

FinCEN beneficial ownership requirements now in effect



Kirstyn M. Wildey | Thursday, May 24, 2018

All Covered Financial Institutions (CFIs) must now comply with the beneficial ownership regulations under 31 C.F.R. §1010.230 and §1020.210(b)(5). The regulations, promulgated by the United States Department of the Treasury Financial Crimes Enforcement Network (FinCEN), were issued in 2016; however, as of May 11, 2018, all CFIs are required to fully comply with the rules^[1]. Thus, CFIs and their legal entity customers must now be prepared to discuss the beneficial ownership requirements and the collection of identifying information for beneficial owners.

What are the requirements?

The beneficial owner regulations are intended to strengthen customer due diligence requirements. Under these regulations, CFIs are required to collect from their legal entity customers, information identifying individual(s) who are deemed beneficial owners. The information assists CFIs in assessing risk in opening such new accounts.

Who are CFIs?

The beneficial ownership regulations apply only to CFIs, which include federally regulated banks, federally insured credit unions, mutual funds, brokers or dealers in securities, and futures commission merchants^[2].

Who are legal entity customers?

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The definition of legal entity customer includes, without limitation, corporations, limited liability companies, and limited partnerships. Of note, sole proprietorships, unincorporated associations, and natural persons opening accounts on their own behalf are excluded from the regulations[3].

Who are beneficial owners?

When a legal entity customer seeks to open an account with a CFI, the legal entity customer must identify the beneficial owner(s) of the customer. There are two prongs of beneficial ownership: the ownership prong and the control prong.

Under the ownership prong, a beneficial owner is one who directly or indirectly owns 25 percent or more of the equity interests in the legal entity customer[4]. For customers with complicated organizational structures involving multiple layers of ownership, calculations to determine indirect and direct ownership will be required[5]. Under the ownership prong, a legal entity customer could have between zero and four beneficial owners.

Under the control prong, a beneficial owner is the one who has the authority to exercise control of the legal entity, such as an entity's chief executive officer or chief financial officer. Thus, every legal entity customer will have at least one beneficial owner[6].

The legal entity customer – not the CFI – is responsible for identifying the beneficial owners. Further, a covered financial institution may reasonably rely on the customer's representations unless there is information that calls into question the reliability of the information[7].

What information must be collected?

Once the legal entity customer identifies the beneficial owner(s), it must provide to the CFI similar information as the institution collects under its Customer Identification Program (CIP), and must provide each beneficial owner's name, date of birth, address, and social security number or other government identification number[8]. FinCEN has provided a standard certification form as a guide; however, use of that form by the CFI is optional[9].

The information may be collected from an individual opening the account on behalf of the legal entity customer (regardless if that person is a beneficial owner) or from another covered financial institution, so long as reliance on such information is reasonable and the other covered financial institution is also subject to the beneficial ownership regulations.

What does this mean for lenders and borrowers?

The new beneficial ownership regulations place a burden on customers opening new accounts to be prepared to identify their ownership and management structures, especially if they have complicated organizational structures. Borrowers must complete a beneficial ownership certification form for every loan transaction and a beneficial ownership identification number must be obtained for each borrower. Each individual who fits within the definition of "beneficial owner" must provide his or her name, date of birth, address, identifying number, such as a social security number, and verify his or her identity to the financial institution with which an account is being opened.[10] Borrowers must provide such information to financial institutions either at the time an account is opened or when an event during the normal course of monitoring and risk assessment, which indicates a possible change in beneficial ownership, necessitates such information.[11]

From the lender's perspective, the full meaning of opening a new account is somewhat unclear.

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However, beneficial ownership certification is required for loan transactions, including refinancing transactions. It is crucial for financial institutions to have robust policies and procedures, to focus on employee training in implementing such policies and procedures, and to communicate with regulators in order to ensure compliance. A financial institution's policies and procedures can be stricter than the new rule's requirements.[12] According to FinCEN, the obligation to monitor equity interests and management teams is a snapshot, not a continuous obligation.[13] However, FinCEN expects financial institutions to update beneficial ownership information based on risk, which is generally triggered by a financial institution's normal monitoring of facts relevant to assessing risk.[14] Financial institutions' obligation to update beneficial ownership information is event-driven, occurring as a result of normal monitoring.[15] Financial institutions are not required to conduct retroactive reviews of accounts opened before May 11, 2018, unless an event during the course of normal monitoring indicates a possible change in beneficial ownership information. Additionally, financial institutions can rely on the information obtained by other financial institutions having similar relationships with existing customers without obtaining new beneficial ownership certifications so long as certain conditions are met. Those conditions are: (1) relying on such information is reasonable under the circumstances, (2) the other financial institution is also regulated by the new beneficial ownership rules, and (3) the other financial institution enters into an agreement under which it certifies annually that it has implemented an anti-money laundering program and that it will perform the procedural requirements of the covered financial institution with which it is sharing such information.[16] However, this may add complication and additional steps to loan transactions. Finally, it is important for financial institutions to remember that they must retain all records made pursuant to the new rules for no less than five years after the date an account is closed.[17]

[1] [https://www.ffiec.gov/bsa_aml_infobase/documents/FAQs_for_CDD_Final_Rule_\(7_15_16\).pdf](https://www.ffiec.gov/bsa_aml_infobase/documents/FAQs_for_CDD_Final_Rule_(7_15_16).pdf)
(Question 26)

[2] 31 CFR 1010.605(e)(1)

[3] [https://www.ffiec.gov/bsa_aml_infobase/documents/FAQs_for_CDD_Final_Rule_\(7_15_16\).pdf](https://www.ffiec.gov/bsa_aml_infobase/documents/FAQs_for_CDD_Final_Rule_(7_15_16).pdf)
(Question 20)

[4] [https://www.ffiec.gov/bsa_aml_infobase/documents/FAQs_for_CDD_Final_Rule_\(7_15_16\).pdf](https://www.ffiec.gov/bsa_aml_infobase/documents/FAQs_for_CDD_Final_Rule_(7_15_16).pdf)
(Question 9)

[5] https://www.fincen.gov/sites/default/files/2018-04/FinCEN_Guidance_CDD_FAQ_FINAL_508_2.pdf
(Question 3)

[6] [https://www.ffiec.gov/bsa_aml_infobase/documents/FAQs_for_CDD_Final_Rule_\(7_15_16\).pdf](https://www.ffiec.gov/bsa_aml_infobase/documents/FAQs_for_CDD_Final_Rule_(7_15_16).pdf)
(Question 13)

[7] https://www.fincen.gov/sites/default/files/2018-04/FinCEN_Guidance_CDD_FAQ_FINAL_508_2.pdf
(Question 4)

[8] [https://www.ffiec.gov/bsa_aml_infobase/documents/FAQs_for_CDD_Final_Rule_\(7_15_16\).pdf](https://www.ffiec.gov/bsa_aml_infobase/documents/FAQs_for_CDD_Final_Rule_(7_15_16).pdf)
(Question 11)

[9] [https://www.ffiec.gov/bsa_aml_infobase/documents/FAQs_for_CDD_Final_Rule_\(7_15_16\).pdf](https://www.ffiec.gov/bsa_aml_infobase/documents/FAQs_for_CDD_Final_Rule_(7_15_16).pdf)
(Question 19)

[10] [Frequently Asked Questions Regarding Customer Due Diligence Requirements for Financial](#)

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Institutions, FinCEN (Apr. 3, 2018), *available at* https://www.fincen.gov/sites/default/files/2018-04/FinCEN_Guidance_CDD_FAQ_FINAL_508_2.pdf.

[11] *Id.*; see 81 Fed. Reg. 29398, 29421 (May 11, 2016).

[12] Frequently Asked Questions Regarding Customer Due Diligence Requirements for Financial Institutions, FinCEN (Apr. 3, 2018), *available at* https://www.fincen.gov/sites/default/files/2018-04/FinCEN_Guidance_CDD_FAQ_FINAL_508_2.pdf.

[13] 81 Fed. Reg. 29398, 29410 (May 11, 2016).

[14] *Id.*

[15] 81 Fed. Reg. 29398, 29399 (May 11, 2016).

[16] 81 Fed. Reg. 29398, 29453 (May 11, 2016).

[17] *Id.*



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