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## THE FEDERAL CORPORATE TRANSPARENCY ACT: MORE ANSWERS ARE PROPOSED<sup>1</sup>

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This is my sixth article<sup>2</sup> discussing the federal Corporate Transparency Act included in the National Defense Authorization Act (“NDAA”) adopted by Congress on January 1, 2021, when it overrode President Trump's veto. The NDAA includes the Corporate Transparency Act (“CTA”) and certain other anti-money laundering provisions which require implementation by Department of Treasury Rulemaking through its Financial Crimes Enforcement Network (“FinCEN”).

On December 7, 2021, FinCEN issued its first notice of proposed rulemaking dealing with one aspect of the CTA - the requirements for reporting companies to provide beneficial ownership information (“BOI”) and other information, such as the definitions of reporting companies, beneficial owners, and senior officers, to FinCEN, in the reports. On September 29, 2022, after the comment period closed, those rules were modified and adopted as discussed in an earlier paper.<sup>3</sup> Those rules primarily focused on the beneficial ownership information reporting requirements under Section 6403 of the CTA to be met by reporting companies under the CTA. As set forth in those rules and as discussed in my earlier paper, the BOI report to be filed with FinCEN will contain a significant amount of confidential and sensitive personal identifiable information (“PII”).

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<sup>1</sup> For an updated version, see Lidstone, Herrick K., *The Federal Corporate Transparency Act: More Answers Are Proposed* (January 11, 2023), available at <https://ssrn.com/abstract=4313089>

<sup>2</sup> *The Federal Corporate Transparency Act: The Answers Are Here, In Part* (October 15, 2022), available at <https://ssrn.com/abstract=4236649>; *The Federal Corporate Transparency Act – Answers Are Coming*, (January 1, 2022) available at <https://ssrn.com/abstract=3991988>; *The Federal Corporate Transparency Act: Still Waiting for Answers* (November 20, 2021) available at <https://ssrn.com/abstract=3964106>; *The Federal Corporate Transparency Act – Part 2: Waiting for Answers and Dealing with Ethical Issues* (March 2021) available at <https://ssrn.com/abstract=3805868>; and *Why Business and Real Estate Lawyers Need to Worry About the 2021 National Defense Authorization Act* (January 2021) available at <https://ssrn.com/abstract=3759897>. These articles provide information about the background to the CTA and why regulators and certain members of Congress have sought its adoption in the United States for almost 20 years.

<sup>3</sup> Lidstone, Herrick K., *The Federal Corporate Transparency Act: The Answers Are Here, In Part*, available at <https://ssrn.com/abstract=4236649>.

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For your convenience and ease in reviewing this paper, I have included the following table of contents:

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### **A. THE RULES FOR BOI REPORTING - ADOPTED**

The rules for BOI reporting adopted in September 2022 have a January 1, 2024, effective date. Reporting Companies (a defined term, with exceptions as explained in my earlier paper) will have 30 days following their formation or registration to file their initial reports.<sup>4</sup> In addition, Reporting Companies will be required to report any changes to the information submitted in their previously filed reports. Once a Reporting Company becomes aware of or has reason to know of the inaccuracy of information submitted in an earlier report(s),<sup>5</sup> it must provide the corrected and/or changed information to FinCEN within 30 days.

Domestic and foreign Reporting Companies created or registered before January 1, 2024, will have one year (until January 1, 2025) to file their initial BOI reports. In addition, they will be held to the same 30-day requirement for reporting changes and and/or corrections of BOI information to FinCEN.

### **B. PROPOSED RULES – ACCESS TO BOI REPORTS AND SECURITY OF PII**

As set forth in the September 2022 adopting release, FinCEN planned to issue two more sets of rules under the CTA to:

- (1) establish rules for who may access BOI, for what purposes, and what safeguards will be required to ensure that the information is secured and protected; and
- (2) revise FinCEN’s customer due diligence rule following the promulgation of the BOI reporting final rule.

On December 15, 2022, FinCEN issued a new Notice of Proposed Rulemaking (“NPRM”)<sup>6</sup> regarding access by authorized persons to BOI that will be reported to FinCEN in the BOI reports to be filed. The proposed regulations would implement protocols to protect the security and confidentiality of the BOI as required by the CTA, to protect sensitive PII reported to FinCEN in the BOI reports. The NPRM explains the circumstances in which specified recipients would have access to BOI and outlines data protection protocols and oversight mechanisms applicable to each recipient category.

It is intended that the disclosure of BOI to authorized recipients in accordance with appropriate protocols being defined by FinCEN will help law enforcement and national security

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<sup>4</sup> 31 CFR § 1010.380(a)(1).

<sup>5</sup> 31 CFR § 1010.380(a)(2)

<sup>6</sup> 87 Fed. Reg. 77404.

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agencies prevent and combat money laundering, terrorist financing, tax fraud, and other illicit activity – all with a goal of protecting national security.

The NPRM is also proposing regulations to specify when and how Reporting Companies can use FinCEN identifiers to report BOI. FinCEN identifiers were discussed in the first set of rules adopted as a means for persons to avoid providing PII in BOI reports<sup>7</sup> by using an identifier received from FinCEN in place of the requested PII in the BOI reports.

The NPRM states that the proposed rule “reflects FinCEN’s understanding of the critical need for the highest standard of security and confidentiality protocols to maintain confidence in the U.S. government’s ability to protect sensitive information while achieving the objective of the CTA—establishing a database of beneficial ownership information (BOI) that will be highly useful in combatting illicit finance and the abuse of shell and front companies by criminals, corrupt officials, and other bad actors.”

The NPRM describes FinCEN’s ongoing efforts to develop a secure, non-public, cloud-based database in which to store BOI and FinCEN’s intention to use rigorous information security methods and controls typically used in the Federal government to protect non-classified yet sensitive information systems at the highest security level. However, as required in the CTA, FinCEN will permit:

- (1) Federal, State, local, and Tribal officials, as well as certain foreign officials acting through a Federal agency, to obtain BOI for use in furtherance of statutorily authorized activities such as those related to national security, intelligence, and law enforcement.
- (2) Financial institutions (“FIs”) with customer due diligence (“CDD”) requirements under applicable law to have access to BOI to facilitate CDD compliance. Their regulators will likewise have access to BOI to make assessments of CDD compliance.

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<sup>7</sup> When filing BOI reports with FinCEN, the rule requires a Reporting Company to identify itself and to report four pieces of information about each of its beneficial owners (including owners, managers, and other control persons):

- name,
- birthdate,
- address, and
- a unique identifying number and issuing jurisdiction from an acceptable identification document (and the image of such document – such as a social security number, a passport, or a driver’s license).

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**1. *Safeguarding and Verification of Disclosure.*** The NPRM makes it clear that “[k]eeping BOI secure and confidential is one of FinCEN’s highest priorities in building the database, but that must be balanced with allowing authorized BOI recipients to ‘access, handle, and use BOI.’”<sup>8</sup> As required in 31 U.S.C. § 5336(c)(8) of the CTA, the information will be cloud-based and is being developed to “meet the highest Federal Information Security Management Act level (referred to as “FISMA High”).”<sup>9</sup> To best protect the information, functionality of the BOI retrieval system will vary by recipient category (some of which are identified below). As noted in the NPRM, “financial institutions will have a different level of access to BOI than law enforcement agencies.”<sup>10</sup>

FinCEN is continuing to evaluate various options for verifying the BOI received by Reporting Companies. After implementation, and no later than two years after the effective date of the final rule for BOI reporting, the Secretary of the Treasury, in consultation with the Attorney General, will conduct a study to evaluate: (i) the costs associated with imposing any new verification requirements on FinCEN; and (ii) the resources necessary to implement any such changes.<sup>11</sup> What obligations this may impose on the other agencies involved, like the Secretaries of the various States, has yet to be determined.

**2. *Permissible Disclosure Under The Proposed Rules.*** The proposed rules on access to the BOI start with the provision that the BOI information reported to FinCEN “is confidential and shall not be disclosed by any individual who receives such information,” such as a federal, State, local or Tribal officer, employee, or contractor, or as a director, officer, employee, contractor, or agent of any FI. 31 CFR § 1010.955(a).

The proposed rules then continue with permitting FinCEN to make disclosure of BOI to federal agencies “for use in furtherance of national security, intelligence, or law enforcement activity” upon receipt of a request from such agency. 31 CFR § 1010.955(b)(1) then contains a broad definition of each of those terms, including:

- (1) National security activity includes activity pertaining to the national defense or foreign relations of the United States, as well as activity to protect against threats to the safety and security of the United States;

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<sup>8</sup> 87 FR 77408.

<sup>9</sup> FISMA is found at 44 U.S.C. § 3541 *et seq.* See U.S. Department of Commerce, *Federal Information Processing Standards Publication: Standards for Security Categorization of Federal Information and Information Systems* (“FIPS Pub 199”) (Feb. 2004), available at <https://nvlpubs.nist.gov/nistpubs/fips/nist.fips.199.pdf>.

<sup>10</sup> 87 FR 77408.

<sup>11</sup> 31 U.S.C. § 6502(b)(1)(C) and (D).

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- (2) Intelligence activity includes all activities conducted by elements of the United States Intelligence Community that are authorized pursuant to Executive Order 12333, as amended, or any succeeding executive order; and
- (3) Law enforcement activity includes investigative and enforcement activities relating to civil or criminal violations of law.<sup>12</sup>

Proposed 31 CFR § 1010.955(b)(2) discusses disclosure of BOI to State, local, and Tribal law enforcement agencies for use in criminal or civil investigations. FinCEN may make that disclosure only if a court of competent jurisdiction has authorized the State, local, and Tribal law enforcement agencies “to seek the information in a criminal or civil investigation.” The rule does not set any standards for the court’s determination, and although not stated, any disclosure should be subject to the severe limitations on further disclosure set forth in proposed 31 CFR § 1010.955(a) described above.

Proposed 31 CFR § 1010.955(b)(3) discusses disclosure of BOI for use in furtherance of foreign national security intelligence or law enforcement activities. This proposed rule provides that FinCEN may make the disclosure “upon receipt of a request” from a U.S. Federal agency on behalf of “a law enforcement agency, prosecutor, or judge of another country, or on behalf of a foreign central authority or foreign competent authority (or like designation) under an applicable international treaty, agreement, or convention.”

- (1) When there is no such treaty, agreement, or convention, the request must be made by a law enforcement, judicial, or prosecutorial authority “of a trusted foreign country.” This leaves significant discretion at FinCEN.
- (2) The request for assistance must be made in a law enforcement investigation or prosecution, or for national security or intelligence activity “that is authorized under the laws of the foreign country.”

The proposed rules do not tie back disclosure to foreign persons to the strict confidentiality rules found in 31 CFR § 1010.955(a).

Proposed 31 CFR § 1010.955(b)(4) discusses disclosure of BOI to “facilitate compliance with CDD requirements” by financial institutions (“FIs”) and their regulatory agencies. The CDD requirements for “beneficial ownership requirements for legal entity customers” are established in 31 CFR § 1010.230(a) which says:

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<sup>12</sup> The proposed rule specifies that this does not include the routine supervision or examination of a financial institution by a Federal regulatory agency with authority described in 1010.955(b)(4)(ii)(A).

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Covered financial institutions are required to establish and maintain written procedures that are reasonably designed to identify and verify beneficial owners of legal entity customers and to include such procedures in their anti-money laundering compliance program required under [31 U.S.C. 5318\(h\)](#) and its implementing regulations.

Proposed 31 CFR § 1010.955(b)(5) discusses disclosure of BOI to officers or employees of the U.S. Department of Treasury “whose official duties the [Treasury] Secretary determines require such inspection or disclosure” as well as for “tax administration as defined in 26 U.S.C. § 6103(b)(4)” which requires that the information be held as confidential “except as authorized by this title.”<sup>13</sup>

**3. *Limitations On The Use Of The Information Disclosed.*** In addition to the strict confidentiality established in proposed 31 CFR § 1010.955(a), the proposed rules contain a section defining “Use of information by authorized recipients”<sup>14</sup> and “Disclosure of information by authorized recipients.”<sup>15</sup>

Proposed 31 CFR § 1010.955(c)(1) states that, unless otherwise authorized by FinCEN, the information disclosed may be used “only for the particular purpose or activity for which such information was disclosed.” To the extent that the information was requested by a Federal agency for international disclosure, the Federal agency “shall only use it to facilitate a response to a request for assistance” under Proposed 31 CFR § 1010.955(b)(3).

Under Proposed 31 CFR § 1010.955(c)(2), any “officer, employee, contractor, or agent of a requesting agency” under certain of the other rules as proposed<sup>16</sup> will be authorized to disclose the information to another officer, employee, contractor, or agent for the purposes for which the disclosure was originally made, “consistent with the requirements of paragraph (d)(1)(i)(F)” discussed below.

A director, officer, employee of a financial institution may disclose the information received to another director, officer, employee of the same financial institution for the particular purpose or activity for which the information was requested<sup>17</sup> or to its “Federal functional

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<sup>13</sup> 26 U.S.C. § 6103(a).

<sup>14</sup> Proposed 31 CFR § 1010.955(c)(1).

<sup>15</sup> Proposed 31 CFR § 1010.955(c)(2).

<sup>16</sup> These include proposed 31 CFR § 1010.955(b)(1) or (b)(2).

<sup>17</sup> Proposed 31 CFR § 1010.955(c)(2)(i).

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regulator, a self-regulatory organization that is registered with or designated by a Federal functional regulator pursuant to Federal statute” and similar agencies.<sup>18</sup>

Proposed 31 CFR § 1010.955(c)(2)(v) provides that the person at the Federal agency making a request on behalf of a foreign entity may make disclosure to the foreign entity. There are similar limitations set forth in subsequent subsections of 31 CFR § 1010.955(c)(2).

**4. Security And Confidentiality Requirements.** Proposed 31 CFR § 1010.955(d) sets forth the security and confidentiality requirements for domestic agencies (in § 1010.955(d)(1)), for financial institutions (in § 1010.955(d)(2)), and for foreign recipients of information (in § 1010.955(d)(3)). While these requirements vary based on the circumstances, they consistently require that the recipient agency:

- (1) Enter into an agreement with FinCEN specifying the standards and systems to protect the security and confidentiality of the information;
- (2) Establish standards and procedures to protect the security and confidentiality of the information;
- (3) Establish a secure system for BOI storage and personnel access to information, that is auditable by FinCEN; and
- (4) Provide semi-annual certification by the “head of the agency on a non-delegable basis”, and annual reports by the agency to FinCEN, and reports on a more frequent basis if required by FinCEN.

Proposed 31 CFR § 1010.955(e) discusses FinCEN’s administration of requests for information, including its ability to reject requests and to suspend access of any requesting party permanently or temporarily, if FinCEN makes certain findings in FinCEN’s sole discretion.

Finally, the proposed rules conclude with Proposed 31 CFR § 1010.955(f) (“*Violations*”) which states that “[e]xcept as authorized by this section, it shall be unlawful for any person to knowingly disclose, or knowingly use, the beneficial ownership information obtained by the person, directly or indirectly,” under the rule.

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<sup>18</sup> Proposed 31 CFR § 1010.955(c)(2)(ii). This would likely include the Comptroller of the Currency, the Securities and Exchange Commission (and self-regulatory entities and exchanges operating pursuant to SEC oversight), and other similar Federal regulatory agencies.



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### C. BENEFICIAL OWNERSHIP INFORMATION REPORTS AND FINCEN IDENTIFIERS

When filing BOI reports with FinCEN, the rule requires a Reporting Company to identify itself and report four pieces of PII about each of its beneficial owners (including owners and other control persons). An individual may avoid the direct inclusion of his or her PII in a BOI report if the individual has a FinCEN identifier – to be issued in a process being developed by FinCEN who would receive the PII separately and issue a FinCEN identifier that the individual can then use instead of including the PII in the BOI report.

The final rules also described the manner in which FinCEN will issue a FinCEN identifier to entities who may hold ownership interests in or otherwise have control of a Reporting Company.<sup>19</sup> The CTA also provided for the use of a Reporting Company’s FinCEN identifier, specifying that if an individual “is or may be a beneficial owner of a reporting company by an interest held by the individual in an entity that, directly or indirectly, holds an interest in the reporting company,” and that the Reporting Company may report the entity’s FinCEN identifier in lieu of providing the individual’s BOI.<sup>20</sup>

To clarify the language when intermediate Reporting Companies are involved, the NPRM proposes to add 31 CFR § 1010.380(b)(4)(ii)(B) which would permit a Reporting Company to report an intermediate entity’s FinCEN identifier in lieu of a beneficial owner’s BOI only when:

- (1) The intermediate entity has obtained a FinCEN identifier and provided that FinCEN identifier to the Reporting Company;
- (2) An individual is or may be a beneficial owner of the Reporting Company by virtue of an interest in the Reporting Company that the individual holds through the entity; and
- (3) Only the individuals that are beneficial owners of the intermediate entity are beneficial owners of the Reporting Company, and vice versa.

As stated on page 77425 of the NPRM, proposed 31 CFR § 1010.380(b)(4)(ii)(B) would permit a Reporting Company to report an intermediate entity’s FinCEN identifier only when the intermediate entity and the Reporting Company have the same beneficial owners.

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<sup>19</sup> See [31 CFR 1010.380\(b\)\(4\)](#).

<sup>20</sup> [31 U.S.C. 5336\(b\)\(3\)\(C\)](#).

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### D. LAW ENFORCEMENT COMMENTS

The NPRM contains an extensive discussion on the importance of accurate BOI being available to law enforcement for their investigations into and prosecutions of money laundering, corruption, and other illicit financial activities.<sup>21</sup> At the present time, the information available to law enforcement consists of the Customer Due Diligence information available from financial institutions and suspicious activity reports provided to law enforcement.

Law enforcement’s investigations into, and prosecutions of, money laundering, corruption, and other illicit financial activities are often prolonged or stymied by those officials’ inability to rapidly access BOI in a centralized database. “The process for the production of records can be lengthy, anywhere from a few weeks to many years, and . . . can be extended drastically when it is necessary to obtain information from other countries . . . . [I]f an investigator obtains the ownership records, either from a domestic or foreign entity, the investigator may discover that the owner of the identified corporate entity is an additional corporate entity, necessitating the same process for the newly discovered corporate entity. Many professional launderers and others involved in illicit finance intentionally layer ownership and financial transactions in order to reduce transparency of transactions. As it stands, it is a facially effective way to delay an investigation.”<sup>22</sup> These challenges are even more difficult for State, local, and Tribal agencies who do not have the resources that are available to federal law enforcement.

The availability and the accuracy of the BOI to be contained in the BOI reports will greatly aid law enforcement and financial institutions in meeting their law enforcement and customer due diligence goals.

### E. OTHER ISSUES REMAINING TO BE CONSIDERED

**1. Filing Office Coordination.** Reporting Companies under the CTA “means a corporation, limited liability company, or similar entity” whether domestic or foreign, with certain exceptions.<sup>23</sup> Other types of legal entities, including certain trusts, and (although not mentioned in the rule) general partnerships are excluded from the definitions to the extent that they are not created or registered by the filing of a document with a secretary of state, Tribal official, or similar

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<sup>21</sup> See more detailed discussion at 87 FR 77405-77406 of the NPRM.

<sup>22</sup> Federal Bureau of Investigation (FBI), *Testimony of Steven M. D'Antuono, Section Chief, Criminal Investigative Division, “Combating Illicit Financing by Anonymous Shell Companies”* (May 21, 2019), available at <https://www.fbi.gov/news/testimony/combating-illicit-financing-by-anonymous-shell-companies>.

<sup>23</sup> 31 U.S.C. § 5336(a)(11) and 31 CFR § 1010.380(c). The term is discussed in detail in *The Federal Corporate Transparency Act: The Answers Are Here, In Part*, available at <https://ssrn.com/abstract=4236649>.

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office who accept filings for the creation of an entity (a “Filing Office”).<sup>24</sup> At the moment, other than requiring the Filing Office to provide a link to the FinCEN reporting system, Filing Offices have no other responsibility under the CTA. Whether a person actually makes a FinCEN filing is not a question that the Filing Offices have been asked to address.

In the comment process, many state authorities commented that the costs associated with the rule would result in unfunded mandates. Commenters suggested that these costs were substantially underestimated in the original notice and proposed several actions that FinCEN could take to minimize these costs and burdens.<sup>25</sup> FinCEN’s response to the concerns raised by the Filing Offices expressed little sympathy:

FinCEN appreciates these suggestions, and will continue to review the suggestions in light of the cost estimates commenters provided. FinCEN is sensitive to the concerns articulated by these commenters, particularly those related to cost, and notes that the rule does not impose direct costs on state, local, and Tribal governments. Moreover, consistent with the requirements of the CTA, FinCEN intends to coordinate closely with state, local, and Tribal authorities on the implementation of the rule and efforts to provide notice of the reporting requirement. A discussion on certain indirect costs to state, local, and Tribal authorities is included in the costs section of the RIA.<sup>26</sup>

It appears that a minimum requirement for the Filing Offices will be to include a link directing the Applicant to the FinCEN website for the Applicant to file the necessary BOI Report. It is not yet known whether this will be the sole obligation, or whether the Filing Offices will have other obligations with respect to the BOI Reports. For example:

- Will FinCEN require the Filing Offices to make any report to FinCEN (“Applicant Kelly Kapers just filed articles of incorporation for XYZ Corp”) so that FinCEN can cross check to ensure the BOI Report has been filed?

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<sup>24</sup> In a recent memorandum to clients and friends, the law firm Fried, Frank described DAOs as “a new form of entity, with explosive growth, that some envision as ‘the New LLCs’.” DAOs operate on a blockchain where owners are generally not disclosed. Fried, Frank, Harris, Shriver & Jacobson LLP client memorandum dated August 17, 2022, available at <https://www.friedfrank.com/news-and-insights/a-primer-on-daos-a-new-form-of-entity-with-explosive-growth-that-some-envision-as-the-new-llcs-10713>. DAOs can be organized as LLCs (as under the Wyoming DAO Supplement) which would require the filing of an instrument with the relevant Filing Office. See Wyo. Stat. § 17-31-101 *et seq.*, adopted in 2021 and amended in 2022 to permit DAOs to obtain legal status as LLCs under Wyoming’s LLC Act.

<sup>25</sup> 87 FR 59556. One commenter stated that costs could exceed \$1.34 million for notifications to entities and responses to entities’ inquiries.

<sup>26</sup> 87 FR 59559. The final regulatory impact analysis (“RIA”) is found at 87 FR 59549

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- Will the Filing Offices have to close the loop and determine that in fact the Applicant has made the BOI Report filing within the required 30-day period?
- Will the Filing Offices have some other obligation to coordinate with FinCEN?

Any of these requirements on the Filing Officers will likely significantly increase the costs to each Filing Office.

**2. Changes to FI Customer Due Diligence Obligations – Still To Be Published.** We have not yet seen any revisions to the customer due diligence obligations required of financial institutions (“FIs”) under 31 U.S.C. 5318(h)(1)<sup>27</sup> which requires FIs to establish a CDD program “to guard against money laundering and the financing of terrorism through financial institutions.” FinCEN has advised that these rules are forthcoming.

**3. State Privacy Laws.** Among the more significant issues that have not been discussed in the context of the CTA and BOI reporting is the potential impact on states like Wyoming which currently provide significant entity secrecy. As was reported when the Panama papers leaked in 2016, “M.F. Corporate Services Wyoming LLC, a Wyoming-based corporation with links to Panamanian law firm Mossack Fonseca, has helped register more

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<sup>27</sup> Customer due diligence (CDD) requirements for FIs were added by Section 312(a) of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 ([Pub. L. 107-56](#)). See also the final rules as amended by FinCEN in 2016 at 81 FR 29397 (avail. at <https://www.federalregister.gov/documents/2016/05/11/2016-10567/customer-due-diligence-requirements-for-financial-institutions>), including:

- 31 CFR § 1010.230 [beneficial ownership requirements for legal entity customers],
- 31 CFR § 1020.210 [anti-money laundering program requirements for financial institutions regulated only by a Federal functional regulator, including banks, savings associations, and credit unions],
- 31 CFR § 1023.210 [anti-money laundering program requirements for brokers or dealers in securities],
- 31 CFR 1026.210 [anti-money laundering program requirements for mutual funds], and
- 31 CFR 1024.210 [anti-money laundering program requirements for futures commission merchants and introducing brokers in commodities].

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than a dozen other corporations in the state behind the cloak of Wyoming's corporate secrecy protections.”<sup>28</sup> As advertised by Mossack Fonseca to tout formation of entities in Wyoming:

“Ownership is confidential and under state law may only be obtained by court order.”

“Managers and members can either be corporate entities or natural persons,” meaning it’s possible for a shell corporation to be formed in Wyoming without any individual person named in the corporate records.”

This is not only the case in Wyoming, however. Even in Colorado companies may be formed without identifying any owners or any individuals, and without even complying with Colorado law regarding registered agents. C.R.S. § 7-90-601 requires, for example, that domestic entities named as registered agents have “a usual place of business in this state” (Colorado”). However, no one checks this. From a review of filings made in just the last year, it appears that UPS boxes and vacant lots are used by registered agents “as a usual place of business” in Colorado.. This is being studied by a Colorado Secretary of State working group formed under C.R.S. § 7-90-315 (authorized by S.B. 2022-034).

**4. DAOs and Blockchain.** The BOI reporting will also impact a new entity recently created by various states, including Wyoming, known as the “decentralized autonomous organization” or a “DAO.” A DAO is a blockchain-based program functioning as a capital fund, which is based on open-source code, lacks a traditional management structure or board of directors, and whose owners are not definable except through block-chain codes. A DAO provides users (who remain anonymous and operate through the blockchain) with a built-in methodology for collectively managing its code.<sup>29</sup> Wyoming Corporate Services, Inc.<sup>30</sup> advertises the privacy and the asset protection associated with forming a Wyoming DAO – first approved by the 2021 Wyoming legislature in the “Wyoming Decentralized Autonomous Organization Supplement” to the Wyoming Limited Liability Company Act, Wyo. Stat. § 17-31-101, *et seq.*

If the BOI reporting works as it is expected, the anonymity of the blockchain and the DAOs formed with blockchain ownership and management will have to be modified or even eliminated.

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<sup>28</sup> <https://www.usatoday.com/story/news/2016/04/06/panama-papers-why-wyoming-hub-for-shell-companies/82697186/>.

<sup>29</sup> [https://www.zenledger.io/blog/what-is-a-dao?adgroupid=&utm\\_campaign=17604303354&utm\\_source=google&utm\\_medium=cpc&utm\\_content=&utm\\_term=&hsa\\_acc=1047829188&hsa\\_cam=17604303354&hsa\\_grp=&hsa\\_ad=&hsa\\_src=x&hsa\\_tgt=&hsa\\_kw=&hsa\\_mt=&hsa\\_net=adwords&hsa\\_ver=3&gclid=CjwKCAiAqaWdBhAvEiwAGAQItkeGfFCxaJkt9jRdsEUUm2YXO\\_PxiS0ni42aaMaNfNmpUAuWTy2IQRoCEnYQAvD\\_BwE](https://www.zenledger.io/blog/what-is-a-dao?adgroupid=&utm_campaign=17604303354&utm_source=google&utm_medium=cpc&utm_content=&utm_term=&hsa_acc=1047829188&hsa_cam=17604303354&hsa_grp=&hsa_ad=&hsa_src=x&hsa_tgt=&hsa_kw=&hsa_mt=&hsa_net=adwords&hsa_ver=3&gclid=CjwKCAiAqaWdBhAvEiwAGAQItkeGfFCxaJkt9jRdsEUUm2YXO_PxiS0ni42aaMaNfNmpUAuWTy2IQRoCEnYQAvD_BwE)

<sup>30</sup> <https://wyomingcompany.com/decentralized-autonomous-organizations-dao/>.

## **THE FEDERAL CORPORATE TRANSPARENCY ACT: MORE ANSWERS ARE PROPOSED**

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### **F. MORE TO COME**

There remains the comment period for the NPRM and the adoption of the underlying rules as well as setting forth the process for obtaining a FinCEN identifier. In addition, revisions to FinCEN's customer due diligence rule are pending.

As discussed above, FinCEN continues to develop the infrastructure for the filing of BOI reports, the creation of FinCEN Identifiers, and the creation of the BOI report form itself. FinCEN has said that it will publish in the Federal Register for public comment the reporting forms that persons will use to comply with their obligations under the BOI reporting rule. FinCEN promised that it will publish these forms well in advance of the effective date of the BOI reporting rule.

In the earlier rulemaking, FinCEN also expressed its intention to develop compliance and guidance documents to assist Reporting Companies in complying with this rule. Some of these materials will be aimed directly at, and made available to, Reporting Companies themselves. FinCEN stated that it will issue a Small Entity Compliance Guide, pursuant to section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996, in order to inform small entities about their responsibilities under the rule. Other materials will be aimed at a wide range of stakeholders that are likely to receive questions about the rule, such as secretaries of state and similar offices. FinCEN also intends to conduct extensive outreach to all stakeholders, including industry associations as well as secretaries of state and similar offices to ensure the effective implementation of the rule.<sup>31</sup>

### **G. THE UNDERLYING DOCUMENTS.**

The documents released by FinCEN reporting the adoption of the CTA rules can be found at the following:

**News Release:** <https://www.fincen.gov/index.php/news/news-releases/fincen-issues-notice-proposed-rulemaking-regarding-access-beneficial-ownership>

**Final Rule:** <https://www.federalregister.gov/documents/2022/12/16/2022-27031/beneficial-ownership-information-access-and-safeguards-and-use-of-fincen-identifiers-for-entities>

**Fact Sheet:** <https://www.fincen.gov/nprm-fact-sheet>

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<sup>31</sup> See discussion at 87 FR 59549-51.