

April 28 2022

Reporting beneficial owners of certain US companies: proposed regulations on when information must be reported and penalties

Kozusko Harris Duncan | Private Client & Offshore Services - USA



SEVERIANO E
ORTIZ



JENNIE CHERRY



BRYAN HOSEOK
OK

- > [Introduction](#)
- > [Background](#)
- > [Initial report](#)
- > [Updated report](#)
- > [Corrected report](#)
- > [Shorter timeframes and increased reporting requirements](#)
- > [Penalties and individual liability](#)
- > [Comment](#)

Introduction

On 7 December 2021, the US Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) issued proposed regulations with details to begin compiling a beneficial owner register for US companies under the Corporate Transparency Act (CTA). This article is the fourth in a series summarising those details and focuses on when information must be reported and penalties for failure to comply.⁽¹⁾

Background

Enacted 1 January 2021, the CTA establishes a beneficial owner reporting regime for US companies, pursuant to which reporting companies must submit a report containing "beneficial owner" and "company applicant" information (together, "beneficial ownership information" (BOI)). For further details please see "[Reporting beneficial owners of certain US companies – details of new Corporate Transparency Act](#)".

The proposed regulations are intended to clarify the various BOI requirements of the CTA, including:

- who must file a BOI report;
- what constitutes beneficial ownership;
- what information must be disclosed in a BOI report; and
- when the information must be reported.

This article summarises the proposed regulations regarding when the information must be reported and associated penalties for failure to comply. Under the proposed regulations, BOI report timing depends on:

- when a reporting company was created or registered; and
- whether the report at issue is:
 - an initial report;
 - an updated report providing new information; or
 - a report correcting erroneous information in a previous report.

Initial report

Under the proposed regulations, the timing for filing an initial BOI report depends on whether a reporting company was formed or registered prior to the effective date of the final regulations (the effective date) or after that date. For further details on what constitutes a "reporting company" please see "[Reporting beneficial owners of certain US companies: proposed regulations on who must file a beneficial owner report](#)".

New companies

Any domestic reporting company formed, and any foreign company registered to do business in the United States, on or after the effective date should file within 14 calendar days of its formation or registration date, respectively. FinCEN is in the process of developing the infrastructure necessary to administer the CTA filing requirements, such as the beneficial ownership information technology system.

Existing companies

On the other hand, any domestic reporting company created and any foreign entity registered to do business in the United States before the effective date must file its initial BOI report within one year after the effective date.

Changed exemption status

Additionally, any entity that no longer meets the criteria for a particular exemption and becomes a reporting company must file within 30 calendar days after the date that it no longer meets the criteria for any such exemption.

Updated report

The proposed regulations require reporting companies to update a BOI report within 30 calendar days after the date on which there is any change with respect to any information previously reported to FinCEN. This includes any change with respect to:

- who is a beneficial owner of a reporting company (for further details please see "[Reporting beneficial owners of certain US companies: proposed regulations on what constitutes beneficial ownership](#)"); and
- information reported for any particular beneficial owner or company applicant (for further details please see "[Reporting beneficial owners of certain US companies: proposed regulations on what information must be disclosed](#)").

The requirement to update BOI reports, as currently provided in the proposed regulations, could be onerous, especially if there are numerous beneficial owners to be reported as a result of the very broad definitions of "substantial control" and "ownership interests". Reporting companies will be required to file updated reports every time there are changes in the company's directors, management or shareholders. In addition, an updated report will be required any time there is a change in the information previously provided with respect to such individuals (eg, a change in address). In either situation, the updated BOI report must be submitted within 30 days from such change.

Corrected report

Similarly, a reporting company is required to correct inaccurately filed information within 14 calendar days after the date on which the reporting company becomes aware or has reason to know that any required information contained in any BOI report filed with FinCEN was inaccurate.

Shorter timeframes and increased reporting requirements

The one-year timeline proposed by FinCEN in the proposed regulations for existing reporting companies to submit their initial BOI report is significantly shorter than the maximum two-year timeline granted under the CTA. In addition, for updated and corrected reports, the timeframes proposed by FinCEN are considerably shorter than the timeframes initially provided under the statute.

The requirement to update a FinCEN BOI report every time there is a change to previously reported information is different from the annual filing requirement of a FinCEN foreign bank account report (commonly known as "FBAR"), which is provided just once a year irrespective of any change during the year (for further details on please see "[US Treasury Department publishes final rule for foreign bank account reports](#)"). The result of this is that BOI reporting could be significantly more burdensome in practice, in stark contrast to FinCEN's statement that:

In developing the proposed regulation, FinCEN has also aimed to minimize burdens on reporting companies, including small businesses. It is anticipated to cost reporting companies less than \$50 apiece to prepare and submit an initial BOI report. In comparison, the state formation fee for creating a limited liability company (LLC) can cost between \$40 and \$500, depending on the state.⁽²⁾

Penalties and individual liability

The CTA provides that any wilful violation of BOI reporting requirements can lead to penalties including:

- civil penalties of up to \$500 per day that a violation has not been remedied; and
- criminal penalties of up to \$10,000 and imprisonment of up to two years.

The CTA itself is unclear as to who will be liable if required information is not properly reported (for further details please see "[Reporting beneficial owners of certain US companies: observations relevant to private client structures](#)"). Regarding the CTA penalties, the proposed regulations provide:

It shall be unlawful for any person to willfully provide, or attempt to provide, false or fraudulent beneficial ownership information, including a false or fraudulent identifying photograph or document, to FinCEN in accordance with this section; or to willfully fail to report complete or updated beneficial ownership information to FinCEN in accordance with this section.

Importantly, the proposed regulations specify that a "person" includes any individual, reporting company or other entity. Thus, the proposed regulations clarify that any individual, in addition to the reporting company and other entity, will be liable and subject to the civil and criminal penalties.

The proposed regulations also clarify that liability can be for direct or indirect violations, and for acts (eg, reporting of inaccurate information) or omissions (eg, failure to provide or update any required information). In addition, a person fails to report complete or updated beneficial ownership information if such person "directs or controls another person" with respect to any such failure to report or is in "substantial control" of a reporting company when it fails to report complete or updated beneficial ownership information to FinCEN.

The reach of penalties in the proposed regulations seems to be a departure from the language of the CTA, pursuant to which penalties are arguably only assessed on the reporting company itself and anyone filing who lies or fails to update the information, not on affiliated individuals or persons completing the filing. The current language of the proposed regulations clearly extends the CTA penalties to more people, including a beneficial owner who has substantial control of a reporting company and anyone who directs or controls a filer or applicant.

Because the CTA penalties are tied to wilful behaviour, enforceability centres around the issue of what it means to be "wilful". In order to assert penalties, the government must demonstrate that the violations were wilful, a question which has been and continues to be heavily litigated in the context of FBAR filings.

Comment

This series of four articles on the CTA proposed regulations and the first two articles on the details of the new CTA and observations relevant to private client structures⁽³⁾ highlight the fact that the United States has joined the continuing world trend toward corporate transparency, addressing at the federal level the fact that few jurisdictions in the United States require legal entities to disclose information about their beneficial owners or the persons forming them. It is yet another step in the global fight against money laundering, terrorism, financial crime and tax evasion. Even the governments of all British Overseas Territories have committed to introducing publicly accessible registers of beneficial ownership by the end of 2023.

The rollout of mandatory BOI reporting in the United States requires the immediate attention of family offices and advisors to families with succession planning structures that include US entities. These professionals should begin to explain the new BOI reporting requirement, identify the individuals to be reported and gather relevant details. Final regulations will hopefully provide more certainty. Further rulemakings are expected from FinCEN to establish rules for who may access BOI and for what purposes, and what safeguards

will be required to ensure that the information is secured and protected. FinCEN is also expected to review its customer due diligence rule following the promulgation of the BOI reporting final rule.

For further information on this topic please contact Severiano E Ortiz at Kozusko Harris Duncan's Washington DC office by telephone (+1 202 454 6721) or email (sortiz@kozlaw.com). Alternatively, contact Jennie Cherry or Bryan Hoseok Ok at Kozusko Harris Duncan's New York office by telephone (+1 212 980 0010) or email (jcherry@kozlaw.com or bok@kozlaw.com). Please note that the authors are unable to provide legal advice to non-clients. The Kozusko Harris Duncan website can be accessed at www.kozlaw.com.

Copyright in the original article resides with the named contributor.

Endnotes

(1) For previous articles in the series, see:

- "Reporting beneficial owners of certain US companies: proposed regulations on who must file beneficial owner report";
- "Reporting beneficial owners of certain US companies: proposed regulations on what constitutes beneficial ownership"; and
- "Reporting beneficial owners of certain US companies: proposed regulations on what information must be disclosed".

(2) FinCEN, "Beneficial Ownership Information Reporting Notice of Proposed Rulemaking".

(3) For the first two articles in the series, see:

- "Reporting beneficial owners of certain US companies: details of new Corporate Transparency Act"; and
- "Reporting beneficial owners of certain US companies: observations relevant to private client structures".