

## New Corporate Transparency Act Will Impose Beneficial Ownership Reporting Requirements on Many Companies, Particularly Small Businesses

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The Corporate Transparency Act (CTA), part of the 2021 National Defense Authorization Act enacted into law on January 1, 2021, will impose new beneficial ownership reporting requirements on many companies. The stated purposes of the CTA include the collection of beneficial ownership interest information for corporations, limited liability companies and similar entities "to (A) set a clear, Federal standard for incorporation practices; (B) protect vital United States national security interests; (C) protect interstate and foreign commerce; (D) better enable critical national security, intelligence and law enforcement efforts to counter money laundering, the financing of terrorism and other illicit activity; and (E) bring the United States into compliance with international anti-money laundering and countering the financing of terrorism standards."

Summary: Once implementing regulations are promulgated by the Secretary of Treasury, "*reporting companies*" (generally, any corporation, limited liability company or similar entity organized in any state and foreign companies registered to do business in the United States unless exempted as noted below) will be required to file reports with the Financial Crimes Enforcement Network of the Department of the Treasury (FinCen) identifying all "*beneficial owners*" (generally any individual directly or indirectly controlling the reporting company or owning 25% or more of the ownership interests of the reporting company) and "*applicants*" (generally any individual filing an application to form or register the reporting company).

There are many issues of scope, definition and interpretation in the CTA which are expected to be addressed by the Treasury's forthcoming implementing regulations.

Who will be required to file reports? The reporting requirements of CTA apply to all "reporting companies" unless exempted. A *reporting company* as defined in the CTA is "any corporation, limited liability company or similar entity that is (i) created by the filing of a document with a secretary of state or a similar office under the law of a State or Indian Tribe; or (ii) formed under the law of a foreign country and registered to do business in the United States by the filing of a document with a secretary of state or a similar office under the laws of a State or Indian Tribe."

Many types of entities, however, are exempted from the requirements of the CTA. These entities include, among others: public companies; governmental entities; banks and bank holding companies; credit unions; broker dealers; registered investment companies; registered investment advisers; insurance companies; registered public accounting firms; public utilities; certain pooled investment vehicles; 501(c) entities; companies with more than 20 full-time employees in the United States, more than \$5 million in gross receipts or sales, and an operating presence at a physical office in the United States; and entities owned or controlled by one or more of such exempt entities.

The CTA permits the Secretary of the Treasury, with the concurrence of the U.S. Attorney General and the Secretary of Homeland Security, to adopt regulations to exempt other entities or classes of entities where the required reporting would not serve the public interest or be highly useful in detecting, preventing or prosecuting "money laundering, the financing of terrorism, proliferation finance, serious tax fraud, or other crimes."

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Who are beneficial owners and applicants of reporting companies? A "beneficial owner" of a reporting company is "any individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise – (i) exercises substantial control over the entity; or (ii) owns or controls not less than 25 percent of the ownership interests of the entity." Certain individuals, however, are excluded from the definition, including: minors (if the information of the parent or guardian is reported); nominees, intermediaries, custodians and agents acting on behalf of another individual; employees (whose economic interest in the reporting company arises solely as an employee); individuals whose interest is through a right of inheritance; and creditors not otherwise controlling the entity.

An "applicant" is any individual who files an application to form a reporting company or registers or files an application to register a foreign company to do business in the United States.

What information is to be reported? A reporting company will be required to identify each beneficial owner and applicant and report the individual's full legal name, date of birth, current residential or business address, and a "unique identifying number from an acceptable identification document" (generally a nonexpired passport, state issued driver's license or identification card or, if the individual does not have any of these, a nonexpired foreign passport) or a FinCen identifying number. The reporting company need only report the name of the exempt entity having a direct or indirect ownership interest in the reporting company (and not any of the other identifying information otherwise required).

When will beneficial ownership reports be required? Reports will begin being required once the implementing regulations are promulgated by the Secretary of the Treasury. The regulations must be promulgated no later than one year from the enactment of the CTA. Existing reporting companies (those in existence before the effective date of the regulations) will have two years to file initial reports. Newly formed or registered reporting companies (those formed or registered after the effective date of the regulations) will be required to file reports when formed or registered. Reporting companies will also be required to report changes in beneficial ownership information within one year of the change, although the Secretary of the Treasury, in consultation with the U.S. Attorney General and Secretary of Homeland Security, may promulgate regulations to shorten this time period.

Will the reported beneficial ownership information be publicly available? The CTA limits the disclosure of beneficial ownership information by FinCEN to requests "through appropriate protocols" to be promulgated by the Secretary of the Treasury from (a) a federal agency engaged in national security, intelligence or law enforcement activities; (b) a state, local or Tribal law enforcement agency if authorized by a court of competent jurisdiction; (c) a federal agency on behalf of a law enforcement agency or court of another country (including a foreign central authority) under an international treaty or convention, (d) with the consent of the reporting company, a financial institution subject to customer due diligence requirements, and (e) a federal functional regulator or other appropriate regulatory agency. The CTA requires the Secretary of the Treasury to maintain the information in a secure, nonpublic database and to establish protocols to protect the security and confidentiality of the reported beneficial ownership information and ensure governmental authorities access the beneficial information only for authorized purposes.

What if a reporting company fails to file reports when required? The CTA authorizes civil and criminal penalties for willfully providing, or attempting to provide, false or fraudulent information or willfully failing to report complete or updated information.

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*How does the CTA affect customer due diligence requirements for financial institutions?* The CTA requires the Secretary of the Treasury to revise the "Customer Due Diligence Requirements for Financial Institutions" final rule (81 Fed. Reg, 29397 (May 11, 2016) not later than one year after the effective date of the CTA implementing regulations to bring that final rule into conformance with the CTA.

*How does the CTA apply to federal contractors?* The CTA requires the Administrator for Federal Procurement Policy to revise the Federal Acquisition Regulations not later than two years after enactment of the CTA to require any contractor or subcontractor that is a reporting company required to report beneficial ownership information under the CTA to provide such information to the federal government as part of any bid or proposal exceeding the applicable simplified acquisition threshold.

To discuss the CTA's reporting requirements that may apply to your business, please reach out to your Miller Canfield attorney or one of the authors of this alert