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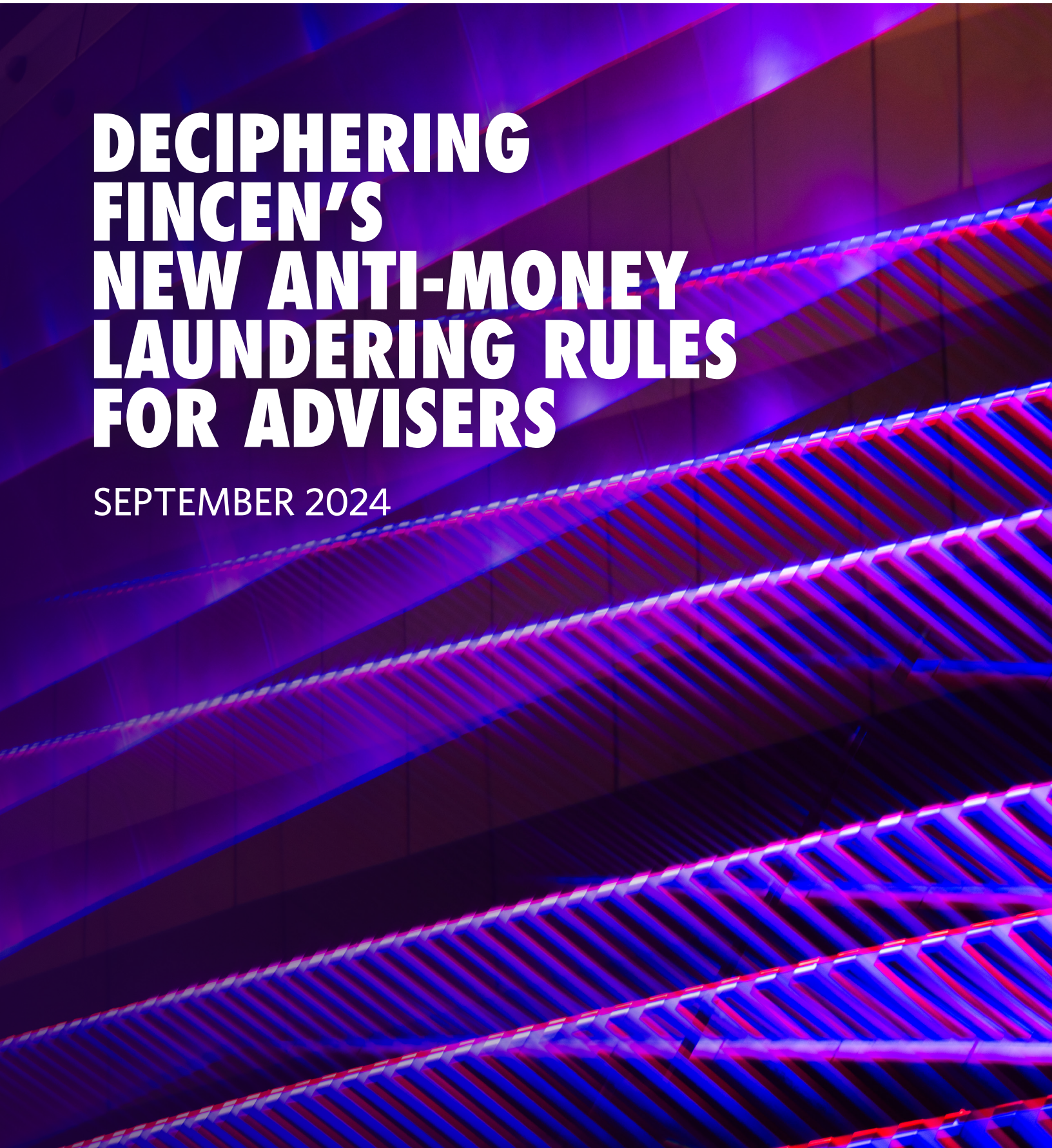
REPORT



DECIPHERING FINCEN'S NEW ANTI-MONEY LAUNDERING RULES FOR ADVISERS

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On August 28, 2024, the US Department of the Treasury's (Treasury's) Financial Crimes Enforcement Network (FinCEN) adopted a final rule (Final Rule) that subjects investment advisers to anti-money laundering/countering the financing of terrorism (AML/CFT) programs and related reporting requirements, including suspicious activity reports (SARs).[1]

Specifically, the Final Rule does the following:

- requires certain registered investment advisers (RIAs) and exempt reporting advisers (ERAs)[2] to establish AML/CFT programs and prescribes minimum standards for such programs;
- requires those RIAs and ERAs to report suspicious activity to FinCEN;
- requires those RIAs and ERAs to comply with the Recordkeeping and Travel Rules;
- requires those RIAs and ERAs to comply with certain obligations applicable to "financial institutions" subject to the Bank Secrecy Act (BSA) and the BSA's implementing regulations, such as special information sharing procedures and special due diligence requirements for correspondent and private banking accounts; and
- delegates examination authority to the US Securities and Exchange Commission (SEC).

FinCEN's fact sheet accompanying the Final Rule states that the Final Rule "aims to help address the illicit finance risks in the investment adviser sector in the United States, which [Treasury] documented in a February 2024 risk assessment." According to FinCEN's fact sheet, the risk assessment (Risk Assessment) "highlights numerous cases in which sanctioned persons, corrupt officials, fraudsters, and other criminals have exploited the investment adviser industry to access the U.S. financial system and launder funds."

In the Adopting Release, FinCEN placed significant focus on the private funds industry (and private fund advisers) as a potential entry point for illicit finance activity that threatens national security. FinCEN explained in the Adopting Release that investment advisers and their private funds, particularly venture capital funds, are being used by foreign states to access certain technology and services with long-term national security implications through investments in early-stage companies.

The Adopting Release cites the growth of the private funds industry as amplifying this threat. FinCEN noted that Treasury found as part of the February 2024 Risk Assessment that "RIAs that advised private

[1] FinCEN, Anti-Money Laundering/Countering the Financing of Terrorism Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers and Exempt Reporting Advisers, 89 Fed. Reg. 72,156 (Sept. 4, 2024) (Adopting Release).

[2] The Adopting Release discusses ERAs as "present[ing] generally higher illicit finance risks" than RIAs and notes that the assets under management (AUM) managed by ERAs is not proportionate to the risks they pose (i.e., lower private fund gross asset value does not mean that the ERA poses lower AML/CFT risk).

funds were associated with or referenced in SARs at twice the rate of RIAs that did not advise private funds."[3]

In the Final Rule, FinCEN largely adopts the substance of the proposed rule that FinCEN issued earlier this year (Proposed Rule),[4] discussed in our prior report. Certain material changes from the Proposed Rule include a narrowing of the Proposed Rule with respect to (1) the types of investment advisers subject to the Final Rule, (2) the scope of applicability of the Final Rule to foreign-located investment advisers, and (3) the scope of applicability of the Final Rule to subadvisers. That being said, FinCEN adopted the minimum requirements of AML/CFT programs largely as proposed.

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

THE FINAL RULE

Scope

The Final Rule adds "investment advisers" to the definition of "financial institutions" for purposes of the BSA's implementing regulations.[5] While the Proposed Rule defined "investment adviser" broadly to include RIAs and ERAs, the Final Rule excludes:

- RIAs that register with the SEC solely because they are mid-sized advisers, multistate advisers, or pension consultants; and
- RIAs that are not required to report any AUM[6] to the SEC on Form ADV.

Foreign-Located Advisers

In addition, with respect to investment advisers subject to the Final Rule 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:

- Take place within the United States, including through the involvement of US personnel of the investment adviser, such as the involvement of an agency, branch, or office within the United States; or
- Provide services to a US person or a foreign-located private fund with an investor that is a US person.

[3] Adopting Release at 72,164 n.68.

[4] FinCEN, Anti-Money Laundering/Countering the Financing of Terrorism Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers and Exempt Reporting Advisers, 89 Fed. Reg. 12,108 (Feb. 15, 2024).

[5] The BSA's implementing regulations are located at 31 C.F.R. Chapter X.

[6] Although FinCEN refers to "AUM," this would be "regulatory assets under management," or RAUM, for purposes of the Investment Advisers Act of 1940 (the Advisers Act).

Notably, under the Final Rule, a non-US adviser to a "foreign-located private fund"[7] with even one US investor must comply with the Final Rule with respect to the entire private fund. There are also look-through obligations for entities that are formed for the purpose of investing in the non-US domiciled fund.

State-Registered Advisers

Consistent with the Proposed Rule, the Final Rule does not apply to state-registered advisers. However, FinCEN stated in the Adopting Release that it will continue to monitor activity involving state-registered advisers for indicia of money laundering, terrorist financing, or other illicit finance activity and may take appropriate steps to mitigate any such activity.[8]

Foreign Private Advisers and Family Offices

Consistent with the Proposed Rule, the Final Rule also does not apply to "foreign private advisers" or "family offices," as such terms are defined under the Advisers Act.

BSA Regulatory Requirements Generally Applicable to Financial Institutions

The Final Rule, like the Proposed Rule, requires covered RIAs and ERAs to comply with the BSA regulatory requirements that are generally applicable to financial institutions, including the information sharing provisions of Section 314(a) of the USA PATRIOT Act;[9] currency transaction report (CTR) requirements;[10] certain recordkeeping and travel rules;[11] requirements to implement certain "special measures" if the Secretary of the Treasury finds that reasonable grounds exist to conclude that a foreign jurisdiction, institution, class or transaction, or type of account is a "primary money laundering concern;"[12] special standards for due diligence for private banking and correspondent bank accounts involving foreign persons;[13] and requirements to create and retain records for extensions of credit and

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[7] According to FinCEN, the Final Rule defines "foreign-located private fund" by reference to Section 202(a)(29) of the Advisers Act, which defines "private fund" to mean "an issuer that would be an investment company, as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a-3), but for section 3(c)(1) or 3(c)(7) of that Act." FinCEN stated that the "foreign-located" aspect of the definition refers to a fund that is a legal entity or arrangement that is incorporated or organized outside the United States and therefore is not a US person for purposes of the Final Rule. *See* Adopting Release at 72,173.

[8] Adopting Release at 72,156.

[9] The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, or USA PATRIOT Act, was signed into law by US President George W. Bush in response to the September 11, 2001, attacks on the United States.

[10] See 31 C.F.R. 1010.310 through 1010.314. The CTR requirement replaces covered RIAs' and ERAs' obligation to file reports on Form 8300 for the receipt of more than $10,000 in cash and negotiable instruments. *See*, *e.g.*, 31 C.F.R. 1010.330.

[11] 31 C.F.R. 1010.410 and 1010.430. These rules require financial institutions to create and maintain records of transmittals of funds and ensure that certain information pertaining to the transmittal of funds "travel" with the transmittal to the next financial institution in a payment chain.

[12] 31 U.S.C. § 5318A.

[13] 31 U.S.C. § 5318(i). The Final Rule subjects covered RIAs and ERAs to those "special standards of due diligence[,] prohibitions[,] and special measures" referenced in 31 C.F.C. 1010.600 through 1010.670,

cross-border transfers of currency, monetary instruments, checks, investment securities, and credit when transactions exceed $10,000.[14]

That said, with respect to the requirements of the information sharing provisions of Sections 314(a) and 314(b) under the USA PATRIOT Act and special due diligence requirements for correspondent and private banking accounts and special measures under Section 311 of the USA PATRIOT Act, FinCEN clarified that covered RIAs and ERAs may deem these requirements satisfied for any mutual fund, 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 AML/CFT program requirements.

AML/CFT PROGRAM REQUIREMENT

The Final Rule, similar to the Proposed Rule, requires covered RIAs and ERAs to develop and implement a written, risk-based AML/CFT program that is reasonably designed to both prevent the RIA or ERA from being used for money laundering, terrorist financing, or other illicit finance activities and achieve and monitor compliance with the applicable provisions of the BSA and the Treasury regulations promulgated thereunder.

The Final Rule requires that each covered RIA's and ERA's AML/CFT program be approved in writing by its board of directors or trustees or, for advisers without a board structure, by its sole proprietor, general partner, trustee, or other persons that have functions similar to a board of directors. FinCEN noted that in such circumstances where an adviser does not have a board of directors or trustees but has individuals or groups with similar status or functions to such a board, other members of senior management may also be appropriately suited to approve the AML/CFT program.[15]

According to FinCEN, such individuals may include the chief executive officer, chief financial officer, chief operations officer, chief legal officer, chief compliance officer, director, and other senior management with similar status or function.[16]

Minimum Requirements

The AML/CFT program must, at a minimum:

- Provide for independent testing for compliance to be conducted by the RIA's/ERA's personnel or by a qualified outside party;
- Designate a person or persons responsible for implementing and monitoring the operations and internal controls of the program;
- Provide ongoing training for appropriate persons; and

thereby expressly applying existing standards, prohibitions, and other requirements for financial institutions to RIAs and ERAs.

[14] 31 C.F.R. 1010.410(a)-(c).

[15] Adopting Release at 72,197.

[16] *Id.*

- Implement appropriate risk-based procedures for conducting ongoing customer[17] due diligence, such as understanding customer relationships for the purpose of developing a customer risk profile, ongoing monitoring for suspicious transactions, and updating customer information based on risk.

Applicability of the AML/CFT Program Requirements

Mutual Funds

As in the Proposed Rule, the Final Rule maintains the exclusion of mutual funds from the requirements of a covered RIA's and ERA's AML/CFT program requirements. However, the Final Rule differs from the Proposed Rule in that it permits a covered RIA or ERA to categorically exclude any mutual fund from an investment adviser's AML/CFT program requirements, whereas the Proposed Rule obligated RIAs and ERAs to verify that such mutual fund has implemented an AML/CFT program.

Collective Investment Funds

In addition, FinCEN in the Final Rule expanded the exclusion from the AML/CFT program to also apply to bank- and trust company-sponsored collective investment funds that comply with the requirements of 12 CFR 9.18 (or other applicable law that incorporates the requirements of 12 CFR 9.18).

Other Advisers Subject to the Final Rule

FinCEN also expanded the exclusion from the AML/CFT program requirements of the Final Rule to any other investment adviser subject to the Final Rule that is advised by the covered RIA or ERA.

Subadvisers

FinCEN explained in the Adopting Release that, as applied to subadvisers, the exclusion pertaining to other investment advisers subject to the Final Rule that are advised by the RIA/ERA will permit a covered RIA or ERA (acting as subadviser) to exclude from its AML/CFT program another investment adviser (the primary adviser) to which it provides subadvisory services where the subadviser has a direct contractual relationship with the primary adviser and not with the underlying customer of that primary adviser.[18]

FinCEN further explained that the covered RIA or ERA may also be able to exclude wrap-fee programs, separately managed accounts, or other advisory relationships so long as the customer is another investment adviser as defined in the Final Rule and the covered RIA or ERA does not have a direct contractual relationship with the underlying customer of the other investment adviser.[19] However, FinCEN stated that this exclusion would not permit an investment adviser to exclude from its AML/CFT program advisory customers that are BSA-defined financial institutions other than an investment adviser, such as a broker-dealer or bank.[20]

[17] FinCEN explained that the Final Rule uses the term "customers" for those natural and legal persons who enter into an advisory relationship with an investment adviser. Adopting Release at 72,157 n.17.

[18] *Id.* at 72,184.

[19] *Id.*

[20] *Id.*

FinCEN provided the following examples of what a covered RIA or ERA would not be able to exclude from its AML/CFT program:

- Wrap-fee programs where a BSA-defined financial institution other than an investment adviser, such as a broker-dealer, is the sponsor
- Any subadvisory relationships where the primary adviser is an investment adviser not covered by this rule, such as a state-registered adviser, or is exempt as a foreign private adviser
- Those customers with which the investment adviser has a direct contractual relationship governing the provision of advisory services even if such contract calls for the investment adviser to act as a subadviser[21]

According to FinCEN, in these circumstances, where the contractual relationship is with the underlying customer, an adviser acting as a subadviser would be better positioned to assess the risk of the customer and to request appropriate information from the customer.[22]

As a result, in the context of retail managed account programs (e.g., wrap fee programs, unified managed account programs, model manager programs), subadvisers in so-called "single contract" and "model manager" programs should be able to exclude the program accounts from their AML/CFT programs where the primary adviser (i.e., the investment adviser that is a program sponsor) selects and contracts with subadvisers and there is no direct contractual relationship with program clients. However, investment advisers in so-called "dual contract" programs will likely not be able to exclude from their AML/CFT programs accounts of program clients with which the investment advisers contract directly.

Registered Closed-End Companies

While FinCEN also did not categorically exempt registered closed-end companies (Registered Closed-End Funds) from the AML/CFT requirements in the Final Rule, FinCEN did note that, absent other indicators of high-risk activity, a covered RIA or ERA may treat exchange-listed Registered Closed-End Funds as lower-risk for purposes of their AML/CFT programs.[23]

SICAVs

FinCEN declined to exempt European SICAVs[24] or other pooled investment vehicles administered by foreign financial institutions from the scope of the Final Rule because the foreign regimes to which they are subject might not take into account threats to the US financial system or provide relevant information directly to US regulators or law enforcement.[25]

Retirement Plans

FinCEN also declined to provide any categorical exclusion or leniency for retirement plans because doing so would leave a material gap in addressing illicit finance risks given that such plans may not be offered

[21] *Id.*

[22] *Id.*

[23] *Id.* at 72,191.

[24] According to FinCEN, SICAV (Société d'investissement à Capital Variable) is a type of collective investment fund commonly used in Europe.

[25] Adopting Release at 72,185.

directly through a financial institution with an AML/CFT program, SAR, and recordkeeping obligations under the BSA.[26]

"Non-Advisory" and "Non-Management" Services

While covered RIAs and ERAs are subject to the Final Rule, as in the Proposed Rule, the Final Rule does not apply to any "non-advisory services," including those provided by covered RIAs and ERAs. FinCEN stated that an example of non-advisory services in the context of private funds, including venture capital funds, is where an adviser's personnel may play certain roles with respect to the portfolio companies in which its customer fund invests.[27] According to FinCEN, activities undertaken in connection with those roles (e.g., making managerial/operational decisions about the activities of portfolio companies) would generally not be "advisory activities."[28]

However, the Final Rule does apply to "non-management" services (i.e., services that do not involve the management of customer assets) where those services are provided along with the management of a customer's assets.[29] FinCEN noted that in such circumstances these services may lead to an adviser learning relevant information about a customer for purposes of understanding customer risk or identifying suspicious activity.[30]

In addition, FinCEN stated that there is a risk that exempting non-management services from the requirements of the Final Rule for advisers that also manage customer assets could potentially encourage some advisers to attempt to evade the requirements of the rule by rebranding certain activities as non-management activities.[31]

Dually Registered Investment Advisers and Advisers Affiliated with, or Subsidiaries of, Entities Required to Establish AML/CFT Programs

As with the Proposed Rule, the Final Rule does not require a covered RIA or ERA that is dually registered as a broker-dealer or is a bank (or bank subsidiary) to establish multiple or separate AML/CFT programs where a comprehensive AML/CFT program already covers all of the entity's relevant business and activities that are subject to BSA requirements.

In addition, a covered RIA or ERA affiliated with, or a subsidiary of, another entity required to establish an AML/CFT program will not be required to implement multiple or separate programs and instead may elect to extend a single program to all affiliated entities that are subject to the BSA so long as such AML/CFT program is designed to identify and mitigate the different money laundering, terrorist financing, and other illicit finance activity risks posed by the different aspects of each affiliate's (or subsidiary's) business(es) and satisfies each of the risk-based AML/CFT program and other BSA requirements to which the entities are subject in all of their BSA-regulated capacities.

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[26] *Id.*

[27] *Id.* at 72,178.

[28] *Id.* at 72,181.

[29] *Id.* at 72,186.

[30] *Id.*

[31] *Id.*

Duty Provision

In the Final Rule, FinCEN removed the provision from the Proposed Rule that would have required the establishment, maintenance, and enforcement of an AML/CFT program to be the responsibility of, and performed by, persons in the United States who are accessible to, and subject to oversight and supervision by, FinCEN and the appropriate federal functional regulator. As a result, foreign-located persons are permitted to participate in AML/CFT compliance oversight under the Final Rule.

Contractual Delegation

FinCEN explained in the Adopting Release that it will permit a covered RIA or ERA to delegate contractually the implementation and operation of some or all aspects of its AML/CFT program to a third-party provider, including a fund administrator.[32] However, FinCEN stated that it believes it is unnecessary to include rule text explicitly permitting such delegation based on current practice within the investment adviser sector for both AML/CFT and other regulatory requirements, and how other financial institutions delegate AML/CFT responsibilities.[33]

FinCEN made clear that if a covered RIA or ERA delegates the implementation and operation of any aspects of its AML/CFT program, the investment adviser will remain fully responsible and legally liable for, and be required to demonstrate to examiners, the program's compliance with AML/CFT requirements and FinCEN's implementing regulations.[34] FinCEN also clarified that it will permit a covered RIA or ERA to delegate the implementation and operation of some or all aspects of its AML/CFT program and other AML/CFT measures to foreign-located service providers, including fund administrators.[35]

FinCEN noted that whether the service provider is located in the United States or outside the United States, the delegation must be subject to contractual agreements and a risk-based approach to oversight, and the RIA or ERA must remain responsible for overall implementation and ensure that FinCEN and the SEC are able to obtain information and records relating to the AML/CFT program.[36]

Private Funds

FinCEN noted in particular that private fund advisers' compensation arrangements, which most commonly include management fees that are based on total AUM invested in the private fund and performance-based compensation based on the private fund's performance, incentivize private fund advisers to add new investors and grow their private fund assets.[37] According to FinCEN, this incentive may lead some advisers to refrain from voluntarily conducting a robust review of illicit finance risk given that such review could lead to the adviser turning away certain AUM, and thus lead to less compensation for the adviser.[38]

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[32] *Id.* at 72,188.

[33] *Id.*

[34] *Id.*

[35] *Id.* at 72,189.

[36] *Id.*

[37] *Id.* at 72,163.

[38] *Id.*

As a result, FinCEN stated that this can lead a private fund adviser to unwittingly assist in illicit finance activity.[39]

FinCEN also focused on private fund advisers because, according to FinCEN, private funds are more likely to be domiciled in jurisdictions with weaker and less effective AML/CFT controls, making it more difficult for private fund advisers to assess the risk posed by the relationship or prevent abuse.[40] According to SEC data, 48% of the total net asset value of private funds managed by US advisers is held in funds that are domiciled in non-US jurisdictions.[41]

As noted above, FinCEN explained that the Final Rule uses the term "customers" for those natural and legal persons who enter into an advisory relationship with an investment adviser. In the context of private funds, FinCEN explained that it expects covered RIAs and ERAs that are the primary adviser to a private fund or other unregistered pooled investment vehicle to make a risk-based assessment of the money laundering, terrorist financing, and illicit finance activity risks presented by the investors in such investment vehicles by considering the same types of relevant factors, as appropriate, as the RIA/ERA would consider for customers for whom the RIA/ERA manages assets directly.[42]

FinCEN stated that, in assessing the potential risk of a private fund under the Final Rule, covered RIAs and ERAs generally should gather pertinent facts about the structure or ownership of the fund, including the extent to which the adviser is provided with relevant information about the investors in that private fund, who may or may not themselves also be customers of the covered RIA/ERA, and the nature of such investor-related information that the covered RIA/ERA receives.[43]

According to FinCEN, where a covered RIA or ERA attempts to and is unable to obtain identifying information about the investors in a private fund as part of its risk-based evaluation of the private fund, the covered RIA/ERA may determine that such private fund poses a higher risk for money laundering, terrorist financing, or other illicit finance activity.[44]

Accordingly, when a private fund's potential vulnerability to such money laundering, terrorist financing, or other illicit finance activity is high, the covered RIA's or ERA's procedures would need to take reasonable steps to address these higher risks to prevent the covered RIA/ERA from being used for money laundering, the financing of terrorist activities, or other illicit activity and to achieve and monitor compliance with the BSA according to FinCEN.[45]

In particular, FinCEN discussed risks associated with hedge funds, venture capital funds, and private equity funds:

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[39] *Id.*

[40] *Id.* at 72,170.

[41] *Id.* at 72,170 n.114.

[42] *Id.* at 72,191.

[43] *Id.*

[44] *Id.*

[45] *Id.*

Hedge Funds

The Adopting Release suggests that hedge funds or other private funds that permit periodic redemptions pose a higher risk for illicit financial activity as compared to funds with restrictions on withdrawals or redemptions.

Venture Capital Funds

As noted above, FinCEN flagged venture capital funds as being used for illicit technology transfer (i.e., transferring technology in violation of sanctions, export controls, or other applicable laws). FinCEN explained that according to the FBI certain foreign governments routinely conceals ownership or control of investment funds to disguise efforts to misappropriate technology or knowledge.[46] For example, FinCEN referred to state-guided or -owned venture capital funds acting on behalf of certain foreign governments. FinCEN believes that for these reasons venture capital funds may pose illicit finance risk.

Private Equity Funds

While the Final Rule does not require covered RIAs and ERAs to seek additional information from portfolio companies (about the portfolio companies' activities) in order to comply with the rule, covered RIAs and ERAs must consider the information they have already obtained in the process of determining whether the fund should invest in the portfolio company (e.g., information obtained during the due diligence process). Covered RIAs and ERAs must file a SAR with respect to the portfolio company activities if the adviser "knows, suspects, or has reason to suspect" that there is suspicious activity occurring at a portfolio company.[47] As a result, covered RIAs and ERAs will need to consider how the Final Rule will impact their due diligence on portfolio companies.

SUSPICIOUS ACTIVITY REPORTS

FinCEN adopted the SAR filing requirements largely as proposed. Specifically, consistent with the Proposed Rule, the Final Rule requires covered RIAs and ERAs to file SARs of any suspicious transactions relevant to a possible violation of law or regulation. A transaction is required to be reported to FinCEN if (1) it is conducted or attempted by, at, or through a covered RIA or ERA; (2) it involves or aggregates funds or other assets of at least $5,000; and (3) the RIA/ERA knows, suspects, or has reason to suspect that the transaction or pattern of transactions:

- involves funds derived from illegal activity or is intended or conducted in order to hide or disguise funds or assets derived from illegal activity as part of a plan to violate or evade any federal law or regulation or avoid any transaction reporting requirement under federal law or regulation;
- is designed to evade any requirements of the BSA or regulations promulgated thereunder;
- has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the RIA/ERA knows of no reasonable explanation for the transaction after examining the available facts; or
- involves use of the RIA/ERA to facilitate criminal activity.

[46] *Id.* at 72,165.

[47] *Id.* at 72,182.

Filing and Notification Procedures

As in the Proposed Rule, the Final Rule requires that a SAR be filed no later than 30 calendar days after the date of initial detection by the RIA or ERA of facts that may constitute a basis for filing a SAR. As in the Proposed Rule, the Final Rule permits (but does not require) joint filings where multiple RIAs, ERAs, or financial institutions with SAR filing obligations are involved. In addition to filing the SAR, for situations requiring immediate attention, such as suspected terrorist financing or ongoing money laundering schemes, covered RIAs and ERAs are required to notify immediately by telephone the appropriate law enforcement authority.

The Final Rule also permits covered RIAs and ERAs to voluntarily report suspicious transactions that may relate to terrorist activity by calling FinCEN's Financial Institutions Hotline in addition to filing timely a SAR if required by the Final Rule. In such situations, covered RIAs and ERAs may also, but are not required to, voluntarily report to the SEC.

Retention of Records

Covered RIAs and ERAs must also collect and maintain a copy of any SAR filed and any supporting documentation concerning the SAR for a period of five years from the date of filing the SAR and make such documentation available to FinCEN; any federal, state, or local law enforcement agency; or any federal regulatory authority, such as the SEC, that examines the RIA or ERA for compliance with the BSA under the Final Rule, upon request of that agency or authority.

Confidentiality

As with the Proposed Rule, the Final Rule prohibits disclosure of a SAR (or information that would reveal the existence of a SAR) except under very limited circumstances. In instances where a covered RIA, ERA, or any of their current or former personnel are subpoenaed or otherwise requested to disclose a SAR or reveal information that would disclose the existence of a SAR, the RIA or ERA must decline to produce the SAR (or such information) and notify FinCEN.

As in the Proposed Rule, the Final Rule contains certain rules of construction that permit limited disclosure of SARs (or information that would reveal the existence of a SAR) and underlying facts and documents. A third rule of construction permits the "sharing of a SAR within an investment adviser's corporate organizational structure for purposes consistent with the BSA *as determined by regulation or in guidance*."[48] While this provision would initially appear to permit a covered RIA or ERA to share a SAR within its organizational structures, that permission is conditioned on there being guidance or regulation that permits such sharing.

While FinCEN declined to provide such guidance in the Adopting Release, it did state that it will consider issuing additional guidance, consistent with SAR sharing guidance finalized in 2010 and applicable to other BSA-defined financial institutions, that would permit investment advisers to share SARs with certain US affiliates, provided that the affiliate is subject to a regulation providing for the confidentiality of SARs issued by FinCEN or by the affiliate's federal functional regulator.[49]

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[48] *See* Rule 31 C.F.R. 1032.320(d)(1)(ii)(B) (emphasis added).

[49] Adopting Release at 72,202 (citing FIN-2010-G005, *Sharing Suspicious Activity Reports by Securities Broker-Dealers, Mutual Funds, Futures Commission Merchants, and Introducing Brokers in Commodities with Certain U.S. Affiliates* (Nov. 23, 2010), and FIN-2010-G006, *Sharing Suspicious Activity Reports by Depository institutions with Certain U.S. Affiliates* (Nov. 23, 2010)).

Limitation on Liability

Consistent with the Proposed Rule, the Final Rule limits a covered RIA or ERA and their personnel's liability in connection with filing SARs. As a result, covered RIAs, ERAs, and their personnel are protected from liability to any person in connection with filing SARs and for failure to provide notice of SAR filings to any person identified in the SAR.

SEC EXAMINATION AUTHORITY

Consistent with the Proposed Rule, FinCEN in the Final Rule delegated its examination authority to the SEC over covered RIAs' and ERAs' compliance with the Final Rule.

CUSTOMER IDENTIFICATION PROGRAM

On May 12, 2024, FinCEN and the SEC published a separate, joint notice of proposed rulemaking to apply Customer Identification Program (CIP) requirements to RIAs and ERAs (the CIP Proposal). The comment period for the CIP Proposal closed on July 22, 2024. FinCEN stated in the Adopting Release that Treasury and the SEC are reviewing comments and are working toward issuing a final CIP rule.[50] FinCEN noted that, given the interrelationship of the Final Rule and a final CIP rule, it intends for the Final Rule and a final CIP rule to have the same compliance date.

NEXT STEPS

In advance of the January 1, 2026 compliance date, covered RIAs and ERAs should take the following actions:

- Determine the extent to which they and their activities are within scope of the Final Rule and the adequacy of any existing AML/CFT programs, including by:
    - identifying exposure to AML risks;
    - taking inventory of current AML capabilities, if any. To the extent that covered RIAs or ERAs already have an AML/CFT infrastructure and program in place, they should consider closely analyzing their programs to ensure that they are consistent with and meet the requirements of the Final Rule;
    - sorting out which customers/entities are already subject to AML programs (e.g., broker-dealers) and which are not (e.g., holding companies in a private fund structure); and
    - for advisers with offshore operations, considering which parts of their business are subject to the Final Rule. Advisers with their primary place of business outside of the United States should assess their US touchpoints/offices to determine whether the Final Rule applies. They should also assess whether they have US investors in their foreign-located private funds;
- Build AML/CFT infrastructures, including by:
    - developing tailored AML/CFT programs that account for the risks associated with their specific business and clients. In particular, covered RIAs and ERAs may want to

[50] Adopting Release at 72,161.

consider beginning to onboard professionals with AML/CFT experience or searching for outsourced solutions. As we noted in our prior LawFlash, while AML/CFT programs will need to be tailored to each RIA/ERA, we recommend as an initial step reviewing the AML program template provided by the Financial Industry Regulatory Authority (FINRA) for use by its smaller broker-dealer members,[51] guidance from federal banking regulators[52] regarding compliance with the BSA, literature from the Financial Action Task Force (FATF) regarding money laundering and terrorist financing in the securities industry,[53] and commentary from FinCEN in the Adopting Release regarding the scope of an RIA's or ERA's AML/CFT program as well as the risk profile of certain advisory clients;

  - considering how the Final Rule could impact the investor/client onboarding process, including changes to fund subscription documents and other enhanced diligencing of investors/clients; and
  - considering how the Final Rule could impact how private fund investors perform due diligence and the information they request from private fund advisers;
- Establish an approach for SAR filings; and
- Develop procedures for the upkeep/maintenance of the AML/CFT program, such as ongoing monitoring of compliance with the program and training of firm personnel

HOW WE CAN HELP

Morgan Lewis has a global team of lawyers who regularly assist investment advisers with their regulatory compliance needs, including those related to AML. Our team stands ready to assist with the development of your firm's AML/CFT program or review of your existing AML/CFT program for consistency with the Final Rule.

CONTACTS

If you have any questions or would like more information on the issues discussed in this report, please contact any of the following:

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[51] FINRA Small Firm Template.

[52] *See* BSA/AML Examination Manual.

[53] *See* FATF, Money Laundering and Terrorist Financing in the Securities Sector (Oct. 2009).

ABOUT US

Morgan Lewis is recognized for exceptional client service, legal innovation, and commitment to its communities. Our global depth reaches across North America, Asia, Europe, and the Middle East with the collaboration of more than 2,200 lawyers and specialists who provide elite legal services across industry sectors for multinational corporations to startups around the world. For more information about us, please visit www.morganlewis.com.

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