



The Real Estate Roundtable

May 5, 2021

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P.O. Box 39
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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) on the advance notice of proposed rulemaking (ANPR) regarding beneficial ownership information reporting requirements. The National Defense Authorization Act for Fiscal Year 2021 enacted a new section 5336, the Corporate Transparency Act (CTA), in Title 31 of the U.S. Code to require America's small and independent businesses to report beneficial ownership information to FinCEN. We appreciate this opportunity to provide FinCEN with our concerns and recommendations for establishing regulations to implement reporting requirements as well as provisions regarding FinCEN's maintenance and disclosure of reported information effectively and fairly.

The CTA is far reaching and will impact many businesses. If not implemented with a clear set of rules and regulations the CTA could result in an outcome of confusion, missteps, and ultimately fines on law abiding businesses. The CTA requires companies defined as reporting companies to file specified beneficial ownership information with FinCEN. Per the CTA, corporations, limited liability companies (LLCs), or other similar entities created by the filing of a document with a secretary of state or a similar office under the law of a State or Indian Tribe; or formed under the law of a foreign country and registered to do business in the United States by the filing of a document with a secretary of state or a similar office under the laws of a State or Indian Tribe are reporting companies. The CTA goes further and defines many categories of companies that are exempt from reporting.

Clear Definitions and Instructions

The scope of the CTA is far reaching and will impact many commercial and residential real estate businesses who are frequent users of the LLC structure for conducting business. Those businesses are experienced in complying with a broad set of regulations, laws and other legal requirements to conduct business. When these 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 regulation. It is apparent from the ANPR that FinCEN shares this common goal in seeking input on definitions and other instructions to be developed.

FinCEN should establish a multiprong notification and education process once the final rules are promulgated. This notification process should be more than a one-time notice and should include both written, electronic and social media outreach. Besides publishing the final rule, FinCEN also should publish a more abbreviated guide or playbook on who, what and how businesses must comply along with a timeline of implementation. FinCEN publishing and updating answers to “Frequently Asked Questions” (FAQs) also would be helpful.

Real estate businesses typically finance their properties through a choice of debt providers. As a result, these businesses have experience in providing the information required by the CTA. In fact, the Customer Due Diligence (CDD) rule finalized by FinCEN in 2018 provides a very good starting point when looking to establish the rules, definition of terms and instructions to comply with the CTA. We strongly recommend using the CDD regulations as a starting point rather than trying to create entirely new rules. For instance, Question 1 of the ANPR asks what should be included in “other similar entities.” The CDD rule takes the opposite approach by defining what entities are not included, such as sole proprietorship. We recommend using this approach rather than trying to define what “other similar entities” includes. We believe this approach would reduce questions from businesses trying to determine whether or not they are a similar entity.

We also note that one of the triggers in the CTA for classifying a business entity as a “reporting company” is whether the entity is “created by the filing of a document with the secretary of state or similar office under the law of a State or Indian Tribe.” We encourage FinCEN to consider that state filing obligations for new business entities vary greatly. For example, business partnerships can be broken down into general partnerships (GP), limited partnerships (LP), limited liability partnerships (LLP) and limited liability limited partnerships (LLLP). While LPs, LLPs and LLLPs typically must register with the Secretary of the State, GPs are generally not required to register. The North Carolina Secretary of State’s Office, for example, does not require the filing of paperwork to create a GP. However, if the entity desires to use a trade name distinct from the name of the general partners, a certificate of assumed name is required to be filed with the Register of

Deeds Office in the county where the principal office is located. In contrast, in the state of Vermont, all GPs must register with the Secretary of State and renew their registration every five years. Additional clarification is necessary to avoid confusion and unequal treatment of same-kind entities depending on the state in which they are situated.

FinCEN asks how to define “substantial control,” which is not defined in the CDD rule. We believe it is imperative the term be defined clearly and concisely. We suggest FinCEN review the approaches employed by other federal agencies and the federal courts. The Securities and Exchange Commission (SEC) has promulgated regulations defining “control,” in the liability context, as “the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.” 17 C.F.R. § 230.405 (Jan. 1, 2021). While an extremely broad definition, it offers a good starting point.

Without a clear definition, “substantial control” over a corporation, LLC or similar entity could be presumed to mean to have the ability to control the organization such as; make investment decisions, encumber the property, sell the property, hire a property manager or other similar key decisions. However, a person or entity may make key decisions but does not exercise “substantial control” for purposes of meeting the definition of beneficial owner. For example, a third-party property manager does not constitute an entity who has substantial control of the corporation, LLC or similar entity. Even though property managers make many decisions that influence the operations of the property, they are hired by and report to the owners of the property. Further, there are many instances where more than one person or entity can have substantial control. An LLC with three equal owners is one example that has multiple substantial controlling parties.

Under the CTA, applicant is defined as an individual who files an application or registers to file an application to form a corporation, LLC or similar entity doing business under the laws of a State or Indian Tribe. Many smaller property owners rely on the corporation or LLC formation services of legal professionals to ensure compliance with applicable state law. Clarification of the term is necessary to state that legal representatives of the reporting company, other than the beneficial owner, may continue to act on behalf of the entity and provide the required beneficial ownership information to FinCEN.

Reporting Beneficial Ownership Information on New and Existing Reporting Companies

We are concerned the small companies targeted by the CTA will face a compliance burden when this new reporting requirement begins. In particular, small real estate developers and builders, commercial and multifamily property owners and property managers often create a separate corporation, LLC or other similar entity for individual projects or properties, or other specific aspects of their businesses. Thus, in addition to being reporting companies themselves, as applicants for numerous corporations, LLCs and

other similar entities may be active participants in other LLCs or entities simultaneously, leading us to believe these small business owners will struggle to comply with the CTA.

In developing regulations for compliance with CTA, FinCEN must consider that small companies are less likely to have the financial means to hire administrative or professional staff to help interpret and carry out the required processes.

Therefore, determining a reporting company and a beneficial owner, the process for reporting the required information on each beneficial owner of newly formed reporting companies and the process for reporting changed information on the beneficial owners of reporting companies must be clear and uncomplicated. Uncertainty regarding these components of the regulations will increase the compliance burden and possibly decrease compliance overall.

The mandate for existing reporting companies to report their beneficial owners within two years of the effective date of the regulations also will pose significant challenges for companies that have created many reporting companies. If an applicant, beneficial owner or other legal representative has created numerous corporations, LLCs or similar entities for specific business purposes, that applicant, beneficial owner, or other legal representative must be made aware of the new reporting requirements for any entities created that are reporting companies. For each entity meeting the definition of a reporting company, all beneficial owners must be determined. Tracking 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.

Reporting Changes to Beneficial Ownership Information

The CTA requires a reporting company to report to FinCEN any change with respect to the beneficial owners not later than one year after the date of a change. The CTA further requires the Secretary of the Treasury in consultation with the Attorney General and the Secretary of Homeland Security to evaluate whether the report on the beneficial owners should be updated within a shorter period of time after considering the benefit of a shorter period of time to law enforcement and national security officials and the burden to corporations, LLCs and other similar entities.

New and updated information on a beneficial owner should not be required by FinCEN within a shorter period than one year after the receipt of the information by the reporting company. Neither should a reporting company be required to confirm on a regular basis to FinCEN that beneficial ownership information is unchanged. FinCEN should only require notification if there is a change to required information. Small reporting companies will face an increased compliance burden if the requirements for reporting to FinCEN are too frequent and seemingly unnecessary.

The timing of annual updates must be considered as well so that businesses that have 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.

Beneficial Ownership Information Reporting and Notification Process for New Entities

FinCEN should work with secretaries of state or similar offices under the law of a State or Indian Tribe to develop a process that requires an applicant creating or forming a corporation, LLC or similar entity to receive and acknowledge information to determine whether it is creating a reporting company and therefore must submit beneficial ownership information to FinCEN. To encourage accurate compliance, this process must be clear and efficient. For example, if while filing to create a corporation, LLC or similar entity, the applicant is able to self-determine it is creating a reporting company, the applicant would find a link to FinCEN's database at the bottom of the state's application form and allow beneficial ownership information to be entered. In the case of paper forms being filed to create the corporation, LLC or similar entity, the same information would be included on the form and an additional form would be required to be completed and sent to FinCEN.

The information/forms received by a corporation, LLC or similar entity being newly created would include all information relevant to a company's reporting requirements. This would include how and when a reporting company must submit changes in beneficial ownership information to FinCEN and a process for determining and notifying FinCEN of a change in a company's status from a reporting company to an exempt company and vice versa. This is sure to happen as companies increase employees and revenue or lose employees and revenue.

Beneficial Ownership Information Reporting Process for Existing Entities and Updated Information

FinCEN should develop a process for existing entities to deliver beneficial ownership information and updated beneficial ownership information directly to FinCEN's beneficial ownership database.

Corporations and LLCs are created for many reasons. For instance, many business owners create numerous corporations or LLCs to deal with different aspects of their businesses; and families set up corporations or LLCs to deal with estates and family business. The CTA requires that all these entities report their information within two years of the reporting going live. We recognize that the reporting requirement to go live is to be determined at some date in the future, well past the issuance date of the reporting requirement January 1, 2022. This presents an opportunity for FinCEN to minimize the

impact on the many businesses that will have to evaluate, collect and determine reporting requirements once reporting goes live.

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, a detailed FAQ and a detailed playbook outlining the key terms and processes for owners to 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

If FinCEN allows paper submittals of this lookback information, it needs to be ready to receive potentially millions of paper submissions. This will require manual entry for these paper-based reporting companies who must subsequently be able to access the entered data to ensure it is accurate.

Notification Process

The CTA requires FinCEN to take reasonable steps to provide notice to persons of the reporting obligations. We believe there are various avenues FinCEN could take to ensure existing corporations, LLCs or similar entities receive notice of this requirement. These would include, for example, outreach to entities that have periodic contact with corporations, LLCs or similar entities, such as the Internal Revenue Service (IRS), secretaries of state or similar offices under the law of a State or Indian Tribe in states that require periodic renewals and updated corporate filings, and accounting firms that file taxes for corporations, LLCs or similar entities.

FinCEN Identifier

We support the creation of a FinCEN identifier. We believe it will ease the compliance burden on reporting companies that can use the identifier for reporting a beneficial owner. For example, an individual who is a beneficial owner across multiple investments would only have to provide their FinCEN identifier to the reporting companies rather than having to provide the required identification to multiple reporting entities. As with the notification process of the reporting requirements themselves, in order to encourage the broadest use of the identifier, FinCEN should establish a media and educational outreach campaign that informs the business community and individuals of the availability of this identifier and its potential benefits.

Required Information

FinCEN asks what information it should require a reporting company to provide about the reporting company itself to ensure the beneficial ownership database is highly useful to authorized users. We do not believe FinCEN should require a reporting company to

report more information to FinCEN than required by the statute.

Neither should a reporting company be required to provide information about its corporate affiliates, parents, and subsidiaries unless any of these entities meet the statute's definition of a beneficial owner. The CTA is clear about the beneficial ownership information required and we would oppose a requirement by FinCEN that a reporting company submit more than the information required in the statute, i.e. (i) full legal name; (ii) date of birth; (iii) current, as of the date on which the report is delivered, residential or business street address; and, (iv) unique identifying number from an acceptable identification document; or FinCEN identifier in accordance with requirements in the statute.

Filing Options

FinCEN's regulations should allow a reporting company to choose whether it files required reports electronically or in written form. While most companies probably will have the capability to file required reports electronically, we believe there will be companies that do not have this capability and there will be others that prefer to file the information by completing and submitting a written document. Both options should be available.

FinCEN also should have a process that allows the reporting company to submit required reports in batches using proprietary software developed by private-sector technology service providers. As we have noted, there will be companies submitting information on numerous corporations, LLC and similar entities that will benefit from the efficiency of this option.

Accuracy of FinCEN Database

Whether initial entry or ongoing updates, FinCEN has a desire for the information in their database to be accurate. To ensure this is the case, any Final Rule should:

- Allow the reporting company to attest the information is accurate to the best of their knowledge in cases where they are unable to secure documentation. For example, what if one of the beneficial owners does not have a passport, driver's license or other form of proof of identity named in the CTA? This is important as there may be instances where the identification information required in the CTA is difficult to obtain.
- Allow for submitting the identification documents by scanning or copying the documents and file either electronically or via paper.
- Encourage FinCEN to establish relationships with all governmental bodies at the international, federal, and state level that issue the acceptable form of identification to assist FinCEN in verifying the reported beneficial owners.
- Make clear that a Safe Harbor for inaccuracies in the database exists and provides for a notice and opportunity-to-cure period that allows sufficient time for a

reporting company to investigate the claim, obtain the information and report back to FinCEN.

Accessing Data from FinCEN

Access to and the security of the information within the FinCEN database is critically important. The CTA outlines a detailed framework for who can request access but the ANPR seeks input on who, how, when and what entities should be able to access the data. While the security of the information is essential and our organizations support limiting access to this database, access to the information by financial institutions, with borrower consent, would be beneficial and could facilitate safe and efficient financial transactions that avoid duplicative reporting.

Decisions on credit often are time bound and delays in evaluating the creditworthiness of an entity can disrupt the flow of capital. Therefore, access to the FinCEN data must be timely in order to ensure the flow of capital to the commercial and residential real estate industry.

FinCEN should consider the variety of lenders in the market and how they can access the FinCEN data in order to make an evaluation of beneficial ownership. For instance, on November 4, 2020 FinCEN issued a *Geographic Targeting Order* that required title companies to report to FinCEN beneficial ownership information for residential real estate transactions settled via an all-cash transaction. The purpose of this order is to close a loophole of the CDD rule for cash transactions. Any real estate property paid for in all cash could avoid the financial institutions regulated by the CTA but depend on a title company to finalize the transactions. However, title companies are not described in the entities having access to the FinCEN database, yet they would still be required to obtain the same information. This duplicative work could be avoided by providing title companies access to the FinCEN database. Another example is Fannie Mae, a government sponsored enterprise that is an insurer of multifamily loans. Fannie Mae requires its Delegated Underwriter and Servicing (DUS) network of lenders to fully underwrite and share in the risk of each loan Fannie Mae insures. Today DUS lenders undertake a very detailed and thorough credit evaluation. As part of their existing due diligence process, these lenders may wish to further bolster the underwriting process by supplementing their underwriting with verification of data using the FinCEN database.

The examples offered are just two of many that may exist. Direct access to the FinCEN database by these lenders is prevented by the explicit rules in the CTA. FinCEN should develop a protected process whereby a reporting company can make a request to have a report securely sent to a lender. This would satisfy the lender's compliance through the receipt of the information directly by a third party but does violate the terms of the CTA.

Conclusion

The real estate industry supports giving the law enforcement community the tools necessary to stop money laundering, terrorism financing or other crimes. 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,

National Apartment Association

National Association of Home Builders of the United States

National Multifamily Housing Council

The Real Estate Roundtable