



CLIENT ALERT

February 2023

1

FEDERAL GOVERNMENT TO CREATE MASSIVE NEW DATABASE

by John Cameron

Will you be required to submit an image of your driver's license or passport for filing with the federal government?

You will if you are involved in the ownership or operation of a business.

To quell money laundering, Congress enacted the Corporate Transparency Act ("CTA") as part of the Anti-Money Laundering Act within the National Defense Authorization Act for Fiscal Year 2021.¹

Noting that the "United States does not currently have a centralized or complete store of information about who owns and operates legal entities within the United States,"² the United States Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN") issued proposed regulations to implement the CTA to address what it has characterized as the "illicit use of the U.S. financial system."³

The solution? A massive federal database containing both business and personal information about persons who own or operate a business.

Following a period allowing public commentary, FinCEN issued its final rule on September 29, 2022.⁴ That rule has broad implications.

Under the rule, each "reporting company" will be required to file a beneficial owner information report (a "BOI") with FinCEN. There are two kinds of reporting companies – "domestic reporting companies" and "foreign reporting companies." Domestic reporting companies include "corporations, limited liability companies and any other entity created by the filing of a document with a Secretary of State or similar office under the law of a state or Indian tribe." A foreign reporting company is

A corporation, limited liability company, or other entity formed under the law of a foreign country that is registered to do business in the United States by the filing of a document with a secretary of state or equivalent office under the law of a state or Indian tribe.

While many business organizations, foreign or domestic, will be required to submit these reports, some entities are excluded from the definition of a reporting company. These include tax exempt entities, units of government, banks, money services businesses, brokers or dealers in securities, and accounting firms. Large operating companies are also excluded, as are publicly traded companies issuing registered securities.

A reporting company's BOI, which will be submitted to FinCEN, must identify the company's *beneficial owners* and provide additional information about *company applicants*.

Terms to Remember

A *beneficial owner* is "any individual who, directly or indirectly, either (i) exercises substantial control over [a] reporting company, or (ii) owns or controls at least 25% of the ownership interest of [a] reporting company." Each beneficial owner of a reporting company must be identified. Minor children, individuals acting as nominees, custodians or agents, employees acting solely as employees and not as senior officers, and individuals who are creditors or whose only interest is a future interest through a right of inheritance are not considered "beneficial owners."

Substantial control means someone who: either serves as a senior officer, has authority over the appointment or removal of a senior officer or a majority of the board of directors (or similar body), directs, determines, or has substantial influence over important decisions, or has any other form of substantial control over a reporting company.

An *ownership interest* is "any instrument, contract, arrangement, understanding or mechanism used to establish ownership." Examples include stock, membership interests, and the like.

Company applicants are the persons who are principally responsible for directing or controlling the filing of the formation documents for the reporting company. Therefore, a "company applicant" is one or two persons: (i) the individual who directly files the document that creates the entity, and (ii) if more than one person is involved, the individual primarily responsible for directing or controlling the filing of the relevant document by someone else. This includes lawyers working on behalf of a client.

In Conclusion

A reporting company must submit its full legal name, any trade name it uses, its address, the jurisdiction in which it was formed, its EIN and taxpayer identification number, DUNS or LEI number. The company's address must be a street address.

A reporting company must also submit, in respect of each beneficial owner and company applicant, the individual's full legal name, date of birth, current residential or business street address, and a unique identifying number from an acceptable identification document, such as a driver's license or passport. An image of that driver's license or passport must also be included.

¹ 31 USC 5311 et seq., esp. 5336.

² 87 FR 59500

³ 87 FR 59499

⁴ 87 FR 59498 et seq.

CLIENT ALERT

The rule becomes effective on January 1, 2024. Companies created or registered before that date will have one year to file initial reports. Reporting companies created or registered after January 1, 2024, will have only 30 days after receiving notice of their creation or registration to file their initial reports. Reporting companies are given 30 days to report changes to information in previously filed reports and must correct inaccurate information within 30 days of discovering the inaccuracy.

ABOUT THE AUTHOR



John G. Cameron, Jr. is a Member in Dickinson Wright's Grand Rapids office. He can be reached at 616.336.1010 or jcameron@dickinsonwright.com.