



## CORPORATE TRANSPARENCY ACT

January 25, 2023

In September 2022, the Financial Crimes Enforcement Network (“FinCEN”) of the Department of the Treasury issued final regulations implementing the beneficial ownership information (“BOI”) reporting requirements of the Corporate Transparency Act of 2020 (the “CTA”). The purpose of the CTA is to increase financial transparency and to protect the U.S. national security and financial systems from illegal use by providing BOI to national security, intelligence, and law enforcement agencies to prevent money laundering, terrorist financing, tax fraud and other illicit activities in the United States.

The final regulations will take effect on January 1, 2024, although companies formed prior to that date will have until January 1, 2025 to comply with the reporting requirements. The final regulations largely mirror the proposed regulations that FinCEN issued in December 2021. For our client alert regarding the proposed regulations, please [click here](#).

The CTA requires that U.S. entities and foreign entities registered to conduct business in the U.S. report BOI to FinCEN.

The CTA and the final regulations indicate who must file a report, what information must be provided, when a report is due and the consequences for failure to file or reporting incorrect information. In addition to the final regulations regarding BOI reporting requirements, the CTA also contains provisions governing access to and protection of BOI with respect to governmental agencies and the ability of financial institutions to request BOI to facilitate compliance by the financial institutions with applicable customer due diligence (“CDD”) requirements.

FinCEN issued proposed regulations as it relates to access to and protection of BOI for governmental agencies, which are discussed briefly at the end of this article.

- **Who must file a report?** Unless exempt, all corporations, limited liability companies and other entities created by filing a document with the secretary of state or any similar office under the law of a State or Indian Tribe must report the beneficial ownership information required by the regulations. In addition, the reporting requirements would apply only to trusts that are formed by filing a document with the secretary of state or any similar office. Certain entities that are otherwise well regulated are exempt from reporting, including (i) public companies, (ii) banks, (iii) investment advisors, (iv) tax exempt entities, and (v) “large” operating companies with more than 20 full time employees in the U.S. and at least \$5 million in sales reported on their most recent federal income tax return. This client alert does not address reporting by non-U.S. persons and entities, which are also covered by the final regulations as “foreign reporting companies”.
- **Who is a Beneficial Owner?** The reporting company is required to report ultimate beneficial ownership. The final regulations appear to be designed to be overinclusive and apply regardless of the structure of control or ownership. A beneficial owner is any natural person who, directly or indirectly, either (i) exercises substantial control over the reporting company, or (ii) owns or controls at least 25% of the ownership interests of the reporting company.
  - “Substantial control” covers, among other things, a senior officer acting in such capacity, authority to appoint a majority of the board or managers, and any other indicia of direction, determination and influence over

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- important matters of the reporting company. It is clear from the final regulations that more than one person can have “substantial control”.
  - Ownership can include both voting and non-voting interests, capital or profits interests, convertible debt and options/warrants.
  - Nominees, custodians and agents are explicitly excluded as beneficial owners.
  - For trusts, the beneficial owner may be (i) the trustee or other individual with right to dispose of assets, (ii) a beneficiary who is the sole permissible recipient of income and principal from the trust or has the right to demand a distribution of or withdraw substantially all of the assets from the trust, or (iii) the grantor or settlor, if he or she has the right to revoke the trust or otherwise withdraw the assets of the trust.
  - The individual who directly files the document that creates the domestic reporting company or the individual who is primarily responsible for directing or controlling the filing of the relevant document by another must also be included on the report as a “company applicant”.
- **What Information Must be Reported?** Each reporting company must report its (i) legal name, (ii) business street address, (iii) state of formation, and (iv) taxpayer identification number. Each reporting company must also identify each of its beneficial owners and company applicants and his or her (w) full legal name, (x) date of birth, (y) business address (if company applicant filing in course of business) or residential address used for tax purposes (for beneficial owners), and (z) passport number or driver’s license number, plus a copy of the same. Note that companies formed before January 1, 2024 do not need to report the company applicant information.
- **When Must the Information be Reported?** The final regulations contain different timing requirements for when reports must be filed. For companies formed after January 1, 2024, initial reports must be filed within 30 days of formation. For companies formed prior to January 1, 2024, initial reports must be filed by January 1, 2025. Reporting companies are obligated to update reports if any information provided in the reports change (other than company applicants), which would include not just changes in beneficial ownership, but also changes of the information required to be provided with respect to the beneficial owners (such as address changes). Such updated reports are due within 30 days of the date the reporting company became aware, or had reason to know, that the information reported was inaccurate.
- **What are the Penalties for Failure to Comply?** The Corporate Transparency Act makes it unlawful to “willfully provide, or attempt to provide, false or fraudulent beneficial information” or to update the same. There are both civil and criminal penalties for failure to comply, with civil penalties of up to \$500 per day and criminal penalties of up to \$10,000 in fines and two years in prison. The final regulations clarify that both the reporting companies and the beneficial owners and company applicants providing information to the reporting companies are subject to these penalties.
- **Who Can Access or Receive Beneficial Ownership Information?** On December 15, 2022, FinCEN issued proposed regulations that establish who may request BOI, who may receive it, how recipients may use the information, how recipients must secure it, and the penalties for failing to follow the requirements. The proposed rule would permit disclosure of BOI to five general categories of recipients:
  1. U.S. Federal, state, local, and Tribal government agencies requesting BOI for specified purposes;
  2. Foreign law enforcement agencies, judges, prosecutors, central authorities, and competent authorities (i.e., foreign requesters);
  3. Financial institutions using BOI to facilitate compliance with CDD requirements;

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4. Federal functional regulators and other appropriate regulatory agencies acting in a supervisory capacity assessing financial institutions for compliance with CDD requirements; and
5. U.S. Department of the Treasury itself.

BOI may be disclosed to federal agencies engaged in national security, intelligence, or law enforcement activity if the requested BOI is for use in furtherance of such activity. The proposed rule would also allow disclosure of BOI to state, local and Tribal law enforcement agencies if a court of competent jurisdiction has authorized the agency to seek the information in a criminal or civil investigation. Any requests by a foreign agency would need to go through intermediary federal agencies and would have to be made either (a) under an international treaty, agreement, or convention, or (b) via a request made by law enforcement, judicial, or prosecutorial authorities in a trusted foreign country. The Treasury Department would also have access to BOI, with BOI being available to any Treasury officer or employee (y) whose official duties require BOI inspection or disclosure or (z) for tax administration.

If you have any questions regarding the regulations, please contact the following Cummings & Lockwood LLC attorneys:

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