

Publications

Corporate Transparency Act - FinCEN Releases Advance Notice of Proposed Rulemaking Regarding Beneficial Ownership Reporting Requirements - More Questions than Answers

Related Professionals

Russell R. Rosler

Related Services

Corporate and Business Organizations

Related Industries

Financial Institutions

Private Equity

CLIENT ALERT | 4.9.2021

The federal Corporate Transparency Act (CTA) mandates that U.S. legal entities and non-U.S. legal entities registered to do business in the U.S. report to the federal government specific information about their “beneficial owners” and the persons who form or register those companies, with certain exceptions. The CTA, adopted January 1, 2021, has the stated purposes of combating money laundering, the financing of terrorism, tax fraud, human and drug trafficking and other illicit activity.

The CTA requires that reporting companies submit the information to the U.S. Department of the Treasury’s Financial Crimes Enforcement Network (FinCEN). FinCEN is required to maintain the information in a non-public database, and disclosure is permitted only to certain government and law enforcement agencies and financial institutions, for limited purposes.

The language of the CTA leaves unclear a number of important interpretive and compliance issues, including what companies fall into the category of “reporting companies,” how companies may be exempt from reporting, and how quickly updates must be made if the reported information changes. As a result, potentially affected businesses, individuals and their advisors are in a challenging position to plan for compliance with the CTA. Presumably in recognition of this, the CTA provides that much of the mandated compliance regime does not come into effect until clarifying regulations are adopted.

FinCEN is charged to issue regulations under the CTA by January 1, 2022. To facilitate this rulemaking, FinCEN issued on April 5, 2021 an advance notice of proposed rulemaking (the Notice), requesting information and comments from practitioners and other interested parties. In short, the Notice merely raises questions under the CTA, in many cases the very same questions being asked by potentially affected businesses and individuals and their advisors.

Given the novel and sweeping obligations under the CTA, it is not surprising that even FinCEN does not know precisely where to begin. However, the Notice is a start, and the questions themselves provide a window into the thinking of FinCEN as the CTA regulations begin to take shape in the time ahead. FinCEN's approach also creates a valuable opportunity for interested parties to have an active hand in providing input toward a relatively desirable regulatory framework for the CTA.

What does the Notice address?

After reviewing the purpose and history of the CTA, the Notice consists of a request for comments on "all aspects of the CTA," but specifically seeks comments in response to *more than 100 specific questions* identified by FinCEN as relevant to adopting regulations under the CTA. The Notice does not propose any specific rules or guidance.

The CTA is new and complex, and it raises complicated questions. Many of the questions raised in the Notice are fundamental and crucial to understanding and complying with the CTA, including the following:

- Is the definition of "beneficial owner" in the CTA, including the specified exceptions, sufficiently clear, or are there aspects of the definition and specified exceptions that FinCEN should clarify by regulation?
- Are there any categories of entities that are not currently subject to an exemption from the definition of "reporting company" that FinCEN should consider for an exemption pursuant to this authority?
- How should a company's eligibility for any exemption from the reporting requirements, including any exemption from the definition of "reporting company," be determined?
- 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?
- Should reporting companies be required to affirmatively confirm the continuing accuracy of previously submitted beneficial ownership information on a periodic basis, and what should be considered a "timely basis" for updating a change in beneficial ownership?

FinCEN is asking interested members of the community for their input on these questions. Comments to the Notice must be submitted by May 5, 2021.

How does the Notice affect companies, practitioners and other interested parties?

The Notice did not provide any specific guidance regarding compliance with the CTA. However, interested parties should view the Notice as an unusual opportunity to engage with FinCEN and provide comments and feedback that will help shape these regulations and address the key definitions, requirements and other interpretive matters.

Please reach out to one of the authors of this alert or your Vorys attorney for more information.