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FinCEN Issues Final Anti-Money Laundering Program Rule for Investment Advisers

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On August 28, 2024, the Financial Crimes Enforcement Network (FinCEN) issued a final rule (the Rule) that will impose and extend certain anti-money laundering (AML) compliance obligations on investment advisers. Specifically, the Rule adds investment advisers (including private fund advisers and exempt reporting advisers) to the definition of "financial institution" under the Bank Secrecy Act of 1970 (BSA) implementing regulations, prescribes minimum standards for AML and countering the financing of terrorism (CFT) programs to be established by such advisers, and requires advisers to report suspicious activity to FinCEN. Covered investment advisers will be required to be in compliance with the Rule by January 1, 2026.

Definition of “Investment Adviser”

While the Rule adds “investment adviser” to the definition of “financial institution” under the BSA, it notably does not apply to, or cover, all investment advisers. Under the Rule, “investment adviser” is defined as:

- Any investment adviser registered, or required to be registered, with the Securities and Exchange Commission (SEC) under the Investment Advisers Act of 1940, as amended (RIAs), other than[1]:
    - RIAs who register with the SEC solely because they are:
        - Mid-sized advisers[2];
        - Multi-state advisers[3]; or
        - Pension consultants[4]; and
    - RIAs who are not required to report any assets under management on Form ADV
- Any investment adviser who is exempt from SEC registration under Section 203(l) or Section 203(m) of the Investment Advisers Act of 1940, as amended (exempt reporting advisers or ERAs).

Moreover, the Rule does not apply to state-registered advisers, foreign private advisers, or family offices.

[1] Should an excluded RIA’s business change such that it no longer remains an “excluded” investment adviser, such RIA will be subject to the Rule, and required to comply with the Rule, as of its next annual Form ADV filing.
[2] RIAs who have assets under management between $25 million and $100 million but who either (1) are not required to be registered as an adviser with the state securities authority in the state where they maintain their principal office and place of business, or (2) are not subject to examination as an adviser by the state in which they maintain their principal offices and places of business.
[3] RIAs who would otherwise be required to register in more than 15 states, but have less than $100 million in assets under management, and have chosen instead to register with the SEC.
[4] Investment advisers that have chosen to register with the SEC that provide investment advice to 1) any employee benefit plan described in Section 3(3) of Employee Retirement Income Security Act of 1974 (ERISA), 2) any governmental plan described in Section 3(32) of ERISA or 3) any church plan described in Section 3(33) of ERISA.

Application to Non-U.S. Advisers

With respect to an RIA or ERA who meets the definition of "investment adviser" under the Rule that has a principal office and place of business outside of the United States, the Rule only applies to its advisory activities that:

- Take place within the U.S., including through U.S. personnel of the investment adviser; or
- Provide advisory services to a U.S. client or any non-U.S. private fund client with one or more investors who is a U.S. person; and

Compliance Action Items

Pursuant to the Rule, covered investment advisers will be required to:

- Implement a risk-based and reasonably designed AML/CFT program including, at a minimum, the following:
    - Policies, procedures, and controls to comply with the requirements of the BSA and designed to address money laundering, terrorist financing, and other illicit finance risks;
    - A designated AML/CFT compliance officer responsible for implementing and monitoring the AML/CFT program;
    - Independent testing of the AML/CFT program; by a qualified internal or external party on a periodic basis;
    - Ongoing training for the investment adviser's personnel; and
    - Risk-based procedures for conducting ongoing customer due diligence.
- File certain reports, such as SARs and currency transaction reports (CTRs), with FinCEN;
- Keep certain records, including those relating to the transmittal of funds (i.e., comply with the Recordkeeping and Travel Rules);[5] and
- Fulfill certain other obligations applicable to financial institutions subject to the BSA and FinCEN's implementing regulations, such as special information sharing procedures.

The Rule excludes mutual funds from the above-mentioned AML/CFT requirements. Further, it permits investment advisers to categorically exclude any such mutual fund from the investment adviser's AML/CFT program and does not require investment advisers to verify that the mutual fund has an AML/CFT program in place. This exclusion extends to (i) bank and trust company-sponsored collective investment funds that comply with certain requirements[6] and (ii) any other investment adviser subject to the Rule that is advised by an investment adviser.

[5] Pursuant to 31 CFR § 103.33(g), fund transmittals larger than $3,000 (or foreign equivalent) requires the transmittor institution to send the following information in the transmittal order relating to the transmitter's (i) name; (ii) account number, if used; (iii) address; (iv) identity of the transmittor's financial institution; (v) amount of the transmittal order; (vi) execution date of the transmittal order; and (vii) identity of the recipient's financial institution. Moreover, it requires the institution receiving the transmittal to retain the following information about the recipient: (i) name; (ii) address; (iii) account number; (iv) any other specific identifier.

[6] 12 CFR § 9.18 details the requirements for collective investment funds.

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Delegation and Reliance

There is some flexibility for investment advisers to delegate some aspects of their AML/CFT programs and other requirements to third-party service providers, such as fund administrators, custodians, or broker-dealers, subject to contractual agreements and risk-based oversight. However, the investment adviser will remain fully responsible and legally liable for compliance with the Rule and will need to ensure that FinCEN and the SEC are able to obtain information and records relating to the AML/CFT program.

Further, the Rule permits investment advisers that are dually registered as broker-dealers or banks, or that are affiliated with entities that are financial institutions already subject to the BSA, to extend a single AML/CFT program to all affiliated entities that are subject to the BSA, so long as the program is designed to identify and mitigate the different risks posed by the different aspects of each affiliate's business and satisfies each of the risk-based AML/CFT program and other BSA requirements to which the entities are subject in all of their regulated capacities.

Enforcement

Covered investment advisers will be subject to examination for compliance with the Rule’s requirements by the SEC as part of its existing regulatory and examination framework. The SEC will coordinate with FinCEN on any enforcement actions or referrals arising from violations.

Next Steps

We encourage all covered investment advisers to start reviewing their compliance programs now to assess whether any updates will be required to be implemented and put into place by January 1, 2026.

For more information regarding the foregoing, please contact a member of the of the Haynes Boone Investment Management Practice Group.

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