

FinCEN Final Rules

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 Reporting 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.¹ This followed enactment of the National Defense Authorization Act for Fiscal Year 2021², which incorporated the Anti-Money Laundering Act of 2020 (the "AML Act")³ under Division F, and amended the Bank Secrecy Act of 1970, with a view 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")⁴ 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.

More recently, in March 2023 FinCEN announced the launch of a website in connection with UBO Reporting Requirements under the CTA.⁵ The first set of published materials include key and frequently asked questions, reporting dates, short videos and other guidance materials related to the FinCEN Final Reporting Rule and UBO Reporting Requirements under the CTA. FinCEN also recently published on November 8, 2023 a Final Rule regarding use of a "FinCEN Identifier" in connection with UBO Reporting Requirements.

The FinCEN Final Reporting 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

¹ FinCEN Final Reporting 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 Reporting Rule was January 1, 2022, notwithstanding its date of issuance on September 30, 2022.

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

³ *Id.* at Pages 1160-1246.

⁴ *Id.* at Pages 1217-1238.

⁵ The FinCEN BOI Website launched on March 24, 2023 can be seen [here](https://www.fincen.gov/boi). (www.fincen.gov/boi).

date, and (ii) 30 days after creation or formation, for entities created or registered after such effective date, though FinCEN has proposed moving this to 90 days.

Notwithstanding that deferred effectiveness, the FinCEN Final Reporting Rule contains numerous important features that are important for entities and individuals alike. The following is a general overview of the CTA and the FinCEN Final Rules effective in order to implement the CTA.

Overview of the FinCEN Final Rules and Guidance Materials

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.⁶ FinCEN guidance materials clarified that company “senior officers” who exercise “substantial control” of the company will also be considered UBO for reporting purposes, regardless of whether these individuals own or control 25% or more of the company. The Frequently Asked Questions explain that “senior officers” may include a company’s President, General Counsel, CEO, CFO, COO, or any other officer with an official title exercising such authority. Subject to the ownership structure of a company, multiple UBO’s may be required to provide their information to FinCEN.⁷
- 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”).⁸ 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 Reporting Rule.

⁶ *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 Reporting Rule* at Page 59594.

⁷ FinCEN Beneficial Ownership Information Reporting Frequently Asked Questions, 9 (<https://www.fincen.gov/boi-faqs>).

⁸ *FinCEN Final Reporting Rule*, at Pages 59593-94.

- A Reporting Company that satisfies certain “substantial operating requirements” may be deemed an Exempted Entity. Examples of substantial operating requirements include: (i) the 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 \$5,000,000.⁹
- In general, however, the CTA requires a Reporting Company to file certain information with FinCEN regarding its UBO and the applicants¹⁰ 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.¹¹ 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.¹² 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.¹³
- Individuals and entities may also obtain a “FinCEN Identifier,” following their first application to the agency, which may be presented to FinCEN instead of the required information as a unique identifying number issued by FinCEN “to individuals who have provided FinCEN with the BOI and to reporting companies that have filed initial reports.”¹⁴ Regarding any FinCEN Identifier issued to entities, the FinCEN Identifier Final Rule clarifies this entity FinCEN Identifier may be provided by a Reporting Company, and satisfy UBO Reporting Requirements under the CTA, only if that entity has obtained and provided to the Reporting Company their FinCEN Identifier, the UBO of the Reporting Company is such by virtue of their ownership interest in the entity providing the FinCEN Identifier, and the individual UBO’s of the Reporting Company and the entity providing the FinCEN Identifier are the same.¹⁵

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 Reporting Rule are not required to identify their UBOs or report

⁹ *Id.* at Page 59594.

¹⁰ 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.

¹¹ *FinCEN Final Reporting Rule* at Page 59592.

¹² *Id.* at Page 59592.

¹³ *Id.*

¹⁴ See *FinCEN Identifier Final Rule*, <https://www.govinfo.gov/content/pkg/FR-2023-11-08/pdf/2023-24559.pdf> at Page 76995.

¹⁵ 31 CFR 1010.380(b)(4)(ii)(B)(1)-(3); see also *FinCEN Identifier Final Rule* at Page 76997.

information immediately. A Reporting Company created or existing before the effective date have up to one year to report information, *i.e.*, until January 1, 2025.¹⁶

Reporting Company Created or Registered AFTER January 1, 2024

Even though the CTA considered requiring a concurrent filing of UBO information with FinCEN for business entities created after the January 1, 2024 effective date of the FinCEN Final Reporting Rule, the CTA instead provide a 30-day grace period to follow the creation or registration of such entities.¹⁷ Following the effective date of the FinCEN Final Reporting Rule, a Reporting Company created or registered after will have up to 30 days following their creation or registration to comply with UBO Reporting Requirements. A Reporting Company must also provide information about the applicant in its organizational or registration document, which is the one individual who directly files the document that creates or registers the company.¹⁸ Companies created before January 1, 2024 are not required to provide information about their applicants.

Business entities needing to update or correct UBO information also have 30 days to do so (no updates to company applicant information are required).¹⁹

The FinCEN Final Reporting 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.²⁰ The FinCEN Final Reporting Rule contains several exceptions to the definition of UBO (minor children, nominees, intermediaries, custodians, agents, employees, inheritors and creditors, to name a few)²¹, and an even broader number of exceptions to the definition of Reporting Company.²²

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 Reporting Rule as

¹⁶ *FinCEN Final Reporting Rule* at Page 59592.

¹⁷ *Id.* at Page 59591. FinCEN has proposed extending this grace period to 90 days from 30 days, but nothing has been finalized.

¹⁸ FinCEN Beneficial Ownership Information Reporting Frequently Asked Questions, 11.

¹⁹ *Id.*

²⁰ *Id.* at Page 59521.

²¹ *Id.* at Page 59595. The FinCEN Final Reporting Rule notes specifically regarding minor children “the Reporting Company reports the required information of a parent or legal guardian of the minor child.” *Id.*

²² *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

the “Beneficial Ownership Secure System” or “BOSS”.²³ 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. Guidance materials more recently released and posted on the FinCEN website referenced above clarify that financial institutions may have access to use the reported information to “conduct legally required customer due diligence”, provided they have their customer’s consent.²⁴

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.²⁵ 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.”²⁶ Most trusts are not so created.²⁷ Additionally, trusts identified in the Internal Revenue Code are explicitly excluded from the definition of Reporting Company.

Penalties

The FinCEN Final Reporting 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.”²⁸ 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.”²⁹ Unauthorized use or disclosure of UBO information stored by FinCEN may also be subject to

²³ FinCEN Beneficial Ownership Information Reporting Rule Fact Sheet, <https://www.fincen.gov/beneficial-ownership-information-reporting-rule-fact-sheet>.

²⁴ FinCEN Beneficial Ownership Information Reporting Frequently Asked Questions, 15.

²⁵ *FinCEN Final Reporting Rule* at Page 59593.

²⁶ *FinCEN Reporting Rule Fact Sheet* at Page 2.

²⁷ *Id.* at Page 59594.

²⁸ *Id.* at Page 59596.

²⁹ *Id.* at Page 59546.

criminal and civil penalties.³⁰ The exact criminal and civil penalties that may be available under the Act have yet to be announced by FinCEN.

Final Considerations

FinCEN have also yet to issue final rules and regulations that are expected to (1) establish criteria for who may access 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) revise FinCEN's Customer Due Diligence Rule.

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³⁰ *Id.* at Page 59520.