

# Regulators Seek to Saddle Industry With New Obligations: Firms Bridle and Stir Up Opposition

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The Financial Crimes Enforcement Network (FinCEN), the Commodity Futures Trading Commission (CFTC), and the SEC have adopted or are proposing substantial increases in regulation of industry participants, primarily investment advisers including advisers to private funds, but also broker-dealers, publicly held companies, and proxy solicitation firms. FinCEN seeks to close “regulatory gaps” that allow “thousands of investment advisers overseeing the investment of tens of trillions of dollars into the U.S. economy [to] currently operate without legally binding [anti-money laundering and counter-terrorism financing] obligations.” Banks, broker-dealers, and investment advisers to mutual funds are already subject to anti-money laundering and counter-terrorism financing obligations. Now FinCEN proposes also to include investment advisers that are:

- Registered with the SEC because they have more than \$110 million in assets under management (RIAs); or
- Unregistered with the SEC but report to the SEC as exempt reporting investment advisers (ERAs), including investment advisers that advise only private funds and have less than \$150 million in assets under management.

Broadly speaking, the proposed rule would require RIAs and ERAs to:

- Implement an anti-money laundering and counter-terrorism financing program;
- File certain reports, such as “suspicious activity reports,” with FinCEN; and
- Keep records such as those relating to the transmittal of funds.

FinCEN proposes to delegate examination authority for the rule to the SEC, given the SEC’s

expertise in regulating investment advisers and experience in examining other financial institutions for carrying out anti-money laundering and counter-terrorism financing responsibilities. FinCEN, a bureau of the U.S. Department of the Treasury that administers the Bank Secrecy Act, issued its rule proposal on February 13, and the public comment period closed on April 15. The rule would take effect 12 months from the final rule's effective date. This FinCEN proposal is but one among many examples of major increased regulatory burdens that regulators seek to impose on investment advisers, including advisers to private funds, and other industry participants. For example, SEC Chair Gary Gensler continues to push his active agenda. More rules will pour out of the SEC pipeline. The two Republican commissioners have opposed the three Democratic commissioners in many cases and will probably continue to do so. The industry is increasingly fighting back by seeking relief from courts. For instance, last December, the Fifth Circuit vacated an SEC rule requiring companies to make certain disclosures about buybacks of their stock. If enacted as proposed, FinCEN's above-discussed regulation of investment advisers also may draw a court challenge, as it has already drawn strong fire from the industry.

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