

CLIENT ALERT

FinCEN Provides Relief to Application of Beneficial Ownership Requirements to Certain CARES Act Loans and Suspends Implementation of CTR Filing Changes

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In [April 3, 2020 guidance](#), the Financial Crimes Enforcement Network (FinCEN) provided limited relief from beneficial ownership verification requirements for federally-insured depository institutions and federally insured credit unions that offer Paycheck Protection Program (PPP) loans to existing customers under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). It also has suspended implementation of a February 2020 ruling on certain Currency Transaction Report (CTR) filing obligations. Finally, FinCEN has recognized that the COVID-19 pandemic may cause “reasonable delays in compliance” with Bank Secrecy Act (BSA) reporting obligations, and has established an online contact mechanism for regulated financial institutions to communicate concerns about COVID-19, while reminding them that it generally expects them “to continue following a risk-based approach, and to diligently adhere to their BSA obligations.” The Office of the Comptroller of the Currency (OCC) issued [guidance on April 7, 2020](#) supporting FinCEN’s approach.

Beneficial Ownership Verification for Paycheck Protection Program Loans

In its April 3, 2020 guidance, FinCEN said that, “[f]or eligible [*i.e.*, eligible to make PPP loans] federally insured depository institutions and federally insured credit unions, PPP loans for existing customers will not require re-verification [of beneficial ownership information] under applicable BSA requirements, unless otherwise indicated by the institution’s risk-based approach to BSA compliance.”

The April 3rd guidance left open the question of what information eligible depository institutions and credit unions must collect from an existing customer that applies for a PPP loan and for which the financial institution never has obtained and verified beneficial ownership information. The Department of the Treasury since has answered that question in its April 6 [Frequently Asked Questions \(FAQs\) addressing PPP loans](#). Federally insured depository institutions and federally insured credit unions eligible to participate in the PPP program that have not yet collected beneficial ownership information on an existing customer do not need to collect and verify beneficial ownership information for that customer when it applies for a new PPP loan, unless otherwise indicated by the lender’s risk-based approach to BSA compliance. This may help to alleviate the burden of beneficial ownership verification for existing customers applying for PPP loans and speed the issuance of such loans.

For non-PPP loans, FinCEN reminded financial institutions of its September 7, 2018, administrative ruling, which excuses financial institutions from the requirement to identify and verify the identity of the beneficial owner(s) when a legal entity customer renews, modifies, or extends existing loans and commercial lines of credit or credit card accounts that do not require new underwriting and approval. The ruling, which also exempted certificate of deposit rollovers and safe deposit box rental renewals, does not apply to the initial opening of any of those types of accounts, however.

FinCEN also stated that “[t]o the extent that renewal, modification, restructuring, or extension for existing legal entity customers falls outside of the scope of that ruling, FinCEN recognizes that a risk-based approach taken by financial institutions may result in reasonable delays in compliance.”

None of this guidance appears to address or provide relief for customer verification policies for new loans made to existing customers under the CARES Act but outside the PPP; for example, those loans made to mid-size or larger businesses.

CTR Filings

FinCEN also has suspended, until further notice, the implementation of its February 10, 2020, [administrative ruling on CTR filing obligations](#) for sole proprietorships and entities operating under a “doing business as” name. The ruling had been slated to go into effect on April 6, 2020. FinCEN stated that the move was in response to concerns from industry regarding certain timing requirements of filings under the BSA during the COVID-19 pandemic.

The February ruling clarified CTR filing obligations using FinCEN Form 112 and gave specific instructions for completion of Part I of the form when reporting transactions involving sole proprietorships and legal entities operating under a “doing business as” (“DBA”) name, including listing the appropriate name and headquarters information in various fields. At the time of its issuance, FinCEN stated that the ruling was done in an effort to both enhance regulatory efficiency and provide complete and accurate CTR data to law enforcement.

The agency said that it will issue further information on these types of CTR filings at an appropriate time with reasonable implementation periods. Until such issuance, FinCEN has said that financial institutions should continue to report transactions involving sole proprietorships and DBAs under prior practice. Those financial institutions that have already made the necessary changes to comply with the 2020 ruling, however, may report CTRs in accordance with the now-suspended ruling, and do not need to revert to past practices.

FinCEN COVID-19 Online Contact Mechanism

The agency also announced the creation of a COVID-19-specific online contact mechanism, via a specific drop-down category, for financial institutions to communicate to FinCEN COVID-19-related concerns “while adhering to their BSA obligations.” Financial institutions that wish to communicate such COVID-19-related concerns to FinCEN must go to www.FinCEN.gov, click on “Need Assistance,” and select “COVID19” in the subject drop-down list. The new guidance suggests a willingness by the agency to entertain comments from industry on how it might alleviate some of the burdens of filing requirements.

Indeed, while FinCEN underscored that it expects financial institutions to continue following a risk-based approach, and to diligently adhere to their BSA obligations, it recognized “that certain regulatory timing requirements with regard to BSA filings may be challenging during the COVID-19 pandemic and that there may be some reasonable delays in compliance.” As it did in [previous guidance](#), FinCEN asked financial institutions to contact FinCEN and their functional regulator as soon as practicable if they have concerns that the pandemic may delay filings required by the BSA. The previous guidance also instructed covered financial institutions, when reporting suspicious activity relating to COVID-19, to enter “COVID-19” in Field 2 of the suspicious activity report (SAR) template.

OCC Response to FinCEN Guidance

In an April 7, 2020 bulletin, the OCC endorsed FinCEN's approach, saying that it "will consider the actions taken by banks to protect and assist employees, customers, and others in response to the COVID-19 pandemic, including any reasonable delays in BSA report filings, beneficial ownership verification or re-verification requirements, and other risk management processes," and similarly encouraged its regulated banks to "contact their examiners if they anticipate delays." With respect to non-PPP loans and other loans and transactions that fall outside of FinCEN's September 7, 2018 ruling, the OCC "recognize[d] that reasonable delays in compliance with beneficial ownership requirements under these circumstances would be an appropriate risk-based approach during the COVID-19 pandemic."

The OCC also said that it "will not criticize in reviews of BSA compliance financial institutions that continue to report transactions involving sole proprietorships and DBAs under prior practice simply for not yet having implemented the updated practice in accordance with" FinCEN's now suspended CTR ruling.

Finally, the OCC "recognize[d] that meeting certain regulatory timing requirements for BSA filings and bank-imposed timing requirements for other BSA risk management processes may be challenging during the COVID-19 pandemic, and that there may be reasonable delays in compliance as a result of resource constraints, limited customer access, or changing priorities caused by an evolving risk profile." The agency promised to "consider the unusual circumstances faced during the COVID-19 crisis when reviewing BSA compliance programs and determining any supervisory response," and agreed to work with affected banks to reduce burden when scheduling examinations or inspections, including making greater use of off-site reviews.

Practical Considerations

Depository institutions and credit unions eligible for the limited relief in FinCEN's guidance should pay close attention to whether there are other facts that nevertheless require the financial institution to go ahead and re-verify beneficial ownership information. For example, the application form for the PPP requires applicants to provide and certify the accuracy of identifying information for all 20% owners of the applicant. This is a distinct requirement from beneficial ownership verification under the BSA, and unaffected by FinCEN's guidance. To the extent that any provided information differs from beneficial ownership information already known by the financial institution about the customer, this would be a risk trigger that would obligate the institution to re-verify beneficial ownership. Such information also is relevant to an institution's sanctions compliance obligations.

Separately, although the guidance from FinCEN and the OCC promises some forbearance for late reporting, there is a simultaneous expectation that the institution will keep these regulators apprised of likely delays and the reasons behind them. Financial institutions should plan for such communications as part of their strategy to deal with any COVID-19-related adjustments in the administration of their programs.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Caroline E. Brown

Partner – Washington, D.C.

Phone: +1 202.624.2509

Email: cbrown@crowell.com

Carlton Greene

Partner – Washington, D.C.

Phone: +1 202.624.2818

Email: cgreene@crowell.com

Scott Lessne

Senior Counsel – Washington, D.C.

Phone: +1 202.624.2597

Email: slessne@crowell.com