

12/20/2023

Corporate Transparency Act/FinCEN Registration Requirements

There are several requirements to creating and maintaining a business entity. Filing requirements currently exist with the applicable Secretaries of State, Departments of Revenue and Internal Revenue Service. Effective January 1, 2024, there is a *new* requirement, resulting from Congress enacting the Corporate Transparency Act (“*CTA*”).

New Businesses / Existing Businesses - FinCEN Registration Requirements

If you form a business entity after January 1, 2024, you will need to register with the Financial Crimes Enforcement Network (“*FinCEN*”). FinCEN has a portal on its website where you will submit the registration. The initial FinCEN registration is due within 90 days of formation during 2024, and within 30 days of formation beginning January 1, 2025. If you formed your business prior to January 1, 2024, then you have until December 31, 2024 to do your initial registration.

Registration

The new FinCEN registration requirement applies to any business entity that you create by filing paperwork with a Secretary of State or other similar agency. Think corporations and limited liability companies primarily, but also potentially business trusts, limited partnerships, and any other type of entity that a particular state requires a filing for its organization.

Although there are exemptions to the FinCEN registration requirements, they are very limited. Additionally, once registered, your company will need to update FinCEN as to any changes in Beneficial Owners within 30 days of such changes occurring.

Potential Registration Exemptions

There are 23 exemptions from FinCEN registration. Banks, public charities and investment firms are some of the types of businesses where registration is not necessary due to their being subject to government oversight already and their ownership being more transparent than other types of businesses. For example, the Office of the Comptroller of Currency, also a bureau within the U.S. Department of Treasury, already has strict requirements on banks, their owners, and the banking industry generally. The Internal Revenue Service and state governments regulate public charities. The Securities and Exchange Commission regulates investment firms.

Also exempt are “large operating companies”. This exemption applies to companies that have 20 or more employees and \$5MM or more in annual revenue. There are very specific tests for determining whether a company satisfies the “large operating companies” definition. Such tests likely will require the help of your attorneys and accountants to sort-through. For example, the revenue test allows you to consolidate affiliated businesses depending on how you file taxes, but the number of employees test does not allow you to consolidate affiliated businesses.

Although there are other exemptions such as for public accounting firms, the majority of small

businesses will be required to register with FinCEN.

Reporting Companies / Beneficial Owners / Applicants

There are three separate types of information that you need to know about regarding FinCEN registration: 1. **“Reporting Companies”**; 2. **“Beneficial Owners”**; and 3. **“Applicants”**.

Disclosure of Beneficial Owners is at the heart of the CTA and the primary information FinCEN seeks. A Beneficial Owner is an *individual* who is an owner of 25% or more equity or other ownership interests (including profits, voting and non-voting) or substantially controls your company. You must disclose *all* Beneficial Owners. This means that while you could have a sophisticated holding company arrangement in which the owners listed on your organization chart are wholly-owned by other companies, each *individual* who is actually considered to be controlling your company will need to be disclosed as the Beneficial Owner. This definition is intentionally broad and the registration exemptions noted above are intentionally narrow, as FinCEN made clear in the preamble to its final CTA regulations. For example, FinCEN considers some “senior officers” to be Beneficial Owners even if they do not meet the threshold equity ownership requirement. You should ask your attorney to assist if there are any questions about who qualifies as a Beneficial Owner or Owners of your company.

The term Reporting Company is simply the company that is registering and disclosing its Beneficial Owners. The term Applicant is the individual or individuals who formed your company with the applicable Secretary of State or other government agency. In many instances, this will be a member of the law firm with which you are working.

FinCEN registration for Reporting Companies will require the submission of detailed information about the location of your business, legal names, D/B/As, jurisdiction where formed, and the company’s taxpayer identification number. And, for all Beneficial Owners, you will need to submit individual legal names, D/O/Bs, residential addresses, and an ID number as shown on a recognized form of identification such as a driver’s license or passport. You will need to submit copies of the Beneficial Owners’ forms of identification, so be prepared to obtain such information in a secure way, such as through encrypted software.

Applicants will need to submit information similar to that which is required of Reporting Companies.

There is a distinction between companies formed prior to January 1, 2024 and those formed on or after that date. Pre-existing companies do not need to list the Applicants whereas new companies do need to list the Applicants. This distinction prevents older companies from a potentially cumbersome task of tracking down and obtaining information about Applicants who may no longer be accessible.

Backdrop

FinCEN is a bureau within the U.S. Department of the Treasury. It safeguards the country's financial system. The purpose of the CTA is to help FinCEN combat money laundering. The United States has a long history of businesses being able to shield the identity of their owners. Criminals use this opaqueness to avoid detection when moving illicit funds and skirting government sanctions. The CTA registration requirements will provide a mechanism for FinCEN and law enforcement to see through the veil of state entity formations where ownership is not necessarily transparent, imposing civil and criminal penalties if a required registration does not occur. FinCEN registrations will not be open to the general public, but will be accessible by law enforcement, intelligence and other similar agencies. Additionally, FinCEN is working to be able to cross-reference state filings when a company is formed and compare those filings to FinCEN registrations to identify companies that do not comply.

Next Steps

The business attorneys at Berger, Cohen & Brandt, L.C. are ready to assist you with the FinCEN registration requirements. Please contact Guy Brandt (gbrandt@bcblawlc.com), Dave Spewak (dspewak@bcblawlc.com) or Doug Whitlock (dwhitlock@bcblawlc.com) to discuss next steps. Or call us at 314-721-7272. We look forward to guiding and assisting you with CTA compliance.