

MEMO# 26300

July 13, 2012

FinCEN Hearing (July 31) on Proposed Rulemaking Regarding Customer Due Diligence

[26300]

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TO: AML COMPLIANCE WORKING GROUP No. 6-12
TRANSFER AGENT ADVISORY COMMITTEE No. 42-12
BROKER/DEALER ADVISORY COMMITTEE No. 33-12
BANK, TRUST AND RETIREMENT ADVISORY COMMITTEE No. 30-12 RE: FINCEN HEARING
(JULY 31) ON PROPOSED RULEMAKING REGARDING CUSTOMER DUE DILIGENCE

On July 10, 2012, the Financial Crimes Enforcement Network ("FinCEN") announced the first in an intended series of public hearings to gather information on its Advance Notice of Proposed Rulemaking ("ANPRM") on Customer Due Diligence ("CDD") Requirements for Financial Institutions published in the Federal Register on March 5, 2012. [\[1\]](#) FinCEN is seeking additional information. The hearing will be held on July 31, 2012, beginning at 9:30 a.m. EST and ending at 5 p.m. EST, at the U.S. Department of Treasury in Washington, D.C.

Requests to attend or participate in the hearing must be received on or before July 24, 2012. In general, FinCEN will make all written comments, including outlines, publicly available. The public hearing also will be made available via webcast. The Institute intends to submit a request to attend the hearing.

ANPRM

On March 5, 2012, FinCEN published the ANPRM to solicit comment on a wide range of questions for the development of a CDD rule that FinCEN stated would codify, clarify, consolidate, and strengthen existing CDD regulatory requirements and supervisory expectations, and establish a categorical requirement for financial institutions to identify the beneficial owners of their customers, subject to risk-based verification. The comment period for the CDD ANPRM ended on June 11, 2012.

Purpose of Hearing and Information Sought by FinCEN

FinCEN states that it has identified law enforcement comment letters supporting a

requirement for financial institutions to identify beneficial owners on the basis that such a requirement would enhance their ability to conduct financial crime investigations. FinCEN also states that it identified several issues raised by commenters. In addition to other topics or concerns a respondent wishes to address, FinCEN specifically seeks clarification, including examples where appropriate, on the following issues:

1. Multiple comment letters indicated that some financial institutions already identify beneficial ownership of their customers in certain circumstances. FinCEN seeks information as to how and when those financial institutions obtain beneficial ownership information, including, but not limited to: (i) the circumstances in which financial institutions obtain beneficial ownership information other than in connection with the regulations implementing Section 312 of the USA Patriot Act; (ii) the basis for determining that such circumstances warrant the collection of beneficial ownership information; (iii) the specific procedures currently used to obtain beneficial ownership information in such circumstances, including the definition of “beneficial owner” used; and (iv) how those circumstances and procedures vary across different lines of business, product type, customer profile and geographic location.
2. FinCEN seeks information as to whether and how financial institutions currently verify beneficial ownership information, including but not limited to, whether and how financial institutions verify: (i) the identity of the individual identified by the customer as the beneficial owner of the customer; and (ii) that the individual identified by the customer as the beneficial owner, is indeed the beneficial owner of the customer.
3. FinCEN seeks information on the costs associated with obtaining beneficial ownership information under current practices, and the expected costs associated with obtaining beneficial ownership information as described in the ANPRM.
4. FinCEN seeks information as to the costs associated with verifying beneficial ownership information under current practices, and the expected costs associated with verifying beneficial ownership information as described in the ANPRM.
5. Multiple comment letters expressed concern regarding the definition of “beneficial owner” described in the ANPRM. FinCEN seeks information about alternative definitions, and why such alternatives would be preferable.
6. As reflected in multiple comment letters, certain financial institutions already identify beneficial ownership of their customers in certain circumstances in order to manage risk more effectively. FinCEN seeks detailed information about how identifying beneficial owners enhances a financial institution’s ability to manage risk. FinCEN also seeks detailed information as to the circumstances and account relationships in which beneficial ownership information may not be relevant for managing risk.
7. Many commenters suggested FinCEN consider requiring financial institutions to obtain beneficial ownership information of their customers on a risk basis. FinCEN seeks detailed information as to (i) how financial institutions would expect to assess risk in determining whether to obtain beneficial ownership information (e.g., what specific factors would a financial institution consider); (ii) specific examples of any customer or account relationships or red flags that would be considered of higher risk for purposes of obtaining and verifying beneficial ownership information, and similarly any such relationships that would be considered of lower risk for purposes of obtaining and verifying beneficial ownership information; and (iii) how financial institutions would obtain and verify beneficial

ownership information on a risk basis. For those financial institutions that already obtain beneficial ownership information on a risk basis, FinCEN seeks detailed information as to when they obtain it – during the on-boarding process, or after a review of the account activity? If the latter, would the review of the account activity be a part of a periodic/routine review or based upon red flags? Do financial institutions reassess risk periodically or based upon red flags? What steps do financial institutions take when new risks have been identified?

8. FinCEN seeks additional information regarding the mitigation of risk associated with a customer's underlying clients in the context of intermediated accounts including but not limited to: (i) the factors considered when conducting diligence on the customer (i.e., the intermediary) to assess the risk of the account (e.g., whether the customer is (1) a domestic or foreign entity, (2) regulated or unregulated for anti-money laundering purposes, etc.), (ii) whether, and if so, when, and what type of information, is obtained from the customer (i.e., the intermediary) about the customer's underlying clients, and (iii) any monitoring or other procedures applied to the customer's account to identify suspicious activity and mitigate risks that may be associated with the customer's underlying clients.

9. FinCEN seeks information as to how financial institutions currently conduct due diligence on trust accounts including but not limited to: (i) how risk is assessed with respect to trust accounts, as opposed to accounts held by natural persons or legal entities, and (ii) what information is obtained about the trust, including identifying information about the trustee.

10. FinCEN seeks information regarding the differences, if any, in obtaining beneficial ownership information from foreign legal entity customers versus domestic legal entity customers.

11. FinCEN seeks information as to whether, and how, financial institutions identify if legal entity customers are so-called "shell companies." [2]

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endnotes

[1] The hearing notice is available at http://www.fincen.gov/statutes_regs/frn/pdf/CDD_ANPRM_Public_Hearing_Notice%287-9-2012%29.pdf. See also ICI [Memorandum](#) No. 25960, March 5, 2012 (describing the ANPRM) and ICI [Memorandum](#) No. 26148, May 7, 2012 (describing the Institute's comment letter on the ANPRM).

[2] The term "shell company" refers to non-public corporations and limited liability companies that typically have no physical presence (other than a mailing address) and generate little to no independent economic value.