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FinCEN Proposes Beneficial Ownership Rules to Implement Anti-Money Laundering Act of 2020 and Strengthen Bank Secrecy Act

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January 7, 2022 – On December 6th and 7th, 2021, the U.S. Treasury Department proposed two rules under the Anti-Money Laundering Act of 2020 (“AMLA”) and the Bank Secrecy Act (“BSA”) with the goal of creating more transparency in corporate ownership and real estate transactions. The AMLA was enacted in January 2021 to modernize and reform the Bank Secrecy Act and the country’s broader anti-money laundering regime. (We previously summarized the AMLA [here](#).) These proposed rules will bolster the U.S. government’s ability to gather information from private entities and strengthen the government’s efforts to enforce the laws against money laundering and terrorist financing.

Corporate Ownership Rules

The AMLA includes the Corporate Transparency Act (“CTA”), which authorizes the Department of the Treasury’s Financial Crimes Enforcement Network (“FinCEN”) to collect identifying information from companies covered under the Act. The CTA requires FinCEN to create a database containing the information about the regulated companies. The corporate ownership rules proposed by FinCEN clarify who must report information to be included in the database and what information must be reported.

~~Specifically, the proposed rule clarifies what qualifies as a “reporting company” and thus required to file reports~~

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beneficial owners of the entity and individuals who filed the application to form the entity. The CTA defines a beneficial owner as someone who either (1) exercises substantial control over a reporting company, or (2) owns or controls at least 25 percent of the ownership interests of a reporting company. The proposed rule further provides three non-exhaustive indicators of “substantial control”:

- Service as a senior officer of a reporting company
- Authority over the appointment or removal of any senior officer or dominant majority of the board of directors (or similar body) of a reporting company
- Direction, determination, or decision of, or substantial influence over, important matters of a reporting company

The rule also defines a “company applicant” as the individual who files the document that forms the entity, or in the case of a foreign company, the individual who files the document that registers the entity to do business in any state. The rule notes a company applicant also includes anyone who directs or controls the filing of the document. The breadth of these definitions could require multiple individuals for each reporting company to file information with FinCEN as beneficial owners or company applicants.

Under the proposed rule, both beneficial owners and company applicants would have to provide to FinCEN their name, birthdate, address, and a unique identifying number from an acceptable identification document.

Real Estate Transaction Rules

FinCEN is also soliciting public comment on a potential rule to impose recordkeeping and reporting requirements on individuals and entities involved in all-cash real estate transactions. FinCEN stated that new requirements are necessary to target corrupt officials and illicit actors who use real estate for money laundering activities. The BSA already applies to real estate transactions that involve a mortgage, since the banks taking the mortgages are “covered financial institutions” under the BSA, but there is currently less regulatory scrutiny on all-cash real estate deals.

In 2016, FinCEN sought to close this loophole by requiring title insurance providers to keep records and identify the individual owners of entities involved in all-cash residential real estate transactions valued over \$300,000 taking place in certain large cities. FinCEN is proposing an expansion of this regulation to apply nationwide, not just to certain metropolitan areas, as well as to commercial real estate in addition to residential real estate. FinCEN did not propose a minimum transaction value for the application of these requirements, but solicited comment on whether a minimum value is appropriate.

The current regulations only apply to title insurance companies, but FinCEN is contemplating adding BSA reporting and recordkeeping requirements to “real estate brokers and agents, title agencies and/or insurance companies, or real estate attorneys.” This would constitute a significant expansion of the categories of individuals and entities subject to the BSA with regard to real estate transactions. FinCEN is accepting public comments on

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