KIRKLAND & ELLIS

Kirkland AIM

FinCEN Proposes to Increase AML Requirements for Investment Advisers

20 February 2024

On February 13, the U.S. Treasury, Financial Crimes Enforcement Network ("**FinCEN**") proposed[1] (the "**Proposed Rule**") to apply affirmative anti-money laundering and countering-the-financing-of-terrorism ("AML/CFT") program obligations as prescribed by the Bank Secrecy Act (the "**BSA**") to investment advisers. These obligations historically have applied primarily to banks, broker-dealers and other similar financial institutions.[2] The Proposed Rule is part of a broader overhaul to the U.S. anti-money laundering regime that includes the now-effective Corporate Transparency Act and upcoming rulemaking to enhance the Customer Due Diligence Rule ("**CDD Rule**").

The Proposed Rule would affect both SEC-registered investment advisers and exempt reporting advisers (e.g., mid-sized private fund advisers and venture capital fund advisers[3]), the vast majority of which have adopted some form of AML/CFT procedures under a patchwork of historical regulatory requirements, counterparty certification obligations and investor due diligence requests. However, by including investment advisers within the definition of "financial institution" under the BSA and in FinCEN's federal anti-money laundering program regulations, the Proposed Rule would impose certain new or additional anti-money laundering program requirements on such investment advisers, including to:

- implement a formal AML/CFT program (if not already adopted) that includes: risk-based internal policies and procedures; internal controls; designation of a compliance officer; and ongoing employee training;
- implement an independent internal or external function to "test" or audit the effectiveness of the program at a risk-based cadence;
- file various reports, such as Suspicious Activity Reports (SARs), with FinCEN and participate in information sharing with and among FinCEN, law enforcement and certain other financial institutions;
- keep records relating to transmittal of funds;

- undertake heightened due diligence for correspondent and other higher-risk accounts; and
- adhere to obligations applicable to BSA "financial institutions" as prescribed by the BSA and FinCEN regulations.

However, the Proposed Rule would not at this time require investment advisers to establish a formal customer identification program to collect beneficial ownership information for counterparties. For the moment, these affirmative "CIP" program requirements will remain applicable only to more highly regulated institutions like banks and broker-dealers, as well as under the laws of certain non-U.S. jurisdictions, although FinCEN anticipates future rulemaking by the end of 2024 to enhance these requirements. Future updates to the CDD Rule may also affect investment advisers.

As registered investment advisers are already subject to routine SEC examination, FinCEN proposes to delegate authority to the SEC to include any final anti-money laundering program inspections in scope of routine adviser examinations.

FinCEN is accepting comments on the Proposed Rule until April 15, with any resulting final rule anticipated to be effective 12 months after adoption.

Please contact the Kirkland regulatory attorneys with whom you regularly work if you have questions regarding the Proposed Rule.

---

1. The Notice of Proposed Rulemaking is available through this link, and the Fact Sheet summarizing the Proposed Rule is available through this link. ↩

2. The proposal reinvigorates an effort that produced a similar proposed rule in 2015 for SEC-registered investment advisers that stalled in the rulemaking process; however, this renewed focus comes against a backdrop in which advisers' assets under management have nearly doubled in the intervening 10 years and in a climate of heightened sanctions and financial crimes enforcement. Concurrent with the Proposed Rule, FinCEN is withdrawing the 2015 proposed rule. ↩

3. The proposed definition of "investment adviser" would include certain non-U.S. investment advisers that are physically located abroad (i.e., do not have a branch, office or staff in the U.S.) but are nonetheless registered or required to register with the SEC (for registered investment advisers) or file Form ADV (for exempt reporting advisers). ↩

Related Professionals

Norm Champ, P.C.

Partner / New York

Scott A. Moehrke, P.C.

Partner / Chicago

Michael Chu

Partner / Chicago

Matthew Cohen, P.C.

Partner / Bay Area – San Francisco / Bay Area – Palo Alto

Melissa S. Gainor

Partner / Washington, D.C.

Phil Vincent Giglio

Partner / Chicago

Nicholas A. Hemmingsen

Partner / Chicago

Xiao-Hong Jing

Partner / New York

Daniel Kahl

Partner / Washington, D.C.

Olga Kamensky

Partner / New York

Jennifer Kim-Gagne

Partner / Washington, D.C.

Radhika Kshatriya

Partner / Los Angeles – Century City

Mac M. Laban

Partner / Washington, D.C.

Timothy D. Nolan

Partner / Chicago

Alpa Patel, P.C.

Partner / Washington, D.C.

Eric L. Perelman

Partner / New York

Christopher Pristouris

Partner / New York

Noah Qiao

Partner / New York

John T. Reinert

Partner / Chicago

Nabil Sabki, P.C.

Partner / Chicago

Reed T. Schuster

Partner / Austin / Chicago

Josh Westerholm, P.C.

Partner / Chicago

Jina K. Yun

Partner / Chicago

Nick Niles

Partner / Chicago

Zachary S. Brez, P.C.

Partner / New York

Related Services

Practices

- Investment Funds

Suggested Reading

- 20 February 2024 Press Release Kirkland Advises Starwood Capital Group on Strategic Investment in Echelon Data Centres
- 20 February 2024 Award Chicago's Notable Women in Law 2024
- 16 February 2024 Sponsored Event 30th Annual Columbia Business School Private Equity Conference

This publication is distributed with the understanding that the author, publisher and distributor of this publication and/or any linked publication are not rendering legal, accounting, or other professional advice or opinions on specific facts or matters and, accordingly, assume no liability whatsoever in connection with its use. Pursuant to applicable rules of professional conduct, portions of this publication may constitute Attorney Advertising.
© 2024 Kirkland & Ellis LLP.