

FinCEN Issues Frequently Asked Questions Regarding Its Customer Due Diligence Rule

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On April 3, 2018, the Financial Crimes Enforcement Network (“**FinCEN**”) issued 37 Frequently Asked Questions¹ (the “**FAQs**”) pertaining to the agency’s Customer Due Diligence rule (“**CDD Rule**”). Covered financial institutions must comply with the CDD Rule by May 11, 2018.² As we [previously reported](#), the CDD Rule clarified and enhanced CDD requirements for financial institutions under the Bank Secrecy Act, and added a new requirement for covered financial institutions to identify and verify the identity of the “beneficial owners” of certain of their legal entity customers. The long-anticipated FAQs cover a wide range of topics, including beneficial ownership threshold issues, specific identification and verification scenarios, and various exemptions and exclusions. Significantly, the new FAQs describe circumstances where covered financial institutions can leverage previously collected beneficial ownership information about current customers to meet the CDD Rule’s requirements, which should reduce the burden of complying with the rule. Below we discuss some of the key aspects of the FAQs.

Discussion of Key Guidance in the FAQs

Existing Customers

Where an individual identified as a beneficial owner of a new legal entity account is an existing customer of a covered financial institution and subject to its customer identification program, the financial institution can rely on information in its possession to fulfill the beneficial ownership requirements, if the existing information is up-to-date and accurate, and the new legal entity customer’s representative certifies or confirms (verbally or in writing) the accuracy of this information. (FAQ 7)

A similar streamlined process can be used when a single legal entity customer opens multiple accounts (whether or not simultaneously). A covered financial institution that has identified and verified the beneficial owner(s) of a legal entity customer may rely on that information to fulfill the beneficial ownership requirement for subsequent accounts, provided that the customer certifies or confirms (verbally or in writing) that the information is up-to-date and accurate at the time each subsequent account is opened, and the financial institution has no knowledge of facts that would call into question the reliability of the information. (FAQ 10)

In the context of financial product renewals (e.g., a loan renewal or certificate of deposit (“**CD**”) rollover), FAQ 12 confirms that each such renewal or rollover is a new “account” and therefore subject to the beneficial ownership requirements under the CDD Rule. However, in apparent recognition of the burden imposed by requiring new identification and verification measures each time a loan or CD is renewed on the same terms to the same customer, FAQ 12 provides relief in this situation. It states that, after a

¹ FinCEN Frequently Asked Questions Regarding Customer Due Diligence Requirements for Financial Institutions (April 3, 2018), https://www.fincen.gov/sites/default/files/2018-04/FinCEN_Guidance_CDD_FAQ_FINAL_508_2.pdf. FinCEN previously published 26 Frequently Asked Questions on July 19, 2016 (the “**2016 FAQs**”) addressing the same topic. For more information about the 2016 FAQs, see Davis Polk, [FinCEN’s Frequently Asked Questions Regarding Customer Due Diligence Requirements for Financial Institutions](#) (July 29, 2016).

² Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. 29,398, 29,451 (May 11, 2016) (codified at 31 C.F.R. pts. 1010, 1020, 1023, 1024, 1026), <https://www.gpo.gov/fdsys/pkg/FR-2016-05-11/pdf/2016-10567.pdf>.

covered financial institution obtains certified beneficial ownership information for the first time, it would not be required to collect such information at the time of each subsequent renewal where (i) the legal entity customer and the financial service or product remain the same, (ii) the customer certifies or confirms the previously obtained information is accurate and up-to-date, and (iii) the covered financial institution has no knowledge of facts that would call into question the reliability of the information. The subsequent certification requirements may be satisfied by the customer agreeing at the time of its initial certification to notify the financial institution of any change in its beneficial ownership information.

Record Retention: Multiple Sets of Documents

Identifying information must be maintained for a period of five years *after the legal entity's account is closed*, while verification records must be maintained for a period of five years *after the record is made*. (FAQ 9) Therefore, if a covered financial institution relies on pre-existing beneficial ownership information in its possession when opening a new account for a legal entity customer, it must maintain all original records (including any verbal or written confirmation of such information) for five years after the new account is closed. Covered financial institutions must also retain a description of each document relied on for verification, any non-documentary methods and results of measures undertaken for verification, and the resolution of any substantive discrepancies discovered in identifying and verifying the identification information for five years after the record is made.

Internal Administrative and Operational Accounts

FinCEN clarifies in FAQ 11 that an account or subaccount relating to an existing legal entity customer opened by a covered financial institution for administrative or operational purposes, and not at the customer's request, will not be considered a new account and will therefore not be subject to the CDD Rule's beneficial ownership requirements. Some financial institutions in the securities and futures industries had expressed concern that an overly technical reading of the definition of "account" by FinCEN could unnecessarily burden covered entities. FinCEN makes clear, however, that an account or subaccount through which the customer of a legal entity customer carries out trading activity directly through the covered financial institution, without intermediation from the existing legal entity customer, would not fall within this FAQ.

Obtaining and Updating Beneficial Ownership Information

Beneficial ownership information is only required to be updated based on specific risk-related triggers or events rather than during routine periodic reviews. (FAQ 14) In addition, FinCEN notes in FAQ 17 that there is no distinction between the identification and verification requirements at the time of account opening and at the time of a triggering event. Each requires covered financial institutions to obtain the same information (name, date of birth, address, and identifying number). Further, only the information that has changed must be updated as the result of a triggering event during the normal course of monitoring. If an update is minor, such as a change of address for an existing beneficial owner, FAQ 16 advises that it is reasonable for this information to be updated in the covered financial institution's database through verbal communication with the legal entity customer and without a full re-certification. However, if an update is more substantial, such as a change in beneficial ownership, the new beneficial owner's identity would need to be collected, certified, and verified.

Trusts as Beneficial Owners

If a trust owns 25% or more of the equity interests of a legal entity customer, the beneficial owner for purposes of the ownership/equity prong is the trustee, regardless of whether the trustee is a natural person or a legal entity. However, because the ownership/equity and control prongs are independent requirements, a covered financial institution would still be required to identify and verify a natural person as the beneficial owner of the legal entity customer to satisfy the control prong. (FAQ 20)

If there are multiple co-trustees of a trust that is a 25% or greater owner of the equity interests of a legal entity customer, a covered financial institution is not required to identify and verify the identity of all co-trustees. It must collect and verify the identity of, at a minimum, one co-trustee of such a multi-trustee trust. (FAQ 19)

Pooled Investment Vehicles

FinCEN states in FAQ 18 that for a pooled investment vehicle (“**PIV**”) whose operators or advisers are not excluded from the definition of a legal entity customer, covered financial institutions are not required to look through the PIV to identify and verify individuals who own 25% or more of its equity interests. However, the CDD Rule still requires covered financial institutions to collect beneficial ownership information for such PIVs under the control prong. This FAQ does not directly address the situation where a PIV is advised by an entity that is (i) excluded from the legal entity customer definition, but (ii) not a “financial institution” as defined in 31 C.F.R. § 1010.100(t), such as an investment adviser registered with the Securities and Exchange Commission. It would be consistent with the purpose and scope of the CDD Rule for such a PIV to be excluded from both the ownership and control prongs of the CDD Rule.

Foreign Financial Institutions

In FAQ 26, FinCEN reiterates that a foreign financial institution is excluded from the definition of legal entity customer if its foreign regulator maintains information on the beneficial owner(s) of the regulated institution. A covered financial institution may rely on the representations of its customer as to whether this (or any) exclusion applies, provided it has no knowledge of facts that would reasonably call into question the reliability of such representation. FAQ 27 notes that the U.S. government will not maintain a list of non-U.S. jurisdictions that maintain beneficial ownership information and advises covered financial institutions to contact the relevant foreign regulator or use other reliable means to ascertain whether a particular non-U.S. jurisdiction maintains such information.

There is an apparent tension between the guidance in FAQ 26 and FAQ 27 as to permitted methods for determining whether the exclusion is available: FAQ 26 indicates that a covered financial institution can rely on a legal entity customer’s representation while FAQ 27 directs a financial institution to contact the foreign regulator or use other reliable means. It is possible that FinCEN’s directive to contact the relevant foreign regulator is intended to assist a financial institution in determining whether the exclusion is available *in general* for foreign financial institutions in a particular jurisdiction, absent any specific representations from a legal entity customer.

Currency Transaction Reporting

Absent a reason to believe otherwise, covered financial institutions filing currency transaction reports (“**CTRs**”) should presume that different businesses under common ownership are operating separately and independently from each other and from the common owner. Therefore, for purposes of CTR filing, covered financial institutions should not aggregate transactions involving those businesses with each other or with those of the common owner, absent indications that the businesses are not operating independently. (FAQ 32) FinCEN also notes in FAQ 33 that as a matter of course, beneficial owners do not need to be listed as beneficiaries in a CTR. However, a financial institution must list a beneficial owner in the CTR if it has knowledge that the transaction(s) requiring the filing was made on behalf of the beneficial owner and resulted in either cash in or out totaling more than \$10,000 during any one business day.

Lower-Risk Customers

The CDD Rule requires covered financial institutions to understand the nature and purpose of a customer relationship in order to develop a customer risk profile. However, for certain lower-risk customers, the nature and purpose of the relationship can be developed by inherent or self-evident information.

Therefore, the documentation required to demonstrate understanding of this relationship varies with the type of customer, account, service, or product. (FAQ 35)

Conclusion

Although the FAQs do not address all outstanding questions regarding the CDD Rule, they demonstrate that FinCEN has carefully considered a number of issues raised by industry representatives as covered financial institutions have been preparing to come into compliance with the rule. We recommend that these financial institutions take advantage of the FAQs to assist them in the smooth implementation of their programs by the May 11, 2018 deadline.³

³ Note also that the American Bankers Association has reported that the federal banking agencies are expected to release their examination procedures in the coming days, which should provide additional guidance to covered financial institutions. See ABA Banking Journal: FinCEN Publishes Long-Awaited FAQs on Beneficial Ownership Rule, (April 3, 2018), <https://bankingjournal.aba.com/2018/04/fincen-publishes-long-awaited-faqs-on-beneficial-ownership-rule/>.

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