

FinCEN Issues Final Rule on the Corporate Transparency Act Requiring Businesses to Report Beneficial Ownership Information

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On September 30, 2022, the U.S. Financial Crimes Enforcement Network (“FinCEN”) published its **final rule** implementing Section 6403 of the Corporate Transparency Act (“CTA”). The final rule, which will take effect on January 1, 2024, will require “tens of millions” of companies doing business in the U.S. to report certain information about their beneficial owners. The reporting companies created or registered before January 1, 2024, will have until January 1, 2025, to file their initial beneficial ownership reports with FinCEN. Reporting companies created or registered on or after January 1, 2024, will be required to file initial beneficial ownership reports within 30 days of formation.

The CTA was passed by Congress on January 1, 2021, as part of the Anti-Money Laundering Act of 2020 in the National Defense Authorization Act for Fiscal Year 2021. After publishing a **Notice of Proposed Rulemaking** and receiving public comments, FinCEN adopted the proposed rule largely as proposed, with certain modifications intended to minimize unnecessary burdens on reporting companies.

What Entities are Reporting Companies? The final rule describes two types of reporting companies: domestic and foreign.

- A domestic reporting company is any entity that is a corporation, a limited liability company, or other entity (such as limited liability partnerships, limited liability limited partnerships, business trusts, and most limited partnerships and business trusts) created by the filing of a document with a secretary of state or any similar office under the law of a state or American Indian tribe.
- A foreign reporting company is any corporation, limited liability company, or other entity formed under the law of a foreign country and registered to do business in any state or tribal jurisdiction by the filing of a document with a secretary of state or any similar office under the law of a state or American Indian tribe.

What Entities are Exempt? The final rule exempts twenty-three separate categories of entities from the definition of the 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 of 1934. Additionally, the rules set forth an exemption for “large operating companies” that can demonstrate each of the following factors:

- Employ more than 20 full-time employees in the U.S.
- Have an operating presence at a physical office within the U.S.
- Filed a federal income tax or information return in the U.S. for the previous year demonstrating more than \$5 million in gross receipts or sales (excluding gross receipts or sales from sources outside the U.S.)

Finally, under the so-called “subsidiary exemption,” entities whose ownership interests are controlled or wholly owned by one or more exempt entities may also qualify for exemption. If a reporting company was formerly exempt but loses its exemption, it must file an updated report that announces the change and includes all the information required in a

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reporting company's initial report.

Who are Beneficial Owners? The final rule requires reporting companies to report each individual who is a beneficial owner of such reporting company. A "beneficial owner" is any individual who, directly or indirectly, either exercises substantial control over the reporting company or owns or controls at least 25 percent of the ownership interests of the reporting company. An individual exercises "substantial control" if such individual:

- Serves as a senior officer (except for corporate secretary or treasurer)
- Has authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body)
- Directs, determines, or has substantial influence over important decisions made by the reporting company
- Has any other form of substantial control over the reporting company

Additionally, an individual may exercise substantial control over a reporting company, directly or indirectly, including as a trustee of a trust or similar arrangement, through:

- Board representation
- Ownership or control of a majority of the voting power or voting rights of the reporting company
- Rights associated with any financing arrangement or interest in a company
- Control over one or more intermediary entities that separately or collectively exercise substantial control over a reporting company
- Arrangements or financial or business relationships, whether formal or informal, with other individuals or entities acting as nominees
- Any other contract, arrangement, understanding, relationship, or otherwise

The final rule exempts five categories of individuals from the definition of beneficial owner: (i) minors, (ii) nominees, intermediaries, custodians, and agents, (iii) certain employees who are not senior officers, (iv) heirs with a future interest in the company, and (v) certain creditors.

Who are Company Applicants? In addition to the beneficial owner information, the final rule requires reporting companies created or registered on or after January 1, 2024, to report identifying information about each "company applicant." A "company applicant" is:

- Any individual who directly files the document to create a domestic reporting company or register a foreign reporting company with a secretary of state or similar office in the U.S.
- Any individual who is primarily responsible for directing or controlling such filing if more than one individual is involved in the filing

The final rule provides further clarification as to certain individuals who, by virtue of their formation roles, fall under the definition of "company applicants." For example:

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- If an attorney oversees the preparation and filing of incorporation documents and a paralegal files them, the reporting company would report both the attorney and paralegal as company applicants.
- If an individual prepares and self-files documents to create the individual's own reporting company, the reporting company would report the individual as the only company applicant.

The final rule removes the requirements that i) entities created before the effective date report company applicant information and ii) reporting companies update their company applicant information (except to correct inaccuracies), each of which were set forth in the proposed rules.

When are Initial Reports Due? When an initial report must be filed depends on the status of the reporting company as of January 1, 2024:

- If Created or Registered on or after January 1, 2024 – It must file a report within 30 calendar days from the earlier of: i) the date on which the company receives actual notice that its creation or registration has become effective, or ii) the date a secretary of state or similar office first provides public notice, such as through a publicly accessible registry, that the company has been created or registered.
- If Created or Registered Prior to January 1, 2024 – It must file a report not later than January 1, 2025.

What Information Must be Reported? An initial report must include the following information with respect to the reporting company:

- The full legal name of the reporting company
- Any trade name or "doing business as" name of the reporting company
- The street address of the principal place of business of the reporting company (if outside the U.S., the street address of the primary location in the U.S. where it conducts business)
- The state, tribal, or foreign jurisdiction of formation of the reporting company (a foreign reporting company must also report the state or tribal jurisdiction where it first registers)
- The IRS Taxpayer Identification Number ("TIN") of the reporting company (including the EIN of the reporting company, or if a foreign reporting company without a TIN, a tax identification number issued by a foreign jurisdiction and the name of such jurisdiction)

For each company applicant (of a reporting company registered or created on or after January 1, 2024) and each beneficial owner of a reporting company, the following information must be reported:

- The full legal name of the individual
- The date of birth of the individual
- The current business street address (for a company applicant who forms or registers an entity in the course of such company applicant's business) or residential street address (for all other individuals including beneficial owners)
- A unique identifying number from, and image of, an acceptable identification document (e.g., a passport)

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If a reporting company is directly or indirectly owned by one or more exempt entities and an individual is a beneficial owner of the reporting company exclusively by virtue of such individual's ownership interest in the exempt entity, the reporting company's report may list the name of the exempt entity in lieu of the beneficial ownership information set forth above.

When do Companies have to Report Changes? If there is any change with respect to required information previously submitted to FinCEN concerning a reporting company or its beneficial owners, including any change with respect to who is a beneficial owner or information reported for any particular beneficial owner, the reporting company is required to file an updated report within 30 calendar days of when the change occurred.

What are the Penalties for Violations? The final rule provides for a fine of up to \$10,000.00 and/or imprisonment of up to two years for any person who willfully: (i) provides or attempts to provide false or fraudulent beneficial ownership information, or (ii) fails to report complete or updated beneficial ownership information to FinCEN. The penalties may also extend to individuals causing a reporting company's failure to report or update information and senior officials of a reporting company at the time such failure occurs.

What is Coming Next from FinCEN? FinCEN is expected to publish the forms and instructions to be used for reporting beneficial ownership information well in advance of the effective date. FinCEN will further establish a secure nonpublic database for storage of the beneficial ownership information. Finally, FinCEN will issue rules on who may access the information (a limited group of governmental authorities and financial institutions), under what circumstances, and how the parties would generally be required to handle and safeguard the information.

What Should Reporting Companies be Doing Now? Existing companies should begin evaluating whether they are a "reporting company" and if so, determining who are their beneficial owners. Such reporting companies, including any other reporting companies that may be created or registered before the effective date, will have until January 1, 2025, to file an initial report. As noted, reporting companies created or registered on or after the effective date will have 30 calendar days after the date of creation or registration to file an initial report.

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