

CLIENT ALERT

FinCEN Grants Rollover and Renewal Exception to Beneficial Ownership Requirement

Sep.24.2018

On September 7, 2018, the Financial Crimes Enforcement Network (FinCEN) granted exceptive relief to “covered financial institutions”—banks, broker-dealers, mutual funds, and introducing brokers in commodities—from the requirement to identify and verify the identity of the beneficial owner(s) of their legal entity customers when those customers open a new account as a result of the following:

- A rollover of a certificate of deposit (CD).
- A renewal, modification, or extension of a loan (*e.g.*, setting a later payoff date) that does not require underwriting review and approval.
- A renewal, modification, or extension of a commercial line of credit or credit card account (*e.g.*, a later payoff date is set) that does not require underwriting review and approval.
- A renewal of a safe deposit box rental.

This exceptive relief applies only to the rollover, renewal, modification, or extension of any of these types of accounts on or after May 11, 2018 (the date on which covered financial institutions became obligated to collect and verify beneficial ownership information), and does not apply to the initial opening of such accounts. The exceptive relief does not affect the other obligations that covered financial institutions have under the Bank Secrecy Act (BSA) and its implementing regulations with respect to such accounts. This includes, in particular, the obligation that covered financial institutions have to understand the “nature and purpose” of customer relationships, and to “conduct ongoing monitoring to identify and report suspicious transactions and, on a risk basis, to maintain and update customer information.”

The exception follows temporary relief that FinCEN granted initially on May 16, 2018, shortly after the CDD Rule went into effect, after industry complained that a large number of renewals and rollovers happened automatically, without the need for further information from customers, and that requiring covered institutions to re-verify beneficial ownership information with customers would: (1) impose substantial costs and burdens; and (2) delay or disrupt services that customers depend on for their financial stability.

FinCEN based its decision to grant long-term relief on these same concerns, and also on its conclusion that the types of accounts covered by the relief present a low-risk of money laundering or terrorist financing. CDs and safety deposit boxes, FinCEN explained, are “non-transactional,” meaning that “customers cannot use either of them to pay or receive payments from a third party.” For CDs, “funds cannot be transferred into or out of the CD during the term of the account relationship.” In addition, certain customer information, including beneficial ownership information, is collected at account opening in order to understand the nature and purpose of the relationship and, for loan or line of credit purposes, to determine the creditworthiness of the customer in question. This information, FinCEN reasoned, “would generally be sufficient for covered financial institutions to understand who their customers are and the type of transactions they conduct in order to assess money laundering and terrorist

financing risks and identify suspicious activity.” FinCEN also reasoned that the exception would not have a significant impact on the quality of BSA information available to law enforcement.

The most important new concept introduced by the exception is its condition that the renewal, modification, or extension of a loan, line of credit, or credit card account not “require underwriting review and approval.” FinCEN did not define this phrase. Most changes other than automatic extensions or rollovers, which typically will be provided for in the original agreement, seem likely to require such review and approval, making the exception a narrow one.

Practical Considerations

Covered financial institutions should review their approach to all of the products covered by this relief, and have a consistent, written plan for how they will treat rollovers, renewals, and modifications of each product. The “no underwriting review and approval” condition has some ambiguities that will require careful consideration. For example, it is conceivable that in some cases a financial institution will have the right to prevent an otherwise automatic renewal of a loan or credit facility, and might conduct underwriting review and approval to make that decision, taking it out of the exception. It also is possible that certain discretionary, unilateral actions by financial institutions to change the terms of loans (for example, by extending repayment dates or borrowing limits) might entail underwriting review and approval, even where the covered financial institution’s right to make such changes is provided for in an initial loan agreement. Conversely, some minor, non-automatic changes to loans or credit facilities that do not require a full underwriting review and approval process may fit within the exception.

In the case of any loan renewals or CD rollovers that fall outside the new exception, covered financial institutions will want to think through whether to take advantage an option FinCEN previously identified in guidance (in particular, Frequently Asked Question 12 of its April 3, 2018 guidance) for updating beneficial ownership for loan renewals and CD rollovers. Under this option, a covered financial institution can get agreement from customers when it confirms beneficial ownership at the first renewal or rollover that they will notify the institution of any future changes to their beneficial ownership information, and rely then on this condition to satisfy its update obligation for future renewals or rollovers.

These considerations should be part of a broader assessment of which of a covered financial institution’s products and services will give rise to “new account” relationships, and how to handle the updating of beneficial ownership information in each situation.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Nimrod Haim Aviad

Partner – Los Angeles

Phone: +1 213.443.5534

Email: naviad@crowell.com

Carlton Greene

Partner – Washington, D.C.

Phone: +1 202.624.2818

Email: cgreene@crowell.com

Scott Lessne

Senior Counsel – Washington, D.C.

Phone: +1 202.624.2597

Email: slessne@crowell.com