Recent FinCEN FAQs Provide Additional Guidance on Compliance

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The US Financial Crimes Enforcement Network (FinCEN) released several new FAQs this month to provide further clarity on the Corporate Transparency Act's (CTA) provisions.

Notably, FinCEN provided guidance on who is considered "primary responsible" for directing a filing, as well as what is necessary to qualify under the subsidiary exemption, among other matters.

The CTA's requirements went into effect on January 1, 2024. As we've previously detailed, reporting companies formed prior to that date will be required to file their initial reports with FinCEN no later than January 1, 2025. A reporting company created during 2024 is required to file its initial report within 90 days of its creation or registration, and one created on or after January 1, 2025, will have 30 days to file its initial report. A previously registered company will need to update its registration within 30 days of a change in its beneficial ownership or other information reported to FinCEN. For detailed overviews of the CTA, please visit our earlier posts located here, here, and here.

Company Applicants: Who is "Primarily Responsible" for Directing a Filing?

The CTA requires that reporting companies formed on or after January 1, 2024, disclose their "company applicant." An individual is a "company applicant" if (1) they directly file the company's formation or registration documents with a secretary of state or similar office or (2) if more than one person is involved in the filing, they are primary responsible for directing or controlling the filing. A maximum of two individuals can be reported as company applicants.

The FAQs clarify that the person who signs the formation document, such as an incorporator, is not necessarily a company applicant. Instead, the rule focuses on the person responsible for making decisions about the filing, including how the filing is managed, what contents to include, and when and where filing will occur.

FinCEN provides three scenarios to illustrate the rule. In two of the scenarios, an attorney or a paralegal instructed by that attorney completes a company creation document using information provided by a client and sends the document to a corporate service provider to be filed with a secretary of state. In this scenario, the attorney will one of the company applicants, and the employee at the corporate service provider who directly filed the document with the secretary of state will be the other company applicant. In the third scenario, the attorney's client initiated the company creation directly with the corporate service provider — in this case, the client will be a company applicant (as will the employee at the corporate service provider who directly filed the document).

Subsidiary Exemption: Is Partial Control of a Subsidiary's Ownership Interests By an Exempt Entity Sufficient to Qualify for the Subsidiary Exemption?

The short answer is — no.

The CTA lists 23 categories of entities that are exempt from the beneficial ownership information (BOI) reporting requirements. A subsidiary of certain categories of exempt entities will also be exempt if the subsidiary is *controlled or wholly owned*, whether directly or indirectly, by one or more of such exempt entities.

The FAQs clarify what happens when the exempt entity partially controls the subsidiary. Partial control is insufficient for an entity to fall within the subsidiary exemption — a subsidiary's ownership interests must be *fully, 100% owned or controlled* by the exempt entity to qualify for this exemption. Thus, control of ownership interests means that one or more exempt entities entirely control all of the ownership interests in the reporting company, in the same way that an exempt entity must wholly own all of a subsidiary's ownership interests for the exemption to apply.

Selected Additional Matters Covered by the New FAQs

- **Reporting Company Ownership Subject to Dispute**: If ownership of a reporting company is the subject of active litigation, all individuals who own or control (or claim to own or control) at least 25% of the company's interests are considered beneficial owners, and BOI must be submitted for each individual (in addition to BOI for all individuals who exercise substantial control over the company). If, after the legal dispute is solved, the reporting company has different beneficial owners from those initially reported, an updated BOI report must be filed within 30 calendar days after the litigation is resolved.
- **Third-Party Couriers or Delivery Service Employees**: Third-party courier or delivery service employees who solely deliver documents to a secretary of state are not company applicants, as long as the third-party courier, the delivery service employee, and the delivery service that employs them play no other roles in the creation or registration of the reporting company.
- **Automated Incorporation Service**: An automated incorporation service's employees are not company applicants if the service solely provides software, online tools, or generally applicable written guidance for the creation of a reporting company and its employees are not directly involved in filing creation documents.
- **No Photo on Identification Document for Religious Reasons**: If a beneficial owner's or company applicant's identification document does not include a photograph for religious reasons, the reporting company may submit an image of that identification document when submitting its report, provided that the document is otherwise an acceptable type of identification. If the individual in question obtains a FinCEN identifier, then the burden of providing the identification document to FinCEN would fall on the individual and not on the

company (which would only need to report the FinCEN identifier).

- **No Permanent Residential Address**: When a reporting company must report an individual's residential address, but no such permanent address is available, the reporting company should report the residential address that is current at the time of filing the report. If the address later changes, the reporting company must submit an updated report within 30 days from such change. The use of a FinCEN identifier by the individual will eliminate the company's need to submit an updated report, although the individual would be required to update his or her address with FinCEN directly.

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