



Jan 11, 2022

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The End of Corporate Anonymity

One of the oldest, most basic aspects of a legal entity is the anonymous nature of its ownership. It can be virtually impossible to determine who owns a corporation or a limited liability company (depending on how it is managed). This privacy feature is what attracts many people to form legal entities, allowing them to hold property or conduct business while maintaining their personal anonymity. But the federal government is about to change that.

The Financial Crimes Enforcement Network, or FinCEN (a division of the U.S. Treasury Department), has proposed new regulations to implement the beneficial ownership information reporting provisions of the federal Corporate Transparency Act. FinCEN is concerned that criminals are taking advantage of corporate anonymity “to conceal proceeds of corrupt and criminal acts” and “obfuscate their activities through the use of anonymous shell and front companies.” To prevent this, FinCEN’s proposed regulations will require corporations and persons forming corporations to file a Beneficial Ownership Information (BOI) report. According to FinCEN, these regulations “represent the culmination of years of efforts by Congress, the Department of the Treasury,” and other national security agencies and law enforcement organizations. Here are some of the features of the regulations and the BOI report:

What Types of Entities Must File a BOI Report with FinCEN?

Both domestic and foreign reporting companies must file. A domestic reporting company is any entity that is created by the filing of a document with a secretary of state or similar office of jurisdiction within the United States. A foreign reporting company is any entity formed under the law of a foreign jurisdiction that is registered to do business within the United States. This covers not only corporations, but also limited liability companies, limited partnerships, limited liability partnerships, certain trusts, and other entities with “opaque corporate structures.”

What Information Must Be Reported?

A reporting company must identify itself and report four pieces of information about each of its “beneficial owners and company

applicants”: name, birthdate, address, and a unique identifying number from an “acceptable identification document” as defined in 31 USC § 5336(a)(1), such as a passport, drivers license, or other government-issued identification document.

Who Qualifies as a “Beneficial Owner”?

A beneficial owner is an individual who meets at least one of two criteria: (i) exercising “substantial control” over the reporting company; or (ii) owning or controlling at least 25% of the ownership interest of the reporting company. The regulations specify three “specific indicators” of substantial control:

- Serving as a senior officer of the reporting company.
- Having authority over the appointment or removal of any senior officer or dominant majority of the board of directors or similar governing board of the reporting company.
- Having direction, determination, or decision of, or substantial influence over, important matters of a reporting company.

The regulations also include a catch-all provision stating that those three factors are not exclusive. Substantial control can take additional forms not specifically listed in the regulations. FinCEN’s explanation of this is that “Each of these indicators supports the basic goal of requiring a reporting company to identify the individuals who stand behind the reporting company and direct its actions.”

What is a “Company Applicant”?

For domestic reporting companies, a company applicant is the individual who files the document that forms the entity. For a foreign reporting company, a company applicant is the individual who files the document that first registers the entity to do business in the United States. Theoretically, a corporate owner can’t get around this requirement by sending an underling to the filing office, since a company applicant includes anyone who directs or controls the filing of the document by another.

When Must the BOI Report be Filed?

This depends on when the reporting company was created or registered, and whether the report is an initial report, an updated report providing new information, or a report filed to correct wrong information on a previous report. Initially, any company (foreign or domestic) created before the regulations become final will have one year after the date on which the regulations become final to file its initial BOI report. After that, if there is a change to any filed information, a company must file an updated report within 30 calendar days. If a company discovers that information in a previously filed report is inaccurate, the company has 14 calendar days in which to file a corrected report.

Who is Exempt?

These regulations don't cover all types of entities. There are 23 specific exemptions. One important one is discussed below. Others include banks, insurance companies, securities issuers, credit unions, local government agencies, and others. Even if your entity doesn't qualify for one of those exemptions now, you could find that it is exempt in the future, because the regulations allow the Secretary of the Treasury, with the written concurrence of the Attorney General and the Secretary of Homeland Security, to exclude additional types of entities from the reporting requirements.

Exemption for Large Operating Companies.

One exemption which will apply to many corporations and other entities is set forth at proposed 31 CFR 1010.380(c)(2)(xxi), which exempts "large operating companies". To qualify as a large operating company and thereby avoid the need to disclose ownership, an entity must meet three requirements:

- It must employ more than 20 employees on a full-time basis in the United States.
- Its U.S. income tax returns for the year preceding the filing deadline must demonstrate more than \$5 Million in gross receipts or sales in the aggregate.
- It must have an operating presence at a physical office within the United States.

While this will shield many corporations from the disclosure requirements, it won't help small "mom-and-pop" corporations or their owners.

When do the Regulations become Final?

Soon, but not immediately. Public comments are being accepted until February 7, 2022. After that, FinCEN is likely to spend a bit of time tinkering with the regulations in response to the comments it receives. Government agencies aren't known for acting quickly, but it would not be surprising if the regulations were finalized by the middle of 2022.

Are you a senior officer of a corporation, LLC, or other entity? Do you exercise "substantial control" over that company? Does your entity qualify as a large operating company? It's not too early to prepare for compliance with these new regulations, or to take steps to establish that you qualify for an exemption.

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