

FinCEN Identifiers Rules Finalized With Modest Changes

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Treasury's Financial Crimes Enforcement Network has finalized rules on how entities must report beneficial ownership information, offering minor clarifications on the use of FinCEN identifiers and eschewing calls for other changes.

FinCEN released the [final regs](#) on November 7. The guidance [follows up](#) on proposed regs on the use of reporting companies' FinCEN identifiers from [December 2022](#).

Identifiers are unique identifying numbers issued by FinCEN to individuals and reporting companies that have provided their beneficial ownership information (BOI) or filed their BOI reports. Final regs from [September 2022](#) addressed individuals' use of identifiers but not entities' use.

The Corporate Transparency Act (CTA) — enacted partly to combat tax fraud by requiring corporations, limited liability companies, and similar entities to disclose information about beneficial owners — states 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,” the reporting company may report the appropriate entity's FinCEN identifier instead of the individual's BOI. As noted in the new final regs, while FinCEN originally intended to incorporate this language without significant change in its rules, some commentators expressed concern that identifiers could promote secrecy. Others were confused by the language. And still others suggested that problems might occur when an identifier is used for ownership structures with multiple beneficial owners and intermediate entities.

The proposed regs provided that a reporting company can report another entity's identifier when the entity has obtained an identifier and provided it to the reporting company; when an individual is or may be the beneficial owner of the company by virtue of an interest in the company that they hold through the entity; and when the beneficial owners of the entity and the reporting company are the same individuals.

“This proposal reflected FinCEN's understanding that use of the entity FinCEN identifier would best satisfy the CTA's overall statutory scheme — in which reporting the intermediate entity's FinCEN identifier would be equivalent to reporting the BOI of the reporting company's beneficial owners — only if the two entities in fact had the same beneficial owners,” the preamble to the final regs states.

The final regs clarify the proposed regs by referring to the entity whose FinCEN identifier is used by the reporting company as “another entity” or “the other entity.” The final regs also clarify that it is an individual's ownership interest in another entity that permits the use of the identifier.

“FinCEN considers both of these changes to improve the clarity of the provision and make it more likely that reporting companies will use the FinCEN identifier as intended,” the preamble states.

FinCEN rejected other calls for revision to its rules, including by declining to remove a provision allowing use of an entity identifier if a beneficial owner of the entity “may be” a beneficial owner of the reporting company by virtue of an interest in an intermediate entity. FinCEN also refused to clarify the requirement that a reporting company update a BOI report if the entity’s beneficial owners cease to be the same as the reporting company.

Severiano E. Ortiz of MNF Legal LLC said the final regs appear to be very narrow. He argued that they may simplify some filings, especially those with several directly held entities.

“In such instances, only the top-level entity would have to report the individual FinCEN identifiers, and the entities below would simply report the entity FinCEN identifier of the most immediate entity owner in the structure. However, this would only be the case in the narrow situation under the rules where the beneficial owners are the same,” Ortiz said.

Ortiz added that the rule could make reporting more complicated in other instances, pointing to the definitional requirement that “the beneficial owners of the other entity and the reporting company are the same individuals.” He said the reporting company will have to be concerned with any changes in beneficial ownership of an entity whose FinCEN identifier it is reporting, given that the requirement to update BOI for any changes in beneficial ownership still applies. He wondered whether an upper-tier entity’s management would cooperate in a timely manner to make those determinations. Ortiz also pointed out that “beneficial owner” includes not only those who indirectly own 25 percent or more of the reporting company but also those who have significant control, including key officers.

“However, for this purpose, the beneficial owner in question is only the individual who is or who may be so ‘by virtue of an interest in the reporting company.’ So, on a practical level, this is still very broad, especially because for purposes of the ownership test, we must take into consideration ownership interests that could be converted, exercised, etc.,” Ortiz said. “So a new issuance of a profits interest in a higher-tier entity in theory could terminate the lower-tier entities’ use of their reported entity FinCEN identifier of their [beneficial owners]. It may be simpler just to do a de novo review of each reporting company’s beneficial owners, without trying to rely on provided entity FinCEN identifiers that risk being incorrect or changing outside the radar of the reporting entity’s management.”