

## CORPORATE TRANSPARENCY ACT WHAT EVERY BUSINESS NEEDS TO KNOW

BY PATRICK D. ANZEVINO

The Corporate Transparency Act is a new U.S. regulatory requirement. It requires companies (mostly small), the company applicant(s), and their owners to report specific information about themselves to the Financial Crimes Enforcement Network (FinCEN). FinCEN will maintain a centralized repository of the reported information. These reporting obligations will impose not only new burden of compliance for all business but will reduce the level of privacy that many owners currently enjoy. This article will discuss only the requirements, from the proposed regulations, as they relate to domestic entities, their applicants, and their owners.

### Background:

The National Defense Authorization Act (NDAA) for 2021 was enacted on January 1, 2021. The NDAA included the Anti-Money Laundering Act of 2020 (AMLA). The AMLA's goal is to increase the enforcement powers of FinCEN, establish the integration of new technologies, and increase the exchange of information sharing between the public and private sectors. An element of the AMLA, the Corporate Transparency Act (CTA) seeks to facilitate the goal of information sharing between the public and private sectors by directing that FinCEN create and manage a new corporate ownership registry. This central registry will allow law enforcement agencies and departments to have a shared location of "beneficial owners" of "reporting entities". This central repository will reduce the usage of shell companies to engage in money laundering, drug trafficking, tax evasion, and other illicit activities.

### Regulations:

The CTA statutory provisions can be found at 31 USC 5336. Proposed regulations for reporting requirements were published in December 2021 and the notice and comment

period closed on February 7, 2022. These proposed regulations attempt to clarify who must file, when they must file, and what information is to be provided. Final regulations were initially supposed to be prepared no later than January 1, 2022, but due to delays, they are expected to be implemented in the latter half of 2022. Regulations affecting access to the central repository of filed information or customer due diligence requirements for financial institutions will be addressed at a later time.

### When To File:

When an entity must file the required information with FINCEN will depend on its date of formation. Entities formed on or after the effective date of the final regulations will have fourteen (14) calendar days from their date of formation to report. Entities formed before the effective date of the final regulations will have one year from the date of their formation to report. The entity's date of formation will be determined by the Secretary of State's office, or a similar office, for the state in which the entity was formed. In the future, whenever an entity has been previously exempted from reporting, but is no longer exempted, that entity will have thirty calendar days from the date they no longer qualify for an exemption.

### Which Entities Must File:

The proposed regulations provide that a "reporting entity" is any entity that is created by filing a document with the secretary of state or a similar office. Corporations and limited liability companies will explicitly be required to report. Limited partnerships, limited liability partnerships, and limited liability limited partnerships will most likely be considered reporting entities in the final regulations, since most are created with the filing of formation documents with a secretary of state or a similar office.

### Which Entities are Exempt:

There are twenty-three specific exemptions from the definition of a "reporting entity" which are: securities issuers, domestic governmental authorities, banks, domestic credit unions, depository institution holding companies, money transmitting businesses, brokers or dealers in securities, securities exchange or clearing agencies, other Securities Exchange Act of 1934 entities, registered investment companies and advisers, venture capital fund advisers, insurance companies, state licensed insurance producers, Commodity Exchange Act registered entities, accounting firms, public utilities, financial market utilities, pooled investment vehicles, tax exempt entities, entities assisting tax exempt entities, large operating companies, subsidiaries of certain exempt entities, and inactive businesses. These numerous exemptions are generally divided among entities that already report their beneficial ownership (due to federal or state rules), tax exempt entities, and various service providers. The Secretary of the Treasury may, with the written agreement of the Attorney General and the Secretary of Homeland Security, exempt additional entities. Tax exempt entities include 501(a) and 501(C)(3) registered entities. To be exempt, a "Large Operating Company", the entity must (1) employ 20 or more people on a full-time basis, (2) have filed a prior year federal return with gross receipts or sales totaling five million or more, and (3) have an operating presence at a physical office within the United States.

### Applicant:

The applicant is the individual who files the document that forms the entity. However, the proposed regulations also include anyone who directs or controls the filing of the document. The applicant (or applicants) will not only have to provide all the same information as

the beneficial Owners but will remain the same indefinitely. Attorneys and law firms should be mindful of the indefiniteness of the reporting requirements when undertaking the filing of each application to form an entity.

**Beneficial Owners:**

A beneficial owner is an individual who either, (1) has the ability to exercise substantial control over the reporting entity or (2) owns or controls at least 25 percent of the ownership interest of the “reporting entity”. Five exceptions exist to the definition of beneficial owners: minor children, nominees or other intermediaries acting on behalf of another individual, employees whose interest is solely that of being employed in the reporting entity, individuals solely from a right inheritance (future interest), and creditors who do not otherwise exert “substantial control” (see below).

**Substantial Control:**

Substantial Control is met when (1) there is service as a senior officer of a reporting entity, (2) the power over appointments or removals, and (3) the ability to direct, determine, decide, or exert substantial influence over significant matters. The proposed regulations predict that at least one owner will be identified under this prong, but many may more be required to report. Senior officers will include the company President, Secretary, Treasurer, Chief Financial Officer, General Counsel, Chief Executive Officer, and / or the Chief Operating Officer.

**25% Owner:**

Individuals holding 25% of a reporting entity’s ownership interest must report. Ownership interest includes equity interest and other interests such as a capital interest or profits interest in a partnership or limited liability company, convertible instruments, warrants, options or privileges to acquire equity, and even joint ownership. Joint ownership occurs when one or more individuals jointly own or control an undivided ownership interest.

**Information to Report:**

Beneficial owners and applicants will have to provide to FinCEN, (1) their full legal name, (2) date of birth, (3) current residential or business address, and (4) a unique identifying number from an acceptable identification document or a “FinCEN” identifier. In the final regulations, beneficial owners will likely have to list their residential address. A residential address is the address used to establish tax residency. In contrast, applicants who provide or file a formation document will have provide their business address. Acceptable identification documents will include, if non-expired: passports, identification documents issued by a government entity, driver’s license, or a foreign passport. A FinCEN identifier may be used by a reporting entity, applicant, or beneficial owner; however, a reporting entity, applicant or beneficial owner will still have to initially report their name, birth date, address and an identification document. Reporting entities will have to provide (1) their full legal name or any “doing business as” (d/b/a) name, (2) business

street address, (3) jurisdiction of formation, and (4) the entity’s Taxpayer Identification Number and Employer Identification Number. If an entity does not yet have a Taxpayer Identification Number, then a Dun and Bradstreet Data Universal Numbering System or Legal Entity Identifier will suffice.

**Conclusion:**

Since “Large Operating Companies” are exempted, the burden of compliance will fall on small businesses and partnerships. Intentional failure to comply with future regulations would result in fines of up to \$500 per day (\$10,000 in aggregate), and a prison term up to two years. In addition, and pending the release of final regulations, many questions remain unanswered. No proposed regulations yet exist as to protocols for access to and disclosure of beneficial ownership. The lack of guidance on access and disclosure is sure to concern many beneficial owners and applicants, whose information will be utilized by various federal law enforcement agencies.



*Patrick Anzevino is an Associate Attorney with Schneider Smeltz Spieth Bell, as a member of their Business and Real Estate practice group. He handles mergers & acquisitions, commercial contracting, and tax matters for corporations, partnerships, and individuals. Since moving back to Cleveland, he has been passionately active in supporting veterans organizations. He has been a CMBA member since 2021. He can be reached at (216) 696-4200 or panzevino@sssb-law.com.*