



When is Old New: Loan Modification Under the BSA's Beneficial Owner Rule

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[William T. Repasky](#)

When does a modification to or extension of a commercial loan constitute the act of opening a “new account”? This question is now more than one of semantics. Effective May 11th of 2018, the new Beneficial Owner Rule under the Bank Secrecy Act will become effective.

The Beneficial Owner Rules applies whenever a new account relationship is opened. And FinCEN has announced that a new account includes the renewal of certificates of deposits and lending relationships.

On the loan side of the banking business, it is common for lenders and work-out officers to adjust the terms of a borrower's contractual commitment during the course of a relationship. So, where within this gray area is the line to be drawn for determining when such loan modifications become events for which Beneficial Owner information must be collected and retained by the lender?

As a starting point, if the lender already has collected this information, and if the borrower certifies or confirms that the information remains accurate; then the financial institution need not re-collect the information upon a loan's renewal. But given that countless loans are in place which were opened before May 11, 2018, and for which the required data was not collected, this issue is likely to be of great interest for the lender's BSA staff for the foreseeable future.

It is clear to FinCEN, the agency with primary oversight for BSA compliance issues, that an outright “renewal” of a commercial loan will constitute a new account event. See e.g., FIN-2018-G001 (4/3/2018) (FAQ #12). One possible approach to the question might be that anything less than a “renewal,” as recorded on the bank's books and records, will not trip the trigger. However, there is concern that bank examiners will not all share this opinion, and further, no primary regulator has published guidance confirming

such a black-and-white interpretation.

So, into the gradients we go. Excepting situations for existing lines of credit (we speculate), a change in terms that makes available new money to a business borrower appears to present a higher risk that regulators will conclude that a new account event has occurred. And since the banking concept of “renewal” implies an extension of maturity, it also might be fair to speculate that a modification that changes the maturity date of an existing credit relationship will also be viewed as a new account event.

In other areas, if the loan’s terms are modified in any way that results in legal “novation,” under the lender’s applicable state’s laws, that too raises the risk that regulators will perceive a new account relationship. It does not necessarily appear that the act of simply requiring the borrower to sign new paperwork documenting a modification, by itself, is likely to be perceived as a hard trigger. Many states’ statute of fraud law memorialize that loans must be in writing to be enforceable and that subsequently it takes a writing to change an existing written agreement. And let’s not explore here the concern that an officer’s oral modification of a loan now might create both credit and BSA risks for the institution. In addition, lenders often revisit a borrower’s collateral documents, like mortgages and security agreements, including renewals of the same. Other common work-out scenarios include deeds in lieu of foreclosure and short sales, which might be considered the polar opposites of a loan’s “renewal.”

The greatest hope for resolving the ambiguities existing in the BSA’s new Beneficial Owner Rule, in this area of banking operations, lies in additional published guidance clarifying the regulatory intent. Until that happens, common sense might suggest, whenever an existing commercial loan customer is required to sign new paperwork to memorialize a change in terms, that it is prudent and relatively convenient for the involved banking officer to collect, at the same time, the new information required under the Beneficial Owner Rule, after May 11, 2018.

For questions about the Bank Secrecy Act, please contact [Bill Repasky](#) at brepasky@fbtlaw.com or (502) 779-8184.

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