WINSTON & STRAWN LLP

CLIENT ALERT

FinCEN Final Rule Exempts Certain Investment Advisers from AML/CFT Compliance Requirements

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Earlier this year, we wrote about the U.S. Department of the Treasury's Financial Crimes Enforcement Network (**FinCEN**) proposed rule, which would have imposed certain anti-money laundering and combating the financing of terrorism (**AML/CFT**) program and other Bank Secrecy Act (**BSA**)-related obligations, including suspicious activity reporting obligations (**SARs**), on all U.S. Securities and Exchange Commission (**SEC**)-registered investment advisers (**RIAs**) and exempt reporting advisers (**ERAs**).

This past week, FinCEN released the final rule, which contains some notable key changes to the proposed rule.

EXCLUDED RIAS

With the final rule, FinCEN has added "investment adviser" to the definition of "financial institution" under the regulations implementing the BSA, as proposed. However, the final rule narrows the definition of "investment adviser" to exclude RIAs that register with the SEC *solely* because they are:

- *Mid-Sized Advisers* – RIAs with between $25 million and $100 million assets under management (**AUM**) *and* not (i) required to register as an adviser with, or (ii) subject to an examination as an adviser by, the state where they maintain their principal office and place of business;[1]
- *Multi-State Advisers* – RIAs with less than $100 million AUM who are required, among other things, to register as an adviser with 15 or more states;[2]
- *Pension Consultants* – RIAs who provide investment advice to certain employee benefit plans, governmental plans, or church plans under the Employee Retirement Income Security Act of 1974; or
- *No-Reported-AUM Advisers* – RIAs that do not report any regulatory AUM on Form ADV.[3]

The foregoing classes of RIAs are referred to below as "Excluded RIAs."

The final rule does not contain categorical exclusions for ERAs.

AML/CFT OBLIGATIONS

The following AML/CFT obligations will apply to (i) SEC-registered RIAs that are not Excluded RIAs and (ii) ERAs:

- implement a risk-based and reasonably designed AML/CFT program;
- file certain reports, such as SARs, with FinCEN;
- keep certain records, such as those relating to the transmittal of funds (i.e., comply with the Recordkeeping and Travel Rules); and
- comply with the information sharing provisions of section 314(a) and (b) of the USA PATRIOT Act (RIAs and ERAs may deem these requirements satisfied for any mutual funds, bank- and trust company-sponsored collective investment funds, or any other investment advisers they advise that are already subject to obligations under the BSA).

RIAS AND ERAS LOCATED OUTSIDE OF THE UNITED STATES

The final rule, like the proposed rule, applies to RIAs and ERAs with a principal office and place of business outside of the United States (**U.S.**)—but only to those activities that:

- take place within the U.S., including through the involvement of the adviser's U.S. personnel (e.g., through a U.S. agency, branch, or office); or
- provide services to a U.S. person;[4] or
- provide services to a foreign-located private fund with an investor that is a U.S. person.[5]

SUSPENDED "DUTY PROVISION" FOR CERTAIN RIAS AND ERAS WITH NO U.S.-RESIDENT COMPLIANCE PERSONNEL

With respect to RIAs and ERAs that have no U.S.-based compliance personnel, FinCEN decided not to include in the final rule the "duty provision" found in 31 U.S.C. § 5318(h)(5), as added by the AML Act of 2020 (**Duty Provision**). The Duty Provision imposed a duty on investment advisers to establish, maintain, and enforce an AML/CFT program that is "the responsibility of, and . . . performed by, *persons in the United States* who are accessible to, and subject to oversight and supervision by, the Secretary of the Treasury and the appropriate Federal functional regulator."

FinCEN acknowledged comments seeking further guidance as to how foreign advisers without U.S.-resident staff could comply with the Duty Provision, including whether use of a U.S.-resident contractor or service provider would suffice. FinCEN is currently evaluating comments on a proposed rule incorporating the Duty Provision for existing BSA-defined financial institutions and may incorporate the Duty Provision in a subsequent rulemaking applicable to investment advisers.[6]

ADDITIONAL IMPORTANT INFORMATION ABOUT THE FINAL RULE

- FinCEN provided a temporary reprieve of sorts to the investment advisory industry by delaying the effectiveness of the final rule by 16 months. The final rule is effective January 1, 2026.
- At this time, FinCEN is not applying the final rule to state-registered investment advisers, foreign private advisers, or family offices.
- Consistent with the proposed rule, FinCEN is delegating its examination authority for the requirements of the final rule to the SEC. The SEC will examine covered advisers' compliance with the final rule, but FinCEN will retain civil administrative fine authority for violations.

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[1] *See* 15 U.S.C. 80b-3a(a)(2). FinCEN interprets "principal office and place of business" to mean the executive office of the investment adviser from which the officers, partners, or managers of the investment adviser direct, control, and coordinate the activities of the investment adviser. *See* 17 C.F.R. § 275-222.1(b).

[2] *See* 17 C.F.R. § 275.203A-2(d).

[3] 31 C.F.R. § 1010.100(nnn)(2) (as amended).

[4] 31 C.F.R. § 1032.111(a)(3)(iii) (as amended) defines U.S. person by referencing the definition in Regulation S, 17 § C.F.R. 230.902(k).

[5] 31 C.F.R. § 1032.111(a) (as amended).

[6] Anti-Money Laundering and Countering the Financing of Terrorism Program, 89 Fed. Reg. 72156 (Sep. 4, 2024) (to be codified at 31 C.F.R. pts. 1010, 1032).
4 Min Read

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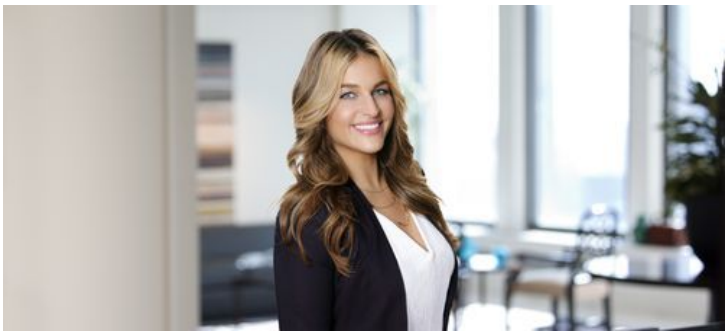

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