

Issue Update

Treasury's Financial Crimes Enforcement Network (FinCEN) has now completed two of the three rulemakings by which it intends to implement the Corporate Transparency Act (CTA), intended to ensure that the United States is not a haven for dirty money.

Reporting rule. FinCEN's reporting rule, as amended, became effective on January 1, 2024. It created a new regulatory regime requiring over 32 million U.S. small businesses —bank customers— to report directly to FinCEN certain information about the company itself; its “beneficial owners” (those who either directly or indirectly: own $\geq 25\%$, or exercise “substantial control” over the company); and for some companies, information about their “company applicants.” The deadline for reporting varies based on when the business was created or registered. Although implementation continues to pose significant challenges, Treasury reported that in the first week of January, over 100,000 businesses registered.

Access rule. FinCEN finalized the access rule in December 2023, which governs the protection of, access to, and use of beneficial ownership information reported to FinCEN. Although much remains to be determined as FinCEN continues its work, this rule substantially improves upon FinCEN's initial proposal, as requested by ABA and all state banking associations. Under this rule, banks will eventually be permitted to seek access to information reported to FinCEN and use it for a wide range of BSA/AML and sanctions compliance purposes. In addition to this important use expansion, also in response to our advocacy, FinCEN will permit banks important flexibility in sharing the information within their enterprises, as well as how and when banks gain the required customer consent. FinCEN and the banking agencies have confirmed this rule does not create any new regulatory requirements or supervisory expectations for banks or require a change in any bank's existing customer due diligence (CDD) compliance procedures.

Upcoming revisions to the CDD rule. The CTA was intended to fight the use of shell companies to commit crimes, while also reducing burden on banks. Now that FinCEN is receiving beneficial ownership information directly from U.S. small businesses, FinCEN must revise the current CDD rule to reduce duplicative and burdensome requirements on banks. FinCEN has projected it intends to publish a proposed revision in June 2024.

Why it Matters

More education is necessary. Despite FinCEN's ongoing education efforts, many of the over 32 million U.S. small businesses with new reporting obligations are still unaware of FinCEN, as well as their new obligations, but can still face significant civil and even criminal penalties for non-compliance. FinCEN must do more to educate the public about this new rule.

Banks' CDD obligations must be revised and clarified. Banks are in the dark about their new possible CDD obligations, when they will take effect, and what changes to existing CDD compliance policies and procedures will be necessary. Much remains to be determined regarding how the access rule will work, and what banks will be allowed, and required, to do. Furthermore, banks are concerned about relying on information that FinCEN does not yet have a plan to verify.

Beneficial Ownership Update

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Duplicative, burdensome, and confusing reporting should be eliminated. Finally, as separate regulatory regimes, there are important differences between the CDD rule applying to banks, and the reporting rule, applying to small businesses. For example, under the CDD rule, a legal entity customer has between 1-5 beneficial owners. Under the reporting rule, there is no numerical limit for beneficial owners of reporting companies. Banks have reported customer confusion as to how and why customers must report “beneficial ownership” information to FinCEN as well as provide similar, but not the same, “beneficial ownership” information to their bank.

Banks need time-sensitive guidance from FinCEN. Very significant interpretative questions remain for FinCEN to answer, and banks are unclear about obligations that may arise from reporting rule requirements. For example, although banks are exempted from the definition of “reporting companies,” many banks assume ownership or control roles in reporting companies by virtue of their trust-related work. To the extent that banks, as trustees, are considered beneficial owners of such reporting companies, it remains unclear how that circumstance aligns with the reporting rule’s general assumption that beneficial owners are natural persons with residential street addresses. FinCEN has also not yet provided time-sensitive guidance necessary to clarify who or what information must be reported for companies that are formed in 2024 and have only 90 days to register.

Recommended Action Item

Raise awareness with Congress. The CTA is novel and AML/CFT policy is complex; share the CTA-related challenges banks and customers are facing. Congress plays an important oversight function, and this feedback will help inform legislative and policy solutions to address implementation challenges.