

The Corporate Transparency Act Is Happening To You and Your Clients: Dealing with the Tsunami

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The beneficial owner reporting requirements of the Corporate Transparency Act,¹ by means of the “Reporting Regulations,”² went into effect on January 1, 2024. As of that effective

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¹ The Corporate Transparency Act (the “CTA”) was adopted as part of the Anti-Money Laundering Act of 2020, it being part of the 2021 National Defense Authorization Act for Fiscal Year 2021 (the “NDAA”). The full name of the NDAA is the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub.L. No. 116-283 (H.R. 6395), 134 Stat. 338, 116th Cong. 2d Sess. Congress’ override of the President’s veto was taken in Record Vote No. 292 (Jan. 1, 2021). The anti-money laundering provisions are found in §§ 6001-6511 of the NDAA. The CTA consists of §§ 6401-6403 of the NDAA. Section 6402 of the NDAA sets forth Congress’ findings and objectives in passing the CTA, and § 6403 contains its substantive provisions, primarily adding § 5336 to Title 31 of the United States Code.

As of this writing (May, 2024) there have been introduced to Congress three bills proposing to amend or even abolish the CTA, namely: (i) H.R. 4035, the “Protecting Small Business Information Act of 2023” (proposing to delay the effective date of FinCEN’s final CTA rules until after the Secretary of Treasury certifies that all of FinCEN’s final rules have been issued and that all the final rules will take effect on the same date); (ii) H.R. 5119, the “Protect Small Business and Prevent Illicit Financial Activity Act” (proposing that existing reporting companies have two years from the effective date of the regulations to file their beneficial owner reports, require that reporting companies formed after the effective date of the CTA regulations have 90 days to file their initial report; set a deadline of 90 days for companies to file as necessary updated reports and prohibiting reports that indicate that they are unable to identify or obtain the required information on their report); and (iii) H.R. 4187 / S. 4297, the “Repealing Big Brother Overreach Act” (providing for the repeal of the CTA). See also *infra* notes 216 through 220 and accompanying text as to lawsuits challenging the constitutionality of the CTA.

² The Reporting Regulations appear at 31 CFR sections 1010.380(a)(1) et seq. The “final” beneficial ownership report regulations were released in Beneficial Ownership Information Reporting Requirements,

date the clock began to run on the requirement that almost every business in the country, whether formed before or after that date, file a report with the Financial Crimes Enforcement Network (“FinCEN”) office of the Department of the Treasury (“Treasury”) identifying itself, its “beneficial owners” and for companies formed on or after January 1, 2024, its “company applicant(s).” The scope of the CTA is breathtaking; Treasury estimates that 35 million companies will in 2024 need to file an initial report, and each year thereafter should see more than 5.5 million reports.³ Likely your firm and most of your clients are subject to these filing requirements.

A Quick Summary

Absent an exemption, every corporation⁴ and limited liability company (“LLC”) and as well certain other business entities organized in the U.S. (each a “domestic reporting company”) is

87 Fed Reg. 59498 (Sept. 30, 2022). The final rules followed from a Notice of Proposed Rule Making, Beneficial Ownership Information Reporting Requirements, 86 FR 69920 (Dec. 8, 2021), it following from the Advance Notice of proposed Rule Making set forth at Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 17557 (Apr. 5, 2021). Those “final” regulations were as to certain due dates amended by Beneficial Ownership Information Reporting Deadline Extension for Reporting Companies Created or Registered in 2024, 88 FR 66730 (Sept. 28, 2023) and supplemented as to the use of FinCEN Identifiers by the release Use of FinCEN Identifiers for Reporting Beneficial Ownership Information of Entities, 88 Fed. Reg. 76995 (Nov. 8, 2023). In interpreting and applying the Reporting Regulations, reference should be made as well to the Beneficial Ownership Information Reporting - Frequently Asked Questions (the “FinCEN FAQs”) and the FinCEN Small Entity Compliance Guide - Reporting Requirements (the “FinCEN Guide”). This article references the FinCEN FAQs and the FinCEN Guide as they stood as of May 19, 2024, that “cut off” date being appropriate as May 19 is the anniversary of the 1536 beheading of Anne Boleyn. Links to the FinCEN Guide and the FAQs, as well as the Reporting Regulations and the CTA itself are below in “Additional Resources.”

³ According to the release accompanying the Reporting Regulations, “The number of legal entities already in existence in the United States that may need to report information on themselves, their beneficial owners, and their formation or registration agents pursuant to the CTA is in the tens of millions.” See Beneficial Ownership Information Reporting Requirements, 31 CFR Part 1010, 87 Fed. Reg. 59498 at 59500 (Sept. 30, 2022) (citation omitted). The footnotes accompanying the quoted language sets forth FinCEN’s estimate “that there will be at least 32 million ‘reporting entities’ (entities that meet the core definition of a ‘reporting company’ and are not exempt) in existence when the proposed rule becomes effective.” *Id.*; see also *id.* at 59562. That same document goes on to state:

Summarizing the estimates of both domestic and foreign entities, the total number of existing entities in 2024 that may be subject to the reporting requirements is 36,581,506 and the total number of new companies annually thereafter is 5,616,382.

Id. at 59565 (citation omitted). Filings are not, as of this writing, on course to meet this tsunami of filing obligations. In the Prepared Remarks of FinCEN Director Andrea Gacki During the SIFMA AML Conference (May 6, 2024), it was stated that 1.7 million BOIR reports had been filed; those Prepared Remarks are available at <https://www.fincen.gov/news/speeches/prepared-remarks-fincen-director-andrea-gacki-during-sifma-aml-conference>. Some basic arithmetic shows this is about 4.85% of the expected filings in 2024. Now no cut-off date for that figure was provided, but let’s assume it was April 30. So over the first 33.33% of 2024, FinCEN has received less than 5% of the expected filings, and keeping in mind that some unknown number of the 1.7 million filings are updates and corrections of already filed BOIRs, fewer than 1.7 million reporting companies have made an initial filing, which means we are already looking at 95% of the expected filings being made over the next 8 months.

⁴ It is a truism that for every categorical statement there is an exception, and there is one here. Certain corporations including those created by legislative act rather than a secretary of state filing are not subject

obligated to file with FinCEN a beneficial owner report that identifies the company and each of its “beneficial owners” and, if the company was organized on or after January 1, 2024, its “company applicant(s).” Corporations, LLCs and other business organizations organized outside of the US but qualified to transact business in any state (each a “foreign reporting company”) are subject to similar reporting obligations.

For domestic companies pre-existing January 1, 2024, they have until “not later than January 1, 2025”⁵ within which to file an initial Beneficial Owner Information Report (a “BOIR”).⁶ That same deadline applies to foreign (*i.e.*, non-US) reporting companies that were already qualified to transact business somewhere in the US before January 1, 2024.⁷ For a domestic reporting company formed in calendar 2024 or a foreign reporting company first qualified in 2024, there is a 90-day deadline for filing that initial BOIR.⁸ Effective January 1, 2025, the deadline for filing an initial BOIR for a newly created domestic reporting company or a newly qualified foreign reporting company will be only 30 days.⁹

In a BOIR a reporting company will identify itself and each of its beneficial owners via a menu of required information and supporting documentation¹⁰ and, if organized or first qualified on or after January 1, 2024, similar information as to each “company applicant.”¹¹

Once an initial BOIR is filed the reporting company is required to submit an update within 30 days of learning of any change in the information previously submitted, which includes the full range of information as to its beneficial owners.¹²

Penalties

The CTA and the Reporting Regulations impose significant penalties for willful non-compliance with its requirements as to what must be reported and when those reports are to be submitted. The CTA defines both the prohibited conduct and the penalties that may attach. As to the former:

to the CTA as they are not within the scope of the definition of a reporting company. See FinCEN FAQ C.9 (Apr. 18, 2024). Those corporations are few and far between, but they do exist. See, *e.g.*, 2021 Ky. Acts ch. 203, § 3 (HB 321) (creating a corporation under the name the “West End Opportunity Partnership”); 2024 Ky. Acts ch. 171, § 4 (SB 299) (repealing and reenacting KRS § 230.225(1) to establish a corporation under the name the “Kentucky Horse Racing and Gaming Corporation.”).

⁵ Why in drafting the Reporting Regulations the deadline was not described as being “not later than December 31, 2024” (*i.e.*, “you have calendar 2024 to get this done”) is unknown.

⁶ See 31 C.F.R. § 1010.380(a)(1)(iii).

⁷ *Id.*

⁸ See 31 C.F.R. § 1010.380(a)(1)(i)(A); *id.* § 1010.380(a)(1)(ii)(A).

⁹ See 31 C.F.R. § 1010.380(a)(1)(i)(B); *id.* § 1010.380(a)(1)(ii)(A); see also FinCEN FAQ G.1 (Dec. 1, 2023).

¹⁰ See *infra* notes 160 through 178 and accompanying text.

¹¹ See *infra* notes 179 through 181 and accompanying text.

¹² See 31 C.F.R. § 1010.380(a)(2)(i). Reporting companies created or qualified on or after January 1, 2024, that include in the BOIR report information as to the “company applicant(s)” are not obligated to thereafter update that information. See also *infra* notes 140 through 142 and accompanying text.

REPORTING VIOLATIONS. —It shall be unlawful for any person to —
(A) willfully provide, or attempt to provide, false or fraudulent beneficial ownership information, including a false or fraudulent identifying photograph or document, to FinCEN in accordance with subsection (b); or
(B) willfully fail to report complete or updated beneficial ownership information to FinCEN in accordance with subsection (b).¹³

And what happens if you do just that?

REPORTING VIOLATIONS. —Any person that violates subparagraph (A) or (B) of [the above quoted] paragraph —
(i) shall be liable to the United States for a civil penalty of not more than \$500¹⁴ for each day that the violation continues or has not been remedied; and
(ii) may be fined not more than \$10,000, imprisoned for not more than 2 years, or both.¹⁵

So there you have it; substantial financial penalties and the possibility of imprisonment. Before getting to who (including the reporting company) is potentially liable for these penalties, consider how they might be applied. Assume a corporation that is incorporated on March 1, 2024; it has 90-days within which to file its initial report of beneficial ownership - let's say that day is June 1, 2024. But no report is filed that day, so the \$500 per day fine starts to accrue and accumulate. In less than 20 days the \$10,000 cap has been reached. Now let's assume that on June 1, 2024, one of the people who *should* have been identified as a beneficial owner in the never filed initial BOIR changes her residential address and the reporting company knew of the change because she reported it to HR. A change in a beneficial owner's residential address triggers (assuming she was not using a FinCEN Identifier¹⁶ and in this hypothetical she is not) an obligation for the reporting company to update its report within 30 days.¹⁷ For whatever reason, our company still makes no filing with FinCEN, and guess what, the \$500 a day fine starts accruing again because the company "willfully fail[ed] to report complete or updated beneficial ownership information to FinCEN."¹⁸

The Reporting Regulations provide further details as to who, in addition to the reporting company itself, may be liable for a failure to file an accurate report. If the company has appointed

¹³ See CTA § 6403(h)(1); see also 31 C.F.R. § 1010.380(g):

It shall be unlawful for any person to willfully provide, or attempt to provide, false or fraudulent beneficial ownership information, including a false or fraudulent identifying photograph or document, to FinCEN in accordance with this section, or to willfully fail to report complete or updated beneficial ownership information to FinCEN in accordance with this section.

¹⁴ This \$500 per diem is adjusted for inflation. See also *infra* note 18.

¹⁵ See CTA § 6403(h)(3)(A); see also 31 C.F.R. § 1010.380(g).

¹⁶ The FinCEN Identifier is discussed *infra* notes 191 through 196 and accompanying text.

¹⁷ See 31 C.F.R. § 1010.380(a)(2)(i).

¹⁸ A confession is here in order: this example is not accurate in that the per diem penalty rate is not \$500. Rather, that rate, set in 2020, is subject to adjustment for inflation. As of this writing the per diem rate has increased to \$591. See also FinCEN FAQ K.2 (Apr. 18, 2024).

a “CTA Compliance Officer” (and almost every company will want to do so) and that person knows or has reason to know that the report made is incomplete or contains fraudulent information, that person, having “cause[d] the failure,” along with the reporting company itself, is liable.¹⁹ In addition, in a truly *in terrorem* provision, the Reporting Regulations extend that same liability to each “senior officer of the entity at the time of the failure.” Who is a “senior officer” is defined in the Reporting Regulations, namely:

The term “senior officer” means 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.²⁰

So even if responsibility for CTA compliance is delegated to a CTA Compliance Officer, those senior officers of the reporting company still have potential liability for a failure to report. How those labels will be applied in the contexts of LLCs and limited partnerships that typically do not use those titles remains to be seen, but the “performs a similar function” is a wide net.²¹

There is a curious gap in the CTA with respect to beneficial owners, who may be distant owners with little if any connection to the business other than receiving notice of meetings (often ignored) and receiving dividend/distribution checks (typically promptly cashed). Often, the business will have no way to compel a beneficial owner to provide the required information if and when it is determined they are a beneficial owner. FinCEN has addressed this lacuna and made it clear that there is an obligation to provide that information to the reporting company, even as its authority for doing so is less than you would like. In an FAQ issued last December FinCEN wrote:

Existing reporting companies should engage with their beneficial owners to advise them of this requirement, obtain required information, and revise or consider putting in place mechanisms to ensure that beneficial owners will keep reporting companies apprised of changes in reported information, if necessary. *Beneficial owners and company applicants should also be aware that they may face penalties if they willfully cause a reporting company to fail to report complete or updated beneficial ownership information.*²²

While we can debate FinCEN’s authority to impose the threatened penalties, it is beyond debate that the expense of being the test case, even if you prevail, far exceeds the potential

¹⁹ See 31 C.F.R. § 1010.380(g)(4)(iii).

²⁰ See 31 C.F.R. § 1010.380(f)(8); see also *infra* 111 through 114 and accompanying text.

²¹ See also *infra* page 43 regarding “over-reporting” of beneficial owners.

²² See FinCEN FAQ K.5 (Dec. 12, 2023) (*emphasis added*); see also FinCEN FAQ K.3(ii) (Dec. 12, 2023) (“[A]n enforcement action can be brought against an individual who willfully causes a reporting company’s failure to submit complete or updated beneficial ownership information to FinCEN. This would include a beneficial owner or company applicant who willfully fails to provide required information to a reporting company”); *id.* K.5 (Dec. 12, 2023) (“Beneficial owners and company applicants should also be aware that they may face penalties if they willfully cause a reporting company to fail to report complete or updates beneficial ownership information.”). Which is all well and good as far as FinCEN’s viewpoint is considered, but there is no provision of the CTA that by its terms compels a person identified as a beneficial owner to provide the necessary information to the reporting company. That being the case, the attorney advising a recalcitrant beneficial owner needs to consider the costs of potentially being FinCEN’s “test case” on the question.

benefits. For that reason reporting companies will want to do all they can to collect and file the necessary information.

Readers will see a theme through this article, namely objections to its lack of precision and resultant ambiguities raising the difficulty in compliance.²³ That may be intentional as a mechanism for casting a broad net while minimizing the opportunities for nefarious actors to exploit gaps in the regulatory scheme. Okay, but in light of the significant penalties that may arise for non-compliance the CTA may fairly be seen as a penal statute with the result that it should be interpreted and construed narrowly. Turning over that coin, the CTA and the Reporting Regulations should not be subjected to there heuristics and exegesis that accompany the analysis of many statutes to determine what the drafters meant to do. The focus should be upon the words actually employed; in other words, it should be read like a tax or criminal statute with the result that consideration of what Congress and/or FinCEN could have written in a well-crafted statute does not impact upon what was actually done.²⁴

The Non-Existent De Minimus Exemption

No doubt some will believe that “this doesn’t apply to me; it’s just about big companies.” That assertion is wrong, and the reality is just the opposite. While in many instances larger companies are exempt from the BOIR reporting obligation,²⁵ there is no de minimus exemption. A passive single member single asset (e.g., a lake house) LLC is obligated to file a BOIR and to keep it current. To provide another example that may hit home to at least many readers of the Kentucky Bench & Bar, imagine a three-attorney law firm organized as a PSC or a professional LLC. The firm operates from a property owned by an LLC that is in turn owned by the three attorneys and their respective spouses. The law firm is a domestic reporting company that, assuming it does not meet the requirements of one of the exemptions discussed below, will have to file a BOIR. In addition the LLC is a domestic reporting company that, assuming it does not meet the requirements of one of the exemptions discussed below, will have to file a BOIR. Each reporting company is obligated to as necessary update its BOIR so the filed information is keep current. For the reasons outlined above with respect to penalties for non-compliance it is important that these reports are made on a timely basis.

²³ See also *infra* p. 43 for a discussion of the costs of over-reporting who are the beneficial owners.

²⁴ Our thanks to Robert R. Keatinge for identifying these issues.

²⁵ See *infra* notes 50 through 76 and accompanying text.

In addition, requirements to file an annual report with the Secretary of State²⁶ or to submit the ownership of a firm to a regulatory board²⁷ do not satisfy the reporting obligations imposed by the CTA.²⁸

Reporting Companies

The first step in the CTA analysis to determine whether a particular business organization is a “reporting company.” Subject to certain exceptions a reporting company is obligated to file beneficial ownership reports into the Beneficial Ownership Secure System (“BOSS”) database being set up by FinCEN. But if not a reporting company, then there is no filing obligation. Reporting companies come in two flavors, namely domestic and foreign.

Before continuing it is here appropriate to make an important point, namely that the reporting obligations that arise under the CTA and the Reporting Regulations apply to “reporting companies,” and a reporting company is always a business organization. Turning over that coin, a natural person is not obligated for herself or himself to file a BOIR; what is at state law a sole proprietorship is not a reporting company.²⁹ While a reporting company may be obligated to include information as to the natural persons that are its beneficial owners and in some instances company applicants, there is no transitive property here at play; the reporting company’s obligation to report information as to those natural persons does not mean the natural persons have a reporting obligation.

What is a Domestic Reporting Company?

²⁶ See, e.g., KRS § 14A.6-010.

²⁷ For example, the “Instate Firm Application” of the Kentucky Board of Accountancy requires that all firm owners, whether or not licensed as CPAs, be listed, that information to be updated from time to time on the “Firm Change Form.” See also KRS § 325.301. The information submitted must be updated within 30 days of the change. See KRS § 325.301(9). The “Application for Business Entity Permit” of the Kentucky Board of Licensure for Engineers and Land Surveyors requires that it list by name, title and address each of the firm’s “principals, directors, and officers”; a “principal” is an owner. See also KRS § 322.060(1)(b); *id.* § 322.060(2)(b). The submitted information must be updated within 30 days of a change. See KRS § 322.060(1)(e); *id.* § 322.060(2)(e). Rules of this type are not restricted to the regulation of professional firms; for example, they extend to business organizations seeking, *inter alia*, a “liquor license.” See, e.g., KRS § 243.390(1)(b) (requiring the disclosure of the partners in a partnership seeking a license); *id.* § 243.390(1)(c) (requiring the disclosure of the owners of a corporation, LLC, etc. in a business organization seeking a license); *id.* § 243.390(2) (requiring that submitted information be updated within ten days of a change). In connection with the organization of a cemetery or cemetery pre-need merchandise seller, an application must be filed that includes “The names, addresses, and other relative information concerning the owners, officers, and directors.” See KRS § 367.946(1)(c). The “Cemetery Company and/or Pre-Need Cemetery Merchandise Seller Registrations Application” calls for the “name and address of each incorporator, principal stockholder (owning 10% or more), director, officer, and general manager stating as to each” of the corporation or other business organization that is to operate the cemetery or act as a pre-need seller; that form is available at https://www.ag.ky.gov/AG%20Business%20Forms/CPN-4_CemeteryRegistrationApplication.pdf. The signature page sets forth a requirement to provide notice of any “material” change in the information submitted within sixty days of the change.

²⁸ See CTA § 5336(b)(1)(A) (“In accordance with regulations prescribed by the Secretary of the Treasury, each reporting company shall submit to FinCEN a report that contains”) (emphasis added); see also FinCEN FAQ F.9 (Dec. 12, 2023).

²⁹ See also *infra* note 34 and accompanying text.

For entities formed in the US, the CTA initially attaches to a “domestic reporting company,”³⁰ that being every corporation, limited liability company and any other “entity ... created by the filing of a document” with a state³¹ secretary of state or equivalent office, including of any of the Indian Tribes.”³² This definition results initially in an important exclusion, namely general partnerships. They are neither corporations nor limited liability companies and they are not created by a filing with a Secretary of State; this exclusion has been recognized by FinCEN.³³ Likewise a sole proprietorship is not a reporting company.³⁴ But of course the business organization world is made up of more than corporations, LLCs, general partnerships and the like, and particular questions are going to arise as to which of them are domestic reporting companies. For example, while a “business trust” formed under the law of Massachusetts or of Indiana is not formed by a Secretary of State filing and is therefore not a reporting company,³⁵ a “statutory trust” formed in Delaware or Kentucky is so created³⁶ and is a reporting company. Likewise some limited partnerships are formed by a Secretary of State filing while others are not; a review of the

³⁰ See 31 C.F.R. § 1010.380(c)(1)(i).

³¹ In the Reporting Regulations, “state” is a defined term. See 31 C.F.R. § 1010.380(f)(9).

³² In the Reporting Regulations, “Indian tribe” is a defined term. See 31 C.F.R. § 1010.380(f)(4); see also FinCEN FAQ C.7 (Jan. 12, 2024) (discussing “reporting company” status of companies created in a variety of U.S. territories).

³³ See Beneficial Ownership Information Reporting Requirements, *supra* note 2 at 59537 (Sept. 30, 2022). In addition there are excluded those corporations formed not by a Secretary of State filing but by, for example, a legislative creation. See also FinCEN FAQ C.9 (Apr. 18, 2024); Beneficial Ownership Information Reporting Requirements, 87 Fed Reg. at 59538 (“FinCEN ... notes that the core consideration for the purposes of the CTA’s statutory text and the final rule is whether an “entity” is “created” by the filing of the document with the relevant authority.”); *id.* (“We emphasize again that the only relevant issue for the purposes of the CTA and the final rule is whether the filing “creates” the entity.”)

³⁴ See Beneficial Ownership Information Reporting Requirements, *supra* note 2 at 59537; see also FinCEN FAQ C.6 (Dec. 12, 2023). As to the characteristics of a sole proprietorship, see *Sparkman v. CONSOL Energy, Inc.*, 470 S.W.3d 321 (Ky. 2015):

A sole proprietorship is defined as a business in which one person owns all the assets, owes all the liabilities, and operates in his or her personal capacity. Black’s Law Dictionary (10th ed. 2014). A sole proprietorship, therefore, differs greatly from other business organizations such as corporations or limited liability companies (LLCs), even in cases where a business organization has only one shareholder or member. For example, the sole member of an LLC or sole shareholder of a corporation is not entitled to assert in his or her individual capacity the rights of the business organization. An owner of a sole proprietorship, on the other hand, is liable in his or her personal capacity for the liabilities of the sole proprietorship, and may assert the rights of the sole proprietorship in his individual capacity.

Keep in mind that the “sole proprietor” here being discussed is a state law concept; a single member LLC that is for tax classification purposes a “disregarded entity” is under the CTA, absent one of the twenty-three exemptions discussed below, a reporting company. See *supra* note [30] and accompanying text; see also FinCEN FAQ C.8 (Apr. 18, 2024) (pass-through tax treatment of an S-corporation does not exempt it from characterizations as a reporting company).

³⁵ See MASS. CODE § 182-2; IND. CODE § 23-5-1-4(a).

³⁶ See 12 DEL. CODE § 3810(b); KRS § 362A.2-010(1).

particular controlling law will need to be undertaken.³⁷ Limited liability partnerships (“LLPs”) are not “created” by a Secretary of State filing,³⁸ but it would seem FinCEN wants to treat them as reporting companies.³⁹ And even if you determine that a particular form is “created” by a filing with a secretary of state, is the venture so created an “entity,” and does that matter?⁴⁰

The CTA does not include a general exclusion for professional firms; a law, medical, dental, architecture, engineering, accounting or other professional firm organized as a corporation, including a P.S.C., LLC including a PLLC or in an atypical form such as a “partnership association” (“PA”) or limited partnership association (an “LPA”) is subject to the CTA unless it satisfies one or more of the exemptions from that requirement. If in contrast a professional firm is organized as a traditional general partnership there is no CTA reporting obligation as a general partnership is not a “reporting company” under the CTA.

A traditional donative trust (and here excluding the “business trust” that is a “trust” by a historic accident of nomenclature)⁴¹ is not within the scope of a reporting company; it is not created by a filing with a secretary of state or equivalent office. Please keep in mind that a trust is not a

³⁷ This is in Kentucky a particularly challenging task as limited partnerships formed under any of the statutes in effect before 1988 remain governed by the statute in effect at the time of organization even as those older statutes were stripped out of the Kentucky Revised Statutes. See THOMAS E. RUTLEDGE AND ALLAN W. VESTAL, RUTLEDGE & VESTAL ON KENTUCKY PARTNERSHIPS AND LIMITED PARTNERSHIPS § 3.2 (2010). Compare KRS § 362.030 (statement and affidavit of limited partnership filed with county clerk) and KRS § 362.420 (limited partnership formed by agreement of the partners) with KRS § 362.415(2) (limited partnership formed by filing of certificate by the secretary of state) and KRS § 362.2-201(1) (same).

³⁸ See KRS § 362.555(1) (existing partnership files a statement of registration); *id.* § 362.1-931 (existing partnership files a statement of qualification); see also ROBERT R. KEATINGE, ANN E. CONAWAY AND THOMAS E. RUTLEDGE, KEATINGE AND CONAWAY ON CHOICE OF BUSINESS ENTITY § 1:10; *id.* § 3:4; CHRISTINE HURT AND D. GORDON SMITH, BROMBERG AND RIBSTEIN ON LIMITED LIABILITY PARTNERSHIPS, THE REVISED UNIFORM PARTNERSHIP ACT, AND THE UNIFORM LIMITED PARTNERSHIP ACT (2001) (2nd Ed.) § 2.02[A]; *id.* § 4.08; Beneficial Ownership Information Reporting Requirements, *supra* note [2] at 59538 (“FinCEN ... notes that the core consideration for the purposes of the CTA’s statutory text and the final rule is whether an “entity” is “created” by the filing of the document with the relevant authority.”); *id.* (“We emphasize again that the only relevant issue for the purposes of the CTA and the final rule is whether the filing “creates” the entity.”).

³⁹ Attorneys need to take great care in counseling LLPs as to their CTA filing obligations, including by comparing the costs of what may ultimately be in effect a voluntary filing against the potential cost of being the “test case” on whether FinCEN is correct that an LLP is a “reporting company.” See SCR 3.130(1.4(b) (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”); see also SCR 3.130(1.1) (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”)

⁴⁰ It is unclear whether FinCEN, in drafting the Reporting Regulations, understood that “entity” is a term of art and used it in that manner, or whether they used it as short hand for “a business structure.” In the recently released guidance with respect to (largely forbidding) non-compete agreements, the FTC indicated that both “partnerships” and “trusts” are entities. See Federal Trade Commission, Non-Compete Clause Rule, 89 Fed. Reg. 38342 at 38360 (May 7, 2024) (“The Commission concludes adding the terms “general partnerships” and “trusts” to the definition is unnecessary, because the phrase “other legal entity” already includes those entity types.”) While the question can be debated as to general partnerships and then only after deciding the definition of what it means to be an “entity,” there is no basis for asserting that a trust, under any definition, is an “entity.”

⁴¹ See, e.g., Rutledge and Habbart, *The Uniform Statutory Trust Entity Act: A Review*, 65 BUS. LAW. 1054 at 1062 (footnote 52) (Aug. 2010).

“thing” in the manner of a corporation or an LLC. Rather, a trust is an agreement/arrangement among at minimum the trustee and the settlor as to the manner in which assets (the trust corpus) are to be managed for the beneficiaries.⁴² Registration of a trust with a court in order to create or confirm jurisdiction does not cause the trust to be “created” and does not cause it to be a reporting company.⁴³

The takeaway is this - if you are dealing with anything other than a plain vanilla corporation or LLC you need to have particularized guidance as to whether or not the organization is or is not a reporting company. You could “wing it” and decide to not make a filing, but then the penalty provision of the CTA and the Reporting Regulations⁴⁴ could be implicated. Furthermore (and this applies as well to the foreign reporting companies discussed below), if a company determines that it is not a “reporting company,” it should seek an attorney letter demonstrating the analysis employed to come to that conclusion, and then the board of directors or member/managers of the LLC or whatever body has the authority to make finding determinations on behalf of the venture should adopt that analysis as its own.⁴⁵

What is a Foreign Reporting Company?

A “foreign reporting company” is organized outside the United States; this is different from the notion of “foreign” used in business entity statutes typically to refer to entities created in a different state.⁴⁶ A foreign business is a “foreign reporting company” if it 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.⁴⁷

The analysis of this definition best begins with its last clause, namely the threshold question of whether the entity “is ... registered.” Note that the definition is not based upon whether the foreign entity “should be registered”; it is not necessary to undertake a review of where it has activities to determine whether they trigger a state law requiring registration. This is a question of positive law – has the entity qualified to transact business in one or more of the states? If the answer is “no,” then the foreign entity is not a foreign reporting company.

⁴² See *also* IRS, Definition of a Trust (“a trust is a relationship in which one person holds title to property, subject to an obligation to keep or use the property for the benefit of another.”), available at <https://www.irs.gov/charities-non-profits/definition-of-a-trust>.

⁴³ See *also* FinCEN FAQ C.4 (Nov. 16, 2023). As to registration of a trust under Kentucky law, see KRS § 386B.2-050.

⁴⁴ See *supra* notes 13 through 22 and accompanying text.

⁴⁵ A well researched and factually documented “attorney letter,” which will of necessity be less definitive than a transactional opinion letter due to the uncertainties in application of the CTA, will help the company and its constituents avoid any claim that a reporting failure in a FinCEN enforcement action was “willful.” See 31 C.F.R. § 1010.380(g).

⁴⁶ See, *e.g.*, KRS § 14A.1-070(10).

⁴⁷ See 31 C.F.R. § 1010.380(c)(1)(ii).

That question aside, and here providing an opportunity to introduce a consistent nomenclature problem in the Reporting Regulations, (i) what under a particular foreign law is an “entity”; (ii) what is a non-U.S. “corporation”; (iii) what is a non-U.S. “limited liability company,”; and (iv) what in non-U.S. law does it mean for a business entity to be “formed”? None of these issues are addressed in the Reporting Regulations or the guidance issued with respect thereto. While under the Internal Revenue Code there is a listing of what are for foreign countries equivalent to the U.S. formed corporations,⁴⁸ that definition is not incorporated by reference in the definition of a foreign reporting company. There is no equivalent listing of what is considered to be a foreign limited liability company, and neither are the defining characteristics of that form set forth. Since under U.S. law it is less than clear what are the necessary characteristics to identify an organization as an “entity,”⁴⁹ doing so as to a non-U.S. entity may be functionally impossible.

The Twenty-Three Exemptions

Having determined that a particular business is a reporting company, the next step is to see if it may avail itself of any of the twenty-three exemptions; we refer to a reporting company able to rely upon an exemption as an “exempt reporting company” even though that term is not utilized in the CTA or the Reporting Regulations.⁵⁰

Some of the exemptions go to the capital structure of the reporting company, some to its line of business, some to its ownership,⁵¹ and one to its economic structure: all of the exemptions are listed on Exhibit A to this article. Relatively few companies will fall within one of these exemptions;⁵² the large operating company exemption, likely the broadest exemption,⁵³ was crafted to leave some 85% of all closely-held ventures in the “reporting company” class.⁵⁴

⁴⁸ See 31 C.F.R. §§ 301.7701-2(b)(8)(i)-(ii).

⁴⁹ See Thomas E. Rutledge, *External Entities and Internal Aggregates: A Deconstructionist Conundrum*, 43 SUFFOLK U. L. REV. 655 (2008-09) (exploring the characteristics of business organizations identified as being an “entity” and determining the label has no inherent meaning); see also J. William Callison, *Indeterminacy, Irony and Partnership Law*, 2 STAN. AGORA 73–76 (2001), <http://agora.stanford.edu/agora/libArticles2/agora2v1.pdf>; David Millon, *The Ambiguous Significance of Corporate Personhood*, 2 STAN. AGORA 38, 58 (2001), <http://agora.stanford.edu/agora/libArticles2/agora2v1.pdf>.

⁵⁰ See also 31 C.F.R. § 1010.380(c)(2) (“Notwithstanding paragraph (c)(1) of this section, the term ‘reporting company’ does not include”).

⁵¹ See Beneficial Ownership Information Reporting Requirements, *supra* note 2 at 59539.

⁵² In contrast, some of the exemptions are so narrow as to raise the question why were they even worth including in the CTA. The exemptions for financial market utilities (31 C.F.R. § 1010.380(c)(2)(xvii)) and for securities exchanges and clearing agencies (31 C.F.R. § 1010.380(c)(2)(viii)) will collectively encompass 51 organizations. See LARRY E. RIBSTEIN, ROBERT R. KEATINGE AND THOMAS E. RUTLEDGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES § 14:2 at footnote 70. As each of these organizations is no doubt as well a large operating company, what was added?

⁵³ The “likely” qualifier accounts for the fact the subsidiary exemption may encompass a greater number of exempt reporting companies, but it is not available until one of the other exemptions applies.

⁵⁴ As has been noted elsewhere, according to 2014 U.S. Census Bureau data, 88% of the United States’ 28.7 million business firms had fewer than 20 employees. See Robert W. Downes, Scott E. Ludwig, Thomas E. Rutledge and Lorraine A. Smiley, *The Corporate Transparency Act – Preparing for the Federal Database of Beneficial Ownership Information*, BUSINESS LAW TODAY (April 2021) at footnote 36, available

There is not space in this article to review the full implications of each of the exemptions; that would of itself be a small book.⁵⁵ But as to several likely most relevant to members of the Kentucky Bar and their clients:

(Some) Accounting Firms: An accounting firm that is registered with the Public Company Accounting Oversight Board (the “PCAOB”) is an exempt reporting company.⁵⁶ This exemption is rather narrow; of the perhaps 50,000 accounting firms in the country there are worldwide only about 800 PCAOB registered firms.

Large Operating Companies: The large operating company (“LOC”) exemption is available to reporting companies that: (i) reported on the prior year’s tax return US sourced revenue or sales of at least \$5 million; (ii) employ more than 20 full-time employees in the US; and (iii) have a physical permanent office in the US.⁵⁷ These requirements contain a variety of limiting factors including: (a) as the more than \$5 million in revenues or sales is dependent upon the prior year’s tax return, a company may not in its first year of operations be a LOC; (b) the requirement is “more than 20 full-time employees,” so the company needs to have at least 21 employees; (c) a company, an example being a seasonal employer, that toggles between having at least 21 full-time employees and not meeting that threshold will find itself filing a BOIR when it drops below that requirement and then filing another BOIR claiming the LOC exemption when that requirement is again satisfied;⁵⁸ (d) in counting the number of employees the reporting company may look only at its own payroll; it is not permitted to consolidate employees counts across affiliated companies;⁵⁹ (e) in counting the number of employees, members in an LLC taxed as a partnership and S-corporation shareholders with 2% or more of the stock are excluded;⁶⁰ (f) in addition, in counting employees, “leased employees” are

at https://www.americanbar.org/groups/business_law/resources/business-law-today/2021-may/the-corporate-transparency-act/.

⁵⁵ In certain instances the application of the CTA and the Reporting Rules to the requirements and structures of a particular industry are being undertaken. See, e.g., J. William Callison, *The Corporate Transparency Act and Affordable Housing Transactions: The Mischief Wrought Through Statutory and Regulatory Opaqueness*, __ J. OF AFFORDABLE HOUSING AND COMMUNITY DEV. L. __ (forthcoming).

⁵⁶ See 31 C.F.R. § 1010.380(c)(2)(xv).

⁵⁷ See 31 C.F.R. § 1010.380(c)(2)(xxi).

⁵⁸ See FinCEN FAQ L.7 (Apr. 18, 2024).

⁵⁹ See also FinCEN FAQ L.4 (Nov. 16, 2023). Yes, it is entirely true that revenues/sales may be determined on the basis of consolidated tax returns. See 31 C.F.R. § 1010.380(c)(2)(xxi)(C). That is because the CTA provides for assessing revenue/sales on a consolidated basis. See CTA § 5336(a)(11)(B)(xxi)(II)(aa)-(bb) (“(aa) other entities owned by the entity; and (bb) other entities through which the entity operates;”); see also Beneficial Ownership Information Reporting Requirements, *supra* note 2 at 59542-43.

⁶⁰ See 31 C.F.R. § 1010.380(c)(2)(xxi)(A) referencing 26 CFR § 54.4980H-1(a) and -3. Under 26 CFR § 54.4980H-1(a)(15), the definition of an “employee” excludes sole proprietors, which encompasses the sole members of almost all single member LLCs, a partner in a partnership, which will encompass the members in most multi-member LLCs, and a 2-percent (or more) S corporation shareholder.

excluded;⁶¹ and (g) WeWork and similar facilities do not satisfy the requirement of a permanent place of business.⁶²

Subsidiaries of Exempt Companies: A wholly-owned subsidiary of an exempt reporting company is in most circumstances as well an exempt reporting company.⁶³ There are three categories of exempt companies, namely a “money services business,”⁶⁴ a “pooled investment vehicle,”⁶⁵ and “an entity assisting a tax-exempt entity,”⁶⁶ whose subsidiaries are not able to rely upon this exemption. This exemption applies only to subsidiaries that are directly or indirectly 100% owned by the exempt reporting company.⁶⁷

Inactive Entities: While from its title⁶⁸ one could easily think this exclusion is for companies that have been dissolved either voluntarily or administratively by the Secretary of State, that is not the case. Rather, this exemption is available to only a reporting company that:

- (A) Was in existence on or before January 1, 2020;
- (B) Is not engaged in active business;
- (C) Is not owned by a foreign person, whether directly or indirectly, wholly or partially;
- (D) Has not experienced any change in ownership in the preceding twelve month period;
- (E) Has not sent or received any funds in an amount greater than \$1,000, either directly or through any financial account in which the entity or any affiliate of the entity had an interest, in the preceding twelve month period; and
- (F) Does not otherwise hold any kind or type of assets, whether in the United States or abroad, including any ownership interest in any corporation, limited liability company, or other similar entity.⁶⁹

⁶¹ See 31 C.F.R. § 1010.380(c)(2)(xxi)(A), it referencing 26 CFR § 54.4980H-1(a) and -3.

⁶² See also 31 C.F.R. § 1010.380(f)(6) (definition of “operating presence at a physical office within the United States”).

⁶³ See 31 C.F.R. § 1010.380(c)(2)(xxii).

⁶⁴ See 31 C.F.R. § 1010.380(c)(2)(xi).

⁶⁵ See 31 C.F.R. § 1010.380(c)(2)(xviii).

⁶⁶ See 31 C.F.R. § 1010.380(c)(2)(xx).

⁶⁷ See 31 C.F.R. § 1010.380(c)(2)(xxii) (“wholly owned”) (emphasis added).

⁶⁸ See 31 C.F.R. § 1010.380(c)(2)(xxiii).

⁶⁹ A company (corporation, LLC, limited partnership, etc.) that falls within the scope of a “domestic reporting company” that has been voluntarily, judicially or administratively dissolved is not necessarily exempt from the CTA.

The difficulties with satisfying this exemption are worthy of their own article. Suffice it to note that: (i) the Reporting Regulations exclude from this exemption any company created on or after January 2, 2020;⁷⁰ (ii) the term “existence”⁷¹ is not defined; (iii) the term “active business”⁷² is not defined; (iv) the end date from which either of the 12-month period limitations⁷³ is not specified; and (v) the term affiliate⁷⁴ is not defined. Cutting to the chase - will this exemption apply to relieve the corporation or LLC you formed in 2020 that has since been permitted to undergo administrative dissolution or that was voluntarily dissolved of classification as a reporting company with CTA reporting obligations? In a word, “no.”⁷⁵ What those companies should do is currently a topic of intense debate among those deeply involved in the CTA, and detailed guidance as to various approaches is being sought.⁷⁶

If a reporting company was as of January 1, 2024, an exempt reporting company then no filing to “claim” this exemption is required.⁷⁷ Likewise, a reporting company created on or after January 1, 2024, that *ab initio* is an exempt reporting company, for example a wholly-owned subsidiary of an exempt report company, has no filing obligation.⁷⁸ A reporting company that has filed a BOIR and thereafter becomes an exempt reporting company will need to file an updated BOIR noting it is now an exempt reporting company.⁷⁹ As a general rule, if what was an exempt reporting company ceases to satisfy the terms of the applicable exemption and is no longer an exempt company it must within usually 30 days thereafter file a BOIR;⁸⁰ a company that was exempt on the basis that it was tax exempt⁸¹ that loses that status is afforded 210 days to file a BOIR.⁸² The special rule applies to reporting companies pre-existing January 1, 2024, that began the year as exempt companies but in the course of the year lose that status. Those entities have until the latter of the “not later than January 1, 2024” generally applicable rule or the 30 day rule.⁸³

Consistent with the treatment that a particular venture is not a reporting company, in most instances a reporting company that satisfied one or more of the exemptions will want an attorney letter supporting that determination, and the final determination should be made by the board of

⁷⁰ See 31 C.F.R. § 1010.380(c)(2)(xxiii)(A).

⁷¹ *Id.* This is the only instance where “existence” is used in the Reporting Regulations.

⁷² See 31 C.F.R. § 1010.380(c)(2)(xxiii)(B). This is the only instance where “active business” is used the Reporting Regulations.

⁷³ See 31 C.F.R. §§ 1010.380(c)(2)(xxiii)(D), (E).

⁷⁴ See 31 C.F.R. § 1010.380(c)(2)(xxiii)(E).

⁷⁵ See *also* Hamlet, act III, scene III, line 87.

⁷⁶ Of course whether FinCEN will respond to those inquiries remains to be seen.

⁷⁷ See FinCEN FAQ L.5 (Nov. 16, 2023).

⁷⁸ *Id.*

⁷⁹ See 31 C.F.R. § 1010.380(a)(2)(ii); see *also* FinCEN Guide ch. 6.3; FinCEN FAQ J.1 (Sept. 18, 2023); *id.* L.5 (Nov. 16, 2023).

⁸⁰ See 31 C.F.R. § 1010.380(a)(1)(iv).

⁸¹ See 31 C.F.R. § 1010.380(c)(2)(xix).

⁸² See 31 C.F.R. § 1010.380(c)(2)(xix)(A). The 210-days is the sum of the usual 30-days after loss of exempt status (see 31 C.F.R. § 1010.380(a)(1)(iv)) plus the 180-day “grace period” provided for in this provision.

⁸³ See FinCEN FAQ G.6 (Apr. 18, 2024).

directors, the members or managers, or whomever has authority to make binding determinations on behalf of the reporting company.

Who is a Beneficial Owner?

As discussed below, the CTA's objective is to create a federal database identifying the individuals⁸⁴ who control and own the reporting companies filing BOIRs. There are two paths to being a beneficial owner of the reporting company, namely (i) to own or control 25% or more of its "ownership interests" or (ii) to be in a position of "substantial control" over the reporting company, including as a "senior officer." It is not out of the ordinary that a particular person may be a beneficial owner by both ownership and substantial control. As is the case with so many aspects of the CTA and the Reporting Regulations, a full exploration of the definition of who is a beneficial owner would itself be a free-standing article; of necessity this discussion is an introduction to this issue.

It is important to recognize that it is the reporting company, and not the affected individual, who will make the determination that he or she is a beneficial owner⁸⁵ and if applicable a company applicant. This is a two-edged sword. Initially, an individual not advised that they are as to a particular reporting company a beneficial owner should have no exposure for not being included in that company's BOIR. But then a reporting company's determination that an individual is a beneficial owner is arguably final and conclusive (presumably it was made in good faith) as to that person and he or she is obligated to provide either his or her identifying information⁸⁶ or FinCEN Id.⁸⁷ There is no mechanism by which a person may object to FinCEN or other body that "I don't care what they say, I'm not a beneficial owner."

The Ownership Test

Under the CTA and the Reporting Regulations, a person is a beneficial owner if they directly or indirectly own or control 25% or more of the "ownership interests" in the reporting company. This ownership test refers to what most might think of as causing a person to be a

⁸⁴ See 31 C.F.R. § 1010.380(b)(11)(ii) ("For every individual who is a beneficial owner of such reporting company") (emphasis added); *id.* § 1010.380(b)(11)(ii)(A) ("The full legal name of the individual") (emphasis added); *id.* § 1010.380(d)(1)(i) ("individual exercises substantial control over a reporting company if the individual") (emphasis added); see *also* FinCEN FAQ D.1 (Apr. 18, 2024) ("A beneficial owner is an individual who either directly or indirectly Because beneficial owners must be individuals (i.e., natural persons),").

⁸⁵ See *also* Beneficial Ownership Information Reporting Requirements, *supra* note 2 at 59514:

The fundamental premise of the CTA is that the reporting company is responsible for identifying and reporting its beneficial owners and applicants. Inherent in that responsibility is the obligation to do so truthfully and accurately. Accordingly, FinCEN believes that it is reasonable to require reporting companies to certify the accuracy and completeness of their own reports, and it is appropriate to expect that reporting companies will take care to verify the information they receive from their beneficial owners and applicants before they report it to FinCEN.

citing 31 U.S.C. § 5336(b)(1)(A); *id.* at 59515 ("Given that the CTA places the responsibility on reporting companies to identify their beneficial owners,"); FinCEN FAQ K.4 (Dec. 12, 2023).

⁸⁶ See *infra* notes 171 through 177 and accompanying text.

⁸⁷ See *infra* notes 191 through 196 and accompanying text.

“beneficial owner,” namely owning some portion of its equity. It is that, but it is broader. An “ownership interest” includes classic equity stock in a corporation and profits and capital interests in an LLC, but may include as well a variety of other rights such as subscription rights and options.⁸⁸ Ownership interests are not limited to those with voting rights.⁸⁹ It is the obligation of the reporting company to determine who holds 25% or more of its ownership interests, and after that determination is made advise the owners of that determination and solicit the necessary information for the BOIR.⁹⁰

A traditional business corporation with one or two classes of common stock may not present too many issues, but a more complex capital structure (preferred stock, warrants, options) will require far more in-depth analysis. In an LLC keep in mind that both members and assignees need to be considered.⁹¹ To provide but a simple example, assume an LLC with three natural person members, each holding 33^{1/3} % of the limited liability company interests therein. Each member holds more than 25% of the capital interests and more than 25% of the profits interests in the venture and is therefore, under the ownership test, a beneficial owner. Now change the facts slightly: the LLC was originally set up as described above, but one of the owners died in 2021 and her widower now holds the decedent’s interest in the LLC as an assignee. Now each of the two members and the assignee are each beneficial owners under the ownership test as each has a claim on more than 25% of its capital and profits. To foreshadow, these facts will under the substantial control test discussed below yield a different result.

There are a variety of particular rules as to measuring the 25% ownership threshold in a variety of capital structures more involved than a two classes of stock business corporation and as well taking account of options, warrants, etc.⁹² As with many aspects of the CTA and the Reporting Regulations these rules deserve their own treatment, there not being space to here go through their application. It is worth noting that when the rules look to “as exercised” and similar concepts, it is only as to a particular beneficial owner and is not an “all in” assessment.⁹³

Substantial Control

The second category of a beneficial owner is a person who has or may exercise “substantial control” over the reporting company. While the Reporting Regulations contain a long listing of who may be deemed to have substantial control over a reporting company, those listed items are not exhaustive.⁹⁴

Initially, a person has substantial control if that individual:

⁸⁸ See 31 C.F.R. §§ 1010.380(d)(2)(i)(A)-(E).

⁸⁹ See 31 C.F.R. § 1010.380(d)(2)(i)(A) (“in each such case, without regard to whether any such instrument is transferable, is classified as stock or anything similar, or confers voting power or voting rights.”) (emphasis added).

⁹⁰ See *also supra* notes 85 through 87 and note 172, in each instance with accompanying text.

⁹¹ See 31 C.F.R. § 1010.380(d)(2)(i)(B).

⁹² See 31 C.F.R. § 1010.380(d)(2)(iii); see *also id.* § 1010.380(d)(2)(i).

⁹³ See 31 C.F.R. § 1010.380(d)(2)(iii)(A) (“of the individual shall be treated as exercised”).

⁹⁴ See 31 C.F.R. § 1010.380(d)(1)(i)(D) (“Has any other form of substantial control over the reporting company”); *id.* § 1010.380(d)(1)(ii)(F) (“any other contract, arrangement, understanding, relationship, or otherwise.”).

- (A) Serves as a senior officer⁹⁵ 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 decisions regarding:
 - (1) The nature, scope, and attributes of the business of the reporting company, including the sale, lease, mortgage, or other transfer of any principal assets of the reporting company;
 - (2) The reorganization, dissolution, or merger of the reporting company;
 - (3) Major expenditures or investments, issuances of any equity, incurrence of any significant debt, or approval of the operating budget of the reporting company;
 - (4) The selection or termination of business lines or ventures, or geographic focus, of the reporting company;
 - (5) Compensation schemes and incentive programs for senior officers;
 - (6) The entry into or termination, or the fulfillment or non-fulfillment, of significant contracts;
 - (7) Amendments of any substantial governance documents of the reporting company, including the articles of incorporation or similar formation documents, bylaws, and significant policies or procedures; or
- (D) Has any other form of substantial control over the reporting company.⁹⁶

In addition, the Reporting Regulations go on to provide examples of how “[a]n individual may directly or indirectly, including as a trustee of a trust or similar arrangement”⁹⁷ exercise substantial control over a reporting company through:

- (A) Board representation;

⁹⁵ “Senior officer” is a defined term. See 31 C.F.R. § 1010.380(f)(8); see also *infra* notes 105 through 108 and accompanying text.

⁹⁶ See 31 C.F.R. § 1010.380(d)(1)(i).

⁹⁷ See 31 C.F.R. § 1010.380(d)(1)(ii); see also FinCEN Guide v. 1.1, ch 2.3 at p. 21 (“Examples of indirect ways to own or control ownership interests in a reporting company are: Owning or controlling one or more intermediary entities, or the ownership interests of any intermediary entities, that separately or collectively own or control ownership interests of a reporting company.”)

(B) Ownership or control of a majority of the voting power or voting rights of the reporting company;⁹⁸

(C) Rights associated with any financing arrangement or interest in a company;

(D) Control over one or more intermediary entities that separately or collectively exercise substantial control over a reporting company;

(E) Arrangements or financial or business relationships, whether formal or informal, with other individuals or entities acting as nominees; or

(F) any other contract, arrangement, understanding, relationship, or otherwise.⁹⁹

For example, if a person has the capacity through his or her share ownership in a corporation to appoint one or more directors that person may have beneficial ownership of the reporting company¹⁰⁰ even as being a director of itself may not give rise to substantial control.¹⁰¹ If for example there are multiple trusts with the same trustee that each individually hold only a minority position as to the reporting company but on an aggregate basis would have substantial control, then the trustee has substantial control.¹⁰² Needless to say it is not possible to present and consider every possible fact pattern, especially when the Reporting Regulations provide that “An individual exercises substantial control over a reporting company if the individual ... [h]as any other form of substantial control over the reporting company.”¹⁰³ So a person has substantial control if that person has substantial control. It’s a good thing that was cleared up in a statute with significant penalties for non-compliance.

It would appear that having “substantial influence,” which presumably includes a blocking right, as to any one of the enumerated seven “important decisions” is sufficient to constitute a person as having “substantial control.”¹⁰⁴ If a blocking position as to the amendment of “substantial governance documents,” such as a requirement of unanimity to amend an LLC’s operating agreement, is sufficient to constitute substantial control then a significant number of LLCs are going to have to identify every member. Supporting the proposition that a mere blocking position may give rise to substantial control is the Reporting Regulation’s separate provision as to holding a majority of the voting rights in the venture; if the focus was upon the ability to take unilateral action as a majority holder then the earlier provision would be superfluous.

⁹⁸ In contrast to the ownership test, where the focus was not restricted to “ownership interests” with voting rights, see *supra* note 89, for substantial control the focus is upon voting rights.

⁹⁹ See 31 C.F.R. §§ 1010.380(d)(1)(ii)(A)-(F).

¹⁰⁰ See 31 C.F.R. § 1010.380(d)(1)(ii)(A).

¹⁰¹ See FinCEN FAQ D.9 (Sept. 29, 2023).

¹⁰² See FinCEN Guide ch 2.3 at p. 21 (“Examples of indirect ways to own or control ownership interests in a reporting company are: Owning or controlling one or more intermediary entities, or the ownership interests of any intermediary entities, that separately or collectively own or control ownership interests of a reporting company.”)

¹⁰³ See 31 C.F.R. § 1010.380(d)(1)(i)(D). While we can debate whether or not this statement is a logical tautology, we can agree that it does not assist in the analysis of who does or does not have substantial control.

¹⁰⁴ Or at least there is no contrary guidance issued to date.

A senior officer, who for these purposes may be thought of as a definitional beneficial owner, is:

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.¹⁰⁵

This provision is another example of a frustrating aspect of the Reporting Regulations, namely that they treat the corporate model as normative notwithstanding that the organization of new limited liability companies in the U.S. has for many years outpaced new incorporations, and notwithstanding that most state laws mandate periodic filings that identify the directors and senior officers of each corporation,¹⁰⁶ thereby alleviating much of the problem identified as the *raison d'être* of the CTA.

Returning to the question at hand, what do those titles connote? Typically, the parameters of authority of a particular corporate officer are defined by that corporation's bylaws and board resolutions.¹⁰⁷ For that reason it is not possible to say "a corporate president has the authority to do A, B and C, but not D," and for that reason it is not possible to define, for example, a particular manager of a particular limited liability company as performing a "similar function" to that of a president. More abstractly, if you cannot define Set A, it is not possible to determine whether Set B is equivalent. But that is exactly what the CTA here requires, a challenge magnified by the inclusion within the group "senior officers" of "or any other officer, regardless of official title, who performs a similar function." Again, similar to what? The board of directors of a reporting company that is a corporation, or the members or managers of an LLC reporting company, and the equivalent decision making bodies in other forms, should determine who are the "senior officers" as part of their CTA compliance program.¹⁰⁸

The element of authority over the appointment and removal of senior officers and a majority of a board or its equivalent (whatever that might be?) is ambiguous in that it is not clear as to whether this must be a unilateral power such as a 51% shareholder with the right to elect the entire or at least a majority of the board or a minority member (20%) who with either of the other two members (each 40%) would have that capacity. In the absence of a voting agreement or similar instrument this provision should look to unilateral rights. Consider, however, a 50%

¹⁰⁵ See 31 C.F.R. § 1010.380(f)(8). The "senior officer" category is *sui generis* in the Reporting Regulations; the category does not exist in the CTA.

¹⁰⁶ See, e.g., KRS §§ 14A.6-010(1)(d)1.a.-c; Model Bus. Corp. Act § 16.21(a)(4) (directing that the annual report include "the names and business addresses of its directors and principal officers").

¹⁰⁷ See KRS § 271B.8-400(1); *id.* § 271B.8-410 ("Each officer shall have the authority and shall perform the duties set forth in the bylaws or, to the extent consistent with the bylaws, the duties prescribed by the board of directors or by direction of an officer authorized by the board of directors to prescribe the duties of other officers."); *id.* § 272A.8-210(4) ("Officers of a limited cooperative association shall perform the duties the organic rules prescribe or as authorized by the board of directors not in a manner inconsistent with the organic rules."); *id.* § 273.227(1); *id.* § 273.228 ("Each officer shall have the authority and shall perform the duties set forth in the bylaws or, to the extent consistent with the bylaws, the duties prescribed by the board of directors or by direction of an officer authorized by the board of directors to prescribe the duties of other officers.")

¹⁰⁸ See *also* *supra* notes 85 through 87 and accompanying text. This is another point as to which a well reasoned and documented "attorney letter" may be a best practice in order to demonstrate diligence in efforts to comply with the CTA and the Reporting Regulations.

shareholder;¹⁰⁹ they do not have the right to elect a director, but they can block the election of a slate of directors. Is that “authority over the appointment”?

As to board representation, FinCEN has published guidance to the effect that being a director in itself does not constitute substantial control.¹¹⁰ That same guidance goes on to note that “Whether a particular director meets any of these criteria is a question that the reporting company must consider on a director-by-director basis.” So appointing a director may give rise to substantial control but being that director does not? Such are the myriad uncertainties of the substantial control test.

Returning to our earlier example, assume an LLC with three natural person members, each holding 33^{1/3} % of the limited liability company interests therein. Each member one-third of the voting rights in the venture; ergo, none may unilaterally make a company level decision. It is unclear whether each has substantial control or none have substantial control. Now change the facts slightly: the LLC was originally set up as described above, but one of the owners died in 2021 and her widower now holds the decedent’s interest in the LLC as an assignee. The only thing that is (reasonably) clear is that the widower-assignee does not have substantial control because, all being equal, an assignee has no right to participate in the LLC’s management.¹¹¹ Whether either of the members has substantial control when neither may act unilaterally (in effect the LLC’s management is subject to a rule of unanimity) continues to be uncertain.

Special Beneficial Owner Reporting Rules

There are five special reporting rules which provide, *inter alia*, that a person who might be identified as a beneficial owner will not be, namely:

(3) Exceptions. Notwithstanding any other provision of this paragraph (d), the term “beneficial owner ”does not include:

(i) A minor child, as defined under the law of the State or Indian tribe in which a domestic reporting company is created or a foreign reporting company is first registered, provided the reporting company reports the required information of a parent or legal guardian of the minor child as specified in paragraph (b)(2)(ii) of this section;

(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, whose substantial control over or economic benefits from such entity are derived solely from the employment status of the employee, provided that such person is not a senior officer as defined in paragraph (f)(8) of this section;

¹⁰⁹ Yes, a shareholder holding 50% of the voting stock is already a beneficial owner under the ownership test; this is just an exploration of the substantial control test.

¹¹⁰ See FinCEN FAQ D.9 (Sept. 29, 2023).

¹¹¹ See KRS § 275.255(1)(c); see also Thomas E. Rutledge, *Adding Insult to Death*, 76 BUS. LAW. 509 (Spring 2021).

(iv) An individual whose only interest in a reporting company is a future interest through a right of inheritance;

(v) A creditor of a reporting company. For purposes of this paragraph (d)(3)(v), a creditor is an individual who meets the requirements of paragraph (d) of this section solely through rights or interests for the payment of a predetermined sum of money, such as a debt incurred by the reporting company, or a loan covenant or other similar right associated with such right to receive payment that is intended to secure the right to receive payment or enhance the likelihood of repayment.¹¹²

Where a minor, all else being equal, would be a beneficial owner, the Reporting Regulations direct that the child not be so identified, and that in his/her stead the parent(s) or legal guardian(s) should be listed.¹¹³ When the child reaches the age of adulthood in the controlling jurisdiction¹¹⁴ the BOIR will need to be amended to delete the information as to the parent(s)/guardian(s) and may need to be further amended to substitute the information of the now adult former child if she or he is a beneficial owner.¹¹⁵

The scope and application of the “nominee” exception are somewhat unclear; to date no guidance as to its application has been provided. One possible application is to the institution that is acting as the custodian of an IRA that in turn holds ownership interests in a reporting company. Conversely it is not applicable to a traditional donative trust because a trustee is not a nominee holder but rather a true title holder.

The “mere” employee exception is focused upon employees of a reporting company. For that reason it is not applicable to the employees of a business organization that is for example a partial owner of the reporting company. To provide but one example of its limited application, it does not extend to the employees of the trust company that is the trustee of the trust holding ownership interests in a reporting company.

The inheritance exception needs to be considered in concert with the provision addressing death of a beneficial owner, it providing:

If an individual is a beneficial owner of a reporting company by virtue of property interests or other rights subject to transfer upon death, and such individual dies, 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

¹¹² See 31 C.F.R. §§ 1010.380(d)(3)(i)-(v); see also FinCEN FAQ D.5 (Sept. 18, 2023) (“There are five instances in which an individual who would otherwise be a beneficial owner of a reporting company qualifies for an exception. In those cases, the reporting company does not have to report that individual as a beneficial owner to FinCEN.”)

¹¹³ See 31 C.F.R. § 1010.380(b)(2)(ii); *id.* § 1010.380(d)(3)(i).

¹¹⁴ Under Kentucky law, see KRS § 2.015.

¹¹⁵ See 31 C.F.R. § 1010.380(a)(2)(iv) (“[I]f a reporting company has reported information with respect to a parent or legal guardian of a minor child pursuant to paragraphs (b)(2)(ii) and (d)(3)(i) of this section, a change with respect to required information will be deemed to occur when the minor child attains the age of majority.”)

testamentary deposition. The updated report shall, to the extent appropriate, identify any new beneficial owners.¹¹⁶

To that end, if Mary¹¹⁷ dies while holding 30% of the capital stock in Reporting Co., and Mary's will leaves those shares to Amy, Amy will not become a beneficial owner of Reporting Co. until such time as Mary's estate is settled, whereupon Reporting Co. will need to amend its BOIR to delete Mary and substitute Amy; that between Mary's death and the settlement of her estate Amy had an expectation that she would receive the shares does not give rise to a ownership position vis-a-vis Reporting Co. In the alternative, same facts as above, but Amy is a per-stirpes heiress with Laura and Sharon. Again, upon settlement of the estate Reporting Co. may delete Mary from its BOIR,¹¹⁸ but none of Amy, Laura or Sharon will need to be identified as the 10% of the stock each inherited is below the 25% threshold for beneficial owner characterization.

The "mere" debtor exception from characterization as a beneficial owner is another point in the Reporting Regulations that has not received attention in the published guidance, and to what degree common lender protections such as veto rights as to changes in organic documents or with respect to certain changes in management will be found to be outside of this exception is unclear. Note as well that the amount of the obligation must be fixed, so certain structures such as cash flow bonds or a loan with a kicker would not be within its scope.

Ownership by an Exempt Company

There is in addition a special rule that addresses the reporting of an exempt reporting company (*i.e.*, a reporting company that satisfies one or more of the twenty-three exemptions) who holds an ownership interest in a reporting company, it providing:

Reporting company owned by exempt entity. If one or more exempt entities under paragraph (c)(2) of this section has or will have a direct or indirect ownership interest in a reporting company and an individual is a beneficial owner of the reporting company exclusively by virtue of the individual's ownership interest in such exempt entities, the report may include the names of the exempt entities in lieu of the information required under paragraph (b)(1) of this section with respect to such beneficial owner.¹¹⁹

¹¹⁶ See 31 C.F.R. § 1010.380(a)(2)(iii).

¹¹⁷ Any resemblance of the names used in this or any example to the co-workers of the authors is entirely coincidental.

¹¹⁸ No guidance has been provided to date as to whether and how Mary's death and the creation of her estate are to be addressed, including whether the executor should be identified. Certainly, as matters stand the estate is not an individual that may be identified as a beneficial owner just as it is not possible to represent via non-action that Mary remains at what was her residential address with the passport or drivers license she held still being valid because, well, they are not. Certainly, there has been a change in the information provided in a previously filed BOIR; Mary's residential address and the unique identifying number from her "valid" drivers license or passport are each from the time of her death no longer valid; see 31 C.F.R. § 1010.380(a)(2)(i) (an updated BOIR is to be filed upon "any change with respect to required information previously submitted ..."). The "updated" here is important; there is no guidance as to how to report an estate that is a beneficial owner on an initial BOIR.

¹¹⁹ See 31 C.F.R. § 1010.380(b)(2)(i) (italics in the original).

This rule may be applicable where, for example, there is an institutional trustee. If the institutional trustee is exempt as a bank or as a wholly-owned subsidiary of an exempt bank,¹²⁰ then rather than the reporting company detailing on its BOIR the Personal Identifiable Information (“PII”) of those who own the institutional trustee, only the name of the exempt entity need be recited. This rule does not, however, shield from disclosure those who have substantial control (e.g., the “trust officer”) over the reporting company, to wit:

Reporting company owned by exempt entity. If ~~[one or more exempt entities under paragraph (c)(2) of this section]~~ *Worthy Nat’l Bank & Trust Co.* has or will have a direct or indirect ownership interest in a reporting company and ~~[an individual]~~ *bank shareholder Amy (who is not a senior officer of Worthy Nat’l Bank & Trust Co.)* is a beneficial owner of the reporting company exclusively by virtue of ~~[the individual’s]~~ *her* ownership interest in ~~[such exempt entities]~~ *Worthy Nat’l Bank & Trust Co.,*¹²¹ the report may include the names of the exempt entities in lieu of the information required under paragraph (b)(1) of this section with respect to such beneficial owner.

The application of this provision when the beneficial owner, by reason of the ownership interest in the reporting company, could be deemed to have substantial control over the reporting company, is unclear.¹²²

Donative Trusts and the CTA

While a traditional donative trust is absent the most extraordinary circumstances not a “reporting company”¹²³ obligated to report its “beneficial owners” to FinCEN via the BOSS interface and database, it does not follow that a donative trust is somehow exempt from the reach of the CTA. Rather, when the trust satisfies the test to be a beneficial owner of a CTA reporting company by virtue of ownership of at least 25% thereof¹²⁴ or “substantial control,”¹²⁵ whether directly or indirectly, the reporting company will need information as to the trust and its constituents in order to file a correct and complete BOIR. Keep in mind that the trust itself is not a beneficial owner; the “beneficial owner” with respect to the trust’s ownership interest in the reporting company are those natural persons who control the trust.¹²⁶ The Reporting Regulations contain a provision focused upon deemed ownership of ownership interests in trust, providing:

¹²⁰ See 31 C.F.R. § 1010.380(c)(2)(iii) (exemption for banks); *id.* § 1010.380(c)(2)(xxii) (exemption for wholly-owned subsidiaries of certain exempt reporting companies).

¹²¹ See also *supra* note 4 and accompanying text.

¹²² See also *infra* notes 94 through 111 and accompanying text.

¹²³ See CTA § 5336(a)(11)(A) (defining a “reporting company”); 31 C.F.R. § 1010.380(c)(1) (same). Reporting companies come in two flavors, domestic and foreign. While the reporting distinctions are relatively minor, this discussion assumes a domestic reporting company.

¹²⁴ See also Beneficial Ownership Information Reporting Requirements, 31 CFR Part 1010, 87 Fed Reg. 59498 at 59531 (Sept. 30, 2022) (“The final rule does not change the provision in the proposed rule that identified specific individuals in trust and similar arrangements whom a reporting company should treat as owners of 25% of the ownership interest in the reporting company by virtue of their relationship to the trust that holds those ownership interests.”)

¹²⁵ The substantial control test is discussed *infra* notes 88 through 111.

¹²⁶ See also *supra* note 78 and accompanying text; FinCEN FAQ D.12 (Sept. 18, 2024).

(ii) Ownership or control of ownership interest. An individual may directly or indirectly own or control an ownership interest of a reporting company through any contract, arrangement, understanding, relationship, or otherwise, including:

...

(C) With regard to a trust or similar arrangement that holds such ownership interest:

- (1) As a trustee of the trust or other individual (if any) with the authority to dispose of trust assets;
- (2) As a beneficiary who:
 - (i) Is the sole permissible recipient of income and principal from the trust; or
 - (ii) Has the right to demand a distribution of or withdraw substantially all of the assets from the trust; or
- (3) As a grantor or settlor who has the right to revoke the trust or otherwise withdraw the assets of the trust.¹²⁷

Bear in mind that these items are not exclusive; they are “specific examples” of the “more general principle” that an “individual may directly or indirectly own or control an ownership interest of a reporting company through and contract, arrangement, understanding, relationship, or otherwise.”¹²⁸ To that end, each particular trust instrument needs to be reviewed in order to make a qualitative assessment of the roles assigned by the trust instrument to determine who is a beneficial owner under the Ownership Test.¹²⁹ Still, it is relatively clear that each of the following is, as to the reporting company, a beneficial owner:

- a trustee who has the authority to dispose of the interests in the reporting company that are in the trust corpus;
- a single beneficiary who is the only permissible beneficiary of income and principal;
- a beneficiary (and here we are not restricted to a single beneficiary trust) who has the right to demand a distribution or withdrawal of substantially all of the trust corpus;

¹²⁷ See 31 C.F.R. § 1010.380(d)(2)(ii)(C).

¹²⁸ See Beneficial Ownership Information Reporting Requirements, *supra* note 2 at 59532; FinCEN FAQ D.15 (Apr. 18, 2024) (“This may not be an exhaustive list of the conditions under which an individual owns or controls ownership interests in a reporting company through a trust. Because facts and circumstances vary, there may be other arrangements under which individuals associated with a trust may be beneficial owners of any reporting company in which that trust holds interests.”).

¹²⁹ See also FinCEN FAQ D.15 (Apr. 18, 2024) (“Trust arrangements vary. Particular facts and circumstances determine whether specific trustees, beneficiaries, grantors, settlors, and other individuals with roles in a particular trust are beneficial owners of a reporting company whose ownership interests are held through that trust.”).

- a settlor who has the right to revoke the trust;
- a settlor who has the right to withdraw the assets from the trust;
- a trusts protector who has the power to remove and replace the trustee;
- distribution advisors with the authority to direct the trustee to make distributions; and
- an investment advisor responsible for investment decisions regarding the trust's assets that include the ownership interests in the reporting company.

It is possible to report just the name of a corporate trustee if all three of the following conditions are satisfied:¹³⁰

- the corporate trustee is exempt from the obligation to file BOIR reports;¹³¹
- the individual owner of the trustee to whom would be attributed 25% or more of the ownership in the reporting company has an ownership interest in the reporting company only through the corporate trustee;¹³² and
- the individual does not exercise substantial control over the reporting company

As was discussed above in connection with the substantial control test, consequent to its reach and lack of precision at distinguishing control as a function of ownership from control as a matter distinct from ownership, this test will be difficult if not impossible for any trust or series of trusts holding 25% or more of the ownership interests in a reporting company, and it may be entirely impossible for a trust or series trusts with 50% or more of the ownership interests in the reporting company to utilize this function.¹³³

Who is a Company Applicant?

The CTA created a third category beyond "reporting companies" and beneficial owners," namely "company applicants" who must be named in many but not all beneficial ownership reports. The distinction of the "company applicant" is that this category is without an obvious antecedent.

¹³⁰ See FinCEN FAQ D.16 (Apr. 18, 2024).

¹³¹ Most trustees that are themselves banks will be exempt; see 31 C.F.R. § 1010.380(c)(2)(iii) (exemption for banks); *id.* § 1010.380(c)(2)(v) (exemption for depository institution holding companies); *id.* § 1010.380(c)(2)(xxii) (exempting, inter alia, subsidiaries of banks and depository institution holding companies).

¹³² **Emphasis** in the original.

¹³³ See also *infra* notes 119 through 122 and accompanying text.

Before getting into who is a "company applicant," it is important to appreciate for which reporting companies the "company applicant" is relevant. While in the development of the Reporting Regulations it had been proposed that the company applicant be identified for all reporting companies,¹³⁴ under the Reporting Regulations a "company applicant" needs to be identified only in the companies initial report to beneficial ownership, and then only if the reporting company was formed on or after January 1, 2024.¹³⁵ A reporting company whose existence pre-dates January 1, 2024, is under no obligation to identify who was its company applicant.¹³⁶

Which returns us to the question of who is a "company applicant"? As provided in the Reporting Regulations:

Company applicant. For purposes of this section, the term "company applicant" means:

- (1) For a domestic reporting company, the individual who directly files the document that creates the domestic reporting company as described in paragraph (c)(1)(i) of this section;
- (2) For a foreign reporting company, the individual who directly files the document that first registers the foreign reporting company as described in paragraph (c)(1)(ii) of this section; and
- (3) Whether for a domestic or a foreign reporting company, the individual who is primarily responsible for directing or controlling such filing if more than one individual is involved in the filing of the document.¹³⁷

The "directly files" element of subsections (1) and (2) quoted above, being based upon the "files an application" language in the CTA,¹³⁸ is yet another example of what can be described from the perspective of a business entity attorney as "sloppy" drafting in the CTA, namely using terms that have technical meanings in a non-technical manner. The only persons who "file"

¹³⁴ FinCEN, in the advance notice of proposed rule making that led to the beneficial ownership reporting regulations (*see supra* note 2) had sought to impose the obligation to identify company applicants on all reporting companies irrespective of when formed. It was pointed out to FinCEN in comment letters that identifying who was involved years after the fact would be functionally impossible, and as many of those persons would by now be deceased it would not be possible to collect and submit the required information - persons who are deceased do not have valid passports or drivers licenses. Other persons would simply not be identifiable or unlocateable.

¹³⁵ See 31 C.F.R. § 1010.380(b)(2)(iv); *see also* FinCEN FAQ E.1 (Sept. 18, 2023) ("Only reporting companies created or registered on or after January 1, 2024, will need to report their company applicants."); *id.* E.2 (Sept. 18, 2023).

¹³⁶ See Beneficial Ownership Information Reporting Requirements, *supra* note 2 at 59509 ("The final rule also removes the requirement that entities created before the effective date of the regulations report company applicant information."); *id.* at 59513 ("As noted, FinCEN has eliminated the requirement that reporting companies update company applicant information, which should reduce compliance burdens."); *id.* at 59522 ("The final rule ... [sets forth] a more general rule that reporting companies created or registered before the effective date of the regulation do not need to report information about their company applicants.").

¹³⁷ See 31 C.F.R. § 1010.380(e).

¹³⁸ See CTA § 5336(a)(2).

certificates and articles of organization or incorporation and the equivalent documents for limited partnerships, statutory trusts, etc. is the Secretary of State or equivalent officer in the jurisdiction. They decide what is and is not to be filed, requiring that the document presented or tendered for filing satisfy statutory requirements, that it be duly executed, and that attendant filing fees have been paid.¹³⁹ Then and only then is the document filed and the legal effect of the document's filing come about.¹⁴⁰ So, as written, the CTA and the Reporting Regulations provide that the Secretary of State (however identified in a particular jurisdiction) is a company applicant for each reporting company.

Still, in the Small Entity Compliance Guide there continue to be references to the person who "directly filed the document that created a domestic reporting company" or who "would have actually or physically filed the document with the [SOS] or similar office."¹⁴¹ Again, this treatment is part of a consistent theme in the CTA, a law that reports to "set a clear, Federal standard for incorporation practices"¹⁴² while ignoring the agreed-upon terms of art and broadly utilized procedures that are employed across the country in the process of "incorporation" including that "incorporation" is itself a term of art employed with respect to the organization of corporations that is inapplicable to the formation of limited liability companies, of limited partnerships, of statutory trusts or any other organizational form that is not a "corporation."

Each reporting company formed on or after January 1, 2024, will have at least one and up to two company applicants. The first, as labeled in the FinCEN Guide,¹⁴³ is the "direct filer," that being the person (a company applicant is always a natural person)¹⁴⁴ who "directly filed the document that created a domestic reporting company or the individual who directly filed the document that first registered a foreign reporting company. This individual would have physically or electronically filed the document with the Secretary of State or similar office."¹⁴⁵ Well, not exactly. The FinCEN FAQ makes clear that the messenger or other in the intermediary in the process of presenting the document to the Secretary of State is not a "company applicant"¹⁴⁶ unless that messenger is an employee of a business formation service or law firm causing the

¹³⁹ See KRS § 14A.2-010.

¹⁴⁰ See, e.g., KRS § 271B.2-030(1) ("Unless a delayed effective date is specified, the corporate existence shall begin when the articles of incorporation are filed by the Secretary of State."); *id.* § 275.020(2) ("Unless a delayed effective date is specified, the existence of the limited liability company shall begin when the articles of organization are filed by the Secretary of State. If a delayed effective date is specified, the existence of the limited liability company shall begin when the articles of organization are effective as specified in KRS 14A.2-070."); *id.* § 386A.2-010(1) ("A statutory trust is formed when a certificate of trust that complies with subsection (2) of this section and filed by the Secretary of State is effective as determined under KRS 14A.2-070.")

¹⁴¹ See FinCEN Guide chapter 3.2 (direct filer).

¹⁴² See CTA § 6402(5)(a).

¹⁴³ See FinCEN Guide chapter 3.2.

¹⁴⁴ See, e.g., 31 C.F.R. § 1010.380(b)(11)(ii) ("For every ... individual who is a company applicant") (emphasis added); *id.* § 1010.380(b)(11)(ii)(A) ("The full legal name of the individual") (emphasis added); *id.* § 1010.380(e)(1) ("For a domestic reporting company, the individual who directly files the document that creates the domestic reporting company....") (emphasis added); see *a/so* FinCEN Guide chapter 3.2 ("All company applicants must be individuals. Companies or legal entities **cannot** be company applicants.") (emphasis in original).

¹⁴⁵ See FinCEN Guide chapter 3.2.

¹⁴⁶ See FinCEN FAQ E.6 (Jan. 12, 2024).

entity to be created/formed. Likewise, the individual who hits the “submit” button on the Secretary of State’s website to upload organizational documents is the “direct filer” company applicant.

The second category of company applicant is by FinCEN labeled the person with “primarily responsible” applicant, that being the person who “who is primarily responsible for directing or controlling the filing.”¹⁴⁷ Keep in mind that the incorporator or person signing the creation document is not *ipso facto* a company applicant.¹⁴⁸ It is possible that the “person controlling the filing” may as well be the “direct filer” such as when an individual logs into a Secretary of State website, completes the form articles/certificate, provide an electronic signature and after paying the filing fee hits the “submit” button.¹⁴⁹ Alternatively, this individual may have no involvement in the (mis)labeled “filing” process but they are still a company applicant because they had primary responsibility for the creation. For example, an attorney who at a client’s request both drafts the articles of organization for the to-be client owned LLC and directs that they be transmitted to the secretary of state via an overnight courier is the person controlling the filing and is the person with primary responsibility and is therefore a company applicant. Alternatively, if the attorney is “primarily responsible” for directing or controlling the filing, and her paralegal effects the filing itself, both are company applicants.¹⁵⁰

In applying the “primarily responsible” element of the “who is a company applicant” test, the focus is “directing or controlling the filing.”¹⁵¹ This is separate and distinct from “primary responsibility for the organization of the venture.” It is entirely possible that, for example, one attorney will oversee drafting and submitting the articles of organization, a second attorney will draft the operating agreement, and a third attorney will be charged with the subscription agreement. While as to the ongoing operations the second attorney’s work on the operating agreement is likely the most important for the success of the venture, only the first attorney is a “company applicant.”

As a practice note, in organizing a new reporting company, it may be a “best practice” that depending upon the form of entity the initial board of directors (if a corporation) or the members or managers (if an LLC) adopt in the organizational resolutions (however labeled) a determination of who are the “company applicants.”¹⁵²

What Goes Into a BOIR?

BOIRs are filed by the reporting company with FinCEN via the BOSS interface and database. There is no filing fee in connection a BOIR filing.¹⁵³

¹⁴⁷ *Id.*

¹⁴⁸ See FinCEN FAQ E.5 (Jan. 12, 2024).

¹⁴⁹ See, e.g., FinCEN Guide ch. 3.2 (p. 26).

¹⁵⁰ See FinCEN FAQ E.3 (Nov. 16, 2023).

¹⁵¹ See 31 C.F.R. § 1010.380(e)(3).

¹⁵² The BOIR’s data fields are described in the Release Agency Information Collection Activities; Submission for OMB Review; Comment Request; Beneficial Ownership Information Requests, 88 Fed. Reg. 67443 (Sept. 29, 2023).

¹⁵³ Be aware that in one permutation of the fraudulent schemes that have cropped up around the CTA a company is solicited to not only provide all of the information that would appear in a BOIR, but as well a filing fee; the authors have seen one fraudulent solicitation, sometimes on a “Form 4022,” with a “filing fee”

What Does the Reporting Company Need to Report About Itself?

A BOIR begins with the reporting company (domestic or foreign) identifying itself with the following:¹⁵⁴

- (i) its “full legal name” and all “doing business as ”names of the reporting company;¹⁵⁵
- (ii) a complete current address consisting of:
 - (1) In the case of a reporting company with a principal place of business in the United States, the street address of such principal place of business;¹⁵⁶ and
 - (2) In all other cases, the street address of the primary location in the United States where the reporting company conducts business;
- (iii) its jurisdiction of formation;
- (iv) for a foreign reporting company, the jurisdiction in which it first qualified to do business; and
- (v) the reporting company’s Taxpayer Identification Number or EIN or if a foreign reporting company does not have a TIN “a tax identification number issued by a foreign jurisdiction and the name of such jurisdiction.”¹⁵⁷

of \$185. All in all, “please pay us to steal your confidential information.” No word as to whether the fraudulent actor making these solicitations is as well a Nigerian Prince.

¹⁵⁴ See 31 C.F.R. §§ 1010.380(b)(1)(i)(A)-(F). This recitation is a paraphrase of the regulatory language that necessarily leaves out particular details; review of the regulatory language is necessary. This entire section of the Reporting Regulations is an addition to the CTA that of itself does not require identification of the reporting company. See Beneficial Ownership Information Reporting Requirements, *supra* note 2 at 59515 (“[T]he CTA does not specify what, if any, information a reporting company must report about itself.”). Treasury/FinCEN, in issuing the Reporting Regulations, went to great lengths to justify this aspect of the Reporting Regulations, acknowledging that without requiring the reporting company to self-identify at the time it submits information as to its beneficial owners that information is essentially useless, characterizing that consequence as “absurd” and positing that regulation “must necessarily” include the ability to require self-identification from the reporting company. *Id.*

¹⁵⁵ The requirement to file all “doing business as” names extends beyond those filed with a Secretary of State, county clerk or otherwise. See Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. at 59515 (Sept. 30, 2022). In Kentucky this obligation is something of an ouroboros in that a company is already precluded from doing business under other than its a real name or a filed assumed name. See KRS § 365.015(2)(a).

¹⁵⁶ A P.O. Box or similar address is not sufficient; it must be a physical address. See FinCEN FAQ F.8 (Dec. 12, 2023).

¹⁵⁷ See 31 C.F.R. §§ 1010.380(b)(1)(i)(A)-(F).

The requirement that a foreign reporting company supply one of two alternative addresses¹⁵⁸ has presented problems for those foreign entities that have no US address for the simple reason that one has not been needed for its activities. Adopting an address through a service that provides “street addresses” is the imposition of an additional costs that is not authorized by the CTA and as well has implications on the company for purposes including state taxation and federal diversity jurisdiction. FinCEN has stated that a foreign reporting company in this position may report the address of its registered office.¹⁵⁹ That determination, published in only a FAQ rather than through a proposed amendment to the Reporting Regulations, raises the question as to whether foreign reporting companies may truly rely upon it when the Reporting Regulations require an address where it conducts business, and that is not at a registered agent’s address; can a FAQ enable reporting something that substantively is not correctly responsive to a regulatory requirement? Further, this direction arguably conflicts with the Final Reporting Regulations Release:

[A]s noted in the proposed rule, the requirement to report the street address of a business is not satisfied by reporting a P.O. Box or the address of a company formation agent or other third party. FinCEN believes that reporting such third-party addresses would create opportunities for illicit actors to create ambiguities or confusion regarding the location and activities of a reporting company and thereby undermine the objectives of the beneficial ownership reporting regime.¹⁶⁰

It seems that, essentially, FinCEN is directing certain foreign reporting companies to file a BOIR reciting information that it has already described as “undermin[ing] the objectives of the beneficial ownership reporting regulations.”

There is a particular issue with many single-member LLCs (“SMLLCs”) for which the sole-member is a natural person. Oftentimes, and as is entirely permissible under the Internal Revenue Code, those SMLLCs use the sole member’s Social Security Number as the business’ EIN. In those circumstances the Reporting Regulations require, *inter alia*, “give us your Social Security Number.” While this is not improper, some persons may not wish to have their Social Security Number posted along with the bounty of information that will be in the BOSS for which “identify theft industry participants” are no doubt salivating, just awaiting the data breach.¹⁶¹ In those instances the SMLLC may apply for its own EIN, presumably identifying on the Form SS-4 as the reason for the application “CTA compliance.” Utilizing this approach may avoid future questions from FinCEN as to why there are multiple reporting companies each using the same “unique” TIN.

The BOIR form will also solicit the name and e-mail address of the person submitting the report so FinCEN can send back the confirmation of filing. In addition, the reporting company will

¹⁵⁸ See 31 C.F.R. §§ 1010.380(b)(1)(i)(C)(1)-(2).

¹⁵⁹ See FinCEN FAQ F.12 (Apr. 18, 2024).

¹⁶⁰ See Beneficial Ownership Information Reporting Requirements, *supra* note 2 at 59516.

¹⁶¹ Admittedly this horse may be out of the barn. See, e.g., Eva Rothenberg, *AT&T says personal data from 73 million current and former account holders leaked onto dark web*, CNN (Mar. 30, 2024), available at https://www.cnn.com/2024/03/30/tech/att-data-leak?cid=ios_app (noting that data leak includes customer Social Security numbers). But rest assured that the security of the PII uploaded to the BOSS database has been considered; Congress provided in the CTA that in the event of a “substantial” data there be an investigation and a report prepared as to the identified “vulnerabilities” and “provide[] recommendations for fixing those deficiencies.” See CTA § 5336(h)(5)(A).

identify the submission as an initial BOIR, an update or a correction.¹⁶² With respect to the submission of a BOIR or an updated BOIR, “each person filing such report or application shall certify that the report or application is true, correct and complete.”¹⁶³ The person making this certification with respect to a BOIR does so as an agent of the reporting company.¹⁶⁴

What Does the Reporting Company Need to Report About Its Beneficial Owners

For each beneficial owner, the reporting company on its BOIR, (and here assuming that one of the quite narrow exceptions when naming a business entity is permitted)¹⁶⁵ will need to provide:

- (i) full legal name;
- (ii) his or her date of birth;
- (iii) complete current street residential address;
- (iv) the unique identification number from that person’s unexpired US passport or unexpired state issued drivers license or identification card or if none of those are available a non-expired passport issued the beneficial owner by a foreign government;¹⁶⁶ and
- (v) an “image” of that identification document from which the identification number was taken.¹⁶⁷

The requirement that the BOIR contain an “image” of the identification document is sui generis in the Reporting Regulations,¹⁶⁸ it being explained that it will make it more difficult to submit false information.¹⁶⁹

¹⁶² See also FinCEN FAQ F.2 (Sept. 18, 2023).

¹⁶³ See 31 C.F.R. § 1010.380(b); see also supra note 85 through 87 and accompanying text.

¹⁶⁴ See Beneficial Ownership Information Reporting Requirements, supra note 2 at 59514:

While an individual may file a report on behalf of a reporting company, the reporting company is ultimately responsible for the filing. The same is true of the certification. The reporting company will be required to make the certification, and any individual who files the report as an agent of the reporting company will certify on the reporting company’s behalf.

¹⁶⁵ See, e.g., 31 C.F.R. § 1010.380(b)(2)(i).

¹⁶⁶ Referred to each herein as an “identification document.” These are the “only” forms of identification permitted. See FinCEN FAQ F.5 (Sept. 18, 2023). The suggestion that a beneficial owner is either required to or may submit her or his “birth certificate” in order to comply with the PII requirements (see Homestead Liberation League, Corporate Transparency Act & Your Small Business (Apr. 25, 2024), available at <https://youtu.be/oLpCi6ukZd4?si=9HrxwRSyCbAr8GJL>.) is simply wrong.

¹⁶⁷ This information set is herein referred to as the “PII” (Personal Identification Information).

¹⁶⁸ Compare CTA §§ 5336(b)(2)(A)(i)-(iv) with 31 C.F.R. § 1010.380(b)(1)(i).

¹⁶⁹ See Beneficial Ownership Information Reporting Requirements at 59519 (“As an initial matter, requiring the submission of an image will help confirm the accuracy of the reported unique identification number. In addition, as some commenters noted, the submission of a falsified image would require much more effort than submitting an incorrect identification number. Thus, the requirement to submit an image of an identification document will also make it harder to provide false identification information.”)

The Reporting Regulations assume that anyone who is or may become a beneficial owner has one of the identification documents. This is not necessarily the case. There are individuals who have none of a state issued drivers license because they do not drive, do not have a passport as they do not travel internationally, and have no need for another state issued form of identification as they do not vote or engage in other activities where an identification document of that nature is required. Nothing deprives these individuals of the right to own property including interests in what are post-January 1, 2024, “reporting companies” or to have substantial control over a “reporting company.” Nothing in the CTA would indicate that these persons have an obligation to acquire any of the four acceptable forms of identification (an obligation that would certainly run afoul of religious objections to doing so) or indicate (were that possible) that the ownership interest or substantial control rights are eliminated, suspended or otherwise impacted by the absence of one of the four acceptable forms of identification. While there is guidance to the effect that an identification document that lacks a picture where omitted for example for religious reason is acceptable,¹⁷⁰ there is to date no guidance where no identification document at all is available.

The listed address need not be the beneficial owner’s “permanent address”; it should be where they are at that time residing.¹⁷¹

In soliciting PII from beneficial owners and then submitting it as part of its BOIR, a reporting company may not be complacent as to the accuracy of the information provided it. Rather, the reporting company must “verify” the information so that the report or application as filed is “true, correct, and complete.”¹⁷² A reporting company, in soliciting and collecting information from beneficial owners (and in applicable circumstances company applicants), may request and depending upon the reporting company’s organic documents demand a certification of accuracy and completeness of the information provided.

What Does the Reporting Company Need to Report About is Company Applicant(s)?

As noted above, a domestic reporting company formed on or after January 1, 2024, and a foreign reporting company first qualified on or after that date, must include in its initial BOIR the PII or the FinCEN Id.¹⁷³ for each company applicant.¹⁷⁴ There is a slight differential in the reporting

¹⁷⁰ See FinCEN FAQ F.10 (Jan. 12, 2024).

¹⁷¹ See FinCEN FAQ F.11 (Jan. 12, 2024).

¹⁷² See 31 C.F.R. § 1010.380(b); see also FinCEN FAQ K.4 (Dec. 12, 2023); Beneficial Ownership Information Reporting Requirements, *supra* note 2 at 59513:

In addition, the final rule does not adopt a good faith or other standard regarding the requirements to update or correct reports. The CTA places the reporting responsibility on reporting companies, and this responsibility includes the obligation to report accurately. The CTA also requires reporting companies to update information when it changes.

¹⁷³ The FinCEN Id. is discussed *infra* notes 185 through 190 and accompanying text.

¹⁷⁴ It is legitimate to question what benefit flows to FinCEN and other members of law enforcement who may be afforded access to BOIRs by requiring information on who are the company applicants. There is no express statement as to why this information is sought, but it can be inferred from a pair of sentences in Beneficial Ownership Information Reporting Requirements, *supra* note 2 at 59522-23, where FinCEN wrote:

At the same time, FinCEN has considered the law enforcement value of company applicant information for entities existing prior to the effective date of the regulation, and FinCEN

obligations for a company applicant who is employed as a formation agent and one who is not, and the differential is with respect to the required address. For individuals not regularly employed as a formation agent, the address set forth on the BOIR must be the company applicant's residential street address. Where in contrast the company applicant is in the formation business the street address of the business is submitted on the beneficial ownership report instead of the company applicants residential address. Note, however, that the company applicant remains that individual, not the company by which they are employed. Essentially, the employees of CT Corporation, Cogency Global, CSC, Capital Services, etc. need not disclose their home addresses to the companies for which formation services are provided. The outer bounds of this provision have not yet been determined. For example, it is unknown whether a paralegal at a law firm who in the course of his or her employment is involved in company formation, but as well does a variety of other tasks that do not fall within company formation activities, may utilize this provision.

Otherwise, the information required of all company applicants will be the same namely: (i) full legal name; (ii) date of birth; (iii) address (residential or business); (iv) a unique identifying number and the name of the issuing jurisdiction from either a valid passport or drivers license; and (v) an image of the document from which that unique identifying number was obtained.¹⁷⁵

As discussed below, a company applicant, rather than providing her or his personal identifying information to the reporting company for inclusion in its initial beneficial ownership report, may provide a FinCEN Id. Especially for persons expecting to be company applicants with some regularity or at least not infrequently, using a FinCEN Id. will likely be quicker and will reduce the distribution of the personal identifying information and its potential theft by nefarious actors.

Updating a Previously Filed BOIR, Error Correction

Essentially, an updated BOIR must be filed by the reporting company any time any of the information previously submitted changes. As to the reporting company, if it changes its name, jurisdiction of organization, primary address or anything else submitted as to its own identity, then an updated BOIR must be filed within 30 days of the change.¹⁷⁶ In addition, if a company becomes an exempt reporting company, it will need to file an updated BOIR as to that change in its

believes such value is limited. The value of such information becomes increasingly attenuated over time, given that an individual company applicant may have limited recollection of the facts and circumstances that gave rise to the creation or formation of an existing reporting company, and no ongoing relationship with the company. Ultimately, FinCEN believes the effective date of the regulation provides an appropriate balance to ensure the availability of useful information to law enforcement for new or ongoing investigations while also providing a reasonable date for which reporting companies can reasonably identify company applicants and company applicant information, particularly because company applicants and reporting companies will be on notice of the requirements of the final rule by the effective date and will file their reports shortly after new companies are formed or registered.

So, it would seem, FinCEN wants to know who are company applicants in order that they know who they can question about the formation of a particular reporting company. Not explained is how the information as to the company applicant is a helpful addition to the information already required as to beneficial owners including the senior officers.

¹⁷⁵ See 31 C.F.R. § 1010.380(b)(1)(ii).

¹⁷⁶ See 31 C.F.R. § 1010.380(a)(2)(i).

circumstances.¹⁷⁷ With respect to the beneficial owners, any change in the previously submitted PII triggers an updating obligation that the reporting company must satisfy within 30 days of becoming aware of the change.¹⁷⁸ For example, if a beneficial owner moves to a new state and gets there a new driver's license, then both that new address and the new driver's license number must be included in the new report, and it must include as well an image of the new license. Where, in contrast, an identification document such as a driver's license is updated without a change in the information otherwise provided to FinCEN because, for example, the unique identifying number carries forward from one license to the next, there is no need to update the BOIR or, if the individual is using a FinCEN Id., its application.¹⁷⁹ The name of a beneficial owner may change upon marriage or divorce. Upon a beneficial owner losing that status, for example upon the death or resignation of a senior officer, an updated BOIR needs to be filed, and an update must be filed if a new beneficial owner is added.¹⁸⁰ As notes previously, there are particular rules that apply upon the death of a person who is a beneficial owner by reason of the ownership test and a child beneficial owner reaching the age of adulthood.¹⁸¹ A reporting company acts at its peril to passively await word from a beneficial owner of a change in the previously submitted PII; rather, it should be pro-active and solicit news of any reportable change.¹⁸²

If there was an error in a filed BOIR the reporting company is granted 30 days of becoming aware of the error within which to file a corrected report,¹⁸³ which must as well be within 90 days of the initial erroneous filing in order to take advantage of the safe-harbor for a corrected BOIR.¹⁸⁴

¹⁷⁷ See 31 C.F.R. § 1010.380(b)(3)(ii).

¹⁷⁸ See 31 C.F.R. § 1010.380(a)(2)(i).

¹⁷⁹ See Beneficial Ownership Information Reporting Requirements, *supra* note 2 at 59513; FinCEN FAQ H.2 (Sept. 18, 2023).

¹⁸⁰ See 31 C.F.R. § 1010.380(a)(2)(i).

¹⁸¹ See *supra* notes 113 through 115 and accompanying text.

¹⁸² See, e.g., 31 C.F.R. § 1010.380(a)(2)(i) (obligation of reporting company to file updated BOIR within 30 days of "any change with respect to required information previously submitted"); Beneficial Ownership Information Reporting Requirements, *supra* note 2 at 59512 "(FinCEN has considered that a more frequent updating requirement may entail more burdens than a less frequent one, but reporting companies can be expected to know who their beneficial owners are, and it is reasonable to expect that reporting companies will update the information they report when it changes.); FinCEN FAQ K.5 (Dec. 12, 2023):

While FinCEN recognizes that much of the information required to be reported about beneficial owners and company applicants will be provided to reporting companies by those individuals, reporting companies are responsible for ensuring that they submit complete and accurate beneficial ownership information to FinCEN. Starting January 1, 2024, reporting companies will have a legal requirement to report beneficial ownership information to FinCEN.

Existing reporting companies should engage with their beneficial owners to advise them of this requirement, obtain required information, and revise or consider putting in place mechanisms to ensure that beneficial owners will keep reporting companies apprised of changes in reported information, if necessary. Beneficial owners and company applicants should also be aware that they may face penalties if they willfully cause a reporting company to fail to report complete or updated beneficial ownership information.

¹⁸³ See 31 C.F.R. § 1010.380(b)(3); see also FinCEN FAQ I.1 (Sept. 29, 2023).

¹⁸⁴ See Beneficial Ownership Information Reporting Requirements, *supra* note 2 at 59513:

FinCEN Ids

As an alternative to having each beneficial owner and for reporting companies formed on or after January 1, 2024, each company applicant provide their PII to the reporting company for inclusion in its BOIR, which delivery adds a burden to the reporting company to keep the information provided safe and secure from disclosure, whether accidental or malicious, the beneficial owners may use a “FinCEN Identifier” (hereinafter a “FinCEN Id.”).¹⁸⁵ A person who is or may become a company applicant or a beneficial owner submits an application to FinCEN seeking a unique FinCEN Id. number; a person may have only one FinCEN Id.¹⁸⁶ - you do not get one for each company for which a person is for example a beneficial owner. The application will require the individual to submit all of his or her PII to FinCEN, and the FinCEN Id. will then be issued.¹⁸⁷ The entire process is automated and takes just a few minutes; FinCEN is not undertaking “due diligence” to confirm the submitted PII before issuing the identification number. Once in hand, whenever a person needs to be identified as a company applicant or a beneficial owner, he or she need deliver only the FinCEN Id. and the reporting company may include that number, in lieu of that person’s PII, in the BOIR.¹⁸⁸ This approach is particularly advantageous vis-a-vis having to make numerous submissions of PII with respect to numerous reporting companies, but even if the relationship is with only one reporting company using a FinCEN Id. avoids concerns as to the continued security of the information presented.

While there is no prohibition of an individual using PII with respect to certain companies and a FinCEN Id. for others, why anyone would want to do so is a wonderment.

Using a FinCEN Id. has a significant impact upon the updating regimen. As noted above, if a reporting company submits a beneficial owner’s PII the reporting company has an obligation to seek out changes therein and to then submit an updated BOIR. Where a FinCEN Id. is used the updating obligation shifts back to the individual; he or she needs to update his or her FinCEN Id. with changes in the information submitted (e.g., residential address, unique identifying number from passport or drivers license, change in name), those updates filed within 30 days of the

31 U.S.C. 5336(h)(3)(C) provides a safe harbor to any person that has reason to believe that any report submitted by the person contains inaccurate information and voluntarily and promptly, and consistent with FinCEN regulations, submits a report containing corrected information no later than 90 days after the date on which the person submitted the inaccurate report. The CTA is clear that the safe harbor is only available to reporting companies that file corrected reports no later than 90 days after submission of an inaccurate report, and does not extend to reports corrected more than 90 days after they are filed, even if a reporting company files a correction promptly after becoming aware or having reason to know that a correction is needed.

¹⁸⁵ See 31 C.F.R. § 1010.380(b)(4). It is possible for a reporting company itself to have its own FinCEN Id., but the use of that number is rather limited, and is not further reviewed in this article. Notably, a reporting company may not use its own FinCEN Id. to identify itself in its own BOIRs. A company level FinCEN Id. is addressed in Use of FinCEN Identifiers for Reporting Beneficial Ownership Information of Entities, 88 Fed. Reg. 76995 (Nov. 8, 2023).

¹⁸⁶ See 31 C.F.R. § 1010.380(b)(4)(i)(C).

¹⁸⁷ See also FinCEN FAQ M.3 (Jan. 4, 2024).

¹⁸⁸ See 31 C.F.R. § 1010.380(b)(4)(ii)(A); see also FinCEN FAQ M.2 (Jan. 12, 2024).

change,¹⁸⁹ and the reporting company need do nothing vis-a-vis its BOIR to account for the updated information (indeed it may not even know that an update has been filed). From the perspective of most if not all reporting companies, they would rather received FinCEN Ids. than PII, and for that reason may at minimum encourage beneficial owners to request and then provide a FinCEN Id.¹⁹⁰

No More Bearer Shares/Membership Interests

The CTA has been criticized as an example of “federal overreach” by substantively regulating what has almost always been a matter of state law, namely the process of organizing new business ventures.¹⁹¹ Setting aside the merits (if any) of that argument, and notwithstanding the statement in the CTA that it aims to “set a clear, Federal standard for incorporation practices,”¹⁹² there is in fact only one provision of the CTA that substantively impacts upon what may be done under state law in the course of organizing a business venture. The CTA provides that “A corporation, limited liability company, or other similar entity formed under the laws of a State or Indian Tribe may not issue a certificate in bearer form evidencing either a whole or fractional interest in the entity.”¹⁹³ This provision is curious in that it addresses a mechanism, namely bearer shares,¹⁹⁴ that is at most employed rarely. Second, many states including Delaware already prohibit bearer shares.¹⁹⁵ Third, the notion of bearer LLC interests is foreign to

¹⁸⁹ See 31 C.F.R. § 1010.380(b)(4)(iii)(1); see also FinCEN FAQ M.5 (Sept. 29, 2023).

¹⁹⁰ This shifting of the burden to update information provided to FinCEN has a curious effect. If an individual is a beneficial owner of a reporting company and provides her or his PII, and then ceases to be beneficial owner, she or he is thereafter relieved of the burden to advise the reporting company of changes in the PII. However, when a FinCEN Id. is obtained, there is a seemingly never ending obligation to keep its underlying information current, even if the holder is no longer a beneficial owner of any reporting company. FinCEN is aware of this issue but has to date not published any guidance granting relief. See FinCEN FAQ M.6 (Sept. 29, 2023).

¹⁹¹ See, e.g., Complaint filed in *Black Economic Council of Massachusetts, Inc. v. Yellen*, Case 1:24-cv-11411 (Complaint filed May 29, 2024) at paragraphs 82, 83:

The sovereign power of the States includes the authority to charter, register, and regulate domestic corporate entities. The powers given to the federal government under the U.S. Constitution do not authorize the federal government to intrude on the sovereign power of the States to charter, register and regulate domestic corporate entities.

See also *infra* notes 200 through 214 and accompanying text.

¹⁹² See CTA § 6402(5)(A).

¹⁹³ See CTA § 5336(f). This provision of the CTA has no corresponding provision in the Reporting Regulations.

¹⁹⁴ What are “bearer” shares and interests are not defined in the CTA.

¹⁹⁵ See DGCL § 158 (“A corporation shall not have power to issue a certificate in bearer form.”) This prohibition extends beyond corporations to other forms. For example, general partnerships organized under the Delaware adoption of a modified Revised Uniform Partnership Act are subject to section 15-103(b)(8), which provides that “[t]he partnership agreement may not: (8) Vary the denial of partnership power to issue a certificate of partnership interest in bearer form under § 15-503(h) of this title.”, while section 15-503(h) provides that “[a] partnership shall not have the power to issue a certificate of partnership interest in bearer form.” In parallel, the Delaware Limited Liability Company Act, at section 18-702(c), provides “[a] limited liability company shall not have the power to issue a certificate of limited liability company interest in bearer form.” The Committee on Corporate Laws of the Section of Business Law of the

the LLC format and its structural limitations on the transfer of interests in the venture; it could be done but for what purpose?¹⁹⁶ And fourth, the prohibition contains a multitude of undefined terms.

Setting aside those curiosities, there are at least two problems with this provision. First, does the statute's prohibition operate only prospectively, or does it invalidate existing outstanding bearer shares or interests? If it is intended that the statute retroactively invalidate existing rights, how is that permissible even if the U.S. Constitution's Contracts Clause¹⁹⁷ is not implicated? Second, even if only prospective, how will it operate with respect to bearer shares and interests already outstanding as of the CTA's effective date of January 1, 2020? May they continue to be exchanged among existing and prospective holders with all the rights provided for at the time of issuance, and if they may be how is the reporting company to determine whether the possibly transient holders of those bearer shares are beneficial owners? Perhaps Congress intended that the transfer of what have been bearer shares be frozen and the owners identified to the reporting companies, but that is not what the CTA actually says.

Bearer shares and interests are so rare that the issues incident to this provision will likely never be noticeable. That said, the provision of the CTA addressing bearer shares all too well again illustrates the "ready fire aim" approach often employed in this statute and the related regulations.

The Mechanics of Filing a BOIR

As noted previously, BOIRs are filed by reporting companies with FinCEN through an interface with the BOSS database. Reporting companies can file directly through one of two means, or they may hire a third-party provider to effect the filings.¹⁹⁸ There is no filing fee for an initial, an updated or a corrected BOIR.¹⁹⁹

There are two options for the BOSS interface, a "fillable pdf" or a web-based application. Obviously the person making the filing should have all the necessary information at hand as a delay can "time out." Once the filing is completed a transcript of the filing will be provided; where there is a problem in the submission the system will alert the filer.²⁰⁰

Reporting companies may find the web-based BOSS interface to be frustrating. If an update must be filed, for example, as to a beneficial owner's change of address, it does not pull

American Bar Association, which controls the drafting and editing of the Model Business Corporation Act, has published revisions to sections 6.04 and 6.25 to prohibit the issuance of bearer shares and script. See Corporate Laws Comm., *Changes in the Model Business Corporation Act—Proposed Amendments to Sections 6.04 and 6.25 Relating to Bearer Shares and Scrip*, 77 BUS. LAW. 1235 (2022). The corresponding provisions of the Kentucky Business Corporation Act, namely sections 271B.6-040(1)(c) and 271B.6-250, have as of this writing not been amended to conform to these revisions.

¹⁹⁶ There is a question of how this provision applies to Decentralize Autonomous Organizations ("DAOs"), whether formed under a statute such as that in Tennessee (see TENN. CODE § 48-250-101 et seq.), but that is outside the scope of this article.

¹⁹⁷ See U.S. CONST., Art 1, § 10, cl. 1. The Contract Clause is not directly implicated by the CTA as the CTA is federal legislation and the Contract Clause limits the states but not the federal government.

¹⁹⁸ See also FinCEN FAQ B.8 (Dec. 12, 2023); *id.* N.1 (Jan. 4, 2024).

¹⁹⁹ See also FinCEN FAQ B.4 (Jan. 4, 2024).

²⁰⁰ See also FinCEN FAQ N.2 (Dec. 12, 2023).

up the information previously submitted, change that one address, and hit “submit.” Rather, the reporting company will need to enter all of the information as to itself and to each of its beneficial owners, including in this example the new address of the one beneficial owner, including the images of the documents from which the beneficial owners’ unique identification numbers were taken.²⁰¹ Ergo, a “update” is not simply of the changed information, but rather requires the resubmission of all information as if the “update” were an entirely new initial report (albeit without company applicant information). These burdens may be avoided by using a third-party commercial service that on its system retains the submitted data, thereby streamlining the updating process, it being necessary to convey to that third-party only the change to be made.

The Unacknowledged Costs of Over-Reporting Who Are the Beneficial Owners

In the face of myriad uncertainty, FinCEN is of the view that “if need be just report uncertain beneficial owners; there is no penalty for over-reporting.” Well, that may be true from FinCEN’s perspective, and over-reporting by reporting companies just adds to the data being accumulated in BOSS against which FinCEN may undertake data-mining activities. There are, however, costs imposed on reporting companies from over-reporting. First, the reporting company, in the absence of clear lines, has to incur the costs of deciding how to apply unclear lines of demarcation, ultimately no doubt identifying “doubtful” beneficial owners. Second, those “doubtful” beneficial owners have to collect their PII and submit it to the reporting company. Third, the reporting company has to incorporate that information into its BOIR. Fourth the reporting company has to protect from further disclosure the PII submitted by that “doubtful” beneficial owner. Fifth, the reporting company has to add that “doubtful” beneficial owner to its program of reminders as to the need to report any changes in the information previously submitted. Sixth, that “doubtful” beneficial owner has to on an ongoing basis consider whether there has been any change in circumstances in her or his life that would necessitate advising the reporting company of changes in the previously submitted PII. Seventh, if there is such a change, the “doubtful” beneficial owner has to collect the information and return it to the reporting company, and then eighth, the reporting company has to submit a new BOIR via the BOSS interface, repeating all of the information with respect to the reporting company and every beneficial owner, and including the updated information with respect to this particular “doubtful” beneficial owner. While FinCEN may believe that there is no “penalty” for over-reporting, that viewpoint is valid only if one ignores the costs incurred by the need to over-report in an environment of unclear rules and draconian penalties.

Why is This Being Done?

In recent years the news has been full of stories about “shell companies” used for nefarious purposes; recall the “Panama Papers” leaked from the Panama law firm Mossack Fonseca²⁰² or stories about the web of companies owning mega-yachts owned ultimately by

²⁰¹ See also FinCEN FAQ H.4 (Dec. 12, 2023).

²⁰² See, e.g., Kirk Semple, Azam Ahmed and Eric Lipton, *Panama Papers Leak Casts Light on a Law Firm Founded on Secrecy*, NEW YORK TIMES (Apr. 6, 2016), available at <https://www.nytimes.com/2016/04/07/world/americas/panama-papers-leak-casts-light-on-a-law-firm-founded-on-secrecy.html>; Organized Crime and Corruption Reporting Project, *Panamanian Law Firm Is Gatekeeper To Vast Flow of Murky Offshore Secrets*, available at <https://www.occrp.org/en/panamapapers/mossack-fonseca/>; and Organized Crime and Corruption Reporting Project, *Inside the Fall of Mossack Fonseca*, available at <https://www.occrp.org/en/panamapapers/inside-the-fall-of-mossack-fonseca> .

Russian oligarchs who themselves were attempting to avoid sanctions.²⁰³ Members of FinCEN and the Treasury, along with other prosecutors and regulators, have long complained that in the course of their investigations of various crimes they would often encounter a corporation or an LLC whose ownership was unknown, or when regulators might be able to determine one corporation or LLC's ownership, they would find that it is owned by another corporation or LLC, and the same problems would again arise.

Congress, in passing the CTA, wrote:

(3) malign actors seek to conceal their ownership of corporations, limited liability companies, or other similar entities in the United States to facilitate illicit activity, including money laundering, the financing of terrorism, proliferation financing, serious tax fraud, human and drug trafficking, counterfeiting, piracy, securities fraud, financial fraud, and acts of foreign corruption, harming the national security interests of the United States and allies of the United States;

(4) money launderers and others involved in commercial activity intentionally conduct transactions through corporate structures in order to evade detection, and may layer such structures, much like Russian nesting "Matryoshka" dolls, across various, secretive jurisdictions such that each time an investigator obtains ownership records for a domestic or foreign entity, the newly identified entity is yet another corporate entity, necessitating a repeat of the same process.²⁰⁴

So there you have it - the CTA is intended to preclude bad actors from hiding their identities behind the corporations, LLCs and other business organizations they may organize in order to effectuate unlawful activities. If law enforcement encounter a business entity they can access the

²⁰³ See also FinCEN, Beneficial Ownership Information Reporting Rule Fact Sheet (Sept. 29, 2022), available at <https://www.fincen.gov/beneficial-ownership-information-reporting-rule-fact-sheet>:

Recent geopolitical events have reinforced the point that abuse of corporate entities, including shell or front companies, by illicit actors and corrupt officials presents a direct threat to the U.S. national security and the U.S. and international financial systems. For example, Russia's illegal invasion of Ukraine in February 2022 further underscored that Russian elites, state-owned enterprises, and organized crime, as well as Russian government proxies have attempted to use U.S. and non-U.S. shell companies to evade sanctions imposed on Russia. This rule will enhance U.S national security by making it more difficult for criminals to exploit opaque legal structures to launder money, traffic humans and drugs, and commit serious tax fraud and other crimes that harm the American taxpayer.

²⁰⁴ See CTA § 6402. Of course this brake on an investigation that might proceed more quickly will oft be not remedied by the CTA because bad actors simply will not file or will file fraudulent information. "Ours is not to reason why," Alfred Lord Tennyson, *The Charge of the Light Brigade* (1854).

BOSS database,²⁰⁵ determine who owns and controls the entity, and proceed in investigating those persons.²⁰⁶ There is, in addition, a less recognized purpose of the CTA.

Under the Bank Secrecy Act, banks and other lending organizations are obligated to establish a Customer Due Diligence, also referred to as Know Your Customer, function that among other things must collect information as to who owns and controls business entities seeking to open an account. As set forth by the Federal Financial Institutions Examination Council Manual:

In accordance with regulatory requirements, all banks must develop and implement appropriate risk-based procedures for conducting ongoing customer due diligence, including, but not limited to:

- Obtaining and analyzing sufficient customer information to understand the nature and purpose of customer relationships for the purpose of developing a customer risk profile; and
- Conducting ongoing monitoring to identify and report suspicious transactions and, on a risk basis, to maintain and update customer information, including information regarding the beneficial owner(s) of legal entity customers.²⁰⁷

The CTA provides that banks, with customer consent, may access the new beneficial ownership database in order to discharge their obligation to at least collect information as to client beneficial ownership.²⁰⁸ If you, on behalf a business, have in the last few years opened an account, you have likely reviewed and consented to the bank's "boilerplate" account agreement, many of which already contained a CTA database access; if not, you should expect future agreements to do so. In addition, for accounts pre-existing the CTA's initial effective date of January 1, 2024, you should not be surprised when the bank requests a CTA consent amendment. For that reason, the banks were significant supporters of the CTA.

You may decide for yourself whether the costs of the CTA are justified against these rationales for its adoption. But regardless of how you might weigh the benefits and burdens, it is

²⁰⁵ This is another topic that could be an entire article, namely who may access the BOSS database. In addition to banks undertaking CDD obligations as discussed below, various law enforcement bodies may to a greater or lesser degree access the database. See CTA § 5336(c)(2)(B); see also Beneficial Ownership Information Access and Safeguards, 88 FR 88732 (published Dec. 22, 2023, effective Feb. 20, 2024). A summation of those regulations appears in Fact Sheet: Beneficial Ownership Information Access and Safeguards Final Rule (Dec. 21, 2023). See also FinCEN FAQs O.1 through O.6 (Apr. 18, 2024).

²⁰⁶ Which of course assumes that those willing to engage in illicit activities will be filing timely and accurate BOIRs with FinCEN.

²⁰⁷ See Federal Financial Institutions Examination Council Manual, Regulatory Requirements - Customer Due Diligence, available at <https://bsaaml.ffiec.gov/manual/AssessingComplianceWithBSARegulatoryRequirements/02>

²⁰⁸ See § CTA 5336(c)(2)(C). As of this writing this functionality is not yet in place. See FinCEN FAQ O.6 (Apr. 18, 2024); Prepared Remarks of FinCEN Director Andrea Gacki During the SIFMA AML Conference (May 06, 2024) ("We expect that financial institutions subject to customer due diligence obligations will receive access in Spring 2025."), available at <https://www.fincen.gov/news/speeches/prepared-remarks-fincen-director-andrea-gacki-during-sifma-aml-conference> .

the law, and compliance is not optional; as discussed above there are significant penalties for non-compliance.²⁰⁹

But Isn't the CTA Unconstitutional?

You may have read about the decision out of the Northern District of Alabama in which the CTA was declared unconstitutional because it exceeded Congress' enumerated powers; that case is *National Small Business United v. Yellen*.²¹⁰ That decision now on appeal to the 11th Circuit Court of Appeals;²¹¹ on April 22 the Court ordered expedited review of the case. It is important to note that while the District Court held the CTA unconstitutional it granted relief in the form of an injunction against enforcement only with respect to the members of National Small Business United ("NSBU");²¹² there is no nationwide injunction sought or issued against the CTA. As a result, as of today:

1. If a company is not a member of NSBU life goes on and it should proceed with its CTA compliance efforts;
2. If a company is a member of NSBU it as of today has relief from CTA compliance, but with the caveat that relief could be lifted at any time by either the trial court or the 11th Circuit issuing a stay or a contrary judgment on the merits;
3. If the relief is lifted a company should not assume that additional time will be given vis-a-vis applicable deadlines;
4. Even if a company is a member of NSBU, it is not clear that its wholly-owned subsidiaries pre-existing March 1, 2024, benefit from the relief granted in the March 1, 2024 judgment; and

²⁰⁹ See *supra* notes 13 through 22 and accompanying text.

²¹⁰ Case No. 5:22-cv-01448; 2024 WL 899372; 2024 U.S. Lexis 36205 (N.D. Ala) (Judge Burke). The memorandum decision and final judgment were each issued on March 1, 2024. There are pending at least five other suits challenging the CTA's constitutionality, namely: *Gargas v. Yellen* (Case 1:23-cv-02468, N.D. Ohio) (complaint filed December 29, 2023); *Boyle v. Yellen* (Case 2:24-cv-00081-LEW, D. Maine) (complaint filed March 15, 2024); *Small Business Ass'n of Michigan v. Yellen* (Case 1:24-cv-00314, W.D. Mich.) (complaint filed March 26, 2024); *Texas Top Cop Shop, Inc. v. Garland* (Case No. 4:24cv478, E.D. Tx) (complaint filed May 28, 2024); and *Black Economic Council of Massachusetts, Inc. v. Yellen* (Case 1:24cv11411, D. Mass.) (complaint filed May 29, 2024). As of this writing: (i) the *Gargas* case is in abeyance pending the decision of the 11th Circuit Court of Appeals in *NSBU v. Dept. of the Treasury*; (ii) a summary judgment briefing schedule has been entered in the *Small Business Ass'n of Michigan* case with that schedule calling for the last briefs at the end of July; and (iii) in *Boyle*, pursuant to a Joint Status Report filed June 3, the parties have agreed to a schedule for a motion to dismiss/motion for summary judgment with the last pleadings due not later than August 23.

²¹¹ Case no. 24:10736 (11th Circuit Court of Appeals). At the 11th Circuit the case is styled *National Small Business United v. Department of the Treasury*. The Court ordered that the case be heard on an expedited basis; see Order entered April 22, 2024. The last brief was filed on June 3, and oral argument is to take place the week of September 16.

²¹² "National Small Business United" is the real name of the "National Small Business Association"; the latter is an assumed name.

5. Even if a company is a member of NSBU, it is really very much not clear that a wholly-owned subsidiary created after March 1, 2024, benefits from the relief granted in the March 1, 2024 judgment.²¹³

As to who benefits from the March 1, 2024 judgment, it may turn at least in part on how NSBU defines its “members.” NSBA’s website membership application does not specify whether the member is a company (they ask for number of employees) or the individual owner (they ask for his or her address, email, etc.). Paragraph 11 of the Complaint would indicate that the membership is the owners (“members who operate their businesses”) while paragraph 12 of that same Complaint indicates the members are business entities (“NSBA’s members include numerous reporting companies ...”). The Memorandum Opinion of March 1, 2024 at page 14 said “Winkles has standing on his own and has been a dues-paying member of NSBU since 2021.”, while in a March 12 video briefing Todd McCracken, President and CEO of the NSBA, said the members are the companies.²¹⁴ As noted above, the CTA imposes reporting obligations upon business entities who absent an exemption satisfy the definition of a “reporting company”; the “beneficial owners” (and “company applicants”) thereof do not have CTA reporting obligations.

The CTA in Litigation

While it is still early, we should expect that the CTA and BOIRs will play a part in litigation. Already in one bankruptcy case the debtor asserted the Deutsche Bank had not complied with its obligations under the CTA; the court held that a Bankruptcy Court cannot enforce the CTA.²¹⁵ While there may be stringent controls upon access to information submitted to FinCEN’s BOSS database and significant penalties for unauthorized access, those protections do not extend to PII in the hands of a reporting company. Discovery requests for that PII are to be expected, providing a party a bonanza of information about parties and/or their affiliates.²¹⁶ Reporting companies seeking to either demonstrate or discredit assertions of federal diversity jurisdiction may rely upon PII in support thereof, while those opposing those efforts will apply the rule that a residential address as provided for inclusion in a BOIR does not of itself demonstrate domicile.²¹⁷ Of course “fishing expeditions” and requests for PII simply to cause discomfort are to be expected. It is far too early (as of this writing the CTA and the Reporting Regulations have been in effect for barely 6 months) to indicate how these and other efforts will play out, but we must expect that there will be efforts by parties in litigation to capitalize on this information.

²¹³ For another take on the implications of this decision, see Lee A. Sheppard, *Beneficial Ownership Reporting and the Constitution*, TAX NOTES FEDERAL, 2024 TNF 11-3 (Mar. 11, 2024).

²¹⁴ That video briefing is available at: https://youtu.be/M7gMXyr764Y?si=wQvlgz7Nqf_ZiBbF.

²¹⁵ See *In re Letennier*, 2024 WL 1596883, 2024 Bankr. Lexis 893 (Bankr. N.D. N.Y. Apr. 11, 2024) (“Debtor also asserts that Deutsche Bank has not complied with the Beneficial Ownership Test of the Corporate Transparency Act.”)

²¹⁶ Another reason beneficial owners may want to provide a FinCEN Id. rather than the range of their PII.

²¹⁷ Citizenship is synonymous with domicile, and “the domicile of an individual is his true, fixed and permanent home and place of habitation. It is the place to which, whenever he is absent, he has the intention of returning.” *Vlandis v. Kline*, 412 U.S. 441, 454 (1973) (quoting *Non-Resident Tuition*, Op. Att’y Gen. of Conn. (1972) (unreported)). See also *Sun Printing & Publishing Association v. Edwards*, 194 U.S. 377 (1904).

State Beneficial Owner Reporting

Various states have adopted or are considering laws requiring the information on ownership and control of entities either organized or qualified to transact business in that jurisdiction. These state level disclosure requirements are in addition to the wide variety of state and local laws that have required or propose to require some level of disclosure of persons who meet one definition or another of a beneficial owner.

State Level “CTAs”

Various of the states have adopted or are considering adopting a state equivalent to the CTA that would mandate beneficial ownership disclosure for entities either organized or qualified to transact business in that state. New York has the unique position of having adopted a beneficial ownership disclosure statute, the “New York Transparency Act,”²¹⁸ then before it could go into effect²¹⁹ repealing it and adopting a different beneficial ownership disclosure statute.²²⁰ Effective January 1, 2026, the new law is applicable to LLCs, whether formed or qualified to transact business in New York.²²¹ Many of the concepts and definitions used in the CTA are utilized in the New York law, but there are as well significant differences. For example, an LLC that under the CTA is exempt²²² is typically not required to make a filing “claiming” the exemption; under this New York law a company exempt under one of the twenty-three exemptions must file a statement to that effect identifying the applicable exemption.

The District of Columbia, since 2020, has required information on beneficial owners of entities organized in that jurisdiction.²²³

²¹⁸ See N.Y. S.B 99B and codified as 2023 New York Laws 772.

²¹⁹ All else being equal, the New York Transparency Act would have become effective December 21, 2024.

²²⁰ See N.Y. S.B.8059 and codified as 2024 New York Laws ch. 102.

²²¹ See NY LIMITED LIABILITY COMPANY LAW § 1107(a).

²²² See 31 C.F.R. § 1010.380 (c)(2).

²²³ See D.C. CODE § 29-10.01(a) as amended by D.C. Act 22-216 (approved Jan. 30, 2019).

As of this writing state level beneficial ownership acts are under consideration in California,²²⁴ Maryland,²²⁵ and Massachusetts.²²⁶

In addition, many states and localities have laws that to different degrees require the disclosure of some or all of the beneficial owners of a particular venture; sometimes those laws are dependent upon the venture's line of business;²²⁷ Kentucky is certainly part of that group.²²⁸

A Case Study

Following is a case study of a hypothetical accounting firm, the interplay of the PCAOB and LOC exemptions, and a variety of other facts that impact upon CTA reporting.

Accounting Firm (the "Firm") was organized as a professional service corporation that then elected to be taxed as an S-Corporation sometime prior to January 1, 2024. As of that date Firm did not perform accounting services for any clients with publicly traded securities, and in consequence was not registered with the Public Company Accounting Oversight Board (the "PCAOB") as contemplated by section 102 of the Sarbanes-Oxley Act of 2002.²²⁹ Firm has 22

²²⁴ See California Senate Bill 738 (introduced Feb. 17, 2023) (applicable to foreign corporations and LLCs upon qualification to transact business in California), *available at* <https://legiscan.com/CA/text/SB738/id/2754877/California-2023-SB738-Amended.html>; Senate Bill 594 (introduced Feb. 15, 2023) (applicable to domestic and foreign corporations and LLCs as well as certain other ventures), *available at* <https://legiscan.com/CA/text/SB594/id/2794135>; Senate Bill 1201 (introduced Feb. 15, 2024) (domestic and foreign corporations would be required to include in their annual statement of information the names and complete business or residence addresses of any beneficial owner; require domestic and foreign LLCs to include in their biennial statements the name and complete business or residence addresses of any beneficial owner, and require a real estate investment trust to file with the Secretary of State a statement containing the name and complete business or residence address of any beneficial owner), *available at* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB1201. Under all of these proposals the beneficial owner information would be a public record.

²²⁵ See Maryland Senate Bill 954 (introduced Feb. 2, 2024) (requiring the filing of certain beneficial ownership information with the Department of Assessments and Taxation), *available at* <https://mgaleg.maryland.gov/2024RS/bills/sb/sb0954F.pdf>.

²²⁶ See Massachusetts House Bill 3566 (introduced March 30, 2023) (applicable to domestic and foreign LLCs, requiring that they report beneficial ownership to the Secretary of State), *available at* <https://malegislature.gov/Bills/193/H3566>.

²²⁷ See *generally* LARRY E. RIBSTEIN, ROBERT R. KEATINGE AND THOMAS E. RUTLEDGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES § 14:2.

²²⁸ See *supra* note 27.

²²⁹ See CTA § 5336(a)(11)(B)(XV) (exempting PCAOB accounting firms from the CTA's reporting obligations); 31 C.F.R. § 1010.380(c)(2)(xv) (same). In response to the proposed beneficial ownership reporting regulations, the American Institute of Certified Public Accountants (the "AICPA") submitted comments including the suggestion that the exemption extend to all accounting firms, which extension would be pursuant to 31 U.S.C. § 5336(a)(11)(B)(xxiv) and the authority of the Secretary of the Treasury to provide for additional exemptions. See AICPA comment letter dated February 4, 2022, *available at* <https://us.aicpa.org/content/dam/aicpa/advocacy/tax/downloadabledocuments/56175896-aicpa-comment-letter-fiicen-boir-nprm-02-04-22-final.pdf?vngagetrans=hQ0wsPLWzsy056DOeTcT> (last visited April 11, 2024). See *also* AICPA comment letter dated May 5, 2021, regarding the Advance Notice of Proposed Rulemaking for beneficial ownership reporting, *available at*

employees including 10 who are shareholders, each holding an equal 10% of the corporation's shares. Firm has a physical office that it has leased for many years and its federal tax return for the year ended December 31, 2022, reported U.S. sourced revenue of \$7.4 million.

As of January 1, 2024, Firm: (a) is a "Reporting Company" as contemplated by the Corporate Transparency Act (the "CTA");²³⁰ (b) is not a "Large Operating Company" ("LOC") as it does not satisfy the requirement to have more than 20 full-time employees;²³¹ and (3) while an accounting firm, as it is not registered with the PCAOB, it is not able to rely upon the exemption in the CTA for those firms.²³² In that Firm was organized prior to the CTA's initial effective date of January 1, 2024, it has until the end of 2024²³³ to file its initial report of beneficial ownership.²³⁴

Alternative Fact Pattern 1

On July 1, 2024, Firm merges with and into Bigger Firm, an accounting firm taxed as a C-Corporation that is registered with the PCAOB; Bigger Firm's organization predated CTA's Reporting Regulation's initial effective date of January 1, 2024. In addition, Bigger Firm is a LOC with 50 full-time employees including its 18 shareholders. Notwithstanding that from January 1 through July 1, 2024, Firm had no exemption from CTA beneficial ownership reporting, it was never obligated to file a beneficial ownership report prior to its merger into Bigger Firm.²³⁵ As

<https://us.aicpa.org/content/dam/aicpa/advocacy/issues/downloadabledocuments/56175896-aicpa-comment-letter-on-fincen-anprm-boir-final-05-05-21.pdf?vngagetrans=4fKieK4MEOm9VePKbtOk> (last visited April 11, 2024). As reported in Beneficial Ownership Information Reporting Requirements, *supra* note 2 at 59540:

In addition, multiple commenters expressed support for exempting highly regulated entities that provide professional services, such as law firms and certain accounting firms, because they already provide beneficial ownership information to regulatory authorities.

Those requests was rejected. *Id.*

²³⁰ See 31 U.S.C. § 5336 (a)(11)(A); 31 C.F.R. § 1010.380(c)(1)(i)(A) (a corporation created by a state Secretary of State filing is a reporting company).

²³¹ See 31 U.S.C. § 5336(a)(11)(B)(xxi); 31 C.F.R. § 1010.380(c)(2)(xxi) (requirements for "large operating company" exemption). The term "employee" is defined under 26 CFR 54.4879H-1(a) to exclude an S corporation shareholder owning 2% or more of the company. See 31 C.F.R. § 1010.380(c)(2)(xxi)(A).

²³² See 31 U.S.C. § 5336(a)(11)(8)(xv); 31 C.F.R. § 1010.380(a)(2)(xv) (accounting firms registered with the PCAOB are exempt from the definition of a CTA "reporting company").

²³³ See 31 C.F.R. § 1010.380(a)(1)(III). The wording of the regulation is "shall file a report not later than January 1, 2025." You could wait to January 1, 2025, the absolutely final deadline for filing an initial BOIR, but if BOSS goes down that day you should not be surprised when FinCEN IT support is not available.

²³⁴ See 31 C.F.R. § 1010.380(a)(1)(i)(B).

²³⁵ There is no authority directly on point as to this situation, and the authors present this conclusion as reasoned under the structure of the Reporting Regulations. The pre-2024 entity had until not later than January 1, 2025, by which to file its initial BOI report, and there is no provision of the Reporting Regulations that accelerates that deadline for changes in the circumstances of the reporting company. We note that FinCEN FAQ G.4 (Nov. 16, 2023) directs those beneficial owners as of the time of filing, irrespective of historical beneficial owners, are to be reported, and that information identifying the reporting company is to be as of the date of the report's filing. See 31 C.F.R. § 1010.380(b)(1)(A)-(F) (identifying information as to the reporting company itself); *id.* § 1010.380(b) (requiring that the person submitting a beneficial owner report "shall certify that the report or application is true, correct, and complete."). Effective upon the merger,

Bigger Firm is exempt both as PCAOB accounting firm and an LOC as of January 1, 2024, no beneficial ownership report “electing into” either of those exemptions is required.²³⁶ Ultimately neither Firm nor Bigger Firm will be filing a BOIR.

Alternative Fact Pattern 2

On July 1, 2024, Firm, having taken on a client which has issued publicly traded securities, registers with the PCAOB, which registration is granted that day. In consequence Firm is from that day an exempt reporting company and is not obligated to file beneficial ownership reports with FinCEN.²³⁷ Having not filed a report prior to achieving exempt reporting company status, no beneficial ownership report “electing into” this exemption is required.²³⁸

Alternative Fact Pattern 3 (Part 1)

On June 20, 2024, Firm files a BOIR identifying each of the shareholder-accountants as a “beneficial owner” consequent to their position as persons with substantial control (none is a 25% or more beneficial owner).²³⁹ On August 1, 2024, 3 incumbent shareholders retire from the firm and their shares are redeemed, and the Firm takes on 14 new full-time employees, including 3 who become shareholders. With this addition Firm’s employee headcount is now 23 and Firm satisfies the requirements for the LOC exemption.²⁴⁰ Within 30 days of August 1, Firm is obligated to update its previously filed BOIR²⁴¹ and indicate it is now exempt from the obligation to file further BOIRs.²⁴²

Alternative Fact Pattern 3 (Part 2)

Firm, with a full-time employee count of 12 and 10 employee shareholders, elects as of November 1, 2024, to surrender its S-corporation status and to thereafter be taxed as a C-Corporation. As a result the employee count now includes each of the shareholders.²⁴³ Firm now has 22 full time employees and satisfies the requirements to be a Large Operating Company.

the non-surviving entity, as a matter of state law, ceased to exist as a jural organization, and from the effective time and date of the merger it is not possible for a person who might file on behalf of the non-surviving entity a BOI report to make the required certification.

²³⁶ See FinCEN FAQ L.5 (Nov. 16, 2023).

²³⁷ See 31 C.F.R. § 1010.380(c)(2)(xv).

²³⁸ 31 C.F.R. § 1010.380(a)(2)(ii) is applicable only if the reporting company has already filed a BOIR.

²³⁹ While it is questionable whether any of the shareholder-accountants in that role hold “substantial control” over Firm, they may decide that rather than dividing that group and deciding in effect that some have more control than do others, all will be identified as “beneficial owners.” Of course if any are as well a “senior officer” as defined at 31 C.F.R. § 1010.380(f)(8) those persons are beneficial owners by reason of those positions.

²⁴⁰ See 31 C.F.R. § 1010.380(c)(2)(xxi).

²⁴¹ See 31 C.F.R. § 1010.380(a)(2)(ii).

²⁴² See 31 C.F.R. § 1010.380(a)(2)(ii).

²⁴³ See 31 C.F.R. § 1010.380(c)(2)(xxi)(A), it referencing 26 CFR § 54.4980H-1(a) and -3. Under 26 CFR § 54.4980H-1(a)(15), the definition of an “employee” excludes sole proprietors, which encompasses the sole members of almost all single member LLCs, a partner in a partnership, which will encompass the members in most multi-member LLCs, and a 2-percent (or more) S corporation shareholder.

Having not filed a BOIR prior to achieving exempt reporting company status, no beneficial ownership report “electing into” this exemption is required.²⁴⁴

Alternative Fact Pattern 3 (Part 3)

Firm, with a full-time employee count of 12 and 10 employee shareholders, elects as of November 1, 2024, to surrender its S-corporation status and to thereafter be taxed as a C-Corporation. As a result the employee count now includes each of the shareholders.²⁴⁵ Firm now has 22 full time employees and satisfies the requirements to be a Large Operating Company. Having not filed a BOIR prior to achieving exempt reporting company status, no beneficial ownership report “electing into” this exemption is required.²⁴⁶ But then on November 15 a total of 3 employees resign. The employee headcount is now 20, which is not “more than 20” as required by the LOC exemption.²⁴⁷ As Firm has never filed a BOIR it has through January 1, 2025, within which to file its initial BOIR.²⁴⁸

Alternative Fact Pattern 4

On July 15, 2024, before Firm files its initial BOIR with FinCEN, it moves its offices to new space it is leasing. When thereafter (but not later than January 1, 2025)²⁴⁹ the initial report is filed the reporting company identifying information recites the new, post-July 15 address; there is no need to recite the prior address notwithstanding that Firm was in that space after January 1, 2024 and before the initial report was filed.²⁵⁰

Alternative Fact Pattern 5

On June 1, 2024, Firm files its initial BOIR; for each of the beneficial owners it includes their PII and no FinCEN Ids.²⁵¹ On July 15, 2024, Firm moves its offices to new space it is leasing. On July 30, 2024, one of the shareholder employees identified in the June 1 BOIR, in connection with marriage, moves her personal residence and changes her last name to a hyphenated name. Firm may either:

²⁴⁴ If in the alternative Firm has previously filed a BOIR it would need to file an updated BOIR reporting it is now exempt. See 31 C.F.R. § 1010.380(a)(2)(ii).

²⁴⁵ See 31 C.F.R. § 1010.380(c)(2)(xxi)(A), it referencing 26 CFR § 54.4980H-1(a) and -3. Under 26 CFR § 54.4980H-1(a)(15), the definition of an “employee” excludes sole proprietors, which encompasses the sole members of almost all single member LLCs, a partner in a partnership, which will encompass the members in most multi-member LLCs, and a 2-percent (or more) S corporation shareholder.

²⁴⁶ If in the alternative Firm has previously filed a BOIR it would need to file an updated BOIR reporting it is now exempt. See 31 C.F.R. § 1010.380(a)(2)(ii).

²⁴⁷ See 31 C.F.R. 1010.380(c)(2)(xxi)(A) (“employs more than 20 full time employees”) (emphasis added).

²⁴⁸ See 31 C.F.R. § 1010.380(a)(1)(i)(A); see also *id.* § 1010.380(f)(6) (definition of “operating presence at a physical office within the United States”).

²⁴⁹ See 31 C.F.R. § 1010.380(a)(1)(iii).

²⁵⁰ See 31 C.F.R. § 1010.380(b)(1)(i)(C) (requiring the current address at the time of filing).

²⁵¹ See 31 C.F.R. 1010.380(b)(4) (setting forth requirements for and how to apply for, and the uses of, a “FinCEN identifier.”); *supra* notes 185 through 190 and accompanying text.

- within 30 days after July 15, 2024, file an updated BOIR reporting the new Firm address and then within 30 days of July 30, 2024, file another updated BOIR reporting the beneficial owner's new address and name; or
- within 30 days after July 15, 2024, file an updated BOIR reporting on all of the Firm's new address and the beneficial owner's new address and name.

Alternative Fact Pattern 6

On June 1, 2024, Firm files its initial beneficial ownership report; for each beneficial owner it uses a FinCEN Identifier.²⁵² On July 15, 2024, Firm moves its offices to new space it is leasing. On July 30, 2024, one of the shareholder employees identified in the June 1 beneficial ownership report, in connection with marriage, moves her personal residence and changes her last name to a hyphenated name. Thereafter:

- within 30 days after July 15, 2024, Firm needs to update its address information as submitted to FinCEN by filing an updated BOIR;²⁵³ and
- within 30 days after July 30, 2024, the shareholder employee needs to update the name and address information submitted to FinCEN in her application for a FinCEN Identifier.²⁵⁴

Alternative Fact Pattern 7 (Part 1)

On June 1, 2024, Firm, acting through its president Masako, causes a single-member limited liability company ("New LLC") to be organized by the filing of articles of organization with the State Secretary of State; the SoS immediately accepts and files those articles and by e-mail sends notice that the organization is complete.²⁵⁵ New LLC provides certain payroll services to Firm clients and is not an exempt entity under the CTA.²⁵⁶ Under New LLC's operating agreement each Firm shareholder is a manager, and on major decisions a vote of a per-capita simple majority controls.

New LLC, having been formed on or after January 1, 2024, and before January 1, 2025, has 90 days within which to file its initial beneficial ownership report.²⁵⁷ In that report it much

²⁵² See 31 C.F.R. § 1010.380(f)(2) (definition of "FinCEN Identifier"); *id.* § 1010.380(b)(4)(i) (application for a FinCEN Id.); *id.* § 1010.380(b)(4)(ii) (use of a FinCEN Id.).

²⁵³ See 31 C.F.R. § 1010.380(a)(2)(i).

²⁵⁴ See 31 C.F.R. § 1010.380(b)(4)(iii)(A).

²⁵⁵ See also 31 C.F.R. § 1010.380(a)(1)(i)(A).

²⁵⁶ Unlike 2% or more shareholders in an S-corporation, shareholders in a C-corporation, regardless of the magnitude of his or her holdings, for these purposes may be counted as shareholders. See 31 C.F.R. § 1010.380(a)(1)(i)(A)-(B) (how to determine from when existence begins, thereby initiating the running of deadlines); see also FinCEN FAQ G.1 (Dec. 1, 2023); *id.* G.5 (Dec. 12, 2023); FinCEN Guide ch. 5.1.

²⁵⁷ See 31 C.F.R. § 1010.380(a)(1)(i):

(1) Initial report. Each reporting company shall file an initial report in the form and manner specified in paragraph (b) of this section as follows:

identify itself,²⁵⁸ its Company Applicant Masako by either her personal identifying information or her FinCEN Id.,²⁵⁹ and the personal identifying information or FinCEN of each of New LLC's beneficial owners.²⁶⁰ The "beneficial owner" of New LLC is not Firm; a beneficial owner is not an entity "parent" but rather the individuals who through the chain of ownership are deemed to have "ownership" or "substantial control" of the reporting company.²⁶¹ In this instance, having already determined that each shareholder-employee is as to Firm a person with "substantial control" of Firm, a decision is made to carry-over that treatment to New LLC even though doing so may result in over-reporting of beneficial owners.²⁶²

Alternative Fact Pattern 9 (Part 2)

On June 1, 2024, before filing a BOIR, Firm added sufficient employees to qualify as a Large Operating Company and registered as a PCAOB firm; Firm is now exempt from the obligation to file BOIRs.²⁶³ On July 15, 2024, Firm, acting through its president Masako, causes a single-member limited liability company ("New LLC") to be organized by the filing of articles of organization with the State Secretary of State; the SoS immediately accepts and files those articles and by e-mail sends notice that the organization is complete. New LLC provides certain payroll services to Firm clients and is not of itself an exempt entity under the CTA. Under New LLC's operating agreement each Firm shareholder is a manager, and on major decisions a vote of a per-capita simple majority controls.

As New LLC is a wholly-owned subsidiary of Firm, and as Firm is an exempt reporting company as it is both an LOC and a PCAOB registered accounting firm, New LLC is exempt from the requirement to file a BOIR.²⁶⁴

Practice Pointers

(i) (A) Any domestic reporting company created on or after January 1, 2024, and before January 1, 2025, shall 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 or 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.

See *also* Beneficial Ownership Information Reporting Deadline Extension for Reporting Companies Created or Registered in 2024, 88 FR 66730 (Sept. 28, 2023).

²⁵⁸ See 31 C.F.R. § 1010.380(b)(1)(i).

²⁵⁹ See 31 C.F.R. § 1010.380(b)(1)(ii) (requiring each reporting company organized on or after January 1, 2024, to include in its initial BOIR its company applicant/s).

²⁶⁰ See 31 C.F.R. 1010.380(b)(1)(i).

²⁶¹ See *supra* note 84 and accompanying text.

²⁶² While New LLC may deem every shareholder-manager as having substantial control over its major decisions, deciding that rather than dividing that group and declaring in effect that some have more control than do others, and identify each as a "beneficial owner" of New LLC, a case can be made that the control is attenuated enough, it taking at least six of the ten to make a major decision (is 1/6th "substantial influence"?), that none has substantial control. See *also* FinCEN FAQ D.9 (Sept. 29, 2023).

²⁶³ See 31 C.F.R. § 1010.380(a)(2)(xv); *id.* § 1010.380(a)(2)(xxi).

²⁶⁴ See 31 C.F.R. § 1010.380(c)(2)(xxii) (exempting entities whose ownership interests are controlled or wholly owned, directly or indirectly, by one or more entities which meet specific exemptions to the CTA).

- Companies will want to set up a “CTA Compliance Officer” who is charged to oversee CTA compliance. In the case of a corporation this may be accomplished by Board resolutions while in an LLC it will need to be in compliance with the operating agreement.
- In concert with the appointment of a CTA Compliance Officer, the company will want to adopt a CTA Compliance Policy.
- In light of the significant uncertainty that exists with respect to interpreting and applying the CTA, it will often be appropriate that an indemnification agreement between the reporting company and the CTA compliance officer be put in place.
- If a company is not a reporting company or is a reporting company that satisfies one of the twenty-three exemptions, it will want a letter from its attorney making that explanation, and then the board or other governing body will want to adopt that explanation on behalf of the company.²⁶⁵
- A company that is a reporting company and is not able to utilize an exemption will want to adopt a CTA Compliance Policy setting forth a company objective of full compliance, describing the process and mechanism for identifying who are the beneficial owners, outreach to those persons for their PII or FinCEN Ids., etc.
- A company that is a reporting company and is not able to utilize an exemption should start early in communicating with its beneficial owners about what will be required of them for the initial BOIR and thereafter.
- A reporting company that will be handling the PII of its beneficial owners (and perhaps company applicants) needs to put in place procedures to insure the continuing confidentiality of that information.
- Every business should review its organizational documents (articles or incorporation or organization, bylaws, operating agreements, voting trust agreements, buy-sell agreements, partnership agreements, etc.) to see what should be modified or supplemented to comply with the CTA.

²⁶⁵ With due respect for our friends in the accounting profession, CTA compliance is a legal, not a tax or accounting, issue. Non-attorneys who opine on topics such as who in a particular LLC is equivalent to the president of a corporation (see 31 C.F.R. 1010.380(f)(8)) or who has “substantial control” over a reporting company may well be engaged in the unauthorized practice of law. See also J. Michael Reese and Sarah Beckett Ference, *CTA and the unauthorized practice of law (UPL)*, *J. Accountancy* (Sept. 30, 2022), available at [https://www.journalofaccountancy.com/issues/2024/jan/oh-boi-the-corporate-transparency-act-and-cpa-firms.html#:~:text=CTA%20and%20the%20unauthorized%20practice,an%20express%20prohibition%20a%20gainst%20UPL;Herrick%20K.%20Lidstone,%20Considerations%20for%20Attorneys%20Resulting%20from%20the%20Corporate%20Transparency%20Act%20\(Apr.%202023\),available%20at%20https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4414393](https://www.journalofaccountancy.com/issues/2024/jan/oh-boi-the-corporate-transparency-act-and-cpa-firms.html#:~:text=CTA%20and%20the%20unauthorized%20practice,an%20express%20prohibition%20a%20gainst%20UPL;Herrick%20K.%20Lidstone,%20Considerations%20for%20Attorneys%20Resulting%20from%20the%20Corporate%20Transparency%20Act%20(Apr.%202023),available%20at%20https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4414393);

- Companies are going to need to remind their beneficial owners to let them know of changes in the PII and/or to update information previously submitted in the application for a FinCEN Id, and attorneys are going to need to remind their clients to send out those reminders.
- Consult with your clients as to having beneficial owners apply for a FinCEN Id. and how the company might facilitate them doing so.
- The board or other governing body for the organization should make the final determination as to who are its beneficial owners and in the case of reporting companies formed on or after January 1, 2024, its company applicants.²⁶⁶
- Familiarize yourself with the various CTA related fraudulent schemes that are being employed and make your clients aware of the need to be vigilant.

Conclusion

While you and your clients may have strong feelings about the CTA (and many do), it is the law and we have to assist our clients in complying with it. Where an attorney is not able or willing (we must pick our battles as to what we will focus upon) to learn this new law sufficient that she or he is competent to give the necessary counsel then she or he is obligated to either bring in co-counsel with the necessary expertise or recommend the client engage separate counsel who has done so.²⁶⁷

Additional Resources

[HERE IS A LINK](#) to the CTA

[HERE IS A LINK](#) to the Reporting Regulations

[HERE IS A LINK](#) to the Release *Beneficial Ownership Information Reporting Requirements*, 87 Fed. Reg. 59498 (Sept. 22, 2022)

[HERE IS A LINK](#) to the Release *Beneficial Ownership Information Reporting Deadline Extension for Reporting Companies Created or Registered in 2024*, 88 Fed. Reg. 66730 (Sept. 28, 2023)

[HERE IS A LINK](#) to the Release *Use of FinCEN Identifiers for Reporting Beneficial Ownership Information of Entities*, 88 Fed. Reg. 76995 (Nov. 8, 2023)

[HERE IS A LINK](#) to the FinCEN Beneficial Ownership Reporting FAQs

[HERE IS A LINK](#) to the FinCEN Small Entity Compliance Guide

²⁶⁶ See also *supra* notes 85 through 87 and accompanying text.

²⁶⁷ See SCR 3.130(1.1) (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”)

HERE IS A LINK to the Release *Beneficial Ownership Information Access and Safeguards*, 88 Fed. Reg. 88732 (Dec. 22, 2023)

HERE IS A LINK to the *Fact Sheet: Beneficial Ownership Information Access and Safeguards Final Rule* (Dec. 21, 2023)

Exhibit A
The Twenty-Three Exemptions

<i>Exemption</i>	<i>Requirements</i>
Securities reporting issuer	<p>Any issuer of securities that is:</p> <p>(A) An issuer of a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l); or</p> <p>(B) Required to file supplementary and periodic information under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)).</p>
Governmental authority	<p>Any entity that:</p> <p>(A) Is established under the laws of the United States, an Indian tribe, a State, or a political subdivision of a State, or under an interstate compact between two or more States; and</p> <p>(B) Exercises governmental authority on behalf of the United States or any such Indian tribe, State, or political subdivision.</p>
Bank	<p>Any bank, as defined in:</p> <p>(A) Section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813);</p> <p>(B) Section 2(a) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)); or</p> <p>(C) Section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)).</p>
Credit union	<p>Any Federal credit union or State credit union, as those terms are defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752).</p>
Depository institution holding company	<p>Any bank holding company as defined in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841), or any savings and loan holding company as defined in section 10(a) of the Home Owners' Loan Act (12 U.S.C. 1467a(a)).</p>

Money services business	Any money transmitting business registered with FinCEN under 31 U.S.C. 5330, and any money services business registered with FinCEN under 31 CFR 1022.380. ¹
Broker or dealer in securities	Any broker or dealer, as those terms are defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c), that is registered under section 15 of that Act (15 U.S.C. 78o).
Securities exchange or clearing agency	Any exchange or clearing agency, as those terms are defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c), that is registered under sections 6 or 17A of that Act (15 U.S.C. 78f, 78q-1).
Other Exchange Act registered entity	Any other entity not described in paragraph (c)(2)(i), (vii), or (viii) of this section that is registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.).
Investment company or investment adviser	Any entity that is: (A) An investment company as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a-3), or is an investment adviser as defined in section 202 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2); and (B) Registered with the Securities and Exchange Commission under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) or the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 et seq.).
Venture capital fund adviser	Any investment adviser that: (A) Is described in section 203(l) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3(l)); and (B) Has filed Item 10, Schedule A, and Schedule B of Part 1A of Form ADV, or any

¹ A subsidiary of a Money Services Business is not able to rely upon the subsidiary of an exempt company exemption. See Treas. Reg. § 1010.380(c)(2)(xxii), it not referencing Treas. Reg § 1010.380(c)(2)(vi).

	successor thereto, with the Securities and Exchange Commission.
Insurance company	Any insurance company as defined in section 2 of the Investment Company Act of 1940 (15 U.S.C. 80a-2).
State-licensed insurance producer	Any entity that: (A) Is an insurance producer that is authorized by a State and subject to supervision by the insurance commissioner or a similar official or agency of a State; and (B) Has an operating presence at a physical office within the United States.
Commodity Exchange Act registered entity	Any entity that: (A) Is a registered entity as defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a); or (B) A futures commission merchant, introducing broker, swap dealer, major swap participant, commodity pool operator, or commodity trading advisor, each as defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a), or a retail foreign exchange dealer as described in section 2(c)(2)(B) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(B)); and (2) Registered with the Commodity Futures Trading Commission under the Commodity Exchange Act.
Accounting firm	Any public accounting firm registered in accordance with section 102 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7212).
Public utility	Any entity that is a regulated public utility as defined in 26 U.S.C. 7701(a)(33)(A) that provides telecommunications services, electrical power, natural gas, or water and sewer services within the United States.
Financial market utility	Any financial market utility designated by the Financial Stability Oversight Council under section 804 of the Payment, Clearing, and

	Settlement Supervision Act of 2010 (12 U.S.C. 5463).
Pooled investment vehicle	Any pooled investment vehicle that is operated or advised by a person described in paragraph (c)(2)(iii), (iv), (vii), (x), or (xi) of this section. ²
Tax-exempt entity	Any entity that is: <p>(A) An organization that is described in section 501(c) of the Internal Revenue Code of 1986 (Code) (determined without regard to section 508(a) of the Code) and exempt from tax under section 501(a) of the Code, except that in the case of any such organization that ceases to be described in section 501(c) and exempt from tax under section 501(a), such organization shall be considered to continue to be described in this paragraph (c)(1)(xix)(A) for the 180-day period beginning on the date of the loss of such tax-exempt status;</p> <p>(B) A political organization, as defined in section 527(e)(1) of the Code, that is exempt from tax under section 527(a) of the Code; or</p> <p>(C) A trust described in paragraph (1) or (2) of section 4947(a) of the Code.</p>
Entity assisting a tax-exempt entity	Any entity that: <p>(A) Operates exclusively to provide financial assistance to, or hold governance rights over, any entity described in paragraph (c)(2)(xix) of this section;</p> <p>(B) Is a United States person;</p> <p>(C) Is beneficially owned or controlled exclusively by one or more United States persons that are United States citizens or lawfully admitted for permanent residence; and</p> <p>(D) Derives at least a majority of its funding or revenue from one or more United States</p>

² A subsidiary of a Pooled Investment Vehicle is not able to rely upon the subsidiary of an exempt company exception. See Treas. Reg. § 1010.380(c)(2)(xxii), it not referencing Treas. Reg. § 1010.380(c)(2)(xviii).

	persons that are United States citizens or lawfully admitted for permanent residence. ³
Large operating company	<p>Any entity that:</p> <p>(A) Employs more than 20 full time employees in the United States, with “full time employee in the United States” having the meaning provided in 26 CFR 54.4980H–1(a) and 54.4980H–3, except that the term “United States” as used in 26 CFR 54.4980H–1(a) and 54.4980H–3 has the meaning provided in § 1010.100(hhh);</p> <p>(B) Has an operating presence at a physical office within the United States; and</p> <p>(C) Filed a Federal income tax or information return in the United States for the previous year demonstrating more than \$5,000,000 in gross receipts or sales, as reported as gross receipts or sales (net of returns and allowances) on the entity’s IRS Form 1120, consolidated IRS Form 1120, IRS Form 1120–S, IRS Form 1065, or other applicable IRS form, excluding gross receipts or sales from sources outside the United States, as determined under Federal income tax principles. For an entity that is part of an affiliated group of corporations within the meaning of 26 U.S.C. 1504 that filed a consolidated return, the applicable amount shall be the amount reported on the consolidated return for such group.</p>
Subsidiary of certain exempt entities.	Any entity whose ownership interests are controlled or wholly owned, directly or indirectly, by one or more entities described in paragraphs (c)(2)(i), (ii), (iii), (iv), (v), (vii), (viii), (ix), (x), (xi), (xii), (xiii), (xiv), (xv), (xvi), (xvii), (xix), or (xxi) of this section. ⁴
Inactive entity	Any entity that:

³ A subsidiary of an Entity Assisting a Tax-Exempt Entity is not able to rely upon the subsidiary of an exempt company exception. See Treas. Reg. § 1010.380(c)(2)(xxii), it not referencing Treas. Reg. § 1010.380(c)(2)(xx).

⁴ Note that money service businesses, pooled investment vehicles and an entity assisting a tax-exempt entity are not part of this list.

	<p>(A) Was in existence on or before January 1, 2020;</p> <p>(B) Is not engaged in active business;</p> <p>(C) Is not owned by a foreign person, whether directly or indirectly, wholly or partially;</p> <p>(D) Has not experienced any change in ownership in the preceding twelve month period;</p> <p>(E) Has not sent or received any funds in an amount greater than \$1,000, either directly or through any financial account in which the entity or any affiliate of the entity had an interest, in the preceding twelve month period; and</p> <p>(F) Does not otherwise hold any kind or type of assets, whether in the United States or abroad, including any ownership interest in any corporation, limited liability company, or other similar entity.</p>
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