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FinCEN Issues Final Rule Implementing Beneficial Ownership Reporting Requirements

On September 30, the Financial Crimes Enforcement Network (“FinCEN”), within the U.S. Department of the Treasury, issued a highly anticipated final rule, *Beneficial Ownership Information Reporting Requirements* (the “Final Rule”),¹ implementing the beneficial ownership reporting requirements of the Corporate Transparency Act (“CTA”).

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The Final Rule requires certain entities organized or registered to conduct business in the United States to disclose identifying and beneficial ownership information (“BOI”) to the U.S. federal government. The Rule addresses a major perceived deficiency in the U.S. anti-money laundering regime and will greatly expand the scope of information that certain legal entities are required to disclose under U.S. law. The Final Rule will take effect on January 1, 2024, with a one-year grace period for covered entities created or registered prior to the effective date.

Background

The CTA, enacted as part of the landmark Anti-Money Laundering Act of 2020, is intended to expand and modernize the U.S. government’s ability to collect beneficial ownership information to deter money laundering, corruption, tax evasion, fraud, and other financial crime. The CTA requires FinCEN, *inter alia*, to (1) implement rules for the reporting of BOI of legal entities organized or registered to conduct business in the United States; (2) develop protocols for access to, and the sharing of, reported BOI; and (3) amend the Customer Due Diligence (“CDD”) Rule applicable to financial institutions to account for the new requirements of the CTA. The Final Rule addresses only the reporting of BOI, with the remaining requirements to be addressed through future rulemaking.

The Final Rule requires “reporting companies” to file reports that (1) identify themselves; and (2) provide BOI of their “beneficial owners” and “company applicants,” each as discussed in greater detail below. This information will be reported to, and housed within, the Beneficial Ownership Secure System (BOSS), a non-public database under development by FinCEN. It is anticipated that information in BOSS will be available to federal agencies in support of national security, intelligence, and law enforcement activity, as well as state, local, and foreign law enforcement agencies in specified circumstances.

The Final Rule reflects public comments received by FinCEN in response to its December 8, 2021 Notice of Proposed Rulemaking on the same topic (the “Proposed Rule”). The Final Rule becomes effective on January 1, 2024. Reporting companies created or registered prior to this date will have a one-year grace period (until January 1, 2025) to file their initial reports. Reporting companies created or registered on or after January 1, 2024, will have 30 days to file their initial reports.

Who Must Comply: Reporting Companies?

The Final Rule applies to reporting companies, which include both domestic and foreign companies, as described below:

- Domestic reporting companies, including any (a) corporation; (b) limited liability company; or (c) other entity that is created by the filing of a document with a secretary of state or any similar office under the law of a State or Indian tribe (which FinCEN believes will exclude many sole proprietorships, trusts, and general partnerships, subject to applicable State or tribal law); and

¹ See Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59,498 (Sept. 30, 2022).

- Foreign reporting companies, meaning any (a) corporation, limited liability company, or other entity; that is (b) formed under the law of a foreign country; and (c) registered to do business in any State or tribal jurisdiction by the filing of a document with a secretary of state or any similar office under the law of a State or Indian tribe.

The Final Rule sets forth 23 exemptions to the definition of reporting company. Consistent with the Proposed Rule, key categories of exempted legal entities include:

- Securities and Exchange Commission (“SEC”) reporting issuers;
- Banks and credit unions;
- Tax-exempt entities;
- Money services businesses registered with FinCEN;
- Broker-dealers; and
- U.S. governmental authorities.

Also exempted are:

- Large operating companies that (1) employ more than 20 full-time employees in the United States; (2) have an operating presence at a physical office within the United States; and (3) filed a federal income tax or information return in the United States for the previous year demonstrating more than \$5,000,000 in gross receipts or sales;
- Inactive entities that were in existence on or before January 1, 2020, and meet other requirements;
- Pooled investment vehicles² operated or advised by a qualifying bank, credit union, broker-dealer, investment company or investment adviser, or venture capital fund adviser (notably, FinCEN considered but declined to extend this exemption to legal entities created by pooled investment vehicles to be used as vehicles to onboard new outside capital or effect specific investments or acquisitions and noted that the use of this exemption does not depend on the nominal designation, but rather on whether the vehicle satisfies the regulatory elements);
- Subsidiaries whose ownership interests are controlled or *wholly* owned, directly or indirectly, by one or more exempt entities *subject to exceptions* (e.g., subsidiaries of pooled investment vehicles are not eligible for the subsidiary exemption);
- Investment companies and investment advisers registered with the SEC; and
- Venture capital fund advisers that have filed Item 10, Schedule A, and Schedule B of Part 1A of Form ADV, or any successor thereto, with the SEC.

Whose Information Must Be Reported?

In addition to identifying information of the reporting company (discussed below), the Final Rule requires the reporting of BOI concerning (1) beneficial owners; and (2) company applicants of reporting companies.

Beneficial Owners

Similar to the CDD Rule, the term “beneficial owner” is defined in terms of both ownership and control: any individual (*i.e.*, natural person) who, directly or indirectly, either (1) exercises *substantial* control over a reporting company or (2) owns or controls at least 25% of the ownership interests of a reporting company. Limited exceptions exist to the

² Under the Final Rule, “pooled investment vehicle” means (1) any investment company, as defined in section 3(a) of the Investment Company Act of 1940 (15 U.S.C. 80a-3(a)); or (2) any company that: (A) would be an investment company under that section but for the exclusion provided from that definition by paragraph (1) or (7) of section 3(c) of that Act (15 U.S.C. 80a-3(c)); and (B) is identified by its legal name by the applicable investment adviser in its Form ADV (or successor form) filed with the SEC (or will be so identified in the next annual updating amendment to Form ADV required to be filed by the applicable investment adviser).

definition, including for minor children (provided that BOI of a parent or legal guardian is reported), nominees, employees (excluding senior officers), future inheritors, and creditors (whose sole interest in a reporting company is as a creditor).

Substantial Control

The Final Rule's definition of "substantial control" is expansive and includes *any* individual who:

- Serves as a senior officer of a reporting company (not including those that serve as a corporate secretary or treasurer);
- Has authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body);
- Directs, determines, or has substantial influence over important decisions made by a reporting company (including, *without limitation*, decisions regarding major expenditures or investments; issuances of equity; incurrence of significant debt; approval of the operating budget; selection or termination of business lines or ventures; compensation schemes and incentive programs for senior officers; entry into and performance of significant contracts; amendments of any substantial governance documents; and reorganization, dissolution, or merger of the reporting company); or
- Has any other form of substantial control over a reporting company.

Notably, an individual could exercise substantial control over a reporting company through, *inter alia*, board representation, ownership or control of a majority of voting rights, or any other contract, arrangement, understanding, relationship, or otherwise. In its discussion of the Final Rule, FinCEN acknowledged that "there will be circumstances in which reporting companies are structured or managed in a way that generates more complexity or uncertainty regarding the scope of the application of the rule." However, in defense of the substantial control standard's breadth, FinCEN concluded that "fulfilling the CTA's directives to report all beneficial owners means that certain compliance burdens may rise with the increasing structural complexity of a given entity."

FinCEN expects that each reporting company will identify *at least* one beneficial owner with substantial control. Importantly, in contrast to the CDD Rule, which requires legal entity customers to identify only a single individual under the "control prong" of the definition of beneficial owner, the Final Rule requires reporting of BOI for *every* individual deemed to exercise substantial control over a reporting company. Indeed, FinCEN specifically rejected proposals to incorporate the "CDD Rule's numerical limitation for identifying beneficial owners via substantial control" as "inconsistent with the CTA's objective of establishing a comprehensive BOI database for all beneficial owners of reporting companies."

The Final Rule incorporates special requirements for foreign pooled investment vehicles. Entities that would otherwise fall within the exemption for pooled investment vehicles, but are formed under the laws of a foreign country, are deemed reporting companies. However, the initial reports of such foreign pooled investment vehicles are required to include BOI *only* for the (single) individual who has the greatest authority over the strategic management of the entity.

Ownership Interests

The Final Rule's definition of "ownership interest" includes not only equity interests but also categories such as capital or profit interests, convertible interests (regardless of whether characterized as debt), known options (which shall be treated as exercised), and a catchall category for any other instrument, contract, arrangement, understanding, or mechanism used to establish ownership (this catchall is an addition from the Proposed Rule). An individual may own or control an ownership interest through joint ownership with other persons; through a nominee, intermediary, custodian, or

agent; through certain trust arrangements; or through ownership or control of intermediary entities that separately or collectively own or control ownership interests of the reporting company.

The Final Rule provides for a special exception for reporting companies with ownership interests held by exempt entities (*i.e.*, an entity falling into one of the 23 categories of exemptions discussed above). Such reporting companies need not provide BOI for individuals that are beneficial owners in the reporting company exclusively by virtue of the individuals' ownership interests in the intermediate exempt entities. Instead, these reporting companies may list the exempt entities. For example, if a reporting company is owned by an exempt pooled investment vehicle,³ the company need not provide BOI for >25% investors in the pooled investment vehicle and may instead list the name of the pooled investment vehicle. However, FinCEN declined to extend this special exception to beneficial owners qualifying under the substantial control prong, so an analysis must still be undertaken to confirm whether these investors exercise substantial control over the reporting company.

Company Applicants

The term “company applicant” means:

- **Domestic reporting company:** the individual who directly files the document that creates a domestic reporting company, as well as the individual who is primarily responsible for directing or controlling such filing (if more than one individual is involved in the filing); and
- **Foreign reporting company:** the individual who directly files the document that first registers a foreign reporting company, as well as the individual who is primarily responsible for directing or controlling such filing (if more than one individual is involved in the filing).

In a change from the Proposed Rule, the requirement to provide BOI for company applicants applies only to reporting companies created or registered on or after the effective date of the Final Rule (January 1, 2024). These newly created or registered entities will be required to report company applicant information, but they will not be required to update it (in recognition of the fact that a company applicant may be an outside service provider with whom the reporting company does not have an ongoing relationship).

What Information Must Be Reported?

Reporting Companies

Initial reports to FinCEN must include the following information concerning the reporting company:

- Full legal name and any trade name or “doing business as” names (regardless of whether the trade or d/b/a names are formally registered);
- Address of principal place of business (if in the United States) or the primary location in the United States where the reporting company does business (if the principal place of business is outside of the United States);⁴
- Jurisdiction of formation (for both domestic and foreign reporting companies) and initial registration in the United States (for foreign reporting companies); and

³ Note that the subsidiary exemption would apply for most companies wholly owned by exempt entities, but not for companies owned by pooled investment vehicles. This special exception is also relevant for companies that are partially, but not wholly, owned by exempt entities (*e.g.*, a joint venture 75% owned by a large operating company).

⁴ Consistent with the Proposed Rule, this requirement is not satisfied by reporting a P.O. box or the address of a company formation agent or other third party.

- Taxpayer Identification Number (TIN), or where a foreign reporting company has not been issued a TIN, a tax identification number issued by a foreign jurisdiction.

Beneficial Owners & Company Applicants

The following information must be reported for each beneficial owner and company applicant:

- Full legal name;
- Date of birth;
- Current residential address (except in the case of company applicants who form or register an entity in the course of the company applicant’s business, for which a business address is required);
- Unique identifying number from a non-expired U.S. passport, state identification document, or state driver’s license (or a foreign passport, if the individual does not possess any of the foregoing); and
- Image of the document showing the unique identifying number.

Unique FinCEN Identifier

Reporting companies and individuals may apply to FinCEN for issuance of a “FinCEN identifier” number that, upon issuance, may be submitted to FinCEN in lieu of the above-described information. Individuals and entities that obtain FinCEN identifiers are required to update and correct information submitted to FinCEN by submitting an updated application for a FinCEN identifier, subject to the same timelines and requirements as updates or corrections to BOI submitted by a reporting company (discussed below).

Timing for Reports & Reporting of Updated/Corrected Information

Any reporting company formed or registered before January 1, 2024, must submit an initial report no later than January 1, 2025.

Reporting companies formed or registered on or after January 1, 2024, must submit an initial report within 30 days of the date (1) the reporting company receives actual notice that its creation or registration has become effective; or (2) a secretary of state or similar office first provides public notice that the reporting company has been created or registered (an extension of the Proposed Rule’s 14-day deadline). If an exempt entity ceases to become exempt, a report must be filed within 30 days after the exemption criteria no longer apply.

The CTA requires reporting companies to update outdated information in a timely manner, as well as to promptly correct any inaccurate information filed in BOSS. The Final Rule accords reporting companies 30 days to (1) file updates to previously filed reports (including any change with respect to who is a beneficial owner or the BOI reported for any particular beneficial owner); and (2) correct inaccurate information contained in previously reported information.⁵

Violations

The CTA provides that any willful violation of BOI reporting requirements can lead to civil or criminal penalties, including (1) civil penalties of up to \$500 per day a violation has not been remedied; and (2) criminal penalties of up to \$10,000 and/or imprisonment of up to two years. The Final Rule adopts the CTA’s penalty framework, clarifying that

⁵ The 30-day deadline to correct inaccurate information generally is triggered on the date on which the reporting company becomes aware or has reason to know of the inaccuracy. However, the Final Rule describes a “safe harbor” for reporting companies that voluntarily and promptly file corrected reports within 90 days after submission of an inaccurate report.

liability can be for direct or indirect violations, and for acts (*i.e.*, reporting of inaccurate information) or omissions (*i.e.*, failure to provide or update any required information).

Conclusion

As anticipated, the Final Rule will significantly expand the scope of information that legal entities must disclose under U.S. law. Although the Final Rule incorporates key exceptions to the reporting requirements—including for large operating companies and qualifying pooled investment vehicles—complex structures, in particular, may present difficult, fact-intensive determinations. For example, the breadth of the substantial control standard may necessitate detailed (subjective) assessments of the rights (and influence) exercised by individuals (*e.g.*, board representatives) affiliated with financial investors. While FinCEN likely will publish Frequently Asked Questions (FAQs) to clarify common, fact-specific applications of the reporting requirements, the introduction to the Final Rule suggests that the bureau intends to interpret the Rule's requirements broadly in favor of disclosure.