Corporate Transparency Act

The Corporate Transparency Act of 2021 was enacted to prevent money laundering and the financing of terrorist activities in the United States by requiring Reporting Companies to disclose information about their Beneficial Owners and Company Applicants.

FinCEN is the regulatory agency in charge of gathering this confidential information. After collecting over 240 comments from various industry and law enforcement agencies FinCEN issued Final Regulations on September 30th, 2022. FinCEN published initial guidance and educational materials on March 24, 2023, and a Small Entity Compliance Guide on September 18, 2023.

To protect the privacy of any person who will be considered a Beneficial Owner or a Company Applicant, these individuals should promptly secure FinCEN Identifiers. This will help ease the burden on Reporting Companies and ensure accurate and up-to-date information in the Beneficial Owners report. The FinCEN Identifier can be provided to the Reporting Company instead of other private information as outlined later in this report.

People associated with existing legal entities will receive notifications about the reporting requirements from state or federal governments in 2023. This could be alarming if the recipient is not aware of the CTA reporting requirement. Review the information included below to become familiar with the CTA terms.

SUMMARY

After years of trying, Congress enacted The Corporate Transparency Act of 2021 (CTA) to enhance anti-money laundering reporting requirements for certain domestic and foreign companies and charged FinCEN with administration of the law.

Reporting Company reports data to FinCEN using the Beneficial Ownership Secure System (BOSS), which includes information on the Reporting Company, Beneficial Owners, and Company Applicants and must be updated for changes over time.

New entities formed after 1/1/2024 will need to file required information within 30 days of formation. Existing entities need to be compliant before 12/31/2024.

HOW IS FINCEN USING THIS INFORMATION?

CTA is the most sweeping anti-money laundering legislation since the 2001 Patriot Act. This is an effort to support law enforcement agencies, taxing authorities, and other potential users for specific purposes on request.

Under this law, the United States is following actions taken in many other developed nations to make the collection and centralization of beneficial ownership information a priority.

Beneficial Ownership information collected by FinCEN is confidential. Beneficial Owner information may only be disclosed upon the request of a federal agency, local law enforcement agency, and by direct request from a prosecutor or judge.

The US is a member of The Financial Action Task Force (FATF) which is an international organization charged with combating money laundering and terrorist financing. Global efforts of this sort have been happening for more than a decade.

Penalties for the improper use of beneficial owner information are severe:

- Civil and criminal fines up to $500,000;
- Imprisonment up to 10 years.

WHO IS A BENEFICIAL OWNER?

A Reporting Company must report as Beneficial Owners individuals who directly or indirectly exercise control over the Reporting Company or owns or controls more than 25% of the interests in the Reporting Company.

An individual or many individuals can have substantial control over a company without any financial ownership. Senior officers within a company and others having the ability to direct important decisions including the removal of senior officers are considered Beneficial Owners.

If the Beneficial Owner is a minor, the Reporting company may instead treat the parent or guardian as the beneficial owner.

WHEN DOES FINCEN REPORTING OF A BENEFICIAL OWNERS START?

- For all new companies formed after 1/1/2024.
- Any existing company in existence today must report Beneficial Owners by 12/31/2024

WHEN DO CHANGES TO BENEFICIAL OWNERSHIP NEED TO BE REPORTED?

- Reporting changes of Beneficial Owners is not an annual filing. Rather, Reporting changes of Beneficial Owners are done on an as needed basis within 30 days of any change to the Reporting Company, the identity of Beneficial Owners, or change in the information previously submitted. In the case of death, the deemed transfer will occur upon settlement of the estate.

In the case of a Trust, an individual trustee of a trust with the power to dispose of trust assets will be deemed to be a Beneficial Owner. In addition, the beneficiary of a trust who is the sole permissible income recipient or who can withdraw substantially all the assets from a trust is a Beneficial Owner. Last, a Grantor of a trust is a Beneficial Owner when they can revoke the trust or can withdraw assets from the trust through a swap power or by other means.

Ownership interests for the 25% test does not contain a family attribution rule. It provides that in addition to direct ownership, it also includes contracts, options, profits interests, or other arrangements that lead to the current or potential 25% representation.

A civil penalty of $500 per day may be imposed for each day that a person continues a violation of reporting requirements. Criminal fines up to $10,000- and 2-years imprisonment may also be imposed.

WHAT INFORMATION IS REPORTED ON EACH BENEFICIAL OWNER BY THE COMPANY?

- The legal name of the individual.
- Date of birth.
- Picture of an ID card such as a driver’s license or passport.
- Address of residence. (No PO Boxes allowed)

WHAT IS A REPORTING COMPANY?

Reporting is required by all corporations, LLCs, and other legal entities created by the filing of a document with a Secretary of State or similar office under the law of a state. This includes domestic and foreign companies.

Exemptions from reporting include Large Operating Companies, non-profits, public accounting firms, banks, credit unions, broker dealers, insurance companies, and other regulated entities that already have reporting requirements.

Company Applicant Disclosure Requirement

The individual who files the document with an Applicable State Agency that creates a Reporting Company or who first registers a foreign Reporting Company is the Company Applicant. This includes the actual filer and the individual who directs the filing. In most cases, this will be one or two people. These individuals need to be identified as “Company Applicants” under the Reporting Company for all entities created after 12/31/2023.

In Addition to Beneficial Owners, What do Reporting Companies Report About Themselves?

- The full legal name as well as any “d.b.a” used.
- The address of the principal place of business.
- The TIN or EIN for the company.

Filing a document with the state is not the usual method of creating general partnerships, sole proprietorships, and trusts, and, as a result, they are not reporting companies.

Even if an entity or trust must file some document with an Agency, it is not a Reporting Company unless the filing was necessary for the formation of the company.

Wholly owned subsidiaries of an exempt Large Operating Company are also exempt from reporting. Although, the employees of the subsidiary do not count towards the parent company’s requirement to have 20 or more full-time employees.

EXEMPT LARGE OPERATING COMPANIES HAVE ALL THE FOLLOWING:

- A physical location that is owned or leased.
- 20 or more full-time employees not including those of subsidiaries.
- $5 million in gross sales or receipts on the prior year’s tax return.

WHAT CAN WE DO TODAY?

Consolidate Entities

When multiple entities exist to operate, the same business consolidation may make a Reporting Company qualify for the exemption as a Large Operating Company relieving them from the reporting requirements.

Review overall revenue and head count to determine if merging companies together achieves this objective. Act on this prior to 12/31/2023.

Monitor Companies That Are Borderline Large Operating Companies

Many companies may just marginally qualify as Large Operating Companies. If there is a recession or any other decline in business, revenues could decline below $5 million, or the employee count may fall below 20 and they could become Reporting Companies. Isolate these companies for regular review.

Conversely, as companies grow, they may become Large Operating Companies and no longer need to comply with the reporting requirements.

Review Corporate Structure for Beneficial Owners

Take the time to review your corporate structure to identify team members who may be deemed Beneficial Owners due to their role within the company. When someone becomes a director or senior officer of a company, make sure they are comfortable providing beneficiary information to the company for reporting purposes.

Identify the Reporting Officer Within Your Company

Identify the person within your company that is responsible for reporting Beneficial Owner information to FinCEN and make sure that your management team is aware of this person's role in keeping your reporting compliant.

CAN PLANNING WITH TRUSTS MAINTAIN PRIVACY?

According to the Final Regulations, a Beneficial Owner will be a sole trust beneficiary who is entitled to income. Consider if planning with trusts that contain multiple beneficiaries to maintain privacy of ownership interests of beneficiaries (but not the trustees). Wait for more clarification before taking action on this strategy.