

FINANCIAL SERVICES ALERT

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DEVELOPMENTS OF NOTE

FinCEN, the Federal Banking Agencies and the SEC Issue Joint Guidance on Obtaining and Retaining Beneficial Ownership Information

The U.S. Treasury Department's Financial Crimes Enforcement Network, the federal bank regulatory agencies, and the Securities and Exchange Commission, in consultation with the Commodity Futures Trading Commission, issued [guidance](#) (the "Guidance") that clarifies and consolidates existing regulatory expectations regarding the information financial institutions must obtain regarding beneficial owners for certain accounts and customer relationships. The Guidance does not alter or supersede previously issued regulations, rulings, or guidance related to Customer Identification Program ("CIP") requirements.

The Guidance emphasizes that financial institutions should follow a risk-focused approach that enables the institution to conduct appropriate customer due diligence ("CDD") on customers, particularly those customers that present a high risk of money laundering or terrorist financing. In particular, the Guidance notes that beneficial owners of accounts may present heightened risks because the use of nominal account holders can conceal the identity of the true owner of assets or property. The Guidance also encourages financial institutions to consider adopting procedures to address the risks presented by beneficial owners on an enterprise-wide basis, such as by sharing and obtaining beneficial ownership information across business lines, separate legal entities within an enterprise, and affiliated support units.

The Guidance states that financial institutions should establish and maintain CDD procedures that are reasonably designed to identify and verify the identity of an account's beneficial owners, as appropriate, based on the risk associated with the account. The Guidance lists the following as examples of such procedures:

- Determining whether the customer is acting as agent for or on behalf of another, and, if so, obtaining information regarding the capacity in which and on whose behalf the customer is acting;
- Where the customer is an entity not publicly traded in the United States, such as an unincorporated association, a private investment company, trust or foundation, obtaining information about the structure or ownership of the entity to allow the institution to determine whether the account poses heightened risk; and
- Where the customer is a trustee, obtaining information about the trust structure to allow the institution to establish a reasonable understanding of the trust structure and to determine the provider of funds and any persons or entities that have control over the funds or have the power to remove the trustees.

If the financial institution identifies an account with heightened risk, the Guidance instructs the institution to perform enhanced due diligence ("EDD") appropriate for the level of risk, such as steps to identify and verify beneficial owners, to reasonably understand the sources and uses of funds in the account, and to reasonably understand the relationship between the customer and the beneficial owner.

The Guidance also highlights particular due diligence requirements concerning beneficial owners of private banking and foreign correspondent accounts. The Guidance observes that financial institutions may need to apply EDD to obtain beneficial ownership information for private banking accounts, including whether a beneficial owner is a senior foreign political figure. The Guidance also notes that, with respect to correspondent accounts for foreign banks with offshore banking licenses or licenses from non-cooperative jurisdictions, covered financial institutions should obtain information, as appropriate, about the identity of any person with authority to direct transactions through any correspondent account that is a payable-through-account and the source and beneficial owner of funds or other assets in such accounts. Under rules prohibiting covered financial institutions from maintaining correspondent accounts for foreign shell banks, such institutions also must take steps to ensure that the account is not being used to provide indirectly services to foreign shell banks.

OCC Permits After-the-Fact Notice for Community Development Investments Aggregating up to 15% of a National Bank's Unimpaired Capital and Surplus

The OCC issued a [Community Development Investment Letter](#) ("CDI Letter #2009-6") in which the OCC concluded that a national bank's after-the-fact notice of its investment in a fund intended to finance the installation of twelve photovoltaic systems designed to primarily benefit low- and moderate-income areas complied with the requirements of 12 U.S.C., §24 (Eleventh) and 12 C.F.R. Part 24. CDI Letter 2009-6 states that the OCC permitted the investment with after-the-fact notice pursuant to a 2006 opinion letter allowing such investments up to an aggregate limit of 15% of a national bank's unimpaired capital and surplus. For such after-the-fact notice investments, the national bank must

continue to be well-capitalized, and the additional investment amounts may not pose a risk to the FDIC's Deposit Insurance Fund.

OTHER ITEMS OF NOTE

SEC Staff Clarifies Compliance Date for New Money Market Fund Stress Testing Requirement

The [March 5, 2010 Alert](#), which discussed the recent amendments to the SEC's rules governing money market funds, stated that money market funds had until May 5, 2010 to comply with the new requirement to adopt stress testing procedures. The *Alert* noted, however, that the discussion of compliance dates in the SEC's formal release adopting the amendments was not entirely clear on this issue. The SEC staff has subsequently indicated that the compliance date for money market fund stress testing procedures is May 28, 2010.

SEC Staff Updates FAQ on Advisers Act Custody Rule to Address Recent Rule Amendments

The staff of the SEC's Division of Investment Management updated its [FAQ](#) on Rule 206(4)-2 under the Advisers Act of 1940 (the "Custody Rule"), which imposes a number of requirements on SEC-registered investment advisers that are deemed to have custody of its clients' funds and securities. The updates address questions raised by the SEC's adoption of amendments to the Custody Rule and related rules (discussed in detail in the [January 5, 2010 Alert](#)), which generally become effective March 12, 2010. In addition to updates to existing topics and answers, the update adds a new section devoted entirely to the compliance dates for the rule changes.

Goodwin Procter Issues Client Alert Providing Further Analysis of IRS Guidance and FinCEN Rule Proposal Regarding FBAR Requirements

Goodwin Procter issued a [Client Alert](#) providing additional analysis of a rule proposal by the U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN) and guidance issued by the Internal Revenue Service (IRS), in each case regarding Reports of Foreign Bank and Financial Accounts (FBARs) required to be filed with the IRS on Form TD F 90-22.1. These developments were previously discussed in the [March 2, 2010 Alert](#).

UCITS III Funds as Suitable Vehicles for Hedge Fund Managers

Our colleagues at SJ Berwin have prepared an analysis of the growing trend for EU based hedge fund managers to launch UCITS compliant funds, which is available by clicking [here](#).

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