PUBLICATION

Corporate Transparency Act Requires Beneficial Ownership Reports

Authors: Daniel Moss
February 07, 2022

On January 1, 2021, Congress enacted the National Defense Authorization Act of 2021. As part of this legislation, Congress set out new Beneficial Ownership Information Reporting Requirements (BOI Reporting Requirements) for domestic and foreign companies doing business in the U.S. in Section 6403 of the Corporate Transparency Act (CTA). On December 8, 2021, the U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN) published a Notice of Proposed Rulemaking setting forth proposed regulations for the BOI Reporting Requirements. This alert addresses key points in the proposed regulations. The public comment period ended February 7, 2022. We will publish another alert when the regulations are finalized.

This proposed rulemaking is the first of three rulemakings to implement the requirements of Section 6403. A second rulemaking will be issued to implement the statute's protocols for access to and disclosure of BOI, and a third will revise the existing customer due diligence requirements for financial institutions at 31 CFR 1010.230 consistent with the requirements of this rulemaking.

The BOI Reporting Requirements require the FinCEN to establish and maintain a national registry of "Beneficial Owners" and "Company Applicants" of entities that are deemed "Reporting Companies."

Congress's stated purposes in enacting this legislation are to:

- Set a clear federal standard for incorporation practices;
- Protect national security interests;
- Protect interstate and foreign commerce;
- Enable efforts to counter money laundering, the financing of terrorism, and other illicit activity; and
- Bring the U.S. in line with international anti-money laundering standards.

What does the CTA accomplish through the BOI Reporting Requirements?

The CTA requires FinCEN to establish and maintain a national registry of "Beneficial Owners" and "Company Applicants" of entities that are deemed "Reporting Companies." This registry will be accessible (with limited access and through "appropriate protocols") to state, federal, and international law enforcement agencies and certain financial institutions to further the purposes of the CTA. Information will not be available to the general public or accessible through Freedom of Information Act requests.

What entities are Reporting Companies?

"Reporting Company" means a corporation, LLC, or other "similar entity" (including most LPs, LLPs, LLLPs, and business/statutory trusts) that is (i) created by the filing of a document with a secretary of state or a similar office, or (ii) formed under the law of a foreign country and registered to do business in the U.S.

Exceptions: There are 23 specific exceptions to the CTA's definition of Reporting Company. Examples include (a) public companies under the Securities Exchange Act of 1934; (b) churches, charities, nonprofit entities, and any other entity that qualifies for tax-exempt status under relevant sections of the Internal Revenue Code; and (c) other types of companies that have existing reporting obligations to governmental entities (for example, insurance companies, banks, federal or state credit unions, investment companies, registered public accounting firms, and public utilities).

Large Operational Company Exception: One other noteworthy exception is for any entity that employs more than 20 employees on a full-time basis in the U.S.; filed in the previous year federal income tax returns in the U.S. demonstrating more than $5,000,000 in gross receipts or sales in the aggregate, including the receipts or sales of other entities owned by the entity, and other entities through which the entity operates; and has an operating presence at a physical office within the U.S.

Who is a Company Applicant?

"Company Applicant" means, for a domestic Reporting Company, any individual who files the document that creates the domestic Reporting Company, and for a foreign Reporting Company, any individual who files the document that first registers the foreign Reporting Company to do business in the U.S. This definition also includes any individual who directs or controls the filing of such documents by another person.

What is required to be reported?

Each Reporting Company shall submit to FinCEN the following information with respect to each Beneficial Owner and each Company Applicant of the Reporting Company:

- Full legal name
- Date of birth
- Current residential or business address (for a Beneficial Owner, the Reporting Company must report the Beneficial Owner's residential address for tax residency purposes. For Company Applicants that provide a business service as a corporate or formation agent, the Reporting Company should report the Company Applicant's business address. For any other Company Applicants, the Reporting Company should report the residential street address that the individual uses for tax residency purposes.)
- Unique identifying number from an acceptable identification document (e.g., passport, driver's license, etc.) or FinCEN identifier. The Reporting Company must provide a scanned copy of the identification document from which the unique identifying number of the Beneficial Owner or Company Applicant is obtained.

The Reporting Company must also submit the following information:

- Its name
- Any alternative names through which the company is engaging in business ("d/b/a names")
- Its business street address
- Its jurisdiction of formation or registration
- A unique identification number. The company must submit a tax identification number (TIN) (including an Employer Identification Number [EIN], or where a TIN has not been issued, a Dun & Bradstreet Data Universal Numbering System [DUNS] number or a Legal Entity Identifier [LEI]. Also, a FinCEN identifier may be submitted it in lieu of a TIN, DUNS, or LEI number.)

Who is a Beneficial Owner?

"Beneficial Owner" means, with respect to any entity, an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise, exercises "Substantial Control" over the entity owns or controls at least 25 percent of the "Ownership Interests" in the entity.

Exceptions: Exceptions to the definition of "Beneficial Owner" include minor children, individuals acting as a nominee, intermediary, custodian, or agent on behalf of another individual, employees whose control is solely derived from employment status, ownership through inheritance, and creditors of the entity unless otherwise meeting the requirements of a beneficial owner.

Substantial Control: The proposed regulations provide three specific indicators of Substantial Control: (1) service as a senior officer of a Reporting Company; (2) authority over the appointment or removal of any senior officer or dominant majority of the board of directors (or similar body) of a Reporting Company; and (3) direction, determination, or decision of, or substantial influence over, important matters of a Reporting Company. The proposed regulations also provide a catch-all category for any person who exercises "any other form of substantial control over the reporting company."

Ownership Interests: Ownership Interests include equity in the reporting company and other types of interests, such as capital or profit interests (including partnership interests) or convertible instruments, warrants or rights, or other options or privileges to acquire equity, capital, or other interests in a reporting company. Debt instruments are included if they enable the holder to exercise the same rights as one of the specified equity or other interests.

What is the timeframe for compliance?

- **Existing Companies**: Reporting Companies in existence or registered to do business as of the effective date of the final regulations must submit their initial report within one year of the effective date of the final regulations.
- **New Companies**: For Reporting Companies formed or registered after the effective date of the final regulations, the report must be submitted within 14 calendar days of the date of formation or registration.
- **Changes in Beneficial Ownership**: For any change in the information described in the report (including if a Reporting Company becomes exempt or a previously exempt entity loses its exempt status), a Reporting Company must submit a report that updates the information relating to the change within 30 calendar days of the change.

What are the penalties for non-compliance?

- For willfully providing, or attempting to provide, false or fraudulent BOI or willfully failing to report (or provide an update report), the fines/penalties are:

  - Civil monetary penalties of $500 for each day that the violation continues or has not been remedied; and
  - Criminal penalties of not more than $10,000, imprisonment of not more than two years, or both.
- There is a Safe Harbor for persons acting in good faith to correct inaccurate information submitted within 90 days of the inaccurate report.

When can we expect the BOI Reporting Requirements to become effective?

The final effective date is not expected in the immediate near term, as FinCEN must review comments, promulgate final rules, build the IT infrastructure for receiving and maintaining information, and develop forms and procedures with the local secretaries of state. However, given the short time frame to report for new companies, those who regularly form or register companies should stay alert on this topic and be ready for prompt compliance.

For more information contact Daniel Moss or your Baker Donelson Business and Corporate attorney.