

**Steve Leimberg's Estate Planning
Email Newsletter Archive Message #2667**

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Subject: John Terrill & Michael Breslow - FinCEN Issues Frequently Asked Question Guidance on Final Customer Due Diligence Regulations Requiring Financial Institutions to Gather Beneficial Ownership Information on Entity Bank Accounts

“FinCEN’s FAQs are a very useful introduction to the Customer Due Diligence/Beneficial Ownership Regulations, and are helpful in explaining in detail some of the nuances of the rules regarding when and how financial institutions will gather beneficial ownership information on entities. The FAQs should be a good reference for trusts and estates practitioners when trying to explain to clients the reason that financial institutions are asking for identification when the entity attempts to open a bank account.

In some cases, the financial institutions may go beyond the minimum requirements of the CDD/BO Regulations and may ask for more information than is necessary, including for example, the beneficiaries of trusts or all of the co-trustees of multi-trustee trusts. Trusts and estates practitioners should expect this to occur, and should be prepared to either explain the reason for the bank’s requests to the client, or, if necessary, help the client to find a different financial institution that is more compatible with a client’s privacy preferences.”

John Terrill and **Michael Breslow** provide members with important commentary on FinCEN’s Customer Due Diligence Regulations. As they note in their commentary, the FAQs should be a good reference for trusts and estates practitioners when trying to explain to clients the reason that financial institutions are asking for identification when an entity attempts to open a bank account.

John A. Terrill, II is a shareholder in the West Conshohocken, PA law firm of **Heckscher, Teillon, Terrill & Sager, P.C.**, a sixteen lawyer firm with a focus on estate planning, trust administration and estate settlement, fiduciary litigation, asset protection planning, charitable planning and

related work. He has been an adjunct professor at both the University of Pennsylvania Law School (where he taught Trusts and Estates) and Villanova University Law School (where he taught Federal Wealth Transfer Taxation and Post-Mortem Planning). Jack is the President-Elect of ACTEC, the former Chair of ACTEC's FATF Task Force and the founding Chair of ACTEC's Asset Protection Committee. He speaks frequently around the Country on FATF and the Good Practices Guidance, asset protection planning and a number of other topics.

Michael A. Breslow is an associate at **Heckscher, Teillon, Terrill & Sager, P.C.** Michael's practice focuses on tax and estate planning, charitable planning, and trust and estate administration. Michael follows and writes about developments in the law in the United States and abroad pertaining to the international effort to combat money laundering and terrorist financing. He earned a J.D. from Temple University Beasley School of Law and an LL.M. in taxation from New York University School of Law.

Here is their commentary:

EXECUTIVE SUMMARY:

This commentary is a follow-up to our [newsletter](#) of May 11, 2016. On May 11, 2016, the Financial Crimes Enforcement Network (FinCEN) issued final regulations under the Bank Secrecy Act to strengthen the customer due diligence (CDD) requirements for financial institutions (the "CDD/BO Regulations").ⁱ The CDD/BO Regulations went into effect on May 11, 2018. The purpose of the CDD/BO Regulations is to assist law enforcement to combat the abuse of corporations and other legal entities by money launderers, tax evaders and terrorist financiers by requiring financial institutions to gather identifying information on the individuals who own or control entities when entities seek to establish bank accounts.

On April 3, 2018, FinCEN published Frequently Asked Questions Regarding Customer Due Diligence Requirements for Financial Institutions (the "FAQs")ⁱⁱ to assist financial institutions and other financial services providers to understand and implement the CDD/BO Regulations. This commentary summarizes the FAQs and highlights the impact of the CDD/BO Regulations and FinCEN's explanations regarding the Regulations on trusts and estates lawyers.

COMMENT:

Background on the CDD/BO Regulations

FinCEN's CDD/BO Regulations are part of a decades-long international effort, led by the Financial Action Task Force (FATF), to combat the abuse of the financial system by terrorists and money launderers through the use of anonymous entities like corporations, LLCs and partnerships. In recent years, it has become routine that corporations or limited liability companies are at the center of news stories about corruption, dirty money and unethical behavior.ⁱⁱⁱ FinCEN's CDD/BO Regulations were issued on May 11, 2016 and went into effect on May 11, 2018. The purpose of the CDD/BO Regulations is to assist law enforcement to combat the abuse of corporations and other legal entities by money launderers, tax evaders and terrorist financiers by requiring financial institutions to gather identifying information on the individuals who own or control entities when entities seek to establish bank accounts.

The CDD/BO Regulations are fairly similar to beneficial ownership regulations existing in other countries; however, in Europe, following the European Union's Fourth and Fifth Anti-Money Laundering Directives, the beneficial ownership information for companies and trusts in EU jurisdictions is required to be retained in national registries that will be accessible by the public.^{iv} There are no provisions for public registries of beneficial ownership information in FinCEN's CDD/BO Regulations.^v

Under the CDD/BO Regulations, when opening a new account, a financial institution will be required to gather identifying information on the individuals that own a 25% or greater equity interest in a "legal entity customer," and on a single individual who has "significant responsibility to control, manage or direct a legal entity customer," such as a director or officer of a corporation or a manager of an LLC.^{vi} The former is referred to as the "ownership prong" and the latter is referred to as the "control prong" of the regulations. Of particular interest for trusts and estates lawyers is that private trusts ***are not included*** in the definition of "legal entity customer" under the regulations.^{vii} Therefore, at least under the direct language of the regulations, a trustee opening a bank account for a trust will not be required to provide the bank with information on the trust's individual beneficiaries.

FinCEN's April 3, 2018 FAQs

On April 3, 2018, FinCEN published Frequently Asked Questions Regarding Customer Due Diligence Requirements for Financial Institutions (the "FAQs")^{viii} to assist financial institutions and other financial services providers to understand and implement the CDD/BO Regulations.

Question 1 of the FAQs asks whether a bank or financial institution is permitted "to adopt and implement more stringent written internal policies and procedures for the collection of beneficial ownership information than the obligations prescribed by the [CDD/BO Regulations]." In other words, are financial institutions allowed to collect beneficial ownership information on owners of **less than 25%** of the equity of an entity or **more than one** individual with managerial control? FinCEN's response is that banks and financial institutions are certainly permitted to implement stricter policies. FinCEN's response to the first FAQ continues by explaining the value of BO transparency to law enforcement, almost telegraphing a preference on the part of FinCEN that financial institutions develop more robust BO information policies than required by the CDD/BO Regulations.

In the response to Question 2, FinCEN outlines that it may be useful to collect BO information at a lower threshold depending on the financial institution's risk assessment of the entity seeking to open an account. The response also outlines other important aspects of CDD when there is a heightened risk assessment of a particular customer in addition to collecting more BO information, including enhanced monitoring and other information gathering.

As mentioned above, financial institutions are not required to collect beneficial ownership information on the beneficiaries of trusts under the CDD/BO Regulations. However, it has been the authors' recent experience, and it may be the experience of many members as well, that banks have been asking for identification information about the beneficiaries of trusts, in addition to the required identifying information about individual trustees. These episodes are likely to be examples of a blanket corporate policy on the part of the financial institution, rather than in response to a heightened risk assessment of particular customers. In many situations, providing the information on the individual beneficiaries of a trust is not particularly cumbersome or offensive; however, for some

privacy-inclined clients, it may be necessary to find another financial institution for a trust that does not expand the mandate of the CDD/BO Regulations.

Question 3 outlines how FinCEN will apply the rules requiring financial institutions to look through multiple layers of entity ownership until individual beneficial owners can be identified. In the example, the legal entity Customer is trying to open a bank account at a financial institution. Customer is owned 50% by Company A and 50% by Company B. Allan owns 60% of Company A and Betty owns 40% of Company A. Betty, Carl and Diane each own $33\frac{1}{3}\%$ of Company B. Allan is treated as owning 30% of Customer through his ownership of 60% of Company A, which owns 50% of Customer. Betty is treated as owning $36\frac{2}{3}\%$ of Customer because she owns 20% of Customer through Company A and $16\frac{2}{3}\%$ of Customer through Company B. Carl and Diane each only own $16\frac{2}{3}\%$ of Customer. Therefore, the financial institution is required to gather beneficial ownership information on Allan and Betty, but not on Carl or Diane. In a situation in which no individual exceeds the 25% threshold, then only the control prong will apply, and the financial institution will be required to gather information on the individual or individuals who control Customer.

Trusts and estates lawyers are familiar with the scenario in which a trust owns 25% or more of a limited partnership or an LLC. In the CDD/BO Regulations, a bank is permitted to “stop” looking through legal entities when it reaches a trustee—“[i]f a trust owns directly or indirectly . . . 25 percent or more of the equity interests of a legal entity customer, the beneficial owner. . . shall mean the trustee.”^{ix} Accordingly, in the example above, if Betty is replaced by Irrevocable Deed of Trust of Betty for the benefit of Betty’s Children, Joe Smith, Trustee, then the financial institution would be required to gather identifying information on Joe Smith as the beneficial owner of Customer, but not on Betty or her children.

Questions 4 through 18 are mostly technical administrative details regarding the types of verification required, existing customer identification protocols, and ongoing customer information monitoring.

Questions 19 and 20 of the FAQs directly relate to trusts. Under the CDD/BO Regulations, when a trust owns 25% or more of a legal entity customer, the financial institution is only required to gather information on the trustee as the beneficial owner. Question 19 asks whether the financial

institution must identify all of the trustees of a multi-trustee trust. FinCEN responds by stating that only one co-trustee of a multi-trustee trust must be identified in this scenario; however, FinCEN explains that a financial institution is free to identify and gather information regarding additional co-trustees if necessary based on its customer due diligence and risk assessment. Again, in its response to Question 19, FinCEN seems to be obliquely encouraging financial institutions to go beyond the mandate of the CDD/BO Regulations. It is not hard to imagine that many financial institutions, as a matter of corporate policy and for simplicity's sake, and not necessarily out of a measured risk assessment, will require the production of identifying information on all co-trustees of a multi-trustee trust that has an interest in a legal entity.

Question 20 asks how the regulations apply to a trustee that is a legal entity, such as a law firm or a bank trust department. FinCEN explains that the trustee is the beneficial owner for purposes of the CDD/BO Regulations regardless of whether the trustee is an individual or an entity. It is possible that an individual owner of the trustee will not be identified, which could occur, for example, with a trust company that is publicly traded. However, for purposes of the "control prong" of the CDD/BO Regulations, the financial institution will be required to gather identifying information on a natural person who controls the customer entity.

The CDD/BO Regulations do not require information to be gathered on the owners of any non-profit entities because non-profit entities typically do not have individual "owners." Question 23 asks whether the exclusion is limited to tax-exempt organizations, and FinCEN makes clear that the tax-exempt status of a non-profit entity is irrelevant. Non-profit entities are excluded from the "ownership" prong because non-profit entities do not have individual "owners." However, non-profit entities are not excluded from the "control" prong of the regulations and therefore, financial institutions will be required to identify individuals who control non-profit entities when such entities seek to open a bank account at a financial institution.

The balance of the FAQs relate to technical questions that are likely to be beyond the scope of most trusts and estates practitioners' experience with the CDD/BO Regulations.

Conclusion

FinCEN's FAQs are a very useful introduction to the CDD/BO Regulations and are helpful in explaining in detail some of the nuances of the rules regarding when and how financial institutions will gather beneficial ownership information on entities. The FAQs should be a good reference for trusts and estates practitioners when trying to explain to clients the reason that financial institutions are asking for identification when the entity attempts to open a bank account. In some cases, the financial institutions may go beyond the minimum requirements of the CDD/BO Regulations and may ask for more information than is necessary, including for example, the beneficiaries of trusts or all of the co-trustees of multi-trustee trusts. Trusts and estates practitioners should expect this to occur, and should be prepared to either explain the reason for the bank's requests to the client, or, if necessary, help the client to find a different financial institution that is more compatible with a client's privacy preferences.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

John A. Terrill, II
Michael A. Breslow

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CITATIONS:

ⁱ 81 F.R. 29397, available at <https://www.federalregister.gov/articles/2016/05/11/2016-10567/customer-due-diligence-requirements-for-financial-institutions>

ⁱⁱ https://www.fincen.gov/sites/default/files/2018-04/FinCEN_Guidance_CDD_FAQ_FINAL_508_2.pdf

ⁱⁱⁱ See e.g., Palazzolo, Joe and Rothfeld, Michael. *Trump Lawyer Used Private Company, Pseudonyms to Pay Porn Star ‘Stormy Daniels’*. WALL STREET JOURNAL. January 18, 2018, available at <https://www.wsj.com/articles/trump-lawyer-used-private-company-pseudonyms-to-pay-porn-star-stormy-daniels-1516315731>. Additionally, a January 2016 CBS News report highlighted a number of American attorneys’ regrettable willingness to use the opacity of limited liabilities companies to transfer funds from suspicious sources. *Anonymous, Inc.* CBS News (January 31, 2016). <http://www.cbsnews.com/news/anonymous-inc-60-minutes-steve-kroft-investigation/>.

^{iv} DIRECTIVE 2015/849/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2015 Official Journal L 141, 5/6/2015 P. 73-116. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015L0849>; DIRECTIVE 2018/843/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 30 May 2018 Official Journal L 156, 6/19/2018, p. 43-74. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L0843&from=en>

^v Congress is currently considering the Counter Terrorism and Illicit Finance Act (“CTIFA”), introduced by U.S. Representatives Steven Pearce and Blaine Luetkemeyer. Counter Terrorism and Illicit Finance Act, H.R. 6068, 115th Cong. (2017-2018). In CTIFA’s original form, there was a proposal for a national directory of beneficial owners of legal entities; however, as of the date of this post, those provisions have been removed.

^{vi} 31 C.F.R. §1010.230(d)(1), (2).

^{vii} In Europe, financial institutions are required to gather beneficial information on the beneficiaries of trusts.

viii https://www.fincen.gov/sites/default/files/2018-04/FinCEN_Guidance_CDD_FAQ_FINAL_508_2.pdf

ix 31 C.F.R. §1010.230(d)(3).