



**(BILLING CODE 4810-02)**

**DEPARTMENT OF THE TREASURY**

**Financial Crimes Enforcement Network**

**31 CFR Chapter X**

**RIN 1506-AB15**

**Customer Due Diligence Requirements for Financial Institutions**

**AGENCY:** Financial Crimes Enforcement Network (FinCEN), Treasury.

**ACTION:** Advance notice of proposed rulemaking.

**SUMMARY:** FinCEN, after consulting with staffs of various Federal supervisory authorities, is issuing this advance notice of proposed rulemaking (ANPRM) to solicit public comment on a wide range of questions pertaining to the development of a customer due diligence (CDD) regulation that would codify, clarify, consolidate, and strengthen existing CDD regulatory requirements and supervisory expectations, and establish a categorical requirement for financial institutions to identify beneficial ownership of their accountholders, subject to risk-based verification and pursuant to an alternative definition of beneficial ownership as described below.

**DATES:** Written comments on this ANPRM must be received on or before [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Comments may be submitted, identified by Regulatory Identification Number (RIN) 1506-AB15, by any of the following methods:

- Federal E-rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. Include RIN 1506-AB15 in the submission. Refer to Docket Number FINCEN-2012-0001.

- Mail: FinCEN, P.O. Box 39, Vienna, VA 22183. Include 1506–AB15 in the body of the text.

Please submit comments by one method only. All comments submitted in response to this ANPRM will become a matter of public record. Therefore, you should submit only information that you wish to make publicly available.

Inspection of comments: Comments may be inspected, between 10 a.m. and 4 p.m., in the FinCEN reading room in Vienna, VA. Persons wishing to inspect the comments submitted must request an appointment with the Disclosure Officer by telephoning (703) 905–5034 (not a toll free call). In general, FinCEN will make all comments publicly available by posting them on <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:**

FinCEN: Regulatory Policy and Programs Division, Financial Crimes Enforcement Network, (800) 949-2732 and select option 6.

**SUPPLEMENTARY INFORMATION:**

**I. Scope of ANPRM**

The scope of this ANPRM includes all of the industries that have anti-money laundering (AML) program requirements under FinCEN’s regulations. At this time, and as an initial matter, FinCEN is considering developing a CDD rule to cover banks, brokers or dealers in securities, mutual funds, futures commission merchants, and introducing brokers in commodities; accordingly, this ANPRM is focused primarily on these institutions. However, FinCEN believes that a CDD rule may be appropriate for all financial institutions subject to FinCEN’s regulations, and will consider extending such a rule to such other financial institutions in the future.

Therefore, in addition to focusing on input from those types of institutions that would be subject to an initial rulemaking, FinCEN is also specifically requesting comment from other institutions, such as money services businesses (including providers of prepaid access), insurance companies, casinos, dealers in precious metals, stones and jewels, non-bank mortgage lenders or originators, and other entities under FinCEN's regulations, in particular regarding issues related to identification and verification of customers as discussed in Section IV A. of this ANPRM. While these institutions currently are not mandated to obtain the minimum mandatory information required to identify customers as is mandated in regulations pertaining to depository institutions, brokers or dealers, and others described above, in some cases they still must, on a risk-based approach, obtain all relevant and appropriate customer-related information necessary to administer an effective anti-money laundering program.<sup>1</sup>

## **II. Background**

FinCEN exercises regulatory functions primarily under the Currency and Financial Transactions Reporting Act of 1970, as amended by the USA PATRIOT Act of 2001 (the Act) and other legislation, which legislative framework is commonly referred to as the "Bank Secrecy Act" (BSA),<sup>2</sup> which authorizes the Secretary of the Treasury (Secretary) to require financial institutions to keep records and file reports that "have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to

---

<sup>1</sup> See, e.g., "Anti-Money Laundering Programs for Insurance Companies," 31 CFR § 1025.210(b)(1).

<sup>2</sup> The BSA is codified at 12 U.S.C. § 1829b, 12 U.S.C. §§ 1951–1959, 18 U.S.C. §§ 1956, 1957, and 1960, and 31 U.S.C. §§ 5311–5314 and 5316–5332 and notes thereto, with implementing regulations at 31 CFR Chapter X. See 31 CFR § 1010.100(e).

protect against international terrorism”<sup>3</sup> The Secretary has delegated to the Director of FinCEN the authority to implement, administer and enforce compliance with the BSA and associated regulations.<sup>4</sup> FinCEN is authorized to impose AML program requirements on financial institutions,<sup>5</sup> as well as to require financial institutions to maintain procedures to ensure compliance with the BSA and FinCEN’s implementing regulations or guard against money laundering.<sup>6</sup>

As reflected in recent guidance and enforcement actions, the cornerstone of a strong BSA/AML compliance program is the adoption and implementation of internal controls, which include comprehensive CDD policies, procedures, and processes for all customers, particularly those that present a high risk for money laundering or terrorist financing.<sup>7</sup> As part of their basic business model, financial institutions seek at some level to identify their customers and their needs in order to best service them. The requirement that a financial institution know its customers, and the risks presented by its customers, is basic and fundamental to the development and implementation of an effective BSA/AML compliance program.<sup>8</sup> In particular, appropriate CDD policies, procedures, and processes assist a financial institution in identifying, detecting, and evaluating unusual or suspicious activity.<sup>9</sup> Furthermore, financial institutions may not be able to perform effective risk

---

<sup>3</sup> 31 U.S.C. § 5311.

<sup>4</sup> Treasury Order 180-01 (Sept. 26, 2002).

<sup>5</sup> 31 U.S.C. § 5318(h)(2).

<sup>6</sup> 31 U.S.C. § 5318(a)(2).

<sup>7</sup> FIN-2010-G001, “Guidance on Obtaining and Retaining Beneficial Ownership Information, March 5, 2010, p.1 (“Beneficial Ownership Guidance”). See also Federal Financial Institution Examination Council Bank Secrecy Act Anti-Money Laundering Examination Manual (2010) (“FFIEC Manual”), available at: [http://www.ffiec.gov/bsa\\_aml\\_infobase/documents/BSA\\_AML\\_Man\\_2010.pdf](http://www.ffiec.gov/bsa_aml_infobase/documents/BSA_AML_Man_2010.pdf); Financial Industry Regulatory Authority, Updated AML Template for Small Firms (Jan. 2010) (“FINRA Small Firm Template”), available at <http://www.finra.org/Industry/Issues/AML/p006340>; National Association of Securities Dealers, Notice to Members 02-21 at 7 (Apr. 2002) (“NASD NTM 02-21”).

<sup>8</sup> See supra note 7.

<sup>9</sup> See supra note 7.

assessments of their customers or account bases without conducting adequate due diligence throughout customer relationships.

As discussed in more detail below, despite the basis for a CDD obligation implicit in BSA requirements, such as the AML program and suspicious activity reporting (SAR) rules, FinCEN believes that issuing an express CDD rule that requires financial institutions to perform CDD, including an obligation to categorically obtain beneficial ownership information, may be necessary to protect the United States financial system from criminal abuse and to guard against terrorist financing, money laundering and other financial crimes. Despite efforts to highlight and clarify CDD and beneficial ownership expectations over the past several years, FinCEN is concerned that there is a lack of uniformity and consistency in the way financial institutions address these implicit CDD obligations and collect beneficial ownership information within and across industries. In the absence of a broader definition of the term “beneficial owner,” in particular a definition that can be applied across lines of business and customer categories in the context of CDD, it may be difficult for a financial institution to 1) identify the risk scenarios that would require the identification of beneficial owners; and 2) collect sufficient information to adequately address identified risk. The lack of consistency and uniformity also severely limits the ability of financial institutions to rely on the CDD efforts of other financial institutions, which would promote greater efficiency and eliminate instances of duplication of effort in transactions involving multiple financial institutions.

FinCEN believes that an explicit CDD program rule codifying, clarifying and (with respect to beneficial ownership information) strengthening existing CDD

expectations for U.S. financial institutions could enhance efforts to combat money laundering, terrorist financing, tax evasion and other financial crimes by:

- (i) strengthening the ability of financial institutions to identify and report illicit financial transactions and comply with all existing legal requirements, including FinCEN regulations implementing the BSA, the International Emergency Economic Powers Act (IEEPA),<sup>10</sup> and related authorities;
- (ii) promoting consistency in the implementation of, examination for, and enforcement of CDD program requirements across and within sectors of the U.S. financial system;
- (iii) assisting financial investigations by law enforcement, particularly by enhancing the availability of beneficial ownership and other information held by U.S. financial institutions;
- (iv) facilitating reporting and investigations in support of tax compliance; and
- (v) promoting global financial transparency and efforts to combat transnational illicit finance, consistent with international standards.

We are exploring an express CDD program rule as one key element of a broader U.S. Department of the Treasury strategy to enhance financial transparency in order to strengthen efforts to combat financial crime, including money laundering, terrorist financing, and tax evasion. Illicit actors continue to create legal entities, masking beneficial ownership information in order to facilitate access to the financial system and conduct financial crimes. Enhancing financial transparency to address such ongoing abuse of legal entities requires a broad approach. Other key elements of this strategy include: (i) improving the availability of beneficial ownership information of legal

---

<sup>10</sup> Title II of Pub. L. 95-223, codified at 50 U.S.C. §§ 1701-1707.

entities created in the United States; and (ii) facilitating global implementation of international standards regarding beneficial ownership of legal entities and trusts and CDD by financial institutions.

While these three elements of the U.S. government's strategy for combating criminal abuse of legal entities are proceeding independent of each other, together they establish a comprehensive approach to effectively combat the criminal abuse of legal entities. As such, strengthening CDD program requirements for financial institutions complements the Administration's ongoing work with Congress to adopt legislation that would require the collection of beneficial ownership information at the time that legal entities are created in the United States. These efforts are also consistent with Treasury's ongoing work with the Group of Twenty Finance Ministers and Central Bank Governors (G20), the Financial Action Task Force (FATF), and other financial centers around the world to clarify and strengthen implementation of international standards on identifying and understanding beneficial ownership, particularly with respect to CDD by financial institutions and the creation of legal entities.

*The Importance of CDD in Strengthening the Ability of Financial Institutions to Deter Illicit Transactions and Comply with Existing Legal Requirements*

The establishment and maintenance of strong AML programs that include CDD policies, procedures, and processes has been a long-standing regulatory and supervisory expectation of certain Federal financial regulatory agencies, and is implicit in regulations requiring financial institutions to maintain an effective BSA compliance program that is reasonably designed to assure and monitor compliance with the recordkeeping and reporting requirements of the BSA.<sup>11</sup> An effective CDD program should provide a

---

<sup>11</sup> See, e.g., FFIEC Manual, FINRA Small Firm Template, NASD NTM 02-21.

financial institution with sufficient information to develop a customer risk profile that can then be used by the financial institution to identify higher-risk customers and accounts, including customers and accounts subject to special or enhanced due diligence requirements.<sup>12</sup> The financial institution also should apply appropriate internal controls to identify and investigate unusual and suspicious activity and make an informed decision whether or not to file a SAR.<sup>13</sup> In the event that a financial institution files a SAR, CDD information collected could enhance the information included in the SAR and thereby enhance law enforcement's ability to initiate and pursue the successful investigation and prosecution of criminal activity. The failure to obtain adequate CDD information may impede a financial institution's ability to detect and report suspicious or unusual activity or provide information in a filing that is useful to law enforcement. Several of the consent orders and enforcement actions issued over the last few years have identified the lack of effective CDD policies, procedures, and processes, or the underlying elements thereof, as rendering AML programs inadequate, being a significant deficiency, and an underlying factor in supervisory actions.<sup>14</sup>

---

<sup>12</sup> See, e.g., FFIEC Manual, pp. 63-66; Beneficial Ownership Guidance; FIN-2006-G009, Application of the Regulations Requiring Special Due Diligence Programs for Certain Foreign Accounts to the Securities Industries (May 10, 2006) ("Finally, we remind securities and futures firms that the correspondent account rule supplements their anti-money laundering obligations – it does not supersede such obligations. A securities or futures firm's anti-money laundering program should contain policies, procedures, and controls for conducting appropriate, ongoing due diligence on foreign entities including, among other things, whether or not they are foreign financial institutions for the purposes of the correspondent account rule. Such policies, procedures, and controls should include, where appropriate, ascertaining the foreign entity's ownership and the nature of its business. In high-risk situations involving any account, an anti-money laundering program should include provisions for obtaining any necessary and appropriate information about the customers underlying such an account.")(emphasis added).

<sup>13</sup> See, e.g., 31 CFR § 1021.210(b)(2)(i).

<sup>14</sup> See, e.g., Pacific National Bank, Miami, FL, Comptroller of the Currency (OCC) #2011-021 (2011); HSBC Bank USA, N.A., McLean, VA, OCC #2010-199 (2010); Consent Order issued by the OCC in the Matter of Wachovia Bank, N.A., Charlotte, NC. OCC #2010-037 (2010); Public Savings Bank, Huntington Valley, PA, FDIC-11-107b (2011); First Financial Holding Co., Ltd, Taipei, Taiwan, Board of Governors of the Federal Reserve System (FRB), Docket Nos. 11-019-WA/RB-FH et seq. (2011); Bank Hapoalim, B.M., Tel Aviv, Israel, FRB, Docket Nos. 09-083-WA/RB-FB (2009); Westfield Bank, Westfield, MA, Office of Thrift Supervision Order No. NE-11-20 (2011); Chapin, Davis, Baltimore MD, FINRA Case



Although appropriate and adequate CDD policies, procedures, and processes have generally been an expectation of the Federal financial regulatory agencies, FinCEN believes that an express CDD program rule will strengthen compliance with and enforcement of CDD program requirements by clarifying, consolidating, and harmonizing such agencies' minimum expectations with respect to CDD policies, procedures, and processes, including the fundamental elements necessary for an effective CDD program.

As described in detail below, FinCEN believes that one fundamental element necessary for an effective CDD program is obtaining beneficial ownership information for all account holders, possibly subject to limited exceptions based upon lower risk. An express CDD program rule would enable FinCEN to establish such a clear requirement, thereby strengthening the ability of financial institutions to detect and address suspicious activity. Establishing a categorical beneficial ownership information requirement through a CDD program rule also would address current concerns regarding potential confusion or inconsistency across financial sectors regarding obligations to obtain beneficial ownership information outside of statutorily prescribed circumstances. Recent industry commentary and feedback indicated a lack of common understanding and consistent practice across the financial services industry for collecting beneficial

---

#2010021065701 (2011); FINRA, Letter of Acceptance, Waiver and Consent No. 2007007328101, Terra Nova Financial, LLC (2009); FINRA, Letter of Acceptance, Waiver and Consent No. 2007007139501, Synergy Investment Group, LLC (2009); FINRA, Letter of Acceptance, Waiver and Consent No. 2008011725001, ViewTrade Securities, Inc., (2009); In the Matter of I Trade FX, NFA Case No. 08-BCC-014 (filed April 24, 2009) (finding that I Trade failed to follow up on red flags and investigate suspicious activity, including following up where the customer's account had inflows of funds well beyond the known income or resources of the customer); In the Matter of Forex Capital Markets LLC (FXCM), NFA Case No. 11-BCC-016 (filed Aug. 12, 2011) (consent order based on allegations in the complaint that FXCM failed to conduct an investigation of suspicious activity involving unexplained wire activity, unexplained transfers between accounts, and deposits that were in excess of the clients' net worth and/or liquid assets identified on their opening account documents).

ownership information. For example, an industry survey conducted by FinCEN in 2008 indicated certain inconsistencies in financial institutions' practices related to collecting and maintaining beneficial ownership information both within and across industries. Moreover, industry commentary following the issuance of the Beneficial Ownership Guidance<sup>15</sup> indicated that there is at least some question about the nature of a financial institution's obligation to conduct CDD and to obtain beneficial ownership information.<sup>16</sup>

---

<sup>15</sup> Supra note 7.

<sup>16</sup> See, e.g., Letter from the Investment Company Institute, the Securities Industry and Financial Markets Association, and the Futures Industry Association (June 9, 2010), available at: <http://www.ici.org/pdf/24354.pdf>.

### *The Importance of CDD in Assisting Criminal Investigations*

As discussed previously, an effective CDD program is important in facilitating effective suspicious activity monitoring, which in turn facilitates the filing of quality SARs containing information that is both meaningful and useful to law enforcement. The lack of such information has been a source of growing concern to law enforcement in its efforts to conduct successful criminal investigations, both domestically and in conjunction with international counterparts. For example, the Chief of DOJ's Asset Forfeiture and Money Laundering Section (AFMLS) has stated that, with respect to international law enforcement cases, "the lack of beneficial ownership information can also hamper our ability to respond to requests for assistance from our foreign counterparts. This problem not only damages our reputation, but also undermines our efforts to join with foreign counterparts in a global offensive against organized crime and terrorism."<sup>17</sup>

### *The Importance of CDD in Facilitating Tax Reporting, Investigations and Compliance*

The collection of CDD information by financial institutions is also fundamentally important in facilitating tax reporting, investigations and compliance. For example, a variety of information may be needed in a tax enquiry including information held by banks and other financial institutions as well as information concerning the ownership of companies or the identity of interest holders in other persons or entities, such as partnerships and trusts. The United States has long been a global leader in establishing and promoting the adoption of international standards for transparency and information exchange to combat cross-border tax evasion and other financial crimes, and

---

<sup>17</sup> Shasky Calvery, Jennifer, "Priorities and Initiatives of the Asset Forfeiture and Money Laundering Section (AFMLS), U.S. Department of Justice" The SAR Activity Review, Trends, Tips, and Issues, p. 44. (May 2011), available at [http://www.fincen.gov/news\\_room/rp/files/sar\\_tti\\_19.pdf](http://www.fincen.gov/news_room/rp/files/sar_tti_19.pdf).

strengthening the CDD procedures of financial institutions is an important part of that effort. Moreover, the United States has an extensive network of agreements for the exchange of tax information that meet international standards. In addition, new tax reporting provisions under the Foreign Account Tax Compliance Act (FATCA)<sup>18</sup> would require overseas financial institutions to identify U.S. account holders, including foreign entities with significant U.S. ownership, and to report certain information about their accounts to the IRS.<sup>19</sup> In many cases, implementing these provisions will require the cooperation of foreign governments to address impediments under foreign law. Requiring U.S. financial institutions to obtain similar ownership information would put the United States in a better position to work with foreign governments to combat offshore tax evasion and other financial crimes.

*The Importance of CDD in Promoting Financial Transparency and Protecting the Financial System from Abuse Consistent with International Standards*

An effective CDD program supports effective suspicious activity monitoring, strengthens national anti-money laundering and counter-financing of terrorism (AML/CFT) regimes, and promotes the integrity of the international financial system as a whole. This importance was recognized by the G20 in several Leaders' Statements supporting the strengthening of CDD procedures. During the Pittsburgh Summit in 2009, the G20 asked the Financial Action Task Force (FATF)<sup>20</sup> to "help detect and deter the proceeds of corruption by prioritizing work to strengthen standards on customer due

---

<sup>18</sup> Hiring Incentives to Restore Employment Act of 2010, Pub.L. 111-147, Section 501(a).

<sup>19</sup> See generally, Internal Revenue Service, "Regulations Relating to Information Reporting by Foreign Financial Institutions and Withholding on Certain Payments to Foreign Financial Institutions and Other Foreign Entities," REG-121647-10 (February 8, 2012), available at <http://www.irs.gov/pub/newsroom/reg-121647-10.pdf>.

<sup>20</sup> The FATF, an inter-governmental organization of which the United States, thirty-four other jurisdictions and two regional organizations are members, is the global standard setter and policy-making body for AML/CFT. [http://www.fatf-gafi.org/pages/0,2987,en\\_32250379\\_32235720\\_1\\_1\\_1\\_1\\_1\\_1\\_1,00.html](http://www.fatf-gafi.org/pages/0,2987,en_32250379_32235720_1_1_1_1_1_1_1,00.html).

diligence.”<sup>21</sup> In November 2010, the G20 specifically urged the FATF to clarify and strengthen beneficial ownership as an element of CDD and as a key component of its Anti-Corruption Action Plan.<sup>22</sup> Additionally, effective adoption and implementation of CDD by financial institutions is consistent with the FATF’s global AML/CFT standards to combat money laundering and the financing of terrorism.<sup>23</sup>

The G20 recognition of the importance of CDD is also reflected in the work of other international standard setting bodies. In October 2001, the Basel Committee on Banking Supervision (BCBS) published a report on CDD, supporting the FATF’s efforts in fighting money laundering. The report states that sound CDD-related procedures are not only critical in combating financial crime, but “critical in protecting the safety and soundness of banks and the integrity of the banking systems.”<sup>24</sup> Similarly, in light of the FATF’s and other international organizations’ work, in October 2002 the International Organization of Securities Commissions (IOSCO) established a Task Force on Client Identification and Beneficial Ownership to survey existing securities regulatory regimes relating to the identification of clients and beneficial owners and to develop principles that address aspects of the CDD process.<sup>25</sup> In May 2004, IOSCO published a report describing principles for client identification and beneficial ownership in the securities

---

<sup>21</sup> Group of Twenty Finance Ministers and Central Bank Governors, “Leaders’ Statement: The Pittsburgh Summit” (September 24-25, 2009).

<sup>22</sup> See Group of Twenty Finance Ministers and Central Bank Governors, Annex III, “G20 Anti-Corruption Action Plan: G20 Agenda for Action on Combating Corruption, Promoting Market Integrity, and Supporting a Clean Business Environment,” p. 2 (November 11-12, 2010).

<sup>23</sup> Financial Action Task Force, “International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation – The FATF Recommendations,” February 2012, Recommendation 10, pp. 14-15, available at <http://www.fatf-gafi.org/dataoecd/49/29/49684543.pdf>. Following a review to update and strengthen global AML/CFT standards, the FATF issued its revised Recommendations on February 16, 2012.

<sup>24</sup> Basel Committee on Banking Supervision, “Customer Due Diligence for Banks,” 2001, p. 2, available at [www.bis.org/publ/bcbs85.pdf](http://www.bis.org/publ/bcbs85.pdf).

<sup>25</sup> International Organization of Securities Commissions, “Principles on Client Identification and Beneficial Ownership for the Securities Industry,” p. 2 (May 2004).

industry.<sup>26</sup> Among other things, the report noted that while “[t]he CDD process is a key component of securities regulatory requirements intended to achieve the principal objectives of securities regulation, the protection of investors; ensuring that markets are fair, efficient and transparent; and the prevention of the illegal use of the securities industry,” it also “contributes to the pursuit of other policy goals related to the prevention of the illegal use of the securities industry such as money laundering and the financing of terrorism that are generally within the competence of other authorities.”<sup>27</sup>

### **III. Treasury’s Efforts to Address CDD, Including Beneficial Ownership Issues**

The identification of beneficial ownership interests as noted previously has become increasingly relevant to AML/CFT efforts both within the United States and beyond its borders. Treasury also has consistently engaged with the Federal financial regulatory agencies and financial institutions for the purpose of understanding and clarifying the efforts of financial institutions with respect to CDD and identifying beneficial ownership interests. Most notably:

- i. Following the adoption of the Act in 2001, the Treasury Department and the federal financial regulatory agencies engaged the financial industry in order to develop customer identification program (“CIP”) and special due diligence requirements in accordance with Sections 326 and 312 of the Act, respectively.
- ii. In November 2006, FinCEN issued a report on “The Role of Domestic Shell Companies in Financial Crime and Money Laundering: Limited Liability Companies.” The report highlights the need for financial institutions to

---

<sup>26</sup> Id.

<sup>27</sup> Id.

assess and manage the risks of providing financial services to shell companies in order to identify and report potential money laundering activity.<sup>28</sup>

- iii. In 2008, FinCEN submitted a survey to industry to solicit feedback on how and when financial institutions obtain and retain beneficial ownership information. The survey results indicated certain inconsistencies in financial institutions' understanding of requirements related to collecting and maintaining beneficial ownership information both within and across industries.
- iv. In November 2009, the Department of the Treasury's then-Assistant Secretary, and current Under Secretary, David Cohen, testified before the Senate Committee on Homeland Security and Governmental Affairs and outlined Treasury's comprehensive plan, the elements of which are designed to enhance the transparency of legal entities with respect to beneficial ownership. Treasury's plan involves: (i) working with Congress to promote legislation that enhances transparency of legal entities in the company formation process; (ii) clarifying and strengthening requirements for U.S. financial institutions with respect to the beneficial ownership of legal entity accountholders, and (iii) clarifying and facilitating the implementation of international standards regarding beneficial ownership, including with respect to company formation by jurisdictional authorities and CDD by financial institutions.

---

<sup>28</sup> Financial Crimes Enforcement Network, "The Role of Domestic Shell Companies in Financial Crime and Money Laundering: Limited Liability Companies," (November 2006), available at [http://www.fincen.gov/news\\_room/rp/files/LLCAssessment\\_FINAL.pdf](http://www.fincen.gov/news_room/rp/files/LLCAssessment_FINAL.pdf).

- v. In March 2010, FinCEN, jointly with the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the Securities and Exchange Commission, and in consultation with staff of the Commodity Futures Trading Commission, issued the Beneficial Ownership Guidance to clarify and consolidate existing regulatory expectations for obtaining beneficial ownership information for certain accounts and customer relationships.<sup>29</sup>
- vi. In November 2011, the Department of the Treasury's Assistant Secretary Daniel Glaser testified before the Senate Committee on the Judiciary, Subcommittee on Crime and Terrorism to discuss efforts to combat international organized crime. In his testimony, Assistant Secretary Glaser discussed the importance of financial transparency in mitigating threats posed by transnational organized crime and other forms of illicit finance as well as the Treasury Department's work to clarify and strengthen CDD requirements for financial institutions.
- vii. In February 2012, the Department of the Treasury's Deputy Assistant Secretary Luke Bronin testified before the House Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security to discuss key vulnerabilities in the U.S. financial system related to transnational organized crime. The testimony included highlighting the importance of CDD as essential to an AML regime. Additionally, Deputy Assistant Secretary Bronin discussed the importance of effective

---

<sup>29</sup> See generally, supra note 7.



implementation of CDD and the need to clarify, consolidate, and strengthen CDD requirements for financial institutions.

#### **IV. Elements of CDD**

Based on the past efforts outlined above and ongoing industry and regulatory consultation and outreach, FinCEN believes that an effective CDD program includes the following elements:

- (i) Conducting initial due diligence on customers, which includes identifying the customer, and verifying that customer's identity as appropriate on a risk basis, at the time of account opening;
- (ii) understanding the purpose and intended nature of the account, and expected activity associated with the account for the purpose of assessing risk and identifying and reporting suspicious activity;
- (iii) except as otherwise provided, identifying the beneficial owner(s) of all customers, and verifying the beneficial owner(s)' identity pursuant to a risk-based approach; and
- (iv) conducting ongoing monitoring of the customer relationship and conducting additional CDD as appropriate, based on such monitoring and scrutiny, for the purposes of identifying and reporting suspicious activity.

FinCEN's understanding of how U.S. financial institutions currently perform certain aspects of CDD in accordance with these elements under existing regulations and FinCEN's proposal for codifying these elements in a CDD rule are described below.

##### **A. Identification and Verification of the Customer**

Various AML obligations are dependent on financial institutions at least obtaining, and in some instances verifying, certain basic customer identification

information. For example, financial institutions subject to the CIP rules implementing Section 326 of the Act must identify and verify the identity of certain “customers” seeking to open an account.<sup>30</sup> In identifying such customers, a financial institution must obtain the customer’s name; for individuals, date of birth, address, and an identification number (e.g., taxpayer identification number, passport number, or alien identification card number) and for a person other than an individual (such as a corporation, partnership or trust), a principal place of business, local office, or other physical location, and identification number.<sup>31</sup> For the purposes of the CIP requirement, the definition of “customer” is the accountholder, regardless of whether the accountholder is also the beneficial owner.<sup>32</sup>

In addition to identifying customers covered by the CIP rule, a financial institution’s CIP must include risk-based procedures for verifying the identity of each customer to the extent reasonable and practicable such that the institution can form a reasonable belief that it knows the true identity of each customer.<sup>33</sup> These procedures must be based on the institution's assessment of the relevant risks, including those presented by the various types of accounts maintained by the institution, the various methods of opening accounts provided by the institution, the various types of identifying information available, and the institution's size, location, and customer base.<sup>34</sup> Further, the CIP must include procedures that describe when the financial institution will use documents, non-documentary methods, or a combination of both methods to verify a

---

<sup>30</sup> See 31 CFR §§ 1020.220(a), 1023.220(a), 1024.220(a), and 1026.220(a).

<sup>31</sup> See 31 CFR §§ 1020.220(a)(2)(i)(A), 1023.220(a)(2)(i)(A), 1024.220(a)(2)(i)(A), and 1026.220(a)(2)(i)(A).

<sup>32</sup> See, e.g., 31 CFR § 1023.100(d) and Customer Identification Programs for Broker-Dealers, 68 FR 25,113, 116 (May 9, 2003).

<sup>33</sup> 31 CFR §§ 1020.220(a)(2), 1023.220(a)(2), 1024.220(a)(2), and 1026.220(a)(2).

<sup>34</sup> Id.

customer's identity.<sup>35</sup> In addition, for customer relationships where the customer is not an individual, based on the financial institution's risk assessment of the account, the financial institution must obtain information about the individuals with authority or control over such account.<sup>36</sup> Consistent with these explicit regulatory requirements and guidance, FinCEN is exploring an express customer identification and risk-based verification component of CDD, which does not create a new CIP obligation, but would be satisfied by compliance with the financial institution's current CIP obligations. The identification and verification component of a CDD requirement may state, generally:

covered financial institutions shall identify, and on a risk-basis verify, the identity of each customer, to the extent reasonable, such that the institution can form a reasonable belief that it knows the true identity of each customer.

If a financial institution is compliant with its current CIP obligations, a financial institution would be compliant with this part of the CDD program rule and therefore there will be no new or additional regulatory obligation. FinCEN notes that, although certain customers are exempt from the CIP requirements (*i.e.*, the customers that are excluded from the definition of "customer" for purposes of the CIP requirement),<sup>37</sup> those customers would not be exempt from the requirements to understand the nature and

---

<sup>35</sup> 31 CFR §§ 1020.220(a)(2)(ii), 1023.220(a)(2)(ii), 1024.220(a)(2)(ii), and 1026(a)(2)(ii).

<sup>36</sup> 31 CFR §§ 1020.220(a)(2)(ii)(C); 1023.220(a)(2)(ii)(C); 1024.220(a)(2)(ii)(C); and 1026.220(a)(2)(ii)(C). This verification method applies only when the financial institution cannot verify the customer's true identity using the verification methods described in the rule. However, the preamble to the final CIP Rule noted that, in addition to the requirements of this paragraph, "the due diligence procedures required under other provisions of the BSA or the securities laws may require broker-dealers to look through to owners of certain types of accounts." Customer Identification Programs for Broker-Dealers, 68 FR 25113, 116, n. 30 and accompanying text (May 9, 2003).

<sup>37</sup> Among other persons, the definition of "customer" for purposes of the CIP requirement excludes: existing customers, as long as the financial institution has a reasonable belief that it knows the customer's true identity; Federally regulated banks; banks regulated by a state bank regulator; governmental entities; and publicly traded companies. *See, e.g.*, 31 CFR §§ 1020.100(c)(2), 1023.100(d)(2), 1024.100(c)(2), 1026.100(d)(2).

purpose of the account and to conduct ongoing monitoring. As discussed below, FinCEN is seeking comment on whether the beneficial ownership requirement should apply with respect to those exempt customers.

*B. Understanding the Nature and Purpose of the Account*

As a general business matter, financial institutions seek to understand the needs of their customers in order to serve them. Financial institutions should understand the nature and purpose of an account or customer relationship so that they can appropriately assess the risk presented by the relationship and appropriately monitor for suspicious activity. Pursuant to suspicious activity reporting procedures, financial institutions compare the available facts of a transaction or series of transactions, including their type, volume, and possible purpose, against the type of transaction in which the customer would normally be expected to engage.<sup>38</sup> In other words, in discerning whether a transaction or series of transactions is suspicious, a financial institution must determine if the activity varies from the normal activities or activities appropriate for the particular customer or class of customer, and has no apparent reasonable explanation.<sup>39</sup> FinCEN has also issued guidance highlighting the need to understand the nature and purpose of an account, in order to assess the risk and determine the appropriate level of due diligence for the account.<sup>40</sup> Accordingly, and in keeping

---

<sup>38</sup> See, e.g., 31 CFR §§ 1020.320(a)(2)(iii), 1023.320(a)(2)(iii), 1024.320(a)(2)(iii), and 1026.320(a)(2)(iii).

<sup>39</sup> See 61 FR 4328 (February 5, 1996).

<sup>40</sup> See, e.g., FIN-2006-G009, Application of the Regulations Requiring Special Due Diligence Programs for Certain Foreign Accounts to the Securities Industries (May 10, 2006). (“A clearing firm’s anti-money laundering program should contain risk-based policies, procedures, and controls for monitoring introduced business, which includes knowing whether the introducing firm may establish or maintain correspondent accounts for foreign financial institutions and the nature and scope of that business, including the nature of the introducing firm’s account base.”) See also FIN-2008-G002, Customer Identification Program Rule

with the SAR obligation and related regulatory guidance, FinCEN is specifically considering including an express obligation to understand the nature and purpose of the account or customer relationship as an element of a CDD program rule.

This element of a CDD program rule may state, generally:

covered financial institutions 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.

Because in FinCEN's view, a financial institution must understand the nature and purpose of an account in order to assess risk and satisfy its obligation to appropriately detect and report suspicious activity, FinCEN does not believe that this will impose a new or additional requirement.

### C. Obtaining Beneficial Ownership Information

#### Potential Beneficial Ownership Obligation Under a CDD Program Rule

Under existing FinCEN regulations, there are two limited situations where financial institutions are expressly obligated to obtain beneficial ownership information. Specifically, under the rules implementing Section 312 of the Act, there are two situations where certain "covered financial institutions"<sup>41</sup> are required to take reasonable steps to obtain beneficial ownership information: (i) covered financial institutions that offer private banking accounts are required to take reasonable steps to identify the nominal and beneficial owners of such accounts;<sup>42</sup> and (ii) covered financial institutions

---

No-Action Position Respecting Broker-Dealers Operating Under Fully Disclosed Clearing Agreements According to Certain Functional Allocations (Mar. 4, 2008).

<sup>41</sup> 31 CFR § 1010.605(e)(1).

<sup>42</sup> 31 CFR § 1010.620(b)(1).

that offer correspondent accounts for certain foreign financial institutions are required to take reasonable steps to obtain information from the foreign financial institution about the identity of any person with authority to direct transactions through any correspondent account that is a payable-through account, and the sources and beneficial owner of funds or other assets in the payable-through account.<sup>43</sup>

In addition to these explicit requirements to obtain beneficial ownership information, under the CIP rules, a financial institution's CIP must address situations where, based on the financial institution's risk assessment of a new account opened by a customer that is not an individual, the financial institution will obtain information about individuals with authority or control over such account.<sup>44</sup> Moreover, FinCEN and the federal financial regulatory agencies have issued guidance stating that there are other situations when financial institutions should consider whether it is appropriate to obtain beneficial ownership information.<sup>45</sup>

Consistent with these explicit and implicit beneficial ownership information obligations, FinCEN is considering expanding the requirement to obtain beneficial ownership information to all customers. Such a beneficial ownership information requirement would constitute an essential element of an effective CDD program. This element of the CDD program rule may state, generally:

Except as otherwise provided, financial institutions shall identify the beneficial owner(s) of all customers, and verify the beneficial owners' identity pursuant to a risk-based approach.

---

<sup>43</sup> 31 CFR § 1010.610(b)(1)(iii)(A).

<sup>44</sup> See *supra* note 36.

<sup>45</sup> *Supra* note 7.

FinCEN anticipates that it would provide additional guidance regarding customers that may be considered low risk (and therefore exempt for purposes of this beneficial ownership requirement), as well as identifying types of customers that may simply necessitate identification of the beneficial owner, and those that are of heightened risk requiring both identification and verification of the beneficial owner. Similar to the CIP requirement, FinCEN also anticipates that it would provide guidance to financial institutions on what they should do in the event they are unable to identify or verify a beneficial owner.

This component of the CDD program rule would create a new express regulatory obligation to obtain beneficial ownership information, given the limited circumstances in which financial institutions are currently expressly obligated to obtain this information.

#### Potential Additional Definition of Beneficial Owner

In the limited instances where reasonable steps to obtain beneficial ownership information are currently required, FinCEN has defined the beneficial owner of an account as “an individual who has a level of control over, or entitlement to, the funds or assets in the account that, as a practical matter, enables the individual, directly or indirectly, to control, manage or direct the account...”<sup>46</sup> This definition was designed specifically for accounts referred to above where beneficial ownership information is required and may not be useful for application to the wide range of other accounts offered by financial institutions.

In addition to FinCEN’s current definition of beneficial owner, federal regulatory agencies<sup>47</sup> and various international organizations and foreign jurisdictions define

---

<sup>46</sup> 31 CFR § 1010.605(a).

<sup>47</sup> Securities Exchange Act Rule 13d-3, 17 CFR § 240.13d-3.

beneficial ownership in ways that may be useful in assisting financial institutions with understanding beneficial ownership in the CDD framework.<sup>48</sup> For purposes of the CDD program requirement discussed above, and not affecting the limited instances in which beneficial ownership information is currently required, FinCEN is considering a definition to be used that would, in the case of legal entities, 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 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 anticipates that such a specific and limited definition of beneficial ownership may be necessary to accommodate the vast array of complex ownership structures of legal entities<sup>49</sup> that may become customers of financial institutions. FinCEN further

---

<sup>48</sup> See e.g., FATF Recommendations, General Glossary, p. 110, available at <http://www.fatf-gafi.org/dataoecd/49/29/49684543.pdf>; European Parliament and Council, “Third European Union Money Laundering Directive,” 2005/60/EC, Article 3(6) (October 26, 2005); United Kingdom Money Laundering Regulations, 2007 No.2157 Part 2, p. 10 (December 15, 2007).

<sup>49</sup> Legal entities would generally include all entities that are established or organized under the laws of a state or of the United States, including corporations, limited liability companies, limited partnerships, and similar entities.



anticipates that this specific limited definition would be applied generally to legal entity customers pursuant to the explicit beneficial ownership requirement described above, while the existing definition would continue to be applied for purposes of 31 CFR §§1010.610 and 1010.620.

FinCEN emphasizes that the potential new beneficial ownership requirement and definition discussed in this ANPRM is not intended to supersede existing BSA obligations to obtain beneficial ownership information.

#### Potential Exemptions from Beneficial Ownership Requirement

FinCEN recognizes that there may be instances in which obtaining beneficial ownership information about a legal entity customer may not be warranted given the AML/CFT risk or other factors associated with that entity. For example, FinCEN is considering whether legal entity customers that are exempt from identification as customers under the CIP Rules (e.g., financial institutions regulated by a federal regulatory agency and publicly traded companies), should also be exempt from the beneficial ownership requirement, both because beneficial ownership information for these entities may not be particularly relevant to the money laundering risks associated with such entities, and because their beneficial ownership information is readily available to law enforcement and regulators. Accordingly, FinCEN seeks comment on a potential exemption from the beneficial ownership requirement for legal entity customers that are exempt under the CIP Rules.

FinCEN recognizes that financial institutions may not have beneficial ownership information on existing customers (which are also exempt from the CIP Rules), outside those requiring such information, and is also considering whether and how a potential

beneficial ownership requirement would apply to existing customers of financial institutions. In this regard, FinCEN is considering adopting a risk-based approach similar to that utilized in the case of the CIP Rules, whereby this potential requirement would apply to all new customers. With respect to existing customers, FinCEN is seeking comment on how a beneficial ownership identification requirement could be phased into ongoing CDD.

#### Beneficial Owners of Assets in Accounts Held by Intermediaries

Given the particular money laundering risks posed by some legal entities, the beneficial ownership requirement and potential definition of “beneficial owner” under consideration as discussed above are designed to identify the beneficial owner of a legal entity customer, as distinct from the beneficial owner of assets in an account. However, there may be instances in which obtaining information about the beneficial owners of assets in an account may be warranted instead, such as where a legal entity (e.g. a foreign or regulated or unregulated domestic financial institution) opens an account for the benefit of its customers (as opposed to for its own benefit), as those customers could pose a money laundering risk through their ability to access the financial system through that account relationship. In such instances, FinCEN recognizes that the potential definition of “beneficial owner” described above may not generally be relevant or appropriate for AML/CFT purposes.

Accordingly, FinCEN seeks comment on potential alternative definitions of “beneficial owner” in instances where obtaining information about the beneficial owners of assets in an account may be warranted. FinCEN also seeks comment on how financial institutions currently address the potential money laundering risks presented by the

beneficial owners of assets in an account pursuant to financial institutions' existing legal obligations and expectations under FinCEN's regulations and related guidance, whether there are any issues or practical difficulties in doing so, and whether further guidance or rulemaking on this particular issue would be beneficial.

FinCEN recognizes that there may be impediments to identifying the beneficial owner of assets in an account in certain instances and account structures (*e.g.*, omnibus accounts or other intermediated accounts), such as where there are layers of intermediated relationships or where there are numerous beneficial owners of assets in the account. FinCEN seeks comment on the difficulties associated with identifying beneficial owners of assets of such an account. FinCEN further requests comment on whether a potential explicit obligation to identify the beneficial owners of assets in an account should be based upon the financial institution's risk assessment of the customer, or whether a more specific obligation would be appropriate.

#### Customer Acting as an Agent

FinCEN believes that, although the use of legal entities to mask beneficial ownership presents the primary illicit finance vulnerability and accordingly the need for beneficial ownership identification, the question of beneficial ownership can also arise in the context of accounts established by an individual or entity (*e.g.* law or accounting firm) which could be acting on behalf of another individual or individuals without disclosing this fact. FinCEN is considering how to best address this potential vulnerability. A possible solution would be to require any individual or entity (other than a regulated financial institution) opening an account at a financial institution to state that he, she, or it is not acting on behalf of any other person. Such approach would be

analogous to longstanding FinCEN transaction reporting requirements, under which a financial institution must record identifying information with respect to “any person or entity on whose behalf such transaction is to be effected.”<sup>50</sup> For individuals and entities acting on behalf of another person, the beneficial ownership element of a CDD program requirement would apply to the person on whose behalf the account is being opened. FinCEN seeks comment on this approach, as well as suggestions for other approaches.

#### Obtaining and Verifying Beneficial Ownership Information

FinCEN anticipates that, in general, the individual opening the account on behalf of a legal entity customer will identify its beneficial owner, and that covered financial institutions will generally be able to rely upon the beneficial ownership information presented by the customer, absent information that indicates reason to question the veracity of the information or an elevated risk of money laundering or terrorist financing. Verification of the beneficial owner could have two possible meanings. One meaning would require verifying the identity of the individual identified by the customer as the beneficial owner of the account, i.e., verifying the existence of the identified beneficial owner. This would presumably be accomplished by using procedures similar to those currently required pursuant to the CIP Rules (e.g., obtaining a copy of a government-issued identity document of the individual), but applied to the identified beneficial owner rather than to an individual customer. The second possible meaning would require that the financial institution verify that the individual identified by the customer as the beneficial owner, is indeed the beneficial owner of the customer, i.e., to verify the status of the identified individual. FinCEN is considering that, in each case the required procedures would need to be reasonable and practicable, and sufficient to form a

---

<sup>50</sup> See, 31 CFR § 1010.312.

reasonable belief that the financial institution knows the identity or status, as the case may be, of the beneficial owner. FinCEN is seeking comment below regarding these two possible meanings, and the appropriateness and challenges associated with each.

*D. Conducting Ongoing CDD*

Due diligence is an on-going obligation, and for this reason financial institutions should have in place policies and procedures to maintain the accuracy of their customer risk profiles and risk assessments. Financial institutions should update CDD information as necessary based on the overall risk of the customer, and may need to update or conduct additional CDD in association with specific events that would result in material changes in a customer's risk profile, such as volume of alerts or red flags relating to the account, change in control, change in occupation or account purpose, or the occurrence of a transaction or activity that is unusual for the customer.

Pursuant to suspicious activity reporting requirements, financial institutions must report a transaction that: (i) involves funds derived from illegal activity or is conducted to hide or disguise funds or assets derived from illegal activity as part of a plan to violate or evade any federal law or regulation or to avoid any federal transaction reporting requirement; (ii) is designed to evade any requirements of the BSA or its implementing regulations; or (iii) has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the financial institution knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction.<sup>51</sup>

---

<sup>51</sup> See generally, 31 CFR §§ 1020.320(a)(2)(i)-(iii), 1023.320(a)(2)(i)-(iii), 1024.320(a)(2)(i)-(iii), and 1026.320(a)(2)(i)-(iii).

Financial institutions' ongoing monitoring and due diligence are critical elements of effectively complying with current suspicious activity reporting requirements.

FinCEN is exploring an ongoing monitoring and due diligence requirement as an express element of a CDD program rule. This element of the CDD program rule may state:

Consistent with its suspicious activity reporting requirements, covered financial institutions shall establish and maintain appropriate policies, procedures, and processes for conducting on-going monitoring of all customer relationships, and additional CDD as appropriate based on such monitoring for the purpose of the identification and reporting of suspicious activity.

FinCEN understands that the obligations in this potential element of an ongoing CDD monitoring rule are already included in the requirements contained in the AML program and SAR rules and, therefore, there would be no new or additional requirement.

## **V. Issues for Comment**

Existing CDD requirements are an implicit, but essential, part of complying with AML program regulations. However, as discussed above, FinCEN is considering expressly requiring that financial institutions conduct CDD as part of their existing AML program requirements, and as part of this requirement, collect beneficial ownership information for all customers, with limited exceptions. For this reason, FinCEN is seeking comment from industry and other interested parties concerning the implementation of CDD programs in general pursuant to existing rules and guidance described above. FinCEN is also interested in better understanding what types of CDD

information are currently collected, specifically in relation to beneficial ownership information, and under what circumstances the information is collected.

1. Aside from policies and procedures with respect to beneficial ownership, what changes would be required in a financial institution's CDD processes as a result of the adoption by FinCEN of an express CDD rule as described in this ANPRM?

Aside from beneficial ownership, FinCEN believes that the other elements of a potential CDD rule as described above are already being implemented by a substantial number of financial institutions, due to three of the four proposed elements of CDD being explicit or implicit under existing FinCEN regulations and related regulatory and supervisory expectations. For this reason, FinCEN believes an explicit regulatory requirement with respect to these elements of CDD should not be onerous, particularly for those industries where CIP requirements are already in place. However, FinCEN is interested in obtaining a better understanding from all industry sectors of anticipated issues and concerns that may arise from creating an explicit regulatory requirement with respect to these three potential elements of CDD, including any additional costs that would be incurred to comply with these three elements.

2. What changes would be required in a financial institution's CDD process, as a result of the adoption by FinCEN of a categorical requirement to obtain (and in some cases verify) beneficial ownership information, as described in this ANPRM? Is FinCEN's suggested alternate definition of "beneficial owner," discussed above, a clear and easily understood definition for the purpose of obtaining beneficial ownership information for legal entities in the context of complying with a CDD obligation? If not, would you suggest a better definition? In addition, how do financial institutions currently address the money laundering risks that might be presented by the beneficial owners of assets in an account held by an intermediary, what difficulties are presented in this regard, would further guidance or regulation be appropriate, should any requirement in this area be risk-based, and how should FinCEN define beneficial ownership for this purpose?

FinCEN is seeking comment on the impact on financial institutions of the adoption of a categorical requirement to obtain beneficial ownership information for most customers, as described in this ANPRM. FinCEN is also seeking comment as to whether

financial institutions have concerns regarding the proposed alternative definition of beneficial ownership discussed above and whether it may cause difficulties with financial institution compliance with a categorical beneficial ownership obligation. In addition, FinCEN is seeking comment on whether it would be confusing to adopt an alternate definition of beneficial ownership as proposed for a general CDD program requirement, except in the limited instances in which the current definition for beneficial owner that is required pursuant to 31 CFR §§ 1010.610 and 1010.620 would continue to be used, and whether the potential beneficial ownership requirement and associated potential definition would be relevant with respect to certain types of intermediated accounts, such as omnibus accounts, and if not, what definition would be more appropriate. Also, please comment on appropriate exemptions from a potential beneficial ownership requirement, including with respect to existing customers, and the practicality of phasing a requirement into ongoing CDD. Please also comment on possible approaches to preventing the misuse of a financial institution account by an individual or entity acting on behalf of another without disclosing this fact. Finally, please comment regarding the costs of complying with a categorical beneficial ownership requirement, in the case where the beneficial ownership requirement would apply only to new customers, as well as where it would apply to all existing customers.

3. Under what circumstances does a financial institution currently obtain beneficial ownership information on a customer or accountholder?

Current FinCEN regulations require financial institutions to obtain beneficial ownership information as a component of CDD on private banking and foreign correspondent customers. Existing BSA obligations, including regulatory and supervisory expectations, require financial institutions to collect this information, as



appropriate, as part of CDD/EDD on higher-risk customers. For this reason, FinCEN requests information from industry regarding the circumstances under which a financial institution currently determines that it is necessary or prudent to obtain beneficial ownership information from a customer, who is neither a private banking nor foreign correspondent customer, whether as part of their customer identification program procedures, anti-money laundering program requirements, transaction/account monitoring procedures, or for other purposes. For example, are there types of customers, types of accounts, levels of account activity, forms of suspicious activity, or other indicia that lead a financial institution to make decisions as to when there may be no risk, moderate risk or substantial risk in not obtaining beneficial ownership information?

4. How do financial institutions currently obtain beneficial ownership information?

FinCEN requests information on how financial institutions collect such information and, specifically, what methods, both documentary and non-documentary, are used to identify and/or verify the beneficial owner (e.g. public documents, identification numbers, etc.). When or if financial institutions collect beneficial ownership information other than as specifically required pursuant to 31 CFR §§ 1010.610 and 1010.620, FinCEN requests comments on whether financial institutions use the same definition of beneficial ownership as that which is applicable under these regulations for private banking and certain foreign correspondent accounts, or other definitions, such as those referenced above in the description of a potential additional definition of beneficial owner.

5. Is the current, primarily risk-based, approach to a CDD program requirement resulting in varied approaches across industries or varied approaches within industries?

FinCEN is seeking comment on whether financial institutions are aware of varied approaches either across or within industries relating to current CDD expectations, including beneficial ownership obligations. For example, FinCEN seeks comment on whether financial institutions are aware of circumstances in which one financial institution may turn down an account due to lack of beneficial ownership information, later to learn that the accountholder has established an account with another institution that did not require the accountholder to provide beneficial ownership information. Alternatively, are there circumstances under which financial institutions have concerns about their ability to rely on CDD undertaken by other financial institutions due to inconsistent practices or expectations?

6. Are there other elements of CDD that would be more effective in facilitating compliance with AML program requirements and other obligations under FinCEN's regulations?

The four elements of CDD listed above were selected based on consistency with existing regulatory requirements and expectations; the importance of beneficial ownership information and other elements of CDD to financial investigations pertaining to money laundering, terrorist financing, and tax evasion, and IEEPA violations; and, consistency with international standards and financial transparency. FinCEN seeks comment on whether other elements of CDD, aside from those listed in this ANPRM would be more effective and efficient in advancing these interests.

7. What information should be required in order to identify, and verify on a risk basis, the identity of the beneficial owner?

Should the required identification information on beneficial owners be consistent with the customer identification information currently required under the CIP regulations

(i.e., name, address, date of birth and identification number) or should additional information be required? In addition, what should be required of financial institutions to verify the identity of the beneficial owner? FinCEN is exploring two possible meanings for verification of beneficial ownership information: one meaning would require verifying the identity of the natural person identified by the customer to be the beneficial owner. This would require that the financial institution, for example, obtain a copy of a government-issued identification document bearing a photograph of the individual identified by the customer as its beneficial owner, to verify that the individual exists. The second meaning would require verifying that the individual identified by the customer as its beneficial owner is, in fact, the beneficial owner of the legal entity customer. FinCEN is seeking comment as to challenges posed by each of these possible verification requirements.

8. Are there any products and services, or customers that should be exempted from the requirement to obtain beneficial ownership information due to there being (i) substantially less risk of money laundering or terrorist financing associated with the account;(ii) limited value associated with the beneficial ownership information in mitigating money laundering/terrorist financing risk; or (iii) an inability to obtain the required information due to other legal requirements?

FinCEN is seeking comment to determine if there are certain types of, or thresholds for, products, services, or customers, with respect to which a financial institution should not be required to obtain beneficial ownership information, due to substantially reduced risk. For example, should customers that are exempt from the CIP Rules, also be exempt from beneficial ownership identification? Additionally, FinCEN is seeking comment as to whether there are certain products or services offered by financial institutions that, due to ancillary statutory or regulatory obligations, would prohibit compliance with a CDD requirement to obtain beneficial ownership information as

outlined in this ANPRM. FinCEN is also seeking comment on whether there are significant differences in risks or perceived ability to obtain beneficial ownership information with respect to foreign versus domestic customers and/or beneficial owners.

9. What financial institutions should not be covered by a CDD rule based on products and services offered?

FinCEN is considering whether a CDD program rule as described in this ANPRM should be more widely applicable to financial institutions not currently subject to a CIP Rule, and is seeking comments from industry and interested parties to determine if there are types of financial institutions currently covered under FinCEN's regulations and subject to SAR and AML Program rules, that should not be covered by a CDD obligation, either because the products and services offered are not consistent with the information sought in a CDD obligation or for any other reason.

10. What would be the impact on consumers or other customers of a CDD program including the elements identified above?

FinCEN is seeking comment regarding the potential impact on consumers or customers of financial institutions. What are the benefits and challenges of the above suggested CDD requirements that may exist between financial institutions and customers taking into account the objective of increasing the inclusion in the financial system of traditionally underserved individuals? Will a CDD program affect the willingness or ability of consumers or others to use or access certain financial institutions or services?

## **VI. Conclusion**

With this ANPRM, FinCEN is seeking input on the questions set forth above. FinCEN also is soliciting comments on the impact to law enforcement or authorities, regulatory agencies, and consumers, and welcomes comments on all aspects of the ANPRM, and all interested parties are encouraged to provide their views.

Date: February 28, 2012

---

James H. Freis, Jr.  
Director,  
Financial Crimes Enforcement Network

**[FR Doc. 2012-5187 Filed 03/02/2012 at 8:45 am; Publication Date: 03/05/2012]**