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Preparing for Compliance Under the Corporate Transparency Act

December 20, 2023

The Corporate Transparency Act (CTA), enacted in 2021, is designed to combat money laundering and other illegal activities by requiring certain US entities that historically have been able to operate privately to disclose their owners and controlling parties. The first trigger date for the Act is January 1st, 2024, and many clients need to understand how this new law will impact them. In summary, the CTA requires certain entities to report identifying information about (i) the entity itself, (ii) its "beneficial owners," and (iii) the "company applicants" to the Financial Crimes Enforcement Network (FinCEN), a bureau of the Department of the Treasury.

Which entities must file CTA reports, and who is responsible for compliance?

The CTA requires "reporting companies" to file CTA reports.

A reporting company includes (i) any entity created through a filing with the secretary of state or equivalent office, and (ii) any foreign entity registered to do business in the United States through such a filing. This will include most corporations, limited liability companies, and limited partnerships. There are exemptions for entities regulated by the government in other ways, such as banks, public companies, and tax-exempt entities. There is also an exemption for qualifying "large operating" entities that employ more than 20 full-time employees in the United States, have more than $5,000,000 in annual gross receipts or sales, and have a physical office in the United States. The exemptions generally will not apply to closely-held entities created for estate planning or asset management purposes.

Each reporting company will need to appoint a responsible person to coordinate and comply with the entity's CTA reports. This might be an officer of a company, the general partner of a limited partnership, or the manager of an LLC.

Is a trust a reporting company and must it file a report?

A typical trust created for estate planning purposes is not a reporting company and will not be required to file CTA reports, because such trusts are not created through a filing with any state or equivalent office. However, information about a trust's ownership and management may need to be reported to FinCEN if the trust has a significant ownership interest in, or substantial control over, a reporting company (discussed further below).

What information about the reporting company must be reported to FinCEN?

The reporting company must report its:
- full legal, DBA, and trade names;
- the address of its current principal place of business (reporting the address of a law firm or the entity's registered agent is not acceptable);
- the jurisdiction in which it was formed; and
- its TIN number.

Who are the beneficial owners that the reporting company must report?

Beneficial owners include:
- any individual who, directly or indirectly, owns 25% or more of the ownership interests of the entity; and
- any individual who, directly or indirectly, substantially controls the entity including:
  - any senior officer;
  - anyone with substantial influence on important decisions made by the company; and
  - anyone with authority to appoint or remove senior officers or certain board members.

What information must be reported if a trust owns 25% or more of, or substantially controls, a reporting company?

Beneficial owners of a reporting company are always individuals, so a trust itself will not be a beneficial owner. Rather, in cases in which a trust owns 25% or more of a reporting company, the reporting company must look through the trust and report the trust's owner(s).

Depending on the specifics of the trust arrangement, a trust may be deemed to have multiple "owners" under the CTA, each of whom must be reported to FinCEN. These trust owners will include:
- the trustee;
- other individuals with authority to "dispose" of trust assets or control rights over shares held in trust (such as an investment advisor, distribution advisor, or trust protector);
- the grantor of a revocable trust; and
- a trust beneficiary who is the only beneficiary eligible to receive distributions of income or principal or who has the right to withdraw or demand a distribution of substantially all the trust assets.

Questions remain as to the reach of these requirements, including whether the following would be deemed trust owners who must be reported: a grantor of an irrevocable grantor trust with the power to "swap" trust assets; the holder of a testamentary or lifetime power of appointment over trust assets; and the beneficiaries of a “pot”-style trust where multiple beneficiaries currently may receive trust distributions.

What information about the beneficial owners must be reported?

For each beneficial owner, the entity must report the

- full legal name;
- date of birth;
- current residential address;
- a unique ID number from a passport, driver’s license, or other state ID document; and
- an image of the document from which the ID number was obtained.

Alternatively, individuals can apply to FinCEN for a FinCEN identifier (FinCEN ID). If an individual has a FinCEN ID, they can provide that ID instead of their personal information.

What other benefits are there to getting a FinCEN ID?

Beneficial owners who obtain FinCEN IDs will not need to provide every entity that they beneficially own with their personal information. Moreover, beneficial owners with FinCEN IDs will not need to notify each entity when there is a change in their personal information, such as a name change or change of address. Rather, they will merely need to update this information once with FinCEN.

What is a company applicant, and what information about company applicants must be reported to FinCEN?

For companies *formed* on or after January 1, 2024, in addition to the information discussed above, the reporting company must report information about the company applicants. The information required in the FinCEN report about company applicants is the same information that the company must report about its beneficial owners. Like with beneficial owners, the company can choose to supply the FinCEN ID of the company applicant instead of the applicant’s personal information. However, unlike with beneficial owners, there is no requirement that the companies update the information about the company applicants if it changes.

The "company applicant" is the individual that files the document that creates the reporting company. For foreign reporting companies, the company applicant is the individual that registered the company in the United States. The individual responsible for directing or controlling the filing is also the company applicant. The company applicant is always an individual and never an entity such as a law or accounting firm. There can be no more than two company applicants.

What is the deadline for filing with FinCEN?

The deadline for filing with FinCEN depends upon when the entity is formed. Entities in existence ***before January 1, 2024***, have until January 1, 2025, to file. Entities formed **during 2024** will have 90 days, and entities formed ***on or after January 1, 2025***, will have 30 days.

When is an updated report required?

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 must file an updated report within 30 days of when the change occurs. Note that a change in the information of the company applicant does not require an updated report. Additionally, if the reporting company listed the FinCEN ID of the beneficial owner in its initial report, it does not need to file an updated report when there is a change in the personal information of the beneficial owner; rather, the beneficial owner must inform FinCEN of the change.

What are the penalties for not filing a CTA report with FinCEN?

Failure to file a FinCEN report when required can result in penalties of $500 a day up to $10,000 and up to two years imprisonment.

If you have questions or would like more information, please contact Yitz Weiss, Leslie Bradenham, or Natanya H. Allan.