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The New Corporate Transparency Act: Five Things You Need to Know Now

by Ken Witt

The Corporate Transparency Act ("CTA") came into effect on January 1, 2024, and an estimated 32.6 million private companies have to report, for the first time, information about their "beneficial owners"[1] to the Treasury Department's Financial Crimes Enforcement Network ("FinCEN"). The CTA's reporting requirements apply to corporations, limited liability companies, limited partnerships, limited liability partnerships, professional corporations, professional limited liability companies, business trusts and other types of legal entities. Failure to comply with the CTA carries significant civil and criminal penalties for non-compliance, including substantial fines and imprisonment.

Here are five things that you need to know about the CTA:

No. 1: The CTA is Still in Effect

Recently, a federal district court in Alabama[2] held that the CTA exceeds the Constitution's limits on Congress's power and is therefore unconstitutional. However, the decision only applies to the plaintiffs in that case. The case is on appeal, and several "copycat" cases have also been filed challenging the constitutionality of the CTA. However, as of now, the CTA still applies to millions of "reporting companies" as defined by the CTA.[3]

No. 2: The Deadlines are Coming Right Up

Companies formed prior to 2024 must file a report under the CTA no later than January 1, 2025. Companies newly formed in 2024 have 90 days to file. Companies formed in 2025 or later must file an initial report within 30 days after formation. If there is any change to previously reported information

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[1] A "beneficial owner" is an individual who directly or indirectly (1) owns or controls 25% or more of the ownership interests of the reporting company, or (2) exercises substantial control over the reporting company. There are detailed regulations about the calculation of ownership percentages and the meaning of substantial control. In addition to beneficial owners, reporting companies formed in 2024 or thereafter must report "company applicant" information. "Company applicants": (i) the individual who directly files the document that creates the reporting company (e.g., articles of incorporation) and (ii) the individual who is primarily responsible for directing or controlling such filing if more than one individual is involved in the filing of the document.

[2] National Small Business United v. Yellen, No. 5:22-CV-01448 (N.D. Ala.)

[3] "Reporting companies" that are subject to the CTA include any domestic entity that is created by filing a document with a secretary of state or similar authority and any foreign entity that is registered to do business in the U.S.

about the reporting company or its beneficial owners, companies must file an updated report with FinCEN within 30 days.

Even if you haven't started new companies in 2024 that are subject to the 90-day deadline, it's important to start preparing well in advance of the year-end filing deadline for several reasons. If your business has a complex organizational chart and a number of owners, officers and directors, it may take time to sort out which companies have to report and who the beneficial owners are. Also, it may take time to collect the needed information from reluctant beneficial owners.

No. 3: Exemptions are Limited (Most Private Companies Will Have to File)

There are 23 categories of exempt entities under the CTA. Notably, publicly held companies and a number of regulated businesses (banks, insurance companies, broker-dealers, investment advisers, etc.) are exempt. Other exemptions apply to some tax-exempt entities (e.g., 501(c)(3) charities), subsidiaries of certain exempt entities and "large operating companies" (companies with more than 20 full-time employees in the United States, with more than $5 million in gross receipts or sales, as reflected on a U.S. tax return, and that have a physical office in the United States). Although the "large operating company" exemption looks helpful, in practice we have found it to be of limited use because many private companies have structures that separate employees and revenue.

Note also that there is an "inactive entity" exemption that is quite limited: (1) it was in existence on or before January 1, 2020; (2) it is not engaged in an active business; (3) it is not directly or indirectly owned by a foreign person; (4) it has not experienced an ownership change in the preceding 12-month period; (5) it has not sent or received any funds greater than $1,000 either directly or through any financial account in which the entity or an affiliate has an interest, in the preceding 12-month period; AND (6) it does not hold any assets in the U.S. or abroad, including any ownership in other entities. Again, in our experience, all of these requirements are seldom met.

No. 4: Getting Rid of a Reporting Company Before the Deadline Won't Work

FinCEN has recently stated you can't avoid the CTA filing requirement by dissolving a reporting company prior to the reporting deadline (January 1, 2025 for companies formed prior to 2024 and 90 days after formation if formed in 2024). If a company is not exempt, unless it was dissolved and ceased to exist as an entity by the end of 2023, it has to file a beneficial ownership report with FinCEN. Reporting would even be required for a company that is formed for use in a merger or other reorganization but that ceases to exist shortly thereafter when the merger is consummated.

No. 5: You Should Have FinCEN Identifiers for Beneficial Owners and Company Applicants

Each reporting company's initial FinCEN report will include sensitive, personally 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., Arizona) and a unique identifying number (typically, an employer identification number).

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Individuals may provide their PII directly to FinCEN on a one-time basis to receive a unique FinCEN identifier for use in CTA reports. FinCEN Identifiers will not only help protect the privacy and PII of beneficial owners but will also shift the responsibility for updating BOI away from the reporting company to the beneficial owners themselves, who are in a better position to make the updates. Reporting companies would be well advised to encourage all beneficial owners (and company applicants) to obtain FinCEN identifiers.

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