

Upcoming Tribal Responsibilities Under the Corporate Transparency Act



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On September 29, 2022, the Financial Crimes Enforcement Network (“FinCEN”), a bureau of the U.S. Treasury, [released final rules](#) (the “Final Rules”) implementing Section 6403 of the Corporate Transparency Act (“CTA”). The CTA was enacted to combat money laundering, terrorist financing, corruption, tax fraud, and other illicit activity. The Final Rules require a “Reporting Company,” its “Beneficial Owners,” and its “Company Applicant” (terms defined in the CTA and described below) to report specified beneficial ownership information (“BOI”) to FinCEN. **Any Reporting Company formed on or after January 1, 2024 will have 30 days to submit its initial report. A Reporting Company in existence before January 1, 2024 will have until January 1, 2025 to submit its initial report. Given the CTA’s application to various tribal entities and citizens, and the importance of reporting, there are a number of specific requirements tribal nations must be aware of:**

I. All reporting companies must disclose BOI to FinCEN.

There are two types of Reporting Companies, and each is subject to beneficial ownership disclosure:

- **Domestic Reporting Company** – any corporation, LLC, or other entity created by filing a document with the secretary of state or similar office, **including tribal jurisdictions.**
- **Foreign Reporting Company** – any corporation, LLC, or other entity that is (a) formed under the law of a foreign country and (b) registered to do business by the filing of a document with the secretary of state or similar office, **including tribal jurisdictions.**

NOTE: Tribally-owned or chartered corporations that do not require the filing described above may not be subject to the CTA. Other tribally-chartered corporations that require filing, corporations and LLCs owned by tribes but formed under state law, and any other tribal entity that must be formed by filing a document with a tribal office similar to a secretary of state (which may vary according to tribal laws and regulations), would likely be covered.

There are 22 exemptions to the definition of Reporting Company, primarily limited to entities already subject to significant regulations (such as banks, insurance companies, and utilities) and tax-exempt entities, and intended by FinCEN to be interpreted narrowly.

NOTE: An entity not falling into one of the exemptions, no matter how small, will likely need to report.

Reporting Companies must file an updated report with FinCEN upon qualifying for an exemption, and previously exempt companies falling out of exemption status must file a report with FinCEN within 30 days of no longer meeting the criteria for the relevant exemption.

A. INFORMATION THAT REPORTING COMPANIES MUST DISCLOSE

In its initial report, a Reporting Company must disclose its (a) full legal name, (b) trade or “doing business as” name (if any), (c) address of principal place of business, (d) jurisdiction of formation, and (e) unique identification number such as a taxpayer identification number/employer identification number. Reporting Companies must also report the following information on all their Beneficial Owners: (a) full legal name, (b) date of birth, (c) current residential street address, (d) unique identifier from an acceptable document (a current U.S. passport, state or local ID, driver’s license, or—if the Beneficial Owner does not have any of the foregoing—a foreign passport), and (e) image of the identification document. All Company Applicants must disclose nearly all of the same information as the Beneficial Owners (replacing the residential address with a business address).

NOTE: Any changes to any of the reported information must be reflected in an updated or amended filing within 30 days of the change.

B. INDIVIDUALS DEEMED TO BE BENEFICIAL OWNERS

A Beneficial Owner is an individual who, directly or indirectly, exercises “Substantial Control” over a Reporting Company. Generally, an individual exercises Substantial Control over a Reporting Company if they (i) are a senior officer (or have authority over the appointment or removal of senior officers or a majority of the board of directors) or (ii) direct, determine, or have substantial influence over important business decisions. Substantial Control may be held directly or indirectly; FinCEN clarified that this can be as a trustee of a trust or similar arrangement, or through board representation, ownership or control of a majority voting power/rights, and any other arrangement. Individuals with less than a 25% Ownership Interest may be deemed Beneficial Owners due to their voting rights.

In addition to Substantial Control, an individual is a Beneficial Owner if they own or control 25% or more of a Reporting Company’s “Ownership Interests.” Like the definition for Substantial Control, FinCEN defined Ownership Interests broadly, including—among other things—equity, stock, capital or profits interests (including options) and certain associated warrants or rights, as well as any other instrument or arrangement to establish ownership. Like Substantial Control, Ownership Interests may be held either directly or indirectly through the catchall of any contract, arrangement, understanding, or otherwise, including trust arrangements. There are specific requirements for calculating Ownership Interests as well, and only a few exceptions from the definition of Beneficial Owner (including, for example, creditors of reporting companies).

C. INDIVIDUALS DEEMED TO BE COMPANY APPLICANTS

A “Company Applicant” is the individual who files the document that forms the entity *and* any individual responsible for directing or controlling such filing. FinCEN’s rationale behind this broad definition is to retain information allowing it to connect the dots with respect to different companies, owners, and those who establish them. For example:

1. An attorney overseeing a Reporting Company’s formation and that attorney’s paralegal who directly files the documents to create it are *both* considered Company Applicants.
2. A Beneficial Owner of a Reporting Company who files the requisite formation documents themselves will file as both a Beneficial Owner and a Company Applicant.

Company Applicants for entities created prior to January 1, 2024 are not required to report information with respect to any Company Applicant.

II. There are penalties for noncompliance with the CTA.

The civil penalty for willful noncompliance of beneficial ownership reporting requirements is a fine of \$500 per day, and criminal penalties include a fine up to \$10,000, imprisonment, or both. While Reporting Companies are generally responsible for compliance under the CTA, individuals may also be held liable for noncompliance. Congress created a safe harbor if a person corrects a BOI report within 90 days; however, this safe harbor does not encompass intentional attempts to evade compliance. Congress has also created penalties for the unauthorized disclosure of BOI, which will likely necessitate additional security measures for all parties involved in reporting.

As indicated above, the CTA and its implementing regulations have created a number of new risks and responsibilities for tribal entities and citizens – we understand the difficulty in sorting through these new requirements, let alone complying with them. If you have any questions about them, or how GableGotwals may be able to help you, please let us know.

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