

U.S. adopts new beneficial owner reporting requirements

AUTHORS



Christopher M. Caparelli



Heding Yang



Peter A. Aziz



Hailey Schnier

The U.S. regulator in charge of anti-money laundering compliance, the Financial Crimes Enforcement Network (FinCEN), has issued a final rule to implement the beneficial ownership reporting provisions of the Corporate Transparency Act of 2020 (CTA). The rule imposes reporting requirements on a wide range of entities formed or registered to do business in the United States.

What you need to know

- New rules going into effect on January 1, 2024, will require many U.S. companies and foreign companies doing business in the United States to report their beneficial owners.
- The new filing regime is intended to protect U.S. national security and strengthen the integrity and transparency of the U.S. financial system by stopping those who would use anonymous shell companies from hiding their illicit proceeds.
- Several exemptions apply to companies already regulated by the U.S. or state governments and “large operating companies” with more than 20 employees and more than \$5 million annual revenues.
- Private funds, holding companies and special purpose vehicles (SPVs) are among the entities likely to have reporting obligations.

Who needs to report beneficial ownership

Many U.S. entities, and non-U.S. entities registered to do business in the United States, will be required to report their beneficial owners unless they fall under one or more exemptions. U.S. reporting companies include corporations, limited liability corporations (LLCs), or any other entity (e.g., limited partnerships) created by filing a document with a secretary of state or analogous office of a state or tribe in the United States. Non-U.S. reporting companies include corporations, LLCs, or other entities formed under the laws of a non-U.S. jurisdiction that are registered to do business in any state in the United States (i.e., by filing a document with a secretary of state or analogous office of a state or tribe in the United States).

Entities likely to face reporting requirements include:

- U.S. private funds and non-U.S. private funds registered to do business in the United States that are not managed by an investment adviser registered with the SEC;

- U.S. companies formed by Canadian private equity funds, Canadian pension plans or other non-U.S. investors to serve as holding companies or SPVs for their U.S. investments;
- small U.S. portfolio companies that have 20 or fewer full-time employees in the United States; and
- foreign issuers registered to do business in the United States that do not trade on U.S. exchanges.

The last category is notable because the beneficial ownership reporting requirements in Canada for purposes of anti-money laundering under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* exempt certain large publicly traded foreign issuers and their subsidiaries.

What needs to be reported

All reporting companies will be required to disclose the identity of their beneficial owners and certain information regarding such beneficial owners (including date of birth, address and an identification number from certain official documents such as a passport). “Beneficial owners” are natural persons who directly or indirectly own or control at least 25% of an entity or otherwise exercise “substantial control” over the entity.

The rules identify three categories of individuals who exercise substantial control over a reporting company: (1) a senior officer; (2) an individual who has authority over the appointment or removal of any senior officer or majority of the board of directors (or similar body); and (3) an individual who directs, determines, or has substantial influence over important decisions made by the reporting company. As the rule explains, these categories support “the basic goal of requiring a reporting company to identify the key individuals who stand behind the reporting company and direct its actions”.

In addition, filers formed or registered to do business on or after January 1, 2024, will need to report “company applicants”—the individuals who file the documents forming the entity (for U.S. entities) or the individuals who file the document that first registers the entity to transact business in the United States (for non-U.S. entities). Company applicants also include anyone directing or controlling the filing of the relevant document.

Entities will also need to report changes to their previously disclosed information within 30 days of becoming aware (or having reason to know of) any inaccuracy in a previous report (other than changes regarding company applicants). FinCEN is required to maintain beneficial owner and company applicant information in a confidential database that may be accessed by law enforcement agencies and, with the reporting entity’s consent, certain financial institutions.

Entities exempt from reporting

The new U.S. reporting rule exempts 23 types of entities, including “large operating companies” that (i) maintain an operating presence in the United States, (ii) have more than 20 full-time employees in the United States, and (iii) have filed a U.S. tax return in the previous year reporting over \$5 million in gross sales or receipts from U.S. sources.

Although the “large operating company” exemption will excuse many portfolio companies from reporting requirements, the exemption must be considered separately for each entity in an ownership chain and, therefore, holding structures sitting above a “large operating company” may not be exempt. (Many subsidiaries of large operating companies will also be exempt.)

Additional exempt entities include companies already regulated by United States or state governments including banks, insurance companies, public companies registered with the SEC, SEC-registered broker-dealers, SEC-registered investment advisers, venture capital fund advisers filing with the SEC, and private funds managed by any such investment adviser or venture capital fund adviser that qualifies as a U.S. “pooled investment vehicle.” Pooled investment vehicles are investment companies (i) that are required to be registered under the U.S. Investment Company Act of 1940 (the Investment Company Act) or are exempt from such registration under section 3(c)(1) or

3(c)(7) of the Investment Company Act (which are the two sections that private funds often rely on for exemption from registration under the Investment Company Act), and (ii) that are listed in the applicable adviser's Form ADV with the SEC (or will be listed in such adviser's next annual amendment to the Form ADV required to be filed with the SEC).

Finally, subsidiaries controlled or wholly owned by exempted entities will themselves be exempt from the reporting requirements—except, notably, subsidiaries of pooled investment vehicles (unless a separate exemption applies).

Non-U.S. entities including private fund managers, private funds, holding companies, SPVs and portfolio investments or portfolio companies are not subject to these rules unless any such entity has registered to do business in a U.S. state and is not otherwise exempt under one of the 23 exemptions. A non-U.S. pooled investment vehicle registered to do business in the United States will only be required to make a narrower disclosure regarding an individual that exercises “substantial control” over such vehicle, rather than requiring disclosure of any other beneficial owners in the vehicle.

Dates to keep in mind

The final rule is effective January 1, 2024. Entities already formed or registered to do business in the United States before that date will have one year (until January 1, 2025) to comply with filing obligations if applicable. Entities formed or registered on or after January 1, 2024, will have 30 days to file following formation or registration to file, if not exempt.

Next steps for FinCEN to implement beneficial ownership reporting

The reporting rule is one of three sets of new rules planned to implement the CTA. FinCEN must still develop the reporting form and procedures as well as issue rules around the database that will maintain the beneficial owner and company applicant information. FinCEN has also committed to developing compliance and guidance documents to assist reporting companies in complying with the rule.

To discuss these issues, please contact the author(s).

This publication is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this publication with you, in the context of your particular circumstances.

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