

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

950 SOUTH GRAND AVENUE
LOS ANGELES, CA 90015
OCTOBER 29, 2012
9:30AM-3:00PM

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 October 29, 2012, at the Los Angeles Branch of the Federal Reserve Bank of San Francisco, 950 South Grand Avenue, Los Angeles, CA 90015. The meeting was held from 9:30am to 3:00pm.

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, and October 5, 2012, officials from U.S. Department of the Treasury (Treasury), including FinCEN, hosted public meetings in Washington, DC, Chicago, IL, and New York, NY, respectively, to invite additional comment on specific issues raised during the comment period.² This roundtable meeting in Los Angeles, CA, continued Treasury's outreach efforts to engage with the private sector on key issues.

The Los Angeles meeting was co-chaired by Sarah Runge, Assistant Director, Office of Strategic Policy for Terrorist Financing and Financial Crimes, U.S. Department of the Treasury and Alan Cox, Assistant Director, Office of Outreach Resources, FinCEN. 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.

Summary of Roundtable Meeting

Mr. Cox and Mrs. Runge opened the discussion with an overview of Treasury's ongoing 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:

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%25BPR%25BN%25BO%25BSR>.

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>. Public roundtable discussions were also planned for Chicago, New York City, Los Angeles and Miami; summaries of all roundtable discussions will be available on FinCEN's website.

Definition of Beneficial Ownership

- To address confusion expressed by commenters at the prior public meetings, Treasury officials clarified that the ANPRM definition of “beneficial owner” includes both concepts of ownership and control.
- Some participants suggested that the control prong of the definition should be limited to the signatory on the account (e.g., an accountant, a financial administrator, etc.). Treasury officials clarified that the control prong of the definition in the ANPRM referred to individuals who control the customer. These individuals may not be signatories on the account.
- Many participants reiterated that any proposed definition of “beneficial owner” intended to cover the wide variety of customers, account types, and products and services offered must be clear and practical so that financial institutions, their line employees and their customers can understand and apply the definition with certainty. One commenter suggested that Treasury provide specific examples that demonstrate application of the definition in various circumstances.
- Some commenters also requested that financial institutions be provided sufficient flexibility in applying the definition of “beneficial owner.” 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 beneficial ownership information in assisting law enforcement investigations and enhancing customer risk profiles developed by financial institutions. 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. Some financial institutions obtain beneficial ownership information in all circumstances, while some do so only for certain high-risk customers or after an alert has been identified through transaction monitoring systems. Further, some financial institutions, such as mutual funds, do not generally obtain beneficial ownership information because, according to the commenters, there is no regulatory or business reason to do so. To update CDD information, some financial institutions include a provision in their deposit agreements requiring customers to inform the financial institution of any changes to CDD information.

- One financial institution that obtains beneficial ownership information for certain high-risk customers noted that such information provides context to potential suspicious activity, which is helpful in determining whether to file a SAR.

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 (i.e., that the individual identified as a beneficial owner is in fact a beneficial owner), as described in the ANPRM.
- In regard to verifying the identity of the individual identified as a beneficial owner, some participants expressed general support for a process similar to customer identification program (CIP) rules because these processes are already well-understood and familiar to financial institutions. In contrast, many commenters noted that verifying a beneficial owner’s status as a beneficial owner would impose a substantial burden on financial institutions and may be impossible in many circumstances.
- Various commenters expressed support for federal legislation that would require the disclosure of beneficial ownership information to the state at the time of company formation because it would enable independent verification by financial institutions. It would also familiarize customers with the process of providing beneficial ownership information, which would promote consistent customer expectations when opening accounts at financial institutions. Treasury officials described their efforts to advance such legislation, and noted that it forms a key component of Treasury’s broader strategy to address beneficial ownership issues.
- Some commenters suggested that a beneficial ownership requirement that permits financial institutions to rely on a customer’s self-certification (with no additional requirement for the financial institution to verify the status of an individual as a beneficial owner) could be workable as a broad-based approach and would substantially reduce the potential implementation and compliance costs.
- Other commenters, however, questioned the utility of a self-certification form as the information may be inaccurate or misleading. Treasury officials reiterated that an intentionally misleading customer response could have significant prosecutorial value, including for purposes of proving criminal intent.

Challenges Associated with Certain Products, Services, and Relationships

- Treasury officials sought comment on the challenges associated with obtaining beneficial ownership information in specific contexts, such as in trust relationships and other unique circumstances.
- Some participants, particularly those representing credit unions, expressed uncertainty as to whether and how the definition of “beneficial owner” could be applied to trusts.

Participants encouraged Treasury to issue more specific guidance on CDD practices for trust relationships.

- Several commenters noted that intermediated relationships pose unique due diligence challenges when a financial institution interacts with its intermediary customer only, and not that customer's underlying clients. According to the commenters, obtaining beneficial ownership information on such underlying clients would be particularly burdensome, and would result in a significant diversion of limited resources.
- Commenters from the securities industry, where intermediation is particularly common, highlighted the importance of existing FinCEN guidance related to omnibus accounts and other intermediated relationships, and urged FinCEN to affirm such guidance and extend its application to the beneficial ownership requirement. Treasury officials acknowledged the importance of existing FinCEN guidance with respect to omnibus accounts and other intermediated relationships,³ and its potential relevance to a beneficial ownership requirement.

Other Issues Pertaining to the Advance Notice of Proposed Rulemaking

- Commenters generally agreed that more consistent CDD practices among financial institutions would reduce business competitiveness concerns by promoting a more even playing field. However, some questioned whether consistency across financial sectors was necessary. As an example, one commenter doubted whether practices at mutual funds need to be consistent with credit unions. According to the commenter, a customer is not likely to arbitrage between the two financial institutions based on differing CDD practices. Further, participants also sought greater consistency by regulators in enforcing compliance standards, and expressed concern that additional rules may be subject to varying interpretations by examiners.
- One commenter asked Treasury to specify the requirements for financial institutions to maintain CDD information collected from customers (i.e., how long should financial institutions maintain the information). Another asked for clear guidance as to when such information should be updated.
- Many commenters urged Treasury to allow sufficient time for financial institutions to implement any new rules. For example, various commenters suggested implementation time frames ranging from 18 months to three years.

³ See, e.g., FinCEN Guidance, FIN-2008-G002, *Customer Identification Program Rule No-Action Position Respecting Broker-Dealers Operating Under Fully Disclosed Clearing Agreements According to Certain Functional Allocations* (March 4, 2008), available at <http://www.sec.gov/about/offices/ocie/aml/fin-2008-g002.pdf>; Guidance from the Staffs of the Department of the Treasury and the U.S. Securities and Exchange Commission, *Question and Answer Regarding the Broker-Dealer Customer Identification Program Rule (31 CFR 103.122)* (October 1, 2003), available at http://www.fincen.gov/statutes_regs/guidance/html/20031001.html.

- Several commenters noted that obtaining beneficial ownership information on accounts opened by attorneys on behalf of their clients may be difficult because of attorney-client privilege issues.
- One commenter suggested that Treasury publish a notice to customers describing the beneficial ownership obligation (similar to the notice contained in the customer identification program rules).⁴
- At least one commenter suggested that Treasury incorporate a liability safe harbor into the beneficial ownership requirement to protect financial institutions from potential liability that could arise from obtaining such information.
- Some commenters reiterated the need for certain exemptions from a categorical requirement to obtain beneficial ownership information. These commenters indicated that such exemptions should include, at a minimum, those customers currently exempt from customer identification program rules,⁵ as well as other customers that may be considered lower risk or whose beneficial ownership information may not be relevant to a financial institution's risk assessment or a law enforcement investigation.
- Commenters generally agreed that coordination between Treasury and the federal functional regulators is critical in promoting consistent compliance examinations. Commenters also welcomed Treasury's continued outreach to the industry on the ANPRM.

Conclusion

The co-chairs thanked all participants for attending and described the ongoing outreach process with respect to the ANPRM. In particular, Treasury intends to continue direct engagement with financial institutions, industry associations and other relevant stakeholders through regional and industry-specific outreach events. Treasury officials encouraged participants to continue to send comment letters to FinCEN on any of the issues discussed in the meeting.

⁴ See, e.g., 31 CFR §1020.220.

⁵ See, e.g., 31 CFR §1020.100(c)(2).