

Treasury Department Issues Proposed Regulations on Disclosure of Beneficial Ownership for Most Business Entities

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By John Orrick

On December 8, 2021, the Department of Treasury issued a release containing a set of proposed regulations that would implement the reporting requirements for disclosure of Beneficial Ownership Information (BOI) of most US and foreign entities doing business in the US under the Corporate Transparency Act (CTA) adopted by Congress in January 2021. The comment period for these regulations extends until February 22, 2021. Commencing with the effective date of the final rule, the reporting regime would commence for all newly formed entities. All existing entities would be subject to the reporting requirements commencing one year after the effective date of the regulations. It is estimated that these reporting requirements would apply to approximately 4 million newly formed entities each year and 25 million existing entities in the first year of its effectiveness.

The proposed regulations require all “reporting companies”, as discussed below, to report to the Financial Crimes Enforcement Network (FinCEN) identifying information concerning any individual who either (i) exercises substantial control over the entity or (ii) owns or controls at least 25% of the ownership interests of the entity. The proposed regulations provide a range of activities that would constitute “substantial control” including (x) service as a senior officer of the entity, (y) authority over the appointment or removal of a senior officer or dominant member of a board of directors or similar body, or (z) direction, determination, or decision of, or substantial influence over, important matters for the entity. The proposed regulations also indicate that substantial control can be exercised through a number of ways by title, contract, arrangement, understanding, relationship, or otherwise, whether directly or through intermediate entities. Similarly, “ownership interests” can be evidenced in a variety of ways including equity, capital or profits interest, convertible instruments, options, through trusts, or otherwise, and either directly or indirectly through intermediate entities.

Reporting companies are defined to include all domestic corporations, limited liability companies and other entities that are formed by the filing of a document with the secretary or similar agency of a state or Indian Tribe, or foreign entities that qualify to do business by the filing of a document with a state or Indian Tribe. Therefore, the regulation clarifies that limited partnerships, statutory trusts, and most other business entities would be subject to the regime. As listed in the CTA, there are 23 exempted categories of entities that are not subject to the regulations, primarily because most of these are already subject to FinCEN regulations or other governmental requirements regarding disclosure of beneficial ownership. The broadest category of exempt entities is so-called “large operating companies” which are defined as companies operating in the US that have more than 20 full-time equivalent employees and have reported over \$5 million in gross operating receipts on a federal tax return.

In addition to the BOI disclosure, the proposed regulations would require the disclosure of information concerning the individual or individuals who directed or controlled the formation of a reporting company.

The BOI that must be reported for each beneficial owner by a reporting company includes (i) the individual's full legal name, (ii) date of birth, (iii) current residential or business address, and (4) unique identifying number, which would include a passport number, driver's license, or similar number issued by a governmental agency, together with a copy of the document that contains such identifying number. Once an individual's information was included in a report, FinCEN would issue its own identifying number to be used for any subsequent reports filed with respect to such individual. Identifying information concerning the reporting company would also be mandated under the proposed regulations.

Under the CTA, as implemented by the proposed regulations, the disclosure of BOI for each beneficial owner must be reported not only within 14 days of the formation of the entity, or for existing entities, within one year of the effective date of the regulations, but also upon any change in the information reported. The proposed regulations state that the updated BOI must be reported within 30 days of the change.

The release indicates that FinCEN has to develop a new IT system, to be called the Beneficial Ownership Disclosure System (BOSS) in order to collect and provide access to the BOI, which may ultimately affect the effective date of the final regulations.

The intent behind the CTA and the proposed regulations is to promote financial transparency and compliance and to assist the US government and law enforcement agencies in combatting money laundering, terrorist financing, drug and arms trafficking, and other illegal acts conducted through so-called "shell companies". These proposed regulations are part of a larger effort by the Biden administration to combat business corruption, and two other rule-making initiatives were announced in the issuing release, including a strengthening of FinCEN's Customer Due Diligence rules adopted in 2016 and the implementation of protocols regarding access to and the disclosure of information collected by FinCEN under the CTA.

We will be monitoring further developments in the adoption of regulations regarding the reporting of BOI for business entities. Please feel free to contact me with any questions.