

Public Companies Should Pay Attention to the Corporate Transparency Act?

WRITTEN BY

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Public Companies are Exempt, But . . .

Public companies have an exemption from the filing requirements under the new Corporate Transparency Act (CTA) reporting rules. The public company exemption applies to companies that are required to file reports with the U.S. Securities and Exchange Commission (SEC). That exemption, however, is not enough to insulate public companies from having to conduct a compliance review and install new internal controls to comply with the new rules of the Financial Crimes Enforcement Network (FinCEN) that became effective January 1, 2024 (FinCEN Rules).

The FinCEN Rules apply to each entity that is formed by a filing with U.S. state authorities or that is formed under foreign law but is registered to do business in the U.S. There is also an exemption from the filing requirement for subsidiaries of public companies (and other exempt companies), but that exemption only applies to wholly owned or controlled subsidiaries. Any subsidiaries or investment entities of public companies that do not meet the wholly owned or controlled test do not qualify for this subsidiary exemption although they may qualify for one of the other statutory exemptions.

The FinCEN Rules are very detailed and specific, so every public company is well advised to do a careful review of all of its affiliated entities to ensure that they are either exempt or are in a position to make any required filings with FinCEN in a timely fashion. Also, going forward, as public companies form new entities, enter into joint ventures, exit or dissolve joint ventures and make investments, they may find themselves, the joint venture or one of their affiliates subject to a reporting requirement under the CTA. Those could include M&A transactions, venture capital, vendor or supplier investments, and internal corporate restructurings (other than solely among wholly owned/controlled subsidiaries).

Timing of Compliance Review and Reporting

There is still time to conduct a compliance review and set up appropriate internal controls and processes. For companies formed before January 1, 2024 that are required to file, the deadline for FinCEN filings is January 1, 2025. For any new companies formed in 2024, the deadline is 90 days after the new company is created. Entities formed after 2024 will only have 30 days from the date of formation to make their initial filings with FinCEN.

Compliance Concerns

Investments and Joint Ventures. While most U.S. public companies tend to operate primarily through wholly owned subsidiaries, many own capital or income interests in joint ventures or other entities. Some of these entities may not be exempt from the new CTA reporting requirements. As part of ongoing compliance with those reporting requirements, public companies will want to ensure that they have appropriate controls, processes and procedures in place so that the required CTA initial filings and any amendments to those filings upon changes in beneficial ownership (which may include changes in or affecting senior management, ownership or other means of substantial control) are timely made.

Non-Wholly Owned Non-U.S. Subs. While non-wholly owned subsidiaries that are not formed under U.S. law will generally not have a CTA filing requirement, a filing will be required if the subsidiary is registered to do business in the United States and not otherwise exempt.

Other Exemptions. If the wholly owned/controlled subsidiary exemption is not available, there are other exemptions that may apply, including exemptions for financial institutions, insurance companies, and others in regulated industries. For non-regulated entities, the most likely alternative exemption that may be available is the exemption for large operating companies and their wholly owned/controlled subsidiaries. However, there are some very technical requirements that must be met for that exemption to apply. For example, the entity itself (and not through its parent or subsidiaries) must have more than 20 full time employees in the U.S., have a physical presence in the U.S., and have filed a Federal income tax or information return for the prior year reflecting at least \$5 million in U.S. gross receipts or sales (which could include a consolidated return). This exemption may not apply to spinoffs, split-offs and other newly formed entities because they would be unlikely to have filed a prior year tax return.

Forming Entities and Company Applicants. If the legal department or another department of a public company forms or causes the formation of entities on or after January 1, 2024, even if those entities will not be required to make FinCEN filings because they are wholly owned subsidiaries, it would be advisable to maintain information that would be required for an initial filing should any exemption cease to be available. This information should include the names and personal information of the “company applicants” (the person making the filing with the Secretary of State and the person causing the filing to be made). Personal information concerning these company applicants may need to be filed with FinCEN if an initial company filing is subsequently made (even if many years later). The information required for company applicants is the same information that must be filed for each beneficial owner of the entity (name, residential address, date of birth, government issued ID number and copy of the government issued ID document, or alternatively a FinCEN identifier). Examples of when this could occur include spinoffs, split-offs, issuance or sale of additional equity or profits interests, issuance of certain warrants or options, etc., or if the subsidiary is sold.

Retaining Filings. For private companies that have made a FinCEN CTA filing, that then become public companies, wholly owned or controlled subsidiaries of public companies, or otherwise qualify for an exemption from the FinCEN filing requirement the formerly non-exempt company will need to file an amendment to its FinCEN filing to claim the exemption.

Each FinCEN reporting company is responsible for amending beneficial ownership information upon any change in beneficial ownership. To understand what amendments need to be made, it is critical to know what has been filed before and for which beneficial owners a filing was made. For many corporate formation records, copies can

be retrieved from the Secretary of State or other official where the form was originally filed. However, because of the security required for beneficial ownership information, FinCEN will not release copies (even to the entity or person that filed those forms). As a result, document retention policies for FinCEN filings and information concerning company applicants and beneficial owners should be retained, in a secure repository, along with information sufficient to substantiate any claim of an exemption from the filing requirements.

Penalties. Willful failure to comply with the requirement to file and amend required CTA filings comes with civil penalties of up to \$500 for each day the violation continues and criminal penalties including up to two years in jail and/or a fine of up to \$10,000. Officers and directors of entities required to make filings can be held liable if complete filings are not timely made.

Conclusion

Because each public company will have its own particular circumstances, and because there are various exemptions from reporting, including exemptions for some regulated businesses, each public company's compliance with the new CTA rules will differ. A careful compliance review and new internal controls will help public companies ensure that they satisfy their filing requirements.

FinCEN's [Small Entity Compliance Guide](#), [FAQs](#) and related Locke Lord's Quick Studies, including those listed below, provide additional guidance.

Locke Lord QuickStudies:

[Locke Lord QuickStudy: The Corporate Transparency Act Is ?Now in Effect](#)

[Locke Lord QuickStudy: Corporate Transparency Act Goes ?Into Effect January 1st](#)

[Locke Lord QuickStudy: FinCEN Issues Small Entity Guide to ?Corporate Transparency Act Compliance](#)

Please contact your usual Locke Lord contact or the authors if you have any questions or need assistance.

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