Spotlight 07/24

US CORPORATE TRANSPA-RENCY ACT

Brief overview of key aspects of the new reporting requirements under the Corporate Transparency Act for companies operating in the US

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The Corporate Transparency Act ("CTA") introduces a reporting requirement to the Financial Crimes Enforcement Network ("FinCEN") for numerous companies operating in the US regarding their beneficial owners and "company applicants". By requiring companies to provide FinCEN with information on significant ownership and control relationships, the reporting requirement is intended to strengthen the fight against money laundering, terrorist financing and other illicit financial activities. Violations of the reporting requirements are punishable by fines or custodial sentences.

Companies subject to reporting requirements

Both US-based and foreign companies registered to do business in the US are subject to the reporting requirements. This encompasses foreign companies that are established as corporations under foreign law and registered with the Secretary of State in order to conduct business in the US.

Submission deadline and scope of the reporting requirements

Reporting entities registered or incorporated after 1 January 2024 are required to submit a Beneficial Ownership Information Report ("BOI") to FinCEN within 90 days of the date of registration or incorporation. Reporting companies that were already in existence prior to 1 January 2024 have until 1 January 2025 to comply with this obligation. Companies established after 1 January 2025 are required to submit their first BOI report within a period of 30 days following their establishment.

The BOI report must include the legal and other business names of the company, the business address in the USA, the place of incorporation or registration in the USA and the tax identification number (TIN) or a foreign equivalent.

Furthermore, the full details of all natural persons who are the beneficial owners or authorised persons of the company and up to two company applicants (cf. below) must be disclosed. This information must include the full names, dates of birth, residential addresses and valid identification documents of all relevant individuals. The BOI report, therefore, contains all the necessary information to determine the control and ownership structure of the companies.

The information disclosed will be accessible to the intelligence community, domestic and foreign law enforcement agencies, financial institutions (with consent), various US federal agencies and the US Internal Revenue Service (IRS).

The company subject to the reporting requirement bears the primary responsibility for the timely submission of the CTA reports and for the provision of complete and accurate information. Failure to submit a report or to do so in a timely manner may result in substantial fines or criminal penalties.

Beneficial owners

The term "beneficial owner" is to be interpreted in a broad manner and encompasses individuals who collectively hold a total of 25% or more of the voting rights, capital shares, profit shares, options or similar rights or who exercise "significant control" over the company subject to the reporting obligation.

A person is deemed to exercise "significant control" over a company if they are a member of the company's management or can influence important decisions. This is particularly relevant to managers or members of the Board of Directors with decision-making powers regarding the direction of the business, transactions or changes to the company's management, etc. This therefore encompasses all individuals who can exert a significant influence on the company. The definition of beneficial owner does not include minor children, intermediaries, employees acting solely in that capacity, or creditors of the company who do not exercise significant control by contract, representation, or otherwise.

Each reporting company is required to disclose at least one individual as a beneficial owner to FinCEN. In the event that no individual has a direct interest in the company, the individual who either directly or indirectly beneficially owns the company or has the power to exercise "significant control" over the company must be identified.

Company Applicants

The CTA defines the term "Company Applicants" as all individuals who have submitted the incorporation documents of a company subject to the reporting obligation. This includes all individuals who are responsible for the management or control of the filing process. If multiple individuals are involved in the filing process, the individual with primary responsibility for the filing is deemed to be the company applicant. If a law firm has been commissioned with the formation of a company, both the lawyers and their employees may act as company applicants for the company in question. In the case of foreign companies subject to reporting requirements, the individual who submits the initial registration or is responsible for managing or supervising the submission is deemed to be the company applicant. However, companies operating in the USA that were founded or registered before 1 January 2014 are exempt from reporting their company applicants.

«FAILURE TO SUBMIT A REPORT OR TO DO SO IN A TIMELY MANNER MAY RESULT IN SUBSTANTIAL FINES OR CRIMINAL PENALTIES.»

Excluded companies

In accordance with issued CTA regulations, there are currently 23 noted CTA exceptions.

In particular, this exemption applies to companies that were not established by registering with the Secretary of State or a comparable authority, such as sole proprietorships, general partnerships (no liability protection), or common law trusts. "Large" companies are exempt if they have more than 20 employees in the US (non-consolidated basis), a turnover of more than USD 5 million (exclusive of income from non-US sources) according to the most recent US tax return and a physical business establishment in the US. Additionally, wholly controlled subsidiaries of exempt companies, shell companies, and non-profit organisations registered under section 501(c) of the IRC are not subject to reporting. In total, the CTA lists 23 exempt entities that are already subject to sufficient regulatory scrutiny or inherently have a low risk of abuse.[1]

Urgent need for action for companies subject to reporting requirements

It is recommended that companies affected by the CTA implement robust anti-money laundering programs, document the processes for determining reporting requirements and exemptions, and establish mechanisms for timely reporting to FinCEN. Proper documentation is critical - both to determine the reporting obligation and to substantiate claimed exemptions. In addition, a designated individual should be appointed to oversee FinCEN reporting in the Beneficial Owner Secure System ("BOSS") in order to guarantee that all pertinent personal information and documentation pertaining to direct, indirect and tiered ownership is complete, accurate and current. In principle, the individual designated as the responsible person may be a beneficial owner, an employee, or an external specialist. It is recommended that the responsibilities for registration with the BOSS and the regular review of exemptions or reporting requirements within the organization be defined at an early stage. It is also important to send regular reminders to all relevant parties to ensure that changes in circumstances are reported or the accuracy of the information is confirmed.

In principle, companies subject to the reporting requirements are permitted to contractually oblige their beneficial owners to provide the necessary information. However, this is not mandatory, as officers and directors can also be held liable under civil and criminal law if they fail to provide the required information or provide false information under the CTA. Nevertheless, the company, as the liable person, should protect itself with an indemnification clause against the beneficial owners for inaccurate, delinquent or incomplete information. Furthermore, it is advisable to agree representations and warranties with the beneficial owners in important contracts.[2]

From 1 January 2024 onwards, it will be mandatory for reporting companies to keep their information on beneficial owners up to date by submitting timely FinCEN reports. This process is simplified if individual beneficial owners or company applicants have individual FinCEN identification numbers assigned to them. In such cases where beneficial owners and company applicants have obtained their own FinCEN ID numbers, the obligation to update the personal data lies with the beneficial owner and company applicant and the company and its management are exempt from the obligation to update their data. In the event that an individual with a FinCEN identification number updates their information, this is automatically updated for the reporting company. Otherwise, it is the responsibility of the reporting company to ensure that the data of the individual beneficial owners and persons exercising significant control over the company is kept up to date in the FinCEN database.

Conclusion

The CTA reporting requirements affect a significant number of both previously established and newly established US companies that do not qualify for an exception and require them to provide comprehensive disclosure regarding ownership and control. Companies are therefore well advised to act now and gather the necessary information about their beneficial owners in order to comply with the provisions of the CTA in a timely manner and avoid penalties.

1 Such as banks, investment advisors, insurance companies, auditing firms or public sector companies.
2 E.g. in shareholder agreements, limited partnership agreements or employment contracts with senior executives.

A company is exempt from having to update information with FinCEN if a beneficial owner or company applicant has their own personal FinCEN identification numbers. Existing US companies and newly established US companies should evaluate the implications of CTA compliance promptly in the light of the pending deadlines.

Keyfacts

01 Due to the Corporate Transparency Act, certain US and foreign companies operating in the USA are subject to new regulations and a duty to report their beneficial owners and company applicants

02 Larger companies, financial institutions and companies that fall under certain special circumstances are exempt from the reporting obligation.

03 Affected companies must now take action by meticulously documenting the processes for determining reporting requirements and exemptions and ensuring that mechanisms are in place for timely and complete reporting to FinCEN.

04 The management of each company should appoint a person who is responsible for the FinCEN reports in the FinCEN database.

05 It is also recommended that an indemnity be agreed with the beneficial owner and persons with "significant control" and that representations and warranties be included or updated in company agreements.

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