Private Funds
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FinCEN Issues Proposed Rule to Require Certain Investment Advisers to Implement Anti-Money Laundering Programs and File Suspicious Activity Reports

By Timothy Welch and Jessica Nash

On February 13, 2024, the Financial Crimes Enforcement Network ("FinCEN") of the U.S. Department of the Treasury issued a Notice of Proposed Rulemaking (the "Proposed Rule") that would subject certain investment advisers to the Anti-Money Laundering and Countering the Financing of Terrorism ("AML/CFT") requirements of the Bank Secrecy Act ("BSA").[1] The Proposed Rule would require investment advisers registered with the U.S. Securities and Exchange Commission ("SEC," and such advisers, "RIAs") and investment advisers that report to the SEC as exempt reporting advisers ("ERAs") to implement AML/CFT compliance programs, file Suspicious Activity Reports ("SARs") with FinCEN, keep records relating to the transmittal of funds in accordance with the Recordkeeping and Travel Rules,[2] and comply with other requirements applicable to financial institutions under the BSA and its implementing regulations.

Although FinCEN previously proposed subjecting private funds and investment advisers to the BSA's AML/CFT program requirements in 2002,[3] 2003,[4] and 2015,[5] it never finalized these proposed rules, and investment advisers are not currently included in the definition of "financial institution" under the BSA or its implementing regulations. The Proposed Rule would amend the BSA by adding "investment adviser" to the definition of "financial institution" and defining "investment adviser" to include:

- Any person who is registered or required to register with the SEC under section 203 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3(a)) (the "Advisers Act"), or
- Any person that is exempt from SEC registration under section 203(l) (*i.e.*, venture capital fund advisers) or 203(m) (*i.e.*, advisers solely to private funds with less than $150M in regulatory assets under management) of the Advisers Act (15 U.S.C. 80b-3(l), (m)).[6]

[1] The Proposed Rule, which is available at https://www.federalregister.gov/public-inspection/2024-02854/anti-money-launderingcountering-the-financing-of-terrorism-program-and-suspicious-activity-report, is scheduled to be published in the Federal Register on February 15, 2024.

[2] 31 C.F.R. § 1010.410(e), (f).

[3] *See* FinCEN, *Anti-Money Laundering Programs for Unregistered Investment Companies*, 67 FR 60617 (Sept. 26, 2002).

[4] *See* FinCEN, *Anti-Money Laundering Programs for Investment Advisers*, 68 FR 23646 (May 5, 2003).

[5] *See* FinCEN, *Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers*, 80 FR 52680 (Sept. 1, 2015).

[6] Financial Crimes Enforcement Network, Department of the Treasury, *Financial Crimes Enforcement Network: Anti-Money Laundering/Countering the Financing of Terrorism Program and Suspicious Activity Report Filing Requirements for Registered*

As drafted, the Proposed Rule would not apply to State-registered investment advisers. The Proposed Rule also would not apply to advisory activities undertaken in connection with mutual funds, which have their own AML/CFT obligations under the BSA.

In addition to other obligations applicable to financial institutions subject to the BSA, the Proposed Rule would require RIAs and ERAs to:

- Implement and maintain a risk-based AML/CFT program, which must include:

  (i) internal policies, procedures, and controls designed to comply with the BSA and address money laundering, terrorist financing, and other illicit finance risks;
  (ii) designation of an AML/CFT compliance officer;
  (iii) ongoing employee training;
  (iv) independent testing of the AML/CFT program for compliance; and
  (v) risk-based procedures for conducting ongoing customer due diligence.
- File SARs with FinCEN regarding suspicious transactions relevant to a possible violation of law or regulation;
- Report transactions in currency over $10,000 by filing a Currency Transaction Report ("CTR");[7]
- Obtain and retain originator and beneficiary information for certain transactions and keep records relating to the transmittal of funds in line with the Recordkeeping and Travel Rules,[8] which require the creation and maintenance of records for transmittal of funds and ensure that certain information regarding a transmittal travel with the transmittal to any subsequent financial institutions in the payment chain;[9] and
- Implement special due diligence measures pursuant to section 311 of the USA PATRIOT Act, if the Secretary of the Treasury finds reasonable grounds exist to conclude that the transaction poses a primary money laundering concern,[10] and implement special due diligence measures pursuant to section 312 of the USA PATRIOT Act for private banking and correspondent bank accounts involving foreign persons.

In relation to these requirements, FinCEN proposes to delegate its examination authority to the SEC in light of its experience and expertise in regulating investment advisers.[11]

By including RIAs and ERAs within the BSA's definition of "financial institution," the Proposed Rule also would enable RIAs and ERAs to share information relating to money laundering or terrorist financing with other financial institutions.

Investment Advisers and Exempt Reporting Advisers, 31 CFR Parts 1010 and 1032, pgs. 33-37, 203, https://public-inspection.federalregister.gov/2024-02854.pdf.

[7] *Id.* at 39. RIAs and ERAs no longer would be required to report such transactions on Form 8300.

[8] The Recordkeeping and Travel Rules are codified at 31 CFR 1010.410(e) and 31 CFR 1010.310(f).

[9] *Supra* note 6, at 42.

[10] *Id.* at 92; *see also* 31 U.S.C. 5318A.

[11] *Id.* at 4.

The Proposed Rule does not include a customer identification program ("CIP") requirement, which FinCEN intends to address in a joint rulemaking with the SEC after the notice-and-comment period, or a requirement for RIAs or ERAs to identify and verify the beneficial owners of their legal entity customers under the Customer Due Diligence Rule (the "CDD Rule"), which FinCEN must revise, in response to the Corporate Transparency Act and its beneficial ownership information reporting requirements, by January 1, 2025. However, in connection with the Proposed Rule, FinCEN invites comments regarding whether it should apply the CDD Rule to RIAs and ERAs once a joint rulemaking addressing CIP requirements is finalized. FinCEN also invites general comments regarding the Proposed Rule and specifically requests comments regarding several other topics, including, for example:

- The scope of the definition of "investment adviser," as incorporated into the definition of "financial institution," including whether State-registered or foreign investment advisers that do not meet the proposed definition ought to be included within the scope of any final rule and, conversely, whether ERAs ought to be excluded from the proposed definition;
- The application of Recordkeeping and Travel Rules and CTR filing requirements to investment advisers, as well as possible exemptions;
- The proposed AML/CFT program requirements for investment advisers, including whether certain categories of activities or entities, other than in relation to mutual funds, might reasonably be exempted from such program requirements;
- The scope of SAR reporting requirements;
- Special information sharing procedures, including under what circumstances investment advisers might enter into voluntary information sharing arrangements; and
- Section 311 measures and special due diligence requirements, including the extent to which investment advisers provide advisory services or enter into advisory relationships that are similar to correspondent or private banking accounts.

Comments on the Proposed Rule will be accepted until April 15, 2024.

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