Proskauer

Deadline Approaches: FinCEN's Rules for Beneficial Ownership Reporting under the Corporate Transparency Act

November 4, 2024

The Corporate Transparency Act (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.

FinCEN's Beneficial Ownership Information Reporting Requirements (the "Reporting Rule") requires certain domestic and foreign entities to submit a "beneficial ownership information" ("BOI") report to FinCEN. The Reporting Rule describes who must file a BOI report, what information must be reported, and when a report is due. The Reporting Rule went into effect on January 1, 2024, and Reporting Companies that were created (or first registered in the U.S.) in 2024, are required to file the required information within 90 days, unless an exemption applies. **Reporting Companies created *before* January 1, 2024, have until January 1, 2025, to file the required information.** As the reporting deadline for these companies is fast approaching, businesses must take action now to determine whether they are exempt from reporting and, if necessary, register with FinCEN.

Who is Required to Report?

Any entity that is a corporation, a limited liability company (“LLC”), a limited partnership or an 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. Federal agencies are not “similar offices”, and domestic entities that are created by State or Federal charter are outside the scope of the CTA. Any corporation, LLC, limited partnership, 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
- U.S. limited partnerships
- Other similar U.S. entities such as business trusts/statutory trusts that are created by a filing with a secretary of state or similar office
- Non-U.S. corporations, LLCs, limited partnerships and other similar entities that are registered to do business with a secretary of state or similar office 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.

- There are also exemptions for large or public companies:
    - Large operating companies that meet certain employment and tax reporting criteria are exempt; specifically, any entity that (1) employs more than 20 full-time employees in the U.S., (2) in the previous year filed a U.S. federal income tax return 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. that is owned or leased by the

entity

    - 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 are exempt

- In addition, fund-related exemptions include:
    - SEC registered investment advisors and 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
    - Pooled investment vehicles (investment companies or funds relying on Section 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940 and listed on the applicable adviser’s Form ADV) 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 the ownership interests of which are entirely controlled or 100% 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 by virtue of ownership
    - 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 has 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 entities the ownership interests of which are directly or indirectly entirely controlled or wholly owned by 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 will 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.

Additional FinCEN Guidance

Subsidiary Exemption

FinCEN has released a number of FAQs[1] in response to questions received regarding compliance with various aspects of the Reporting Rule. In response to questions relating to the exemption available to subsidiaries that are "controlled or wholly owned" by certain categories of exempt entities, FinCEN clarified that a subsidiary's ownership interests must be "*fully, 100 percent*[2] owned or controlled by an exempt entity (or exempt entities)." FinCEN further stated that "control of ownership interests" means that the exempt entity (or exempt entities) "*entirely controls*" all of the ownership interests of the subsidiary in the same way that an exempt entity must wholly own all of a subsidiary's ownership interests to qualify for a subsidiary exemption. Note that a subsidiary the ownership interests of which are owned or controlled by more than one entity can qualify for the subsidiary exemption, if each owning or controlling entity is one of the types of exempt entities that the Reporting Rule designates as an eligible owning or controlling entity (such as a registered investment advisor, a publicly traded company, or a large operating company). These owning or controlling entities do not need to be affiliated with each other for the subsidiary to qualify for this exemption. If any portion of a subsidiary's ownership interests cease to be wholly owned or entirely controlled by eligible exempt entities, the subsidiary will not qualify for the subsidiary exemption.

Multiple Changes to Exemption Status

On April 18, 2024, FinCEN further clarified whether a Reporting Company whose size fluctuates above and below one of the thresholds for the large operating company exemption needs to file a BOI report with each change. A Reporting Company will need to file a BOI report whenever it "otherwise meets the definition of a reporting company and does not meet the criteria for the large operating company exemption (or any other exemption)." If a Reporting Company files a BOI report and later becomes exempt, that company should file a "newly exempt entity" BOI report. If at a later date the Reporting Company no longer meets the criteria for an exemption, the Reporting Company will need to file an updated BOI report within 30 calendar days of the occurrence of the change.

Dissolved Entities

On July 8, 2024, FinCEN clarified that entities that ceased to exist before January 1, 2024, are not required to file a BOI report. Reporting Companies that existed for any period of time on or after January 1, 2024, and were not formally and irrevocably dissolved before that date are required to file. This is the case even if the entity formally dissolved before its initial BOI report was due.

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.) and, for a disregarded entity, the EIN of its regarded owner

If a Reporting Company does not have a principal place of business in the United States, then the company must report its address to FinCEN as the primary location in the United States where it conducts business, or, if none, the address of any of those locations where the Reporting Company receives important correspondence. If a Reporting Company has no principal place of business in the United States and does not generally conduct business functions at any location in the United States, then its primary location is the address in the United States of the person that the Reporting Company, under State or other applicable law, has designated to accept service of legal process on its behalf.

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 (for Company Applicants) 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

For beneficial owners who hold their ownership interests in a Reporting Company "*exclusively* through *multiple* exempt entities", the Reporting Rule allows the names of all of those exempt entities to be reported to FinCEN instead of the individual beneficial owner's information. This rule does not apply when an individual owns or controls ownership interests in a Reporting Company through both exempt and non-exempt entities. In that case, the Reporting Company must report the individual as the beneficial owner (if no exemption applies), but the exempt companies do not need to be listed in the BOI report.

FinCEN will issue a FinCEN identifier upon request following provision of the above information, which can be included on BOI reports in lieu of the required information. Note that beneficial owners have a duty to update this required information within 30 days of any changes (see below, "*When Do I Need to Report?*"), but that such information only needs to be updated via the FinCEN identifier portion of FinCEN's website and not also at the level of individual BOI reports. As a result, a Reporting Company should request that its beneficial owners obtain and use FinCEN identifiers whenever possible to eliminate the burden of updating its report if a particular beneficial owner's information changes.

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. The Reporting Company should not report a corporate entity that acts as an intermediate company for individual persons. If the beneficial owners of the Reporting Company and an intermediate company are identical, a Reporting Company may report the FinCEN identifier and full legal name of an intermediate company through which the individuals own the Reporting Company.

Substantial Control

Under the Reporting 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 “seniorofficer” 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 substantial 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). In States with community property laws, the spouse of a beneficial owner could also be considered a beneficial owner if the State’s community property laws dictate that both spouses own or control 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 Reporting 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?

Reporting Companies created *before* January 1, 2024, have 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. If a Reporting Company created before January 1, 2024, was previously exempt from the Reporting Rule but then loses its exempt status in 2024, that Reporting Company must file a BOI report within either one of two timeframes, whichever is longer: (1) the remaining days left in the one-year filing period for existing companies; *or* (2) the 30-calendar-day period for companies that lose their exempt status.

Reporting Companies created *on or after* January 1, 2024, but before January 1, 2025, are required to file the required information within 90 days after receiving notice of an effective formation or registration. Reporting Companies created *on or after* January 1, 2025, are 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.

Conversions from one company type to another (e.g., an LLC to a corporation) may need to be reported to FinCEN. If the conversion results in a new Reporting Company, such new Reporting Company must file a BOI report. If the conversion does not create a new Reporting Company but changes the name of an existing Reporting Company (e.g., "Company, Inc." to "Company, LLC"), such Reporting Company will be required to submit an updated BOI report within 30 days of the date of the conversion. Note that a Reporting Company that changes its jurisdiction of formation will also be required to submit an updated BOI report within 30 days of such change. A Reporting Company does not need to file an additional BOI report each time it registers to do business in a new jurisdiction.

Who Has Access to Reported Information?

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.

On December 16, 2022, FinCEN proposed the Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities rule providing 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 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, including up to two years in prison. 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."

Challenges to the CTA

In November 2022, plaintiffs Isaac Winkles, who owns a number of small businesses in Alabama, and the National Small Business Association filed a lawsuit against the U.S. Department of the Treasury seeking an injunction against the implementation of the CTA as unconstitutional.[3] On March 1, 2024, Judge Liles C. Burke of the U.S. District Court for the Northern District of Alabama ruled that the CTA is unconstitutional because it "exceeds the Constitution's limits on the legislative branch and lacks a sufficient nexus to any enumerated power to be a necessary or proper means of achieving Congress' policy goals."[4] The injunction granted by the court is limited to the plaintiffs, including all members of the National Small Business Association as of March 1, 2024, the date of the injunction. All other Reporting Companies are advised to comply with the Reporting Rule by the applicable deadline. Since this ruling, there have been several additional suits filed against the Department of Treasury in various courts seeking to enjoin or overturn the CTA, in addition to the Department of Treasury's appeal of the Alabama ruling. As of the date of this updated alert, rulings have not yet been issued in the appeal or any of the subsequent lawsuits.

Key Takeaways

The CTA and the Reporting Rule established a nationwide disclosure regime which is intentionally broad in scope and is designed to deter money laundering, corruption, tax evasion and other financial crimes. Unless an exemption applies, entities organized or registered to conduct business in the U.S. are required to disclose identifying information to FinCEN about those who formed and ultimately own or control those entities. 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 equity and private fund structures, trusts, and others will need to evaluate their own particular circumstances to determine whether they qualify for an exemption under the Reporting Rule. All existing entities that do not qualify for an exemption will need to file a BOI report by the applicable deadline, or potentially face civil and criminal penalties.

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

---

[1] The FAQs released by FinCEN and updated periodically are available at https://www.fincen.gov/boi-faqs.

[2] Emphasis in the original.

[3] *Nat'l Small Bus. United v. Yellen*, No. 5:22-cv-01448-LCB (N.D. Ala. 2022).

[4] For more information on the ruling, please see our client alert, U.S. District Court in Alabama Finds the Corporate Transparency Act Unconstitutional.

Related Professionals

- **Elanit Snow**
  Senior Counsel
- **Robert H. Sutton**
  Partner
- **Jeffrey A. Horwitz**
  Partner
- **Yuval Tal**
  Partner
- **Seetha Ramachandran**
  Partner
- **Benjamin V. Weisman**
  Associate