

FinCEN Issues Final Rule for Beneficial Ownership Reporting under Corporate Transparency Act

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On September 30, 2022, the Financial Crimes Enforcement Network (FinCEN) within the U.S. Department of Treasury issued final regulations under the Corporate Transparency Act (CTA) that will require most small domestic and foreign business entities which are registered to do business in the United States to disclose the identity of their beneficial owners. The rule will take effect on January 1, 2024.

These regulations, which finalized proposed regulations issued under the CTA in December 2021, resulted from years of debate in Congress over the best measures to develop a database of beneficial owners of business entities in order to combat terrorism, money laundering and other financial crimes. With the adoption of these regulations, the United States joins many other developed countries throughout the world in providing a means for the federal government, as well as state and local law enforcement agencies, to ascertain the identity of individuals who possess ultimate control over so-called “shell companies” that heretofore were not required to disclose their owners and therefore be better equipped to combat illicit activities conducted through such entities.

The regulations require all “reporting companies,” as discussed below, to report identifying information concerning itself and any individual who either (i) exercises “substantial control,” as discussed below, over the reporting company or (ii) owns or controls at least 25% of the ownership interests of the reporting company. In addition, all reporting companies formed after January 1, 2024, must disclose the identity of the individual or individuals who directly filed the document that creates the entity, or in the case of a foreign reporting company, the document that first registers the entity to do business in the United States, and the individual who is primarily responsible for directing or controlling the filing of the relevant document by another (including attorneys, corporate service companies, etc.) (each such individual referred to as a “company applicant”).

Reporting Company

A reporting company is any entity (i) that is formed under the laws of any state or Indian tribe in the United States or any entity that is formed under the laws of any foreign jurisdiction that has qualified (registered) to do business in any jurisdiction in the United States, and which is formed or qualified by the filing of a document with the secretary of state or equivalent filing office in the jurisdiction of formation or qualification, and (ii) is not one of 23 specified categories of exempt entities that are already subject to beneficial ownership reporting requirements to FinCEN.

Accordingly, all corporations, limited liability companies, limited partnerships and business trusts, among other entities, fall within the definition of a reporting company, while general partnerships, sole proprietorships and other trusts do not.

Exempt entities include, among others, (i) most regulated financial institutions, including banks, credit unions, insurance companies, and broker-dealers, (ii) companies required to file reports under the Securities and Exchange Act of 1934, (iii) tax-

exempt entities, (iv) subsidiaries of exempt entities, and (v) “large operating companies”. This latter category of an exempted entity consists of any entity that has a physical presence in the United States, employs more than 20 full-time equivalent employees and has annual gross receipts in excess of \$5 million.

Beneficial Owners

The regulations require each reporting company to report to FinCEN certain information with respect to each individual that qualifies as a direct or indirect beneficial owner of such reporting company, as described below. The determination of who constitutes a beneficial owner derives from either of two independent tests, a substantial control test or an ownership test.

The regulations define “substantial control” over the entity to mean any of the following: (i) service as a senior officer; (ii) possessing authority to remove or appoint any senior officer or majority of the board of directors or equivalent body; (iii) having the ability to direct, determine or have substantial influence over important decisions to be made by the reporting company; or (iv) having some other form of substantial control over the reporting company. Substantial control can be exercised in a number of ways, including through a position held with the reporting company, through a position held with the parent or other controlling entity of the reporting company, through contractual or other arrangements, through nominee relationships, or through other financial relationships with the reporting company.

The ownership test requires that the individual own, directly or indirectly, at least 25% of the ownership interests of the reporting company. Such ownership may be obtained through direct or indirect ownership of equity interests in the company, through a profits interest, or through convertible instruments such as options, warrants or convertible debt instruments, as well as through trusts or other contractual arrangements. In calculating the percentage of ownership, the regulations require that the number of ownership interests owned by such individual be compared to the total outstanding ownership interests of the company and that any convertible, or exercisable interests in securities owned by the individual be considered to be fully converted or exercised on a per share basis.

The regulations make it clear that there can be more than one beneficial owner of each reporting company.

Information to be Reported and Filing Deadline

Each reporting company formed on or after January 1, 2024, must file an initial report with FinCEN within 30 days of receipt of official notice of formation or qualification from the applicable jurisdiction of formation or qualification. Each reporting company in existence or qualified prior to January 1, 2024, must file an initial report no later than January 1, 2025. The initial report must contain the following information:

- Legal name of the entity and any d/b/a names
- Full business address
- Jurisdiction of formation or qualification for foreign entities
- Tax Identification Number
- Beneficial Owner information, including for each individual:
 - Full legal name of the individual
 - Residence address of the individual
 - Unique identifying number for the individual as provided by a governmental agency, such as a driver’s license number, passport number or other identification card number, in each case together with an image of the document where such number exists.

In addition, reporting companies must file an updated report with FinCEN containing revised information within 30 days of (i) any changes to the information or (ii) the company becoming aware or having reason to know of any incorrect information previously reported.

For entities formed on or after January 1, 2024, the initial report must also include information for each company applicant similar to that required of beneficial owners, although a business address may be reported in place of a residence address for such individuals. While a reporting company must file a report to show any corrected information for any company applicant named in the initial report, it is not required to report updated information with respect to company applicants.

When a reporting company files an initial report, it may apply for a FinCEN identifying number that it may use for filing any updating reports.

In the future, FinCEN will be releasing FAQs that detail questions and answers regarding specific situations as they arise and the forms for the initial and updated reports. In addition, FinCEN will be subsequently releasing separate sets of regulations dealing with what parties will have access to the database of beneficial ownership information and revisions to the existing Customer Due Diligence regulations for financial institutions to better harmonize the existing requirements with those under the final Beneficial Ownership Reporting regulations.

Offit Kurman has a team of attorneys who are familiar with the CTA and the final regulations. We will continue to monitor the roll-out of the additional regulations and other FinCEN guidance and will be happy to answer any questions that you may have in this regard.