SEC Shouldn't Complicate Broker-Dealers' AML Compliance

By **Michael Leotta and Jason Wilson** (March 25, 2025)

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The U.S. Securities and Exchange Commission's recent anti-money laundering enforcement actions reflect a number of trends and developments, but one positive and one negative trend stand out.

First, the SEC continued its logically flawed expansion of its AML jurisdiction into areas already covered by other regulators. The SEC does not have its own AML program rule, and it does not have jurisdiction to charge a broker-dealer for violating the Financial Crimes Enforcement Network's Bank Secrecy Act regulations or the Financial Industry Regulatory Authority's Rule 3310 for the failure to maintain or establish a reasonably designed AML program.

But in a December enforcement action against SogoTrade Inc., the SEC continued asserting that when a broker-dealer does not abide by its documented AML procedures, the broker-dealer has violated the SEC's recordkeeping rule because it failed to accurately document its procedures.[1]

On the other hand, in a December enforcement action against Deutsche Bank Securities Inc., the SEC took a positive step when it explicitly stated that a firm must have a reasonable period of time to investigate potentially suspicious activity before the 30- or 60-day suspicious activity report filing clock begins.[2] This prevailing industry practice is consistent with decades-old federal guidance, but in recent matters, the SEC's Division of Enforcement staff presumptively treated SARs as late when filed more than 30 or 60 days after the suspicious transaction occurred, without accounting for reasonable time for investigation.

We hope the new administration's SEC Enforcement leadership recognizes that broker-dealers are their partners in fighting money laundering, spending their own funds to develop leads for law enforcement. This is difficult work made more complicated by unnecessary and duplicative regulatory complexity.

If regulators second-guess broker-dealers' reasonable judgment, or stretch the law or their jurisdiction to regulate through enforcement, broker-dealers should be prepared to vigorously defend their AML programs.

The SEC's Expansion of AML Jurisdiction

It might not be efficient or necessary for the SEC to bring AML cases at all. There are two other regulators — FinCEN[3] and FINRA[4] — enforcing their AML rules against broker-dealers. And because FinCEN has never delegated BSA enforcement authority to the SEC,[5] the SEC does not have direct authority to bring an enforcement action against a broker-dealer for violations of the BSA, such as for the failure to maintain or establish an AML program.

Nevertheless, the SEC has long used its reporting and recordkeeping rule under Rule 17a-8,[6] promulgated pursuant to its authority under Section 17(a) of the Securities Exchange Act,[7] to bring AML cases by asserting that a failure to timely file SARs is a failure to keep

the records required by the BSA, in violation of the SEC's rule.[8]

That power was affirmed in 2020 by the U.S. Court of Appeals for the Second Circuit, in SEC v. Alpine Securities Corp., the only federal appellate case to consider the issue, when it held that the SEC's enforcement action against a broker-dealer for failing to adhere to the SAR-filing requirements fell within the SEC's independent authority to enforce the reporting and recordkeeping obligations under Rule 17a-8.[9]

The past year saw the SEC further expand its asserted AML jurisdiction by treating a broker-dealer's failure to strictly follow its documented AML procedures as a failure to accurately document its procedures, in violation of the SEC's recordkeeping rule.

According to the SEC, SogoTrade is an online discount brokerage platform with many retail customers in foreign jurisdictions, a "significant number" of whom engaged in potentially suspicious activity involving low-priced securities.[10] Among other things, SogoTrade was "notified of indications that [it] was not complying with its" own customer identification program requirements, "but failed to take remedial action."[11]

The SEC charged SogoTrade with a violation of Rule 17a-8 recordkeeping obligations because the broker-dealer "did not adhere to the written verification procedures set forth in its [customer identification program] with respect to verifying the identity of some of its foreign customers using third-party verification measures, and, thus, failed to accurately document its procedures."[12]

This theory, that a failure to comply with one's documented procedures is a failure to accurately document one's procedures, provides the SEC with an ostensible jurisdictional basis to police broader AML policy deficiencies as recordkeeping violations — but it does not make sense.

A broker-dealer or its employees may at times fail to comply with the firm's accurately documented procedures, but that does not mean that the written procedures were not accurately documented, just like a broker-dealer's failure to comply with the SEC's rules does not mean that the SEC's rules were not accurately documented.

Broker-dealers write procedures to explain to personnel what is expected of them and govern their behavior; they cannot guarantee that their employees will always behave perfectly in accordance with those procedures. Otherwise, every instance of disciplining an employee for violating the firm's written procedures could be viewed as the firm failing to accurately document those procedures.

Certainly, a broker-dealer could fail to accurately document its procedures. For example, in a 2006 settlement with Crowell Weedon & Co., the SEC alleged that the firm's written procedures did not correspond to the actual procedures in use at the firm.[13] And more recently, in a January settlement with LPL Financial LLC, the SEC alleged that the written policies did not fully document processes that should have been documented.[14]

But the SEC has not limited this theory to such circumstances. Indeed, in a 2018 settlement with Central States Capital Markets LLC, the SEC found that even the failure to comply with the broker-dealer's documented procedures as to a single client constituted the failure "to accurately document its procedures."[15]

This legal theory is a jurisdictional grab, inefficient and not necessary for the effective regulation of broker-dealers' AML policies. As noted above, FinCEN and FINRA already police

broker-dealer AML programs, both of which have clear authority to bring enforcement actions for failures to adopt and implement reasonably designed AML programs.

And a broker-dealer that is registered as a futures commission merchant is also subject to the U.S. Commodity Futures Trading Commission's Regulation 42.2, which requires it to comply with the applicable provisions of the BSA and implementing regulations.[16]

Two or three regulators enforcing the same rule is one or two more than enough. The SEC should abandon its illogical stretching of its rules to cover a field over which it does not have — and does not need — substantive regulatory authority.

The SEC Acknowledges Guidance on SAR Timing

There was a positive development in the SEC's AML enforcement at the close of the year, when the SEC explicitly recognized FinCEN's regulatory guidance, and thereby affirmed the industry's prevailing practice, on when financial institutions will be deemed to have timely filed SARs.

In what is referred to as the SAR filing clock, broker-dealers are required to file a SAR within "30 calendar days after the date of the initial detection by the reporting broker-dealer of facts that may constitute a basis for filing" the SAR if a suspect is identified, although where "no suspect is identified on the date of such initial detection," the financial institution may take up to 60 days to file.[17]

This deadline was interpreted in repeated FinCEN guidance in the mid-2000s, which clarified that "the phrase 'initial detection' should not be interpreted as meaning the moment a transaction is highlighted for review," and that the SAR filing clock does not begin "until an appropriate review is conducted and a determination is made that the transaction under review is 'suspicious' within the meaning of the SAR regulations."[18]

As a result, broker-dealers understand that they have a reasonable amount of time to conduct AML investigations and determine that a SAR is warranted before the clock begins to run. This interpretation allows SARs to be more thoroughly researched, including through the use of Section 314(b) information-sharing procedures, providing more meaningful information to law enforcement.

In numerous enforcement actions over the years, however, the Enforcement Division staff at the SEC and other regulators have attempted to disavow that older guidance. Indeed, FinCEN Division of Enforcement staff may claim these statements were not official guidance at all and were not binding. And the SEC Enforcement Division staff may claim in other matters that SARs were presumptively late when filed more than 30, or 60, days after the underlying transaction occurred.

The SEC Enforcement Division staff's basis for this interpretation often referred to statements taken out of context from the U.S. District Court for the Southern District of New York's 2018 decision in SEC vs. Alpine Securities Corp.[19] That case found that the broker-dealer had a duty to file SARs on certain penny stock transactions within 30 days of the transactions.[20]

When read in context, however, we do not believe that the district court's decision in Alpine Securities means that the SAR filing clock starts when a transaction occurs, or even when a transaction monitoring system initially detects it.

The court emphasized that "[t]he information that triggered the duty to file a SAR was available to Alpine at the very time that the five transactions reported in [the] SARs occurred,"[21] meaning, in our view, that in those specific instances, no further investigation was necessary. The broker-dealer already had information including that "each transaction was a large deposit of a penny stock," the account had been "flagged for heightened review," and "[t]hree of the SARs themselves state[d] that it [was] Alpine's practice to file SARs for transactions from the accounts at issue."[22]

Further, Alpine was unable to "identify any recently-acquired information regarding the transaction that converted it from one for which no SAR was required to one that required a SAR."[23] The court therefore rejected Alpine's position that it "was entitled to an indeterminate amount of time to initiate review of a transaction before the 30- or 60-day reporting period began,"[24] and held that Alpine was obligated to file SARs within 30 days of the penny stock transactions at issue.[25]

We agree that a broker-dealer does not have unlimited time to initiate a review of a potentially suspicious transaction. A transaction must be reported in a SAR when the firm knows, suspects, or "has reason to suspect" that the transaction warrants reporting[26] — implying that the firm has a reasonable amount of time to conduct such a review before it can be said to have reason to suspect that a SAR is required.

A financial institution must have an appropriate amount of time to investigate before the SAR filing clock begins to run, as FinCEN itself recognized more than 15 years ago.[27]

In the December settlement with Deutsche Bank Securities, the SEC finally recognized this need explicitly, stating that "[b]roker-dealers are generally permitted a period of time for an 'appropriate review' before the 30-day clock begins to run."[28] The SEC directed broker-dealers to "begin that review 'promptly' and complete it 'within a 'reasonable period of time.'"[29]

The SEC reiterated the principle in a January settlement with Robinhood Financial LLC and Robinhood Securities LLC.[30]

This language in these settled orders is welcome. A large financial institution is not a single person who can know or suspect something in an instant — with millions of securities transactions and money movements occurring every day, broker-dealers must rely upon complex systems to identify potentially suspicious activity, escalate it for review, identify critical context and data held elsewhere in its systems (including data about the customers at issue, their prior transactions and history, and their counterparties), and digest that information into a useful narrative that will assist regulators and law enforcement in combatting money laundering.

It is not realistic to expect such activity to be flagged, assigned to an investigator, thoroughly investigated, and reported in a SAR within 30 days of the transaction's occurrence, or even from when an alert is triggered. Financial institutions should commence SAR investigations reasonably promptly after an alert is triggered, or following the receipt of a subpoena or other regulatory request, and should thoroughly review the activity to determine whether there is reason to suspect that the activity warrants a SAR within a reasonable amount of time.[31]

There will doubtless be disagreement over how much time is reasonable to identify and investigate potentially suspicious activity, but these settled actions reflect the SEC's recognition that some time is necessary.

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[1] In the Matter of SogoTrade Inc., Rel. No. 101936, File No. 3-22363, at 9 (Dec. 17, 2024).

[2] In the Matter of Deutsche Bank Securities Inc., Rel. No. 102011, File No. 3-22375 (Dec. 20, 2024); see also In the Matter of Robinhood Financial LLC and Robinhood Securities LLC, Rel. No. 102170, File No. 3-22405 (Jan. 13, 2025).

[3] See 31 C.F.R. § 1023.320 ("Reports by brokers or dealers in securities of suspicious transactions").

[4] See FINRA Rule 3310 ("Each member shall develop and implement a written anti-money laundering program reasonably designed to achieve and monitor the member's compliance with the requirements of the Bank Secrecy Act (31 U.S.C. 5311, et seq.), and the implementing regulations promulgated thereunder by the Department of the Treasury.").

[5] See 31 C.F.R. § 1010.810(b) ("Authority to examine institutions to determine compliance with the requirements of this chapter is delegated as follows: . . . To the Securities and Exchange Commission with respect to brokers and dealers in securities and investment companies as that term is defined in the Investment Company Act of 1940."); 31 C.F.R. § 1010.810(a) ("Overall authority for enforcement and compliance, including coordination and direction of procedures and activities of all other agencies exercising delegated authority under this chapter, is delegated to the Director, FinCEN.").

[6] 17 C.F.R. § 240.17a-8 ("Every registered broker or dealer who is subject to the requirements of the Currency and Foreign Transactions Reporting Act of 1970 shall comply with the reporting, recordkeeping and record retention requirements of chapter X of Title 31 of the Code of Federal Regulations.").

[7] 15 U.S.C. § 78q(a)(1) ("Every . . . registered broker or dealer . . . shall make and keep for prescribed periods such records, furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter.").

[8] See, e.g., In the Matter of Wells Fargo Clearing Servs. LLC, Rel. No. 82382, File No. 3-20866, at 6-7 (May 20, 2022) (penalizing the firm for filing multiple "late" SARs in violation

of Section 17(a) of the Exchange Act and Rule 17a-8 thereunder, "which require broker-dealers to comply with the reporting, record keeping, and record retention requirements of the BSA, including filing SARs as required by the SAR Rule, 31 C.F.R. § 1023.320(a)(2)").

[9] See SEC v. Alpine Sec. Corp., 982 F.3d 68, 76 (2d Cir. 2020) (holding that the SEC's enforcement action against Alpine "was brought solely under Section 17(a) of the Exchange Act and Rule 17a-8 promulgated thereunder. This suit therefore falls within the SEC's independent authority as the primary federal regulator of broker-dealers to ensure that they comply with reporting and recordkeeping requirements of those provisions. The fact that Rule 17a-8 requires broker-dealers to adhere to the dictates of the BSA in order to comply with the recordkeeping and reporting provisions of the Exchange Act does not constitute SEC enforcement of the BSA.").

[10] In the Matter of SogoTrade Inc., Rel. No. 101936, File No. 3-22363, at 2 (Dec. 17, 2024).

[11] Id. at 8-9.

[12] Id. at 9.

[13] See In the Matter of Crowell, Weedon & Co., Rel. No. 53847, File No. 3-12300 (May 22, 2006).

[14] See In the Matter of LPL Financial LLC, Rel. No. 102224, File No. 3-22422, at 4-5 (Jan. 17, 2025) ("LPL's AML Policies did not describe what CIP information should be retained or how to retain the screenings performed. … As noted above, from at least May 2019 to December 17, 2020, LPL's AML Policies stated that an account that failed CIP should be closed; however, LPL's AML Policies did not provide instructions for when or how this should occur.").

[15] See In the Matter of Central States Capital Markets LLC, Rel. No. 84851, File No. 3-18940, at 8 (Dec. 19, 2018) ("Central States violated the CIP Rule because, as described above, it failed to follow the written verification procedures set forth in its CIP with respect to verifying that Scott Tucker was authorized to act on behalf of the Tribal Corporations, and, thus, failed to accurately document its procedures.").

[16] 17 C.F.R. § 42.2 ("Every futures commission merchant and introducing broker shall comply with the applicable provisions of the Bank Secrecy Act and the regulations promulgated by the Department of the Treasury under that Act at 31 CFR chapter X, and with the requirements of 31 U.S.C. 5318(l) and the implementing regulation jointly promulgated by the Commission and the Department of the Treasury at 31 CFR 1026.220, which require that a customer identification program be adopted as part of the firm's Bank Secrecy Act compliance program.").

[17] 31 C.F.R. § 1023.320(b)(3).

[18] FinCEN, SAR Activity Review (May 2006), at 45; see also FinCEN, SAR Activity Review (Oct. 2008), at 37; FinCEN, SAR Activity Review (May 2009), at 15.

[19] SEC v. Alpine Sec. Corp., 308 F. Supp. 3d 775 (S.D.N.Y. 2018).

[20] Id. at 811.

[21] Id.

[22] Id.

[23] Id.

[24] Id.

[25] Id. We note that the Second Circuit did not have the opportunity to address the district court's statements on appeal regarding the SAR filing clock. See SEC v. Alpine Sec. Corp., 982 F.3d 68 (2d Cir. 2020), cert. denied sub nom. Alpine Sec. Corp. v. SEC, 142 S. Ct. 461 (2021).

[26] 31 C.F.R. § 1023.320(a)(2).

[27] See FinCEN, SAR Activity Review (Oct. 2008), at 36 (asserting that "[u]pon identification of unusual activity, additional research is typically conducted and institutions may need to review customer transaction or account activity to determine whether to file a SAR. The need to review a customer's account activity, including transactions, does not necessarily indicate the need to file a SAR, even if a reasonable review of the activity or transaction might take an extended period of time.").

[28] In the Matter of Deutsche Bank Securities Inc., Rel. No. 102011, File No. 3-22375, at 2 (Dec. 20, 2024) (quoting FinCEN, SAR Activity Review (May 2009)).

[29] Id.

[30] See also In the Matter of Robinhood Financial LLC and Robinhood Securities LLC, Rel. No. 102170, File No. 3-22405, at 11 (Jan. 13, 2025) ("Broker-dealers are generally permitted a period of time for an appropriate review before the 30-day clock begins to run, but are directed to begin that review promptly and complete it within a reasonable period of time.").

[31] See In the Matter of Deutsche Bank Securities Inc., Rel. No. 102011, File No. 3-22375, at 3 (Dec. 20, 2024).