

# FinCEN Releases Notice of Proposed Rulemaking on Access to Beneficial Ownership Information

## Five Things To Know

On December 16, 2022, the Financial Crimes Enforcement Network (“FinCEN”) invited public comment on its [proposed rule](#) (the “Proposed Access Rule”) implementing the requirements of the Corporate Transparency Act (“CTA”) to provide authorized recipients access to beneficial ownership information collected by FinCEN. The comment period for the Proposed Access Rule will close on February 14, 2023.

As discussed in our [prior client alerts](#), under the CTA, which was passed as part of the 2020 Anti-Money Laundering Act (“AMLA”), Congress created a new federal framework for the reporting, disclosure, and use of beneficial ownership information. The CTA aims to combat the illicit use of shell companies to hide the proceeds of crime, and to transfer some of the burden of identifying the owners of such companies from financial institutions to the government itself.

This alert summarizes five key takeaways from the Proposed Access Rule.

### 1

#### **The Proposed Access Rule Only Addresses Access to Beneficial Ownership Information Collected by FinCEN, and Not the Use of Such Information by Financial Institutions**

The Proposed Access Rule is the second of three rules required to implement the CTA. The first rule (the “Reporting Rule”) was finalized on September 29, 2022, and is described in our [prior client alert](#). The Reporting Rule implemented the CTA’s requirement that covered reporting companies provide information on their beneficial owners to FinCEN; it will be effective on January 1, 2024, and preexisting reporting companies will have until January 1, 2025 to file their first report.

The Proposed Access Rule, when finalized, will govern access by authorized recipients—i.e., law enforcement agencies, financial regulators, and financial institutions—to the beneficial ownership information collected under the Reporting Rule. FinCEN has proposed an effective date of January 1, 2024 for this rule as well.

FinCEN has yet to publish a proposal for the third rulemaking required by the CTA, which will revise the existing customer due diligence (“CDD”) requirements imposed on financial institutions in light of FinCEN’s collection of beneficial ownership information under the Reporting Rule and financial institutions’ access to that information under the Proposed Access Rule. Until that forthcoming CDD rule is proposed, finalized, and becomes effective, financial institutions must continue to comply with the current CDD rule.

### 2

#### **The Proposed Access Rule Stays Close to the Statutory Text, and Provides Limited Technical Detail on How Financial Institutions Will Request and Receive Beneficial Ownership Information**

Under the CTA, covered reporting companies must report information on their beneficial owners to FinCEN (as implemented in the Reporting Rule), and FinCEN will store that information in a central repository. Law enforcement agencies, financial regulators, and financial institutions will then be able to access that information—law enforcement agencies in order to carry out investigations and enforcement actions and to satisfy appropriate requests from foreign law enforcement, financial regulators in order to carry out supervisory duties, and financial institutions in order to carry out CDD checks, if they have the consent of the entity about which they are seeking the information.

The Proposed Access Rule reiterates this fundamental structure and does not go far beyond the statute, leaving important implementation questions to future guidance. Notably, while the CTA requires that FinCEN seek to ensure that beneficial information is collected “in a form and manner that ensures the information is highly useful in . . . facilitat[ing] the compliance of financial institutions with anti-money laundering [requirements],” the Proposed Access Rule provides limited detail about how financial institutions will actually access information in the FinCEN database.

The preamble to the Proposed Access Rule explains that, due to the sensitive nature of beneficial ownership information, FinCEN is “not planning to permit [financial institutions] to run broad or open-ended queries in the beneficial ownership IT system or to receive multiple search results.” Rather, FinCEN anticipates that “a [financial institution], with a reporting company’s consent, would submit to the system identifying information specific to that reporting company, and receive in return an electronic transcript” containing that company’s beneficial ownership information. It remains unclear how such a process would operate in practice, and whether such a system will provide quick responses that can be easily digested by financial institutions’ own technological systems. In addition, it is unclear if FinCEN will allow third parties, such as vendors and fintech partners, to submit requests on behalf of financial institutions.

Relatedly, FinCEN has sought comments on its proposal to limit access to beneficial ownership information for use only in “customer due diligence requirements under applicable law” (defined to refer to FinCEN’s current CDD rule, although this definition will presumably be updated to refer to any new CDD rule under the CTA). Specifically, FinCEN seeks comments on whether beneficial ownership information should be accessible to financial institutions for a broader range of due diligence/anti-money laundering purposes, rather than solely for complying with CDD obligations. FinCEN states that it would consider expanding the definition if it believed that the benefits of expanded access for compliance and regulatory purposes would outweigh the increased security and confidentiality burdens.

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### 3

## **The Proposed Access Rule Requires Financial Institutions to Establish Confidentiality and Information Security Safeguards for Beneficial Ownership Information, and to Share Information Only Within the U.S.**

Financial institutions seeking access to beneficial ownership information must obtain and document proof of customer consent, and must implement “administrative, technical, and physical safeguards reasonably designed to protect the security, confidentiality and integrity” of beneficial ownership information.<sup>1</sup>

Under the Proposed Access Rule, financial institutions’ obligations to implement safeguards will be deemed satisfied if they apply existing procedures pursuant to the Gramm-Leach-Bliley Act (“GLBA”), as implemented by their functional regulators. If an institution is not subject to the GLBA requirements, it must implement procedures that would satisfy the GLBA’s standards. FinCEN believes this approach will “avoid duplicative or inconsistent requirements for information security and protocols,” but has requested comment as to whether the standards under the GLBA are sufficient to protect beneficial ownership information. Financial institutions will have a significant interest in commenting on this point, to forestall the imposition of parallel and potentially inconsistent standards for the protection of customer information.

Further, in language that will be important to global financial institutions and institutions that offshore CDD processes—and that stands in tension with recent attempts to promote cross-border anti-money laundering information sharing—the Proposed Rule requires that financial institutions limit access to beneficial ownership information to personnel, contractors, and agents within the United States. FinCEN has requested comment on whether this restriction imposes undue hardships on financial institutions, as well as on its practical implications and potential costs.

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<sup>1</sup> Government agencies must also satisfy confidentiality and information security requirements, including establishing appropriate standards and procedures, entering an agreement with FinCEN specifying those standards and procedures, and establishing and maintaining a secure system in which to store beneficial ownership information.

## 4

### FinCEN Faces Substantial Challenges in Building the Technology for its Database, Which Risks An Attempt to Shift Burdens to Industry

FinCEN is in the process of developing the infrastructure necessary to receive, store, maintain, and provide regulated access to beneficial ownership information—a significant technological task. In the preamble to the Proposed Access Rule, FinCEN notes that it has begun work toward creating an IT system for these purposes. According to FinCEN, the initial build of the system’s cloud infrastructure is complete, and FinCEN is currently working on the first set of system products. FinCEN’s target date for the system to be online and able to accept reports of beneficial ownership information is January 1, 2024, the effective date of the Reporting Rule. However, in the preamble to the Proposed Access Rule, FinCEN notes that it is facing budgetary resource constraints in developing and deploying the system, exacerbated by the fact that it is also preparing to field significant customer service requests in the first effective year of the Reporting Rule. In addition to raising the prospect of delay, these statements put into question whether FinCEN will shift burdens to financial institutions, such as by requiring financial institutions to verify the accuracy of beneficial ownership information when received by those institutions, rather than FinCEN itself validating the accuracy of its collected information.

## 5

### The Proposed Access Rule Could Allow A Broad Set of Federal, State, Local, or Tribal Agencies to Access Beneficial Ownership Information

The CTA provides that FinCEN may, with appropriate protocols, disclose beneficial ownership information obtained under the Reporting Rule to federal agencies engaged in “national security, intelligence, or law enforcement activity, for use in furtherance of that activity.” In the Proposed Access Rule, FinCEN expansively defines the term “federal agency engaged in . . . law enforcement activity” to include “investigative and enforcement activities relating to civil or criminal violations of law.” Similarly, FinCEN defines the term “state, local, or Tribal law enforcement agency” from the CTA to include any agency of those governments that “is authorized by law to engage in the investigation or enforcement of civil or criminal violations of law.”

FinCEN has requested comment on these definitions which, because they encompass civil as well as criminal law enforcement activity, may be viewed by civil liberties groups as allowing a broader set of agencies to access beneficial ownership information than is contemplated by the statute. Notably, it is possible that the group of agencies with access to beneficial ownership information will extend beyond the set of law enforcement agencies permitted to receive suspicious activity reports.

For further information on the Proposed Rule or the CTA more generally, please contact the members of Covington’s Financial Institutions practice.

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