

March 2 2023

Using 2023 to get ready to comply with new US FinCEN beneficial owner register

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Introduction

The Corporate Transparency Act (CTA) was enacted 1 January 2021 announcing the creation of a federal beneficial owner register for entities established under the law of a US state. Proposed regulations were issued 7 December 2021 with details of the type of information to be collected. On 29 September 2022, the US Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) released final regulations and set a 1 January 2024 start date. The register will include details for US companies in a family's succession planning structure, and advisers should begin in earnest to understand the rules and gather the required details. While an individual may file a report on behalf of a reporting company, the company itself is ultimately responsible for the information provided and the accompanying certification.

Background

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)). FinCEN will oversee implementation and enforcement. The stated goal of the CTA is to combat abuse of anonymous companies, money laundering, terrorist financing and other illicit activities (for further details please see "[Reporting beneficial owners of certain US companies – details of new Corporate Transparency Act](#)").

Final regulations mostly follow proposed regulations

The proposed regulations provided further details and were intended to clarify the various BOI requirements of the CTA, including:

- who must file a BOI report (for further details please see "[Reporting beneficial owners of certain US companies – proposed regulations on who must file beneficial owner report](#)");
- what constitutes beneficial ownership (for further details please see "[Reporting beneficial owners of certain US companies – proposed regulations on what constitutes beneficial ownership](#)");
- what information must be disclosed in a BOI report (for further details please see "[Reporting beneficial owners of certain US companies – proposed regulations on what information must be disclosed](#)"); and
- when the information must be reported (for further details please see "[Reporting beneficial owners of certain US companies – proposed regulations on when information must be reported and penalties](#)").

Final regulations provide the blueprint for compliance

The final regulations adopt most of the details laid out in the proposed regulations, but FinCEN did make some important changes. Generally speaking, FinCEN's final regulations:

- retain the overall architecture of the proposed regulations and provide some helpful clarifications;
- modify the definition of company applicant and limit initial and updated reporting requirements for company applicants;

- change beneficial owner rules, particularly regarding trusts and 25% ownership rules;
- adjust reporting timeframes, particularly updated reports and corrected reports; and
- include in the preamble useful comments as to how the final regulations will be applied.

The final regulations confirm that all reporting companies must provide FinCEN with information on:

- the reporting company itself;
- each "beneficial owner" of the reporting company; and
- the reporting company's "company applicant(s)."

The final regulations also made some significant adjustments to the types of information required under the proposed regulations.

Importantly, the final regulations expanded the application of penalties beyond the reporting company alone to include those individuals who have a relationship with such company (ie, an individual or entity who directly or indirectly wilfully provides, or attempts to provide, false or fraudulent information, or who fails to report complete or updated information as required).

Step one: determine whether US entities in family structure are "reporting companies"

Only an entity that meets the definition of a "reporting company" is subject to the requirements of the CTA. Family advisers should be aware that a structure's US-based holding companies are targeted. The final regulations retain the definition of "reporting companies" to include corporations, limited liability companies (LLCs) or other similar entities that are:

- created by the filing of a document with a secretary of state or a similar office under the law of a state or Indian Tribe (a domestic entity); or
- formed under the law of a foreign country and registered to do business in the United States by the filing of a document with a secretary of state or a similar office under the laws of a state or Indian Tribe (a foreign entity), although not all activities within a state by a foreign entity will require registration.

Thus, reporting companies do not include common law general partnerships, foreign entities not registered to do business in the United States, unincorporated associations or sole proprietorships, and wealth planning trusts, but do include holding companies that do not qualify for a CTA exemption.

The final regulations make no changes to the 23 categories of entities exempt from the CTA's BOI reporting requirements. Exempted entities are generally already subject to US regulatory oversight and not regularly found in family succession planning structures. For example:

- certain issuers of securities registered with the Securities and Exchange Commission (SEC);
- certain SEC-registered investment companies and advisors;
- Commodity Exchange Act-registered companies;
- certain pooled investment vehicles;
- certain tax-exempt entities, including charitable 501(c) entities, political organisations, and charitable trusts;
- "large operating companies" with a US presence; and
- companies whose ownership interests are controlled or wholly owned, directly or indirectly, by one or more entities that themselves qualify for certain of the foregoing exemptions (subsidiary exemption).

The final regulations clarify certain aspects of the exemption for a "large operating company". This exemption applies to companies that employ more than 20 employees on a full-time basis in the United States, maintain an operating presence at a physical office in the United States and filed a US federal income tax return for the previous year showing more than \$5 million in gross receipt or sales from operations in the United States.

Step two: review information to be provided on reporting company itself

Each reporting company in the family structure has a new compliance undertaking necessary to remain in good standing. Fiduciary responsibilities now include learning the details required for a BOI report, reviewing the information in preparation for the initial report and then tracking changes in ownership or officer or board composition and other company events that necessitate an update to the company's BOI report.

Name and jurisdiction of formation

Each reporting company must provide its full legal name and any alternative names under which it is doing business, as well as the jurisdiction of formation or registration. These details are straightforward. The requirement to also provide the company's business street address may prove more difficult.

Business street address

The preamble to the final regulations confirms that, as noted in the proposed regulations, the requirement to report the street address of a business is not satisfied by reporting a post office box or the address of a company formation agent or other third party. FinCEN believes that reporting such third-party addresses creates opportunities to undermine the objectives of the beneficial owner reporting regime. However, this does not take into account holding companies that legitimately require no brick-and-mortar office space. FinCEN has said it will consider providing future guidance or frequently asked questions to address questions regarding principal place of business.

Tax identification number

A reporting company is also required to provide a taxpayer identification number (TIN). However, unlike the proposed regulations, the

final regulations provide that reporting companies will not be allowed to report a data universal numbering system number or a legal entity identifier number in lieu of a TIN. Family advisors will need to apply to the Internal Revenue Service for a TIN if the company does not already have one. Foreign reporting companies without a US TIN will be required to provide a foreign tax identification number (for further information on applying for a US TIN, please see "[Completing US tax forms: Form SS-4 – Application for Employer Identification Number](#)").

Step three: identify company applicant

The final regulations limit the definition of company applicant to only one or two individuals, in comparison with potential multiple persons required to be identified as company applicants under the proposed regulations.

Individuals who file or direct the filing of state establishment documentation

For a domestic reporting company, the company applicant is "the individual who directly files" the document that creates the company. Similarly, for a foreign reporting company, the company applicant is "the individual who directly files" the document that first registers the foreign company. This individual is named in the state formation documents.

For both domestic and foreign reporting companies, "the individual who is primarily responsible for directing or controlling" the filing of the document is also a reportable company applicant, if more than one individual is involved in the filing of the document.

Under the expanded application of the penalties, company applicants could be penalised if they cause the failure of a reporting company to complete or update its beneficial ownership information, which is still defined as "any information provided to FinCEN" including company applicant information.

It follows that company applicants will include:

- the attorney primarily responsible for overseeing preparation and filing of incorporation documents and the paralegal who directly files documents with a state office to create the reporting company;
- the individual who will control a reporting company and creates that company by filing its formation documents without the assistance of a business formation service, law firm, or similar service; and
- service company employees who are personally involved in filing documents to form a company, but not where the business formation service merely provides software, online tools or applicable written guidance.

Step four: determine reporting company's beneficial owners

The final regulations retain the two-prong definition of "beneficial owner." A reporting company's "beneficial owner" is any individual who directly or indirectly, either:

- exercises "substantial control" over the reporting company; or
- owns or controls at least 25% of its "ownership interests".

Substantial control and 25% ownership interest are not defined in the CTA. The final regulations provide guidance to determine whether substantial control or a 25% ownership interest exists.

Know which persons are exempt from being reported as beneficial owners

Details do not have to be provided on a BOI report for the following persons:

- minor children (provided reporting company reports required information of a parent or guardian);
- nominees, intermediaries, custodian or agent;
- employees of a reporting company, acting solely as an employee, provided such a person is not a senior officer;
- an individual whose only interest in a reporting company is a future interest through a right of inheritance; and
- creditors of the reporting company.

Gather information to be provided for each beneficial owner or company applicant

The following details must be submitted for each beneficial owner and company applicant:

- full legal name;
- date of birth;
- complete address; and
- unique ID number from an acceptable identification document (such as a non-expired passport or driver's licence).

Consider applying for FinCEN identifier

For individuals who are beneficial owners or company applicants for multiple reporting companies, they may wish to apply for and use a FinCEN identifier instead of providing personal details with each reporting company submission. This unique identifying number will be assigned by FinCEN after the individual submits an application containing the information about themselves that would be required in a report filed by a reporting company.

The final regulations also permit a reporting company to obtain a FinCEN identifier, but only at or after the time that the entity submits its initial report to FinCEN. However, rather than allow a reporting company to use a FinCEN identifier in the same way as an individual, FinCEN has reserved the ability for further review.

Establish procedures for maintaining compliance across various regimes

Both pre-existing and newly-formed domestic and registered foreign entities are required to file a BOI report, unless otherwise specifically exempt. This is in addition to the increasing diligence required to maintain annual state filings, IRS reporting obligations and paying all related fees and taxes.

Family advisers must remember that the US tax status of an entity is independent of whether that entity is a reporting company for BOI reporting purposes. For example, a single member LLC with a default tax status of "disregarded" may nevertheless be a "reporting company" as defined for CTA purposes (for further details on entity classification, please see "[Preparing US tax and information returns: Form 8832, Entity Classification Election](#)").

Foreign owned single member US LLCs should also review annually whether a Form 5472 must be filed with the IRS to report transactions with the foreign owner or a related party. Eventually, information provided in the BOI report may allow the IRS to follow up on a foreign owned entity's filing obligations (for further details, please see "[Completing US tax forms: Form 5472 – foreign-owned disregarded entities](#)").

Waiting on BOI report template, certifications and reporting portal

FinCEN is in the process of developing the form of the BOI report and the manner in which it will be filed. FinCEN anticipates most filings will be done electronically and is developing a Beneficial Ownership Secure System (BOSS) to house the gathered information but will still publish copies of the forms. The final regulations do not contain any mechanism to verify accuracy of information reported. But the form will include a certification that reported information is "true, correct, and complete". FinCEN emphasised that it:

believes that it is reasonable to require reporting companies to certify the accuracy and completeness of their own reports, and it is appropriate to expect that reporting companies will take care to verify the information they receive from their beneficial owners.

While an individual may file a report on behalf of a reporting company, the reporting company is ultimately responsible for the information provided and the accompanying certification.

Deadlines

Due dates provided in the final regulations will reduce some of the compliance burden.

Prior to 1 January 2024

Reporting companies created or registered prior to 1 January 2024 must file an initial BOI report to provide information about the reporting company and its beneficial owners by 1 January 2025.

Reporting companies created or registered prior to 1 January 2024, are not required to report information with respect to any company applicant.

On or after 1 January 2024

Reporting Companies formed on or after 1 January 2024 must file an initial BOI report within 30 days of the earlier of:

- the date on which a reporting company receives actual notice that its creation (or registration) has become effective; or
- the date on which a secretary of state or similar office first provides public notice, such as through a publicly accessible registry, that the reporting company has been created (domestic) or registered (foreign), as the case may be.

Reporting companies formed on or after 1 January 2024 must provide information for both its beneficial owners and its company applicants.

Updated reports for company applicants are not required, but reporting companies are required to correct any inaccurate information previously reported about their company applicants.

Comment

Advisors to families with succession planning structures should take steps now to identify all entities within each structure that were created by filing a document with a US state or that were formed under the law of a foreign country and then registered to do business in the United States. Family members should be educated on disclosure, maintenance of information by FinCEN and confidentiality of BOI reports. Considerations of how the final regulations should be applied to trust companies and trust structures will be addressed in a separate newsletter. Where anonymity and confidentiality are paramount, alternatives should be considered and implemented during 2023.

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