

#18 Via e-mail: reqcomments@fincen.treas.gov

November 25, 2002

Financial Crimes Enforcement Network
P.O. Box 39
Vienna, Virginia 22183 – 1619

Attention: NPRM – Section 352 Unregistered Investment Company
Regulations

Dear Sir or Madam:

I am writing this letter on behalf of the National Futures Association (NFA), a registered futures association under the Commodity Exchange Act and a self-regulatory organization for the United States futures industry. NFA is responsible for overseeing the regulatory requirements of commodity pool operators (“CPOs”). NFA appreciates the opportunity to address the United States Department of Treasury – Financial Crimes Enforcement Network’s proposed rulemaking that requires “unregistered investment companies” to adopt an anti-money laundering program.

NFA wishes to voice its strong support for FinCEN’s efforts devoted to preventing, detecting and prosecuting international money laundering and terrorist financing. As you are aware, NFA previously worked closely with the Commodity Futures Trading Commission (CFTC) in developing anti-money laundering program requirements for futures commission merchants (FCMs) and introducing brokers (IBs). Our specific comments on the proposal with regard to unregistered investment companies are set forth below.

Application of AML Requirements to Commodity Pools

As you are aware, under the regulatory framework in the futures industry, CPOs, rather than the commodity pools they operate, are the registered entities. Specifically, CPOs are required to register with the CFTC and are Members of NFA. CPOs are also required to provide the CFTC and NFA with specific information on each pool that they operate. In order to be in compliance with industry regulations, a commodity pool cannot exist without a CPO. Although NFA notes that Treasury may include commodity pools as an “unregistered investment company” under the current proposal, we believe that certain issues need to be clarified in order to avoid confusion with regard to the applicable AML requirements for CPOs and the pools that they operate.

For example, the interim final rule issued by Treasury on November 6, 2002 that temporarily defers application of the AML program requirements to CPOs suggests that CPOs may also have to adopt an AML program in the future.¹ If commodity pools are required to adopt a program under Treasury's current proposal, having a similar requirement for CPOs under the USA PATRIOT Act would be duplicative and serve no regulatory purpose. Specifically, any AML program adopted by a CPO would be applied to the commodity pools that it operates – the same commodity pools that are required to adopt an AML program under this proposal. NFA recommends, therefore, if FinCEN adopts its current proposal for unregistered investment companies, it should issue a permanent deferral of these requirements to CPOs.

Moreover, FinCEN should be aware that CPOs are subject to extensive regulation by the CFTC and NFA. However, under the proposal, it is not clear which Federal functional regulator will be responsible for enforcing the AML requirements for unregistered investment companies, including commodity pools. With regard to this issue, NFA strongly recommends that FinCEN recognize that the CFTC is the Federal functional regulator with subject matter expertise for commodity pools and, through NFA, has the infrastructure in place to monitor compliance with any AML requirements.

NFA currently conducts detailed examinations of our CPO Members' activities and it would be a logical approach and simple process to work a review of AML programs for their regulated pools and unregulated funds into our examination process. For your information, 55 of the top one hundred hedge fund entities² are currently NFA Member CPOs and NFA performs examinations of their commodity pool operations on a regular basis. If Treasury were to delegate AML examination authority for these futures industry registrants to the CFTC, NFA could impose AML program requirements upon CPO Members by adopting a rule that requires NFA CPO Members to ensure that an AML program is in effect for each of their commodity pools and any other unregistered investment funds that they operate. Of course, NFA would then develop an audit program for CPO examinations to ensure that each unregistered investment company operated by the CPO has an AML program in place.

Delegation of AML Compliance Responsibilities to Third Parties

The proposed rulemaking acknowledges that unregistered investment companies typically conduct their operations through separate entities such as fund administrators and CPOs. The rulemaking also permits commodity pools to contractually delegate certain aspects of an AML program to these third parties. NFA strongly recommends that Treasury clarify that the particular responsibilities and duties of a pool's AML program may be delegated to several potential delegees. For example, the pool may delegate the program's know your customer requirements to a fund

¹ See 67 Fed. Reg. 67547 (Nov. 6, 2002)

² As ranked by Institutional Investor Platinum Magazine (2002)

administrator while the compliance officer may be an employee of the CPO. Obviously, any delegation of functions must be in writing and clearly allocated and documented.

Notice Requirement

The proposed rulemaking notes that many unregistered investment companies are not registered or identifiable by Treasury or another Federal functional regulator. As a result, without some way of identifying these entities, Treasury or the Federal functional regulator will be unable to assure these entities are in compliance the AML program requirements. To address this issue, under the proposal, an unregistered investment company would be required to file a notice with FinCEN identifying itself and providing basic information about the company. The proposal recognizes, however, that regulated commodity pools operated by CPOs have been identified to NFA and specifically requests comments on whether those commodity pools should be exempt from this requirement.

NFA fully supports an exemption from the proposal's notice requirement for commodity pools operated by NFA Member CPOs. Each NFA Member CPO is currently required to identify to NFA all commodity pools operated by it (along with submitting a copy of the pool's disclosure document). Information relating to a CPO and the pools it operates is therefore available from NFA upon request by the CFTC and Treasury. NFA believes that this notification to NFA sufficiently addresses FinCEN's concern about being able to identify these entities. Imposing an additional notice requirement would not provide any regulatory benefit. Moreover, to avoid duplicative filing requirements for NFA Member CPO firms, NFA also encourages FinCEN to allow NFA Member CPOs to identify their non-commodity pool investment funds to NFA. NFA could adopt a rule imposing this requirement upon its CPO Members. Therefore, information regarding any investment funds—regulated commodity pool or other—operated by an NFA Member CPO would be collected and easily accessible from one location.

Limitations and Exceptions to the Definition of Unregistered Investment Company

Finally, the proposed rulemaking notes that an overly expansive definition of "unregistered investment company" would, among other things, unnecessarily burden businesses not likely to be used to launder money. As a result, the proposal includes specific limitations and exceptions to the definition of "unregistered investment company."

NFA fully supports these limitations and exceptions but requests clarification on the responsibilities of other regulated entities, such as FCMs and IBs, that may have these accounts as a customer. Specifically, NFA's AML program guidance for FCMs and IBs requires the FCM and IB to do a risk based analysis of the money laundering risks posed by a collective investment vehicle. One of the factors to consider in the analysis is whether the collective investment vehicle has its own AML

program in place. If so, this fact would reduce the risks associated with these vehicles. NFA believes that the fact that a commodity pool is not required to adopt an AML program because it falls within one of the proposal's exceptions should not result in the FCM or IB having to do additional due diligence on the entity. Since FinCEN acknowledges that these businesses are not likely to be used for money laundering purposes, the FCM or IB should be able to consider this as a material factor in determining the risks associated with these collective investment vehicles.

Conclusion

NFA agrees that commodity pools should be subject to an AML program requirement. NFA also believes that FinCEN's proposed approach is one way to achieve this goal. NFA encourages FinCEN to consider the comments of other industry participants on these important issues. NFA continues to stand ready to assist FinCEN and the CFTC in achieving this important goal.

Thank you for your consideration of NFA's comments on this proposal. If you have any questions or need additional information, please do not hesitate to contact me at (312) 781-1413 or by e-mail at tsexton@nfa.futures.org.

Sincerely,

Thomas W. Sexton
Vice President and General Counsel