

# Alert

## FinCEN Issues Final Rule Requiring Reporting of Beneficial Ownership Information

October 20, 2022

On Sept. 30, 2022, the Financial Crimes Enforcement Network of the United States Department of the Treasury (“FinCEN”) issued a final rule (the “Final Rule”)<sup>1</sup> implementing beneficial ownership information reporting requirements under the Corporate Transparency Act (“CTA”), enacted as part of the Anti-Money Laundering (“AML”) Act of 2020.<sup>2</sup> As discussed in greater detail below, the Final Rule requires certain legal entities formed or registered to do business in the United States (each, a “Reporting Company”) to report to FinCEN certain identifying information regarding (i) individuals with equity ownership of, or substantial control over, the Reporting Company; (ii) individuals responsible for filing certain documents with FinCEN on behalf of the Reporting Company; and (iii) the Reporting Company itself. Information reported to FinCEN is to be held in a non-public database maintained by FinCEN, which will be accessible to United States government agencies, tax authorities, law enforcement and, with the Reporting Company’s consent, certain financial institutions.<sup>3</sup>

FinCEN has adopted the Final Rule largely as proposed in December 2021,<sup>4</sup> with certain modifications “intended to minimize unnecessary burdens on [Reporting Companies].”<sup>5</sup> The requirements outlined in the Final Rule will become effective Jan. 1, 2024.

This *Alert* summarizes key takeaways from the Final Rule.

### 1. What Is the Purpose of the Reporting Requirements Outlined in the Final Rule?

The CTA was enacted to expand the United States government’s ability to collect beneficial ownership information (“BOI”) in order to protect United States national security and the United States financial system from illicit use. Such information, FinCEN explains, will help “prevent drug traffickers, fraudsters, corrupt actors such as oligarchs, and proliferators from laundering or hiding money and other assets in the United States.”<sup>6</sup>

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<sup>1</sup> FinCEN, Final Rule, Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59,498 (Sept. 30, 2022), available [here](#) (hereinafter, “Final Rule”). See also FinCEN, Beneficial Ownership Information Reporting Rule Fact Sheet (Sept. 29, 2022), available [here](#) [hereinafter “Fact Sheet”].

<sup>2</sup> National Defense Authorization Act for Fiscal Year 2021 (CTA §§ 6401–03), available [here](#).

<sup>3</sup> Final Rule, 87 Fed. Reg. at 59,501.

<sup>4</sup> For more information regarding the CTA and AML Act generally, please see our prior [Alert](#) “Passage of Anti-Money Laundering Act of 2020 Includes Comprehensive BSA/AML Reform Measures.”

<sup>5</sup> *Id.* at 59,509. For FinCEN’s proposed rule, see FinCEN, Notice of Proposed Rulemaking, Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69,920 (Dec. 8, 2021), available [here](#).

<sup>6</sup> Fact Sheet, *supra*.

FinCEN points out that illicit actors frequently rely on shell companies “to obfuscate their identities and launder their ill-gotten gains through the United States,” a practice that FinCEN describes as undermining United States national security and threatening United States economic prosperity. By “shielding” the identities of the true owners and control persons of entities formed or registered in the United States, criminals are effectively allowed to hide behind shell and front companies in order to access the United States financial system, which in turn, puts small, law-abiding United States businesses at a disadvantage. FinCEN also highlights that “Russia’s illegal invasion of Ukraine in February 2022 . . . underscored that Russian elites, state-owned enterprises, and organized crime, as well as Russian government proxies have attempted to use U.S. and non-U.S. shell companies to evade sanctions imposed on Russia.”

## **2. Which Entity Is a “Reporting Company” Required to File Reports With FinCEN under the Final Rule?**

Subject to numerous exemptions (designed to exclude many regulated entities and operating businesses, as discussed below), a Reporting Company includes (i) a domestic corporation, limited liability corporation (LLC), limited partnership, business trust or any other entity created by filing a document with a secretary of state or comparable United States office; and (ii) a foreign company registered to do business in any U.S. state or Tribal jurisdiction.<sup>7</sup>

Certain subsidiaries of an entity that is exempt from the definition of “Reporting Company” are similarly exempt from BOI reporting requirements.<sup>8</sup>

In response to public comments to the proposed rule asking FinCEN for greater clarification on which entities qualify as Reporting Companies, FinCEN notes that “state corporate formation law and practices dictate whether an entity is a [Reporting Company].”<sup>9</sup>

## **3. What Information Will a Reporting Company Be Required to Disclose to FinCEN?**

Each Reporting Company will be required to identify itself to FinCEN in a Beneficial Ownership Information Report (“BOI Report”) and disclose therein certain information regarding its Beneficial Owners and Company Applicants (defined below, respectively), as well as additional identifying information regarding the Reporting Company.

*Beneficial Owner Information.* The Final Rule requires each Reporting Company to disclose to FinCEN the following information pertaining to each of its Beneficial Owners: (i) full legal name; (ii) date of birth; (iii) complete current street address (residential or business); (iv) a unique identifying number from an acceptable identification document;<sup>10</sup> and (v) an image of the document from which the unique identifying number was obtained.

*Company Applicant Information.* Reporting Companies created after Jan. 1, 2024 are required to disclose the same identifying information for Company Applicants as is required for Beneficial Owners, except

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<sup>7</sup> Final Rule, 87 Fed. Reg. at 59,593.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 59,538.

<sup>10</sup> Acceptable identification documents include (1) non-expired passport issued by the United States government; (2) non-expired identification document issued by a state local government or Indian Tribe for the purpose of identifying the individual; (3) non-expired driver’s license issued by a State; or (4) non-expired passport issued by a foreign government. Final Rule at 59,519. The identification document must specify the jurisdiction in which it was issued. See Fact Sheet, *supra*.

that a business address rather than residential address may be provided. The Final Rule, however, does not require Reporting Companies existing or registered at the time of the Final Rule’s effective date to report on their Company Applicants.<sup>11</sup>

*Additional Self-Identifying Information.* Each Reporting Company must also disclose to FinCEN the following self-identifying information:

- Company’s full name;
- Any trade name or “doing business as” name;
- Business street address;
- State or Tribal jurisdiction of formation; and
- Internal Revenue Service (IRS) Taxpayer Identification Number (or, in the case of a non-U.S. Reporting Company, any tax identification or similar number issued by the relevant non-U.S. jurisdiction and the name of that jurisdiction).

#### **4. Who Can Access a Reporting Company’s BOI Report?**

The CTA only authorizes FinCEN to disclose reported BOI “in limited circumstances” to an enumerated group of governmental authorities and financial institutions.<sup>12</sup> FinCEN explains that “[g]iven the sensitivity of the reportable information, the CTA imposes strict confidentiality, security, and access restrictions on the data FinCEN collects.”<sup>13</sup> For example, financial institutions will only be able to access BOI, with the consent of the Reporting Company, in order to help the financial institution comply with its requirements under the Customer Due Diligence (“CDD”) rule. Additionally, a financial institution’s regulator will obtain BOI that has been provided to a financial institution that it regulates “for the purpose of performing regulatory oversight that is specific to that financial institution.”<sup>14</sup>

#### **5. Who Is a Beneficial Owner?**

The Final Rule defines a Beneficial Owner as an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise (i) owns or controls not less than 25 percent of the *ownership interests* of a Reporting Company; or (ii) exercises *substantial control* over a Reporting Company. The Final Rule provides standards for calculating an individual’s “ownership interests” and outlines various activities that could constitute “substantial control” of a Reporting Company.

- *Ownership Interests.* Ownership interests include equity in the Reporting Company, as well as other types of interests, such as capital or profit interests, including partnership interests, convertible instruments, warrants or rights, or other options or privileges to acquire equity,

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<sup>11</sup> Reporting Companies formed or registered after the effective date of the rule are similarly excluded from the requirement to update company applicant information. See Fact Sheet, *supra*.

<sup>12</sup> Final Rule, 87 Fed. Reg. at 59,507.

<sup>13</sup> *Id.* (providing that “Federal agencies, for example, may only obtain access to BOI when it will be used in furtherance of a national security, intelligence, or law enforcement activity. For state, local, and Tribal law enforcement agencies, ‘a court of competent jurisdiction’ must authorize the agency to seek BOI as part of a criminal or civil investigation. Foreign government access is limited to requests made by foreign law enforcement agencies, prosecutors, and judges in specified circumstances.” [Internal citations omitted]).

<sup>14</sup> *Id.*, citing 31 U.S.C. § 5336(c)(2)(C).

capital or other interests in a Reporting Company. Debt instruments are included in ownership interests if they enable the holder to exercise the same rights as one of the specified equity or other interests, including the ability to convert the instrument into one of the specified equity or other interests.<sup>15</sup> An individual may reach the 25 percent threshold by jointly owning or controlling with one or more other persons an undivided ownership interest in a Reporting Company.

- *Substantial Control.* The Final Rule provides three specific indicators of substantial control: (i) service as a senior officer of a Reporting Company; (ii) authority over the appointment or removal of any senior officer or dominant majority of the board of directors (or similar body) of a Reporting Company; and (iii) direction, determination or substantial influence over important matters of a Reporting Company.

The Final Rule also includes a catch-all provision to make clear that substantial control can take additional forms not specifically listed. Thus, an individual may be determined to directly or indirectly exercise substantial control over a Reporting Company through a variety of means, such as (i) board representation; (ii) ownership or control of a majority or dominant minority of the voting shares of the Reporting Company; (iii) holding rights associated with any financing arrangement or interest in a Reporting Company; (iv) controlling one or more intermediary entities that separately or collectively exercise substantial control over a Reporting Company; (v) having in place arrangements or financial or business relationships, whether formal or informal, with other individuals or entities acting as nominees; or (vi) through any other contract, arrangement, understanding, relationship or otherwise. Notably, unlike FinCEN's CDD rule, the Final Rule's definition could require information to be provided on more than one individual under the substantial control prong.

- *Exclusions.* A Beneficial Owner does not include (i) an individual acting as a nominee, intermediary, custodian or agent on behalf of another individual; (ii) an employee of a Reporting Company, acting solely as an employee and not as a senior officer, whose substantial control over or economic benefits from such entity are derived solely from the employment status of the employee; (iii) a Reporting Company's creditors, unless the creditor holds at least 25 percent of the Reporting Company or has substantial control over the Reporting Company; (iv) an individual whose only interest in a Reporting Company is a future interest through a right of inheritance; or (v) a minor child, if the information of a parent or guardian is reported.<sup>16</sup>

## 6. Who Is a Company Applicant?

A Company Applicant is defined in the Final Rule as (i) the individual who directly files a document that creates a domestic Reporting Company or who first registers a foreign Reporting Company with a secretary of state or similar office in the United States; or (ii) the individual who is "primarily responsible for directing or controlling such filing if more than one individual is involved in the filing of the document."<sup>17</sup> FinCEN clarifies that a Company Applicant could therefore include an individual outside of the Reporting Company, such as an outside counsel or paralegal, if such person oversees the

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<sup>15</sup> This is similar to the United States Securities and Exchange Commission's ("SEC") definition of "equity security" in 17 C.F.R. § 230.

<sup>16</sup> Final Rule, 87 Fed. Reg. at 59,595; see also CTA § 6403 (adding 31 USC § 5336(a)(3)(B)).

<sup>17</sup> *Id.* at 59,596.

preparation of a creation document for the Reporting Company, as well as directly files it with the appropriate authority.<sup>18</sup>

## 7. What Is a FinCEN Identifier?

In order to “minimize burdens” on Reporting Companies “associated with the collection of beneficial ownership information, including by eliminating duplicative requirements; and . . . ensure the beneficial ownership information reported to FinCEN is accurate, complete, and highly useful,”<sup>19</sup> and “[g]iven the sensitivity of the reportable information,”<sup>20</sup> any person required to report BOI to FinCEN will be eligible to obtain a “FinCEN Identifier” and provide such FinCEN Identifier to a Reporting Company to be included on a BOI Report in lieu of having to provide the underlying information requested on the BOI Report. A FinCEN Identifier is a unique identification number that FinCEN will issue to Beneficial Owners, Company Applicants or Reporting Companies upon request, provided that certain conditions are met.<sup>21</sup>

With respect to Beneficial Owners and Company Applicants, FinCEN will issue a FinCEN Identifier if an individual submits to FinCEN the same four pieces of identifying information as would be required in a BOI Report.<sup>22</sup>

Reporting Companies that have provided their BOI to FinCEN will also be eligible to receive a FinCEN Identifier upon filing their initial BOI Report under certain circumstances.<sup>23</sup>

## 8. What Entities Are Exempted From the Definition of Reporting Company?

Closely paralleling the exemptions in the Customer Identification Program (“CIP”) and CDD rules,<sup>24</sup> the Final Rule provides 23 exemptions from the definition of Reporting Company, many of which are for entities “already subject to substantial federal and/or state regulation or already have to provide their beneficial ownership information to a governmental authority.”<sup>25</sup> Such exemptions include the following:<sup>26</sup>

1. A securities issuer registered under section 12 of the Securities Exchange Act of 1934 or otherwise required to file information under section 15(3) of the Securities Exchange Act of 1934.

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<sup>18</sup> *Id.* at 59,536.

<sup>19</sup> 31 U.S.C. § 5336(b)(4).

<sup>20</sup> Final Rule, 87 Fed. Reg. at 59,507.

<sup>21</sup> *Id.* at 59,507.

<sup>22</sup> *I.e.*, the individual’s (1) full legal name; (2) date of birth; (3) complete current street address (residential or business); and (4) unique identifying number from an acceptable identification document. *See* 31 U.S.C. 5336(b)(3)(A)(i).

<sup>23</sup> Final Rule, 87 Fed. Reg. at 59,507.

<sup>24</sup> *See* 31 CFR §§ 1020.315(b)(2) through (b)(4) (listing exemptions from the bank CIP rule); 31 CFR §§ 1010.230(e)(2) and (h) (listing exemptions from the CDD rule).

<sup>25</sup> Final Rule, 87 Fed. Reg. at 59,539.

<sup>26</sup> *See* Final Rule, 87 Fed. Reg. at 59,593–94. *See also* CTA § 6403 (adding 31 USC § 5336(a)(11)(B)) (providing for the same in the statutory context).

2. An investment company<sup>27</sup> that is registered with the Securities and Exchange Commission (“SEC”) under the Investment Company Act of 1940<sup>28</sup> (“40 Act”).<sup>29</sup>
3. An investment adviser<sup>30</sup> that is registered with the SEC under the Investment Advisers Act of 1940<sup>31</sup> (“Advisers Act”).<sup>32</sup>
4. A venture capital fund adviser that is (i) described in section 203(l) of the Advisers Act, and (ii) that has “filed Item 10, Schedule A, and Schedule B of Part 1A of Form ADV, or any successor thereto, with the [SEC].”<sup>33</sup>
5. A money services business.<sup>34</sup>
6. A bank.<sup>35</sup>
7. A depository institution holding company.<sup>36</sup>
8. A federal or state credit union.<sup>37</sup>
9. A broker-dealer registered under section 15 of the Securities Exchange Act of 1934 and defined in § 3 of the same.<sup>38</sup>
10. A futures commission merchant, introducing broker, swap dealer, major swap participant, commodity pool operator and commodity trading adviser registered with the Commodities Futures Trading Commission.<sup>39</sup>
11. An insurance company as defined in § 2 of the 40 Act.
12. A state-licensed insurance producer.<sup>40</sup>
13. A securities exchange or clearing agency.<sup>41</sup>

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<sup>27</sup> As defined in section 3 of the 40 Act (15 USC § 80a-3). Final Rule, 87 Fed. Reg. at 59,593.

<sup>28</sup> 15 USC § 80a-1, *et seq.*

<sup>29</sup> Final Rule, 87 Fed. Reg. at 59,593–94; *see also* CTA § 6403 (adding 31 USC § 5336(a)(11)(A)(x)).

<sup>30</sup> As defined in section 202 of the Advisers Act (15 USC § 80b-2).

<sup>31</sup> 15 USC § 80b-1, *et seq.*

<sup>32</sup> Final Rule, 87 Fed. Reg. at 59,593–94; *see also* CTA § 6403 (adding 31 USC § 5336(a)(11)(A)(x)).

<sup>33</sup> Final Rule 87 Fed. Reg. at 59,594; *see also* CTA § 6403 (adding 31 USC § 5336(a)(11)(A)(xi)).

<sup>34</sup> Final Rule, 87 Fed. Reg. at 59,593.

<sup>35</sup> As defined in (i) section 3 of the Federal Deposit Insurance Act (12 USC § 1813); (ii) section 2(a) of the 40 Act (15 USC § 80a-2(a)); and (iii) section 202(a) of the Advisers Act (15 USC § 80b-2(a)). *Id.*

<sup>36</sup> Any bank holding company as defined in section two of the Bank Holding Company Act of 1956 (12 U.S.C. 1841), or any savings and loan holding company as defined in section 10(a) of the Home Owners’ Loan Act (12 U.S.C. 1467a(a)). Final Rule, 87 Fed. Reg. at 59,593; *see also id.* at 59,540-41.

<sup>37</sup> As defined in § 101 of the Federal Credit Union Act (12 USC § 1752). Final Rule, 87 Fed. Reg. at 59,593.

<sup>38</sup> 15 USC § 78o and 15 USC § 789c, respectively. *Id.*

<sup>39</sup> Final Rule, 87 Fed. Reg. at 59,594.

<sup>40</sup> *I.e.*, an insurance producer that has “an operating presence at a physical office within the United States” and is “authorized by a State and subject to supervision by the insurance commissioner or a similar official or agency of a State.” *Id.*

<sup>41</sup> FinCEN notes that the per the SEC’s website, there are currently only 38 such agencies in the United States altogether. Final Rule, Final Rule, 87 Fed. Reg. at 59,566.

14. A domestic governmental authority.<sup>42</sup>
15. Any public accounting firm registered in accordance with § 102 of the Sarbanes-Oxley Act of 2002.<sup>43</sup>
16. Any regulated public utility that provides telecommunications services, electrical power, natural gas or water and sewer services within the United States.<sup>44</sup>
17. Any financial market utility designated by the Financial Stability Oversight Council under section 804 of the Payment, Clearing, and Settlement Supervision Act of 2010.<sup>45</sup>
18. A tax exempt entity.<sup>46</sup>
19. An entity assisting a tax exempt entity.<sup>47</sup>
20. An inactive business.<sup>48</sup>
21. Any “pooled investment vehicle” that is operated or advised by a (i) bank, (ii) Federal or State credit union, (iii) SEC-registered broker-dealer, (iv) SEC registered investment company or investment adviser or (v) venture capital fund adviser.<sup>49</sup>

The Final Rule defines a “pooled investment vehicle” to mean (i) any investment company, as defined in section 3(a) of the 40 Act;<sup>50</sup> or (ii) any company that (a) would be an investment company under that section but for the exclusion provided from that definition by paragraph (1) or (7) of section 3(c) of the 40 Act, and (b) is identified by its legal name by the applicable investment adviser in its Form ADV (or successor form) filed with the SEC or will be so identified in the next annual updating amendment to Form ADV required to be filed by the applicable investment adviser pursuant to rule 204–1 under the

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<sup>42</sup> A “governmental authority” means any entity (i) “established under the laws of the United States, an Indian tribe, a State, or a political subdivision of a State, or under an interstate compact between two or more States” that (ii) “[e]xercises governmental authority on behalf of the United States or any such Indian tribe, State, or political subdivision.” Final Rule, Final Rule, 87 Fed. Reg. at 59,593.

<sup>43</sup> 15 U.S.C. 7212. Final Rule, Final Rule, 87 Fed. Reg. at 59,594.

<sup>44</sup> As defined in 26 U.S.C. § 7701(a)(33)(A). *Id.*

<sup>45</sup> 12 U.S.C. § 5463. *Id.*

<sup>46</sup> A tax exempt entity is defined to mean an organization that is (i) described in § 501(c) of the Internal Revenue Code of 1986 (“Code”) (determined without regard to § 508(a) of the Code) and exempt from tax under § 501(a) of the Code; or (ii) a political organization as defined in § 527(e)(1) of the Code that is exempt from tax under § 527(a) of the Code; or (iii) a trust described in paragraphs (1) or (2) of § 4947(a) of the Code. *See* Final Rule, 87 Fed. Reg. at 59,594. Recognizing public comments FinCEN received raising concerns about potential exploitation of this exemption, FinCEN intends to monitor its application and “assess the need for further guidance, notices, or FAQs accordingly.” Final Rule, 87 Fed. Reg. at 59,541-42.

<sup>47</sup> An “entity assisting a tax-exempt entity” is an entity that “(i) operates exclusively to provide financial assistance to, or hold governance rights over, a tax-exempt entity, (ii) is a U.S. person, (iii) is beneficially owned or controlled exclusively by one or more U.S. persons that are U.S. citizens or lawfully admitted for permanent residence, and (iv) derives at least a majority of its funding or revenue from one or more United States persons that are United States citizens or lawfully admitted for permanent residence.” Final Rule, 87 Fed. Reg. at 59,542.

<sup>48</sup> To be exempt from the CTA’s reporting requirements as an “inactive entity,” a business must (i) have been in existence on or before Jan. 1, 2020 (the date of enactment of the CTA); (ii) not be engaged in active business; (iii) not be owned by a foreign person, whether directly or indirectly, wholly or partially; (iv) not have “experienced any change in ownership in the preceding 12-month period;” (v) not have “sent or received any funds in an amount greater than \$1,000, either directly or through any financial account in which the entity or any affiliate of the entity had an interest, in the preceding 12-month period;” and (vi) not otherwise hold any kind or type of assets, whether in the United States or abroad, including any ownership interest in any corporation, limited liability company or other similar entity. Final Rule, 87 Fed. Reg. at 59,545.

<sup>49</sup> *Id.*; *see also* CTA § 6403 (adding 31 USC § 5336(a)(11)(A)(xviii)).

<sup>50</sup> 15 USC § 80a-3(a).

Advisers Act.<sup>51</sup> Such pooled investment vehicles are not required to file a BOI Report with FinCEN between their formation date and the date they are identified by a legal name by their applicable investment adviser in Form ADV (or successor form) filed with the SEC.<sup>52</sup>

22. Larger operating companies that (i) “employ[] more than 20 employees on a full-time basis in the United States”; (ii) “filed in the previous year Federal income tax returns in the United States demonstrating more than \$5,000,000 in gross receipts or sales in the aggregate,” including the receipts or sales of other entities owned by the entity and through which the entity operates; and have (iii) “an operating presence at a physical office within the United States.”<sup>53</sup>

23. Subsidiaries of certain exempt entities, i.e., entities whose ownership interests are “controlled or wholly owned, directly or indirectly, by one or more” exempt entities other than money services businesses, pooled investment vehicles, entities assisting a tax - exempt entity, or inactive entities, are also exempt from BOI reporting requirements.<sup>54</sup>

## **9. Which Exemptions From the Definition of Reporting Company Apply to Investment Funds and Investment Advisers?**

The Final Rule exempts from the definition of “Reporting Company” many private investment funds and their advisers, relieving the majority of funds and advisers from reporting their beneficial ownership information to FinCEN. More specifically, the Final Rule exempts from the definition of Reporting Company: mutual funds; SEC registered investment advisers; venture capital fund advisers (as defined under Rule 203(l)-1); and pooled investment vehicles formed under the laws of the United States that are operated or advised by a bank, credit union, broker-dealer, SEC-registered investment adviser or venture capital fund adviser. Each of these entities is not required to submit a BOI Report to FinCEN.

However, other investment advisers that are not registered with the SEC, such as state-registered investment advisers and advisers relying on the “private fund adviser exemption,” available to advisers that solely advise private funds if the adviser has assets under management in the United States of less than \$150 million (under Rule 203(m)-1), are not included in the list of exemptions from the definition of Reporting Company. Neither are the pooled investment vehicles operated and advised by such advisers. Such advisers, and the pooled investment vehicles they manage, will thus be required to file BOI Reports with FinCEN unless another exemption to the definition of Reporting Company applies. For example, FinCEN provides that an investment adviser that is not otherwise exempt may be able to rely on the exemption available for an entity that employs more than 20 employees on a full-time basis in the United States, has more than \$5 million in gross receipts or sales in the aggregate, and maintains a physical office presence within the United States.<sup>55</sup>

Because private investment fund managers often advise numerous funds and special purpose vehicles, both foreign and domestic, it is important for them to become familiar with the Final Rule’s requirements and incorporate any applicable reporting obligations into their compliance functions.

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<sup>51</sup> Final Rule, 87 Fed. Reg. at 59,596.

<sup>52</sup> *Id.* at 59,544.

<sup>53</sup> *Id.* at 59,594.

<sup>54</sup> *Id.*

<sup>55</sup> See Final Rule, 87 Fed. Reg. at 59,584.



## 10. When Must Reporting Companies File BOI Reports With FinCEN?

Reporting Companies formed or registered before Jan. 1, 2024 will have one year (until Jan. 1, 2025) to file their initial reports, whereas Reporting Companies formed or registered after Jan. 1, 2024, will have 30 days after receiving actual notice of their formation or registration to file their initial reports. Thereafter, Reporting Companies will have 30 days to report any changes to the BOI provided in their previously-filed reports. Reporting Companies will further be required to correct any inaccuracies in their BOI Reports within 30 days of becoming aware of or having reason to know of any inaccurate information included in such Reporting Companies' earlier BOI Reports.<sup>56</sup>

These timing provisions differ slightly from those initially proposed by FinCEN. FinCEN had originally proposed a 14-day window for newly-qualified Reporting Companies to file an initial report and for Reporting Companies to correct information included in a previous report. FinCEN extended this time period in the Final Rule to 30 days in response to public comments.<sup>57</sup>

## 11. What Are the Penalties for Non-Compliance With the Final Rule's Requirements?

The Final Rule sets penalties for failing to report or reporting inaccurate or incomplete information. Any person who (i) willfully provides, or attempts to provide, false or fraudulent beneficial ownership information, including a false or fraudulent identifying photograph or document; or (ii) willfully fails to report, complete or update beneficial ownership information (a) shall be liable for a civil penalty of not more than \$500 for each day that the violation continues or has not been remedied and (b) may be fined not more than \$10,000, imprisoned for not more than two years, or both.<sup>58</sup> The Final Rule clarifies that this applies to individuals, including Beneficial Owners, as well as Reporting Companies. However, there is a safe harbor if a report that contains inaccurate information is voluntarily corrected within 90 days so long as the inaccurate report was not submitted to evade the reporting requirements or with actual knowledge of its inaccuracy.<sup>59</sup>

Lastly, with respect to compliance, the preamble to the Final Rule indicates that "FinCEN intends to prioritize education and outreach to ensure that all reporting companies and individuals are aware of and on notice regarding their reporting obligations."<sup>60</sup> FinCEN notes that the effective date of Jan. 1, 2024 and the one-year compliance period essentially give existing reporting companies over two years from the publication of this rule to prepare to come into compliance with their reporting obligations. FinCEN will take into consideration the request to add examples of reporting violations in any future guidance or Frequently Asked Questions issued by FinCEN.

## 12. What Are FinCEN's Next Steps in Implementing the CTA?

The Final Rule is one of three FinCEN rulemakings planned to implement the CTA. FinCEN will engage in two additional rulemakings to (i) establish who is permitted to access BOI Reports filed with FinCEN, for what purposes BOI Reports can be accessed and what safeguards will be put in place to protect and secure BOI; and (ii) revise FinCEN's CDD rule to align with the Final Rule. FinCEN states that it is

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<sup>56</sup> See Fact Sheet, *supra*.

<sup>57</sup> See Final Rule, 87 Fed. Reg. at 59,560.

<sup>58</sup> Final Rule, 87 Fed. Reg. at 59,596; see also CTA § 6403 (adding 31 USC § 5336(h)).

<sup>59</sup> Final Rule, 87 Fed. Reg. at 59,513; see also CTA § 6403 (adding 31 USC § 5336(h)(4)(3)(C)(i)).

<sup>60</sup> Final Rule, 87 Fed. Reg. at 59,546.

continuing to “develop the infrastructure to administer these requirements, including the information technology system that will be used to store [BOI] in accordance with the strict security and confidentiality requirements of the CTA.”<sup>61</sup>

## Conclusion

The Final Rule brings the United States AML regulatory framework one step closer to transparency regarding the beneficial ownership of entities operating within the United States financial system. The centralized BOI database to be created pursuant to the CTA, and the information required to be reported pursuant to the Final Rule, will provide United States financial regulators, law enforcement and financial institutions with additional information to combat financial crime, as contemplated by Congress and the CTA.

In preparation for filing BOI Reports in line with the Final Rule’s requirements, Reporting Companies should ensure that they are in possession of any information required to be included in such BOI Reports prior to the Jan. 1, 2025 filing deadline and that each Reporting Company has policies and procedures in place to ensure its ongoing compliance with FinCEN’s requirements.

If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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<sup>61</sup> Fact Sheet, *supra*.