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Corporate Transparency Act ("CTA") Check-In: What's the Latest?

by Matthew Ditman and Ken Witt

In less than six months' time, an estimated 32.6 million private companies will become subject to the reporting requirements of the CTA—federal legislation carrying significant civil and criminal penalties for non-compliance. Many companies that have never been required to disclose information about company ownership will now be on the hook, both civilly and potentially criminally, for failure to disclose such information.

As more fully described in our previous articles on all things CTA (linked here and here), effective January 1, 2024 any entity classified as a "reporting company" must submit an initial report to the Financial Crimes Enforcement Network ("FinCEN") detailing information about (i) the company itself, (ii) all "beneficial owners" of the company, and (iii) any "company applicant." Generally speaking, a "reporting company" is any LLC, corporation, or other entity formed by filing a document with a state's secretary of state (or other similar office) that does not fall within one of the CTA's 23 specific exemptions from the definition of "reporting company." 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.).

Two additional exemptions on which many companies will likely rely are the "large operating company" and "subsidiary of exempt entity" exemptions. To qualify for the "large operating company" exemption, a company must meet *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. The "subsidiary" exemption states that any entity whose ownership interests are controlled or wholly owned, directly or indirectly, by one or more exempt entities will also be exempt from the definition of "reporting company."

It is important to note that initial FinCEN reports for reporting companies formed on or after January 1, 2024 will be due within 30 calendar days of notice from the secretary of state that the creation or registration of the reporting company is effective (while, by comparison, reporting companies formed before January 1, 2024 will have until January 1, 2025 to file their initial FinCEN reports). While a newly formed company may anticipate qualifying for an exemption from the "reporting company" filing requirements at some point in the future, often the newly formed entity will not qualify for an exemption, particularly the "large operating company" exemption, within the initial 30 calendar-day window. If your company does not meet the requirements for an exemption right away, it will be necessary to file beneficial ownership and company application reports with FinCEN as a reporting company.

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While "reporting companies" formed before the CTA's January 1 effective date are *not* required to include information about company applicants in their initial FinCEN reports (a welcome relief for many older companies who may have lost this information to the sands of time), these companies *will* need to disclose information about their beneficial owners (i.e., individuals who either (i) exercise "substantial control" over the reporting company, or (ii) own or control at least 25% of the ownership interests in the reporting company). Importantly, beneficial ownership is a "warm body" standard—meaning that reporting companies must identify the living, breathing human beings who own or control at least 25% of the ownership interests. For some reporting companies, this will be a relatively simple, straightforward task. Others, though, will be well advised to begin determining beneficial ownership now as ownership interests may be indirect, and beneficial ownership determination may require complex, multi-layered analysis.

As noted in our previous CTA articles, each reporting company's initial FinCEN report will include a significant amount of sensitive, personal identifiable information ("PII") about the company's beneficial owner(s) 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. To minimize the number of times beneficial owners and company applicants must disclose PII and allow these individuals to disclose PII to FinCEN once, rather than potentially to multiple reporting companies on multiple occasions, FinCEN recently issued a notice and request for comment outlining the process by which individuals can obtain a "FinCEN Identifier." Beginning January 1, 2024, individuals may provide their PII directly to FinCEN on a one-time basis to receive a FinCEN Identifier for use in future FinCEN reports. Individuals who regularly engage in corporate formation or who own multiple companies would be well advised to take this proactive measure as a means of protecting their PII. It is worth noting, though, that individuals who secure a FinCEN Identifier have an affirmative obligation to update any change in PII indefinitely (e.g., a change in address, a new passport or driver's license number, etc.).

As the CTA's January 1 effective date continues to draw closer, companies should start figuring out *now* (i) if they 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. As noted above, both of these questions can be difficult to answer, but 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 a member of Kutak Rock's Scottsdale Corporate and Securities Group. You may also visit us at www.kutakrock.com.