

or registered in a foreign jurisdiction, does the jurisdiction comply with the European Union anti-money laundering directives, and has the jurisdiction been identified by the Financial Action Task Force as non-cooperative); and the adviser's historical experience with the entity or the references of other financial institutions. As the entity's potential vulnerability to money laundering increases, the adviser's procedures would need to reasonably address these increased risks, such as by obtaining and reviewing information about the identity and transactions of the investors in the vehicle.

In contrast, if the adviser also creates or administers a pooled investment vehicle not subject to BSA anti-money laundering program requirements, then the adviser's program would need to address the investors in the vehicle under the same type of criteria as the adviser uses for non-pooled vehicle clients, as discussed above. If, however, any of the investors are themselves pooled investment vehicles (e.g., hedge funds or pension funds), the adviser would need to address the money laundering risks posed by the pooled entity investing in the adviser's vehicle (and any other intermediary that may be involved), under the same type of criteria an adviser would use for pooled entities it advises directly, as described above.<sup>24</sup>

Anti-money laundering programs at larger firms would allocate the responsibility for carrying out these procedures among affected departments, managers, and employees, whereas implementation responsibilities at smaller firms would typically be more centralized. In either case, if the adviser needs to look to affiliated or unaffiliated service providers to evaluate some transactions or perform parts of its anti-money laundering program, it would be permissible to delegate the implementation and operation of appropriate elements of its program by contract. The investment adviser, however, would remain fully responsible for the effectiveness of its anti-money laundering program, as well as for ensuring that federal examiners are able to obtain information and records relating to the program and to inspect the third party for purposes of the program. Accordingly, the adviser would still be required to identify the

particular procedures appropriate to address its vulnerability to money laundering and terrorist financing, and then undertake reasonable steps to assess whether the service provider would carry out such procedures effectively. For example, it would not be sufficient to simply obtain a certification from a service provider that the service provider "has a satisfactory anti-money laundering program."

Some investment advisers, such as advisers that are dually-registered as broker-dealers, may already have anti-money laundering programs in place. FinCEN does not require that such investment advisers establish multiple anti-money laundering programs. The same program may apply to an entity that functions as more than one type of financial institution, so long as the program is appropriately designed to address the different risks posed by the different aspects of the entity's business and satisfies each of the anti-money laundering program requirements to which it is subject in each of its capacities.

The adviser's anti-money laundering program should also be reasonably designed to ensure compliance with BSA requirements. The BSA currently requires investment advisers to report on Form 8300 the receipt of cash totaling more than \$10,000 in one transaction or two or more related transactions.<sup>25</sup> In order to develop a compliant anti-money laundering program, the program should be reasonably designed to detect and report not only transactions required to be reported on Form 8300, but also to detect activity designed to evade such requirements. Such activity, commonly known as "structuring," may involve making deposits into a trading or investment account of \$10,000 or more with multiple money orders, travelers' checks, or cashier's checks or other bank checks, each with a face amount of less than \$10,000. Such methods of payment may be indicative of money laundering, particularly when the payment instruments were obtained from different sources or the payments were made at different times on the same day or on consecutive days or close in time.

<sup>25</sup> See *Financial Crimes Enforcement Network; Amendments to the Bank Secrecy Act Regulations—Requirement that Nonfinancial Trades or Businesses Report Certain Currency Transactions*, 66 FR 67679 (Dec. 31, 2001). The reporting requirement also covers cashier's checks, bank drafts, traveler's checks, or money orders having a face amount of not more than \$10,000 received in certain retail sales or in any transaction in which the recipient knows that such instrument is being used in an attempt to avoid the reporting of the transaction.

FinCEN is currently considering whether investment advisers should be subject to additional BSA requirements, including filing suspicious activity reports pursuant to section 5318(g) of the BSA and complying with account holder identification and verification procedures pursuant to section 326 of the Act. If advisers become subject to additional requirements, they will need to update their compliance programs to include appropriate procedures, training, and testing functions. In addition, FinCEN encourages investment advisers to implement promptly procedures for voluntarily filing suspicious activity reports with FinCEN and for reporting suspected terrorist activities to FinCEN using its Financial Institutions Hotline (1-866-566-3974).

(2) *Provide for Independent Testing of Compliance to be Conducted by Company Personnel or by a Qualified Outside Party.*

An investment adviser would be required to provide for testing of its program periodically, to assure that the program is functioning as designed. Personnel conducting the testing—whether a third party, an affiliate of the firm, or an employee of the firm—should have a working knowledge of applicable BSA requirements, but should not be the person designated to implement and monitor the program under requirement (3) below. The frequency of such a review would depend upon factors such as the size and complexity of the adviser's business and the extent to which its business model may be subject to a higher risk of money laundering than other business models. A written assessment or report should be a part of the review, and any recommendations resulting from such review should be promptly addressed.

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

The investment adviser would be required to charge an individual (or group of individuals) with the responsibility for overseeing the anti-money laundering program. The person or group of persons should be competent and knowledgeable regarding applicable requirements and money laundering risks, and empowered with full responsibility and authority to develop and enforce appropriate policies and procedures. The person or group should also have adequate time and resources to carry out these oversight duties, taking into account the nature and complexity of the firm's program and their other responsibilities. In addition, a person responsible for

<sup>24</sup> See 67 FR 60617, 60621 (Sept. 26, 2002) (Treasury's UIC NPRM, *supra* note 17, provides for similar treatment for "funds of hedge funds"), and 67 FR 21117, 21119–21120 (April 29, 2002) (Treasury's interim final rule requiring mutual funds to establish anti-money laundering programs provides for similar treatment for omnibus accounts).