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Financial Crimes Enforcement Network
P.O. Box 39
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Attention: Section 352 Investment Adviser Rule Comments
Section 352 CTA Regulations Comments

Ladies and gentlemen:

We respectfully submit this comment letter regarding FinCEN's proposed regulations requiring anti-money laundering programs for investment advisers (the "IA Rule") and requiring anti-money laundering programs for commodity trading advisors (the "CTA Rule").[1] We request consideration of this letter, notwithstanding that the comment period has expired, and we apologize for its lateness. We are not submitting this letter on behalf of any client or industry; rather, our comments are analytical in character and intended for your consideration as a matter of policy and consistency. Essentially, we make only one point in this letter.

According to FinCEN's analysis of the IA Rule and the CTA Rule set forth in the Federal Register notices, an important element in the anti-money laundering program of an investment adviser or a commodity trading advisor is "the extent to which the adviser provides investment advice to, and creates or administers, pooled investment vehicles." An adviser that provides investment advice to a pooled investment vehicle that is subject to a requirement under Bank Secrecy Act ("BSA") regulations that it operate an anti-money laundering program may exclude that vehicle from the scope of its own anti-money laundering program.[2]

An adviser that advises a pooled investment vehicle that is *not* subject to a BSA regulatory requirement that it operate an anti-money laundering program, however, must include that vehicle within the scope of its own anti-money laundering program. FinCEN discusses two cases here. First, an investment adviser or commodity trading advisor may advise a pooled investment vehicle that has been created and is administered by a third party. The adviser will have little or no access to information about the investors in such a pooled investment vehicle, and so the adviser should establish procedures for assessing and addressing the money laundering risk presented by the vehicle itself.

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[1] 68 Federal Register 23646 and 23640 (May 5, 2003), respectively.

[2] In addition to FinCen's "Section-by-Section Analysis: B. The Anti-Money Laundering Program," *see* the IA Rule, § 103.150(b), and the CTA Rule, § 103.133(b).

Second, an investment adviser or commodity trading advisor may advise a pooled investment vehicle that it has created or it administers. In this case, the adviser should have little difficulty in including such a pooled investment vehicle within the scope of its anti-money laundering program. In the IA Rule (but not in the CTA Rule) Treasury requires an investment adviser advising such a pooled investment vehicle to "address the investors in the vehicle under the same type of criteria as the adviser uses for non-pooled vehicle clients," such as individuals for whom it manages assets in separate accounts.[3]

In its proposed regulation on anti-money laundering programs for "unregistered investment companies" published last fall, FinCEN excluded from the coverage of the anti-money laundering program requirement any "unregistered investment company" that offers shares or interests that are not redeemable or that are redeemable only after a holding period of at least two years. FinCEN noted that such investment companies would "lack the liquidity that makes certain financial institutions attractive to money launderers in the first place." Such investment companies would include private REITs, many special purpose financing vehicles, and most private equity and venture capital funds.[4] Thus, investment advisers and commodity trading advisors that sponsor and advise hedge funds, private equity funds and venture capital funds have expected since last fall that, when Treasury's final regulation is adopted, they will be required to establish anti-money laundering programs covering their hedge funds, but not their private equity funds and venture capital funds.

One effect of the IA Rule and the CTA Rule, if adopted as proposed, would be to require investment advisers and commodity trading advisors, after all, to establish anti-money laundering programs covering their private equity funds and venture capital funds, as well as their hedge funds. But FinCEN proposed an appropriate policy last fall—private equity funds and venture capital funds are illiquid and unlikely vehicles for money launderers to use, whether for placement, layering or integration. We see no reason why FinCEN should reverse itself now and require investment advisers and commodity trading advisors to establish anti-money laundering programs for their private equity funds and venture capital funds.

We recommend that FinCEN *exclude* private equity funds and venture capital funds, and other pooled investment vehicles that do not permit redemption within two years of an investment, from the scope of its requirement that investment advisers and commodity trading advisors include in their anti-money laundering programs pooled investment vehicles advised by them that are not subject to BSA regulatory anti-money laundering program requirements. For purposes of making the change recommended here, the pertinent section of the IA Rule is section

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[3] *See* "Section-by-Section Analysis: B. The Anti-Money Laundering Program," 68 Federal Register 23646, 23650 (May 5, 2003). The preamble to the CTA Rule has no corresponding statement.

[4] *See* "II. Unregistered Investment Companies—General Issues: Definition of Unregistered Investment Company," 67 Federal Register 60617, 60619 (September 26, 2002).

103.150(b)(1) and of the CTA Rule is section 103.33(b)(1), each of which permits the investment adviser or commodity trading advisor to—

> exclude from its anti-money laundering program any pooled investment vehicle it advises that is subject to an anti-money laundering requirement under another provision of this subpart.

Our recommended change could be accommodated at this point, for example, by adding a few words (shown in boldface), as follows—

> exclude from its anti-money laundering program any pooled investment vehicle it advises **(i)** that is subject to an anti-money laundering requirement under another provision of this subpart **or (ii) that is excluded from the definition of "unregistered investment company" in section 103.132(a)(6) of this subpart by section 103.132(a)(6)(i)(B) of this subpart**.

We believe that this change will provide appropriate relief. It will not weaken the anti-money laundering program of any investment adviser or commodity trading advisor, nor will it weaken the national effort to combat money laundering and terrorist financing. It will avoid imposing unnecessary burdens on investment advisers and commodity trading advisors, many of which are small companies for which the operation of anti-money laundering programs represents a significant allocation of resources. As a result of our recommended change, if adopted, many advisers will bear an appropriately lighter burden in operating anti-money laundering programs. Investment advisers and commodity trading advisors that advise *only* private equity funds or venture capital funds will be in a position to avoid the burden of operating an anti-money laundering program altogether. We believe that our recommendation is consistent with FinCEN policy goals and, indeed, that it will serve those goals well.

Thank you for considering this request for consideration of our comments on FinCEN's proposed regulations regarding anti-money laundering programs for investment advisers and commodity trading advisors. If you have any questions, please call the undersigned at (212) 728-8207.

Sincerely yours,

John B. Cairns