

exemptions.¹³ One important exemption is for persons who neither direct client accounts nor provide commodity trading advice tailored to the commodity interest or cash market positions or other circumstances or characteristics of particular clients.¹⁴ This exemption includes, among other categories, persons who publish newsletters, maintain non-customized Internet web sites, and create non-customized computer software.¹⁵ Although these persons are exempt from registration, according to the NFA, a small number of them have opted to register with the CFTC. Nonetheless, even if they are registered, FinCEN believes it is appropriate to exclude these persons from the scope of this proposed anti-money laundering program rule, because they do not direct client accounts and thus, in light of their lack of information about particular clients, they are in no position to observe activity that may indicate the presence of money laundering or terrorist financing.

Although CTAs that provide commodity trading advice tailored to the commodity interest or cash market positions or other circumstances or characteristics of particular clients are not covered by this exemption, FinCEN has determined to exclude them as well, so that only those CTAs that direct client accounts will be subject to the proposed rule.¹⁶ This is because a CTA that only provides commodity trading advice, without directing the account, is

not in a position to actually observe potentially suspicious activity; indeed, a CTA whose service is limited to providing trading advice may not even know whether the client actually follows that advice.¹⁷ Only CTAs that direct accounts are in a position to observe potential money laundering or terrorist financing activity.

In some instances, CTAs that would be subject to the proposed rule advise pooled investment vehicles that are themselves required to maintain anti-money laundering programs under BSA rules,¹⁸ such as unregistered investment companies, or that are sponsored or administered by financial institutions subject to such requirements.¹⁹ To prevent overlap and redundancy, the proposed rule would permit CTAs covered by the rule to exclude from their anti-money laundering programs any investment vehicle they advise that is subject to an anti-money laundering program requirement under BSA rules.

B. The Anti-Money Laundering Program

1. Individualized Program

Section 103.133(b) of the proposed rule would require each CTA subject to the proposed rule to develop and implement a program reasonably designed to prevent the CTA from being used for money laundering or terrorist financing, and to achieve and monitor compliance with other applicable requirements of the BSA and FinCEN's implementing regulations. The legislative history of the Act explains that the requirement to have an anti-money laundering program is not a one-size-fits-all requirement. The general nature of the requirement reflects Congress' intent that each financial institution should have the flexibility to tailor its program to fit its business, taking into account factors such as its size, location, activities, and risks or vulnerabilities to money laundering. This flexibility is designed to ensure that all financial institutions subject to

the Act, from the largest to the smallest, have in place policies and procedures appropriate to monitor for anti-money laundering compliance.²⁰

The proposed rule is designed to give CTAs flexibility to tailor their programs to their specific circumstances so long as the minimum requirements are met. For example, a CTA that directs a wide variety of commodity interest trading accounts may require more extensive oversight by its compliance officer than would a CTA that directs a smaller number of individual accounts. The former also would require more frequent independent review. Similarly, the educational component of the program should be tailored towards the size of the CTA, the type of trading or investing, and the identities of the CTA's clients.

To assure that the requirement to have an anti-money laundering program receives the highest level of attention, the proposed rule would require that each CTA's program be approved in writing by the board of directors or trustees, or if it doesn't have one, by its sole proprietor, general partner, or other persons who have similar functions.²¹ The four required elements of the anti-money laundering program are discussed below.

2. The Four Required Elements of Each Anti-Money Laundering Program

(1) Establish and Implement Policies, Procedures, and Internal Controls Reasonably Designed To Prevent the CTA From Being Used To Launder Money or Finance Terrorist Activities, Including But Not Limited To Achieving Compliance With the Applicable Provisions of the BSA and FinCEN's Implementing Regulations

Each CTA subject to the proposed rule would be required to develop a written program reasonably designed to prevent it from being used to launder money or finance terrorist activities and to achieve compliance with applicable requirements of the BSA and FinCEN's implementing regulations. As described below, this would require each CTA to review the types of services it provides and the nature of its clients to identify its vulnerabilities to money laundering

¹³ See Section 4m of the CEA, 7 U.S.C. 6m, and CFTC Rule 4.14(a), 17 CFR 4.14(a). These provisions exempt from the registration requirement a number of persons who meet the definition of CTA. For example, section 4m(3) of the CEA, 7 U.S.C. 6m(3), exempts from the registration requirement persons who are registered as investment advisers with the Securities and Exchange Commission and whose business does not consist primarily of acting as a CTA and who do not act as a CTA to an entity that is primarily engaged in trading commodity interests. Another example is CFTC Rule 4.14(a), which exempts from registration, among other entities, certain persons who are registered with the CFTC in other capacities. Any person who is not registered as a CTA by virtue of 7 U.S.C. 6m or CFTC Rule 4.14(a) is not a "financial institution" pursuant to section 5312 of the BSA and is excluded from the scope of this proposed rule. It should be noted that some of these exempt persons may have anti-money laundering obligations due to their registration in another capacity.

¹⁴ See CFTC Rule 4.14(a)(9), 17 CFR 4.14(a)(9).

¹⁵ The CFTC has determined to minimize the regulatory impact on speech, other than deceptive or misleading speech. For this reason, the CFTC exempts from registration those persons who meet the definition of CTA, but whose advice to clients is limited to non-customized communications, such as newsletters or Internet web sites, and who do not direct client accounts. 65 FR 12938 (March 10, 2000).

¹⁶ The NFA estimates that approximately one quarter of all registered CTAs direct client accounts.

¹⁷ It should be noted that futures commission merchants are not required to furnish account statements to CTAs that merely provide trading advice to clients and do not direct their accounts. Compare CFTC Rule 1.33(d), 17 CFR 1.33(d).

¹⁸ CTAs advise commodity pools as well as individual customers. A "pool" is defined in CFTC Rule 4.10 as "any investment trust, syndicate or similar form of enterprise operated for the purpose of trading commodity interests." 17 CFR 4.10(d)(1).

¹⁹ For example, a CTA may act as advisor to other investment vehicles, such as certain unregistered investment companies or an insurance company's separate accounts, that will be subject to anti-money laundering program rules under pending FinCEN proposals. See, e.g., *Anti-Money Laundering Programs for Unregistered Investment Companies*, 67 FR 60617 (Sept. 26, 2002); *Anti-Money Laundering Programs for Insurance Companies*, 67 FR 60625 (Sept. 26, 2002).

²⁰ See USA PATRIOT Act of 2001: Consideration of H.R. 3162 Before the Senate (October 25, 2001) (statement of Sen. Sarbanes), 147 Cong. Rec. S10990-02; Financial Anti-Terrorism Act of 2001: Consideration Under Suspension of Rules of H.R. 3004 Before the House of Representatives (October 17, 2001) (statement of Rep. Kelly) (provisions of the Financial Anti-Terrorism Act of 2001 were incorporated as Title III in the Act), 147 Cong. Rec. H6924-01.

²¹ The board's approval could be given at its first regularly scheduled meeting after the program is adopted.