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Beneficial Ownership Reporting Under the Corporate Transparency Act

Key Points

In December 2021, the Financial Crimes Enforcement Network (FinCEN) issued proposed regulations (Proposed Rule) that would implement the beneficial ownership reporting requirements of the Corporate Transparency Act of 2020 (CTA).

The Proposed Rule would require most companies to report personal information about each person involved in the company's formation and each beneficial owner to FinCEN.

FinCEN will use the information collected to develop and maintain a national beneficial ownership registry in order to combat money-laundering and related criminal activity.

Which entities are required to report?

Under the Proposed Rule, all non-exempt corporations, limited liability companies and other entities created by filing a document with the secretary of state or similar office under the laws of any State or Indian tribe (Reporting Companies) will be required to report ultimate beneficial ownership and any changes thereto. Foreign entities registered to do business in the United States are also Reporting Companies under the Proposed Rule.

The reporting requirements would apply to newly created Reporting Companies and those already in existence on the date of enactment. Operating companies and holding companies or other passive entities will all be required

to report beneficial ownership and any changes to such information, unless an exemption applies. The Proposed Rule estimates that 85% of newly formed entities in the United States will fall within the definition of Reporting Companies.

Which entities are exempt?

The Proposed Rule also establishes several exemptions that shield certain entities from its onerous reporting requirements. Generally, the exemptions include businesses that are already heavily regulated or otherwise subject to significant reporting requirements.

The Proposed Rule includes 23 categories of exemption, including:

Charitable organizations;

Certain companies in heavily regulated industries such as banks, insurance companies and SEC registered entities;

Companies with a physical presence in the U.S. with at least 20 employees and gross receipts in excess of \$5 million; and

Certain passive entities meeting several additional requirements.

What information must be reported?

Reporting Companies must provide FinCEN with information about the company itself, its beneficial owners and company applicants.

Reporting Companies. A Reporting Company must disclose (1) its full name, (2) any alternate names through which it engages in business, (3) its business address, (4) its jurisdiction and (5) its Tax Identification Number.

Beneficial Owners and Company Applicants. As to its beneficial owners and company applicants, a Reporting Company must disclose the following: the owner's (1) full legal name, (2) date of birth, (3) current residential or business street address and (4) unique identifying number from an acceptable identification document.

What does it mean to be a Company Applicant?

The term "Company Applicant" refers to the person who filed the entity's formation documents, as well as any person who directed such person. For example, this may include the legal professional who prepared the formation documents and their supervisors, as well as the person acting as the company organizer or manager.

Who counts as a Beneficial Owner?

The term “Beneficial Owner” includes any individual who directly or indirectly exercises substantial control over the company or owns at least 25% of the ownership interests of the company.

For the purpose of establishing beneficial ownership of a Reporting Company, the Proposed Rule defines the term “substantial control” to include any individual who:

Serves as a senior officer of a reporting company;

Has authority over the appointment or removal of any senior officer or dominant majority of the board of directors (or similar governing body) of a Reporting Company;

Has direction, determination or decision of, or substantial influence over, important matters of a reporting company; or

Holds any other form of substantial control over the Reporting Company.

A person may possess substantial control formally or informally, including by way of informal understandings or arrangements.

Further, the Proposed Rule offers an expansive definition of “ownership interests” to include any equity interest, capital or profits interest, and options. It also includes the holder of any debt instrument secured by an ownership interest. With respect to an interest owned by a trust, the ownership interest would be attributable to the trustee and any other individual able to dispose of trust assets, the grantor of any revocable trust, and a beneficiary who is the sole permissible distributee or has the power to withdraw substantially all of the assets.

What timelines apply to Reporting Companies?

The timeframe for initial reporting depends on when the Reporting Company was created. Companies in existence prior to the effective date of the final rule will have one year from the effective date to provide FinCEN with their initial reports. Companies created on or after the effective date must file their initial reports within 14 days of formation. Regardless of when a Reporting Company was formed, any change to a previously filed report must be reported to FinCEN within 30 days of the changes, and any error in a filing must be corrected within 14 days of filing.

What are the consequences for noncompliance?

Significant civil and criminal penalties may be imposed for violations of the reporting obligations established under the CTA. A person who willfully fails to report information or reports inaccurate information may be subject to a civil penalty of up to \$500 per day for each day a violation continues

without cure and may receive criminal penalties including up to two years of imprisonment and a fine of up to \$10,000.

What comes next?

The public comment period for the Proposed Rule closed on February 7, 2022. FinCEN will issue final regulations and establish effective dates, but the final regulations may differ from those described in this alert as a result of comments received in response to the Proposed Rule.

Companies likely to be Reporting Companies under the final rules may prepare by developing procedures for collecting relevant information and protecting it appropriately. Companies may also prepare for the CTA's implementation by incorporating language in the bylaws, operating agreements, shareholder agreements and the like obligating beneficial owners to provide the required information, consent to its disclosure and update it as necessary for compliance.

Contact us

We will monitor progress and work with clients to ensure compliance with all applicable requirements. If you have questions or concerns about how the CTA and the Proposed Rule may impact your business, please contact a member of the Private Wealth team at Husch Blackwell.