FinCEN Proposed Regulations to the CTA

Legal Alert

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Effective January 1, 2021, Congress passed the Corporate Transparency Act (CTA) which aims to prevent money laundering and other illicit activity by requesting additional, personal information from certain business owners. An overview of this law was discussed in an earlier Flaster Greenberg Legal Alert, linked here. At the end of 2021, the Financial Crimes Enforcement Network of the United States Department of Treasury (FinCEN) released proposed regulations to the CTA. All companies already in existence as of the effective date of the final regulations must provide the requested information one year thereafter. While the window for public review and comment for this round of proposed regulations closed on February 7, 2022, FinCEN has not announced when the next round of proposed regulations will be available for review.

After the final regulations become effective, all qualifying entities formed on or after their effective date must comply with the CTA's disclosure requirements within fourteen (14) days of formation. FinCEN has not yet set the deadline or timeframe as to when final regulations should be released.

Following are notable takeaways of the proposed regulations:

- The CTA differentiates between a domestic reporting company and a foreign reporting company, both of which must disclose the information required by the CTA, assuming all other criteria are met. The proposed regulations clarify that a domestic reporting company includes, (1) a corporation; (2) an LLC; and (3) any other entity that is created by the filing of a document with a secretary of state or similar office under the law of a state or Indian tribe. Note that according to the Federal Register's analysis of these proposed regulations, FinCEN generally believes the aforementioned definition includes limited liability partnerships (LLPs), limited liability limited partnerships (LLLPs), business trusts (aka statutory trusts or Massachusetts trusts) and most limited partnerships (LPs).
- The CTA requires that all entities provide "beneficial ownership information" (BOI) to FinCEN. The proposed regulations define a beneficial owner as someone who meets at least one of the following two criteria: (1) exercising substantial control over the reporting company; or (2) owning or controlling at least 25% of the ownership interest in the reporting company. The proposed regulations provide three indicators of "substantial control": (1) service as a senior officer of a company required to report under the CTA; (2) authority over the appointment or removal of any senior officer or dominant majority of the board of directors (or similar body) of a reporting company; and (3) direction, determination, or decision of or substantial influence over, important matters of the reporting company. This list of indicators is non-exhaustive, and the general intention is to identify those persons who direct the reporting company's actions. A person's ownership interest, for purposes of establishing whether the 25% threshold is met, includes all ownership interests of any class or type in comparison to the undiluted ownership interests of the company.

- FinCEN intends to adopt, verbatim, the statutory language granting the twenty-three (23) specified exemptions to the CTA's reporting requirements. One such exemption is for "large operating companies", which the proposed regulations defines as a company that, (1) employs twenty (20) or more employees on a full-time basis in the United States; (2) filed federal income tax return in the United States during the previous year demonstrating more than $5,000,000 in gross receipts or sales in the aggregate, including the receipts or sales of other entities owned by the entity and through which the entity operates; and (3) has an operating presence at a physical office within the United States.
- FinCEN also intends to work with secretaries of state and other similar offices to notify reporting companies in existence prior to the final regulations' effective date of their reporting obligations. The proposed regulations do not offer more clarity on the format reporting companies will use to disclose the requested information.

As the proposed regulations are undergoing public comment and review, they are subject to change. For now, however, we have some insight as to which businesses will be impacted by the CTA's reporting requirements.

If you or your business need legal advice, please consider contacting any member of Flaster Greenberg's Business & Corporate Department.