CARLTON FIELDS

Closing Gaps? FinCEN Proposes Anti-Money Laundering Rule for Investment Advisers

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After more than a decade of delay, the Financial Crimes Enforcement Network (FinCEN) of the Department of Treasury issued a notice of proposed rulemaking that would require registered investment advisers to establish anti-money laundering programs and file suspicious activity reports with FinCEN in certain circumstances. If the proposed rule is finalized, investment advisers registered with the SEC would be required to establish written AML programs and report any suspicious activity to FinCEN in accordance with the Bank Secrecy Act (BSA). Moreover, FinCEN's proposal adds investment advisers to the list of financial institutions required to file Currency Transaction Reports (CTRs) and implement other safeguards against money laundering. In announcing the proposed rule change, FinCEN Director Jennifer Shasky Calvery stated that "[i]nvestment advisers are on the front lines of a multi-trillion dollar sector of our financial system." She further stated, "If a client is trying to move or stash dirty money, we need investment advisers to be vigilant in protecting the integrity of their sector." The 86-page proposal, announced by FinCEN on August 25, 2015, seeks to close gaps in the U.S. financial system's battle against money laundering and terrorist financing by subjecting investment advisers to the BSA as well as portions of the Patriot Act. At a minimum, it requires

investment advisers to (1) establish and implement written AML policies and procedures, (2) provide for independent compliance testing, (3) designate an AML compliance officer, (4) provide ongoing training, (5) file CTRs for any transaction involving cash transactions of more than $10,000, and (6) file Suspicious Activity Reports with respect to any questionable transaction involving $5,000 or more. While FinCEN's proposed rule does not require investment advisers to implement a customer identification program (generally required for other financial institutions), indications are that such a requirement may arrive via joint rulemaking with the SEC in the future. Under FinCEN's proposal, the SEC will have the authority to conduct AML compliance examinations. Immediate reactions to the long-expected proposal have been mixed. Some in the industry applaud what FinCEN characterizes as addressing "money laundering vulnerabilities" in the system, even questioning the exclusion of non-SEC-registered investment advisers from the proposed rule. Others, like the Investment Adviser Association, express concerns over both the compliance costs and likely benefits of such a rule. In fact, many in the industry attribute the long delay in FinCEN's proposal to the relatively low risk of money laundering posed by investment adviser activity, in large part because most investment advisers work with financial institutions already subject to BSA requirements. Written comments are due on or before 60 days after the proposed rule's publication in the Federal Register. Assuming the proposed rule is finalized, investment advisers will have six months to establish and implement compliant AML programs.

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