



OTTEN JOHNSON ALERT

Updates and Reminders Regarding the Corporate Transparency Act

September 2023 • [Matthew S. Bender](#), [Michael P. Davidson](#)

As the end of 2023 quickly approaches, so does the January 1, 2024 effective date of the Corporate Transparency Act (“**CTA**”). With that, we are providing an update to our [July 2022 Alert](#), in which we initially summarized the background and likely impact of the CTA based on the proposed rulemakings that were available at the time. In this update, we will provide (i) a high-level overview of what the CTA is and what it mandates and (ii) an update on the current state of the law pursuant to the final and proposed rulemakings that have been published to date.

Overview of the Corporate Transparency Act

Congress passed the CTA to promote transparency and limit the concealment of entity ownership in order to advance national security, intelligence, and law enforcement activities related to the abuse of corporate structures used to hide illicit activities. The CTA seeks to achieve these ends by establishing beneficial ownership information (“**BOI**”) reporting requirements that apply to entities that are created or registered by filing a document with any state secretary of state or similar office (see the July 2022 Alert for additional information concerning exempt entities) (“**Reporting Companies**”).

Reporting Companies are required to file an initial report that includes (i) the full legal name of the entity; (ii) any trade name or doing business as name; (iii) the complete current address of the principal place of business in the United States or, if the entity

does not have a principal place of business in the United States, the primary location where the entity conducts business in the United States; (iv) the entity's jurisdiction of formation or registration; and (v) the Taxpayer Identification number of the entity.

Additionally, the CTA imposes BOI reporting requirements covering Beneficial Owners and Company Applicants. The CTA defines a "**Beneficial Owner**" as any individual who either exercises substantial control over the entity or owns or controls at least 25 percent of the ownership interests in the entity (whether voting interest or otherwise). The CTA defines a "**Company Applicant**" as anyone that files or directs or controls the filing of the document that creates or registers the Reporting Company. Beneficial Owners and Company Applicants are required to report (i) their full legal name; (ii) their date of birth; (iii) a complete current residential address (Company Applicants that form an entity in the course of business may report their business address); (iv) a unique identifying number and the issuing jurisdiction (including a United States passport, an identification document issued by a State, local, or Tribal government, a State-issued driver's license, or a foreign passport if the individual does not possess any of the prior listed documents); and (v) an image of the document from which the unique identifying number was obtained.

The Financial Crimes Enforcement Network ("**FinCEN**"), a bureau of the U.S. Department of the Treasury, is empowered by the CTA to promulgate the regulations necessary for the implementation and enforcement of the CTA.

Legal Updates Pursuant to FinCEN Rulemaking

In September 2022, FinCEN published the first final rule (the "**Final Rule**") of three to implement and enforce the CTA. The Final Rule on Beneficial Ownership Information and Reporting Requirements largely conformed to the notice of proposed rulemaking that was published by FinCEN in December 2021, however, there were several notable changes, including the following:

1. The Final Rule established a January 1, 2024 effective date for the CTA. Therefore, all entities formed or registered before January 1, 2024 will have until January 1, 2025 to file their initial report, while entities created or registered after January 1, 2024 will have thirty (30) days to file their initial report.
2. The Final Rule increased the amount of time that newly formed or registered entities have to submit their initial report from fourteen (14) days, as originally provided by the proposed rulemaking, to thirty (30) days. Additionally, the Final Rule defined the event that triggers the start of the reporting period, providing that this time limit begins to run from the date when the entity first receives either actual or public notice that it has been registered to do business. The Final Rule also increased the window that reporting companies have to correct previously

reported BOI from fourteen (14) days to thirty (30) days to align with the reporting period for updating BOI.

3. The Final Rule also deviated from the proposed rule by removing the requirement that entities in existence prior to January 1, 2024 report Company Applicant information. Instead, these entities will only be required to report the fact that they were created or registered prior to the effective date, in addition to the required information about the company and the Beneficial Owners. However, entities created after January 1, 2024 will still be required to report Company Applicant information. In any event, entities that are required to report Company Applicant information will not be required to update this information after the initial report.

Following the publication of the first Final Rule, FinCEN published a notice of proposed rulemaking in December 2022, establishing standards for access to BOI reported to FinCEN and stored in the national registry. The five groups that will have varying levels of access to the registry include (i) financial institutions subject to customer due diligence (“**CDD**”) requirements; (ii) US Federal, State, local, and Tribal government agencies; (iii) foreign law enforcement agencies; (iv) federal functional regulators assessing financial institutions compliance with CDD requirements; and (v) the U.S. Department of the Treasury. The proposed rulemaking addresses details concerning the disclosure of information by FinCEN, use of the information by authorized recipients, security and confidentiality requirements, and what constitutes a violation of lawful access to BOI. Notably, this rule assuages some of the concerns regarding general public access to the reported information.

Clarifications Concerning Penalties for Violations

In the July 2022 Alert, we briefly addressed the potential penalties for violations of the CTA, but were unable to address the potential liability for unintentional misrepresentations and who will be subject to the penalties based on the information that was available at the time. Since then there have been developments in the law addressing these two outstanding issues.

The CTA imposes penalties for failure to comply with the reporting requirements and for the unauthorized use of reported information. The penalties for willful failures to properly report BOI include (i) fines up to \$500.00 per day (capped at \$10,000.00) and (ii) up to two years in prison; however, more severe penalties are contemplated for the unauthorized use or disclosure of reported information. Understandably, there was significant concern among commenters regarding the penalties imposed on violators in response to the notice of proposed rulemaking. FinCEN attempted to quell concerns in the commentary to the final rulemaking, noting that FinCEN does not intend to punish individuals that have made an inadvertent mistake while acting in good faith after diligent inquiry, but rather is focused on punishing willfully false and fraudulent

disclosures. In addressing what will constitute a willful action, FinCEN stated that willfulness is a legal concept established by existing case law and that fault determinations will be fact specific.

To clarify who may be held liable for failure to satisfy reporting obligations, the Final Rule states that a person fails to report complete or updated BOI if that person causes the failure or is a senior officer of the entity at the time of the failed disclosure.

FinCEN's hope is that adding the reference to the existing definition of senior officer will reduce confusion as to who may be liable for failure to file updates and corrections to BOI and will ensure that the information is correct and up to date. Although only time will tell, this should exempt Company Applicants from the CTA's penalties for willful failures of disclosure unless they willfully cause such failure.

Highlighting Special Rules Concerning Indirect Ownership and Substantial Control

An increasingly important element of the CTA that was not highlighted in the July 2022 Alert are the special rules concerning indirect ownership by exempt companies and indirect exercises of substantial control of reporting companies, both of which will impact who is deemed a Beneficial Owner.

Beginning with indirect ownership, FinCEN established an exception for companies owned by exempt entities that provides that if an exempt entity has an ownership interest in a Reporting Company, and an individual is a Beneficial Owner of the Reporting Company exclusively through their ownership interest in the exempt entity, the report need only include the name of the exempt entity, rather than all of the information that must be reported by Beneficial Owners generally. Therefore, if you have an ownership interest in an entity that is exempt from the reporting requirements of the CTA and that exempt entity has an ownership interest in a Reporting Company that is subject to reporting requirements, you will be exempt from reporting your individual information and can satisfy the reporting requirement with only the name of the exempt entity.

Moving on to indirect exercises of substantial control, the Final Rule clarified that an individual can exercise substantial control over a Reporting Company by acting as a trustee of a trust or similar arrangement, including through board representation; ownership or control of a majority of voting rights of the Reporting Company; rights associated with any financing arrangement in a Reporting Company; control over intermediary entities that exercise substantial control over a Reporting Company; business relationships with individuals acting as nominees; or any other similar contract arrangement. The clarification that an individual acting as a trustee of a trust or similar arrangement was in direct response to comments requesting that FinCEN clarify whether this type of arrangement can constitute substantial control. Therefore, (i) substantial control can take many different forms and (ii) an individual exercises

substantial control if it is a key individual that directs the actions of a Reporting Company.

Conclusion

As the effective date of the CTA approaches, we still await two additional final rulemakings. The first will establish rules concerning access to BOI collected by FinCEN by addressing the comments received in response to the December 2022 notice of proposed rulemaking, while the second will revise FinCEN's CDD rule following the creation of the final rule on BOI reporting.

In any event, the conclusion of our July 2022 Alert remains accurate: new and existing entities and their Beneficial Owners will be subject to significant additional reporting requirements as a result of the CTA. We suggest that you begin preparing for that additional reporting burden now (both for your existing entities and any new entities), by assessing which of your entities are Reporting Companies and gathering any applicable BOI for those Reporting Companies. In addition, please do not hesitate to contact us to discuss how the CTA may impact your business and how we may be able to help.

**This alert was co-authored with Rachel DeSimone, a law clerk at Otten Johnson.*

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