

FinCEN Publishes Notice of Proposed Rulemaking on the Corporate Transparency Act

December 21, 2021

On December 8, 2021, the U.S. Financial Crimes Enforcement Network (FinCEN) issued a Notice of Proposed Rulemaking (NPRM) implementing Section 6403 of the Corporate Transparency Act (CTA), which gives the public until February 7, 2022, to review and comment on the proposed rules. The CTA was passed by Congress on January 1, 2021, as part of the Anti-Money Laundering Act of 2020. The purpose of the CTA is to curb illicit use of the U.S. financial system by establishing a centralized government database of beneficial ownership information. The proposed rules specify which entities must submit reports, what information must be reported, and when reports must be submitted. A separate regulation to be issued by FinCEN will address who may access the beneficial ownership information database, for what purpose, and how to safeguard the information.

A brief summary outlining the proposed rules in the NPRM is set forth below.

Reporting Companies: The proposed rules describe two types of reporting companies: domestic and foreign. Under the proposed rules, a domestic reporting company is any entity that is a corporation, a limited liability company, or other entity that is created by the filing of a document with a secretary of state or similar office of a U.S. jurisdiction. A foreign reporting company is defined as any corporation, limited liability company, or other entity that is formed under the law of a foreign jurisdiction and registered to do business within the United States.

Exemptions: Under the proposed rules, there are 23 existing exemptions from the definition of a reporting company. Many of the exempted entities are already subject to federal or state regulations requiring disclosure of beneficial ownership information, such as banks, credit unions, depository institutions, investment advisors, securities brokers and dealers, accounting firms, governmental entities, tax exempt entities, and entities registered with the SEC under the Exchange Act. Additionally, the rules set forth an exemption for "large operating companies" that:

- employ more than 20 full-time employees in the U.S.;
- had at least \$5 million in gross receipts or sales (including receipts or sales of other entities owned by the entity and through which the entity operates) as evidenced by the previous year's federal income tax return; and
- have an operating presence at a physical office in the U.S. (not a residence and not a shared space).

Finally, under the so called "subsidiary exemption," entities that are wholly owned by an exempt entity also qualify for exemption.

Beneficial Owners: FinCEN defines a "beneficial owner" as every individual who, directly or indirectly, through contract, arrangement, understanding, relationship or otherwise, exercises substantial control over the reporting company or owns or controls at least 25 percent of the ownership interest of the reporting company. The proposed rules set forth three indicators of "substantial control":

- service as a senior officer;
- authority over the appointment or removal of any senior officer or dominant majority of the board of directors (or similar body); and

Continued

- direction, determination, or decision of, or substantial influence over, important matters of a reporting company.

The proposed rules also include a catch-all provision clarifying that substantial control can take additional forms not specifically listed.

Company Applicants: In addition to the beneficial owner information, the proposed rules require reporting companies to report identifying information about each "company applicant." A "company applicant" is a person who files a document that creates a domestic reporting company or who first registers a foreign reporting company with a secretary of state or similar office in the U.S. Additionally, the proposed definition of a company applicant includes any person who directs or controls such filing by another person.

Timing of Report: Any company newly formed or registered on or after the effective date of the regulations must file a report within 14 calendar days from its date of formation or registration. Companies that have been formed or registered prior to the effective date of the regulations are required to file a report within one year from the effective date (the proposed rules shorten this filing deadline from two years in the CTA). Further, companies have an affirmative obligation to update the information they provided to FinCEN within 30 days of any changes in the information. This includes changes with respect to the identity of a beneficial owner, as well as changes to the particular information reported for any beneficial owner or company applicant.

Reporting Requirements: An initial report of a company must include the following information:

- The full name of the reporting company;
- any trade name or "doing business as" name of the reporting company;
- the business street address of the reporting company;
- the State or Tribal jurisdiction of formation of the reporting company (or for a foreign reporting company, State or Tribal jurisdiction where such company first registers); and
- the IRS Taxpayer Identification Number (including an Employer Identification Number) of the reporting company.

For each beneficial owner and company applicant, the following information must be reported:

- The full legal name of the individual;
- the date of birth of the individual;
- the complete current address;
- a unique identifying number from a non-expired U.S. or foreign passport, non-expired identity document issued by a state, local, or tribal government, or non-expired driver's license; and
- an image of the document from which the unique identifying number was obtained, which includes both the unique identifying number and a legible photograph.

Conclusion: The comment period for the proposed rule is open for 60 days, until February 7, 2022. This means that the CTA will likely become effective before the end of 2022. In anticipation thereof, reporting companies should begin gathering the required information for the company itself, and each beneficial owner and company applicant. If you

Continued

have any questions about the CTA, the NPRM or how they may apply to your company, please contact your Miller Canfield attorney or one of the authors of this alert.