

Bodman PLC

October 27, 2023

The Corporate Transparency Act: New Requirements for Businesses to Report Beneficial Ownership Information

By: Robert Cambridge, Member, and Kelsey Lutz, Associate, Business Practice Group

The Corporate Transparency Act (the “CTA”), which takes effect on January 1, 2024, will require many companies to report certain beneficial ownership information to the Financial Crimes Enforcement Network (“FinCEN”), a division of the Treasury Department. These requirements are intended to help prevent and combat money laundering, terrorist financing, corruption, tax fraud and other illicit activity, while aiming to minimize the burden on entities doing business in the United States.

It is important for all business owners, and small business owners in particular, to be prepared to report the required information before the filing deadline and to comply with their ongoing reporting obligations. To help businesses prepare for the implementation of CTA, Bodman has prepared this overview of its applicability and reporting requirements. There are still many unanswered questions – we will provide further updates as we learn more.

Background

The CTA applies to all domestic entities that are formed by filing a document with a state, and all foreign entities registered to do business in the U.S. by such a filing. This will include corporations, limited liability companies, limited partnerships, limited liability partnerships, and business trusts.

Companies formed on or after January 1, 2024 will have 30 days from the date of formation to file their reports with FinCEN. FinCEN has recently issued a Notice of Proposed Rulemaking to extend this filing deadline for new companies formed between January 1, 2024 and December 31, 2024 to 90 days. Companies formed before January 1, 2024 have until January 1, 2025 to report.

The reporting requirement is a one-time obligation, not an annual filing, but all companies are under a continuing obligation to update their reports within 30 days of any change in information or beneficial ownership (but not with respect to information of company applicants).

Although the reporting database is not available yet, FinCEN reports that companies will be able to file their reports electronically online and that the filing will not require a fee.

Exemptions

The CTA and final rules include 23 specific exemptions from the reporting requirements. Exemptions are generally targeted towards entities that are already subject to substantial regulation and provide beneficial ownership information to government authorities. However, there is also an exclusion for “large operating companies,” which are those companies that have more than 20 full-time employees in the United States, more than \$5 million in gross receipts or sales (based on the federal income tax or information return for the previous year), and an operating presence at a physical office within the U.S.; and for companies that are controlled or wholly owned (directly or indirectly) by certain exempt companies.

Who Must Report

If no exception applies, each reporting company must file a beneficial ownership report with FinCEN that includes identifying information for the reporting company itself, each “beneficial owner” and each “company applicant.” Important to note is that companies formed before January 1, 2024, are not required to report company applicant information.

A “beneficial owner” includes all individuals who:

- own or control 25% or more of the ownership interests of the reporting company; and/or
- exercise “substantial control” over the reporting company.

“Substantial control” includes:

- any individual serving as a senior officer of the reporting company;
- any individual with authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar governing body);
- any individual who directs, determines, or has substantial influence over significant aspects of the reporting company’s business such as investments, expenditures, major contracts, lines of business, amendments of corporate governance documents, and dissolutions and reorganizations; and
- any individual with any other form of substantial control over the company.

The CTA and final rules provide additional guidelines for determining ownership and substantial control. These definitions are highly fact-intensive and must be determined on a case-by-case basis. For example, beneficial ownership for purposes of the CTA may include not only stock ownership but stock options, voting rights, profits interests, and convertible securities. The CTA also makes clear that ownership can be direct or indirect, including through a trust or ownership or control of an intermediary entity. Furthermore, the CTA's regulations include catch-all provisions indicating that ownership and substantial control may take other forms not specifically listed.

A "company applicant" is any person who files a document creating a reporting company (such as the articles or certificate of incorporation), or who is responsible for directing or controlling the filing of such document by another person.

What Must Be Reported

The identifying information to be reported includes:

- For the reporting company, its full legal name and any assumed names, business street address, jurisdiction of formation and TIN/EIN; and
- For beneficial owners and company applicants, that person's name, DOB, address, and a copy of an identifying document such as a driver's license or passport.

Alternatively, beneficial owners and company applicants can submit the required information to FinCEN to obtain a unique "FinCEN identifier," which can be used for reporting purposes rather than submitting their information to each reporting company.

Privacy and Security; Penalties for Non-Compliance

The information reported to FinCEN will be stored and maintained in a secure federal database, and will not be publicly available or subject to FOIA. Access to the information will be permitted only to federal intelligence and law enforcement agencies, federal regulatory agencies, and financial institutions (with the reporting company's consent, to comply with customer due diligence requirements).

The CTA establishes criminal and civil penalties for knowing or willful non-compliance with its reporting requirements. This includes penalties for providing false or fraudulent information, as well as willful failure to report complete or updated information.

Bodman is available to assist with questions regarding the CTA's reporting requirements. We are tracking new developments regarding these regulations given there are many unanswered questions, including what the form used for reporting will look like. Look for further updates from us as we learn more.

While there are some trusted third parties working on filing solutions for companies, please be aware of potential scams where third parties that are not authorized to collect or file this information reach out to you.

For questions regarding your company's obligations under the CTA, please contact your Bodman attorney or one of the authors, Robert Cambridge or Kelsey Lutz. Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.

Robert J. Cambridge
248-743-6028
rcambridge@bodmanlaw.com

Kelsey M. Lutz
734-930-5688
klutz@bodmanlaw.com