

FinCEN Proposes Customer Due Diligence Requirement of Beneficial Ownership Identification to Enhance Federal Anti-Money Laundering and Counterterrorism Efforts

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On Feb. 29, 2012, the Financial Crimes Enforcement Network (FinCEN) issued an [advance notice](#) of proposed rulemaking (ANPR) seeking comments on a proposed customer due diligence (CDD) regulation that would explicitly require covered financial institutions to institute defined programs to identify the real or beneficial ownership of account holders. FinCEN noted in its ANPR that there currently are two limited circumstances (concerning private bank accounts and correspondent accounts) in which financial institutions are expressly required to obtain beneficial ownership information, and that it is considering expanding the explicit requirement to obtain beneficial ownership information to *all* customers.

The proposed CDD is intended to enhance federal anti-money laundering and counterterrorism efforts, and to establish a uniform and consistent CDD obligation with respect to beneficial ownership across financial institution sectors. Although the federal banking agencies already generally expect appropriate and adequate customer due diligence policies, FinCEN's proposed rule intends to clarify the agencies' expectations.

Proposed Elements of Customer Due Diligence Program

FinCEN is initially proposing a CDD rule that would cover banks, broker dealers, mutual funds, futures commission merchants, and introducing brokers in commodities. The rule, if created, would require such entities to (i) conduct due diligence and verify the identity of customers when opening accounts; (ii) understand the purpose and intended nature of the account; (iii) identify and verify the beneficial owner(s) of all customers pursuant to a risk-based approach, and (iv) monitor the customer relationship and undertake further due diligence as needed. FinCEN anticipates that it will provide additional guidance regarding customers that are considered low risk, customers for which only identification of the beneficial owner(s) may be necessary, and customers for which both identification and verification of the beneficial owner(s) is required.

The ANPR states that FinCEN will consider extending these CDD requirements to cover all other financial institutions currently subject to FinCEN's anti-money laundering requirements, including casinos, money services businesses, nonbank mortgage lender and originators, and dealers in precious metals, stones and jewels. Accordingly, in addition to requesting input from institutions that would be covered by the initial rulemaking, FinCEN is specifically soliciting comments from these additional institutions that may later become subject to the rules. FinCEN is accepting comments on the ANPR for sixty days from the date of publication in the Federal Register.

According to FinCEN, the proposed regulations, if promulgated, would form part of a broader U.S. Treasury initiative to enhance efforts to combat financial crime, including money laundering, terrorist financing, and tax evasion. Beneficial ownership of accounts can pose additional risks because it can enable individuals to shield the identity (for example, through the use of shell companies) of the true owner of assets derived from criminal activity.

Potentially Expanded Due Diligence Requirements

FinCEN states that most of the proposed requirements do not pose new or additional burdens on covered financial institutions. For example, according to FinCEN, the customer identification and risk-based verification requirement would be satisfied by a financial institution's existing Customer Identification Programs (CIP). However, as noted by FinCEN, while existing CIP requirements exempt certain customers (namely, existing customers, provided that the financial institution has a reasonable belief that it knows the customer's true identity; banks regulated by a federal or state regulator; governmental entities; and publicly traded companies), the CDD requirements to understand the purpose and intended nature of the accounts and to conduct ongoing monitoring would apply to such customers. In addition, FinCEN has requested comments regarding whether the beneficial ownership requirement should apply with respect to those exempt customers.

With respect to the proposed, customer verification requirement, FinCEN is considering two possible variations on such verification—either it would require verification of the existence of the beneficial owner, as identified by the customer opening the account on behalf of the legal entity account holder, or, verification might require the financial institution to verify that the individual identified by the customer as the beneficial owner is indeed the beneficial owner.

Proposed Legislation Requiring States to Collect Beneficial Ownership Information

The increased burden presented by FinCEN's proposed regulation might be eased by the passage of [U.S. Senate Bill S. 1483](#), which would require the 50 states—either directly or through state-licensed registration agents – to collect beneficial ownership information showing which individuals ultimately own corporations that are formed within their jurisdiction. The bill, co-sponsored by Sen. Carl Levin (D. – Mich.) and Sen. Charles Grassley (R. – Iowa), currently is under consideration by the Senate Homeland Security and Government Affairs Committee. A related [House Bill, H. 3416](#), was introduced by Rep. Carolyn Maloney of New York and is currently in the House Financial Services Committee.

A statute requiring states to collect beneficial owner information would certainly reduce the existing anti-money laundering burden on banks and other impacted institutions, and could make it significantly easier for financial institutions to meet their obligations under FinCEN's new rules. For example, banks could streamline the compliance process if it were possible to simply ask a business customer to provide a copy of the beneficial ownership information it provided to the state where the business was incorporated. Although these pending legislative initiatives have been endorsed by law enforcement officials, the 50 secretaries of state have expressed resistance to it, particularly those in states such as Delaware that derive significant revenue from incorporation. The banking industry, to date, has yet to publicly endorse the approach, and although the benefits of easing their AML burden may be attractive, banks may not want to enter the fray of any tension between the states and the federal government.

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