

CLIENT ALERT

# FinCEN Finalizes Rule on Beneficial Ownership Reporting Requirements

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The Financial Crimes Enforcement Network (“**FinCEN**”) released its long-awaited [Final Rule](#) implementing the beneficial ownership information reporting requirements set forth in the Corporate Transparency Act (“**CTA**”) at Title LXIV of the Anti-Money Laundering Act of 2020 (“**AMLA**”).<sup>1</sup> The Final Rule, which closely tracks the Proposed Rule<sup>2</sup>, requires “Reporting Companies” to report information about their beneficial owners to FinCEN.

The Final Rule is effective **January 1, 2024**. Reporting Companies created or registered *before* January 1, 2024 will have until **January 1, 2025** to file their initial reports, while Reporting Companies created or registered *after* January 1, 2024, will have 30 days after receiving notice of their creation or registration to file their initial reports. All entities will have 30 days to file an updated or corrected report, from the date that the need to update or correct the report is identified.

As we discussed in our prior [Client Alert](#) on the Proposed Rule, the beneficial ownership reporting requirement is one of three rulemakings planned to implement the CTA. FinCEN will engage in additional rulemakings to: (1) establish rules for who may access beneficial ownership information, for what purposes, and what safeguards will be required to ensure that the information is secure and protected; and (2) revise FinCEN’s customer due diligence rule. In addition, FinCEN noted

<sup>1</sup> See 87 Fed. Reg. 59498 (Sep. 30, 2022). As we discussed in our prior [Client Alert](#) on the Act, the AMLA set forth wide-ranging updates to the U.S. anti-money laundering and countering the financing of terrorism regime, primarily by imposing new obligations on FinCEN, but also expanding transparency and reporting requirements for companies created under the laws of the United States or registered to do business in the United States.

<sup>2</sup> 86 Fed. Reg. 69920 (Dec. 8, 2022), available at <https://www.federalregister.gov/documents/2021/12/08/2021-26548/beneficial-ownership-information-reporting-requirements>.

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that it continues to develop the infrastructure to administer these requirements, including the IT system that will be used to store beneficial ownership information in accordance with the strict security and confidentiality requirements of the CTA.<sup>3</sup>

### **Key Updates from the Final Rule**

While the Final Rule largely tracks the language of the Proposed Rule, FinCEN did implement some clarifying changes based on feedback that it received during the comment period, as discussed below.

- ***Scope of “Reporting Companies” Remains Essentially Unchanged***

Under the CTA, so-called Reporting Companies<sup>4</sup>—which includes most legal entities, with exceptions for public companies and trusts/partnerships that are not created by state filings (among others)—are required to submit beneficial ownership information to FinCEN. Notably, FinCEN declined to make changes to the definition of Reporting Company despite the disparate practices between states regarding corporate formation, noting that even where differences in state law could result in evasion by forum shopping, the CTA clearly requires state corporate formation law and practices to be the determining factor for whether an entity is a Reporting Company. For instance, some states may require filings in order to conduct business in the state, but such filings do not “create” the entity and therefore the entity would fall outside the definition of Reporting Company. Nonetheless, FinCEN has made clear that the CTA was only intended to capture entities created by State filings, not entities that submit filings for other purposes or to satisfy other state requirements.

In addition, the scope of the exemptions for entities that are not considered Reporting Companies remains practically unchanged. The CTA sets forth 23 types of entities that are exempt from the scope of the term “Reporting Company,” primarily because such entities are already subject to reporting requirements of equivalent scope under different regulations.<sup>5</sup> FinCEN noted that the exemptions should be interpreted reasonably narrowly and made only minor clarifying revisions to the list of exempt entities and their respective definitions. Moreover, while the CTA provides for the exemption of additional entities by regulation, FinCEN declined to do so and noted that the CTA sets a high bar for

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<sup>3</sup> See Beneficial Ownership Information Reporting Rule Fact Sheet (Sep. 29, 2022), available at <https://www.fincen.gov/beneficial-ownership-information-reporting-rule-fact-sheet>.

<sup>4</sup> Specifically, Reporting Companies are defined as any entity that is a corporation or limited liability company that is: (i) 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 (a domestic reporting company); or (ii) formed under the law of a foreign country and 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 (a foreign reporting company). The Final Rule lists 23 exemptions from the term “Reporting Company.”

<sup>5</sup> The Final Rule exempts certain entities from the term “Reporting Company” under the following categories, as defined in the Final Rule: securities reporting issuers; governmental authorities; banks; credit unions; depository institution holding companies; money services businesses; brokers or dealers in securities; securities exchanges or clearing agencies; other exchange act registered entities; investment companies or investment advisers; venture capital fund advisers; insurance companies; state-licensed insurance producers; commodity exchange act registered entities; accounting firms; public utilities; financial market utilities; pooled investment vehicles; tax-exempt entities; entities assisting a tax-exempt entity; large operating companies; subsidiaries of certain exempt entities; and inactive entities.

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creating additional exemptions, requiring persuasive evidence that requiring an entity to submit beneficial ownership information under the regulations would not serve the public interest or promote the key government objectives set forth in the CTA.

- ***FinCEN Clarifies Factors for “Substantial Control” and “Ownership Interests”; Declines to Align Key Terms with the 2016 CDD Rule***

The CTA requires that Reporting Companies provide specified information for every individual beneficial owner, defined as any individual who, directly or indirectly, either (i) exercises **substantial control** over such Reporting Company; or (ii) owns or controls at least 25 percent of the **ownership interests** of such Reporting Company.<sup>6</sup> In the Final Rule, FinCEN implemented important clarifying edits to the terms “substantial control” and “ownership interests,” discussed further below. FinCEN also explicitly declined to align the language in the Final Rule with that in the 2016 CDD Rule or other comparable regulatory provisions addressing beneficial ownership.

The CTA requires that FinCEN revise portions of the 2016 CDD Rule within one year after the effective date of the beneficial ownership information reporting rule in order to reduce overlapping requirements and to bring the 2016 CDD Rule in alignment with the requirements in the CTA. FinCEN noted that it intends to revise the 2016 CDD Rule in a future rulemaking, allowing for stakeholders to submit additional comments regarding the alignment of the implementation of the CTA and the 2016 CDD Rule.

- *“Substantial Control”*

In defining “beneficial owners,” the Final Rule is more expansive than the 2016 CDD Rule, both in applicability and scope. FinCEN explicitly declined to align the Final Rule with the approach set forth in the 2016 CDD Rule, citing the text and intent of Congress in passing the CTA. The 2016 CDD Rule requires that covered financial institutions identify at least one individual who “controls” its legal entity customers.<sup>7</sup> While the 2016 CDD Rule requires new legal entity customers of a covered financial institution to provide only a single individual with significant responsibility to control, manage, or direct a legal entity customer, the Final Rule requires all such individuals to be identified. FinCEN noted that applying a limit to the number of beneficial owners that need to be reported would be contrary to the purpose and effectiveness of the requirement. FinCEN expects that a Reporting Company will always identify at least one beneficial owner under the “substantial control” component.

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<sup>6</sup> The Final Rule lists the following exceptions from the term “beneficial owner,” as defined in the Final Rule: minor children; nominees, intermediaries, custodians, or agents; employees; future interests through a right of inheritance; creditors.

<sup>7</sup> The 2016 CDD Rule requires covered financial institutions to identify and verify the identity of any individual who owns 25 percent or more of a legal entity and an individual who controls the legal entity.

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The Final Rule also includes a number of clarifying edits to the language defining the term “substantial control.” The Proposed Rule listed a number of indicators that should be evaluated to determine whether an individual has substantial control over an entity. In the Final Rule, FinCEN created a new definition of the term, adopting the indicators largely as proposed but with some technical changes to streamline and clarify the indicators and corresponding definitions.<sup>8</sup> Of note, FinCEN clarified control through trust arrangements, explicitly stating that the trustee of a trust or similar arrangement can exercise substantial control over a reporting company through the types of relationships outlined in the provision. FinCEN also maintains a catch-all provision, which—although drafted in a circular manner (stating that a person has substantial control over an entity if they have any form of substantial control over the entity)—is intended to capture novel or unusual means of control and prevent evasion of the reporting requirements.

Like the Proposed Rule, there remain significantly more exemptions to the beneficial ownership information reporting requirements under the Final Rule than under the analogous provisions of the CDD Rule, which requires financial institutions to collect beneficial ownership information on their “legal entity customers,” subject to a limited number of exemptions.<sup>9</sup>

- *“Ownership interests”*

FinCEN also declined to conform the definition of “ownership interests” to the 2016 CDD Rule, noting that the 2016 CDD Rule considers only “equity interests” as relevant to evaluate the “ownership” prong, does not address joint ownership, and deems assets in trust owned solely by their trustees. The Final Rule deems both equity interests and other types of interest in a Reporting Company to be “ownership interests,” including capital or profit interests (including partnership interests) or convertible instruments, warrants or rights, or other options or privileges to acquire equity, or other interests as those indicating an “ownership interest” in a Reporting Company, as well as via debt instruments in some cases.<sup>10</sup>

As with the “substantial control” factor described above, FinCEN maintains a catch-all provision to the definition of “ownership interest,” which is intended to capture unusual or novel ownership arrangements.

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<sup>8</sup> Among other clarifying edits, FinCEN revised the definition of the term “senior officer” to omit the roles of corporate secretary and treasurer. FinCEN also deleted references to the “authority to appoint or remove a ‘dominant minority’ of the board of directors” as an indicator of substantial control.

<sup>9</sup> The exemptions cover securities issuers, domestic governmental authorities, banks, domestic credit unions, depository institution holding companies, money transmitting businesses, brokers or dealers in securities, securities exchange or clearing agencies, other Securities Exchange Act of 1934 entities, registered investment companies and advisers, venture capital fund advisers, insurance companies, state licensed insurance producers, Commodity Exchange Act registered entities, accounting firms, public utilities, financial market utilities, pooled investment vehicles, tax exempt entities, entities assisting tax exempt entities, large operating companies, subsidiaries of certain exempt entities, and inactive businesses.

<sup>10</sup> FinCEN further stated that debt instruments would be included if they enable the holder to exercise the same rights as one of the specified types of equity or other interests, or can be converted into such interests.

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### *Conclusion*

While the Final Rule does include useful clarifying revisions, it does not substantially change the scope or applicability of the CTA. Companies should begin to evaluate whether they may be required to submit reports pursuant to the regulations, keeping in mind the January 1, 2025 deadline for existing companies. FinCEN anticipates issuing further guidance, including FAQs, as the Final Rule comes into effect and FinCEN considers different fact-specific circumstances as they arise.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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