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

Allison J. Donovan*
Stoll Keenon Ogden PLLC
Lexington, Kentucky

Thomas E. Rutledge **
Stoll Keenon Ogden PLLC
Louisville, Kentucky***

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

* Allison J. Donovan is a member of Stoll Keenon Ogden PLLC resident in its Lexington, Kentucky office. Allison's practice concentrates primarily on Business Services, Banking, and Mergers & Acquisitions, including representing public and private entities before federal and state agencies including the Federal Reserve, FDIC, OCC, and Kentucky Department of Financial Institutions.

** Thomas E. Rutledge is a member of Stoll Keenon Ogden PLLC resident in its Louisville, Kentucky office where his practice is focused on the law of business organizations. In addition he is a frequent commentator on the law of business organizations and is an elected member of the American Law Institute. In 2018 Tom joined RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES as a co-author in place of the late Professor Ribstein. His first article on beneficial ownership reporting, published in 2010, had the subtitle "Proposed New Laws Are Burdensome, But With the Benefit of Being Ineffective;" he stands by that assessment as applied to the CTA.

*** ©The Authors (May 11, 2024, July 30, 2024). The authors would like to thank Professor Joan Heminway and Robert R. Keatinge for helpful comments as to portions of this article's manuscript.

[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 (July, 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 267 through 274 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, 87 Fed. Reg. 59498 (Sept. 30, 2022). The final rules followed from a Notice of Proposed Rule Making, Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 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 Fed. Reg. 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"). While the first published version of this article referenced 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

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 corporation[4] and limited liability company ("LLC") and as well certain other business entities organized in the U.S. (each a "domestic reporting company") is 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.

---

anniversary of the 1536 beheading of Anne Boleyn, this version is current as of July 20, 2024. 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, 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 many 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 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.").

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 is beneficial owners via a menu of required information and supporting documentation[10] 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 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:

> 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]

---

[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 215 through 225 and accompanying text.

[11] *See infra* notes 226 through 229 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.

[13] *See* CTA, 31 U.S.C.A. § 5336(h)(1):

> 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

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 $500[14] 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 penalty starts to accrue and accumulate. 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 Identifier[16] 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 in consequence the $500 a per diem penalty starts accruing <u>again</u> because the company "willfully fail[ed] to report complete <u>or updated</u> beneficial ownership information to FinCEN."[18] Ultimately the per diem "civil penally" could be well more than the per diem amount as it could be assessed against not only the reporting company but also certain (perhaps numerous) of its constituents. And that is all before the "fine" of $10,000 is imposed, along with the risk of imprisonment. That may not be how the law will be applied, but it is possible. Even if not so applied, $500 (adjusted for inflation) per day is going to quickly add up. This per diem "civil penalty" is in addition to the possibility of a $10,000 "fine" and the possibility of incarceration.[19]

> report complete or updated beneficial ownership information to FinCEN in accordance with this section.

See also 31 C.F.R. § 1010.380(g). "Willfully" is itself a defined term, namely the "voluntary, intentional violation of a known legal duty." *See* CTA, 31 U.S.C.A. § 5336(h)(6).

[14] This $500 per diem is adjusted for inflation. *See* Federal Civil Monetary Penalties Inflation Adjustment Act of 1990, Public Law 101-410 (Oct. 5, 1990), as revised by Section 701 of the Bipartisan Budget Act of 2015, Public Law 114-74 (Nov. 2, 2015); *see also infra* note 18.

[15] *See* CTA, 31 U.S.C.A. § 5336(h)(3)(A); *see also* 31 C.F.R. § 1010.380(g).

[16] The FinCEN Identifier is discussed *infra* notes 239 through 244 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); *supra* note 14.

[19] *See also* FinCEN FAQ K.2 (April 8, 2024):

> As specified in the Corporate Transparency Act, a person who willfully violates the BOI reporting requirements may be subject to civil penalties of up to $500 for each day that the

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 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.[20] 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.[21]

So even if responsibility for CTA compliance is delegated to a CTA Compliance Officer, the 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.[22]

Again, we have not seen any CTA compliance enforcement actions to date, but applying the words of the statute and the Reporting Regulations, this could be the approach taken. Now to be fair FinCEN has stated that it is not going to be focused upon inadvertent errors; in a June 11, 2024, presentation, FinCEN Director Andrea Gacki stated:

> But let me be clear. Small business owners doing their best to comply with the law should not lose sleep over these new reporting requirements. The CTA penalizes willful violations of the law, and this is where we plan to focus our enforcement actions. It's not a "gotcha" exercise, and we're not looking to needlessly burden America's thriving small business community.[23]

How this plays out remains to be seen.

> violation continues. However, this civil penalty amount is adjusted annually for inflation. As of the time of publication of this FAQ, this amount is $591.
>
> A person who willfully violates the BOI reporting requirements ***may also be*** subject to criminal penalties of up to two years imprisonment and a fine of up to $10,000. Potential violations include willfully failing to file a beneficial ownership information report, willfully filing false beneficial ownership information, or willfully failing to correct or update previously reported beneficial ownership information. (***emphasis*** added).

[20] *See* 31 C.F.R. § 1010.380(g)(4)(iii).

[21] *See* 31 C.F.R. § 1010.380(f)(8); *see also infra* 145 through 148 and accompanying text.

[22] *See also infra* pages 52-53 regarding "over-reporting" of beneficial owners.

[23] *See* Prepared Remarks of FinCEN Director Andrea Gacki During Beneficial Ownership Information Reporting Event in Tucson, Arizona (June 11, 2024), available at https://www.fincen.gov/news/speeches/prepared-remarks-fincen-director-andrea-gacki-during-beneficial-ownership-information.

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 lets just say tenuous. 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.*[24]

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 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 the lack of precision in both the CTA and the Reporting Regulations and resultant ambiguities raising the difficulty in compliance.[25] 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 the 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.[26]

---

[24] *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.

[25] *See also infra* pp. 52-53 for a discussion of the costs of over-reporting who are the beneficial owners.

[26] Our thanks to Robert R. Keatinge for identifying these issues.

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,[27] 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.

[27] *See infra* notes 55 through 154 and accompanying text.

In addition, requirements to file an annual report with the Secretary of State[28] or to submit the ownership of a firm to a regulatory board[29] do not satisfy the reporting obligations imposed by the CTA.[30]

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

---

[28] *See*, *e.g.*, KY. REV. STAT. ANN. § 14A.6-010.

[29] 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* KY. REV. STAT. ANN. § 325.301. The information submitted must be updated within 30 days of the change. *See* KY. REV. STAT. ANN. § 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* KY. REV. STAT. ANN. § 322.060(1)(b); *id*. § 322.060(2)(b). The submitted information must be updated within 30 days of a change. *See* KY. REV. STAT. ANN. § 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.*, KY. REV. STAT. ANN. § 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. 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* KY. REV. STAT. ANN. § 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. Under the Kentucky Medical Cannabis Program Regulations, the license application must identify "(e) The name, address, date of birth, and curricula vitae or resume of each principal officer and board member of the proposed cannabis business as well as any additional information required by the cabinet; (f) Disclosure of any individual or business entity with an ownership interest of at least ten (10) percent equity or similar interest in the proposed cannabis business and each identified individual or entity's ownership percentage as well as any additional information required by the cabinet; (g) Disclosure of any parent company or parent individual that has an ownership interest in the proposed cannabis business and each identified individual or entity's ownership percentage as well as any additional information required by the cabinet; (h) A document showing the ownership organizational structure of the proposed cannabis business; [and] (i) The name and address of any individual or entity providing financial support to the proposed cannabis business that are not involved in the day-to-day operations beyond providing financial resources as well as any additional information required by the cabinet." *See* 915 KAR 1:010 (proposed).

[30] *See* CTA, 31 U.S.C.A. § 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).

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.[31] 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?

For entities formed in the US, the CTA initially attaches to a "domestic reporting company,"[32] that being every corporation, limited liability company and any other "entity … created by the filing of a document" with a state[33] secretary of state or equivalent office, including of any of the Indian tribes."[34] 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.[35] Likewise a sole proprietorship is not a reporting company.[36] But of course the business

[31] *See also infra* note 36 and accompanying text.

[32] *See* 31 C.F.R. § 1010.380(c)(1)(i).

[33] In the Reporting Regulations, "State" is a defined term. *See* 31 C.F.R. § 1010.380(f)(9).

[34] 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).

[35] *See* Beneficial Ownership Information Reporting Requirements, *supra* note 2 at 59537. 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, *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."); *supra* note 4. The source provision of the CTA is section 5336(a)(11), and it avoids the apparent reading of the Reporting Regulations to the effect that a reporting company is any of a, b or c, it providing:

> (11) REPORTING COMPANY.—The term ''reporting company''—
>
> (A) means a corporation, limited liability company, or other similar entity that is—
>
> (i) created by the filing of a document with a secretary of state or a similar office under the law of a State or Indian Tribe[.].

Why in drafting the Reporting Regulations FinCEN thought it necessary to depart from the clear statutory language and adopt a formula that is subject to a contrary reading is unknown.

[36] *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

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,[37] a "statutory trust" formed in Delaware or Kentucky is so created[38] and consequently is a reporting company. Likewise some limited partnerships are formed by a Secretary of State filing while others are not; a review of the particular controlling law will need to be undertaken.[39] Limited liability partnerships

> 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 also* FinCEN FAQ C.8 (Apr. 18, 2024) (pass-through tax treatment of an S-corporation does not exempt it from characterization as a reporting company).

[37] *See* MASS. CODE § 182-2; IND. CODE § 23-5-1-4(a).

[38] *See* 12 DEL. CODE § 3810(b); KY. REV. STAT. ANN. § 362A.2-010(1).

[39] This is in Kentucky a particularly challenging task as limited partnerships formed under any of the statues 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* KY. REV. STAT. ANN. § 362.030 (statement and affidavit of limited partnership filed with county clerk) and KY. REV. STAT. ANN. § 362.420 (limited partnership formed by agreement of the partners) *with* KY. REV. STAT. ANN. § 362.415(2) (limited partnership formed by filing of certificate by the secretary of state) and KY. REV. STAT. ANN. § 362.2-201(1) (same).

("LLPs") are not "created" by a Secretary of State filing,[40] but it would seem FinCEN wants to treat them as reporting companies.[41]

And even if it is 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?[42] It very well may. Whether a "protected series" formed under for example the Delaware LLC Act[43] or the Kentucky Uniform Statutory Trust Act (2012)[44] is an "entity" may determine whether the protected series itself is a reporting company if under the controlling statute it is first determined that the protected series is "created" by a filing with a Secretary of State.

---

[40] *See* KY. REV. STAT. ANN. § 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; Permanent Editorial Board for the Uniform Commercial Code, PEB Commentary No. 17, *Limited Liability Partnerships under the Choice of Law Rules of Article 9* (June 29, 2012), available at https://www.ali.org/media/filer_public/d6/51/d65184b6-e23d-4fdb-9c9a81a1b30df556/peb_commentary_on_llps-final.pdf:

> It follows that the statement of qualification filed with the State and by which a partnership becomes a limited liability partnership under the 1997 UPA is not a 'public organic record' under the 2010 amendments to Article 9. The statement of qualification is not a record filed with the State to 'form or organize' the partnership. It is the association of the partners that forms the partnership, not any record publicly filed with the State. Both conceptually and legally, a partnership is formed wholly apart from the filing of a statement of qualification with the State. Because a limited liability partnership is not formed or organized by the filing of a public organic record, it cannot be a 'registered organization' under the 2010 amendments to Article 9. (citation omitted);

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.").

[41] 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.")

[42] 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."

[43] *See* DEL. LLC ACT § 18-218(d).

[44] *See* KY. REV. STAT. ANN. § 386A.1-010 et seq.

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 ("LPA") is subject to the CTA unless it can demonstrate it is not a reporting company or 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; the same treatment should apply to a professional firm organized as an LLP.

A traditional donative trust (and here excluding the "business trust" that is a "trust" by a historic accident of nomenclature)[45] 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 "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.[46] 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.[47]

FinCEN was invited to address the treatment of captive insurance companies, but it affirmatively stated it would not address the issue and provide guidance beyond the general definition of a reporting company, writing:

> FinCEN does not opine here on whether or to what extent certain captive insurance companies, which can vary significantly in structure and size, might be able to properly claim [the insurance companies] exemption. FinCEN may further consider captive insurance companies in connection with the study of exempt entities required under CTA section 6502(c).[48]

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 Regulations[49] 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

---

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

[46] *See also* Treas. Reg. § 301.7701-4(a) ("In general, the term 'trust' as used in the Internal Revenue Code refers to an arrangement created either by a will or by an inter vivos declaration whereby trustees take title to property for the purpose of protecting or conserving it for the beneficiaries under the ordinary rules applied in chancery or probate courts."); 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.

[47] *See also* FinCEN FAQ C.4 (Nov. 16, 2023). As to registration of a trust under Kentucky law, *see* KY. REV. STAT. ANN. § 386B.2-050.

[48] *See* Beneficial Ownership Information Reporting Requirements, *supra* note 2 at 59541.

[49] *See supra* notes 13 through 26 and accompanying text.

LLC or whatever body has the authority to make finding determinations on behalf of the venture should adopt that analysis as its own.[50]

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.[51] 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.[52]

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.

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 structures are for foreign countries equivalent to the U.S. formed corporations,[53] 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,"[54] doing so as to a non-U.S. entity may be functionally impossible.

---

[50] 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).

[51] *See, e.g.,* KY. REV. STAT. ANN. § 14A.1-070(10).

[52] *See* 31 C.F.R. § 1010.380(c)(1)(ii).

[53] *See* Treas. Reg. §§ 301.7701-2(b)(8)(i)-(ii).

[54] *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*

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.[55]

Some of the exemptions go to the capital structure of the reporting company, some to its line of business, some to its ownership,[56] 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;[57] the large operating company exemption, likely the broadest exemption,[58] was crafted to leave some 85% of all closely-held ventures in the "reporting company" class.[59]

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.[60] : Here we will focus upon four of the exemptions, namely those for some accounting firms, for large operating companies, for subsidiaries of exempt reporting companies, and for inactive companies.

Corporate Personhood, 2 STAN. AGORA 38, 58 (2001), http://agora.stanford.edu/agora/libArticles2/agora2v1.pdf.

[55] *See* 31 C.F.R. § 1010.380(c)(2) ("Notwithstanding paragraph (c)(1) of this section, the term 'reporting company' does not include …."); *see also* 31 U.S.C.A. § 5336(a)(11)(B) ("The term 'reporting company' … (B) does not include ….").

[56] *See* Beneficial Ownership Information Reporting Requirements, *supra* note 2 at 59539.

[57] 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?

[58] 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.

[59] 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 at* https://www.americanbar.org/groups/business_law/resources/business-law-today/2021-may/the-corporate-transparency-act/. Another source reports that of the some 33.3 million small businesses in the country, some 27.1 million have no employees and another 5.4 million have between 1 and 19 employees; collectively these businesses comprise 32.5 million small businesses and 97.6% of the 33.3. small business group. *See* Kelly Main, *Small Business Statistics for 2024* (FORBES, Jan. 31, 2024), available at https://www.forbes.com/advisor/business/small-business-statistics/. That same source reports that "only 647,921 businesses have a workforce ranging from 20 to 499 employees." *Id.* (citation omitted). Setting aside those few who will have exactly 20 employees, it is the companies in this latter group who may be eligible for the LOC exemption.

[60] 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*, 33 J. OF AFFORDABLE HOUSING AND COMMUNITY DEV. L. 20 (*forthcoming*).

(Some) Accounting Firms: An accounting firm that is registered with the Public Company Accounting Oversight Board (the "PCAOB") is an exempt reporting company.[61] 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[62] 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. 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;[63] (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;[64] (e) in counting the number of employees, all members in an LLC taxed as a partnership and S-corporation shareholders with 2% or more of the stock are excluded;[65] (f) in addition, in counting employees, "leased employees" are excluded;[66] and (g) WeWork and similar facilities do not satisfy the requirement of a permanent place of business.[67] Companies that are close to the line as to satisfying the requirements for the LOC exemption, typically because of the number of full-time employees requirement, should formalize a monthly confirmation that it remains satisfied;**[68]** the $5 million of revenue or sales element should be confirmed annually by reference to the tax return filed for the prior year.

---

[61] *See* 31 C.F.R. § 1010.380(c)(2)(xv).

[62] *See* 31 C.F.R. § 1010.380(c)(2)(xxi).

[63] *See* FinCEN FAQ L.7 (Apr. 18, 2024).

[64] *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, 31 U.S.C.A. § 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.

[65] *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.

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

[67] *See also* 31 C.F.R. § 1010.380(f)(6) (definition of "operating presence at a physical office within the United States").

[68] *See also* 31 C.F.R. § 1010.380(c)(2)(xxi)(A) (requirement to have more than 20 full time employees); 26 C.F.R. § 54.4980H-3 ("Determining full-time employees. (a) In general. This section sets forth the rules for determining hours of service and status as a full-time employee for purposes of section 4980H. These regulations provide two methods for determining full-time employee status—the monthly measurement method, set forth in paragraph (c) of this section, and the look-back measurement method, set forth in

The exact language of the $5 million in revenue or sales requirement is important; it requires that the reporting company seeking classification as a large operating company have:

> 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.[69]

What is the tax or information return for the "previous year" is addressed in a FAQ.[70] The consolidated return provision allowing the aggregation of revenue and sales among the group is applicable only to a C Corporation seeking LOC status; the consolidated return rules encompass only C Corporations to the exclusion of S Corporations and organizations taxed as partnerships.[71] To that end when Parent, a C Corporation, which of itself has no revenue or sales, but has three wholly owned subsidiaries, each itself a C Corporation with $2 million of US sourced revenue, files a consolidated return with its subsidiaries then Parent meets the $5 million of U.S. sourced revenue element of the LOC exemption. Assuming the other requirements are satisfied Parent will be exempt as an LOC and each of its subsidiaries will be exempt as subsidiaries of an exempt company. Now change the facts slightly and assume Parent is an S Corporation. The consolidated return rules are no longer applicable, and Parent cannot benefit from the revenues received by its subsidiaries (each of which is a C Corporation)[72] to satisfy the revenue / sales threshold. Parent is not an LOC (it has no revenue or sales, much less $5 million) and if it is to be exempt each subsidiary must of itself satisfy an exemption from reporting. While consolidated return reporting may not be available to S corporations and tax partnerships (or individual sole proprietorships operated through disregarded LLCs), to the extent that a subsidiary or other corporation in which the Parent has an interest makes a 87 Fed. Reg. distribution to the parent, such distribution (either by way of dividend or redemption) it may appear on either Form 1120-S line 1a or Form 1065 line 1a (gross receipts and sales) and be available to satisfy the gross revenue test. Note that the income of disregarded entities such as disregarded LLCs and qualified

---

paragraph (d) of this section."); *id*. ("(c) Monthly measurement method—(1) In general. Under the monthly measurement method, an applicable large employer member determines each employee's status as a full-time employee by counting the employee's hours of service for each calendar month. See § 54.4980H-1(a)(21) for the definition of full-time employee."); *id*. § 54.4980H-1(a)(21) ("*Full-time employee*—(i) *In general.* The term *full-time employee* means, with respect to a calendar month, an employee who is employed an average of at least 30 hours of service per week with an employer.").

[69] *See* 31 C.F.R. § 1010.380(c)(2)(xxi)(C).

[70] *See* FinCEN FAQ L.9 (June 10, 2024).

[71] *See also* Alex Young, *No, Partnerships and S-Corporations May Not File Consolidated Tax Returns*, J. TAX'N (June 2024).

[72] *See* 26 U.S.C.A. § 1361(b)(1)(B).

S corporation subsidiaries should appear on Form 1120-S or 1065. Whether the term "gross receipts and sales" means the same thing for CTA purposes as it does on the tax returns may have an impact of qualification. For example, both Form 1120-S at line 5 and Form 1065 at line 7 include "other income" as an amount distinct from gross receipts and sales. The instructions indicate that "other income" includes such items as interest received on receivable balances, taxable income from insurance proceeds, and certain tax credits or recoveries. Both Form 1120-S at line 4 and Form 1165 at line 7 include gain or loss from form 4797 (ordinary net gains or losses from sales of business property, which is generally recapture income). Finally, Form 1065 at lines 4 (dealing with ordinary income (loss) from other partnerships, estates, and trusts) and 5 dealing with net farm profit from Schedule F list amounts that appear distinct from gross receipts and sales. Thus, determining gross receipts and sales will require hermeneutic review of the interaction of tax law and the somewhat terse CTA regulatory structure.

Again, changing the facts under consideration, Parent is an LLC taxed as a partnership; it has for itself $2 million of US sourced revenue. Parent has four wholly owned single-member subsidiaries (a "SMLLC"), each of which has $1 million of US sourced revenue. Each SMLLC is for tax purposes a disregarded entity, and all revenue is reported on Parent's Form 1120. For purposes of the LOC exemption Parent has more than $5 million of U.S. sourced revenue as all of the revenue of each SMLLC accrues to the sole member, each SMLLC being treated as a "division."[73]

Next, let's assume that Parent LLC is taxed as a partnership. It has as a subsidiary a C corporation that in the prior year has U.S. sourced revenue of $2 million. In addition Parent LLC is a partner in three separate general partnerships, holding a 70% profits interest in each; last year each partnership generated $2 million in U.S. sourced revenue. Parent and its subsidiary C corporation are not in a consolidated group, so Parent cannot report the corporation's $2 million of revenue on its tax return; that income does not move Parent LLC closer to the LOC's $5 million threshold. While the three partnerships in which Parent LLC is a partner generated net $6 million in U.S. sourced revenue, Parent LLC is a 70% partner, and 70% of $6 million is $4.2 million; Parent LLC has not met the LOC exemptions $5 million revenue or sales threshold. If, however, Parent LLC were an 85% partner in each partnership it would have $5.1 million of US sourced revenue and could conceivable satisfy the LOC exemption's requirements.

Last, the fact pattern is again altered, and it is assumed that Parent is an S Corporation, and it is the sole shareholder in three Qualified Subchapter S Subsidiaries ("QSUBs")[74] that each generate in the applicable period $2 million of US sourced revenue. Akin to a disregarded entity SMLLC, the QSUB is disregarded for income tax purposes[75] with the effect that Parent will report

[73] *See* Treas. Reg. § 301.7701-3(a) ("an eligible entity with a single owner can elect to be classified as an association or to be disregarded as an entity separate from its owner."); IRS, *Limited Liability Company - Possible Repercussions*, available at https://www.irs.gov/businesses/small-businesses-self-employed/limited-liability-company-possible-repercussions ("If the single-member disregarded LLC is owned by a corporation or partnership, the activities of the LLC should be reflected on its owner's federal tax return as a division of the corporation or partnership.").

[74] *See also* 26 U.S.C.A. § 1361(b)(3)(B).

[75] *See also* 26 U.S.C.A. §§ 1361(b)(3)(A)(i) and (ii).

on its return $6 million of US sourced income on its return and is therefore able to satisfy this element of the requirements for the LOC exemption.

Subsidiaries of Exempt Companies: A wholly-owned subsidiary of an exempt reporting company is in most circumstances as well an exempt reporting company.[76] There are three categories of exempt companies, namely a "money services business,"[77] a "pooled investment vehicle,"[78] and "an entity assisting a tax-exempt entity,"[79] 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.[80]

Inactive Entities: While from its title[81] 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, as set forth in the Reporting Regulations, 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.[82]

This exemption is especially difficult to assess and apply; suffice it to note that: (i) the Reporting Regulations exclude from this exemption any company created on or after January 2,

---

[76] *See* 31 C.F.R. § 1010.380(c)(2)(xxii).

[77] *See* 31 C.F.R. § 1010.380(c)(2)(xi).

[78] *See* 31 C.F.R. § 1010.380(c)(2)(xviii).

[79] *See* 31 C.F.R. § 1010.380(c)(2)(xx).

[80] *See* 31 C.F.R. § 1010.380(c)(2)(xxii) ("wholly owned") (emphasis added); ***see also*** FinCEN FAQ L.3 (Sept. 18, 2023).

[81] *See* 31 C.F.R. § 1010.380(c)(2)(xxiii).

[82] 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.

2020;[83] (ii) the term "existence"[84] is not defined; (iii) the term "active business"[85] is not defined; (iv) the end date from which either of the 12-month period limitations[86] is not specified; and (v) the term affiliate[87] 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 and terminated by concluding its winding up of classification as a reporting company with CTA reporting obligations? FinCEN's reaction to questions on this issue have suggested that its answer would be, in a word, "no."[88] Perhaps the remedy to the problem of an entity that has totally ceased existence is not that it is exempt as an inactive entity, but rather that it is not an entity at all. As such, it has not the capacity, and thus should not have the obligation, to file updated BOIRs.

On July 8, 2024, FinCEN issued three FAQs[89] that touch upon the application of the inactive entity exemption. In the first FinCEN states that the reporting obligations are not applicable to what would otherwise be reporting companies that "ceased to exist as legal entities before January 1, 2024."[90] The second FAQ expands on the "ceased to exist" requirement, stating:

> [M]eaning that it entirely completed the process of formally and irrevocably dissolving. A company that ceased to exist as a legal entity before the beneficial ownership information reporting requirements became effective January 1, 2024, was never subject to the reporting requirements and thus is not required to report its beneficial ownership information to FinCEN.
>
> Although state or Tribal law may vary, a company typically completes the process of formally and irrevocably dissolving by, for example, filing dissolution paperwork with its jurisdiction of creation or registration, receiving written confirmation of

[83] *See* 31 C.F.R. § 1010.380(c)(2)(xxiii)(A). Note that this limitation does not exists in the CTA, it requiring only that the organization seeking to take advantage of the exemption have been in existence for at least one year. *See* 31 U.S.C.A. § 5336(11)(B)(xxiii). While it is clear that the Treasury has been delegated the authority to create additional exemptions, in effect adding to the twenty-three exemptions Congress provided for in the CTA, it is at minimum questionable that Treasury has the capacity to materially limit the application of a statutory exemption.

[84] *See* 31 C.F.R. § 1010.380(c)(2)(xxiii)(A). This is the only instance where "existence" is used in the Reporting Regulations.

[85] *See* 31 C.F.R. § 1010.380(c)(2)(xxiii)(B). This is the only instance where "active business" is used the Reporting Regulations.

[86] *See* 31 C.F.R. §§ 1010.380(c)(2)(xxiii)(D), (E).

[87] *See* 31 C.F.R. § 1010.380(c)(2)(xxiii)(E).

[88] *See also* Hamlet, act III, scene III, line 87.

[89] FinCEN FAQ C.12 (July 8, 2024); *id*. C.13 (July 8, 2024); and *id*. C.14 (July 8, 2024).

[90] *See* FinCEN FAQ C.12 (July 8, 2024); *see also* FinCEN Guide Ch. 6.1 (p. 46) ("There is no requirement to report a company's termination or dissolution.").

> dissolution, paying related taxes or fees, ceasing to conduct any business, and winding up its affairs (e.g., fully liquidating itself and closing all bank accounts).[91]

Turning over that coin the FAQ goes on to identify facts that would indicate the the reporting company remains subject to the reporting requirements, namely:

> If a reporting company (see Question C.1)[92] continued to exist as a legal entity for any period of time on or after January 1, 2024 (i.e., did not entirely complete the process of formally and irrevocably dissolving before January 1, 2024), then it is required to report its beneficial ownership information to FinCEN, even if the company had wound up its affairs and ceased conducting business before January 1, 2024.
>
> Similarly, if a reporting company was created or registered on or after January 1, 2024, and subsequently ceased to exist, then it is required to report its beneficial ownership information to FinCEN—even if it ceased to exist before its initial beneficial ownership information report was due.[93]

Providing an example of when this relief from reporting is not available, the FAQ provides: "A company that is administratively dissolved or suspended—because, for example, it failed to pay a filing fee or comply with certain jurisdictional requirements—generally does not cease to exist as a legal entity unless the dissolution or suspension becomes permanent."[94] Then, making everything entirely non-clear, FinCEN directs that:

> For specifics on how to determine when a company ceases to exist as a legal entity, consult the law of the jurisdiction in which the company was created or registered.

Which is all well and good, but seldom if ever is state law going to provide that level of specificity in dissolution statutes. Dissolution is as much a status as it is a process, signaling to the world that the venture has ceased to do business in the ordinary course and has shifted to a purpose of winding up and terminating its affairs.[95] After dissolution commences, typically by filing "articles of dissolution" (however labeled)[96] with the secretary of state, the dissolving organization remains (as applicable) a corporation or LLC, its shareholders/members continue to enjoy limited liability, it retains title to its assets, its registered officer/agent remains in place, and it may sue or be

---

[91] *See* FinCEN FAQ C.13 (July 8, 2024).

[92] FinCEN FAQ C.1 (Sept. 18, 2023) addressed the question "What companies will be required to report beneficial ownership information to FinCEN?"

[93] *See* FinCEN FAQ C.13 (July 8, 2024).

[94] *Id.*

[95] *See*, *e.g.*, KY. REV. STAT. ANN. § 271B.14-050(1) ("A dissolved corporation shall continue its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs"); *id*. § 275.300(2) ("A dissolved limited liability company shall continue its existence but shall not carry on any business except that appropriate to wind up and liquidate its business and affairs").

[96] Under the Delaware LLC Act it is a "certificate of cancellation," but it is not filed until the LLC's winding up is completed. *See* 6 DEL. CODE § 18-203.

sued.[97] Thereafter the entity must collect its assets, ascertain its liabilities, satisfy or make provision for those liabilities, and distribute the remaining balance to its owners. Even after dissolution is complete, absent resignation the directors and officers remain directors and officers, with the same treatment for LLC managers, and the shareholders/members remain in that same role. There is not, however, a filing with the secretary of state to the effect "dissolution is done, we are really finished." In addition, there is the question of whether "dissolution" is complete prior to the filing of a tax return that reports the entity's activities and at least tenders the taxes that are calculated as being due.[98] But should completion of winding up be necessary before the obligation to submit and update BOIRs ends; in Beneficial Ownership Information Reporting Requirements FinCEN wrote: "Lastly, with respect to questions regarding the treatment of company termination or dissolution, FinCEN does not expect a reporting company to file an updated report upon company termination or dissolution."[99] Dissolution happens by filing the "articles of dissolution" and typically long proceeds the completion of the winding up; FinCEN may assert that the guidance is consistent on the basis that Beneficial Ownership Information Reporting Requirements was focused upon updated, and not initial, BOIRS, but then could not a company already in dissolution file an initial BOIR and then make no further reports irrespective of when winding up is completed?

While the two FAQs referenced above apply to companies created prior to January 1, 2024, the next in this series of FAQs addresses companies formed on or after that date, it being as well the effective date of the Reporting Regulations. It is initially noted that:

> These [reporting] obligations remain applicable to reporting companies that cease to exist as legal entities—meaning wound up their affairs, ceased conducting business, and entirely completed the process of formally and irrevocably dissolving—before their initial beneficial ownership reports are due. If a reporting company files an initial beneficial ownership information report and then ceases to exist, then there is no requirement for the reporting company to file an additional report with FinCEN noting that the company has ceased to exist.[100]

So a company created and dissolved in 2024 must file a BOIR even if it no longer carries on business activities? How that will work is hard to ascertain. Assume a single member LLC created on June 1, 2024; all else being equal it has 90 days to file its initial BOIR. But it is never used for anything by anyone. Nobody ever becomes a member, so the LLC's existence fails as

---

[97] *See* KY. REV. STAT. ANN. § 14A.7-020(4); *id.* § 271B.14-050; *id.* § 273.302; *id.* § 275.300(2). The same principle applies with respect to corporations and LLCs organized in Indiana (*see* IND. CODE § 23-0.5-6-2; *id.* § 23-1-45-5; *id.* § 23-17-22-5; *id*. § 23-18-9-3) and Delaware (*see* 8 DEL. CODE § 278; 6 DEL. CODE § 18-803(b)).

[98] *See*, *e.g.*, KY. REV. STAT. ANN. § 271B.14-050(2)(h) (dissolution does not alter obligations to file federal and state tax returns and pay federal and state taxes due); *id*. § 275.300(4)(d) (same).

[99] *See* Beneficial Ownership Information Reporting Requirements, *supra* note 2 at 59514 (emphasis added).

[100] *See* FinCEN FAQ C.14 (July 8, 2024). As to the last point and the absence of a requirement to report a reporting companies cessation of existence, *see also* Beneficial Ownership Information Reporting Requirements, *supra* note 2 at 59514 ("Lastly, with respect to questions regarding the treatment of company termination or dissolution, FinCEN does not expect a reporting company to file an updated report upon company termination or dissolution.").

an LLC must have a member.[101] How exactly is the LLC to file a BOIR; it never had an owner and the organizer, unlike an incorporator,[102] has no authority over the LLC after the moment of its formation. Being that there is no member there is no actual or apparent agent for the company and nobody has "substantial control" and as there is no member nobody has any, much less 25%, ownership. A business organization is a legal construct governed as to its organization and operation by state law. This FAQ seems to assume that every organization proceeds to some level of operation before it enters the process of dissolution, addressing in this FAQ how the CTA then applies. What it does not address is the treatment of an organization that is organized by a secretary of state filing but then abandoned.

Assuming a company has been organized in 2024 or thereafter and engaged in some level of activity, which may be as little as transient usage in an exchange or acquisition transaction, it will need to file a BOIR even if it is wound up before the arrival of the BOIR reporting deadline. For entities created in calendar 2024 that deadline is 90 days after notice of formation, a timeline that will be reduced to 30 days for entities organized on or after January 1, 2025.[103] There may not be much to report. A BOIR needs to include information current as of the time the filing is made.[104] Presumably the officers/directors/managers of a transient entity could resign from those offices before the reporting date, leaving the entity with no persons exercising as to it managerial control. Like, any person or entity who was an owner therein could "resign" from being an owner, declaring that any ownership rights they might hold are rejected, leaving the reporting company with no owners, much less owners with a 25% ownership interest. On those facts the BOIR would identify the reporting company and the company applicant(s), but there would be no information provided as to beneficial owners as there are in fact none. Whether the BOSS will permit such a filing is a separate issue; currently it would seem at least the web based submission system will not accept a filing that does not include at least one beneficial owner and absent completion of the fields for one beneficial owner will not permit the filing to proceed.

An additional fact pattern not addressed by FinCEN is the creation of a reporting company that before an applicable initial BOIR filing deadline arrives is merged out of existence.

---

[101] *See*, *e.g.*, 6 DEL. CODE § 18-101(8) ("'Limited liability company' and 'domestic limited liability company' means a limited liability company formed under the laws of the State of Delaware and having 1 or more members."); KY. REV. STAT. ANN. § 275.015(12) (definition of an LLC (other than a non-profit LLC) includes that it has a member).

[102] Recall that unlike the "incorporator" of a corporation who has certain authorities including to adopt the initial bylaws and appoint the initial directors (if not already done in the articles of incorporation) (*see*, *e.g.*, KY. REV. STAT. ANN. § 271B.2-050(1)(b); *id.* § 271B.5-060(1)), the "organizer" of an LLC is not so empowered; all they do is submit the articles of organization to the secretary fo state for filing. *See*, *e.g.*, KY. REV. STAT. ANN. § 275.020(1). While a corporate incorporator may have the capacity to voluntarily dissolve a corporation, (*see*, *e.g.*, KY. REV. STAT. ANN. § 271B.14-010)), there is no similar capacity with respect to an LLC; rather dissolution is by an action of the members. *See*, *e.g.*, 6 DEL. CODE § 18-801(a)(3) ("Unless otherwise provided in a limited liability company agreement, upon the vote or consent of members who own more than 2/3 of the then-current percentage or other interest in the profits of the limited liability company owned by all of the members.); KY. REV. STAT. ANN. § 275.285(3).

[103] *See* 31 C.F.R. § 1010.380(a)(1)(i)(A); *id.* § 1010.380(a)(1)(i)(B).

[104] *See* FinCEN FAQ G.4 (Nov. 16, 2023).

All of these issues with respect to FAQs C.13 and C.14, and they are of themselves significant, are as well subject to an additional overriding problem, namely that the "guidance" provided in these FAQs is not integrated with the inactive entity exemption[105] as provided for in the Reporting Regulations. To provide but two examples: (i) with respect to FAQ C.13 and dissolution of entities completed before January 1, 2024, is it as well necessary that the organization's existence have pre-dated January 1, 2020,[106] and there was no change in ownership in the twelve months preceding (presumably) its final cessation of legal existence,[107] or is it merely enough the dissolution was completed before the effective date of the reporting regulations?; and (ii) with respect to FAQ C.14, if this is an explication of the inactive entity exemption, how can a company "created or registered in 2024" make use of an exemption limited by its express terms to a reporting company that "[w]as in existence on or before January 1, 2020."?[108]

Claiming an Exemption. If a reporting company was as of January 1, 2024, an exempt reporting company then no filing to "claim" this exemption is required.[109] 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.[110] 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.[111] 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;[112] a company that was exempt on the basis that it was tax exempt[113] that loses that status is afforded 210 days to file a BOIR.[114] 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.[115]

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

---

[105] *See* 31 C.F.R. § 1010.380(c)(2)(xxiii).

[106] *See* 31 C.F.R. § 1010.380(c)(2)(xxiii)(A).

[107] *See* 31 C.F.R. § 1010.380(c)(2)(xxiii)(D).

[108] *See* 31 C.F.R. § 1010.380(c)(2)(xxiii)(A).

[109] *See* FinCEN FAQ L.5 (Nov. 16, 2023).

[110] *Id.*

[111] *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).

[112] *See* 31 C.F.R. § 1010.380(a)(1)(iv).

[113] *See* 31 C.F.R. § 1010.380(c)(2)(xix).

[114] *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.

[115] *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 individuals[116] 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 owner[117] 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 (presuming it was made in good faith) as to that person and he or she is obligated to provide either his or her identifying information[118] or FinCEN Id.[119] 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

---

[116] *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), ….").

[117] *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.A. § 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).

[118] *See infra* notes 215 through 225 and accompanying text.

[119] *See infra* notes 239 through 244 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.[120] Ownership interests are not limited to those with voting rights.[121] 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.[122]

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.[123] 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.[124] 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.[125]

Persons living in community property states or who did previously when the ownership interests in the venture were acquired need to be aware that both spouses (and other persons benefiting from the applicable community property rule such as domestic partners in Washington state) are treated as the owners of all of the ownership interests.[126] As the reporting company will often not know that its owners are in a community property state or that the ownership interests are subject to community property law, they need to so advise the reporting company. Turning over that coin, each reporting company needs to make inquiry as to the application (or not) of community property law.

There are in the FinCEN Guide a variety of illustrations as to how the ownership thru various business structures are to be addressed. It is not obvious what is the aspect of the

---

[120] *See* 31 C.F.R. §§ 1010.380(d)(2)(i)(A)-(E).

[121] *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).

[122] *See also supra* notes 129 through 131 and accompanying text.

[123] *See* 31 C.F.R. § 1010.380(d)(2)(i)(B).

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

[125] *See* 31 C.F.R. § 1010.380(d)(2)(iii)(A) ("of the individual shall be treated as exercised").

[126] *See* 31 C.F.R. § 1010.380(d)(2)(ii)(A).

Reporting Regulations that authorizes this treatment, but it it ultimately helpful in reducing the number of persons who are treated as beneficial owners under the ownership test. For example, if LLC has two members A and B, member A, also an LLC, holds a 48% interest in LLC, and Member A in turn has two equal members 1 and 2, A's interest in LLC is allocated half (24%) to 1 and half to 2 to the effect that neither is, under the ownership test, a beneficial owner.

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.[127]

Initially, a person has substantial control if that individual:

(A) Serves as a senior officer[128] 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

[127] *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.").

[128] "Senior officer" is a defined term. *See* 31 C.F.R. § 1010.380(f)(8); *see also infra* notes 150 through 153 and accompanying text.

formation documents, bylaws, and significant policies or procedures; or

(D) Has any other form of substantial control over the reporting company.[129]

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"[130] exercise substantial control over a reporting company through:

(A) Board representation;

(B) Ownership or control of a majority of the voting power or voting rights of the reporting company;[131]

(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.[132]

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 substantial control and therefore beneficial ownership of the reporting company[133] even as being a director of itself may not give rise to substantial control.[134] 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.[135] 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

[129] *See* 31 C.F.R. § 1010.380(d)(1)(i).

[130] *See* 31 C.F.R. § 1010.380(d)(1)(ii); *see also* 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.")

[131] In contrast to the ownership test, where the focus was not restricted to "ownership interests" with voting rights, *see supra* note 133, for substantial control the focus is upon voting rights.

[132] *See* 31 C.F.R. §§ 1010.380(d)(1)(ii)(A)-(F).

[133] *See* 31 C.F.R. § 1010.380(d)(1)(ii)(A).

[134] *See* FinCEN FAQ D.9 (Sept. 29, 2023).

[135] *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.")

company."[136] 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."[137] 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 is upon the ability to take unilateral action as a majority holder then the earlier provision would be superfluous.

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.[138]

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,[139] 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.[140] 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

---

[136] *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.

[137] Or at least there is no contrary guidance issued to date.

[138] *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.

[139] *See*, *e.g.*, KY. REV. STAT. ANN. §§ 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").

[140] *See* KY. REV. STAT. ANN. § 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.")

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; 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.[141]

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% shareholder;[142] 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.[143] 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.[144] 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:

---

[141] *See also supra* notes 13 through 26 and accompanying text.

[142] 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.

[143] *See* FinCEN FAQ D.9 (Sept. 29, 2023).

[144] *See* KY. REV. STAT. ANN. § 275.255(1)(c); *see also* Thomas E. Rutledge, *Adding Insult to Death*, 76 BUS. LAW. 509 (Spring 2021).

(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;

(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.[145]

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.[146] When the child reaches the age of adulthood in the controlling jurisdiction[147] 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.[148]

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.

---

[145] *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.”)

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

[147] Under Kentucky law, *see* KY. REV. STAT. ANN. § 2.015. *See also* IND. CODE § 31-9-2-7.

[148] *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.”)

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 should 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 testamentary deposition. The updated report shall, to the extent appropriate, identify any new beneficial owners.[149]

To that end, if Mary[150] dies while holding 30% of the capital stock in Reporting Co., and Mary's will leaves those share 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,[151] 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.

---

[149] *See* 31 C.F.R. § 1010.380(a)(2)(iii).

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

[151] 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. 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 dealt 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 on an initial BOIR an estate that is a beneficial owner.

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 entit*y. 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.[152]

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,[153] 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 entit*y. 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.*,[154] 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.[155]

Donative Trusts and the CTA

While a traditional donative trust is absent the most extraordinary circumstances not a "reporting company"[156] 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

---

[152] *See* 31 C.F.R. § 1010.380(b)(2)(i) (*italics* in the original).

[153] *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).

[154] *See also supra* note and accompanying text.

[155] *See also infra* notes 139 through 156 and accompanying text.

[156] *See* CTA, 31 U.S.C.A. § 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.

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% thereof[157] or "substantial control,"[158] 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 in 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.[159] The Reporting Regulations contain a provision focused upon deemed ownership of ownership interests in trust, providing:

> (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.[160]

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."[161] 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

---

[157] *See also* Beneficial Ownership Information Reporting Requirements, *supra* note 2 at 59531 ("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.")

[158] The substantial control test is discussed *infra* notes 139 through 156.

[159] *See also supra* note 128 and accompanying text; FinCEN FAQ D.12 (Sept. 18, 2024).

[160] *See* 31 C.F.R. § 1010.380(d)(2)(ii)(C).

[161] *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.").

beneficial owner under the ownership test.[162] 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;
- 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:[163]

- the corporate trustee is exempt from the obligation to file BOIR reports;[164]
- 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;[165] and
- that individual does not exercise substantial control over the reporting company.

---

[162] *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.").

[163] *See* FinCEN FAQ D.16 (Apr. 18, 2024).

[164] 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).

[165] ***Emphasis*** in the original.

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.[166]

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.

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,[167] under the Reporting Regulations a "company applicant" needs to be identified only in the initial report to beneficial ownership, and then only if the reporting company

[166] *See also infra* notes 119 through 122 and accompanying text.

[167] 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 (not "irregardless") 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.

was formed on or after January 1,2024.[168] A reporting company whose existence pre-dates January 1, 2024, is under no obligation to identify who was its company applicant.[169]

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:
>
> > 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

[168] *See* 31 C.F.R. § 1010.380(b)(2)(iv) (BOIRs filed by domestic reporting companies pre-existing January 1, 2024, and foreign reporting companies qualified before that date need not report information with respect to any company applicant); *see also* Beneficial Ownership Information Reporting Requirements, *supra* note 2 at 59509 (Sept. 30, 2022) ("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."); 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). The grammatical parsing of the statutory language to justify the change in direction in the proposed regulatory scheme to claim fealty to the former is impressive, namely:

> This approach is also consistent with the plain language of the CTA. Although the CTA requires reporting companies to ''identify each beneficial owner of the applicable reporting company and each applicant with respect to that reporting company,'' the statute defines ''applicant'' in the present tense as any individual who ''files'' or ''registers'' an application to form or register an entity. At the time of the effective date of the final rule, when this obligation is imposed, entities that were formed or registered prior to the effective date will have no individual who files or registers the application because such filing or registration will have occurred in the past. Such entities will thus have no company applicant to report.

See Beneficial Ownership Information Reporting Requirements, *supra* note 2 at 59523 (citations omitted).

[169] *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.").

> (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.[170]

The "directly files" element of subsections (1) and (2) quoted above, being based upon the "files an application" language in the CTA,[171] 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" 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.[172] Then and only then is the document filed and the legal effect of the document's filing come about.[173] 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."[174] Again, this treatment is part of a consistent theme in the CTA, a law that purports to "set a clear, Federal standard for incorporation practices"[175] 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,[176] is the "direct filer," that being the person (a company applicant is always a natural person)[177] who "directly filed the

---

[170] *See* 31 C.F.R. § 1010.380(e).

[171] *See* CTA, 31 U.S.C.A. § 5336(a)(2).

[172] *See* KY. REV. STAT. ANN. § 14A.2-010.

[173] *See*, *e.g.*, KY. REV. STAT. ANN. § 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.")

[174] *See* FinCEN Guide chapter 3.2 (direct filer).

[175] *See* CTA § 6402(5)(a).

[176] *See* FinCEN Guide chapter 3.2.

[177] *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

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."[178] 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"[179] unless that messenger is an employee of a business formation service or law firm causing the 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 "primarily responsible" applicant, that being the person who "who is primarily responsible for directing or controlling the filing."[180] Keep in mind that the incorporator or person signing the creation document is not *ipso facto* a company applicant.[181] 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.[182] Alternatively, this individual may have no involvement in the (mislabeled) "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.[183]

In applying the "primarily responsible" element of the "who is a company applicant" test, the focus is "directing or controlling the filing."[184] 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

---

creates the domestic reporting company….") (emphasis added); *see also* FinCEN Guide chapter 3.2 ("All company applicants must be individuals. Companies or legal entities **cannot** be company applicants.") (**emphasis** in original).

[178] *See* FinCEN Guide chapter 3.2.

[179] *See* FinCEN FAQ E.6 (Jan. 12, 2024).

[180] *Id.*

[181] *See* FinCEN FAQ E.5 (Jan. 12, 2024).

[182] *See*, *e.g.*, FinCEN Guide ch. 3.2 (p. 26).

[183] *See* FinCEN FAQ E.3 (Nov. 16, 2023).

[184] *See* 31 C.F.R. § 1010.380(e)(3).

or managers (if an LLC) adopt in the organizational resolutions (however labeled) a determination of who are the "company applicants."[185]

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 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 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.[186]

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.

While reporting companies that are exempt pursuant to one of the twenty-three exemptions[187] may not be obligated to file to claim the exemption,[188] still they should collect the information as to the company applicants. For example, consider NewCo, created as a wholly owned subsidiary of Large Operating Co., on January 2, 2024. From the date of creation NewCo was exempt from the CTA's reporting obligations. But then a year later on January 2, 2025, NewCo's ownership is spun off to several members of its management. NewCo is no longer able to rely upon the wholly-owned subsidiary exemption and let us assume it is not of itself able to rely on any other exemption. NewCo needs to begin filing BOIRs on its own behalf, and having been created on or after January 1, 2024, it needs to submit information as to its company

[185] 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).

[186] *See* Beneficial Ownership Information Reporting Requirements, *supra* note 2 at 59522-23.

[187] *See* 31 C.F.R. §§ 1010.380(c)(2)(i)-(xxiii).

[188] *See* FinCEN FAQ L.5 (Nov. 16, 2023) (no filing is required to "claim" the exemption).

applicants.[189] Further, it will need to confirm the continued accuracy of the information captured at the time of creation as it needs to submit information current as of when the first BOIR is filed.

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.[190]

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:[191]

(i) its "full legal name" and all ''doing business as" names of the reporting company;[192]

(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;[193] and

(2) In all other cases, the street address of the primary location in the United States where the reporting company conducts business;

---

[189] *Contrast* 31 C.F.R. § 1010.380(b)(2)(iv) ("Notwithstanding paragraph (b)(1)(ii) of this section, if a reporting company was created or registered before January 1, 2024, the reporting company shall report that fact, but is not required to report information with respect to any company applicant.").

[190] 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, on a "Form 4022," with a "filing fee" 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.

[191] *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*.

[192] 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, *supra* note 2 at 59515. In Kentucky this obligation is something of an ouroboros in that a company is precluded from doing business under other than its a real name or a filed assumed name. *See* KY. REV. STAT. ANN. § 365.015(2)(a).

[193] A P.O. Box or similar address is not sufficient; it must be a physical "street" address. *See also* FinCEN FAQ F.8 (Dec. 12, 2023).

(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."[194]

The requirement that a foreign reporting company supply one of two alternative addresses[195] 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 cost 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.[196] That determination, published in only a FAQ rather than through an 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 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.[197]

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 regime."

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.[198] In those

---

[194] *See* 31 C.F.R. §§ 1010.380(b)(1)(i)(A)-(F).

[195] *See* 31 C.F.R. §§ 1010.380(b)(1)(i)(C)(1)-(2).

[196] *See* FinCEN FAQ F.12 (Apr. 18, 2024).

[197] *See* Beneficial Ownership Information Reporting Requirements, *supra* note 2 at 59516.

[198] 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

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.[199]

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 identify the submission as an initial BOIR, an update or a correction.[200] 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."[201] The person making this certification with respect to a BOIR does so as an agent of the reporting company.[202]

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)[203] will need to provide her or his:

(i) full legal name;
(ii) 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;[204] and

---

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, 31 U.S.C.A. § 5336(h)(5)(A).

[199] Until the end of June the BOSS system would at least some of the time not accept an initial filing with the same EIN as a prior filing (updates and corrections were not so affected). This was not a feature of BOSS intended to prevent multiple initial BOIRs from being filed under the same EIN, but rather a programming bug that has now been remedied. *See also* Thomas E. Rutledge and Robert R. Keatinge, *CTA Beneficial Ownership Information Reports: Single-Member LLCs and EINs*, BUS. L. TODAY (July 12, 2024).

[200] *See also* FinCEN FAQ F.2 (Sept. 18, 2023).

[201] *See* 31 C.F.R. § 1010.380(b).

[202] *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.

[203] *See*, *e.g.*, 31 C.F.R. § 1010.380(b)(2)(i).

[204] 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

(v) an “image” of that identification document from which the identification number was taken.[205]

The requirement that the BOIR contain an “image” of the identification document is sui generis in the Reporting Regulations,[206] it being explained that it will make it more difficult to submit false information.[207] FinCEN further justified this addition to reporting requirements by noting that the penalty provision of the CTA[208] forbids conduct including providing “false or fraudulent beneficial ownership information, including a false or fraudulent identifying photograph or document” to FinCEN, and noting that “If FinCEN lacked authority to collect images of identifying documents, the express reference to such documents in the penalty provision would be superfluous.”[209] Maybe it was the reference to “images” in the penalty provision that was superfluous?

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 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,[210] 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.[211]

---

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.

[205] *See* 31 C.F.R. §§ 1010.380(b)(1)(ii)(M)-(E).This information set is herein referred to as the “PII” (Personal Identification Information).

[206] *Compare* CTA, 31 U.S.C.A. §§ 5336(b)(2)(A)(i)-(iv) *with* 31 C.F.R. § 1010.380(b)(1)(i).

[207] *See* Beneficial Ownership Information Reporting Requirements, *supra* note 2 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.”)

[208] *See* CTA, 31 U.S.C.A. § 5336(h)(1).

[209] *See* Beneficial Ownership Information Reporting Requirements, *supra* note 2 at 59520 (emphasis added).

[210] *See* FinCEN FAQ F.10 (Jan. 12, 2024).

[211] *See* FinCEN FAQ F.11 (Jan. 12, 2024).

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."[212] 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. At the same time the reporting company must have in place procedures to protect from further disclosure, whether accidental or nefarious, of the PII provided it.[213]

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.[214] for each company applicant. There is a slight differential in the reporting 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.[215]

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 or identification card; and (v) an image of the document from which that unique identifying number was obtained.[216]

---

[212] *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.

[213] *See also* Federal Trade Commission, Protecting Personal Information: A Guide for Business, available at https://www.ftc.gov/business-guidance/resources/protecting-personal-information-guide-business.

[214] The FinCEN Id. is discussed *infra* notes 239 through 2440 and accompanying text.

[215] *See also* ARISTOTLE, NICOMACHEAN ETHICS, μία χελιδὼν ἔαρ οὐ ποιεῖ (1098a18: "one swallow does not a spring make").

[216] *See* 31 C.F.R. § 1010.380(b)(1)(ii).

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.[217] In addition, if a company becomes an exempt reporting company, it will need to file an updated BOIR as to that change in its circumstances.[218] 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 the change.[219] 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.[220] 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.[221] As noted 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.[222] 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.[223] The obligation on the reporting company is to update its BOIR within 30 days of the change, not 30 days of becoming aware of the change.

---

[217] *See* 31 C.F.R. § 1010.380(a)(2)(i).

[218] *See* 31 C.F.R. § 1010.380(b)(3)(ii).

[219] *See* 31 C.F.R. § 1010.380(a)(2)(i).

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

[221] *See* 31 C.F.R. § 1010.380(a)(2)(i).

[222] *See supra* notes 157 through 163 and accompanying text.

[223] *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,

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,[224] 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.[225]

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."). [226] 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.[227] - 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.[228] 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

---

> 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.

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

[225] *See* Beneficial Ownership Information Reporting Requirements, *supra* note 2 at 59513:

> 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.

[226] *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).

[227] *See* 31 C.F.R. § 1010.380(b)(4)(i)(C).

[228] *See also* FinCEN, *Step-by_Step Instructions FinCEN Identifier (ID)*, available at https://fincenid.fincen.gov/assets/helpContent/FinCEN-ID-Step-By-Step-Instructions-20240104.pdf.; FinCEN FAQ M.3 (Jan. 4, 2024).

number, in lieu of that person's PII, in the BOIR.[229] 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, name), those updates filed within 30 days of the change,[230] 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. 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.[231]

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.[232] 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,"[233] 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

---

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

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

[231] *See* FinCEN FAQ M.6 (Sept. 29, 2023).

[232] *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 252 through 259 and accompanying text.

[233] *See* CTA § 6402(5)(A).

fractional interest in the entity."[234] This provision is curious in that it addresses a mechanism, namely bearer shares,[235] that is at most employed rarely. Second, many states including Delaware already prohibit bearer shares.[236] Third, the notion of bearer LLC interests is foreign to the LLC format and its structural limitations on the transfer of interests in the venture; it could be done but for what purpose?[237] 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 Clause[238] 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.

---

[234] *See* CTA, 31 U.S.C.A. § 5336(f). This provision of the CTA has no corresponding provision in the Reporting Regulations.

[235] What are "bearer" shares and interests are not defined in the CTA.

[236] *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 American Bar Association, which controls the drafting and revision 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.

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

[238] *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.

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.[239] There is no filing fee for an initial, an updated or a corrected BOIR.[240]

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.[241]

Reporting companies may find the BOSS interface to be frustrating. If a reporting company used FinCEN's web-based application to submit the previous BOI report, when an update must be filed, for example as to a beneficial owner's change of address, it does not pull 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.[242] Ergo, a "update" of the web-based interface option 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). In contrast, a reporting company that filed its prior BOI report using the fillable PDF version may update its saved copy and resubmit to FinCEN. 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. This option may be more practical for reporting companies that may have occasional changes that would need to be reported as they will lack experience with accessing the BOSS.

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

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

[240] *See also* FinCEN FAQ B.4 (Jan. 4, 2024).

[241] *See also* FinCEN FAQ N.2 (Dec. 12, 2023).

[242] *See also* FinCEN FAQ H.4 (Dec. 12, 2023).

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, all of which it needs to verify from every beneficial owners, 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 Fonseca[243] or stories about the web of companies owning mega-yachts owned ultimately by Russian oligarchs who themselves were attempting to avoid sanctions.[244] 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;

---

[243] *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.

[244] *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.

> (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.[245]

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.[246] If law enforcement encounter a business entity they can access the BOSS database,[247] determine who owns and controls the entity, and proceed in investigating those persons.[248] 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

[245] *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).

[246] For a broader contextualization of the CTA within other federal requirements to disclose beneficial ownership information and efforts by the U.S. to satisfy international standards and requirements as to beneficial ownership transparency, see KEATINGE AND CONAWAY ON CHOICE OF BUSINESS ENTITY, ***supra*** note 40 at chapter 21 (forthcoming Nov. 2024).

[247] 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, 31 U.S.C.A. § 5336(c)(2)(B); *see also* Beneficial Ownership Information Access and Safeguards, 88 Fed. Reg. 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).

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

- 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.[249]

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.[250] 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 the law, and compliance is not optional; as discussed above there are significant penalties for non-compliance.[251]

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*.[252] That decision now on appeal to the 11th

---

[249] *See* Federal Financial Institutions Examination Council Manual, Regulatory Requirements - Customer Due Diligence, available at https://bsaaml.ffiec.gov/manual/AssessingComplianceWithBSARegulatoryRequirements/02

[250] *See* CTA, 31 U.S.C.A. § 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 .

[251] *See supra* notes 13 through 22 and accompanying text.

[252] 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 six other suits challenging the CTA's constitutionality, namely: *Gargasz 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); *Black Economic Council of Massachusetts, Inc. v. Yellen* (Case 1:24cv11411, D. Mass.) (complaint filed May 29, 2024); and *Firestone v. Yellen* (Case 3:24-cv-01034SI, D. Or.) (compliant filed June 27, 2024).

As of July 28, 2024: (i) the *Gargasz* case is in abeyance pending the decision of the 11th Circuit Court of Appeals in *NSBU v. Dept. of the Treasury*; (ii) in *Boyle*, the parties have agreed to a modified schedule for a motion to dismiss/motion for summary judgment with the last pleadings due not later than September 20 (the earlier agreed upon deadline was August 23); (iii) a summary judgment briefing schedule was entered in *Small Business Ass'n of Michigan*, and the plaintiffs filed there last pleading on July 26; (iv) in *Texas Top Cop Shop* the last pleadings with respect to the plaintiff's request for a preliminary injunction were filed on July 3 and the docket does not indicate that a hearing as to that request has been scheduled; (v) there has

Circuit Court of Appeals;[253] 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");[254] 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
>
> 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.[255]

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

---

been no action in *Black Economic Council of Massachusetts* beyond the filing and service of the complaint; and (vi) in *Firestone* the plaintiff's application for a temporary restraining order was denied on July 17 and a schedule has been set for a preliminary injunction hearing with the plaintiff's reply brief due by August 30 with the hearing scheduled for September 9.

Further lawsuits have been threatened. *See*, *e.g.*, *Jennifer Martin, The Corporate Transparency Act: HOAs Don't Need that Kind of Transparency*, NAT'L LAW REVIEW (July 10, 2024); Community Associations Institute, *Corporate Transparency Act Advocacy and Resources Page*, available at https://www.caionline.org/Advocacy/Priorities/CTA/Pages/landing.aspx (recounting how in June, 2024, the board of the Community Associations Institute authorized the bringing of a suit challenging the application of the CTA to community associations such as HOAs).

[253] 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 on September 27.

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

[255] 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).

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.[256] 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.

Whether the Supreme Court’s decision in *Loper Bright v. Raimondo*[257] overturning the *Chevron Doctrine*[258] will impact upon the challenges to the CTA’s constitutionality remains to be seen.[259]

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 Deusche Bank had not complied with its obligations under the CTA; the court held that a Bankruptcy Court cannot enforce the CTA.[260] 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.[261] 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.[262] 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 to capitalize on this information.

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

---

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

257 *Loper Bright Enters. v. Raimondo*, 2024 U.S. LEXIS 2882 (June 28, 2024).

258 *Chevron, U.S.A., Inc. v. NRDC, Inc*., 467 U.S. 837 (1984).

259 *See also* Mary Katherine Browne and Nathan J. Richman, *Supreme Court’s Overturning of Chevron Could Cause Tax Shake-Up*, TAX NOTES doc 2024-19254 (July 1, 2024).

260 *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.”)

261 Another reason a beneficial owner may want to provide a FinCEN Id. rather than the range of her or his PII.

262 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).

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,"[263] then before it could go into effect[264] repealing it and adopting a different beneficial ownership disclosure statute.[265] Effective January 1, 2026, the new law is applicable to LLCs, whether formed or qualified to transact business in New York.[266] 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 exempt[267] 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.[268]

As of this writing state level beneficial ownership acts are or have been under consideration in California,[269] Maryland,[270] and Massachusetts.[271]

---

[263] *See* N.Y. S.B. 99B and codified as 2023 New York Laws 772.

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

[265] *See* N.Y. S.B. 8059 and codified as 2024 New York Laws ch. 102.

[266] *See* N.Y. LIMITED LIABILITY COMPANY LAW § 1107(a).

[267] *See* 31 C.F.R. § 1010.380(c)(2).

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

[269] *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.

[270] *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 .

[271] *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.

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;[272] Kentucky is certainly part of that group.[273]

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.[274] Firm has 22 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");[275] (b) is not a "Large Operating Company" ("LOC") as it does not satisfy the requirement to have more than 20 full-time employees;[276] and (3) while an accounting firm, as it is not registered with the PCAOB, it is not able to rely upon the exemption

---

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

[273] *See supra* note 29.

[274] *See* CTA, 31 U.S.C.A. § 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.A. § 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-fincen-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 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 were rejected. *Id*.

[275] *See* CTA, 31 U.S.C.A. § 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).

[276] *See* CTA, 31 U.S.C.A. § 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).

in the CTA for those firms.[277] In that Firm was organized prior to the CTA's initial effective date of January 1, 2024, it has until the end of 2024[278] to file its initial report of beneficial ownership.[279]

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.[280] As 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.[281] 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.[282] Having not filed a report prior to achieving exempt reporting company status, no beneficial ownership report "electing into" this exemption is required.[283]

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

---

[277] *See* CTA, 31 U.S.C.A. § 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").

[278] *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.

[279] *See* 31 C.F.R. § 1010.380(a)(1)(i)(B).

[280] 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 that the 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, 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.

[281] *See* FinCEN FAQ L.5 (Nov. 16, 2023).

[282] *See* 31 C.F.R. § 1010.380(c)(2)(xv).

[283] 31 C.F.R. § 1010.380(a)(2)(ii) is applicable only if the reporting company has already filed a BOIR.

25% or more beneficial owner).[284] 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.[285] Within 30 days of August 1, Firm is obligated to update its previously filed BOIR[286] and indicate it is now exempt from the obligation to file further BOIRs.[287]

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.[288] 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.[289]

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.[290] 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.[291] 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

---

[284] 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.

[285] *See* 31 C.F.R. § 1010.380(c)(2)(xxi).

[286] *See* 31 C.F.R. § 1010.380(a)(2)(ii).

[287] *See* 31 C.F.R. § 1010.380(a)(2)(ii).

[288] *See* 31 C.F.R. § 1010.380(c)(2)(xxi)(A), it referencing 26 C.F.R. § 54.4980H-1(a) and -3. Under 26 C.F.R. § 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. 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 employees.

[289] 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).

[290] *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.

[291] 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).

by the LOC exemption.[292] As Firm has never filed a BOIR it has through January 1, 2025, within which to file its initial BOIR.[293]

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)[294] 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.[295]

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.[296] 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:

- 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 BOIR; for each beneficial owner it uses a FinCEN Identifier.[297] 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. Thereafter:

- within 30 days after July 15, 2024, Firm needs to update its address information as submitted to FinCEN by filing an updated BOIR;[298] and

---

[292] *See* 31 C.F.R. § 1010.380(c)(2)(xxi)(A) ("employs more than 20 full time employees ….") (emphasis added).

[293] *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").

[294] *See* 31 C.F.R. § 1010.380(a)(1)(iii).

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

[296] *See also* 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 239 through 244 and accompanying text.

[297] *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.).

[298] *See* 31 C.F.R. § 1010.380(a)(2)(i).

- 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.[299]

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.[300] New LLC provides certain payroll services to Firm clients and is not an exempt entity under the CTA.[301] 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 BOIR.[302] In that report it much identify itself,[303] its company applicant Masako by either her personal identifying information or her FinCEN Id.,[304] and the personal identifying information or FinCEN of each of New LLC's beneficial owners.[305] 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.[306] In this instance, having already determined that each shareholder-employee is as to Firm a person with "substantial control" of Firm, a decision is

---

[299] *See* 31 C.F.R. § 1010.380(b)(4)(iii)(A).

[300] *See also* 31 C.F.R. § 1010.380(a)(1)(i)(A).

[301] *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.

[302] *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:
>
> (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, *supra* note 2.

[303] *See* 31 C.F.R. § 1010.380(b)(1)(i).

[304] *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).

[305] *See* 31 C.F.R. § 1010.380(b)(1)(i).

[306] *See supra* note 128 and accompanying text.

made to carry-over that treatment to New LLC even though doing so may result in over-reporting of beneficial owners.[307]

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.[308] 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.[309]

Practice Pointers

- Companies will want to authorize and designate 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 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.[310]

---

[307] 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).

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

[309] *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).

[310] 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),

- 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.

- 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.

- 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

---

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%20against%20UPL; Herrick K. Lidstone, *Considerations for Attorneys Resulting from the Corporate Transparency Act* (Apr. 20, 2023), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4414393.

in co-counsel with the necessary expertise or recommend the client engage separate counsel who has done so.[311]

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

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)

[311] *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.")

Exhibit A
The Twenty-Three Exemptions
31 C.F.R. § 1010.380(c)(2)

Exemption	***Requirements***
Securities reporting issuer	Any issuer of securities that is: (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 (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)).
Governmental authority	Any entity that: (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 (B) Exercises governmental authority on behalf of the United States or any such Indian tribe, State, or political subdivision.
Bank	Any bank, as defined in: (A) Section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813); (B) Section 2(a) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)); or (C) Section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)).
Credit union	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).
Depository institution holding company	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

Exemption	*Requirements*
	10(a) of the Home Owners' Loan Act (12 U.S.C. 1467a(a)).

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:

[1] A subsidiary of a Money Services Business is not able to rely upon the subsidiary of an exempt company exemption. *See* 31 C.F.R. § 1010.380(c)(2)(xxii), it not referencing 31 C.F.R. § 1010.380(c)(2)(vi).

	(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 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 The provision that appears as (B) is a defined term; *see* 31 C.F.R. § 1010.380(f)(6).	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: (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; (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 (C) A trust described in paragraph (1) or (2) of section 4947(a) of the Code.
Entity assisting a tax-exempt entity	Any entity that: (A) Operates exclusively to provide financial assistance to, or hold governance rights over, any entity described in paragraph (c)(2)(xix) of this section; (B) Is a United States person;

[2] A subsidiary of a Pooled Investment Vehicle is not able to rely upon the subsidiary of an exempt company exception. *See* 31 C.F.R. § 1010.380(c)(2)(xxii), it not referencing 31 C.F.R. § 1010.380(c)(2)(xviii).

	(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 (D) Derives at least a majority of its funding or revenue from one or more United States persons that are United States citizens or lawfully admitted for permanent residence.[3]
Large operating company The provision that appears as (B) is a defined term; *see* 31 C.F.R. § 1010.380(f)(6).	Any entity that: (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); (B) Has an operating presence at a physical office within the United States; and (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.
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),

[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* 31 C.F.R. § 1010.380(c)(2)(xxii), it not referencing 31 C.F.R. § 1010.380(c)(2)(xx).

	(viii), (ix), (x), (xi), (xii), (xiii), (xiv), (xv), (xvi), (xvii), (xix), or (xxi) of this section.[4]
Inactive entity	Any entity 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.

4889-1823-3799.3

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