

April 16, 2020

BSA and AML Compliance Guidance and the Paycheck Protection Program

FinCEN, the OCC and SBA Issue Guidance Regarding BSA Obligations and the Paycheck Protection Program

BACKGROUND

The passage of the Coronavirus Aid, Relief and Economic Security Act (“CARES Act”) and the creation of the Paycheck Protection Program (“PPP”) have generated both interest and confusion as financial institutions consider how to disburse loans available under the PPP while complying with their Bank Secrecy Act (“BSA”) obligations. Recent guidance from the U.S. Small Business Administration (“SBA”), in consultation with the United States Department of the Treasury (“Treasury Department”), the Financial Crimes Enforcement Network (“FinCEN”), and the Office of the Comptroller of the Currency (“OCC”) clarifies that although BSA requirements still apply to PPP loans, financial institutions do not need to collect or re-verify beneficial ownership information from existing customers, unless indicated by the financial institution’s risk-based approach to BSA compliance. For new customers, financial institutions are instructed to collect certain information from holders of a 20% or greater ownership interest in prospective customer and verify that information pursuant to the institution’s risk-based approach to BSA compliance.

A. THE PPP PROGRAM AND BSA COMPLIANCE

The CARES Act established the PPP, which allows the SBA to offer a new loan product under its Section 7(a) Loan Program. The CARES Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the PPP. One of the goals of the PPP is to disburse funds expeditiously to support small businesses that are experiencing financial hardship in light of the COVID-19 pandemic. In an attempt to balance this goal with the need for BSA compliance, the SBA, FinCEN and the OCC have recently issued relevant guidance to financial institutions that want to participate in the PPP. On April 2, the SBA released its interim final rule on the PPP (the “SBA IRF”), which noted that financial institutions did not need to re-

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verify beneficial ownership information for existing customers in order to disburse a PPP loan, unless otherwise indicated by the institution's risk-based approach to BSA compliance.¹ On April 3, FinCEN released a notice (the "FinCEN Notice") that mirrored the SBA IRF.² This preliminary guidance left unanswered questions about the agencies' expectations with respect to BSA compliance. In response, the OCC released a bulletin (the "OCC Bulletin")³ on April 7 and the SBA, in consultation with the Treasury Department, released a compilation of frequently asked questions on the PPP (the "SBA FAQ").⁴ The SBA regularly updates its FAQs and, as of April 13, it has released two questions that address beneficial ownership information requirements. On April 13, FinCEN released these two SBA FAQs on FinCEN letterhead (the "FinCEN FAQ") and indicated that FinCEN would continue to update its list to reflect BSA-related questions published in the SBA FAQ.⁵

The FinCEN Notice and the OCC bulletin both underscore each agency's commitment to promoting the success of the CARES Act and the expeditious disbursement of funds. But they also stress that BSA compliance remains crucial to national security and that financial institutions should continue to follow a risk-based approach in their BSA compliance.

To balance these goals, the OCC Bulletin, the SBA FAQ, and the FinCEN FAQ clarify that financial institutions may disburse PPP loans to existing customers even if the financial institutions have not collected or verified beneficial ownership information for those customers, provided that the institutions comply with their own risk-based approaches to BSA compliance.

For new customers, the SBA FAQ⁶ indicates that financial institutions should collect the name, title, percentage of ownership, TIN, address, and date of birth from all natural persons with a 20% or greater ownership stake in the prospective customer. If a business or other legal entity holds a 20% or greater ownership in the prospective customer, the financial institution will need to collect appropriate beneficial ownership information for that entity. Financial institutions should verify the collected beneficial ownership information pursuant to their risk-based approach to BSA compliance. The FinCEN FAQ, released on the same day, mirrors the information released in the SBA FAQ.

B. BSA COMPLIANCE AND THE COVID-19 PANDEMIC

In addition to the guidance on PPP lending, the FinCEN Notice provides several other updates in response to the COVID-19 pandemic, including: (i) an acknowledgement that the timing of certain BSA reporting obligations may be reasonably delayed; (ii) a temporary suspension of the implementation of FinCEN's February 6, 2020 ruling with respect to Currency Transaction Reports ("CTRs"); (iii) a description of a new online communication method that financial institutions can use to communicate BSA-compliance issues related to COVID-19 to FinCEN; (iv) encouragement to exercise reasonable innovation in undertaking BSA compliance; and (v) a reminder of the fraudulent

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and malicious transaction typologies that started to emerge in response to the pandemic and other typologies that tend to emerge after natural disasters.

The OCC Bulletin reiterates the COVID-19-related information provided in the FinCEN Notice and also provides some insight into how the OCC will evaluate a financial institution's BSA compliance program in light of the pandemic. Specifically, the OCC will consider a financial institution's actions to protect and assist employees, customers, and others in response to the COVID-19 pandemic. Such actions may include reasonable delays in BSA report filings, beneficial ownership verification or re-verification requirements, and other risk management processes. The OCC Bulletin's mention of reasonable delays in connection with customer verification requirements may suggest that the OCC understands the difficulty financial institutions face in both maintaining robust BSA compliance and expeditiously disbursing CARES Act funds and that the OCC will provide financial institutions some amount of latitude as they balance these competing goals.

CONCLUSION

FinCEN indicated that it will continue to consider reasonable risk-based approaches to balance a financial institution's BSA obligations with the desired policy objective of promoting the success of the CARES Act and may issue further guidance as the CARES Act is implemented. For now, however, it is clear that financial institutions are relieved of their obligation to collect beneficial ownership information from existing customers before the disbursement of a PPP loan, unless otherwise indicated by the institution's risk-based approach to BSA compliance. With respect to new customers, to comply with the BSA, financial institutions must collect certain information from holders of 20% or greater ownership interests of the prospective customer and verify that information pursuant to the institution's risk-based approach to BSA compliance.

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ENDNOTES

- 1 Business Loan Program Temporary Changes; Paycheck Protection Program, *available at*: https://www.sba.gov/sites/default/files/2020-04/PPP--IFRN%20FINAL_0.pdf.
- 2 The Financial Crimes Enforcement Network Provides Further Information to Financial Institutions in Response to the Coronavirus Disease 2019 (COVID-19) Pandemic, *available at*: <https://www.fincen.gov/news/news-releases/financial-crimes-enforcement-network-provides-further-information-financial>.
- 3 OCC Bulletin 2020-34, Bank Secrecy Act/Anti-Money Laundering: OCC Supports FinCEN's Regulatory Relief and Risk-Based Approach for Financial Institution Compliance in Response to COVID-19, *available at*: <https://www.occ.gov/news-issuances/bulletins/2020/bulletin-2020-34.html>.
- 4 Paycheck Protection Program Loans Frequently Asked Questions (FAQs), Question 18, *available at*: <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>.
- 5 Paycheck Protection Program Frequently Asked Questions (FAQs), *available at*: https://www.fincen.gov/sites/default/files/2020-04/Paycheck_Protection_Program_FAQs.pdf.
- 6 Paycheck Protection Program Loans Frequently Asked Questions (FAQs), Question 25, *available at*: <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>.

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