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Suggested Reading:

"Atomic Habits"

By James Clear

This book is an excellent Gameplan for building Good Habits and breaking Bad Ones.

How will The Corporate Transparency Act affect you?



Brandi LaBruzzo

In January 2024, a new law will take effect, requiring certain entities to file a report with the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN). This law, known as the Corporate Transparency Act, goes into effect for newly created entities on January 1, 2024 and for existing entities January 1, 2025. This article will break down the important elements of the Corporate Transparency Act (CTA), what we know and potential problems and questions left unanswered.

The CTA was enacted as part of the Anti-Money Laundering Act of 2020 when Congress overrode former President Trump's veto of the National Defense Authorization Act of 2021. Congress' stated purpose in the CTA is that the states lack laws requiring companies to identify their beneficial owners, enabling some entities and "bad actors" to use shell companies to facilitate activities including money laundering, terrorism, human and drug trafficking, and securities fraud. The act requires certain business entities to file a report with the FinCEN, identifying the entities' "beneficial owners" and further authorizes FinCEN to disclose this information to certain government authorities and to financial institutions for select purposes.

Who Must Report?

The entities that must report are corporations, LLCs and entities that are created or registered to do business by filing a document with the Secretary of State or similar office. Both domestic and foreign entities that are registered to do business in the United States are included in the scope of the act. There are twenty-three types of entities expressly excluded from the reporting requirements, which are generally large and already highly regulated entities including governmental authorities, banks, public utilities, and insurance companies.

There are also exemptions for inactive businesses and large operating companies that employ more than twenty full-time employees in the United States and reported more than \$5M in gross receipts or sales on their prior year U.S. federal income tax return. **Therefore, the CTA covers most small businesses in the U.S.**

What Information Must be reported?

Reporting entities must file a “Beneficial Ownership Information” (“BOI”) report, which must identify its “beneficial owners” as well as its Company Applicant (company applicant is applicable to entities created on or following January 1, 2024). The report must include the company’s full name, DBA, address, jurisdiction in which it was formed, and a TIN or other tax ID number. The “beneficial owners” of the company are those individuals who either (1) own or control 25% or more of the ownership interests in the reporting company or, (2) exercise “substantial control” over the reporting company. This would clearly include senior officers such as president, CEO, and CFO but may include other positions if that individual has the ability to make important decisions on behalf of the company, which is left open to interpretation.

The next disclosure included in the report is the “company applicant.” The company applicant is a person with the primary responsibility for directing or controlling the filing of the formation documents of the company, which includes first the individual that actually files the document that creates or registers the reporting company, as well as the individual that directs or controls the filing of the relevant documents by another individual.

What Information must be disclosed on the Beneficial Owners and Company Applicants?

For both Beneficial Owners and Company Applicants, the individuals must disclose their full name, date of birth, residential or business address, an ID number from an acceptable source, such as driver’s license or passport number, as well as an image of the ID document. An individual may also go onto the FinCEN site and obtain a unique identifying number to then use on the report.

When must a report be filed?

As previously mentioned, new entities that are created or registered on or after January 1, 2024 must file within thirty days notice of creation or registration. Existing entities created prior to January 1, 2024 have one year to comply, with a deadline to file of January 1, 2025. Further, all entities have an obligation to file corrected and updated reports. For any errors, the company has thirty days to file once the company becomes aware or had reason to know that the information previously reported was inaccurate. Additionally, when any information contained in the reports related to the reporting company or its beneficial owners (but not company applicants) has

changed, the company has thirty days to file an updated report. It's important to note that minors are excluded from reporting as beneficial owners. However, presumably once they attain age of majority, an updated report by the company would need to be filed within thirty days of that owner's birthday.

What happens if you fail to comply?

Possible penalties include civil and criminal penalties if a reporting company willfully provides false or fraudulent information or has a willful failure to report, complete or update its BOI report. The civil liabilities are up to five hundred dollars per day as long as the failure to comply continues. The criminal penalties include a fine up to ten thousand dollars and imprisonment for up to two years. FinCEN would assess the facts and circumstances surrounding the filing to determine if the reporting was done in good faith or willfully false or fraudulent behavior occurred. A willful failure to comply by a reporting company or senior officer of the reporting company or another person who willfully causes the failure, may cause the entity or individuals to be liable for criminal penalties.

There is a safe harbor from the civil and criminal penalties, found in Section 5336(h)(3)(C) if a person submitting incorrect information submits a report containing corrected information not later than 90 days after the date on which the person submitted the report originally, provided that the person was not acting to evade the reporting requirements and did not have actual knowledge that information contained in the original report was inaccurate.

Where do Trusts fall in the reporting requirements?

In general, trusts are not reporting companies to the extent they are not formed with the filing of a document with the Secretary of State or similar entity. However, if a trust is deemed to be a beneficial owner of a company, then a filing requirement would be triggered. A trustee or other individual with the authority to dispose of trust assets would report. Likewise a beneficiary who is either 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 of the trust needs to report as beneficiary owner. A grantor or settlor of a trust is deemed to have ownership or control and thus be a reporting individual if the grantor/settlor has the authority to revoke the trust or otherwise withdraw trust assets. If the trust is irrevocable, then the trustee as opposed to the grantor or beneficiaries would be deemed as the party having control over the trust assets.

If the trustee is not an individual but is instead a corporate trustee, it is unclear under current regulations who would need to report if there are numerous individuals exercising control over the trust. The regulations state that the ability to make important decisions for the entity constitutes the exercise of substantial control, so when dealing with a trust company its clear that this may be multiple individuals.

Final Thoughts:

Companies will need to have a person or persons designated to maintain this information and anytime there is a change in company or beneficial ownership information, to file a report. The reporting company ultimately bears responsibility for ensuring the reports are correct and updated as needed.

The BOI reporting rule is the first of three rulemakings planned that will implement the Corporate Transparency Act. Additional rulemaking will establish guidelines for who may access BOI, for what purposes and what safeguards will be required to ensure the information is, as well as revision of FinCEN's customer due diligence rule following the BOI reporting rule. A major privacy concern associated with the CTA is that the statute provides broad authorization to FinCEN to disclose the information it collects to other state and federal agencies and hopefully FinCEN issues the rules concerning access to the information and related safeguards before the law and filing requirements take effect. FinCEN also will publish a "Small Entity Compliance Guide" in order to inform small businesses about their responsibilities under the rule. FinCEN's website also states that the organization will conduct "extensive outreach" to all stakeholders, including industry associations as well as secretaries of state and similar offices to ensure the effective implementation of the rule.

For businesses that wish to comply with the CTA, particular attention needs to be given to the requirements to update reports, including change in ownership, management or other controlling position, or a change in name or address. If for example a beneficial owner gets married and changes their name, this would trigger a thirty-day reporting deadline. The company must ensure that all the persons involved in the company report know that they must notify the company of any such changes.

As of our publication date, two bills have been introduced in U.S. Congress to delay this rule – H.R. 4035 and S. 2623, both titled the Protecting Small Business Information Act of 2023. These identical bills introduced in the U.S. House by Representative Patrick McHenry and introduced in the U.S. Senate by Senator Mike Rounds would delay the start date of the rule providing additional time for small businesses to learn about and better understand their new reporting requirements. It is important to monitor developments as this law is finalized and contact your legal counsel if you have any questions or for assistance in ensuring you and your business entities are prepared to comply with the Corporate Transparency Act.



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