

## **IS YOUR BUSINESS READY TO COMPLY WITH THE CORPORATE TRANSPARENCY ACT?**

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On September 29, 2022, as part of the Anti-Money Laundering Act of 2020, the U.S. Department of the Treasury's Financial Crimes Enforcement Network ("**FinCEN**") issued a final rule (the "**Final Rule**") for implementation of reporting requirements of the Corporate Transparency Act (the "**CTA**"). The implications of the CTA and its reporting requirements are far reaching and affect entities, investors, managers, officers, directors, owners and even advisors to businesses of all shapes and sizes. In this article we discuss: (i) the CTA and the Beneficial Ownership Information ("**BOI**") reporting requirements promulgated thereunder; (ii) who the CTA and BOI reporting requirements apply to; (iii) what information must be disclosed and when; (iv) penalties for non-compliance with the CTA and BOI reporting requirements; and (v) how business owners, officers and companies can prepare to comply with the CTA. **On January 1, 2024, will your company be prepared?**

### **WHAT IS THE CTA? WHAT IS BENEFICIAL OWNERSHIP INFORMATION?**

The CTA and BOI reporting requirements provide U.S. government departments and agencies, law enforcement, tax authorities and financial institutions ("**Governmental Actors**") with a valuable tool, a database of BOI, to assist enforcement efforts and prevention of financial crimes, such as money laundering or evasion of U.S. sanctions, through the use of "shell" companies.

What information will comprise Beneficial Ownership Information? The Final Rule requires a Reporting Company (defined below) to report on its own behalf: (i) information regarding the company itself; (ii) information for each beneficial owner; and (iii) information for company applicants. The information required to be disclosed for each of these subclasses is addressed below. Once the CTA and BOI become effective, Reporting Companies will need to provide the applicable BOI to FinCEN in their initial report, and additionally within thirty (30) days following any change in any of the BOI submitted to FinCEN or the Reporting Company becomes aware of inaccuracies in a previously submitted report. In order to enforce compliance and create an up-to-date comprehensive tool for Governmental Actors, the CTA imposes severe penalties for a failure to supplement/amend BOI, within any applicable thirty (30) day period.

### **DO THE CTA BOI REPORTING REQUIREMENTS APPLY TO MY BUSINESS?**

The determination as to whether the CTA BOI reporting requirements apply to you, is dependent on whether your company is defined as a Reporting Company, which involves an analysis of the Final Rule. The Final Rule provides that the term Reporting Company is inclusive of both "domestic reporting compan[ies]" and "foreign reporting compan[ies]." *Pursuant to the Final Rule, a "domestic reporting company" is defined as a "corporation, limited liability company*

(LLC), or any entity created by the filing of a document with the secretary of state or any similar office under the law of a state or Indian Tribe.” Alternatively, a “foreign reporting company” is defined as a “corporation, LLC, or other entity formed under the law of a foreign country that is registered to do business in any state or tribal jurisdiction by the filing of a document with a secretary of state or similar office” (domestic reporting companies and foreign reporting companies hereinafter referred to individually as a “**Reporting Company**”).

The catch-all language, “filing of a document with a secretary of state or any similar office,” in both definitions is meant to capture other entity types such as most limited partnerships, limited liability partnerships, limited liability limited partnerships, and business trusts, thus triggering a BOI reporting requirement for these entity types as well. However, to the extent such entities do not require a filing with a secretary of state or similar office, they would not meet the definition of a Reporting Company. Pursuant to the Final Rule, there are twenty-three (23) express exemptions from the definition of Reporting Company, including those for banks, large operating companies, companies with more than 20 U.S. based full time employees, and more. Almost all of the exemptions related to industries, businesses or entities types that are already regulated by another arm of the Federal Government.

## **WHAT INFORMATION NEEDS TO BE DISCLOSED AND WHEN?**

BOI reports for a Reporting Company will be filed via a government controlled secure online filing system, similar to systems currently utilized by the IRS and FINRA. The BOI reports will require: (i) disclosure of certain information regarding the Reporting Company itself; (ii) disclosure of certain information for each “beneficial owners” of the Reporting Company; and (iii) in the case of a Reporting Company formed or registered after January 1, 2024, disclosure of certain information for each of a Reporting Company’s “company applicants.” The information required to be submitted in the initial filing of a Reporting Company includes: (a) The full legal name of the Reporting Company; (b) any trade name or DBA of the Reporting Company; (c) a complete current address consisting of: (1) in the case of a Reporting Company with a principal place of business in the United States, the street address of such principal place of business; (2) In all other cases, the street address of the primary location in the United States where the Reporting Company conducts business; (d) the jurisdiction of formation of the Reporting Company; (e) for a foreign Reporting Company, the State or Tribal jurisdiction where such company first registers; and (f) the IRS Taxpayer Identification Number (TIN), (including an Employer Identification Number (EIN)) of the Reporting Company. The initial report of the Reporting Company also must include the information for all “company applicants” and “beneficial owners.”

How is the determination of “beneficial owner” status made? Pursuant to the Final Rules, “any individual who, directly or indirectly, either (1) exercises substantial control over a Reporting Company, or (2) owns or controls at least twenty-five (25) percent of the ownership interests of a Reporting Company, is a “beneficial owner.” The troubling part of this definition lies with the language “substantial control.” The language in the Final Rules was intentionally bolstered to ensure information is captured and reported by individuals who direct the actions of a Reporting Company but do not own a twenty-five percent (25%) ownership interest, thereby capturing the leadership and control rank and file of the Reporting Company. Under the Final Rules:

An individual exercises substantial control over a reporting company if the individual: (A) Serves as a senior officer of the reporting company; (B) Has

authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body); (C) Directs, determines, or has substantial influence over important decisions made by the reporting company, including decisions regarding: (1) The nature, scope, and attributes of the business of the reporting company, including the sale, lease, mortgage, or other transfer of any principal assets of the reporting company; (2) The reorganization, dissolution, or merger of the reporting company; (3) Major expenditures or investments, issuances of any equity, incurrence of any significant debt, or approval of the operating budget of a reporting company; (4) The selection or termination of business lines or ventures, or geographic focus, of the reporting company; (5) Compensation schemes and incentive programs for senior officers; (6) The entry into or termination, or the fulfillment or non-fulfillment, of significant contract; (7) Amendments of any substantial governance documents of the reporting company, including the articles of incorporation or similar formation documents, bylaws, and significant policies or procedures; or (D) Has any other form of substantial control over the reporting company.<sup>1</sup>

The broad stroke language of the criteria above, captures many individuals in a company, creating a burdensome ongoing task for companies who are not covered by a reporting exemption.

What criteria dictates whether an individual or organization is considered a “company applicant?” Pursuant to the Final Rules, a Reporting Company formed or registered after January 1, 2024, must report certain information for each “company applicant.” The Final Rules clarified the identity of “company applicants,” explaining a company applicant is the individual who directly files the document that first registers the Reporting Company as well as the individual who is primarily responsible for directing or controlling such filing if more than one individual is involved in the filing of the document. This would implicate both the person who gave the instruction to form the company, as well as the person who actually inputted the information, even if they only serve a clerical role.

The Final Rules require that a Reporting Company must submit the following information to FinCEN for each “beneficial owner” and “company applicant” (as applicable):

(A) The full legal name of the individual; (B) the date of birth of the individual; (C) A complete current address consisting of: (1) In the case of a company applicant who forms or registers an entity in the course of such company applicant’s business, the street address of such business; or (2) In any other case, the individual’s residential street address; (D) A unique identifying number and the issuing jurisdiction from one of the following documents: (1) A non-expired passport issued to the individual by the United States government; (2) A non-expired identification document issued to the individual by a State, local government, or Indian Tribe for the purpose of identifying the individual; (3) A non-expired driver’s license issued to the individual by a State; or (4) A non-expired passport issued by a foreign government to the individual, if the individual does not possess

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<sup>1</sup> 31 CFR § 1010.380(d)(1)(i).

any of the documents described [above]; and (E) An image of the document from which the unique identifying number [above] was obtained.<sup>2</sup>

With all of the information that needs to be disclosed, the question of when does a Reporting Company need to submit, remains. The effective date of the Final Rules is January 1, 2024 (the “**Effective Date**”). As such, a Reporting Company in existence prior to the Effective Date will have until January 1, 2025 to file their initial report, while a Reporting Company created on or after the Effective Date must file their initial report within thirty (30) calendar day of whichever is earlier in time: (i) the date on which it receives actual notice that its creation has become effective; or (ii) the date on which a secretary of state or similar office first provides public notice that the Reporting Company has been created. As mentioned above, pursuant to the Final Rules, a Reporting Company must file an amendment within thirty (30) days after any change occurs to “required information previously submitted to FinCEN concerning a Reporting Company or its beneficial owners.” The Final Rules deviated from the initial proposed rules, which required updating of information for “company applicants,” to no longer require amendments to reflect changes for a “company applicant.”

### **PENALTIES FOR NON-COMPLIANCE**

Due the urgent need for Governmental Actors to receive this information to assist in compiling information for creation and upkeep of their comprehensive database, the CTA provides for steep penalties for non-compliance. Currently, the failure to timely provide complete and/or updated information, or willfully providing false or fraudulent BOI can result in civil penalties of \$500.00 a day up to \$10,000.00 and criminal penalties up to two (2) years in prison.

### **HOW CAN BUSINESS OWNERS AND OFFICERS BE PROACTIVE?**

Business owners and officers of a Reporting Company should utilize this time to get in front of the BOI reporting requirements and determine how they are going to manage their reporting requirements. Some things to consider, include: (1) appointing an individual in your organization or hiring legal counsel to assist in identifying beneficial owners, compilation of BOI information, submission of initial reports, and ongoing CTA compliance; (2) amending governing documents (bylaws, operating agreements, etc.) to include provisions regarding the CTA and member/shareholder’s responsibility to timely provide updated information, when a change to their BOI occurs; (3) rollout various additional protections for the company in case of instances of non-compliance; and (4) inquire into databases and other ways to track your members/shareholders and other “beneficial owners” BOI.

To learn more about how to prepare your business for January 1, 2024, please reach out to one of Fairfield and Woods, P.C.’s corporate attorneys.

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<sup>2</sup> 31 CFR § 1010.380(b)(1)(ii).