

## FinCEN Seeks Comments on Beneficial Ownership Registry

Litigation Alert

**04.15.2021**

The Financial Crimes Enforcement Network (FinCEN) last week issued an Advanced Notice of Proposed Rulemaking (ANPRM) to solicit public comment on questions pertinent to the implementation of the Corporate Transparency Act (CTA). The ANPRM is the start of the notice-and-comment rulemaking process and provides a formal invitation for all potentially affected persons and entities to participate in shaping the proposed rule. Once promulgated, the implementing regulations for the CTA could potentially affect all U.S. companies, even those that are exempt from reporting beneficial ownership information.

The CTA, which was passed on January 1, 2021 as part of the National Defense Authorization Act (NDAA), established a registry of beneficial ownership information for U.S. companies and directed Treasury to promulgate regulations to implement that registry. Under the CTA, "reporting companies" must report to FinCEN the identity and personal identifying information of each beneficial owner, which is generally someone who exercises "substantial control" over the company or owns more than 25 percent of the entity (with some exceptions as discussed below). A reporting company is broadly defined as any corporation, limited liability company, or similar entity created under the laws of a state or registered to do business in the United States, but the CTA includes 23 exceptions, such as issuers and companies with employees, office space, and revenue in the United States.

Under the CTA, FinCEN is required to promulgate regulations implementing the beneficial ownership registry within one year. FinCEN kicked off that process last week with the [ANPRM](#). FinCEN seeks comments generally on all aspects of the CTA and specifically regarding 48 questions relating to the implementation of the beneficial ownership registry. We can assist with the drafting of comments responsive to FinCEN's request.

If your company is formed in the United States or registered in the United States, the future rulemaking could impact your reporting obligations, even if your company falls under one of the exceptions. FinCEN is seeking comments not only on the procedures for submitting beneficial ownership information to FinCEN, but also on how exemptions from reporting requirements should be determined and what information exempt companies should have to provide to qualify for exemption.

Other noteworthy aspects of the FinCEN ANPRM include:

- **Corporate Affiliates:** The ANPRM asks what information FinCEN should require a reporting company to provide about its corporate affiliates, parents, and subsidiaries, and whether that information should be required as a matter of course or only when that information has a bearing on the reporting company's ultimate beneficial owners. This question has the potential to affect entities that are exempt from reporting.
- **Trusts:** FinCEN asks whether trusts or special purpose vehicles that are created by filing a document with a secretary of state should be included or excluded from the reporting requirements. FinCEN also seeks comment on whether the exemptions for beneficial owners, including an exemption for someone "whose only interest . . . is through a right of inheritance," is sufficiently clear.
- **Individual Liability:** The CTA includes a safe harbor provision for individuals who voluntarily and promptly seek to correct inaccurate information, in accordance with the implementing regulation. FinCEN is seeking comment on how the implementing regulations should define the scope of the safe harbor, including for example whether it should apply to a complete omission of a beneficial owner or just to clerical errors. The scope of this aspect of the rule will be critical to the potential liability of individuals required to report beneficial ownership information. Relatedly, FinCEN seeks comments on whether the reporting companies should be required to certify the accuracy of their information when they submit it and whether the information should be verified.

These are just a few of the critical issues being considered by FinCEN at this time. The deadline to submit written comments to the ANPRM is **Wednesday, May 5**. It is not too early to think about how the regulatory requirements associated with the beneficial ownership registry could affect your company.

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