

## What To Expect From FinCEN's Beneficial Ownership Rules

By **Daniel Tehrani, Robin Nunn and Bryan Woll** (April 20, 2021, 6:33 PM EDT)

There has been a recent flurry of activity by the U.S. Department of the Treasury in connection with the Corporate Transparency Act, a key component of the Anti-Money Laundering Act of 2020.

In a major new anti-fraud initiative, the Financial Crimes Enforcement Network issued an advance notice of proposed rulemaking, or ANPRM, seeking comment on specific questions relating to the implementation of the CTA's requirements for reporting beneficial ownership information and the maintenance and disclosure of that information.[1]

Interested parties include regulated entities; state, local and tribal governments; law enforcement; and federal regulatory agencies. The goal of the initiative is to establish standards to make reliable information on beneficial ownership available to law enforcement and financial institutions for use in combating money laundering. Comments are due on May 5.

The ANPRM itself does not make rules, nor does it propose specific rules for public comment. Rather, it is an information-gathering mechanism designed to seek comment on the ways in which FinCEN should exercise its delegated authority to implement the CTA.

Nevertheless, by reviewing the questions FinCEN chose to ask, it is possible to gain insight on FinCEN's current thinking on its proposed rulemaking.[2] In that regard, most of FinCEN's questions are straightforward and seek comment on the various ways in which the CTA's beneficial ownership reporting requirement could be implemented, and whether further clarification of statutory terms is necessary.

Certain of FinCEN's questions, however, suggest that FinCEN is considering imposing regulatory requirements that may not necessarily have been expected. For example, FinCEN appears to be contemplating a requirement that entities exempted from the beneficial ownership requirement be required affirmatively to establish their exempt status, potentially on an ongoing basis.

FinCEN also appears to be considering requiring nonexempt reporting companies to provide beneficial



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ownership information to FinCEN beyond the information specifically called for by the express terms of the CTA. To the extent regulations are implemented enacting such requirements, they will necessarily impose additional burdens on both reporting and exempt entities alike.

## **Background**

The CTA, enacted by Congress on Jan. 1, established a reporting regime for the beneficial owners of corporations and limited liability companies with the aim of making reliable information on beneficial ownership available to law enforcement and financial institutions for use in combating money laundering.[3]

Subject to certain exceptions, these entities are required to report beneficial ownership information to FinCEN, which is authorized to disclose this information pursuant to proper requests from law enforcement or financial institutions, with customer consent, fulfilling their customer due diligence obligations.[4]

The CTA delegated to FinCEN substantial authority to implement the mechanics of the reporting and disclosure regime. In doing so, Congress gave FinCEN one year to promulgate implementing regulations (i.e., by Jan. 1, 2022).[5]

## **The Advance Notice of Proposed Rulemaking**

In issuing the ANPRM, FinCEN explained its understanding of the procedures, methods and standards that the CTA required FinCEN to develop by Jan. 1, 2022.[6]

Specifically, FinCEN noted that it intends to promulgate regulations:

- "[P]rescribing procedures and standards governing reporting of beneficial ownership information";
- "[S]pecifying the information required to be reported and the reporting method";
- "[S]pecifying the method for reporting changes in beneficial ownership"; and
- "[S]pecifying reporting requirements for exempt subsidiaries and exempt grandfathered entities that cease to be exempt." [7]

The ANPRM does not address modifications to the customer due diligence requirements of financial institutions, which are expected to be covered in separate rulemaking.

Accordingly, in order to implement those aspects of the CTA, FinCEN solicited input on nearly 50 specific questions covering the following topics.

## ***Definitions***

FinCEN seeks comments on various defined terms in the CTA, including:

- Whether entities other than corporations or limited liability companies (i.e., "other similar entities") should, or should not, be subject to reporting requirements;

- Whether the definition of "beneficial owner" should match the definition under the customer due diligence rule;
- Whether the terms "own," "control," or "substantial control" should be defined, and whether "reporting company" is sufficiently clear; and
- Whether it should include additional categorial exemptions, how any exemptions should be initially determined, and whether exempt entities should be required to make a periodic filing in support of their ongoing eligibility for exempt status.

### ***Reporting of Beneficial Ownership Information***

FinCEN also solicits input on the information that it should require from reporting companies, including whether information should be required as to the relationship between the company and its beneficial owners.[8]

FinCEN is also interested in whether it should require information "about the reporting company's corporate affiliates, parents, and subsidiaries as a matter of course" or only when pertinent to the beneficial ownership, and what information it should require concerning these affiliated entities.[9]

The ANPRM seeks comments on how and when reporting companies or individuals should update FinCEN upon a change in previously reported information (e.g., a change in substantial control), whether such requirements should differ depending on whether the company or individual holds a FinCEN identifier, and how the safe harbor for correcting previously reported inaccurate information should be applied.[10]

Similarly, FinCEN asks for input on how beneficial ownership information should be verified, including whether reporting companies should be required to document and/or certify the accuracy of their filings, and whether and how they should affirm the ongoing accuracy of that information over time.[11]

Other reporting topics include the type and number of methods for filing required information; the burdens to reporting companies and how FinCEN could reduce them while still providing useful information to law enforcement and financial institutions; and how federal, state and tribal governments should fulfill their duties under the CTA to provide notice to entities of their reporting obligations.[12]

### ***FinCEN Identifier***

FinCEN seeks comments on the format of the FinCEN identifier, its most likely uses, the process and requirements for an individual or entity to obtain a FinCEN identifier, and how FinCEN can ensure the uniqueness and security of identifiers and reduce the burden to financial institutions associated with complex ownership structures involving multiple FinCEN identifiers.[13]

### ***Security and Use of Beneficial Ownership and Applicant Information***

The ANPRM solicits input on how FinCEN should evaluate requests for beneficial ownership information from federal regulatory agencies and state, local, or tribal law enforcement, as well as the timing, scope and authorization of FinCEN's response to such requests from financial institutions.[14]

FinCEN also seeks comments on whether and how it should update these requestors if a reporting

company subsequently provides updated information, when it should disclose applicant information on similar terms as beneficial ownership information, and what privacy and security measures FinCEN should take with regard to beneficial ownership and applicant information.[15]

### ***Cost, Process, Outreach and Partnership***

Finally, the ANPRM requests comments on the potential costs that the CTA imposes on small businesses; the burdens it imposes on state, local, and tribal governments; and how FinCEN could minimize these costs and burdens.[16]

FinCEN also asks for input on its outreach to the small business community, financial institutions, "other business constituencies" and "civil society stakeholders" concerning the CTA implementation, and opportunities for partnership with state, local, and tribal governments, including the identification of beneficial owners through these governments' existing processes.[17]

### **Takeaways**

In many ways, the ANPRM covered topics that FinCEN was expected to address in its forthcoming implementing regulations. In particular, there is no question that Congress granted FinCEN discretion to define the scope of the reporting requirement — through the definition of "reporting company" or through the enumeration of additional exemptions — and left FinCEN responsible for fleshing out the mechanics for the reporting regime.

The ANPRM covers those expected topics. Similarly, the CTA clearly delegated to FinCEN the authority to prescribe the mechanisms by which beneficial ownership was to be reported. In the ANPRM, FinCEN is clearly seeking comment on those topics, for example, whether the information should be reported electronically, and how and if the information should be verified.

In other ways, however, FinCEN, through the ANPRM, indicated that it was contemplating implementing aspects of the reporting program that may have been unexpected. In particular, FinCEN appears to be contemplating the possibility of an affirmative process to establish an exemption from registration (Question 9 from the ANPRM).

This would effectively require all entities that satisfy the definition of a "reporting company" to register in some form with FinCEN, whether or not the entity is exempt. Nonexempt companies would be required to provide beneficial ownership information, and exempt companies would be required to provide the basis for their exempt status.

Furthermore, FinCEN is contemplating requiring companies to periodically confirm their exempt status. Given the CTA's, and the ANPRM's, focus on the burdens associated with the reporting regime — and the desire to minimize those burdens to the greatest extent possible — requiring exempt companies affirmatively to register, establish and regularly confirm their exemption seems surprising.

Furthermore, FinCEN also appears to be considering a requirement that nonexempt reporting companies must report more information than is set out in the CTA. The CTA is specific as to what information must be reported.

Under the heading "Required Information," the CTA lists the following information to be reported for each beneficial owner and applicant of a reporting company: (1) name; (2) date of birth; (3) current

residential or business address; and (4) a unique identifying number from an acceptable identification document or a FinCEN identifier.[18]

Unlike other aspects of the CTA, there is no catchall provision delegating to FinCEN the authority to expand this list. Nevertheless, FinCEN's questions indicate that it is contemplating requiring reporting entities to provide additional information about (1) the reporting entity itself; (2) the reporting entity's corporate affiliates, parents, and subsidiaries; and (3) the nature of the reporting entity's relationship to its beneficial owners (Questions 10-13).

For certain of these categories, the phrasing of the questions suggests that FinCEN has not decided on imposing such requirements. For example, Question 13 asks: "What information, if any, should FinCEN require a reporting company to provide about the nature of a reporting company's relationship to its beneficial owners?"

Other questions seem to assume that some additional information will be required. Question 11, for example, asks: "What information should FinCEN require a reporting company to provide about the reporting company's corporate affiliates, parents, and subsidiaries, particularly given that in some cases multiple companies can be layered on top of one another in complex ownership structures?"

And Question 12 asks whether information about corporate affiliates, parents and subsidiaries should be required as a matter of course, or only in certain circumstances. Thus, the questions seem to suggest that FinCEN has decided that, at least in some circumstances, reporting companies will be required to report information about corporate affiliates.

Requiring the reporting of this information would not only increase the reporting burden on reporting entities, but it is arguably beyond the scope of FinCEN's authority. Congress was specific about the information to be reported and did not authorize FinCEN to require more.

Although the reporting requirement of the CTA is prefaced by the phrase "[i]n accordance with regulations prescribed by the Secretary of the Treasury,"[19] that most clearly refers to the mechanism FinCEN establishes for reporting, not authority for FinCEN to expand the types of information it collects.

Similarly, although the CTA authorizes FinCEN to prescribe by regulation "procedures and standards governing" the beneficial ownership report,[20] that does not relate to the content of the report itself. Indeed, in the ANPRM, FinCEN distinguishes between "procedures and standards" and "the information required to be reported." [21]

Thus, there are legitimate arguments that FinCEN lacks the authority to require reporting entities to report more information to FinCEN than specified in the CTA.

## **Next Steps**

Although a final rule may be some time away, the ANPRM and ensuing rulemaking steps have implications for the entire financial ecosystem as a whole, as well as for the dynamics between law enforcement and financial institutions.

In issuing the ANPRM, FinCEN encouraged all interested parties to comment on the specific questions posed in the ANPRM as well as any other aspects of the implementation of the CTA.

Entities affected by the CTA — including exempted and nonexempted entities and financial institutions — should take FinCEN up on its invitation to participate in the development of this program.

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[1] Beneficial Ownership Information Reporting Requirements (ANPRM), 86 Fed. Reg. 17,557, 17,560 (Apr. 5, 2021) (to be codified at 31 C.F.R. pt. 1010).

[2] In that regard, Kenneth Blanco, who was the FinCEN Director at the time the ANPRM was issued, subsequently left FinCEN. See <https://www.fincen.gov/news/news-releases/fincen-announces-acting-director-and-new-deputy-director>. Michael Moser has been appointed Acting Director, effective April 9, 2021. Whether the leadership change affects the timing or the substance of the forthcoming regulations is an open question.

[3] See generally NDAA § 6403(a). The CTA defines "beneficial owner" as an individual who "exercises substantial control over the entity" or "owns or controls not less than 25 percent of the ownership interests of the entity." *Id.* (adding 31 U.S.C. § 5336(a)(3)).

[4] *Id.* (adding 31 U.S.C. § 5336(c)(2)(B)).

[5] *Id.* (adding 31 U.S.C. § 5336(b)(5)).

[6] *Id.*

[7] *Id.*

[8] ANPRM at 17,562.

[9] *Id.*

[10] *Id.* at 17,563. The FinCEN identifier is a unique identifying number to be issued by FinCEN (upon request) to a person or entity registering under the CTA, which can then be used for CTA reporting purposes. See NDAA § 6403(a) (adding 31 U.S.C. §§ 5336(a)(6), 5336(b)(3)).

[11] ANPRM at 17,563.

[12] *Id.* at 17,562-63.

[13] *Id.* at 17,563-64.

[14] *Id.* at 17,564.

[15] *Id.*

[16] Id.

[17] Id. at 17,564-65.

[18] NDAA § 6403(a) (adding 31 U.S.C. § 5336(b)(2)(A)).

[19] Id.

[20] Id. (adding 31 U.S.C. 5336(b)(4)(A)).

[21] ANPRM at 17,561.