000. The transmitting financial institution is required to obtain and retain name, address, and other information on the transmitter of the transaction.⁶

At the same time, the Recordkeeping and Travel Rule includes mutual funds within existing exceptions which exclude from coverage fund transfer or transmittals where certain financial institutions are the transmitter, originator, recipient, or beneficiary. Mutual fund administrators should carefully examine this exception to determine whether a mutual fund falls within its purview.

The final Rules also subject mutual funds to requirements on the creation and retention of records on transactions over \$10,000 involving extension of credit and cross-border transfers of currency, monetary instruments, checks, investment securities, and credit.

Other Changes

FinCEN's final Rule brings about two other changes that are primarily administrative and will have little effect on the day-to-day operations of mutual funds. First, the Rule amends the definition of mutual fund in the rule that requires mutual funds to establish anti-money laundering programs. The amendment brings the definition of mutual fund in the anti-money laundering program rule in line with its definition in other BSA rules that apply to mutual funds. Second, FinCEN's Rule amends the rule that delegates authority to examine institutions for compliance with the BSA. The amendment specifies that FinCEN has delegated such authority to the SEC, as the federal functional regulator of mutual funds, and not to the IRS.



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¹ Bank Secrecy Act, Pub. L. 91-508, codified at 12 U.S.C. 1829b, 12 U.S.C. 1951-1959, and 31 U.S.C. 5311-5314; 5316-5332.

² FinCEN's rules implementing the BSA are codified at 31 CFR Part 103. These amendments can be found at 75 Fed. Reg. 19241 (Apr. 14, 2010).

³ 31 CFR 103.11(n)(10). Mutual funds are defined as open-end investment companies registered or required to be registered with the SEC under section 8 of the Investment Company Act of 1940. See 31 CFR 103.11(ccc).

⁴ For CTR purposes, currency is defined as "coin or paper of the United States or any other country that is designated as legal tender and that circulates and is customarily used as a medium of exchange in a foreign country." For Form 8300, which applies to transactions in "cash," cash is defined as U.S. and foreign coin and currency, a cashier's check, money order, bank draft, or traveler's check.

⁵ See 31 CFR 103.33(f) and (g). These records must be retained for a period of 5 years.

⁶ See 31 CFR 103.33(f)(1)(i) and (f)(2).