

# FinCEN Proposes Rule to Grant Access to Beneficial Ownership Information Registry

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On December 16, 2022, the U.S. Treasury Department's Financial Crimes Enforcement Network ("FinCEN") issued a proposed rule (1) to establish the circumstances in which certain governmental entities and financial institutions may access beneficial ownership ("BO") information that will be collected by the federal government and (2) to specify related data protection protocols and oversight mechanisms (the "Proposed Rule").<sup>1</sup> The comment period for the Proposed Rule is open until **February 14, 2023**.

The Proposed Rule is the second of three rules to implement the BO reporting provisions of the Corporate Transparency Act ("CTA"), which was enacted as part of the Anti-Money Laundering Act of 2020.<sup>2</sup> On September 30, 2022, FinCEN finalized the first rule, specifying which entities must report BO information, what information must be reported and when a report is due (the "Reporting Rule").<sup>3</sup> The CTA requires FinCEN also to adopt a third rule, to revise the customer due diligence ("CDD") requirements for financial institutions, within one year of the Reporting Rule's effective date.

In this Debevoise In Depth, we provide a brief background on the Proposed Rule and highlight certain key provisions.

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## Background

The CTA requires various legal entities organized or registered to do business in the United States to report information about their beneficial owners and control persons to FinCEN. The law also requires FinCEN to maintain a secure, nonpublic database of this information for use, subject to appropriate protocols, by national security, intelligence and law enforcement agencies, federal functional regulators and financial institutions.

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<sup>1</sup> 87 Fed. Reg. 77404 (Dec. 16, 2022), available [here](#). For a summary of BO reporting requirements, see our previous Debevoise In Depth, FinCEN Finalizes Landmark Beneficial Ownership Reporting Rule, available [here](#).

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

<sup>3</sup> 87 Fed. Reg. 59547 (Sept. 30, 2022), available [here](#).

As we have described previously, the creation of a BO registry at FinCEN signals a landmark change to U.S. law, which international bodies have long criticized for insufficient corporate transparency. In issuing the Proposed Rule, FinCEN stated that the recently finalized Reporting Rule “is a major step forward in unmasking shell companies and protecting the U.S. financial system from abuse by money launderers, drug traffickers, sanctioned oligarchs, and other criminals.”<sup>4</sup> The Proposed Rule aims to ensure that information reported to FinCEN pursuant to the Reporting Rule is available to authorized recipients for use in combatting financial crime and other authorized purposes in a manner that protects the security and confidentiality of this highly sensitive information.

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## Key Components of the Proposed Rule

The Proposed Rule describes (1) who may request, and receive, BO information, (2) how recipients may use BO information, (3) how recipients must secure such information and (4) penalties for failing to follow applicable requirements. The Proposed Rule also discusses aspects of the secure, nonpublic information technology system that FinCEN is building to store and manage access to BO information as well as when and how reporting companies may report FinCEN identifiers associated with entities.

### Which entities may access BO information reported to FinCEN?

The Proposed Rule provides for five categories of authorized recipients of BO information:

- Domestic government agencies seeking information for specified purposes, including:
  - Federal agencies engaged in national security, intelligence or law enforcement activity, as such terms are defined under the Proposed Rule, provided that (a) information is sought in furtherance of such activity, and (b) a brief justification is submitted to FinCEN, and
  - State, local and tribal law enforcement agencies, provided that (a) they are authorized by a court of competent jurisdiction to seek BO information from the registry for use in a criminal or civil investigation, and (b) the applicable court authorization is provided to FinCEN.

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<sup>4</sup> See FinCEN Press Release, FinCEN Issues Notice of Proposed Rulemaking Regarding Access to Beneficial Ownership Information and Related Safeguards, *available* [here](#).

- Foreign law enforcement agencies, judges, prosecutors, central authorities and competent authorities if (a) the request is for assistance in a law enforcement investigation or prosecution or for a national security or intelligence activity authorized under the laws of the foreign country, and (b) the request is made either under an international treaty or via authorities of a trusted foreign country.
- Financial institutions, provided that (a) they are using information from the registry to facilitate compliance with CDD requirements, and (b) the relevant reporting company consents to the disclosure. Notably, under this formulation, the Proposed Rule would limit access to only certain types of financial institutions, such as banks and securities broker-dealers, that have CDD rule compliance obligations. In addition, the Proposed Rule appears to preclude a financial institution's use of information from the registry for purposes of general anti-money laundering compliance and for ongoing monitoring or to identify and report suspicious activity.
- Federal functional regulators and other regulatory agencies acting in a supervisory capacity to assess financial institutions' compliance with CDD requirements.
- The U.S. Treasury Department itself, with respect to official duties requiring inspection or disclosure of BO information, including tax administration.

### **What level of access would be provided?**

- *Domestic government agencies and Treasury users* would have broad search capabilities, including the ability to run queries in the BO registry using multiple search fields directly and review results immediately.
- *Foreign requesters* would not have direct access to the registry. Rather, most foreign requesters would need to submit requests for BO information to an intermediary federal agency, which would evaluate the requests for compliance with specified requirements and then retrieve the requested information from the registry. For foreign requesters that are financial intelligence units, FinCEN proposes to directly receive, evaluate and respond to requests for BO information.
- *Financial institutions* would not be permitted to run queries in the registry or to receive multiple search results. Rather, they would need to submit identifying information specific to a reporting company and in return would receive that entity's BO information.
- *Federal functional regulators* and other regulatory agencies exercising supervisory functions would be able to request from FinCEN the BO information that the

financial institutions they supervise have already obtained from the registry but only for the purpose of assessing compliance with CDD requirements.

### **What limits would be placed on use and disclosure of BO information obtained from FinCEN?**

- *General prohibition on disclosure.* Except as authorized by the Proposed Rule, any information reported to FinCEN pursuant to the Reporting Rule would be confidential and may not be disclosed.
- *General limits on use.* Unless otherwise authorized by FinCEN, any person who receives BO information disclosed by FinCEN pursuant to the Proposed Rule would be required to use that information only for the particular purpose or activity for which the information was disclosed.<sup>5</sup>
- *Authorized disclosures.*
  - Generally, any officer, employee, contractor or agent of an authorized recipient (and any director of a financial institution) who receives information from the registry in response to a request may disclose that information to another officer, employee, contractor or agent (or director, as applicable) of the same authorized recipient for the same purpose or activity for which information was requested and in compliance with applicable security and confidentiality requirements.
  - Importantly, for financial institutions, such disclosures may only be made to persons physically present in the United States. This restriction may be challenging for financial institutions that rely on offshore affiliates or service providers to conduct certain elements of their CDD rule compliance.
  - A financial institution may disclose BO information received from the registry to its federal functional regulator, a self-regulatory organization (“SRO”) or another appropriate regulatory agency, provided any such entity is authorized by law to assess the financial institution’s compliance with CDD requirements, will use the information solely for this purpose and has entered into an agreement with FinCEN addressing safekeeping of the information. Financial institutions may rely on an entity’s representation that it meets these requirements. Federal functional regulators also may disclose BO information to an SRO.

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<sup>5</sup> The Proposed Rule specifies certain authorized disclosures, as described herein. In addition, the Proposed Rule suggests that FinCEN may provide written consent or issue protocols or guidance to authorize further disclosures. 87 Fed. Reg. 77404, 77419.

- Domestic government agencies would be permitted to disclose BO information to courts or to parties to a civil or criminal proceeding. Federal agencies may disclose BO information to the U.S. Department of Justice for purposes of making a referral or for use in litigation related to the activity for which the information was requested.
- An intermediary federal agency receiving requests for BO information from a foreign requester may disclose the requested information to the requester, and a foreign requester may disclose and use BO information consistent with the international treaty under which the information was requested.

### **What security and confidentiality requirements would apply for financial institutions?**

- To receive BO information from the registry, a financial institution would be required to:
  - Restrict access to information obtained from FinCEN to persons within the United States;
  - Develop and implement administrative, technical and physical safeguards reasonably designed to protect the security, confidentiality and integrity of the information, with a safe harbor for the application of information procedures developed to satisfy the requirements of section 501 of the Gramm-Leach-Bliley Act;<sup>6</sup>
  - Obtain and document a reporting company's consent prior to requesting the company's information from the registry (and track any revocation of consent);<sup>7</sup> and
  - For each request for BO information from the registry, certify to FinCEN that the institution: (1) is requesting information to facilitate its compliance with CDD requirements; (2) has obtained the written consent of the reporting company to request the information from FinCEN; and (3) has fulfilled all other requirements of the Proposed Rule with respect to security and confidentiality.

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<sup>6</sup> If a financial institution is not subject to section 501 of the Gramm-Leach-Bliley Act, it would be deemed to satisfy this requirement if it applies procedures with regard to the protection of its customers' nonpublic personal information that are required, recommended or authorized by federal or state law and are at least as protective as procedures that satisfy section 501. *Id.* at 77421-22.

<sup>7</sup> Such documentation must be maintained for five years after it was last relied on in connection with a request for information from the registry. *Id.* at 77446.

- FinCEN expects that financial institutions would establish protocols to ensure the requirements are satisfied, provide training on these protocols and ensure appropriate records are maintained for audit and oversight purposes.
- FinCEN states in the preamble to the Proposed Rule that system users from financial institutions would be required to complete FinCEN-provided online training about the registry and related responsibilities as a condition for creating and maintaining accounts.<sup>8</sup>

### How would FinCEN administer requests for BO information?

- *Form and manner of requests.* FinCEN intends to specify the form and manner in which requests for BO information may be submitted.
- *Rejection of requests.* FinCEN may reject a request for information if the request is not submitted in the form and manner prescribed by FinCEN or if FinCEN finds that the requester failed to meet any requirement of the Proposed Rule, the information is being requested for an unlawful purpose or other good cause exists to deny the request.
- *Bar or suspension of requester.* FinCEN may permanently bar or temporarily suspend for any period of time any requesting party from receiving or accessing BO information if FinCEN finds that the requesting party failed to meet any requirement of the Proposed Rule or requested information for an unlawful purpose or that other good cause exists for such bar or suspension.

### Will FinCEN verify BO information reported to the registry?

- FinCEN states in the preamble to the Proposed Rule that it continues to evaluate options for verifying BO information. FinCEN cites in this regard a requirement under the Anti-Money Laundering Act of 2020 that the Secretary of the Treasury conduct a study to evaluate the costs and resources associated with imposing a verification obligation on FinCEN. This study is required to be conducted no later than two years after the effective date of the Reporting Rule.

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<sup>8</sup> Other authorized recipients of information from the registry would be subject to security and confidentiality requirements that include memoranda of understanding with FinCEN imposing such requirements as background checks on personnel accessing information and controls to ensure appropriate use, regular training and robust audit and oversight. The distinction between these requirements and the terms of use proposed for financial institutions reflects the more limited registry access for financial institutions. See, e.g., *id.* at 77411, 77419-22.

**Will financial institutions be required to access information in the registry?**

- The preamble makes clear that accessing BO information is not mandatory under the Proposed Rule. FinCEN intends to address the interplay between financial institutions' CDD efforts and the BO registry in the third rulemaking implementing the CTA.

**What are the consequences of noncompliance with the requirements outlined by FinCEN?**

- The Proposed Rule tracks the CTA in specifying that it is unlawful for any person to knowingly disclose or use BO information obtained through a report submitted to or an authorized disclosure made by FinCEN, except as authorized.
- The Proposed Rule explains that unauthorized use would include accessing information submitted to FinCEN under the Reporting Rule without authorization, including knowing violation of applicable security and confidentiality requirements in connection with such access.
- The CTA provides for civil and criminal penalties for knowingly disclosing or using BO information without authorization.

**What does the Proposed Rule include regarding FinCEN identifiers?**

- As explained in our update regarding the Reporting Rule, FinCEN will issue a unique identifying number ("FinCEN ID") to individuals or entities following submission of specified information.
- Under the Reporting Rule, an individual who obtains a FinCEN ID may provide this identifier to a reporting company for use in the company's BO reporting to FinCEN in lieu of the information elements that the company would otherwise be required to provide for that individual.<sup>9</sup>
- The Reporting Rule reserved for further consideration a reporting company's ability to report an intermediary company's FinCEN ID in lieu of BO information about an individual who beneficially owns the reporting company via the individual's interest in the intermediary.
- The Proposed Rule addresses this question by proposing to allow a reporting company to report an intermediary company's FinCEN ID in lieu of a beneficial owner's BO information only when the two companies have the same beneficial owners.

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<sup>9</sup> 31 CFR 1010.380(b)(4)(ii)(A).

### When would the Proposed Rule take effect?

- FinCEN proposes an effective date for the Proposed Rule of January 1, 2024, to align with the date on which the Reporting Rule is set to become effective. However, FinCEN continues to face resource constraints in developing and deploying the system that will store and manage access to BO information and putting in place the various processes needed to support collection and use of BO information.
- FinCEN has stated that it is working diligently to complete as much of the CTA implementation work as possible with existing resources and staffing. FinCEN may need to identify trade-offs if additional funds are not appropriated, including potential staged access by different authorized recipients.

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## Next Steps

FinCEN invites comments on all aspects of the Proposed Rule and includes 30 specific questions covering primary components of the Proposed Rule, including understanding the rule; disclosure of information; use of information; security and confidentiality requirements; outreach; and FinCEN identifiers. We expect that many financial industry participants, entities that may need to report BO information to the registry and the trade associations that represent both types of institutions will comment on the Proposed Rule.

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Please do not hesitate to contact us with any questions.

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