

Client Alert

FinCEN Seeks Comment on Beneficial Ownership Reporting Requirements

April 16, 2021

On April 5, 2021, the Financial Crimes Enforcement Network (FinCEN) published an [Advance Notice of Proposed Rulemaking](#) (ANPRM) in the Federal Register seeking public comment on 48 questions with respect to the implementation of the beneficial ownership reporting requirements in the Corporate Transparency Act (CTA) and the implementation of the related database maintenance use and disclosure provisions. The deadline for comment is May 5, 2021.

As we previously [reported](#), the CTA was enacted on January 1, 2021 as part of the 2021 National Defense Authorization Act and under the scope of the Anti-Money Laundering Act of 2020, to combat money laundering and the financing of terrorism and related crimes, including by discouraging the use of shell companies by money launderers and other illicit actors. The CTA imposes requirements on reporting companies—corporations, LLCs and other similar entities—to submit personal identifying information about their beneficial owners and applicants. FinCEN must promulgate rules implementing the reporting requirements by January 1, 2022.

FinCEN seeks input on the procedures by which companies will report beneficial ownership information and on FinCEN's maintenance and disclosure of reported information. The 48 questions posed by FinCEN fall into the following five categories: 1) definitions, 2) reporting of beneficial ownership information, 3) FinCEN identifier, 4) security and use of beneficial ownership and applicant information," and 5) cost, process, outreach and partnership.

The key areas of inquiry in the ANPRM include:

1. FinCEN seeks input on the definitions of key terms in the CTA, including:

"Other Similar Entity" – The CTA's beneficial ownership requirements apply only to "reporting companies" which are defined as "a corporation, limited liability company, or other similar entity" formed by the filing of a document with a secretary of state or a similar office and registered to do business in the United States. Certain categories of entities are exempted. FinCEN seeks comment on what kind of entities other than corporations and LLCs should be considered subject to reporting requirements.

"Beneficial Owner" and "Substantial Control" –TheCTA defines "beneficial owner" as "an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise" either "exercises substantial control over the entity" or "owns or controls not less than 25 percent of the ownership interests of the entity." FinCEN seeks comment on whether the definition and specified

exceptions are sufficiently clear, to what extent the definition should comport with the “beneficial owner” definition under the consumer due diligence (CDD) rule’s definition or the standards established under 17 CFR § 240.13d-3 under the Securities Exchange Act of 1934, and whether FinCEN should define the terms “own,” “control” or “substantial control.”

Exemptions to “Reporting Company” – The CTA authorizes the Secretary of the Treasury, with the concurrence of the Attorney General and the Secretary of Homeland Security, to exempt any other entity or class of entities by regulation upon making determinations as to whether it would serve the public interest and further enforcement efforts under the CTA. FinCEN seeks comment on whether the current exemptions are sufficiently clear, and whether FinCEN should consider additional categories of entities for exemption, such as trusts or special purpose vehicles.

2. FinCEN also seeks comment on the scope of information that should be required from reporting companies, the mechanics for filing the information, the burdens that reporting requirements might impose, and notice requirements. At present, the CTA requires a reporting company to disclose their (a) full legal name, (b) date of birth, (c) residential or business street address, and (d) unique identifying for each beneficial owner and applicant. FinCEN asks whether and when additional disclosures should be required for corporate affiliates, parents, and subsidiaries; whether and to what extent FinCEN should require a reporting company to provide information about the nature of a reporting company’s relationship to its beneficial owners; how to ensure accuracy of disclosures, including whether and certifications should be required; and how to mitigate associated costs and burdens. Reporting companies should pay particular attention to potential new costs and burdens, and financial institutions should consider the benefits of access to additional information for CDD.
3. FinCEN requests comment on the form of FinCEN identifiers, the process for obtaining them, and how best to protect an entity’s privacy interests.
4. FinCEN requests input on how financial institutions should obtain beneficial owner information for CDD, including procedures for authenticating law enforcement requests for beneficial ownership information; security and privacy measures to protect this information and limit its use to authorized purposes, and whether additional penalties for violations are needed; and whether financial institutions should be permitted to use the beneficial ownership information for purposes beyond CDD.
5. Finally, FinCEN seeks input on the potential costs that the CTA may impose on small businesses and state, local, and tribal governments, and how best to minimize the burden. FinCEN also solicits input on how “to ensure the efficiency and effectiveness of the process by which financial institutions could potentially access the beneficial ownership information held by FinCEN.”

This request for comments is the first of what is expected to be many as the Treasury Department and FinCEN implement the broad sweeping provisions of the CTA and the AMLA. The ANPRM notes that the CTA’s mandate that the final rule on CDD requirements for financial institutions be revised will be the subject of a separate rulemaking, about which the public will receive notice and opportunity to comment. Those affected by the

requirements prescribed in the CTA – including both exempted and non-exempted entities and financial institutions – should consider submitting comments. For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Caroline E. Brown

Partner – Washington, D.C.

Phone: +1.202.624.2509

Email: cbrown@crowell.com

Carlton Greene

Partner – Washington, D.C.

Phone: +1.202.624.2818

Email: cgreene@crowell.com

Rebecca Monck Ricigliano

Partner – New York

Phone: +1.212.895.4268

Email: rricigliano@crowell.com

Laura Schwartz

Counsel – Los Angeles

Phone: +1.213.443.5581

Email: lschwartz@crowell.com

Nicole Sayegh Succar

Counsel – New York

Phone: +1.212.803.4031

Email: nsuccar@crowell.com

Allison Skager

Associate – Los Angeles

Phone: +1.213.310.7957

Email: askager@crowell.com