

SUMMARY OF ROUNDTABLE MEETING:
ADVANCE NOTICE OF PROPOSED RULEMAKING ON CUSTOMER DUE
DILIGENCE

9100 N.W. 36th Street,
Miami, FL 33178
December 3, 2012
9:30AM-4:30PM

The Financial Crimes Enforcement Network (FinCEN) hosted a roundtable meeting to continue gathering information on the Advance Notice of Proposed Rulemaking (ANPRM) on customer due diligence (CDD) requirements for financial institutions. The meeting was held on December 3, 2012, at the Miami Branch of the Federal Reserve Bank of Atlanta, 9100 N.W. 36th Street, Miami, FL 33178. To maximize private sector participation, the meeting was divided into a morning session from 9:30am to 12:30pm, and an afternoon session from 1:30pm to 4:30pm.

On March 5, 2012, FinCEN issued the ANPRM to solicit public comment on the potential development of an explicit CDD obligation for financial institutions, including a requirement to obtain information on the beneficial ownership of customers.¹ The comment period closed on June 11, 2012. On July 31, 2012, September 28, 2012, October 5, 2012 and October 29, 2012, officials from the U.S. Department of the Treasury (Treasury), including FinCEN, hosted public meetings in Washington, DC, Chicago, New York, and Los Angeles, respectively, to invite additional comment on specific issues raised during the comment period.² This final roundtable meeting in Miami concluded Treasury's public outreach events specific to this ANPRM.

This Miami meeting was co-chaired by Jamal El-Hindi, Associate Director, Regulatory Policy and Programs Division, FinCEN, and Chip Poncy, Director, Office of Strategic Policy for Terrorist Financing and Financial Crimes, U.S. Department of the Treasury. Representatives from all interested financial institutions were invited to attend and participate. Set forth below is a general summary of the primary issues discussed at the roundtable meeting, as understood by Treasury officials in attendance. It is not intended to be a transcript, and does not purport to include every comment or issue raised during the meeting.

¹ Financial Crimes Enforcement Network, Customer Due Diligence Requirements for Financial Institutions, 77 FR 13046 (March 5, 2012), available at: <http://www.regulations.gov/#!docketDetail:D=FINCEN-2012-0001;dc=FR%252BPR%252BN%252BO%252BSR>.

² Summary of Public Hearing: Advance Notice of Proposed Rulemaking on Customer Due Diligence (July 31, 2012), available at <http://www.fincen.gov/whatsnew/html/20120913.html>; *Summary of Public Hearing: Advance Notice of Proposed Rulemaking on Customer Due Diligence* (September 28, 2012), available at <http://www.fincen.gov/whatsnew/html/20121130CHI.html>; *Summary of Public Hearing: Advance Notice of Proposed Rulemaking on Customer Due Diligence* (October 5, 2012), available at <http://www.fincen.gov/whatsnew/html/20121130NYC.html>; *Summary of Public Hearing: Advance Notice of Proposed Rulemaking on Customer Due Diligence* (October 29, 2012), available at <http://www.fincen.gov/whatsnew/html/20121130LA.html>.

Summary of Roundtable Meeting

Messrs. El-Hindi and Poncy opened the discussion with an overview of Treasury's prior outreach process with respect to the ANPRM, and then led an open forum to discuss the following key issues raised during the comment period and at prior public meetings:

Definition of Beneficial Ownership

- Treasury officials asked participants to comment on three aspects of the definition: (i) the ownership prong; (ii) the control prong; and (iii) how a "beneficial ownership" definition could be applied to customers that are individuals, as opposed to legal entities.
- Participants expressed varied suggestions regarding the application of the "ownership" and "control" prongs of the definition. Some suggested that the two be merged so that a single prong could capture owners that exercise significant control over the legal entity. Others suggested that the application of the definition would be more manageable and risk-based if the requirement is to obtain only "a" person under each prong, rather than "the" person. In the case of the control prong, for example, obtaining *any* individual with substantial control would be more workable than obtaining *the* individual with the most control. Commenters also suggested that Treasury provide additional guidance and clarity as to the underlying purpose of each prong to assist financial institutions in identifying the most relevant individual.
- Treasury asked whether U.S. financial institutions typically obtain beneficial ownership for customers that are individuals by, for example, asking if the individual is opening the account on behalf of any other individual. Most U.S. financial institutions do not, but acknowledged that simply adding this question to the account opening process would not be a significant burden (if allowed enough time to work such a step into their periodic updating of systems and procedures).
- Treasury officials noted how the various comments highlighted the challenge of proposing a definition that provides flexibility and consistency, but emphasized the need to try to achieve both.

Obtaining Beneficial Ownership Information - Current Practices

- Treasury officials discussed the importance of obtaining beneficial ownership information for purposes of mitigating risk and providing useful information to law enforcement. Treasury officials then asked participants to provide examples of the circumstances in which financial institutions currently obtain beneficial ownership information, and how financial institutions define "beneficial owner" in such circumstances.
- Participants expressed varied views as to whether, how, and in what circumstances, financial institutions obtain beneficial ownership information. Financial institutions also described varying practices relating to the types of information obtained from customers about beneficial owners (e.g., name and address or name only). Further, institutions described

various ways in which they obtain beneficial ownership information, including the thresholds used to determine whether an individual is a beneficial owner (e.g., 25% or 10%).

- Commenters noted that widely divergent beneficial ownership practices among financial institutions create business competitiveness concerns whereby some institutions with robust compliance procedures risk losing customers to other institutions with less rigorous procedures. Similarly, commenters also described inconsistencies among regulatory examiners in enforcing compliance standards. Treasury acknowledged the need to mitigate these concerns by creating an environment where clearer rules and guidance may foster more consistent practices by financial institutions and examiners.

Verification of Beneficial Ownership - Identity and/or Status

- Treasury officials asked participants to comment on a potential obligation for financial institutions to verify a beneficial owner's (i) identity and (ii) status as beneficial owner, as described in the ANPRM.
- With respect to verifying the identity of a beneficial owner, participants expressed general support for a process consistent with the customer identification program rules,³ as these practices are familiar to financial institutions.
- Many commenters noted that verifying the status of an individual as a beneficial owner (i.e., that the individual identified as a beneficial owner is in fact a beneficial owner) would impose a substantial burden on financial institutions. In particular, they noted that smaller financial institutions may be less capable of absorbing the associated costs.
- Many commenters acknowledged that a beneficial ownership requirement that permits reliance on a customer's self-certification (with no requirement for the financial institution to verify the status of an individual as a beneficial owner) could be workable as a broad-based approach. They expressed concern, however, that regulatory examiners may require financial institutions to verify beneficial ownership despite a rule that permits them to rely on a self-certification form. Treasury noted the importance of working with the regulators on the development, issuance, and implementation of the rule.
- Some commenters questioned the utility of a self-certification as the information may be inaccurate or misleading. Treasury officials reiterated the view of the law enforcement community that an intentionally misleading customer representation could have significant investigative and prosecutorial value, including for purposes of proving criminal intent.

Challenges Associated with Existing Relationships and Requirements to Update Information

- Treasury officials sought comment on the challenges associated with obtaining beneficial ownership information for existing customers, and a potential requirement to update, or "refresh," such information.

³ See, e.g., 31 CFR §1020.220.

- Many commenters noted that a requirement to “look back” to obtain beneficial ownership information on existing customers would impose a substantial burden with minimal benefit. Instead, they suggested that any “look back” requirement be, at most, risk-based.
- With respect to updating, or “refreshing,” customer information, participants generally described their practice of updating CIP information either pursuant to a schedule that varies based on risk (e.g. every 1 year for high-risk customers; 3 years for medium risk; 5 years for low risk) or upon a triggering event (e.g., after transaction monitoring systems generate an alert). Treasury noted that these practices may also be workable for the beneficial ownership requirement, but some participants nonetheless questioned whether the burden would outweigh the benefit.

Other Issues Pertaining to the Advance Notice of Proposed Rulemaking

- Commenters generally agreed that creating consistent beneficial ownership expectations among financial institutions would promote a more even playing field and mitigate concerns related to business competitiveness. Participants also noted their desire for greater consistency by regulatory examiners in enforcing compliance standards, and expressed concern that additional rules may be subject to varying interpretations by regulatory examiners.
- As an alternative to requiring financial institutions to obtain and verify beneficial ownership information, commenters expressed support for federal legislation that would require the disclosure of beneficial ownership information at the time of company formation. Treasury encouraged participants to express their support of the legislative initiative. In doing so, Treasury officials also described efforts to advance such legislation, as well as other similar initiatives, and noted that these efforts form a key component of Treasury’s broader strategy to address beneficial ownership issues. However, Treasury noted that, unlike a customer due diligence program rule, such legislation would not address the abuse of legal entities formed abroad. It would also be less relevant to the customer due diligence program rule to the extent the rule does not require independent verification of a beneficial owner’s status as the beneficial owner. Nonetheless, such legislation would be useful in generating awareness among customers as to the process of disclosing beneficial ownership information. Treasury noted the strong opposition to such legislation by some private sector interests, and that financial institutions, in general, have not yet expressed support to Congress.
- Some commenters suggested that a risk-based – rather than categorical – requirement to obtain beneficial ownership would be more effective. Treasury explained that a risk-based approach still requires some minimum expectations. Nonetheless, to promote more risk sensitive rules, Treasury discussed potential exemptions to the beneficial ownership requirement. Commenters indicated that such exemptions should include, at a minimum, those customers currently exempt from customer identification program rules,⁴ as well as

⁴ See, e.g., 31 CFR § 1020.100(c)(2).

other customers that may be considered lower risk, or whose beneficial ownership information may be available through other sources.

- Some commenters suggested that Treasury clarify expectations associated with recording and retaining beneficial ownership information. They also sought clarity on what financial institutions would be expected to do with beneficial ownership information once they collect it (i.e., use it for analyzing links across different accounts, screening for OFAC compliance, etc.). Treasury noted that, consistent with the purpose of the customer due diligence program rule, the beneficial ownership information is intended to enable financial institutions to better understand and mitigate risk by incorporating such information into their existing risk mitigation processes to the extent practical and reasonable.
- Many commenters urged Treasury to allow sufficient implementation time to enable financial institutions to incorporate any new rules into existing systems and procedures. Treasury noted that it will consider these implementation challenges when proposing a timeline and effective date.

Conclusion

The co-chairs thanked all participants for attending this outreach event. Treasury officials also encouraged participants to continue to send comment letters to FinCEN on any of the issues discussed in the meeting.