PUBLICATION

Advisers Charged with Cleansing Dirty Money from Industry

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On August 25, 2015, the Financial Crimes Enforcement Network (FinCEN) proposed an anti-money laundering rule applicable to SEC-registered investment advisers (RIAs). The proposed rule would require RIAs to establish anti-money laundering (AML) programs and to report suspicious activity to FinCEN under the Bank Secrecy Act (BSA).

"Investment advisers are on the front lines of a multi-trillion dollar sector of our financial system," said FinCEN Director Jennifer Shasky. "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."

RIAs should take note of this charge and begin developing or assessing their AML policies and procedures.

FinCEN also proposed to include RIAs in the general definition of "financial institution" in rules implementing the BSA. Doing so would subject RIAs to the BSA requirements generally applicable to financial institutions, including the requirements to file Currency Transaction Reports (CTRs) and to keep records relating to the transmittal of funds.

Establishment of AML Programs

The target of FinCEN's proposed rule is money laundering, which FinCEN describes as the processing of criminal proceeds through the financial system to disguise their illegal origin or the ownership or control of the assets, or promoting an illegal activity with illicit or legal source funds.

Under the proposed rule, RIAs would need to develop and implement AML compliance programs designed to prevent the facilitation of money laundering and to ensure compliance with the new FinCEN rules. In general, the AML program would need to (1) establish and implement appropriate policies, procedures and internal controls; (2) provide for independent testing for compliance; (3) designate one or more persons responsible for implementing and monitoring the operations and controls; and (4) provide ongoing training for appropriate persons.

Recordkeeping and Reporting Requirements under the BSA

FinCEN has proposed to include RIAs within the general definition of "financial institution" in the regulations implementing the BSA and to add a proposed definition of investment adviser which would include both primary advisers and sub-advisers. Including RIAs within the definition of "financial institution" would bring those advisers under the BSA's general reporting and recordkeeping requirements.

The proposal would place new requirements on RIAs relating to CTRs. Currently, RIAs are required to file reports on Form 8300 for the receipt of more than $10,000 in cash and negotiable instruments. Under the proposal, RIAs would have to file a CTR for transactions involving a transfer of more than $10,000 in currency by, through or to the firm during a single business day. As a result, RIAs would no longer be required to file reports involving certain negotiable instruments, such as money orders.

The proposal would also require RIAs to establish records of transmittals of funds that equal or exceed $3,000, and ensure that information relating to the transmittal of funds "travel" with the transmittal to the next financial institution in a payment chain.

The new rule would further require RIAs to file Suspicious Activity Reports (SARs) for certain transactions. The reporting requirements would generally apply to transactions involving at least $5,000 in assets. A transaction may be suspicious if it appears, among other things, to involve funds derived from illegal activity, is designed to evade BSA requirements or involves the RIA to facilitate criminal activity.

Implementation and Future Rulemaking

The full text of the proposed rule can be found here. RIAs should begin examining their existing AML policies, procedures and internal controls to determine if they are adaptable to the requirements set forth in the proposed rule. Written comments responding to FinCEN's notice of proposed rulemaking can be submitted on or before November 2, 2015. Under the current proposal, RIAs would have six months from the effective date of the regulation to develop and implement an AML program.

RIAs should expect FinCEN to address additional AML-related issues in the near future. FinCEN has stated that it anticipates addressing customer identification program requirements and the potential application of regulatory requirements in line with the USA PATRIOT Act in subsequent rulemakings. FinCEN has also explained that while its current proposal relates only to SEC-registered firms, future rulemaking may include investment advisers that are exempt from SEC registration.

If you have any questions regarding these or any other securities-related issues, or need assistance in evaluating your company's policies and procedures, please contact any of the attorneys in Baker Donelson's Broker-Dealer/Registered Investment Adviser group.