

Commodity trading advisors are defined as financial institutions under the BSA.<sup>3</sup> In November 2002, FinCEN temporarily exempted certain financial institutions, including commodity trading advisors, from the requirement to establish and implement an anti-money laundering program.<sup>4</sup>

## II. The 2003 Notice of Proposed Rulemaking and Subsequent Developments

### A. The 2003 Notice of Proposed Rulemaking

On May 5, 2003, FinCEN issued a notice of proposed rulemaking, in which it proposed requiring commodity trading advisors to establish and implement anti-money laundering programs.<sup>5</sup> FinCEN proposed to apply the rule to commodity trading advisors that are registered or required to be registered with the Commodity Futures Trading Commission and that direct client commodity futures or options accounts.

The comment period closed on July 7, 2003. FinCEN received three comment letters in response to the notice of proposed rulemaking. One of the comment letters was submitted by a registered futures association, another was submitted by a futures industry trade association, and the third was submitted by a commodity trading advisor. Comments focused on four matters: (1) Relief from AML obligations for certain commodity trading advisors; (2) allocation of certain money laundering obligations between commodity trading advisors and futures commission merchants; (3) liability issues for commodity trading advisors when outsourcing the performance of AML functions; and (4) access by federal examiners to the BSA records of a commodity trading advisor.

### B. Subsequent Developments

In June 2007, FinCEN announced that it would be taking a fresh look at BSA regulation to ensure that it is being applied efficiently and effectively across the industries that FinCEN regulates and the industries FinCEN has proposed to regulate. As part of that initiative, FinCEN is considering whether and to what extent it should impose requirements under the BSA on commodity trading advisors and similar entities.

As it considers its approach to commodity trading advisors, FinCEN has determined that it will withdraw the notice of proposed rulemaking that was published in May 2003. Given the passage of time, FinCEN has determined that it will not proceed with an anti-money laundering program requirement for commodity trading advisors without publishing a new proposal. This will give industry and other interested parties an opportunity to provide comment on the contents of any such proposal, as it may be affected by any developments since 2003 in industry operations as well as functional and BSA regulation.

Finally, since the time that the notice of proposed rulemaking was published, FinCEN has concluded the major rulemakings required by the USA PATRIOT Act for banks, broker-dealers, and futures commission merchants. Each of these institutions is subject to a comprehensive set of requirements under the BSA including, among other things, the obligation to establish and implement an anti-money laundering program,<sup>6</sup> the obligation to establish and implement a customer identification program,<sup>7</sup> the obligation to establish and implement a special due diligence program for foreign correspondent accounts and foreign private banking accounts,<sup>8</sup> the obligation to detect and report suspicious activity,<sup>9</sup> and the obligation to file currency transaction reports.<sup>10</sup>

Commodity trading advisors must conduct financial transactions for their clients through other financial institutions that are subject to BSA regulations. A client's commodity interests in particular must be carried with a futures commission merchant. Thus, as FinCEN continues to consider the extent to which BSA requirements should be imposed on commodity trading advisors, their activity is not entirely outside the current BSA regulatory regime.

## III. Withdrawal of the Notice of Proposed Rulemaking

For the foregoing reasons, the notice of proposed rulemaking, in which FinCEN proposed requiring certain commodity trading advisors to establish and implement anti-money laundering programs, as published in the **Federal Register** on May 5, 2003 (68 FR 23640), is hereby withdrawn.

Dated: October 29, 2008.

**James H. Freis, Jr.,**

*Director, Financial Crimes Enforcement Network.*

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## DEPARTMENT OF THE TREASURY

### 31 CFR Part 103

RIN 1506-AA71

#### **Financial Crimes Enforcement Network; Withdrawal of the Notice of Proposed Rulemaking; Anti-Money Laundering Programs for Investment Advisers**

**AGENCY:** Financial Crimes Enforcement Network, Treasury.

**ACTION:** Withdrawal of notice of proposed rulemaking.

**SUMMARY:** The Financial Crimes Enforcement Network ("FinCEN") is withdrawing the notice of proposed rulemaking, dated May 5, 2003, in which FinCEN proposed imposing on certain investment advisers a requirement to establish and implement an anti-money laundering program.

**DATES:** The withdrawal is effective November 4, 2008.

**FOR FURTHER INFORMATION CONTACT:** Regulatory Policy and Programs Division, Financial Crimes Enforcement Network, (800) 949-2732.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

On October 26, 2001, the President signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (the "USA PATRIOT Act"), Public Law 107-56. Title III of the USA PATRIOT Act amended the anti-money laundering provisions of the BSA, which is codified at 12 U.S.C. 1829b, 12 U.S.C. 1951-1959, and 31 U.S.C. 5311-5314, 5316-5332. The amendments were designed to promote the prevention, detection, and prosecution of international money laundering and terrorist financing.

Regulations implementing the Bank Secrecy Act appear at 31 CFR Part 103. The authority of the Secretary of the Treasury ("the Secretary") to administer the Bank Secrecy Act and its implementing regulations has been delegated to the Director of the Financial Crimes Enforcement Network.<sup>1</sup>

<sup>1</sup> Accordingly, references herein to the Secretary's authority apply equally to the Director of FinCEN.

<sup>3</sup> 31 U.S.C. 5312(c).

<sup>4</sup> 31 CFR 103.170. See also *Anti-Money Laundering Programs for Financial Institutions*, 67 FR 67547 (Nov. 6, 2002).

<sup>5</sup> *Anti-Money Laundering Programs for Commodity Trading Advisors*, 68 FR 23640 (May 5, 2003).

<sup>6</sup> 31 CFR 103.120.

<sup>7</sup> 31 CFR 103.121-103.123.

<sup>8</sup> 31 CFR 103.176 and 103.178.

<sup>9</sup> 31 CFR 103.17-103.19.

<sup>10</sup> 31 CFR 103.22.

## II. The 2003 Notice of Proposed Rulemaking and Subsequent Developments

### A. The 2003 Notice of Proposed Rulemaking

Section 352 of the USA PATRIOT Act amended section 5318(h) of the BSA. Section 352 requires every financial institution to establish an anti-money laundering program that includes, at a minimum, (1) The development of internal policies, procedures, and controls; (2) the designation of a compliance officer; (3) an ongoing employee training program; and (4) an independent audit function to test programs. Section 352 authorizes the Secretary, after consulting with the appropriate Federal functional regulator,<sup>2</sup> to prescribe minimum standards for anti-money laundering programs, and to exempt from the application of those standards any financial institution that is not subject to rules implementing the BSA.

Although the BSA does not expressly enumerate investment advisers among the entities defined as financial institutions under sections 5312(a)(2) and (c)(1), section 5312(a)(2)(Y) of the BSA authorizes the Secretary to include additional types of entities within the definition if he determines that they engage in an activity "similar to, related to, or a substitute for" an activity of an enumerated entity. On May 5, 2003, FinCEN observed that certain investment advisers may offer services to investors that are similar to, related to, or a substitute for those of broker-dealers in securities and other enumerated entities.<sup>3</sup> FinCEN proposed requiring these investment advisers to establish and implement anti-money laundering programs under section 5318(h)(1) of the BSA.<sup>4</sup>

<sup>2</sup> In the case of investment advisers, the appropriate Federal functional regulator is the Securities and Exchange Commission ("SEC").

<sup>3</sup> *Anti-Money Laundering Programs for Investment Advisers*, 68 FR 23646, 23647 (May 5, 2003). FinCEN noted that investment advisers that manage clients' assets work closely with other institutions, for example by directing broker-dealers to purchase or sell client securities or by directing banks to transfer client funds, and found that advisers' services frequently are a substitute for products offered by investment companies or insurance companies, such as when advisers manage client assets in pooled investment vehicles or in separate accounts. Some investment advisers offer asset management services that are similar to, and that may even compete directly with, asset management services provided by certain banks through their trust departments. The interrelationship between investment advisers and other institutions (such as securities broker-dealers, mutual funds, commodity trading advisors, and commodity pool operators) is demonstrated in part by dual registration.

<sup>4</sup> The proposal would have applied generally to SEC-registered investment advisers with assets

The comment period closed on July 7, 2003. FinCEN received 26 comment letters in response to the notice of proposed rulemaking. Of the 26 comment letters received, six were submitted by investment advisers, nine were submitted by trade groups, five were submitted by law firms, one was submitted by a personal investment entity, one by a depository institution, and one by a federal agency.

Comments were received on all aspects of the notice of proposed rulemaking. Comments focused most notably on the proposed definition of "investment adviser," the proposed requirement to develop and implement an anti-money laundering program reasonably designed to prevent the investment adviser from being used by its clients for money laundering or terrorist financing purposes, the ability of an investment adviser to outsource BSA compliance to a third party, and the proposed notice requirement for unregistered investment advisers.<sup>5</sup>

### B. Subsequent Developments

In June 2007, FinCEN announced that it would be taking a fresh look at BSA regulation to ensure that it is being applied efficiently and effectively across the industries that FinCEN regulates and the industries FinCEN has proposed to regulate. As part of that initiative, FinCEN is considering whether and to what extent it should impose requirements under the BSA on investment advisers and similar entities.

As it considers its approach to investment advisers, FinCEN has determined that it will withdraw the notice of proposed rulemaking that was published in May 2003. Given the passage of time, FinCEN has determined that it will not proceed with an anti-money laundering program requirement for investment advisers without publishing a new proposal. This will give industry and other interested parties an opportunity to provide comment on the contents of any such proposal, as it may be affected by any developments since 2003 in industry operations as well as functional and BSA regulation.

Finally, in the time since the notice of proposed rulemaking was published, FinCEN has concluded major rulemakings required by the USA PATRIOT Act for banks, broker-dealers,

under management and to advisers with \$30 million or more of assets under management and that are exempt from registration under section 203(b)(3) of the Investment Advisers Act (15 U.S.C. 80b-3(b)(3)). *Id.* at 23648.

<sup>5</sup> Comments are available at [http://www.fincen.gov/statutes\\_regs/frn/reg\\_proposal\\_comments.html](http://www.fincen.gov/statutes_regs/frn/reg_proposal_comments.html).

and futures commission merchants. Each of these institutions is subject to a comprehensive set of requirements under the BSA including, among other things, the obligation to establish and implement an anti-money laundering program,<sup>6</sup> the obligation to establish and implement a customer identification program,<sup>7</sup> the obligation to establish and implement a special due diligence program for foreign correspondent accounts and foreign private banking accounts,<sup>8</sup> the obligation to detect and report suspicious activity,<sup>9</sup> and the obligation to file currency transaction reports.<sup>10</sup>

Investment advisers must conduct financial transactions for their clients through other financial institutions that are subject to BSA requirements, and their clients' assets must be carried at these other financial institutions. Thus, as FinCEN continues to consider the extent to which BSA requirements should be imposed on investment advisers, their activity is not entirely outside the current BSA regulatory regime.

## III. Withdrawal of the Notice of Proposed Rulemaking

For the foregoing reasons, the notice of proposed rulemaking, in which FinCEN proposed requiring certain investment advisers to establish and implement anti-money laundering programs, as published in the **Federal Register** on May 5, 2003 (68 FR 23646), is hereby withdrawn.

Dated: October 29, 2008.

**James H. Freis, Jr.**,

*Director, Financial Crimes Enforcement Network.*

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## DEPARTMENT OF THE TREASURY

### 31 CFR Part 103

#### RIN 1506-AA77

### Financial Crimes Enforcement Network; Withdrawal of the Notice of Proposed Rulemaking; Anti-Money Laundering Programs for Unregistered Investment Companies

**AGENCY:** Financial Crimes Enforcement Network, Treasury.

**ACTION:** Withdrawal of notice of proposed rulemaking.

<sup>6</sup> 31 CFR 103.120.

<sup>7</sup> 31 CFR 103.121-103.123.

<sup>8</sup> 31 CFR 103.176 and 103.178.

<sup>9</sup> 31 CFR 103.17-103.19.

<sup>10</sup> 31 CFR 103.22.