Fried Frank International Trade and Investment *Alert*™

FinCEN Proposes Rule Subjecting Investment Advisers to AML Compliance Requirements

On August 25, 2015, the Treasury Department's Financial Crimes Enforcement Network (FinCEN) proposed a rule that would subject investment advisers that are registered with the U.S. Securities and Exchange Commission (SEC) to certain formal anti-money laundering (AML) compliance program and reporting requirements. The proposed rule seeks to expand the Bank Secrecy Act's (BSA) definition of financial institutions to cover investment advisers. Currently, the AML compliance rules apply to entities such as banks and broker-dealers, but not to investment advisers and private funds. As a result, the adoption of the proposed rule would have three primary effects, requiring investment advisers to: (1) establish AML compliance programs; (2) file Suspicious Activity Reports (SARs) and Currency Transaction Reports (CTRs) with FinCEN pursuant to the BSA and keep related records; and (3) comply with information sharing requests and special procedures, which were established pursuant to the USA PATRIOT Act of 2001.

Of note, the proposed rule does not include a requirement to establish a customer identification program despite the fact that this requirement has been imposed on other financial institutions subject to similar AML program requirements. However, FinCEN indicated that it expects to address this requirement with respect to investment advisers in a future joint rulemaking with the SEC. If eventually adopted, the proposed rule would cover many types of investment advisers, including some of those that advise private funds such as private equity funds and hedge funds.

FinCEN is soliciting written comments from the public on the proposed rule, which must be submitted on or before November 2, 2015.

We have summarized below the most salient aspects of the proposed rule.

Investment Advisers as "Financial Institutions"

The proposed rule would include investment advisers within the general definition of "financial institution" in the regulations implementing the BSA. The rule would also include a new definition of "investment adviser," which would include all investment advisers that are registered, or that are required to be registered, with the SEC under Section 203 of the Investment Advisers Act of 1940.

The inclusion of investment advisers within the BSA definition of "financial institution" would subject investment advisers to most of the BSA requirements generally applicable to financial institutions, such as the requirements to file CTRs and to maintain certain records relating to the transmittal of funds (as discussed further below).

Copyright © 2015 Fried, Frank, Harris, Shriver & Jacobson LLP. All rights reserved. International Trade and Investment Practice Group.
Attorney Advertising. Prior results do not guarantee a similar outcome.

AML Program Requirement

If adopted, the proposed rule would require that covered investment advisers establish an AML compliance program meeting certain minimum standards similar to those imposed on other financial institutions. In particular, the AML compliance program would be required to include, at a minimum:

- The development of internal, risk-based policies, procedures and controls addressing AML risks;
- Independent testing for compliance to be conducted by company personnel or a qualified external party (i.e., an audit function);
- The designation of a person or persons to be responsible for the implementation and monitoring of the AML compliance program (i.e., a compliance officer); and
- Ongoing training for appropriate personnel.

If the proposed rule is adopted, covered investment advisers would be required to implement AML compliance programs meeting the requirements outlined above within six months after the effective date of the final rule.

Reporting Requirements

If the proposed rule is adopted, and investment advisers are included within the definition of "financial institution" under the BSA, covered investment advisers would be required to file CTRs in the same manner as other financial institutions. Of note, investment advisers currently are required to file reports on Form 8300 when such entities receive more than $10,000 in cash or negotiable instruments. Under the proposed rule, investment advisers would no longer be required to file reports on Form 8300, and would instead file CTRs for any transfers exceeding $10,000 in currency by, through, or received by the investment adviser in a business day.

In addition, investment advisers would be required to report suspicious transactions that are conducted or attempted by, at, or through the investment adviser and that involve (individually or in the aggregate) at least $5,000 in funds or other assets. This requirement is consistent with the suspicious activity reporting requirements imposed on other financial institutions under the BSA. FinCEN is proposing to extend these requirements to investment advisers to provide additional helpful information to law enforcement and regulators on money laundering and terrorist financing activities.

USA PATRIOT Act Information Sharing

If the proposed rule is adopted, investment advisers would be required to comply with information sharing requests and special procedures, which were established pursuant to the USA PATRIOT Act. Under these procedures, FinCEN can require financial institutions to search their records to determine if they have maintained an account for or otherwise conducted transactions with a person that law enforcement authorities have certified is suspected of engaging in terrorist activity or money laundering activities.

Key Takeaways

The proposed rule follows previous attempts by FinCEN to regulate investment advisers in this space. In 2002 and 2003, respectively, FinCEN proposed rules that would have required unregistered investment companies and registered investment companies to establish AML programs. The 2002 and 2003 rules were withdrawn in 2008 after FinCEN received many public comments on the rules. Since 2008, there

have been substantial changes in the regulatory framework, including as a result of the passage of the Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). In particular, Dodd-Frank amended the Investment Advisers Act of 1940, requiring historically unregistered advisers to private equity funds, hedge funds and other private funds, to now register with the SEC. As a result of these regulatory changes, FinCEN has indicated that only one rule is needed at this time to appropriately cover AML risks relating to investment advisers.

The proposed rule is intended to address identified vulnerabilities in the U.S. financial system, with a goal of deterring money laundering and terrorist financing through investment advisers. More specifically, FinCEN has determined that investment advisers may have a more nuanced understanding of their clients' movement of funds through the U.S. financial system as a result of the advisory services that they provide.

As noted above, FinCEN is currently soliciting comments from the public—both general comments and responses to specific questions posed by FinCEN—on the proposed rule. Any comments should be submitted on or before November 2, 2015. At this stage, it is unclear how and when the proposed rule may be translated into a final rule, particularly given the negative comments received in response to the 2002 and 2003 proposed rules, and how long FinCEN has waited to publish a new proposed rule on this topic. We will continue to monitor this matter for any pertinent updates.

If you have any questions regarding the proposed rule and how it might impact your business should it be adopted, please reach out to one of the contacts listed below.

* * *

Authors:

Hon. Mario Mancuso

Michael Gershberg

Elyse Feuer

This alert is not intended to provide legal advice, and no legal or business decision should be based on its content. If you have any questions about the contents of this alert, please call your regular Fried Frank contact or the attorneys listed below:

Contacts:

Washington, D.C.

Hon. Mario Mancuso	+1.202.639.7055	mario.mancuso@friedfrank.com
Michael Gershberg	+1.202.639.7085	michael.gershberg@friedfrank.com

Fried Frank's International Trade and Investment Group regularly represents clients in international mergers and acquisitions, joint ventures, principal investments, and sensitive corporate investigations, particularly in relation to matters that implicate the U.S. government's regulation of international business activities, such as the Committee on Foreign Investment in the United States (CFIUS), economic sanctions, export controls, and anti-corruption and anti-bribery.

For decades, our international trade and investment practitioners have been consistently recognized for their legal and policy-based contributions. Today, our practice is unique among its kind: it draws upon the Firm's long tradition of senior U.S. government and diplomatic service, combines policy insight with deep technical expertise and business judgment, is fully integrated with Fried Frank's preeminent Corporate and Litigation Practices, and is international in its outlook, experience, network reach and reputation.

A Delaware Limited Liability Partnership

Fried Frank International Trade and Investment *Alert*™ is published by the International Trade and Investment Practice Group of Fried, Frank, Harris, Shriver & Jacobson LLP.

Fried Frank International Trade and Investment *Alert*™ is provided free of charge to subscribers. If you would like to subscribe to this E-mail service, please send an E-mail message to CRMTeam@friedfrank.com and include your name, title, organization or company, mail address, telephone and fax numbers, and E-mail address.

To unsubscribe from all Fried Frank E-mail Alerts and electronic mailings send a blank E-mail to unsubscribe@friedfrank.com.