

DEPARTMENT OF STATE
DIVISION OF CORPORATIONS

Statutory Authority: 8 Delaware Code, Section 132; 6 Delaware Code, Sections 15-111, 17-104 and 18-104 (8 **Del.C.** §132; 6 **Del.C.** §§15-111, 17-104 & 18-104)

FINAL

ORDER

Registered Agent Customer Entity Verification Requirements

Pursuant to 29 **Del.C.** §8703(7), the Department of State ("DOS" or "the Department") published proposed regulations to establish customer entity verification requirements for registered agents in the September 1, 2018 edition of the *Delaware Register of Regulations*. Having solicited and received public comment on the proposed regulations in accordance with the *Delaware Administrative Procedures Act*, 29 **Del.C.** Ch. 101, et. seq., this is the Department's Order adopting the proposed regulations, as modified by the public submissions outlined below.

SUMMARY OF THE EVIDENCE

1. House Bill 404 of the 149th Delaware General Assembly, as amended by House Amendment No. 1 and Senate Amendment No. 2, 81 Del. Laws. C. 334, modified 8 **Del.C.** §132 and 6 **Del.C.** §§15-111; 17-104; 18-104 to authorize the Department to establish uniform entity verification regulations for registered agents to verify the identification of their customer business entities.

2. The purpose of this regulation is to clarify the obligation of registered agents in Delaware to comply with regulations as issued by DOS on matters involving filings submitted to DOS on behalf of corporations, partnerships, limited partnerships, trusts and limited liability companies. This regulation outlines requirements, standards, and procedures promulgated by DOS for registered agents regarding verification of customer entities in accordance with these recent legislative changes.

3. The *Delaware Register of Regulations* published the proposed regulations on September 1, 2018. Following publication in the *Delaware Register of Regulations*, DOS invited a period of forty-five (45) days for written comment from the public.

4. Many public comments focused on minor changes to the definition section to clarify the meaning of the defined terms. This paragraph summarizes the proposed changes to the definitions. The public comment suggests that the term "Blocked Persons" should be included in the definition of "Specially Designated Nationals" for consistency with the Office of Foreign Assets Control ("OFAC") reference. "Business Entity Formation" should refer to the act of organizing and filing documents with DOS, and non-profit entities should be included. The public comment recommends deleting a reference to "speaks" in the definition of "Business Entity Representation." A definition of "Customer" further clarifies the defined term "Customer Information." The proposed definition of "Customer" is "the person or persons intending to form, and otherwise conduct activities through, a business entity formed, registered or qualified in Delaware." In addition, the public comment suggests including "series" within the definition of "Limited Liability Company." The public comment suggested adding credit cards to the list of items that a registered agent could check to verify identity. The comment also corrected a statutory reference to the Delaware Limited Partnership Act.

5. Other public comments suggested that registered agents may be overburdened with additional work such as data collection, research, follow-up, filing and recording data by the proposed regulation. Potentially, the proposed regulatory scheme could induce registered agents to seek deficient due-diligence methods in order to avoid the loss of clients and decreased revenue. The comments suggested a reference to "manual verification" in Section 4.1.1.1 to clarify the reasonable steps that a registered agent may take to verify customer identity. The comments propose including the phrase "before performing services for any new Customer" as a clarification of accepting a new Customer.

6. The comments further question the applicability of other related federal standards that relate to specific industries such as banking. One comment notes that the requirements of the proposed rule are more specific than the OFAC risk matrix, which could be an additional burden for registered agents. Many comments focused on the burden of quarterly periodic review. Finally, the public comments suggested a "safe harbor" for registered agents for reliance on a "Trusted Law Firm."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The *Delaware Register of Regulations* published the proposed regulation to establish customer entity verification requirements for registered agents on September 1, 2018.

2. Following publication in the *Delaware Register of Regulations*, the DOS provided a period of forty-five (45) days for

written comment from the public.

3. The public notice and opportunity to provide public comments in writing afforded by DOS complied in all respects with the *Delaware Administrative Procedures Act*, Section 10115 of Title 29 of the Delaware Code.

4. In response to the invitation for public comment, DOS received several insightful comments concerning the proposed regulation, as summarized above.

5. The Department finds that it is authorized to establish uniform entity verification regulations for registered agents to verify the identification of their customer business entities pursuant to House Bill 404 of the 149th Delaware General Assembly, as amended by House Amendment No. 1 and Senate Amendment No. 2, 81 Del. Laws. C. 334, which modified 8 **Del.C.** §132 and 6 **Del.C.** §§15-111; 17-104; 18-104.

6. The Department finds that it is necessary to adopt this proposed regulation to implement the legislative intent to establish uniform requirements, standards, regulations, and procedures for registered agents in Delaware to verify the identification of their customer business entities in filings submitted to DOS on behalf of corporations, partnerships, limited partnerships, trusts and limited liability companies.

7. The Department finds that the proposed regulation strikes the appropriate balance between protecting the public by ensuring that those persons prohibited from conducting business by the federal Office of Foreign Assets Control do not form entities in Delaware, without imposing undue burden on the essential business of registered agents. The Department further finds that it is appropriate to require registered agents to review complete customer registry against the OFAC register or lists at a minimum on a quarterly basis.

8. The Department adopts the following changes to the definition section of the proposed regulation as suggested by the public comment because the changes make the proposed regulation more clear to the registered agents and the general public:

- a) The term "Blocked Persons" will be included in the definition of "Specially Designated Nationals" for consistency with the Office of Foreign Assets Control reference.
- b) "Business Entity Formation" refers to the act of organizing and filing documents with DOS, and non-profit entities are included.
- c) The reference to "speaks" in the definition of "Business Entity Representation" in the proposed regulation is deleted.
- d) A definition of "Customer" is added to mean "the person or persons intending to form, and/or otherwise conduct activities through, a business entity formed or qualified in Delaware."
- e) The definition of "Limited Liability Company" will also include a "series" as set forth in the Delaware Code.
- f) The statutory reference to the Delaware Limited Partnership Act is corrected.

9. The Department incorporates a reference to "manual verification" in Section 4.1.1.1 to clarify the reasonable steps that a registered agent may take to verify customer identity. The Department adopts the comment to include "before performing services for any new Customer" as a clarification of the term accepting a new Customer.

10. DOS determines that the changes included into the regulation as the result of the public comment are procedural and not substantive in accordance with 29 **Del.C.** §10118(c). When the public notice fairly apprises the public of the issues contemplated by the agency in the rulemaking process, changes made to the proposed rule in consideration of the public comment do not require another notice period. *Collazuol v. Tulou*, 1996 WL 658966 (Del. Super. Oct. 31, 1996).

11. The Department does not adopt the public comment that proposed a safe harbor for registered agents. The safe harbor for Trusted Law Firms delegates responsibility for core functions of registered agents to verify their customer entities. While the Department does not expressly list credit cards specifically as a method to verify new customers, by design, the registered agents will exercise some discretion in their methods of identification. Except as expressly referenced to OFAC, the regulation does not incorporate other federal regulatory identification protocols.

DECISION AND ORDER CONCERNING THE REGULATIONS

Having found that the proposed regulation is necessary, as outlined herein, the Department finds that the regulation shall be adopted as informed by the procedural changes offered in the public comment and adopted by this Order. The regulation changes will be effective on January 1, 2019 following publication of this Order in the *Delaware Register of Regulations* on December 1, 2018.

IT IS SO ORDERED this 20th day of November, 2018 by the Delaware Department of State.

The Honorable Jeffrey W. Bullock

Registered Agent Customer Entity Verification Requirements

1.0 Enabling Legislation

House Bill 404 of the 149th Delaware General Assembly, as amended by House Amendment No. 1 and Senate Amendment No. 2, 81 **Del. Laws**, Ch. 334, modifies 8 **Del.C.** §132; 6 **Del.C.** §§~~15-111,~~ 17-104 and 18-104 to enable the Secretary to establish regulations for Registered Agents to verify the identification of their customer business entities.

2.0 Purpose

The purpose of this regulation is to clarify the obligation of Registered Agents in Delaware to comply with regulations issued by the Secretary pertaining to Business Entity Formation in matters involving filings submitted to the Secretary on behalf of corporations, partnerships, trusts, limited partnerships, and limited liability companies. This regulation outlines the standards for Registered Agents regarding verification of customer entities in accordance with House Bill 404 of the 149th Delaware General Assembly, as amended by House Amendment No. 1 and Senate Amendment No. 2, 81 **Del. Laws**, Ch. 334.

3.0 Definitions

The following words and terms, when used in this regulation, shall have the following meaning unless the context clearly indicates otherwise:

~~["Blocked Persons" means those persons or entities listed as such with the Office of Foreign Assets Control.]~~

"Business Entity Formation" means **[the act of]** any person, partnership, association, corporation, company, singly or jointly with others, ~~[that organizes in organizing]~~ under the Delaware Code and **[files filing]** the required documents with the Division of Corporations in the Department of State~~[- but shall expressly exclude a nonprofit association as set forth at 6 Del.C. §1910].~~

"Business Entity Representation" means any person, partnership (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)), association, corporation, company, singly or jointly with others, that acts ~~[and/or speaks]~~ on behalf of any person or entity as a registered agent.

"Corporation" means an entity that is organized or incorporated in accordance with the Delaware Code and as expressly set forth at Title 8 of the Delaware Code.

"Customer" means the person or persons intending to form, and/or otherwise conduct activities through, a business entity formed, registered or qualified in Delaware.]

"Customer Information" means any and all information or documents relating to the true and correct identity of a potential customer of a Registered Agent that includes, but is not limited to, full name, complete address (to include background information related to a P.O. Box address), photographs, background information, or any other information as needed to verify identification.

"Department" means the Delaware Department of State.

"Limited Liability Company" means an entity that is organized or created in accordance with the requirements of a "limited liability company" **[or a "series"]** as set forth in the Delaware Code and as expressly defined at 6 **Del.C.** §18-101, as amended.

"Limited [Liability] Partnership" means an entity that is organized or created in accordance with the requirements of a "limited liability partnership" as set forth in the Delaware Code and as expressly defined at 6 **Del.C.** §17-101 as amended.

"Office of Foreign Assets Control" means the office or its equivalent office(s) as created by federal laws and administered by order of the United States Department of the Treasury or its successor(s) or equivalent department(s).

"Partnership" means an entity that is organized or created in accordance with the requirements of a "partnership" as set forth in the Delaware Code at 6 **Del.C.** §15-202 as amended.

"Registered Agents" means an agent or agents as defined or described in accordance with the Delaware Code and as expressly set forth at 8 **Del.C.** §132 and 6 **Del.C.** §§15-111, 17-104 and 18-104.

"Secretary" means the Secretary of the Delaware Department of State.

"Specially Designated Nationals [and Blocked Persons (SDN)]" means individuals, groups and entities as defined or described as "Specially Designated Nationals" by the Office of Foreign Assets Control.

"Trust" means a statutory trust as set forth in the Delaware Code and as expressly defined in 12 **Del.C.** Ch. 38 as amended.

4.0 Procedures

- 4.1 Registered Agents are required to complete the following steps to verify filings submitted to the Secretary on behalf of corporations, partnerships, limited partnerships, trusts, and limited liability companies in the course of Business Entity Representation:
- 4.1.1 Prior to engaging in business:
- 4.1.1.1 Registered Agents will take reasonable steps to verify the identity of potential customers. Such steps may include, but are not limited to, **[manual verification,]** the use of software or third party services to perform background or identification verification or obtaining such documents sufficient for identity.
- 4.1.2 New Customer Information:
- 4.1.2.1 Registered Agents shall compare new customer information against the register and lists of the Office of Foreign Assets Control (“OFAC”), before **[accepting performing services on behalf of]** any new customer. Customer information shall include the full name and complete address of the submitting customer (whether business or individual).
- 4.1.2.2 For Business Entity Formation or Business Entity Representation, Registered Agents shall collect and retain the full name, business address and business telephone number of the current communications contact(s) and any other such information that shall hereafter be required by statute. In addition, Registered Agents may collect additional information, including, but not limited to officers, directors, members, managing members, partners, or owners. All such information collected shall be compared against OFAC.
- 4.1.3 Updating names and addresses of related parties:
- 4.1.3.1 Registered Agents shall request (at minimum annually) updates to the communications contact(s) and any other information required by statute. To the extent additional information has been collected, Registered Agents may, at their discretion, request updates to such information. All updated information shall be compared against OFAC.
- 4.1.4 Entity and Customer Information transferred from another Registered Agent:
- 4.1.4.1 Registered Agents shall compare all entity and customer information transferred from another registered agent against the register and lists of OFAC, or its successor, before accepting the customer.
- 4.1.4.2 Entity information shall include the full name, business address and business telephone number of communications contact(s), any other information required by statute along with any additional information collected by the previous registered agent.
- 4.1.5 Quarterly Review:
- 4.1.5.1 Registered Agents shall review complete customer registry against the OFAC register or lists at a minimum on a quarterly basis.
- 4.1.6 Notifications:
- 4.1.6.1 Registered Agents shall sign up for notifications and updates from OFAC, to include but not limited to updates on specific sanctions.
- 4.1.7 OFAC Search Lists:
- 4.1.7.1 Registered Agents shall search for either individuals or corporate entities on all OFAC lists, to include but not limited to “Specially Designated Nationals” and “Blocked Persons” lists. Registered Agents may use software or third party services to perform a search of OFAC lists.