



The Real Estate Roundtable

February 4, 2022
Financial Crimes Enforcement Network
Global Investigations Division
P.O. Box 39
Vienna, VA 22183

RE: Beneficial Ownership Information Reporting Requirements; Docket Number FINCEN-2021-0005 and RIN 1506-AB49

The undersigned real estate organizations are writing to respond to the U.S. Department of the Treasury (Treasury) and the Financial Crimes Enforcement Network (FinCEN) notice of December 7, 2021, proposed rulemaking (NPRM or proposed rule) regarding implementation of Section 6403 of the Corporate Transparency Act (CTA) enacted into law as part of the National Defense Authorization Act for Fiscal Year 2021 (NDAA.) The proposed rule is to implement the beneficial ownership information reporting requirements of Section 6403.

The CTA requires entities defined as reporting companies to submit beneficial ownership and company applicant information to FinCEN to help prevent and combat money laundering, terrorist financing, tax fraud, and other illicit activity. The NPRM is a proposal of what information must be filed with FinCEN that would best accomplish the intent of the statute and be highly useful in protecting U.S. national security, provide critical information to law enforcement, and promote financial transparency and compliance by increasing the transparency of the ownership structure of corporations, limited liability companies (LLCs), limited partnership, and statutory trust (among other) structures. It describes who must file information, what information must be filed, and when the information is to be filed.

The scope of the proposed rule and the CTA is far reaching and will impact many commercial and residential real estate businesses that are frequent users of the corporate and LLC structure for conducting business. Those businesses have a varied experience level of compliance with regulations, laws, and other legal requirements to conduct business. When rules are opaque and not clearly defined, it becomes a compliance burden for businesses to interpret and comply to the best of their knowledge. Therefore, it is imperative for FinCEN to establish a very clear set of rules, definitions, and instructions to eliminate any misinterpretation by a commercial or residential real estate business seeking to comply with the FinCEN regulations.

The importance of clarity in the final rule cannot be overstated. The requirements must be easy to follow so they are applied consistently by the reporting companies. As will be shown in our comments, the rule as proposed leaves many definitions difficult to interpret for businesses and leaves users with a confusing process to follow to determine the who, what and when of reporting.

While we support efforts to eliminate terrorism financing and money laundering and appreciate efforts to protect the U.S. financial system from illicit actors and business entities, we are concerned about the cost and compliance burden of imposing excessive, unnecessary and/or confusing beneficial ownership reporting requirements on real estate businesses.

Our comments are organized to respond to FinCEN's goal of defining who must file, what they need to file and when they need to file.

Who Must File

The CTA requires reporting companies to file information on the beneficial owners and the company applicant of the reporting company. FinCEN has proposed that the reporting company file information on itself so it can be identified in the FinCEN database, Beneficial Ownership Secure System, (BOSS), that includes the beneficial ownership information and company applicant information.

The goal of the CTA is for FinCEN to maintain a comprehensive and up-to-date BOSS database in which the beneficial owners and company applicants of business entities meeting the definition of a reporting company are identified and recorded.

The first step in the process is to understand who is a reporting company.

Reporting Company

Under 31 CFR 1010.380 (c) (1), FinCEN proposes the following definitions of a domestic and a foreign reporting company:

- (i) The term "domestic reporting company" means any entity that is:
 - (A) A corporation;
 - (B) Limited liability company; or
 - (C) Other entity that is created by the filing of a document with a secretary of state or any similar office under the law of a State or Indian tribe.

- (ii) The term "foreign reporting company" means any entity that is:
 - (A) A corporation, limited liability company, or other entity;
 - (B) Formed under the law of a foreign country; and
 - (C) Registered to do business in any State or tribal jurisdiction by the filing of a document with a secretary of state or any similar office under the law of a State or Indian tribe.

FinCEN believes the proposed definition of domestic reporting company would likely include limited liability partnerships, limited liability limited partnerships, business trusts (a/k/a statutory trusts or Massachusetts trusts), and most limited partnerships, in addition to corporations and LLCs, because such entities appear typically to be created by a filing with a secretary of state or similar office. However, FinCEN also states it understands that state and Tribal laws may differ on whether certain other types of legal or business forms—such as general partnerships, other types of trusts, and sole proprietorships—are created by such a filing. Therefore, reporting companies may differ depending on the state or Indian Tribe. Due to this possibility, FinCEN does not propose to categorically include any particular legal forms other than corporations and limited liability companies within the scope of the definition.

The statute and the proposed rule identify 23 specific entities that are exempt from the definition of reporting company, generally leaving small entities with 20 or fewer full-time employees; or \$5 million or less in gross U.S. receipts/sales subject to the reporting requirements. Ironically, it is legitimate, smaller companies that often are most challenged with insufficient resources to meet new compliance requirements.

Recommendation

FinCEN asked whether there are states or Indian Tribes where corporations or LLCs are not created by filing of a document with a secretary of state or similar office. Further, FinCEN asked responders whether there are any states and Indian Tribes in which general partnerships, or other types of trusts, or sole proprietorships are created by the filing of a document with a secretary of state or similar office. We recommend FinCEN work directly with states and Tribes to make this determination rather than asking in the NPRM.

Although the proposed rule's definition of reporting company attempts to provide additional clarity, we urge FinCEN to provide further specificity for the millions of small businesses who will read this rule.

We believe FinCEN should spell out all entities it believes should *not* be subject to the definition, so the reporting entities do not vary by a state's or Indian Tribe's filing requirements. We recommend keeping (C), but adding "unless the entity's ownership structure is specifically exempted by FinCEN or the entity is specifically exempted by the CTA."

Beneficial Owner

Under 31 CFR 1010.380 (d) FinCEN proposes to define "beneficial owner" as any individual who, directly or indirectly, either exercises substantial control over such reporting company or owns or controls at least 25 percent of the ownership interests of such reporting company.

Recommendation

This proposed definition requires the terms "substantial control," "directly," "indirectly," and "ownership interests" also be defined with clarity within 31 CFR 1010.380. Please see our recommendations for the definitions of "substantial control," "direct control," "indirect control," "owns or controls," and "ownership interests."

Substantial Control

Under 31 CFR 1010.380 (d)(1): FinCEN proposes the following definition of "substantial control":

(1) Substantial control.

- (i) Service as a senior officer of the reporting company;
- (ii) Authority over the appointment or removal of any senior officer or a majority or dominant minority of the board of directors (or similar body);
- (iii) Direction, determination, or decision of, or substantial influence over, important matters affecting the reporting company, including but not limited to:
 - (A) The nature, scope, and attributes of the business of the reporting company, including the sale, lease, mortgage, or other transfer of any principal assets of the reporting company;
 - (B) The reorganization, dissolution, or merger of the reporting company;

- (C) Major expenditures or investments, issuances of any equity, incurrence of any significant debt, or approval of the operating budget of the reporting company;
 - (D) The selection or termination of business lines or ventures, or geographic focus, of the reporting company;
 - (E) Compensation schemes and incentive programs for senior officers;
 - (F) The entry into or termination, or the fulfillment or non-fulfillment of significant contracts; and
 - (G) Amendments of any substantial governance documents of the reporting company, including the articles of incorporation or similar formation documents, bylaws, and significant policies or procedures; and
- (iv) Any other form of substantial control over the reporting company.

Recommendation

The proposed rule significantly expands the scope of what is included in the definition of substantial control. For instance, the presumption that every “senior officer” exercises substantial control over a reporting company could capture several individuals who do not, in fact, exercise substantial control over the company. In many cases, small corporations and LLCs may not assign traditional titles to employees, and some will have no senior officer at all. The list provided in iii) is comprehensive and would in fact, include by reference, anyone who has control over an entity. Therefore, we recommend eliminating i) since it will cause reporting companies to potentially include many who have no substantial control over the reporting company and all of the authorities described in iii) will adequately capture all individuals who have substantial control.

The definition in ii) is unclear and needs to be rewritten. We can offer no suggestion since we do not understand the meaning of the terminology “dominant minority of the board of directors” nor the intent of its inclusion.

We also recommend the elimination of iv). Section iii) already acts as a catchall through the use of language “including but not limited to” and iv) is simply another catchall phrase that by its inclusion only creates more confusion because it requires a definition of substantial control which simply creates a circular definition.

Direct Control and Indirect Control

Under 31 CFR 1010.380 (d)(2), FinCEN describes how an individual may directly or indirectly exercise substantial control over a reporting company:

(2) *Direct or indirect exercise of substantial control.* An individual may directly or indirectly exercise substantial control over a reporting company through a variety of means, including through board representation; through ownership or control of a majority or dominant minority of the voting shares of the reporting company; through rights associated with any financing arrangement or interest in a company; through control over one or more intermediary entities that separately or collectively exercise substantial control over a reporting company; through arrangements or financial or business relationships, whether formal or informal, with other individuals or entities acting as nominees, or through any other contract, arrangement, understanding, relationship, or otherwise. An individual who has the right or ability to exercise substantial control as specified in paragraph (d)(1) of this section and this paragraph (d)(2) shall be deemed to exercise such substantial control.

Recommendation

The term *indirect control* lacks definition and will lead to confusion for businesses. Whether direct or indirect, control is control and is described extensively in the list. For that reason, we recommend removing the use of the modifier *direct and indirect*. We suggest reformatting this section, as follows, to provide greater clarity for businesses:

(2) *Exercise of substantial control*. An individual may exercise substantial control over a reporting company through a variety of means, including:

- (i) through board representation;
- (ii) through ownership or control of a majority or dominant minority of the voting shares of the reporting company;
- (iii) through rights associated with any financing arrangement or interest in a company;
- (iv) through control over one or more intermediary entities that separately or collectively exercise substantial control over a reporting company;
- (v) through arrangements or financial or business relationships, whether formal or informal, with other individuals or entities acting as nominees, or through any other contract, arrangement, understanding, relationship, or otherwise.

An individual who has the right or ability to exercise substantial control as specified in paragraph (d)(1) of this section and this paragraph (d)(2) shall be deemed to exercise such substantial control.

The list of activities that determine substantial control is comprehensive and includes means of exercising substantial control over a reporting company, which may be interpreted as direct or indirect control.

There are several terms used in this definition that require clarification. As noted in the prior section the use of the term *dominant minority of the voting shares* is unclear. FinCEN needs to clarify its intent for this term.

Under (v) the use of the term *informal* for financial or business relationships is unclear and requires greater clarity. In fact, even with a clearer definition it remains unclear how a reporting company can make that determination for one of its beneficial owners. It appears that FinCEN is trying to capture all nuances in every reporting company but with definitions that lack clarity it will only serve to make compliance extremely difficult. How would this type of information be requested, analyzed, and documented?

Ownership Interests

Under 31 CFR 1010.380 (d)(3), the proposed rule defines ownership interests as:

(3) *Ownership interests*.

(i) The term “ownership interest” means:

- (A) Any equity, stock, or similar instrument, certificate of interest or participation in any profit-

sharing agreement, preorganization certificate or subscription, transferable share, voting trust certificate or certificate of deposit for an equity security, interest in a joint venture, or certificate of interest in a business trust, without regard to whether any such instrument is transferable, is classified as stock or anything similar, or represents voting or non-voting shares;

(B) Any capital or profit interest in a limited liability company or partnership, including limited and general partnership interests;

(C) Any proprietorship interest;

(D) Any instrument convertible, with or without consideration, into any instrument described in paragraph (d)(3)(i)(A), (B), or (C) of this section, any future on any such instrument, or any warrant or right to purchase, sell, or subscribe to a share or interest described in paragraph (d)(3)(i)(A), (B), or (C) of this section, regardless of whether characterized as debt; or

(E) Any put, call, straddle, or other option or privilege of buying or selling any of the items described in paragraph (d)(3)(i)(A), (B), (C), or (D) of this section without being bound to do so.

(ii) An individual may directly or indirectly own or control an ownership interest of a reporting company through a variety of means, including but not limited to:

(A) Joint ownership with one or more other persons of an undivided interest in such ownership interest;

(B) Through control of such ownership interest owned by another individual;

(C) With regard to a trust or similar arrangement that holds such ownership interest:

(1) As a trustee of the trust or other individual (if any) with the authority to dispose of trust assets;

(2) As a beneficiary who:

(i) Is the sole permissible recipient of income and principal from the trust; or

(ii) Has the right to demand a distribution of or withdraw substantially all of the assets from the trust; or

(3) As a grantor or settlor who has the right to revoke the trust or otherwise withdraw the assets of the trust

:

(i) Through ownership or control of one or more intermediary entities, or ownership or control of the ownership interests of any such entities, that separately or collectively own or control ownership interests of the reporting company; or

(ii) Through any other contract, arrangement, understanding, or relationship.

(iii) In determining whether an individual owns or controls 25 percent of the ownership interests of a reporting company, the ownership interests of the reporting company shall include all ownership interests of any class or type, and the percentage of such ownership interests that an individual owns or controls shall be determined by aggregating all of the individual's ownership interests in comparison to the undiluted ownership interests of the company.

Recommendation

FinCEN is significantly broadening the definition and calculation of ownership interest compared to what the CTA includes and what the existing bank Customer Due Diligence (CDD) rule requires. We appreciate the reasoning offered by FinCEN as it will capture situations where the simple definition of equity ownership falls short. We are concerned that the breadth of the proposed definition will add complexity and potentially confusion for businesses in their ultimate determination of the 25% threshold of ownership interest.

It is imperative that FinCEN provide clearer processes to determine the contribution of each of the listed items and how they contribute toward ownership interests. The proposed definition is very broad and inclusive but does not offer how a reporting company would calculate ownership interests if any of the items listed in (A)-(E) apply. Items listed do not directly translate into the definition of ownership interest and may be difficult to directly determine how they impact ownership interest. For example, under (B) the use of the term *profit interest in a limited liability company* is not defined nor is it clear how that would be translated into ownership interest. Further, that agreement could be in the form of an operating agreement whereby the share of profits changes among the members of an LLC based on the financial performance of an underlying real estate asset. It is unclear with this example how a reporting company would calculate the value contributed toward the determination of ownership interests.

Readers of this rule as written will face a challenge to accurately determine ownership interests. As provided in our example, reporting companies may find it difficult to determine value for some of the items in the comprehensive list. Some contain variable components, which will add to the difficulty. It is imperative that FinCEN provide clearer processes to determine the contribution of each of the listed items and how they contribute toward ownership interests.

What Information Must be Filed

The CTA spells out what information must be filed by reporting companies. It requires each reporting company to file specified beneficial ownership information and company applicant information with FinCEN. Though the CTA does not specify what, if any, information a reporting company must report about itself, the proposed rule requires a reporting company to report identifying information about itself to the FinCEN database.

Beneficial Ownership Information

The CTA requires each reporting company to submit to FinCEN a report identifying each beneficial owner of the reporting company by: (1) full legal name, (2) date of birth, (3) current residential or business street address, and (4) unique identifying number from an acceptable identification document; or, if this information has already been provided to FinCEN, by a FinCEN identifier. The proposed rule specifies the reporting company must provide a scanned copy of the identification document from which the unique identifying number of the beneficial owner or company applicant is obtained, in connection with reporting that unique number.

Recommendation

FinCEN has proposed the reporting company report the residential address for tax residency purposes of each beneficial owner even though the CTA statute offers the reporting company a choice of reporting a beneficial owner's residential or business street address. Although FinCEN explains that it believes a residential address provides a more direct way of finding a beneficial owner, we believe FinCEN should not make this determination unilaterally. It should remain the choice of the reporting company. It is possible the beneficial owner could be a business entity and requiring a residential address would not make sense.

FinCEN relies on reporting companies to enter data into the BOSS database but must ensure the data has been verified so that financial institutions can rely on the information to minimize burdens on reporting companies. Without verification and reliance, the compliance burden will greatly increase as reporting companies will be duplicating reporting every time a new entity is created or changes occur (once to FinCEN and once (or more) to every financial institution where it maintains an account).

As noted in the NPRM, FinCEN is obligated and intends to, in a future NPRM, harmonize the CDD Rule to the proposed rule so that they go into effect at the same time (both reporting companies and financial institutions). Without harmonized changes, these reporting regimes are different and overlap, which will create compliance difficulties for reporting companies and financial institutions.

Company Applicant Information

The CTA requires each reporting company to submit to FinCEN a report identifying each company applicant by: (1) full legal name, (2) date of birth, (3) current residential or business street address, and (4) unique identifying number from an acceptable identification document; or, if this information has already been provided to FinCEN, by a FinCEN identifier. The proposed rule specifies the reporting company must provide a scanned copy of the identification document from which the unique identifying number of the beneficial owner or company applicant is obtained, in connection with reporting that unique number.

The company applicant, as defined in the CTA and the proposed rule, is presumed to have a significant role in the formation of the company.

(2) APPLICANT. —The term ‘applicant’ means any individual who— H. R. 6395—1219

“(A) files an application to form a corporation, limited liability company, or other similar entity under the laws of a State or Indian Tribe; or ‘

‘(B) registers or files an application to register a corporation, limited liability company, or other similar entity formed under the laws of a foreign country to do business in the United States by filing a document with the secretary of state or similar office under the laws of a State or Indian Tribe.

As per the CTA, the proposed rule defines a company applicant as the individual who files the document that creates a new reporting company or created an existing reporting company. In the case of a foreign reporting company, a company applicant is the individual who files or filed the document that first registers the entity to do business in the United States. The proposed rule expands the definition of company applicant to include anyone who directs or controls the filing of the document by another

person. FinCEN explains this inclusion is designed to ensure an individual directing or controlling the formation of a legal entity is unable to remain anonymous simply by directing another third-party individual such as an employee of a business formation service or law firm, or an associate, agent, or family member to file the requisite paperwork.

(e) Company applicant. For purposes of this section, the term “company applicant” means:

(1) For a domestic reporting company, any individual who files the document that creates the domestic reporting company as described in paragraph (c)(1)(i) of this section, including any individual who directs or controls the filing of such document by another person; and

(2) For a foreign reporting company, any individual who files the document that first registers the foreign reporting company as described in paragraph (c)(1)(ii) of this section, including any individual who directs or controls the filing of such document by another person.

FinCEN has proposed that when a reporting company’s applicant is an individual providing a business service as a corporate or formation agent, the reporting company would report the company applicant’s business address. For all other company applicants, the reporting company would report the residential street address that the individual uses for tax purposes. FinCEN explains this establishes a uniform rule for the selection of addresses to be reported and provides specificity to the reporting company for ease of administration.

FinCEN acknowledges that filing the documentation for a reporting company created long before the effective date of the rule may present challenges for a longstanding company (e.g., one that was formed a century ago.) FinCEN offers an alternative reporting option when a company applicant is deceased. For this circumstance, FinCEN has proposed the reporting company report that the company applicant is deceased along with whatever identifying information the reporting company actually knows about the company applicant.

Recommendation

We believe FinCEN’s proposed, expanded definition of company applicant, which includes anyone who directs or controls the filing of the document creating the reporting company by another person, would create an unnecessarily complicated and confusing filing requirement for reporting companies and, generally, would not offer useful information in a future investigation of the reporting company. Theoretically, an individual creating a company and trying to hide behind the company applicant could continue to remain anonymous behind multiple layers of individuals. In our response to FinCEN’s advance notice of proposed rulemaking (ANPR),¹ we wrote “FinCEN should not require a reporting company to report more information to FinCEN than required by the statute.” As the CTA does not

¹ In a letter dated May 5, 2021, the National Multifamily Housing Council, the Real Estate Roundtable, the National Apartment Association, and the National Association of Home Builders responded to FinCEN’s Advance Notice of Proposed Rulemaking on Beneficial Ownership Information Reporting Requirements issued on April 5, 2021.

require the inclusion of anyone who directs or controls the filing of the document creating the reporting company, we request that FinCEN eliminate this from its proposed definition of company applicant.

The proposed rule assumes that a “company applicant” is an individual who plays a significant role in the company, but frequently, this is not the case. In many cases the individual who files the document that creates a new reporting company or created an existing reporting company or in the case of a foreign reporting company, files or filed the document that first registers the entity to do business in the United States will likely be a company employee in an administrative position or an employee of a third-party firm and will not typically be a relevant party in a future investigation of the reporting company. The only individuals or entities that FinCEN should consider significant and relevant for possible investigative purposes are the beneficial owners and any individuals or entities with substantial control of the reporting company.

A company applicant should not be required to certify that the report is accurate and complete unless they are a beneficial owner or have substantial control.

The identifying information about a company applicant should be only the information specified in the CTA. The CTA does not require a scanned copy of the company applicant’s identification documentation so this should not be required by FinCEN.

As with the beneficial owner, FinCEN proposes to eliminate the choice of the company applicant to provide its residential address or business address and proposes a bifurcated approach. We recommend an employee of a reporting company that is filing the beneficial ownership information should have the option of providing his or her residential address used for tax purposes or using the reporting company’s business address as allowed per the CTA.

FinCEN offers an alternative reporting option for an existing company when a company applicant is deceased. FinCEN also should acknowledge and offer an alternative reporting option for instances when a company applicant for an existing company is unknown or not traceable even if not known to be deceased and regardless of whether or not the company is “longstanding.”

We recommend for all reporting companies formed prior to the implementation date of this rule FinCEN allow the company applicant to be the individual currently filing the required information on the reporting company. FinCEN has an unreasonable expectation about the ability of any existing company to identify the original person who filed paperwork to form or register a company.

Reporting Company Information

While the CTA specifies the information required to be reported to “identify each beneficial owner of the applicable reporting company and each company applicant with respect to that reporting company,” the CTA does not include a requirement for a reporting company to file information about itself.

Therefore, to ensure that each reporting company can be identified, FinCEN has proposed to require each reporting company to report its name, any alternative names through which the company is engaging in business (“d/b/a names”), its business street address, its jurisdiction of formation or registration, as well as a unique identification number, which FinCEN specifies as the Internal Revenue Service (IRS) Taxpayer Identification Number (TIN) (including an Employer Identification Number (EIN)) of the reporting company, or where a reporting company has not yet been issued a TIN, one of the

following: (1) Dun & Bradstreet Data Universal Numbering System (DUNS) Number of the reporting company; or (2) Legal Entity Identifier (LEI).

Recommendation

In the NPRM, FinCEN recognizes the perspective of the many responders to the ANPR who encouraged FinCEN to require a reporting company to report a significant amount of additional information about itself and about intermediate legal entity owners through which ultimate natural person beneficial owners of the reporting company own their interests. We appreciate FinCEN decided not to require this information citing concern that it cannot find authority in the statute for the collection of such information from reporting companies. This decision conforms with our stated position in response to the ANPR that “FinCEN should not require a reporting company to report more information to FinCEN than required by the statute.”

However, we agree that limited identifying information about a reporting company is necessary to allow FinCEN and other users of the centralized database to begin the search for the beneficial owners of the appropriate associated reporting company.

Process for Notice to the Public about Specific Reporting Requirements

Neither the CTA nor the NPRM have described a process for how the public will be notified of the reporting requirements to FinCEN. In the NPRM, FinCEN writes that it “intends to work with secretaries of state or similar offices and to leverage other communication channels to ensure that reporting companies in existence prior to the effective date of the regulations receive timely notice of and guidance on their BOI reporting obligations” and that it “will work closely with state, local, and Tribal governments to ensure effective outreach strategies for implementation of the eventual final rule.”

FinCEN also notes the existence of a call center that will receive incoming inquiries relating to the CTA and its implementation and references publishing documents such as guidance and frequently asked questions (FAQs).

Recommendation

The importance of ensuring the reporting requirements are well-publicized, particularly to existing reporting companies, cannot be overstated. While FinCEN states it will provide guidance directly to the public as well as work with and provide guidance materials to state, local and Tribal governments for distribution in response to questions those statements do not define a “process.” There is no overarching plan to ensure the public is broadly aware of these new requirements.

As recommended in our response to the ANPR, we believe there are various avenues FinCEN should take to ensure existing reporting companies receive notice of the reporting requirements. In addition to enlisting outreach by secretaries of state or similar offices under the law of a state, local or Indian Tribe that require periodic renewals and updated corporate filings, entities that have recurring contact with reporting companies such as the Internal Revenue Service (IRS) and accounting firms that file taxes should be expected to provide notification of the requirement to businesses.

We strongly encourage FinCEN to establish a media and educational outreach campaign that informs the business community well ahead of the reporting operational date. The campaign should be supported by a FinCEN hotline or the call center, and comprehensive guidance outlining the key terms and

processes for how reporting companies comply. These information sources should be developed and rolled out well in advance of the go-live date of reporting. FinCEN also should work directly with the business community in developing these resources in order to make them as clear, complete and user friendly as possible.

A list of FAQs should be issued as quickly as possible following the final rule's publication to clarify areas of the rule that could be misunderstood. Included in the FAQ should be a spreadsheet showing the business entities, by jurisdiction, subject to reporting company analysis. This document should be regularly updated by FinCEN and reflect questions from users on areas of the rule that are causing confusion and raising compliance uncertainty. The hotline or call center would be a good source of user questions to include in a continuously updated FAQ document. FAQs are an especially important reference tool for businesses that may not have resources to help them understand nuances of a complicated regulation to which they are subject.

When to File

The CTA designates specific timeframes for reporting companies to submit, correct, and update beneficial ownership information. The CTA requires that any reporting company formed or registered prior to the effective date of the regulations contained in the proposed rule have two years to submit information to the BOSS database, yet the proposed rule shortens that time to one year. The CTA also requires that reporting companies seeking to correct previously submitted information have a safe harbor of one year to complete such corrections, yet the proposed rule shortens that to 90 days.

Reporting Timeframe Requirements for Existing Reporting Companies

Under Title 31 U.S.C. Sec. 5336(b)(1)(B), the CTA requires that existing reporting companies must submit beneficial ownership information within two years of the regulation's effective date. However, the proposed rule only provides existing reporting companies one year to achieve reporting compliance.

Recommendation

FinCEN should implement a reporting timeframe that complies with the CTA's original intent. We believe a two-year window for existing reporting companies to file reporting information is necessary for those businesses with limited administrative capacity where additional time to collect and report information is critical to achieving compliance. The proposed rule is expected to impact several million existing businesses with new reporting responsibilities and require far greater levels of effort than newly formed entities to achieve compliance. FinCEN must consider that small companies, largely the reporting audience of the CTA, are less likely to have the financial means to hire administrative or professional staff to help interpret and carry out the required processes.

Complex business entities, where a beneficial owner or other legal representative has created numerous corporations, LLCs, or similar entities for specific business purposes, face an even broader compliance burden. For each entity meeting the definition of a reporting company, all beneficial owners must be determined. The reporting company must then track down the required information on all beneficial owners of a reporting company that may have been created years ago, i.e., copies of licenses or passports or current addresses likely will be a very time-consuming and challenging process. FinCEN has not constructed a timeframe that aligns with the intent of Congress, in the CTA, to "minimize burdens

on reporting companies associated with the collection of the information².” Instead, limits have been placed on reporting timeframes that do not adequately reflect the level of effort required to obtain and report beneficial ownership information.

FinCEN should determine if its authority under CTA allows the agency to request expedited information from existing reporting companies within the two-year timeframe. Furthermore, FinCEN should determine its authority to ask a reporting company if submitted information is accurate and, if not, to update or correct that information. This ensures accuracy for reporting companies under investigation, while lifting the compliance burden of discovery and monitoring for other entities not under investigation.

We recognize the importance of maintaining a database with timely beneficial ownership information. However, rushing the collection of this data could have unintended consequences that exacerbate the risk of companies submitting faulty or inaccurate data, thereby compromising the utility of the database in law enforcement investigations. This approach both harms reporting companies attempting to come into compliance with the requirements of the CTA and does nothing to protect the integrity of the U.S. financial system.

Reporting Timeframe Requirements for Corrections and Inaccurate Information

Under the CTA, Title 31 U.S.C. 5336(h)(3)(C), a person shall not be subject to civil or criminal penalties if they voluntarily and promptly correct known inaccuracies in reporting material with 90 days of report submission. The safe harbor provision would not apply if it was determined that the applicant acted in a way to evade or shield the reporting of certain information. The proposed rule establishes that a reporting company shall file a corrected report within 14 calendar days of becoming aware that information initially reported was and remains inaccurate.

Recommendation

We are concerned with both the timeline requirements and the subjectiveness of how FinCEN will apply the safe harbor. The criteria that FinCEN would use to determine the intention with which a reporting company submits beneficial ownership information is not included in the proposal and likely will not be applied uniformly by all FinCEN investigators, causing confusion and hardship for small entities. Some reporting companies will have limited administrative capacity to complete the requirements of the proposed rule, let alone the ability to achieve sustained monitoring of the reported information for unintentional inaccuracies. Furthermore, what constitutes an inaccuracy in reporting information? Will the criteria be limited to inaccuracies of reporting requirements or broadly include all inaccuracies such as spelling errors and typos? We believe that these questions can be answered in a comprehensive FAQ document distributed prior to regulation implementation.

Given the capacity limitations of many reporting companies, the 90-day safe harbor provision should be applied broadly to all reporting companies and be set as the standard timeline for correcting inaccuracies.

Again, FinCEN should determine if the agency’s authority provided in the CTA allows it to ask a reporting company if the data in BOSS is up to date and if not then request that an update be made. We would

² 31 U.S.C. Sec. 5336(b)(1)(F)(iii)

expect that in any investigation FinCEN conducts it would ask this question and require BOSS to be updated. The business burden on companies to continuously monitor and update this information has been underestimated by FinCEN.

Reporting Timeframe Requirements for Updated Information

Under Title 31 U.S.C. 5336(b)(1)(D) of the CTA, reporting companies must update information from prior reports no later than one year after they experience a change that would necessitate updating reporting criteria. Additionally, the CTA includes a provision that states that the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of Homeland Security, shall conduct a review to evaluate “the necessity of a requirement for corporations, limited liability companies, or other similar entities to update the report on beneficial ownership information related to a change in ownership, within a shorter period of time than “in a timely manner and not later than one year.””

However, the proposed rule, 31 CFR 1010.380(a)(2), requires reporting companies to file an updated report within 30 calendar days after the date on which there is any change with respect to any information previously submitted to FinCEN. Similarly, 31 CFR 1010.380(a)(iv) places the same 30-day window on reporting changes in exemption status.

Recommendation

Updated information on a beneficial owner and changes in exemption status should not be required by FinCEN within a shorter period than one year after the receipt of the information by the reporting company until Treasury has evaluated the necessity of such a requirement. Further, we believe this would require continuous monitoring of a reporting company’s exemption status, a process likely to cost considerable time and resources. The timing of annual updates also must be considered so that businesses with multiple reporting entities are not updating throughout the year. FinCEN should consider establishing a single date whereby all entities report or alternatively allow a reporting company to self-select a single reporting date if reporting for multiple entities.

FinCEN should determine if its authority provided in the CTA allows it to ask a reporting company if the data in BOSS is up to date and if not then request that an update be made. We would expect that in any investigation FinCEN conducts it would ask this question and require BOSS to be updated. The business burden on companies to continuously monitor and update this information has been underestimated by FinCEN.

Conclusion

While the real estate industry supports the goal of preventing money laundering, terrorism financing or other crimes, we believe there are aspects of the proposed rule that are flawed and should be reconsidered per our recommendations. First, the rule and certain definitions require greater clarity in order for businesses to accurately comply with the rule. Second, the shortened deadlines for submission of information do not comply with the intent of the CTA. Third, the proposed rule unnecessarily requests information outside of the scope and intent of the CTA. We also remind FinCEN that the CTA directs Treasury to seek to minimize burdens on reporting companies associated with the collection of beneficial ownership information. We appreciate the opportunity to provide our comments and voice our concerns regarding the implementation of the CTA. We stand ready to work directly with FinCEN to develop a clear, transparent, and secure set of rules for our industry.

Signed,

ICSC

National Apartment Association

National Association of Home Builders of the United States

National Multifamily Housing Council

The Real Estate Roundtable