

THE CORPORATE TRANSPARENCY ACT: A MUST-DO LIST FOR THE NEW REGULATIONS

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By now, lawyers with business and corporate clients should know that the Corporate Transparency Act (CTA) took effect on January 1, 2024. Non-exempt reporting companies formed on or after that date will need to file an initial beneficial ownership information (BOI) report within 90 calendar days after the date of formation.¹ Non-exempt reporting companies existing prior to January 1, 2024 will have until January 1, 2025 to file their initial BOI reports. This deadline received little fanfare or attention in the media, however, and many lawyers (and law firms) have not yet adopted the procedures they need to prepare themselves and their clients for the sea change in practice that will follow the passage of this deadline.

THE REGULATIONS SO FAR

Congress adopted the CTA as part of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021.² The CTA includes some of the most significant changes to the Bank Secrecy Act (BSA) and US anti-money laundering (AML) laws in recent years. Those changes, in turn, will result in extensive changes to US corporate governance.

The CTA requires companies that are formed or registered to do business in the US to file a BOI report with the Financial Crimes Enforcement Network of the US Treasury Department (FinCEN). FinCEN will assemble the BOI reports into a massive database of BOI data. FinCEN has published regulations (the Reporting Rule) that govern the data required in BOI reports and the timing of those reports.³

The law requires FinCEN to use that database to fight money laundering in cooperation with other US law enforcement agencies. Although the FinCEN database will not be publicly available, FinCEN will make the database accessible to US law enforcement agencies, US financial institutions, and some non-US law enforcement agencies pursuant a proposed regulation that would govern access.⁴

The form of BOI report that reporting companies are to submit to FinCEN was not included in the Reporting Rule and an earlier proposed form of BOI report drew extensive criticism from both industry and Congressional advocates. Consequently, in September 2023, FinCEN published a proposed form of

BOI Report (Proposed BOI Report Template) in a notice that was open for comment until October 30, 2023.⁵ Importantly, the Proposed BOI Report Template will require every field to be completed. If an individual tries to file a BOI Report with any field left blank, FinCEN will reject the submission.

However, in its September 2023 announcement of the Proposed BOI Report Template, FinCEN stated that it would have “a potential alternative implementation” that it might adopt that “would have the same response fields that require the same information to be reported” [but would] provide “a mechanism for filers to temporarily indicate if they are unable to provide certain information for certain reasons.”⁶ FinCEN specified this “alternative implementation” would contain:

a drop-down option in the Beneficial Owner(s) section that would allow filers to specify one of a few reasons why they are temporarily unable to provide a piece of information about a beneficial owner ... Forms whose filers select a dropdown option will be accepted into the filing system but will still be considered incomplete and non-compliant filings. Forms will only be considered complete and compliant once the missing information is subsequently added, the drop-down option is removed from each field, and the form is updated. FinCEN will be seeking feedback from database users, including filers and law enforcement on these options.⁷

At the present time, practitioners cannot know if FinCEN will implement these alternatives. Prudence suggests, therefore, that practitioners should plan (and advise their clients) as if the Report Template that took effect on January 1, 2024 remains in effect.

Separately, FinCEN extended the deadline for filing an initial BOI report for entities formed on or after January 1, 2024, and before January 1, 2025, to 90 days instead of 30 (which was the deadline in the earlier version of the regulations).⁸

Practitioners will need to remain aware of the potential for changes in these requirements as time passes.

SUMMARY OF CTA REQUIREMENTS

The CTA, as implemented through the Reporting Rule, requires any domestic reporting company created on or after January 1, 2024 to file a report within 90 calendar days of the earlier of the date on which it receives actual notice that its creation has become effective. Alternatively, the domestic reporting company would have to file a report within 90 calendar days of the date on which 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.⁹

Similarly, any entity that becomes a foreign reporting company on or after January 1, 2024 must file a report within 90 calendar days after the earlier of: (i) the date on which it receives actual notice that it has been registered to do business; or (ii) the date on which a secretary of state or similar office first provides public notice, such as through a publicly accessible registry, that the foreign reporting company has been registered to do business.¹⁰

In contrast, both domestic reporting companies created before January 1, 2024 and foreign reporting companies that became foreign reporting companies before January 1, 2024 must file an initial report not later than January 1, 2025.¹¹

Each reporting company that is not exempt must identify in its initial BOI report each of its “beneficial owners,” and provide five pieces of personally identifiable information about each of those beneficial owners.¹² In addition, the initial BOI report must disclose the reporting company’s full legal name, any trade name or “doing business as” name, a complete current address, the state or jurisdictions of the reporting company’s formation, and the reporting company’s taxpayer identification number (TIN) including an Employer Identification Number (EIN) or, where a foreign reporting company has not been issued a TIN, a tax identification number issued by a foreign jurisdiction, and the name of that jurisdiction.¹³

For each beneficial owner of the reporting company, the reporting company must disclose in its initial report each beneficial owner’s: (i) full legal name; (ii) date of birth; (iii) residential street address; (iv) a unique identifying number (which may be a non-expired US passport, a non-expired identification document, such as a driver’s license, issued by a state, local government, or Indian tribe, or a nonexpired passport issued by a foreign government if the individual does not possess any of the other document types listed); and (v) an image file of the document that provides the unique identifying number.¹⁴

In addition, for reporting companies that are formed (or registered to do business in the US) after January 1, 2024, the initial BOI report must also include these same five pieces of information for the reporting company’s “company applicant.” The Reporting Rule defines “company applicant” as: (i) with respect to a domestic reporting company, “the individual who directly files the document that creates the domestic reporting company”; and (ii) with respect to a foreign reporting company, the individual who directly files the document that first registers the foreign reporting company.”¹⁵

If there is more than one individual responsible for the filing of the document that forms the domestic reporting company (or that registers the foreign reporting company to do business in the US), the “company applicant” is the individual “who is primarily responsible.”¹⁶

After a reporting company files its first BOI report, the company must amend its report within 30 calendar days after there is any change to the information required in that report.¹⁷

Each reporting company that is not exempt must follow the CTA’s definition of “beneficial owner” to identify its beneficial owners. The Reporting Rule defines “beneficial owner” as “any individual who, directly or indirectly, either exercises substantial control over such reporting company or owns or controls at least 25 percent of the ownership interests of such reporting company.”¹⁸

An individual who would otherwise be included as a beneficial owner may be omitted if they fall into one of the following categories: (i) a minor child; (ii) an individual acting as a nominee, intermediary, custodian or agent on behalf of another individual; (iii) an employee of a reporting company, acting solely as an employee (other than a senior employee); (iv) an individual whose only interest in a reporting company is a future interest through a right of inheritance; or (v) a creditor of a reporting company.¹⁹

The CTA exempts from the obligation to file a BOI report any reporting company that falls into any of 23 exemption categories.²⁰ The exemption categories cover several classes of entity that are the subject of extensive regulation or that are otherwise required by law to disclose their ownership information to the government.

The CTA contains serious penalties for non-compliance. A reporting company that fails to file a BOI report (or a required amendment) when due is subject to a \$500 per day fine, up to a maximum of \$10,000. A willful failure to file a report when due or an intentional filing of inaccurate information is

punishable as a felony by up to two years' imprisonment. A willful violation in combination with other anti-money laundering violations can result in an amplified penalty of up to 10 years' imprisonment.

DEFINITION OF "REPORTING COMPANY"

To determine whether it must file a report under the CTA, a company must first determine if it is a "reporting company."

The Reporting Rule defines "reporting company" in 31 CFR section 1010.380 (C)(1), largely following the statutory definition, as either a "domestic reporting company" or a "foreign reporting company."

- A "domestic reporting company" means any entity that is "(A) a corporation, (B) a limited liability company, or (C) created by the filing of a document with a secretary of state or any similar office under the law of a State or Indian tribe."²¹
- A "foreign reporting company" means any entity that is "(A) a corporation, limited liability company or other entity, (B) formed under the law of a foreign country, and (C) registered to do business in any State or tribal jurisdiction by the filing of a document with a secretary of state or any similar office under the law of a State or Indian tribe."²²

The Reporting Rule specifies that the term "Indian tribe" refers to the definition given for that term in section 104 of the Federally Recognized Indian Tribe List Act of 1994.²³

Examples of Reporting Companies

Practitioners will identify domestic reporting companies by including corporations, limited liability companies, and those entities that are "created by the filing of a document with a secretary of state or any similar office under the law of a State or Indian tribe."²⁴ In the Reporting Rule, FinCEN explained that the requirement of filing a document with a secretary of state was a matter of state law.

In states that adopted the Uniform Limited Partnership Act (2001), a limited partnership is formed by the filing of a document with the secretary of state, so that limited partnerships will fall into the definition of "domestic reporting company."²⁵

In contrast, in most states, parties may form a general partnership without filing a document with the secretary of state or any similar office. As a result, a general partnership formed in one of these states will not be a "domestic reporting company" for purposes of the CTA. This generality has some exceptions, however, as Delaware requires the filing of a document with its secretary of state to form a general partnership. As a result, a general partnership formed in Delaware would be a "domestic reporting company."

Practitioners will need to review the statutory requirements of other types of legal entities to determine whether they are "created by the filing of a document with a secretary of state or any similar office under the law of a State or Indian tribe."

In most states, for example, a trust can be formed without filing a document with a secretary of state.²⁶ A Delaware statutory trust, however, must file a certificate of trust in the office of the secretary of state of Delaware and would therefore be a domestic reporting company.²⁷

In the Reporting Rule, FinCEN explained that it:

believes the proposed definition of domestic reporting company would likely include limited liability partnerships, limited liability limited partnerships, business trusts (a/k/a statutory trusts or Massachusetts trusts), and most limited partnerships, in addition to corporations and limited liability companies (LLCs), because such entities appear typically to be created by a filing with a secretary of state or similar office.²⁸

FinCEN also explained that “state and Tribal laws may differ on whether certain other types of legal or business forms—such as general partnerships, other types of trusts, and sole proprietorships—are created by a filing, and therefore does not propose to categorically include any particular legal forms other than corporations and limited liability companies within the scope of the definition.”²⁹

In the Reporting Rule, FinCEN attempted to quantify the number of entities that might be subject to the reporting obligations of the CTA. Based on that exercise, FinCEN estimated that, as of 2021, there were a little more than 30 million domestic reporting companies, and that more than 3.7 million domestic reporting companies were created each year.³⁰

The defining characteristic of a “foreign reporting company” is that it is “registered to do business ... by the filing of a document.” FinCEN expressly considered the possibility that this definition might “capture more entities than “created by the filing of a document” because typically a jurisdiction within the United States will require any legal entity formed under the law of any other jurisdiction—including another jurisdiction within the United States—to register to do business as a “foreign” entity if it engages in certain types of activities.”³¹

The definition included in the Reporting Rule, however, requires that practitioners identify a “foreign reporting company” based upon whether the entity has “registered to do business in any State or tribal jurisdiction by filing a document with a secretary of state or any similar office under the law of a State or Indian tribe.”³²

EXEMPTIONS FROM THE CTA’S REPORTING OBLIGATIONS

The CTA itself exempted 24 classes of entities that would otherwise have been reporting companies. These exemptions consist of a list of entities whose beneficial ownership is already a matter of public record, entities that are already subject to substantial governmental oversight, and a catch-all for “any entity or class of entities that the Secretary of the Treasury, with the written concurrence of the Attorney General and the Secretary of Homeland Security, has, by regulation, determined should be exempt [from the statute’s beneficial ownership reporting requirements].”³³

In the Reporting Rule, FinCEN declined to list any such additional exemption categories, leaving the remaining 23 categories in the regulation, generally as they were defined in the statute.

As a result, an entity that would otherwise fall within the definition of a “reporting company” is exempt from any obligation to file a beneficial ownership report with FinCEN if it falls into one or more of the 23 listed categories.

Each category refers to a class of entity that is already subject to some form of regulation that would allow the federal government to identify either the beneficial owners of the entity or the individuals

responsible for the entity. The ability to identify such persons eliminates the need to have such entities provide their beneficial ownership to FinCEN under the CTA.

Because each category involves the application of some other body of law, practitioners may need assistance from attorneys with specialized experience in those areas.

DETERMINING WHO IS A BENEFICIAL OWNER

In the Reporting Rule, FinCEN defined “beneficial owner” as any individual who, directly or indirectly, either: (i) exercises substantial control over the reporting company; or (ii) owns or controls at least 25 percent of the ownership interests of the reporting company.³⁴ As a result, an individual is a beneficial owner if the individual satisfies either of these two tests.

Calculating Ownership Interests

The Reporting Rule provides several rules for calculating whether an individual owns or controls at least 25 percent of the ownership interests of a reporting company as follows:

- Calculate on a Fully-Diluted Basis: Ownership interests of the individual shall be calculated on a fully diluted basis, with any options or convertible securities being treated as exercised;
- Tax Partnerships Measured as a Percentage of Outstanding Capital and Profits: For reporting companies that issue capital or profit interests (including entities treated as partnerships for federal income tax purposes), the individual’s ownership interests are the individual’s capital and profit interests in the entity, calculated as a percentage of the total outstanding capital and profit interests of the entity;
- Corporate Ownership Rule: For corporations, entities treated as corporations for federal income tax purposes, and other reporting companies that issue shares of stock, the applicable percentage shall be the *greater of*: (i) the total combined voting power of all classes of ownership interests of the individual as a percentage of total outstanding voting power of all classes of ownership interests entitled to vote; or (ii) the total combined value of the ownership interests of the individual as a percentage of the total outstanding value of all classes of ownership interests; and
- Failsafe Rule: If the facts and circumstances do not permit the calculations described above to be performed with “reasonable certainty,” any individual who owns or controls *25 percent or more of any class or type* of ownership interest of a reporting company shall be deemed to own or control 25 percent or more of the ownership interests of the reporting company.³⁵

An individual that owns 25 percent or more of the ownership interests of the reporting company under any of these measures is a beneficial owner for reporting purposes.

Determining Substantial Control

Even if an individual is not a beneficial owner under the 25-percent-ownership test, an individual may be a beneficial owner if the individual directly or indirectly exercises “substantial control” over the reporting company.

FinCEN's Reporting Rule defines "substantial control" through a facts and circumstances test that requires the reporting company to consider several factors, including whether 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 several examples of important decisions], or (D) Has any other form of substantial control over the reporting company.³⁶

Because the definition of "substantial control" is a facts-and-circumstances test, many reporting companies and their counsel should consider any facts and circumstances that might bear on substantial control, including family relationships among beneficial owners, voting rights, employment agreements, and other arrangements.

Attributing Beneficial Ownership to Individuals

Importantly, the definition of beneficial owner is limited to "any individual" and does not include legal entities.³⁷ Any interest in a reporting company held by a legal entity will be calculated with respect to the individual natural person who has the ultimate beneficial ownership of that interest. Attorneys assisting clients in determining the beneficial owners of a reporting company will need to attribute the beneficial ownership of any non-natural person to the individuals who, in turn, are the beneficial owners of the non-natural person.

While this process could become complicated in situations where a reporting company is owned by several non-natural persons who, in turn, are owned by other non-natural persons, FinCEN's Reporting Rule provides some guidance on the logical process to follow when attributing beneficial ownership to individuals.

The Reporting Rule provides, generically, that "an individual may directly or indirectly own or control an ownership interest of a reporting company through any contract, arrangement, understanding, relationship, or otherwise."³⁸

The Reporting Rule lists several examples of indirect ownership, including: (i) "Joint ownership with one or more other persons of an undivided interest in such ownership interest;" and (ii) "Through another individual acting as a nominee, intermediary, custodian, or agent on behalf of such individual."³⁹

Where an interest in a reporting company is owned by more than one non-natural person, determining those natural persons who will be attributed ownership in the reporting company requires the reporting company to look "through ownership or control of one or more intermediary entities, or ownership or control of the ownership interests of any such entities, that separately or collectively own or control ownership interests of the reporting company."⁴⁰

With respect to ownership interests in a reporting company owned by a trust "or similar arrangement," the Reporting Rule provides a series of rules that determine which natural person should be treated as the natural person with attributed ownership.⁴¹

Under the trust rules: (i) the trustee of the trust has ownership of an interest in a reporting company held by the trust if the trustee has "the authority to dispose of trust assets"; (ii) a beneficiary of the trust

has ownership of an interest in a reporting company held by the trust if the beneficiary “[i]s the sole permissible recipient of income and principal from the trust” or “[h]as the right to demand a distribution of or withdraw substantially all of the assets from the trust”; and (iii) the grantor or settlor of a trust has ownership of an interest in a reporting company held by the trust “has the right to revoke the trust or otherwise withdraw the assets of the trust.”⁴²

Excluded Individuals

The Reporting Rule provides that certain individuals are excluded from the definition of “beneficial owner” notwithstanding the other provisions of the Reporting Rule that would otherwise attribute beneficial ownership status.

The Reporting Rule provides that “beneficial owner” does not include:

- A minor child;
- An individual acting as a nominee, intermediary, custodian, or agent on behalf of another individual;
- An employee of a reporting company, acting solely as an employee (not including senior officer), whose substantial control over or economic benefits from such entity are derived solely from the employment status of the employee;
- An individual whose only interest in a reporting company is a future interest through a right of inheritance; or
- A creditor of a reporting company.⁴³ Individuals whose only interest in the reporting company is described in these categories are excluded from the definition of “beneficial owner.”

WHEN MUST REPORTING COMPANIES FILE AN INITIAL BOI REPORT?

Each reporting company that is not exempt and that is either created on or after January 1, 2024 (and before January 1, 2025), or first registered to do business after that date (in the case of a foreign reporting company), must file an initial report within 90 calendar days of the earlier of: (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, such as through a publicly accessible registry, that the domestic reporting company has been created.

In contrast, domestic reporting companies created before January 1, 2024, and foreign reporting companies that were registered to do business before January 1, 2024, must file an initial report not later than January 1, 2025.⁴⁴

Thirty-Day Amendment Rule

The Reporting Rule requires a reporting company that has filed an initial BOI report to file an amendment with FinCEN within 30 calendar days after there is any change to the information required in the initial report.⁴⁵ The 30-day amendment rule includes several key provisions that will require close attention.

If a reporting company files an initial report but subsequently meets the criteria for an exemption under 31 CFR section 1010.380(c)(2), “this change will be deemed a change with respect to information previously submitted to FinCEN and the entity shall file an updated report.”⁴⁶

If an individual that was excluded from disclosure in the reporting company’s prior BOI report because the individual’s interest was solely “by virtue of property interests or other rights subject to transfer upon death ... a change with respect to required information will be deemed to occur when the estate of the deceased beneficial owner is settled, either through the operation of the intestacy laws of a jurisdiction within the United States or through a testamentary deposition.”⁴⁷ Such a circumstance would obligate the reporting company to amend its report to identify the previously-excluded individual. In any such updated report, the reporting company must, if applicable, also identify any new beneficial owners.⁴⁸

If an individual that was excluded from disclosure in the reporting company’s prior beneficial ownership report because the individual was a minor, “a change with respect to required information will be deemed to occur when the minor child attains the age of majority.”⁴⁹

A change in required information is deemed to occur “when the name, date of birth, address or unique identifying number” changes on the image of the document provided by the reporting company.⁵⁰

Importantly, a change in the imaged document (such as a change in the individual’s picture or the document’s expiration date) that does not alter any of the designated items of information does not trigger a duty to amend a prior report. In its discussion of comments considered in its adoption of the Reporting Rule, FinCEN noted that “a change in the details of a document’s image that do not relate to a change in information to be reporting in 31 CFR section 1010.380(b)(1)(ii)(A)-(D) on the identification document will not trigger a requirement to update the image.”⁵¹

CONTENTS OF AN INITIAL BOI REPORT

As discussed above, in its initial BOI report, a nonexempt reporting company must identify each of its beneficial owners and provide five pieces of personally identifiable information about each of them.⁵² In addition, the initial BOI report must disclose the reporting company’s full legal name, any trade name or “doing business as” name, a complete current address, the state or jurisdictions of the reporting company’s formation, and the reporting company’s TIN (including an EIN or, where a foreign reporting company has not been issued a TIN, a tax identification number issued by a foreign jurisdiction and the name of that jurisdiction).⁵³

For each beneficial owner, the reporting company must disclose in its initial report such beneficial owner’s full legal name, date of birth, residential street address, a unique identifying number, and an image file of the document that provides the unique identifying number.⁵⁴

In addition, for reporting companies that are formed (or registered to do business in the US) after January 1, 2024, the initial BOI report must also include these same five pieces of information for the reporting company’s company applicant.⁵⁵

In its disclosure of the reporting company’s company applicant, the reporting company may report the company applicant’s business street address, if the company applicant formed the reporting company in the course of the company’s applicant’s business.⁵⁶

SPECIAL RULES AFFECTING BOI REPORTS

Reporting Company Owned by Exempt Entity

If a reporting company is owned, in part, by an entity that itself is exempt from beneficial ownership reporting, and an individual would have a direct or indirectly ownership interest in the reporting company exclusively by virtue of the individual's ownership interest in such exempt entities, the nonexempt reporting company may include the names of the exempt entities in lieu of the information that would otherwise have been required in respect of such individual.⁵⁷

Minor Child

If a reporting company reports the information required to be reported in respect of the parent or legal guardian of a minor child as required by the Reporting Rule, the reporting company's beneficial information report must indicate that such information relates to a parent or legal guardian.⁵⁸

Foreign Pooled Investment Vehicle

If an entity would be a reporting company but for the exemption provided for pooled investment vehicles in 31 CFR section 1010.380(c)(2)(xviii) and is formed under the laws of a foreign country, such entity shall be deemed a reporting company for purposes of beneficial ownership reporting, except the initial BOI report shall include otherwise required information solely with respect to an individual who exercises substantial control over the entity. If multiple individuals exercise substantial control over the entity, the entity shall report information with respect to the individual who has the greatest authority over the strategic management of the entity.⁵⁹

FINCEN IDENTIFIERS

The CTA contemplated that some individuals might need to be included in so many BOI reports that they might prefer to obtain a unique FinCEN identification number that could be substituted for such individual's personal information in beneficial ownership reports.

The Reporting Rule allows an individual to obtain a FinCEN identifier by completing an application (on a form to be specified by FinCEN) that provides the same information as a reporting company would be required to disclose in a BOI report in which such individual was a beneficial owner.⁶⁰

A reporting company may obtain a FinCEN identifier by submitting to FinCEN an application at or after the time the entity submits its initial beneficial ownership report.⁶¹

If an individual obtains a FinCEN identifier, a reporting company may include the individual's FinCEN identifier in its BOI report in lieu of providing the requisite information items for the individual.⁶²

Obtaining a FinCEN identifier does not, however, relieve an individual from ongoing reporting obligations; it merely shifts the duty from the reporting company to the individual. An individual who obtains a FinCEN identifier and who has provided it to a reporting company, must update the individual's

application “to update or correct any information previously submitted to FinCEN” in the application for the FinCEN identifier within 30 calendar days after the date on which the change occurs.⁶³

ENFORCEMENT AND PENALTIES

Because the purpose of the CTA is to enable FinCEN to develop and maintain a database of beneficial ownership data, Congress included penalties in the CTA to encourage compliance and to punish violators.

The CTA provides that it is unlawful for any person to willfully provide, or attempt to provide, false or fraudulent BOI or to willfully fail to report complete or updated BOI to FinCEN as required by the CTA.⁶⁴

The CTA provides for a civil penalty of not more than \$500 for each day a reporting violation occurs.⁶⁵

An individual who willfully files false information or willfully fails to file information required to be filed may be fined not more than \$10,000 or imprisoned for not more than two years or both.⁶⁶

One of the ambiguities presented by the statute, however, was who would be responsible for a reporting company’s reporting errors or omissions. By its terms, the statute required a reporting company to file its BOI report. The enforcement provisions of the statute, however, relate to individuals. In the regulatory process, commenters asked, if a reporting company failed to file (or filed inaccurate information), who would be liable for that corporate reporting failure?

FinCEN answered that question in the Reporting Rule when it provided that a reporting failure is an obligation of both the individual who “causes the failure ... or is a senior officer of the entity at the time of the failure.”⁶⁷

The Reporting Rule defines “senior officer” to mean “any individual holding the position or exercising the authority of a president, chief financial officer, general counsel, chief executive officer, chief operating officer, or any other officer, regardless of official title, who performs a similar function.”⁶⁸

As a consequence, a beneficial owner or company applicant who willfully provides false or fraudulent information to a reporting company may be liable for the reporting company’s failure to provide accurate information when required.

Likewise, each senior officer of the reporting company will also be liable for any willful failure on the part of the reporting company to provide accurate information when required.

SOME PRACTICAL CONSIDERATIONS

For closely held companies, especially those owned by family members, compiling beneficial ownership data will not be too difficult. Family members will trust each other with their personal data and will be able to collect that data manually and provide it directly to FinCEN. Family members will often also be able to track changes in personal data (such as a change in residential address) in order to report such changes in an amendment to FinCEN.

For companies not owned by family members, however, beneficial owners might not be willing to trust each other with personal data. Personally identifiable data is sometimes used to perpetrate identity theft, and many are accustomed to keeping personal data secret and secure.

To assist companies and their beneficial owners in collaborating for CTA purposes while maintaining the secrecy and integrity of their confidential data, companies and their counsel may want to explore third-party tools like those provided by The FinCEN Report Company.⁶⁹

RECENT DEVELOPMENTS

In a ruling dated March 1, 2024, a federal judge in the Northern District of Alabama ruled that the CTA was unconstitutional. The court's ruling was on cross-motions for summary judgment by the parties in *NSBU v. Yellen*, a challenge to the CTA brought by a trade association on behalf of a group of small business owners. In its ruling, the court held that Congress lacked the constitutional power to adopt the CTA. Although the court ruled that the CTA was unconstitutional, its order was limited to the plaintiffs and members of the NSBU association as of March 1, 2024, and the court ordered Treasury not to enforce the CTA against those individuals.

Subsequently, FinCEN clarified that, although it would comply with the court's order, it would continue to enforce the CTA against everyone else. Thereafter, the Treasury appealed the district court's ruling to the 11th Circuit Court of Appeals. That appeal is unlikely to result in an appellate ruling until 2025. As a result, practitioners should advise their clients that are not expressly addressed in the court's order that they should file their BOI reports as required by the CTA until further notice.

CONCLUSIONS

The CTA will prove challenging to attorneys and their clients. This new law requires small businesses to think differently about their investors and managers and to adopt systems to collect personally identifiable information about those investors and others who may constitute beneficial owners.

FinCEN has not made the process easy. Despite having more than two years to adopt implementing regulations, FinCEN has not finalized the form of the BOI Report and has signaled that key aspects of the BOI Report Template might change after the implementation date. FinCEN has not launched its reporting portal or given practitioners the ability to prereview the portal or its functions. FinCEN claims that it will have a "help center" available to answer user questions but has not stated publicly when it will be available or how it will work. By failing to communicate to the marketplace transparently, FinCEN has increased uncertainty and anxiety and made the rollout of this new reporting regime more difficult.

Nevertheless, practitioners have little choice other than to provide their clients with the best advice possible. A prudent approach would have practitioners advise their clients to begin their preparations immediately, adopting a system for the collection and required reporting information and modifying corporate governance procedures.

Notes

1 The original 30-day deadline was extended to 90 days. See *infra* footnote 8.

2 The CTA is Title LXIV of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Public Law 116–283 (Jan. 1, 2021) (the NDAA). Division F of the NDAA is the Anti-Money Laundering Act of 2020, which includes the CTA. Section 6403 of the CTA, among other things, amends the Bank Secrecy Act (BSA) by adding a new section 5336, Beneficial Ownership Information Reporting Requirements, to subchapter II of chapter 53 of title 31, United States Code.

3 Beneficial Ownership Information Reporting Requirements, 87 Fed. R. 59,498, codified as 31 § CFR 1010.380 (Sept 30, 2022) (hereinafter Reporting Rule).

4 Beneficial Ownership Information Access and Safeguards and Use of FinCEN Identifiers for Entities, 87 Fed. R. 77,404 (Dec. 16, 2022) to be codified at 31 § CFR 1010.

5 Agency Information Collection Activities; Submission for OMB Review; Comment Request; Beneficial Ownership Information Reports (Sept. 29, 2023), 88 Fed. R. 67,443 (Sept. 29, 2023) available at <https://www.govinfo.gov/content/pkg/FR-2023-09-29/pdf/2023-21293.pdf>.

6 Id.

7 Id. at 67,444.

8 Beneficial Ownership Information Reporting Deadline Extension for Reporting Companies Created or Registered in 2024, 88 Fed. Reg. 83,499 (Nov. 30, 2023).

9 31 CFR § 1010.380(a)(i).

10 31 CFR § 1010.380(a)(ii).

11 31 CFR § 1010.380(a)(iii).

12 31 CFR § 1010.380(b).

13 31 CFR § 1010.380(b)(i).

14 31 CFR § 1010.380(b)(ii).

15 31 CFR § 1010.380(e).

16 31 CFR § 1010.380(e)(3).

17 31 CFR § 1010.380(a)(2).

18 31 CFR § 1010.380(d).

19 31 CFR § 1010.380(a)(3).

20 31 CFR § 1010.380(c)(2).

21 31 CFR § 1010.380(c)(1)(i).

22 31 CFR § 1010.380(c)(1)(ii).

23 25 U.S.C. § 5131.

24 31 CFR § 1010.380(c)(1)(i).

25 See, e.g., Uniform Limited Partnership Act (2001) (Last Amended 2013), Section 201(a) (“to form a limited partnership, a person must deliver a certificate of limited partnership to the Secretary of State for filing”).

26 See, e.g., Uniform Trust Code (last revised 2010).

- 27 12 Del. Code 3810.
- 28 Reporting Rule, 86 Fed. Reg. at 69938-69939.
- 29 Reporting Rule, 86 Fed. Reg. at 69939.
- 30 Reporting Rule, 86 Fed. Reg. at 69957.
- 31 Reporting Rule, 86 Fed. Reg. at 69939.
- 32 31 CFR § 1010.380(c)(2)(C).
- 33 31 U.S.C. 5336(a)(11)(B)(xxiv).
- 34 31 CFR § 1010.380(d).
- 35 31 CFR § 1010.380(d)(2)(iii).
- 36 31 CFR § 1010.380(d)(1)(i).
- 37 31 CFR § 1010.380(d).
- 38 31 CFR § 1010.380(d)(1)(ii).
- 39 31 CFR § 1010.380(d)(2)(ii).
- 40 31 CFR § 1010.380(d)(2)(ii)(D).
- 41 31 CFR § 1010.380(d)(2)(ii)(C).
- 42 Id.
- 43 31 CFR § 1010.380(d)(3).
- 44 31 CFR § 1010.380(a)(iii).
- 45 31 CFR § 1010.380(a)(2).
- 46 31 CFR § 1010.380(a)(2)(ii).
- 47 31 CFR § 1010.380(a)(2)(iii).
- 48 31 CFR § 1010.380(a)(2)(iii).
- 49 31 CFR § 1010.380(a)(2)(iv).
- 50 31 CFR § 1010.380(a)(2)(v).
- 51 Reporting Rule, 87 Fed. Reg. at 58597.
- 52 31 CFR § 1010.380(b).
- 53 31 CFR § 1010.380(b)(i).
- 54 31 CFR § 1010.380(b)(ii).
- 55 31 CFR § 1010.380(e).

56 31 CFR § 1010.380(b)(ii)(C).

57 31 CFR § 1010.380(b)(2)(i).

58 31 CFR § 1010.380(b)(2)(ii).

59 31 CFR § 1010.380(b)(2)(ii).

60 31 CFR § 1010.380(b)(4)(i)(A).

61 31 CFR § 1010.380(b)(4)(i)(B).

62 31 CFR § 1010.380(b)(4)(ii)(A).

63 31 CFR § 1010.380(b)(4)(iii)(A)(1).

64 31 U.S.C. § 5336(h)(1).

65 31 U.S.C. § 5336(h)(3)(A)(i).

66 31 U.S.C. § 5336(h)(3)(A)(ii).

67 31 CFR § 1010.380(g)(4).

68 31 CFR § 1010.380(f)(8).

69 <https://fincenreport.com/>.

