Final Transparency Regs Move Closer to Release

by Andrew Velarde

Final regs related to the Corporate Transparency Act (CTA) are inching toward release, having reached one of the final stages of review at the Office of Information and Regulatory Affairs.

According to its website, the final regs from Treasury's Financial Crimes Enforcement Network were received on August 30 by OIRA, which is part of the Office of Management and Budget. They are deemed economically significant, a designation that is given to regs expected to have an annual non-revenue effect on the economy of $100 million or more.

The CTA became law in January 2021 and targets tax fraud, terrorism financing, and money laundering by requiring corporations, limited liability companies, and similar entities to disclose information about beneficial owners to FinCEN. Despite the legislation, the United States ranked No. 1 on the Tax Justice Network's 2022 Financial Secrecy Index, and lawmakers have called for quicker issuance of regs.

Treasury released proposed regs (RIN 1506-AB49) on beneficial ownership in December 2021 that provide details on reporting requirements and exemptions. Reporting requires information such as names, addresses, and identifying numbers from the reporting entity, the beneficial owner, and the company applicant. The company applicant is the individual who files or directs and controls the filing of the formation or registration documents. A beneficial owner is defined as any individual who, directly or indirectly, either exercises substantial control over a reporting company or owns or controls at least 25 percent of the ownership interests of the company. Exempt from the reporting requirement are large operating companies with 20 or more full-time U.S. employees, more than $5 million in sales, and a physical operating presence in the United States.

FinCEN received more than 400 comments on its proposed regs, ranging from those voicing support for the rules to others seeking significant changes to definitions and exemptions from reporting. Some practitioners are worried about the breadth of the rules and the potential burdens and liabilities they impose, especially for private equity clients. Others have argued that the rules could have a significant impact on states that look to establish high levels of privacy for entities and foreign investors who wish to remain anonymous.

According to Severiano Ortiz of Kozusko Harris Duncan, among the biggest changes practitioners are hoping for in the final regs is a paring down of the reporting requirements for company applicants. He added that changes to substantial control definitions, which could affect those holding a power of attorney under Form 2848, would also be welcome.

Well, We're Waiting . . .

The regs on beneficial ownership are just a portion of CTA guidance expected. Treasury previously indicated that it expects to release three tranches of guidance, with the latter two portions addressing revisions to FinCEN's customer due diligence rules and access to the information.

According to the project's abstract on the OIRA website, while the proposed regs only addressed the reporting aspect of the CTA, FinCEN received comments on all three subjects targeted for regulation as well as their interaction and how the information database will function.

"FinCEN is reviewing these comments and considering the timing and sequence of the regulatory actions it will take to fulfill the requirements of section 5336 in light of the issues of regulatory interaction that the comments raise," the abstract states.

Title 31, section 5336 was added by the CTA to the Bank Secrecy Act and required final regs on beneficial ownership information reporting to be published by January 1, 2022.

FinCEN acting Director Himamauli "Him" Das was grilled by some lawmakers over his bureau's operations and its rulemaking during an April 28 hearing of the House Committee on Financial Services. Rep. Patrick T. McHenry, R-N.C., argued that the proposed regs were "far too complex, overly broad, and deviated significantly from Congress' intent."

Das said FinCEN was considering the burdens faced by small businesses as it worked toward drafting the final rules but that it also proposed a

rule that would "develop a highly effective database for law enforcement." Das made clear at the hearing that funding shortfalls had plagued the bureau, leading to missed deadlines, and that sufficient resources were critical to help it build its beneficial ownership database.

"We'll continue to miss deadlines because we just don't have the staffing to be able to carry through on all the efforts required under" the Anti-Money Laundering Act of 2020, Das said, adding that FinCEN hoped to get the access rule proposed by the end of the year while it continued to address comments on the reporting proposed reg.

In April the Financial Accountability and Corporate Transparency Coalition wrote FinCEN, urging it to quickly release its second set of regs on the collection, storage, and interoperability of beneficial ownership data to help facilitate sanctions against Russian oligarchs.

The House has proposed legislation that would increase FinCEN's budget to $210 million, a figure sought by the Biden administration. A Senate Appropriations Committee bill included $189 million for FinCEN, which would be a smaller, 17 percent increase over its current-year budget. ■

Groups Lean on Lenity to Support Per-Form FBAR Penalty Approach

by Andrew Velarde

Myriad interest groups are asking the Supreme Court to hold that non-willful foreign bank account reporting penalties apply per form, arguing that the rule of lenity applies and the statute is at least ambiguous.

On August 25 the Center for Taxpayer Rights and the U.S. Chamber of Commerce each filed amicus briefs in support of the petitioner, Alexandru Bittner, with the Court in *Bittner v. United States*. Those follow a brief from the American College of Tax Counsel filed in support of Bittner August 24. The groups all filed separate amicus briefs in support of Bittner's petition for a writ of certiorari in April.

The U.S. Chamber of Commerce brief faults the government for what it deems its "maximalist reading" of the Bank Secrecy Act that would apply non-willful FBAR penalties per account, arguing that Bittner's "less draconian interpretation" is the proper one.

"At a minimum, the law fails to provide a clear statement that violators can be subject to a (quickly multiplying) per-account obligation. The rule of lenity requires Congress to speak plainly if it wishes to inflict such harsh penalties on U.S. taxpayers," the brief says. "Applying the rule of lenity here would serve the very interests the rule has protected for centuries: providing fair notice of the conduct triggering statutory penalties, while leaving it to Congress, not the courts, to fill any gaps in the statutory scheme."

The National Federation of Independent Business Small Business Legal Center, National Association of Home Builders, American Farm Bureau Federation, Restaurant Law Center, and Corn Refiners Association also filed an amicus brief on August 23, citing the rule of lenity in asking the Court to rule in favor of the per-form interpretation.

Section 5321 of title 31 of the U.S. Code establishes civil penalties for non-willful FBAR violations, but it doesn't define violation. Section 5321(a)(5)(A) states that Treasury may impose a civil penalty on a person who violates "any provision of section 5314," while section 5321(a)(5)(B)(i) says the penalty shall not exceed