



## *FinCEN's Proposed AML Requirements on Investment Advisers Pose Imminent Burdens and Risks*

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In August of 2015, the U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN) proposed a rule to add registered investment advisers to the definition of "financial institution" for the purposes of anti-money laundering (AML) program requirements established by the Bank Secrecy Act (BSA).<sup>1</sup>

The proposed rule would subject investment advisers to the same rules that already require banks, mutual funds, securities broker-dealers, and insurance companies to maintain AML programs and file reports of suspicious activities, in order to combat what FinCEN called "money laundering vulnerabilities in the U.S. financial system."<sup>2</sup> The text of the proposed rule was published on September 1, 2015, and a public comment period was opened for sixty days.<sup>3</sup>

### **The Provisions of the Proposed Rule**

The proposed rule would apply only to investment advisers that are required to register with the U.S. Securities and Exchange Commission (SEC).<sup>4</sup> FinCEN did indicate, however, that it may consider a future expansion of the BSA to include investment advisers that are not registered or required to be registered with the SEC.<sup>5</sup>

The proposed rule would, among other things:

- Replace the requirement that investment advisers file Form 8300 reports for the receipt of more than \$10,000 in cash and negotiable instruments with a requirement that investment advisers file Currency Transaction Reports (CTRs) in accordance with [31 CFR 1010.311](#);<sup>6</sup>
- Subject investment advisers to the requirements of the Recordkeeping and Travel Rules and other related recordkeeping requirements for transmittals of funds exceeding \$3,000;<sup>7</sup>
- Require each investment adviser to develop and implement a written AML program, approved in writing by its board of directors or a party with a similar function, that is reasonably designed to prevent the adviser from being used to facilitate money laundering or the financing of terrorist activities;<sup>8</sup>



- Require investment advisers to file Suspicious Activity Reports (SARs) for activities involving at least \$5,000 in funds or other assets.<sup>9</sup>

The proposed rule would require an investment adviser to develop and implement its AML program within six months of the date the regulation goes into effect, which could be any day.<sup>10</sup> Public comment on the compliance timetable was critical of the six-month deadline because of the onerous effects of the law; several commenters suggested that the compliance date should be extended to eighteen months.<sup>11</sup>

## Implications for Investment Advisers

The implications of this impending rules change are significant:

- Beware of AML Mission Creep: Implementation of compliant AML programs is likely to be burdensome, time-consuming, and complex. The requirements to which investment advisers will soon be subject are continually expanding. For example, FinCEN recently extended customer due diligence (CDD) requirements under BSA rules, thus requiring financial institutions to identify and verify the identity of beneficial owners of a legal entity at the time the legal entity opens a new account, develop risk profiles, conduct ongoing monitoring of customers, and establish risk-based procedures for conducting ongoing CDD.<sup>12</sup>
- AML Rules are Ripe for Enforcement: While, historically, the SEC has charged firms with AML failures under federal securities laws, it recently expanded the target of its AML charges by, for the first time, charging a firm solely for failing to file required SARs.<sup>13</sup> The targeted Wall Street-based brokerage firm agreed to pay a \$300,000 penalty and be censured in order to settle charges that, for more than five years, it failed to file SARs with bank regulators despite “red flags tied to its customers’ high-volume liquidations of low-priced securities” and other questionable trading activities.<sup>14</sup>

## Final Thoughts on Compliance

A speech in April by FINRA’s executive vice president of enforcement is indicative of the regulatory mindset for determining AML liability toward so-called gatekeepers such as AML compliance officers.<sup>15</sup> Top on the list of factors of regulatory concerns are recidivism, the extent to which the officer was involved in or willfully blind to the wrong-doing, whether the individual has taken corrective measures, and the extent of underlying conduct and degree of investor harm. FINRA’s hard look at AML officers will sound eerily familiar to RIA compliance officers, who heard a similar speech from the SEC’s enforcement chief.<sup>16</sup>

In order to stay compliant with the ever-evolving rules, due diligence on clients is key. Financial institutions must tailor their programs to the risks inherent in the services they provide. In addition, AML compliance programs must be tested and updated regularly. Employees should receive regular compliance training and designated compliance officers must be diligent in their oversight. Finally, because FinCEN’s proposed deadline for implementation is only six months from the date the new rule is effective, investment advisers should consider beginning preparation for the new requirements now to ensure they are able to meet the coming deadline.





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<sup>1</sup> Press Release, Financial Crimes Enforcement Network, FinCEN Proposes AML Regulations for Investment Advisers, August 25, 2015, available at [https://www.fincen.gov/news\\_room/nr/html/20150825.html](https://www.fincen.gov/news_room/nr/html/20150825.html).

<sup>2</sup> *Id.*

<sup>3</sup> Financial Crimes Enforcement Network: Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers, 80 Fed. Reg. 52680 (proposed Sept. 1, 2015) (to be codified at 31 C.F.R. chapter undefined).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Financial Crimes Enforcement Network: Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers, Public Comment, 80 Fed. Reg. 52680, available at <https://www.regulations.gov/docketBrowser?rpp=50&so=DESC&sb=postedDate&po=0&dct=PS&D=FINCEN-2014-0003>.

<sup>12</sup> Jacqueline M. Allen, et al., Inside FinCEN's Beneficial Ownership Final Rule, LAW360, May 26, 2016, <http://www.law360.com/articles/800744/inside-fincen-s-beneficial-ownership-final-rule>.

<sup>13</sup> Press Release, U.S. Securities and Exchange Commission, "Brokerage Firm Charged with Anti-Money Laundering Failures, June 1, 2016, available at <https://www.sec.gov/news/pressrelease/2016-102.html>.

<sup>14</sup> *Id.*

<sup>15</sup> See J. Bradley Bennett, Exec. Vice President of Enforcement, FINRA, Address to SIFMA Anti-Money Laundering and Financial Crimes Conference (April 5, 2016).

<sup>16</sup> See Andrew Ceresney, Director, Division of Enforcement, U.S. Securities and Exchange Commission, Keynote Address, National Society of Compliance Professionals National Conference (Nov. 4, 2015).

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