



INVESTMENT COMPANY INSTITUTE

Craig S. Tyle
General Counsel

July 7, 2003

Judith R. Starr, Chief Counsel
Office of the Chief Counsel
Financial Crimes Enforcement Network
Department of the Treasury
P.O. Box 39
Vienna, Virginia 22183-0039

Re: Section 352 Investment Adviser Rule Comments

Dear Ms. Starr:

The Investment Company Institute¹ is pleased to comment on the rule proposed by the Treasury Department's Financial Crimes Enforcement Network (FinCEN) that would require investment advisers to establish anti-money laundering programs.²

The Institute has consistently expressed its support for effective rules to combat potential money laundering in the financial services industry, and we support the concept of applying anti-money laundering requirements to investment advisers. We agree that, even though not specifically required by the USA PATRIOT Act, it is appropriate as a matter of public policy to treat investment advisers as "financial institutions" for purposes of Section 5318(h) of the Bank Secrecy Act and to require them to establish anti-money laundering programs. We therefore support the adoption of the rule as proposed.

In particular, we support the provision that would permit an investment adviser to exclude from its anti-money laundering program any pooled investment vehicle it advises that is itself subject to an anti-money laundering program requirement (which would include mutual funds). According to the proposing release, this exclusion is intended to "prevent

¹ The Investment Company Institute is the national association of the American investment company industry. Its membership includes 8,678 open-end investment companies ("mutual funds"), 555 closed-end investment companies, 106 exchange-traded funds and 6 sponsors of unit investment trusts. Its mutual fund members have assets of about \$6.697 trillion, accounting for approximately 95% of total industry assets, and 90.2 million individual shareholders. Many of the Institute's investment adviser members render investment advice to both investment companies and other clients. In addition, the Institute's membership includes 267 associate members which render investment management services exclusively to non-investment company clients. A substantial portion of the total assets managed by registered investment advisers are managed by these Institute members and associate members.

² Financial Crimes Enforcement Network; Anti-Money Laundering Programs for Investment Advisers, 68 Fed. Reg. 23646 (May 5, 2003) (the "proposing release").

overlap and redundancy,” which is an approach that the Institute has consistently encouraged.³ We commend FinCEN for its efforts to tailor the proposed investment adviser anti-money laundering program rule to avoid unnecessary duplication and encourage FinCEN to apply the same principle in other contexts.

We also support the risk-based approach embodied in the proposed rule. As described in the commentary, the proposed rule “would require each investment adviser to review the types of services it provides and the nature of its clients to identify its vulnerabilities to money laundering and terrorist financing activity.” This implies that the adviser should take a risk-based approach to the design of *all* elements of its anti-money laundering program. We are concerned, however, with the part of the commentary that draws a distinction between clients that are pooled investment vehicles created or administered by the adviser and those that are created and administered by a third party. A risk-based approach is expressly encouraged for pooled investment vehicles that are created and administered by a third party.⁴ In contrast, the commentary indicates that “if the adviser also creates or administers a pooled investment vehicle . . . the adviser’s program would need to address the investors in the vehicle under the same type of criteria as the adviser uses for non-pooled vehicle clients.” This seems to suggest that an adviser would have to “look through” any pooled investment vehicle that it sponsored, regardless of the degree of money laundering risk posed by that vehicle.

Looking through a pooled investment vehicle to its investors is a difficult and costly proposition, particularly with respect to publicly-offered and sold funds. Accordingly, this should be seen as a necessary step only in those cases where the risks of money laundering activity are high. In cases where that risk is low, such as with publicly-sold funds that are domiciled and regulated in Europe, advisers should be able to rely upon their assessment of the risks of the vehicle and the anti-money laundering compliance performed by the fund’s administrator and not be required to look through the fund to the underlying investors.⁵

We therefore strongly recommend that the commentary accompanying the final rule clarify that an adviser may take a risk-based approach to all aspects of its anti-money

³ Proposing release at 23648. The Institute frequently has raised concerns with the inefficiencies and other adverse consequences that can result from duplicative anti-money laundering responsibilities. *See, e.g.*, Letter from Craig S. Tyle, General Counsel, Investment Company Institute, to Judith R. Starr, Chief Counsel, FinCEN, dated March 21, 2003 (recommending that, once a mutual fund suspicious activity reporting rule is adopted, mutual funds not be required to report transactions involving cash equivalents on Form 8300); Letter from Craig S. Tyle, General Counsel, Investment Company Institute, to Judith R. Starr, Chief Counsel, FinCEN, and Jonathan G. Katz, Secretary, Securities and Exchange Commission, dated September 6, 2002 (recommending that mutual funds not be required to perform duplicative identification and verification of persons who hold fund shares through an intermediary that has independent customer identification responsibilities).

⁴ The proposing release encourages advisers to “establish procedures to assess whether the entity that created and administers the vehicle, or the nature of the vehicle itself, reduces the risk of money laundering.”

⁵ Indeed, certain foreign laws (particularly those in Luxembourg and Ireland) may prevent fund administrators from providing U.S. advisers with access to information on the underlying investors. In these cases, it would be impossible to look through the vehicle to the underlying investors.

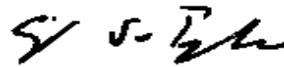
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laundering program, including those that address pooled investment vehicles that the adviser itself sponsors or administers.

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We appreciate the opportunity to comment on the proposed anti-money laundering program rule for investment advisers. If you have any questions or need additional information, please contact me at (202) 326-5815, Frances Stadler at (202) 326-5822 or Bob Grohowski at (202) 371-5430.

Sincerely,

A handwritten signature in black ink, appearing to read "C. S. Tyle".

Craig S. Tyle
General Counsel

cc: Paul F. Roye
Director, Division of Investment Management
Securities and Exchange Commission