

THE CORPORATE TRANSPARENCY ACT – A MAJOR NEW FEDERAL LAW

(REQUIRES CERTAIN
ORGANIZATIONS TO REPORT
“BENEFICIAL OWNERSHIP
INFORMATION” TO FINANCIAL
CRIMES ENFORCEMENT NETWORK)

By Mike Batts, CPA

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The Corporate Transparency Act – A Major New Federal Law

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By Mike Batts, CPA

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The Corporate Transparency Act (CTA) was passed into law in January 2021. The purpose of the CTA is to provide the federal government and law enforcement authorities with better information about the identities of the people who own or control business entities operating in the United States. Members of Congress who sponsored the legislation believe that nefarious actors often operate by using “shell” entities or entity structures that make it difficult to identify them.

The Essence of the CTA

The gist of the CTA is that it requires certain entities, labeled “reporting companies,” to report to the Financial Crimes Enforcement Network (FinCEN), a bureau of the US Treasury Department, the “Beneficial Ownership Information” (BOI) of the reporting company. BOI is generally identifying information and an image of a permissible identifying document for individuals who are deemed “beneficial owners” of the reporting companies. For reporting companies formed on or after January 1, 2024, the law also requires reporting of identifying information of the individual who directly files the document that creates a reporting company (or who directly files a document registering a foreign reporting company to operate in the US) and any individual who is primarily responsible for directing or controlling such filing if more than one individual is involved in the filing of the document. Such individuals are referred to as “company applicants.”

The General Rules

Unless an exemption applies, a reporting company is a corporation, limited liability company, or other similar entity created in or registered to do business in the United States.

FinCEN has adopted a Final Rule implementing the CTA with an **effective date of January 1, 2024**.

Failure to comply with the CTA as administered by FinCEN can result in civil penalties of \$500 per day (up to \$10,000) and criminal penalties that can include imprisonment.

Domestic reporting companies that existed (or foreign reporting companies that were registered in the US) prior to January 1, 2024, must submit the required information on or after January 1, 2024 (FinCEN will not accept reports prior to January 1, 2024), and no later than January 1, 2025.

Domestic reporting companies formed on or after January 1, 2024, must submit the required information within “30 calendar days of the earlier of the date on which it receives actual notice that its creation 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 domestic reporting company has been created.” A similar deadline applies to foreign reporting companies that register to do business within the US.

[Special Update: Regulations just adopted by FinCEN allow 90 days for submitting the required information for reporting companies formed in 2024 only – allowing more time due to the fact that the requirement is new.¹]

If there is any change with respect to required information previously submitted to FinCEN concerning a reporting company or its beneficial owners, including any change with respect to who is a beneficial owner or information reported for any

¹ Source: <https://www.federalregister.gov/documents/2023/11/30/2023-26399/beneficial-ownership-information-reporting-deadline-extension-for-reporting-companies-created-or>

particular beneficial owner, the reporting company must file an updated report within 30 calendar days after the date on which such change occurs.

Under FinCEN's Final Rule, a "beneficial owner" means any individual who, directly or indirectly, either exercises substantial control over such reporting company or owns or controls at least 25% of the ownership interests of such reporting company.

For this purpose, an individual exercises "substantial control" if he/she:

- A. Serves as a senior officer of the reporting company;
- B. Has authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body);
- C. Directs, determines, or has substantial influence over important decisions made by the reporting company, including decisions regarding:
 1. The nature, scope, and attributes of the business of the reporting company, including the sale, lease, mortgage, or other transfer of any principal assets of the reporting company;
 2. The reorganization, dissolution, or merger of the reporting company;
 3. Major expenditures or investments, issuances of any equity, incurrence of any significant debt, or approval of the operating budget of the reporting company;
 4. The selection or termination of business lines or ventures, or geographic focus, of the reporting company;
 5. Compensation schemes and incentive programs for senior officers;
 6. The entry into or termination, or the fulfillment or non-fulfillment, of significant contracts;

7. Amendments of any substantial governance documents of the reporting company, including the articles of incorporation or similar formation documents, bylaws, and significant policies or procedures; or

- D. Has any other form of substantial control over the reporting company. (Federal guidance provides examples of various ways in which substantial control may exist.)

Exemptions to the CTA of Relevance to Nonprofit Organizations

A number of exemptions to the general reporting requirement apply. Exemptions that would likely be of interest to nonprofit organizations include the following:

- A tax-exempt entity

For purposes of this exemption, a tax-exempt entity is defined as:

- A. An organization that is described in section 501(c) of the Internal Revenue Code of 1986 (Code)...and is exempt from tax under section 501(a) of the Code, except that in the case of any such organization that ceases to be described in section 501(c) and exempt from tax under section 501(a), such organization shall be considered to continue to be described in this paragraph... for the 180-day period beginning on the date of the loss of such tax-exempt status;
 1. (This will have significant implications for organizations whose exempt status is revoked for failure to file Form 990.)
- B. A political organization, as defined in section 527(e)(1) of the Code, that is exempt from tax under section 527(a) of the Code; or
- C. Certain charitable trusts (those described in paragraph (1) or (2) of section 4947(a) of the Internal Revenue Code).

- An entity assisting a tax-exempt entity

For purposes of this exemption, an entity assisting a tax-exempt entity is defined as an entity that:

- Operates exclusively to provide financial assistance to or hold governance rights over a tax-exempt entity;
- Is a United States person;
- Is beneficially owned or controlled exclusively by one or more United States persons that are United States citizens or lawfully admitted for permanent residence; and
- Derives at least a majority of its funding or revenue from one or more United States persons that are United States citizens or lawfully admitted for permanent residence.

- A large operating company

For purposes of this exemption, a large operating company is defined as an entity that:

- Employs more than 20 full-time employees in the United States, with “full-time employee in the United States” being defined with reference to Regulations related to the Affordable Care Act;
- Has an operating presence at a physical office within the United States; and
- Filed a federal income tax or information return in the United States for the previous year demonstrating more than \$5,000,000 in gross receipts or sales, as reported as gross receipts or sales (net of returns and allowances) on the entity’s IRS Form 1120, consolidated IRS Form 1120, IRS Form 1120-S, IRS Form 1065, or other applicable IRS form, excluding gross receipts or sales from sources outside the United States, as determined under federal income tax principles. For an entity that is part of an affiliated group of corporations...that

filed a consolidated return, the applicable amount shall be the amount reported on the consolidated return for such group.

- A subsidiary of an exempt entity

For purposes of this exemption, a subsidiary of an exempt entity is defined as any entity whose ownership interests are controlled or wholly owned, directly or indirectly, by one or more exempt entities described above or elsewhere in the Final Rule.

- An inactive entity

For purposes of this exemption, an inactive entity is an entity that:

- Was in existence on or before January 1, 2020;
- Is not engaged in active business;
- Is not owned by a foreign person, whether directly or indirectly, wholly or partially;
- Has not experienced any change in ownership in the preceding twelve-month period;
- Has not sent or received any funds in an amount greater than \$1,000, either directly or through any financial account in which the entity or any affiliate of the entity had an interest, in the preceding twelve-month period; and
- Does not otherwise hold any kind or type of assets, whether in the United States or abroad, including any ownership interest in any corporation, limited liability company, or other similar entity.

- Note that a number of other exemptions are provided in FinCEN’s Final Rule that are not addressed in this article, as they are less likely to be relevant to nonprofit organizations. Any organization evaluating the applicability of the reporting requirements should evaluate all possible exemptions under the advice of appropriate and knowledgeable counsel.

Compliance with the CTA Is a Legal Matter

BMWL considers the requirement to submit reports to FinCEN pursuant to the CTA to be a legal requirement involving multiple legal considerations – including, but not limited to, the determination of whether an entity is a reporting company, whether one or more exemptions apply, and whether an individual is a beneficial owner or a company applicant. Accordingly, we recommend that organizations and their leaders obtain advice from appropriate, knowledgeable legal counsel regarding the applicability of the requirements to their organizations and that they obtain the assistance of such counsel in preparing and submitting any required information to FinCEN.

For more information, including FAQs, see FinCEN's website below.²

There is also a video clip of the discussion of this topic at the 2023 BMWL National Nonprofit Conference available on our website.³

² Source: <https://www.fincen.gov/boi>

³ Source: <https://nonprofitcpa.com/the-corporate-transparency-act-a-major-new-federal-law-requires-certain-organizations-to-report-beneficial-ownership-information-to-financial-crimes-enforcement-network/>

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