

## **FinCEN Issues Final Rule for Beneficial Ownership Information Reporting Requirements Under the Corporate Transparency Act**

### **Introduction**

On September 29, 2022, the Financial Crimes Enforcement Network (“[FinCEN](#)”) issued a final rule (the “[Final Rule](#)”) implementing the beneficial ownership and company applicant information reporting requirements set forth in the Corporate Transparency Act (“[CTA](#)”).<sup>i</sup> The Final Rule is intended to “protect the U.S. financial system by making it more difficult for bad actors to conceal their financial activities through entities with opaque ownership structures.”

The Final Rule largely adopts the provisions of the Notice of Proposed Rulemaking published by FinCEN on December 8, 2021 (the “[Proposed Rule](#)”) (see our [prior alert](#)).

The Final Rule requires certain domestic and foreign entities that do not fit into enumerated exemptions to file reports with FinCEN that include:

- (1) basic information about the reporting companies;
- (2) certain identifying information about its beneficial owners (the individuals who ultimately own or control the entities); and
- (3) company applicants (those who file to form the entities).<sup>ii</sup>

**These reports will need to be filed by companies formed after January 1, 2024 within 30 days of formation and by January 1, 2025 for companies existing before January 1, 2024.** FinCEN will maintain the reportable information in a secure, non-public database, and, given the sensitive nature of the information being reported, is authorized to disclose such information only to a statutorily defined group of governmental authorities and financial institutions in limited circumstances.<sup>iii</sup>

This alert summarizes the key clarifications and modifications to the Proposed Rule that are formalized in the Final Rule and describes (1) which entities are subject to the reporting requirements, (2) what information is required to be reported, and (3) the reporting timeframes in which entities are required to submit reports.

### **Which entities must report?**

***Reporting Companies*** – The following entities are subject to the CTA’s reporting requirements:<sup>iv</sup>

- “Domestic Reporting Companies,” which are corporations, limited liability companies, and entities created by a filing with a secretary of state or similar office; and
- “Foreign Reporting Companies,” which are corporations, limited liability companies, and other entities formed under the law of a foreign country and registered to do business in a U.S. State or formed under a tribal jurisdiction.

***Exemptions*** – The Final Rule also adopted the 23 exemptions set forth in the CTA and Proposed Rule (discussed [here](#)) without adding any additional exemptions, though it made minor modifications to these

provisions to improve clarity.<sup>v</sup> FinCEN declined to implement a process for entities to obtain exemption certificates.<sup>vi</sup>

### **What information must be reported?**

The Final Rule requires reporting companies to submit identifying information about the companies themselves, as well as specific information identifying their “beneficial owners” and “company applicants.”

***Company Identifying Information*** – To ensure reporting companies can be identified, the Final Rule requires each reporting company to report:

- (1) ***Name***: its full legal name;
- (2) ***D/B/A***: any trade or ‘doing business as’ (d/b/a) name (regardless of whether the trade or d/b/a names are formally registered);
- (3) ***Address***: its business street address, which is its principal place of business for United States companies and the primary location in the United States for non-United States companies (which in each case cannot be a P.O. box, the address of a company formation agent or of another third party);
- (4) ***Jurisdiction***: its jurisdiction of formation for both domestic and foreign companies and, in addition, the jurisdiction of first registration for a foreign company; and
- (5) ***Identification Number***: its Internal Revenue Service taxpayer identification number (“**TIN**”) or a tax identification number for foreign companies issued by a foreign jurisdiction.<sup>vii</sup>

***Information Identifying “Beneficial Owners” and “Company Applicants”*** – For each beneficial owner and company applicant, each company must report:

(1) the person’s full legal name, date of birth and address, and current street address (business address for a company applicant that formed the entity in the course of its business, and residential street address for all other individuals); and

(2) a unique identifying number from an acceptable identification document (e.g., passport, state identification card, or driver’s license) together with an image of such document with the individual’s photograph or a FinCEN ID.<sup>viii</sup>

***“Beneficial Owner”*** – A “beneficial owner” of a reporting company is any individual who, directly or indirectly, either (i) exercises substantial control over such reporting company, or (ii) owns or controls at least 25% of the ownership interests of such reporting company.<sup>ix</sup> Reporting companies are expected to always identify at least one non-excluded beneficial owner who meets the “substantial control” component of the definition, even if no individual meets the ownership interest component.<sup>x</sup>

- ***Substantial Control*** – The Final Rule sets forth that an individual exercises substantial control over a reporting company if the individual: (A) serves as a “senior officer” of the reporting company; (B) has authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body); (C) directs, determines, or has substantial influence over important decisions made by the reporting company, or (D) has any other form of substantial control over the reporting company.<sup>xi</sup>

The Final Rule makes clear that an officer’s title is not dispositive in the determination of whether such officer is “senior”—an individual is considered a senior officer if such person exercises the authority of or performs the functions of a senior officer.<sup>xii</sup> It also modifies the language of (C) above to clarify that it applies to those with influence over important decisions

of a reporting company, as opposed to the more ambiguous proposed standard of “important matters affecting” the company.<sup>xiii</sup>

- **Ownership Interests** – The Final Rule sets forth that an individual may own or control ownership interests of a reporting company through any “contract, arrangement, understanding, relationship or otherwise,” including: (A) joint ownership of an undivided interest in such ownership interest; (B) through another individual acting as a nominee, intermediary, custodian, or agent; (C) with regard to a trust (or similar) arrangement that holds such ownership interest, a trustee with the authority to dispose of its assets, or a beneficiary who (i) is the sole permissible recipient of its income and principal or (ii) has the right to withdraw, or demand a distribution of, substantially all of its assets; or (D) through ownership or control of one or more intermediary entities (or the ownership interests of any such entities), that separately or collectively own or control ownership interests of the reporting company.<sup>xiv</sup> It further provides specific guidance for calculating ownership interests in a reporting company, clarifying that an individual’s total ownership interests is compared to the outstanding ownership interests of the company, and that options and similar interests are treated as though exercised.<sup>xv</sup>

In defining ownership interests, the Final Rule revised the Proposed Rule to focus solely on the types of arrangements conveying ownership interests (as opposed to reference to specific legal entities) to limit the potential for evasion.<sup>xvi</sup> It also clarified: (A) that the listed forms of ownership are independent of voting power<sup>xvii</sup> and (B) that companies will not be expected to report ownership of options or derivatives created by third parties of which the reporting company is not aware.

- **Exemptions** – The Final Rule adopted the five proposed exemptions to FinCEN’s definition of beneficial owner (discussed [here](#)), clarifying (i) with respect to the exemption for an employee whose beneficial owner status derives solely from such person’s employment status, that senior officers otherwise exercising substantial control are not exempted thereby; and (ii) with respect to the exemption for a creditor of a reporting company qualifying as a beneficial owner solely through its right to payment of a predetermined sum of debt, that such a creditor qualifies for the exemption based on its entitlement to payment of indebtedness, regardless of whether the debt is secured.<sup>xviii</sup>

**“Company Applicant”** – The Final Rule clarifies that a “company applicant” (i) for a domestic reporting company is the individual who directly files the document that creates the entity, (ii) for a foreign reporting company is the individual who directly files the document that first registers the entity in the United States, and (iii) for both domestic and foreign reporting companies, is the individual who is primarily responsible for directing or controlling such filing if more than one individual is involved in the filing.<sup>xix</sup> The addition of (iii) was intended to ensure that the party actually responsible for the entity’s creation is reported.<sup>xx</sup>

**Certification** – The Final Rule adopted the certification requirement in the Proposed Rule that each person filing a report must certify that the reported information is “true, correct, and complete” on behalf of the reporting company.

## **When must reports be filed?**

### ***Initial Reports***

**Newly Created Entities** – For newly created entities, the Final Rule modified the Proposed Rule to require their initial reports be filed within 30 days (as opposed to 14 days) of the earlier of (i) the company receiving notice its creation or registration has become effective and (ii) the secretary of state or similar office first providing public notice that the domestic company has been created or the foreign company has been registered.<sup>xxi</sup>

**Existing Entities** – For existing entities, the Final Rule adopted the reporting timeframe proposed by the Proposed Rule without any changes, requiring they submit their initial report by January 1, 2025.<sup>xxii</sup> The Final Rule does, however, remove the requirement for existing entities to submit company applicant information to address the burden of identifying such information. Existing entities that are exempt as of January 1, 2024, but cease to be exempt thereafter will be required to file by the later of (i) January 1, 2025 and (ii) 30 days from when they cease to be exempt.<sup>xxiii</sup>

**Updated and Corrected Reports** – The Final Rule extended the 14 calendar-day reporting timeframe for corrections proposed by the Proposed Rule, requiring companies to file corrected reports within 30 calendar days after they become aware or have reason to become aware that any required information reported in previous reports is inaccurate.<sup>xxiv</sup>

### **Personal Liability**

The Proposed Rule provided that an individual could be personally liable for reporting violations if such person directed or controlled another person with respect to a failure to report, or was in “substantial control” of a reporting company that failed to report. The Final Rule modifies these provisions to clarify that an individual can be liable where such person willfully provides false or fraudulent information or willfully fails to report complete or updated information.<sup>xxv</sup> Violating these rules can result in both civil and criminal penalties.

### **Conclusion**

These new reporting obligations go into effect on January 1, 2024 and will require an investment of time and resources from key officers of new and existing companies. We recommend that companies begin compiling and confirming the information required to be reported as soon as possible. If you have any questions regarding specific requirements in the Final Rule, please contact one of the attorneys listed below or your regular Patterson Belknap contact.

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<sup>i</sup> *Beneficial Ownership Information Reporting Rule Fact Sheet*, September 29, 2022, <https://www.fincen.gov/beneficial-ownership-information-reporting-rule-fact-sheet>

<sup>ii</sup> *Beneficial Ownership Information Reporting Requirements*, 87 Fed. Reg. 59498 (Sept. 30, 2022).

<sup>iii</sup> *Id.*, at 59507.

<sup>iv</sup> *Id.*, at 59593.

<sup>v</sup> *Id.*, at 59539.

<sup>vi</sup> *Id.*, at 59539.

<sup>vii</sup> *Id.*, at 59515.

<sup>viii</sup> *Id.*, at 59524.

<sup>ix</sup> *Id.*, at 59525.

<sup>x</sup> *Id.*

<sup>xi</sup> *Id.*, at 59594-95.

<sup>xii</sup> *Id.*, at 59526.

<sup>xiii</sup> *Id.*

<sup>xiv</sup> *Id.*

<sup>xv</sup> *Id.*, at 59532-33.

<sup>xvi</sup> *Id.*

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- xvii *Id.*  
xviii *Id.*, at 59535.  
xix *Id.*, at 59596.  
xx *Id.*, at 59536.  
xxi *Id.*, at 59509.  
xxii *Id.*, at 59509.  
xxiii *Id.*, at 59511.  
xxiv *Id.*, at 59512.  
xxv *Id.*, at 59545-46.

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

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