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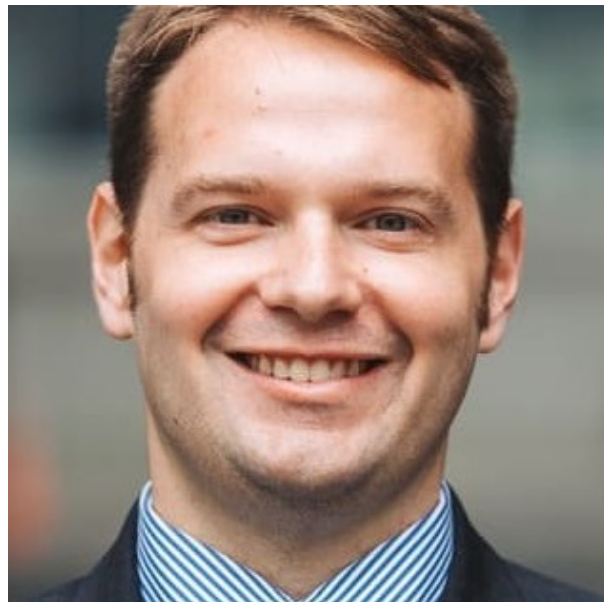
Will new beneficial ownership law aid CFIUS's ongoing NNT search?

As most Foreign Investment Watch readers know, the Corporate Transparency Act, which requires certain companies to disclose beneficial ownership information, became effective back in January. Experts now say the Act could theoretically help CFIUS in its ongoing search for non-notified transactions.

WHAT HAPPENED

The Corporate Transparency Act, which was created to curb illicit finance, was enacted three years ago and became effective Jan. 1, 2024. Among other things, the law requires many companies doing business in the U.S. to report information about the individuals who ultimately own or control them.

Earlier this year, the Treasury Department's



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Financial Crimes Enforcement Network began accepting those “[beneficial ownership reports](#).” The process is free; most existing companies have until Jan. 1, 2025 to file, and newly created companies have 90 days after incorporation to do so.

Generally speaking, a beneficial owner is an individual who owns 25% of the company, or who “exercises substantial control.”

CFIUS NEXUS

After the law was enacted, FinCEN published a separate [fact sheet](#) related to information access. According to the document, while beneficial ownership information is confidential, FinCEN can disclose BOI in several different instances, including to “U.S. federal agencies engaged in national security, intelligence, or law enforcement activity.”

Several experts who spoke to Foreign Investment Watch stated that CFIUS will likely be one of the national security agencies that utilizes the new BOI data.

“Absolutely,” says one former Treasury staffer now in private practice. “This absolutely means the Committee can and will request BOI as it seeks to fulfill its national security mandate.”

There are some limitations on those requests though. For example, federal government agencies like CFIUS will be required to provide the “specific reasons why the requested information is relevant” to their national security activity.

Despite that, experts believe that access won’t be an issue. “What CFIUS wants, CFIUS will get,” said another member of the CFIUS bar, “especially when it comes to BOI.”

Derrick Kyle, a senior associate at Torres Trade Law, agrees, noting that CFIUS would “fit squarely within the type of

organization” that would utilize BOI. Kyle calls the BOI “low hanging fruit” for CFIUS and says the Committee “would be foolish not to take advantage of the treasure trove of information that will now be available.” As an example, Kyle says “a change of beneficial owner reported to FinCEN showing a new beneficial owner with a foreign residential address and foreign passport could flag a potential foreign investment or acquisition.”



[View](#) the beneficial ownership report filing instructions.

Unlike other federal forms – like IRS income tax returns, for example – the BOI database will include information about “an astonishing number of individuals that have control over private companies,” says Kyle. FinCEN has [explicitly stated](#) that the BOI reporting requirements are designed to “close loopholes that allow corporate structuring that obscures owners or decision-makers,” which has long been a concern for CFIUS.

IMPACT ON NON-NOTIFIEDS

According to experts like Kyle, there is significant risk of overlap with CFIUS non-notified reviews. That’s because the types of companies most in danger of failing to file with CFIUS are also the ones that need to file BOI reports. That includes early stage startups working on emerging technologies that need access to capital.

“Captured in the net of the BOI reporting requirements will be companies that are primed for foreign investment, and potentially concerning for national security,” says Kyle, “like small tech start-ups that are engaged in the design or production of critical technologies, or app developers that may collect sensitive personal data of U.S. citizens.”

The requirement to update FinCEN on changes of beneficial ownership could be especially relevant here. “This reporting of changes in BOI will almost certainly uncover non-notified transactions subject to CFIUS jurisdiction, including some transactions that required a mandatory filing,” adds Kyle.

One major question regards the ubiquity of the BOI data asset in the near term. “Whenever a new filing requirement is unveiled, there’s often a period of adjustment, during which compliance is not optimized,” said one former Commerce Department official. “FinCEN has set up a [website](#) and is doing education and outreach, but I suspect this may take a few years for the market to adjust, just like CFIUS had a pilot program to hammer out kinks.”

Penalties, of course, may drive compliance. According to FinCEN’s recently updated [Small Business Compliance Guide](#), “willful failure” to report complete or updated BOI could result in civil or criminal penalties, “including civil penalties of up to \$500 for each day that the violation continues, or criminal

New Federal Reporting Requirement for Beneficial Ownership Information (BOI)

Effective January 1, 2024, many companies in the United States must report information about their beneficial owners—the individuals who ultimately own or control the company—to the Financial Crimes Enforcement Network (FinCEN), a bureau of the U.S. Department of the Treasury.

Filing is simple, secure, and free of charge. Beneficial ownership information reporting is not an annual requirement. Unless a company needs to update or correct information, a report only needs to be submitted once.

Be sure to review FinCEN’s [Small Entity Compliance Guide](#), which provides information to help small businesses comply with this reporting requirement.

Who Has to Report?

Companies required to report are called **reporting companies**. Reporting companies may have to obtain information from their beneficial owners and report that information to FinCEN.

Your company may need to report information about its beneficial owners if it is:

1. a corporation, a limited liability company (LLC), or was otherwise created in the United States by filing a document with a secretary of state or any similar office under the law of a state or Indian tribe; or
2. a foreign company and was registered to do business in any U.S. state or Indian tribe by such a filing.

penalties including imprisonment for up to two years and/or a fine of up to \$10,000.”

[Download](#) the FinCEN brochure on beneficial ownership information.

Interestingly, within the context of CFIUS, failure to file BOI to FinCEN, combined with failure to file a relevant transaction to CFIUS, could result in multiple penalties based on the Committee’s new [penalty framework](#). And while Kyle at Torres Law says the CFIUS civil penalty would still be more severe than the FinCEN civil penalty, “the CTA includes a criminal penalty of up to two years imprisonment and/or a \$10,000 fine for failure to file BOI or filing false or fraudulent BOI.”

CONTEXT, MORE INFORMATION

As most Foreign Investment Watch readers know, the Treasury Department has had a particular focus on non-notified transactions. While the overall volume of NNTs [decreased 28%](#) in 2023, largely due to a decrease in M&A, CFIUS has put a particular focus on non-notified transactions, and mentioned in its [strategic plan](#) that it was working to find and process NNTs faster.

We have provided extensive details on [how CFIUS scours for NNTs](#), and also reminded readers that the DoD also [has its own team](#) prowling for non-notified deals.

The full text of [The Corporate Transparency Act](#) is available, as is a FinCEN website on [beneficial ownership reports](#) and the [fact sheet](#) on information access.

A Torres Trade Law [client alert](#) on this topic, authored by Derrick Kyle at Torres, is also available.
