

Client Alert

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FinCEN Issues Statement Encouraging Banks to Evaluate Money Services Businesses on a Case-by-Case Basis

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On November 10, 2014, the Financial Crimes Enforcement Network (FinCEN) issued a Statement addressing bank “de-risking,” often described as the practice of closing accounts or refusing to open accounts for particular types customers. The focus of the Statement is bank de-risking with respect to money services businesses (MSBs). The Statement appears to be a regulatory response to address what FinCEN states is a concern that “banks are indiscriminately terminating the accounts of all MSBs, or refusing to open accounts for any MSBs. . . .” FinCEN said that the purpose of the Statement is to “reiterate” regulatory expectations under the Bank Secrecy Act for banks that provide services to MSBs.

FinCEN EXPECTS BANKS TO EVALUATE MSBS ON A CASE-BY-CASE BASIS

In the Statement, FinCEN observes that MSBs play an important role in the financial services sector and that de-risking related to MSBs may result in diminished transparency in the financial system. In this regard, FinCEN said in the Statement that it generally discourages the practice of de-risking and expects financial institutions to properly manage and mitigate any risks presented by providing banking services to MSBs on a case-by-case basis. In evaluating MSBs on a case-by-case basis, FinCEN states that financial institutions should:

- Understand the MSB’s business model and the general nature of the MSB’s own customer base; and
- Follow existing regulatory guidance and establish and maintain an appropriate risk-based anti-money laundering program.

FinCEN states that a financial institution is neither prohibited nor discouraged from providing services to MSB customers, so long as the financial institution properly manages its customer relationships and effectively mitigates their risks. FinCEN further states that it does not expect financial institutions to “serve as the de facto regulator of the money services business industry any more than of any other industry.”

PRIOR FinCEN STATEMENTS

This particular issue has been on FinCEN’s radar screen for some time. Most recently, in prepared remarks delivered on August 12, 2014, FinCEN Director Jennifer Shasky Calvery stated that FinCEN has “been hearing about instances of ‘de-risking,’ where [MSBs] are losing access to banking services because of perceived risks with this category of customer and concerns about regulatory scrutiny.” Director Calvery further stated in those remarks that joint guidance issued by FinCEN and the federal banking agencies on April 26, 2005, still remains in effect. In the joint guidance, the agencies said that they “expect banking organizations that open and maintain accounts for money services businesses to apply the requirements of the Bank Secrecy Act . . . on a risk-assessed basis. . . .”

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TAKEAWAYS

It is unclear whether the recent Statement by FinCEN will serve as a catalyst for banks to reevaluate decision-making regarding the provision of services to MSBs, or whether the Statement signals a material change in the regulatory environment. As a practical matter, the Statement is notable in that it was issued solely by FinCEN and not jointly with any prudential regulators. Nonetheless, the Statement seems to be encouraging banks to engage in risk assessments with respect to decisions about whether to provide services to MSBs.

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