King & Spalding

Client Alert

Providing Strategic Legal Guidance to the Financial Services Industry

SEPTEMBER 09, 2024

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FinCEN Issues Final Rule Expanding Anti-Money Laundering/ Countering the Financing of Terrorism Requirements for Investment Advisers

On September 4, 2024, the Financial Crimes Enforcement Network ("FinCEN"), U.S. Department of Treasury, published a final rule (the "Final Rule") expanding the definition of "financial institution" under the Bank Secrecy Act ("BSA") to include registered investment advisers ("RIAs") and exempt reporting advisers ("ERAs"), subject to certain exclusions. The Final Rule prescribes minimum standards, subjecting these investment advisers to anti-money laundering/countering the financing of terrorism ("AML/CFT") requirements that already apply to banks, broker-dealers, and certain other financial institutions. Such requirements include developing an AML/CFT compliance program and requirements to report suspicious activity to FinCEN.

The compliance date for the Final Rule is January 1, 2026.

I. Scope and Exclusions

EXCLUSIONS FOR CERTAIN TYPES OF RIAS

The Final Rule will apply to all RIAs and ERAs, with the exception of RIAs within scope of the following exclusions:

- **No Regulatory Assets Under Management**: An adviser that does not report any assets under management ("AUM") in their latest Form ADV;
- **Mid-Sized Advisers**: An adviser registered with the SEC solely on the basis of being a "mid-sized advisory firm;"[i]

- **Multi-State Advisers**: An adviser registered with the SEC solely on the basis of being a “multi-state adviser” (an adviser that otherwise would be required to register in 15 or more states); and,
- **Pension Consultants**: An adviser registered with the SEC solely on the basis of being a pension consultant that qualifies for the exemption in Advisers Act Rule 203A-2(a).

The above exceptions reflect FinCEN’s decision to narrow the definition of an RIA in response to the public comments submitted to its proposed rule (see our previous client alert on the proposed rule in February 2024 here).

SCOPE OF APPLICABILITY TO NON-U.S. ADVISERS

With respect to investment advisers subject to the Final Rule that have their principal office and place of business outside the United States, 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.

MUTUAL FUNDS

Consistent with the proposed rule, the Final Rule allows an investment adviser to exclude from its obligations any mutual fund advised by the investment adviser, without obligating the adviser to verify that the mutual fund has implemented an AML/CFT program.

STATE-REGISTERED ADVISERS

The Final Rule does not apply to state-registered investment advisers.

II. Substantive Obligations Under the Final Rule

By designating certain RIAs and ERAs as financial institutions under the BSA, FinCEN subjects them to AML/CFT obligations under the BSA and FinCEN’s implementing regulations. These requirements include the development and implementation of risk-based AML/CFT programs that are reasonably designed to prevent the services offered from being misused for money laundering or terrorist financing (or other related illicit conduct). There must be written policies, procedures, an ongoing risk assessment, and internal controls tailored to the specific risks faced by the advisers. Such policies should be subject to regular review and updated.

Under the Final Rule, RIAs and ERAs must file Suspicious Activity Reports (“SARs”) with FinCEN for any transactions that appear to involve funds derived from illegal activities, designed to evade BSA requirements, or have no apparent lawful purpose. The Final Rule also requires these RIAs and ERAs to comply with the requirements to file Currency Transaction Reports (“CTRs”), adhere to applicable recordkeeping and travel rules, as well as the information sharing provisions under the BSA. See FinCEN IA Final Rule Fact Sheet.

The Final Rule allows investment advisers to contractually delegate the implementation and operation of certain aspects of its AML/ CFT program. This would allow investment advisers to delegate certain compliance provisions of this Final Rule to a third party, like a fund administrator. However, the investment advisers would remain fully responsible and legally liable for the AML/CFT program’s compliance, and FinCEN and the SEC must be able to obtain all information and records pertaining to the program.

FinCEN will coordinate with the Securities and Exchange Commission ("SEC") to ensure that investment advisers are examined for compliance with these AML/CFT requirements.

IMPLICATIONS FOR THE FOR PRIVATE FUNDS INDUSTRY

In particular, the Final Rule significantly affects the private funds industry. While many RIAs already apply AML/CFT requirements if, for example, they are banks or subsidiaries of banks, registered as broker-dealers, or advise mutual funds, advisers to the private funds industry will have to comply with these AML/CFT requirements for the first time; among the AML/CFT requirements set forth under the Final Rule, this may mean conducting enhanced due diligence when dealing with higher-risk investors or transactions.

Additionally, compliance with these requirements, in conjunction with FinCEN's jointly proposed Customer Identification Program ("CIP") rule with the SEC (once finalized) that would impose CIP requirements on RIAs and ERAs (as discussed in our recent client alert), will pose significant burdens on private fund managers. Treasury and the SEC are reviewing comments and are working toward finalizing the CIP rule. In the Final Rule, FinCEN noted that CIP requirements are "a long-standing, foundational component of a financial institution's AML/CFT requirements."

Accordingly, early engagement with key stakeholders, such as the board of directors and senior management, will be critical, as the AML/CFT program must be approved by an adviser's board of directors or trustees.

III. CONCLUSION

Investment advisers covered by the Final Rule, including those with existing AML programs, should review requirements under the Final Rule well in advance of the January 1, 2026, compliance date, to identify policy-and-procedure revisions and/or operational changes that may be required for compliance with the Final Rule, as each firm's implementation effort will vary. If you have any questions, your King & Spalding contacts would be glad to speak with you.

ABOUT KING & SPALDING

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[i] An adviser with AUM of at least $25 million but less than $100 million and that is not required to be registered as an investment adviser with a state's securities authority where it maintains its principal office or place of business.