

MEMO# 34331

October 31, 2022

FinCEN Issues Final Rule Regarding Beneficial Ownership Information Reporting

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TO: ICI Members SUBJECTS: Anti-Money Laundering
Compliance
Operations

Transfer Agency RE: FinCEN Issues Final Rule Regarding Beneficial Ownership Information Reporting

On September 29, 2022, the Financial Crimes Enforcement Network ("FinCEN") issued a final rule regarding beneficial ownership information reporting ("Rule").^[1] FinCEN proposed the Rule in December 2021^[2] to implement Section 6403 of the Corporate Transparency Act ("CTA"), which was enacted into law as part of the National Defense Authorization Act for Fiscal Year 2021. In the Adopting Release, FinCEN states that the Rule is "intended to help prevent and combat money laundering, terrorist financing, corruption, tax fraud, and other illicit activity, while minimizing the burden on entities doing business in the United States."^[3]

The Rule requires reporting companies to file reports with FinCEN that provide identifying information about beneficial owners of the company, as well as company applicants ("BOI reports"). The Rule requirements are discussed in more detail below.

Reporting Companies

Definitions. The Rule defines "reporting company" to include "domestic reporting companies" and "foreign reporting companies."

- "Domestic reporting company" means any entity that is a corporation, is a limited liability company, or is created by the filing of a document with the secretary of state or any similar office under the law of a state or Indian tribe.^[4]
- "Foreign reporting company" means any entity that is a corporation, limited liability company or other entity formed under the law of a foreign country and is registered to do business in any state or tribal jurisdiction by the filing of a document with the secretary of state or any similar office under the law of a state or Indian tribe.

Exemptions. The Rule, consistent with the CTA, enumerates twenty-three specific types of entities that are exempt from the definition of "reporting company."[\[5\]](#)

Notably, the Rule exempts "any entity that is (A) an investment company as defined in section 3 of the [Investment Company Act of 1940] or an investment adviser as defined in section 202 of the [Investment Advisers Act of 1940] and (B) registered with the [SEC] under the [Investment Company Act] or the [Investment Advisers Act]." In addition, the Rule exempts "venture capital fund advisers," which is defined to mean an investment adviser that "is described in section 203(l) of the [Investment Advisers Act] and has filed Item 10, Schedule A, and Schedule B of Part 1A of Form ADV with the [SEC]." The Adopting Release states that these provisions regarding investment companies and advisers use the CTA language "largely verbatim" and are adopted as proposed.[\[6\]](#)

In addition, the Rule exempts "any pooled investment vehicle that is operated or advised by a [bank, credit union, broker or dealer in securities, investment company or investment adviser, or venture capital fund adviser]," each as defined in the Rule's exemptions from the definition of "reporting company." With regard to this exemption, the Adopting Release states:

"the term 'pooled investment vehicle' encompasses a wide variety of investment products with a wide range of names and structures, which present a range of risk profiles. It is accordingly impracticable for FinCEN to prospectively opine on the applicability of the exemption to specific structures that may not carry the name 'pooled investment vehicle.' However, as a general principal, FinCEN notes that a vehicle's eligibility for this exemption does not hinge on its nominal designation, but rather on whether the vehicle or entity satisfies the elements articulated in the final regulatory text."[\[7\]](#)

BOI Reports

BOI reports are required to include the following information about the reporting company:

1. Full legal name of the reporting company, as well as all trade or d/b/a names, whether or not the names are registered;
2. Reporting company address;[\[8\]](#)
3. Jurisdiction of formation, which may be a state, tribal or foreign jurisdiction; and
4. Company Identification Number.[\[9\]](#)

In addition, BOI reports are required to include the following information about each beneficial owner and company applicant of the reporting company:

1. Full legal name;
2. Date of birth;
3. Complete current address;[\[10\]](#) and
4. Unique identifying number and the issuing jurisdiction from one of several permitted documents.[\[11\]](#)

Beneficial Owners

The Rule defines a "beneficial owner" of a reporting company as "any individual who, directly or indirectly, either exercises substantial control over such reporting company or owns or controls at least 25 percent of the ownership interests of such reporting company."

Substantial Control. The Rule states that an individual exercises substantial control over the

reporting company if he or she:

1. Serves as a senior officer of the reporting company;
2. Has authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body);
3. Directs, determines, or has substantial influence over important decisions made by the reporting company, including decisions regarding certain key aspects of the business, which are enumerated in the Rule; or
4. Has any other form of substantial control over the reporting company.

The Rule adds that an individual may directly or indirectly exercise substantial control over a reporting company through various means, including, among others enumerated in the Rule, board representation, ownership or control of a majority of the voting power, or any other contract, arrangement, understanding, relationship or otherwise. The Adopting Release states that the addition of this section of the Rule "underscores 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 paragraph."[\[12\]](#)

Ownership Interest. The Rule defines "ownership interest" to mean a variety of enumerated types of interests.[\[13\]](#) The Rule specifies that an individual may directly or indirectly own or control an ownership interest "through any contract, arrangement, understanding, relationship, or otherwise," including certain enumerated relationships and arrangements, such as joint ownership of an undivided interest, through an individual acting as nominee, intermediary, custodian or agent, as trustee, beneficiary or grantor or settlor of a trust, or through ownership of one or more intermediary entities, each as subject to the conditions set forth in the Rule.

Calculation of Total Ownership Interest in Reporting Company. The Rule includes guidance regarding the calculation of an individual's total ownership interest in a reporting company for certain types of reporting entities and certain convertible interests. The Rule also specifies that calculations are performed on the ownership interest as of the time of calculation, and options and similar interests are treated as exercised for purposes of the calculations (i.e., on a fully diluted basis).

Exceptions. The Rule contains certain exceptions to the definition of "beneficial owner," including for minor children, individuals acting as nominee, intermediary, custodian or agent on behalf of another individual, an employee of a reporting company acting solely as an employee (provided not a senior officer), individuals whose only interests are future interests through a right of inheritance, and creditors of a reporting company (subject to certain conditions). The Adopting Release states that exceptions included in the Rule align with the exceptions specified in the CTA.

Company Applicant

The Rule defines a "company applicant" of a reporting company to be:

1. For a domestic reporting company, the individual who directly files the document that creates the domestic reporting company;
2. For a foreign reporting company, the individual who directly files the document that first registers the foreign reporting company; and
3. For a domestic or foreign reporting company, if more than one individual is involved in the filing of the relevant document, the individual who is primarily responsible for

directing or controlling the filing.

The Adopting Release states that this definition is intended to "[reduce] potential burdens by limiting the definition . . . to only one or two individuals."[\[14\]](#) The Adopting Release also provides certain examples regarding the identification of company applicants.

Certification of Accuracy and Completeness

The Rule states that "each person filing [a BOI] report or application shall certify that the report or application is true, correct, and complete." This requirement applies to BOI reports as well as applications for a FinCEN ID. The Adopting Release states:

"FinCEN recognizes that much of the information required to be reported about beneficial owners and applicants will be provided to reporting companies by those individuals. However, the structure of the CTA reflects a deliberate choice to place the responsibility for reporting this information on the reporting company itself. The fundamental premise of the CTA is that the reporting company is responsible for identifying and reporting its beneficial owners and applicants. Inherent in that responsibility is the obligation to do so truthfully and accurately."[\[15\]](#)

With regard to a reporting company's oversight over reported information, the Adopting Release states, "as a general matter, FinCEN does not expect that an inadvertent mistake by a reporting company acting in good faith after diligent inquiry would constitute a willfully false or fraudulent violation."[\[16\]](#)

Timing of BOI Report Filings

Initial BOI Report. The effective date for the Rule is January 1, 2024 ("Effective Date"). Reporting companies that exist on the Effective Date are required to file an initial BOI report within one year of the Effective Date. Reporting companies that are created after the Effective Date are required to file an initial BOI report within 30 calendar days of the earlier of the date on which the reporting company receives actual notice that its creation or registration has become effective or on which the applicable secretary of state (or similar office) first provides public notice, such as through a publicly accessible registry, that the reporting company has been created or registered.

Updated BOI Report. If previously submitted information regarding a reporting company or its beneficial owners has changed, the reporting company must file an updated BOI report within 30 calendar days after the date the change occurred. A reporting company does not need to file an updated BOI report to report changes to information regarding a company applicant. The Rule also provides guidance on certain specific circumstances in which an updated report needs to be filed.[\[17\]](#)

Corrected BOI Report. If any BOI report was inaccurate when it was filed (and remains inaccurate), the reporting company must file a corrected report within 30 calendar days after the date on which the reporting company becomes aware or has reason to know of the inaccuracy.

Storage and Disclosure of Reported BOI

FinCEN has developed the Beneficial Ownership Secure System (BOSS) to receive, store and maintain the BOI provided by reporting companies. FinCEN expects that reporting companies will submit their BOI reports electronically through an online interface. FinCEN is

considering how to address circumstances where a reporting company may be unable to file through the online interface. FinCEN states in the Adopting Release that the BOSS will be secured to a Federal Information Security Management Act "High" compliance level, which is the highest information security protection level under the Act.

Looking Ahead

The Rule is one of three planned FinCEN rulemakings to implement the CTA. FinCEN expects to engage in additional rulemakings to (i) establish rules regarding the safeguarding of BOI, who may access the information and for what purposes, and (ii) revise FinCEN's customer due diligence^[18] rule following the adoption of the Rule. In addition, FinCEN expects to publish the reporting forms that will be used to comply with the Rule in the Federal Register for public comment.^[19]

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Notes

^[1] Beneficial Ownership Information Reporting Requirements, Financial Crimes Enforcement Network, Department of the Treasury, 87 F.R. 59498 (Sept. 30, 2022) ("Adopting Release"), available at <https://www.govinfo.gov/content/pkg/FR-2022-09-30/pdf/2022-21020.pdf>.

^[2] Beneficial Ownership Information Reporting Requirements, Financial Crimes Enforcement Network, Department of the Treasury, 86 F.R. 69920 (Dec. 8, 2021), available at <https://www.govinfo.gov/content/pkg/FR-2021-12-08/pdf/2021-26548.pdf>.

^[3] Adopting Release at 59498.

^[4] The Adopting Release clarifies that "the only relevant issue for the purposes of the CTA and the [Rule] is whether the filing 'creates' the entity. Whether the 'filing' is deemed mandatory or voluntary, whether such a filing is pursuant to a conversion or reorganization, whether it is made for tax, dissolution, or other purposes, or any other such consideration, is not necessarily dispositive." In addition, FinCEN declined to revise or provide additional guidance on the proposed approach to rely on state corporate law, and the Adopting Release states that "the CTA is clear that state corporate formation law and practices dictate whether an entity is a reporting company." Adopting Release at 59538.

^[5] In addition to the exemptions for investment companies, investment advisers and pooled investment vehicles discussed in this section, the Rule also exempts any broker or dealer registered with the SEC, any other Exchange Act registered entity, and any Commodity Exchange Act registered entity, among others.

^[6] Adopting Release at 59544. The Rule also exempts "any entity whose ownership

interests are controlled or wholly owned, directly or indirectly, by one or more entities described in [certain of the other exemptions contained in the Rule]." Additionally, the Adopting Release states that "Congress has further specified that the exemption for subsidiaries should apply to the subsidiaries of these defined venture capital fund advisers, investment companies, and investment advisers." The Adopting Release also states that FinCEN has declined to adopt an exemption for state-registered investment advisers, noting FinCEN's view that "the extent of state supervision varies significantly." Adopting Release at 59544-45.

[\[7\]](#) Adopting Release at 59544.

[\[8\]](#) The reporting company address is required to be the reporting company's principal place of business in the United States or, if the company's principal place of business is outside the United States, the street address of the primary location in the United States where the reporting company does business.

[\[9\]](#) This will generally be a Tax Identification Number ("TIN") but, for a foreign reporting company that has not been issued a TIN, may also be a foreign tax identification number along with the name of the relevant jurisdiction.

[\[10\]](#) This address is required to be a business address for company applicants who create or register companies in the course of their business and a residential address for all other individuals, including beneficial owners.

[\[11\]](#) The permitted documents include a: non-expired United States passport; non-expired identification document issued to the individual by a state, local government or Indian tribe for the purpose of identifying the individual; non-expired drivers license; or, if none of the foregoing are available, a non-expired passport issued by a foreign government.

[\[12\]](#) Adopting Release at 59529.

[\[13\]](#) These include, among others: equity, stock or similar instrument; capital or profit interest in an entity; instruments convertible into, futures on, or any warrant or right to purchase, sell or subscribe to such an instrument; puts, calls, straddles or other options or privilege of buying or selling such instruments; or any other instrument, contract arrangement, understanding, relationship or mechanism used to establish ownership.

[\[14\]](#) Adopting Release at 59536.

[\[15\]](#) Adopting Release at 59514.

[\[16\]](#) Adopting Release at 59515.

[\[17\]](#) These specific circumstances include: if a reporting company meets the criteria for an exemption to the filing requirement after making an initial filing; if an individual is a beneficial owner by virtue of a property interest or other rights subject to transfer upon death, and such individual dies; and if a parent or legal guardian's information has been provided on behalf of a minor who is a beneficial owner, and such minor attains the age of majority. In addition, the Rule clarifies that, if the name, birthdate, address or unique identifying number on the submitted identifying document has changed, the reporting company should refile an updated image of the identifying document.

[\[18\]](#) Although the CTA refers to the Customer Due Diligence Rule, it actually requires

FinCEN to revise the beneficial ownership requirements set forth in 31 C.F.R. 1010.230, to make them consistent with the requirements of the CTA.

[19] Beneficial Ownership Information Reporting Rule Fact Sheet, Financial Crimes Enforcement Network, Department of the Treasury (Sept. 29, 2022), available at <https://www.fincen.gov/beneficial-ownership-information-reporting-rule-fact-sheet>.

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