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# Roll Call: Report or Face the Consequences

## What the Corporate Transparency Act Means for Your Business

By Michael B. Crosby, III, and Dalton B. Swindell

The Corporate Transparency Act (CTA) will lift the veil over previously undisclosed ownership information of business entities registered to do business in the United States as part of a congressional effort to curb illicit activity conducted through these corporate structures. Set to become effective January 1, 2024, the CTA will require the disclosure of personal information of those individuals considered “beneficial owners” of an entity, that is, individuals who either directly or indirectly 1) exercise substantial control over the entity or 2) hold at least 25% of a company’s equity interest.<sup>1</sup> With millions of small businesses currently operating in the United States and millions more created yearly, the CTA will have a significant impact on how companies—and those who help create them—operate moving forward. Here is what you need to know.

According to the Financial Crimes Enforcement Network (FinCEN), the disclosure of the Beneficial Ownership Information (BOI) of entities registered to do business in the United States will provide law enforcement with the ability to better protect U.S. national security interests and aid national intelligence agency efforts to combat illicit activity such as money laundering, tax fraud and the financing of terrorism.<sup>2</sup> Current reporting requirements leave the door open for bad actors to conduct crimes through legally formed businesses in the United States and across the globe. Oversights in the current system’s reporting framework allow criminals to maintain anonymity through the formation of shell companies, exploiting the system’s pitfalls by concealing the identities of those who hold ownership interests. The CTA will reduce, if not eliminate, many of these loopholes, promoting honesty and fair play amongst businesses operating in the U.S. and abroad while providing FinCEN with the information necessary to track down and prevent criminal activity.

BOI will be stored in BOSS (the Beneficial Ownership Secure System)—the system currently being developed by FinCEN to receive, store, and maintain BOI.<sup>3</sup> BOSS is a secure, nonpublic database maintained by the Secretary of the Treasury and held to the highest level of security protection afforded under the Federal Information Security Management Act.<sup>4</sup> FinCEN will only disclose BOI upon



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request under special circumstances such as (i) a federal, state, or local criminal or civil investigation, (ii) a request made by a foreign government in accordance with a treaty or agreement, (iii) an official request made by law enforcement or judicial authorities of a foreign country, (iv) a financial institution subject to due diligence requirements with consent of the reporting company, or (v) a request by an authorized federal regulatory authority.<sup>5</sup>

### What is BOI?

FinCEN requires entities to submit four pieces of Beneficial Ownership Information of individuals who either directly or indirectly 1) exercise substantial control over the entity or 2) hold at least 25% of a company's equity interest.<sup>6</sup> It's important to note how many ways an individual could be considered to "exercise substantial control" over an entity under the terms of the CTA—an individual may directly or indirectly exercise substantial control over a reporting company through: (a) board representation; (b) ownership or control of a majority of the voting power or voting rights of the reporting company; (c) rights associated with any financing arrangement or interest in the company; (d) control over one or more intermediary entities that separately or collectively exercise substantial control over a reporting company; (e) arrangements or financial or business relationships, whether formal or informal, with other individuals or entities acting as nominees; (f) any other contract, arrangement, understanding, relationship, or otherwise.<sup>7</sup> The CTA expounds on the distinct categories listed above in detail. A full reading of the CTA is recommended in order to understand how an individual may be exercising substantial control over an entity under the Act.

To comply with the CTA, the following four pieces of BOI must be submitted:<sup>8</sup>

- 1) the individual's full legal name
- 2) date of birth
- 3) current residential or business street address
- 4) a FinCEN identifier (issued to the individual upon request)

or a unique identifying number from an acceptable form of identification, such as a passport.

The submission of the legal name, date of birth, and address requirement of beneficial owners is standard and should be readily available. With respect to an individual, FinCEN identifier numbers may be acquired upon request or obtained through an acceptable identification document, such as a nonexpired passport issued by the United States or a nonexpired identification document issued by a state, local government, or Indian tribe to the individual for the purpose of identification of that individual.<sup>9</sup>

### Who must report, and when?

The CTA requires each beneficial owner of an entity and any individual who files an application to form a domestic entity to report BOI, including those individuals who register a foreign entity to conduct business in the United States.<sup>10</sup> These entities are referred to as "reporting companies."<sup>11</sup> The following bullet points describe when reporting companies are required to report BOI to comply with the CTA:<sup>12</sup>

- Entities in existence *before* the January 1, 2024, effective date shall submit BOI **no later than 1 year after** the effective date (January 1, 2025).
- Entities created *after* the January 1, 2024, effective date shall submit BOI **no later than 30 days after** the earlier of: 1) the date on which the reporting company receives actual notice that its creation (or registration) has become effective; or 2) a secretary of state or similar office first provides public notice, such as through a publicly accessible registry, that the domestic reporting company has been created or the foreign reporting company has been registered.
- Any changes in an entity's beneficial ownership structure require submission of updated BOI to FinCEN **no later than 30 days after** the date upon which the change occurred.

### What entities are exempt from reporting BOI?

Twenty-three different entities are exempt from the reporting requirements set forth by the CTA.<sup>13</sup> Many of these entities are exempt because of strict BOI



reporting requirements already in place, and the CTA intends to avoid duplicate filings and reporting overlaps through these exemptions. The exempt entities include but are not limited to banks, large operating companies, insurance producers, tax exempt entities, investment companies and public accounting firms.<sup>14</sup>

### Penalties for reporting violations

Failing to meet BOI reporting requirements set forth in the CTA may result in civil and criminal penalties. If an individual, reporting company, or other entity willfully fails to report or provides false ownership information, the penalty may be a fine of \$500.00 per day that the information goes unreported or uncured, up to \$10,000.00, and imprisonment of up to two years—penalty guidelines set forth in 31 U.S.C. § 5336(h)(1) and adopted by FinCEN.<sup>15</sup>

### How will the CTA impact attorneys?

With millions of small businesses currently operating in the United States and millions more created yearly, the CTA will have a significant impact on how attorneys approach entity formation for their clients moving forward. Depending on their involvement in the entity formation process, attorneys may be required to report their own personal information as well. Aside from reporting BOI, the CTA requires every reporting company to report information about its company applicants to FinCEN as well. A “company applicant” is defined as an individual who files (or is directly responsible for directing or controlling such filing) an application to form an entity or registers an entity to do business—something attorneys commonly do for clients.<sup>16</sup>

The information required to be reported for company applicants is identical to the information required of beneficial owners—the full legal name, date of birth, and current address of the individual. Attorneys who commonly function as company applicants for their clients may benefit from the use of a FinCEN identifier (issued by FinCEN upon request) in place of the standard identifying information.<sup>17</sup> Attorneys should consider this expanded

reporting requirement when outlining the nature of their engagement with clients. Some attorneys may approach a client’s entity formation process from a purely advisory standpoint, while others may take a more hands-on approach. Attorneys must educate themselves on how the CTA distinguishes these roles and the impact it may have on their own obligations. Keep in mind reporting companies created or registered before the effective date of the regulation do not need to report information about their company applicants.<sup>18</sup>

Not only will attorneys need to reassess which role they will play when aiding a client in the formation of an entity, they will also need to properly advise and educate the client on the details associated with that role. Some clients may be sophisticated enough to manage the filing and reporting themselves, while others may need an attorney to do the heavy lifting. In addition to the initial reporting requirements, the CTA requires updates whenever the beneficial ownership of a company changes, thus placing the obligation upon someone to report that updated information within 30 days to FinCEN.<sup>19</sup> That “someone” may be an attorney if he or she assumed the role of company applicant during formation, or it may be an individual associated with the entity itself—a manager, member, or registered agent.<sup>20</sup> Regardless, those details must be discussed at length with clients to ensure the client fully understands the scope of the attorney’s role and how that may impact their own reporting obligations in the future.

### Conclusion

Business entities play an incalculable role in the economies of the world. While the CTA will protect the integrity of the system, it will require adjustments and enhanced obligations on entities and those helping create them. Companies and attorneys should be assessing whether they will be required to report to FinCEN and begin compiling all relevant documents in preparation for the reporting deadline. Attorneys would do well to familiarize themselves with the CTA beyond the contents of this article so that they can

better assist clients with entity formation in the future, ensuring the requirements of the CTA are conducted in a way that promotes honesty and fair play amongst businesses in the United States and abroad.

### Endnotes:

1. Beneficial Ownership Information Reporting Requirements, 87 FED. REG. 59,498, 59,507 (Sept. 30, 2022).
2. *Id.* at 59,498.
3. *Id.* at 59,508.
4. *Id.*
5. Beneficial Ownership Information Reporting Requirements, 87 FED. REG. 59,498, 59,507 (Sept. 30, 2022).
6. *Id.*
7. *Id.* at 59,594.
8. *Id.* at 59,507.
9. Beneficial Ownership Information Reporting Requirements, 87 FED. REG. 59,498, 59,507 (Sept. 30, 2022).
10. *Id.*
11. *Id.* at 59,593.
12. *Id.*
13. Beneficial Ownership Information Reporting Requirements, 87 FED. REG. 59,498, 59,539 (Sept. 30, 2022).
14. Other exempt entities include: Depository Institution Holding Companies; State-Licensed Insurance Companies; State-Regulated Insurance Companies; Entity Assisting a Tax-Exempt Entity; Subsidiaries; Pooled Investment Vehicles; Investment Adviser; Venture Capital Fund Adviser; Inactive Entities; Securities Issuers; Domestic Governmental Authorities; Registered Money Transmitting Business; Broker-Dealers; Security Exchange Clearing Agents; Commodity Exchange Act; Registered Entities; Public Utilities; Financial Market Utilities; Other Exchange Act Registered Entities.
15. 31 U.S.C. § 5336(h)(1).
16. Beneficial Ownership Information Reporting Requirements, 87 FED. REG. 59,498, 59,536 (Sept. 30, 2022).
17. *Id.* at 59,507.
18. *Id.* at 59,509.
19. *Id.*
20. Beneficial Ownership Information Reporting Requirements, 87 FED. REG. 59,498, 59,536. ■