

ISSUE ALERTS

BUSINESSES BEWARE: NEW FILING REGULATIONS FOR MOST COMPANIES TAKE EFFECT JANUARY 1

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Starting Jan. 1, 2024, the Corporate Transparency Act (“CTA”) will require “reporting companies” to electronically file a report identifying the entity and its beneficial owner(s) to the Financial Crimes Enforcement Network (“FinCEN”). FinCEN will use this information to create a database of reports to aid law enforcement in combatting money laundering, terrorism financing, and other illegal activities. FinCEN estimates that more than 32 million businesses will be subject to this new reporting requirement.

“REPORTING COMPANIES” DEFINED

The final regulations define a reporting company to include a domestic or foreign corporation, LLC, or other similar entity that is created or registered to do business by filing a document with a secretary of state or any similar office under the laws of a state or Indian tribe. The regulations exempt numerous entities from this definition.

Twenty-three business types are exempt from the definition of a reporting company under the CTA, most of which are already in highly regulated industries. Prominent examples include banks, credit unions, bank holding companies, public accounting firms, insurance companies, entities registered with the Securities Exchange Commission, and certain tax-exempt entities.

Also exempt from the reporting requirements are “large operating companies” that have more than 20 full-time employees, a physical operating presence in the U.S., and whose previous federal income tax returns demonstrated more than \$5 million dollars in gross receipts.

An entity that is otherwise a reporting company is exempt from the filing requirements if it is controlled or wholly owned by certain exempt entities.

Inactive entities are also exempt from the filing requirements if they existed on or before Jan. 1, 2020, are not engaged in active business, are not owned by a foreign person, have not experienced any change in ownership in the last 12 months, have not received or sent funds of more than \$1,000 in the last 12 months, and do not

otherwise hold any other type of asset, including an ownership interest in an entity.

“BENEFICIAL OWNERS” AND “COMPANY APPLICANT” DEFINED

The required CTA report must include information about any individual who is a “beneficial owner” or a “company applicant.” Under the final regulations, a beneficial owner is one who directly or indirectly exercises substantial control over the reporting company or owns at least 25% of the ownership interests in a reporting company.

Every report must identify at least one beneficial owner through substantial control. FinCEN defines “substantial control” in various ways, including serving as a senior officer (a CEO, COO, CFO, general counsel, or any other role that performs a similar function), having appointment or removal authority over a senior officer or a majority of the board of directors, or having the ability to direct, determine, or exercise substantial influence over important decisions made by the reporting company. Examples include decisions regarding reorganization, merger or dissolution, major expenditures, or investments.

An individual may also exercise indirect control through ownership or control of voting rights, serving on a board, serving as a trustee of a trust, or control over an intermediary entity that exercises substantial control over a reporting company.

An individual may directly or indirectly own or control an ownership interest through any contract, arrangement, or understanding related to any equity, stock, or similar instrument that either confers voting power or rights or any capital or profit interest, including any option, warrant, put, call, or straddle that is convertible into or the right to acquire any such interest. Such arrangements may include a trustee who can exercise rights, the sole beneficiary, or ownership or control of any intermediaries that own or control such interests. An individual meets the 25% threshold if the individual either has combined voting power or ownership interests of 25% or more compared to the total voting power or outstanding value, whichever is higher.

The definition of beneficial owner excludes individuals acting as a custodian, or agent on the behalf of another, employees who are not senior officers, those whose only interest is a future right through inheritance, and mere creditors of a reporting company.

A company applicant is defined as the person who directly files the document that creates or registers the reporting company and any other person who is primarily responsible for directing or controlling the filing. The reporting company must identify at least one company applicant but cannot identify more than two. Entities created or registered before Jan. 1, 2024, are not required to submit information regarding company applicants.

REQUIRED INITIAL FILING AND DISCLOSURES

Entities existing prior to Jan. 1, 2024, have until Jan. 1, 2025, to file their initial reports. Entities established on or after Jan. 1, 2024, will have to file their initial reports 30 days from the earlier of (1) the date on which the reporting company receives actual notice that its creation or registration is effective, or (2) the date on which the secretary of state or similar office provides public notice that the company has been created or registered to do business. A proposed amendment to the rule would extend the filing timeframe for new reporting companies to 90 days for 2024 only.

Each reporting company must report to FinCEN its legal name, trade name(s), principal place of business address, formation or registration jurisdiction, and its taxpayer identification number. For each beneficial owner or company applicant, a reporting company must report the full legal name, date of birth, residential address (or business address for a company applicant), and a unique identification number from an acceptable identification document of the beneficial owner. Acceptable identification documents include a non-expired foreign or domestic-issued passport, driver's license, or other state or local government-issued identification document. Entities must also attach a picture of these identification documents to the reports.

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MANDATORY UPDATING

Each reporting company has a duty to report any changes in reported information, including changes regarding its beneficial owner, to FinCEN within 30 days of the change. Common examples of events requiring an updated filing include the hiring or firing of a senior officer, the settlement of the estate of a deceased beneficial owner, any transfers in ownership of company equity, or a change in any beneficial owner's legal name.

If the reporting company discovers an error in its beneficial owner report, it has 30 days from the date on which the entity becomes aware or has reason to know of the inaccuracy to file a corrected report. The CTA does not impose an obligation on reporting companies to update company applicant information.

A beneficial owner or company applicant may submit an application for a FinCEN identification number after Jan. 1, 2024. Once an individual receives a FinCEN identification number, the entity need only report the individual's identification number instead of including that individual's personal information on every report or update.

PENALTIES AND THE SAFE HARBOR EXCEPTION

The CTA makes it unlawful for any individual, reporting company, or other entity, to willfully provide, or attempt to provide, false beneficial ownership information used in a CTA report. It is also unlawful for any reporting company or its senior officers to willfully fail to timely report complete or updated beneficial ownership information. A senior officer may be liable for CTA violations if the reporting company fails to file a beneficial owner report, even if that senior officer was not directly responsible for directing the filing.

The CTA imposes a civil penalty of up to \$500 for each day that the violation continues. The CTA also allows violators to be fined up to \$10,000 or imprisoned for up to two years, or both, for violations.

Under the safe harbor exception, a person is not be subject to civil or criminal penalties if the person has reason to believe the report contains inaccurate information and within 90 days submits a corrected report. The safe harbor exception is not applicable to any person who intentionally avoided reporting or who had actual knowledge that the report was inaccurate.

STORAGE AND DISCLOSURE OF REPORTING COMPANY AND BENEFICIAL OWNER REPORTS

The CTA database is not publicly accessible. The CTA authorizes FinCEN to disclose beneficial ownership information to federal law enforcement agencies, state law enforcement agencies (if authorized by a court order), foreign law enforcement agencies (if the request is pursuant to an international agreement), and financial institutions for the purposes of conducting customer due diligence, if authorized by the reporting company.

FOR MORE INFORMATION

If you have questions or want more information regarding the Corporate Transparency Act and its possible effects on your business entity, contact your legal counsel. If you do not have regular counsel for such matters, Foulston Siefkin LLP would welcome the opportunity to work with you to meet your specific business needs, including assistance in filing beneficial owner reports with FinCEN. For more information, contact Bill Matthews at 316.276.6371 or bmatthews@foulston.com. For more information on the firm, please visit our website at www.foulston.com.

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