

Gearing Up for Compliance with the Corporate Transparency Act

By Steven W. Lippman

Starting on January 1, 2024, the Corporate Transparency Act (the “CTA”) will require certain entities to provide beneficial ownership reports and be responsible for keeping such reported information up to date. The CTA was enacted on January 1, 2021,¹ with the primary focus of combating illicit financing arrangements (e.g., tax fraud and money laundering) by creating a secure database of entity ownership information which is reported to the U.S. Department of the Treasury’s Financial Crimes Enforcement Network (“FinCEN”). FinCEN issued a final rule on September 30, 2022, laying out the reporting requirements under the CTA (the “Final Rule”).² Entities that fall within the definition of a “reporting company” will be required to file informational reports to FinCEN regarding the reporting company’s “beneficial owners” and “applicants.” Attorneys should familiarize themselves with the necessary reporting requirements and start advising clients of the upcoming changes and deadlines – below are key details of the CTA, but please note that the CTA, including applicable regulations, does not necessarily provide clear guidance, and rulemaking is still underway.³

WHICH ENTITIES ARE REPORTING COMPANIES?

It may be no surprise based on the CTA’s purpose, but the definition of a “reporting company” casts a wide net and is somewhat vague. Still, the CTA expressly brings both domestic and foreign entities within the CTA’s purview. Domestic entities include corporations and limited liability

companies, but also include any entity that requires a formation filing with the state of domestication (e.g., secretary of state or the State Corporation Commission here in the Commonwealth).⁴ A foreign entity includes any entity that registers to do business within a state.

WHICH ENTITIES ARE EXEMPT/ EXCLUDED FROM THE REPORTING REQUIREMENTS?

There is an extensive list of entities that are explicitly exempt from the reporting requirements,⁵ but generally speaking, the list includes already heavily regulated entities with similar reporting requirements, such as financial institutions and tax-exempt entities. One notable exemption is for “large operating companies,” which is defined as an entity that: (a) has 21 or more full-time employees within the United States; (b) operates a physical office within the United States; and (c) filed a federal income tax return for the prior reporting year with more than \$5 million in gross receipts or sales (excluding foreign gross receipts or sales). However, entities filing tax returns as part of a consolidated return must use total consolidated return figures in determining whether they meet the definition of a “large operating company.” Lastly, inactive companies are excluded from the reporting requirements so long as they meet the listed criteria (i.e., no active operations, no foreign ownership, do not hold any type of assets).⁶ However, should these inactive companies resume certain activities, the reporting company has 30 days to file a

report with FinCEN.

WHAT INFORMATION IS REQUIRED TO BE REPORTED?

A reporting company’s report must include the following information:

- Full name of the company;
- Any trade name or fictitious name;
- Address (cannot use a P.O. Box or registered agent address);
- State of jurisdiction/domestication (foreign entities list the first state they registered to do business in);
- The company’s taxpayer identification number (TIN); and
- Personal identifying info of every individual beneficial owner and applicant:
 - Full legal name;
 - Date of birth;
 - Current residential or business address;
 - Passport, Driver’s License Number, or other state/local government identification document; and
 - Image of identification document.

In the Final Rule, FinCEN expects all reporting companies to report at least one individual with substantial control.

WHO IS A BENEFICIAL OWNER OR APPLICANT?

A “Beneficial Owner” is any individual who, directly or indirectly, exercises “substantial control” over the reporting company or owns or controls at least 25 percent of the ownership interests of the reporting company. Again, there is some vagueness as the term “substantial control” is broadly defined and even includes a catchall. Furthermore, the calculation of 25 percent ownership interest has some nuances to the calculation methodology (which are outside the scope of this article). The CTA generally frames the exercise of substantial control as the power or authority typically afforded to boards of directors and senior-level executives or officers (e.g., CEO, CFO, General Counsel, COO, etc.), and the CTA also



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includes a non-exhaustive list of examples of “important matters” which is supposed to help identify individuals that can exercise substantial control.⁷ However, the CTA does provide several explicit exclusions to the definition, including certain types of employees.⁸

An “Applicant” is any individual who files an application to create a domestic entity or to register a foreign entity to do business in the United States. This is where attorneys need to pay particular attention, primarily when servicing clients who are serial filers, and would include attorneys who helped file formation documents in the past. The Final Rule indicates that supervising attorneys and the paralegals they supervise should be listed as applicants.

WHAT ARE THE REPORTING DEADLINES?

Attorneys should be aware that the reporting requirements under the CTA are obligations of the reporting company, with senior-level executives subject to civil and criminal penalties.

For entities created prior to January 1, 2024, the initial report must be filed by January 1, 2025. For entities created on or after January 1, 2024, the initial report must be filed within 30 days of the earlier of either (i) the effective date of formation or authorization to conduct business, or (ii) public notice is provided that such entity has been created or registered to do business. If a previously exempt entity no longer meets the exemption requirements, such entity has 30 days after its exemption ceased to file its initial report.

Be aware that reporting requirements are *continuous* and must be updated within 30 calendar days after the date on which there is any change to information previously reported (i.e., if a beneficial owner moves to a new house or is issued a new identification document, this will trigger the necessity of filing an updated report).

HOW SHOULD ATTORNEYS AND REPORTING COMPANIES PREPARE?

Below are items for consideration to help your client in preparation for reporting:

Create a form for clients to complete with the necessary reporting information.

Assume managers of an LLC with powers similar to their counterparts in a

corporation fall within the definition of a beneficial owner.

Add requirements to bylaws and operating agreements requiring owners to provide necessary reporting information and *updates* promptly.

Address applicable confidentiality provisions for compliance with reporting requirements.

Obtain FinCEN identifier numbers. Individuals may obtain a FinCEN identifier, which requires providing the same info as a reporting company would be required to provide. If an individual has a FinCEN identifier number, the reporting company can simply list the individual’s FinCEN identifier number instead of listing out the individual’s information. An individual is required to update reported details relating to their FinCEN identifier number within 30 days of any changes.

Refrain from relying on state-level offices, as nuances in formation filing requirements may not capture all the necessary information required to be reported under the CTA in addition to other obstacles (e.g., backlogs or distinct holiday schedules).

Keep up-to-date on available resources (i.e., state-level offices may change filing requirements to match CTA), including FinCEN administrative procedures.

One interesting concept proffered by the International Association of Commercial Administrators, a professional association for government administrators of business organization and secured transaction record systems across all levels of government, requested FinCEN to create an online wizard that can be filled out to help determine whether an entity is subject to the reporting requirements.

Certain services are currently under development that will help to aggregate necessary reporting information and help with the filing process in the same way that there are services for registered agents.

Specifics on how reports are to be submitted are still forthcoming. ■

Disclaimer: The information provided in this article does not, and is not intended to, constitute legal advice; instead, all information and content is for general informational purposes only. Information in this article may not constitute the most up-to-date legal or other information.

Endnotes

1. Part of the National Defense Authorization Act for Fiscal Year 2021 (31 U.S.C. § 5336).
2. Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498 (Sept. 30, 2022).
3. FinCEN issued a Notice of Proposed Rulemaking on December 15, 2022, regarding access to the beneficial ownership information database (<https://www.federalregister.gov/documents/2022/12/16/2022-27031/beneficial-ownership-information-access-and-safeguards-and-use-of-fincen-identifiers-for-entities>).
4. Entities required to file with the Virginia State Corporation Commission: Domestic and Foreign LLCs, Professional LLCs, Domestic and Foreign Stock and Nonstock Corporations, Professional Corporations, Domestic and Foreign Limited Partnerships, Domestic and Foreign Limited Liability Partnerships, and Domestic and Foreign Business Trusts. Note that Domestic and Foreign General Partnerships do not require a formation filing.
5. See 31 U.S.C. § 5336(a)(11)(B). The CTA lists the following entities as excluded: Public companies, investment companies or advisors, venture capital fund advisers, pooled investment vehicles (including foreign pooled investment vehicles), insurance companies and insurance providers, banks, federal and state credit unions, public accounting firms, tax-exempt entities, entities assisting tax-exempt entities, governmental authorities, and subsidiaries of certain exempt entities.
6. See 31 U.S.C. § 5336(a)(11)(B)(xxiii). Entity must have existed prior to January 1, 2020, is not actively engaged in business, is not wholly or partially owned, directly or indirectly, by a non-U.S. person, no change in ownership during the preceding 12-month period, has not sent or received funds exceeding \$1,000 in the preceding 12-month period, and does not otherwise hold any type of assets.
7. Examples of “important matters”: sale or lease of principal assets; major expenditure or investments, equity issuance, incurring significant debt, approval of company’s operating budget; compensation and incentive programs for senior officers; entry and termination of significant contracts; and amendments to any of the company’s substantial governance documents, and any other form of substantial control.
8. See 31 U.S.C. § 5336(a)(3)(B). Minors; nominees, intermediaries, custodians, and agents (on behalf of another individual); certain employees who are not senior officers; heirs; certain creditors (only have the right to be paid a predetermined amount).

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