

The Merry Month of May: FinCEN, GDPR and Financial Institutions

In 1599, the English Elizabethan dramatist Thomas Dekker (1572-1632) saw his play "The Shoemaker's Holiday" first performed (in London). In Act 3, Scene V of the play, set in a French "neighborhood," a famed bit of verse is included (relevant to occurrences in the play):

O, the month of May, the merry month of May
So frolic, so gay, and so green, so green, so green!
O, and then I did unto my true love say,
Sweet Peg, thou shall be my Summer Queen.

The poem captures the burst of agricultural and sexual energy arising out of the end of Winter, the plantings in the Spring, and optimism about the future.

But in May 2018, it is not at all clear that an optimistic outlook continues, especially for financial institutions, given the implementation of two new regulatory regimes – which on their face seem very much at cross purposes.

On May 11, 2018, the new beneficial ownership (so called "Customer Due Diligence" or "CDD") regulation went into effect. First adopted by the Financial Crimes Enforcement Network ("FinCEN") on May 11, 2016, with a two-year incubation period, the new regulation applies to all "covered financial institutions" that are federally regulated and/or insured banks, federally insured credit unions, mutual funds, brokers or dealers in securities, future commission merchants, and introducing brokers in commodities. The FinCEN regulation does not apply to registered investment advisers IF they do not engage in effecting securities transactions for their clients.

FinCEN is a Bureau of the United States Department of the Treasury founded April 25, 1990, as a section in the Department. In May 1999 it was given regulatory responsibilities, and in October of that year the Treasury's Office of Financial Enforcement was merged into FinCEN. On September 26, 2002, after passage of the PATRIOT Act in response to 9/11, FinCEN was made a separate Bureau of the Treasury. Its purposes (in the words of Jennifer Shasky Calvery, the FinCEN Director, on November 18, 2013) are "... to safeguard the financial system from illicit use, combat money laundering and promote national security." Its motto is: "Follow the Money."

The new CDD regulations require any covered financial institution opening (or generally renewing) an account for a "legal entity" (e.g., corporation, limited liability company, limited partnership, general partnership, business trusts, and similar entities where ownership may not be readily apparent) to determine and record who are the beneficial owners of the legal entity. For purposes of the CDD regulation, beneficial ownership has two prongs: a) ownership and (b) control. The covered financial institution is to obtain certification from the legal entity customer of: a) every natural person (including name, date of birth, address and social security number or other governmental identification number [such as passport number in the case of foreign persons]) who owns 25% or more of the equity interests in the legal entity; b) every natural person with significant responsibility to control/manage the legal entity (such as officers, directors, managers, etc.). The covered financial institution must verify this information using reasonable procedures (unless the legal entity presents a higher risk profile or category of activities that cause the financial institution to have concerns about the legal entity or its activities and mandate further inquiry).

Over →



Then just two weeks later, on May 25, 2018, the General Data Protection Regulation (“GDPR”) issued by the European Parliament and Council on April 27, 2016, took effect after a 25-month incubation period. The GDPR applies (see Article 5, Section 2):

...to the processing of personal data of data subjects who are in the [European] Union by a controller or processor not established in the Union, where the processing activities are related to:

- (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union, or
- (b) the monitoring of their behavior as far as their behavior takes place within the Union.

The GDPR defines “personal data” in Article 1 Section 1 as:

...any information relating to an identified or identifiable natural person (data subject); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, psychological, genetic, mental, economic, cultural or social identity of that natural person.

Clearly, to the extent a covered financial institution is offering or providing services to persons located in the European Union, the GDPR applies. Further, to the extent the person in the Union to which services are being offered or provided is a legal entity, the FinCEN CDD regulation requires obtaining, verifying, recording, and updating beneficial ownership information – data to which the GDPR specifically applies.

Article 6 of the GDPR makes the collection and processing of such data illegal with possible substantial adverse consequences (fines up to the lower of 20 million Euros or 4% of the business’s annual worldwide revenue) unless:

- (a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;
- (b) processing is necessary for compliance with a legal obligation to which the controller is subject.

In light of the potential for conflict between these two regulatory regimes, we suggest that covered financial institutions offering or providing services to persons in the European Union amend the form of Certificate included in the FinCEN regulation (the form is suggested, but not required) as set out on the attachment to this paper when opening or renewing an account for a legal entity “located” in the European Union. The amended form does the following: it adds the express consent of the person completing the Certificate (noting the requirements of the CDD) including a representation by the person completing the Certificate that the other natural persons whose information is included on the Certificate have also consented to providing the information, and it expressly states the legal obligation of the covered financial institution to obtain, verify, record and update the information.

We are quite hopeful that these steps will make future months for affected financial institutions even more MERRY than the Month of May 2018.

This *Banking Alert* was written by Peter D. Hutcheon, Esq. If you have any questions about the information contained in this alert or any other questions related to banking, please feel free to contact him at pdhutcheon@nmmlaw.com.

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**APPENDIX TO
“THE MERRY MONTH OF MAY: FinCEN, GDPR and FINANCIAL INSTITUTIONS”
CERTIFICATION REGARDING BENEFICIAL OWNERS OF LEGAL ENTITY CUSTOMERS
WHOSE DATA ARE SUBJECT TO THE EUROPEAN UNION GENERAL DATA
PROTECTION REGULATIONS**

I. GENERAL INSTRUCTIONS

What is this form?

To help the United States government fight financial crime, U.S. Federal regulation administered by the Financial Crimes Enforcement Network (“FinCEN”) of the U.S. Department of the Treasury requires certain financial institutions to obtain, verify, and record information about the beneficial owners of legal entity customers. Legal entities can be abused to disguise involvement in terrorist financing, money laundering, tax evasion, corruption, fraud, and other financial crimes. Requiring the disclosure of key individuals who own or control a legal entity (i.e., the beneficial owners) helps law enforcement investigate and prosecute these crimes.

Who has to complete this form?

This form pursuant to Fin CEN regulations must be completed by the person opening a new account on behalf of a legal entity with any of the following U.S. financial institutions: (i) a bank or credit union; (ii) a broker or dealer in securities; (iii) a mutual fund; (iv) a futures commission merchant; or (v) an introducing broker in commodities.

For the purposes of this form, a legal entity includes a corporation, limited liability company, or other entity that is created by a filing of a public document with a Secretary of State or similar office, a general partnership, and any similar business entity formed in the United States or a foreign country. Legal entity does not include sole proprietorships, unincorporated associations, or natural persons opening accounts on their own behalf.

What information do I have to provide?

This form requires you to provide the name, address, date of birth and Social Security number (or passport number or other similar information, in the case of foreign persons) for the following individuals (i.e., the beneficial owners):

- (i) Each individual, if any, who owns, directly or indirectly, 25 percent or more of the equity interests of the legal entity customer (e.g., each natural person that owns 25 percent or more of the shares of a corporation); and
- (ii) Each individual with significant responsibility for managing the legal entity customer (e.g., a Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Managing Member, General Partner, President, Vice President, or Treasurer).

The number of individuals that satisfy this definition of "beneficial owner" may vary. Under section (i), depending on the factual circumstances, up to four individuals (but as few as zero) may need to be identified. Regardless of the number of individuals identified under section (i), you must provide the identifying information of one individual under section (ii). It is possible that in some circumstances the same individual might be identified under both sections (e.g., the President of Acme, Inc. who also holds a 30% equity interest). Thus, a completed form will contain the identifying information of at least one

individual (under section (ii)), and up to five individuals (i.e., one individual under section (ii) and four 25 percent equity holders under section (i)).

The financial institution may also ask to see a copy of a driver's license or other identifying document for each beneficial owner listed on this form.

II. CERTIFICATION OF BENEFICIAL OWNER(S)

Persons opening an account on behalf of a legal entity must, as required by FinCEN regulations, provide the following information;

a. *Name and Title of Natural Person Opening Account:*

b. *Name and Address of Legal Entity for Which the Account is Being Opened:*

c. *The following information for each individual, if any, who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, owns 25 percent or more of the equity interests of the legal entity listed above:*

Name	Date of Birth	Address (Residential or Business Street Address)	<i>For U.S. Persons:</i> Social Security Number	<i>For Foreign Persons:</i> Passport Number and Country of Issuance, or other similar identification number ¹

(If no individual meets this definition, please write "Not Applicable.")

d. *The following information for one individual with significant responsibility for managing the legal entity listed above, such as:*

- An executive officer or senior manager (e.g., Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Managing Member, General Partner, President, Vice President, Treasurer); or*

Any other individual who regularly performs similar functions.

(If appropriate, an individual listed under section (c) above may also be listed in this section (d)).

Name	Date of Birth	Address (Residential or Business Street Address)	<i>For U.S. Persons:</i> Social Security Number	<i>For Foreign Persons:</i> Passport Number and Country of Issuance, or other similar identification number ¹

I, _____ (name of natural person opening account) acknowledge and agree that the financial institution to which I am delivering this Certificate in connection with opening an account with that institution on behalf of _____ (full name of legal entity) is legally obligated by the regulations of the Financial Crimes Enforcement Network, a Bureau of the United States Department of the Treasury (“FinCEN”), to obtain, verify, record and update the information concerning beneficial owners set out above.

I understand that the institution asks that I and all other natural persons named above consent to giving the institution the required information concerning beneficial ownership, specifically personal data concerning me, in my case, and personal data concerning each other natural person named above.

I represent and warrant that each of the natural persons named above (other than I) was informed by me of the legal obligation (under FinCEN regulations) of this financial institution to obtain, verify, record and update the information concerning beneficial ownership as to each of them and that each of them consented to having that personal data concerning beneficial ownership provided to this financial institution.

I, _____ (name of natural person opening account), hereby certify, to the best of my knowledge, that each of the information, acknowledgement and agreement, and representation and warranty, provided above is complete and correct.

Signature _____ Date: _____

Legal Entity Identifier _____ (Optional)

¹ In lieu of a passport number, foreign persons may also provide an alien identification card number, or number and country of issuance of any other government-issued document evidencing nationality or residence and bearing a photograph or similar safeguard.