THE AMERICAN COLLEGE OF
TRUST AND ESTATE COUNSEL

McPherson Building
901 15th Street, NW, Suite 525
Washington, DC 20005
(202) 684-8460 • Fax (202) 684-8459
actec.org

Board of Regents

President
ANN B. BURNS
Minneapolis, Minnesota

President-Elect
ROBERT W. GOLDMAN
Naples, Florida

Vice President
KURT A. SOMMER
Santa Fe, New Mexico

Treasurer
SUSAN D. SNYDER
Chicago, Illinois

Secretary
PETER S. GORDON
Wilmington, Delaware

Immediate Past President
STEPHEN R. AKERS
Dallas, Texas

LEIGH-ALEXANDRA BASHA
Washington, District of Columbia

PROF. GERRY W. BEYER
Lubbock, Texas

LORA L. BROWN
Seattle, Washington

ELAINE M. BUCHER
Boca Raton, Florida

STEPHANIE B. CASTEEL
Reno, Nevada

MICKEY R. DAVIS
Houston, Texas

LAUREN Y. DETZEL
Orlando, Florida

GREGORY V. GADARIAN
Tucson, Arizona

CHRISTOPHER H. GADSDEN
Wayne, Pennsylvania

KEITH BRADOC GALLANT
New Haven, Connecticut

STEVEN B. GORIN
St. Louis, Missouri

LYNNE K. GREEN
Jackson, Mississippi

MIRIAM W. HENRY
New Orleans, Louisiana

JOSHUA E. HUSBANDS
Portland, Oregon

KIM KAMIN
Chicago, Illinois

AMY K. KANYUK
Concord, New Hampshire

BETH SHAPIRO KAUFMAN
Washington, District of Columbia

TRENT S. KIZIAH
Los Angeles, California

JAMES D. LAMM
Minneapolis, Minnesota

MARGARET G. LODISE
Los Angeles, California

BRIDGET A. LOGSTROM KOCI
Minneapolis, Minnesota

STEPHANIE LOOMIS-PRICE
Houston, Texas

C. KEVIN McCRINDLE
Waterloo, Iowa

PROF. NANCY A. McLAUGHLIN
Salt Lake City, Utah

PETER T. MOTT
Southport, Connecticut

RUDY L. OGBURN
Raleigh, North Carolina

THOMAS L. OVERBEY
Fayetteville, Arkansas

LYNN B. SASSIN
Baltimore, Maryland

JAMES D. SPRATT
Atlanta, Georgia

DALE B. STONE
Birmingham, Alabama

ROBERT E. TEMMERMAN, JR.
San Jose, California

SUZANNE BROWN WALSH
Hartford, Connecticut

RANDALL M. L. YEE
Honolulu, Hawaii

Executive Director
DEBORAH O. MCKINNON

Please Address Reply to:

February 4, 2022

Financial Crimes Enforcement Network
Global Investigations Division
P.O. Box 39
Vienna, VA 22183

RE: Docket Number: FINCEN-2021-0007 and RIN 1506-AB54
Submitted electronically at: www.regulations.gov

Dear Ladies and Gentlemen:

The American College of Trust and Estate Counsel ("ACTEC") is pleased to submit comments in response to an Advance Notice of Proposed Rulemaking (the "ANPRM") RIN 1506-AB-54, dated December 2, 2021, by the Financial Crimes Enforcement Network ("FinCEN") seeking public comments regarding potential requirements under the Bank Secrecy Act ("BSA") regarding, broadly, the reporting of certain information by certain persons regarding certain non-financed real estate transactions.

ACTEC is a professional organization of approximately 2,400 lawyers from throughout the United States including 100 international members. Fellows of ACTEC are elected to membership by their peers on the basis of professional reputation and the ability in the fields to trusts and estates on the basis of having made substantial contributions through lecturing, writing, teaching and bar activities. Fellows of ACTEC have extensive experience in providing advice to taxpayers. As such, most of the Fellows of ACTEC are involved on a day-to-day basis with the creation and administration of trusts. ACTEC offers technical comments about the law and its effective administration but does not take positions on matters of policy or political objectives.

This response will not address the second section of the ANPRM given that ACTEC Fellows are only infrequently involved in real estate closings and settlements. Instead, ACTEC will respond to the issues raised in the first section of the ANPRM, addressing the area of its members 'expertise, the structure and operation of trusts, including those that may become involved in non-financed real estate transactions.

This response is divided into the following sections:

I. ACTEC's Recommendations
II. Trust Real Estate Purchases Made through LLC's
III. Exemption from Recordkeeping/Reporting Requirements for Trusts with Corporate Trustees - responding to Question 31 of the ANPRM
IV. Types of Trusts
V. Funding of Trusts by Others
VI. Risk Assessment Relating to Types of Trusts
VII. Brief Responses to Question 26 and 43

If you would like to discuss these comments, please contact the primary drafters who are the Co-Chairs of the ACTEC FATF Task Force, Carolyn A. Reers at, creers@wiggin.com; Lyat Eyal at lyat@are-legal.com , and Glenn G. Fox, at glenn.fox@bakermckenzie or Deborah O. McKinnon, ACTEC Executive Director at domckinnon@actec.org.

Respectfully submitted,

Ann B. Burns, President

Attachment:

The American Collee of Trust and Estate Counsel (ACTEC) Comment to Notice of Proposed Rule Making-Customer Due Diligence requirements for Financial Institutions (Regulatory Identification Number 1506-AB25), October 2, 2014

February 4, 2022

Bank Secrecy Act

Advance Notice of Proposed Rulemaking ("ANPRM") Information Reporting Requirements for Persons Involved in Real Estate Transactions
ACTEC Replies to Questions 31, 26 and 43
In response to Request for Comments on Potential Requirements under The Bank Secrecy Act (BSA) for certain Persons Involved in Real Estate Transactions – RIN 1506-AB54

INTRODUCTION

By document dated December 2, 2021, the Financial Crimes Enforcement Network ("FinCEN") of the Department of the Treasury issued an Advance Notice of Proposed Rulemaking (the "ANPRM") seeking public comments regarding potential requirements under the Bank Secrecy Act ("BSA") regarding, broadly, the reporting of certain information by certain persons regarding certain non-financed real estate transactions. The ANPRM is divided into two sections, one seeking comments regarding situations where reporting of transactions is or is not called for (Questions 1-59) and the other seeking comments regarding the possible imposition on "persons involved in real estate closings and settlements" of general AML/CFT recordkeeping and reporting requirements. This response will not address the second section of the ANPRM given that ACTEC[1] Fellows are only infrequently involved in real estate closings and settlements. Instead, ACTEC will respond to the issues raised in the first section of the ANPRM, addressing the area of its members' expertise, the structure and operation of trusts, including those that may become involved in non-financed real estate transactions.

As noted in the cover letter accompanying this response, ACTEC is a professional organization most of whose members are involved in representing clients in the field of trust and estate law, among other related areas of practice. As such, most of the Fellows of ACTEC are involved on a day to day basis with the creation and administration of trusts. To the extent that a trust is the purchaser of real estate, the experience of ACTEC Fellows can provide assistance to FinCEN in identifying any particular areas of risk which the involvement of a trust in the transaction adds that is unique to trusts. On the other hand, ACTEC Fellows do not typically engage directly in real estate transactions and, as a result, do not bring any additional value to the information that will undoubtedly be shared by real estate professionals in answers to the majority of the 82 questions.

[11] The American College of Trust and Estate Counsel

This response is divided into the following sections:

I. ACTEC's Recommendations
II. Trust Real Estate Purchases Made through LLC's
III. Exemption from Recordkeeping/Reporting Requirements for Trusts with Corporate Trustees - responding to Question 31 of the ANPRM
IV. Types of Trusts
V. Funding of Trusts by Others
VI. Risk Assessment Relating to Types of Trusts
VII. Brief Responses to Question 26 and 43

I. <u>ACTEC'S RECOMMENDATIONS</u>

Our recommendations include the following:

1. Where the real estate is purchased by an LLC or similar entity, rather than directly by the trust, FinCEN will be able to collect whatever information is needed in support of its AML policies through the LLC and its obligations, and information about the trust as an owner of the LLC will be included on that report. As a result, there should be no separate reporting obligation of the purchase by the trust itself. *See paragraph II. below.*

2. Where the trust has a corporate trustee, the corporate trustee is subject to anti-money laundering rules ("AML") including the BSA regulations by the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC"), and other federal and state anti-money laundering regulations. As a result, we suggest that the information and reporting rule should have an exception for trusts with corporate trustees. *See paragraph III. and VI.A. below.*

3. We recommend limiting or eliminating data collection and reporting requirements otherwise applicable to non-financed real estate transactions involving trusts where the purchasing trust is a Testamentary Trust for which no corporate trustee is serving. If and to the extent that FinCEN determines not to exclude such trusts, we recommend that the information required to be gathered be identical to the information to be gathered in connection with *inter vivos* trusts with one or more living Settlors. *See paragraphs IV.B. and VI.B. below.*

4. Where the trust is a revocable trust, the trust should be looked through and any record-keeping/reporting should treat the Settlor of the revocable trust as the direct purchaser of the real estate or owner of the LLC or other entity. *See paragraphs IV.A.1. and VI.C. below.*

5. *Inter vivos* Irrevocable Trusts with a living Settlor should be required to provide the names and other identifying information of all trustees of the trust. *See paragraphs IV.A.2. and VI.D. below*.

II. TRUST REAL ESTATE PURCHASES MADE THROUGH LLC'S

ACTEC takes seriously the significance of the need to impose recordkeeping and reporting requirements to identify non-financed real estate transactions that may be vulnerable to efforts to money launder and the suggestion throughout the ANPRM that consideration be given to minimizing duplication and expense in determining a rule that might apply to the reporting of certain real estate transactions. To that end, we note that in the majority of situations in which a trust is involved in a real estate transaction, the purchase is made by a legal entity other than a trust that is owned wholly or partially by the trust. For example, if a trust intends to purchase a home as an investment or for the beneficial use by a trust beneficiary, the trustee would typically create an LLC or similar legal entity which itself becomes the purchaser of the home. This is done for a variety of purposes mainly having to do with the protection of other trust assets from liabilities arising from the ownership of the home. In such a case, the LLC would be subject to whatever reporting obligations Treasury imposes as a result of the ANPRM on legal entities like LLCs. Moreover, the LLC would likely be subject to beneficial ownership reporting obligations under the Corporate Transparency Act, obligations that are currently the subject of proposed rules issued by FinCEN and which are not the subject of this Response. Accordingly, we suggest that where the purchase of real estate is made directly by a legal entity other than a trust, FinCEN will be able to collect whatever information is needed in support of its AML policies through the LLC and its obligations, and that there should be no separate reporting obligation of the purchase by the trust itself. Our responses below are focused on situations where a trust is the direct purchaser of real estate in a non-financed transaction and not to those where a legal entity owned by the trust is the purchaser.[2]

III. EXEMPTION FROM RECORDKEEPING/REPORTING REQUIREMENTS FOR TRUSTS WITH CORPORATE TRUSTEES

In the special case of a trust with one or more corporate trustees, there is an added level of reporting obligations, and this is discussed in more detail below[3].

[2] Where an LLC or similar entity that is the purchaser is owned in whole or in part by a trust, the data collection and reporting requirements applicable to the trust as an owner should be consistent with our recommendations below for trusts that are direct purchasers.

[3] We also note, parenthetically, that in every case of which we are aware, a trust will have opened one or more financial accounts to receive, hold and disburse trust assets and every such account must have been opened in an entity subject to BSA obligations. As a result, where a trust makes a direct non-financed purchase of real estate, in every such case the purchase price must have been deposited in, and remitted from, an account managed by a reporting entity with existing BSA obligations. Such information gathering includes Customer Due Diligence requirements as required by federal law and reporting obligations include suspicious activity reports ("SAR") as required by federal law. These information gathering and reporting requirements are discussed in more detail below. Accordingly, much of the information FinCEN seeks to gather in connection with these transactions is available through those holding these existing obligations.

So, with the foregoing as a basis for the following discussion, we respond to Question 31:

> Assuming FinCEN's proposed rule is limited to purchases by legal entities, which legal entities should any rule cover? . . . . Should trusts be covered?"

To respond to Question 31 we will describe the different types of trusts that may be involved in real estate transactions and identify the likely degree of the risk of vulnerability to money laundering for each type.

IV. TYPES OF TRUSTS

The creation and administration of trusts is governed almost exclusively by state law that, like all property law, varies widely from state to state. Moreover, the ways trusts are created and administered also reflect a matter of preference and local custom, with different lawyers and law firms taking different approaches. That said, it is ACTEC's view that trusts include common themes and techniques which should be considered by FinCEN in the current rule-making process.

To begin at the most basic level, trusts involve three primary roles: (1) the Settlor, who creates and funds the trust; (2) the trustee's legal ownership rights; and (3) the beneficiaries who receive the beneficial ownership rights, all of which are structured by the terms of the trust agreement or Will. There are several types of trusts and variations within each type. In all cases, however, the trustee has the power and duty to manage, buy, and sell trust assets for the benefit of the beneficiaries. The beneficiaries are not permitted to manage, buy, or sell trust assets but are entitled to the economic benefit of the assets as provided in the trust agreement.

Trusts may be divided into two main categories: *inter vivos* trusts created during the Settlor's life and testamentary trusts created following the Settlor's death at his or her direction by Will or trust agreement.

A. *INTER VIVOS* TRUSTS

Trusts created during a Settlor's lifetime can also be divided into two categories: those that are revocable and can be terminated or changed by the Settlor during his or her life and those that are irrevocable which, subject to certain provisions of local law, generally cannot be changed after they are created.

1. Revocable Trusts

Many trusts created in the United States each year are created by a living individual (the "Settlor") with his or her own assets and are fully revocable by the Settlor for his or her lifetime. These are referred to herein as "Revocable Trusts." Typically, the trust is administered for the benefit of the Settlor during life and the Settlor may or may not be the trustee or a co-trustee. A Revocable Trust agreement usually has two parts. The first part provides that the Settlor can control the trust during his or her lifetime, adding assets, taking assets back out, modifying the terms of the trust that apply during the Settlor's life and following his or her death, revoking the trust, changing the trustees, whatever he or she likes. The second part provides what happens to the trust assets upon the Settlor's death and, in effect, usually operates as a Will substitute, directing that the Settlor's debts and expenses of death be paid and providing who will be

the beneficiaries of the remaining assets after the Settlor's death. If a bequest for a beneficiary is directed to be held in further trust for him or her, rather than being distributed to the beneficiary outright, typically the terms of that trust will be included as a part of the Revocable Trust agreement. On some occasions, the Settlor may also have a Will that provides that any assets the Settlor owns directly at his or her death should be paid over to the trustee of the Revocable Trust to be distributed as provided in the trust agreement.

During a Settlor's life, a Revocable Trust is like the alter ego of the Settlor. Indeed, for income tax and estate tax purposes, the Internal Revenue Service treats the Settlor as though he or she still owns assets held in the Revocable Trust because of the degree of control the Settlor can exercise over the assets of the Revocable Trust. Moreover, the assets of a Revocable Trust are almost always available to pay the Settlor's debts.

The purposes for which a Revocable Trust may be created include avoiding the expense and delay of the probate process at the death of the Settlor, providing for ease of administration of the Settlor's assets held in the trust if the Settlor becomes incapacitated, avoiding ancillary probate at the death of the Settlor (meaning a probate proceeding in the court of a state other than that in which the Settlor was domiciled at his or her death) if the Settlor owns real property in another state, and, in community property states, permitting all of the property of the marital community to be held in a joint trust for the benefit of the married couple. Even though some of these benefits are only realized at the death of the Settlor, since anyone may die at any time, the use of a Revocable Trust for Settlors in excellent health nonetheless may be warranted. In some parts of the country, the use of Revocable Trusts is considered routine for almost all clients.

2. Irrevocable Trusts

Inter vivos trusts created a Settlor by with his or her own assets can also be made irrevocable by the Settlor, meaning the Settlor does not retain the right to modify or revoke these trusts. These "Irrevocable Trusts" designate a class of persons (such as, "my children"), or in some cases identify a single individual (for example, "my daughter, Susan"), to whom distributions can or must be made (the "beneficiaries" or a "beneficiary") and may last until a beneficiary attains a specific age, for the beneficiary's life, or for as long as permitted under the applicable law.

Typically, but not always, transfers to Irrevocable Trusts are designed to be completed gifts for the benefit of the Settlor's family members or whomever else the Settlor has chosen to benefit, and have the effect of removing the value of the trust assets and their future appreciation from the estate of the Settlor for estate tax purposes because the Settlor relinquishes control over the transferred assets. The gifts may also take advantage of tax benefits available to the Settlor like using the value of the applicable exclusion (the amount Congress has designated that can pass free of gift and estate tax from an individual to others during the individual's life or at his or her death, currently a little over $12 million). A Settlor may make additional transfers to an existing Irrevocable Trust if he or she chooses, but usually does not wish for others to make transfers to the trust.

Although the same estate tax result could be achieved by making the gift directly to the beneficiary, Settlors instead may choose to use trusts for a wide variety of reasons. For example, the beneficiary may (i) be a minor and not yet have capacity to own assets directly, (ii) be young and not yet experienced at managing

assets, (iii) be a spendthrift, or (iv) have a spouse from whom the Settlor wishes to protect the assets in the event of a potential divorce. Alternatively, the Settlor may wish to use a trust for the beneficiary to (i) protect the assets from potential creditors of the beneficiary, (ii) prevent the assets from being subject to estate tax in the beneficiary's estate at his or her death, or (iii) ensure that the assets will be used for a specific purpose for the beneficiary (e.g., education). Still another reason for using a trust might be to permit a particular asset to be shared among a group of beneficiaries (e.g., a vacation home) by having the trustee manage the use and payment of expenses of the asset to avoid potential conflict among the beneficiaries.

In some states, the law may permit a Settlor to create an Irrevocable Trust of which he or she is a current beneficiary but not treat the Settlor as though he or she is still the owner of the assets. Typically, the Settlor does not serve as a trustee of the trust and cannot influence whether the trustee makes distributions to him or her. These trusts, sometimes referred to as Asset Protection Trusts, are designed to protect the assets transferred to the trust by the Settlor from the claims of the Settlor's creditors, while still permitting the Settlor to have the economic benefit of the assets. At the death of the Settlor, the assets are passed to the remainder beneficiaries of the trust (usually the Settlor's family) either outright or in further trust.

B. TESTAMENTARY TRUSTS

Testamentary Trusts are defined as those trusts that become effective as a result of the death of the Settlor. They can arise under the individual's Will or under a lifetime document (either a Revocable or an Irrevocable Trust agreement). While the word "testamentary" typically refers to trusts created by a decedent's will, for purposes of these comments we use the general term to encompass all trusts that become effective following a person's death. Testamentary Trusts, by their nature, are irrevocable because the Settlor is no longer alive to be able to modify or change the terms of the trust, either in a Revocable Trust agreement or in a Will. Indeed, Revocable Trusts become irrevocable upon the death of the Settlor because he or she no longer can exercise the retained rights to modify or revoke the trust.

At an individual's death, typically his or her Will is submitted through a court proceeding for proof that it is the individual's most recent Will and was actually executed by the decedent. This process, often referred to as "probate," usually occurs through some form of court filing and the Will itself becomes a part of the public record. In a Will, an individual directs to whom his or her property will pass, either outright or in trust. If the bequest for a beneficiary passes in trust, typically, the terms of the trust are enumerated in the Will. As a result of the probate process, certain filings are required that document the assets that may pass to a Testamentary Trust and the terms of the Testamentary Trust.

Although in most states, no court proceeding is required regarding a Revocable Trust at the death of the Settlor, nevertheless, the trusts created under a Revocable Trust following the death of the Settlor may be considered Testamentary Trusts because the Settlor is no longer alive and cannot influence the terms of the trust or the assets that pass to them.

There are many hundreds of thousands, perhaps more, of existing Testamentary Trusts in the United States (i.e., trusts that were created by someone who is now deceased). They are created for a wide variety of purposes, including tax and non-tax reasons. For example, "credit shelter trusts" are created to preserve the use of the applicable exclusion amount of the first spouse to die to reduce the estate tax that otherwise might be due for some family member at the death of the surviving spouse (this is an exceedingly complex

area of estate planning). A marital trust may be created, particularly in the case of a second marriage, to be sure that the assets of the first spouse to die can be used for the benefit of the survivor during his or her life, but that the assets remaining at the survivor's death will pass to the children of the first spouse to die. Finally, trusts may be used to protect the interests of the children and grandchildren of the Settlor from a variety of liabilities, including claims of creditors, spouses, estate tax, etc. The trusts are held for the benefit of one or more beneficiaries. In rare cases, a beneficiary can terminate the trust at his or her sole discretion. In most such trusts, distributions to beneficiaries are made in the discretion of the trustees and the beneficial interests are controlled by the trustees. As a result, typically the trustees must be in reasonably close contact with the beneficiaries of the trusts. Technically, while an existing trust can receive assets transferred by persons other than the original creator, such transfers are exceedingly rare for the reasons discussed below.

V. FUNDING OF TRUSTS BY OTHERS

A Settlor may make separate and repeated gifts to an *inter vivos* Irrevocable Trust over the course of his or her lifetime, although it is exceedingly rare that any additional assets will be contributed to such a trust following its funding after the death of the Settlor. Generally speaking, a trust usually has only one Settlor, with the exception of the less usual circumstance when a married couple both fund a trust for the benefit of family members. Admittedly, no laws prohibit such additional transfers to a trust by multiple Settlors, but a number of issues may arise. First, most individuals prefer to determine the trustees, beneficiaries, and terms of administration for trusts to which they plan to make contributions, rather than making transfers to trusts created by other Settlors that reflect another's preferences. Second, members of different generations should not make transfers to the same trust because of the need to protect transfers that benefit individuals who are more than one generation removed from the donor from the generation-skipping transfer ("GST") tax. Commingling transfers from different generations to benefit the same trust will make efficient protection of such transfers from the GST tax very difficult. Finally, to facilitate tracking tax benefits, a Settlor will prefer not to have other individuals make gifts to a trust he or she has created.

VI. RISK ASSESSMENT RELATED TO TYPES OF TRUSTS

We believe the risk of vulnerability to money laundering of each type of trust should be assessed separately, because the risk varies substantially. In the interests of avoiding duplicative reporting and developing regulations that will be effective and efficient in identifying areas of risk in real estate transactions involving trusts, we recommend that different approaches should be developed for different types of trusts.

A. GENERAL EXCEPTION FOR TRUSTS WITH CORPORATE TRUSTEE

Corporate trustees are generally financial organizations that are regulated by federal and state regulators. Thus, financial organizations have obligations under the BSA, OFAC, and other AML, anti-terrorism, anti-proliferation, and economic sanctions regulations in the jurisdictions in which the financial organization conducts business. As a result, a corporate trustee will have programs in place to monitor the intake of new business. This will include maintaining a Customer Identification Program as required by the USA Patriot Act, as well as maintaining a Beneficial Ownership Program for its U.S. Banks and Broker Dealer

entities as required by FinCEN's Customer Due Diligence Rule. Also, the financial institution will monitor ongoing transactions in relationships with clients. This includes the monitoring of electronic payments, currency transactions and aggregated currency transactions, involving client funds. Financial institutions also generally establish a process for keeping up-to-date with applicable new or amended regulations, including modifications to sanctions lists. Financial institutions are also responsible for reporting suspicious activities in accordance with regulatory requirements under these federal regulations, as well as regulatory requirements of the jurisdictions in which the financial institution conducts business. Generally, a SAR or suspicious transaction report ("STR") or local equivalent is completed by the financial institution in every instance required when a known or suspected violation of applicable law, money laundering, or other specified criminal activity occurs or is attempted against the financial organization, or where the financial institution was used as a vehicle for criminal activity.

As a result, since all types of trusts potentially can have such a regulated corporate trustee, we recommend that FinCEN consider providing, in its anticipated rules for real estate transactions, a blanket exemption for the period during which such a regulated corporate trustee is serving, in order to avoid the additional data collection and reporting that would otherwise apply. The risk of vulnerability of such trusts has already been substantially reduced due to the practices already in place as a result of the BSA and other regulations applicable to such corporate trustees. The exemption will be consistent with the stated Department of Treasury goal to implement a system consistent with the BSA to maximize benefits while minimizing burdens on reporting financial institutions and nonfinancial trades or businesses.[4]

B. TESTAMENTARY TRUSTS

We recommend that FinCEN consider excluding non-financed real estate transactions by Testamentary Trusts from any data collection and reporting requirements, because the person whose assets were used to fund the Testamentary Trust is no longer alive and obviously cannot participate in any transactions and it is exceedingly rare for assets to be transferred into such a trust by other persons after its original creation (i.e., following the Settlor's/decedent's death). Therefore, we believe that the risk of use of such a trust for money laundering purposes is remote. In addition, since the person who was the source of the funds is now deceased, there are probably very limited ways to address that person's source of funds. Finally, because Testamentary Trusts are created at the death of the Settlor, the determination that the Settlor is deceased should not be difficult, making these trusts simple to identify.

We recognize that money laundering concerns may still arise in Testamentary Trusts and we recognize that the current rule-making process is designed to address potential AML/CFT issues across a wide spectrum of transactions. If FinCEN determines not to exclude transactions involving Testamentary Trusts, the following discussion will of course bear on such trusts.

[4] This exemption should only apply when the corporate trustee is appropriately regulated since some state jurisdictions permit unregulated corporations to serve as trustee if not tendering trust services to the public. i.e., so-called private trust companies. The SEC rules for investment advisor registration, for example, exempt certain trustees but only if regulated by certain banking laws.

C. REVOCABLE TRUSTS

We recommend that, for the purposes of the rulemaking under this ANPRM, the existence of the Revocable Trust be ignored. As described above, a Revocable Trust is entirely controlled by the Settlor during his or her life and, for income and estate tax purposes, is treated as a nullity. We suggest that non-financed real estate transactions involving Revocable Trusts while the Settlor is alive should therefore adopt the same policy. Transactions involving Revocable Trusts during the Settlor's life should be subject to the same data collection and reporting requirements that would be applicable if the Settlor were engaging in the transaction directly without the use of the trust.

D. *INTER VIVOS* IRREVOCABLE TRUSTS

In order to tailor our recommendations to the risks involved, we have attempted to provide FinCEN with a fairly detailed description of what trusts are and the variety of ways they are created, used and supervised. We have suggested that non-financed real estate purchases by trusts be divided between those where other reporting regimes should apply (in particular, when the purchase is by an LLC, partnership or other legal entity already, or likely to become, subject to reporting requirements) and those where such regimes do not pertain. In the less common cases where non-financed real estate purchases are made directly by a trust, we have suggested that when a trust has a corporate trustee, BSA recordkeeping and reporting obligations are already imposed on the trust and no further rules should be necessary with respect to transaction engaged by such a trust. In addition, in the case of Testamentary Trusts, the death of the creator of the trust may make it unnecessary to impose a transaction reporting requirement as the likelihood of such trusts being involved in money-laundering or terrorist financing are negligible or manageable.

With respect to the remaining categories of trusts — *inter vivos* Irrevocable Trusts engaging in a relevant transaction with no regulated corporate trustee then serving — ACTEC does acknowledge that these trusts have greater vulnerability for abuse than those described above. However, ACTEC believes that the discussions related to identifying and verifying the identity of the beneficial owners of legal entities in the Customer Due Diligence Requirements for financial Institutions NPRM and in ACTEC's response to it[5] are highly relevant to the risk assessment applicable here to *inter vivos* Irrevocable Trusts engaged in non-financed real estate transactions.

For that purpose, FinCEN defined beneficial owners as the natural person who ultimately owns or controls the legal entity and includes those persons who exercise ultimate effective control over a legal person or arrangement. Since the beneficial owners of trusts are not the persons who control trusts, the preamble to the NPRM did not include private trusts within the ambit of the NPRM. As discussed above, in the case of *inter vivos* Irrevocable Trusts that have a living Settlor, it is the trustee who holds legal title to the assets of the trust that is in a position to control the trust assets. As ACTEC described in considerable detail in our response to Customer Due Diligence Requirements for Financial Institutions, it is clear under the law governing private trusts that the trustee is required to know all of the information regarding the trust in question, its Settlor, its beneficiary or beneficiaries, and, most importantly for these purposes, the source and application of the funds used to make a non-financed real estate purchase. In what we believe to be

[5] Customer Due Diligence Requirements for Financial Institutions - Resources | The American College of Trust and Estate Counsel (actec.org)

the rare case that an *inter vivos* Irrevocable Trust with a living Settlor poses risk of vulnerability to money laundering activities, the reporting of the information regarding the trustees of the trust will provide FinCEN and other government agencies with the ability to obtain information to have additional transparency. Therefore, we recommend that *inter vivos* Irrevocable Trusts with a living Settlor should be required to provide the names and other identifying information of all trustees of the trust.

Based on all of the foregoing, non-financed real estate purchases directly by trusts should be the subject of a record keeping/reporting requirement, as suggested in section 1, question 31, of the ANPRM, and we recommend that that requirement should be limited to *Inter Vivos* Irrevocable Trusts, that do not have a regulated corporate trustee, with one or more living Settlors.

VII. BRIEF RESPONSES TO QUESTIONS 26 AND 43

In addition to the response to question 31 above, ACTEC is responding below to ANPRM questions 26 and 43 with specific reference to the involvement of trusts in non-financed real estate transactions.

26. What general factors should FinCEN consider in determining which transactions to cover?

As ACTEC Fellows, we are not in a position to address this question in detail, but we would like to emphasize our view that any non-financed real estate transaction by a trust as a purchaser where the trustee is a regulated corporate trustee should be exempt from any reporting obligations because, as described in our response to question 31, these trusts are not vulnerable to risks of money laundering because of the BSA recordkeeping and reporting requirements already in place for these institutional trustees.

43. What information should FinCEN require to be reported regarding the legal entity (or if applicable, natural person) purchasing real estate in a covered transaction?

As explained above in our response to question 31, when an *inter vivos* Irrevocable Trust for which no regulated corporate trustee is serving is a purchaser of non-financed real estate, records should be maintained identifying all of the trustees of the trust.

ACTEC appreciates that the task of preparing these proposed regulations is complex and would very much appreciate the opportunity to participate in an open and on-going dialogue with FinCEN on a regular basis to assist in the process of formulating the new rules, particularly as they may relate to trusts involved in non-financed real estate transactions.

ACTEC's Executive Director, Deborah McKinnon and/or the Co-Chairs of the FATF Task Force, Glenn G. Fox, Carolyn A. Reers and Lyat Eyal are available and may be contacted for this purpose:

Deborah McKinnon at domckinnon@actec.org
Glenn G. Fox at glenn.fox@bakermckenzie.com
Carolyn A. Reers at CReers@wiggin.com
Lyat Eyal at lyat@are-legal.com

McPherson Building
901 15th Street, NW, Suite 525
Washington, DC 20005
(202) 684-8460 Fax (202) 684-8459
www.actec.org

THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL

Please Address Reply to:

BOARD OF REGENTS

President
KATHLEEN R. SHERBY
St. Louis, Missouri

President-Elect
BRUCE STONE
Coral Gables, Florida

Vice President
CYNDA C. OTTAWAY
Oklahoma City, Oklahoma

Treasurer
SUSAN T. HOUSE
Pasadena, California

Secretary
CHARLES D. FOX IV
Charlottesville, Virginia

Immediate Past President
DUNCAN E. OSBORNE
Austin, Texas

STEPHEN R. AKERS
Dallas, Texas

GLEN S. BAGBY
Lexington, Kentucky

SUSAN T. BART
Chicago, Illinois

ANN B. BURNS
Minneapolis, Minnesota

MARC A. CHORNEY
Denver, Colorado

MARK M. CHRISTOPHER
Boston, Massachusetts

MARY JANE CONNELL
Honolulu, Hawaii

M. PATRICIA CULLER
Cleveland, Ohio

C. FRED DANIELS
Birmingham, Alabama

P. DANIEL DONOHUE
Sioux Falls, South Dakota

TERRENCE M. FRANKLIN
Los Angeles, California

SUSAN N. GARY
Eugene, Oregon

J. KEITH GEORGE
Los Osos, California

T. RANDALL GROVE
Vancouver, Washington

LOUIS S. HARRISON
Chicago, Illinois

DAN W. HOLBROOK
Knoxville, Tennessee

ROBERT K. KIRKLAND
Liberty, Missouri

LAIRD A. LILE
Naples, Florida

JAMES M. MADDOX
Hobbs, New Mexico

MARY ANN MANCINI
Washington, District of Columbia

KEVIN D. MILLARD
Denver, Colorado

R. HAL MOORMAN
Brenham, Texas

CHARLES IAN NASH
Melbourne, Florida

ANNE J. O'BRIEN
Washington, District of Columbia

DAVID PRATT
Boca Raton, Florida

CHARLES A. REDD
St. Louis, Missouri

CHRISTY EVE REID
Charlotte, North Carolina

ANNE-MARIE RHODES
Chicago, Illinois

NANCY SCHMIDT ROUSH
Kansas City, Missouri

BARBARA A. SLOAN
New York, New York

DEBORAH J. TEDFORD
Mystic, Connecticut

JOHN A. TERRILL II
West Conshohocken, Pennsylvania

HOWARD S. TUTHILL III
Stamford, Connecticut

Executive Director
DEBORAH O. MCKINNON

October 2, 2014

Mail: Policy Division
Financial Crimes Enforcement Network
P.O. Box 39
Vienna, VA 22183

Re: The American College of Trust and Estate Counsel (ACTEC®) Comment to Notice of Proposed Rule Making—Customer Due Diligence Requirements for Financial Institutions (Regulatory Identification Number: 1506-AB25)

Dear Ladies and Gentlemen:

The American College of Trust and Estate Counsel ("ACTEC") believes that the proposed rules reflected in the above-captioned Notice of Proposed Rule Making (the "NPRM") can be improved in a number of important ways. While ACTEC supports the decision not to include private trusts as "Legal Entity Customers," we believe that this decision can be expressed more clearly in the proposed rules. In addition, it appears that the sensible decision not to include private trusts as legal entity customers has not carried over to the determination of the equity owners of legal entity customers when a private trust holds stock, a partnership interest or a membership interest in an LLC. Here, the proposed rules appear to require financial institutions to determine the natural persons who are beneficiaries of a private trust that holds such an interest in a legal entity customer. It is ACTEC's belief that the reasoning behind the decision not to define private trusts as legal entity customers should support a similar limitation when a private trust is an owner of such a customer. Finally, while the proposed rules appear not to require the determination of a lawyer or law firm's clients in connection with the opening or management of a lawyer/law firm trust account (an obvious example of an Intermediated Account Relationship), ACTEC seeks a specific provision excluding law firm trust accounts from application of the proposed rules.

ACTEC is a professional organization of approximately 2,600 lawyers from throughout the United States. Fellows of ACTEC are elected to membership by their peers on the basis of professional reputation and ability in the fields of trusts and estates and on the basis of having made substantial contributions to those fields through lecturing, writing, teaching, and bar activities. Fellows of ACTEC have extensive experience in providing advice to taxpayers on matters of federal taxes, with a focus on estate, gift, and GST tax planning, fiduciary income tax planning, and compliance. ACTEC offers technical comments about the law and its effective administration, but does not take positions on matters of policy or political objectives.

If you or your staff would like to discuss the Comment, please contact John A. Terrill, II, Chair of the ACTEC Financial Action Task Force (FATF) Committee, at (610) 940-4172 or jterrill@htts.com.

Respectfully submitted,

Kathleen R. Sherby

Kathleen R. Sherby
ACTEC President 2014-2015

The American College of Trust and Estate Counsel (ACTEC®) Comment to Notice of Proposed Rule Making—Customer Due Diligence Requirements for Financial Institutions (Regulatory Identification Number: 1506-AB25)

The purpose of this submission is to provide comments regarding the Notice of Proposed Rule Making—Customer Due Diligence Requirements for Financial Institutions, 79 Federal Register 45151, (Department of Treasury, Financial Crimes Enforcement Network, August 4, 2014; hereinafter referred to as the "NPRM"). This Comment has four discrete purposes, each of which is responsive to one or more of the list of comment areas contained in Paragraph V of the NPRM:

1. To comment in general terms on the decision by the Financial Crimes Enforcement Network ("FinCEN") not to include a requirement that financial institutions apply the proposed rules to accounts opened by private trusts and to describe some aspects of private trusts that support this decision.

2. To comment on the technical detail by which the proposed rules reflect the decision not to apply the proposed rules to accounts opened by private trusts and to suggest a modification of the proposed rules to clarify this decision.

3. To comment on the requirement that covered financial institutions collect beneficial ownership information concerning the **"individuals"** who directly or indirectly own equity interests in legal entity customers, notwithstanding the overall decision not to require financial institutions to collect information regarding the beneficial ownership of private trusts, and to suggest a modification of the proposed rules to address this issue.

4. To comment on the decision not to include lawyer and law firm trust accounts in the definition of legal entity customers and to suggest that the rules specifically refer to such exclusion.

FinCEN's Decision and the Role of Private Trusts

1. The Treatment of Private Trusts in the NPRM.

The primary purpose of the NPRM stated in the 21-page preamble (the "Preamble") is to create "more explicit rules for covered financial institutions [fn] with respect to customer due diligence (CDD) within the BSA regime." NPRM at 45151, 45152. Moreover, the key elements of CDD must include, *inter alia,* "identifying and verifying the identity of beneficial owners of legal entity customers (i.e., the natural persons who own or control legal entities) . . . ." Id.

The core determination that must precede the application of the proposed rules is whether or not any party opening or managing an existing account is a "legal entity customer." Part of the Preamble is dedicated to a summary of circumstances under which legal entities can be abused by criminals engaged in money laundering and/or terrorists to disguise and support their activities. In describing FinCEN's overall strategy to address what it refers to as "financial transparency," NPRM, at 45155, FinCEN describes one key element of its strategy to be

"facilitating global implementation of international standards regarding CDD and beneficial ownership of legal entities **and trusts.**" Id. (emphasis added.) Here FinCEN draws a distinction between legal entities, the overall subject of the NPRM, and trusts, not the subject of the NPRM.

While the NPRM proposes to modify a number of regulations, the most important new element of the proposed rules is the requirement that financial institutions identify and verify the identity of beneficial owners, down to natural persons, of legal entity customers. To define beneficial owners, FinCEN refers to a definition created by the Financial Action Task Force on Money Laundering ("FATF") as "the natural person(s) who ultimately owns or controls a customer. . . It also incorporates those persons who exercise ultimate effective control over a legal person or arrangement." NPRM, at 45156. One question for FinCEN, and one that appears to have been addressed in some of the public meetings held by FinCEN regarding the NPRM, has been the extent to which determining and verifying the identity of such natural persons applies to beneficiaries of private trusts. That this concern was raised during the earlier comment period and through the public hearings is evident; the Preamble notes that "compliance challenges" would be associated with applying beneficial ownership requirements on trusts. NPRM, at 45157.

Responding to the concerns raised during the earlier comment period to the Advance Notice of Proposed Rulemaking ("ANPRM"), FinCEN chose to limit the application of the proposed rules to accounts opened or owned by "legal entity customers." Specifically, the proposed rules do "not include trusts other than those that might be created through a filing with a state (e.g. statutory business trusts)." NPRM, at 45159. As will be noted below, the actual definition of "legal entity customers" in Proposed Rule 1010.230(d)(1) does not **exclude** private trusts, except by inference, nor are private trusts included in the list of entities for which beneficial ownership information is not required in Proposed Rule 1010.230(d)(2). One purpose of this Comment is to reinforce the decision by FinCEN not to include private trusts in the application of the proposed rules, notwithstanding the reference to international standards seeking the application of beneficial ownership rules to private trusts.

In addressing the matter of private trusts, the Preamble concludes with a recitation of FinCEN's reasoning behind not including private trusts under the NPRM (NPRM, at 45160):

--there are a variety of types of trusts, some of which fall within the definition of legal entity customer but most of which will not.

--unlike corporations, partnerships, LLCs and other business entities, a trust is generally a "contractual arrangement" between the person creating the trust and one or more trustees for the benefit of one or more beneficiaries.

--trusts do not require state action to become effective.

--corporate trustees must receive a government charter to act.

--identifying the "beneficial owner," under the definition thereof in the NPRM, focusing on an "equity" interest, would not be practical.

--existing Customer Identity Protocols ("CIP") already require financial institutions to gather information regarding the trustee or trustees of private trusts and the trustees would have information regarding the settlor and beneficiaries sufficient for law enforcement.

As this summary reflects, ACTEC believes that FinCEN has made a well-considered decision to not treat private trusts as legal entity customers for the purposes of the proposed rules. As will be noted below, ACTEC suggests that this decision, while clear in the Preamble, is not so clearly incorporated into the proposed rules and should be.

Moreover, notwithstanding this decision, neither the Preamble nor the proposed rules addresses the matter of trusts as beneficial owners of legal entity customers. In particular, financial institutions will be required to determine the "natural persons who are beneficial owners of legal entity customers . . . ." NPRM, at 45156. The Preamble goes on to divide this determination into two prongs, an "ownership" prong (addressing the equity ownership of the legal entity customer) and a "control" prong (addressing the ability to manage the legal entity customer). NPRM, at 45157. While it seems clear that the identification of, and collection of information about, the trustee or trustees of a private trust will satisfy the control prong, by requiring the financial institution to pierce the layers of equity ownership when there are entities "in the middle," and to find "natural persons," the proposed rules effectively create an obligation to look into the beneficial ownership of trusts **that themselves are owners of legal entities** where FinCEN would not require such an inquiry when the trust opens an account. It is suggested that this inconsistency be corrected in the proposed rules.

2. Private Trusts in the American Legal System.

As the preeminent organization of trusts and estates lawyers in the United States, ACTEC is perhaps uniquely qualified to assist FinCEN in understanding the role that private trusts (and for purposes of this Comment, we will refer to trusts created by individuals for their own estate and other planning purposes as trusts or private trusts interchangeably; this contrasts with business or statutory trusts that are not the subject of this Comment) play in the United States and to reinforce and support FinCEN's determination not to include private trusts within the definition of "legal entity customers."

In this regard, it is important to note that trusts play a role in the estate planning for millions of persons in the United States regardless of the level of wealth. The number of private trusts that exist in connection with estate plans is impossible to determine since many of them require no public filing. However, based on informal inquiries within the ACTEC community alone, it is very likely to be in the millions.

Trusts serve many, many purposes, including the following:

--In states where probate is complicated, trusts are used to avoid or minimize the probate process. This is particularly true in states like California, New York and Massachusetts.

--In many other states where the probate process is relatively streamlined, trusts are still often the main dispositive vehicle for an estate plan. They provide efficiency and privacy for the clients.

--In the several community property states, it is common for married couples to own their assets in so-called "community property trusts," the main purpose of which is to facilitate management of the couple's assets.

--Trusts are also used to facilitate the management of assets and the protection of elderly persons as their capabilities diminish. Trusts can be used to manage assets and to make provisions for persons of all ages who have diminished mental or physical capacity. This is frequently seen with the elderly but it is also seen with persons who have special needs or other compromising factors. For example, many trusts are created for minors or other persons who lack financial acumen. In addition, trusts may be created by a court for the benefit of a person injured in an accident.

--Trusts are frequently created by older members of a family for the benefit of younger members, particularly for purposes such as education and medical needs.

--Trusts are created by family members to protect the assets from division upon a divorce of a beneficiary or from attachment by a beneficiary's creditors.

--Trusts are also used for tax planning by the more wealthy members of society and while this is not a relevant topic to many persons, there are certainly very significant numbers of trusts that are created for purposes of tax planning. It is common, for example to transfer interests in closely-held businesses (whether stock, partnership interests or membership interests in LLCs) to trusts for the benefit of spouses, descendants and other beneficiaries. Trusts serve the important purpose of maintaining control over these interests, control that is more desirable than outright ownership.

Beyond the purposes of trusts, it is useful to address the mechanics of private trusts, mechanics that support and explain the decision by FinCEN not to require financial institutions to "look through" private trusts to determine their beneficial owners and should support a decision to permit financial institutions to limit their inquiry regarding trusts as equity owners of legal entity customers to identifying the trustee or trustees as they do now.

First, trusts can be created during the lifetime of the person creating the trust (the "settlor" or "trustor" or "grantor"); these are customarily referred to as *inter vivos* or living trusts. *Inter vivos* trusts can be revocable during the settlor's lifetime and become irrevocable upon the occurrence of an event, often the death of the settlor. They can also be irrevocable from inception.

Other trusts are created or become operational upon the death of an individual and are created under the will of the person creating the trust; these are commonly referred to as "testamentary" trusts. In some cases, *inter vivos* trusts are inactive during the settlor's lifetime and become active upon death; while they are created during the settlor's lifetime, they act in many ways like testamentary trusts.

All trusts have four "elements"—a settlor or testator who creates and arranges for the funding of the trust; one or more trustees who are responsible for administering the trust; a "corpus" or "res", the assets owned by the trust; and beneficiaries, the person or persons or institutions to whom distributions of trust assets must or can be made.

Trusts are created by written documents (deeds of trusts, agreements, wills, and the like) and their operations are governed by a combination of those writings, applicable state and federal legislation and the supervision of the courts, typically the courts of the state or, in the case of foreign trusts, of the country, where the trust has its legal situs. While the Preamble suggests that trusts are a matter of contract, NPRM, at 45160, in fact, they are governed by trust law, which is its own body of legal relationships and obligations. One important element of trust law is in the nature of the obligation of the trustee to the beneficiaries, an obligation normally referred to as a "fiduciary relationship," in contrast to agency or arm's length relationships.

The proposed rules, and current CIP obligations of financial institutions, are not concerned with the settlor or the corpus of trusts in most cases. Their focus is on two elements—the trustee or trustees, and the beneficiaries. The Preamble makes clear, and ACTEC agrees, that the current process of collecting information about the trustee or trustees of a private trust is sufficient to provide the financial institution, and eventually in some cases, law enforcement, sufficient data regarding trusts so as to permit their exclusion from the definition of legal entity owners.

The complex issue, and the issue that supports and reinforces FinCEN's decision not to require information regarding beneficial ownership of private trusts, is the determination of the beneficial interests in private trusts. A few examples should serve to illuminate this:

(i) A revocable *inter vivos* trust is created by John Jones in which he names himself as the original trustee and the sole person entitled to receive distributions of principal or income. After his death, the remaining assets will continue in trust for his widow, Amy, and following her death for the Jones' descendants who are then living. John as trustee opens bank and investment accounts to hold trust assets. The identification of the trustee is easy. But who are the beneficial owners of the trust? John, clearly, but what about his wife who is only a beneficiary if she survives him? How about their descendants? Is it all children and grandchildren now alive? Are they really "owners" in the way that owners of stock of a corporation are?

(ii) George Smith dies leaving a will creating a series of separate trusts to hold part of his estate for the lives of his four children. Each child is the trustee of his or her own trust except for his disabled child, Sam; for Sam's trust, his sister, Lydia, is the trustee. Each trust is slightly different but in all cases, distributions can only

be made to the child and his or her descendants based on need. Sam's is a special needs trust. Again, trusteeship is easy but who are the beneficial owners of these trusts? The children and their descendants are beneficiaries under trust law but their rights are nothing like the rights of owners of corporations or members of LLCs.

In short, the nature of most private trusts is to leave the rights of beneficiaries uncertain. In some cases, this has to do with timing; one or more than one individual may receive distributions currently and they may be mandatory or permissive. Others may receive distributions only in the future and then only if they are alive and other conditions are met. In other cases, the uncertainty has to do with the existence of discretion in the trustee to make distributions. These timing and discretionary elements leave it difficult or impossible to say who has an equitable interest in a private trust and support FinCEN's decision not to require financial institutions to make this determination.

3. The Definition of Legal Entity Customers and the Need to Include Private Trusts in the List of Excluded Entities.

As noted above, FinCEN has determined that it will not include private trusts in the definition of legal entity customers. However, while this decision is stated very clearly in the Preamble, the implementation of this decision in the actual rules is less clear. ACTEC's concern is that compliance personnel at financial institutions responsible for implementing these CDD rules will look only at the rules and not at the Preamble. ACTEC believes that it will be a significant improvement to the proposed rules to make it completely clear that the beneficial ownership information required of legal entity customers is not required of private trusts.

Proposed Rule 1010.230(a) requires covered financial institutions to "establish and maintain written procedures that are reasonably designed to identify and verify beneficial owners of legal entity customers." Subparagraphs (b) and (c) go on to set forth the information that must be gathered to comply with this obligation. Subparagraph (d)(1) provides the following definition of legal entity customer: "*Legal entity customer* means: a corporation, limited liability company, partnership or other similar business entity. . . ." Subparagraph (d)(2) goes on to list ten categories of entities that are not within the definition of legal entity customer. Private trusts are not included in that list of excluded entities. Interestingly, the excluded entity list includes charities or nonprofit entities, **many of which are trusts.**

That the proposed rules do not apply to private trusts must depend on the conclusion that private trusts are not in the category of "other similar business entity." Might an unsophisticated employee at a bank inadvertently conclude that a particular private trust is such an entity? What if the trust holds an ownership interest in a private company or LLC? Adding to the potential uncertainty is the inclusion of charities in the subparagraph (d)(2) list of excluded entities, many or perhaps most of which are created under trusts executed and funded by private individuals. Even more uncertainty comes from the Preamble where, on page 45159, FinCEN states that it will interpret the definition of legal entity customers to include some kinds of trusts (those that might be created through a filing with a state). So the definition of legal entity customer in

subparagraph (d) does include some types of trusts but not others; this can be discerned only if the reader is familiar with the Preamble.

It would be very simple and clarifying for the proposed rules to be modified to incorporate into the rules what is made clear in the Preamble. This can be done in one of two ways, either to modify subparagraph (d)(1) or to add private trusts in subparagraph (d)(2).

For example: "(1) *Legal entity customer* means: a corporation, limited liability company, partnership or other similar business entity (whether formed under the laws of a state or of the United States or a foreign jurisdiction), **but shall not include trusts other than those that might be created through a filing with a state (e.g. statutory business trusts)** that opens a new account."

Alternatively: (2) *Legal entity customer* does not include:

(xi) Trusts other than those that might be created through a filing with a state (e.g. statutory business trusts).

4. The Determination of the Equity Owners of Legal Entity Customers Where Private Trusts are in the Chain of Ownership.

As noted above, FinCEN proposes to require financial institutions, once they determine that a new or existing account is owned by a legal entity customer, to determine the beneficial ownership of the legal entity customer using two prongs, the ownership prong and the control prong. The ownership prong requires the identification of "[e]ach individual, if any, who directly or indirectly through any contract, arrangement, understanding or otherwise, owns 25 percent or more of the equity interests of a legal entity customer." NPRM, at 45157. The use of the word "individual" is included in Proposed Rule 1010.230(c)(1). The requirement that there be an "individual" is carried over to the Appendix A of the proposed rules where the form requires a name, date of birth, address and other information not applicable to private trusts.

While the proposed rules themselves do not directly address the application of the ownership prong where at the first or subsequent level of inquiry an owner of a legal entity customer is itself an entity, the Preamble makes clear on page 45158 that the financial institution must request information regarding intervening entities until it gets to one or more individuals: "the phrase 'directly or indirectly' in the ownership prong of the definition is intended to make clear that where a legal entity customer is owned by (or controlled through) one or more other legal entities, the proposed rule requires customers to look through those other legal entities to determine which natural persons own 25 percent or more of the equity interests of the legal entity customer." NPRM, at 45158.

Now imagine that an irrevocable *inter vivos* trust owns 25% of the stock of X Company and X Company is attempting to open a bank account. The X Company officers attempt to complete Appendix A and find that there is no place to reflect the trust as an owner of 25% of the stock. If it is FinCEN's intent to require a determination here of the individuals who own that equity, this is the same determination that FinCEN chose not to require when it is the trust itself

opening the account. It is suggested that the decision in the latter case, to permit financial institutions to rely on the identification of the trustee or trustees, should be more than sufficient to provide the information required to satisfy the need to determine beneficial ownership.

This issue may be resolved either by modifying Proposed Rule 1010.230(c)(1) or by adding an additional note at the end of (c). In addition, the Appendix A form needs to be modified.

For example, (c)(1) could say "(1) Each individual and each trust, if any, . . ." Alternatively, the note to this rule could include the following: "In the case of a trust, other than a statutory or business trust, that owns 25 percent or more of the legal entity customer, it is sufficient for the institution to identify the trustee or trustees of the trust, applying customer identification procedures already in place." There could be other ways to cross reference the identification of the trustee or trustees but the bottom line is to clarify that this information is sufficient.

The modification of Appendix A will be more complex. There should probably be an information paragraph added to the existing "What information do I have to provide?." Something like the following would achieve this goal: "(iii) In the case of a trust, other than a statutory or business trust, the name and address of all currently serving trustees. There is no requirement to identify the beneficiaries of the trust." Finally, there could be added under Item II an additional table for trustee information.

Clarification Regarding the Inapplicability of the Proposed Rules to Law Firm Trust Accounts: Intermediated Accounts.

In the Preamble, FinCEN notes as follows with respect to Intermediated Account Relationships and Pooled Investment Vehicles:

> The ANPRM sought comment on whether and how a beneficial ownership requirement should be applied to accounts held by intermediaries on behalf of third parties. An intermediary generally refers to a customer that maintains an account for the primary benefit of others, such as the intermediary's own underlying clients. NPRM, at 45160.

ACTEC observes that this concept clearly applies to lawyer and law firm trust accounts, sometimes called client accounts. Many if not most lawyers and law firms have segregated accounts in which lawyers deposit and account for client monies. For any number of purposes lawyers and law firms have reasons to hold clients' money.

Typical examples include:

(i) retainers;

(ii) funds escrowed in connection with a closing of a real estate or business transaction;

(iii) funds received in settlement of a lawsuit to be disbursed to one or more litigants.

These accounts are typically subject to stringent state bar rules, and lawyers must keep account records for every client that has money deposited in such accounts.

ACTEC recommends that the rule make it clear that the financial institutions' obligations regarding the beneficial ownership requirement should apply only with respect to its immediate customer, i.e., the lawyer or law firm and not the lawyer or law firm's clients.

This clarification could be made in the proposed rules under (d)(2) where legal entity customer could specifically exclude accounts in which lawyers or law firms deposit client monies.

00877598.DOCX