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FinCEN's Highly Anticipated Beneficial Ownership Reporting Rule Under CTA Effective January 1, 2024

The U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) issued its highly anticipated final rule implementing the beneficial ownership information (BOI) reporting requirements of the Corporate Transparency Act (CTA) legislation on September 29, 2022. The final rule brings about the most significant revisions to the U.S. anti-money laundering/countering the financing of terrorism (AML/CFT) compliance framework in more than 20 years, implementing sweeping beneficial ownership disclosure requirements applicable to all U.S. companies and foreign companies doing business with or within the United States.

The final rule generally tracks FinCEN's earlier proposed rule from December 7, 2021, discussed in our prior article [here](#), although there have been a few amendments to the earlier proposal. Provided below is a brief summary of key provisions and takeaways from the final rule.

Key Takeaways

Broad definition of "reporting company" retained. The final rule makes clear that the BOI reporting obligations will apply extraordinarily broadly to U.S. domestic and foreign registered companies.

Under the CTA, "reporting companies" were broadly defined to include "a corporation, limited liability company, or other similar entity" created by a filing to a secretary of state, including foreign businesses registered to do business in the United States subject to exceptions to ultimately be determined by FinCEN. The final rule retains the proposed rule's expanded definition for "Reporting Company" to encompass "domestic reporting compan[ies]" defined to include any entity "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" and "foreign reporting compan[ies]," defined to include any foreign entity "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." To that end, in commentary on the rule, FinCEN confirmed that the agency expects the rule to include (unless specifically exempted): limited liability partnerships, limited liability limited partnerships, business trusts, and most limited partnerships, as well as corporations and limited liability companies (LLCs). FinCEN noted that "other types of legal entities, including certain trusts, are excluded from the definitions to the extent that they are not created by the filing of a document with a secretary of state or similar office," which is welcome news in the trust world.

Beyond confirmation that certain types of trusts will not be included, FinCEN did not expand the exemptions under the final rule from the 23 types of entities identified to be exempted under the CTA. Key exemptions from the BOI reporting requirements continue to include: U.S. Securities and Exchange Commission (SEC) registered issuers, banks and other types of regulated financial institutions, pooled investment vehicles, tax-exempt entities, large operating companies (20+ U.S. employees, U.S. operations, and greater than \$5 million in annual gross receipt or sales), and inactive entities formed *prior to* January 1, 2020, without foreign owners and which hold no assets (including ownership interests).

Clarification as to "Beneficial Owners" who need to be reported. As in the proposed rule, the final rule defines a beneficial owner of a reporting company as any individual 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. FinCEN requires a reporting company to identify itself and to report the name, birth date, address, and unique identifying number and issuing jurisdiction from an acceptable identification

document, along with an image of that document for its beneficial owners.

Notably, "substantial control" is defined broadly to include senior officers as well as persons who "direct, determine, or ha[ve] substantial influence over important decisions made by the reporting company" and have "any other form of substantial control over the reporting company." Given the breadth of these definitions, there will likely be considerable uncertainty as to specifically who FinCEN will expect to be included in these reports with regard to many (if not most) reporting companies. Hopefully, FinCEN will issue further guidance to assist the public in navigating these definitions. Guidance may also be sought directly from FinCEN with regard to ambiguities.

Penalties are only for willful violations. While civil and criminal penalties are available under the final rule for violations, unlike most other AML/CTF reporting violations, penalties for violations of the final rule will apply only with regard to willful violations, including willful failure to file, willful provision of false or fraudulent information, or willfully failing to provide complete or updated beneficial ownership information to FinCEN. The final rule does not provide for penalties in the case of negligent or reckless failures.

However, the expansive definition of what may constitute a willful violation under the final rule will include circumstances involving "willful blindness" or "conscious disregard," expanding the potential for inquiries and enforcement. The final rule also provides for criminal or civil liability for "causing" a violation, significantly expanding the pool of individuals who could be targeted for their role in failures under this rule.

Additional time granted for required disclosures. The final rule broadens the allowed time frame for reporting companies to disclose their beneficial owners to FinCEN from the 14 days proposed previously to within 30 days of formation for new entities, or within one year of the final rule's effective date for existing entities.

What's Next?

All companies need a process to comply, document exception decisions, and monitor for necessary updates. As a first step, all companies should review the rule carefully and develop a process for identifying any required reporting regarding companies formed prior to the rule's effective date, January 1, 2024.

Companies—and individuals and entities involved in corporate formation—will need to develop procedures going forward for vetting newly established entities and determining whether reports are required under this rule. Decisions regarding the application of exemptions to the reporting requirements should be carefully documented. Procedures should include robust processes for vetting the fulsomeness and accuracy of all disclosures made in reports under the rule.

After an initial report is made, companies will also need a process to monitor changes to ensure that updates are made as required. This includes new filings on behalf of entities that were previously exempt where circumstances negate the exemption as well as reporting companies where details submitted in the report may change over time. Reporting companies must submit updated reports within 30 days of any change.

Monitoring and reporting processes must be ready in just over one year. The final rule will go into effect on January 1, 2024. Reporting companies created or registered before January 1, 2024, will have one year (or until January 1, 2025) to file their initial BOI reports. After January 1, 2024, newly formed reporting companies will only have 30 days after receiving notice of creation to file their initial reports.

Big issues remain to be addressed. The final rule is the first of three rulemakings that FinCEN will make for implementing the CTA. The final rule does not address access to the BOI collected and safeguards to ensure that the information is secured and protected nor does it address required revisions to FinCEN's customer due

diligence (CDD) rules to incorporate this new process. Given that the final rule will go into effect on January 1, 2024, we would expect at least a rule regarding access to and use of BOI within FinCEN's database—and potentially both additional rulemakings—within the next year. Reporting companies should pay close attention to those developments in order to calibrate and craft their procedures for complying with the CTA prior to January 1, 2024.

Recommendations

The final rule marks sea change in the U.S. AML/CFT framework. While the final rule does not go into effect until January 1, 2024, companies should get started now. 2024 may seem far away, but for many companies, there will be complicated issues to address, guidance to be sought from FinCEN, and significant amounts of information to gather to identify beneficial owners under FinCEN's broad definition. The next year will likely fly by for those working to prepare for this rule.

Perkins Coie lawyers will continue monitoring additional developments in the CTA implementation process and are available to discuss these and any related issues.

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