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Corporate Transparency Act Alert: FinCEN Extends Reporting Deadline

by Ken Witt and Matthew Ditman

The Corporate Transparency Act (“CTA”) will come into effect on January 1, 2024, and an estimated 32.6 million private companies will have to report, for the first time, extensive information about their beneficial owners and company applicants to the Treasury Department’s Financial Crimes Enforcement Network (“FinCEN”). Failure to comply with the CTA carries significant civil and criminal penalties for non-compliance, including fines of up to \$500 per day (up to a maximum of \$10,000) and imprisonment for up to two years for willful violations.

As more fully described in our previous articles on all things CTA (linked [here](#), [here](#), [here](#), and [here](#)), any entity classified as a “reporting company” must submit an initial report to FinCEN detailing information about the company itself and two categories of individuals: (i) all “beneficial owners,”¹ and (ii) “company applicants.”² (Company applicant information is not required, however, for companies formed or first registered to do business in the U.S. before January 1, 2024.) Beneficial ownership information (“BOI”) must be reported within 30 days of formation, but, in an effort to give reporting companies more time to understand the new reporting requirements, FinCEN [just amended the BOI reporting rule](#) to extend the BOI filing deadline from 30 to 90 days for companies formed in 2024.

Reporting Requirements Refresher

Generally speaking, a “reporting company” is any LLC, corporation, or other entity formed by filing a document with a secretary of state (or other similar office) and that does not fall within one of the CTA’s 23 specific exceptions. Also included are foreign companies registered to do business in the U.S. Notable exemptions include regulated entities that already disclose significant information about themselves (e.g., SEC reporting issuers, broker-dealers, banks, credit unions, insurance companies, etc.) and “Large operating companies” are limited to companies meeting *all three* of the following criteria: (1) employ more than 20 employees on a full-time basis (i.e., at least 30 hours a week or 130 hours a month) in the U.S.; (2) have filed U.S. federal income tax returns in the previous year demonstrating more than \$5,000,000 in gross receipts or sales in the aggregate; and (3) have an operating presence at a physical office within the U.S.

¹“Beneficial owners” for this purpose include owners of 25% or more of a company and persons who exercise substantial control, such as senior officers.

²“Company applicant(s)” are the individuals who either file, or direct the filing of, the document creating or registering the reporting company. FinCEN permits no more than two company applicants per reporting company.

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Each reporting company's initial FinCEN report will include sensitive, personal identifiable information ("PII") about the company's beneficial owners and company applicant(s), including each individual's legal name, date of birth, current residential address (or business address for a company applicant), a unique identifying number from a current passport, driver's license, etc., and an image of the document. Reporting companies are also required to file basic company information, such as full legal entity name (as well as any trade or d/b/a names), address of principal place of business, jurisdiction of organization (e.g., Delaware) and a unique identifying number (typically, an employer identification number). If there is any change to previously reported information about the reporting company or its beneficial owners, companies must file an updated BOI report with FinCEN within 30 days after the date on which the change occurred.

FinCEN Identifiers

FinCEN is creating a process by which individuals and companies can obtain a "FinCEN Identifier," which, for individuals, can be used in lieu of providing PII in connection with forming new companies and filing updates. Beginning January 1, 2024, individuals may provide their PII directly to FinCEN on a one-time basis to receive a unique FinCEN Identifier for use in future BOI reports. FinCEN Identifiers will not only help protect the privacy and PII of beneficial owners, but they will also shift the responsibility for updating BOI away from the reporting company to the beneficial owners themselves. Reporting companies would be well advised to encourage all beneficial owners to obtain FinCEN identifiers as a means of mitigating the reporting companies' responsibilities while also protecting their beneficial owners' PII.

What next?

With the effective date of the CTA coming up in about three weeks, every U.S. privately held company should take steps to ensure compliance:

- Determine (i) if it will be classified as a reporting company and required to file an initial FinCEN report, and, if so, (ii) who qualifies as a beneficial owner of the company.
- If new companies will be formed in the near future, consider organizing the company in 2023, if possible, which would extend the initial CTA filing deadline to the end of 2024.
- Consider dissolving inactive or unneeded entities before the end of 2023 to avoid incurring unnecessary costs under the CTA. The "inactive entity" exemption from BOI reporting is quite limited and does not include entities that were formed on or after January 1, 2020, or entities that hold assets of any kind or type.
- Require beneficial owners to provide the necessary PII to the company or obtain a FinCEN identifier. Employment agreements, LLC agreements, stockholder agreements and stock purchase or subscription agreements should be amended to include such covenants on the part of potential beneficial owners.
- Reporting companies that will be receiving PII from beneficial owners should put in place systems and procedures to protect such PII and prevent the unauthorized disclosure or use of such information. Note that there are a number of third-party vendors with new product offerings that are designed to intake, organize and protect beneficial owner information.

Kutak Rock is here to help clients navigate the CTA compliance process. If you have any questions about how, if at all, the CTA will affect your business, please contact your Kutak Rock attorney, one of the authors or one of the attorneys in Kutak Rock's Scottsdale Corporate and Securities Group listed on the left. You may also visit us at www.kutakrock.com.

