

BY KENT L. SCHLIENGER

Corporate Transparency Act:

Prepare for Compliance Now



Because of the Corporate Transparency Act's comprehensive and pervasive scope, entities and their attorneys must quickly learn, adjust, and adapt to its requirements.

On Jan. 1, 2024, most entities and closely held businesses organized or operated in the United States will become subject to the reporting obligations of the Corporate Transparency Act¹ (hereinafter the Act) and the federal regulations promulgated under it (hereinafter the Regulations).² At its core, the Act requires an entity subject to its requirements, called a “reporting company,” to report certain identifying information about itself, about the individuals who filed its U.S. entity formation or registration documents, and about the individuals who directly or indirectly have substantial ownership of or control over it.

Congress passed the Act in 2021³ with the stated purpose of providing federal standards “for the collection of beneficial ownership information for corporations, limited liability companies, [and] other similar entities” to protect U.S. national security and interstate and foreign commerce; to better enable the fight against money laundering, terrorism financing, and other illicit activities; and to bring the United States in step with worldwide standards for entity data collection to aid in that fight.⁴

Entities Targeted by the Corporate Transparency Act

The focus of the Act and its codification in the U.S. Code⁵ and the Regulations (referred in this article collectively as the CTA) is on the entity structures that so-called bad actors have historically used to hide their identities and launder the profits of illicit activities. The information collected under the reporting requirements of the CTA will be available in a central database to federal law enforcement and national security and intelligence agencies and, upon authorization from a

court of competent jurisdiction, to law enforcement agencies of the individual U.S. states and the District of Columbia, Native American tribal authorities, and U.S. territories, possessions, and commonwealths for investigatory purposes. The Act also provides that the database information can be made available for national security investigations to law enforcement agencies outside the United States, to financial institutions for information about their customers if consented to by those customers, and to the U.S. Department of Treasury for tax administration purposes.⁶

Unless otherwise specifically exempt from the requirements of the CTA, reporting companies are 1) U.S. domestic corporations, limited liability companies (LLCs), and other entities created by the filing of formation documents with a secretary of state or similar office under the laws of any of the various states, the District of Columbia, the territories, commonwealths, and possessions of the United States, and the Native American tribal authorities that broadly constitute the United States; and 2) non-U.S. entities registered to do business in any state or other U.S. jurisdiction by the filing of documents with the secretary of state or similar office of that jurisdiction.⁷

Among those not included as reporting companies because they are not created by the filing of a formation document are sole proprietorships, general partnerships, joint ventures, and trusts (other than business trusts created by a formation filing in a state office, which may exist in other states, but not in Wisconsin). Likewise, the registration with a state entity formation office of a characteristic or status of an entity does not bring the entity within the scope of the “reporting company” definition.⁸ Examples of filings that do not cause an entity to be a reporting company

SUMMARY

On Jan. 1, 2024, the federal Corporate Transparency Act will take effect. The Act requires certain entities to report identifying information, the individuals who filed their formation or registration documents, and the individuals who directly or indirectly have substantial ownership of or control.

This article provides an overview of the types of entities to which the Act does and does not apply; the Act's reporting requirements, including when reports must be filed and which information must be included; potential difficulties in identifying beneficial owners and company applicants; and penalties for violation of the Act.

One consequence of the Act's reporting requirements will be that a newly organized entity's ownership and governance issues must be dealt with immediately, rather than, as sometimes has occurred, be deferred for months and then resolved by documents retroactively dated to the entity's formation.

would be a sole proprietorship registering a DBA (doing business as) or trade name with a secretary of state office, or in Wisconsin, the filing of a qualification statement by a Wis. Stat. chapter 178 partnership for limited liability status pursuant to Wis. Stat. section 178.0901. Similarly, a tax status does not affect whether an entity is a reporting company: for example, a single-member LLC that is disregarded for federal tax purposes is nonetheless a reporting company under the CTA unless an exemption from the reporting requirements of the CTA would otherwise apply.

It is estimated that more than 30 million entities will become reporting companies immediately upon the Jan.

Identifying the beneficial owners of a reporting company will in some cases be a challenging task best undertaken by the entity's attorneys.

1, 2024, implementation of the CTA.⁹ Included among them will be most small-business enterprises, commercial and residential real property holding companies, vacation property LLCs, start-up and entrepreneurial companies, syndicated-development projects, and unregistered investment vehicles.

Entities that fall within one of 23 exempt categories will not be “reporting companies” under the CTA as long as the entities meet the requirements of the specific exempt category: “[public company] securities issuers, domestic governmental authorities, banks, domestic



Kent L. Schlienger, U.W. 1985, practices business and corporate law with Neider & Boucher S.C., Madison. He is a member of the State Bar of Wisconsin's Business Law and Taxation Law sections. Access the digital article at www.wisbar.org/wl.

kschlienger@neiderboucher.com

credit unions, depository institution holding companies, money transmitting businesses, brokers or dealers in securities, securities exchange or clearing agencies, other entities registered pursuant to the Securities Exchange Act of 1934, registered investment companies and advisers, venture capital fund advisers, insurance companies, state licensed insurance producers, entities registered pursuant to the Commodity Exchange Act, [certified public] accounting firms, public utilities, financial market utilities, pooled investment vehicles, tax exempt entities, entities assisting tax exempt entities, large operating companies, subsidiaries of certain exempt entities, and inactive businesses.”¹⁰ Except for the

last three categories, the entities exempt from the CTA are themselves generally subject to public scrutiny or reporting obligations outside the CTA.

The one exempt category that merits individual attention in any discussion of entities subject to the CTA is that of the “large operating company.” Even some large, closely held businesses might find it difficult to satisfy all three requirements of this exemption, which are that it has a physical operating presence in the United States, has at least \$5 million in annual U.S.-sourced gross revenues or receipts, and employs at least 20 full-time employees (based on common-law employment principles and without aggregating part-time employees as full-time equivalents).¹¹ The exemption for “inactive businesses” is misleading in that it is narrowly focused on entities that existed on or before January 1, 2020, and that have no business operations and de minimis assets.¹² Treatment of entities formed after January 1, 2020, that are no longer active either when the CTA is implemented or after that date are not addressed and do not fall

within the “inactive business” exemption category, which leaves uncertainty as to their reporting obligation if they are, or when they become, inactive.

General Reporting Requirements

The CTA requires each reporting company to make initial and updated online information reports to a database called the Beneficial Ownership Secured System (BOSS).¹³ The BOSS is maintained by the Financial Crimes Enforcement Network (FinCEN), a bureau of the U.S. Department of Treasury, via a reporting portal on the FinCEN website. FinCEN is the agency legislatively empowered to regulate, administer, and enforce the CTA and maintain and oversee security and permitted disclosure of the information collected in the BOSS.

Each reporting company is required, within 30 days after its formation (if a U.S. domestic entity) or its registration to do business in the United States (if a foreign entity), to file an initial report¹⁴ providing certain identifying information about itself¹⁵ and about 1) each individual, called a “company applicant,” responsible for filing the reporting company’s formation or registration documents; and 2) each individual, called a “beneficial owner,” directly or indirectly having 25% or more ownership of the reporting company’s interests or directly or indirectly exercising substantial control over the entity.¹⁶

Each reporting company is additionally required to file an updated report if there is a change in its status that would make it exempt from the CTA, if the reporting company has any new beneficial owners (in which case the reporting company would include the information of the new beneficial owner), if any individual is no longer a beneficial owner, and if there is any change in any of the information that was previously reported about the reporting company or its beneficial owners. An updated report is required to be filed within 30 days after the date of a change.¹⁷

A one-time exception to the initial

reporting requirements applies to reporting companies in existence before Jan. 1, 2024. These entities have until Jan. 1, 2025, to file an initial report and they do not identify in their initial report their company applicant(s).¹⁸ The information required to be reported under the CTA for both beneficial owners and company applicants is referred to as “beneficial ownership information” (and sometimes as “BOI”).¹⁹

Identification of Beneficial Owners Might Be Difficult

Identifying the beneficial owners of a reporting company will in some cases be a challenging task best undertaken by the entity’s attorneys. Although only individuals can be beneficial owners, the CTA’s definition of the term has a broad sweep due to its many widely inclusive and subjective parameters.

The CTA establishes numerous factors for determining individuals who are beneficial owners because they hold 25% or more ownership of a reporting company, including the following:

- 1) Ownership can be direct or indirect and through control or ownership of one or more intermediary entities owning interests in a reporting company.
- 2) Ownership interests in a reporting company include contingent interests, such as options, warrants, and convertible securities, and percentage ownership is determined on a fully diluted basis that includes all ownership interests in the reporting company.
- 3) An individual’s ownership can be through nominees, custodians, agents, and intermediaries.
- 4) Under certain trust arrangements, both a trustee and the beneficiaries could be “owners” of the same interest in a reporting company held by a trust.

Likewise, the CTA identifies numerous ways in which an individual is a beneficial owner through their exercise of substantial control of a reporting company, including the following:

- 1) The individual is or exercises the authority of the president, CEO, chief

financial officer, chief operating officer, or general counsel (or equivalent officer) of the reporting company.

- 2) The individual has the power to appoint or remove any senior officer or majority of a governing board.

- 3) The individual can direct, determine, or influence major decisions of the reporting company, whether directly or indirectly, including through one or more intermediary entities the individual controls, through majority voting control, or through another arrangement that provides the individual with the ability to exercise substantial control.²⁰ FinCEN has clarified that an attorney acting as outside legal counsel is not a beneficial owner by providing legal services in that capacity.

Anyone considering the certainty provided by the CTA for identifying beneficial owners likely will concede that the guidelines are often ambiguous and frequently without objective standards.

For entities with simple ownership and governance, the task of identifying and reporting their beneficial owners will nonetheless be straightforward. But for entities with complex governance structures and investor protections, or that issue diverse types and classes of equity securities, or whose owners hold interests through interrelated ownership vehicles and arrangements, the determination of beneficial owners and the reporting and updating of BOI will present an analytical problem that needs greater guidance from FinCEN.

Identification of Company Applicants

Identifying the company applicants of a reporting company will be less challenging and more objective than identifying beneficial owners, and in many cases, attorneys and their staff will be the company applicants for their entity clients. FinCEN has clarified that up to a maximum of two individuals are company



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applicants²¹ – 1) the individual who directly files the document that creates a domestic reporting company or that first registers a foreign reporting company; and, if a different person, 2) the individual who is primarily responsible for directing or controlling that filing.²²

Among examples given by FinCEN of two individuals who are each a company applicant is the scenario of an attorney who oversees the preparation and filing of an entity's formation documents and the paralegal who directly files those formation documents with the state office.²³ FinCEN has also clarified that individuals indirectly involved in the filing are not company applicants, and individuals working in state filing offices who process formation documents are not the company applicants of the documents that they process.²⁴

Types of Information Required in Initial and Updated Reports

The information that a reporting company must report about itself in its initial report under the CTA consists of the following:

1) The reporting company's full legal name and, if applicable, all of its trade names and DBA names;

2) The street address of the reporting company's principal place of business if that location is in the United States or the street address of the primary place of business in the United States if the principal office is outside the United States;

3) The U.S. jurisdiction or foreign jurisdiction of the reporting company's formation and for foreign reporting companies, the U.S. jurisdiction in which it first registers; and

4) An IRS taxpayer identification number (TIN) or for foreign reporting companies that have not been issued a TIN, a foreign taxpayer identification number and the name of that issuing jurisdiction.²⁵

The beneficial ownership information that a reporting company must report for its beneficial owners and its company applicants is substantially the same information for all these individuals, with a slight nuance regarding the address for certain company applicants. The individual BOI consists of the following:

1) The individual's full legal name, date of birth, and complete current residential street address (except that for any company applicant, such as a lawyer or paralegal, who forms or registers entities in the course of their business,

the business address should be reported instead); and

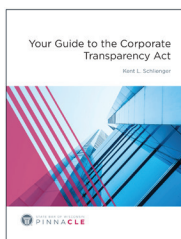
2) The issuing jurisdiction, identifying number, and an uploaded image of a nonexpired U.S. passport, a driver's license issued by a U.S. state, the District of Columbia, or any U.S. commonwealth, territory, or possession, or an ID issued by any of those jurisdictions or by a local government or Native American tribe, or if an individual does not have any such identifying documents, a nonexpired foreign passport.²⁶

It is the obligation of each reporting company to obtain from its company applicants and beneficial owners their current BOI required for the reporting company's initial and updated reports to FinCEN. In most instances, the reporting company's interests will be aligned with the interests of those individuals from whom the company will need to obtain beneficial ownership information. However, because of the nature of the personal information required and the always present potential for strained relationships between a reporting company and some of its interest holders, inevitably there will be instances when beneficial owners might be unwilling to voluntarily provide their BOI. In anticipation of these eventualities, reporting companies should have provisions in their governance documents that compel the holders of ownership interests (as broadly defined by the CTA) to cooperate in providing any needed BOI of the holders of those interests, and if the holders are entities or intermediaries, the BOI of the individuals who own, direct, or control the interest holders. Attorneys who represent entity clients should at a minimum supplement their template shareholder agreements, operating agreements, and other relevant governance documents to establish affirmative duties of the clients' interest holders to provide and update the BOI of the interest holders and their affiliates whenever entity clients are required to report or update that BOI under the CTA.

Your Guide to the Corporate Transparency Act

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Confidentiality of Information. One CTA feature that might ease some of the angst of beneficial owners and company applicants concerning providing their BOI is the FinCEN identifier.²⁷ Reporting companies and individuals can apply for and obtain a FinCEN identifier, a unique identifying number that can be reported to FinCEN in any required information report in lieu of the identifying information of the holder of the FinCEN identifier.²⁸

To obtain a FinCEN identifier, an applicant must report to FinCEN the same identifying information that would be required in an initial report made by a reporting company, and after the FinCEN identifier is issued, the holder of the identifier must then continue to update the holder's reported information in the BOSS system within 30 days after any changes.²⁹ The FinCEN identifier allows individual company applicants and beneficial owners to maintain the confidentiality of their identifying information from reporting companies by allowing them to provide the FinCEN identifier to a reporting company as an alternative to providing their BOI. This does, however, place the burden on the holder of the FinCEN identifier to update and keep their BOI current in the BOSS database.

Enforcement

Violations of the CTA can result in a

civil penalty of \$500 per day for each continuing day of violation and a criminal penalty consisting of a fine of not more than \$10,000, imprisonment for not more than two years, or both.³⁰ Any individual, reporting company, or other entity that willfully provides or attempts to provide to FinCEN false or fraudulent information required to be reported or willfully fails to report to FinCEN complete or updated information required to be reported under the CTA is in violation of the information reporting obligations under the Act.³¹

The CTA grants no exceptions or grace period for a reporting company's inability to obtain or file the required information timely and accurately, other than a safe harbor for correcting inaccurate information within 90 days after its initial filing (not the date the inaccuracy becomes known to the reporting company), if the initial filing of the inaccurate information was not willful.³² How the violations of the CTA's strict reporting requirements will be enforced is one of the many unknowns that surround the new regime.

Conclusion

The comprehensive and pervasive scope of the CTA will require entities and their attorneys to quickly learn, adjust, and adapt to its requirements. No longer can a newly organized entity's ownership

and governance issues be deferred for months and then resolved by documents retroactively dated to its formation. Key officer resignations, removals, and appointments and significant ownership changes must occur in real time. Entities must become familiar immediately with some of their owners' and investors' most sensitive personal information and monitor any changes to it.

With its often ambiguous and subjective language, lack of history and precedent, and paucity of administrative guidance, the CTA is, on the eve of its implementation, poised as an intimidating trap for the unaware and unwary and an anxiety-producing compliance exercise for the diligent. If the best intentions of the CTA are to be realized, FinCEN will need to quickly address the legitimate questions and concerns that will inevitably be raised by reporting companies and their attorneys as they attempt to navigate this new and uncharted regulatory territory. Without that response, the CTA will almost certainly become a nightmare for many involved. **WL**

ENDNOTES

¹31 U.S.C. § 5336.

²31 C.F.R. § 1010.380; 87 Fed. Reg. 59,498 (Sept. 30, 2022).

³William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, div. F, tit. LXIV, §§ 6401-6403, 134 Stat. 3488, 4604-25 (2021).

⁴CTA, § 6402, 134 Stat. 4604-05.

⁵31 U.S.C. § 5336.

⁶31 U.S.C. § 5336(c)(2)(B)(i)-(iv).

⁷31 C.F.R. § 1010.380(c)(1).

⁸87 Fed. Reg. 59,498, 59,537.

⁹*Id.* at 59,500.

¹⁰*Id.* at 59,539 n.186; see also 31 C.F.R. § 1010.380(c)(2)(i)-(xxiii).

¹¹31 C.F.R. § 1010.380(c)(2)(xxi).

¹²31 C.F.R. § 1010.380(c)(2)(xxiii).

¹³FinCEN, *Beneficial Ownership Information Reporting Rule Fact Sheet* (Sept. 29, 2022), <https://www.fincen.gov/beneficial-ownership-information-reporting-rule-fact-sheet>.

¹⁴31 C.F.R. § 1010.380(a)(1).

¹⁵31 C.F.R. § 1010.380(b)(1)(i).

¹⁶31 C.F.R. § 1010.380(b)(1)(ii).

¹⁷31 C.F.R. § 1010.380(b)(3).

¹⁸31 C.F.R. § 1010.380(a)(1)(iii).

¹⁹FinCEN, *Beneficial Ownership Information Frequently Asked Questions* (issued Mar. 24, 2023; updated Aug. 3, 2023), https://www.fincen.gov/sites/default/files/shared/BOI_FAQs_FINAL_508.pdf.

²⁰31 C.F.R. § 1010.380(d).

²¹87 Fed. Reg. at 59,536.

²²31 C.F.R. § 1010.380(e).

²³87 Fed. Reg. 59,498, 59,536.

²⁴*Id.*

²⁵31 C.F.R. § 1010.380(b)(1)(i).

²⁶31 C.F.R. § 1010.380(b)(1)(ii).

²⁷31 C.F.R. § 1010.380(b)(4).

²⁸31 C.F.R. § 1010.380(b)(4)(ii).

²⁹31 C.F.R. § 1010.380(b)(4)(iii).

³⁰31 U.S.C. § 5336(h)(3)(A).

³¹31 C.F.R. § 1010.380(g).

³²31 C.F.R. § 1010.380(a)(3); 31 C.F.R. § 1010.380(a)(4)(iii)(A)(2)).

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