

FINCEN HAS BEGUN ACCEPTING BENEFICIAL OWNERSHIP INTEREST REPORTS UNDER THE CORPORATE TRANSPARENCY ACT

On January 1, 2024, the Financial Crimes Enforcement Network, a bureau of the U.S. Department of the Treasury ("**FinCEN**"), began accepting online filings of beneficial ownership interest ("**BOI**") reports pursuant to the Corporate Transparency Act ("**CTA**"). BOI reporting requirements under the CTA generally apply to any entity that, through filing a document with a secretary of state or similar office of any U.S. State, is either formed or registered to do business. The CTA provides for 23 categories of legal entities that would be considered exempt from the CTA's reporting obligations, including, among others, public companies, large operating companies, banks, securities brokers or dealers, insurance companies, registered investment companies and advisers, and pooled investment vehicles.

This briefing provides a general introduction to BOI reporting requirements and certain exemptions that we believe will likely apply to many of our clients.

BACKGROUND

The CTA was enacted in 2021 to generally require in-scope legal entities to report specified information about the individuals who ultimately own or control them. The purpose of the CTA's reporting requirements is to provide greater transparency to law enforcement and other authorities with respect to the ownership and/or control of companies to counter the use of legal entities by bad actors to hide illicit activity.

In September 2023, FinCEN published its "Beneficial Ownership Information Reporting Requirements" as a final rule in the Federal Register (the "**BOI Reporting Rule**", [available here](#)), to implement the reporting requirements and

exemptions contemplated by the CTA. As subsequently modified by FinCEN's Beneficial Ownership Information Reporting Deadline Extension for Reporting Companies Created or Registered in 2024 ([available here](#)), the BOI Reporting Rule became effective as of January 1, 2024. This rule indicates which entities are required to file BOI reports, specifies the information to be provided in these reports, and the related filing deadlines. In addition, this rule identifies the conditions that a potentially in-scope legal entity would need to meet in order to qualify for one of the 23 exemptions from these reporting requirements.

NOTABLE EXEMPTIONS

Exempt entities have no obligation to report the fact of their exempt status to FinCEN. The CTA's exemptions include the following.

SEC-reporting public company. An exemption is available to any entity that is an issuer of securities and that is either:

- registered under Section 12 of the Securities Exchange Act of 1934, as amended (the "**Exchange Act**"); or
- required to file supplementary and periodic information pursuant to Section 15(d) of the Exchange Act.

In general, the public company exemption applies to companies that have securities listed on either the NYSE or Nasdaq . It also includes issuers that have made public offerings of securities pursuant to an effective registration statement under the Securities Act of 1933 (even if not listed on the NYSE or Nasdaq). This exemption, however, would not be available to non-U.S. companies that rely on the exemption for the Exchange Act's registration requirements provided by Rule 12g3-2(b) under the Exchange Act, including those that have "Level 1" American Depositary Receipts that trade over-the-counter in the United States.¹

Investment Related Exemptions. There are several investment-related exemptions, including those that apply to investment companies and investment advisers that are registered with the Securities and Exchange Commission,² venture capital fund advisers,³ and certain pooled investment vehicles.⁴ To be exempt as a pooled investment vehicle, a legal entity must be operated by either a U.S. bank, domestic credit union, broker or dealer, registered investment company or adviser, or venture capital fund adviser, and either:

- be an investment company as defined under the Investment Company Act of 1940; or
- qualify as an investment company pursuant to such section but for an exclusion under 3(c)(1) or (3)(c)(7) of the Investment Company Act of 1940 and be identified by the applicable investment adviser in Form ADV.⁵

¹ These non-U.S. companies would not be within the scope of the CTA unless they are registered to do business in the United States. The fact that their shares may be traded among U.S. persons would not, in and of itself, trigger obligations under the CTA.

² 31 CFR 1010.380(c)(2)(x).

³ 31 CFR 1010.380(c)(2)(xi).

⁴ 31 CFR 1010.380(c)(2)(xviii).

⁵ *Emphasis added.* 15 U.S.C. 80a-3(c)(1) provides that the pooled investment vehicle has no more than 100 beneficial owners. 15 U.S.C. 80a-3(c)(7) is limited to investors that are qualified purchasers (an individual is a qualified purchaser if they own \$5 million or more in investments; \$25

Large Operating Company Exemption. A CTA exemption is available when a legal entity has:

- more than 20 full-time employees in the United States;
- an operating presence at a physical office in the United States; and
- has filed a U.S. federal income tax return (or informational return) in the previous year showing in excess of \$5 million gross receipts or sales (excluding gross receipts or sales from sources outside the United States).⁶

We note that for purposes of meeting the \$5 million gross receipts threshold, when an entity is a part of an affiliated group that filed a consolidated tax return, the legal entity may use the amount reported on the consolidated tax return for the affiliated group. The employee-related threshold, however, must be satisfied with respect to each legal entity, and employees cannot be aggregated with other entities to meet the threshold.

Entities registered with specified U.S. regulators, such as banks or insurance companies. FinCEN has identified specific types of entities whose beneficial ownership disclosure is already sufficient through other channels. Banks, insurance companies, money services businesses, and accounting firms are among the limited types of entities that qualify for such exemptions. These exemptions, however, do not provide exempt status to non-U.S. entities that may be subject to equivalent regulation by non-U.S. regulators.

Subsidiary Exemption. The subsidiary exemption applies to when all of the ownership interests of an in-scope legal entity are wholly owned or entirely controlled by one or more entities that are exempt under a specified subset of CTA exemptions.⁷ For example, a legal entity that is wholly owned by an entity that qualifies for the CTA's large operating company exemption would qualify for the subsidiary exemption. Recent FinCEN guidance on this exemption clarified that a subsidiary would only qualify if its ownership interests are "fully, 100 percent owned or controlled by an exempt entity," reiterating that this criteria can be met through either ownership of ownership interests or control of ownership interests. A determination as to whether an entity's ownership interests are wholly owned or entirely controlled by one or more entities that qualify for one or more specified exemptions generally will involve a fact-specific inquiry and will need to be made on a case-by-case basis.

The subset of exemptions that permit reliance on the subsidiary exemption does not include the following exempt categories:

- money services businesses;
- pooled investment vehicles;

million for entities) or, in certain circumstances, if there are non-qualified purchasers in addition to qualified purchasers, the non-qualified purchasers are not more than 100 persons. A special disclosure rule applies to non-U.S. pooled investment vehicles.

⁶ 31 CFR 1010.380(c)(2)(xxi).

⁷ 31 CFR 1010.380(c)(2)(xxii). "Ownership interests" for purposes of the CTA is broadly defined to include non-voting shares as well as any instruments that are convertible into, or exercisable for, any equity, stock or similar instrument. "Control" over the ownership interests of a legal entity may be established pursuant to a contract, arrangement, understanding, relationship, or otherwise.

- entity assisting a tax-exempt entity; and
- inactive entities.

Information to be Included in a BOI Report

Each legal entity that is subject to CTA reporting requirements will be required to file its own separate report with FinCEN. BOI reports are organized into the following three parts:

- Part I information relates to the reporting company;
- Part II information relates to company applicants; and
- Part III information relates to beneficial owners.

Reporting company information. Each reporting company will be required to provide in Part I of its BOI report:

- its full legal name (and any names under which it does business);
- the street address of its principal place of business in the United States or the primary location in the United States where it conducts business;
- its jurisdiction of formation and/or registration, as applicable; and
- a taxpayer/employer ("**TIN/EIN**") identification number, except that a non-U.S. reporting company that does not have a TIN/EIN may provide an identification number issued by its home jurisdiction along with the name of the jurisdiction.

Company Applicants. Company applicant information is not required for entities formed / registered before January 1, 2024. Only reporting companies that are formed or registered after January 1, 2024 will be required to report specified information about "company applicants" in Part II of their BOI Report. The company applicant is:

- the individual who directly files the document creating the reporting company or registering the company to do business in the United States; and
- the individual who is primarily responsible for directing or controlling such filing.

Two different people may be identified as a company applicant if the same person does not perform both roles.⁸

Information to be provided in a BOI report with respect to a company applicant is generally similar to the information that must be provided with respect to beneficial owners in Part III (described below), except that an individual who forms or registers an entity in the course of their business should provide their business street address instead of their residential address.

Reporting of beneficial owners. In Part III of a BOI report, each reporting company will be required to identify and report information concerning its "Beneficial Owners", including their full legal name, date of birth, residential

⁸ See 31 CFR 1010.380(e).

address, and their identification number from an acceptable identification document (e.g., a non-expired driver's license or passport) together with an image of such document.

Who is a "beneficial owner" for purposes of the CTA? Beneficial owners are those individuals who ultimately (directly or indirectly) either:

- exercise substantial control over the reporting company or
- own or control 25% or more of the ownership interests in the reporting company.

An individual exercises substantial control over a reporting company if the individual:

- serves as a senior officer of the reporting company;
- has authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body);
- directs, determines, or has substantial influence over important decisions made by the reporting company.

FinCEN acknowledges that not all members of a board of directors and not all officers of a company necessarily exercise substantial control for the purpose of CTA-reporting compliance.

With respect to any individuals who own or control a reporting company solely through one or more CTA-exempt entities, the reporting company may exercise an option to report the exempt entity or entities rather than the individual beneficial owner under a "special reporting rule" provided by FinCEN.⁹ Individual beneficial owners who hold ownership interests through both exempt and non-exempt entities may not use this special reporting rule to obscure their standing as beneficial owners of a reporting company.

Deadline for filing an initial report. Each reporting company that was formed (or registered to do business) in a U.S. state prior to January 1, 2024, will have until January 1, 2025 to file its report with FinCEN. Each reporting company formed or registered during 2024 will have 90 days after the date such company receives notice (actual or constructive) that such company has been formed or registered to file its report with FinCEN. Reporting companies formed in 2025 and beyond will have 30 days from formation to comply with the reporting requirement. In addition, if an in-scope entity's circumstances change so that it is no longer eligible for an exemption, it will be required to submit a BOI report to FinCEN within 30 days after the change in its status.

OBLIGATION TO FILE AMENDED REPORTS

A reporting company must file amended reports to reflect any change in information previously submitted to FinCEN concerning the reporting company or its beneficial owners. Reporting companies will not be required to file amended reports to reflect any changes in a company applicant's information. If a reporting company that did not qualify for an exemption subsequently qualifies for one, it should file an amended report indicating the status change. By contrast, a

⁹ See 31 CFR 1010.380(b)(2)(i).

reporting company does not need to file an amended report in connection with its termination or dissolution.

Deadline for filing amendments. After filing an initial report with FinCEN, a reporting company is responsible for maintaining the accuracy of its report. Should a change occur with respect to information a company has reported, an updated report should be filed within 30 days after the change. Similarly, if incorrect information is included in a submitted report as the result of a mistake, a reporting company has 30 days following the date it knew or should have known of the mistake to file a corrected report.

USE OF FINCEN IDENTIFIERS

FinCEN provides an option for persons to obtain a FinCEN Identifier ("**FinCEN ID**"), which is a unique identification number that can be used to identify the individual (and such person's personal information) in lieu of having to re-enter such person's information. The use of the FinCEN ID makes certain filings and any amendment thereof more efficient and can protect the privacy of individuals since they are providing the information one time through one channel, rather than through multiple channels and multiple occasions.

To apply for a FinCEN ID, individuals submit the required personal information together with an image of their identification directly to FinCEN via an online platform. A reporting company may also seek a FinCEN ID at the time it submits a report to FinCEN. It should be noted that after a person receives a FinCEN ID, they bear responsibility for reporting any changes in the information they provided to FinCEN as part of their application within 30 days after the change.

SECURITY AND PRIVACY

FinCEN is the bureau of the U.S. Department of Treasury that is generally responsible for collecting, analyzing and disseminating financial intelligence to support law enforcement. The information that is reported electronically to FinCEN by reporting companies pursuant to the CTA will be stored in a non-public database, which is encrypted with data security at the highest information security protection level under the Federal Information Security Management Act. In addition to appropriate use by authorized U.S. governmental authorities, the CTA will allow banks and other financial institutions to seek information from the database in connection with their implementation of anti-money laundering programs if they have obtained the prior consent of the relevant reporting company. A financial institution's request for such access is at its discretion and is not mandatory. In addition, information that a reporting company may have provided to a financial institution (such as a bank or broker-dealer) to obtain an account is likely to be different from that reported to FinCEN, given that present rules generally require financial institutions to obtain beneficial ownership information on a smaller set of individuals than those individuals that need to be included in a reporting company's filing with FinCEN.

PENALTIES FOR NONCOMPLIANCE

Reporting companies are directly liable for failures to comply and any other persons who cause such failures may also be liable. This means that an individual who provides false information or refuses to provide information

necessary for a reporting company's filing may liable under the CTA. Willful breach of the CTA's reporting requirements can result in civil or criminal penalties. A civil penalty of \$500 per day can be assessed against the relevant legal entity or individual for each day that such violation continues. Criminal penalties for companies and individuals and imprisonment for individuals are possible when there is evidence of knowing or intentional conduct. In addition to direct violation of the CTA, criminal liability can also attach under several other Federal criminal statutes. Based on its public statements, we do not believe that it is likely that FinCEN will take enforcement actions against a legal entity that makes an inadvertent mistake in complying with the CTA, although it may take an investigation for them to reach that conclusion. We expect that enforcement will be mostly in the context of those seeking to subvert the purposes of the CTA to facilitate or engage in illicit activity, or where prosecutors believe there is criminal activity and the CTA is the easiest way to reach the perceived perpetrators.

EMERGING STATE REQUIREMENTS

Although still in the development state, some states, such as New York, are developing parallel reporting requirements which may be modeled on the CTA and FinCEN's regulations. The scope of legal entities with requirements to report as well as the public or non-public nature of state beneficial ownership registries may be the key areas where FinCEN and state reporting requirements vary. New York's law while already enacted, may be subject to further revision prior to the law coming into effect on January 1, 2025.

CONCLUSIONS

For most reporting companies, the CTA-required information will be relatively simple to provide, but determining how the rule applies to particular entities and who must be reported as a beneficial owner may be complicated in some situations. In addition, the requirement to update changes in beneficial ownership could create ongoing compliance difficulties. Businesses with many entities or complex structures may face greater compliance challenges under the CTA. In addition, the precise wording of any representations and warranties with respect to compliance with the CTA should be carefully considered as practical implementation of the CTA compliance continues to develop.

Additional FinCEN guidance and clarification of the rules with respect to more complex legal structures, such as those used as "special purpose vehicles" in the context of investments and acquisitions may be necessary to ensure that the law meets its purpose while mitigating unintended burdens for industry.

ADDITIONAL GUIDANCE

Determining reporting obligations and exemption eligibility is fact specific and depends upon a wholistic review of the facts and circumstances applicable to the entity. With a combination of former regulators, including former FinCEN leadership, as well as attorneys seasoned in the implementation and use of legal structures for a variety of purposes, Clifford Chance is able to provide further guidance on CTA-issues as they arise. Please contact a member of the Clifford Chance team listed below for further assistance.

CONTACTS

CORPORATE TRANSPARENCY ACT, IN GENERAL

David DiBari
Partner

T +1 202 912 5098
E david.dibari
@cliffordchance.com

Megan Gordon
Partner

T +1 202 912 5021
E megan.gordon
@cliffordchance.com

Jamal El-Hindi
Counsel

T +1 202 912 5167
E jamal.elhindi
@cliffordchance.com

Rebecca Hoskins
Professional Support
Lawyer

T +1 212 878 3118
E rebecca.hoskins
@cliffordchance.com

CORPORATE

Neil Barlow
Partner

T +1 212 878 4912
E neil.barlow
@cliffordchance.com

Eric Schaffer
Associate

T +1 212 878 8088
E eric.schaffer
@cliffordchance.com

Erin Hanson
Trainee

T +1 212 878 8245
E erin.hanson
@cliffordchance.com

CAPITAL MARKETS

Andrew Epstein
Partner

T +1 212 878 8332
E andrew.epstein
@cliffordchance.com

FUNDS

Michael Sabin
Partner

T +1 212 878 3289
E michael.sabin
@cliffordchance.com

Caitlin Haynes
Associate

T +1 212 880 5722
E caitlin.haynes
@cliffordchance.com

REAL ESTATE

Ness Cohen
Partner

T +1 212 878 8217
E ness.cohen
@cliffordchance.com

Jeanne Roig-Irwin
Partner

T +1 212 878 3058
E jeanne.roig-irwin
@cliffordchance.com

Anthony Norris
Associate

T +1 212 878 3065
E anthony.norris
@cliffordchance.com

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www.cliffordchance.com

Clifford Chance, 2001 K Street NW,
Washington, DC 20006-1001, USA

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Lee Askenazi
Partner

T +1 212 878 8230
E lee.askenazi
@cliffordchance.com

Alistair Dunlop
Partner

T +1 212 878 3259
E alistair.dunlop
@cliffordchance.com

Rebecca O'Brien
Partner

T +1 212 878 8263
E rebecca.obrien
@cliffordchance.com

Robert Villani
Partner

T +1 212 878 8214
E robert.villani
@cliffordchance.com

Michael Welch
Counsel

T +1 202 912 5077
E michael.welch
@cliffordchance.com