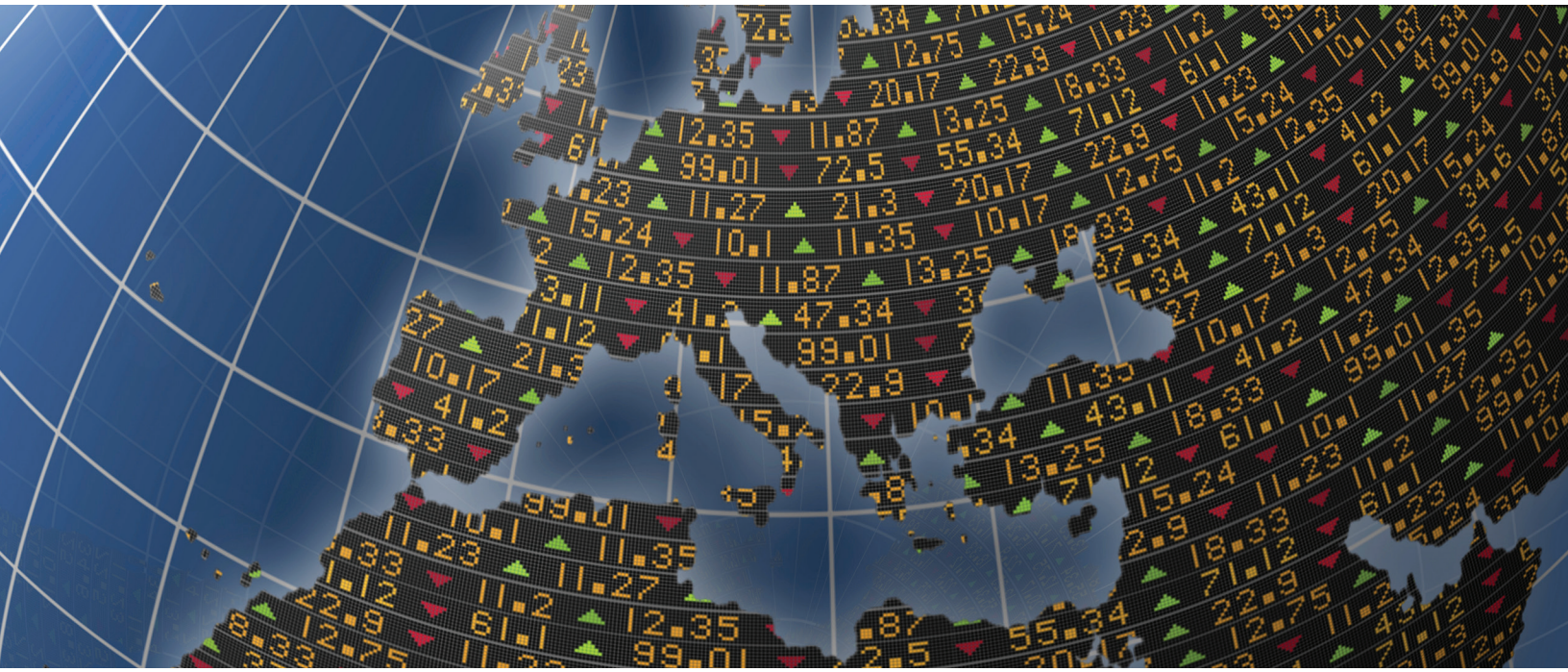
Debevoise & Plimpton

FCPA Update
October 2022
Volume 14
Number 3

FCPA Update

A Global Anti-Corruption Newsletter



Also in this issue:

Click here for an index of all FCPA Update articles

If there are additional individuals within your organization who would like to receive *FCPA Update*, please email prohlik@debevoise.com, eogrosz@debevoise.com, or pferenz@debevoise.com

Brazilian Airline Resolves Foreign Bribery Investigations with Reduced Penalty Based on Inability to Pay

On September 15, 2022, GOL Linha Aereas Inteligentes S.A. ("GOL"), one of Brazil's most prominent airlines, agreed to pay $41.5 million to resolve bribery investigations by DOJ, the SEC, and Brazilian authorities. These resolutions involved allegations that GOL executives bribed prominent Brazilian officials in exchange for the passage of two laws intended to benefit the airline industry.[1]

Continued on page 2

1. *See* Deferred Prosecution Agreement, *United States v. Gol Linhas Aereas Inteligents S.A.*S v. GOL, No. 22-cr-325-PJM (D. Md. Sept. 15, 2022), https://www.justice.gov/criminal-fraud/file/1535366/download ["GOL DPA"]; Order, *In re Gol Linhas Aereas Inteligentes S.A.*, Securities Exchange Act Release No. 95800 (Sept. 15, 2022), https://www.sec.gov/litigation/admin/2022/34-95800.pdf ["GOL Order"]; CGU Press Release, CGU e AGU Celebram Acordo de Leniencia de R$14 Milhoes com a Empresa GOL Linhas Aereas Inteligentes S.A. (Sept. 15, 2022) https://www.gov.br/cgu/pt-br/assuntos/noticias/2022-periodo-eleitoral/cgu-e-agu-celebram-acordo-de-leniencia-de-r-14-milhoes-com-a-empresa-gol-linhas-aereas-inteligentes-s-a.

Brazilian Airline Resolves Foreign Bribery Investigations with Reduced Penalty Based on Inability to Pay

Continued from page 1

In another display of the "truly remarkable" cooperation between the United States and Brazil,[2] this case reflects both countries' continued commitment to working together in enforcing their anti-corruption laws. DOJ's resolution, in particular, applied its guidance on calculating appropriate penalties and considering whether to impose monitorships. More broadly, while demonstrating the serious risks posed to companies by insufficient controls, the GOL resolutions exemplify how authorities currently factor cooperation and remediation into their enforcement decisions.

Background

As reported in its SEC filing on May 1, 2017, GOL received inquiries in 2016 from Brazilian tax authorities regarding payments to firms owned by politically exposed persons in Brazil. GOL retained U.S. and Brazilian counsel to conduct an independent investigation. In December 2016, GOL entered into a leniency agreement with the Brazilian Federal Public Ministry, avoiding criminal or civil charges and agreeing to pay a R$12 million fine and improve its compliance program. GOL also paid a R$4.2 million fine to the Brazilian tax authorities and agreed to notify relevant Brazilian and U.S. authorities about the investigation.[3]

According to the criminal information DOJ filed in the District of Maryland earlier in September 2022, GOL conspired to violate the FCPA's anti-bribery and books and records provisions. Specifically, between 2012 and 2013, GOL caused approximately $3.8 million in bribe payments to be made to certain Brazilian officials to secure the passage of two laws that lowered certain payroll and fuel taxes, financially benefiting GOL and other Brazilian airlines.[4] According to Assistant Attorney General Kenneth A. Polite Jr., "the company entered into fraudulent contracts with third-party vendors for the purpose of generating and concealing the funds necessary to perpetrate this criminal conduct, and then falsely recorded the sham payments in their own books."[5]

The SEC similarly found that a GOL director committed to pay approximately $5.4 million in bribes to Brazilian politicians in order to ensure passage of legislation that financially benefitted GOL.[6] According to the SEC, between October 2012 and

Continued on page 3

2. Ana de Liz, "DOJ prosecutor hails 'truly remarkable' relationship with Brazilian authorities," GIR (Oct. 26, 2022), https://globalinvestigationsreview.com/just-anti-corruption/article/doj-prosecutor-hails-truly-remarkable-relationship-brazilian-authorities.
3. GOL Linhas Aereas Inteligentes S.A., Annual Report (Form 20-F) (May 1, 2017), at 82.
4. Information ¶ 16, *United States v. Gol Linhas Aereas Inteligents S.A.*S v. GOL, No. 22-cr-325-PJM (D. Md. Sept. 9, 2022), https://www.justice.gov/criminal-fraud/file/1535361/download.
5. DOJ Press Release, GOL Linhas Aéreas Inteligentes S.A. Will Pay Over $41 Million in Resolution of Foreign Bribery Investigations in the United States and Brazil (Sept. 15, 2022), https://www.justice.gov/opa/pr/gol-linhas-reas-inteligentes-sa-will-pay-over-41-million-resolution-foreign-bribery ["DOJ Press Release on GOL"].
6. See GOL Order ¶ 2.

Brazilian Airline Resolves Foreign Bribery Investigations with Reduced Penalty Based on Inability to Pay

Continued from page 2

2013, GOL, through the GOL director, paid the equivalent of $1.14 million in bribes to a Brazilian official who helped ensure the inclusion of the air transport industry in legislation significantly lowering payroll taxes.[7] These bribes were paid through at least two companies that the Brazilian official controlled and characterized as legitimate advertisement expenses.

As reflected in the SEC's order, GOL also paid almost $1 million in bribes to close associates of the Brazilian official and a company associated with a Brazilian legislator.[8] GOL recorded all these payments as legitimate expenses for services, even though the services were never rendered. In 2013, GOL, through the GOL director, also paid $552,400 in bribes to a former Brasilia official who influenced the passage of legislation that lowered Brasilia's aviation fuel tax by more than half. GOL similarly recorded these payments as fees for services that were never rendered.[9]

"Anti-bribery violations need not involve payments to government officials in exchange for particular commercial opportunities or the approval of business licenses or permits, for example. Here, GOL paid officials to exert legislative influence in a way that financially benefited the company."

These two new laws saved GOL almost $52 million: approximately $39.7 million in 2013 as a result of the payroll law and approximately $12.24 million from lower aviation fuel taxes.[10]

In addition to bribery charges, the SEC found that GOL failed to devise and maintain an adequate system of internal accounting controls. These insufficient internal controls resulted in payments to vendors involved in this bribe scheme even though most of the vendor's purported services were never rendered. Moreover, the vendor procurement process did not have an effective review process and instead relied primarily on the GOL director for authorization and verification of services rendered.[11]

Continued on page 4

7. *Id.* ¶ 4.
8. *Id.* ¶ 5.
9. *Id.* ¶¶ 7,8.
10. *Id.* ¶¶ 6, 8.
11. *Id.* ¶ 12.

Brazilian Airline Resolves Foreign Bribery Investigations with Reduced Penalty Based on Inability to Pay

Continued from page 3

The GOL Resolutions

To resolve DOJ's criminal case, GOL entered into a three-year DPA. GOL agreed to: (i) pay a criminal penalty of $17 million; (ii) continue cooperating with DOJ in any related ongoing or future criminal investigations; and (iii) continue enhancing its compliance program and, for the term of the DPA, reporting to DOJ regarding its remediation and enhanced compliance measures.[12] Additionally, GOL agreed to pay $24.5 million to resolve its civil case with the SEC.[13]

Both DOJ and the SEC fully credited GOL's cooperation with the investigations, which included timely and voluntarily providing the facts obtained through the company's internal investigation, translating documents, testing thousands of transactions, and making management available for interviews in the United States.[14]

GOL also received credit for its remedial efforts, which included an overhaul of its anti-corruption compliance program under new leadership, extensive assessment of the company's risks, and termination of any relationship with third parties involved in the bribery scheme.[15] In fact, DOJ determined that an independent compliance monitor was unnecessary because of GOL's remediation efforts and improvements to its compliance program.[16]

However, the DPA also noted that GOL did not receive voluntary disclosure credit and that the company previously had been subject to civil and regulatory actions, though not criminal ones.[17]

The DPA reflects that DOJ and GOL agreed that the appropriate criminal penalty for the company's violations is $87 million. Based on GOL's representations and supporting evidence that it was unable to pay this amount, DOJ – in accordance with its Inability to Pay Guidance[18] – determined that paying a criminal penalty greater than $17 million "would substantially threaten the continued viability of the Company."[19]

Continued on page 5

12. *See* GOL DPA ¶¶ 4(e), 4(j), 4(l)-(m).
13. *See* GOL Order §IV(B).
14. *See* GOL DPA ¶¶ 4(b); GOL Order at 5.
15. GOL Order at 5; *see also* GOL DPA ¶ 4(d).
16. GOL DPA ¶ 4(m).
17. *Id.* ¶¶ 4(a), 4(g).
18. *See* Memo from Assistant Attorney General (Brian A. Benczkowski), "Evaluating a Business Organization's Inability to Pay a Criminal Fine or Criminal Monetary Penalty" (Oct. 8, 2019), https://www.justice.gov/opa/speech/file/1207576/download; Kara Brockmeyer, Andrew M. Levine, et al., "The Year 2020 in Review: Another Record-Breaking Year of Anti-Corruption Enforcement," FCPA Update, Vol. 12, No. 6, https://www.debevoise.com/insights/publications/2021/01/fcpa-update-january-2021.
19. *Id.* ¶¶ 4(k), 9.

Brazilian Airline Resolves Foreign Bribery Investigations with Reduced Penalty Based on Inability to Pay

Continued from page 4

Similarly, the SEC's administrative order explains that the civil penalty imposed on GOL was not based on the $87 million criminal fine.[20] Although GOL owes a total of $70 million in disgorgement and prejudgment interest, given the company's representations and evidence about its financial condition, it will only be required to pay $24.5 million.[21]

In 2020, GOL reported its conduct to Brazil's Comptroller General's Office (*Controladoria-Geral da Uniao* or "CGU") and Attorney General's Office (*Advocacia-Geral de Uniao* or "AGU").[22] DOJ and the SEC each agreed to credit up to $1.7 million of GOL's penalty, for a total of $3.4 million, against the approximately $3.4 million fine levied against GOL by CGU under the Administrative Improbity Law.[23] In its leniency agreement with CGU, GOL also agreed to improve its compliance and governance policies, including internal controls.[24]

Key Takeaways

The GOL resolutions underscore several important reminders:

- Anti-bribery violations need not involve payments to government officials in exchange for particular commercial opportunities or the approval of business licenses or permits, for example. Here, GOL paid officials to exert legislative influence in a way that financially benefited the company. And the fact that the legislation would benefit other companies too provided no defense.
- DOJ's Inability to Pay Guidance remains operative and can reduce significantly the penalties a company ultimately pays. Even after a 25% reduction of the bottom of the applicable U.S. Sentencing Guidelines penalty range, GOL would have been required to pay $157 million to resolve its cases with both agencies. However, the company was permitted to pay a total penalty of $41.5 million – approximately one-fourth of what the agencies deemed to be "appropriate" penalties.
- Even though GOL did not self-report, DOJ did not to appoint a compliance monitor. This is likely due in part to the fact that the bribes at issue occurred almost a decade ago and were not pervasive. Significantly, the company also invested significantly in revamping its compliance program. As DOJ announced

Continued on page 6

20. GOL Order at 5.
21. *Id.* at 6.
22. *See* CGU Press Release, CGU e AGU Celebram Acordo de Leniencia de R$14 Milhoes com a Empresa GOL Linhas Aereas Inteligentes S.A. (Sept. 15, 2022), https://www.gov.br/cgu/pt-br/assuntos/noticias/2022-periodo-eleitoral/cgu-e-agu-celebram-acordo-de-leniencia-de-r-14-milhoes-com-a-empresa-gol-linhas-aereas-inteligentes-s-a ["CGU Press Release"].
23. *See* DOJ Press Release on GOL; GOL SEC Order at 6.
24. *See* CGU Press Release.

Brazilian Airline Resolves Foreign Bribery Investigations with Reduced Penalty Based on Inability to Pay

Continued from page 5

on the same day as GOL's resolutions, while voluntary self-disclosure is one factor prosecutors should consider in assessing the need for a monitor, another involves whether, at the time of the resolution, the company has adequately tested its (enhanced) compliance program and internal controls.[25] Here, the passage of time between GOL's misconduct and the resolutions with U.S. and Brazilian authorities gave the company additional time both to improve and test its anti-corruption controls.[26]

- Although CGU and AGU investigated GOL for misconduct under both Brazil's Administrative Improbity Law and its Anti-Corruption Law, the fine levied stemmed only from the former. Nevertheless, recent amendments to the Administrative Improbity Law have resulted in a higher standard of proof, even than in criminal cases. This has made prosecution and enforcement under the law harder. It will be interesting to see, going forward, to what extent and for what purposes CGU and AGU rely on each of these laws.
- GOL's settlement involved the same agencies responsible for the Stericycle bribery settlement earlier this year, again demonstrating the strong relationships between U.S. and Brazilian anti-corruption agencies. Even with all the flux in Brazil, including the end of *Lava Jato* and the elections, there is no jurisdictional parallel when it comes to coordination with the U.S. authorities. Looking ahead, particularly given CGU's recent announcement about expanding its focus to corruption outside of Brazil,[27] the importance of the authorities' ongoing cooperation likely will continue to grow.

Andrew M. Levine

Bruce E. Yannett

Matthew S. French

Isabela Garcez

Andrew M. Levine and Bruce E. Yannett are partners in the New York office. Matthew S. French and Isabela Garcez are associates in the New York office. Full contact details for each author are available at www.debevoise.com.

Continued on page 7

25. *See* Memo from the Deputy Attorney General (Lisa O. Monaco), "Further Revisions to Corporate Criminal Enforcement Policies Follow Discussions with Corporate Crime Advisory Group" (Sept. 15, 2022), https://www.justice.gov/dag/page/file/1535286/download.
26. Kara Brockmeyer, Helen V. Cantwell, et al., "DOJ Offers Additional Guidance on Corporate Criminal Enforcement," Debevoise In Depth (Sept. 19, 2022), https://www.debevoise.com/insights/publications/2022/09/doj-offers-additional-guidance-on-corporate.
27. *E.g.*, Ana de Liz, "Brazil boosts focus on corruption beyond its borders," Global Investigations Review (Oct. 26, 2022), https://globalinvestigationsreview.com/article/brazil-boosts-focus-corruption-beyond-its-borders.

FinCEN Finalizes Landmark Beneficial Ownership Reporting Rule

On September 30, 2022, the U.S. Treasury Department's Financial Crimes Enforcement Network ("FinCEN") published its long-anticipated final rule (the "Final Rule") implementing the beneficial ownership information reporting requirements of the Corporate Transparency Act (the "CTA").[1] Under the Final Rule, which is the first of three rulemakings that FinCEN plans to undertake to implement the CTA, legal entities created or registered to do business in the United States will need to report beneficial ownership information into a centralized governmental database.

Tens of millions of legal entities, including certain holding companies, special purpose entities and investment vehicles, likely will be impacted by the Final Rule. The creation of a corporate registry at FinCEN signals a landmark change to U.S. corporate law, which international bodies have long criticized for insufficient transparency.

The Final Rule describes who must report beneficial ownership information, what information must be reported and when reports are due. As described in the preamble to the Final Rule, the requirements outlined in FinCEN's December 8, 2021 proposal (the "Proposed Rule") are being implemented largely as proposed, with a few modifications.[2]

The Final Rule is effective January 1, 2024, with reporting companies created or registered to do business before that date having until January 1, 2025 to file their initial reports. Importantly, the effective date specified in the Final Rule assumes that FinCEN will receive adequate funding to hire necessary staff to conduct outreach to stakeholders, design and build the secure database that will receive, store and maintain reported information and implement related rulemakings.

In this article, we describe the Final Rule's key provisions and implications for reporting entities and their owners, control persons and formation or registration agents.

Continued on page 8

1. 87 Fed. Reg. 59498 (Sept. 30, 2022), *available* here.
2. 86 Fed. Reg. 69920 (Dec. 8, 2021), *available* here. *See also* Debevoise In Depth, FinCEN Proposes Beneficial Ownership Reporting Rule (Dec. 10, 2021), *available* here.

FinCEN Finalizes Landmark Beneficial Ownership Reporting Rule
Continued from page 7

Background

The CTA requires various legal entities organized or registered to do business in the United States to report beneficial ownership information to FinCEN. The law also requires FinCEN to maintain a secure, nonpublic database of this information for use, under varying conditions, by national security, intelligence and law enforcement agencies, federal functional regulators and financial institutions.

The beneficial ownership reporting provisions of the CTA have been a particular focus of the Biden Administration and are expected to "help prevent drug traffickers, fraudsters, corrupt actors such as oligarchs, and proliferators from laundering or hiding money and other assets in the United States."[3] Recent attempts by Russian elites, state-owned enterprises and organized crime, as well as Russian government proxies, to use shell companies to evade sanctions on Russia "reinforce[] the point that abuse of corporate entities … presents a direct threat to the U.S. national security and the U.S. and international financial systems" and underscore the need for beneficial ownership reporting.[4]

Ultimately, the Final Rule allows the United States to join at least 30 countries that have some form of beneficial ownership registry, and U.S. efforts to collect beneficial ownership information are hoped to "spur similar efforts by foreign jurisdictions" to make it more difficult for bad actors to conceal their activities.[5]

Key Components Of The Final Rule

Who is required to submit beneficial ownership reports, and who is exempt?

- ***Reporting Companies.*** A "reporting company" under the Final Rule is either: (i) a domestic reporting company created by the filing of a document with a secretary of state or similar office under the law of a U.S. state or Indian tribe;[6] or (ii) a foreign reporting company formed under the law of a foreign country and registered to do business within the United States by the filing of a document with a secretary of state or similar office, in each case unless an exemption applies.[7] In this regard, the Final Rule adopts the Proposed Rule's definition of reporting company and exemptions from the reporting requirements without significant changes.

Continued on page 9

3. FinCEN, Beneficial Ownership Information Reporting Rule Fact Sheet (Sept. 29, 2022), *available* here.
4. *Id.*
5. 87 Fed. Reg. at 59499.
6. Other types of entities, including most trusts, are excluded from the reporting company definition to the extent that they are not created by the filing of a document with a secretary of state or similar office.
7. 31 CFR 1010.380(c)(1).

FinCEN Finalizes Landmark Beneficial Ownership Reporting Rule
Continued from page 8

- ***Exemptions.*** The Final Rule exempts 23 types of entities, as specifically set out in the CTA, from the definition of reporting company. FinCEN noted in the preamble to the Final Rule that the definition of reporting company is broad, that the 23 exemptions are "carefully circumscribed" and that any expansion of these exempt categories would require "consultation and specific findings that [beneficial ownership] reporting would not be highly useful" to law enforcement.[8] The exemptions remain largely unchanged from the Proposed Rule, with only a few minor modifications.

  Exempt entities include publicly traded companies; banks; bank holding companies; money services businesses registered with FinCEN; broker-dealers registered with the Securities and Exchange Commission; SEC-registered investment advisers ("RIAs") and investment companies; securities exchanges, clearing agencies and other entities registered with the SEC or the Commodity Futures Trading Commission (the "CFTC"); and operating companies with more than 20 full-time employees, annual gross receipts or sales of greater than $5 million and an operating presence at a physical office in the United States.

"Under the Final Rule, … legal entities created or registered to do business in the United States will need to report beneficial ownership information into a centralized governmental database."

Certain pooled investment vehicles ("PIVs") operated or advised by RIAs and other exempt financial institutions also are exempt. However, FinCEN declined to extend the PIV and RIA exclusions to certain related entities, as described below. FinCEN also declined to exempt from the reporting requirements intermediate holding companies established by foreign banks that are not bank holding companies, commodity pools that are operated by CFTC-registered commodity pool operators or advised by CFTC-registered commodity trading advisors, family offices, state-registered money services businesses and entities registered in jurisdictions where beneficial ownership information is readily accessible, among other exemptions requested by commenters on the

Continued on page 10

8. 87 Fed. Reg. at 59539-40.

FinCEN Finalizes Landmark Beneficial Ownership Reporting Rule
Continued from page 9

Proposed Rule.[9] FinCEN stated in the preamble to the Final Rule that it will continue to consider potential exemptions, including the extent to which certain entities may already report their beneficial owners to the federal government through means other than the CTA.[10]

- ***No Exemption Certification Requirement.*** The Final Rule does not require exempt entities to file a form or obtain an exemption certificate to claim an exemption.

What about subsidiaries?

- ***Subsidiary Exemption.*** Entities whose ownership interests are controlled or wholly owned, directly or indirectly, by one or more of 18 exempt entity types are exempted from the definition of reporting company.[11] The preamble to the Final Rule suggests that the concept of control set out in the CTA, as discussed below, would apply for purposes of considering whether an entity qualifies for this exemption.
- ***No Expansion Beyond Proposal.*** Commenters to the Proposed Rule had requested that FinCEN expand the exemption to include companies holding only exempt entities and subsidiaries majority owned by exempt entities, but FinCEN declined to do so.
- Further, PIVs are not among the exempt entities whose ownership or control may serve to exempt an entity from beneficial ownership reporting requirements. Thus, a PIV's ownership of a downstream legal entity will not *per se* exempt the downstream entity from reporting.[12]

Are pooled investment vehicles and other entities in a fund structure exempt?

- ***Scope of PIV Exclusion.*** The Final Rule exempts from the reporting company definition certain PIVs operated or advised by RIAs or other specified exempt entities.[13] A "pooled investment vehicle" for this purpose is: (i) any investment company under the Investment Company Act of 1940 (the "Investment Company Act"); or (ii) any company that would be such an investment company but for the exclusion in section 3(c)(1) or 3(c)(7) of the Investment Company Act ***and*** that is

Continued on page 11

9. 87 Fed. Reg. at 59540.
10. *Id.*
11. 31 CFR 1010.380(c)(2)(xxii).
12. In this scenario, it may be the case that the relevant RIA exercises "control" over the downstream entity's ownership interests, in which case the downstream entity may qualify for the subsidiary exclusion from reporting. However, such an analysis would necessarily depend on the applicable facts and circumstances and further analysis of the Final Rule.
13. 31 CFR 1010.380(c)(2)(xviii).

FinCEN Finalizes Landmark Beneficial Ownership Reporting Rule

Continued from page 10

identified by its legal name in the applicable RIA's Form ADV filed with the SEC or that will be so identified in the next annual updating amendment.[14]

This language represents a modification from the proposed rule text in response to comments from industry participants, who sought clarification that an RIA's creation of a new PIV will not require an update to the RIA's Form ADV in order for the PIV to qualify for the reporting exclusion. FinCEN agreed that it would be impracticable for an RIA to update its Form ADV in a manner inconsistent with existing SEC requirements for the sole purpose of establishing an exemption for a newly formed PIV, and accordingly modified the rule text to clarify that a PIV may qualify for the exclusion even if it is not yet identified on the Form ADV, provided that it will be so identified in the next annual updating amendment.[15]

- ***Application to PIV-Related Entities.*** Under FinCEN's customer due diligence ("CDD") rule, some market participants have taken the position that all entities within a PIV structure are ultimately operated or advised by the RIA and therefore qualify for the PIV exclusion under that rule. Because the CTA defines a PIV as one that is identified by its legal name in the RIA's Form ADV, many in the industry sought clarification from FinCEN as to the applicability of the PIV exemption to different upstream and downstream entities in a fund structure.

  FinCEN acknowledged in the preamble to the Final Rule that a fund structure may, for example, contain different entities that are wholly owned by exempt PIVs, such as subsidiary legal entities created to effect specific investments or acquisitions.[16] However, FinCEN explicitly declined to provide a "blanket" exemption for all entities related to a PIV or subsidiaries of a PIV.[17] Rather, FinCEN stated that whether these entities are exempt from reporting requirements will depend on whether they themselves meet the criteria of an exemption. Thus, the specific facts and circumstances will need to be considered in determining whether an entity within a fund structure qualifies for an exclusion from reporting requirements.

- ***Reporting for Foreign PIVs.*** WAs supported by commenters, the Final Rule retains language making clear that a foreign PIV may only be required to report beneficial ownership information if it is registered with a state or tribal jurisdiction and therefore qualifies as a reporting company.[18]

Continued on page 12

14. 31 CFR 1010.380(f)(7).
15. 87 Fed. Reg. at 59544.
16. *Id.*
17. *Id.*
18. 31 CFR 1010.380(b)(2)(iii).

FinCEN Finalizes Landmark Beneficial Ownership Reporting Rule

Continued from page 11

What information must be reported?

The Final Rule requires each reporting company to submit to FinCEN information about: (1) each individual who is a beneficial owner; (2) company applicants; and (3) the reporting company itself.

Who are a reporting company's "beneficial owners"?

- Under the Final Rule, the term "beneficial owner" is defined as any individual who, directly or indirectly: (i) exercises "substantial control" over a reporting company; or (ii) owns or controls at least 25% of the ownership interests of the company.[19] FinCEN made some clarifications to the concepts underlying the beneficial owner definition but largely adopted the definition as proposed.
- ***Substantial Control.*** The Final Rule lists various activities that could constitute the exercise of substantial control, including service as a senior officer of the reporting company and direction, determination or substantial influence over important decisions made by the reporting company. These "important decisions" include decisions regarding the nature, scope and attributes of the company's business, transfers of principal assets, major expenditures or investments, entry into or termination of significant contracts and other examples provided in the Final Rule.[20] The definition also includes a catch-all provision stating that substantial control can be found in other forms not specifically listed.

  The Final Rule notes that substantial control may be exercised through various means, including board representation, ownership or control of a majority of the voting power or voting rights and control over intermediary entities that exercise substantial control.[21] FinCEN added language to the regulatory text to underscore that a trustee can exercise substantial control over a reporting company through the types of relationships outlined in the rule.[22]

Continued on page 13

19. 31 CFR 1010.380(d). The Final Rule contains five exceptions to the definition of beneficial owner: (1) a minor child, provided that a parent's or guardian's information is reported; (2) an individual acting as nominee, intermediary, custodian or agent on behalf of another individual; (3) an individual acting solely as an employee of a reporting company in specified circumstances (provided that the employee is not a senior officer); (4) an individual whose only interest in a reporting company is a future interest through a right of inheritance; and (5) a creditor of a reporting company, as defined by FinCEN. 31 CFR 1010.380(d)(3); 87 Fed. Reg. at 59533-36.
20. 31 CFR 1010.380(d)(1)(i).
21. 31 CFR 1010.380(d)(1)(ii).
22. 87 Fed. Reg. at 59529.

FinCEN Finalizes Landmark Beneficial Ownership Reporting Rule

Continued from page 12

The Final Rule differs from the CDD rule in requiring reporting with respect to *all* individuals with control over a reporting company. FinCEN noted in the preamble to the Final Rule that requiring reporting of all control persons will provide law enforcement with a more complete picture of who makes important decisions at a reporting company.[23]

- ***Ownership Interests.*** The term "ownership interests" is defined broadly and includes equity interests, capital or profit interests, convertible instruments (regardless of whether characterized as debt) and puts, calls or other options.[24] The definition also includes a catch-all provision for other instruments, arrangements or mechanisms used to establish ownership.

"The creation of a corporate registry at FinCEN signals a landmark change to U.S. corporate law, which international bodies have long criticized for insufficient transparency."

The Final Rule specifies that an individual may own or control an ownership interest in a reporting company through various means, including: joint ownership; through another individual acting as nominee, intermediary, custodian or agent; as a trustee, beneficiary, grantor or settlor of a trust in certain circumstances; and through ownership or control of intermediary entities.[25] The Final Rule also adds provisions for the calculation of ownership interests.[26]

Who are "company applicants"?

- ***Company Applicant.*** The Final Rule defines the term "company applicant" to mean the individual who directly files the document that creates or first registers a reporting company and the individual who is primarily responsible for directing or controlling such filing.[27]

Continued on page 14

23. *Id.* at 59528.
24. 31 CFR 1010.380(d)(2)(i).
25. 31 CFR 1010.380(d)(2)(ii).
26. 31 CFR 1010.380(d)(2)(iii).
27. 31 CFR 1010.380(e).

FinCEN Finalizes Landmark Beneficial Ownership Reporting Rule
Continued from page 13

- ***Reporting Related to Company Applicants.*** The Final Rule requires reporting companies created or registered *after* the effective date of the regulations to report information about company applicants. In response to comments related to the burdens associated with reporting such information, the Final Rule removes the requirement that companies with an obligation to report company applicant information keep such information updated in their filings with FinCEN. The Final Rule also removes the requirement that entities created or registered *before* the effective date report information for company applicants.

What should be included in a beneficial ownership report?

- The Final Rule requires beneficial ownership reports to include the information described below, which is largely as proposed.
- ***Required Information for Reporting Company.*** The Final Rule requires each reporting company to include in its beneficial ownership report its full legal name; any trade or "doing business as" names; the street address of its principal place of business in the United States (or, if not applicable, street address of the primary U.S. location where it conducts business); its jurisdiction of formation (and, for a foreign reporting company, jurisdiction where it first registers to do business in the United States); and its Internal Revenue Service taxpayer identification number ("TIN") or, for a foreign reporting company that has not been issued a TIN, a foreign tax identification number and name of the issuing jurisdiction.[28]
- ***Required Information for Beneficial Owners and Company Applicants.*** For each beneficial owner and (as applicable) company applicant,[29] a reporting company must report the individual's full legal name; date of birth; complete current address (*i.e.*, business street address for a company applicant who forms or registers the reporting company in the course of such individual's business and otherwise the individual's residential street address); a unique identifying number and issuing jurisdiction from a non-expired U.S. passport, state or local identification document, driver's license or foreign passport; and an image of the document from which the unique identifying number was obtained.[30]

Continued on page 15

28. 31 CFR 1010.380(b)(1)(i). The Proposed Rule allowed for Dun & Bradstreet Data Universal Numbering System numbers or legal entity identifiers to be reported instead of TINs. 87 Fed. Reg. at 59516-17. The Final Rule requires the collection of a TIN for the reporting company and does not allow these alternatives.
29. As noted above, reporting companies created or registered before January 1, 2024 are not required to report company applicant information. 31 CFR 1010.380(b)(2)(iv).
30. 31 CFR 1010.380(b)(1)(ii).

Continued from page 14

- ***No TIN Required for Individuals.*** The Proposed Rule would have permitted reporting companies to voluntarily report the TIN of any beneficial owner or company applicant with such individual's consent.[31] The Final Rule does not include this language, as FinCEN concluded that the benefits were likely to be limited given the voluntary nature of the reporting and that the reporting of TINs would heighten privacy concerns and cybersecurity and operational risks.[32]

What is the FinCEN identifier, and how will it be used?

- ***FinCEN Identifier.*** An individual or reporting company may obtain a unique FinCEN identifier ("FinCEN ID") by submitting an application containing the information (as described above) that is required to be reported under the regulations.[33] Information submitted to FinCEN in connection with obtaining a FinCEN ID must be kept updated.[34]
- ***Use of FinCEN ID.*** An individual who obtains a FinCEN ID may provide this identifier to a reporting company, for use in the company's beneficial ownership reporting to FinCEN in lieu of the required information elements described above.[35] The Proposed Rule would have allowed a reporting company to report an intermediary company's FinCEN ID in lieu of beneficial ownership information about an individual who is a beneficial owner of the reporting company via the individual's interest in the intermediary.[36] The Final Rule does not adopt this proposed use of the FinCEN ID due to concerns about its potential application in ways that result in incomplete or misleading disclosures.[37] FinCEN intends to address these issues before the Final Rule goes into effect.

Are submissions to FinCEN required to be certified?

- ***Certification as to Accuracy; No Qualifiers.*** The Final Rule requires a certification that any report or application submitted to FinCEN is "true, correct, and complete."[38] FinCEN stated that the structure of the CTA reflects a deliberate choice to place on reporting companies the responsibility to identify beneficial owners and report information to FinCEN and, thus, FinCEN declined

Continued on page 16

31. 87 Fed. Reg. at 59520.
32. *Id.* at 59521.
33. 31 CFR 1010.380(b)(4)(i).
34. 31 CFR 1010.380(b)(4)(iii).
35. 31 CFR 1010.380(b)(4)(ii).
36. 87 Fed. Reg. at 59524.
37. *Id.* at 59525.
38. 31 CFR 1010.380(b).

FinCEN Finalizes Landmark Beneficial Ownership Reporting Rule

Continued from page 15

to apply a knowledge qualifier or other due diligence standard to the certification requirement.[39]

- However, FinCEN clarified in the preamble to the Final Rule that an inadvertent mistake by a reporting company acting in good faith after diligent inquiry would not be expected to constitute a willfully false or fraudulent violation for purposes of the civil and criminal penalty provisions.[40]
- ***Liability for Reporting Violations.*** FinCEN clarified in the preamble that, although an individual may file a report on behalf of a reporting company, the reporting company is ultimately responsible for the filing. Similarly, an individual who files a report as agent of a reporting company will certify on the reporting company's behalf, as the reporting company is responsible for making the certification.[41] That said, an individual could face liability for certain reporting violations, including a reporting company's willful failure to report complete or updated beneficial ownership information that: (i) is caused by such individual; or (ii) occurs when the individual is a senior officer of the reporting company at the time of the failure.[42]

"Ultimately, the Final Rule allows the United States to join at least 30 countries that have some form of beneficial ownership registry, and U.S. efforts to collect beneficial ownership information are hoped to 'spur similar efforts by foreign jurisdictions' to make it more difficult for bad actors to conceal their activities."

When must reports be filed?

- ***Filing Timeline and Trigger.*** The Final Rule clarifies the trigger for filing an initial report and provides for filing within 30 days for newly created or registered entities, instead of the originally proposed 14-day timeframe.[43] The trigger for an initial report for a reporting company created or registered to do business after

Continued on page 17

39. 87 Fed. Reg. at 59514, 59515.
40. *Id.* at 59515.
41. *Id.* at 59514.
42. 31 CFR 1010.380(g)(4). The term "senior officer" is defined to include an individual holding the position or exercising the authority of a president, chief executive officer, chief operating officer, chief financial officer, general counsel or similar function. 31 CFR 1010.380(f)(8).
43. 87 Fed. Reg. at 59509.

FinCEN Finalizes Landmark Beneficial Ownership Reporting Rule

Continued from page 16

the effective date of the Final Rule (*i.e.*, January 1, 2024) is the earlier of: (i) the date on which the reporting company receives actual notice that its creation or registration has become effective; or (ii) the date on which a secretary of state or similar office first provides public notice that the company has been created or registered to do business.[44] Any entity created or registered to do business before January 1, 2024 must file an initial report by January 1, 2025.[45]

- ***Loss of, or Eligibility for, Exemption.*** Any entity that no longer meets the criteria for an exemption must report beneficial ownership information to FinCEN within 30 days after the date that it no longer qualifies for the exemption.[46] (Conversely, a reporting company that meets the criteria for an exemption after its filing with FinCEN must file an updated report indicating that it is no longer a reporting company.)[47]

What happens if reported information is incorrect or changes?

- ***Updates.*** Reporting companies must update reports for any changes to required information previously submitted to FinCEN within 30 days after the date on which the change occurs.[48] This includes changes with respect to who is a beneficial owner and changes in reported information for any particular beneficial owner. There is no materiality threshold, and thus *any* change in required information must be reported.[49] The image of an identifying document submitted to FinCEN also must be updated if there is a change with respect to the name, date of birth, address or unique identifying number of the relevant individual.[50]
- ***Corrections.*** If a report was inaccurate when filed and remains inaccurate, the Final Rule requires that the reporting company file a corrected report within 30 calendar days after the date on which the company becomes aware or has reason to know of the inaccuracy.[51] This is a slight modification to the originally proposed 14-day timeline.[52]

Continued on page 18

44. 31 CFR 1010.380(a)(1)(i),(ii).
45. 31 CFR 1010.380(a)(1)(iii).
46. 31 CFR 1010.380(a)(1)(iv).
47. 31 CFR 1010.380(a)(2)(ii), (b)(3)(ii).
48. 31 CFR 1010.380(a)(2)(i).
49. 87 Fed. Reg. at 59524.
50. 31 CFR 1010.380(a)(2)(v).
51. 31 CFR 1010.380(a)(3).
52. 87 Fed. Reg. at 59512, 59513.

Continued from page 17

- ***Safe Harbor for Corrected Reports.*** Corrected reports filed within the 30-day period specified above will be deemed to satisfy the statutory safe harbor for persons who inadvertently report inaccurate information to FinCEN if filed within 90 days after the date on which the inaccurate report was filed.[53] Some commenters requested clarification that the safe harbor applies if a corrected report is filed within 90 days from the date on which the reporting company becomes aware or has reason to know of the inaccuracy. Based on the statutory text, FinCEN declined to modify the regulation to provide this clarification.[54]

Will there be a system to maintain beneficial ownership information?

- ***Beneficial Ownership System and Reporting.*** To implement the CTA's beneficial ownership information reporting requirements, FinCEN has been developing the Beneficial Ownership Secure System ("BOSS") to receive, store and maintain collected information.[55] FinCEN expects that beneficial ownership reports will be submitted electronically to the BOSS through an online interface.
- ***Related Rulemaking.*** Regulations governing the disclosure of collected information to authorized recipients and requiring such recipients to safeguard beneficial ownership information will be forthcoming.

When is the Final Rule effective?

- ***Effective Date.*** The Final Rule will be effective January 1, 2024, with reporting companies created or registered to do business before that date having until January 1, 2025 to file their initial reports.

  FinCEN adopted this effective date based on several factors, including the time needed for secretaries of state and tribal authorities to understand the new requirements and to update documentation to notify reporting companies of the new obligations; for small businesses and other reporting companies to receive notice of and comply with the new rules; and for FinCEN to take steps to design and build the BOSS and to work with stakeholders to ensure a thorough and complete understanding of the rules.[56]

Continued on page 19

53. 31 CFR 1010.380(a)(3).
54. 87 Fed. Reg. at 59513.
55. *Id.* at 59508.
56. *Id.* at 59547.

Continued from page 18

- ***Effectiveness Dependent on FinCEN Budget Increase.*** Notably, FinCEN stated in the preamble to the Final Rule that the effective date necessarily depends on FinCEN's receipt of adequate funding to hire staff in order to conduct outreach to stakeholders, design and build the BOSS and implement related rulemakings. If FinCEN's requested budget increase is not provided, FinCEN may need to adjust its implementation and outreach plans.[57]

Next Steps

As noted above, the Final Rule is one of three required rulemakings to implement the CTA. FinCEN will address separately the protocols for access to and disclosure of the beneficial ownership information reported to FinCEN and revisions to the CDD rule that took effect in 2018. FinCEN intends to propose and finalize the rulemaking governing access to beneficial ownership information by the Final Rule's effective date, and FinCEN noted in the preamble to the Final Rule the CTA requirement that FinCEN rescind the specific beneficial ownership identification and verification requirements of the CDD rule (while retaining the general requirement for financial institutions to identify and verify the beneficial owners of legal entity customers) within one year after the effective date of the reporting rule (*i.e.*, by January 1, 2025).

FinCEN continues to note that the CTA requires the CDD rule revisions to, in part, account for financial institutions' access to beneficial ownership information reported to FinCEN "in order to confirm the beneficial ownership information provided directly to the financial institutions."[58] As we have noted previously, any requirement that financial institutions obtain beneficial ownership information from reporting companies before they can access the BOSS could potentially limit financial institutions' interest in using the database and may not serve to reduce burdens on reporting companies, contrary to the objectives of the CTA. It remains to be seen how FinCEN will balance these interests and how the Final Rule will affect and interact with the CDD rule's requirements.

In addition to the two related rulemakings described above, FinCEN is expected to draft and issue guidance and frequently asked questions, prepare forms and instructions and engage with various stakeholders regarding the Final Rule and the rulemakings to come.

Continued on page 20

57. *Id.*

58. *Id.* at 59507, citing CTA, Section 6403(d)(1)(A)–(C).

FinCEN Finalizes Landmark Beneficial Ownership Reporting Rule

Continued from page 19

For now, organizations should consider whether entities within their structures (whether currently existing or of a type that may be created in the future) may fall within the definition of reporting company and should work on developing policies, procedures and controls to: (i) identify reporting companies; (ii) identify and obtain information from beneficial owners and company applicants; (iii) prepare and file beneficial ownership reports; and (iv) ensure identification and filing of timely updates and, as applicable, corrections to information filed with FinCEN.

Satish M. Kini

Aseel M. Rabie

Zila Reyes Acosta-Grimes

Isabel Espinosa de los Reyes

Satish M. Kini is a partner in the Washington, D.C. office. Aseel M. Rabie is a counsel in the Washington, D.C. office. Zila Reyes Acosta-Grimes and Isabel Espinosa de los Reyes are associates in the New York office. Full contact details for each author are available at www.debevoise.com.

FCPA Update

FCPA Update is a publication of
Debevoise & Plimpton LLP

919 Third Avenue
New York, New York 10022
+1 212 909 6000
www.debevoise.com

Washington, D.C.
+1 202 383 8000

San Francisco
+1 415 738 5700

London
+44 20 7786 9000

Paris
+33 1 40 73 12 12

Frankfurt
+49 69 2097 5000

Hong Kong
+852 2160 9800

Shanghai
+86 21 5047 1800

Luxembourg
+352 27 33 54 00

Bruce E. Yannett
Co-Editor-in-Chief
+1 212 909 6495
beyannett@debevoise.com

Andrew J. Ceresney
Co-Editor-in-Chief
+1 212 909 6947
aceresney@debevoise.com

David A. O'Neil
Co-Editor-in-Chief
+1 202 383 8040
daoneil@debevoise.com

Karolos Seeger
Co-Editor-in-Chief
+44 20 7786 9042
kseeger@debevoise.com

Erich O. Grosz
Co-Executive Editor
+1 212 909 6808
eogrosz@debevoise.com

Douglas S. Zolkind
Co-Executive Editor
+1 212 909 6804
dzolkind@debevoise.com

Kara Brockmeyer
Co-Editor-in-Chief
+1 202 383 8120
kbrockmeyer@debevoise.com

Andrew M. Levine
Co-Editor-in-Chief
+1 212 909 6069
amlevine@debevoise.com

Winston M. Paes
Co-Editor-in-Chief
+1 212 909 6896
wmpaes@debevoise.com

Jane Shvets
Co-Editor-in-Chief
+44 20 7786 9163
jshvets@debevoise.com

Philip Rohlik
Co-Executive Editor
+852 2160 9856
prohlik@debevoise.com

Andreas A. Glimenakis
Associate Editor
+1 202 383 8138
aaglimen@debevoise.com

Please address inquiries regarding topics covered in this publication to the editors.

Please note:
The URLs in *FCPA Update* are provided with hyperlinks so as to enable readers to gain easy access to cited materials.