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,[2] 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.[3] FinCEN proposed requiring these investment advisers to establish and implement anti-money laundering programs under section 5318(h)(1) of the BSA.[4]

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.[5]

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, 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,[6] the obligation to establish and implement a customer identification program,[7] the obligation to establish and implement a special due diligence program for foreign correspondent accounts and foreign private banking accounts,[8] the obligation to detect and report suspicious activity,[9] and the obligation to file currency transaction reports.[10]

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 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 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.

[FR Doc. E8–26205 Filed 11–3–08; 8:45 am]

BILLING CODE 4810–02–P

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.

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[2] In the case of investment advisers, the appropriate Federal functional regulator is the Securities and Exchange Commission (''SEC'').

[3] *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.

[4] The proposal would have applied generally to SEC-registered investment advisers with assets 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.

[5] Comments are available at *http://www.fincen.gov/statutes_regs/frn/reg_proposal_comments.html.*

[6] 31 CFR 103.120.

[7] 31 CFR 103.121–103.123.

[8] 31 CFR 103.176 and 103.178.

[9] 31 CFR 103.17–103.19.

[10] 31 CFR 103.22.

SUMMARY: The Financial Crimes Enforcement Network (''FinCEN'') is withdrawing the notice of proposed rulemaking, dated September 26, 2002, in which FinCEN proposed requiring unregistered investment companies—such as hedge funds, commodity pools, and similar investment vehicles—to establish and implement anti-money laundering programs.

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.[1]

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,[2] 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.

Investment companies are defined as financial institutions in the BSA.[3] On April 29, 2002, FinCEN published an interim final rule requiring mutual funds—a category of investment company—to establish and implement anti-money laundering programs.[4] On September 26, 2002, FinCEN issued a notice of proposed rulemaking, proposing to require ''unregistered investment companies'' to establish and implement anti-money laundering programs.[5] In November 2002, FinCEN temporarily exempted certain financial institutions, including investment companies that were not mutual funds as that term is defined in the anti-money laundering program rule for mutual funds,[6] from the requirement to establish and implement an anti-money laundering program.[7]

II. The 2002 Notice of Proposed Rulemaking and Subsequent Developments

A. The 2002 Notice of Proposed Rulemaking

In its September 2002 notice of proposed rulemaking, FinCEN proposed to define the term ''unregistered investment company'' as (1) An issuer that, but for certain exclusions, would be an investment company as that term is defined in the Investment Company Act of 1940, (2) a commodity pool, and (3) a company that invests primarily in real estate and/or interests in real estate. FinCEN proposed to capture within the definition so-called hedge funds, private equity funds, venture capital funds, commodity pools, and real estate investment trusts with total assets or subscriptions of $1,000,000 or more.

FinCEN proposed to exclude, among other things, any issuer that subjected its participants to a two-year lock-up period. Because unregistered investment companies are not subject to Federal functional regulation,[8] FinCEN proposed requiring these companies to file a notice so that FinCEN and agencies conducting BSA compliance examinations of unregistered investment companies could readily identify such companies.

The comment period closed on November 25, 2002. FinCEN received 34 comments in response to the notice of proposed rulemaking from law firms, unregistered investment companies, investment advisers, bank holding companies, trade groups, and a registered futures association. These comments addressed many aspects of FinCEN's proposal.

Significantly, comments were focused on the breadth of the proposed definition of ''unregistered investment company,'' including the proposed inclusion of commodity pools that are operated by CFTC-regulated commodity pool operators; the proposed inclusion of real estate investment companies; and the proposal to exclude from the definition any company that subjects its participants to a two-year lock-up period. Comments also were focused on the minimum contact provisions proposed by FinCEN, under which certain offshore funds would be obligated to comply with the rule; the ability of funds to outsource anti-money laundering program obligations to third-party administrators; and the proposed notice requirement.

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 unregistered investment companies.

As it considers its approach to unregistered investment companies, FinCEN has determined that it will withdraw the notice of proposed rulemaking that was published in September 2002. Given the passage of time, FinCEN has determined that it will not proceed with an anti-money laundering program requirement for any entity within the proposed definition of unregistered investment company without publishing a new proposal. This will give industry and other interested parties an opportunity to provide comment on the contents of any

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[1] Accordingly, references herein to the Secretary's authority apply equally to the Director of FinCEN.

[2] Unregistered investment companies—except commodity pools operated by a commodity pool operator that is registered or required to be registered with the Commodity Futures Trading Commission—are not functionally regulated.

[3] 31 U.S.C. 5312(a)(2)(I).

[4] *Anti-Money Laundering Programs for Mutual Funds*, 67 FR 21117 (Apr. 29, 2002).

[5] *Anti-Money Laundering Programs for Unregistered Investment Companies*, 67 FR 60617 (Sep. 26, 2002).

[6] *See* 31 CFR 103.130(a) (a ''mutual fund'' is an ''open-end company,'' as the term is defined in the Investment Company Act of 1940).

[7] 31 CFR 103.170. *See also Anti-Money Laundering Programs for Financial Institutions*, 67 FR 67547 (Nov. 6, 2002).

[8] Commodity pools, however, may be operated by a CFTC-regulated commodity pool operator. *See* 7 U.S.C. 1a(5) (defining a ''commodity pool operator'' as ''any person engaged in a business that is of the nature of an investment trust, syndicate, or similar form of enterprise, and who * * * solicits, accepts, or receives from others, funds, securities, or property * * * for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market or derivatives transaction execution facility * * *'').

such proposal, as it may be affected by any developments since 2002 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 regulations under the BSA including, among other things, the obligation to establish and implement an anti-money laundering program,[9] the obligation to establish and implement a customer identification program,[10] the obligation to establish and implement a special due diligence program for foreign correspondent accounts and foreign private banking accounts,[11] the obligation to detect and report suspicious activity,[12] and the obligation to file currency transaction reports.[13]

The financial transactions of unregistered investment companies and their participants must be conducted through other financial institutions that are subject to BSA requirements. Assets within any of these unregistered investment pools typically are carried with these financial institutions. Thus, as FinCEN continues to consider the extent to which BSA requirements should be imposed on unregistered investment companies, their activity is not entirely outside the current BSA regulatory regime.

[9] 31 CFR 103.120.

[10] 31 CFR 103.121–103.123.

[11] 31 CFR 103.176 and 103.178.

[12] 31 CFR 103.17–103.19.

[13] 31 CFR 103.22.

III. Withdrawal of the Notice of Proposed Rulemaking

For the foregoing reasons, the notice of proposed rulemaking, in which FinCEN proposed requiring unregistered investment companies to establish and implement anti-money laundering programs, as published in the **Federal Register** on September 26, 2002 (67 FR 60617), is hereby withdrawn.

Dated: October 29, 2008.

James H. Freis, Jr.,

Director, Financial Crimes Enforcement Network.

[FR Doc. E8–26202 Filed 11–3–08; 8:45 am]

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