**CORPORATE TRANSPARENCY ACT**

Beginning January 1, 2024, certain entities organized or registered to conduct business in the U.S. will be required to disclose identifying information about those who ultimately own or control the entity. Unless subject to an exemption, every new LLC, LLP, corporation, and other business entity will have certain filing obligations with the Financial Crimes Enforcement Network (“FinCEN”), a bureau of the U.S. Department of the Treasury. FinCEN has estimated that there are more than 32 million preexisting entities (created prior to 2024) and approximately 5 million new entities per year (formed Jan. 1, 2024, and thereafter) that will have filing obligations pursuant to the Corporate Transparency Act (“CTA”).

**BACKGROUND**

The Anti-Money Laundering Act of 2020, which is part of the National Defense Authorization Act for Fiscal Year 2021 (“NDAA”) and includes the CTA, became law on January 1, 2021. The CTA requires non-exempt business entities (defined as “Reporting Companies”), to file information on their “Beneficial Owners” with the FinCEN.

Congress enacted the CTA to better enable critical national security, intelligence, and law enforcement efforts to counter money laundering, the financing of terrorism, and other illicit activity. When fully implemented in 2024, the CTA will create a database of Beneficial Ownership Information (“BOI”) within FinCEN. Prior to the implementation of the CTA, the burden of collecting BOI fell on financial institutions, which are required to identify and verify Beneficial Owners through the Bank Secrecy Act’s customer due diligence requirements. Under the Customer Due Diligence (“CDD”) Rule, FinCEN required certain financial institutions to collect and verify BOI of certain legal entities’ customers. The CTA will shift the collection burden from financial institutions to the reporting companies and will impose stringent penalties for willful non-compliance and unauthorized disclosures.

BOI reporting is expected to significantly aid the efforts of U.S. government departments and agencies, law enforcement, tax authorities, and financial institutions to protect the country’s financial system from illicit use that undermines national security and foreign policy interests. Consistent with the CTA’s goals, the BOI reporting requirement effectively bans anonymous shell companies.

**WHO MUST REPORT?**

On September 29, 2022, FinCEN issued its Final Rule requiring certain domestic and foreign entities to submit a BOI report to FinCEN.

1. ***Reporting Companies***

A Reporting Company is a corporation, LLC, or other business entity that is created by the filing of a document with a state’s secretary of state or similar office (domestic reporting companies), or 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 state’s secretary of state or similar office (foreign reporting companies).

The term “Reporting Company” also encompasses LLPs, LLLPs, business trusts, and most limited partnerships because these entities are typically established by filing with a secretary of state or similar office. Certain types of trusts that are not created by the filing of a document with a secretary of state or similar office are not subject to the filing obligations.

1. ***Exemptions***

  The CTA exempts roughly 23 categories of entities from the definition of “Reporting Company” and empowers FinCEN to create new exemptions. Despite having that authority, FinCEN declined to adopt any additional exemptions at this time. A non-exhaustive list of exempt entities is below:

* Large operating companies — companies with 20 or more full-time U.S. employees, more than $5 million in U.S.-sourced revenue, and a physical operating presence in the U.S.;
* Issuers registered with the SEC;
* Banks, bank holding companies, savings and loan holding companies, credit unions, financial market utility entities, and money services businesses registered with FinCEN;
* Registered Commodity Exchange Act entities, registered investment companies and advisers, broker-dealers, and registered venture capital fund advisers;
* Insurance companies or state-licensed insurance producers;
* Accounting firms;
* Public utilities;
* Certain pooled investment vehicles;
* Tax-exempt entities and certain entities that assist tax-exempt entities;
* Inactive companies; and
* Subsidiaries of certain exempt entities.

Although many companies will clearly fall within an exemption, complicated BOI reporting situations will still arise. Individual companies will have to develop internal policies and procedures to assess their reporting obligations, identify Beneficial Owners, and identify Company Applicants (as discussed in greater detail below). In addition, companies will need to develop policies and procedures to monitor changes to their reporting status or Beneficial Ownership on an ongoing basis to avoid potential penalties.

**KEY TERMS**

***Beneficial Owner***: The CTA defines a Beneficial Owner as *any* individual who, directly or indirectly, either exercises substantial control over a Reporting Company or owns or controls at least 25% of its ownership interests

1. *Substantial Control*

Under the Final Rule, an individual exercises substantial control over a Reporting Company if the individual:

* Is a senior officer of the Reporting Company (*e.g.,* President, CEO, CFO, COO, general counsel, or any other officer performing a similar function);
* Has authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body) of the Reporting Company;
* Directs, determines or has substantial influence over important matters of the Reporting Company; or
* Has any other form of substantial control over the Reporting Company.

The last prong is a catch-all provision for control that is exercised in less conventional ways and for entities with atypical governance structures. This provision is designed to capture anyone who can make important decisions on behalf of the entity.

1. *Ownership Interest*

The Reporting Rule defines ownership interest as any contract, arrangement, or understanding used to establish ownership. An individual may own or control an ownership interest of a Reporting Company in a variety of ways, including through joint ownership, certain trust arrangements, or acting as an intermediary, custodian, or agent on behalf of another. The rule provides that convertible instruments, warrants, and other rights to purchase, sell, or subscribe to an ownership interest are included, regardless of whether they are characterized as debt or equity.

When determining whether an individual owns or controls 25% or more of the ownership interests, the individual’s ownership interests should be aggregated and compared to the “undiluted ownership interests” of the Reporting Company. If options or profits interests are outstanding, they are deemed to be exercised and “in the money” for purposes of the 25% ownership test. If there is more than one class of equity interests outstanding, the 25% threshold is determined as a percentage of all outstanding interests if possible, but, failing that, more than 25% of any class of equity interests triggers the reporting requirement.

There are certain exclusions from the definition of a Beneficial Owner:

* Minor children, if the parent or guardian’s information is reported properly;
* An individual acting as a nominee, intermediary, custodian, or agent on behalf of another individual;
* An individual acting solely as an employee who is not a senior officer;
* An individual whose interest in an entity is only through a right of inheritance; or
* Certain creditors.
* Certain tax or legal professionals designated as agents of the Reporting Company.

**Company Applicant**:  A Company Applicant is any individual who files the document to create or register the Reporting Company and the individual who is primarily responsible for directing or controlling such filing if more than one individual is involved in the filing.

The Final Rule specifies that existing entities formed or registered before the effective date (January 1, 2024) are *not* required to report Company Applicant information. Reporting Companies formed after that date must report all Company Applicants.

In many cases, Company Applicants may be employed by a law firm. For example, there may be an attorney primarily responsible for overseeing the preparation and filing of incorporation documents and a paralegal who handles the filing. In this example, this Reporting Company would report two Company Applicants—the attorney and the paralegal. State filing office employees who process formation documents are not the filers of the documents they process and therefore do not need to be reported.

**WHAT MUST BE REPORTED?**

If the business falls under the definition of Reporting Company, the business must provide the following information for *each* Beneficial Owner and *each* Company Applicant with respect to the Reporting Company.

***For Reporting Company:***

* Full legal name;
* Any trade name or DBA;
* Complete current address of its principal place of business in the U.S.;
* Jurisdiction of formation;
* Jurisdiction of first registration for foreign Reporting Companies;
* TIN issued by the IRS;

***For each Beneficial owner and each Company Applicant:***

* Full legal name;
* Date of birth;
* Current residential or business street address; and
  + A unique identifying number from an acceptable identification document (*e.g.*, passport, driver’s license or other government-issued ID) or a FinCEN identifier.

While an individual may file a report on behalf of a reporting company, the Reporting Company is ultimately responsible for the filing. The same is true of the certification. The Reporting Company will be required to make the certification, and any individual who files the report as an agent of the Reporting Company will certify on the Reporting Company's behalf.

**WHEN AND HOW TO REPORT?**

***When to Report***

The Reporting Rule goes into effect on January 1, 2024.

Reporting Companies created before January 1, 2024 will have one year (until January 1, 2025) to file the required information.  These companies are required to submit information about their Beneficial Owners but are not required to report information about their Company Applicants. Reporting Companies created on or after January 1, 2024 will be required to include information on both Company Applicants and Beneficial Owners within 30 days of formation or registration.

Any change to the information previously reported concerning a Reporting Company or its Beneficial Owners must be reported to FinCEN within 30 days. No updates are required with respect to Company Applicant information.

* With respect to deceased Beneficial Owners, an updated report must identify new Beneficial Owners within 30 days of the settlement of the decedent’s estate.
* An updated report must be filed if the decedent was a Beneficial Owner “by virtue of property interests or other rights subject to transfer upon death”—not solely because the deceased Beneficial Owner owned or controlled 25% of the Reporting Company's ownership interests.
* No special rules apply for purposes of determining whether successors to the deceased Beneficial Owner are Beneficial Owners of the Reporting Company, and the Reporting Company must apply the Beneficial Owner definition to assess whether any successor is a Beneficial Owner by virtue of the new property interests or rights.

Any inaccuracies must be reported within 30 days of the date the Reporting Company becomes aware of the inaccuracy.  Any time there is a change in an entity’s ownership, regardless of whether the entity is a Reporting Company prior to such change, the entity may be required to file a BOI report or update an existing report.

The Final Rule specifies that reporting companies need only update information concerning the Reporting Company or its Beneficial Owners—not Company Applicants. This change in reporting requirements *only applies to updated reports*. Reporting Companies will still be required to correct any inaccurate information previously reported about their Company Applicants.

***How to Report***

FinCEN is developing a Beneficial Ownership Secure System (BOSS) where the reports will be submitted electronically through an online interface. FinCEN will also publish reporting forms and guidance documents that companies will use to comply with their obligations under the CTA in advance of the date the reports are due. Reports will not be accepted prior to January 1, 2024.

**WHO HAS ACCESS TO THE INFORMATION I REPORT?**

The information reported to FinCEN will not be accessible to the public and is not subject to Freedom of Information Act requests. However, the CTA authorizes FinCEN to disclose BOI to:

* U.S. government agencies
* Certain foreign agencies and authorized persons
* Financial institutions using the information for certain Know Your Customer purposes

The Final Rule provides access to BOI directly from the FinCEN database to three types of U.S. government agencies:

* Federal agencies engaged in national security, intelligence, and law enforcement activity
* Treasury officials and employees in the course of their official duties, including tax administration
* State, local and Tribal law enforcement agencies in connection with criminal or civil investigations

Federal agencies will need to provide FinCEN with a brief justification for their request, while State, local and Tribal agencies will need to provide a court document authorizing the agency to access the BOI from FinCEN’s database.

Foreign law enforcement agencies, judges, prosecutors, central authorities and competent authorities will not have direct access to FinCEN’s BOI database. Authorized foreign requestors must submit a request to a federal agency to act as an intermediary to retrieve the BOI information from FinCEN’s database. The federal agency may only provide BOI to a foreign requestor in response to a request for assistance in an investigation or prosecution by such foreign country where there is an applicable treaty or similar international agreement. The foreign requestor must limit the use of the BOI in a manner consistent with the treaty or similar agreement under which the request was made.

**COMPLIANCE AND VIOLATIONS**

The CTA provides for both civil and criminal penalties for non-compliance.  Any person who provides false information, or fails to report complete or updated information, is subject to a civil penalty of not more than $500 for each day that the violation continues, and may face fines not more than $10,000, imprisonment for not more than two years, or both. A person is also subject to penalties for willfully providing, or attempting to provide, false or fraudulent Beneficial Owner information.

There are exceptions for mistakes made in good faith. If a company is unable to prove a good faith mistake and FinCEN finds the inaccurate reporting was intentional, there is a penalty of $500 a day, up to $10,000, and possible imprisonment for up to two years. In cases where inaccuracies are due to reasonable cause and not willful negligence, the penalty may be waived with the permission of the Secretary of the Treasury.

With respect to compliance, FinCEN intends to prioritize education and outreach to ensure that all reporting companies and individuals are aware of and on notice regarding their reporting obligations.

31 U.S.C. 5336(h)(3)(C) provides a safe harbor to any person that has reason to believe that any report he/she submitted contains inaccurate information and voluntarily and promptly, and consistent with FinCEN regulations, submits a report containing corrected information within 90 days of the submission of the inaccurate report. The safe harbor does not extend to reports corrected more than 90 days after they are filed, even if a Reporting Company files a correction promptly after becoming aware or having reason to know that a correction is needed. In addition, the Final Rule does not adopt a good faith or other standard regarding the requirements to update or correct reports. The CTA places the reporting responsibility on Reporting Companies, and this responsibility includes the obligation to report accurately.

**STEPS BUSINESS OWNERS AND COMPANIES SHOULD TAKE NOW:**

1. Determine if the company is a “Reporting Company” and begin developing a list of all entities in which you own a controlling interest.
2. Determine if an exemption applies.
3. If it is a “Reporting Company”
4. Begin compiling a list of all and any potential Beneficial Owners and their required information;
5. Meet with a qualified counsel to determine and comply with reporting requirements.