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UNDERSTANDING THE NEW CORPORATE TRANSPARENCY ACT

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Quick Facts:

- Goes into effect January 1, 2024.
- Applies to all entity types that are formed by filing a document with a Secretary of State unless an exception is met. A Texas trust and a Texas general partnership are examples of entity types that do not require filing anything with a Secretary of State to form.

The Corporate Transparency Act (“CTA”) creates a national database of individuals who hold substantial interests in, or hold substantial control over, certain domestic and foreign legal entities.

The information will be maintained by the U.S. Department of the Treasury Financial Crimes Enforcement Network (“FinCEN”) in a secure national database called the Beneficial Ownership Secure System. Information stored in the database will only be available to federal law enforcement, if court-ordered for criminal or civil investigation purposes, and limited other uses. (Specifics on who can access the information is provided later in this paper.)

The form to supply the required information is called a Beneficial Ownership Information Report (“BOI” Report). **As of today, FinCEN has not yet made the form available.**

When Does It Start?

For domestic entities:

- New Reporting Companies created in 2024 must file initial BOI Reports within 90 calendar days of formation. Beginning January 1, 2025, new Reporting Companies have just 30 calendar days to file their initial BOI Report.
- Reporting Companies existing prior to January 1, 2024, must file initial BOI Reports no later than January 1, 2025.

For foreign entities:

- Foreign Reporting Companies first registering in the U.S. in 2024 must file initial BOI Reports within 90 calendar days of registration. Beginning January 1, 2025, Foreign Reporting Companies have just 30 calendar days to file their initial BOI Report.
- Foreign Reporting Companies registered in the U.S. prior to January 1, 2024, must file initial BOI Reports no later than January 1, 2025.

Companies Exempt from Requirements

Entities Not Created by Filing

The CTA does not apply to entities which do not require the filing of a document with a Secretary of State or a similar office under the law of a state to be created.

Entities not created by filing, such as a Texas general partnership, are not Reporting Companies under the CTA. Texas trusts and other trusts not created by filing with other state government authorities are also not Reporting Companies.

Large Operating Company Exemption

The CTA does not apply to “Large Operating Companies” because the principal targets of the CTA are shell companies used for illicit purposes. Therefore, legal entities that have significant business operations in the United States are not subject to the CTA.

To be considered a Large Operating Company under the CTA, the company must meet all of the following requirements:

- Have an operating presence at a physical location in the U.S. where the legal entity regularly conducts business that is owned or leased by the legal entity and is physically distinct from the place of business of any unaffiliated entities;
- Have at least 20 full-time employees in the U.S.; and
- Have at least \$5 million of gross receipts or sales, in the aggregate, as shown on its prior year’s federal income return.

Tax-Exempt Entities

Organizations that are exempt from income tax under Section 501(c) are exempt from the CTA.

Subsidiary Exemption

Entities which are owned or controlled, directly or indirectly, by one or more of certain exempt entities are also exempt from the CTA.

Old Forgotten Inactive Entities

Inactive legal entities that are not owned directly or indirectly, in whole or part, by any foreign persons are CTA-exempt. To qualify as an “inactive entity,” the entity must (a) have been in existence on or before January 1, 2020; (b) not be engaged in an active business; (c) hold no assets (including an interest in another legal entity); (d) not had a change of ownership in the prior 12-month period; and (e) not received, directly or through an affiliated entity, more than \$1,000 in the prior 12-month period.

Others Exempt

The CTA also exempts the following types of entities from the reporting requirement:

- Certain types of securities reporting issuers.
- U.S. governmental authorities.
- Certain types of banks.
- Federal or state credit unions as defined in section 101 of the Federal Credit Union Act.

- Bank holding companies as defined in section 2 of the Bank Holding Company Act of 1956 or any savings and loan holding company as defined in section 10(a) of the Home Owners' Loan Act.
- Certain types of money transmitting or money services businesses.
- Any broker or dealer, as defined in section 3 of the Securities Exchange Act of 1934, that is registered under section 15 of that Act.
- Securities exchanges or clearing agencies as defined in section 3 of the Securities Exchange Act of 1934, and that is registered under sections 6 or 17A of that Act.
- Certain other types of entities registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934.
- Certain types of investment companies as defined in section 3 of the Investment Company Act of 1940 or investment advisers as defined in section 202 of the Investment Advisers Act of 1940.
- Certain types of venture capital fund advisers.
- Insurance companies defined in section 2 of the Investment Company Act of 1940.
- State-licensed insurance producers with an operating presence at a physical office within the United States, authorized by a state, and subject to supervision by a state's insurance commissioner or a similar official or agency.
- Commodity Exchange Act registered entities.
- Any public accounting firm registered in accordance with section 102 of the Sarbanes-Oxley Act of 2002.
- Certain types of regulated public utilities.
- Any financial market utility designated by the Financial Stability Oversight Council under section 804 of the Payment, Clearing, and Settlement Supervision Act of 2010.
- Certain pooled investment vehicles.
- Entities assisting a tax-exempt entity qualifying as exempt from the CTA.

What Does the BOI Report Ask For?

Information About Company Applicants

Reporting Companies must identify the individuals involved in the legal formation or registration of the Reporting Company (called "Company Applicants" in the CTA). The individual who actually files the document to form the entity (such as a paralegal or legal assistant) and the individual who directs or controls the filing of such a document (such as an attorney) are considered the Company Applicants.

The following information must be reported for each Company Applicant (unless a FinCEN Identifier as discussed below is submitted):

- Full legal name, date of birth, and residential street address. However, if the individual formed the entity in the ordinary course of business, such as an attorney, then the address reported should be the work street address (the company address for the attorney's law office).
- An official identifying number from a non-expired (1) U.S. passport; (2) driver's license issued by a state; or (3) identification card issued by a state, local government, or Indian tribe. If none of the foregoing documentation is available, a non-expired foreign passport may be used for this purpose.
- An image of the identifying document from which the official identifying number described above was obtained, with the individual's photograph.

For Reporting Companies existing before January 1, 2024, no Company Applicant information need be provided.

About FinCEN Identifiers

Individuals and entities that are Company Applicants or Beneficial Owners will be able to obtain a unique FinCEN identification number (a “FinCEN Identifier”). **As of today, the process to apply for a FinCEN Identifier has not yet been made available.** Once obtained, the FinCEN Identifier may be provided by a Reporting Company on the BOI Report in lieu of the detailed information described above. (A Reporting Company may also secure its own FinCEN Identifier but only after submitting its initial BOI Report to FinCEN.)

Note: The individual or entity that obtained the FinCEN Identifier (rather than the Reporting Company) has the responsibility to keep the information provided up to date, to keep the image of the identifying document current, and to correct any inaccuracies in the information provided.

Information About Reporting Company

The following information must be reported about the Reporting Company:

- Full legal name of the Reporting Company, as well as any other trade name or “d.b.a.” used by the Reporting Company.
- Primary location in the U.S. from which the Reporting Company conducts business. This requirement is not satisfied by supplying a Post Office Box or the address of a third party, such as a company formation agent.
- The state, territory, possession or tribal jurisdiction of a domestic Reporting Company’s formation or a foreign Reporting Company’s first U.S. registration.
- The Taxpayer Identification Number (“TIN”) or Employer Identification Number (“EIN”) for all domestic Reporting Companies and foreign Reporting Companies possessing a TIN or EIN; otherwise, a foreign Reporting Company’s taxpayer identification number issued by a foreign jurisdiction and the name of that jurisdiction.

Information About Beneficial Owners

Reporting Companies must provide the following information about individuals who hold a substantial interest in, or hold substantial control over, a Reporting Applicant (unless a FinCEN Identifier is submitted). These individuals are referred to in the CTA as “Beneficial Owners.”

- Full legal name, date of birth, and residential street address.
- An official identifying number from a non-expired (1) U.S. passport; (2) driver’s license issued by a state; or (3) identification card issued by a state, local government, or Indian tribe. If none of the foregoing documentation is available, a non-expired foreign passport may be used for this purpose.
- An image of the identifying document from which the official identifying number described above was obtained, with the individual’s photograph.

If an individual is a Beneficial Owner of a Reporting Company exclusively due to that individual’s interest in a CTA-exempt legal entity that owns an interest in the Reporting Company, then in lieu of providing Beneficial Owner information with regard to that individual, the Reporting Company may simply provide information about the applicable CTA-exempt legal entity.

Trusts Which Hold Ownership Interest in Reporting Company

With regard to a trust that holds a 25% or more ownership interest in a Reporting Company, multiple individuals could be deemed to own or control the same ownership interest and therefore be required to be reported as Beneficial Owners.

Beneficial Owners:

- The grantor of any trust is considered a Beneficial Owner only if the grantor has the right to revoke or otherwise withdraw the trust assets.
- An individual trustee with the power to dispose of trust assets is considered a Beneficial Owner.
- Any other individual with the power to dispose of trust assets is considered a Beneficial Owner, including fiduciary positions such as investment directors, advisors, or committee members, and non-fiduciary positions, such as trust protectors or persons holding a veto power, depending on the specific circumstances.
- If there is one sole permissible recipient of income or principal of the trust that owns a 25% interest, or who can withdraw substantially all of the assets from the trust that owns a 25% interest, that individual is a Beneficial Owner.

Note: Generally, a beneficiary of a trust that has more than one current beneficiary will not be deemed to be the Beneficial Owner of the interest in the Reporting Company held by the trust unless that beneficiary can withdraw substantially all of the assets from the trust.

Who are the Beneficial Owners of a Reporting Company?

I. Exercise “substantial control” over Reporting Company

Individuals who exercise “substantial control” over a Reporting Company must be reported as Beneficial Owners. An individual can have substantial control based upon a variety of facts and circumstances. Further, multiple individuals can have substantial control over a Reporting Company, all of whom will be “Beneficial Owners” for purposes of the CTA reporting requirements.

- a) Senior Officers: Individuals holding the position (or exercising the authority of) a President, CEO, CFO, COO, general counsel, or other officer performing a similar function.
- b) An individual who may remove any senior officer or a majority of the Board (or similar body).
- c) An individual who directs, determines, or has “substantial influence” over “important decisions,” disposition, or encumbrance of any principal assets; reorganizations, mergers and dissolutions; major expenditures; issuing equity; significant debt; altering lines of business; approving operating budgets; setting compensation of senior officers; certain decisions regarding major contracts; changes to governing documents; and other similar major decisions. FinCEN has taken the position that when multiple individuals have equal control, they are each likely to be considered to have substantial influence over decisions even if no one of them controls the outcome.
- d) An individual having “any other form of substantial control” over a Beneficial Owner.

- e) Substance Over Form: Substantial control can be exercised directly or indirectly, and it may be exercisable by a trustee of a trust or other similar arrangement. Substantial control also may be exercised, for example, through representation on the Board of Directors; majority ownership or control of voting rights or powers; rights derived from financing arrangements; control over intermediary entities that separately or collectively have substantial control; formal or informal arrangements with individuals or other entities acting as nominees; and other forms of contracts, arrangements, understandings, relationships, or other mechanisms.

II. Own or control more than 25% of Reporting Company

Individuals who own or control more than 25% of the “ownership interests” of a Reporting Company must be reported as Beneficial Owners.

For this purpose, an “ownership interest” is broadly defined as any instrument, contract, arrangement, understanding, relationship, or other mechanism used to establish ownership. Specific forms of ownership for this purpose include equity, stock or similar instruments; preorganization certificates or subscriptions; a transferrable share of, or voting trust certificate or certificate of deposit for, an equity security, interest in a joint venture, or certificate of interest in a business trust; and capital or profits interests in an entity. Instruments that are convertible into any of the listed forms of ownership, any future on such an instrument, and any warrant or right to purchase, to sell, or to subscribe to any of the listed forms of ownership also constitute an “ownership interest.”

Reporting Company must report arrangement unless it was created and held by one or more third parties without the knowledge or involvement of the Reporting Company.

With regard to a trust that holds an ownership interest in a Reporting Company, multiple individuals could be deemed to own or control the same ownership interest.

- a) An individual trustee of a trust (or similar arrangement), or other individual, with the power to dispose of trust assets, “other individual” fiduciary positions such as investment directors, advisors, or committee members, or even in non-fiduciary positions, such as trust protectors or persons holding veto power.
- b) Beneficiary of a trust—sole permissible recipient of income or principal of the trust, or who can withdraw substantially all of the assets from the trust. This implies that a beneficiary of a trust that has more than one current beneficiary will not be deemed to own the ownership interest in the Reporting Company held by the trust unless that beneficiary can withdraw substantially all of the assets from the trust.
- c) Grantor of any trust if grantor has the right to revoke or otherwise withdraw.

How to determine 25% or more of the ownership interests.

- a) Ownership and control at “present time,” as of the date of the report. Options or similar interests of the individual are treated as having been exercised.
- b) 25% of the voting power OR 25% of the outstanding value.
- c) 25% of the outstanding capital or profits interests.
- d) If none of the foregoing rules can be applied with reasonable certainty, an individual who owns or controls at least 25% of any class of ownership interest.

If an individual owns any interest in the Reporting Company through a CTA-exempt legal entity, but also owns an interest in the Reporting Company outside of its interests in the CTA-exempt legal entity, then the interests of the individual must be aggregated with the interests held through the CTA-exempt legal entity, to ascertain whether the individual is a Beneficial Owner. For example, if the individual owned a 23% interest in the Reporting Company through one or more CTA-exempt legal entities, and a 2% direct interest in the Reporting Company, that individual is a Beneficial Owner whose information must be including on the BOI Report.

Minors: So long as an individual is a minor, the Reporting Company may treat the parent or legal guardian as the Beneficial Owner. When the minor reaches majority, the individual's information must be provided.

III. Excluded as Beneficial Owners

The following are excluded:

- A. Ownership interests through a future right of inheritance, as well as a nominee, intermediary, custodian, or agent.
- B. Employees of the Reporting Company (other than senior officers), if their economic benefits or substantial control are derived solely from their employment status.
- C. Creditors will not be treated as Beneficial Owners if their rights and interests relate only to the right to be repaid or a loan covenant or similar right intended to ensure, or enhance the likelihood of, repayment of that sum of money.
- D. FinCEN does not envision that the providers of ordinary, arms-length advisory, or other third-party professional services will be a Beneficial Owner.

Correcting and Updating BOI Reports

Correcting Errors

If any information in a BOI Report filed with FinCEN contains information that is incorrect or inaccurate, the Reporting Company has 30 calendar days from when it first becomes aware of, or has reason to know of, the mistake or inaccuracy to file a corrected BOI Report.

If an individual applies for a FinCEN Identifier and if the information in that application is incorrect or inaccurate, then that individual has 30 calendar days from when he or she first become aware of, or has reason to know of, the mistake or inaccuracy to file a corrected application.

Keeping BOI Reports and Applications Up to Date

Reporting Company to keep its BOI Report current with FinCEN within 30 calendar days:

- a) Any change in the information submitted about the Reporting Company itself.
- b) Any change to the identity of the Beneficial Owners transferrable upon death change in the Beneficial Owner deemed to have occurred upon the date that the estate has settled. At that time, the BOI Report must be updated. The update appears to be required even if none of the successor owners will be Beneficial Owners.
- c) Any change in the information previously submitted with regard to the Beneficial Owners.

- d) Changes to the image of the identifying documents submitted to FinCEN for a Beneficial Owner require an update only if the change pertains to the Beneficial Owner's name, date of birth, residence address, or unique identifying number.

Note that if a Reporting Company is using a FinCEN Identifier for a Beneficial Owner, the obligation to keep the information on that Beneficial Owner up to date falls on the Beneficial Owner and not the Reporting Company.

If a Reporting Company has secured its own FinCEN Identifier, the Reporting Company must update any change in the information in the application within 30 days of when the change occurred.

Who Exactly Can Access the Information?

The information in the Beneficial Ownership Secure System database may only be disclosed to:

- U.S. Federal agencies engaged in national security, intelligence, and law enforcement activities.
- The U.S. Department of the Treasury.
- Federal and state regulators assessing financial institutions for compliance with legally required customer due diligence obligations.
- Foreign law enforcement agencies and certain other foreign authorities who submit qualifying requests for the information through a U.S. Federal agency.
- With court authorization, the information may be disclosed to state, local, and tribal law enforcement agencies.
- With customer consent, the information may be disclosed to financial institutions using beneficial ownership information to conduct legally required customer due diligence.

Penalties for Violating the CTA

It is unlawful to knowingly provide or attempt to provide FinCEN false or fraudulent Beneficial Owner information or willfully fail to provide complete or updated Beneficial Ownership information.

A civil penalty of up to \$500 per day may be imposed for each day that a person continues a violation until the violation is remedied. A criminal fine of up to \$10,000 and/or imprisonment of up to two years may also be imposed.

A safe harbor is provided for persons who submit incorrect information on a BOI Report if the correction is made within 90 days of the original incorrect filing unless the person knew the information was incorrect or intended to deliberately evade the CTA reporting requirements.

Note: In addition to the specific persons who caused the failure, any senior officer of a Reporting Company is also responsible for the failure.

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