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CLIENT ALERT

FinCEN Responds to Industry Concerns About Cost of Proposed Customer Due Diligence Rule

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On December 24, 2015, the Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) published notice in the Federal Register of the availability of a Regulatory Impact Assessment (RIA) and Initial Regulatory Flexibility Analysis (IRFA) relating to its proposed new Customer Due Diligence (CDD) rule for banks, brokers and dealers in securities, mutual funds, and futures commission merchants and introducing brokers in commodities. Comments on these documents must be received on or before January 25, 2016. While the publication of the RIA and IRFA will further delay implementation of a final CDD rule, the move appears to be aimed at addressing concerns expressed by industry about the costs of the proposed rule.

For several years, FinCEN has been working toward finalization of a new CDD rule for banks and other financial institutions that would clarify and strengthen their anti-money laundering (AML) requirements and would, for the first time, require covered financial institutions to seek to ascertain the beneficial ownership of their corporate-entity customers. According to FinCEN, the primary purpose of the proposed new CDD requirement is to "assist financial investigations by law enforcement" and to "impair criminals' ability to exploit the anonymity provided by the of use legal entities to engage in financial crimes including fraud, money laundering, terrorist financing, corruption, and sanctions evasion."

FinCEN received more than 130 comments in response to its Notice of Proposed Rulemaking (NPRM) published in the Federal Register on August 4, 2014. As explained by FinCEN in its December 24 notice, a "large number of commenters" asserted that the NPRM "substantially underestimated" the implementation and compliance-related costs that the rule would impose. Based in part on these comments, FinCEN concludes that these costs "may exceed $100 million annually, making this rulemaking an 'economically significant regulatory action,'" and triggering a requirement under Executive Orders 13563 and 12866 to complete a regulatory impact analysis. FinCEN accordingly asked the Treasury Department's Office of Economic Policy to prepare the current RIA. The RIA evaluates the economic costs and benefits of the CDD rule, as well as alternatives to it. The RIA estimates that the ten-year quantifiable cost of the proposed rule ranges from $700 million to $1.5 billion. However, it concludes that even a very small reduction—less than one percent—in the estimated $300 billion in annual illicit proceeds from financial crime as a result of the rule would justify it, and that such a reduction is likely.

The other analysis—the IRFA—is required under the Regulatory Flexibility Act if a proposed rule would have a "significant economic impact" on a "substantial number" of small businesses. FinCEN had previously sought to avoid the need for completing an IRFA by certifying that the rule would not have such an impact. However, in response to comments to the NPRM, FinCEN determined that it would undertake and publish an IRFA. The IRFA concludes that while the proposed rule would impose burdens such as training and additional time at the account opening stage, it would not have a significant economic impact on a substantial number of small entities.

Financial institutions have been awaiting finalization of the proposed CDD rule for some time. The fact that FinCEN undertook these intermediate steps of publishing and receiving comments on the RIA and the IRFA means there will be a further delay in implementation of a final rule, and the analyses also confirm significant potential costs for one. However, FinCEN's decision to conduct an in-depth analysis weighing the costs and benefits of its proposal will put the agency in a stronger position to support any final rule, and makes eventual issuance of such a rule more likely.

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

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