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Spring's Coming

February 28, 2023

Table of Contents:

- FinCEN’s Final Rule for Beneficial Ownership Reporting Requirements – You Can Run But You Can’t Hide
- Hedging in UK Real Estate Finance Transactions - Part 2
- Biden-Harris Administration Issues White Paper Addressing Tenants’ Rights
- Recent Transactions

FinCEN's Final Rule for Beneficial Ownership Reporting Requirements – You Can Run But You Can't Hide

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The Financial Crimes Enforcement Network ("FinCEN") issued its final rule ("Rule") to implement reporting requirements for beneficial ownership information on September 30, 2022. The Rule will, among other things, require most entities to file with FinCEN the beneficial owners of said entities. The requirements will apply to most companies either located in the U.S. or doing business in the U.S., including pre-existing companies.

The Rule implements Section 6403 of the Corporate Transparency Act ("CTA"), which is intended to, among other things, reduce financial crimes such as money laundering and fraud often committed by shell companies. Previously, the U.S. government and most states have not required the beneficial ownership of companies to be disclosed, which makes it difficult to track and prevent shell companies from committing illegal acts. By providing a centralized database of beneficial ownership information for companies, the Rule is intended to assist in preventing or stopping money laundering, terrorist financing, corruption, tax fraud, and other crimes committed using companies with opaque ownership structures.

The types of companies covered by the Rule include foreign and domestic "Reporting Companies." Domestic Reporting Companies are any entities that are created by the filing of a document with a secretary of state or similar office of a jurisdiction in the U.S., including a comparable office operated by an Indian Tribe; foreign Reporting Companies are any entities that are created under the law of a foreign jurisdiction that are registered to do business with the U.S. There are a range of exceptions for legal entities whose ownership information is either already publicly available or easily obtainable, such as SEC reporting issuers, banks, governmental authorities, public utilities, tax-exempt entities and many others. Entities that fall into the "Reporting Companies" categories above must meet the requirements of the new Rule.

The Rule also sets forth the timeline for compliance. Reporting Companies created or registered to do business in the U.S. before January 1, 2024 will have until January 1, 2025 to file their initial reports containing the requisite information. Reporting Companies created or registered to do business in the U.S. after January 1, 2024 will have 30 days after creation or registration to file their initial reports. If there is a change to the information submitted to FinCEN concerning a Reporting Company, its beneficial owners, or information reported for any beneficial owner, the company must file an updated report within 30 days. If a report was submitted that contains inaccurate information that remains inaccurate, the company must file a corrected report within 30 days after the company became aware or had reason to be aware that the information was inaccurate.

FinCEN also clarified who constitutes a beneficial owner. Beneficial owners are any individuals who, directly or indirectly, either exercise substantial control over a Reporting Company or who own or control at least 25% of the ownership interests of such company. The intention is clearly to provide a wide breadth of coverage as FinCEN defined "substantial control" as one who: (i) serves as a senior officer of a Reporting Company, (ii) has authority over the appointment or removal of any senior officer or a majority or dominant majority of the board of directors (or similar body) of a Reporting Company, and (iii) those who direct, determine, or decide, or exercise substantial influence over, important matters affecting a Reporting Company.

The Rule also clarified exactly what information must be submitted in the initial reports. It requires companies to submit information to FinCEN for the Reporting Company itself and for each beneficial owner and – for newly created entities only – the Company Applicant. "Company Applicants" are (a) individuals who file the document that creates the entity for domestic Reporting Companies and (b) for foreign Reporting Companies, the individuals that first register the entity to do business in the U.S., or anyone who is primarily responsible for directing the occurrence of either (a) or (b) above. The information required for the Reporting Company is the following: (i) the company's full legal name and any trade name, (ii) a complete, current address, (iii) the state or jurisdiction of formation and, for any foreign Reporting Company, the state or jurisdiction where the company first registers, and (iv) the Taxpayer Identification Number or, if the Reporting Company is a foreign entity, the equivalent information. The information required for each beneficial owner and Company Applicant of the Reporting Company is the following: (i) full legal name, (ii) date of birth, (iii) complete, current address, and (iv) a unique identifier such as passport or state-issued identification (such as a driver's license).

The potential liability for failing to comply with the requirements can be substantial. The CTA makes it a federal crime to file, or attempt to file, false reports for a Reporting Company. The CTA provides in essence that it will be illegal to willfully provide false or fraudulent beneficial ownership information to FinCEN or to willfully fail to submit the required information. Individuals that commit a violation are liable to the U.S. for a civil penalty of up to $500 for each day that the violation continues or has not been remedied, may be fined up to $10,000, and can face up to two years in prison.

Going forward, submitting beneficial ownership information to FinCEN will be the new normal for entities formed in the U.S. or doing business in the U.S. Many companies will be required to submit information on their beneficial ownership and to keep that information up-to-date. The application of the Rule is intentionally broad and will cover many companies that do business in the U.S., and the consequences of noncompliance can be significant. It will be important to make sure individuals know what is required and when. We will update this article with any future developments concerning the Rule.

Hedging in UK Real Estate Finance Transactions - Part 2

By **Assia Damianova**
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Following our article from last month, we continue with our discussion on hedging in real estate financing transactions by discussing the frequently negotiated tension points between the facility agreement and the Hedging Agreement.

Structural points to consider

Conflicts between documents. The Hedge Counterparty will start its negotiation from the expectation that the ISDA Master Agreement, Schedule and confirmation that govern its relationship with the Borrower shall prevail. We therefore need to consider the extent to which the provisions of the facility agreement can override those of the Hedging Agreement.

- There will be some general provisions agreed in the facility agreement (such as governing law, tax credits or duty to mitigate) which the Hedge Counterparty would not necessarily want to follow with respect to its Hedging Agreement.

- Separately, the definitions of Finance Party and Finance Documents will exclude, in many circumstances, the Hedge Counterparty and the Hedging Agreement, *i.e.*, the Hedge Counterparty would not necessarily have voting rights under the facility agreement.

- The Hedge Counterparty will also consider and restrict the adverse actions that the Borrower agrees to under the facility documents, *e.g.*, allowing the release of the security, amendments to the waterfall – and the Hedge Counterparty will negotiate that it has to be given sufficient notice of any such proposed changes and that its consent should be obtained before the Borrower can agree to any adverse changes.

Security. The Hedge Counterparty would aim to share the control over the security arrangements and their enforcement right with the senior lenders. They will also ensure that any security documents cover the Hedge Counterparty as a secured finance party and cover all payments under the swap as secured liabilities.

Priorities of Payment. The Hedge Counterparty will want to rank either *pari passu* with or senior to the senior lenders. Therefore, the Hedge Counterparty will review the waterfalls to ensure that principal and interest-type payments are only ever applied in accordance with the agreed order of priority and that no other leakage takes place.

Prepayment. The Hedge Counterparty will incur costs associated with the swaps if partial or full prepayment of the loans occurs. The Hedge Counterparty will therefore negotiate (i) having advance notice of any prepayment, probably in addition to being the recipient of all the transaction reports, with (ii) the calculations being made by the Hedge Counterparty on its side of the market and

(iii) having the right to get paid, under the waterfalls, on the date that the repayment funds are applied.

***Interest*.** Both the Hedge Counterparty and the senior lenders will consider if there are mismatches in the calculation of the applicable interest rate benchmarks, including the business day conventions, day count fractions, and the hierarchy of fallback provisions.

Ratings. Some deals may attempt to anticipate rating requirements associated with any potential securitisation and to write their swaps accordingly with a vast array of rating-agency-required ISDA modifications, as well as rating triggers and tightly-regulated routes to cure drops in the Hedge Counterparty's ratings. The Hedge Counterparty is likely to resist deviations from its "corporate"-style form that anticipate a securitisation.

Biden-Harris Administration Issues White Paper Addressing Tenants' Rights

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On January 25, the White House Domestic Policy Council and National Economic Council published a *Blueprint for a Renter Bill of Rights* on behalf of the Biden-Harris Administration. The stated purpose of the Renter Bill of Rights is to "support the development of policies and practices that promote fairness for Americans living in rental housing."

You can read our Clients & Friends Memo here.

Recent Transactions

Here is a rundown of some of Cadwalader's recent work on behalf of clients:

- Represented the lender in a $425,000,000 mortgage loan secured by a 42-property portfolio of triple-net leased properties located in eight states.
- Represented investors in a Manhattan luxury condominium development in connection with the settlement of foreclosure litigation.
- Represented the lenders in a $380 million securitized financing secured by a life science lab and office building in San Francisco – certified in alignment with the Green Bond Principles 2021 framework.
- Represented the lender in the $82,448,000 financing of a multifamily property located in Las Vegas under a $200 million revolving credit facility.
- Represented the administrative agent and lender on a $71 million construction loan in connection with the development of student housing in Syracuse, New York.
- Represented the lender in connection with a $48M construction loan to finance the construction of a multifamily apartment complex with ground floor retail near the Florida State University campus.
- Represented several lenders in a $531.5 million mortgage loan to refinance a single tenant office building located in Somerville, Massachusetts.