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# Shining a Light on the Corporate Transparency Act: FinCEN's Rules for Beneficial Ownership Reporting

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On January 1, 2021, Congress enacted the Corporate Transparency Act (the "CTA") as part of the Anti-Money Laundering Act of 2020 in the National Defense Authorization Act for Fiscal Year 2021. Congress passed the CTA to "better enable critical national security, intelligence, and law enforcement efforts to counter money laundering, the financing of terrorism, and other illicit activity." The CTA requires a range of entities, primarily smaller, otherwise unregulated companies, to file a report with the U.S. Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN") identifying the entities' beneficial owners—the persons who ultimately own or control the company—and provide similar identifying information about the persons who formed the entity. The CTA also authorizes FinCEN to disclose this information to authorized government authorities and to financial institutions in certain circumstances.

The CTA directs FinCEN to propose rules specifying the information to be collected, the manner of collection and how such information is to be shared with other law enforcement agencies given the strict confidentiality obligations imposed on FinCEN with respect to the information collected. After its initial proposal in December 2021, FinCEN issued the final rule on Beneficial Ownership Information Reporting Requirements (the "Reporting Rule") on September 29, 2022. The Reporting Rule requires certain domestic and foreign entities to submit a "beneficial ownership information" ("BOI") report to FinCEN. FinCEN estimates that there will be at least 32 million entities required to submit BOI reports on the effective date of the Reporting Rule and an additional 5 million reporting companies created each year thereafter. According to FinCEN, BOI reporting will significantly aid the efforts of U.S. government departments and agencies, law enforcement, tax authorities, and financial institutions to protect the U.S. financial system from illicit use that undermines U.S. national security and foreign policy interests. Consistent with the CTA's goals, the BOI reporting requirement effectively bans anonymous shell companies.

On December 16, 2022, FinCEN proposed the Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities rule (the "Proposed Access Rule") laying out the protocols for access to the beneficial ownership database by law enforcement and by eligible financial institutions. The Proposed Access Rule aims to provide access to BOI to authorized recipients, while still maintaining the highest levels of data protection and oversight.

In a third rule, to be issued no later than one year after the effective date of the Reporting Rule (January 1, 2025), FinCEN will revise the Customer Due Diligence Rule, the anti-money laundering rule that governs how financial institutions collect BOI from their legal entity customers.

The Reporting Rule describes who must file a BOI report, what information must be reported, and when a report is due.

**Who is Required to Report?**

Any entity that is a corporation, a limited liability company ("LLC"), or any entity created by filing with a Secretary of State or any similar office under the law of a State or Indian tribe is required to comply with the Reporting Rule. Additionally, any corporation, LLC, or other entity that is formed under the laws of a foreign country and is registered to do business in any State or tribal jurisdiction is also subject to the Reporting Rule.

Accordingly, the rule requires the following types of entities to file reports, unless they fall within an exemption (each, a "Reporting Company"):

- U.S. corporations
- U.S. LLCs
- Other similar U.S. entities such as limited partnerships and business trusts/statutory trusts
- Non-U.S. corporations, LLCs and other similar entities that are registered to do business in the United States

**Are There Any Exemptions?**

The Reporting Rule lists 23 types of entities that are exempt from the definition of Reporting Company and consequently are not required to file reports under the Reporting Rule. These include governmental authorities, banks, credit unions, money services businesses, registered broker dealers, exchanges and clearing agencies, insurance companies, accounting firms, public utilities, certain tax exempt entities, and entities assisting tax-exempt entities, among others.

- Corporate exemptions include:
  - Large operating companies that meet certain employment and/or tax reporting criteria; specifically, any entity that (1) employs more than 20 full-time employees in the U.S., (2) in the previous year filed U.S. federal income tax returns demonstrating more than $5,000,000 in gross receipts or sales in the aggregate (on a consolidated basis, if applicable), excluding gross receipts or sales from sources outside the U.S., and (3) has an operating presence at a physical office within the U.S.
  - Publicly traded companies that are issuers of securities and registered under Section 12 of the Securities Exchange Act of 1934 (the “Exchange Act”) or otherwise required to file supplementary and periodic information under Section 15(d) of the Exchange Act
- Fund related exemptions include:
  - SEC registered investment advisors
  - SEC registered investment companies
  - Venture capital fund advisers that have made certain filings with the SEC
  - Commodity pool operators and commodity trading advisors that are registered with the CFTC
  - Funds that are operated or advised by a bank, Federal or State credit union, SEC registered broker-dealer, SEC registered investment company or investment adviser, or venture capital fund adviser
- Subsidiaries
  - Subsidiaries that are controlled or wholly owned, directly or indirectly, by certain exempt entities are also exempt from the reporting requirements of the Reporting Rule
  - The subsidiary exemption does not extend to subsidiaries of money services business, pooled investment vehicles, or entities assisting a tax-exempt entity

- Entities registered in a State or tribal jurisdiction that are subsidiaries of large foreign companies that do not qualify for the large operating company exemption because of insufficient U.S. presence or gross receipts will be required to report BOI under the Reporting Rule, absent another applicable exemption

Despite the large number of exemptions, the Reporting Rule is expected to have a significant impact on private investment funds and other entities structured to facilitate investment by a group. While registered investment advisers are exempt from the reporting requirements under the Reporting Rule, private fund advisers, foreign private advisers, and family offices are not exempt. Additionally, although the Reporting Rule exempts directly or indirectly wholly owned subsidiaries of registered investment companies, there is no such blanket exemption for subsidiaries of private funds. Some feeder fund vehicles, AIVs, other subsidiaries of private funds, and holding company entities that are not otherwise eligible for an exemption, are likely to be subject to the Reporting Rule. Certain kinds of pooled investment vehicles, such as real estate vehicles relying on the Section 3(c)(5)(c) exemption under the Investment Company Act of 1940 (the "1940 Act"), certain commodity pools (even if advised by a registered commodity trading advisor and operated by a registered commodity pool operator), and certain foreign pooled investment vehicles are not exempt from the Reporting Rule. Finally, while private fund clients of registered investment advisers relying on the 3(c)(1) and 3(c)(7) exemptions under the 1940 Act are exempt from the definition of Reporting Company under the Reporting Rule, subsidiaries of those private fund clients may not be exempt.

The final rule authorizes the Secretary of the Treasury to exempt additional entities, but FinCEN expressed reluctance to expand the exemptions beyond those enumerated in the CTA. Such an expansion would require a finding that the relevant entity's submission of a BOI report would not serve the public interest and would not be highly useful in furthering the objectives of the CTA.

**What Information is Required to be Reported?**

Each Reporting Company is required to report:

- Entity name (and any alternative trade or d/b/a names)
- Business street address

- Jurisdiction of formation and, for foreign entities, the State or Tribal jurisdiction of registration
- A unique identification number (such as TIN, EIN, LEI, etc.)

The Reporting Rule also requires Reporting Companies to identify their beneficial owners and, for certain Reporting Companies, the "company applicants" who directly file, and who are primarily responsible for filing, or directing or controlling the filing of, the entity's formation documents (the "Company Applicants"). The identifying information required to be reported for beneficial owners and Company Applicants includes:

- Full legal name
- Date of birth
- Current residential or business street address
- A unique identifying number from an acceptable identification document (such as a State issued ID or passport) along with an image of the document

FinCEN will issue a FinCEN identifier upon request following provision of the above information, which can be included on subsequent filings in lieu of the required information.

**Who is a Beneficial Owner?**

The Reporting Rule defines a *beneficial owner* as any individual who, directly or indirectly, either (1) exercises substantial control over a Reporting Company, *or* (2) owns or controls at least 25% of the ownership interests of a Reporting Company.

***Substantial Control***

Under the final rule, an individual exercises substantial control over a Reporting Company if the individual:

- Serves as a senior officer of the Reporting Company; the rule defines "senior officer" to include any individual holding the position or exercising the authority of president, CEO, CFO, COO, general counsel, or any other officer performing a similar function;
- Has authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body) of the Reporting Company;

- Directs, determines or has substantial influence over important matters of the Reporting Company (including, for example, the reorganization, dissolution or merger of the Reporting Company, the selection or termination of business lines or ventures or the amendment of any governance documents); *or*
- Has any other form of substantial control over the Reporting Company.

The last prong is a catch-all provision for control that is exercised in less conventional ways and for entities with atypical governance structures. This provision is designed to capture anyone who can make important decisions on behalf of the entity.

***Ownership Interest***

The Reporting Rule defines *"ownership interest*" as any instrument, contract, arrangement, understanding, or mechanism used to establish ownership (such as any equity, stock, capital, or profit interest). An individual may own or control an ownership interest of a Reporting Company in a variety of ways directly or indirectly, including through joint ownership, certain trust arrangements, or acting as an intermediary, custodian, or agent on behalf of another. The rule provides that convertible instruments, warrants, and other rights to purchase, sell, or subscribe to an ownership interest are included, regardless of whether they are characterized as debt or equity. Puts, calls, and other options to buy or sell ownership interests are also included in the definition of ownership interest, except to the extent created and held by a third party without the knowledge or involvement of the Reporting Company.

"Beneficial owner" does not include minor children (so long as a parent or legal guardian's information is reported), individuals acting as nominees, intermediaries, custodians, or agents, employees acting solely as employees and not as senior officers, individuals whose only interest in a Reporting Company is a future interest through a right of inheritance, or creditors of a Reporting Company (unless the creditor otherwise meets the definition of beneficial owner by exercising substantial control or by owning or controlling 25% or more of the entity's ownership interests).

**Do I Need to Report a Company Applicant?**

The Reporting Rule also requires new companies created or registered on or after the rule's effective date of January 1, 2024, to provide the identifying information of Company Applicants. Reporting Companies created or registered prior to January 1, 2024 are not required to report their Company Applicants. If applicable, the Reporting Company must provide a business address for Company Applicants who create or register companies in the course of their business (a residential address is required for beneficial owners).

**When Do I Need to Report?**

The Reporting Rule goes into effect on January 1, 2024.

Reporting Companies created *before* January 1, 2024 will have one year (until January 1, 2025) to file the required information. These companies are required to submit information about their beneficial owners but are not required to report information about their Company Applicants.

Reporting Companies created *on or after* January 1, 2024 will be required to file the required information within 30 days after receiving notice of an effective formation or registration. Companies formed or registered after the effective date of the Reporting Rule are required to include information on both Company Applicants and beneficial owners.

Any change to the information previously reported concerning a reporting company or its beneficial owners must be reported to FinCEN within 30 days of the date of the change. No updates are required with respect to Company Applicant information. Any inaccuracies must be reported within 30 days of when the Reporting Company becomes aware of the inaccuracy. It is important to note that any time there is a change in an entity's ownership, whether or not the entity is a Reporting Company prior to the change in ownership, the entity may be required to file a BOI report or update an existing report.

**Who Has Access to the Information I Report?**

The CTA authorizes FinCEN to disclose BOI to:

- U.S. government agencies
- Certain foreign agencies and authorized persons
- Financial institutions using the information for certain KYC purposes

The information reported to FinCEN under the Reporting Rule will not be accessible to the public and is not subject to Freedom of Information Act requests.

The Proposed Access Rule provides access to BOI directly from the FinCEN database to three types of U.S. government agencies:

- Federal agencies engaged in national security, intelligence, and law enforcement activity (which includes both civil and criminal enforcement activity)
- Department of the Treasury officials and employees in the course of their official duties, including tax administration
- State, local and Tribal law enforcement agencies in connection with criminal or civil investigations

Federal agencies will need to provide FinCEN with a brief justification for their request, while State, local and Tribal agencies will need to provide a court document authorizing the agency to access the BOI from FinCEN's database.

Foreign law enforcement agencies, judges, prosecutors, central authorities and competent authorities will not have direct access to FinCEN's BOI database. These authorized foreign requestors will need to submit a request to a federal agency to act as an intermediary to retrieve the BOI information from FinCEN's database. The federal agency may only provide BOI to a foreign requestor in response to a request for assistance in an investigation or prosecution by such foreign country where there is an applicable treaty (or similar international agreement). The foreign requestor must limit the use of the BOI in a manner consistent with the treaty (or similar agreement) under which the request was made.

FinCEN may also disclose BOI to financial institutions to assist with AML compliance only where the Reporting Company has provided its consent to such disclosure.

**Violations**

Consistent with the CTA's penalty framework, willful violations of the Reporting Rule may lead to civil or criminal penalties. However, FinCEN stated that it "intends to prioritize education and outreach to ensure that all reporting companies and individuals are aware of and on notice regarding their reporting obligations."

**Key Takeaways**

Beginning in 2024, certain entities organized or registered to conduct business in the U.S. will be required to disclose identifying information about those who form and ultimately own or control the entity.  The Reporting Rule is intended to deter money laundering, corruption, tax evasion and other financial crimes. While there are a large number of exemptions from the reporting requirements and many large operating companies and publicly traded or otherwise regulated companies will likely meet one or more of the enumerated exemptions, domestic and foreign commercial groups with U.S. subsidiaries, private funds, pooled investment vehicles, trusts, and others will need to evaluate their own particular circumstances to determine whether they qualify for an exemption under the Reporting Rule.

You can view the final rule here: Beneficial Ownership Information Reporting | FinCEN.gov

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