FINANCING YOUR NEXT PROJECT: RECENT CHANGES TO BANKING REGULATIONS AND HELPFUL TIPS FOR A SPEEDY AND EFFICIENT LOAN CLOSING

By: Louis Seminski

Anyone involved in a recent financing transaction can attest to the significant additional efforts required to reach a loan closing. Most are quick to place blame on the lenders. However, it is really the U.S. Treasury Department's Financial Crimes Enforcement Network ("FinCEN") that has wreaked much of the havoc thanks to its recent release of some new Anti-Money Laundering ("AML") rules, regulations and enforcement measures.

These AML rules and regulations govern all F.D.I.C. protected financial institutions. As such, whether you are seeking financing for a new construction or redevelopment project, a new acquisition, or simply refinancing an existing credit facility, you will likely encounter FinCEN's enhanced rules.

In sum, FinCEN now requires banks and other covered financial institutions strengthen their due diligence in opening accounts for legal entity customers by identifying and verifying each entity's beneficial owners, and revamp their internal AML procedures for collecting, preserving, and monitoring this information. Much of the same body of law regulating banks and their account-opening practices now also applies to the underwriting and closing of all conventional loans and credit facilities.

Acronyms like "CIP" (Customer Identification Program),"CDD" (Customer Due Diligence), "EDD" (Enhanced Due Diligence) and "KYC" (Know Your Customer), once the vernacular of only financial services executives and lawyers, have become the parlance of lenders and even bank tellers alike. Thanks to FinCEN's new regulations, all financial institutions have over the past few years begun to educate, train and enforce specific procedures with regard to these once-foreign AML concepts. Now it is time for everyone else to catch up.

It all starts with the CIP, a process in which banks gather identifying information and assess customers for risk (KYC – no, not the fast-food fried chicken restaurant), followed by CDD and EDD as necessary. The idea behind the recently enhanced AML rules is to force financial institutions to better know their customers and identify their "beneficial owners."

The new "Beneficial Ownership Requirements for Legal Entity Customers" requires financial institutions to collect specific personal identifiers and information of any individual who holds, directly or indirectly, 25 percent or more of the legal equity interests in, and at least one individual who has managerial control of, that legal entity customer. See 31 U.S.C. § 5318(h); 31 CFR 1010.230(a).

This is a minimum threshold, so do not be surprised if lenders collect beneficial ownership information also from those holding a lower percentage of equity interests, especially if Enhanced Due Diligence has been triggered. Many of these requirements go beyond just verifying your identity; for example, financial institutions are now required to keep records of other identifying information and even check customer names against terrorist lists.

These changes, combined with more rigid lender underwriting and multi-faceted closing procedures (prompted by the new requirements) have significantly increased the time frame within which loans close- in some cases causing delays of weeks, and even months.

Most attorneys representing lenders and financial services clients have already seen significant revisions to loan closing checklists to incorporate new CIP, CDD, EDD, and KYC protocol. If properly understood (and complied with) these changes do not add much to the process, but it is only natural to recognize the additional requirements as being somewhat burdensome. Borrowers in particular have been quick to question the changes, asking "why" they have never been asked to do all of this before.

Continued on page 13

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Note: For a comprehensive summary of FinCEN's changes, see the official FinCEN Guidance bulletin issued April 3, 2018 (FIN-2018-G0001).

FINANCING YOUR NEXT PROJECT

Continued from page 6

The fact of the matter is that these changes protect citizens, consumers and financial services and bank customers alike, all from financial crimes (and to prevent the financing of terrorist operations and money laundering). And it is likely that these risk assessment procedures will only become more cumbersome in the future.

Prudence, therefore, requires every consideration to streamline this evolving process. The following is a helpful (non-exhaustive) list of tips to consider:

1. Retain the services of an experienced local attorney. With his or her assistance, and through their familiarity with local procedures and practice, you can better ensure an efficient information-gathering and exchange process to expedite closing. Counsel will also be able to act as an advocate to negotiate certain provisions in the loan documents as applicable, saving you time and money in the long run.

2. Consider using a Licensed Broker. Aside from advising you (as borrower) as to specific loan products available, brokers can help you compare and obtain the most competitive interest rates and favorable terms. A broker may also assist you in gathering the requisite information, with an eye towards certain underwriting items, even before a prospective lender requests it.

3. Be proactive and stay involved in the transaction, even after you agree upon the relevant business terms. It is your deal (and your money). Do not wait for the week before a closing to raise any concerns that you may have about the pre-closing process or requested items. (In fact, obtain your lenders' form pre-closing checklist early on and provide a legal entity organizational chart listing). Also, gather all of the requested information and provide it to your attorney and the lender at one time, to the extent practicable, rather than in a piecemeal fashion). By doing so, you can prevent the majority of otherwise costly delays.

4. Cooperate with your attorney, lender's counsel and the lender. Be attentive to the lender's pre-closing checklist. Don't fight the items requested, as it is more productive (and many times easier) to just comply with requests and to provide the items sought. For example, providing early on the borrowing entity's formation and governing documents (including all beneficial ownership information) is suggested. Something as easy as providing your identification (with the correct spelling of your name as a signatory) for the preparation of loan documents will prevent unnecessary revisions, delays and expense.

5. Shy away from closings by mail; request an in person, live closing instead. This will not only eliminate the chance of last minute impediments to closing, but afford you an opportunity to understand the documents you will be required to execute. (It will also allow you to obtain a complete set of executed loan documents for your own records). You will likely need them down the road.

Reach the finish line! With the help of experienced professionals, and some cooperation, you can get the job done. Rather than ignoring all the new acronyms (or fighting the process) focus on accepting the recent changes so that you can close your loan and move on to your next project...$$$.

TOP 10 ESSENTIAL SEO RULES

Continued from page 9

9. Create quality content.

The most important way to gain backlinks is through consistent quality content. By creating useful, informative and engaging blogs, e-books, videos, and infographics, you provide useful information for users and shareable content for social media and other websites. It's the natural spreading of quality content that leads to the most high-quality backlinks. Incidentally, linking back to other informative, relevant websites within your blog posts can provide helpful information to users and help your search engine ranking.

10. Keep the endgame in mind.

Always consider where search engines are heading, not where they are. The goal of the leading search engines is to provide the highest quality, most relevant content. As search engines get closer to this goal, technical SEO will become much less relevant, with the creation of useful content and user-friendly design becoming the key to dominating search engines.

When in doubt, do what's best for the user, not for the search engines. That way, no matter what Google algorithm changes come down the line, you should be able to avoid the lost page rank that many sites experience.