

FinCEN Commences Rulemaking Process To Implement New Beneficial Ownership Requirements

Skadden

04 / 23 / 21

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Jamie L. Boucher

Washington, D.C.
202.371.7369
jamie.boucher@skadden.com

Eytan J. Fisch

Washington, D.C.
202.371.7314
eytan.fisch@skadden.com

Javier A. Urbina

Washington, D.C.
202.371.7376
javier.urbina@skadden.com

Jasmine A. Banks

Washington, D.C.
202.371.7363
jasmine.banks@skadden.com

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

One Manhattan West
New York, NY 10001
212.735.3000

1440 New York Avenue, N.W.
Washington, D.C. 20005
202.371.7000

On April 1, 2021, the Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) issued an advance notice of proposed rulemaking (ANPRM) to solicit public comments on the implementation of the Corporate Transparency Act (CTA), which was enacted on January 1, 2021, as part of the National Defense Authorization Act for fiscal year 2021 (NDAA).¹ The CTA aims to improve corporate transparency by establishing a new framework for the reporting, maintenance and disclosure of beneficial ownership information.

The ANPRM seeks public input on the procedures and standards for companies to submit beneficial ownership information to FinCEN. The CTA requires FinCEN to promulgate regulations implementing this reporting requirement by January 1, 2022, which will specify a subsequent effective date. FinCEN also is seeking comments on its implementation of the related database maintenance use and disclosure provisions of the CTA, though the CTA did not impose a deadline on the promulgation of these regulations. The ANPRM is the first in a series of regulatory actions that FinCEN will undertake to implement the CTA.

The CTA's Reporting Requirement

The CTA requires "reporting companies" to submit a report to FinCEN identifying each of their "beneficial owners" and "applicants" by full legal name, date of birth, current residential or business street address, and a unique identifying number from an acceptable identification document (*e.g.*, a valid passport or driver's license number) or the individual's FinCEN identifier.² Reporting companies include subject to certain statutory exemptions corporations, LLCs and "any other similar entity" created under the laws of a state or Indian tribe, or formed under the law of a foreign country and registered to do business in the U.S. The CTA defines a beneficial owner as an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, owns or controls 25% or more of the ownership interests of the entity or exercises "substantial control" over the entity. An applicant is an individual who files an application to form or register a reporting company under applicable state or tribal law.

Exempted Entities

The CTA specifically exempts 24 categories of entities from its broad definition of reporting companies, presumably because beneficial ownership information for these entities is generally available from other credible sources. Exempted entities include, among others, banks, bank holding companies, savings and loan holding companies, federal or state credit unions, and FinCEN-registered money transmitters; certain issuers of securities registered with the Securities and Exchange Commission; certain entities registered with the Commodities Futures Trading Commission; certain pooled investment vehicles or tax exempt 501(c)(3) organizations; investment advisers and insurance companies; registered public accounting firms; certain public utilities; and entities owned or controlled by each of the foregoing exempted entities. A reporting company similarly does not include companies that employ more than 20 employees on a full-time basis in the U.S., have filed U.S. federal income tax returns in the previous

¹ The NDAA also included the Anti-Money Laundering Act of 2020, which, together with the CTA, is intended to modernize the anti-money laundering and counterterrorist financing laws in the U.S. For further information on the Anti-Money Laundering Act of 2020, the CTA and other related statutes, see our January 7, 2021, client alert "[US Enacts Historic Legislation To Strengthen Anti-Money Laundering and Counterterrorist Financing Legal Framework.](#)"

² The term "FinCEN identifier" means the unique identifying number assigned by FinCEN to a person pursuant to the CTA.

FinCEN Commences Rulemaking Process To Implement New Beneficial Ownership Requirements

year showing more than \$5 million in aggregate gross receipts or sales and maintain an operating presence at a physical office within the U.S. An entity that was exempt, but that no longer meets the exemption criteria, must report beneficial ownership information to FinCEN as soon as the entity no longer qualifies for exemption.

When Must Reporting Companies Begin To Report?

As mentioned above, the CTA requires FinCEN to promulgate regulations implementing the CTA's reporting requirement by January 1, 2022. These regulations will specify a subsequent effective date, which may be informed by the public comments received. Reporting companies formed or registered after the effective date of these regulations must disclose beneficial ownership information at the time of formation or registration. Those formed or registered before the effective date must submit a report to FinCEN in a timely manner, and in no case more than two years after the effective date of the regulations. All reporting companies must report to FinCEN within one year of any changes to information previously reported.

Permitted Disclosure of Beneficial Ownership Information

The CTA requires FinCEN to store beneficial ownership information in a confidential, secure and nonpublic database. However, pursuant to appropriate protocols, FinCEN is permitted to share such information with authorized government authorities for certain purposes specified in the CTA, such as to address requests from a federal agency in furtherance of national security, court-authorized requests with respect to a civil or criminal investigation, or requests made by a federal functional regulator. FinCEN also is authorized to share beneficial ownership information with financial institutions, with the consent of the reporting company, to facilitate their compliance with applicable customer due diligence (CDD) requirements.

Intersection With CDD Rule for Financial Institutions

The CTA requires FinCEN to revise the CDD rule for financial institutions, which was finalized by FinCEN in May 2016 and became effective in May 2018 (the May 2018 rule).³ Not later than one year after the effective date of the regulations implementing the CTA's beneficial ownership reporting requirements, FinCEN must conform the May 2018 rule to the CTA's implementing regulations to avoid duplicative requirements. FinCEN indicated in the ANPRM that revisions to the May 2018 rule will be the subject of separate rulemaking, about which the public will receive notice and opportunity to comment.

³ See 81 Fed. Reg. 29397 (May 11, 2016).

Comments Sought by the ANPRM

FinCEN invites comments on all aspects of the CTA, but specifically seeks comments on 48 targeted questions grouped into five major themes:

1. **Definitions.** The CTA requires reporting of beneficial ownership information by reporting companies. FinCEN seeks comments on various aspects of this definition, including how to interpret the term "other similar entity," whether the exemptions specified in the CTA are sufficiently clear, whether additional exemptions should be established by regulation and how a company's eligibility for any exemption from the reporting requirements should be determined. The ANPRM also seeks comments on the definition of beneficial owner, including whether FinCEN should define the term "substantial control."
2. **Reporting of Beneficial Ownership Information.** The ANPRM requests public comments on the types of information reporting companies should be required to submit — including the nature of a reporting company's relationship to its beneficial owners — in order to ensure the beneficial ownership database is "highly useful," as required by the CTA. FinCEN also requested comments on several questions regarding the type of information that a reporting company should be required to provide with respect to its affiliates, parents and subsidiaries. Additionally, the ANPRM poses a range of questions with respect to federal and state notice requirements, the burdens commenters anticipate in connection with CTA reporting requirements, and how best to initially collect and periodically update beneficial ownership information, including whether reporting companies should be permitted to file beneficial ownership reports electronically.
3. **FinCEN Identifier.** The CTA introduces the concept of a "FinCEN identifier," which is a unique identifying number that may be assigned by FinCEN to a person pursuant to the CTA's reporting provisions. The ANPRM poses several questions to determine when a FinCEN identifier should be used, the form the FinCEN identifier should take, how best to protect the privacy interests of those who obtain a FinCEN identifier and how to mitigate any potential risks (*e.g.*, unauthorized use, individuals applying for more than one FinCEN identifier).
4. **Security and Use of Beneficial Ownership and Applicant Information.** The ANPRM seeks responses to questions related to confirming and authenticating requests for beneficial ownership information stored in the database, determining the scope and criteria of related definitions (*e.g.*, entities to whom FinCEN is authorized to release beneficial ownership information), and how to best make initial and updated beneficial ownership information available to financial institutions

FinCEN Commences Rulemaking Process To Implement New Beneficial Ownership Requirements

with CDD obligations (e.g., allowing reporting companies to pre-authorize specific financial institutions to access their beneficial ownership information).

5. **Cost, Process, Outreach and Partnership.** FinCEN poses questions with respect to the costs and burdens that CTA requirements would impose on small businesses, other affected business constituencies, and state, local and tribal governmental agencies. Further, the notice requests feedback on how FinCEN can use existing state and federal processes and procedures to more effectively collect beneficial ownership information and minimize burdens and costs.

The rules and regulations developed with respect to the CTA beneficial ownership reporting requirement will likely impact a wide range of companies that are organized or operate within the U.S. Companies that may be required to comply with the CTA should continue to monitor developments related to this rulemaking over the course of this year. The deadline for comments on the ANPRM is May 5, 2021.