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CLIENT ALERT

FinCEN Eliminates Regulatory Gap between Banks with and without a Federal Functional Regulator

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As predicted earlier this year, on September 14, 2020, FinCEN closed the regulatory gap and issued a final rule which removed the anti-money laundering ("AML") program exemption for banks that lack a Federal functional regulator, including, but not limited to, private banks, non-federally insured credit unions, and certain trust companies. These institutions will now have to comply with additional regulatory obligations provided by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act") previously reserved only for banks with a Federal functional regulator. The legislative framework guiding these regulations is commonly referred to as the Bank Secrecy Act ("BSA").

Banks without a Federal functional regulator were already required to comply with certain BSA obligations, such as filing suspicious activity reports ("SARs") and currency transaction reports ("CTRs"). Now, based on this final rule, these institutions must expand their existing policies and procedures. Specifically, these newly covered financial institutions must:

- establish and implement AML controls;
- comply with Customer Identification Program (CIP) requirements; and
- comply with beneficial ownership information requirements.

Establishing and implementing AML controls:

Pursuant to Section 352 of the USA PATRIOT Act, FinCEN requires financial institutions to establish AML programs that, at a minimum, include: (1) the development of internal policies, procedures, and controls to assure ongoing compliance; (2) the designation of a compliance officer; (3) an ongoing employee training program; and (4) an independent audit function to test programs. Under this Final Rule, banks that lack a Federal functional regulator are required to establish and implement written AML programs under the specified minimum standards.

Comply with Customer Identification Program (CIP) requirements:

Pursuant to Section 326 of the USA PATRIOT Act, FinCEN requires financial institutions to establish procedures for account opening that, at a minimum, include: (1) verifying the identity of any person seeking to open an account, to the extent reasonable and practicable; (2) maintaining records of the information used to verify the person's identity, including name, address, and other identifying information; and (3) determining whether the person appears on any lists of known or suspected terrorists or terrorist organizations provided to the financial institution by any government agency. Based on a previously enacted final rule in May 2003, private banks, savings associations, non-federally insured credit unions and trust companies were already required to comply with these Customer Information Program (CIP) requirements. However, the current final rule now imposes the CIP requirements on all other banks without a Federal functional regulator that were not already included, such as non-federally insured state-chartered banks and savings and loan or building and loan associations, and international banking entities.

Comply with beneficial ownership information requirements:

Banks and other financial institutions that lack a Federal functional regulator were already prohibited from maintaining correspondent accounts for foreign shell banks and were required to obtain and retain information on the ownership of foreign banks. Pursuant to this new rule, however, non-federally regulated financial institutions will have to comply with added requirements pursuant to 31 CFR 1010.230. Under 31 CFR 1010.230, financial institutions are required to establish and maintain written procedures that are reasonably designed to identify and verify beneficial owners of new accounts opened by legal entity customers and to include such procedures in their AML programs.

Takeaways:

- Private banks, non-federally insured credit unions, and certain trust companies have six months, until March 15, 2021, to comply with the reported anti-money laundering, customer identification, and beneficial ownership program requirements.
- While the 2020 National Strategy for Combating Terrorist and Other Illicit Financing published in February 2020 also reported that the Treasury Department was exploring "harmonizing AML/CFT obligations for other key financial intermediaries, such as investment advisers," these institutions are not included in the final rule.

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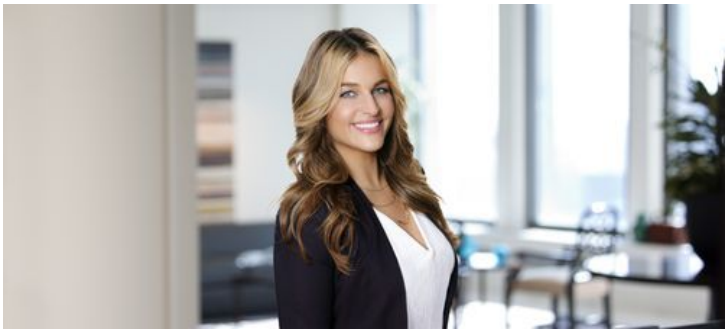

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