October 3, 2014

Financial Crimes Enforcement Network
Policy Division
P.O. Box 39
Vienna, Virginia  22183

Re: Department of the Treasury Financial Crimes Enforcement Network Notice of Proposed
Rulemaking—Customer Due Diligence Requirements for Financial Institutions;
(August 4, 2014)

Dear Sir/Madam:

On behalf of the American Bar Association (ABA), which has nearly 400,000 members, I write in
response to the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) request
for comments on the above-referenced notice of proposed rulemaking (Proposed Rule) concerning
customer due diligence requirements for financial institutions. Although the ABA supports those
portions of the Proposed Rule regarding the limited beneficial ownership disclosures required for
intermediated accounts, the ABA urges FinCEN to include additional language in the final rule
clarifying that when lawyers or law firms establish accounts at financial institutions on behalf of
their clients, those accounts will be deemed to be intermediated accounts under the rule. As Chair of
the ABA Task Force on Gatekeeper Regulation and the Profession, I have been authorized to
express the ABA’s views with respect to the Proposed Rule.

FinCEN’s Advance Notice of Proposed Rulemaking and the ABA’s Previous Comments

As FinCEN notes in the Proposed Rule, it “formally commenced this rulemaking process in March
2012 by issuing an ANPRM [Advance Notice of Proposed Rulemaking] that described FinCEN’s
potential proposal for codifying explicit CDD [customer due diligence] requirements, including
customer identification…and obtaining beneficial ownership information.”1 In the ANPRM,
FinCEN sought comment on a number of new customer due diligence proposals, including a
categorical requirement for financial institutions to identify beneficial ownership of their
accountholders, subject to risk-based verification.

While the ANPRM was focused primarily on requiring financial institutions such as banks, brokers
or dealers in securities, mutual funds, and other financial entities to gather beneficial ownership
information in connection with new accounts, FinCEN also sought comment on whether an
individual or entity—such as a law or accounting firm—that opens an account on behalf of another

1 See Proposed Rule, 79 Fed. Reg. at 45154, referring to FinCEN’s Advance Notice of Proposed Rulemaking—Customer
Due Diligence Requirements for Financial Institutions; RIN 1506-AB15, 77 Fed. Reg. 13046 (March 5, 2012) (footnote
omitted).
should be required to disclose that fact. In addition, FinCEN sought comments in the ANPRM on whether the beneficial ownership of the assets in those accounts, not just beneficial ownership information about the legal entity establishing the account, should have to be disclosed.  

In response to the ANPRM, the ABA submitted a comment letter in May 2012 expressing concerns over the proposals referenced above to the extent that they could be interpreted to require lawyers and law firms to disclose their clients’ identities or their corporate clients’ beneficial owners whenever lawyers and law firms establish accounts at financial institutions on behalf of the clients or deposit client funds into the client trust accounts of these lawyers and law firms. In particular, the ABA expressed concerns that the ANPRM proposals could impose substantial and unjustified burdens on lawyers, law firms, and their clients, while undermining the attorney-client relationship, client confidentiality under ABA Model Rule of Professional Conduct 1.6 and the corresponding state court rules, as well as traditional state court regulation of lawyers. Therefore, the ABA urged FinCEN not to proceed with these aspects of the ANPRM in any subsequent proposed or final rule.

FinCEN’s New Proposed Rule Regarding Intermediated Accounts

In its Proposed Rule, FinCEN has proposed new rules under the Bank Secrecy Act “to clarify and strengthen customer due diligence requirements for: Banks; brokers or dealers in securities; mutual funds; and futures commission merchants and introducing brokers in commodities.” The Proposed Rule also contains explicit customer due diligence requirements and “a new regulatory requirement to identify beneficial owners of legal entity customers, subject to certain exceptions.”

Unlike FinCEN’s previous ANPRM, the current Proposed Rule does not seek the disclosure of beneficial ownership information regarding the assets of an account when the account is opened on behalf of another. Instead, the Proposed Rule focuses on a new proposed “requirement to identify and verify the beneficial owners of legal entity customers, subject to certain exemptions.”

In addressing the subject of new accounts held by an “intermediary” on behalf of third parties—which the Proposed Rule describes as “a customer that maintains an account for the primary benefit of others, such as the intermediary’s own underlying clients”—the Proposed Rule discusses the important issue of “whether a financial institution would be required to identify the intermediary’s own underlying clients or their beneficial owners…[or] whether a financial institution must identify the beneficial owners of the intermediary (i.e., the direct customer)…” only.

After acknowledging the valid concerns expressed by commentators that a new requirement to identify an intermediary’s underlying clients and their beneficial owners could have “significant detrimental consequences to the efficiency of the U.S. financial markets,” the Proposed Rule

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3 The ABA’s May 4, 2012 comment letter, which outlined the ABA’s support for reasonable anti-money laundering (AML) and combating the financing of terrorism (CFT) measures and its concerns over the ANPRM is available at http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2012may4_customerduediligence_c.authcheckdam.pdf
5 Id.
7 Id. at 45160.
provided the following guidance with respect to how financial institutions should handle intermediated accounts:

“Therefore, for purposes of the beneficial ownership requirement, if an intermediary is the customer, and the financial institution has no CIP [Customer Identification Program] obligation with respect to the intermediary’s underlying clients pursuant to existing guidance, a financial institution should treat the intermediary, and not the intermediary’s underlying clients, as its legal entity customer.”

Accordingly, under this proposed guidance in the Proposed Rule, when an intermediary opens a new account at a financial institution for the primary benefit of its clients, the intermediary would be required to disclose only its own beneficial ownership information on the Certification of Beneficial Owner(s) form attached to the Proposed Rule, not the beneficial ownership information regarding the intermediary’s clients.

The ABA’s Views on the Proposed Rule’s Guidance on Intermediated Account Relationships

The ABA supports the guidance outlined above regarding intermediated accounts—and the wording of the proposed Certification of Beneficial Owner(s) that was attached to the Proposed Rule—as a reasonable and effective way for financial institutions to gather clearly defined beneficial ownership information about the financial institution’s direct customers without the detrimental consequences that could arise if intermediaries were required to disclose beneficial ownership information about all of their underlying clients for whom the accounts are opened and maintained.

The Proposed Rule’s guidance on intermediated accounts is worded broadly and appears on its face to include accounts that lawyers and law firms establish on behalf of their clients, but it does not specifically reference these accounts. Thus, it is certainly possible that some financial institutions, in an environment of rigorous governmental enforcement, could misinterpret the rule and seek to require lawyers and law firms opening such accounts to disclose information about their clients’ identities and beneficial ownership. The ABA urges FinCEN to clarify this issue in the final rule for the following important reasons:

1. **Because Lawyers and Law Firms Are Required to Establish Trust Accounts for Many of Their Clients, Requiring these Lawyers and Law Firms to Disclose Their Clients’ Identities and Beneficial Ownership Information Would Be Costly and Burdensome**

As explained in the ABA’s previous comments to the ANPRM, lawyers and law firms often hold funds of clients in one or more separate trust accounts they establish at banks or other financial institutions. The U.S. Supreme Court has explained that “attorneys are frequently required to hold clients’ funds for various lengths of time...(and it) has long been recognized that they have a professional and fiduciary obligation to avoid commingling their clients’ money with their own, but it is not unethical to pool several clients’ funds in a single trust account.” *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 220-221 (2003) (discussing *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 160-161 (1998)). In fact, ABA Model Rule of Professional Conduct 1.15

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8 Id. at 45161.
dealing with “Safekeeping of Property” requires lawyers to deposit into a client trust account any legal fees and expenses that have been paid in advance, and the lawyer is permitted to withdraw funds from the trust account “only as fees are earned or expenses incurred.”

Every state court system has adopted—and vigorously enforces—binding rules similar to ABA Model Rule 1.15 that require lawyers to keep their client funds in separate trust accounts until the fees are earned or expenses incurred. In addition, many lawyers and law firms establish separate client trust accounts for other purposes, such as when the lawyer or law firm is “administering estate monies or acting in similar fiduciary capacities” for the client.

In our view, the considerable time, effort, and expense that would be required for lawyers and law firms to collect and report beneficial ownership information for the large percentage of their clients for whom they establish trust accounts is excessive and clearly disproportionate to any marginal AML or CFT benefits that the information might be expected to provide to FinCEN and other federal agencies. The cost to both large and small law firms, as well as to sole practitioners, would increase and administration of client monies would become less efficient. The establishment of legitimate trust accounts to meet clients’ legal needs would be discouraged. Moreover, the burden on lawyers and law firms is likely to grow and worsen over time, as their clients’ beneficial ownership information is subject to periodic changes, sometimes without the knowledge of the lawyers or law firms.

2. Requiring Lawyers and Law Firms That Establish Client Trust Accounts to Disclose Their Clients’ Identities and Beneficial Ownership Information Would Violate Client Confidentiality

The ABA is concerned that if the Proposed Rule were interpreted to require lawyers and law firms to disclose confidential information to financial institutions or the government regarding the identity and beneficial ownership of their clients whenever the lawyer or law firm establishes an account for the client or deposits advance fees or expenses received from the client into the lawyer’s or law firm’s trust account, these disclosure obligations would be inconsistent with ABA Model Rule of Professional Conduct 1.6 dealing with “Confidentiality of Information” and with the many binding state rules of professional conduct that closely track the ABA Model Rule. ABA Model Rule 1.6 states that “a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent…” or unless one or more of the narrow exceptions listed in the Rule is present.

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9 See ABA Model Rule of Professional Conduct 1.15(c).
10 See chart comparing ABA Model Rule 1.15 in the various individual states, available at: http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_15.authcheckdam.pdf
11 See ABA Model Rule 1.15, Comment [1].
13 Although ABA Model Rule 1.6(6) allows a lawyer to disclose confidential client information “to comply with other law or a court order,” nothing in the Proposed Rule, the Bank Secrecy Act, or the other statutes cited by FinCEN expressly or implicitly requires lawyers to reveal client confidences to financial institutions or the government.
The range of client information that lawyers are not permitted to disclose under ABA Model Rule 1.6 is broader than that covered by the attorney-client privilege. Although Rule 1.6 prohibits lawyers from disclosing information protected by the attorney-client privilege and the work product doctrine, Rule 1.6 also forbids lawyers from voluntarily disclosing other non-privileged information that the client wishes to keep confidential. This category of non-privileged, confidential client information includes the identity of the client as well as other information related to the legal representation, including, for example, the beneficial ownership of the corporate client and other confidential information that the client may choose to reveal to the lawyer but does not wish to be revealed to third parties.

Disclosing this type of confidential client information would be clearly inconsistent with lawyers’ existing ethical duties outlined in Rule 1.6 and the binding state rules of professional conduct that mirror the ABA Model Rule. In addition, the risk that the client’s identity—and other confidential beneficial ownership information about the clients—could be divulged by the lawyer or law firm could discourage a client from retaining a lawyer or law firm and entrusting funds with the lawyer or law firm, thereby substantially interfering with a client’s fundamental right to counsel.

**Conclusion**

For all these reasons, the ABA urges FinCEN to include additional language in the final rule clarifying that when lawyers or law firms establish new accounts at financial institutions on behalf of their clients, those accounts will be deemed to be intermediated accounts under the rule, and the lawyers and law firms need only disclose their own beneficial ownership information, not the identity or beneficial ownership information of their clients for whose benefit the accounts are established or maintained.

Thank you for considering the views of the ABA on these important issues. If you have any questions regarding the ABA’s position on the Proposed Rule, please contact me at (410) 244-7772 or klshepherd@venable.com, or Thomas M. Susman, Director of the ABA Governmental Affairs Office, at (202) 662-1765 or thomas.susman@americanbar.org.

Very truly yours,

Kevin L. Shepherd

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14 See, e.g., Alabama Ethics Op. 89-111 (1989) (lawyer may not disclose name of client to funding agency); Texas Ethics Op. 479 (1991) (law firm that obtained bank loan secured by firm's accounts receivable may not tell bank who firm's clients are and how much each owes); South Carolina Ethics Op. 90-14 (1990) (lawyer may not volunteer identity of client to third party); and Virginia Ethics Op. 1300 (1989) (in absence of client consent, nonprofit legal services corporation may not comply with federal agency's request for names and addresses of parties adverse to certain former clients, since that may involve disclosure of clients’ identities, which may constitute a client secret).
cc: Members, ABA Task Force on Gatekeeper Regulation and the Profession
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