

Corporate Transparency Act Fact Sheet

The Corporate Transparency Act (“CTA”) was enacted by Congress as part of its on-going effort to combat terrorism, organized crime, and money-laundering. The United States is joining other nations that have already adopted similar reporting requirements in an effort to make it more difficult to hide criminal activity from law enforcement by creating shell companies. The CTA requires most small to mid-sized entities, called “reporting companies”, to report information about the companies themselves, their beneficial owners (more on identifying these individuals is below), and company applicants (the individual who filed the formation documents with a secretary of state or similar office, and if applicable, the individual responsible for directing the filing for a reporting company created on or after January 1, 2024). The CTA is quite broad and will apply to most small to mid-range companies, with potentially severe penalties for not accurately and timely reporting required information to the government through an online reporting system created by the Financial Crimes Enforcement Network (“FinCEN”), a bureau of the United States Department of the Treasury. However, companies generating more than \$5 million in annual revenue, having more than 20 employees, and operating in the United States are exempted from having to file or disclose information to FinCEN.

WHAT KINDS OF ENTITIES ARE REPORTING COMPANIES?

Reporting companies include corporations (including Subchapter S corporations), limited liability companies (“LLCs”), and other types of entities that are required to file with a state’s secretary of state (or an American tribal jurisdiction) in order to be formed (e.g., limited partnerships). Many people own interests in such entities, whether they are active businesses or they were specially created to hold particular assets or for particular estate planning purposes. It is common for interests in these entities to be held through trusts, or even other entities that are themselves reporting companies. All reporting companies in the chain of ownership or control must individually comply with the CTA’s reporting requirements unless exempted.

WHEN MUST BOI REPORTS BE MADE TO FINCEN

FinCEN has announced that companies formed in calendar-year 2024 will have 90 days from their date of formation to make the initial filing. Any reporting company created before January 1, 2024, will have to file with FinCEN no later than January 1, 2025. Reporting companies formed on or after January 1, 2025, must make the initial filing no later than 30 days after the reporting company’s formation.

WHAT INFORMATION MUST BE REPORTED TO FINCEN?

Each reporting company must file its initial beneficial ownership report on the PDF form available from the

FinCEN website. The individual submitting the filing on behalf of the reporting company must certify the information to be “true, correct, and complete.” The initial report must include the full legal name and any trade or “doing business as name” for the reporting company, a complete address of the reporting company, including street address of the principal place of business (no P.O. Box or the address of the attorney who formed the entity), state of formation, and the Taxpayer Identification Number for the reporting company. In addition, the report must include the following information for each beneficial owner and each company applicant: full legal name, date of birth, complete current residential address, a unique identifying number from certain official governmental identification documents (e.g., non-expired passport or government issued driver’s license), and a copy of the document used.

WHO ARE “BENEFICIAL OWNERS”?

For purposes of the CTA, beneficial owners are not just the persons many would consider to be owners of an entity. A beneficial owner includes any individual who, directly or indirectly, either (i) exercises “substantial control” over a reporting company or (ii) owns or controls at least 25 percent of the ownership interests of the reporting company. There are many key phrases including “substantial control” and “ownership interests.” Each term is defined in the final rule for Beneficial Ownership Information Reporting Requirements (the “FinCEN rule”) and generally results in a very broad series of rules intended to catch as many people as possible who could potentially influence the operation of the entity.

“Substantial control” over a reporting company can include (i) serving as a senior officer of the reporting company; (ii) having authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body); and (iii) having substantial influence over important decisions made by the reporting company (which is further defined in the FinCEN rule). In addition, an individual can exercise substantial control indirectly through a number of arrangements and relationships set forth in the FinCEN rule. It is important to note that a person acting as trustee of a trust may have direct or indirect control of an entity owned by the trust.

“Ownership interests” include not only equity and stock instruments (and other similar arrangements), regardless of whether they are transferable or confer voting rights, but also a broad array of other interests, rights and other arrangements set forth in the FinCEN rule. An individual can have direct or indirect ownership of a reporting company. Direct ownership of an interest in 25% or more of a reporting company is fairly straightforward. However, beneficial owners also include those who “control” ownership interests in a wide manner of ways, including holding the interest as a joint owner, through an individual who acts as agent or nominee of the beneficial owner, through ownership or control of intermediary entities, or through a trust.

If a trust holds an ownership interest, the FinCEN rule provides that the beneficial owner is the trustee of the trust or other individual “with the authority to dispose of trust assets,” which may include the holder of a power of appointment. The trustee of a trust that holds a 25% ownership interest in a reporting company seems to be an obvious beneficial owner based on the FinCEN rule. But in addition to the trustee, the term also includes (a) a beneficiary who (i) is the sole permissible recipient of income and principal from the trust or (ii) has the right to withdraw or to demand a distribution of substantially all of the assets from the trust; and (b) a grantor who has the right to revoke the trust or otherwise withdraw the assets of the trust. These provisions could implicate a number of individuals who hold beneficial interests in the trust, and also include others associated with the trust, such as a trust protector, depending on the powers granted to these individuals under the trust agreement or applicable law.

ARE THERE ANY EXEMPTIONS OR EXCEPTIONS?

The most significant filing exemption is for companies generating more than \$5 million in annual revenue, having more than 20 employees, and operating in the United States. These larger companies are exempted from having to file or disclose information to FinCEN. Congress reasoned that larger entities were likely subject to sufficient regulation and thus exempted them from the CTA filing and disclosure requirements. There are other exemptions to the CTA's reporting requirements, notably for non-profits, banks, and stock exchange listed companies. In addition, the CTA has certain exceptions for the reporting of beneficial owners. For instance, if a minor is a beneficial owner, CTA provides an exception and allows the minor's parents' information to be reported instead of the minor child's information.

You should consult with legal counsel when determining whether one of the CTA's exemptions or exceptions applies.

WHAT ABOUT UPDATING BOI REPORTS FILED WITH FINCEN?

Updated reports are required within 30 days of any change in the reportable information of any of the beneficial owners or the identities of the beneficial owners. For instance, if a reporting company is wholly owned by the president and the president moves to a new address, then the reporting company must file an updated report within 30 days of the move. If the president marries (or divorces) resulting in a name change, then an updated report must be filed within 30 days of the name change. There are special rules regarding when updated reports must be filed if the president dies and president's interest in or control over the reporting company is transferable at death.

WHAT ABOUT FINCEN IDENTIFIERS?

For individuals who are beneficial owners, it is possible to obtain a FinCEN Identifier (a confidential unique identification number). The reporting company would then file its report using the beneficial owner's FinCEN Identifier rather than having to collect each beneficial owner's personally identifiable information. To obtain a FinCEN Identifier, an individual provides FinCEN with the information required to be collected under the CTA and

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then the individual can supply this FinCEN Identifier to any reporting company requesting information for CTA reporting compliance purposes. However, the individual will be responsible for updating FinCEN with any reportable changes within 30 days of any such change. As reporting companies begin to grapple with their reporting requirements under the CTA, they may require that each beneficial owner obtain a FinCEN Identifier because then the responsibility for reporting changes may fall on the individual who experiences the change rather than on the reporting company, which may not know that a change has occurred.

WHAT ARE THE PENALTIES?

The penalties for willfully failing to report complete or updated beneficial ownership information to FinCEN or willfully providing or attempting to provide false or fraudulent beneficial ownership information are substantial. There are civil penalties of up to \$500 for each day that a violation continues or has not been remedied, and criminal penalties of up to \$10,000 and 2 years imprisonment.

HOW CAN HARRIS BEACH ASSIST YOU?

If you would like to engage us to work with you on any CTA compliance issues, please contact:

Constantine Lizas, clizas@harrisbeach.com or 202.975.9780, Xanthe Larsen, xlarsen@harrisbeach.com or 202.285.3543, or the attorney at Harris Beach with whom you currently work.

Please note that Harris Beach is working on CTA compliance for clients only when specifically engaged to do so and the scope of our services is confirmed in writing.

WHAT SHOULD YOU DO NOW?

To the extent that you may be a beneficial owner, or a person responsible for making sure a reporting company is in compliance with this new law, you should ensure that you have all the information necessary for timely compliance. For example:

- If you could be a beneficial owner because you have substantial control over a reporting company, ensure that the company determines and reports the beneficial ownership information in a timely manner.
- If you could be a beneficial owner because you may have an ownership interest of 25% or more in any reporting company that may be subject to the CTA reporting requirements, inquire with the reporting company about what steps the company will be taking to ensure timely compliance with the CTA.
- If you are the trustee of a trust that holds an interest in a reporting company, and if the trust may hold a 25% interest in or control over the reporting company, you should consider having an advisor review the trust instrument to determine who may hold powers that could make the trustee or other parties, including the beneficiary of the trust, a beneficial owner of the reporting company.
- If you believe that you may be a beneficial owner of one or more reporting companies whether by having substantial control or an ownership interest of 25% or more, you may wish to apply for a FinCEN Identifier.
- It is uncertain what should be reported if a reporting company has no Tax Identification number (TIN) (such as a single member LLC) because it may use an individual's social security number. Because of this uncertainty, it may make sense to apply for a TIN if you do not already have one.