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Via E-Rulemaking Portal: <http://www.regulations.gov>

October 3, 2014

Policy Division
Financial Crime Enforcement Network
P.O. Box 39
Vienna, VA 22183

Re: RIN 1506-AB25; Proposed Amendments to the Bank Secrecy Act (“BSA”) Regulations—Customer Due Diligence Requirements for Financial Institutions

Dear Sir or Madam:

The Independent Community Bankers of America¹ (ICBA) appreciates the opportunity to comment on the Financial Crimes Enforcement Network’s (FinCEN’s) proposal to clarify and strengthen customer due diligence (CDD) requirements in part by requiring banks to identify beneficial owners of legal entity customers. FinCEN is proposing to amend its existing rules so that each of the key elements of CDD is explicitly referenced in a corresponding requirement within its program rules.

Summary of ICBA’s Position

ICBA believes that expanding the requirement to collect beneficial ownership information on legal entity customers will be a burdensome task and difficult to implement and strongly opposes the finalization of such a proposal. Beneficial ownership information should be collected and verified at the time a legal entity is formed and shifting the responsibility and oversight of collecting this information to financial institutions is misguided and ineffective.

In the event FinCEN finalizes this proposal, ICBA encourages a risk-based approach to identifying beneficial owners and suggests that FinCEN provide

¹The Independent Community Bankers of America® (ICBA), the nation’s voice for more than 6,500 community banks of all sizes and charter types, is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education and high-quality products and services. ICBA members operate 24,000 locations nationwide, employ 300,000 Americans and hold \$1.3 trillion in assets, \$1 trillion in deposits and \$800 billion in loans to consumers, small businesses and the agricultural community. For more information, visit www.icba.org.

financial institutions with guidance on categorizing the risk-level of legal entity customers. Specific guidance in this area will more effectively promote consistency and clarify regulatory expectations.

Although FinCEN's proposal enables banks to generally rely on the representations of the customer when answering the financial institution's questions about the natural persons behind a legal entity, the proposal, as written, would still require bank employees to have some advanced business acumen in order to understand and determine to whom the definition applies, which would be costly and burdensome to implement.

Community banks would not be able to utilize typical nondocumentary methods of verifying identity, such as obtaining information from a consumer reporting agency, on beneficial owners absent express authorization. In the event FinCEN finalizes this proposal, ICBA urges FinCEN to eliminate CIP verification procedures for beneficial owners.

Despite FinCEN's statement, the proposed rule, as written, will require community banks to maintain and update the equity interests and management team of each legal entity customer on an ongoing basis, which would place a significant burden on community banks.

Community banks are already spending significant resources complying with a number of new statutory and regulatory changes. And while each individual requirement may not be overly burdensome, the cumulative impact of regulations often places a burden on community banks that are often disproportionate to the benefits of the additional requirements. Incorporating new information and a new document into the new accounts process would initially inundate community banks.

ICBA recommends that banks be permitted to collect required information through other means, such as by automated electronic methods and by enabling the information contained in FinCEN's standard certification form be incorporated into new deposit or loan account documents. Additionally, ICBA recommends that if FinCEN finalizes its proposal, banks are able to identify and verify the beneficial owners and executive manager within a reasonable period of time after the account is opened, which is consistent with its requirements under the current CIP verification requirements.

It would be operationally impractical for banks to determine whether a charitable organization or nonprofit entity has been denied tax exempt status or has filed the most recently required annual information return and therefore, ICBA urges FinCEN to impose no qualifiers on exempting charitable organizations from this proposal.

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ICBA believes that additional time will be needed to fully comply with the additional burdens placed on community banks as a result of this proposal and suggests an effective date of twenty four to thirty six months from the issue date of the final rule at a minimum.

Background

FinCEN, in consultation with the staffs of the federal functional regulators and the Department of Justice, has determined that more explicit rules with respect to CDD are necessary to clarify and strengthen CDD within the BSA regime.

FinCEN is proposing to amend its existing rules so that each of the key elements of CDD in a bank's existing AML program is explicitly referenced in a corresponding requirement within FinCEN's program rules.

The proposed rule states that the core elements of CDD include:

- Identifying and verifying the identity of customers;
- Identifying and verifying the identity of beneficial owners of legal entity customers (i.e., the natural persons who own or control legal entities);
- Understanding the nature and purpose of customer relationships; and
- Conducting ongoing monitoring to maintain and update customer information and to identify and report suspicious transactions.

Because the first element is already required under the existing customer identification program (CIP) rule, FinCEN is proposing two rule changes that will have explicit requirements with respect to the three remaining elements. As such, FinCEN is proposing to add explicit CDD requirements with respect to understanding the nature and purpose of customer relationships and conducting ongoing monitoring as components in each covered financial institution's core AML program requirements.

Additionally, FinCEN is proposing a new separate requirement to identify and verify the beneficial owners of legal entity customers, subject to certain exemptions.

Enhancing Transparency

The Treasury Department has a broad three-part strategy to enhance financial transparency. The key elements of this strategy are clarifying and strengthening CDD; facilitating global implementation of international standards regarding CDD and beneficial ownership of legal entities and trusts; and increasing the transparency of U.S. legal entities through the collection of beneficial ownership information at the time of the legal entity's formation.

FinCEN states that legal entities are at times abused to obfuscate ownership interests and used to engage in illegal activities such as money laundering,

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corruption, fraud, terrorist financing and sanctions evasion. Criminals have exploited the anonymity that legal entities can provide to engage in a variety of crimes, and often take advantage of shell and front companies to conduct such activity. Making legal entities more transparent by requiring identifying information of natural person owners would likely hinder such abuses. However, shifting the responsibility and oversight of collecting this information to financial institutions is misguided and ineffective and therefore, ICBA urges FinCEN to withdraw its proposal.

Beneficial ownership information should be collected and verified at the time a legal entity is formed. Collecting and verifying the identity of all natural person owners of each entity by either the Internal Revenue Service or other appropriate federal agency and/or state in which the entity is formed would provide uniformity and consistency across the United States. By making the formation of an entity contingent on receiving beneficial owner information, strong incentives would be created for equity owners and investors to provide such information. Additionally, periodic renewal of an entity's state registration would provide an efficient and effective vehicle for updating beneficial ownership information.

FinCEN states that this proposal is a component of Treasury's broader strategy and complements the Administration's ongoing work with Congress to require the collection of beneficial ownership information at the time that legal entities are formed in the United States.² Requiring both the federal government and financial institutions to collect the same information on the same entities is ineffective, duplicative and costly. It is important to ensure that any additional regulatory requirements maintain a balanced approach that promotes the purposes of BSA with the limited and already strained resources of community banks. This proposal does not achieve that balance and is another reason for ICBA's opposition to this proposal.

Furthermore, information regarding beneficial owners could be more easily shared between law enforcement and government agencies than between banks and law enforcement. While privacy laws do not permit banks to share personal information with a government agency, absent a subpoena or similar directive, inter-agency sharing of personal information is permissible if certain requirements are met.³ ICBA urges FinCEN to withdraw this proposal.

Risk-Based System

In the event FinCEN proceeds to finalize this proposal, ICBA encourages a risk-based approach to identifying beneficial owners and suggests that FinCEN provide financial institutions with guidance on i.) categorizing the risk-level of legal entity customers, ii.) identifying high-risk legal entity customers, and iii.) collecting information on the beneficial owners of high-risk legal entity customers.

² G-8 Action Plan for Transparency of Company Ownership and Control (June 2013)

³ The Privacy Act of 1974, 5 U.S.C. § 552a

Specific guidance in this area will more effectively promote consistency and clarify regulatory expectations.

ICBA agrees that clarifying customer due diligence standards to provide a uniform framework for identifying beneficial owners would help safeguard the financial system against illicit financial activity. However, FinCEN's notice proposing a universal requirement to obtain beneficial ownership information is problematic as the benefit to law enforcement is not commensurate with the significant increase in costs and burdens to community banks.

Comprehensive and effective customer due diligence necessitates that a bank verify a customer's identity; assess the risks associated with that customer; and conduct ongoing due diligence. This standard does not diminish when accounts are opened for legal entity customers. In fact, FinCEN acknowledges that it may be appropriate for a bank to identify and verify the identity of individuals who may not fall within the definition of a beneficial owner, but may be relevant to mitigate risk. This is consistent with the overall risk-based approach applied throughout the anti-money laundering and counter terrorist financing regime and should be applied to identifying beneficial owners of legal entities.

Definition of Beneficial Owner

FinCEN has defined the beneficial owner of an account with two prongs. The first prong – ownership prong – is each natural person who directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, owns 25 percent or more of the equity interests of a legal entity customer. The second prong – control prong – is an individual with significant responsibility to control, manage, or direct a legal entity customer, including:

- (a) An executive officer or senior manager (e.g., a Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Managing Member, General Partner, President, Vice President, or Treasurer); or
- (b) Any other individual who regularly performs similar functions.⁴

The beneficial owner must be a natural person as opposed to another legal entity. Therefore, in instances where legal entities are held by other legal entities, one must look through those other entities to determine which natural persons own 25 percent or more of the equity interest of the legal entity customers to implement this requirement.

Such a requirement will be extremely burdensome and challenging, particularly in cases with complex legal structures and multiple levels of ownerships. Currently, banks must assess the risk of a new business account and obtain information about individuals with authority or control over the account and when appropriate, obtain beneficial ownership information. It would be difficult to ascertain

⁴ 79 FR 45170

information on individuals who are directing the business affairs of a legal entity, yet not named as account owners or signers on an account.

Expanding this requirement to obtain beneficial ownership on all legal entity customers, and verifying their identity on certain business accounts, will be a burdensome task and difficult to implement. While the ownership interest and management responsibility of a business may be straightforward in certain cases and specified in a legal organizational document in other cases, certain legal structures make determining ownership equity extremely difficult, at best.

Each community bank must have a written customer identification program (CIP) that would enable it to form a reasonable belief that it knows the true identity of each customer. Existing risk-based CIP practices apply to natural person customers as well as legal entity customers on a risk basis. FinCEN expressly states that financial institutions would be required to verify the identity of beneficial owners consistent with their existing CIP practices. However, incorporating beneficial owners into existing risk-based CIP practices and risk assessments creates an implicit requirement for bank employees to understand various legal structures and ownership interests in order to assess risk.

As such, bank front line staff would be required to conduct several additional intermediate steps during the account-opening process to ensure they have a reasonable belief they know the true identity of each beneficial owner. This will add significantly more time to each business account being opened.

A comprehensive CIP enables a bank to reasonably know its customer and understand the sources and uses of funds in an account as well as the relationship between the customer and the beneficial owner to assess risk. Bank employees would be required to have, at a minimum, an understanding of various legal structures to ensure due diligence of beneficial ownership information at account opening. FinCEN acknowledges that in instances where legal entities are held by other legal entities, determining ownership may require several intermediate and analytical steps. Those steps would be required not only of the customer, but of the bank employees as well.

Additionally, the term “equity interests” is broadly interpreted and can apply to a variety of different legal structures and ownership situations. Employees would need to understand complex legal structures such as trusts, investment vehicles, limited liability companies, partnerships and sole proprietors, as well as equity interests in communal property states to determine whether certain individuals own more than 25% equity interest in the entity. Such an analysis would also be required to determine how contingent and indirect ownership equity interests would be applied.

Although FinCEN’s proposal enables banks to *generally* rely on the representations of the customer when answering the financial institution’s questions about the natural persons behind the legal entity, bank employees

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would still require some advanced business acumen in order to understand and determine to whom the definition applies.

Identifying and Verifying the Identity of Beneficial Owners

FinCEN is proposing that banks verify the identity of a beneficial owner using existing risk-based CIP practices. As such, the proposed rule provides that a bank must implement risk-based procedures to verify the identity of each beneficial owner according to procedures that comply with the CIP requirements to verify the identity of the customers that are natural persons. Therefore, a bank may use documentary or non-documentary methods, as it deems appropriate under its procedures for verifying the identity of customers that are natural persons.

Currently, section 326 of the PATRIOT Act requires each bank to implement a written customer identification program (CIP) that enables a bank to form a reasonable belief that it knows the true identity of each customer. While the bank does not need to establish the accuracy of every element of the identifying information obtained, it must verify enough information to form a reasonable belief that it knows the true identity of the customer. The bank may use documents, nondocumentary methods, or a combination of both for verification.

In most instances, all beneficial owners will not be present to open an account. Rather, businesses will likely send a designated representative to complete the account opening transaction and no beneficial owners will be present. As such, banks would need to rely on nondocumentary methods to verify each beneficial owner's and executive officer's identity. Nondocumentary methods may include contacting a customer, independently verifying the customer's identity through the comparison of information provided by the customer with information obtained from a consumer reporting agency, public database, or other source; checking references with other financial institutions; and obtaining a financial statement.⁵

When utilizing nondocumentary methods of verification, community banks typically use information obtained from a consumer reporting agency to verify a customer's identity. Such a method adequately balances the level of information received with the costs and burdens of obtaining verifying information. Additionally, obtaining information from a consumer reporting agency is permitted under the Fair Credit Reporting Act (FCRA) for this purpose. Specifically, section 1681b of the FCRA permits consumer reporting agencies to furnish a consumer report under specific limited circumstances, including for a legitimate business need for the information in connection with a business transaction *that is initiated*

⁵ FFIEC BSA/AML Examination Manual, Customer Identification Program, Verification Through Nondocumentary Methods, Pg. 55

by the consumer (emphasis added)⁶ or with written instructions from the consumer.⁷

When an account is opened by a customer that is not an individual, the bank is conducting the transaction with the legal entity for which the account is opened – not with the beneficial owners or the natural person tasked with opening the account. As such, beneficial owners are not the bank’s customers and are not initiating the transaction. Therefore, banks are not permitted to obtain credit reports without express authorization from each beneficial owner and executive officer or senior manager.

Obtaining authorizations and sensitive information from each beneficial owner and executive officer or manager would be difficult, at best. Beneficial owners are unlikely to be involved in the day to day activities of a business and would not be readily available to provide authorization for such collection - particularly investors with indirect equity ownership in an entity. Furthermore, an investor or other indirect equity owner would be extremely hesitant to provide personal and sensitive information, such as a social security number and date of birth, to an administrative employee tasked with opening an account on behalf of a business. Under these circumstances, community banks would not be able to utilize this common and cost-effective nondocumentary method to verify the identity of beneficial owners. Other nondocumentary methods would require substantial employee time, making all business accounts costly. In the event FinCEN finalizes this proposal, ICBA urges FinCEN to eliminate CIP verification procedures for beneficial owners.

Ongoing Monitoring

While FinCEN states that it is not proposing that banks be required to update or refresh periodically the beneficial ownership information obtained in this proposal, it does state that as a general matter, a bank should keep CDD information, including beneficial ownership information, as current as possible and update as appropriate on a risk basis. ICBA believes that the proposed rule, as written, will require community banks to, at a minimum, monitor the equity interests and management team of each legal entity customer on ongoing bases.

FinCEN is proposing to add explicit CDD requirements with respect to the core pillars that are currently included within the AML program rules. FinCEN is proposing to add to the existing core provisions a fifth pillar that includes understanding the nature and purpose of customer relationships and conducting ongoing monitoring as components. In this context, conducting ongoing monitoring *to maintain and update customer* information is included as a key element and must be complied with at a fundamental level.

⁶ 15 U.S. Code § 1681b(a)(3)(F)(i)

⁷ 15 U.S. Code § 1681b(a)(2)

ICBA certainly agrees that one of the cornerstones of a strong BSA/AML compliance program is comprehensive CDD policies and procedures that begin with knowing a customer and enabling the bank to predict with relative certainty the types of transactions in which a customer is likely to engage. This process enables a bank to monitor accounts more effectively and evaluate activity to determine whether it is unusual or suspicious, as currently required under suspicious activity reporting obligations.

Furthermore, ICBA supports the continuation of collecting and updating CDD information, including beneficial ownership information on a risk basis. Banks currently obtain information when an account is opened that enables them to differentiate between lower-risk and higher-risk customers. With additional guidance from FinCEN that identifies red flags on high-risk legal entity customers, banks will be able to identify those customers that pose higher money laundering or terrorist financing risks and obtain additional information from the customer, such as beneficial ownership information as well as implement enhanced due diligence account monitoring.

However, FinCEN's proposed requirement to "conduct ongoing monitoring *to maintain and update customer information*"⁸ (emphasis added) expressly imposes a requirement to maintain and update customer information on an ongoing basis. ICBA disagrees with FinCEN's interpretation that such a statement means that, when in the course of monitoring the financial institution becomes aware of customer information relevant to assessing the risk posed by a customer, it is expected to update the customer's relevant information accordingly. In fact, the plain language of the proposed rule requires banks to monitor accounts "to" maintain and update customer information. The "to maintain and update" language plainly requires banks to conduct ongoing monitoring for the purpose of maintaining and updating customer information and for no other reason.

By contrast, existing monitoring rules require banks to conduct ongoing monitoring for the purposes of identifying and reporting suspicious activity.⁹ Current CDD and enhanced due diligence (EDD) requirements are based on a fundamental tenet to assess risk; monitor and mitigate that risk; and to detect and report suspicious activity. This is done by monitoring transactions conducted by, at, or through the bank. FinCEN's proposal would require banks to conduct ongoing monitoring not only to customer transactions, but more broadly to update investor, indirect equity owners, and the management teams of every business account regardless of how low of a risk it imposes. Amending the AML Program rules to such a substantial and fundamental shift would impose extraordinary burdens on community banks and as written, would be near impossible for community banks to implement.

⁸ Federal Register p. 45173

⁹ BSA/AML Manual at 33-34

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FinCEN makes clear that nothing in this proposed rule should be interpreted in a manner inconsistent with previous guidance, existing regulations or supervisory expectations. However, it is doing just that by shifting the underlying CDD structure from monitoring for suspicious activity to monitoring for customer information.

FinCEN Certification of Beneficial Owners Form

The second proposed element of CDD would require banks to identify and verify the beneficial owners of legal entity customers. Banks must satisfy this requirement by obtaining, at the time a new account is opened, a standard certification form directly from the individual opening the new account on behalf of the legal entity customer. FinCEN believes the form, which is provided in the proposal, would promote consistent practices and regulatory expectations, significantly reduce compliance burden, and preserve the benefits of obtaining the information.

While ICBA understands that a standardized certification form may promote consistent practices and regulatory expectations, it is important to recognize that different account-opening documents are used by different financial institutions as well as for different types of accounts being opened, such as transaction accounts and loan accounts. If FinCEN moves forward with this proposal, we urge FinCEN to enable the collection of all required information through other means, such as by automated electronic methods, and by enabling the information contained in the form be incorporated into new account or loan documents.

FinCEN's proposal requires banks to identify and verify the identity of beneficial owners and an executive manager or officer at the time a new account is opened.¹⁰ Such a mandate would require that a bank not open a new account until it has received all of the required information on the Certification Form. As described above, such information in most cases will be difficult to obtain as equity owners and investors are often inaccessible. ICBA recommends that if FinCEN finalizes its proposal, it be consistent with its requirements under the current CIP verification requirements and enable banks to identify and verify the beneficial owners and executive manager within a reasonable period of time after the account is opened.

Exemptions

In this proposal, the definition of "legal entity customer" for purposes of the beneficial ownership requirement excludes the same types of entities as the definition of "customer" for purposes of the CIP rules. In addition to incorporating exemptions applicable to the CIP rules, FinCEN is also proposing to exempt certain listed entities whose beneficial ownership information is generally available from other credible sources. Included in that list is a designated charity

¹⁰ 79 FR 45170

or nonprofit entity that has not been denied tax exempt status, and that is required to and has filed the most recently required annual information return with the Internal Revenue Service.

We support FinCEN's exemptions as these entities pose a nominal risk of money laundering and obtaining beneficial ownership information on such customers would not be warranted. However, we strongly urge FinCEN impose no qualifiers on exempting charitable organizations. It would be operationally impractical for banks to determine whether an organization or nonprofit entity has been denied tax exempt status or has filed the most recently required annual information return. Such a verification goes beyond the scope of requiring a bank to form a reasonable belief that it knows the true identity of each customer – a fundamental component of CDD.

Effective Date

FinCEN is proposing an effective date of one year from the date the final rule is issued. ICBA believes that additional time will be needed to fully comply with the additional burdens placed on community banks as a result of this proposal and suggests an effective date of twenty four to thirty six months from the issue date of the final rule at a minimum. We respectfully disagree with FinCEN that certain requirements set forth in this proposal would not require banks to perform any additional activities or operations. Nor do we agree that to comply with the beneficial ownership requirement would only require banks to modify existing customer on boarding processes.

As we mentioned previously, customer due diligence procedures would require front line bank staff to recognize and understand complex legal structures in order to understand and determine to whom the definition of beneficial owner applies. FinCEN itself acknowledges that identifying such individuals may be challenging where the legal entity customer has a complex legal structure with multiple layers of ownership. Such a change would require comprehensive employee training and supervision.

To comply with this proposal, community banks would have to assess and determine whether their in-house systems are adequate to collect the additional information; whether they would have to amend their existing programs or buy additional software. Once that is determined, they would have to update their systems, which may take significant time. Once systems are in place, banks would then have to amend their new account procedures and finally, will have to train staff.

Additionally, community banks are already spending significant resources complying with a number of new statutory and regulatory changes. And while each individual requirement may not be overly burdensome, the cumulative impact of regulations often places a burden on community banks that are often disproportionate to the benefits of the additional requirements. Incorporating

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new information and a new document into the new accounts process would initially inundate community banks. A twenty four month to thirty six month implementation date gives community banks an opportunity to manage their resources effectively and coordinate this new mandate with the myriad of new and revised regulations with which they are faced.

ICBA appreciates the opportunity to comment on FinCEN's notice of proposed rulemaking on the application of an explicit customer due diligence obligation on financial institutions, including a requirement for financial institutions to identify beneficial ownership of their accountholders. If you have any questions, please do not hesitate to contact me at 202-659-8111 or Lilly.Thomas@icba.org.

Sincerely,

/s/

Lilly Thomas
Vice President and Regulatory Counsel

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