

**FinCEN Final Rule**

**Ultimate Beneficial Ownership Reporting Requirements**

On September 30, 2022, the U.S. Department of the Treasury’s Financial Crimes Enforcement Network (“FinCEN”) issued its Final Rule regarding Beneficial Ownership Information Reporting Requirements (the “FinCEN Final Rule”), which requires certain entities to provide information on their beneficial owners as well as the individuals who file applications with a government or state authority on behalf of such entities.<sup>1</sup> This follows U.S. Senate enactment of the National Defense Authorization Act for Fiscal Year 2021<sup>2</sup>, which incorporated the Anti-Money Laundering Act of 2020 (the “AML Act”)<sup>3</sup> under Division F, and amended the Bank Secrecy Act of 1970, with a view to buttressing the USA Patriot Act of 2001 to combat money laundering, terrorist financing, corruption, tax fraud and other illicit activity by entities doing business in the United States.

More specifically, Title 64 of the AML Act enacts the Corporate Transparency Act (the “CTA”)<sup>4</sup> that imposes new requirements regarding ultimate beneficial ownership reporting (the “UBO Reporting Requirements”) to FinCEN. The UBO Reporting Requirements apply to certain U.S. entities organized under state law and similar entities organized or to be organized under the laws of foreign jurisdictions, which are qualified or seek to qualify to do business in the U.S.

The FinCEN Final Rule does not go into effect until January 1, 2024, however, and grants grace periods of (i) one year for entities created or registered prior to such effective date, and (ii) 30 days after creation or formation, for entities created or registered after such effective date. Notwithstanding that deferred effectiveness, the FinCEN Final Rule contains a number of important features that are important for entities and individuals alike.

This memorandum provides a general overview of the CTA and the FinCEN Final Rule, and what remains unaddressed by FinCEN in order to implement the CTA.

---

<sup>1</sup> FinCEN Final Rule, <https://www.federalregister.gov/documents/2022/09/30/2022-21020/beneficial-ownership-information-reporting-requirements>. Note that the original date FinCEN estimated effective for the FinCEN Final Rule was January 1, 2022, notwithstanding its date of issuance on September 30, 2022.

<sup>2</sup> AML Act, <https://www.congress.gov/116/bills/hr6395/BILLS-116hr6395enr.pdf>

<sup>3</sup> *Id.*, at Pages 1160-1246.

<sup>4</sup> *Id.*, at Pages 1217-1238.

## Background

The CTA is part of the continued effort of the U.S. government to combat the proliferation of anonymous entities designed to operate, with impunity, as vehicles for the criminal and corrupt laundering of illicit funds.

The CTA was thus enacted (i) to provide Federal standard incorporation practices, (ii) to protect interstate and foreign commerce, (iii) to protect national security, (iv) to enhance intelligence and law enforcement measures to counter money laundering, and (v) to align U.S. laws with international standards for countering money-laundering and financing of terrorism.<sup>5</sup>

## Overview of the FinCEN Final Rule

The CTA amended the U.S. Code by adding Section §5336, which sets forth all significant changes and UBO Reporting Requirements. A general overview of the requirements is as follows:

- The term beneficial owner (“UBO”) is defined as an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise (i) exercises substantial control over the entity, or (ii) owns or controls at least 25% of the ownership interest of the entity.<sup>6</sup>
- The CTA requires corporations, limited liability companies, limited liability partnerships and similar entities organized or formed in the U.S. (each defined as a “Reporting Company” and collectively as “Reporting Companies”) to file UBO information with FinCEN. The CTA defines Reporting Company broadly, and provides a long list of exceptions. Those exceptions include companies with substantial regulatory oversight, such as companies registered under the U.S. Securities and Exchange Commission, banks, Federal Credit Unions, insurance companies, etc. (each defined as an “Exempted Entity” and collectively as “Exempted Entities”).<sup>7</sup> As a general rule, if a business entity is created or registered to do business in the United States by filing a document with a Secretary of State or similar office under the laws of a given state or tribal jurisdiction, that entity will be deemed a “Reporting Company” under the CTA’s FinCEN Final Rule.
- A Reporting Company that satisfies certain “substantial operating requirements” may be deemed an Exempted Entity. Examples of substantial operating requirements include: (i) the

---

<sup>5</sup> *AML ACT*, at Page 1217.

<sup>6</sup> *Id.* at Page 1219. An individual exercises control over a Reporting Company by, inter alia, serving as a senior officer, having authority over appointment or removal of members of a board of directors or similar body, or directing, determining and influencing the decisions of a Reporting Company. *FinCEN Final Rule* at Page 59594.

<sup>7</sup> *FinCEN Final Rule*, at Pages 59593-94.

number of full-time employees the entity employs on a full-time basis being greater than 20, and (ii) its federal income tax return for the prior year showing gross receipts or sales in excess of \$5,000,000.<sup>8</sup>

- In general, however, the CTA requires a Reporting Company to file certain information with FinCEN regarding its UBO and the applicants<sup>9</sup> involved in incorporating or registering the same. The Reporting Company must also provide information about itself, viz., its full name as well as any name under which the entity conducts or “does business as,” its street address and state or jurisdiction of organization or formation, and its tax identification number.<sup>10</sup> Each UBO is required to provide his/her full name, date of birth, current residential or business street address, and a copy of an acceptable identification document.<sup>11</sup> Acceptable identification documents include a non-expired passport issued by the U.S. Department of State, a state identification or driver’s license and, if the UBO does not have a U.S. document, a non-expired passport issued by a foreign government.<sup>12</sup> Individuals may also obtain a “FinCEN Identifier,” following their first application to the agency, which may be presented to FinCEN instead of the required information.<sup>13</sup>

### **Reporting Company Created or Existing BEFORE January 1, 2024**

As aforesaid, business entities created or registered prior to the January 1, 2024 effective date of the FinCEN Final Rule are not required to identify their UBOs or report information about themselves until one year after such effective date, *i.e.*, January 1, 2025.<sup>14</sup>

### **Reporting Company Created or Registered AFTER January 1, 2024**

Although the CTA did consider requiring a concurrent filing of UBO information with FinCEN for business entities created after the January 1, 2024 effective date of the FinCEN Final Rule, the CTA instead provided a 30-day grace period following creation or registration for such entities.<sup>15</sup> Business entities needing to update or correct UBO information also have 30 days to do so (no updates to company applicant information are required).<sup>16</sup>

---

<sup>8</sup> *Id.* at Page 59594.

<sup>9</sup> Applicants mean: any individual who files an application to set up a corporation, limited liability company or similar entity defined as a “reporting company” under the CTA.

<sup>10</sup> *FinCEN Final Rule* at Page 59592.

<sup>11</sup> *Id.* at Page 59592.

<sup>12</sup> *Id.*

<sup>13</sup> *FinCEN Final Rule* at Page 59593.

<sup>14</sup> *Id.* at Page 59592.

<sup>15</sup> *Id.* at Page 59591.

<sup>16</sup> *Id.*

The FinCEN Final Rule also clarified a special rule previously proposed and relating to Reporting Companies owned by Exempted Entities, explaining that if an individual owns an Exempted Entity, which in turn owns, directly or indirectly, a Reporting Company “exclusively” through “one or more” Exempted Entities, the Reporting Company may provide information about the Exempted Entities instead of about the individual owning the Reporting Company.<sup>17</sup> The FinCEN Final Rule contains several exceptions to the definition of UBO (minor children, nominees, intermediaries, custodians, agents, employees, inheritors and creditors, to name a few)<sup>18</sup>, and an even broader number of exceptions to the definition of Reporting Company.<sup>19</sup>

FinCEN will store beneficial ownership and applicant information it collects in a non-public registry with strict non-disclosure rules, referred to in the FinCEN Final Rule as the “Beneficial Ownership Secure System” or “BOSS”.<sup>20</sup> FinCEN may also share access to such information with federal agencies responsible for national security, intelligence, and law enforcement and with state, local, or tribal law enforcement authorities, although protocols and procedures for such external access to information collected by BOSS have not been announced.

### Considerations on Foreign Entities and Trusts

In the case of foreign entities, the CTA applies only to those which are registered to conduct business in a U.S. state or tribal jurisdiction through the filing of a document with a Secretary of State or similar office of a given state or jurisdiction.<sup>21</sup> If, for example, maintaining a bank account and/or hosting annual meetings do not qualify as “doing business” in a particular state, then entities incorporated or organized outside the U.S. will be able to maintain accounts in U.S. banks without triggering the UBO Reporting Requirements with FinCEN. Covered financial institutions, however, will nevertheless be required to comply with the same know-your-customer requirements and customer due-diligence rules applicable to all foreign entities.

Trusts, in general, including those formed under foreign law, are excluded from the definition of a Reporting Company under the CTA “to the extent that they are not created by the filing of a document with a secretary of state or similar office.”<sup>22</sup> Most trusts are not so created.<sup>23</sup>

---

<sup>17</sup> *Id.* at Page 59521.

<sup>18</sup> *Id.* at Page 59595. The FinCEN Final Rule notes specifically regarding minor children “the Reporting Company reports the required information of a parent or legal guardian of the minor child.” *Id.*

<sup>19</sup> *Id.* at Pages 59533-39. Twenty-three (23) specified types of entities are exempt from the definition of a “Reporting Company,” predominantly entities already subject to significant federal and state regulations regarding beneficial ownership information. FinCEN estimate 4,024,577 Exempted Entities will exist as of 2024. *Id.* at Page 59568

<sup>20</sup> FinCEN Beneficial Ownership Information Reporting Rule Fact Sheet, <https://www.fincen.gov/beneficial-ownership-information-reporting-rule-fact-sheet>.

<sup>21</sup> *FinCEN Final Rule* at Page 59593.

<sup>22</sup> *FinCEN Reporting Rule Fact Sheet* at Page 2.

<sup>23</sup> *Id.* at Page 59594.

Additionally, trusts identified in the Internal Revenue Code are explicitly excluded from the definition of Reporting Company.

### Penalties

The FinCEN Final Rule states that “[i]t shall be unlawful for any person to willfully provide, or attempt to provide, false or fraudulent beneficial ownership information... or to willfully fail to report complete or updated beneficial ownership information to FinCEN.”<sup>24</sup> FinCEN commented their express intention for such provisions “to be sufficient regarding the availability of both civil and criminal penalties for the identified willful reporting violations.”<sup>25</sup> Unauthorized use or disclosure of UBO information stored by FinCEN may also be subject to criminal and civil penalties.<sup>26</sup>

This memorandum will be updated periodically as and when additional regulations to the CTA are adopted, including regulations (1) establishing criteria for who may access to beneficial ownership information, for what purposes, as well as safeguards that will be put in place to ensure that information is secure and protected; and (2) revising FinCEN’s Customer Due Diligence Rule.

**Fox Horan & Camerini LLP**  
**January 2023**

Fox Horan & Camerini LLP is a full service law firm based in New York City that has been serving clients for more than half a century. Our dispute resolution team has extensive experience arbitrating and litigating complex, often multinational, legal matters around the world. Many U.S. and international clients choose FHC for its attorneys’ wealth of experience, diversity of training, professional ability, and commitment to efficient dispute resolution. For more information regarding our services and attorneys, contact us today.

**Attorney Advertising.** Readers are advised that past results do not guarantee a similar outcome.

IRS CIRCULAR 230 DISCLOSURE: ANY STATEMENTS REGARDING FEDERAL TAX LAW CONTAINED HEREIN ARE NOT INTENDED OR WRITTEN TO BE USED, AND CANNOT BE USED, FOR THE PURPOSES OF AVOIDING PENALTIES THAT MAY BE IMPOSED UNDER FEDERAL TAX LAW OR TO PROMOTE, MARKET, OR RECOMMEND TO ANOTHER PARTY ANY TRANSACTION OR MATTER ADDRESSED HEREIN.

---

<sup>24</sup> *Id.* at Page 59596.

<sup>25</sup> *Id.* at Page 59546.

<sup>26</sup> *Id.* at Page 59520.