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Andrea M. Gacki
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P.O. Box 39
Vienna, VA 22183

Via electronic submission

15 April 2024

Dear Ms. Gacki:

Re: Anti-Money Laundering/Countering the Financing of Terrorism Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers and Exempt Reporting Advisers, 89 FR 12108 (Feb. 14, 2024); Docket Number FINCEN–2024–0006 and RIN 1506–AB58

We are writing on behalf of the British Private Equity and Venture Capital Association ("BVCA"), which is the industry body and public policy advocate for the private equity and venture capital industry in the United Kingdom. With a membership of over 600 firms, we represent the vast majority of all UK-based private equity and venture capital firms, as well as their professional advisers and investors. BVCA data shows that our members' funds delivered an aggregate since inception return for all suitably mature funds launched in the past decade (with vintages between 2013 and 2018) of 19.7%, and typically around 30% of the capital raised by our members annually comes from U.S. investors.

We therefore welcome the opportunity to provide feedback on the U.S. Financial Crimes Enforcement Network ("FinCEN") notice of proposed rulemaking to (i) include certain investment advisers in the definition of "financial institution" under the Bank Secrecy Act (BSA), (ii) prescribe minimum standards for anti-money laundering/countering the financing of terrorism (AML/CFT) programs to be established by covered investment advisers, (iii) require covered investment advisers to report suspicious activity to FinCEN pursuant to the BSA, and (iv) make several other related changes to FinCEN regulations (together, the "Proposed Rule").

How The Proposed Rule Affects Our Members

Our members will become subject to the Proposed Rule in a variety of manners. Although certain firms amongst our membership will be subject to the Proposed Rule by virtue of having a principal place of business within the United States, most of our members are investment advisers with a principal place of business outside of the United States ("non-U.S. advisers"), who principally provide advice with respect to private funds organized outside of the United States ("non-U.S. private funds"). Certain of our members may be subject to the jurisdiction of the U.S. Investment Advisers Act of 1940 (the "Advisers Act") due to one or more of the following: (i) soliciting U.S. persons to invest in their private fund, (ii) maintaining a place of business, subsidiary or affiliate in the United States, or (iii) providing advice with respect to U.S. private funds or other types of U.S. clients. The perspective and feedback set out in this letter is therefore principally that of non-U.S. advisers advising non-U.S. funds.

Most of our members who are subject to the Advisers Act rely on the following exceptions from registration under the Adviser Act: (i) the foreign private fund adviser exemption in Section 203(b)(3) ("foreign private advisers") or (ii) either of (a) the venture capital fund adviser exemption in Section 203(l) or (b) the private fund adviser exemption in Section 203(m) (together "exempt reporting advisers"). However, certain of our members are non-U.S. advisers who have registered with the U.S. Securities and Exchange Commission (the "SEC").

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The Association is a private company limited by guarantee without share capital

Comments

The Proposed Rule Should Not Apply to Relationships Between Non-U.S. Advisers and Non-U.S. Funds in a Manner Consistent with the Long-Standing SEC Interpretation of Extraterritorial Limitations of Investment Adviser Regulation

FinCEN states that (i) it is seeking to "harmonize this AML/CFT framework in a manner consistent with the SEC's existing framework for investment advisers," (ii) it believes that the "the proposed rule follows the scope of the SEC's registration requirements for RIAs and Form ADV filing requirements for ERAs" and (iii) it believes the proposed rule is "[c]onsistent with longstanding SEC practice and guidance interpreting investment adviser registration requirements under the Advisers Act."

However, the position of FinCEN that the Proposed Rule would "apply on the same basis to RIAs and ERAs located outside the United States" is inconsistent with the long-standing SEC interpretation of the exterritorial limitations on the regulation of non-U.S. investment advisers and is a dramatic departure from the SEC's existing regulatory framework for non-U.S. investment advisers.

The long-standing view of the SEC and the SEC staff is that most of the substantive provisions of the Advisers Act should not apply with respect to a non-U.S. adviser's relationship with its non-U.S. clients and non-U.S. funds (including funds with U.S. investors).[1]

This SEC position has been based on the following main principles:

- *Investor Expectations*: Both U.S. and non-U.S. investors in non-U.S. funds "do not expect, and may not desire, a foreign adviser to be subject to the Advisers Act."[2]

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[1] SEC Division of Investment Management, Protecting Investors: A Half Century of Investment Company Regulation (May 1992), available at https://www.sec.gov/divisions/investment/guidance/icreg50-92.pdf ("Protecting Investors Study") at 229 ("[c]omity suggests that the Advisers Act should not apply to a foreign registered adviser's relationship with its non-United States clients outside the United States, just as the Commission would not expect the laws and regulations of a foreign country to apply to a United States adviser's relationship with its United States clients"); Uniao de Banco de Brasileiros S.A., SEC Staff No-Action Letter (July 28, 1992) ("Unibanco")("Under the Division's approach, the substantive provisions of the Advisers Act generally would not apply with respect to a foreign registered adviser's non-United states clients"); Registration Under the Advisers Act of Certain Hedge Fund Advisers, SEC Release No. IA-2333 (Dec. 2, 2004) ("Hedge Fund Adviser Registration Adopting Release") at fns. 211 – 213 and the accompanying paragraph (stating that that "the substantive provisions of the [Advisers Act] generally would not apply to the offshore adviser's dealings with the offshore fund."); Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers, SEC Release No. IA-3222 (Jun. 22, 2011)("Exemptions Adopting Release")(re-iterating "long-held view that non-U.S. activities of non-U.S. advisers are less likely to implicate U.S. regulatory interests and that this territorial approach is in keeping with general principles of international comity"); Private Fund Advisers; Documentation of Registered Investment Adviser Compliance, SEC Release No. IA-6383 (Aug. 23, 2023)(re-iterating that "[w]e have previously stated, and continue to take the position, that we do not apply most of the substantive provisions of the Advisers Act with respect to the non-U.S. clients (including private funds) of an SEC-registered offshore adviser," stating that "[i]t is appropriate to continue to apply this historical approach to these three new rules" and extending this position to non-U.S. advisers that are not SEC-registered to be consistent with "our historical position of not applying substantive provisions of the Advisers Act to SEC-registered offshore advisers with respect to their offshore clients, including private fund clients.").

[2] Protecting Investors Study at 229; Hedge Fund Adviser Registration Adopting Release at fn. 213 (stating that "U.S. investors in [a non-U.S. fund advised by a non-U.S. adviser] generally would not have reasons to expect the full protection of the U.S. securities laws.")

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- *International Comity/Conflicts of Laws*: Applying all of the substantive provisions of the Advisers Act to a non-U.S. adviser's non-U.S. advisory business "could result in inconsistent regulatory requirements or practices imposed by the regulations of their local jurisdiction and the U.S. securities laws."[3]
- *Detrimental U.S. Market Impacts*: Applying all of the substantive provisions of the Advisers Act to a non-U.S. adviser's non-U.S. advisory business would deter non-U.S. advisers from engaging in activities that would subject themselves to the Advisers Act, which would result in U.S. investors being deprived of the expertise of non-U.S. advisers.[4]

While investor expectations may be less important in the context of anti-money laundering laws, we believe the potential conflicts of laws and the determinantal impact on the U.S. market would still be significant. First, as described more fully in Annex 1, the UK and EU have their own anti-money laundering laws and regulations. Overlaying the Proposed Rule on top of those would result in non-U.S. investment advisers based in the UK and EU needing to navigate the redundancies and conflicts between the anti-money laundering laws and regulations of the UK and EU and those of the Proposed Rule.

Second, the compliance burdens from these redundancies and conflicts will result in more non-U.S. investment advisers avoiding engaging in business in the U.S. that could subject them to the Proposed Rule. A non-U.S. investment adviser would be less likely to (i) hire employees based in the United States and (ii) enter into investment advisory relationships with U.S. clients or solicit U.S. investors for their private funds.

A non-U.S. investment adviser may be required to register with the SEC or file as an exempt reporting adviser if it has either (i) 15 or more U.S. clients or investors in their private funds or (ii) $25 million or more in regulatory assets under management ("RAUM") attributable to U.S. clients or investors in their private funds, which would mean that the adviser cannot rely on the "foreign private adviser" exemption in Section 203(b)(3) of the Advisers Act. To stay within these limits and avoid the burdens of the Proposed Rule, non-U.S. investment advisers will restrict their engagement with U.S. clients and investors. For example, non-U.S. investment advisers may deny U.S. investors the ability to invest in their non-U.S. private funds if such investment would put them over either the 15 investor or $25 million threshold. In addition, since the $25 million RAUM threshold is based on the fair value of the underlying investments (and so is expected to increase over time even with no new investments by the U.S. investors), non-U.S. investment advisers may limit the ability of U.S. investors to invest well below the $25 million RAUM threshold or require U.S. investors to transfer or redeem out of the private fund so that the non-U.S. investment adviser could continue to avoid falling out of the "foreign private adviser" exemption.

In addition, a non-U.S. investment adviser may be required to register with the SEC or file as an exempt reporting adviser if it has a U.S. "place of business." An investment adviser cannot rely on the "foreign private adviser" exemption in Section 203(b)(3) of the Advisers Act if it has any "place of business" in

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[3] Exemptions Adopting Release at fn. 393 and the accompanying text (citing the Protecting Investors Study); Unibanco (expressing concern that "the Advisers Act may prohibit them from engaging in business practices with their foreign clients that are both legal and customary in their home countries."); Hedge Fund Adviser Registration Adopting Release at fn. 213 (nothing that "[t]he laws governing such a fund would likely be those of the country in which it is organized or those of the country in which the adviser has its principal place of business.").

[4] Protecting Investors Study at 229 (discussing "the unfortunate effect of limiting United States investors' access to foreign advisory expertise"); Hedge Fund Adviser Registration Adopting Release at fn. 213 (noting that "as a practical matter, U.S. investors may be precluded from an investment opportunity in offshore funds if their participation resulted in the full application of the Advisers Act and our rules").

the United States. A "place of business" does not require there be a formal office or permanent location.[5] It can be any location at which any of the adviser's employees engage in investment advisory services on a regular basis, which could include an employee working remotely at a residence in the United States or even an employee who regularly works from a U.S. hotel. In order to avoid the application of the Proposed Rule, non-U.S. investment advisers would be less likely to hire U.S. employees (including persons working remotely in the U.S.), which would have a negative impact on the U.S. labor market and the economy in general. In addition, non-U.S. investment advisers would be more likely to avoid having their employees work regularly in the U.S., which would mean that the advisers may decide to provide fewer services to their U.S. clients or investors then such advisers provided to their non-U.S. clients or investors.

Taken together, it is clear that imposing the Proposed Rule on to non-U.S. investment advisers will (i) deprive U.S. clients and investors from the expertise of non-U.S. investment advisers for whom the additional compliance burdens exceed the economic benefits and (ii) make it less likely that non-U.S. investment advisers hire U.S.-based employees or engage in other economic activity in the United States.

These types of negative effects on the U.S. economy and U.S. investors are the exact reasons why the SEC adopted its position on the extraterritorial application of the Advisers Act to non-U.S. investment advisers. We believe that to bring the position on extraterritorial applicability of the Proposed Rule into "harmony" with the SEC's long-standing position on the applicability of the Advisers Act to non-U.S. investment advisers, the Proposed Rule should not apply to non-U.S. investment advisers (including both SEC-registered investment advisers and exempt reporting advisers) with respect to their non-U.S. clients, including non-U.S. private funds, even if such non-U.S. private funds have U.S. investors.

We also wish to draw FinCEN's attention to the further specific arguments relating to the principles for limited extraterritorial effect with respect to non-U.S. exempt reporting advisers and foreign private fund advisers that the SEC recognized when adopting rules implementing specific exemptions to the Advisers Act.[6] We believe that FinCEN applying these Proposed Rules to non-U.S. exempt reporting advisers with respect to their non-U.S. funds would run counter to the SEC's goal of establishing "appropriate limits on the extraterritorial application of the Advisers Act" when adopting the implementing rules relating to the new exceptions established under the Dodd-Frank Act.[7]

FinCEN Should Adopt an Assets Under Management Minimum for the Proposed Rule

While FinCEN proposes to require all SEC-registered investment advisers and exempt reporting advisers comply with the Proposed Rule, it proposes to not apply the Proposed Rule to state-registered investment advisers, because "the Treasury risk assessment found few examples of State-registered investment advisers being misused for money laundering, terrorist financing, or other illicit financial activities." The referenced Treasury risk assessment noted state-registered investment advisers often have few employees (including 81% having only one or two employees), have fewer reporting requirements as

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[5] See Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers, SEC Release No. IA-3222 (Jun. 22, 2011) at 120 – 121.

[6] Exemptions Adopting Release at p. 96 (that Rule 203(m)-1 was "designed to encourage the participation of non-U.S. advisers in the U.S. market by applying the U.S. securities laws in a manner that does not impose U.S. regulatory and operational requirements on a non-U.S. adviser's non-U.S. advisory business.").

[7] Exemptions Adopting Release at fn. 320 and the accompanying sentence.

compared to SEC-registered investment advisers, and would be required to register with the SEC once they have more than 100 million in AUM.[8]

We believe that these factors apply to many exempt reporting advisers. According to the SEC's April 2024 data, more than 50% of exempt reporting advisers have an AUM of less than $100 million and over 20% of exempt reporting advisers have an AUM of less than $25 million. Therefore, a majority of exempt reporting advisers have AUM amounts that are similar to state-registered investment advisers. Exempt reporting advisers also have similarly reduced reporting burdens that in many cases are even less than state-registered investment advisers. Furthermore, many exempt reporting advisers have a similarly small number of employees. Therefore, we believe that exempt reporting advisers with less than $100 million in AUM have a similar risk profile as state-registered investment advisers and should be treated as the same under the Proposed Rule.

In addition, a non-U.S. investment adviser is permitted to register with the SEC even if its AUM is less than $100 million. Therefore, certain non-U.S. SEC-registered investment advisers may have similarly low AUM amounts and have risk profiles similar to state-registered investment advisers.

We believe also that in order to make sure the treatment of investment advisers is in harmony with the Advisers Act exemptions, the AUM threshold should be measured similar to the private fund adviser exemption in Section 203(m) of the Advisers Act, and Rule 203(m)-1 adopted thereunder: (i) the global AUM for a U.S. investment adviser and (ii) the AUM attributable to a U.S. place of business for a non-U.S. investment adviser.[9] The SEC adopted this interpretation in recognition "that non-U.S. activities of non-U.S. advisers are less likely to implicate U.S. regulatory interests and is in keeping with general principles of international comity" and "to encourage the participation of non-U.S. advisers in the U.S. market by applying the U.S. securities laws in a manner that does not impose U.S. regulatory and operational requirements on a non-U.S. adviser's non-U.S. advisory business."[10] We believe that these policy considerations apply also with respect to the application of the Proposed Rules.

We note further that, in many circumstances, an exempt reporting adviser or a non-U.S. SEC-registered investment adviser with a U.S. place of business could have registered as a state investment adviser instead of either relying on one of the exempt reporting adviser exemptions or the basis for non-U.S. investment advisers to register with the SEC. We do not believe the risk profile of an investment adviser changes because of a choice whether to register with the SEC or a state or rely on an exemption from SEC and state registration.

FinCEN Should Provide an Exemption for All or Some of the Proposed Rule Where the Investment Adviser is Subject to Equivalent AML Requirements

Similar to the considerations discussed above with respect to the international comity and to avoid conflicts of laws, we believe that the Proposed Rule should not apply to non-U.S. investment advisers with respect to all or some of the Proposed Rule where the non-U.S. investment adviser is subject to equivalent AML requirements. As discussed in more detail in Annex 1, non-U.S. investment advisers based in the UK and EU are already subject to similar anti-money laundering laws and regulations. Therefore, the burden

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[8] Department of the Treasury, 2024 Investment Adviser Risk Assessment (Feb. 2024) at 33, *available at* https://home.treasury. gov/system/files/136/US-Sectoral-Illicit-FinanceRisk-Assessment-Investment-Advisers.pdf.

[9] See Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers, SEC Release No. IA-3222 (Jun. 22, 2011).

[10] Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers, SEC Release No. IA-3222 (Jun. 22, 2011) at 96.

of the application of the Proposed Rule to non-U.S. investment advisers would not only be disproportionate, but also duplicative.

We believe that an investment adviser subject to equivalent AML obligations in a non-U.S. jurisdiction would have a substantially lower risk profile than an investment adviser that is not subject to any of non-U.S. AML requirements. This lower risk profile would support an exemption of such a non-U.S. adviser from the specific requirements of the Proposed Rule. Alternatively, the exemption could cover program requirements or reporting requirements where similar requirements are applicable to the non-U.S. adviser under non-U.S. laws or regulations.

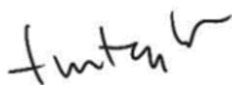
Sub-Advisers Should be Excepted from the Proposed Rule

A sub-adviser typically is not responsible for the onboarding of an advisory client or, with respect to a private fund or other pooled investment vehicle, an investor and, therefore, the sub-adviser should not be responsible for whether the general partner or primary adviser or manager complies with the applicable anti-money laundering laws and regulations. A sub-adviser often will have no contact with investors or will not be in any position to review prospective clients or investors. The typical arrangement is that the AML obligations will be handled by the general partner and/or any primary adviser or manager.

We believe this particularly true where a U.S. adviser is engaged as sub-adviser to a non-U.S. fund structure with a manager or general partner who is a non-U.S. adviser. In addition to the practical considerations mentioned above, requiring a U.S. sub-adviser to impose its AML obligations on the non-U.S. general partner or primary adviser or manager would make it more likely that such non-U.S. adviser or manager avoids engaging the U.S. adviser. This would harm the competitiveness of U.S. advisers.

Please do not hesitate to get in touch if you have any questions or if you would like to discuss any part of this response in more detail (please contact Tom Taylor (ttaylor@bvca.co.uk) or Nick Chipperfield (nchipperfield@bvca.co.uk)).

Yours sincerely,



Tom Taylor

Head of Legal and Regulatory Policy

British Private Equity and Venture Capital Association (BVCA)

Annex 1: UK Anti-Money Laundering and Counter-Terrorism Financing Requirements

Investment advisors in the UK are subject to extensive AML and counter-terrorism financing requirements. These include:

- Maintaining robust policies and procedures enabling them to identify, assess, monitor and manage money laundering risk. The precise extent of these policies and procedures will be dictated by the firm's documented money laundering risk assessment, which it must undertake and review periodically. This risk assessment may determine, for example, that it would be appropriate for a firm to maintain an internal audit function to review its AML policies and procedures.
- Appointing a senior individual with responsibility for AML compliance, known as the Money Laundering Reporting Officer ("MLRO"). This individual must have the necessary skills, knowledge, and expertise to perform the MLRO role, and their appointment must be approved by the UK Financial Conduct Authority ("FCA").
- Reporting their knowledge or suspicions of, or reasonable grounds for suspecting, money laundering to the UK National Crime Agency ("NCA"). The Firm's MLRO will typically be responsible for making such Suspicious Activity Reports ("SAR").
- Conducting due diligence checks on their customers (known as "CDD"), in particular when first establishing a business relationship or when carrying out transactions.
    - An investment advisor's "customers" for these purposes will typically include fund investors, transaction counterparties and co-investors, and target/investee companies.
    - CDD broadly involves identifying the relevant customer and verifying that identity based on documents or other information from a reliable and independent source. It also involves identifying the customer's beneficial owners.
    - CDD must be applied based on a customer risk assessment, so that certain customers must be subject to enhanced due diligence ("EDD") where high risk factors are present. EDD is mandatory in certain circumstances, such as where the customer is a politically exposed person or is resident in a "blacklisted" jurisdiction deemed to present a high money laundering risk.
- Retaining fulsome records of its compliance with all of the above obligations, and training staff on these matters on a regular basis.

The majority of these requirements derive from EU legislation implemented in the UK before it left the EU, and so they are broadly replicated across the EU Member States. We would also note that for many of these requirements, failure to comply can constitute a criminal offence.