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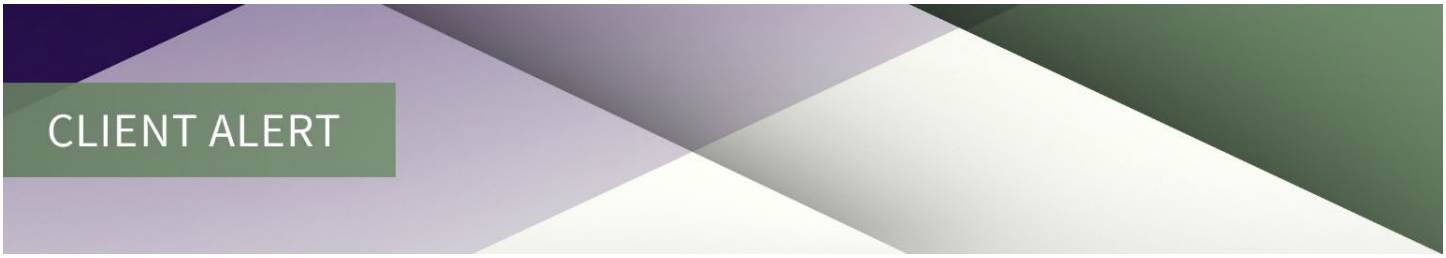

FinCEN Final Rule Imposes AML Requirements on Investment Advisers

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Without further ado, the Financial Crimes Enforcement Network ("**FinCEN**") published its long-awaited Final Rule to bring investment advisers within the scope of its anti-money laundering ("**AML**") / countering the financing of terrorism ("**CFT**") regulatory framework. Starting **January 1, 2026**, investment advisers will be considered "financial institutions" under the Bank Secrecy Act ("**BSA**") and FinCEN's regulations, and will be required to implement and maintain an AML/CFT compliance program and submit suspicious activity reports ("**SARs**") to FinCEN, among other obligations.

Pursuant to the BSA and its implementing regulations, "financial institutions" are required to (1) establish AML/CFT programs that meet minimum standards; (2) file SARs and Currency Transaction Reports with FinCEN; and (3) keep records relating to the transmittal of funds (among other reporting and recordkeeping requirements). Prior to this rulemaking, investment advisers had not been covered financial institutions under FinCEN's regulations, and compliance with these regulatory requirements has therefore not been compulsory (though many investment advisers have voluntarily implemented AML/CFT compliance programs that meet the requirements).

Following publication of the Notice of Proposed Rule Making earlier this year, detailed in our client alert Third Time's a Charm: FinCEN Proposes AML Rule for Investment Advisers, FinCEN solicited and reviewed public comments and published the Final Rule on August 28, 2024. The Final Rule is largely similar to the Proposed Rule, with some key differences outlined below, which loosen certain requirements from the Proposed Rule in response to feedback. FinCEN also published a Fact Sheet, which summarizes some of the key changes in the Final Rule.

I. Notable Changes in the Final Rule

While much of the Final Rule is largely consistent with the Proposed Rule, there are some notable changes in the Final Rule.

a. Scope of the Definition of "Investment Adviser"

The Proposed Rule would have defined the term "investment adviser" to include all investment advisers registered with the SEC ("**RIAs**") and all investment advisers exempt from reporting to the SEC ("**ERAs**") (together, "**Covered Advisers**"). In the Final Rule, FinCEN narrows the definition of "investment adviser" to exclude:

(1) RIAs that register with the SEC solely because they are (i) mid-sized advisers, as set forth in Section 203A(a)(2)(B) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3a(a)(2)(B)); (ii) multi-state advisers; or (iii) pension consultants; and

(2) RIAs that do not report any assets under management (AUM) on Form ADV.

The Final Rule does not exclude smaller advisers based on number of employees, as industry groups had requested.

With respect to investment advisers located outside the United States, the Proposed Rule (in an effort to harmonize its AML/CFT framework with the SEC's existing registration requirements for non-U.S. investment advisers) would have applied broadly to non-U.S. RIAs and non-U.S. ERAs if they, respectively, were registered or required to be registered with the SEC or report to the SEC on Form ADV. The Final Rule, however, narrowed the scope of this requirement. For investment advisers that have their principal office and place of business outside the United States, FinCEN clarified that the Final Rule applies only to their activities that (i) take place within the United States, including through the involvement of U.S. personnel of the investment adviser, such as the involvement of an agency, branch, or office within the United States or (ii) provide services to a U.S. person or a foreign-located private fund with an investor that is a U.S. person.

We note that similar to the Proposed Rule, the Final Rule does not apply to State-registered advisers, foreign private advisers, or family offices.

b. AML/CFT Program Requirements

Under the Proposed Rule, FinCEN proposed to require that the duty to establish and maintain an AML/CFT program be the responsibility of, and performed by, persons in the United States. However, in response to feedback seeking further guidance, an exemption from, or a delay in the implementation of this requirement, FinCEN determined not to include the requirement at this time. FinCEN noted, however, that it is continuing to evaluate the issue and may incorporate the requirement (or something similar) in a future rulemaking.

In addition, FinCEN clarified that investment advisers may deem requirements under sections 314(a) and 314(b) under the USA PATRIOT Act satisfied for any mutual funds, bank- and trust company-sponsored collective investment fund, or any other investment adviser they advise subject to the Final Rule that is already subject to the AML/CFT program, so as to avoid duplicative obligations. Sections 314(a) and 314(b) of the USA PATRIOT Act are provisions aimed at information sharing with government entities and other financial institutions. Under section 314(a), financial institutions, now including investment advisers, have an obligation to search their records and report to FinCEN in response to a request for information on specified account or transaction activity and must designate a contact person for section 314(a) requests. Section 314(b) facilitates information sharing between financial institutions. It is entirely voluntary, but those financial institutions that opt to participate must provide notice to FinCEN and comply with all requirements set forth in section 314(b).

FinCEN did not make any notable changes to the minimum standards for an investment adviser's AML/CFT program, or to the SAR filing provisions, adopting those requirements largely as outlined in the Proposed Rule. FinCEN is adopting the minimum requirements largely as proposed in the Final Rule.

II. Next Steps

FinCEN extended the proposed date for compliance to **January 1, 2026**, meaning that no later than this date, investment advisers must have implemented AML/CFT programs, commenced filing SARs when required, and begun complying with the other reporting and recordkeeping requirements as set forth in the Final Rule. Covered Advisers should begin formulating their AML/CFT compliance programs that meet the minimum standards under the Final Rule well ahead of the above deadline, as implementation will need to have commenced by this effective date. FinCEN has delegated its examination authority to the SEC, given the SEC's expertise in the regulation of investment advisers and the existing delegation to the SEC of authority to examine broker-dealers and certain investment companies.

As we describe in detail in our prior client alert, the Proposed Rule did not include Customer Identification Program ("CIP") requirements or elaborate on the applicability of the Customer Due Diligence framework (the "CDD Rule"), which requires certain financial institutions to collect beneficial ownership information for their legal entity customers. FinCEN has addressed the CIP requirements in a separate joint notice of proposed rulemaking issued by FinCEN and the SEC on May 21, 2024, which would apply the CIP requirements to investment advisers. FinCEN further said that it would address the CDD requirements in a separate rulemaking, which has not yet been issued. As a result, investment advisers may need to take a staggered approach to developing their compliance programs, by first implementing the aspects of the AML compliance program-related requirements set forth in the Final Rule by the January 1, 2026 deadline, followed by the implementation of any forthcoming CIP/CDD Rule requirements, which are not yet in effect.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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