Fact Sheet: FinCEN Issues Final Rule to Combat Illicit Finance and National Security Threats in the Investment Adviser Sector

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Today, the Financial Crimes Enforcement Network (FinCEN) issued a final rule to help safeguard the investment adviser sector from illicit finance activity, including misuse by criminals, foreign adversaries, and other money laundering and terrorist financing threats. This final rule adds certain registered investment advisers (RIAs) and exempt reporting advisers (ERAs) to the definition of "financial institution" under the regulations that implement the Bank Secrecy Act (BSA), prescribes minimum standards for anti-money laundering and countering the financing of terrorism (AML/CFT) programs to be established by such RIAs and ERAs, requires RIAs and ERAs to report suspicious activity to FinCEN, and makes other related changes to FinCEN's regulations that implement the BSA.

This rule aims to help address the illicit finance risks in the investment adviser sector in the United States, which the U.S. Department of the Treasury documented in a February 2024 risk assessment. The 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. Moreover, it finds that foreign states, most notably the People's Republic of China and the Russian Federation, leverage investment advisers and their advised funds through investment in early-stage companies to access certain technologies and services with national security implications. This rule aims to mitigate these risks and deliver on a key component of the Biden-Harris Administration's 2021 U.S. Strategy on Countering Corruption.

The rule reflects FinCEN's careful consideration of the comments received in response to its February 15, 2024, Notice of Proposed Rulemaking (NPRM); extensive consultations with staff at the Securities and Exchange Commission (SEC), other U.S. government agencies, and industry representatives; and efforts to be responsive to the industry and public comments received, including by altering the scope and requirements of the rule.

The following is an overview of the key elements of this final rule, including several areas in which FinCEN made appropriate changes from the NPRM based on the comments received. Please refer to the published rule for further details, including definitions.

Investment Advisers Covered by the Final Rule

The final rule adds "investment adviser" to the definition of "financial institution" under the BSA's implementing regulations, and, with certain exclusions noted below, defines investment advisers as:

- investment advisers registered with or required to register with the SEC, also known as registered investment advisers (RIAs), and
- investment advisers that report information to the SEC as exempt reporting advisers (ERAs).

Investment advisers generally must register with the SEC if they have over $110 million in assets under management (AUM). ERAs are investment advisers that (1) advise only private funds and have less than $150 million in AUM in the United States or (2) advise only venture capital funds. ERAs are exempt from SEC registration but pursuant to existing SEC regulations must still file certain information with the SEC.

The final rule responds to comments to the NPRM by adopting a narrower definition of "investment adviser" than initially proposed, and excludes from the definition: (A) RIAs that register with the SEC solely because they are (i) mid-sized advisers, (ii) multi-state advisers, or (iii) pension consultants; as well as (B) RIAs that are not required to report any AUM to the SEC on Form ADV.

The final rule also addresses views raised in comments to the NPRM relating to how the proposed rule would apply to RIAs or ERAs that have a principal office and place of business outside the United States. For these investment advisers (defined as "foreign-located investment advisers" in the final rule), the final rule only applies to their advisory activities that (i) take place within the United States, including through the involvement of U.S. personnel of the investment adviser or (ii) provide advisory services to a U.S. person or a foreign-located private fund with an investor that is a U.S. person. At this time, FinCEN has also determined not to include in the final rule the proposed provision implementing 31 U.S.C. § 5318(h)(5) requiring that the duty to establish, maintain, and enforce an investment adviser's AML/CFT program to remain the responsibility of, and be 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.

As in the proposed rule, the final rule does not apply to State-registered advisers or to foreign private advisers or family offices (each as defined in SEC regulations).

Requirements of the Final Rule

The rule requires RIAs and ERAs to:

- implement a risk-based and reasonably designed AML/CFT program;
- file certain reports, such as Suspicious Activity Reports (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
- fulfill certain other obligations applicable to financial institutions subject to the BSA and FinCEN's implementing regulations, such as special information sharing procedures.

The final rule includes several exclusions that endeavor to tailor the requirements in order to minimize potential burden from duplication of existing AML/CFT measures, while pursuing transparency initiatives to safeguard the U.S. financial system and national security. The rule permits an investment adviser to exclude from its obligations any mutual fund advised by the investment adviser, and includes text modified from the NPRM to permit an investment adviser to categorically carry out that exclusion without obligating the adviser to verify that the mutual fund has implemented an AML/CFT program. The final rule also permits an investment adviser

to exclude from its obligations: (i) bank- and trust company-sponsored collective investment funds and (ii) any other investment adviser subject to the final rule that is advised by the investment adviser.

The final rule does not reflect program amendments directed by section 6101(b) of the Anti-Money Laundering Act of 2020 (AML Act) and proposed in the AML/CFT Program NPRM, which were announced on June 28, 2024 and published in the Federal Register on July 3, 2024.

In addition, the final rule adopts the SAR filing requirements largely as proposed and does not exempt investment advisers from the requirements to file Currency Transaction Reports (CTRs) or adhere to the Recordkeeping and Travel Rules. Moreover, the final rule applies to investment advisers the information sharing provisions of sections 314(a) and 314(b) of the USA PATRIOT Act; investment advisers may deem these requirements satisfied for any mutual funds, bank- and trust company-sponsored collective investment funds, or any other investment adviser they advise that are already subject to obligations under the BSA.

FinCEN is delegating its examination authority for the requirements of this rule to the SEC, the Federal functional regulator responsible for the oversight and regulation of investment advisers. This is consistent with FinCEN's existing delegation to the SEC of the authority to examine brokers and dealers in securities and mutual funds for compliance with the BSA and FinCEN's implementing regulations and reflects the SEC's expertise in the regulation of investment advisers.

Benefits of the Final Rule

This final rule aims to help safeguard investments in the United States and help prevent criminals and other illicit actors from laundering money through the U.S. financial system. By addressing these illicit finance risks and appropriately incorporating many of the public comments received on the NPRM, this rule will help level the regulatory playing field through a consistent application of risk-based AML/CFT requirements.

The final rule will bring benefits to investors by improving the U.S. financial system's transparency and integrity, reducing the likelihood that proceeds of crime and other illicit activities will be invested in U.S. markets.

The rule will provide highly useful information to law enforcement authorities and national security agencies. These requirements will also address the current uneven application of AML/CFT requirements across the investment adviser sector, which creates illicit finance risk and allows both legitimate and illicit investors to "shop around" for an adviser who does not need to apply AML/CFT controls, such as inquiring into the investor's source of wealth.

The rule also brings the United States into greater compliance with international AML/CFT standards and addresses a significant gap identified by the Financial Action Task Force in the 2016 Mutual Evaluation of the United States.

Compliance Date

FinCEN is extending the date for compliance with the requirements of this rule from that proposed in the NPRM to January 1, 2026.