2014. Also for this purpose, a binding written commitment exists when an employer is contractually required to pay for an arrangement, and a plan begins enrolling employees when it begins accepting employee elections to participate in the plan. The relief provided in this section does not apply to an applicable large employer that would have been liable for a payment under section 4980H without regard to § 1.36B–6(a)(2) of these proposed regulations.

An offer of coverage under an eligible employer-sponsored plan that does not comply with § 1.36B–6(a)(2) of these proposed regulations does not preclude an employee from obtaining a premium tax credit under section 36B, if otherwise eligible.

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required. It has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations and, because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the **ADDRESSES** heading. The Treasury Department and the IRS request comments on all aspects of the proposed rules. All comments will be available at *www.regulations.gov* or upon request. A public hearing will be scheduled if requested in writing by any person who timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these regulations is Andrew Braden of the Office of the Associate Chief Counsel (Income Tax and Accounting). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments

Accordingly, 26 CFR part 1 as proposed to be amended on May 3, 2013 (78 FR 25909), is proposed to be further amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read as follows:

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2.** Section 1.36B–6, as proposed to be added May 3, 2013 (78 FR 25909), is amended by revising paragraphs (a) and (g) to read as follows:

§ 1.36B–6 Minimum value.

(a) *In general.* An eligible employer-sponsored plan provides minimum value (MV) only if—

(1) The plan's share of the total allowed costs of benefits provided to an employee (the MV percentage) is at least 60 percent; and

(2) The plan provides substantial coverage of inpatient hospital services and physician services.

* * * * *

(g) *Effective/applicability date*—(1) *In general.* Except as provided in paragraph (g)(2) of this section, this section applies for taxable years ending after December 31, 2013.

(2) *Exception.* Paragraph (a)(2) of this section applies for plan years beginning after November 3, 2014.

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2015–21427 Filed 8–31–15; 8:45 am]

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DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

31 CFR Chapter X

RIN 1506–AB10

Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers

AGENCY: Financial Crimes Enforcement Network, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: Financial Crimes Enforcement Network (''FinCEN''), a bureau of the Department of the Treasury (''Treasury''), is issuing this notice of proposed rulemaking to prescribe minimum standards for anti-money laundering programs (''AML'') to be established by certain investment advisers and to require such investment advisers to report suspicious activity to FinCEN pursuant to the Bank Secrecy Act (''BSA''). FinCEN is taking this action to regulate investment advisers that may be at risk for attempts by money launderers or terrorist financers seeking access to the U.S. financial system through a financial institution type not required to maintain AML programs or file suspicious activity reports (''SARs''). The investment advisers FinCEN proposes to cover by these rules are those registered or required to be registered with the U.S. Securities and Exchange Commission (''SEC''). FinCEN is also proposing to include investment advisers in the general definition of ''financial institution'' in rules implementing the BSA. Doing so would subject investment advisers to the BSA requirements generally applicable to financial institutions, including, for example, the requirements to file Currency Transaction Reports (''CTRs'') and to keep records relating to the transmittal of funds. Finally, FinCEN is proposing to delegate its authority to examine investment advisers for compliance with these requirements to the SEC.

DATES: Written comments on this notice of proposed rulemaking (''NPRM'') must be submitted on or before November 2, 2015.

ADDRESSES: You may submit comments, identified by Regulatory Identification Number (RIN) 1506–AB10, by any of the following methods:

- *Federal E-rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Include 1506–AB10 in the submission. Refer to Docket Number FINCEN–2014–0003.
- *Mail:* FinCEN, P.O. Box 39, Vienna, VA 22183. Include 1506–AB10 in the body of the text. Please submit comments by one method only. All comments submitted in response to this NPRM will become a matter of public record. Therefore, you should submit only information that you wish to make publicly available.
- *Inspection of comments:* The public dockets for FinCEN can be found at Regulations.gov. **Federal Register** proposed and final rules published by FinCEN are searchable by docket number, RIN, or document title, among other things, and the docket number,

RIN, and title may be found at the beginning of the notice. FinCEN uses the electronic, Internet-accessible dockets at Regulations.gov as their complete, official-record docket; all hard copies of materials that should be in the docket, including public comments, are electronically scanned and placed in the docket. In general, FinCEN will make all comments publicly available by posting them on *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: The FinCEN Resource Center at (800) 767–2825 or email *frc@fincen.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

A. General Statutory Provisions

FinCEN exercises regulatory functions primarily under the Currency and Financial Transactions Reporting Act of 1970, as amended by the USA PATRIOT Act and other legislation. This legislative framework is commonly referred to as the ''Bank Secrecy Act'' (''BSA'').[1] The Secretary of the Treasury (''Secretary'') has delegated to the Director of FinCEN the authority to implement, administer, and enforce compliance with the BSA and associated regulations.[2] Pursuant to this authority, FinCEN may issue regulations requiring financial institutions to keep records and file reports that ''have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism.'' [1] Additionally, FinCEN is authorized to impose AML program and suspicious activity reporting requirements for financial institutions.[2]

In this rulemaking, FinCEN is not proposing a customer identification program requirement or including within the AML program requirements provisions recently proposed with respect to AML program requirements for other financial institutions.[3] FinCEN anticipates addressing both of these issues with respect to investment advisers, as well as other issues, such as the potential application of regulatory requirements consistent with Sections 311, 312, 313 and 319(b) of the USA PATRIOT Act,[4] in subsequent rulemakings, with the issue of customer identification program requirements anticipated to be addressed via a joint rulemaking effort with the SEC.

B. Previous Rulemaking Efforts

On May 5, 2003, FinCEN published a notice of proposed rulemaking in the **Federal Register** proposing to require certain investment advisers to establish AML programs (''First Proposed Investment Adviser Rule'').[5] This followed FinCEN's published notice of proposed rulemaking issued on September 26, 2002, proposing that unregistered investment companies establish AML programs (''Proposed Unregistered Investment Companies Rule'').[6] In June 2007, FinCEN announced that it would be taking a fresh look at how its regulatory framework was being implemented to ensure that it was being applied effectively and efficiently across the industries that the statute covers. In conjunction with this initiative, and given the amount of time that had elapsed since initial publication of the proposals, FinCEN determined that it would not proceed with BSA requirements for these entities without undertaking further public notice and comment process, and therefore withdrew the First Proposed Investment Adviser Rule and the Proposed Unregistered Investment Companies Rule (collectively, the ''previous proposals'' or ''proposed but now-withdrawn rules'') on November 4, 2008.[7] Since the previous proposals have been withdrawn, there have been significant changes in the regulatory framework for investment advisers with the passage of the Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'').[8]

II. Money Laundering Risks and Investment Advisers

As of June 2, 2014, there were 11,235 investment advisers registered with the SEC, reporting approximately $61.9 trillion in assets for their clients.[9] Investment advisers provide advisory services to many different types of clients, including individuals, institutions, pension plans, corporations, trusts, foundations, mutual funds, private funds, and other pooled investment vehicles.[10] Some of the advisory services that investment advisers provide include portfolio management, financial planning, and pension consulting. Advisory services can be provided on a discretionary or non-discretionary basis.[11] Investment advisers often work closely with their clients to formulate and implement their clients' investment decisions and strategies. Investment advisers may be organized in a variety of legal forms, including corporations, sole proprietorships, partnerships, or limited liability companies.[12]

As long as investment advisers are not subject to AML program and suspicious activity reporting requirements, money launderers may see them as a low-risk way to enter the U.S. financial system. It is true that advisers work with financial institutions that are already subject to BSA requirements, such as when executing trades through broker-dealers to purchase or sell client securities, or when directing custodial banks to transfer assets. But such broker-dealers and banks may not have sufficient information to assess suspicious activity or money laundering risk. When an adviser orders a broker-dealer to execute a trade on behalf of an adviser's client, the broker-dealer may not know the identity of the client. When a custodial bank holds assets for a private fund managed by an adviser, the custodial bank may not know the identities of the investors in the fund. Such gaps in knowledge make it possible for money launderers to evade

[1] The BSA is codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, 31 U.S.C. 5311–5314 and 5316–5332 and notes thereto, with implementing regulations at 31 CFR chapter X. *See* 31 CFR 1010.100(e).

[2] Treasury Order 180–01 (Sept. 26, 2002).

[1] 31 U.S.C. 5311.

[2] 31 U.S.C. 5318(g) and (h).

[3] Customer Due Diligence Requirements for Financial Institutions, 79 FR 45151 (Aug. 4, 2014).

[4] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (''USA PATRIOT Act'') (Pub. L. 107–56).

[5] *See Anti-Money Laundering Programs for Investment Advisers,* 68 FR 23646 (May 5, 2003). The SEC regulates investment advisers under the Investment Advisers Act of 1940 (''Advisers Act'') and the rules adopted under that Act. *See* 15 U.S.C. 80b *et seq.* and 17 CFR part 275.

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

[7] *See Withdrawal of the Notice of Proposed Rulemaking; Anti-Money Laundering Programs for Unregistered Investment Companies,* 73 FR 65569 (Nov. 4, 2008); and *Withdrawal of the Notice of Proposed Rulemaking; Anti-Money Laundering Programs for Investment Advisers,* 73 FR 65568 (Nov. 4, 2008).

[8] *See* Dodd Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

[9] *See* Frequently Requested FOIA Document: *Information About Registered Investment Advisers and Exempt Reporting Advisers,* available at *http://www.sec.gov/foia/docs/invafoia.htm.*

[10] *See* Part 1A, Item 5 of Form ADV for a list of examples of different types of advisory clients. Form ADV is the uniform form used by investment advisers to register with both the Securities and Exchange Commission (SEC) and state securities authorities; it is available at *http://www.sec.gov/divisions/investment/iard/iastuff.shtml.*

[11] An adviser has discretionary authority or manages assets on a discretionary basis if it has the authority to decide which securities to purchase and sell for the client. An adviser also has discretionary authority if it has the authority to decide which investment advisers to retain on behalf of the client. *See* Glossary to Form ADV.

[12] *See* Part 1A, Item 3.A of Form ADV.

scrutiny more effectively by operating through investment advisers rather than through broker-dealers or banks directly.

Money laundering is 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. Generally, money laundering involves three stages, known as placement,[13] layering,[14] and integration,[15] and an investment adviser's operations are vulnerable at each stage. Money laundering is defined in part with respect to the proceeds of certain predicate crimes referred to as ''specified unlawful activities.'' [16] Securities fraud is a specified unlawful activity. Both securities fraud and the act of laundering the proceeds of securities fraud are destructive to investors, individual businesses, and the financial system as a whole. The crime of money laundering also encompasses the movement of funds to finance terrorism, individual terrorists, or terrorist organizations. These funds may be from illegitimate or legitimate sources.[17]

In addition to offering services that could provide money launderers, terrorist financers, and other illicit actors the opportunity to access the financial system, investment advisers may be uniquely situated to appreciate a broader understanding of their clients' movement of funds through the financial system because of the types of advisory activities in which they engage. If a client's advisory funds include the proceeds of money laundering, terrorist financing, and other illicit activities, or are intended to further such activities, an investment adviser's AML program and suspicious activity reporting may assist in detecting such activities. Accordingly, investment advisers have an important role to play in safeguarding the financial system against fraud, money laundering, terrorist financing, and other financial crime.

III. The Proposed and Withdrawn Rules for Investment Advisers and Unregistered Investment Companies

In 2003, FinCEN published the First Proposed Investment Adviser Rule, which would have imposed on certain investment advisers a requirement to establish and implement AML programs. Prior to that, in 2002, FinCEN issued the Proposed Unregistered Investment Companies Rule. We mention the Proposed Unregistered Investment Companies Rule in the context of this rulemaking because it is FinCEN's belief that most of the issuers captured in that proposed-but-now-withdrawn rule would be included in the AML programs of investment advisers covered by this proposed rule. The previous proposals were limited to proposing AML program requirements only; they did not include additional proposed requirements to report suspicious activities to FinCEN.

FinCEN received 26 comment letters in response to the First Proposed Investment Adviser Rule. Comments were received on all aspects of the proposed rulemaking, with a particular focus on the proposed definition of ''investment adviser,'' the scope of an adviser's AML program, and the ability of an adviser to outsource compliance to a third party. FinCEN received 34 comment letters in response to the Proposed Unregistered Investment Companies Rule, and, again, there was a particular focus on the proposed definition of ''unregistered investment company,'' the scope of an issuer's AML program, and the ability of an issuer to outsource compliance obligations to third parties. In developing this current proposal, FinCEN re-reviewed all previously submitted comments to the previous proposals and has taken them into consideration.

IV. Section-by-Section Analysis

As discussed above, FinCEN previously proposed two complementary rules to address money laundering risks in the asset management industry. At the time the First Proposed Investment Adviser Rule and the Proposed Unregistered Investment Companies Rule were published by FinCEN, the regulatory landscape for investment advisers was significantly different than it is today. At the time of those proposals, asset management services provided by investment advisers were generally divided into two categories for regulatory purposes: (i) Registered advisers that managed assets for a variety of clients including mutual funds, individuals, pension plans, etc.; and (ii) unregistered private fund advisers that managed private funds and other pooled investment vehicles, like hedge and private equity funds. As a result of the Dodd-Frank Act amendments to the Investment Advisers Act of 1940 (''Advisers Act''), formerly unregistered advisers to hedge, private equity, and other private funds are now required to register with the SEC. Accordingly, FinCEN believes the two-pronged approach of the prior proposals is no longer necessary to address the money laundering and terrorist financing risks presented by SEC-registered investment adviser clients and the unregistered investment companies that are managed by such advisers.[18] FinCEN, therefore, is proposing a single rule for SEC-registered investment advisers that will result in coverage substantially similar to what would have existed if the two previously proposed but now-withdrawn rules for investment advisers and unregistered investment companies had been adopted under the Investment Act before Dodd-Frank.

A. Definitions

The BSA does not expressly enumerate ''investment adviser'' among the entities defined as a financial institution under sections 5312(a)(2) and (c)(1) of title 31 of the United States Code. In addition to those institutions listed, however, section 5312(a)(2)(Y) authorizes the Secretary to include additional types of businesses within the BSA definition of financial institution if the Secretary determines that they engage in any activity similar to, related to, or a substitute for, any of the listed businesses. Investment advisers work closely with, and provide services that are similar or related to services provided by, other businesses defined as financial institutions under

[13] At the ''placement'' stage, proceeds from illegal activity or funds intended to promote illegal activity are first introduced into the financial system. For example, this could occur in the investment advisory business when a money launderer tries to fund an investment advisory account with cash or cash equivalents derived from illegal activity. Money launderers also may approach investment advisers seeking to obtain the adviser's assistance as an intermediary in placing funds into custodial accounts.

[14] The ''layering'' stage involves the distancing of illegal proceeds from their criminal source through a series of financial transactions to obfuscate and complicate their traceability. A money launderer could place assets under management with an investment adviser as one of many transactions in an ongoing layering scheme. Layering may involve establishing an advisory account in the name of a fictitious corporation or an entity designed to break the link between the assets and the true owner. A money launderer also may place assets under management with an adviser and then shortly thereafter arrange for their removal.

[15] ''Integration'' occurs when illegal proceeds previously placed into the financial system are made to appear to have been derived from a legitimate source. For example, once illicit funds have been invested with an investment advisor, the proceeds from those investments may appear legitimate to any financial institution thereafter receiving such proceeds.

[16] *See* 18 U.S.C. 1956(c)(7).

[17] *See* 18 U.S.C. 1956, 2339A, and 2339B.

[18] The Proposed Unregistered Investment Companies Rule included in the proposed definition of ''unregistered investment company'' certain commodity pools. *See Anti-Money Laundering Programs for Unregistered Investment Companies* at 60618. For the purposes of the rules being proposed today, FinCEN is deferring on a discussion of such commodity pools.

the BSA (''BSA-defined financial institutions'').

Investment services offered by advisers may be similar or related to those offered by broker-dealers in securities, banks, or insurance companies, each of which are BSA-defined financial institutions, and similar or related securities or other financial products are used to implement those services. For instance, many investment advisers sponsor and provide advisory services to mutual funds and advise clients on the purchase or sale of mutual fund shares. Banks and broker-dealers also may provide recommendations on mutual fund shares and may sell them to their own clients or clients of investment advisers. Investment advisers may provide advice with respect to products such as annuities that are offered by insurance companies and broker-dealers in securities.[19] Some investment advisers may offer asset management services that are similar to, and that may even compete directly with, the asset management services offered by certain banks through their trust departments. Advisers often have relationships with broker-dealers to direct the purchase or sale of client securities that are held at bank or broker-dealer custodians for their clients. The close interrelationship between investment advisers and other BSA-defined financial institutions is further demonstrated by the fact that they are often dually registered as a broker-dealer in securities or affiliated with each other.[20] Accordingly, FinCEN considers investment advisers to engage in activities that are ''similar to, related to, or a substitute for'' financial services that are provided by other BSA-defined financial institutions and, therefore, should be subject to the requirements of the BSA.

Based on this consideration and the money laundering risks described above, FinCEN is proposing three regulatory changes: (1) Including investment advisers within the general definition of ''financial institution'' in the regulations implementing the BSA and adding a definition of investment adviser; (2) requiring investment advisers to establish AML programs; and (3) requiring investment advisers to report suspicious activity. These proposals are discussed in greater detail below.

1. Adding the Term ''Investment Adviser'' to General Definitions

FinCEN is proposing to add a definition of ''investment adviser'' to section 1010.100(nnn). The proposed definition is ''[a]ny person who is registered or required to register with the SEC under section 203 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3(a).'' The proposed definition relies on terms and definitions used in the Advisers Act and in the SEC's regulations implementing the Advisers Act to define investment advisers that would be subject to the proposed AML program, SAR, and general recordkeeping requirements of the BSA. The proposed definition would permit investment advisers to determine easily whether they are subject to the proposed rules. The proposed definition would include both primary advisers and subadvisers.[21] While FinCEN is limiting today's proposed definition to investment advisers registered or required to be registered with the SEC, future rulemakings may include other types of investment advisers, such as state-regulated investment advisers or investment advisers that are exempt from SEC registration, that are found to present risks to the U.S. financial system of money laundering, terrorist financing, and other types of financial crimes.

2. Scope of an Investment Adviser Definition

Generally, an investment adviser's assets under management determine whether an investment adviser is required to register or is prohibited from registering with the SEC.[22] In implementing the Dodd-Frank Act amendments to the Advisers Act, the SEC amended the instructions to Part 1A of Form ADV to further implement a uniform method for an investment adviser to calculate its assets under management in order to determine whether it is required to register or is prohibited from registering with the SEC.[23] Generally, an investment adviser falls into one of three categories based on its regulatory assets under management, *i.e.,* a large, mid-sized, or small adviser. The application of the proposed definition under 31 CFR 1010.100(nnn) to these three categories of adviser is discussed in the following section. In view of the comment letters submitted in response to the First Proposed Investment Adviser Rule, this section also discusses the application of the proposed investment adviser definition to certain specific types of advisers and other related entities.[24]

(a) Application of the Definition to Large, Mid-Sized, and Small Investment Advisers

Generally, a large adviser has $100 million or more in regulatory assets under management, and is required to register with the SEC (and therefore included in the proposed definition) unless an exemption from SEC registration is available.[25] FinCEN notes that large advisers would comprise the bulk of investment advisers that are included in the definition of investment adviser for purposes of the rules being proposed today.

Generally, a mid-sized adviser has $25 million or more but less than $100 million, and a small adviser has less than $25 million in regulatory assets under management and is regulated or required to be regulated as an investment adviser in the State where it maintains its principal office and place of business.[26] Mid-sized and small advisers are generally prohibited from registering with the SEC and therefore are excluded from the proposed definition, unless an exemption from the prohibition on SEC registration is available.[27] Mid-sized and small

[19] *See* Securities and Exchange Commission, *Annuities* (Apr. 6, 2011) *available at http://www.sec.gov/answers/annuity.htm.* Insurance companies that issue securities are regulated by the SEC, State securities commissioners, and State insurance commissioners.

[20] *See* Securities and Exchange Commission, *Study on Investment Advisers and Broker Dealers as Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act* (Jan. 2011) at page 8 *available at http://www.sec.gov/news/studies/2011/913studyfinal.pdf.*

[21] In the investment advisory industry, an adviser may act as the ''primary adviser'' or a ''subadviser.'' The Advisers Act does not distinguish between advisers and subadvisers; all are ''investment advisers.'' *See Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers* at note 504 and accompanying text. Generally, the primary adviser contracts directly with the client and a subadviser has contractual privity with the primary adviser. With respect to such a shared client, an advisory contract may grant the primary adviser the discretionary authority to retain and dismiss a subadviser. Other advisory contracts may only permit the primary adviser to recommend a subadviser to such a client—the client retains the authority to hire or dismiss a subadviser.

[22] *See Rules Implementing Amendments to the Investment Advisers Act of 1940* at 42955.

[23] *See* Instructions for Part 1A, Item 5.F of Form ADV. *See also id.*

[24] FinCEN notes that this discussion is not exhaustive and that there may be other types of investment advisers or entities that meet the definition being proposed today and, therefore, would be subject to today's proposed rule.

[25] 17 CFR 275.203A–1(a)(1).

[26] *See* 15 U.S.C. 80b–3A(a)(1). Currently, only the State of Wyoming does not regulate investment advisers. A small adviser located in the State of Wyoming, therefore, is required to register with the SEC.

[27] *See* 15 U.S.C. 80b–3A(a)(2). A mid-sized adviser with its principal office and place of business in Wyoming is neither required to register with the State, nor ''subject to examination'' by the State securities authority and is, therefore, required to register with the SEC. Also, mid-sized advisers

Continued

advisers prohibited from registering with the SEC are generally subject to regulation by the States.

In the rules being proposed today, FinCEN is limiting the scope of the investment adviser definition to those advisers that are registered or required to be registered with the SEC. Limiting the definition of investment adviser to SEC-registered advisers will align FinCEN's regulatory framework with Federal functional regulation and allow FinCEN to work with the SEC to develop consistent application and examination of the BSA to such advisers. FinCEN notes that Congress has decided that, as a threshold matter, the type of investment adviser that should be subject to Federal regulation is, generally, an adviser that has $100 million or more in assets under management.[28]

FinCEN recognizes that investment advisers that are at risk for abuse by money launderers, terrorist financers, and other illicit actors may not be limited to advisers that are registered, or required to be registered, with the SEC. FinCEN, therefore, may consider future rulemakings to expand the application of the BSA to include investment advisers that are not registered or required to be registered with the SEC.

(b) Application of the Investment Adviser Definition to Certain Specific Types of Advisers and Other Related Entities

Investment advisers provide many types of advisory services and may be organized in a wide variety of legal forms. The proposed definition applies to persons registered or required to register with the SEC and therefore may include, among others, the following types of advisers:

- Dually-registered investment advisers, and advisers that are affiliated with or subsidiaries of entities required to establish AML programs;
- certain foreign investment advisers;
- investment advisers to registered investment companies;
- financial planners;
- pension consultants; and
- entities that provide only securities newsletters and/or research reports.

FinCEN recognizes that the different types of investment advisers included within today's proposed definition may present varying degrees of money laundering and terrorist financing risks. FinCEN, therefore, anticipates that the burden of establishing an AML program would also correspondingly be reduced due to the risk-based nature of the program and the types of advisory services these entities provide.

B. Delegation of Examination Authority to the Securities and Exchange Commission

FinCEN has overall authority for enforcement of compliance with its regulations, including coordination and direction of procedures and activities of all other agencies exercising delegated authority. FinCEN is proposing to amend section 1010.810 to include investment advisers within the list of financial institutions the SEC has the authority to examine for compliance with FinCEN's rules. Persons and entities meeting the definition of investment adviser being proposed today under 31 CFR 1010.100(nnn) would fall under this provision. The SEC has expertise in the regulation of investment advisers. The SEC is the Federal functional regulator for certain investment advisers and, therefore, is responsible for examining investment advisers for compliance with the Advisers Act and the SEC rules promulgated under that Act. Moreover, FinCEN has delegated to the SEC examination authority for broker-dealers in securities and certain investment companies, which are BSA-defined financial institutions subject to FinCEN's regulations and for which the SEC is the Federal functional regulator.[29] Accordingly, the SEC is in the best position to act as the designated examiner of investment advisers for compliance with the rules FinCEN is proposing today.

C. Investment Advisers Defined as Financial Institutions

FinCEN is proposing to include investment advisers registered or required to be registered with the SEC within the general definition of ''financial institution'' in the regulations implementing the BSA.[30] The application of general BSA reporting and recordkeeping requirements to an entity depends upon whether the entity is included in the general definition of ''financial institution.''[31] To date, investment advisers have not been required to comply with Currency Transaction Report (CTR) filing requirements,[32] and the recordkeeping, transmittal of records, and retention requirements for the transmittal of funds under the Recordkeeping and Travel Rules and other related recordkeeping requirements.[33] Defining investment advisers as a financial institution under 31 CFR 1010.100(t) would require investment advisers to comply with all BSA regulatory requirements generally applicable to financial institutions, including these requirements and to comply with information sharing requests pursuant to section 314(a) of the USA PATRIOT Act.[34]

1. Investment Advisers' Obligation To File CTRs Replaces Obligation To File Form 8300

Under FinCEN's regulations that apply to a broad range of commercial activity, investment advisers are currently required to file reports on Form 8300 for the receipt of more than $10,000 in cash and negotiable instruments.[35] The rules being proposed today would replace this requirement with a requirement that investment advisers file CTRs pursuant to 31 CFR 1010.311.[36] An investment adviser

with their principal offices and places of business in New York would be required to register with the SEC because the State securities authority has not represented to the SEC that registered advisers are ''subject to examination'' in the State; therefore, such advisers must register with the SEC. A mid-sized adviser that is required to register in any other State is subject to examination by the State and thus would be prohibited from registering with the SEC. *See* 15 U.S.C. 80b–3A(a)(2). *See also* Securities and Exchange Commission—Division of Investment Management, *Frequently Asked Questions Regarding Mid-Sized Advisers* (Jun. 28, 2011) *available at http://www.sec.gov/divisions/investment/midsizedadviserinfo.htm.*

[28] 17 CFR 275.203A–1(a)(1).

[29] *See* 31 CFR 1010.810(b)(6).

[30] *See* 31 CFR 1010.100(t).

[31] The general definition of ''financial institution'' at 31 CFR 1010.100(t) is less inclusive than the definition in the BSA itself. *See* 31 U.S.C. 5312(a)(2). The general definition determines the scope of rules that require the filing of CTRs and the creation, retention, and transmittal of records or information on transmittals of funds and other specified transactions. *See* 31 CFR 1010.310; 31 CFR 1010.311; 31 CFR 1010.312; 31 CFR 1010.313; 31 CFR 1010.314; 31 CFR 1010.315; 31 CFR 1010.410; 31 CFR 1010.415; and 31 CFR 1010.430. Defining a business as a financial institution also could make the business ineligible for exemption from the requirement to file CTRs. *See, e.g.,* 31 CFR 1020.315(e)(8).

[32] *See infra* Section IV.C.1.

[33] *See* 31 CFR 1010.410 and 1010.430. The recordkeeping, transmittal of records, and retention requirements for the transmittal of funds for non-bank financial institutions under 31 CFR 1010.410 are often referred to as the ''Recordkeeping and Travel Rules.'' *See infra* Section IV.C.2.

[34] *See* 1010.520.

[35] 31 CFR 1010.330(a)(1)(i). ''Cash'' and ''negotiable instruments'' include cashier's checks, bank drafts, traveler's checks, and money orders in face amounts of $10,000 or less, if the instrument is received in a ''designated reporting transaction.'' 31 CFR 1010.330(c)(1)(ii)(A). A ''designated reporting transaction'' is defined as the retail sale of a consumer durable, collectible, or travel or entertainment activity. 31 CFR 1010.330(c)(2). In addition, an investment adviser would need to treat the instruments as currency if the adviser knows that a customer is using the instruments to avoid the reporting of a transaction on Form 8300. 31 CFR 1010.330(c)(1)(ii)(B).

[36] *See* 31 CFR 1010.330(a) (stating that section 1010.330 [the BSA provision requiring the filing of the Form 8300] ''does not apply to amounts received in a transaction reported under 31 U.S.C.

would file a CTR for a transaction involving a transfer of more than $10,000 in currency by, through or to the investment adviser.[37] The threshold in 31 CFR 1010.311 applies to transactions conducted during a single business day.[38] A financial institution must treat multiple transactions as a single transaction if the financial institution has knowledge that the transactions are conducted by or on behalf of the same person.[39]

Because investment advisers would no longer be required to file Form 8300s, investment advisers would be freed from having to report applicable transactions involving certain negotiable instruments reportable on Form 8300 but not the CTR when the investment adviser suspects that the monetary instruments are being used to avoid the Form 8300 being filed.[40] Although FinCEN recognizes that there may be some potential for criminals to use negotiable instruments such as money orders to move illicit cash through the investment adviser, the volume of Form 8300s currently filed by investment advisers is relatively low when compared to the overall volume of transactions involving investment advisers.[41] Because investment advisers rarely receive from or disburse to clients significant amounts of currency, FinCEN believes they are less likely to be used during the initial ''placement'' stage of the money laundering process than other financial institutions. Moreover, since an investment adviser would be required to report suspicious transactions under the SAR rule being proposed today, the ability to report suspicious transactions on Form 8300 would be redundant.[42]

2. The Recordkeeping and Travel Rules and Other Related Recordkeeping Requirements

Including investment advisers in the general definition of financial institution would subject an investment adviser to the requirements of the Recordkeeping and Travel Rules and other related recordkeeping requirements. Under the Recordkeeping and Travel Rules, financial institutions must create and retain records for transmittals of funds, and ensure that certain information pertaining to the transmittal of funds ''travel'' with the transmittal to the next financial institution in the payment chain.[43] Accordingly, the rules being proposed today would require compliance with 31 CFR 1031.410 (cross referencing 31 CFR 1010.410) and 31 CFR 1031.430 (cross referencing 31 CFR 1010.430).

The Recordkeeping and Travel Rules apply to transmittals of funds that equal or exceed $3,000. A ''transmittal of funds'' includes funds transfers processed by banks, as well as similar payments where one or more of the financial institutions processing the payment (*e.g.,* the transmittor's financial institution, an intermediary financial institution, or the recipient's financial institution) is not a bank.[44] When a financial institution accepts and processes a payment sent by or to its customer, then the financial institution would be the ''transmittor's financial institution'' or the ''recipient's financial institution,'' respectively. The Recordkeeping and Travel Rules require the transmittor's financial institution to obtain and retain the name, address, and other information about the transmittor and the transaction.[45] The Recordkeeping and Travel Rules also require the recipient's financial institution (and in certain instances, the transmittor's financial institution) to obtain or retain identifying information on the recipient.[46] The Recordkeeping and Travel Rules require that certain information obtained or retained ''travel'' with the transmittal order through the payment chain.[47]

Under the proposed rule, investment advisers would fall within an existing exception that is designed to exclude from these requirements' coverage funds transfers or transmittals of funds in which certain categories of financial institutions are the transmittor, originator, recipient, or beneficiary.[48] The proposed application of the exception to investment advisers is intended to provide advisers with treatment similar to that of banks, brokers or dealers in securities, futures commission merchants, introducing brokers in commodities, and mutual funds. Finally, the proposed amendment would subject investment advisers to requirements to create and retain records for extensions of credit and cross-border transfers of currency, monetary instruments, checks, investment securities, and credit.[49] These requirements apply to transactions in amounts exceeding $10,000.[50]

D. Anti-Money Laundering Programs

The provisions of 31 U.S.C. 5318(h), added to the BSA in 1992 by section 1517 of the Annunzio-Wylie Anti-Money Laundering Act (''Annunzio-Wylie Act''), authorize the Secretary ''[i]n order to guard against money laundering through financial institutions . . . [to] require financial institutions to carry out anti-money laundering programs.''[51] Those programs must include, at a minimum, ''the development of internal policies, procedures, and controls;'' ''the designation of a compliance officer;'' ''an ongoing employee training program;'' and ''an independent audit

5313 and 31 CFR 1010.311.'') To the extent an investment adviser conducts transactions other than in currency (as defined in section 1010.100(m) for purposes of the CTR requirement), it would be exempt from reporting such transactions because the Form 8300 requirement does not apply.

[37] *See* 31 CFR 1010.311 and 31 CFR 1010.100(m) (currency is defined as the coin and paper of the United States or of any other country that is designated as legal tender and that circulates and is customarily used as a medium of exchange in a foreign country).

[38] *See* 31 CFR 1010.313(b). Financial institutions must file a CTR for a transaction or related transactions for each deposit, withdrawal, exchange of currency or other payment or transfer, by, through or to such financial institution which involves a transaction in currency of more than $10,000 during any one business day. Compare to the threshold requirement for the Form 8300 defining any transactions conducted between a payer (or its agent) and the recipient in a 24-hour period as related transactions. Transactions are considered related even if they occur over a period of more than 24 hours if the recipient knows, or has reason to know, that each transaction is one of a series of connected transactions. *See* 31 CFR 1010.330(b)(3).

[39] 31 CFR 1010.313(b).

[40] In determining whether to file a Form 8300, an investment adviser currently may need to treat instruments as currency if the adviser knows that a customer is using the instruments to avoid the reporting of a transaction on Form 8300. *See* 1010.330(c)(1)(ii)(B).

[41] A review of BSA data revealed that approximately 3,047 Form 8300s were filed by all investment advisers, whether registered or unregistered, over the seven years beginning in 2008, which is a fraction of the millions of transactions investment advisers conduct yearly on behalf of their clients.

[42] Currently an investment adviser can report a suspicious transaction voluntarily by checking box 1(b) in the Form 8300. In addition to the requirement that an investment adviser report on a CTR, under the proposed rule, an investment adviser would also be required to file a SAR if a transaction exceeds the threshold amount.

[43] *See* 31 CFR 1020.410(a) and 1010.410(f). Financial institutions are also required to retain records for five years. *See* 31 CFR 1010.430(d).

[44] *See* 31 CFR 1010.100(f), (g), (w), (z), (aa), (ii), (jj), (pp), (qq), (ddd), (eee), (fff), and (ggg) for various definitions pertaining to a ''transmittal of funds and persons and institutions involved in the payment chain of a transmittal of funds.''

[45] *See* 31 CFR 1010.410(e)(1)(i) and (e)(2).

[46] *See* 31 CFR 1010.410(e)(3) (information that the recipient's financial institution must obtain or retain).

[47] *See* 31 CFR 1010.410(f) (information that must ''travel'' with the transmittal order); 31 CFR 1010.100(eee) (defining ''transmittal order'').

[48] 31 CFR 1020.410(a)(6) and 31 CFR 1010.410(e)(6).

[49] *See* 31 CFR 1010.410(a) through (c). Financial institutions must retain these records for a period of five years. 31 CFR 1010.430(d).

[50] *See* 31 CFR 1010.410(a) through (c).

[51] 31 U.S.C. 5318(h)(1); Annunzio-Wylie Act, Title XV of the Housing and Community Development Act of 1992, Public Law 102–550.

function to test programs.'' [52] Title III of the USA PATRIOT Act amended 31 U.S.C. 5318(h) to make the establishment of anti-money laundering programs mandatory for financial institutions.[53]

Registered investment advisers are currently subject to Federal securities laws governing the securities industry, which require the establishment of a variety of policies, procedures, and controls. The Advisers Act requires a registered investment adviser to maintain certain books and records, as prescribed by the SEC.[54] Under 17 CFR 275.204–2, an SEC-registered investment adviser is required to keep certain books and records that relate to its investment advisory business.[55] Under 17 CFR 275.203–1, investment advisers are also required to complete and submit Form ADV to the SEC. The Advisers Act also prohibits an investment adviser from engaging in fraudulent, deceptive, and manipulative conduct.[56] SEC rules require investment advisers to adopt and implement written policies and procedures reasonably designed to prevent violation of the Advisers Act and the rules that the SEC has adopted under that Act.[57] Advisers must conduct annual reviews to ensure the adequacy and effectiveness of their policies and procedures and must designate a chief compliance officer responsible for administering the policies and procedures.[58] Accordingly, FinCEN contemplates that investment advisers would be able to adapt existing policies, procedures, and internal controls in order to comply with the rules FinCEN is proposing today. Moreover, some investment advisers have already implemented AML programs either voluntarily or in conjunction with an SEC No-Action letter permitting broker-dealers in securities to rely on registered investment advisers to perform some or all aspects of broker-dealers' customer identification program (''CIP'') obligations.[59]

1. Overview of AML Program Requirement

Section 1031.210(a)(1) of the proposed rule would require each investment adviser to develop and implement a written AML program reasonably designed to prevent the investment adviser from being used to facilitate money laundering or the financing of terrorist activities and to achieve and monitor compliance with the applicable provisions of the BSA and FinCEN's implementing regulations. Section 1031.210(a)(2) would require each investment adviser's AML program to be approved in writing by its board of directors or trustees, or if the investment adviser does not have a board, by its sole proprietor, general partner, trustee, or other persons that have functions similar to a board of directors. Each investment adviser would also be required to make its AML program available to FinCEN or the SEC upon request.

The four minimum requirements for the AML program are set forth in section 1031.210(b) and are discussed in greater detail below. The AML program requirement is not a one-size-fits-all requirement but rather is risk-based. The risk-based approach of the proposed rule is intended to give investment advisers the flexibility to design their programs to meet the specific risks of the advisory services they provide and the clients they advise.[60] For example, large firms should adopt policies, procedures, and internal controls addressing the responsibilities of the individuals and departments carrying out each aspect of the AML program, while smaller firms will likely adopt procedures that are consistent with their (often) simpler, more centralized organizational structures.[61] This flexibility is designed to ensure that all firms subject to FinCEN's AML program requirements, from the smallest to the largest, and the simplest to the most complex, have in place policies, procedures, and internal controls appropriate to their advisory business to prevent the investment adviser from being used to facilitate money laundering or the financing of terrorist activities and to achieve and monitor compliance with the applicable provisions of the BSA and FinCEN's implementing regulations.

2. Scope

Generally, an investment adviser's program must cover all of its advisory activity, whether the adviser is acting as the primary adviser or a subadviser. The discussion below focuses on FinCEN's expectations with respect to the coverage of the following specific types of services: (a) Advisory services that do not include the management of client assets; (b) subadvisory services; and (c) advisory services provided to real estate funds.

(a) Provision of Other Advisory Services

An investment adviser may provide clients with advisory services, such as pension consulting, securities news letters, research reports, or financial planning that do not include the management of client assets.

[52] 31 U.S.C. 5318(h)(1)(A)–(D).

[53] Section 352(a) of the Act, which became effective on April 24, 2002, amended section 5318(h) of the BSA.

[54] *See* 15 U.S.C. 80b–4(a) (requiring investment advisers to make and retain records as defined in section 3(a)(37) of the Exchange Act and to make and disseminate reports as prescribed by the SEC).

[55] *See* 17 CFR 275.204–2 (Books and records to be maintained by investment advisers).

[56] *See, e.g.,* 15 U.S.C. 80b–6(1), (2) and (4) (Advisers Act prohibiting registered and unregistered investment advisers from engaging in any activity that would defraud a client or prospective client). *See also* 17 CFR 275.206(4)–8 (SEC rule prohibiting registered and unregistered investment advisers from making false or misleading statements to, or otherwise defrauding, investors or prospective investors to pooled investment vehicles).

[57] 17 CFR 275.206(4)–7(a).

[58] 17 CFR 275.206(4)–7(b) and (c).

[59] Under the SEC No-Action letter re-issued in consultation with FinCEN on January 9, 2015, a broker-dealer in securities is permitted to rely on a registered investment adviser to perform all or part of its CIP obligations with regard to shared clients as if the investment adviser were subject already to an AML program rule, provided the other provisions of CIP reliance are met. Securities and Exchange Commission, Division of Trading and Markets, *Request for No-Action Relief Under Broker-Dealer Customer Identification Rule* (31 CFR 1023.220) (Jan. 9, 2015) *available at http://www.sec.gov/divisions/marketreg/mr-noaction/2015/sifma-010915-17a8.pdf. See also* 31 CFR 1023.220(a)(6) (CIP rule permitting a financial institution to rely on another financial institution to perform all or part of its obligations to verify the identity of its customers as required by 31 U.S.C. 5318(h)).

[60] The legislative history of the BSA reflects that Congress intended that each financial institution should have the flexibility to tailor its program to fit its business, taking into account factors such as size, location, activities, and risks or vulnerabilities to money laundering, so long as the program meets the four minimum statutory requirements. This flexibility is designed to ensure that all firms, from the largest to the smallest, have in place policies and procedures appropriate to monitor for money laundering. *See* USA PATRIOT Act of 2001: Consideration of H.R. 3162 Before the Senate, 147 Cong. Rec. S10990–02 (Oct. 25, 2001) (statement of Sen. Sarbanes); Financial Anti-Terrorism Act of 2001: Consideration Under Suspension of Rules of H.R. 3004 Before the House of Representatives, 147 Cong. Rec. H6938–39 (Oct. 17, 2001) (statement of Rep. Kelly) (provisions of the Financial Anti-Terrorism Act of 2001 were incorporated as Title III in the Act).

[61] According to the *2014 Evolution Revolution Report,* which is based on Part 1 of the Form ADVs filed by SEC-registered investment advisers, as of April 7, 2014, there were 10,895 investment advisers registered with the SEC managing $61.7 trillion in regulatory assets under management (RAUM). Many advisers have relatively few employees. 6,216 advisers (57.1%) reported having 10 or fewer full-time and part-time non-clerical employees and 9,581 (87.9%) reported having 50 or fewer such employees. However, a relatively small number of very large advisers manage a high percentage of the reported RAUM. One hundred and twelve (1%) of the largest registered advisers (those reporting $100 billion or more in RAUM) collectively accounted for 52.6% of all reported RAUM. Advisers with less than $1 billion RAUM, which account for 71.5% of all registered advisers, collectively managed 3.5% of all reported RAUM. *See 2014 Evolution Revolution; A Profile of the Investment Adviser Profession* at page 5, *available at* (*https://www.investmentadviser.org/eweb/*).

Additionally, an investment adviser may provide other clients with advisory services that are a combination of asset management and the advisory services discussed above. FinCEN would expect an investment adviser to address in its AML program all of its advisory activity, including activity that does not entail the management of client assets.

(b) Subadvisory Services

Today's rule, as proposed, would require an investment adviser providing subadvisory services to a client to address these services in its AML program and to monitor such services for potentially suspicious activity. FinCEN acknowledges that requiring an investment adviser to address in its AML program the subadvisory services it provides certain types of clients may result in some duplication of effort, such as when the primary adviser is subject to today's proposed rule. However, there may be some instances in which an investment adviser provides subadvisory services to a client that has a primary adviser not subject to the AML program and SAR requirements proposed today, *e.g.,* certain mid-sized advisers that do not meet the criteria for SEC registration. Under this circumstance, the application of the investment adviser's AML and SAR programs to the subadvisory activity will mitigate the potential risk that the subadviser could be used for money laundering, terrorist financing, or other illicit activity.

(c) Real Estate Funds

Today's proposed rule would require an investment adviser to include in its AML program the advisory activity it provides to any publicly or privately offered real estate fund. The proposed rule does not require a real estate fund to establish and implement its own AML program, but instead requires a person that meets today's proposed definition of investment adviser, and that provides advisory services to such a fund, to include this advisory activity in its own AML program. The proposed rule does not provide for any explicit limitations or exceptions for the advisory activity provided to a real estate fund.

3. Addressing Money Laundering and Terrorist Financing Risks

In developing its program, an investment adviser would need to analyze the money laundering and terrorist financing risks posed by a particular client that maintains an account with the adviser by using a risk-based evaluation of relevant factors. This type of review could build upon the investment adviser's efforts to comply with the Federal securities laws applicable to investment advisers. If the client is an individual, the source of the client's funds and the jurisdiction in which the client is located, among other things, would be significant factors. If a client is an entity, an investment adviser may consider the type of entity, the jurisdiction in which it is located, and the statutory and regulatory regime of that jurisdiction, if relevant.[62] The investment adviser's historical experience with the individual or entity and the references of other financial institutions may also be relevant factors. The investment adviser's risk assessment should also include any other relevant factors that may be particular to the adviser's business and the client. An investment adviser should monitor the advisory activity it provides to its clients for potentially suspicious activity. Based on the investment adviser's risk assessment, as the risks posed by a client increase, the adviser's policies, procedures, and internal controls will need to be reasonably designed to prevent the adviser from being used by the client for money laundering or terrorist financing. FinCEN recognizes that some types of clients and/or client activities will pose greater risks for money laundering or terrorist financing than others.

In view of the comment letters submitted in response to the First Proposed Investment Adviser Rule, the discussion below focuses on FinCEN's expectations regarding how an investment adviser's AML program may address the money laundering or terrorist financing risks that may be presented by certain specific types of advisory clients, as well as how an adviser's program may address the risks presented by certain specific advisory services provided to those clients. The following types of clients will be discussed: (a) Non-pooled investment vehicle clients (*e.g.,* individuals and institutions); (b) registered open-end fund clients; (c) registered closed-end fund clients; and (d) private fund clients/unregistered pooled investment vehicle clients. In addition, this section describes FinCEN's expectations under a risk-based approach regarding advisory services to wrap fee programs.

(a) Non-Pooled Investment Vehicle Clients

Advisers are vulnerable to money laundering or terrorist financing risks when managing the assets of non-pooled investment vehicle clients (*e.g.,* individuals and institutions).[63] Accordingly, an investment adviser's assessment of the risks presented by the different types of advisory services it provides to such clients should take into account the types of accounts offered (*e.g.,* managed accounts), the types of clients opening such accounts, and how the accounts are funded.

(b) Registered Open-End Fund Clients (Mutual Funds)

Generally, FinCEN acknowledges that the advisory services provided to registered open-end fund clients, specifically mutual funds, may present lower money laundering and terrorist financing risks to the investment adviser than the advisory activities provided to other types of pooled investment vehicles, such as private funds and other unregistered pooled investment vehicles, because registered open-end investment companies are subject to the full panoply of FinCEN's rules implementing the BSA. Registered open-end investment companies already are required to, among other things, establish AML and customer identification programs and report suspicious activity. The BSA requirements to which mutual funds are subject may mitigate the money laundering risks that a mutual fund client and the mutual fund's underlying client base or investors present to an investment adviser.

(c) Registered Closed-End Fund Clients

FinCEN recognizes that the advisory activity provided to a closed-end fund may present a lower risk for money laundering, terrorist financing, and other illicit activity than other types of advisory activity.[64] Purchases and sales of closed-end fund shares are executed through broker-dealers or banks, and these entities are already required to

[62] If an entity is organized or registered in a foreign jurisdiction, an investment adviser should ascertain whether the jurisdiction has been identified by the Financial Action Task Force (''FATF'') as a jurisdiction subject to a FATF call for counter-measures or a jurisdiction with strategic AML/CFT deficiencies. *See generally* FATF Web site, *available at http://www.fatf-gafi.org/.* FinCEN has issued several advisories informing financial institutions of the AML/CFT deficiencies of such jurisdictions. *See generally* FinCEN Web site, *available at http://www.fincen.gov/news_room/advisory/.*

[63] *See also Anti-Money Laundering Programs for Investment Advisers* at 23649 (discussing an adviser's higher vulnerability to risk of being used for money laundering when clients place their assets under management with the adviser and possible indicia of money laundering activities that should be included in an investment adviser's AML program procedures).

[64] *See A Report to Congress in Accordance with 356(c) of the Uniting and Strengthening America by Providing the Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act)* at pages 15–7.

establish and implement AML programs under the BSA. Consequently, given the risk-based approach required in the AML programs for financial institutions generally, including investment advisers, FinCEN would expect an investment adviser to risk-rate the advisory services it provides to a closed-end fund to reflect a lower risk for money laundering or terrorist financing than other types of advisory activity, such as that provided to a private fund or other unregistered pooled investment vehicle.

(d) Private Fund Clients/Unregistered Pooled Investment Vehicles

An investment adviser that is the primary adviser to a private fund or other unregistered pooled investment vehicle is required to make a risk-based assessment of the money laundering and terrorist financing risks presented by the investors in such investment vehicles by considering the same types of relevant factors, as appropriate, as the adviser would consider for clients for whom the adviser manages assets directly, as discussed above.[65] Generally, when an investment adviser is the primary adviser for a private fund or other unregistered pooled investment vehicle, the adviser should have access to information about the identities and transactions of the underlying or individual investors. FinCEN notes, however, that there may be a lack of transparency regarding the entities that invest in private funds and other unregistered pooled investment vehicles.[66] The lack of transparency regarding the investors may put these types of investment vehicles at risk for money laundering, terrorist financing, fraud, and other illicit activity. Under certain circumstances, FinCEN further recognizes that an investment adviser may be required to assess the money laundering and terrorist financing risks associated with the underlying investors of a client that is a private fund or other unregistered pooled investment vehicle using a risk-based approach.

FinCEN recognizes that certain private funds and other unregistered pooled investment vehicles may present lower risks for money laundering or terrorist financing than others. Consequently, FinCEN would not expect an investment adviser to risk-rate the advisory services it provides to a pooled investment vehicle that presents a lower risk the same as it might rate the advisory services it provides to other types of pooled investment vehicles that may present higher risks for attracting money launderers, terrorist financers, or other illicit actors.

If any of the investors in the private fund or other unregistered pooled investment vehicle for which the investment adviser is acting as the primary adviser are themselves private funds or some other type of unregistered pooled investment vehicles (an ''investing pooled entity''), the investment adviser will need to assess the money laundering or terrorist financing risks associated with these investing pooled entities using a risk-based approach.

Investment advisers acting as primary advisers may provide advisory services to a private fund or other unregistered pooled investment vehicle that operates offshore.[67] That is, investment advisers may advise a private fund or other unregistered pooled investment vehicle that may be organized in the United States or in a foreign jurisdiction, and interests in these pools may be offered to U.S. and/or foreign investors. In the rule FinCEN is proposing today, regardless of offshore formation or offering, an investment adviser should apply the same policies and the procedures as discussed above to any private fund or other unregistered pooled investment vehicle for which the investment adviser provides advisory services.

(e) Wrap Fee Programs

In some instances, the sponsoring securities broker-dealer of a wrap fee program may be dually registered as an investment adviser.[68] As discussed above, FinCEN would expect such an investment adviser to address the money laundering or terrorist financing risks of the underlying clients in the program.

In other instances, an investment adviser may provide advisory services to a wrap fee program that is sponsored by an unaffiliated broker-dealer. Although under such circumstances the investment adviser may have more limited access to investor information and transactions, such an adviser may still have access to information that would enable the adviser to identify money laundering, terrorist financing, or other illicit activity.

4. Dually Registered Investment Advisers and Advisers Affiliated With or Subsidiaries of Entities Required To Establish Anti-Money Laundering Programs

Some investment advisers are dually registered with the SEC as investment advisers and broker-dealers in securities. Other investment advisers may be affiliated with, or subsidiaries of, entities that are either defined as a financial institution under the BSA in other capacities, or are otherwise required to establish AML programs. With respect to an investment adviser that is dually registered as a broker-dealer, FinCEN is not proposing to require such an adviser to establish multiple or separate AML programs so long as a comprehensive AML program covers all of the entity's advisory and broker-dealer activities and businesses. The program must be designed to address the different money laundering risks posed by the different aspects of the dually registered entity's businesses and satisfy each of the risk-based AML program requirements to which it is subject in its capacity as an investment adviser and broker-dealer in securities.[69] Similarly, an investment

[65] *See* generally discussions *supra* ''Scope'' and ''Non-Pooled Investment Vehicle Clients.'' *See also Anti-Money Laundering Programs for Investment Advisers* at 23650 (proposing a similar approach for an adviser that creates or administers a pooled investment vehicle not subject to BSA requirements).

[66] *See Anti-Money Laundering Programs for Unregistered Investment Companies* at 60621 (investors in unregistered investment companies may include individuals and institutional investors [such as pension funds and corporations], as well as other registered and unregistered investment companies [*i.e.,* ''funds of hedge funds'']; the diversity and complexity of the structures of these pooled investment vehicles, particularly those with offshore operations, may result in a lack of transparency regarding the entities that invest in the unregistered investment company).

[67] *See* General Instructions for Part 2 of Form ADV, Item 10.C.2 *available at http://www.sec.gov/about/forms/formadv-part2.pdf* (requiring SEC-registered investment advisers to include in their narrative brochure to clients any relationship or arrangement that the adviser has with an offshore fund that is material to its advisory business or to its clients). *See also Anti-Money Laundering Programs for Unregistered Investment Companies* at note 31.

[68] A ''wrap fee program'' for purposes of the rules being proposed today is a program under which investment advisory and brokerage execution services are provided for a single ''wrapped'' fee that is not based on the number of transactions executed in a client's account. An investment advisory program under which all clients pay traditional, transaction-based commissions is not a wrap fee program. Similarly, a program under which client assets are allocated among mutual funds is not a wrap fee program, because normally there is no payment for brokerage execution. *See* Securities and Exchange Commission—Division of Investment Management, *General Regulation of Investment Advisers* at *http://www.sec.gov/divisions/investment/iaregulation/memoia.htm.*

[69] FinCEN notes that while broker-dealers in securities are subject to the full panoply of FinCEN's regulations implementing the BSA, investment advisers would not be subject to certain of those BSA requirements, *e.g.,* the customer identification rule. FinCEN expects that an entity dually registered as a broker-dealer in securities and an investment adviser will design an enterprise-wide AML compliance program under which its broker dealer activities would be subject to BSA requirements appropriate to broker dealers, and its

adviser affiliated with, or a subsidiary of, an entity required to establish an AML program in another capacity does not have to implement multiple or separate programs as long as the program covers all of the entity's activities and businesses that are subject to the BSA. The program must be designed to address the different money laundering risks posed by the different aspects of the entity's business and satisfy each of the risk-based AML program and any other BSA requirements to which it is subject in all of its regulated capacities, as for example an investment adviser and a bank or insurance company.[70]

FinCEN recognizes the importance of enterprise-wide compliance and, therefore, believes it would be beneficial and cost-effective for these types of entities to implement one comprehensive AML program that includes all activities covered by FinCEN's regulations. However, these entities are not required to establish one comprehensive AML program; they may instead establish multiple programs to satisfy their AML obligations.

5. Delegation of Duties

As indicated by the discussion of various client relationships and services above, an investment adviser's advisory services may involve other financial institutions, such as broker-dealers, banks, mutual funds, or other investment advisers that have separate AML program requirements. In addition, an investment adviser may conduct some of its operations through agents or third-party service providers, such as broker-dealers in securities (including prime brokers), custodians, and transfer agents. Some elements of the compliance program may best be performed by personnel of these entities, in which case it is permissible for an investment adviser to delegate contractually the implementation and operation of those aspects of its AML program to such an entity.[71] Any investment adviser that delegates the implementation and operation of aspects of its AML program to another financial institution, agent, third-party service provider, or other entity, however, will remain fully responsible for the effectiveness of the program, as well as for ensuring that FinCEN and the SEC are able to obtain information and records relating to the AML program.

6. AML Program Approval

Section 1031.210(a)(2) of the proposed rule would require that each investment adviser's AML program be approved in writing by its board of directors or trustees, or if it does not have a board, by its sole proprietor, general partner, trustee, or other persons that have functions similar to a board of directors. This provision of the proposed rule would assure that the requirement to have an AML program receives the appropriate level of attention and is sufficiently flexible to permit an investment adviser to comply with this requirement based on its particular organizational structure. An investment adviser's written program would have to be made available to FinCEN or the SEC upon request.

7. The Required Elements of an Anti-Money Laundering Program

(a) Establish and Implement Policies, Procedures, and Internal Controls

Section 1031.210(b)(1) requires an investment adviser's written AML program to establish and implement policies, procedures, and internal controls based upon the investment adviser's assessment of the money laundering or terrorist financing risks associated with its business. The policies, procedures, and internal controls should be reasonably designed to prevent the investment adviser from being used for money laundering or the financing of terrorist activities, and to achieve and monitor compliance with the applicable provisions of the BSA and FinCEN's implementing regulations. Generally, an investment adviser must review, among other things, the types of advisory services it provides and the nature of the clients it advises to identify its vulnerabilities to money laundering and terrorist financing activities, and the adviser's policies, procedures, and internal controls must be developed based on this review. An investment adviser's AML program may encompass many types of advisory clients, including individuals, institutions, registered investment companies, and other pooled vehicles, including private funds and other unregistered pools, regardless of whether the investment adviser is acting as the primary adviser or a subadviser.

(b) Provide for Independent Testing for Compliance To Be Conducted by Company Personnel or by a Qualified Outside Party

Section 1031.210(b)(2) requires that an investment adviser provide for independent testing of the program on a periodic basis to ensure that it complies with the requirements of the rule and that the program functions as designed. Employees of either the investment adviser, its affiliates, or unaffiliated service providers may conduct the independent testing, so long as those same employees are not involved in the operation and oversight of the program. The employees should be knowledgeable regarding BSA requirements. The frequency of the independent testing will depend upon the investment adviser's assessment of the risks posed. Any recommendations resulting from such testing should be promptly implemented or submitted to senior management for consideration.

(c) Designate a Person or Persons Responsible for Implementing and Monitoring the Operations and Internal Controls of the Program

Section 1031.210(b)(3) requires that an investment adviser designate a person or persons to be responsible for implementing and monitoring the operations and internal controls of the AML program. An investment adviser may designate a single person or committee to be responsible for compliance. The person or persons should be knowledgeable and competent regarding FinCEN's regulatory requirements and the adviser's money laundering risks, and should have full responsibility and authority to develop and enforce appropriate policies and procedures to address those risks. Whether the compliance officer is dedicated full time to BSA compliance would depend on the size and type of advisory services the adviser provides and the clients it serves. A person designated as a compliance officer should be an officer of the investment adviser. FinCEN notes that in order to comply with this requirement of the AML program, investment advisers should be able to

investment advisory activities would be subject to the BSA requirements required by this proposed rule.

[70] FinCEN notes that although certain insurance companies are required to establish and implement AML programs and report suspicious activity, the term ''insurance company'' is not included within the general definition of financial institution under FinCEN's regulations and, therefore, such insurance companies are not required to file CTRs with FinCEN or comply with the Recordkeeping and Travel Rules and other related recordkeeping requirements. Accordingly, FinCEN would not expect an insurance company that is affiliated with or owns an investment adviser to design an enterprise-wide AML compliance program that would subject the insurance company to BSA requirements not required by FinCEN's regulations. Conversely, FinCEN would not expect a bank, which is subject to the full panoply of FinCEN's regulations implementing the BSA that is affiliated with or owns an investment adviser to design an enterprise-wide AML compliance program that would subject the investment adviser to BSA requirements that would not be required by the rules FinCEN is proposing today.

[71] *See e.g., Anti-Money Laundering Programs for Investment Advisers* at 23650.

adapt existing policies and procedures.[72]

(d) Provide Ongoing Training for Appropriate Persons

Section 1031.210(b)(4) requires that an investment adviser provide for training of appropriate persons. Employee training is an integral part of any AML program. In order to carry out their responsibilities effectively, employees of an investment adviser (and of any agent or third-party service provider) must be trained in BSA requirements relevant to their functions and in recognizing possible signs of money laundering that could arise in the course of their duties. Such training may be conducted by outside or in-house seminars, and may include computer-based training. The nature, scope, and frequency of the investment adviser's training program would be determined by the responsibilities of the employees and the extent to which their functions bring them in contact with BSA requirements or possible money laundering activity. Consequently, the training program should provide a general awareness of overall BSA requirements and money laundering issues, as well as more job-specific guidance regarding particular employees' roles and functions in the AML program. For those employees whose duties bring them in contact with BSA requirements or possible money laundering activity, the requisite training should occur when the employee assumes those duties. Moreover, these employees should receive periodic updates and refreshers regarding the AML program.

E. Applicability Date

Section 1031.210(c) states the effective date by which an investment adviser must comply with this section. FinCEN is proposing that an investment adviser must develop and implement an AML program that complies with the requirements of this section on or before six months from the effective date of the regulation.

F. Reports of Suspicious Transactions

In 1992, the Annunzio-Wylie Act authorized the Secretary to require financial institutions to report suspicious transactions.[73] FinCEN has issued rules under this authority requiring banks, casinos, money services businesses, broker-dealers in securities, mutual funds, insurance companies, futures commission merchants, and introducing brokers in commodities, among others, to report suspicious activity.[74] Suspicious activity reporting by these and other types of financial institutions provides information highly useful in law enforcement and regulatory investigations and proceedings, as well as in the conduct of intelligence activities to protect against international terrorism.[75] Requiring investment advisers to report suspicious activity is similarly expected to provide useful information for investigations and proceedings involving domestic and international money laundering, terrorist financing, fraud, and other financial crimes. Requiring investment advisers to report suspicious activity also narrows the regulatory gap that may be exploited by money launderers seeking access to the U.S. financial system through financial institutions not required to report suspicious transactions.

The rule, as proposed, does not permit investment advisers to share SARs within their corporate organizational structures in the absence of further guidance. In 2010, in close consultation with the Federal banking agencies, the SEC, and the Commodity Futures Trading Commission, FinCEN finalized proposed amendments to the SAR rules that, among other things, clarified the scope of the statutory prohibition against the disclosure by a financial institution of a SAR.[76] At the same time, FinCEN finalized two pieces of interpretive guidance clarifying that banks, broker-dealers in securities, mutual funds, futures commission merchants, and introducing brokers in commodities could share SARs, subject to certain limitations, within their corporate organizational structures.[77] Although the guidance was limited to these industries, the final rule noted that the regulatory framework being finalized would facilitate the potential expansion of this authority to other industries in the future. FinCEN understands that investment advisers may find it necessary to share SARs within their organizational structures to fulfill reporting obligations under the BSA, and to facilitate more effective enterprise-wide BSA compliance. FinCEN is interested in hearing from investment advisers on this specific issue (see the Request for Comment section) and is mindful that guidance on this topic may need to be issued in a timely manner following the issuance of any final rule.

1. Reports by Registered Investment Advisers of Suspicious Transactions

Proposed § 1031.320(a) sets forth the obligation of investment advisers to report suspicious transactions that are conducted or attempted by, at, or through an investment adviser and involve or aggregate at least $5,000 in funds or other assets. The $5,000 minimum amount in this proposed rule is consistent with the SAR filing requirements for most other financial institutions that are subject to a SAR reporting requirement under FinCEN's rules implementing the BSA.[78] A transaction is reportable under this proposed rule regardless of whether the transaction involves currency.[79] Filing a report of a suspicious transaction does not relieve an investment adviser from the responsibility of complying with the Advisers Act or any rule imposed by the SEC.

Section 1031.320(a)(1) contains the general statement of the obligation to file reports of suspicious transactions. The obligation extends to transactions conducted or attempted by, at, or through an investment adviser. To clarify that the proposed rule imposes a reporting requirement that is uniform with that for other financial institutions, § 1031.320(a)(1) incorporates language from the suspicious activity reporting

[72] *See* discussion *supra* Section IV.D (''Anti-Money Laundering Programs'') for a discussion of existing Advisers Act recordkeeping and reporting obligations that would enable investment advisers to adapt existing policies, procedures, and internal controls in order to comply with the AML program requirement to designate a compliance officer.

[73] 31 U.S.C. 5318(g) was added to the BSA by section 1517 of the Annunzio-Wylie Anti-Money Laundering Act, Title XV of Public Law 102–550 (October 28,1992); it was expanded by section 403 of the Money Laundering Suppression Act of 1994 (the Money Laundering Suppression Act), Title IV of the Riegle Community Development and Regulatory Improvement Act of 1994, Public Law 103–325, to require designation of a single government recipient for reports of suspicious transactions. As amended by the USA PATRIOT Act, subsection (g)(1) states generally that ''the Secretary may require any financial institution, and any director, officer, employee, or agent of any financial institution, to report any suspicious transaction relevant to a possible violation of law or regulation.''

[74] *See* 31 CFR 1020.320, 1021.320, 1022.320, 1023.320, 1024.320, 1025.320, and 1026.320, 1029.320 and 1030.320.

[75] *See* 31 U.S.C. 5311 (Declaration of Purpose of the Bank Secrecy Act).

[76] *See generally Confidentiality of Suspicious Activity Reports,* 75 FR 75593 (Dec. 3, 2010).

[77] *See generally Sharing Suspicious Activity Reports by Securities Broker-Dealers, Mutual Funds, Futures Commission Merchants, and Introducing Brokers in Commodities with Certain U.S. Affiliates,* FIN–2010–G005 (Nov. 23, 2010) and *Sharing Suspicious Activity Reports by Depository Institutions with Certain U.S. Affiliates,* FIN–2010–G006 (Nov. 23, 2010).

[78] *See* 31 CFR 1024.320(a), 1023.320(a), 1020.320(a), 1021.320(a), 1026.320(a), and 1021.320(a) (requiring mutual funds, broker-dealers in securities, banks, futures commission merchants and introducing brokers in commodities, and casinos to report suspicious transactions if they involve in the aggregate at least $5,000).

[79] *See* 31 U.S.C. 5318(g)(1).

rules applicable to other financial institutions, such as banks, broker-dealers in securities, mutual funds, casinos, and money services businesses. Furthermore, this section of the proposed rule contains a provision that permits an investment adviser to report voluntarily any transaction the investment adviser believes is relevant to the possible violation of any law or regulation but that is not otherwise required to be reported by this proposed rule. Thus, the rule encourages the voluntary reporting of suspicious transactions in cases in which the rule does not explicitly require reporting, such as in the case of a transaction that is below the $5,000 threshold of the proposed rule in § 1031.320(a)(2). Such voluntary reporting is subject to the same protection from liability as mandatory reporting pursuant to 31 U.S.C. 5318(g)(3). Section 1031.320(a)(2) requires the reporting of suspicious activity that involves or aggregates at least $5,000 in funds or other assets. Sections 1031.320(a)(2)(i) through (iv) specifies that an investment adviser is required to report a transaction if it knows, suspects, or has reason to suspect that the transaction (or a pattern of transactions of which the transaction is a part): (i) Involves funds derived from illegal activity or is intended or conducted to hide or disguise funds or assets derived from illegal activity; (ii) is designed, whether through structuring or other means, to evade the requirements of the BSA; (iii) has no business or apparent lawful purpose, and the investment adviser knows of no reasonable explanation for the transaction after examining the available facts; or (iv) involves the use of the investment adviser to facilitate criminal activity.[80]

A determination as to whether a SAR must be filed should be based on all the facts and circumstances relating to the transaction and the client in question. Different types of clients and transactions will require different judgments. One commenter to the First Proposed Investment Adviser Rule included in its comments examples of money laundering red flags likely to be observed by an investment adviser. The red flags submitted included the following: (1) A client exhibits an unusual concern regarding the adviser's compliance with government reporting requirements or is reluctant or refuses to reveal any information concerning business activities, or furnishes unusual or suspicious identification or business documents; (2) a client appears to be acting as the agent for another entity but declines, evades, or is reluctant to provide any information in response to questions about that entity; (3) a client's account has a pattern of inexplicable and unusual withdrawals, contrary to the client's stated investment objectives; (4) a client requests that a transaction be processed in such a manner as to avoid the adviser's normal documentation requirements; or (5) a client exhibits a total lack of concern regarding performance returns or risk.[81] FinCEN believes that these are all examples of circumstances that may be indicative of suspicious activity and warrant further consideration by the investment adviser. FinCEN notes, however, that the techniques of money laundering or terrorist financing are continually evolving, and there is no way to provide a definitive list of suspicious transactions.

The proposed rule would require that an investment adviser evaluate client activity and relationships for money laundering risks and design a suspicious transaction monitoring program that is appropriate for the particular investment adviser in light of such risks. Some of the types of suspicious activity an investment adviser may see could include structuring and fraudulent activity. Suspicious activity observed in the subscription of private fund interests may include the use of money orders or travelers checks in structured amounts to avoid currency reporting requirements. A money launderer also could engage in structuring by funding a managed account or subscribing to a private fund by using multiple wire transfers from different accounts maintained at different financial institutions. Suspicious activity could include other unusual wire activity that does not correlate with a client's stated investment objectives. As discussed above, investment advisers should be able to build upon existing policies, procedures, and internal controls they currently have in place to comply with the Federal securities laws to which they are subject in order to report suspicious activity.

Section 1031.320(a)(3) provides that the obligation to identify and report a suspicious transaction rests with the investment adviser involved in the transaction. However, where more than one investment adviser, or another financial institution with a separate suspicious activity reporting obligation, is involved in the same transaction, only one report is required to be filed. FinCEN recognizes that other financial institutions, such as broker-dealers in securities, mutual funds, and banks have separate reporting obligations that may involve the same suspicious activity.[82] Furthermore, as discussed above, many investment advisers may be dually registered or affiliated with another financial institution. Therefore, in those instances, when an investment adviser and another financial institution are involved in the same transaction, only one report is required to be filed. It is permissible for either the investment adviser or the other financial institution to file a single joint report provided it contains all relevant facts and that each institution maintains a copy of the report and any supporting documentation.

2. Filing and Notification Procedures

Proposed § 1031.320(b)(1) through (4) sets forth the filing and notification procedures to be followed by investment advisers making reports of suspicious transactions. Within 30 days after an investment adviser becomes aware of a suspicious transaction, the adviser must report the transaction by completing and filing a SAR with FinCEN in accordance with all form instructions and applicable guidance. Supporting documentation relating to each SAR is to be collected and maintained separately by the investment adviser and made available upon request to FinCEN; any Federal, State, or local law enforcement agency; or any Federal regulatory authority, in particular the SEC, which examines the investment adviser for compliance with the BSA. Because supporting documentation is deemed to have been filed with the SAR, these authorities and agencies are consistent with those authorities or agencies to whom a SAR may be disclosed pursuant to proposed rules of construction, as discussed further below. For situations requiring immediate attention, such as suspected terrorist financing or ongoing money laundering schemes, investment advisers are required to notify immediately by telephone the appropriate law enforcement authority in addition to filing a timely SAR. Any investment adviser reporting suspicious transactions that may relate to terrorist

[80] The fourth category of reportable transactions has been added to the suspicious activity reporting rules promulgated since the passage of the USA PATRIOT Act to make it clear that the requirement to report suspicious activity encompasses the reporting of transactions involving fraud and those in which legally derived funds are used for criminal activity, such as the financing of terrorism.

[81] The Proposed Unregistered Investment Companies Rule also provided examples of suspicious transactions that could indicate potential money laundering in an unregistered investment company. *See Anti-Money Laundering Programs for Unregistered Investment Companies* at 60620.

[82] *See* 31 CFR 1023.320 and 1024.320.

activity may call FinCEN's Resource Center (FRC) at 1–800–767–2825 in addition to filing timely a SAR if required by this section.

3. Retention of Records

Proposed § 1031.320(c) provides that investment advisers must maintain copies of filed SARs and the underlying related documentation for a period of five years from the date of filing. As indicated above, supporting documentation is to be made available to FinCEN and the prescribed law enforcement and regulatory authorities, upon request.

4. Confidentiality of SARs

Proposed § 1031.320(d) provides that a SAR and any information that would reveal the existence of a SAR are confidential and shall not be disclosed except as authorized in § 1031.320(d)(1)(ii). Section 1031.320(d)(1)(i) generally provides that no investment adviser, and no current or former director, officer, employee, or agent of any investment adviser, shall disclose a SAR or any information that would reveal the existence of a SAR. This provision of the proposed rule further provides that any investment adviser and any director, officer, employee, or agent of any investment adviser that is subpoenaed or otherwise requested to disclose a SAR or any information that would reveal the existence of a SAR, must decline to produce the SAR or such information and must notify FinCEN of such a request and any response thereto. In addition to reports of suspicious activity required by the proposed rule, investment advisers would be prohibited from disclosing voluntary reports of suspicious activity.[83]

Section 1031.320(d)(1)(ii) provides three rules of construction that clarify the scope of the prohibition against the disclosure of a SAR by an investment adviser and closely parallel the rules of construction in the suspicious activity reporting rules for other financial institutions. As discussed above, the proposed rules of construction primarily describe situations that are not covered by the prohibition against the disclosure of a SAR or information that would reveal the existence of a SAR contained in § 1031.320(d)(1). Section 1031.320(d)(1)(ii), however, makes clear that the rules of construction proposed today are each qualified by, and subordinate to, the statutory mandate that no person involved in any reported suspicious transaction can be notified that the transaction has been reported.

The first rule of construction, in § 1031.320(d)(1)(ii)(A)(1), does not prohibit an investment adviser, or any director, officer, employee or agent of an investment adviser from disclosing a SAR, or any information that would reveal the existence of a SAR, to FinCEN, or any Federal, State or local law enforcement agencies, or a Federal regulatory authority that examines the investment adviser for compliance with the BSA provided that no person involved in the reported transaction is notified that the transaction has been reported. As discussed above, FinCEN is proposing to delegate its examination authority for compliance with FinCEN's rules implementing the BSA to the SEC.

The second rule of construction, in § 1031.320(d)(1)(ii)(A)(*2*), provides that the phrase ''a SAR or information that would reveal the existence of a SAR'' does not include ''the underlying facts, transactions, and documents upon which a SAR is based.'' An investment adviser, or any director, officer, employee, or agent of an investment adviser, therefore, is not prohibited from disclosing the underlying facts, transactions, and documents upon which a SAR is based, including but not limited to, disclosures of such information to another financial institution or any director, officer, employee, or agent of a financial institution, for the preparation of a joint SAR, provided that no person involved in the reported transaction is notified that the transaction has been reported.

The third rule of construction, in § 1031.320(d)(1)(ii)(B), recognizes that investment advisers may find it necessary to share within their corporate organizational structures a SAR or information that would reveal the existence of a SAR for purposes consistent with Title II of the BSA. The proposed rule would not authorize sharing within an investment adviser's corporate organizational structure in the absence of further guidance or rulemaking by FinCEN as to circumstances under which such sharing would be consistent with Title II of the BSA.

Section 1031.320(d)(2) incorporates the statutory prohibition against disclosure of SAR information by government users of SAR data other than in fulfillment of their official duties consistent with the BSA. The paragraph clarifies that official duties do not include the disclosure of SAR information in response to a request by a non-governmental entity for non-public information[84] or for use in a private legal proceeding, including a request under 31 CFR 1.11.[85]

5. Limitation of Liability

Proposed § 1031.320(e) provides protection from liability for making either required or voluntary reports of suspicious transactions, and for failures to disclose the fact of such reporting to the full extent provided by 31 U.S.C. 5318(g)(3).

6. Compliance

Proposed § 1031.320(f) notes that compliance with the obligation to report suspicious transactions will be examined by FinCEN or its delegates and provides that failure to comply with the rule may constitute a violation of the BSA and FinCEN's regulations. As discussed above, pursuant to 31 CFR 1010.810(a), FinCEN has overall authority for enforcement and compliance with its regulations, including coordination and direction of procedures and activities of all other agencies exercising delegated authority. Further, pursuant to § 1010.810(d), FinCEN has the authority to impose civil penalties for violations of the BSA and its regulations.

7. Compliance Date

Proposed section 1031.320(g) provides that the new suspicious activity reporting requirement applies to transactions initiated after the implementation of an AML program required by § 1031.210 of this part. However, investment advisers may and will be encouraged to begin filing SARs as soon as practicable on a voluntary basis upon the issuance of the final rule.

Investment advisers may conduct some of their operations through agents or third-party service providers, which

[83] To encourage the reporting of possible violations of law or regulation and the filing of SARs, the BSA contains a safe harbor provision that shields financial institutions making such reports from civil liability. In 2001, the USA PATRIOT Act clarified that the safe harbor also covers voluntary disclosure of possible violations of law and regulations to a government agency and expanded the scope of the limit on liability to cover any civil liability which may exist under any contract or other legally enforceable agreement (including any arbitration agreement). *See* USA PATRIOT Act, section 351(a). Public Law 107–56, Title III, 351, 115 Stat. 272, 321(2001); 31 U.S.C. 5318(g)(3).

[84] For purposes of this rulemaking, ''non-public information'' refers to information that is exempt from disclosure under the Freedom of Information Act.

[85] 31 CFR 1.11 is the Department of the Treasury's information disclosure regulation. Generally, these regulations are known as ''Touhy regulations,'' after the Supreme Court's decision in *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951). In that case, the Supreme Court held that an agency employee could not be held in contempt for refusing to disclose agency records or information when following the instructions of his or her supervisor regarding the disclosure. As such, an agency's Touhy regulations are the instructions agency employees must follow when those employees receive requests or demands to testify or otherwise disclose agency records or information.

may or may not be affiliated with the investment adviser, such as broker-dealers in securities, custodians, administrators, or transfer agents. Just as investment advisers are permitted to delegate the implementation and operation aspects of their AML programs to such service providers, an investment adviser is permitted to delegate its suspicious activity reporting requirements. However, if an investment adviser delegates such responsibility to an agent or a third-party service provider, the adviser remains responsible for its compliance with the requirement to report suspicious activity, including the requirement to maintain SAR confidentiality.

G. Special Information Sharing Procedures To Deter Money Laundering and Terrorist Activity

Section 1031.500 proposes to subject investment advisers to FinCEN's rules implementing the special information sharing procedures to detect money laundering or terrorist activity requirements of sections 314(a) and 314(b) of the USA PATRIOT Act.[86] Section 314(a) provides for the sharing of information between the government and financial institutions and allows FinCEN to require financial institutions to search their records to determine whether they have maintained an account or conducted a transaction with a person that law enforcement has certified is suspected of engaging in terrorist activity or money laundering. Section 314(b) provides financial institutions with the ability to share information with one another, under a safe harbor that offers protections from liability, in order to identify better and report potential money laundering or terrorist activities. Sections 1010.520 and 1010.540 implement sections 314(a) and 314(b) of the USA PATRIOT Act, respectively, and generally apply to any financial institution that is listed in 31 U.S.C. 5312(a)(2) and is subject to an AML program requirement. Section 1031.500 would state generally that investment advisers are subject to the special information sharing procedures to detect money laundering or terrorist activity requirements set forth and cross referenced in §§ 1031.520 (cross-referencing to 31 CFR 1010.520) and 1031.540 (cross-referencing to 31 CFR 1010.540). Because FinCEN is proposing to include investment advisers within the definition of financial institution under section 5312(a)(2)(Y) and to require investment advisers to establish AML programs, investment advisers would also be subject to FinCEN's rules implementing section 314. The rules being proposed today, therefore, add subpart E to part 1031 to make clear that FinCEN's rules implementing section 314 would apply to investment advisers.

[86] *See* 31 U.S.C. 1010.520 and 1010.540.

V. Request for Comment

FinCEN seeks comment on today's proposed rules and whether the rules are appropriate in light of the nature of investment adviser activities and the recent amendments to the Advisers Act under the Dodd-Frank Act. In particular, FinCEN seeks comment on the following aspects of the proposed rule.

Proposed Definition of Investment Adviser

FinCEN requests comment on all aspects of the definition of ''investment adviser'' as proposed in section 1010.100(nnn). In particular:

- Does the exclusion from the definition of investment adviser of those large advisers that qualify for and use an exemption from the requirement to register with the SEC place this class of investment adviser at risk for abuse by money launderers, terrorist financers, or other illicit actors? If so, should FinCEN include these advisers in its definition of investment adviser? What would be the disadvantage of doing so?
- Are there classes of investment advisers included in the definition of investment adviser that are not at risk, or present a very low risk for money laundering, terrorist financing, or other illicit activity such that they could appropriately be excluded from the definition? If so, why would it be appropriate to exclude such advisers from the definition as opposed to adopting an AML program that is appropriate to their level of risk?
- Should foreign advisers that are registered or required to register with the SEC, but that have no place of business in the United States, be included in the definition of investment adviser?
- To what extent are mid-sized, small, State-registered, and foreign private investment advisers that do not meet the definition of investment adviser proposed today at risk for being used for money laundering, terrorist financing, or other illicit activity?
- Are there other types of investment advisers that may not meet the definition as proposed today, such as exempt reporting advisers (''ERAs'') (whether the adviser is a U.S. or non-U.S. person), family offices, and financial planners, that are at risk for abuse by money launderers, terrorist financers, or other illicit actors?
- With regard to ERAs, are there differences in the risks associated with an adviser that qualifies for and elects to use the 203(l) exemption from an adviser that qualifies for and elects to use the 203(m) exemption that would warrant different treatment under the BSA?
- Are there certain types of financial planners that are not included in the proposed definition that, based on the activities in which they engage, are at risk for being used for money laundering, terrorist financing, or other illicit activity?

A. Proposed Requirement To Include Investment Advisers in the General Definition of Financial Institution and To Require Advisers To File CTRs and Comply With the Recordkeeping and Travel Rules

FinCEN requests comment on the inclusion of investment advisers in the general definition of financial institution at 31 CFR 1010.100(t). In particular:

- With regard to requiring investment advisers to comply with the Recordkeeping and Travel Rules and other related recordkeeping requirements and the anticipated impact of subjecting advisers to these requirements, what are the anticipated time and monetary savings that could result from replacing the requirement to file reports on Form 8300 with a requirement to file CTRs?
- Is there any information that law enforcement, tax, regulatory, and counter-terrorism investigations may possibly lose because investment advisers would be filing CTRs as opposed to filing Form 8300s?

B. Proposed AML Program Requirement

FinCEN requests comment on all aspects of the proposed AML program requirement for investment advisers. In particular:

- Is the proposed rule's approach of requiring an investment adviser to include in its AML program requirement all of the advisory services it provides, whether acting as the primary adviser or a subadviser, an appropriate approach?
- Is the risk-based nature of the proposed AML program requirement sufficiently flexible to permit an investment adviser to develop and implement an AML program without providing specific exclusions for certain advisory activity?

C. Proposed Minimum Requirements of the AML Program

FinCEN seeks comment on the minimum requirements an investment

adviser would be required to include in its AML program as proposed in § 1031.210(b). In particular:

• Is it appropriate to allow an adviser to delegate some elements of its compliance program to an entity with which the client, and *not* the adviser, has the contractual relationship?

• Is it appropriate for FinCEN to expect an investment adviser to include in its AML program all advisory services that an adviser may provide to non-pooled investment vehicle clients (*e.g.,* individuals and institutions), registered open-end fund clients, registered closed-end fund clients, private fund/other unregistered pooled investment vehicle clients, and wrap fee programs?

• To what extent would a subadviser's AML program overlap with the primary adviser's AML program and how could any possible duplication of effort be mitigated?

• Is there an increased risk for such a subadviser to be used for money laundering, terrorist financing, or other illicit activity when providing advisory services to a client that has a primary adviser that is not an investment adviser?

• Should the primary adviser be required to apply the same approach when the investing pooled entity is a registered investment company, such as a mutual fund or closed-end fund?

• Should a subadviser to a private fund or other unregistered pooled investment vehicle, which has a primary adviser that is not an investment adviser, be required to establish the same policies and procedures as when the primary adviser is an investment adviser?

• If an underlying investor in the private fund or other unregistered pooled investment vehicle is an investing pooled entity, should a subadviser be required to identify risks and incorporate policies and procedures within its AML program to mitigate the risks of the investing pooled entity's underlying investors, sponsoring entity, and/or intermediaries when there is an increased risk of money laundering, terrorist financing, or other illicit activity?

• Is an express exclusion for advisory activity provided to an open-end or closed-end fund appropriate to reduce potential overlap or redundancy?

• With respect to a mutual fund's omnibus accounts, are the money laundering or terrorist financing risks mitigated because the fund is required to assess the risks posed by its own particular omnibus accounts?

• Should an adviser to a wrap fee program be required to obtain additional information about the investors in the program and/or coordinate its review with the sponsoring broker-dealer when the adviser sees an increased risk for money laundering, terrorist financing, or other illicit activity?

FinCEN seeks comment on the money laundering program requirements as proposed in § 1031.210(b)(2) through (4).

D. Proposed Suspicious Activity Reporting Rule

FinCEN seeks comment on all aspects of today's suspicious activity reporting rule as proposed in § 1031.320. In particular:

• Should investment advisers be permitted to share SARs within their corporate organizational structure in the same way that banks, broker-dealers in securities, futures commission merchants, mutual funds, and introducing brokers in commodities are permitted to share? How would such sharing be consistent with the purposes of the BSA and how would investment advisers be able to maintain the confidentiality of shared SARs?

E. Future Consideration of Additional BSA Requirements for Investment Advisers

• Should investment advisers be required to comply with other FinCEN rules implementing the BSA, including the rules requiring customer identification and verification procedures pursuant to section 326 of the USA PATRIOT Act and the correspondent account rules of section 311 and 312 of the USA PATRIOT Act?

• Should investment advisers be required to comply with FinCEN rules implementing section 313 and 319(b) of the USA PATRIOT Act?

The regulations implementing section 326 require certain financial institutions to implement reasonable customer identification procedures for: (1) Verifying the identity of any person seeking to open an account, to the extent reasonable and practicable; and (2) maintaining records of the information used to verify the person's identity, including name, address, and other identifying information.[87] The regulations implementing section 311 require U.S. financial institutions to take certain ''special measures'' against foreign jurisdictions, institutions, classes of transactions, or types of accounts the Treasury designates as a ''primary money laundering concern.'' [88] The regulations implementing section 312 require a U.S. financial institution to perform due diligence and, in some cases, enhanced due diligence, with regard to correspondent accounts established or maintained for foreign financial institutions and private banking accounts established or maintained for non-U.S. persons.[89]

The regulations implementing section 313 prohibit certain financial institutions from providing correspondent accounts to foreign shell banks, and require such financial institutions to take reasonable steps to ensure that correspondent accounts provided to foreign banks are not used to indirectly provide banking services to foreign shell banks.[90] The regulations implementing section 319(b) require these financial institutions that provide correspondent accounts to foreign banks to maintain records of the ownership of such foreign banks and their agents in the United States designated for legal service of process for records regarding these correspondent accounts, and require the termination of correspondent accounts of foreign banks that fail to comply with or fail to contest a lawful request of the Secretary of the Treasury or the Attorney General of the United States.

VI. Regulatory Analysis

A. Executive Orders 13563 and 12866

Executive Orders 13563 and 12866 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. It has been determined that this proposed rule is designated a ''significant regulatory action'' although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, this proposed rule will be reviewed by the Office of Management and Budget (''OMB'').

B. Regulatory Flexibility Act

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (''RFA'') requires the agency to ''prepare and make available for public comment'' an ''initial regulatory

[87] *See, e.g.,* 31 CFR 1020.220, 1023.220, 1024.220, and 1026.220.

[88] *See, e.g.,* 31 CFR 1010.653.

[89] *See, e.g.,* 31 CFR 1020.610–620, 1023.610–620, 1024.610–620, and 1026.610–620.

[90] *See, e.g.,* 31 CFR 1020.630, 1023.630, 1024.630, and 1026.630.

flexibility analysis'' (''IRFA'') which will ''describe the impact of the proposed rule on small entities.'' 5 U.S.C. 603(a). Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

After consultation with the Small Business Administration's Office of Advocacy, FinCEN is proposing to define the term small entity in accordance with definitions obtained from SEC rules implementing the Advisers Act and information obtained from the Investment Adviser Registration Depository (''IARD''),[91] in lieu of using the Small Business Administration's definition.[92] FinCEN requests comment on the appropriateness of using the SEC's definition of small entity.

Relying on the SEC's definition has the benefit of ensuring consistency in the categorization of small entities for SEC examiners,[93] as well as providing the advisory industry with a uniform standard. In addition, FinCEN's proposed use of the SEC's definition of small entity will have no material impact upon the application of these proposed rules to the advisory industry.

The SEC defines an entity as a small adviser if it: (1) Has assets under management having a total value of less than $25 million; (2) did not have total assets of $5 million or more on the last day of its most recent fiscal year; and (3) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had total assets of $5 million or more on the last day of its most recent fiscal year.[94] The proposed rules would define investment adviser as any person who is registered or required to register with the SEC under section 203 of the Advisers Act.[95] Generally speaking, only large advisers, having $100 million or more in regulatory assets under management, are required to registers with the SEC,[96] and only those that do will fall within the ambit of these proposals. The Small Business Administration, on the other hand, defines a provider of ''investment advice'' to be a small entity as having ''annual receipts'' of $38.5 million,[97] which is still significantly below the $100 million threshold for registration.

Based on IARD data, the SEC estimates that as of June 2, 2014, approximately 11,235 investment advisers were registered with the SEC.[98] To determine how many of the 11,235 advisers are small entities for purposes of the RFA, FinCEN is adopting the SEC's definition of a small adviser. The SEC estimates that there are about 464 investment advisers registered that would be considered small entities. The SEC also estimates that the total number of small investment advisers is about 18,035.[99] Therefore, FinCEN estimates that the proposed rule will affect 4% of registered small investment advisers. FinCEN has determined that the proposed rule will not affect a substantial number of small entities.

Investment advisers' services can be a substitute for investment services and products offered by other financial institutions designated as financial institutions under the BSA, such as mutual funds, broker-dealers in securities, banks, or insurance companies. Moreover, investment advisers managing client assets work closely with other BSA-defined financial institutions. The rules being proposed today address vulnerabilities in the U.S. financial system. If investment advisers are not required to establish AML or suspicious activity reporting programs, they are at risk of attracting money launderers attempting to seek access to the United States financial system through an institution that offers financial services that is not required to maintain such programs. Requiring investment advisers to file CTRs and comply with the Recordkeeping and Travel Rules and the other recordkeeping requirements of FinCEN's rules implementing the BSA will also deter money launderers from using investment advisers. Lastly, by requiring investment advisers to establish AML programs and file reports of suspicious activity and comply with the other rules being proposed today, investment advisers and other financial institutions subject to FinCEN's regulations would be operating under similar regulatory burdens.

The proposed rule would require investment advisers to develop and implement a written risk-based AML program. FinCEN believes that the flexibility incorporated into the proposed AML program rule would permit each investment adviser to tailor its AML program to fit its particular size and risk exposure. For example, having recognized that the size of a financial institution does not correlate with its risks for money laundering and terrorist financing, FinCEN has established its AML program rules as risk-based rules rather than ''one-size-fits-all'' rules. Thus, this proposed rule is inherently flexible. Investment advisers are required to develop AML programs that address the money laundering and terrorist financing risks of their particular advisory business. Accordingly, smaller advisers that provide advisory services to clients that may present lower risks for money laundering or terrorist financing are not required to develop complex, time-consuming, or cost-intensive compliance programs. As discussed above, some investment advisers have already implemented AML programs pursuant to an SEC No-Action letter permitting broker-dealers in securities to rely on registered investment advisers to perform some or all aspects of broker-dealers' obligations to verify the identity of their customers.[100]

Investment advisers are already subject to comprehensive regulation, which should ease the cost and burden of complying with today's proposed rule. Investment advisers may build on their existing risk management procedures and prudential business practices to ensure compliance with the proposed rule. Notably, SEC-registered investment advisers are subject to the Advisers Act and the SEC rules implementing the Advisers Act. The Advisers Act prohibits advisers from engaging in a wide range of fraudulent, deceptive, and manipulative conduct. In addition to the anti-fraud provisions of the Advisers Act, advisers are subject to the anti-fraud and manipulation provisions of the Federal securities laws. For example, under Advisers Act Rule 204–2, advisers are required to maintain certain books and records, such as a record of client holdings, custody records (if applicable), a list of all discretionary accounts, all written agreements (or copies) that the adviser has entered into with any client, and all written communications between the adviser and its clients.[101] Further, under Advisers Act Rule 206(4)–7, advisers are required to adopt and implement

[91] *See* 17 CFR 275.0–7 (small entities defined under the Investment Advisers Act for purposes of the RFA).

[92] 13 CFR 121.201.

[93] FinCEN is proposing to amend section 1010.810 to include investment advisers within the list of financial institutions that the SEC would examine for compliance with the BSA's implementing regulations. *Supra* section IV.B.

[94] Rule 0–7(a) [17 CFR 275.0–7(a)].

[95] 15 U.S.C. 80b *et seq.*

[96] 17 CFR 275.203A–1(a)(1).

[97] 13 CFR 121.201.

[98] *See infra* note 100.

[99] The SEC's estimates of the number of investment advisers that would be considered small entities and the number of small investment advisers is based on IARD data as of June 2, 2014.

[100] *See* discussion *supra* Section IV.D (''Anti-Money Laundering Programs'').

[101] *See* 17 CFR 275.204–2.

written policies and procedures reasonably designed to prevent violation of the Advisers Act and the rules that the SEC has adopted under that Act.[102] Advisers must conduct annual reviews to ensure the adequacy and effectiveness of their policies and procedures and must designate a chief compliance officer responsible for administering the policies and procedures.[103] Form ADV requires registered investment advisers to report to the SEC detailed information regarding their advisory activities. Accordingly, FinCEN estimates that the burden of the AML program requirement on investment advisers, particularly in light of the above mentioned existing compliance requirements under the Advisers Act, would not have a significant impact on small entities.

The proposed rule would require investment advisers to report suspicious transactions. The proposed rule, however, would not impose a significant burden on small advisers. Investment advisers are already subject to the anti-fraud and manipulation provisions of the Advisers Act and other Federal securities laws. Investment advisers, therefore, should already have in place policies and procedures to prevent and detect fraud. Such internal controls should help investment advisers identify and report suspicious activity. Additionally, investment advisers, as part of their client on-boarding procedures may already be gathering some of the information required to complete certain parts of the SAR form. A review of current SAR filings indicates that the securities industry, with a population of approximately 10,000 entities, files 19,000+ SARs per year.[104] Acknowledging that the majority of reports are filed by larger entities, FinCEN estimates that the number of SARs filed by all small investment advisers will be fewer than ten per adviser. Therefore, FinCEN estimates that the burden of the SAR filing requirement on investment advisers would not have a significant impact.

The proposed rule would require investment advisers to file CTRs. This requirement in the proposed rule, however, would not impose a significant burden on small advisers. Investment advisers are currently required to file Form 8300s. As discussed above, investment advisers would no longer be required to report transactions involving certain negotiable instruments reportable on the Form 8300 but not on the CTR. Moreover, FinCEN believes that investment advisers rarely receive cash from or provide significant amounts of currency to their clients. The proposed rule, therefore, would not impose any additional burden on investment advisers but would, in fact, reduce their burden to report such transactions.

The proposed rule would require investment advisers to create and retain records for transmittals of funds, and to transmit information on these transactions to other financial institutions in the payment chain. This requirement in the proposed rule, however, would not impose a significant economic impact on small advisers. Any new recordkeeping obligations, if not already being performed by investment advisers in accordance with other law or as a matter of prudent business practice, are likely to be commensurate with the size of the adviser.

The additional burdens imposed by the proposed rules would be the requirements to develop and implement a written AML program, file reports on suspicious transactions, file CTRs, and comply with the requirements of the Recordkeeping and Travel Rules. As discussed above, FinCEN estimates that these requirements would not impact a substantial number of small entities. Accordingly, FinCEN certifies that the proposed rules would not have a significant economic impact on a substantial number of small entities.

Questions for Comment

FinCEN seeks comment on whether the proposed rules would have a significant economic impact on a substantial number of small entities:

1. Please provide comment on any or all of the provisions in the proposed rule with regard to (a) the impact of provision(s) (including any benefits and costs), if any, in carrying out the requirements of the proposed rule(s) on investment advisers; and (b) alternative requirements, if any, FinCEN should consider.

2. Please provide comment regarding whether the AML program and suspicious activity reporting requirements proposed in these rulemakings would require small entities to gather any information that is not already being gathered as part of other regulatory requirements, due diligence, or prudential business practices and provide specific example of such information.

C. Paperwork Reduction Act

The collections of information contained in this proposed rule are being submitted to OMB for review in accordance with the Paperwork Reduction Act of 1995 (''PRA'').[105] Comments on the collection of information should be sent to Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction Project (1506), Washington, DC 20503, fax (202–395–6974), or by the Internet to *oira_submission@omb.eop.gov,* with a copy to FinCEN by mail or email at the addresses previously specified. Comments on the collection of information should be received by November 2, 2015.

In accordance with the requirements of the PRA, and its implementing regulations, 5 CFR part 1320, the following information concerning the collection of information is presented to assist those persons wishing to comment on the proposed information collection. The information collections in this proposal are contained in 31 CFR 1010.100(t)(11), 1031.210, 1031.320, 1031.311, 1010.410, and 1031.410; the collection of this information pursuant to these sections is mandatory.

AML programs for investment advisers:

31 CFR 1031.210 (AML programs for investment advisers). Information about an investment adviser's AML program would be required to be retained pursuant to 31 U.S.C. 5318(h) and proposed 31 CFR 1031.210. The information collected would be pursuant to § 1031.210 and would be used by FinCEN and the proposed designated examiner, the SEC, to determine whether investment advisers comply with the BSA requirement to implement AML programs. The collection of information would be mandatory.

Description of Recordkeepers: Investment advisers as defined in 31 CFR 1010.100(nnn).

Estimated Number of Recordkeepers: 11,235.[106]

Estimated Average Annual Burden Hours per Recordkeeper: The estimated average annual burden associated with the recordkeeping requirement proposed under proposed 31 CFR 1031.210 is 3 hours.

Estimated Total Annual Recordkeeping Burden: FinCEN

[102] *See* 17 CFR 275.206(4)–7.

[103] *Id.*

[104] *See* FinCEN, *SAR Stats,* Section 5 (Jan. 2015).

[105] 44 U.S.C. 3507(d).

[106] The proposed rules apply to investment advisers registered or required to register with the SEC. Based on IARD data the SEC estimates that as of June 2, 2014 there were approximately 11,235 investment advisers registered with the SEC.

estimates that the annual recordkeeping burden would be 33,705 hours.

The burden would be included in (added to) the existing burden under OMB Control Number 1506–0020 currently titled ''Anti-Money Laundering Programs for Money Services Businesses, Mutual Funds, and Operators of Credit Card Systems.'' The new title for this control number would be ''Anti-Money Laundering Programs for Investment Advisers, Money Services Businesses, Mutual Funds, and Operators of Credit Card Systems.'' The new total number of recordkeepers for this OMB control number would be 266,341 and the new total burden would be 374,922 hours. Records required to be retained under the BSA and FinCEN's implementing regulations must be retained for five years. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information subject to the PRA unless it displays a valid control number assigned by the OMB.

Reports by investment advisers of suspicious transactions:

31 CFR 1031.320 (SARs for investment advisers). Information about suspicious transactions would be required to be provided pursuant to 31 U.S.C. 5318(g) and proposed 31 CFR 1031.320. This information would be used by FinCEN and law enforcement and regulatory agencies in criminal and regulatory investigations or proceedings. The collection of information would be mandatory.

Description of Recordkeepers: Investment advisers as defined in 31 CFR 1010.100(nnn).

Estimated Number of Recordkeepers: 11,235.

Estimated Average Annual Burden Hours per Recordkeeper: The estimated average annual burden associated with the recordkeeping proposed under 31 CFR 1031.320 is 1 hour for the maintenance of the rule. This would be a new requirement that requires a new OMB control number 1506–0069.

Estimated Total Annual Burden: The proposal estimates the annual burden would be 22,470 hours, consisting of 1 hour for report completion and 1 hour for recordkeeping for a total of 2 hours. This burden will be included in (added to) the existing burden under OMB control number 1506–0065 currently titled ''Bank Secrecy Act Suspicious Activity Reports.''

Generally, a financial institution that is required to file SARs under FinCEN's rules implementing the BSA must report any suspicious transaction conducted or attempted by, at, or through the financial institution that involves, or aggregates, funds or assets of at least $5,000.[107] The requirement to file SARs at the $5,000 threshold (''SAR threshold'') was determined when the SAR rules for banks and other depository institutions were promulgated and has been adopted for most other financial institutions that have been subsequently required to file SARs.[108] The SAR threshold balances the interests of law enforcement and analysts with the reporting burden placed on financial institutions. Even though the $5,000 threshold for mandatory SAR filing has not changed, the reduction in the real value of the threshold adjusted for inflation has been offset by the increased ability of financial institutions to monitor for, report, and even preemptively stop suspicious transactions in real time with their automated systems. A uniform reporting threshold for mandatory SAR filing applicable to most financial institutions subject to a SAR rule furthers the consistent application of FinCEN's rules by (1) allowing SAR data to be analyzed consistently across different financial institutions; and (2) subjecting transactions that may be conducted through more than one financial institution type, such as an investment adviser that executes transactions through a broker-dealer in securities, to be subject to the same reporting requirements. Lastly, the SAR rules also encourage a financial institution to report voluntarily transactions that, alone or in the aggregate, fall below the $5,000 threshold that the financial institution believes is relevant to the possible violation of any law or regulation.[109] Because the rule permits the filing of a voluntary SAR that does not prescribe a threshold balance, the SAR rule is flexible.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information subject to the PRA unless it displays a valid control number assigned by the OMB. The title for this control number will be ''Suspicious Activity Reports by Investment Advisers, (31 CFR 1031.320).'' The administrative burden for the new OMB number will be 1 hour. The burden for the recordkeeping and reporting requirement is added to existing OMB control number 1506–0065 (Bank Secrecy Act Suspicious Activity Report (BSAR)). The new total number of responses for OMB control number 1506–0065 would be 1,653,395. The new total burden for OMB control number 1506–0065 would be 3,306,790 hours. Records required to be retained under FinCEN's regulations implementing the BSA must be retained for five years.

CTR Filing Requirements for Investment Advisers

31 CFR 1031.311 (Filing obligations for reports of transactions in currency). This information would be required to be retained pursuant to 31 U.S.C. 5313, 31 CFR 1010.311, and proposed 31 CFR 1031.311. This information would be used by FinCEN and law enforcement and regulatory agencies in criminal and regulatory investigations or proceedings. The collection of information would be mandatory.

Description of Recordkeepers: Investment advisers as defined in 31 CFR 1010.100(t)(11).

Estimated Number of Recordkeepers: 11,235.

[107] *See* 31 CFR 1020.320(a), 1021.320(a), 1023.320(a), 1024.320(a), 1025(a), and 1026.320(a) (requiring banks, casinos, broker-dealers in securities, mutual funds, insurance companies, and futures commission merchants and introducing brokers in commodities to report a suspicious transaction if it involves in the aggregate of at least $5,000). *See also* 31 CFR 1022.320(a)(2) (requiring money services businesses (''MSBs'') as described in 31 CFR 1010.100(ff)(1) and (3) through (7) to report a suspicious transaction if it involves in the aggregate of at least $2,000) and 31 CFR 1022.320(a)(3) (an issuer of money orders or travelers checks is required to report a transaction or pattern of transactions only if the transactions involve or aggregate funds or other assets of $5,000 or more when the transactions required to be reported are derived from a review of clearance records or other similar records of money orders or travelers checks the MSB has sold or processed). A lower threshold for required SAR reporting was established for MSBs because of the nature of the MSB business and the generally lower dollar amounts associated with the transactions in which they engage. FinCEN has asked for and received comment in proposed rules issued in the past as to whether a change in the threshold dollar amount for SARs filed by MSBs is warranted. After consideration of comments received, FinCEN has determined that the $2,000 threshold for MSBs as prescribed in 31 CFR 1022.320(a)(2) remains appropriate.

[108] *See Amendment to the Bank Secrecy Act; Requirement To Report Suspicious Transactions,* 61 FR 4326, 4328 (Feb. 5, 1996); *Minimum Security Devices and Procedures, Reports of Suspicious Activities, and Bank Secrecy Act Compliance Program,* 61 FR 4332, 4333 (Feb. 5, 1996); *Membership of State Banking Institutions in the Federal Reserve System; International Banking Operations; Bank Holding Companies and Change in Control; Reports of Suspicious Activities Under Bank Secrecy Act,* 61 FR 4338, 4341 (Feb. 5 1996); *Amendment to the Bank Secrecy Act; Requirement To Report Suspicious Transactions,* 61 FR 6096, 6098 (Feb. 16, 1996); *Suspicious Activity Reports,* 61 FR 6095, 6097 (Feb. 16, 1996); and *Operations-Suspicious Activity Reports and Other Reports and Statements,* 61 FR 6100, 6101 (Feb. 16, 1996). FinCEN's rule requiring banks and other depository institutions to report suspicious activity was issued in coordination with the Office of the Comptroller of the Currency (''OCC''), the Board of Governors of the Federal Reserve System, the Office of Thrift Supervision (''OTS''), and the Federal Deposit Insurance Corporation. As of July 21, 2011, the OTS is part of the OCC.

[109] *See* 31 CFR 1020.320(a), 1021.320(a), 1022.320(a), 1023.320(a), 1024.320(a), 1025(a), and 1026.320(a).

Estimated Average Annual Burden Hours per Recordkeeper: The estimated average annual burden associated with the collection of information proposed under 31 CFR 1031.311 would be 1 hour.[110]

Estimated Total Annual Burden: FinCEN estimates that the total annual recordkeeping and reporting burden would be 11,235 hours.[111]

This burden will be included in (added to) the existing burden under OMB Control Number 1506–0064 currently titled ''Bank Secrecy Act Currency Transaction Reports (BCTR).'' The new total number of responses for OMB Control Number 1506–0064 would be 14,114,305. The new total burden for OMB Control Number 1506–0064 would be 9,409,536 hours. Records required to be retained under FinCEN's regulations implementing the BSA must be retained for five years.

Generally, a financial institution required to file CTRs under FinCEN's rules implementing the BSA must report any currency transaction for over $10,000 that is conducted by, through, or to the financial institution, as well as treat as a single transaction, multiple currency transactions that the financial institution knows are on behalf of one person that, in the aggregate total over $10,000 during any one business day.[112] The reporting by financial institutions of transactions in currency in excess of $10,000 is a major component of FinCEN's regulations implementing the BSA. The reporting requirement is issued under the broad authority granted to the Secretary under 31 U.S.C. 5313(a) to require reports of domestic coins and currency transactions. The CTR tracks the movement of currency into and out of financial institutions.[113] The $10,000 threshold balances the interests of law enforcement and analysts with the reporting burden placed on financial institutions. The threshold has remained unchanged because the reduction in the real value of the $10,000 threshold adjusted for inflation has been offset by the reduction in the use of currency as a medium of exchange due to the increased usage of electronic payment mechanisms, such as credit, debit, prepaid, and ACH transactions. In 2008, the Government Accountability Office (''GAO'') conducted a study that looked at, in part, the CTR thresholds. Based on its study, the GAO recommended keeping the CTR threshold at $10,000 for the reasons discussed above and on the recommendation of various Federal, State, and local law enforcement agencies. The $10,000 threshold applies across all financial institutions that are required to file CTRs. Moreover, a uniform CTR threshold is appropriate because the money laundering risks presented by these types of transactions, and which the CTR is designed to capture, are not differentiated by financial institution type, but rather are inherent to the transactions themselves because of the large amounts of currency involved with such transactions. A uniform reporting threshold for CTR filing requirements furthers the consistent application of FinCEN's rules by (1) allowing CTR data to be analyzed consistently across different financial institutions and non-financial trades and businesses (''NFTBs''); and (2) subjecting reportable transactions that are conducted through more than one financial institution type, such as an investment adviser that executes transactions through a broker-dealer in securities, to be subject to the same reporting requirements. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information subject to the PRA unless it displays a valid control number assigned by the OMB.

Questions for Comment

1. We seek comment on FinCEN's three-hour estimate for the establishment of an AML program per investment adviser. Is the estimate of three hours per year accurate and if not, what is a recordkeeping estimate that more accurately reflects the time an investment adviser would need to establish an AML program. We also seek comment regarding the estimated costs associated with establishing an AML program, specifically with regard to systems and labor costs.

2. We seek comment on FinCEN's annual three-hour estimate for the SAR recordkeeping and reporting requirement per investment adviser. Is the estimate of three hours per year accurate, and if not, what is a recordkeeping and reporting requirement estimate that more accurately reflects the time an investment adviser would need to fulfill the SAR recordkeeping and reporting requirement. We also seek comment regarding the estimated start-up costs and costs of operation to maintain SARs.

3. We seek comment on FinCEN's average annual estimate of one hour of recordkeeping and reporting per CTR per investment adviser. Is FinCEN's estimate of the burden of the proposed collection of information accurate? FinCEN seeks comment on whether the proposed collection of information is necessary for the proper performance of the mission of FinCEN, including whether the information will have practical utility. Are there ways to minimize the burden of the required collection of information, including through the use of automated collection techniques or other forms of information technology? Finally, FinCEN seeks comment regarding the estimated start-up costs and costs of operation, maintenance, and purchase of services to maintain the collected information.

D. Unfunded Federal Mandates Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), Public Law 104–4 (March 22, 1995), requires that an agency prepare a budgetary impact statement before promulgating a rule that may result in expenditure by the State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 202 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. Taking into account the factors noted above and using conservative estimates of average labor costs in evaluating the cost of the burden imposed by the proposed regulation, FinCEN has determined that it is not required to prepare a written statement under section 202.

[110] The single assigned hour is established to maintain the requirement. The reporting, recordkeeping, and record retention is accounted for under OMB control number 1506–0064 (BCTR).

[111] While it is not industry practice for investment advisers to accept cash, there is no regulation that prohibits investment advisers from accepting cash. Therefore, for purposes of estimating the annual burden the filing of CTRs will have on covered investment advisers, FinCEN estimates that each covered investment adviser will file one CTR per year.

[112] *See* discussion *supra* Section IV.C.1 (''Investment Advisers' Obligation to File Currency Transactions Reports Replaces Obligation to File Form 8300'').

[113] The $10,000 threshold of the CTR requirement mirrors the reporting thresholds of other requirements under FinCEN's rules implementing the BSA, such as: (1) The requirement that all persons who receive currency in excess of $10,000 in the course of a trade or business report such transactions (''non-financial trades and businesses'' or ''NFTBs''); and (2) the requirement that all persons report the international transportation of monetary instruments in excess of $10,000, referred to as the ''Form 8300'' and ''CMIR'' respectively. *See* 31 CFR 1010.330 and 1010.340. The Form 8300 requires the reporting of large amounts of currency within the United States; the CMIR requires the reporting of large amounts of currency into and out of the United States. Similar to the SAR and CTR requirements, the thresholds for Form 8300 and the CMIR were determined when the rules for these reporting requirements were promulgated.

List of Subjects in 31 CFR Parts 1010 and 1031

Administrative practice and procedure, Anti-money laundering, Banks, Banking, Brokers, Brokerage, Investment advisers, Money laundering, Mutual funds, Report and recordkeeping requirements, Securities, Suspicious transactions, Terrorism, Terrorist financing.

Authority and Issuance

For the reasons set forth in the preamble, chapter X of title 31 of the Code of Federal Regulations is proposed to be amended as follows:

PART 1010—GENERAL PROVISIONS

■ 1. The authority citation for part 1010 continues to read as follows:

Authority: 12 U.S.C. 1829b and 1951–1959; 31 U.S.C. 5311–5314 and 5316–5332; title III, sec. 314, Pub. L. 107–56, 115 Stat. 307.

■ 2. Amend § 1010.100 by:
■ a. Removing the word ''or'' at the end of paragraph (t)(9);
■ b. Removing the period at the end of paragraph (t)(10), and in its place adding the words ''; or''; and
■ c. Adding paragraphs (t)(11) and (nnn).

The additions read as follows:

§ 1010.100 General definitions.

* * * * *

(t)(11) An investment adviser.

* * * * *

(nnn) *Investment adviser.* Any person who is registered or required to register with the SEC under section 203 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3(a)).

■ 3. Amend § 1010.410 by:
■ a. Removing the word ''or'' at the end of paragraphs (e)(6)(i)(H) and (I);
■ b. Removing the word ''and'' at the end of paragraph (e)(6)(i)(J) and in its place adding the words ''; or''; and
■ c. Adding paragraph (e)(6)(i)(K).

The additions read as follows:

§ 1010.410 Records to be made and retained by financial institutions.

* * * * *

(e) * * *
(6) * * *
(i) * * *
(K) An investment adviser; and

■ 4. Amend § 1010.810 by revising paragraph (b)(6) to read as follows:

§ 1010.810 Enforcement.

* * * * *

(b) * * *

(6) To the Securities and Exchange Commission with respect to brokers and dealers in securities, investment advisers, and investment companies as that term is defined in the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*);

■ 5. Add part 1031 to read as follows:

PART 1031—RULES FOR INVESTMENT ADVISERS

Subpart A—Definitions

Sec.
1031.100 Definitions.

Subpart B—Programs

1031.200 General.
1031.210 Anti-money laundering programs for investment advisers.
1031.220 [Reserved]

Subpart C—Reports Required To Be Made by Investment Advisers

1031.300 General.
1031.310 Reports of transactions in currency.
1031.311 Filing obligations.
1031.312 Identification required.
1031.313 Aggregation.
1031.314 Structured transactions.
1031.315 Exemptions.
1031.320 Reports by investment advisers of suspicious transactions.

Subpart D—Records Required To Be Maintained by Investment Advisers

1031.400 General.
1031.410 Recordkeeping.

Subpart E—Special Information Sharing Procedures To Deter Money Laundering and Terrorist Activity

1031.500 General.
1031.520 Special information sharing procedures to deter money laundering and terrorist activity for investment advisers.
1031.530 [Reserved]
1031.540 Voluntary information sharing among financial institutions.

Subpart F—Special Standards of Diligence; Prohibitions, and Special Measures for Investment Advisers

1031.600 [Reserved]
1031.610 [Reserved]
1031.620 [Reserved]
1031.630 [Reserved]
1031.640 [Reserved]
1031.670 [Reserved]

Authority: 12 U.S.C. 1829b and 1951–1959; 31 U.S.C. 5311–5314 and 5316–5332; title III, sec. 314, Pub. L. 107–56, 115 Stat. 307.

Subpart A—Definitions

§ 1031.100 Definitions.

Refer to § 1010.100 of this chapter for general definitions not noted herein.

Subpart B—Programs

§ 1031.200 General.

Investment advisers are subject to the program requirements set forth and cross referenced in this subpart. Investment advisers should also refer to subpart B of part 1010 of this chapter for program requirements contained in that subpart that apply to investment advisers.

§ 1031.210 Anti-money laundering programs for investment advisers.

(a)(1) Each investment adviser shall develop and implement a written anti-money laundering program reasonably designed to prevent the investment adviser from being used for money laundering or the financing of terrorist activities and to achieve and monitor compliance with the applicable provisions of the Bank Secrecy Act (31 U.S.C. 5311 *et seq.*) and the implementing regulations thereunder.

(2) Each investment adviser's anti-money laundering program must be approved in writing by its board of directors or trustees, or if it does not have one, by its sole proprietor, general partner, trustee, or other persons that have functions similar to a board of directors. An investment adviser shall make its anti-money laundering program available for inspection by FinCEN or the SEC upon request.

(b) *Minimum requirements.* The anti-money laundering program shall at a minimum:

(1) Establish and implement policies, procedures, and internal controls reasonably designed to prevent the investment adviser from being used for money laundering or the financing of terrorist activities and to achieve and monitor compliance with the applicable provisions of the Bank Secrecy Act and the implementing regulations thereunder;

(2) Provide for independent testing for compliance to be conducted by the investment adviser's personnel or by a qualified outside party;

(3) Designate a person or persons responsible for implementing and monitoring the operations and internal controls of the program; and

(4) Provide ongoing training for appropriate persons.

(c) *Effective date.* An investment adviser must develop and implement an anti-money laundering program that complies with the requirements of this section on or before [DATE SIX MONTHS FROM THE EFFECTIVE DATE OF THE FINAL RULE].

§ 1031.220 [Reserved]

Subpart C—Reports Required To Be Made by Investment Advisers

§ 1031.300 General.

Investment advisers are subject to the program requirements set forth and cross referenced in this subpart. Investment advisers should also refer to subpart C of part 1010 of this chapter for

program requirements contained in that subpart that apply to investment advisers.

§ 1031.310 Reports of transactions in currency.

The reports of transactions in currency requirements for investment advisers are located in subpart C of part 1010 of this chapter.

§ 1031.311 Filing obligations.

Refer to § 1010.311 of this chapter for reports of transactions in currency filing obligations for investment advisers.

§ 1031.312 Identification required.

Refer to § 1010.312 of this chapter for identification requirements for reports of transactions in currency filed by investment advisers.

§ 1031.313 Aggregation.

Refer to § 1010.313 of this chapter for reports of transactions in currency aggregation requirements for investment advisers.

§ 1031.314 Structured transactions.

Refer to § 1010.314 of this chapter for rules regarding structured transactions for investment advisers.

§ 1031.315 Exemptions.

Refer to § 1010.315 of this chapter for exemptions from the obligation to file reports of transactions for investment advisers.

§ 1031.320 Reports by investment advisers of suspicious transactions.

(a) *General.* (1) Every investment adviser shall file with FinCEN, to the extent and in the manner required by this section, a report of any suspicious transaction relevant to a possible violation of law or regulation. An investment adviser may also file with FinCEN a report of any suspicious transaction that it believes is relevant to the possible violation of any law or regulation, but whose reporting is not required by this section. Filing a report of a suspicious transaction does not relieve an investment adviser from the responsibility of complying with the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 *et seq.*) or any regulation imposed by the Securities and Exchange Commission.

(2) A transaction requires reporting under this section if it is conducted or attempted by, at, or through an investment adviser; it involves or aggregates funds or other assets of at least $5,000; and the investment adviser knows, suspects, or has reason to suspect that the transaction (or a pattern of transactions of which the transaction is a part):

(i) Involves funds derived from illegal activity or is intended or conducted in order to hide or disguise funds or assets derived from illegal activity (including, without limitation, the ownership, nature, source, location, or control of such funds or assets) as part of a plan to violate or evade any Federal law or regulation or to avoid any transaction reporting requirement under Federal law or regulation;

(ii) Is designed, whether through structuring or other means, to evade any requirements of this part or any other regulations promulgated under the Bank Secrecy Act;

(iii) Has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the investment adviser knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction; or

(iv) Involves use of the investment adviser to facilitate criminal activity.

(3) More than one investment adviser may have an obligation to report the same transaction under this section, and other financial institutions may have separate obligations to report suspicious activity with respect to the same transaction pursuant to other provisions of this part. In those instances, no more than one report is required to be filed by the investment adviser(s) and other financial institution(s) involved in the transaction, provided that the report filed contains all relevant facts, including the name of each financial institution and the words ''joint filing'' in the narrative section, and each institution maintains a copy of the report filed, along with any supporting documentation.

(b) *Filing and notification procedures*—(1) *What to file.* A suspicious transaction shall be reported by completing a Suspicious Activity Report (''SAR''), and collecting and maintaining supporting documentation as required by paragraph (c) of this section.

(2) *Where to file.* The SAR shall be filed with FinCEN in accordance with the instructions to the SAR.

(3) *When to file.* A SAR shall be filed no later than 30 calendar days after the date of the initial detection by the reporting investment adviser that may constitute a basis for filing a SAR under this section. If no suspect is identified on the date of such initial detection, an investment adviser may delay filing a SAR for an additional 30 calendar days to identify a suspect, but in no case shall reporting be delayed more than 60 calendar days after the date of such initial detection.

(4) *Mandatory notification to law enforcement.* In situations involving violations that require immediate attention, such as suspected terrorist financing or ongoing money laundering schemes, an investment adviser shall immediately notify by telephone an appropriate law enforcement authority in addition to filing timely a SAR.

(5) *Voluntary notification to FinCEN.* Any investment adviser wishing voluntarily to report suspicious transactions that may relate to terrorist activity may call FinCEN's Resource Center (FRC) in addition to filing timely a SAR if required by this section.

(c) *Retention of records.* An investment adviser shall maintain a copy of any SAR filed by the investment adviser or on its behalf (including joint reports), and the original (or business record equivalent) of any supporting documentation concerning any SAR that it files (or is filed on its behalf) for a period of five years from the date of filing the SAR. Supporting documentation shall be identified as such and maintained by the investment adviser, and shall be deemed to have been filed with the SAR. The investment adviser shall make all supporting documentation available upon request to FinCEN, or Federal, State, or local law enforcement agency, or any Federal regulatory authority that examines the investment adviser for compliance with the Bank Secrecy Act.

(d) *Confidentiality of SARs.* A SAR, and any information that would reveal the existence of a SAR, are confidential and shall not be disclosed except as authorized in this paragraph (d). For purposes of this paragraph (d) only, a SAR shall include any suspicious activity report filed with FinCEN pursuant to any regulation in this part.

(1) *Prohibition on disclosures by investment advisers*—(i) *General rule.* No investment adviser, and no director, officer, employee, or agent of any investment adviser, shall disclose a SAR or any information that would reveal the existence of a SAR. Any investment adviser, and any director, officer, employee, or agent of any investment adviser that is subpoenaed or otherwise requested to disclose a SAR or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such information, citing this section and 31 U.S.C. 5318(g)(2)(A)(i), and shall notify FinCEN of any such request and the response thereto.

(ii) *Rules of construction.* Provided that no person involved in any reported suspicious transaction is notified that

the transaction has been reported, paragraph (d)(1) shall not be construed as prohibiting:

(A) The disclosure by an investment adviser, or any director, officer, employee, or agent of an investment adviser of:

(1) A SAR, or any information that would reveal the existence of a SAR, to FinCEN or any Federal, State, or local law enforcement agency, or any Federal regulatory authority that examines the investment adviser for compliance with the Bank Secrecy Act; or

(2) The underlying facts, transactions, and documents upon which a SAR is based, including but not limited to disclosures to another financial institution, or any director, officer, employee, or agent of a financial institution, for the preparation of a joint SAR; or

(B) The sharing by an investment adviser, or any director, officer, employee, or agent of the investment adviser, of a SAR, or any information that would reveal the existence of a SAR, within the investment adviser's corporate organizational structure for purposes consistent with Title II of the Bank Secrecy Act as determined by regulation or in guidance.

(2) *Prohibition on disclosures by government authorities.* A Federal, State, local, territorial, or tribal government authority, or any director, officer, employee, or agent of any of the foregoing, shall not disclose a SAR, or any information that would reveal the existence of a SAR, except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act. For purposes of this section, official duties shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, to a non-governmental entity in response to a request for disclosure of non-public information or a request for use in a private legal proceeding, including a request pursuant to 31 CFR 1.11.

(e) *Limitation on liability.* An investment adviser, and any director, officer, employee, or agent of any investment adviser, that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this section or any other authority, including a disclosure made jointly with another institution, shall be protected from liability for any such disclosure, or for failure to provide notice of such disclosure to any person identified in the disclosure, or both, to the full extent provided by 31 U.S.C. 5318(g)(3).

(f) *Compliance.* Investment advisers shall be examined by FinCEN or its delegates under the terms of the Bank Secrecy Act, for compliance with this section. Failure to satisfy the requirements of this section may be a violation of the Bank Secrecy Act and of this part.

(g) *Applicability date.* This section applies to transactions occurring after full implementation of an anti-money laundering program required by § 1031.210.

Subpart D—Records Required To Be Maintained by Investment Advisers

§ 1031.400 General.

Investment advisers are subject to the recordkeeping requirements set forth and cross referenced in this subpart. Investment advisers should also refer to subpart D of part 1010 of this chapter for recordkeeping requirements contained in that subpart which apply to investment advisers.

§ 1031.410 Recordkeeping.

Refer to § 1010.410 of this chapter.

Subpart E—Special Information Sharing Procedures To Deter Money Laundering and Terrorist Activity

§ 1031.500 General.

Investment advisers are subject to the special information sharing procedures to deter money laundering and terrorist activity requirements set forth and cross referenced in this subpart. Investment advisers should also refer to subpart E of part 1010 of this chapter for special information sharing procedures to deter money laundering and terrorist activity contained in that subpart which apply to investment advisers.

§ 1031.520 Special information sharing procedures to deter money laundering and terrorist activity for investment advisers.

(a) Refer to § 1010.520 of this chapter.

(b) [Reserved]

§ 1031.530 [Reserved]

§ 1031.540 Voluntary information sharing among financial institutions.

(a) Refer to § 1010.540 of this chapter.

(b) [Reserved]

Subpart F—Special Standards of Diligence; Prohibitions; and Special Measures for Investment Advisers

§ 1031.600 [Reserved]

§ 1031.610 [Reserved]

§ 1031.620 [Reserved]

§ 1031.630 [Reserved]

§ 1031.640 [Reserved]

§ 1031.670 [Reserved]

Dated: August 24, 2015.

Jennifer Shasky Calvery

Director, Financial Crimes Enforcement Network.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2012–0079; FRL–9933–31–Region 4]

Approval and Promulgation of Implementation Plans; Alabama: Nonattainment New Source Review

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve portions of a revision to the Alabama State Implementation Plan (SIP) submitted by the Alabama Department of Environmental Management (ADEM) to EPA on May 2, 2011. The proposed SIP revision modifies Alabama's nonattainment new source review (NNSR) regulations in their entirety to be consistent with the federal new source review (NSR) regulations for the implementation of the criteria pollutant national ambient air quality standards (NAAQS). EPA is proposing approval of portions of the NNSR rule changes in Alabama's May 2, 2011, SIP revision because the Agency has preliminarily determined that the changes are consistent with the Clean Air Act (CAA or Act) and federal regulations regarding NNSR permitting.

DATES: Comments must be received on or before October 1, 2015.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2012–0079, by one of the following methods:

1. *www.regulations.gov:* Follow the on-line instructions for submitting comments.

2. *Email: R4-ARMS@epa.gov.*