FINANCIAL SERVICES INSTITUTE

VOICE OF INDEPENDENT FINANCIAL SERVICES FIRMS
AND INDEPENDENT FINANCIAL ADVISORS

VIA E-RULEMAKING PORTAL (www.regulations.gov)

November 2, 2015

Jennifer Shasky Calvery
Director
Financial Crimes Enforcement Network
Department of the Treasury
P.O. Box 39
Vienna, VA 22183

Re: **FinCEN-2014-0003: Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers (RIN 1506-AB10)**

Dear Ms. Shasky Calvery:

On September 1, 2015, the Financial Crimes Enforcement Network (FinCEN) published its request for public comment on a proposal to require certain investment advisers to establish anti-money laundering (AML) programs and file suspicious activity reports (SAR) pursuant to the Bank Secrecy Act (BSA) (Proposed Rules).[1] The Proposed Rules would amend the definition of financial institution under BSA regulations to subject certain registered investment advisers (RIAs) to new compliance, reporting, and recordkeeping requirements.

The Financial Services Institute[2] (FSI) appreciates the opportunity to comment on this important proposal. We strongly support FinCEN's efforts to protect the financial system from illicit activities such as money laundering and terrorist financing. Moreover, we greatly appreciate FinCEN's authorization of risk-based approaches to AML program design. We believe that certain additions and clarifications to the Proposed Rules will help ensure its effectiveness, while providing greater specificity in regards to an RIA's obligations. We expand upon these issues below.

Background on FSI Members

The independent financial services community has been an important and active part of the lives of American investors for more than 40 years. In the U.S., there are approximately 167,000 independent financial advisors, which account for approximately 64.5% percent of all producing registered representatives. These financial advisors are self-employed independent contractors, rather than employees of Independent Broker-Dealers (IBD).

[1] 80 Fed. Reg. 52680 (Sept. 1, 2015).

[2] The Financial Services Institute (FSI) is an advocacy association comprised of members from the independent financial services industry, and is the only organization advocating solely on behalf of independent financial advisors and independent financial services firms. Since 2004, through advocacy, education and public awareness, FSI has been working to create a healthier regulatory environment for these members so they can provide affordable, objective financial advice to hard-working Main Street Americans.

FSI member firms provide business support to financial advisors in addition to supervising their business practices and arranging for the execution and clearing of customer transactions. Independent financial advisors are small-business owners who typically have strong ties to their communities and know their clients personally. These financial advisors provide comprehensive and affordable financial services that help millions of individuals, families, small businesses, associations, organizations and retirement plans with financial education, planning, implementation, and investment monitoring. Due to their unique business model, FSI member firms and their affiliated financial advisors are especially well positioned to provide middle-class Americans with the financial advice, products, and services necessary to achieve their investment goals.

Discussion

The vast majority of FSI member firms are dually registered as broker-dealers and RIAs. As such, many firms have already adopted enterprise-wide AML programs. We appreciate FinCEN's recognition of the importance of an enterprise-wide program as a beneficial and cost-effective way to satisfy their obligations under both the broker-dealer AML program requirements as well as the new requirements found in the Proposed Rules.[3] However, in order to ensure the effectiveness of these enterprise-wide programs, we respectfully request that FinCEN issue the necessary guidance in conjunction with the final rule to allow RIAs to share SARs within their corporate organizations.

Additionally, many FSI member firms allow financial advisors to affiliate with their firm pursuant to a "Hybrid-RIA Model." Under such an arrangement the independent financial advisor is licensed as a registered representative with the broker-dealer but also owns and operates an independent RIA (IRIA) that is licensed at either the federal or state level. For purposes of the securities laws, the IRIA is deemed to be an outside business activity (OBA) of the broker-dealer with whom the financial advisor is licensed. Broker-dealers maintain certain responsibilities to oversee such OBAs in accordance with FINRA guidance.[4] Where such IRIA is an SEC registrant, the Proposed Rules raise particular novel questions regarding the obligations placed on the IRIA as compared to the broker-dealer with which they are affiliated. We respectfully request certain clarifications from FinCEN that will provide certainty on each entity's obligations and minimize potential burdens imposed on these IRIAs.

I. Sharing SARs within a Corporate Organization

The Proposed Rules do not permit RIAs to share SARs within their corporate organization structures in the absence of further guidance. Section 1031.320(d) provides that a SAR and any information that would reveal the existence of a SAR are confidential and cannot be disclosed. The proposed Rules also include three rules of construction that clarify the scope of the prohibition against the disclosure of a SAR by an RIA. The third of these rules of construction recognizes that RIAs may find it necessary to share SARs within their corporate organizational structures. However, FinCEN explains that the Proposed Rules would not authorize such sharing in the absence of further guidance or rulemaking detailing the circumstances under which such sharing would be consistent with Title II of the BSA.

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[3] 80 Fed. Reg. 52688, fn. 69.
[4] See NASD Notice-to-Members 94-44; *see also* NASD Notice-to-Members 96-33.

In 2010, FinCEN issued guidance that confirmed that it is consistent with Title II of the BSA for broker-dealers (in addition to mutual funds, futures commission merchants, and introducing brokers in commodities) to share a SAR or any information that would reveal the existence of the SAR with certain affiliates that are also subject to a SAR regulation. In the guidance, FinCEN explained that the sharing of SARs with such affiliates facilitate their compliance with the identification of suspicious transactions taking place through those affiliates.

FinCEN states it recognizes the importance of enterprise-wide AML compliance programs. FinCEN also notes that it understands that authorizing SAR sharing would facilitate more effective enterprise-wide BSA compliance. We whole-heartedly concur with that assessment. The failure to issue such guidance would hinder enterprise-wide AML programs. Additionally, for firms that are dually registered as a broker-dealer and RIA, the absence of such guidance would subject the same legal entity to conflicting SAR sharing approaches. Such a scenario would place firms in a potentially difficult compliance position.

Therefore, we encourage FinCEN to issue guidance authorizing RIAs to share SARs within their corporate organizations pursuant to the same reasoning, and subject to the same conditions, with which it authorized such sharing by other financial institutions. We believe that the terms of the RIA guidance should be consistent with the terms of the 2010 guidance applicable to broker-dealers. Moreover, we believe that such guidance should be issued in conjunction with the final rule in order to ensure that firms have clarity and certainty when evaluating their compliance programs and considering any necessary modifications and amendments in light of the requirements of the Proposed Rules.

II. Clarifying Reporting Obligations under the Hybrid RIA Model

As discussed above, many FSI member firms offer Hybrid RIA affiliation models whereby the financial advisor is licensed as a registered representative of the broker-dealer but also owns and operates its own IRIA. This unique scenario raises several points for clarification regarding application of the Proposed Rules. FinCEN states that in instances when an RIA and another financial institution are involved in the same transaction, only one SAR is required to be filed.[5] Either entity may file a single joint report, but each entity must maintain a copy of the report and any supporting documentation.[6] We request that in conjunction with the final rule, FinCEN clarify the responsibilities regarding reporting of suspicious activity when an individual is licensed with both an IRIA and a broker-dealer. It is unclear, in such scenario who maintains the obligation to file the report. We request that FinCEN clarify that the reporting obligation rests with the financial institution that identifies the suspicious activity. A broker-dealer that discovers suspicious activity should be able to file a SAR on its own and not work with an IRIA of an affiliated financial advisor to file a joint report, simply because individuals may be licensed with both entities.

III. Compliance with Recordkeeping and Travel Rules

As a result of amending the definition of financial institution to include RIAs, the Proposed Rules subject these entities to the requirements of the Recordkeeping and Travel Rules.[7] These rules require that for each transmittal of funds that equals or exceeds $3,000, the transmittor's

[5] 80 Fed. Reg. 52691.
[6] *Id.*
[7] *Id.* at 52685.

financial institution must make and keep certain records and ensure that such records travel through the payment chain with the transmittal order.[8] The records required to be made by the transmittor's financial institution include information such as name, address, and account number of the client, the amount of the wire, payment instructions, and information regarding the wire payment recipient.[9]

The records required by these rules are not currently maintained by RIAs as part of their books and records. This information is typically maintained by custodians servicing the RIA. Should an RIA receive instructions to wire money from a client, the RIA would need to provide all relevant information to the custodian in order to effectuate the wire. Aside from transmitting instructions, RIAs do not participate in the mechanics of the wire transfer. The custodian is responsible for all such functions and is also in possession of all necessary client identifying information. As such, we respectfully request that FinCEN consider exempting RIAs from the requirements of the Recordkeeping and Travel Rules so long as their custodian agrees to ensure compliance with these rules for the RIA's customers. While we do not question the purpose behind these rules, we do not believe that placing the requirement on custodians, rather than RIAs, reduces the effectiveness of anti-money laundering programs or increases risks to the financial system.

Additionally, we request clarification regarding the application of the Recordkeeping and Travel Rules to the Hybrid RIA Model. Specifically, in situations where an advisor is affiliated with two entities it may be difficult to determine which entity was the first to receive the wire instruction. In an effort to address the confusion caused by such a scenario, we would appreciate FinCEN clarifying, in conjunction with the final rule, with whom the compliance obligation rests in instances where it may be unclear which entity was the first to receive the wire instruction.

IV. Increasing the Implementation Period to 18 Months

FinCEN proposes that the AML program requirements take effect six months from the effective date of the final regulation. FinCEN also proposes that the SAR filing requirements apply to all transactions initiated after the implementation of an AML program. We believe that six months is an insufficient amount of time to allow RIAs to conceptualize, develop and implement an AML program compliant with the Proposed Rules. As such, we respectfully request that FinCEN extend the implementation period to 18 months.

FinCEN states that it believes RIAs would be able to adapt existing policies, procedures, and internal controls to comply with the Proposed Rules.[10] As FinCEN notes, such existing policies and procedures are designed to prevent violations of the terms of the Investment Advisers Act of 1940 (Advisers Act) and any implementing regulations. The Advisers Act prohibits an RIA from engaging in fraudulent, deceptive, and manipulative conduct.[11] It further requires RIAs to maintain certain books and records related to its investment advisory business and to complete and file Form ADV.[12] SEC rules require RIAs to conduct annual reviews to ensure the adequacy and effectiveness of their policies and procedures.[13]

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[8] *Id.*
[9] 31 CFR 1010.410(e).
[10] 80 Fed. Reg. 52686.
[11] *See e.g.,* 15 U.S.C. 80b-6(4); 17 CFR 275.206(4)-8.
[12] *See* 17 CFR 275.203-1.
[13] *See* 17 CFR 275.206(4)-7.

We question whether RIAs will be able to easily adapt such existing policies, procedures, and controls to comply with the Proposed Rules. The Advisers Act is designed to protect investors from harmful or violative conduct and ensure that RIA clients receive full and fair disclosure. Policies and procedures maintained by RIAs are designed to ensure compliance with those requirements. They are not designed to ensure compliance with BSA requirements or to monitor for suspicious customer activity. Moreover, many IRIAs are small businesses with limited resources. Developing an AML program will be a significant and costly undertaking for them. As such, we believe that achieving compliance with the Proposed Rules will necessitate time and resources in excess of those anticipated by FinCEN.

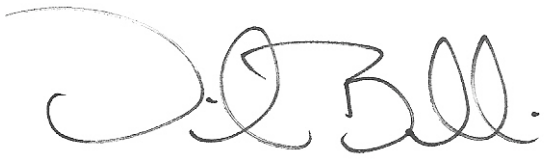
Additional implementation time is required for both RIAs that are part of organizations that have enterprise-wide compliance programs as well as RIAs that currently do not maintain AML compliance programs. Particularly for the latter category of firms, sufficient time is required to assess the money laundering risks posed by the RIA's clients, develop, implement, and test all policies and procedures designed to comply with the Proposed Rules, and hire and train personnel responsible for overseeing the newly created AML compliance program. RIAs will also need sufficient time to budget and plan for these resource requirements. Extending the implementation period to 18 months will ensure that RIAs have the requisite time to achieve compliance with these new obligations.

Conclusion

We are committed to constructive engagement in the regulatory process and welcome the opportunity to work with FinCEN on this and other important regulatory efforts

Thank you for considering FSI's comments. Should you have any questions, please contact me at (202) 803-6061.

Respectfully submitted,



David T. Bellaire, Esq.
Executive Vice President & General Counsel