

DEPARTMENT OF THE TREASURY

31 CFR Part 103

RIN 1506-AA93

Financial Crimes Enforcement Network; Amendment to the Bank Secrecy Act Regulations; Defining Mutual Funds as Financial Institutions

AGENCY: Financial Crimes Enforcement Network (“FinCEN”), Treasury.

ACTION: Notice of proposed rulemaking and request for comments.

SUMMARY: FinCEN is proposing to include mutual funds within the general definition of “financial institution” in rules implementing the Bank Secrecy Act (“BSA”). The proposal would subject mutual funds to rules under the BSA on the filing of Currency Transaction Reports (“CTRs”) and on the creation, retention, and transmittal of records or information for transmittals of funds.

DATES: Written comments on all aspects of this notice are welcome and must be received on or before September 3, 2009.

ADDRESSES: Those submitting comments are encouraged to do so via the Internet. Comments submitted via the Internet may be submitted at <http://www.regulations.gov/search/index.jsp> with the caption in the body of the text, Attention: Comment Request; Defining Mutual Funds as Financial Institutions. Comments also may be submitted by written mail to: Financial Crimes Enforcement Network, Department of the Treasury, P.O. Box 39, Vienna, VA 22183, Attention: Comment Request; Defining Mutual Funds as Financial Institutions. Please submit comments by one method only. All comments submitted in response to this notice of proposed rulemaking will become a matter of public record; therefore, you should submit only information that you wish to make publicly available.

Inspection of comments: Comments may be inspected, between 10 a.m. and 4 p.m., in the FinCEN reading room in Vienna, VA. Persons wishing to inspect the comments submitted must request an appointment with the Disclosure Officer by telephoning (703) 905-5034 (Not a toll free call). In general, FinCEN makes all comments publicly available by posting them on <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: The FinCEN regulatory helpline at (800) 949-2732 and select Option 6.

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory Provisions

The Bank Secrecy Act, Public Law 91-508, codified as amended at 12 U.S.C. 1829b, 12 U.S.C. 1951-1959, and 31 U.S.C. 5311-5314; 5316-5332, authorizes the Secretary of the Treasury (“Secretary”) to issue regulations requiring financial institutions to keep records and file reports that are determined to have a high degree of usefulness in criminal, tax, and regulatory investigations or proceedings, or in the

conduct of intelligence or counter-intelligence activities, including analysis, to protect against international terrorism, and to implement anti-money laundering programs and compliance procedures.\1\ Regulations implementing the BSA appear at 31 CFR Part 103. The authority of the Secretary to administer the BSA has been delegated to the Director of FinCEN.

\1\ Language expanding the scope of the BSA was added by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (“USA PATRIOT Act”), Public Law 107-56.

The definition of “financial institution” in the BSA includes investment companies.\2\ FinCEN has the authority to issue rules defining investment companies as financial institutions. The Investment Company Act of 1940, codified at 15 U.S.C. 80a-1 et seq. (the “Investment Company Act”), defines “investment company” \3\ and subjects investment companies to regulation by the Securities and Exchange Commission (“SEC”).

\2\ 31 U.S.C. 5312(a)(2)(I).

\3\ See 15 U.S.C. 80a-3.

B. Overview of Current Regulatory Provisions

Regulations implementing the BSA currently apply only to investment companies that are “open-end companies,” as the term is defined in the Investment Company Act. More commonly known as mutual funds, open-end companies are the predominant type of investment company. Open-end companies are management companies that offer or have outstanding securities that are redeemable at net asset value.\4\

\4\ 15 U.S.C. 80a-4; 15 U.S.C. 80a-5(a)(1); 15 U.S.C. 80a-2(a)(32). Face-amount certificate companies and unit investment trusts are excluded from the definition of “management company.” 15 U.S.C. 80a-4(3).

On April 29, 2002, FinCEN issued a rule under section 352 of the USA PATRIOT Act prescribing minimum standards for the development of anti-money laundering programs by mutual funds.\5\ On May 9, 2003, FinCEN issued jointly with the SEC a rule under section 326 of the USA PATRIOT Act requiring mutual funds to implement customer identification programs.\6\ On May 4, 2006, FinCEN issued a rule requiring mutual funds to report suspicious transactions.\7\ On August 9, 2007, FinCEN completed the anti-money laundering rules required with respect to certain financial institutions, including mutual funds, under section 312 of the USA PATRIOT Act.\8\ These rules require mutual funds to establish due diligence programs for correspondent and private banking accounts.

\5\ Anti-Money Laundering Programs for Mutual Funds, 67 FR 21117 (April 29, 2002).

\6\ Customer Identification Programs for Mutual Funds, 68 FR 25131 (May 9, 2003).

\7\ Amendment to the Bank Secrecy Act Regulations--Requirement That Mutual Funds Report Suspicious Activity, 71 FR 26213 (May 4, 2006).

\8\ Anti-Money Laundering Programs; Special Due Diligence Programs for Certain Foreign Accounts, 71 FR 496 (January 4, 2006); Anti-Money Laundering Programs; Special Due Diligence Programs for Certain Foreign Accounts, 72 FR 44768 (August 9, 2007).

Although FinCEN has issued individual rules that apply to mutual funds, FinCEN has not included mutual funds within the definition of “financial institution” at 31 CFR 103.11(n). The definition of “financial institution” at 31 CFR 103.11(n) is less inclusive than the definition in the BSA itself.\9\ The regulatory 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.\10\

\9\ See 31 U.S.C. 5312(a)(2).

\10\ See 31 CFR 103.22; 31 CFR 103.28; 31 CFR 103.29; 31 CFR 103.33; and 31 CFR 103.38. Defining a business as a financial institution also could make the business ineligible for exemption from the requirement to file CTRs. See 31 CFR 103.22(d)(5)(viii).

II. Section-by-Section Analysis

A. Sections 103.11(n)(10) and 103.11(ccc)--Mutual Funds Move From Filing Form 8300 to the Currency Transaction Report

The proposed amendment would add mutual funds to the regulatory definition of “financial institution” at 31 CFR 103.11(n)(10). FinCEN is also proposing to add a general definition of a “mutual fund” at 31 CFR 103.11(ccc). The definition of “mutual fund” would cover only those entities registered or required to register with the SEC. Specifically, “mutual fund” would be defined as:

An “investment company” (as the term is defined in section 3 of the Investment Company Act (15 U.S.C. 80a-3)) that is an “open-end company” (as that term is defined in section 5 of the Investment Company Act (15 U.S.C. 80a-5)) registered or required to register with the Securities and Exchange Commission under section 8 of the Investment Company Act (15 U.S.C. 80a-8).

Mutual funds currently file reports on Form 8300 for the receipt of more than \$10,000 in currency.\11\ The requirement applies to currency received in one transaction or two or more related transactions.\12\ The proposed amendment would replace this requirement with a requirement to file CTRs under 31 CFR 103.22.\13\

A mutual fund would file a CTR for a transaction involving a transfer of more than \$10,000 in currency by, through, or to the mutual fund.\14\

The CTR filing obligation covers incoming, outgoing, and exchange transactions in currency. The definition of “currency” for purposes of the CTR rule is different from and less inclusive than the definition of “currency” in the rule for Form 8300; therefore, mutual funds would only be required to file CTRs on cash transactions. The threshold in 31 CFR 103.22 applies to transactions conducted during a single business day.\15\

Under the CTR rule, 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.\16\

\11\ 31 CFR 103.30(a)(1)(i). In addition to coin and currency of the United States or of any other country, “currency” includes cashier’s checks, bank drafts, traveler’s checks, and money orders in face amounts of \$10,000 or less, if the instruments are received in a “designated reporting transaction.” 31 CFR 103.30(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 103.30(c)(2). In addition, a mutual fund would need to treat the instruments as currency if the mutual fund knows that a customer is using the instruments to avoid the reporting of a transaction on Form 8300. 31 CFR 103.30(c)(1)(ii)(B).

\12\ 31 CFR 103.30(a). The rule defines “related transactions” to include transactions conducted between a payer or its agent and the recipient of the currency in a 24-hour period. 31 CFR 103.30(c)(12)(ii). Transactions conducted during a period of more than 24 hours are related if the recipient knows or has reason to know that each transaction is one of a series of connected transactions. 31 CFR 103.30(c)(12)(ii). In addition, the rule includes provisions on the treatment of multiple deposits or installment payments relating to a single transaction. See 31 CFR 103.30(b).

\13\ 31 CFR 103.30(a)(1)(ii) (the requirement to file a Form 8300 does not apply to transactions reported under 31 CFR 103.22).

\14\ See 31 CFR 103.22(b)(1) and 31 CFR 103.11(h) (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).

\15\ See 31 CFR 103.22(c)(2).

\16\ 31 CFR 103.22(c)(2). The obligation to file a CTR is conditioned on knowledge that the transactions are conducted by or on behalf of the same person and result in either cash in or cash out totaling more than \$10,000 during any one business day.

Because mutual funds would no longer be required to file Form 8300s, mutual funds would be freed from having to report applicable transactions involving certain negotiable instruments.\17\
Although FinCEN recognizes that there may be some threat of financial criminals using negotiable instruments such as money orders to move illicit funds into mutual funds, the volume of Form 8300s filed is relatively low when compared to the overall volume of transactions.\18\
Because mutual funds rarely receive from or disburse to shareholders significant amounts of currency, FinCEN believes they are not as likely as depository institutions to be used during the initial “placement” stage of the money laundering process.\19\

\17\ In determining whether to file a Form 8300, a mutual fund may need to treat instruments as currency if the mutual fund knows that a customer is using the instruments to avoid the reporting of a transaction on Form 8300, in which case the mutual fund also may

need to file a suspicious activity report (“SAR”). See 31 CFR 103.30(c)(1)(ii)(B) and 31 CFR 103.15(a)(2).

\18\ A review of BSA data revealed that while hundreds of millions of transactions involving mutual funds were conducted in calendar years 2004, 2005, 2006, and 2007, fewer than 19,500 Form 8300s were filed by mutual funds over the same period.

\19\ Anti-Money Laundering Programs for Mutual Funds, 67 FR 21117, 21118 (April 29, 2002).

FinCEN requests comment on whether mutual funds are less likely to be used during the initial placement stage of money laundering than a depository institution and therefore present a lower risk for money laundering. Furthermore, since mutual funds are subject to SAR reporting requirements, the ability to report suspicious transactions on Form 8300 is redundant.\20\

FinCEN requests comment on whether the filing of CTRs as opposed to Form 8300s is more appropriate when considering the anti-money laundering program requirement and the information technology changes that mutual funds may be required to make.

\20\ A mutual fund could report a suspicious transaction voluntarily by checking box 1(b) in the Form 8300. A mutual fund is required to file a SAR reporting the transaction, however, if the transaction exceeds the threshold set forth in the rule requiring mutual funds to report suspicious transactions. See 31 CFR 103.15(a)(2).

B. Section 103.33--The Travel Rule and Related Recordkeeping Requirements

In addition, the proposed amendment would subject mutual funds to requirements regarding the creation and retention of records for transmittals of funds, and the requirement to transmit information on these transactions to other financial institutions in the payment chain.\21\ These requirements are often referred to as the “Travel Rule.”

\21\ See 31 CFR 103.33(f) and (g). Financial institutions must retain records for a period of five years. 31 CFR 103.38(d).

The Travel Rule applies to transmittals of funds in amounts 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--the transmitter’s financial institution, an intermediary financial institution, or the recipient’s financial institution--is not a bank.\22\ Such payments processed by mutual funds would be “transmittals of funds.” If the mutual fund is processing a payment sent by or to its customer, then the mutual fund would be either the “transmitter’s financial institution” or the “recipient’s financial institution.”

\22\ Rules under the BSA define a “transmittal of funds” and the persons or institutions involved in a “transmittal of funds.” See 31 CFR 103.11(d), (e), (q), (r), (s), (v), (w), (cc), (dd), (jj), (kk), (ll), and (mm).

The Travel Rule requires the transmitter’s financial institution to obtain and retain name, address, and other information on the transmitter and the transaction.\23\
The Travel Rule also requires the recipient’s financial institution--and in certain instances, the transmitter’s financial institution--to obtain or retain identifying information on the recipient.\24\
The Travel Rule requires that certain information obtained or retained by the transmitter’s financial institution “travel” with the transmittal order through the payment chain.\25\

\23\ See 31 CFR 103.33(f)(1)(i) and (f)(2).

\24\ See 31 CFR 103.33(f)(3) (information that the recipient’s financial institution must obtain or retain).

\25\ See 31 CFR 103.33(g) (information that must “travel” with the transmittal order); 31 CFR 103.11(kk) (defining “transmittal order”).

The proposed amendment would include mutual funds within an existing exception designed to exclude from coverage of these requirements funds transfers or transmittal of funds in which certain categories of financial institution are the transmitter, originator, recipient, or beneficiary.\26\
The proposed inclusion of mutual funds within the exceptions is intended to provide mutual funds with treatment similar to that of banks, brokers or dealers in securities, futures commission merchants, and introducing brokers in commodities. Finally, the proposed amendment would subject mutual funds to requirements on the creation and retention of records for extensions of credit and cross-border transfers of currency, monetary instruments, checks, investment securities, and credit.\27\
These requirements apply to transactions in amounts exceeding \$10,000.

\26\ See 31 CFR 103.33(e)(6)(i) and 31 CFR 103.33(f)(6)(i).

\27\ See 31 CFR 103.33(a)-(c). Financial institutions must retain these records for a period of five years. 31 CFR 103.38(d).

Mutual funds are already subject to the record retention requirements of the rules promulgated under the Investment Company Act of 1940 and mutual fund transfer agents are subject to recordkeeping requirements under the Securities Exchange Act of 1934.\28\
FinCEN believes that the requirements of 31 CFR 103.33 and 31 CFR 103.38 would have a de minimus impact on mutual funds and their transfer agents.\29\
Furthermore, rules under the BSA on the establishment of customer identification programs by mutual funds and on the reporting by mutual funds of suspicious transactions impose requirements to create and retain records.\30\

\28\ See, e.g., 15 U.S.C. 80a-30 (mutual funds); 15 U.S.C. 78q(a)(3) (transfer agents).

\29\ Mutual fund transfer agents are not subject to the Travel Rule or related recordkeeping requirements. Nevertheless, FinCEN has noted the role of transfer agents in performing BSA compliance functions. See e.g., 71 FR 26213, (May 4, 2006) (adopting release for mutual fund SAR rule), 68 FR 25131, (May 9, 2003) (adopting release for mutual fund Customer Identification Program rule). Many

mutual funds contractually delegate their BSA compliance functions, including recordkeeping, to transfer agents, although the mutual fund remains responsible under the BSA for ensuring compliance.

\30\ See 31 CFR 103.131 (mutual funds must obtain and record identifying information for persons opening new accounts, and verify the identity of persons opening new accounts); 31 CFR 103.15(c) (mutual funds must maintain records of documentation that supports the filing of a SAR).

IV. Request for Comment

All comments submitted in response to this notice will become a matter of public record. FinCEN welcomes written comment on all aspects of this notice, and FinCEN especially encourages comments on the following issues:

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.

The nature, volume, content, and value of any potentially lost information to law enforcement, tax, regulatory, and counter-terrorism investigations or activities that could result from the filing of CTRs, rather than Form 8300s, by mutual funds.

The anticipated impact of subjecting mutual funds to rules under the BSA that require the creation, retention, and transmittal of records or information for transmittals of funds and other specified transactions.

V. Proposed Location in Chapter X

As per its November 7, 2008 notice of proposed rulemaking pertaining to a restructuring of its regulations in a new chapter in the Code of Federal Regulations,\31\ FinCEN is separately proposing to remove Part 103 of Chapter I of Title 31, Code of Federal Regulations, and add Parts 1000 to 1099 (Chapter X). As such and if finalized, the proposed changes herein would be reorganized according to the changes proposed in that rulemaking. The planned reorganization would have no substantive effect on the proposed regulatory changes herein. The proposed regulatory changes herein would be renumbered according to the structure established via the finalization of the Chapter X rule.

\31\ Transfer and Reorganization of Bank Secrecy Act Regulations, 73 FR 66414 (November 7, 2008).

VI. Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act (“RFA”) (5 U.S.C. 601 et seq.), FinCEN certifies that the proposed rule in this notice would not have a significant economic impact on a substantial number of small entities. The economic impact of the proposed rule on small entities should not be significant. Mutual funds, regardless of their size, are already required to comply with most of the existing BSA rules required of financial institutions. While all mutual funds are captured under this rulemaking, the estimated burden associated with defining mutual funds as financial institutions is minimal. FinCEN believes that mutual funds rarely receive from or disburse to shareholders significant amounts of currency. New record-keeping obligations, if not already being performed by mutual funds in accordance with other law or as a matter of prudent business practice, are likely to be commensurate with the size of the fund. FinCEN seeks comment on whether the proposed rule would have a significant economic impact on a substantial

number of small entities.

VII. Executive Order 12866

It has been determined that the proposed rule is not a “significant regulatory action” for purposes of Executive Order 12866. Accordingly, a regulatory impact analysis is not required.

VIII. Paperwork Reduction Act

The collection of information contained in the proposed rule is being submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the 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 (or by e-mail to oir_submission@omb.eop.gov), with a copy to FinCEN by mail or by Internet submission at the addresses previously specified. In accordance with the requirements of the Paperwork Reduction Act of 1995, 44 U.S.C. 3506(c)(2)(A), and its implementing regulations, 5 CFR part 1320, the following information concerning the collection of information as required by 31 CFR 103.22 and 31 CFR 103.33 is presented to assist those persons wishing to comment on the information collection. The collection of information in the proposed rule is in 31 CFR 103.22 and 31 CFR 103.33.

Description of Affected Financial Institutions: Mutual funds as defined in 31 CFR 103.11(ccc).

Estimated Number of Affected Financial Institutions: 8,029.\32\

\32\ See Investment Company Institute (ICI) 2008 Investment Company Fact Book, at 110 (2008), available at: http://www.icifactbook.org/pdf/2008_factbook.pdf (number of mutual funds in the U.S. in 2007).

Estimated Average Annual Burden Hours per Affected Financial Institution: The estimated average burden associated with the collection of information in this notice is one hour recordkeeping per response per affected financial institution.\33\

\33\ The single hour is based on an estimate of 45 minutes to complete the CTR form and 15 minutes for recordkeeping and archiving.

Estimated Total Annual Burden: 8,029 hours.\34\

\34\ While it is not industry practice for mutual funds to accept cash, there is no restriction on mutual funds that prohibits mutual funds from accepting cash. Therefore, for purposes of estimating the annual burden the filing of CTRs will have on mutual funds, FinCEN estimates that each mutual fund will file one CTR per year.

FinCEN specifically invites comment on: (a) 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; (b) the accuracy of FinCEN's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information required to be maintained; (d) 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; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to maintain the information.

Under the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number.

List of Subjects in 31 CFR Part 103

Administrative practice and procedure, Banks and banking, Brokers, Currency, Investigations, Penalties, Reporting and recordkeeping requirements, Securities, Terrorism.

Amendment

For the reasons set forth above in the preamble, 31 CFR part 103 is proposed to be amended as follows:

PART 103--FINANCIAL RECORDKEEPING AND REPORTING OF CURRENCY AND FOREIGN TRANSACTIONS

1. The authority citation for part 103 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, secs. 311, 312, 313, 314, 319, 326, 352, Public Law 107-56, 115 Stat. 307.

Subpart A--Definitions

2. Amend Sec. 103.11 by revising paragraph (n)(9) and by adding paragraphs (n)(10) and (ccc) to read as follows:

Sec. 103.11 Meaning of terms.

* * * * *

(n) * * *

(9) An introducing broker in commodities;

(10) A mutual fund.

* * * * *

(ccc) Mutual fund means an "investment company" (as the term is defined in section 3 of the Investment Company Act (15 U.S.C. 80a-3)) that is an "open-end company" (as that term is defined in section 5 of the Investment Company Act (15 U.S.C. 80a-5)) registered or required to register with the Securities and Exchange Commission under section 8 of the Investment Company Act (15 U.S.C. 80a-8).

Subpart C--Records Required To Be Maintained

3. Amend Sec. 103.33 by revising paragraphs (e)(6)(i)(I) and (f)(6)(i)(I) and by adding paragraphs (e)(6)(i)(J) and (f)(6)(i)(J) to read as follows:

Sec. 103.33 Records to be made and retained by financial institutions.

* * * * *

(e) * * *

(6) * * *

(i) * * *

(l) A Federal, State or local government agency or instrumentality; or

(j) A mutual fund; and

* * * * *

(f) * * *

(6) * * *

(i) * * *

(l) A Federal, State or local government agency or instrumentality; or

(j) A mutual fund; and

* * * * *

Dated: June 1, 2009.

William F. Baity,

Acting Director, Financial Crimes Enforcement Network.