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Feds' De-Risking Guidance May Not Move Needle At Banks

By **Jon Hill**

Law360 (July 8, 2022, 9:32 PM EDT) -- Federal regulators have put out a new call for banks to refrain from categorically shunning independent ATM operators and other groups of customers as illicit finance risks, but some financial services attorneys say the guidance may have limited practical effect.

The Financial Crimes Enforcement Network and federal banking agencies teamed up to issue a joint statement Wednesday broadly counseling against de-risking, a practice in which banks restrict or refuse service to customers in industries and regions deemed at high risk for financial crime.

Framed as a reminder of existing policy, the statement said banks should remember to use a "risk-based approach" when conducting their required anti-money laundering due diligence of customers and should avoid stereotyping particular kinds of customers as automatically higher risk.

And while the agencies noted their advice goes for "all customer types," they highlighted several specific examples with a list that included charities, foreign nationals, cash-intensive businesses and operators of independent ATMs, whose struggles with banks' de-risking efforts go back years.

"The agencies continue to encourage banks to manage customer relationships and mitigate risks based on customer relationships, rather than decline to provide banking services to entire categories of customers," the statement said.

But whether banks take that message to heart is a different matter, and some financial services attorneys who spoke to Law360 are skeptical.

"My personal view is that these statements don't really help," said Laurel Loomis Rimon, a partner in the investigations and white collar defense practice at Paul Hastings LLP. "They don't provide any real protection if a bank decides to take less de-risking activity and actually be more inclusive, and they don't provide any real specific guidance."

The joint statement, which was also signed by the Federal Reserve, Federal Deposit Insurance Corp., Office of the Comptroller of the Currency and National Credit Union Administration, marked the latest in a series of recent moves from federal regulators that have been broadly tied to de-risking concerns.

The phenomenon of de-risking is itself nothing new. In an era of tough anti-money laundering regulation and enforcement, it has often been the case that dropping a potentially high-risk customer can make

more business sense for a bank than investing heavily to manage the necessary compliance.

During the Obama administration, a U.S. Department of Justice initiative known as Operation Choke Point also put pressure on banks to cut ties with certain customer groups, further tilting the compliance cost-benefit calculus against serving businesses like payday lenders and pawn shops.

That initiative ended in 2017 in a cloud of controversy and litigation. But even before that, federal regulators had acknowledged the threat de-risking posed to money services business, issuing guidance as early as 2005 that sought to discourage banks from reflexively turning them away.

"[The agencies] have been fighting this idea for a while," Rimon said. "On the one hand, it is very much throughout all of the AML program requirements that everything needs to be 'risk-based.' On the other hand, they're telling banks don't go too far with that, don't go too broadly with that, that it needs to be more individualized."

Federal regulators have continued to hear complaints about de-risking and its undesirable consequences, such as blocked money transfers for humanitarian organizations working in war-torn countries, and bank account closures for immigrants from regions like East Africa and Latin America.

Independent ATM operators, which were among the original targets of now-shuttered Operation Choke Point, have also reported persistent difficulties with account closures and service denials at the banks they need to supply cash for the machines they run in bars, bodegas and other locations.

In response to such complaints, the Federal Financial Institutions Examination Council — an interagency body of banking regulators — recently revamped parts of its anti-money laundering exam manual that are often blamed for helping to scare banks away from some of these groups.

The updated manual, released in December, no longer describes independent ATMs as "particularly susceptible" to fraud and money laundering, for example, and it drops a similar characterization of humanitarian groups as vulnerable to "abuse by money launderers and terrorists."

Instead, the manual now emphasizes that ATM operators and international charities aren't inherently high risk for illicit activity and that regulators won't frown on banks for doing business with them. Wednesday's joint statement echoes that language, as well as bank guidance put out last month by FinCEN affirming that ATM operators aren't all big money laundering threats and offering tips on risk-based due diligence for them. The earlier guidance noted ATM operators "are an important channel in providing financial services" to underserved markets.

But even if Wednesday's statement is just underscoring what has already been said, some observers told Law360 that the fact it's coming from FinCEN as well as the major banking agencies could give it some extra heft, showing that all the regulators are on the same page.

Marc-Alain Galeazzi, a partner at Morrison Foerster LLP who advises banks on anti-money laundering issues and other regulatory matters, said he views such statements as "very important."

"It takes the temperature of what the regulators are focused on and also what the examiners will look at," Galeazzi said. "It's not a rule or regulation, but it does provide banks and other financial informal institutions with good information on how they might need or want to change their approach to anti-money laundering compliance."

That, in turn, could benefit not just ATM operators, but also a range of other financial products and services — like money transmitters and cryptocurrency exchanges — that have faced de-risking challenges with banks, according to Chris Hoyle, a partner at global advisory firm StoneTurn Group LLP.

The joint statement is "a reminder to banks that while risks need to be managed appropriately, it should not be done in a way that inappropriately or unfairly prevents customers' access to the financial system," Hoyle said.

But with the document weighing in at a little less than two pages, other attorneys expressed doubt about how actionable banks will find the agencies' advice, describing it as rather high-level and generic.

"I imagine for most banks, there really isn't anything to implement," said Daniel Meade, a partner in the bank regulatory practice at Cadwalader Wickersham & Taft LLP. "I think it probably comes down to double-checking, 'Hey, we're not saying no to whole classes of customers, are we?' And for the vast majority of banks, I think the answer really is no, we already do a risk-based analysis on each customer."

Rimon of Paul Hastings noted the statement also doesn't include details that might help banks better calibrate their risk determinations, such as analytics drawn from suspicious activity reports. Nor does it provide much assurance that banks won't wind up facing regulatory scrutiny if they do get more nuanced about which businesses they're willing to serve, according to Rimon.

"The expectation here is that a bank will increase the size of its compliance department and do more manual reviews of some individual customers," she said. "Obviously, banks and other financial institutions are using all kinds of tools now, given the volume of data, to try to do this kind of work. But I think this [statement] would provide very little protection if an examiner or investigation said, 'Well, you missed this. You didn't pick up on how risky this particular customer really was.'"

If anything, some attorneys said they see Wednesday's statement as effectively putting banks in the perceived position of shouldering more responsibility for de-risking. Although regulatory pressures are at the root of the phenomenon, the guidance presents banks as the real gatekeepers by stressing that the agencies don't prohibit or discourage banks from serving "customers of any specific class or type."

"The agencies recognize that it is important for customers engaged in lawful activities to have access to financial services," the statement said, adding later that it's up to banks to "choose whether to enter into or maintain business relationships based on their business objectives and other relevant factors."

That might provide some helpful cover to the agencies at a time when fears of improper regulatory meddling in banks' business decisions have loomed large on the radars of Republican lawmakers.

"The agencies don't want to be called out in Congress for instituting Operation Choke Point 2.0, or anything like that," Cadwalader's Meade said. "It may be that there is a little bit of an effort here to say, 'That's not our intent at all,' and preempt criticism like that."

--Editing by Alanna Weissman and Lakshna Mehta.

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