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## **FinCEN's Potential New Customer Due Diligence and Beneficial Ownership Information Requirements**

### What is the big picture on what is happening?

Earlier this week, FinCEN published an advance notice of proposed rulemaking on customer due diligence for financial institutions.<sup>1</sup> FinCEN has requested comments on this proposal by May 4, 2012. The purpose of this advance notice is to gauge industry reaction to a proposal by FinCEN to require a more in depth review of the beneficial owners of accounts at financial institutions. This is not even a proposed rule so it is as preliminary as these things get, but it may be a precursor of new rules in the future. And if nothing else, the FinCEN notice is a helpful restatement of what banks should be doing today with regard to customer due diligence, particularly with regard to establishing beneficial ownership.

### Editorial comment

In many respects, it is hard to argue against any proposals by FinCEN to increase the level of scrutiny over bank customers when the principal purpose of such scrutiny is so laudable as the prevention of money laundering or even worse terrorist financing. Put another way, who wants to make it easier to launder money or finance terrorists? The answer of course is nobody does; but the issue is at what point does the government stop asking banks to delve deeper and deeper into the affairs of the banks' customers.

It would appear that the only way to put a brake on the continuing quest for more information from more types of institutions is to perform some sort of cost/benefit analysis in which the government must prove it needs the new information to catch money launderers and those who help terrorists. Merely providing helpful or interesting information should not be enough to justify new regimes of information gathering that will further tax a weakened industry. It is too much to expect that the bureaucrats themselves will ever conclude they have sufficient

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<sup>1</sup> <http://www.gpo.gov/fdsys/pkg/FR-2012-03-05/html/2012-5187.htm>

information to do their jobs effectively. Any pushback has to come from the industry itself or the elected officials. And it might be easier to oppose “mom” or “apple pie” than to ask for a break from gathering and verifying more customer data.

#### What customer due diligence is currently required?

Under current law and guidance, FinCEN requires banks to establish and employ “comprehensive customer due diligence policies, procedures, and processes for all customers, particularly those that present a high risk for money laundering or terrorist financing.” This statement sounds fairly complete, but FinCEN is contemplating going beyond “comprehensive.” FinCEN does not believe that the existing regulatory expectations for obtaining beneficial ownership information for certain accounts and customer relationships are adequate.<sup>2</sup>

#### What is FinCEN thinking of adding?

FinCEN believes that issuing a rule that mandates a certain level of customer due diligence, including an obligation to categorically obtain beneficial ownership information, is desirable. FinCEN believes that it is necessary to obtain beneficial ownership information for **all** account holders, possibly subject to limited exceptions based upon lower risk.

FinCEN is concerned that there is a lack of uniformity and consistency in the way financial institutions address their customer due diligence obligations and collect beneficial ownership information. Bad guys continue to create complex legal entities, thereby masking beneficial ownership information in order to conduct financial crimes.

#### What new Beneficial Ownership Data would be collected?

FinCEN is considering expanding the requirement to obtain beneficial ownership information to **all** customers. This component of the customer due diligence program rule would create a new express regulatory obligation to obtain beneficial ownership information. A Customer Identification Plan must address situations where, based on a risk assessment of a new corporate account, a bank will obtain information about the individuals with authority or control over such account.

FinCEN is considering adopting a new definition of “beneficial owner” to be used that would include:

(1) Either:

(a) Each of the individual(s) who, directly or indirectly, through any contract, arrangement, understanding, relationship, intermediary, tiered entity, or otherwise, owns more than 25 percent

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<sup>2</sup> FIN-2010-G001, “Guidance on Obtaining and Retaining Beneficial Ownership Information”, March 5, 2010.

of the equity interests in the entity; or

(b) If there is no individual who satisfies (a), then the individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, intermediary, tiered entity, or otherwise, has at least as great an equity interest in the entity as any other individual, and  
(2) The individual with greater responsibility than any other individual for managing or directing the regular affairs of the entity.

FinCEN is seeking comment on whether the beneficial ownership requirement should apply with respect to those currently exempt customers such as regulated financial institutions and publicly traded companies.

### Understanding the Purpose of an Account Relationship

Under current requirements, banks should understand the nature and purpose of an account or customer relationship to assess risks and monitor for suspicious activities.

FinCEN is considering a rule to require a bank to understand the nature and purpose of an account or customer relationship as a mandatory element of a customer due diligence program. FinCEN sums up this proposed rule as: banks shall understand the nature and purpose of the account and expected activity associated with the account for the purpose of assessing the risk and identifying and reporting suspicious activity.

### Accounts Opened by Third Parties

FinCEN has concerns regarding obtaining information about the beneficial owners of assets in an account, such as where a legal entity (e.g. a foreign financial institution) opens such account for the benefit of its customers (as opposed to for its own benefit). FinCEN recognizes that there are difficulties in identifying the beneficial owner of assets in these types of accounts (e.g., omnibus accounts or other intermediated accounts), where there are layers of intermediate companies.

A similar question arises in the context of accounts established by an individual or entity (e.g. law or accounting firm) that may be acting on behalf of another individual or individuals without disclosing this fact. A possible solution suggested by FinCEN would be to require a statement that any individual or entity opening an account is not acting on behalf of any other person.

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