

FinCEN Proposes Beneficial Ownership Reporting Rule

December 10, 2021

On December 7, 2021, the Financial Crimes Enforcement Network (“FinCEN”) invited comment on a proposed rule that requires certain legal entities to report beneficial ownership information to FinCEN (the “Proposed Rule”).¹ The Proposed Rule would implement the beneficial ownership reporting obligations required under the Corporate Transparency Act (“CTA”), which was part of the Anti-Money Laundering Act of 2020 (“AML Act”).²

The Proposed Rule describes who must file a beneficial ownership information report (“BOI report”), what information must be reported and when a report is due. While many of the provisions of the Proposed Rule incorporate and reflect the statutory requirements of the CTA, the Proposed Rule also clarifies and provides greater specificity for key aspects of the beneficial ownership reporting obligations. The comment period for the Proposed Rule is open until February 7, 2022.

Notably, the Proposed Rule is one of three rulemakings that FinCEN plans to undertake to implement the beneficial ownership reporting provisions of the AML Act. FinCEN will address separately the protocols for access to and disclosure of the beneficial ownership information filed with FinCEN and conforming revisions to the Customer Due Diligence (“CDD”) Rule that took effect in 2018.

In this client update, we provide a brief background on the Proposed Rule and highlight certain of the Proposed Rule’s key provisions.

Background

The CTA requires broad categories of companies organized in the United States or required to register to do business in the United States to report beneficial ownership

¹ 86 Fed. Reg. 69920 (Dec. 8, 2021), available [here](#).

² See our previous Debevoise In Depth, Congress Passes Sweeping Anti-Money Laundering and Corporate Beneficial Ownership Law, available [here](#).

information to FinCEN at formation and report changes in their beneficial ownership on a going-forward basis. It further requires that FinCEN maintain a secure, nonpublic database of beneficial ownership information for use, under varying restrictions, by national security, intelligence and law enforcement agencies, federal functional regulators and financial institutions. The CTA directs Treasury to promulgate regulations in order to implement these requirements under the statute and to do so in a manner that minimizes the burden on reporting companies while ensuring that the information collected is accurate, complete and highly useful.³

FinCEN had previously sought public input regarding how it should implement the beneficial ownership information reporting requirements under the CTA to inform its drafting of the Proposed Rule.⁴

The creation of a corporate registry at FinCEN signals a landmark change to corporate law in the United States, which international bodies have long criticized for insufficient transparency. The beneficial ownership regulations are a particular focus of the Treasury Department and the Biden Administration. The Proposed Rule was issued one day after the Biden Administration released its United States Strategy on Countering Corruption, which outlines a whole-of-government approach to the fight against corruption.⁵ The Strategy cites the beneficial ownership regulations and registry as a key mechanism to achieve the Administration's goal of curbing illicit finance.⁶ In issuing the Proposed Rule, FinCEN stated that the ultimate goal of the regulatory proposal is to "impede malign actors from abusing legal entities, like shell companies, to conceal proceeds of corrupt and criminal acts."⁷

Key Components of the Proposed Rule

The Proposed Rule provides specificity as to "who must file a BOI report, what information must be reported, and when a report is due" under the beneficial ownership requirements of the CTA.⁸

³ See 31 U.S.C. 5336(b)(4)(B).

⁴ See 86 Fed. Reg. 17557 (Apr. 5, 2021) (advance notice of proposed rulemaking); Debevoise In Depth, Debevoise Insight: Round-up of Recent Anti-Money Laundering Developments, [available here](#).

⁵ The White House, United States Strategy on Countering Corruption (Dec. 2021), [available here](#).

⁶ *Id.* at page 20-21.

⁷ See FinCEN Press Release, FinCEN Issues Proposed Rule for Beneficial Ownership Reporting to Counter Illicit Finance and Increase Transparency, [available here](#).

⁸ See FinCEN Fact Sheet: Beneficial Ownership Information Reporting Notice of Proposed Rulemaking (NPRM), [available here](#).

Who Must Report

- **Reporting Companies.** The Proposed Rule identifies two categories of companies that must file reports with the FinCEN registry: domestic reporting companies and foreign reporting companies. A domestic reporting company includes any entity created by the filing of a document with a secretary of state or similar office of a jurisdiction within the United States, unless an exemption applies. A foreign reporting company is defined as any entity formed under the law of a foreign jurisdiction that is registered to do business within the United States, again, unless exempted.
- **Exemptions.** Under the CTA, 23 types of entities are exempted from the definition of reporting company.⁹ Exemptions include publicly traded companies, banks, bank holding companies, money transmitters, broker-dealers, registered investment advisers (“RIAs”), securities exchanges, clearing agencies and other entities registered with the Securities and Exchange Commission or the Commodity Futures Trading Commission as well as operating companies with more than 20 full-time employees, annual gross receipts of greater than \$5 million and a physical office in the United States. Pooled investment vehicles operated or advised by RIAs and other exempt financial institutions are also exempt. For this purpose, “pooled investment vehicle” means an investment company as defined in section 3(a) of the Investment Company Act of 1940 or a company that would be an investment company but for the exclusions in sections 3(c)(1) or (7) of that Act so long as the vehicle is identified by its legal name by its investment adviser in the adviser’s Form ADV.

Although the CTA includes an option for additional types of entities to be excluded by regulation, the Proposed Rule does not exempt any additional entities beyond those specified by the CTA. However, FinCEN has clarified the meaning of certain exemptions established by the CTA. Furthermore, the Proposed Rule does not require exempt entities to file a report to claim an exemption, although FinCEN invites comment on any applicable statutory authority to impose such a requirement and the appropriateness of inviting voluntary filings.

What Information Must Be Reported

Reporting companies must submit to FinCEN information about: (1) each beneficial owner and company applicant; and (2) the reporting company itself.

Beneficial Owners and Company Applicants

- **Beneficial Owners.** The Proposed Rule implements the CTA’s definition of a beneficial owner as any individual who (1) exercises substantial control over the

⁹ See 31 U.S.C. 5336(a)(11)(B).

reporting company; or (2) owns or controls at least 25% of the ownership interest of the reporting company.¹⁰ In order to clarify this definition, the Proposed Rule defines the terms “substantial control” and “ownership interests,” which were not defined under the statute. It also identifies ways an individual may “own or control” an ownership interest of the reporting company.

- In defining “substantial control,” the Proposed Rule lists various activities that could constitute such control, including service as a senior officer of the reporting company and direction, determination or decision of, or substantial influence over, important matters (including the examples listed in the Proposed Rule) affecting the reporting company. The Proposed Rule also includes a catch-all provision stating that substantial control can be found in other forms not specifically listed.
- The Proposed Rule does not mirror the CDD Rule, which requires a financial institution to provide beneficial ownership information for only one individual with “significant responsibility to control” the entity. Instead, FinCEN notes that limiting reporting to only one person could become a means of evasion.
- Company Applicant. For a domestic reporting company, a company applicant is the individual who files the document that forms the entity. In the case of a foreign reporting company, a company applicant is the individual who files the document that first registers the entity to do business in the United States. The Proposed Rule additionally states that a company applicant includes anyone who directs or controls the filing of such a document by another.

Required Information

- Beneficial Ownership Information. As in the CTA, the Proposed Rule requires reporting companies to identify each beneficial owner of the reporting company and each company applicant by: (1) full legal name; (2) date of birth; (3) current residential or business street address;¹¹ and (4) unique identifying number from an acceptable identification document. The Proposed Rule further specifies that a reporting company must provide an image of the identification document from which the identifying number is taken. It also includes a voluntary mechanism for

¹⁰ In accordance with the CTA, five types of individuals are exempt from the definition of “beneficial owner,” subject to proposed clarifications to ensure that reporting companies identify real parties in interest: (i) minor children; (ii) nominees or other intermediaries; (iii) employees; (iv) inheritors; and (v) creditors. See 31 U.S.C. 5336(a)(3)(B).

¹¹ Under the Proposed Rule, reporting companies must provide a residential street address used for tax residency purposes for any beneficial owner. Reporting companies must provide a business address for any company applicant that provides a business service as a corporate or formation agent. For all other company applicants, reporting companies would need to report the company applicant’s residential street address.

reporting the Taxpayer Identification Number (“TIN”) for a beneficial owner or company applicant.

- Reporting Company Information. The CTA did not specify what information a company had to report about itself. The Proposed Rule would require each reporting company to report its name, any alternative names through which the company is engaging in business, its business street address and its jurisdiction of formation or registration, as well as the company’s TIN or, if a TIN has not yet been issued, another unique identification number.
- FinCEN Identifier. An individual who submits beneficial ownership information or an entity that submits a filing as a reporting company to FinCEN may obtain a FinCEN identifier for use in its reporting obligations under the Proposed Rule going forward. For example, a beneficial owner can provide a FinCEN identifier to a reporting company for submission to FinCEN in lieu of providing the beneficial ownership information that the reporting company is required to submit under the Proposed Rule.
- Special Rules. The Proposed Rule also set forth special reporting rules for ownership interests held by exempt entities, minor children, foreign pooled investment vehicles and deceased company applicants. For exempt entities, if an individual is a beneficial owner of a reporting company by virtue of a direct or indirect ownership interest in the company held by an exempt entity, the reporting company’s BOI report shall include the name of the exempt entity rather than the name of the beneficial owner. In the case of foreign pooled investment vehicles, a foreign legal entity that would be a reporting company but for the pooled investment vehicle exemption under the Proposed Rule must report beneficial ownership information of the individual who exercises substantial control over the legal entity.

When a Report Is Due

- Newly Formed or Registered Companies. Domestic reporting companies created, or foreign reporting companies newly registered to do business, in the United States on or after the effective date of the final regulations would be required to file their initial report with FinCEN within 14 days.
- Existing Reporting Companies. Domestic and foreign reporting companies created before the effective date of the final regulation would be required to file a report within one year after the effective date, which is a shorter period than the maximum two-year period contemplated under the CTA.

- Updating or Correcting Reports. Updates to previously filed reports would be required within 30 days after information has changed. Reporting companies would have 14 days to correct inaccurate reports after the reporting company becomes aware or has reason to know that any required information contained in any report that the reporting company filed with FinCEN was inaccurate when filed and remains inaccurate.

Next Steps

While FinCEN invites comment on all aspects of the Proposed Rule, it specifically includes 40 questions organized by the primary components of the Proposed Rule: understanding the rule; reporting requirement; FinCEN identifier; special reporting rules; beneficial owners; company applicant; reporting company; other definitions; timing of reports and updates; reporting violations and effective date of the rule.

As noted above, the Proposed Rule is only the start of the process for establishing the beneficial ownership reporting obligations required under the AML Act. FinCEN stated that it plans to engage in two additional rulemakings to (1) establish rules for who may access the beneficial ownership information in the registry; and (2) revise FinCEN's CDD Rule to reconcile its provisions with the new reporting regime.

Under the CTA, FinCEN is required to "reduce any burdens on financial institutions" that are "unnecessary and duplicative" in light of the changes to beneficial ownership reporting requirements. However, FinCEN also notes that the CDD Rule revisions must 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." Any requirement that financial institutions obtain beneficial ownership information from reporting companies before they would be permitted to access the FinCEN data could potentially limit financial institutions' interest in using the database, which may not serve to reduce burdens on reporting companies.

The CTA requires that FinCEN revise the CDD Rule within one year after the effective date of the beneficial ownership reporting rule. The Proposed Rule acknowledges that the anticipated timeline for revising the CDD Rule is one factor in determining an appropriate effective date for the final reporting rule.

* * *

We will continue monitoring developments as FinCEN works to implement the beneficial ownership reporting requirements, including as the Proposed Rule proceeds to final form, and will provide updates as warranted. Please do not hesitate to contact us with any questions.

WASHINGTON, D.C.



Satish M. Kini
smkini@debevoise.com



Aseel M. Rabie
arabie@debevoise.com



Robert T. Dura
rdura@debevoise.com

NEW YORK



Josie Dikkers
jdikkers@debevoise.com

LONDON



Jonathan R. Wong
jrwong@debevoise.com