

FinCEN Issues Final Rule on Access to Beneficial Ownership Information

Seven Things To Know

On December 21, 2023, the Financial Crimes Enforcement Network (“FinCEN”) issued a [final rule](#) (the “Final Access Rule”) addressing access by authorized recipients to beneficial ownership information (“BOI”) collected by FinCEN under the Corporate Transparency Act (“CTA”).

The CTA, which was passed as part of the 2020 Anti-Money Laundering Act, 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.

The Final Access Rule is the second of three required rulemakings by FinCEN to implement the CTA. The first rule, [finalized](#) in September 2022, is scheduled to go into effect on January 1, 2024, and requires covered entities to report information on their beneficial owners to FinCEN (the “Reporting Rule”). The Final Access Rule will govern the ability of law enforcement, regulators, and financial institutions to access the beneficial ownership information collected by FinCEN. The third and final CTA rulemaking, in which FinCEN has yet to release a proposed rule, will modify the obligations of financial institutions under a 2016 customer due diligence (“CDD”) rule (the “2016 CDD Rule”) to account for their access to FinCEN’s BOI database.

This alert summarizes seven key takeaways from the Final Access Rule, focusing on developments from the proposed rule (which is summarized in our prior client alert [here](#)).

1

Financial institutions will likely not have access to FinCEN’s BOI database until the required CDD rulemaking is completed in 2024 or 2025.

In the preamble to the Final Access Rule, FinCEN notes that it will “take a phased approach to providing access” to its BOI database. The first stage will be a pilot program for “a handful of key Federal agency users,” to be followed by other federal agencies and, subsequently, state, local, and tribal law enforcement agencies. Notably, financial institutions will be the last entities to receive access to the BOI database, and FinCEN “expects that the timing of their access will roughly coincide with the upcoming revision of FinCEN’s 2016 CDD Rule.” This coordinated timing will avoid placing financial institutions in the challenging position of having access to the BOI database, but no clear guidelines for when and how they should make use of such information.

FinCEN indicated that it will provide additional information about the timing of this phased approach in early 2024, but given that CDD revisions have yet to be proposed, it seems likely that financial institutions will not have access to the BOI database until late 2024 or early 2025.

2

At least initially, only financial institutions subject to the 2016 CDD Rule will have access to the BOI database.

Even when financial institutions do gain access to the BOI database, FinCEN intends to exercise its discretion under the CTA, preserved in the Final Access Rule, to only permit access for those institutions covered by the 2016 CDD Rule. This includes banks, registered broker-dealers, registered futures commission merchants and introducing brokers, and mutual funds.

Notably, this approach will exclude financial institutions who have anti-money laundering (“AML”) obligations – and therefore may benefit from access – but are not covered by the 2016 CDD Rule, such as money transmitters and other money service businesses.

FinCEN explained in the preamble to the Final Access Rule that the goal of this approach is to “allow FinCEN to work towards timely access for those institutions with comprehensive security and confidentiality protocols and compliance and supervisory frameworks regarding the use of that information,” and that FinCEN will further evaluate whether it is “appropriate and feasible to expand access” to other financial institutions after an initial implementation period.

3

The Final Access Rule expands the permissible uses of BOI compared to the proposed rule.

The proposed rule, by narrowly defining the term “customer due diligence requirements under applicable law,” would have limited the use of BOI obtained from FinCEN’s database to satisfying the requirements of the 2016 CDD Rule. This approach would have significantly limited the utility of the BOI database to financial institutions in administering their compliance programs, in conflict with the purposes of the CTA.

The Final Access Rule responds to comments highlighting this concern by expanding the universe of permissible BOI uses to “any legal requirement or prohibition designed to counter money laundering or the financing of terrorism, or to safeguard the national security of the United States, to comply with which it is reasonably necessary for a financial institution to obtain or verify beneficial ownership information of a legal entity customer.” This allows financial institutions to incorporate the use of BOI information from FinCEN’s database into, among other things, their processes for enhanced due diligence and suspicious activity monitoring and reporting.

4

The Final Access Rule will allow financial institutions to share BOI outside the United States.

The proposed rule would have prohibited financial institutions from sharing BOI obtained from FinCEN’s database with employees or contract personnel located outside the United States – in tension with recent attempts to allow firms to operate integrated, global anti-money laundering programs and avoid siloing of information. In response to comments highlighting the significant costs the proposed rule would have imposed on institutions with significant international operations and correspondingly global compliance functions, FinCEN has revised the Final Access Rule to only prohibit sharing with employees and contract personnel located in China, Russia, jurisdictions subject to comprehensive sanctions, or jurisdictions designated as a state sponsor of terrorism.

5

The Final Access Rule loosens the customer consent requirement compared to the proposed rule.

The proposed rule would have required financial institutions to obtain a customer’s written consent prior to accessing their BOI in FinCEN’s database, provide a written certification to FinCEN that consent had been obtained, and maintain documentation of the consent for five years. The Final Access Rule maintains the requirement that financial institutions obtain customer consent, certify that consent, and document it for five years, but removes the requirement that the customer consent and certification be written.

Financial institutions will be able obtain consent in a manner that they determine is appropriate based on their own customer base, risk tolerance, and resources. The certification to FinCEN will be “in such form and manner as FinCEN shall prescribe,” and FinCEN “anticipates that a financial institution will be able to make the certification via a simple checkbox when requesting BOI.”

Institutions will be glad to have the flexibility to obtain consent in a manner tailored to their own operations, but they will also need to customize and integrate that process into their broader privacy frameworks.

6**The technical specifics of the BOI database remain unclear.**

In the preamble to the Final Access Rule, FinCEN offered some commentary on how the BOI database may function for financial institution users, but its exact operation remains unclear. FinCEN noted that it “does not, at this time, anticipate providing bulk data exports of BOI to authorized users,” but does expect to make an application programming interface available to financial institutions to facilitate making queries and retrieving information. FinCEN also explained that it anticipates that financial institutions will “submit identifying information specific to [a] reporting company and receive in return an electronic transcript with that entity’s BOI,” and that this transcript will be available “immediately after submitting the search request.”

7**Effectiveness of the Reporting Rule will not be further delayed.**

FinCEN has faced pressure from parts of the business community and certain politicians to delay the Reporting Rule due to the compliance burden it will place on small businesses and the need for additional education. On November 30, 2023, FinCEN amended the Reporting Rule to extend the BOI reporting deadline for new entities formed after January 1, 2024 from 30 days to 90 days (entities that already exist as of January 1, 2024 will have the full year to file their BOI report). And, as noted above, FinCEN is staging (and thus effectively delaying, for many users) access to the BOI database.

At the same time, in the preamble to the Final Access Rule, FinCEN noted that its database system should be able to begin accepting BOI reports on January 1, 2024, consistent with the Reporting Rule’s effective date.

For further information on the Final Rule, please contact the following members of Covington’s Financial Institutions practice.

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