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## NAVIGATING THE CORPORATE TRANSPARENCY ACT AND THE FUTURE OF BENEFICIAL OWNERSHIP REPORTING

*The Corporate Transparency Act (“CTA”) was enacted on January 1, 2021, as part of efforts by the United States Congress to combat financial crime by increasing transparency around the beneficial ownership of legal entities. The CTA will require many millions of entities, from unsophisticated small businesses to complex holding company structures, to file confidential reports with the Financial Crimes Enforcement Network (“FinCEN”), starting in 2024, on the entities and on individuals who have significant direct or indirect ownership, are senior officers, or otherwise are deemed to have a measure of control over an entity. This article provides a general introduction to the CTA’s reporting requirements, including the statute’s history and purposes, and the implementing rule adopted by FinCEN. It gives practical advice for legal practitioners who may be unfamiliar with the CTA, with special attention to issues faced in determining which legal entities are reporting companies under the CTA and which individuals must be reported as beneficial owners.*

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While the U.S. historically has combatted crime and countered the financing of terrorism (“CFT”) through its anti-money laundering (“AML”) efforts, the lack of transparency into those who benefit from and control shell and front companies has long troubled law enforcement and has been the subject of claims by other countries that the U.S. is not taking strong enough leadership on these issues. For example, a 2016 evaluation by the Financial Action Task Force (“FATF”) called the U.S. AML/CFT framework “well developed and robust,” but claimed that the lack of timely access to adequate, accurate, and current beneficial ownership information was a fundamental gap.<sup>1</sup> The FATF stated

that “the relative ease with which U.S. corporations can be established, their opaqueness and their perceived global credibility makes them attractive to abuse of [money laundering and terrorism financing], domestically as well as internationally.”<sup>2</sup> In response to

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*footnote continued from previous column...*

*Report 3, 4 (2016), <https://www.fatf-gafi.org/content/dam/fatf-gafi/mer/MER-United-States-2016.pdf>. The FATF is an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering, terrorist financing, and the financing of proliferation of weapons of mass destruction.*

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<sup>1</sup> FATF, *Anti-Money Laundering and Counter-Terrorist Financing Measures – United States Mutual Evaluation*

<sup>2</sup> *Id.* at 153.

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### FORTHCOMING

● **HOW TO NAVIGATE THE EVOLVING STANDARDS OF CARE FOR RETAIL INVESTMENT ADVICE**

these concerns, Congress passed the Corporate Transparency Act (“CTA”), and the Financial Crimes Enforcement Network (“FinCEN”), which is a bureau of the U.S. Department of the Treasury, has promulgated an implementing reporting rule.

This article considers the implementation of the CTA’s reporting requirements across a spectrum of entities commonly employed in business activity, and trust and investment structures. By considering the interplay of the complexities inherent across a diverse range of entities, we aim to illuminate some of the practical challenges encountered during the initial phases of CTA implementation. Our analysis focuses on providing insights to legal practitioners specializing in business organizations, trust and estates, and securities law, as well as non-specialist lawyers — all of whom are well aware, as are we, that regardless of the intent of the CTA to make life more difficult for bad actors, it also creates burdens for millions of legitimate businesses, many of which are not even aware of the CTA reporting requirements.

## THE LEGISLATIVE JOURNEY OF THE CORPORATE TRANSPARENCY ACT

The CTA forms the centerpiece of the Anti-Money Laundering Act of 2020, which in turn comprises Division F of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (“NDAA”).<sup>3</sup> The CTA garnered bipartisan support due to its perceived potential to curb illicit financial flows through anonymous shell companies. The original version of the CTA was H.R. 2513, the proposed Corporate Transparency Act of 2019, which was passed in the House of Representatives by a vote of 249 to 173<sup>4</sup>

but did not receive consideration in the Senate. Provisions substantially similar to H.R. 2513, still called the Corporate Transparency Act of 2019, were added to H.R. 6395 (the proposed NDAA) in 2020 on the floor of the House of Representatives, together with other amendments in the same bloc, by a vote of 336 to 71.<sup>5</sup>

The version of the NDAA passed by the Senate did not include the CTA. In conference, the Senate receded, and the CTA was included, with changes to establish an improved reporting system for beneficial ownership information, including building in further protections to ensure that sensitive information is properly used and protected.<sup>6</sup> The conference committee noted that the measure is intended “to combat the abuse of anonymous companies, which can be used to facilitate money laundering, the financing of terrorism, proliferation finance, tax evasion, human and drug trafficking, sanctions evasion, and other financial crimes.”<sup>7</sup> The House agreed to the conference report by a vote of 335 to 78,<sup>8</sup> and the Senate agreed by a vote of 84 to 13.<sup>9</sup>

For reasons unrelated to the CTA, President Trump vetoed the NDAA.<sup>10</sup> The House overrode the veto by a

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<sup>3</sup> Pub. L. No. 116-283, 134 Stat. 3388 (2021), <https://www.congress.gov/116/plaws/publ283/PLAW-116publ283.pdf>. The substance of the CTA is contained in Section 6403 of the NDAA, which added 31 U.S.C. § 5336.

<sup>4</sup> Roll Call 577, H.R. 2513, 116<sup>th</sup> Cong. (Oct. 22, 2019), <https://clerk.house.gov/Votes/2019577>; *see* H.R. 2513, 116<sup>th</sup> Cong. (as passed by the House, Oct. 22, 2019), <https://www.congress.gov/116/bills/hr2513/BILLS-116hr2513eh.pdf>.

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<sup>5</sup> Roll Call 143, H.R. 6395, 116<sup>th</sup> Cong. (July 20, 2020), <https://clerk.house.gov/Votes/2020143>; *see* 166 Cong. Rec. H3379 – H3389 (daily ed. July 20, 2020) (text of the amendment).

<sup>6</sup> H.R. Rep. No. 116-617, at 2136 – 37 (2020) (conference report), <https://www.congress.gov/116/crpt/hrpt617/CRPT-116-hrpt617.pdf>.

<sup>7</sup> *Id.* at 2139.

<sup>8</sup> Roll Call 238, H.R. 6395, 116<sup>th</sup> Cong. (Dec. 8, 2020), <https://clerk.house.gov/Votes/2020238>.

<sup>9</sup> Roll Call 264, H.R. 6395, 116<sup>th</sup> Cong. (Dec. 11, 2020), [https://www.senate.gov/legislative/LIS/roll\\_call\\_votes/vote1162/vote\\_116\\_2\\_00264.htm](https://www.senate.gov/legislative/LIS/roll_call_votes/vote1162/vote_116_2_00264.htm).

<sup>10</sup> 166 Cong. Rec. H9150 (daily ed. Dec. 24, 2020) (veto message), <https://www.congress.gov/116/crec/2020/12/24/CREC-2020-12-24-pt1-PgH9150-2.pdf>.

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vote of 322 to 87,<sup>11</sup> and the Senate did so by a vote of 81 to 13.<sup>12</sup> As a result, the NDAA, including the CTA, became law on January 1, 2021. The House and Senate debates on the veto override did not mention the CTA. Indeed, the legislative history of the CTA is quite thin. There is, to be sure, a legislative history for H.R. 2513, including floor discussion and a committee report,<sup>13</sup> but that bill differed substantially from the final version of the CTA, which was extensively rewritten in conference. As a result, the relevant legislative history of the CTA largely consists of the discussion in the conference report<sup>14</sup> and floor statements during the consideration of the conference report.<sup>15</sup>

Following the passage of the CTA, FinCEN was tasked with promulgating regulations to implement the Act. After publication of an advance notice of proposed rulemaking<sup>16</sup> and a formal proposal,<sup>17</sup> and the receipt of public comments,<sup>18</sup> FinCEN adopted its beneficial ownership reporting rule — which is the primary focus of this article — in 2022.<sup>19</sup>

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<sup>11</sup> Roll Call 253, H.R. 6395, 116<sup>th</sup> Cong. (Dec. 28, 2020), <https://clerk.house.gov/Votes/2020253>.

<sup>12</sup> Roll Call 292, H.R. 6395, 116<sup>th</sup> Cong. (Jan. 1, 2021), [https://www.senate.gov/legislative/LIS/roll\\_call\\_votes/vote\\_1162/vote\\_116\\_2\\_00292.htm](https://www.senate.gov/legislative/LIS/roll_call_votes/vote_1162/vote_116_2_00292.htm).

<sup>13</sup> H.R. Rep. No. 116-227 (2019), <https://www.congress.gov/116/crpt/hrpt227/CRPT-116hrpt227.pdf>.

<sup>14</sup> H.R. Rep. No. 116-617, *supra* note 6, at 2136 – 40.

<sup>15</sup> 166 Cong. Rec. S7309 – 13 (daily ed. Dec. 9, 2020) (statement of Sen. Brown); 166 Cong. Rec. H6932 – 33 (daily ed. Dec. 8, 2020) (statement of Rep. McHenry).

<sup>16</sup> Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 17557 (Apr. 5, 2021), <https://www.federalregister.gov/d/2021-06922>.

<sup>17</sup> Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69920 (Dec. 8, 2021), <https://www.federalregister.gov/d/2021-26548>.

<sup>18</sup> Beneficial Ownership Information Reporting Requirements, Docket ID FINCEN-2021-0005, All Comments on Docket, <https://www.regulations.gov/docket/FINCEN-2021-0005/comments>.

<sup>19</sup> Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498 (Sept. 30, 2022), <https://www.federalregister.gov/d/2022-21020> (adopting 31 C.F.R. § 1010.380) (“Adopting Release”).

## THE GOALS OF THE CTA

From a policy perspective, the passage of the CTA represented a congressional effort to fight financial crime in the U.S., an effort couched by its proponents as representing a paradigm shift.<sup>20</sup> The CTA’s core objective — the establishment of a beneficial ownership database — seeks to remedy a perceived critical vulnerability often exploited within the financial and corporate sectors: the opacity surrounding anonymous front and shell companies.

In passing the CTA, Congress framed the issue of beneficial ownership disclosure as analogous to a driver’s license. Of the more than two million entities formed in the U.S. each year, most states typically require less information from owners at the time of formation than is needed to obtain a bank account or driver’s license. In adopting the CTA, Congress found that this laxity allows “malign actors to conceal their ownership” of such entities and utilize the benefit of anonymity to facilitate illicit activity.<sup>21</sup>

By requiring the true beneficiaries of financial transactions to report their identities to FinCEN, the CTA aims to make it more difficult to launder illicit funds or finance terrorism through anonymous companies. The beneficial ownership reporting requirement is also intended to deter criminal activity by raising the stakes. In addition, the CTA’s beneficial ownership database is meant to function as an investigative tool, allowing investigators to identify the individuals behind criminal activity, track the movement of assets, and recover stolen funds. The CTA is also intended to better align U.S. beneficial ownership reporting requirements with those of other developed nations, which, in many cases, will continue to be more extensive than the CTA’s requirements.<sup>22</sup>

The passage and implementation of the CTA have not been without controversy. The CTA, by its terms, applies to a substantial portion of all small businesses formed in the U.S., most of which are engaged in

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<sup>20</sup> Remarks by Secretary of the Treasury Janet L. Yellen at the Financial Crimes Enforcement Network (Jan. 8, 2024), <https://home.treasury.gov/news/press-releases/jy2017>.

<sup>21</sup> NDAA § 6402(3).

<sup>22</sup> *See, e.g.*, Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Directive 2005/60/EC and Directive 2006/70/EC and repealing Directive 2005/60/EC.

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completely legitimate activities or may solely be formed as holding companies. Critics have raised concerns about the burden the reporting requirements place on legitimate businesses. There is also concern about the reduced level of privacy for beneficial owners and the risk that the FinCEN database of beneficial ownership information could be subject to hacking. Some see the CTA as a leaky net that will inconvenience law-abiding businesses and investors, but which bad actors will find easy to evade. Opponents of the CTA believe that FinCEN already has access to much of this information, such as beneficial ownership information collected by financial institutions when opening an account under existing AML rules,<sup>23</sup> and question whether the CTA adds any real tools to FinCEN's toolbox in terms of reaching those truly engaged in criminal activity.

## LEGAL CHALLENGES CASTING DOUBT OVER CTA

A series of recent constitutional challenges have cast a pall over the implementation of the CTA. These legal challenges focus primarily on the CTA's reporting requirements, which mandate that certain entities disclose their beneficial ownership information to FinCEN.

Opponents of the CTA have raised several constitutional arguments against these reporting requirements. Critics contend that the CTA exceeds Congress's enumerated powers under the Constitution and extends beyond activities that substantially affect interstate commerce, thereby encroaching upon the traditional regulatory domain of states. This argument calls into question the constitutional basis for the federal government's authority to regulate beneficial ownership reporting. Critics also argue that the CTA violates the Fourth Amendment's prohibition against unreasonable searches and seizures. They assert that the mandatory disclosure of beneficial ownership information constitutes an unconstitutional intrusion into the privacy of individuals and businesses, absent any individualized suspicion of wrongdoing. In addition to these Fourth Amendment and Commerce Clause challenges, opponents have also raised concerns about the CTA's potential infringement upon the Fifth Amendment's Due Process Clause, arguing that the Act's reporting requirements are unduly burdensome and lack adequate procedural safeguards to protect individuals and businesses from potential errors or misuse of their information, and the First Amendment, arguing that the CTA is an unconstitutional form of compelled speech.

These constitutional challenges are evidenced by a growing number of lawsuits attempting to limit or overturn the CTA. In a notable case, *National Small Business United v. Yellen*,<sup>24</sup> the U.S. District Court for the Northern District of Alabama ruled that the CTA was unconstitutional, finding that it exceeded Congress's authority under the foreign affairs powers of Congress, the Commerce Clause, and the taxing power. In light of this ruling, the court found it unnecessary to consider the plaintiffs' arguments under the First, Fourth, and Fifth Amendments. The court granted the plaintiffs' motion for an injunction against enforcement. This ruling, however, is limited to the specific plaintiffs in the case, and reporting requirements under the CTA were not otherwise enjoined. The defendants have appealed to the U.S. Court of Appeals for the Eleventh Circuit. FinCEN has announced that pending the appeal, it will not enforce the CTA against the plaintiffs in that action, but other reporting companies are still required to comply with the law and file beneficial ownership reports.<sup>25</sup>

There have also been several other challenges to the CTA, most of which followed and appear to have been inspired by *National Small Business United v. Yellen* and largely make similar arguments.<sup>26</sup> One case has been stayed pending the outcome of the Eleventh Circuit decision.<sup>27</sup> The other cases are proceeding, although in one case the plaintiffs' motion for a preliminary injunction has been denied without written opinion.<sup>28</sup> In

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<sup>24</sup> *National Small Business United v. Yellen*, Case No. 5:22-cv-01448, 2024 WL 899372 (N.D. Ala. Mar. 1, 2024), *appeal docketed*, No. 24-10736 (11<sup>th</sup> Cir. Mar. 11, 2024).

<sup>25</sup> Notice Regarding National Small Business United v. Yellen, No. 5:22-cv-01448 (N.D. Ala.) (Mar. 11, 2024), <https://fincen.gov/boi>.

<sup>26</sup> Complaint, *Black Economic Council of Mass. v. Yellen*, No. 1:24-cv-11411 (D. Mass. May 29, 2024); Complaint, *Texas Top Cop Shop v. Garland*, No. 4:24-cv-00478 (E.D. Tex. May 28, 2024); Verified Complaint, *Small Business Ass'n of Mich.*, No. 1:24-cv-00314 (W.D. Mich. Mar. 26, 2024); Complaint, *Boyle v. Yellen*, No. 2:24-cv-00081 (D. Me. Mar. 15, 2024); Complaint for Injunctive and Declaratory Relief – Combined Motion for a Preliminary Injunction and Memorandum in Support of the Motion for a Preliminary Injunction, *Robert J. Gargas Co. v. Yellen*, No. 1:23-cv-02468 (N.D. Ohio Dec. 29, 2023).

<sup>27</sup> *Robert J. Gargas Co. v. Sec'y of the Treasury*, No. 1:23-cv-02468 (N.D. Ohio Apr. 17, 2024).

<sup>28</sup> The court indicated that the denial of a preliminary injunction was based on a lack of irreparable harm and that its ruling on

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<sup>23</sup> 31 C.F.R. §1010.230.

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the Eleventh Circuit appeal, the court has granted a joint motion to expedite briefing and oral argument,<sup>29</sup> and oral argument is currently scheduled for September 29, 2024. The appeal has attracted several amicus briefs, including one from 22 states in favor of affirming the district court’s ruling.<sup>30</sup>

The ruling on the CTA’s constitutionality, and the subsequent pending appeal, has created a climate of legal uncertainty and raised the prospect of a potential appeal to the U.S. Supreme Court. The outcome of such an appeal could have significant implications for the future of the CTA and its efforts to combat money laundering and financial crime, as well as AML requirements more broadly. Ultimately, it is difficult to predict with certainty how the U.S. Supreme Court would treat such a challenge. At the time of writing, the legal future of the CTA remains uncertain, but the Act remains operational and in force.

## REPORTING REQUIREMENTS

The CTA imposes reporting obligations on a broad spectrum of entities, termed “reporting companies.” For domestic entities, a reporting company is an entity that is a corporation, a limited liability company (“LLC”), or created by the filing of a document with a secretary of state or similar office under the laws of a U.S. state or possession, or under the laws of an Indian tribe.<sup>31</sup> For foreign entities, a reporting company is an entity that is formed under the law of a foreign country and which registers to do business in a U.S. jurisdiction by the filing of a document with a secretary of state or any similar office, or under the laws of an Indian tribe.<sup>32</sup> The definition of “reporting company” is expansive and

encompasses various business structures, including limited partnerships and certain types of trusts, depending on applicable state law. Notably, the CTA provides exemptions for certain categories of entities, such as publicly traded companies, financial institutions, and large operating companies, from reporting company status; some of these exemptions are elaborated upon below.<sup>33</sup>

These reporting companies must submit beneficial ownership information (“BOI”) to FinCEN, including identifying information for the company itself and its “beneficial owners” — individuals who exercise substantial control over the entity or own or control at least 25% of the company’s equity interests.<sup>34</sup> The BOI reporting requirement is the cornerstone of the CTA’s transparency initiative, as it aims to unveil the individuals who ultimately control or benefit from these entities. The specific information required for beneficial owners includes the full legal name, the date of birth, the current residential street address, and a unique identifying number from a non-expired U.S. passport or state-issued identification document; a non-expired foreign passport number may also be used, but only if the individual does not have a U.S. identification document. Additionally, the reporting company must provide an image of the identification document.<sup>35</sup> The filing is not required to report the nature of the beneficial owner’s ownership or control.

Similar information must also be provided for up to two individuals who are known as “company applicants.” These are (1) the individual who directly files the document that creates a domestic reporting company or registers a foreign reporting company to do business and (2) the individual who is primarily responsible for directing or controlling that filing.<sup>36</sup> In many cases, company applicants may be lawyers or law firm employees. Law firms will need to consider carefully whether they are prepared for their personnel to fill that role.

Reporting companies must update their BOI reports if there is any change in any of the reported information concerning the company or its beneficial owners (but not concerning the company applicants, for whom there is no updating requirement). The only exception is that an updated filing is not required for the image of an

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the merits could go either way. Transcript of Preliminary Injunction Hearing 50-57, *Small Business Ass’n of Mich. v. Yellen*, No. 1:24-cv-314 (W.D. Mich. April 26, 2024).

<sup>29</sup> *National Small Business United v. U.S. Dep’t of the Treasury*, No. 24-10736 (11<sup>th</sup> Cir. Apr. 22, 2024).

<sup>30</sup> Brief of Amici Curiae States of West Virginia, Kansas, South Carolina, and 19 Other States in Support of Appellees and Affirmance, *National Small Business United v. Yellen*, No. 24-10736 (11<sup>th</sup> Cir. May 20, 2024) (listing, in addition to the aforementioned states, Alabama, Arkansas, Florida, Georgia, Idaho, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming).

<sup>31</sup> 31 C.F.R. § 1010.380(c)(1)(i).

<sup>32</sup> *Id.* § 1010.380(c)(1)(ii).

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<sup>33</sup> *Id.* § 1010.380(c)(2).

<sup>34</sup> *Id.* § 1010.380(d).

<sup>35</sup> *Id.* § 1010.380(b)(1).

<sup>36</sup> *Id.* § 1010.380(e).

identification document if there is no change to the identification number and other information provided by the document. This requirement presents a substantial compliance burden for reporting companies, which must be prepared to update their BOI reports whenever a beneficial owner has a change of address or a change in the identifying number of their identification document.

The compliance burden can be mitigated, for both reporting companies and their beneficial owners and company applicants, by the beneficial owners and company applicants obtaining FinCEN identifiers. Individuals can obtain FinCEN identifiers by submitting to FinCEN an application that contains the information that would otherwise be filed about the individual by the reporting company.<sup>37</sup> Thereafter, the individual will be obligated to update FinCEN with any changes to their information, but the reporting company will not be required to file an update.<sup>38</sup> This flexibility will be particularly welcome for individuals who are beneficial owners or company applicants with respect to many reporting companies and might otherwise have to provide personal information and updates to all of them.

For reporting companies first created or registered to do business in 2024, a BOI report is due within 90 calendar days after receiving evidence of the filing. This 90-calendar day deadline runs from the date the company receives actual notice that its creation or registration is effective or the date a secretary of state or similar office first provides public notice of its creation or registration, whichever is earlier. Reporting companies first created or registered to do business prior to 2024 must file a BOI report on or before January 1, 2025, and those entities do not need to include company applicant information. Reporting companies created or registered to do business after 2024 and entities that no longer meet the criteria for an exemption from reporting company status must file a BOI report within 30 days, calculated in the same manner as noted above.<sup>39</sup> All updates are due within 30 days after the change precipitating the update occurs.<sup>40</sup>

Reporting companies and beneficial owners who fail to accurately report may be subject to civil fines of up to

\$591 per day and, in cases of willful noncompliance, criminal penalties of up to \$10,000 and imprisonment for up to two years.<sup>41</sup> Persons potentially liable include persons who either cause a failure to report complete or updated BOI, or are senior officers of the relevant entity at the time of the failure.<sup>42</sup> However, Andrea Gacki, the Director of FinCEN, has stated that FinCEN is not looking to needlessly burden the small business community, and small business owners looking to comply should not lose sleep over these new reporting requirements, as enforcement actions will focus on willful violations by illicit actors.<sup>43</sup> A safe harbor from civil and criminal penalties is available to a person who voluntarily and promptly submits a report containing corrected information within 90 days after the date of the original submission.<sup>44</sup>

## EXEMPT ENTITIES

The CTA provides 23 exemptions from reporting company status for entities that either fall under existing regulatory scrutiny or are deemed to present a minimal risk of being used for illicit purposes.<sup>45</sup> The basic justification behind these exemptions is that most categories refer to entities that already disclose their beneficial owners to the government in one way or another and so don't need to duplicate that disclosure in the FinCEN database.<sup>46</sup> According to the legislative history, these exemptions should be interpreted as

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<sup>37</sup> Welcome to the FinCEN ID Application for Individuals, <https://fincenid.fincen.gov/>.

<sup>38</sup> *Id.* § 1010.380(b)(4).

<sup>39</sup> *Id.* § 1010.380(a)(1).

<sup>40</sup> *Id.* § 1010.380(a)(2)(i).

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<sup>41</sup> 31 U.S.C. § 5336(h); 31 C.F.R. § 1010.380(g). *See also* Financial Crimes Enforcement Network; Inflation Adjustment of Civil Monetary Penalties, 89 Fed. Reg. 4820, 4821 (Jan. 25, 2024).

<sup>42</sup> 31 C.F.R. § 1010.380(g)(4).

<sup>43</sup> Andrea Gacki, Director, FinCEN, Prepared Remarks of FinCEN Director Andrea Gacki During Beneficial Ownership Information Reporting Event in Tucson, Arizona (June 11, 2024), <https://fincen.gov/news/speeches/prepared-remarks-fincen-director-andrea-gacki-during-beneficial-ownership-information>.

<sup>44</sup> 31 U.S.C. § 5336(h)(3)(C); *see also* Adopting Release, *supra* note 19, 87 Fed. Reg. at 59513 (stating that the safe harbor does not extend to reports corrected more than 90 days after they are filed, even if a reporting company files a correction promptly after having reason to know that a correction is needed).

<sup>45</sup> 31 C.F.R. § 1010.380(c)(2) (listing the 23 exemptions to “reporting company”).

<sup>46</sup> 166 Cong. Rec. S7311 (daily ed. Dec. 9, 2020) (statement of Sen. Brown).

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narrowly as possible to exclude entities that do not disclose their beneficial owners to the government.<sup>47</sup>

Financial institutions, already subject to comprehensive regulatory frameworks, are largely exempt. Exemptions cover banks, credit unions, depository institution holding companies, money services businesses, broker-dealers in securities, securities exchanges and clearing agencies, registered investment companies, registered investment advisers, and insurance companies. These entities are subject to rigorous reporting and oversight, rendering the CTA's reporting requirements redundant.

Large operating companies with more than 20 full-time employees, annual United States revenue exceeding \$5 million as reported on a U.S. tax return, and a physical operating presence in the U.S. are also exempt. These businesses are considered less susceptible to misuse due to their size and visibility. Similarly, publicly traded companies, subject to the stringent reporting requirements of the Securities Exchange Act of 1934, are not required to report under the CTA.

Other exempt entities include accounting firms, tax-exempt entities, certain inactive entities, public utilities, commodity boards of trade and conglomerates of exempt entities. These exemptions are predicated on the understanding that these entities either operate under existing regulatory regimes or pose a low risk of being used for illicit financial activities. An exemption is also available for entities that are wholly owned or controlled by one or more entities falling within certain exemptions. The legislative history indicates that this exemption should be interpreted as narrowly as possible to exclude subsidiaries that never disclose their true owners to the federal government.<sup>48</sup>

The CTA's exemptions reflect an effort by Congress to demonstrate a balanced approach that prioritizes risk assessment and avoids imposing undue burdens on entities that pose minimal risk. The effect, however, will be counterintuitive to many reporting companies and their beneficial owners. Large, well-resourced companies, familiar with regulatory requirements and readily able to comply with requirements such as those imposed by the CTA, will generally be exempt from

filing BOI reports. At the same time, many small businesses and their owners and controlling persons, lacking both sophistication and resources, are subject to unexpected new filing and updating requirements.

The listed exemptions may not necessarily be permanent. If the Secretary of the Treasury determines that a class of exempt entities has been involved in significant abuse relating to financial crime, the Secretary is to submit to Congress a report that explains the reasons for the determination and any administrative or legislative recommendations to prevent such abuse.<sup>49</sup> The legislative history suggests that the exemptions for private funds and other pooled investment vehicles (which is further discussed below), for large operating companies, and for wholly owned or controlled subsidiaries of certain exempt entities (which is also further discussed below) may be of special concern and should be subject to continuous, careful review by Treasury.<sup>50</sup>

## **IDENTIFYING POTENTIAL REPORTING COMPANIES: INCONSISTENT TREATMENT ACROSS STATES**

Although the CTA is a federal law, its interaction with varying state laws creates inconsistencies in how entities are treated across jurisdictions. The CTA's definition of a "reporting company" hinges on whether the entity is formed by filing documents with a state office. However, states permit some entities, such as (in most but not all states) general partnerships, to exist without formal registration.<sup>51</sup> This discrepancy means that some entities may be exempt from CTA reporting in one state but not in another, based solely on location.

Consider, for example, the formation requirements for limited liability partnerships ("LLPs"), which differ significantly between states like New York and Pennsylvania. In New York, LLPs are explicitly required to file,<sup>52</sup> while Pennsylvania law requires a filing of a certificate electing limited liability status but does not expressly state that the entity is formed by a filing.<sup>53</sup>

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<sup>47</sup> *Id.*; see also Adopting Release, *supra* note 19, 87 Fed. Reg. at 59539 (stating that, as a general matter, FinCEN believes it is appropriate to interpret ambiguities in exemptions reasonably narrowly).

<sup>48</sup> 166 Cong. Rec. S7311 (daily ed. Dec. 9, 2020) (statement of Sen. Brown).

<sup>49</sup> 31 U.S.C. § 5336(i).

<sup>50</sup> 166 Cong. Rec. S7311 (daily ed. Dec. 9, 2020) (statement of Sen. Brown).

<sup>51</sup> For example, Delaware, Hawaii, and Louisiana all require formation documents to be filed with the Secretary of State in order to start a general partnership in these jurisdictions. Whether this means that a general partnership is "created" by the filing must be determined on a state-by-state basis.

<sup>52</sup> N.Y. Partnership Law § 121-1500 (McKinney 2024).

<sup>53</sup> 15 Pa. Cons. Stat. § 8201.

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This disparity creates potential confusion regarding their reporting obligations under the CTA and may even incentivize the formation of certain entities in specific states based on reporting requirements. Significantly, registration to do business in the U.S. triggers reporting company status for foreign (non-U.S.) entities, but it has no effect on domestic entities.

The complexities of trusts and other legal arrangements, such as business trusts, nominee agreements, and variable structures, raise questions about their classification as reporting companies, and the diverse operating agreements of LLCs similarly raise questions about who is a beneficial owner. For instance, whether a certain individual member of an LLC is required to report may depend on the structure of the LLC's operating agreement, the degree of control exercised by its members, and other factors.

Furthermore, some states have their own beneficial ownership reporting rules, separate from the CTA. These can sometimes conflict with or supplement federal reporting, creating a complex patchwork of obligations for entities operating in multiple states.<sup>54</sup>

These inconsistencies threaten the CTA's goal of achieving national uniformity and raise the specter of regulatory arbitrage, where entities may seek to exploit loopholes or favorable interpretations in different jurisdictions. Therefore, it is imperative for legal practitioners to be cognizant of these nuances and advise clients on the optimal course of action.

## **IDENTIFYING BENEFICIAL OWNERS: 25% OWNERSHIP TEST**

The 25% ownership test, while seemingly straightforward, can be complex in application. It encompasses both direct and indirect ownership, including ownership held through trusts, holding companies, or other legal arrangements.<sup>55</sup> Determining ownership percentages can become particularly challenging in cases of layered ownership structures or those in which ownership interests are dispersed among multiple individuals or entities. In circumstances where a company has multiple classes of stock or units with differing voting rights, an individual must calculate both

the percentage of *ownership interest* the individual would hold if all convertible instruments held by the individual were exercised or converted, and the percentage of *voting power* the individual would hold if all convertible instruments held by the individual were exercised or converted.<sup>56</sup> The individual's ownership interest for BOI reporting purposes will be the larger of these two percentages. A similar calculation is used if the company in question is treated as a partnership for federal income tax purposes and issues capital or profit interests.

A nuanced consideration in calculating ownership interests for BOI reporting is the treatment of convertible instruments. Warrants, options or rights to purchase, sell, or subscribe to ownership of a company (whether shares or ownership units) must be treated as exercised or converted in all calculations. However, convertible instruments issued to third parties (i.e., parties other than the individual whose ownership percentage is being calculated for BOI reporting) are treated as not exercised or converted. As a result, a reporting company may have more than four beneficial owners based on the 25% ownership test — in concept, considerably more than four if the company has many convertible securities outstanding.

If an individual is a beneficial owner exclusively by virtue of the individual's indirect ownership through one or more exempt entities, the reporting company may include the names of the exempt entities in lieu of the BOI that would otherwise be required.<sup>57</sup> This special rule does not apply when an individual owns or controls ownership interests through both exempt and non-exempt entities.<sup>58</sup> In addition, the rule, by its terms, does not apply if the individual also has substantial control of the reporting company.

## **IDENTIFYING BENEFICIAL OWNERS: SUBSTANTIAL CONTROL TEST**

Control over entities can manifest in various forms, some more apparent, such as direct ownership. However, the CTA also endeavors to capture instances of direct and indirect control by individuals who may not be owners of the company in question but wield decision-

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<sup>54</sup> For example, consider New York's Limited Liability Company Transparency Act ("NY LLCTA"), which was signed into law on March 1, 2024, as an amendment to the existing Limited Liability Company Law. The NY LLCTA is modeled after and contains similar reporting requirements to the CTA.

<sup>55</sup> 31 C.F.R. § 1010.380(d)(2).

<sup>56</sup> FinCEN, Small Entity Compliance Guide 18 – 28 (Sept. 18, 2023), <https://www.fincen.gov/boi/small-entity-compliance-guide>.

<sup>57</sup> 31 C.F.R. § 1010.380(b)(2)(i).

<sup>58</sup> Beneficial Ownership Information Frequently Asked Question D.7. (Sept. 29, 2023), [https://fincen.gov/boi-faqs#D\\_7](https://fincen.gov/boi-faqs#D_7).



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making power over its operations. To achieve this, the CTA characterizes “beneficial owners” to include those who exercise “substantial control” over the entity, as well as those who own or control at least 25% of the ownership interests in the entity. The concept of substantial control extends beyond mere formal titles or positions, encompassing the ability to make key decisions, influence operations, or direct the company’s activities.<sup>59</sup> This broad definition is designed to capture the actual power dynamics within an organization, irrespective of how the organization is formally structured. Therefore, the analysis of substantial control can be oblique.

“Substantial control” does not need to be formal, nor does it necessarily require majority ownership; rather, it focuses on the practical ability to influence significant decisions. The language is intentionally broad, recognizing the potential for control to be exerted through informal channels, personal relationships, or other mechanisms not readily captured by numerical thresholds. In its implementing rule, FinCEN identifies four different ways that an individual may exercise substantial control:

1. **Senior Officer.** The individual is a senior officer of the entity. This includes positions such as president and chief executive officer but also extends to other individuals in an entity’s hierarchy, including the chief financial officer, the general counsel, the chief operating officer, and any other officer, regardless of title, who performs a similar function.
2. **Appointment or Removal Authority.** The individual has the capacity to appoint or remove senior officers or a majority of the board of directors (or similar body).
3. **Important Decision-Making Authority.** The individual directs, determines, or substantially influences important decisions made by the entity, including decisions concerning the entity’s business, finances, or structure. This would include decisions regarding the nature or scope of the business, entry into or termination of key contracts, transfer or sale of key assets, changes to structure or filings, or amendments to key documents.

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<sup>59</sup> 31 C.F.R. § 1010.380(d)(1); *see also* Small Entity Compliance Guide, *supra* note 56 (providing guidance on issues relating to “substantial control”). FinCEN expects that a reporting company will always identify at least one beneficial owner under the substantial control component. Adopting Release, *supra* note 19, 87 Fed. Reg. at 59525.

4. **Any other form of substantial control.** This final criterion is intentionally broad, designed to encompass both customary agreements such as stockholders’ agreements and any novel or evolving forms of control over entities, including flexible organizational structures that may have unique indicators of control. Therefore, other agreements such as voting agreements, proxies, and similar instruments also need to be evaluated to determine substantial control.

Defining “substantial control” under the CTA poses a considerable challenge for reporting companies and legal practitioners, even those well-versed in forming and advising entities of all types and the applicable laws relating thereto. The statute’s intentional breadth introduces a degree of ambiguity that is likely to lead to significant interpretive difficulties for the most sophisticated companies and their counsel.

One primary concern lies in the application of the “catchall” provision, which necessitates a fact-intensive inquiry into the nuances of a company’s operations, decision-making processes, and informal power dynamics. Such an inquiry can be resource-intensive, requiring extensive document review, interviews, and potentially expert testimony. Moreover, the breadth of the catchall may lead to conflicting views by a company or its counsel as to how to evaluate the various matters that need to be considered in assessing who has substantial control.

Another challenge arises from the concept of indirect control, which allows for the attribution of control through intermediary entities. This can create complexity in determining the ultimate beneficial owner, particularly in multi-layered corporate structures with intricate ownership chains.

Further complicating the matter is the potential for control to be exercised through informal means, such as personal relationships, reputational influence, or historical patterns of deference. These informal mechanisms are often difficult to quantify and may not be readily apparent from an entity’s governing documents, agreements with owners, or public filings, requiring a deep understanding of the company’s culture and internal dynamics and the personal histories of key individuals.

In practice, applying the substantial control test under the CTA will necessarily involve a complex factual inquiry for all but the simplest of entity structures. Legal practitioners advising clients on CTA compliance must approach the determination of “substantial control” with

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a nuanced understanding of both the legal framework and the specific factual context. This exercise may require a multidisciplinary approach, drawing on expertise in organizational law, financial regulations, investigative techniques, and potentially even cultural analysis. It may also require proactive engagement with regulatory authorities to seek guidance and clarification in ambiguous situations. Despite FinCEN's publication of guidance and answers to frequently asked questions,<sup>60</sup> many questions remain unanswered.

## THE IMPACT OF THE CTA ON SEC-REGULATED AND CFTC-REGULATED ENTITIES

The CTA contains broad exemptions from reporting company status for many entities that are regulated by the U.S. Securities and Exchange Commission or the Commodity Futures Trading Commission. These include exemptions for SEC reporting companies, registered broker-dealers, other entities registered with the SEC under the Securities Exchange Act of 1934 (e.g., SEC-registered transfer agents and municipal advisors), and registered investment companies, as well as futures commission merchants, introducing brokers, swap dealers, major swap participants, commodity pool operators, and retail foreign exchange dealers registered with the CFTC.<sup>61</sup> In addition, any entity whose ownership interests are controlled or wholly owned, directly or indirectly, by one or more of these exempt entities is also exempt.<sup>62</sup>

The situation becomes more nuanced when we turn to investment advisers. To be sure, there is a similar broad exemption for SEC-registered investment advisers,<sup>63</sup> and there is also an exemption for venture capital fund advisers, which are exempt from SEC registration but nonetheless file Form ADV with the SEC.<sup>64</sup> There is no exemption, however, for state-registered investment advisers or certain other exempt reporting advisers, which also file Form ADV, nor is there any exemption for entities exempted from investment adviser registration and filing, notably including family offices.

FinCEN has not, to date, addressed the application of the CTA to relying advisers or to certain special purpose vehicles ("SPVs"). A relying adviser is an investment adviser eligible to register with the SEC that relies upon another investment adviser to file an umbrella registration on Form ADV that covers both the filing adviser and one or more relying advisers.<sup>65</sup> The Form ADV includes a Schedule R for each relying adviser that provides similar information to that which would otherwise be provided elsewhere in Form ADV. An SPV is an entity that is established by a registered investment adviser to act as the general partner or managing member of a private fund. The SEC staff (but not the SEC itself) has stated that an SPV meeting certain conditions may look to, and essentially rely upon, the registered adviser's registration and need not submit a separate Form ADV, and it characterized such an SPV as an investment adviser registered with the SEC.<sup>66</sup> An SPV must be controlled by a registered investment adviser, but it may have different ownership, and its officers and direct and indirect owners are not disclosed on Form ADV.

Nuance also applies to the treatment of private funds. There is an exemption for certain private funds (entities excluded from investment company status by Section 3(c)(1) or (7) of the Investment Company Act of 1940 ("1940 Act")), but only if the entity is identified by its legal name by an investment adviser on Form ADV (or will be so identified in the next annual updating amendment) and is operated or advised by a bank, credit union, broker-dealer, registered investment company, registered investment adviser, or venture capital fund

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<sup>60</sup> Beneficial Ownership Information, <https://fincen.gov/boi>.

<sup>61</sup> 31 C.F.R. § 1010.380(c)(2). Annoyingly, since "reporting company" can refer either to a reporting company under the CTA or to an SEC reporting company (which is automatically *not* a CTA reporting company), it is necessary to take care in using the term when the reference might be to either.

<sup>62</sup> *Id.* § 1010.380(c)(2)(xxii).

<sup>63</sup> *Id.* § 1010.380(c)(2)(x).

<sup>64</sup> *Id.* § 1010.380(c)(2)(xi).

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<sup>65</sup> Form ADV General Instruction 5, <https://www.sec.gov/files/formadv.pdf>.

<sup>66</sup> *American Bar Ass'n, Business Law Section, SEC No-Action Letter* (Jan. 18, 2012), <https://www.sec.gov/divisions/investment/noaction/2012/aba011812.htm>; *ABA Subcommittee on Private Investment Entities, SEC No-Action Letter* (Dec. 8, 2005), <https://www.sec.gov/divisions/investment/noaction/aba120805.htm>. The 2012 letter also addressed relying advisers, but that position has been superseded by SEC action and withdrawn; the letters continue to represent the position of the staff with respect to SPVs. Frequently Asked Questions on Form ADV and IARD (June 12, 2017), <https://www.sec.gov/divisions/investment/iard/iardfaq#schedr>. Although the SEC did not endorse the staff position with respect to SPVs, it expressly did not withdraw the position when it withdrew the staff position on relying advisers. Form ADV and Investment Advisers Act Rules, Release No. IA-4509 (Aug. 25, 2016), 81 Fed. Reg. 60418, 60435 (Sept. 1, 2016), <https://www.federalregister.gov/d/2016-20832>.

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adviser.<sup>67</sup> Thus, an analysis is required for each private fund to confirm that it meets these requirements. Real estate funds, which rely on a different exemption from the 1940 Act, typically will not be exempt. While commodity pool operators are exempt, there is no exemption for commodity pools, although some commodity pools may be able to rely on the private fund exemption.

The private fund exemption is also limited by a special rule for foreign pooled investment vehicles. An entity relying on this exemption but formed under the laws of a foreign country is nonetheless deemed a reporting company, but needs to provide beneficial ownership information solely with respect to an individual who exercises substantial control over the entity.<sup>68</sup> For this purpose, a pooled investment vehicle is a private fund or an investment company (within the meaning of the 1940 Act) that is not a registered investment company — e.g., business development companies, employees' security companies, and investment companies granted an exemption from registration by the SEC.<sup>69</sup>

Even when a private fund is an exempted entity, its portfolio companies may be reporting companies. The exemption for subsidiaries of certain exempt entities does not apply to the subsidiaries of pooled investment vehicles. Since the exemption applies to entities whose ownership interests are “controlled or wholly owned, directly or indirectly,” by certain exempt entities, it may be possible to rely on it nonetheless if the portfolio company is a wholly owned subsidiary of a private fund that is controlled by one or more registered investment advisers. However, less than full control is insufficient, FinCEN has said, explaining that “control of ownership interests means that the exempt entity entirely controls all of the ownership interests in the reporting company, in the same way that an exempt entity must wholly own all of a subsidiary’s ownership interests for the exemption to apply.”<sup>70</sup>

Even when exemptions are fully available, timing may be an issue. Starting in 2025, a BOI report will be due within 30 days of an entity’s creation or registration to do business. Qualifying for an exemption may take

more than 30 days. For example, the registration of an investment adviser may take up to 45 days.<sup>71</sup> This may, of course, also be an issue for other would-be exempt entities, such as tax-exempt entities.

## THE INTERSECTION BETWEEN THE CTA AND TRUST AND ESTATE PLANNING

The CTA significantly impacts the trust and estate world in several distinct ways. First, many clients own closely held or family-owned businesses, often structured as limited liability companies or limited partnerships for estate, tax, or asset protection planning purposes. Unless exempt, these entities may be classified as reporting companies under the CTA, subjecting a substantial number of individuals to the BOI reporting requirements. The CTA’s reporting requirements mandate that the individuals who own and control these entities, directly or indirectly, need to provide their personal identifying information to FinCEN or face substantial penalties.<sup>72</sup> Crucially, many smaller and closely held businesses are unaware of these new reporting requirements, so perhaps the most important step for legal practitioners is to make such clients aware of any reporting obligations under the CTA.

Secondly, the CTA introduces complexities surrounding the death of a beneficial owner. When a beneficial owner dies, resulting in changes to the reporting company’s beneficial ownership structure, the changes are required to be reported within 30 days of when the deceased beneficial owner’s estate is settled.<sup>73</sup> The updated report should, to the extent appropriate, identify any new beneficial owners. This approach eliminates the need to report the decedent’s estate as a beneficial owner within 30 days of death.<sup>74</sup>

While common law trusts used for estate planning purposes typically are not reporting companies themselves, the CTA’s beneficial ownership rule requires identifying any individual that, directly or indirectly, has substantial control over or owns or controls 25% or more of the ownership interest in a reporting company. This may include trust beneficiaries and other parties participating in the administration of a

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<sup>67</sup> 31 C.F.R. § 1010.380(c)(2)(xviii), (f)(7)(ii).

<sup>68</sup> *Id.* § 1010.380(b)(2)(iii).

<sup>69</sup> *Id.* § 1010.380(f)(7); *see* 1940 Act §§ 3, 6, 15 U.S.C. §§ 80a-3, 80a-6.

<sup>70</sup> Beneficial Ownership Information Frequently Asked Question L.6. (Jan. 12, 2024), [https://fincen.gov/boi-faqs#L\\_6](https://fincen.gov/boi-faqs#L_6).

<sup>71</sup> Investment Advisers Act of 1940, § 203(c)(2), 15 U.S.C. § 80b-3(c)(2).

<sup>72</sup> 31 U.S.C. § 5336(h).

<sup>73</sup> 31 C.F.R. § 1010.380(a)(2)(iii).

<sup>74</sup> Small Entity Compliance Guide, *supra* note 56, at 45 (clarifying that the death of a beneficial owner would constitute a change in beneficial ownership).

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trust. As a result, a reporting company may need to collect identifying information from the trust's trustee, grantor, and beneficiaries to fulfill its reporting obligations. Where a trust owns or controls a reporting company, the following individuals must be reported as beneficial owners:<sup>75</sup>

1. Any trustee of the trust or other individual with authority to dispose of trust assets.
2. Any beneficiary who is the sole current permissible recipient of trust income and principal from the trust or who has the right to demand a distribution of or withdraw substantially all of the trust assets.
3. Any grantor who has the right to revoke the trust or otherwise withdraw trust assets.

This list is not exhaustive, and a thorough analysis of each trust is necessary to evaluate whether any party to the trust meets the substantial control or 25% ownership threshold tests. Multiple individuals involved in the administration of a trust may be considered beneficial owners. Additionally, such analysis must consider the facts of a particular trust, including whether any minor children or non-vested beneficiaries are involved, as these individuals may be exempted from the definition of a beneficial owner.

In some cases, trusts may appoint "advisors" such as investment advisers, distribution advisers, and trust protectors. FinCEN does not specifically address these roles, but it does note that facts and circumstances may cause individuals other than the grantor, trustee, or beneficiary to be beneficial owners.<sup>76</sup> For example, if a trust advisor has the right to dispose of trust assets, or meets the substantial control test, that advisor should be treated as a beneficial owner and reported to FinCEN.

In the event an institution (as opposed to an individual) is serving as a trustee of a trust that owns at least 25% of a reporting company or if the trustee has substantial control over a reporting company, the reporting company may need to report BOI about the institutional trustee. However, if certain conditions are met, including the institutional trustee being exempt from reporting requirements, the reporting company may

only be required to report the name of the institutional trustee.<sup>77</sup>

## CHALLENGES IN FILING BOI

Once an entity has determined its reporting obligations and identified its beneficial owners, the final hurdle is obtaining and submitting the relevant information to FinCEN.<sup>78</sup> Gathering the requisite personal identifying information ("PII"), such as legal names, dates of birth, residential addresses, and unique identification numbers from government-issued identification documents, can be an arduous task, particularly when beneficial owners are reticent or uncooperative. In such cases, reporting companies may need to engage in extensive due diligence, consult public records, or seek legal counsel to ensure accurate reporting.

To mitigate these challenges, existing reporting companies should proactively review and update their governing documents, such as operating agreements, certificates of incorporation, bylaws, and shareholder agreements, to include language requiring beneficial owners to provide copies of their identifying documents and attest to the accuracy of the information provided. This approach not only facilitates compliance with the CTA's reporting requirements but also establishes a contractual obligation for beneficial owners to cooperate in the information-gathering process. Enforcing these contractual obligations, however, can be challenging, especially when dealing with foreign beneficial owners or complex ownership structures. Newly formed entities should consider including CTA compliance covenants in their organizational documents and any agreements between and among the company and its owners.

Another challenge lies in the ongoing obligation to update BOI reports promptly. FinCEN's Beneficial Ownership Information Reporting Requirements mandate that reporting companies file an updated report within 30 days after any change in previously reported information.<sup>79</sup> Typical changes would be modifications to the beneficial ownership structure, such as the addition or removal of beneficial owners, as well as changes in the PII of existing beneficial owners. Monitoring these changes and ensuring timely reporting

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<sup>75</sup> 31 C.F.R. § 1010.380(d)(2)(ii).

<sup>76</sup> Adopting Release, *supra* note 19, 87 Fed. Reg. at 59529 (noting that "[d]epending on the particular facts and circumstances trusts may serve as a mechanism for the exercise of substantial control").

<sup>77</sup> Beneficial Ownership Information Frequently Asked Question D.16 (Apr. 18, 2024), <https://fincen.gov/boi-faqs-D.16>.

<sup>78</sup> Welcome to the BOI E-Filing System, <https://boiefiling.fincen.gov/>.

<sup>79</sup> 31 C.F.R. § 1010.380(d).

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can be a significant administrative burden, particularly for companies with frequent ownership changes or a large number of beneficial owners. Non-compliance with these update requirements can result in civil and criminal penalties, underscoring the importance of implementing robust compliance procedures.

Data privacy concerns are also paramount in the context of the CTA's reporting regime.<sup>80</sup> While FinCEN has established stringent data security safeguards to protect the confidentiality of BOI reports, the risk of unauthorized access, data breaches, and misuse of sensitive personal information remains a concern. Reporting companies must take appropriate measures to secure the PII they collect, such as implementing robust cybersecurity protocols, limiting access to authorized personnel, and complying with applicable data protection laws. Furthermore, FinCEN's recent announcement regarding fraudulent attempts to solicit information from potential reporting entities highlights the need for vigilance and caution in sharing BOI data.<sup>81</sup>

From a practical perspective, reporting companies must allocate sufficient resources to navigate the CTA's complexities. This includes engaging legal counsel to interpret the statute and regulations, establishing internal compliance procedures, and investing in technology solutions to facilitate data collection, verification and reporting. Additionally, companies should proactively communicate with their beneficial owners about the CTA's requirements and the importance of timely and accurate reporting.

## CONCLUDING THOUGHTS

The CTA undeniably evidences a new approach in the U.S.'s efforts to combat financial crime. By mandating the disclosure of beneficial ownership details, the CTA endeavors to break through the opaque structures that have been used by illicit actors to facilitate concealing their activities. Its reach extends beyond U.S. borders, impacting entities established under foreign law that conduct business within the U.S., thus necessitating a nuanced understanding of the extraterritorial implications for attorneys advising multinational clients.

The CTA's implementation nonetheless faces hurdles and challenges. The sheer volume of information to be gathered, verified, and secured presents logistical complexities, while the potential for unintended consequences on small businesses and legitimate privacy concerns warrant careful consideration.

It is imperative for legal practitioners to remain abreast of evolving regulatory guidance, engage in ongoing discourse on the CTA's intricacies, and contribute to research endeavors that illuminate its impact across various sectors and jurisdictions. Lawyers advising clients across multiple jurisdictions must be particularly vigilant in navigating the complexities of compliance, considering the interplay of local laws and the CTA's requirements. A comprehensive understanding of exemptions, reporting obligations, and potential penalties is essential for providing effective counsel. ■

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<sup>80</sup> As contemplated by the CTA, FinCEN has adopted a data privacy rule governing information gathered pursuant to the CTA. Beneficial Ownership Information Access and Safeguards, 88 Fed. Reg. 88732 (Dec. 22, 2023) (adopting 31 C.F.R. § 1010.955). FinCEN plans to grant access to its database in phases. Key federal agencies engaged in national security, intelligence, or law enforcement activities will be the first to gain access, followed by other federal agencies and state, local, and tribal law enforcement agencies with court authorization. Foreign law enforcement agencies and financial institutions meeting specific criteria will also be granted access later in the rollout. Each category of authorized recipients will be subject to strict security and confidentiality protocols to prevent unauthorized disclosure.

<sup>81</sup> FinCEN states on its BOI home page that it has learned of fraudulent attempts to solicit information from individuals and entities who may be subject to reporting requirements under the CTA. Beneficial Ownership Information, <https://fincen.gov/boi>.

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