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PRATT'S
**PRIVACY &
CYBERSECURITY
LAW**
REPORT



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The Corporate Transparency Act: Beneficial Ownership Information Reporting Checklist

*By Megan L. Jones and Brent A. Morowitz**

In this article, the authors provide an overview of the reporting requirements under the Corporate Transparency Act and subsequent guidance.

Enacted as part of the Anti-Money Laundering Act of 2020 in the National Defense Authorization Act for Fiscal Year 2021, the Corporate Transparency Act (CTA) requires certain entities – basically smaller and otherwise unregulated companies – to file a report with the U.S. Department of the Treasury’s Financial Crimes Enforcement Network (FinCEN). This report identifies the entities’ beneficial owners, the persons who ultimately own or control the company, and provides similar identifying information about those individuals who formed the entity. The Act further authorizes FinCEN to disclose this information to certain government authorities and to financial institutions for select purposes.

For new entities, these filing requirements are effective January 1, 2024. Existing entities are given until January 1, 2025, to report. With the new entities filing deadline less than a year away, those who might need to report should be proactive in ensuring that they are compliant.

This article provides an overview of the reporting requirements under the CTA and subsequent guidance and is based on current guidance at the date of publication.

WHO MUST REPORT?

- Reporting companies include corporations, LLCs and entities that are created or registered to do business by filing a document with a secretary of state or any similar office.
- Also likely included, depending on applicable state law and subject to any exemptions, are limited partnerships, LLPs, business trusts or statutory trusts, and possibly general partnerships (if they file a document with a secretary of state or similar office).
- Both domestic and foreign entities registered to do business in the United States are included.
- Dormant entities might be required to file depending on whether or not they meet the inactive test.

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ELIGIBLE FOR EXEMPTION:

- Exemptions include: governmental authorities, banks, credit unions, money services businesses, broker-dealers, securities reporting issuers, Securities Exchange Act registered entity, investment companies or investment advisers, venture capital fund advisers, insurance companies, Commodity Exchange Act registered entities, tax-exempt entities, large operating companies and certain subsidiaries.
- Certain pooled investment vehicles are exempted under the following conditions: must be operated or advised by a bank, a credit union, a registered broker-dealer, a federally registered investment company or investment adviser or a venture capital fund adviser. Further, to meet the definition of “pooled investment vehicle,” the entity must rely on either Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act (accordingly, vehicles that rely on a separate exemption are not exempt) and be reported on the adviser’s Form ADV.
- Those entities required to file should potentially not include common law trusts and general partnerships, even if those entities make an optional filing with state officials, because those entities generally are not formed by filing a document—but they are not included in the list of entities expressly excluded.

NOT ELIGIBLE FOR EXEMPTION:

- Foreign private advisers and family offices, and there are *no blanket exemptions* for subsidiaries of private funds.
- Likely, certain feeder fund vehicles, alternate investment vehicles, other subsidiaries of private funds, and holding company entities not otherwise eligible for an exemption. (But certain of these vehicles may in fact be exempt, particularly if they are operated or advised by a registered investment adviser or venture capital fund adviser, rely on the applicable exemption and are listed on the adviser’s Form ADV.)
- Certain pooled investment vehicles, including real estate vehicles relying on the Section 3(c)(5)(c) exemption under the Investment Company Act of 1940, commodity pools (even those advised by a registered commodity trading advisor and operated by a registered commodity pool operator), pooled investment vehicles advised by state-registered investment advisers (or investment advisers exempt from state registration, if not otherwise in an exempt category above) or investment advisers relying on the “private fund adviser” exemption and foreign pooled investment vehicles.
- While private fund clients of the above referenced exempt advisers relying on the 3(c)(1) and 3(c)(7) exemptions under the 1940 Act are exempt

from the definition of a reporting company under the CTA, subsidiaries of those private fund clients may not be exempt.

- Entities registered in a state or Tribal jurisdiction that are subsidiaries of large foreign companies that do not qualify for the large operating company exemption due to insufficient U.S. presence or gross receipts, absent another applicable exemption.

INFORMATION REPORTED:

- *Reporting company*: full name, DBA, address, jurisdiction of formation or registration, TIN or other unique tax ID number shown.
- *Beneficial owners*: full name, date of birth, address, photo ID with ID number shown. There is a special rule for reporting companies owned by one or more exempt entities that states that if an individual is deemed to be a “beneficial owner” exclusively due to his or her ownership of the exempt entity, then the name of the exempt entity may be reported in lieu of the otherwise required information. (The rule specifically states the ownership being the exclusive reason to withhold personal information and provide information regarding the exempt entity. Accordingly, these entities will still need to provide information on those exercising substantial control over the entity under the rules.)
- *Company applicants (new reporting companies only, but limited)*: full name, date of birth, address, photo ID with ID number shown.

An individual may submit the required information, as detailed above, directly to FinCEN, and receive a unique FinCEN identifier. This individual can then provide their FinCEN identifier, instead of their personal information, to a reporting company to be used in filing a report.

A BENEFICIAL OWNER IS:

- An individual who, directly or indirectly, exercises substantial control over the reporting company.
- Includes senior officers (president, chief executive officer, chief operating officer, chief financial officer, general counsel).
- Also included are those with the ability to make important decisions on behalf of the reporting company.
- An individual who, directly or indirectly, owns or controls at least 25% of the ownership interests of the reporting company, including of convertible interests irrespective of whether these convertible interests are debt or equity, along with directly held options and warrants.

- Certain trust arrangements, or those individuals or entities acting as an intermediary, custodian or agent on behalf of another.

WHAT CONSTITUTES “CONTROL”?

An individual is deemed to have control or ownership of trust assets if the individual is serving as trustee or otherwise has authority to dispose of trust property.

A trust beneficiary who is the sole permissible recipient of trust income and principal, or who has authority to withdraw trust assets, is deemed to have ownership or control of the trust property.

The grantor of a trust is deemed to have ownership or control if the grantor has the authority to revoke the trust or otherwise withdraw trust assets.

Often, for more complicated irrevocable trusts, only the trustee will be deemed to have control or ownership of the trust assets.

Not included in the definition of beneficial owner are:

- Minor children (if a parent or legal guardian's information is reported), individuals acting as nominees, intermediaries, custodians or agents, employees acting solely as employees and not as senior officers, individuals whose only interest in a reporting company is a future interest through a right of inheritance, or creditors of a reporting company (unless the creditor otherwise meets the definition of beneficial owner by exercising substantial control or by owning or controlling 25% or more of the entity's ownership interests).

Those seeking to file must do so in the non-public cloud-based database maintained by FinCEN. FinCEN proposes extensive protocols and safeguards for authorized users.

Access to the filed information is provided to:

- Federal agencies engaged in law enforcement, national security or intelligence activity, to be used in furtherance of such activity.
- State, local and Tribal law enforcement for use in criminal or civil investigations and with authorization from a court of competent jurisdiction.
- Select foreign agencies engaged in law enforcement, national security or intelligence activity.
- Financial institutions subject to customer due diligence requirements, to facilitate compliance with these requirements, and their regulators.
- Certain Treasury officers and employees, including tax administration.

It should be noted that Treasury published a proposed rule on access on December 15, 2022. FinCEN is expected to issue a final access rule by January 1, 2024, so final guidance has not been issued yet.

DATES AND CONSEQUENCES

New companies have until January 1, 2024, to file, and they must file the initial report within 30 days of creation or registration. Existing reporting companies have until January 1, 2025, to file an initial report. Updates and corrections to beneficial ownership information require the filing of a report within 30 days.

Penalties for noncompliance or misuse of beneficial ownership information fall under two categories:

- Civil and criminal penalties for willful reporting violations, including fines of up to \$10,000 and imprisonment for not more than two years.
- Civil and criminal penalties for unauthorized disclosure and use of beneficial ownership information also exist.

TAKEAWAYS

- The Corporate Transparency Act requires a broad range of entities to file a report with FinCEN identifying those who own, control and formed the company.
- The Act authorizes FinCEN to disclose this information to government authorities and some financial institutions for select purposes.
- The requirements are effective January 1, 2024, for new entities and January 1, 2025, for existing entities. However, entities in existence in 2024 will seemingly need to report even if they dissolve before the applicable 2025 reporting deadlines.

CONCLUSION

The rules for filing contain many nuances which can determine who must report under the CTA. Guidance provided to date has erred toward overreporting, as the purpose of these reporting requirements is to broadly begin tracking ownership of the relevant entities.

Entities that must report should contact counsel well in advance of reporting deadlines to ensure that all relevant filings are done in a timely manner, knowing that each situation might vary under the specifics of the rules. Any entities for which reporting might be problematic, or mostly but not fully dormant entities, should address issues well in advance of 2024.