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Four Takeaways from the Final Rule on Access to the Beneficial Ownership Database

***The Final Rule appropriately drops serious barriers to access and usage,
verification of information remains unclear***

On December 21, 2023, the U.S. Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN") finalized the second of three rules to implement the Corporate Transparency Act ("CTA"), a landmark anti-money laundering ("AML") law to collect the beneficial ownership information ("BOI") of covered U.S. companies and similar entities. This Final Rule details the methods by which authorized users (including law enforcement officials, national security officials, and financial institutions ("FI"s) with AML obligations) may access the database.

- 1. Fortunately, the Final Rule removes serious barriers to access by state, local, and tribal law enforcement, reflecting in the most important aspects the position taken in our comment.**

As we stated in our [comment](#) on the implementation of the CTA, when it comes to investigations into foreign corruption and other crimes, "restricted access to beneficial ownership information or other unnecessary hurdles would mean cases cannot move forward and criminals may escape justice." In order to ensure effective access *in practice*, we stressed the CTA's implementing rules must reflect the plain language and clear intent of the enacting law. Unfortunately, FinCEN's Draft Rule regarding access to the database by state, local, and tribal law enforcement deviated from the clear, precise, legislatively-historied language of the CTA.

In particular, the Draft Rule added multiple, highly consequential requirements. Namely, that a requesting agency [1] "submit to FinCEN" a [2] "[copy](#) of a [3] [court order](#) from a court of competent jurisdiction authorizing the agency to seek the information in a criminal or civil investigation" as well as a "[4] written justification that sets forth [5] specific reasons why the requested information is [6] relevant to the criminal or civil investigation."

In our [comment](#) responding to the Draft Rule, we wrote:

[T]he Draft Rule's imposition of the requirement of a court order contradicts the plain reading of the CTA and violates congressional intent for a streamlined and informal court authorization process....The CTA also does not permit FinCEN to condition access to BOI on confirmation or evidencing of the required court authorization (that an agency submit to FinCEN a "copy of a court order"). **Instead, all that the text of the CTA can be read to require is that the agency aver, declare, or certify** that an officer of a court of competent jurisdiction has authorized the agency to seek the BOI in a criminal or civil investigation. The inquiry stops there.

FinCEN's final rule largely adopts this position, stating:

Prior to requesting BOI, State, local, and Tribal law enforcement agency users must certify that a court of competent jurisdiction has authorized the agency to seek the information in a criminal or civil investigation and that the requested information is relevant to the criminal or civil investigation. Such users must also provide a description of the information the court has authorized the agency to seek.

- 2. Fortunately, the Final Rule broadens the purposes for which banks and other financial institutions may use BOI, reflecting in substantial part the position of our comment.**

In our [comment](#) responding to the Draft Rule, we wrote:

FIs should...be allowed to use BOI for the entire range of AML, countering the financing of terrorism...and other related program activities for which they currently use BOI...throughout the life cycle of the customer account. Otherwise, the database as a whole may prove simply nonfunctional to the thousands of FIs across the United States.

FinCEN's Final Rule reflects this position at essential parts, stating:

In response to comments on the proposed rule, the final Access Rule broadens the definition of "customer due diligence requirements under applicable law" to include "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."

3. Unfortunately, the Final Rule does not expressly state whether reported information will be subject to verification.

As we wrote in our [comment](#) on the Draft Rule, “It is self-evident that the database will only be as useful as it is accurate.” Given this, we encouraged FinCEN to use existing government information to verify the BOI reported to the database, by, for example, creating partnerships with the U.S. State Department (to electronically check reported names and passport numbers), the National Law Enforcement Telecommunications System (to check state drivers’ licenses and state identification numbers), and the U.S. Postal Service (to check addresses), among other agencies and entities. Such automated, real-time checks, we wrote, “will provide a minimum level of assurance that reported information is accurate and reliable, and thus highly useful.”

Unfortunately, the Final Rule does not provide any clear conclusions on this critical issue. Instead, its accompanying explanation states that “Although verification is not addressed in this rule....FinCEN continues to assess options to verify BOI taking into consideration practical, legal, and resource challenges.”

To the extent there are resource constraints to engaging in full verification of the information, Congress should appropriate the resources quickly. However, we again encourage FinCEN to overcome beliefs that the CTA itself could serve as a legal barrier to verification, and to work diligently and quickly with partners in government, private industry, and civil society to ensure the delivery of an integrated database that is highly useful and capable of operating with integrity.

4. Lastly, the Final Rule unfortunately maintains different access rules for domestic and foreign personnel that have no basis in the CTA.

In the Final Rule, it remains unclear why the personnel of certain foreign requesters (a foreign law enforcement agency, judge, or prosecutor, via a request made by a law enforcement, judicial, or prosecutorial authority of a “trusted” foreign country when no relevant international treaty, agreement, or convention is available) would have different access standards than their U.S. counterparts.

For such foreign personnel, information can only be accessed by those who have “undergone training on the appropriate handling and safeguarding of information obtained,” whereas information can be accessed by U.S. state, local, or tribal agency personnel who have either undergone training *or* who obtain the information from someone who has (and who received the information directly from FinCEN). This discrepancy has no basis in the CTA and will unnecessarily complicate and impede the practical use of BOI by foreign personnel.

For questions or comments, please contact:

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