July 28, 2017

Via Electronic Filing (www.regulations.gov)

The Honorable Steven Mnuchin
United States Treasury Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, DC 20220

Re: Review of Regulations; Executive Orders 13771 and 13777

Dear Mr. Mnuchin:

The Investment Adviser Association[1] (IAA) appreciates the opportunity to comment on the Department of the Treasury's request for information on regulations for possible repeal, replacement, or modification in order to reduce burdens and in furtherance of Executive Order 13771 and Executive Order 13777.[2]

The IAA previously has commented on regulations that are relevant to the Department's review. Most notably, we have: (1) asked the Financial Crimes Enforcement Network (FinCEN) to reconsider the scope of its proposal relating to anti-money laundering (AML) compliance requirements for investment advisers; and (2) expressed concerns to FinCEN about revised regulations regarding Reports of Foreign Bank and Financial Accounts (FBAR). We recognize that the RFI is intended to solicit public comments on existing Treasury regulations and guidance. Nonetheless, we are highlighting these two proposed Treasury regulations because, if adopted, each could require investment advisers to incur significant new compliance expenses and we believe that the cumulative regulatory costs and compliance burdens of financial services regulations should be considered as part of any review.[3] And because they have not yet been adopted, FinCEN can readily make further revisions in any final rulemaking.

[1] The IAA is a not-for-profit association that represents the interests of investment adviser firms registered with the U.S. Securities and Exchange Commission (SEC). The IAA has more than 600 member firms that collectively manage approximately $20 trillion for a wide variety of individual and institutional investors, including pension plans, trusts, investment companies, private funds, endowments, foundations, and corporations. For more information, please visit www.investmentadviser.org.

[2] *Review of Regulations*, Department of the Treasury (June 14, 2017), Request for information (RFI), *available at* https://www.gpo.gov/fdsys/pkg/FR-2017-06-14/pdf/2017-12319.pdf.

[3] We note that the current Unified Agenda of Regulatory and Deregulatory Actions, available at https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201704&RIN=1506-AB10, shows that the proposed rule *Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Investment Advisers* is slated for final action in September 2017.

(1) *FinCEN – AML*

FinCEN has proposed to extend AML regulations to every SEC-registered investment adviser, regardless of its business model. The IAA asked FinCEN to reconsider application of the Bank Secrecy Act (BSA) regime to a range of advisers and advisory services that we believe do not raise material money laundering risks.

The IAA recognizes the importance of detecting and preventing money laundering. However, we believe that FinCEN's expansive proposal is based on a fundamental misunderstanding of the nature and scope of the services advisers provide. FinCEN's basic premise—that 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—is simply not true. Advisers do not provide *any* way – much less a "low risk way" – for a client to bypass banks, broker-dealers, or any other financial institutions covered by the BSA and enter the U.S. financial system. As we explained in our comments, the actual physical custody of the cash and securities in the client's account is required to be maintained by a "qualified custodian," such as a broker-dealer or bank. Therefore, the process for opening and funding a client account with an adviser necessarily involves SEC-registered broker-dealers or regulated banking institutions that are already subject to extensive AML regulatory obligations. Those facts, in combination with the nature of an adviser's relationship with its clients in which the adviser provides continuous and regular supervision and/or management of the client's securities portfolios over the long term, make investment advisers a fundamentally unattractive medium for people who seek to quickly and frequently move funds in and out of the financial system without raising suspicion. We recognize that, because of the nature of an adviser's relationship with its clients, it may be possible for an adviser to identify behavior that may be suspicious under some circumstances. However, certain types of advisers in particular (described below) do not, in the IAA's view, provide services to clients and/or engage in advisory services that raise money laundering risks that need to be addressed by FinCEN's proposed rules.

It is essential to balance the dual goals of maintaining the integrity and effectiveness of the proposed AML regime, while avoiding unjustified or duplicative regulatory burdens and costs on advisers whose operations pose no meaningful risk of money laundering. The proposal's expansive scope, which would apply AML requirements to all SEC-registered investment advisers regardless of the nature of their clients or the advisory services they provide, does not strike that balance. Given the varying types of advisers and the diversity of their advisory activities and client bases, FinCEN should seek to extend the BSA only where doing so would fill a potential gap in our nation's AML regime. In particular, for the reasons set forth in our prior letter, certain types of advisers should not be subject to AML requirements: (i) advisers providing advisory services not involving management of client assets (*e.g.*, nondiscretionary financial planning and publication of securities-related newsletters, impersonal "model portfolios" or research reports); (ii) advisory services to clients that are already subject to the extensive AML requirements of the BSA (*e.g.*, banking institutions, registered investment companies, insurance companies and registered broker-dealers); (iii) sub-advisory relationships, in which an unaffiliated sub-adviser is only involved in the investment management of assets and lacks visibility into client-level account activity (further, the primary adviser would be required to implement an AML program under the proposal); (iv) advisory services to low-risk clients (*e.g.*, pension plans, employer-sponsored investment companies – known as employees' securities companies – which are exempt from the provisions of the Investment Company Act of 1940, and publicly traded corporations); and (v) foreign advisers that have no place of business inside the United States.

We are also concerned about the costs advisers would incur to comply with the proposed rule, even if FinCEN were to adopt all of the modifications the IAA has recommended, because FinCEN has greatly underestimated implementation costs. For example, as we pointed out in our comments, FinCEN's estimates of just three hours per year to implement an AML program and another three hours for suspicious activity report (SAR) recordkeeping and reporting, and just one hour per year for currency transaction reporting, substantially understate the necessary cost of implementing the proposal for advisers.

This burden will weigh most heavily on smaller advisers. In 2017, 56.8% (6,911) of advisers registered with the SEC reported having fewer than ten non-clerical employees, with a median number of nine employees.[4] The IAA asked FinCEN to reconsider its cost-benefit analysis and, in particular, to more fulsomely consider costs on smaller advisers, and we reiterate that request here.

(See **Attachment A** for the IAA's comment letter dated November 2, 2015 and **Attachment B** for the IAA's supplemental letter dated September 14, 2016.)

(2) *FinCEN – FBAR*

In our comment letter to FinCEN concerning proposed changes to the FBAR rules, the IAA supported a proposal to reduce filing obligations for employees of investment advisers who have signature or other authority over (but no financial interest in) certain foreign financial accounts. If finalized, the changes would exempt such employees from filing if the account is reported by their employer or any other entity within the same corporate or other business structure. We urge FinCEN to broaden the exemption to include investment adviser employees who have signature or other authority over non-U.S. funds, regardless of whether their employers have an FBAR filing obligation. Because their accounts do not benefit any U.S. person, FinCEN should not have any policy interest in receiving information about the account. In addition, FinCEN should allow individuals to rely on the new exemption for past years so that previously deferred filings would not be required.

[4] *See* Investment Adviser Association & National Regulatory Services, *2017 Evolution Revolution*: A Profile of the Investment Adviser Profession (2017), at 27-28, *available at* https://www.investmentadviser.org/publications/reports-surveys#EVREV_Report. Findings are based on Form ADV, Part 1 data filed by all SEC-registered investment advisers as of April 10, 2017.

The IAA does not support proposed elimination of a special rule that currently allows filers reporting on 25 or more foreign accounts to report the number of such accounts and provide more detailed information on request. Because this information is already available to FinCEN upon request, the proposed filing requirement would be unnecessarily burdensome and raise substantial cybersecurity concerns due to the large amount of sensitive data that would potentially be subject to unauthorized access.

(See **Attachment C** for the IAA's comment letter dated May 9, 2016.)

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We appreciate the opportunity to provide comments on the RFI and would be pleased to meet with the Department and its staff regarding our comments and to provide any additional information. Please contact the undersigned or Laura Grossman, IAA Assistant General Counsel, at (202) 293-4222 with any questions regarding these matters.

Respectfully submitted,

Gail Bernstein

Gail C. Bernstein
General Counsel

Attachments

cc: Craig Phillips, Counselor, U.S. Department of Treasury
Jamal El-Hindi, Deputy Director, FinCEN