THE CORPORATE TRANSPARENCY ACT: DRAFTING TO ENSURE COMPLIANCE

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I. INTRODUCTION

The Corporate Transparency Act ("CTA") was adopted by Congress on January 1, 2021, as part of the National Defense Authorization Act, requiring the Financial Crimes Enforcement Network ("FinCEN") to establish and maintain a national registry of beneficial owners of entities subject to the CTA.[1] This paper serves to (1) summarize FinCEN's progress in implementing the objectives of the CTA, (2) outline the provisions contained in the CTA itself and the final and proposed rules FinCEN has issued at this time, and (3) address some areas of consideration for attorneys drafting documents.

II. CORPORATE TRANSPARENCY ACT RULEMAKING

The CTA tasks FinCEN with the implementation of three core objectives of the law: (1) establishing the procedure for the reporting of a company's information and that of its owners and control persons and company applicants to FinCEN; (2) maintaining a database of information received and developing protocols for authorized entities to access such information; and (3) revising Customer Due Diligence requirements for financial institutions to conform to the CTA to account for financial institutions' ability to access beneficial ownership information ("BOI").

In September 2022, FinCEN issued its final rule entitled "Beneficial Ownership Information Reporting Requirements", along with Supplementary Information pursuant to the CTA (collectively the "Final BOI Rule").[2] The Final BOI Rule goes into effect on January 1, 2024. The Department of the Treasury (the "Treasury") issued FAQs clarifying reporting requirements on March 24, 2023, and updated those FAQs on August 3, 2023. The provisions contained in the Final BOI Rule are discussed in Section III below.

In December 2022, FinCEN issued a notice of proposed rulemaking regarding access to the information reported under the CTA (the "Access NPRM").[3] According to the Treasury's Semiannual Agenda, FinCEN intends to issue a final rule entitled "Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities" in September 2023.[4] Presumably this final rule will address comments received in response to the Access NPRM. Section IV below briefly discusses the parties authorized to access BOI.

FinCEN is also required to issue rulemaking regarding customer due diligence programs for financial institutions.[5] No rules have been proposed at this time; however, the CTA requires the final rule be effective no later than January 1, 2025, and the Treasury's Semiannual Agenda indicates FinCEN will issue a proposed rule in November 2023.[6]

III. CORPORATE TRANSPARENCY ACT & THE FINAL BOI RULE

The CTA and the Final BOI Rule defines the types of entities subject to the reporting requirements of the CTA ("reporting companies"); the persons whose information must be reported due to their interest in the reporting company ("beneficial owners") or their involvement in the establishment of the reporting company ("company applicants"); the information that must be reported; deadlines for filing such information; and the penalties for failure to report.

A. Reporting Companies

Entities subject to the reporting requirements imposed by the CTA are referred to as reporting companies.

1. General Definition

Reporting companies are corporations, limited liability companies or any other entities either (1) created by the filing of a document with a Secretary of State or any similar office under the law of a State or Indian tribe, ("domestic reporting companies")[7] or (2) formed under the law of a foreign country and 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 ("foreign reporting companies").[8] The preamble to the proposed rules introduced before the Final BOI Rule was issued clarifies that limited partnerships, limited liability partnerships, and business trusts are considered to be reporting companies.[9]

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[1] *See* H.R. 6401-6403, 116th Cong. (2021) (enacted).
[2] *See* 87 Fed. Reg. 59,498-59,596 (Sept. 30, 2022).
[3] *See* 87 Fed. Reg. 77,404-77,457 (December 16, 2022).
[4] 88 Fed. Reg. 48,594 (July 27, 2023).
[5] *See* 31 U.S.C. §6403(d).
[6] 88 Fed. Reg. 48,593 (July 27, 2023).
[7] 31 C.F.R. §1010.380(c)(1)(i).
[8] 31 C.F.R. §1010.380(c)(1)(ii).
[9] 86 Fed. Reg. 69,938 (December 8, 2021).

2. Exemptions

Twenty-three types of entities are excluded from being considered reporting companies. These exemptions may be categorized as: (1) regulated entities that already report similar information to the federal government; (2) large operating companies that meet the criteria described below; (3) certain subsidiaries of exempt entities; (4) inactive entities and (5) entities exempted by the Secretary of the Treasury.

a. Regulated Entities

Most of the exemptions established by the CTA apply to entities that are already subject to similar reporting regimes under existing laws, including:

1) Certain **securities issuers**;[10]
2) Certain **domestic governmental authorities**;[11]
3) Certain types of **banks**;[12]
4) Federal or state **credit unions** as defined in section 101 of the Federal Credit Union Act;[13]
5) Any **bank holding company** 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;[14]
6) Certain types of **money transmitting** or **money services businesses**;[15]
7) 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;[16]
8) **Securities exchanges** or **clearing agencies** as defined in section 3 of the Securities Exchange Act of 1934, and that are registered under sections 6 and 17A of that Act;[17]
9) Certain other types of **entities registered with the Securities and Exchange Commission** under the Securities Exchange Act of 1934;[18]
10) Certain types of **investment companies** or **investment advisors**;[19]
11) Certain types of **venture capital fund advisers**;[20]
12) **Insurance companies** defined in section 2 of the Investment Company Act of 1940;[21]
13) State-licensed **insurance producers**;[22]
14) **Commodity Exchange Act registered entities**;[23]

[10] 31 C.F.R. §1010.380(c)(2)(i) ("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. 780(d)).").

[11] 31 C.F.R. §1010.380(c)(2)(ii). ("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.").

[12] 31 C.F.R. §1010.380(c)(2)(iii) ("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)).").

[13] 31 C.F.R. §1010.380(c)(2)(iv).

[14] 31 C.F.R. §1010.380(c)(2)(v).

[15] 31 C.F.R. §1010.380(c)(2)(vi) ("Any money transmitting business registered with FinCEN under 31 U.S.C. 5330, and any money services business registered with FinCEN under 31 C.F.R. 1022.380.").

[16] 31 C.F.R. §1010.380(c)(2)(vii).

[17] 31 C.F.R. §1010.380(c)(2)(viii).

[18] 31 C.F.R. §1010.380(c)(2)(ix) ("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.).").

[19] 31 C.F.R. §1010.380(c)(2)(xi) ("Any investment adviser that: (A) Is described in section 203(l) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3(l)); and (B) has filed Item 10, Schedule A, and Schedule B of Part 1A of Form ADV, or any successor thereto, with the Securities and Exchange Commission.").

[20] 31 C.F.R. §1010.380(c)(2)(xi) ("Any investment adviser that: (A) Is described in section 203(l) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3(l)); and (B) Has filed Item 10, Schedule A, and Schedule B of Part 1A of Form ADV, or any successor thereto, with the Securities and Exchange Commission.").

[21] 31 C.F.R. §1010.380(c)(2)(xii).

[22] 31 C.F.R. §1010.380(c)(2)(xiii) ("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.").

[23] 31 C.F.R. §1010.380(c)(2)(xiv) ("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) is: (1) a futures commission merchant, introducing broker, swap dealer, major swap participant,

15) Any **public accounting firm** registered in accordance with section 102 of the Sarbanes-Oxley Act of 2002;[24]
16) Certain types of **regulated public utilities**;[25]
17) Any **financial market utility** designated by the Financial Stability Oversight Council under section 804 of the Payment, Clearing, and Settlement Supervision Act of 2010;[26]
18) Certain **pooled investment vehicles**;[27]
19) Certain types of **tax-exempt entities**, including:

- 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;
- 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
- A trust described in paragraph (1) or (2) of section 4947(a) of the Code;[28] and

20) Entities **assisting a tax-exempt entity** described in 19 above.[29]

b. Large Operating Companies

The criteria for this exemption are as follows: (1) the company must employ more than 20 full-time employees in the United States; (2) the company must have a physical presence in the United States; and (3) the company must have filed tax returns in the U.S. reflecting gross receipts or sales of more than $5,000,000.[30] The test for large operating companies is discussed further below.

(1) Employee Requirement

This determination is made as of the date of the report and should only consider full-time employees of the company, not any subsidiaries or affiliates. The Final BOI Rule provides that "full-time employee" has "the meaning provided in 26 CFR 54.4980H-1(a) and 54.4980H-3."[31] Full-time status is determined using what FinCEN considers "well-known and well-established general business tax principles," which generally consider anyone employed an average of at least 30 service hours per week or 130 service hours per month, with adaptations for non-hourly workers to be a full-time employee.[32]

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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.").

[24] 31 C.F.R. §1010.380(c)(2)(xvi).

[25] 31 C.F.R. §1010.380(c)(2)(xvi) ("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.").

[26] 31 C.F.R. §1010.80(c)(2)(xvii) ("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).").

[27] 31 C.F.R. §1010.380(f)(7) ("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. 31 C.F.R. §1010.380(c)(2)(xviii). The term "pooled investment vehicle" means: (i) any investment company, as defined in section 3(a) of the Investment Company Act of 1940 (15 U.S.C. 80a-3(a)); or (ii) any company that: (A) would be an investment company under that section but for the exclusion provided from that definition by paragraph (1) or (7) of section 3(c) of that Act (15 U.S.C. 80a-3(c)); and (B) is identified by its legal name by the applicable investment adviser in its Form ADV (or successor form) filed with the Securities and Exchange Commission or will be so identified in the next annual updating amendment to Form ADV required to be filed by the applicable investment adviser pursuant to rule 204-1 under the Investment Advisers Act of 1940 (17 C.F.R. 275.204-1).").

[28] 31 U.S.C. §5336(a)(11)(B)(xix); *see also* 31 C.F.R. §1010.380(c)(2)(xix).

[29] 31 U.S.C. §5336(a)(11)(B)(xix) ("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; (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."); *see also* 31 C.F.R. §1010.380(c)(2)(xx). The term "lawfully admitted for permanent residence" has the meaning given the term in section 101(a) of the Immigration and Nationality Act (8 U.S.C. 1101(a)). 31 C.F.R. § §1010.380(f)(5). The term "United States person" has the meaning given the term in section 7701(a)(30) of the Internal Revenue Code of 1986. 31 C.F.R. §1010.380(f)(10).

[30] 31 C.F.R. §1010.380(c)(2)(xxi).

[31] 31 C.F.R. §1010.380(f)(1).

[32] 87 Fed. Reg. 59,543 (Sept. 30, 2022).

(2) Operating Presence in the U.S.

This requirement is met if an entity regularly conducts its business at a physical location in the United States that the entity owns or leases and that is physically distinct from the place of business of any other unaffiliated entity.[33] A residence will not meet this requirement.[34]

(3) Gross Receipts Greater than $5,000,000

The company must have filed a federal income tax or information return for the previous year demonstrating more than $5,000,000 reported as gross receipts or sales (net of returns or allowances), excluding any gross receipts or sales from sources outside the U.S.[35] Receipts and sales of other entities owned by the legal entity and through which the legal entity operates are included in the legal entity's gross receipts.

Note that this criterion requires a tax return to have been filed for the previous year, meaning that an entity formed on or after January 1, 2024, cannot be considered a large operating company for exemption purposes during its first year because it would not have filed the prior year's tax return necessary to meet the gross receipts portion of the test. While such an entity may eventually qualify for the exemption, it would be considered a reporting company required to file an initial report and its newly exempt status would also need to be reported.

c. Subsidiaries of Certain Exempt Entities

An entity controlled or wholly owned, directly or indirectly, by one or more entities described in 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19 or 21 above are exempt. Entities that are wholly owned or controlled by one or more Large Operating Companies are also exempt; [36] however, there is no corresponding exemption for the parent company or holding company of a Large Operating Company.

d. Inactive Entities

An inactive entity is any entity that: (1) was in existence on or before January 1, 2020; (2) is not engaged in active business; (3) is not owned by a foreign person[37], whether directly or indirectly, in whole or in part; (4) has not experienced a change in ownership in the preceding twelve-month period; (5) 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 (6) 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.[38]

e. Secretary of the Treasury Created Exemptions

The CTA authorizes the Secretary of the Treasury to exempt entities or classes of entities if requiring BOI from the entity or class or entities would not serve the public interest or would not be highly useful in the government's efforts to "detect, prevent or prosecute money laundering, the financing of terrorism, proliferation finance, serious tax fraud or other crimes."[39] Such a decision by the Secretary of the Treasury would require written concurrence of the Attorney General and the Secretary of Homeland Security.

When issuing the Final Rulemaking, FinCEN declined to create any additional exemptions due to the concern that doing so would allow illicit actors to evade reporting requirements.[40]

B. Beneficial Owners

Beneficial owners are individuals who, directly or indirectly (1) own or control at least 25% of the ownership interests of a reporting company or (2) exercise substantial control over the reporting company, subject to certain exceptions.[41]

[33] 31 C.F.R. §1010.380(f)(6).
[34] 87 Fed. Reg. 59,543 (Sept. 30, 2022).
[35] 31 C.F.R. §1010.380(c)(2)(xxi)(C).
[36] 31 C.F.R. §1010.380(c)(2)(xxii).
[37] The term "foreign person" means a person who is not a United States person. 31 C.F.R. §1010.380(f)(3).
[38] 31 C.F.R. §1010.380(c)(2)(xxiii).
[39] 31 U.S.C. §5336(a)(11)(B)(xxiv).
[40] 87 Fed. Reg. 59,540 (Sept. 30, 2022).
[41] 31 U.S.C. §5336(a)(3).

1. Individuals with Ownership or Control of an Ownership Interest

The Final BOI Rule provides definitions of ownership interests, ways in which ownership interests may be held or controlled and rules for calculating an individual's ownership percentage.

a. Ownership Interests

Ownership interests for purposes of the CTA are very broadly defined and include:

1) Any equity, stock, or similar instrument; preorganization certificate or subscription; or transferable 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; 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;
2) Any capital or profit interest in an entity;
3) Any instrument convertible, with or without consideration, into the equity described above, any future on any such instrument, or any warrant or right to purchase, sell, or subscribe to such share or interest, regardless of whether characterized as debt;
4) Any put, call, straddle, or other option or privilege of buying or selling any of such "equity" described above, without being bound to do so, except to the extent that such option or privilege is created and held by a third party or third parties without the knowledge or involvement of the reporting company; or
5) Any other instrument, contract, arrangement, understanding, relationship, or mechanism used to establish ownership.[42]

b. Ownership or Control of an 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:

1) joint ownership with one or more other persons of an undivided interest in such ownership interest;
2) through another individual acting as a nominee, intermediary, custodian, or agent on behalf of such individual;
3) with regard to a trust or similar arrangement that holds such ownership interest:
    - as a trustee of the trust, or other individual (if any),[43] with the authority to dispose of trust assets;
    - 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
    - as a grantor or settlor who has the right to revoke the trust or otherwise withdraw the assets of the trust; or
4) through ownership or control of one or more intermediary entities, or ownership or control of the ownership interests of any such entities, that separately or collectively own or control the ownership interests of the reporting company.[44]

These attribution provisions may result in multiple individuals being considered beneficial owners with respect to the same ownership interest. For instance, if spouses own an interest in an entity as community property, ownership of that interest would be attributed to both spouses. Trust arrangements may also result in multiple individuals having ownership of the same interest.[45]

c. Rules for Calculating Percentage of Ownership Interest.

In determining whether an individual owns or controls at least 25% of the ownership interests of a reporting company, the total ownership interests that an individual owns or controls, directly or indirectly, are calculated as a percentage of the total outstanding ownership interests of the reporting company as follows:

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[42] 31 C.F.R. §1010.380(d)(2)(i).

[43] The use of "other individual" in addition to a trustee implies that persons serving as trust investment directors, advisors, committee members or trust protectors or persons holding veto powers over certain actions of the trustee could be deemed to have an ownership interest. FinCEN acknowledged this possibility in the Supplementary information when adopting the Final Rule. 87 Fed. Reg. 59,532 (Sept. 30, 2022).

[44] 31 C.F.R. §1010.380(d)(2)(ii).

[45] 87 Fed. Reg. 59,532 (Sept. 30, 2022).

(1) Time of Determination

Ownership interests of the individual are calculated at the present time (meaning the date of the report), and any options or similar interests of the individual are treated as exercised.[46] The present value of a contingent interest is not relevant to the calculation of percentage of ownership interests.[47]

(2) Partnerships, Etc.

For reporting companies that issue capital or profit interests (including entities treated as partnerships for federal income tax purposes), the individual's ownership interests are the individual's capital and profit interests in the entity, calculated as a percentage of the total outstanding capital and profit interests of the entity.[48]

(3) Corporations, Etc.

For corporations, entities treated as corporations for federal income tax purposes, and other reporting companies that issue shares of stock, the applicable percentage is the greater of: (a) the total combined voting power of all classes of ownership interests of the individual as a percentage of total outstanding voting power of all classes of ownership interests entitled to vote, or (b) the total combined value of the ownership interests of the individual as a percentage of the total outstanding value of all classes of ownership interests.[49]

(4) Cannot Perform Calculations with Reasonable Certainty

If the facts and circumstances do not permit the calculations described above to be performed with reasonable certainty, any individual who owns or controls 25% or more of any class or type of ownership interest of a reporting company is deemed to own or control 25% or more of the ownership interests of the reporting company.[50]

2. Individuals with Substantial Control Over Reporting Company

A person with substantial control over a reporting company will be considered a beneficial owner under the CTA even if that person does not own an ownership interest in the reporting company. The Final BOI Rule defines substantial control and the ways it may be exercised.

a. Substantial Control

The Final BOI Rule describes three indicators of substantial control, along with a catch-all to address novel situations with the goal of requiring a reporting Company to identify the key individuals who stand behind the Reporting company and direct its action. The first indicator identifies persons with nominal authority while the second and third indicators identify persons with functional authority.[51]

(1) Senior Officers

A person exercises substantial control over a Reporting company if the individual serves as a senior officer.[52] A senior officer 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.[53] FinCEN intends for this to be a bright-line rule.[54]

(2) Authority to Appoint or Remove

A person has substantial control over a reporting company if the individual has authority over appointment or removal of any senior officer or a majority of the board of directors (or similar body).[55]

(3) Important Decisions

A person has substantial control over a reporting company if the individual directs, determines, or has substantial influence over important decisions made by the reporting company, including decisions regarding:

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[46] 31 C.F.R. §1010.380(d)(2)(iii)(A).
[47] 87 Fed. Reg. 59,532 (Sept. 30, 2022).
[48] 31 C.F.R. §1010.380(d)(2)(iii)(B).
[49] 31 C.F.R. §1010.380(d)(2)(iii)(C).
[50] 31 C.F.R. §1010.380(d)(2)(iii)(D).
[51] 87 Fed. Reg. 59,526 (Sept. 30, 2022).
[52] 31 C.F.R. §1010.380(d)(1)(i)(A).
[53] 31 C.F.R. §1010.380(f)(8).
[54] 87 Fed. Reg. 59,526 (Sept. 30, 2022).
[55] 31 C.F.R. §1010.380(d)(1)(i)(B).

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, issuance 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; or
7) amendments of any substantial governance documents of the reporting company, including articles of incorporation or similar formation documents, bylaws, and significant policies or procedures.[56]

This list is not intended to be exhaustive, but rather to provide examples of the types of company decisions FinCEN considers important to guide reporting companies.[57]

The Supplementary Information includes a discussion of scenarios in which an individual would or would not be considered to have substantial influence over important decisions. The first situation described imagines a sanctioned individual who directs an advisor to form an entity but to leave the sanctioned person out of the formation documents. The sanctioned individual is pulling the advisor's strings and would therefore have substantial control. Another example is an entity structured so that multiple individuals have equal authority over the entity's decisions. In that case, each of those individuals would be considered to have substantial influence over the decisions even though no single person directs those decisions or has the ultimate authority over them.[58]

Tax or legal professionals "performing ordinary, arms-length advisory or other third-party professional services" would not be considered to have the power to direct or determine or have substantial influence over a reporting company's important decisions because "the senior officers or board members would remain primarily responsible for making decisions based on the external input provided by such third-party service providers."[59]

(4) Catch-All

The Final BOI Rule includes a catch-all provision requiring information be reported about any individuals with any other form of substantial control over the reporting company.[60] FinCEN recognizes that control may be exercised in "novel and less conventional ways" and still be substantial. The catch-all is meant to prevent sophisticated bad actors from getting creative to evade reporting requirements.[61]

b. Ways an Individual May Exercise Substantial Control

An individual may directly or indirectly, including as a trustee of a trust or similar arrangement, exercise substantial control over a reporting company through:

1) Board representation;
2) Ownership or control of the majority of the voting power or voting rights of the reporting company;
3) Rights associated with a financing arrangement or interest in a company;
4) Control over one or more intermediary entities that separately or collectively exercise substantial control over a reporting company;
5) Arrangements or financial or business relationships, whether formal or informal, with other individuals or entities acting as nominees; or
6) Any other contract, arrangement, understanding, relationship, or otherwise.[62]

3. Exceptions

The term "beneficial owner" does not include:

[56] 31 C.F.R. §1010.380(d)(1)(i)(C).
[57] 87 Fed. Reg. 59,527 (Sept. 30, 2022).
[58] *Id.*
[59] *Id.*
[60] 31 C.F.R. §1010.380(d)(1)(i)(D).
[61] 87 Fed. Reg. 59,527 (Sept. 30, 2022).
[62] 31 C.F.R. §1010.380(d)(1)(ii).

a. Minors

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;[63]

b. Individual Acting on Behalf of Another Individual

An individual acting as a nominee, intermediary, custodian, or agent on behalf of another individual.[64]

c. Employee of Reporting Company

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,[65] provided that such person is not a senior officer.[66]

d. Inheritance

An individual whose only interest in a reporting company is a future interest through a right of inheritance.[67] This exception would only apply to persons holding a future interest through a right of inheritance. The Supplementary Information provides that "once an ownership interest is inherited and comes to be owned by an individual, that individual has the same relationship to an entity as any other individual who acquires an ownership interest through another means."[68]

e. Creditors

A creditor of a reporting company is not considered a beneficial owner if its rights or interests in the reporting company are limited to "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."[69]

C. Company Applicants

Company applicants include: (a) the individual who directly files the document that creates, or first registers, the reporting company, and (b) if more than one person is involved with filing of the document, the individual who is primarily responsible for directing or controlling the filing.[70] The number of company applicants is limited to two individuals, being the person who made the filing and the person who is primarily responsible for directing the filing.

If an attorney directs a paralegal to form an entity and the paralegal uses a business formation service, whether the paralegal is a company applicant likely depends on the level of the business formation service's involvement. The Supplementary Information provides that when a business formation service provides "software, online tools or generally applicable written guidance, the employees of such service are not company applicants [but] employees of such services may be company applicants if they are personally involved in the filing of a document to form a particular company."[71] With that in mind, a paralegal who filed formation documents using a business formation service's online tool would likely be considered a company applicant. On the other hand, a paralegal who faxed a form that the service then submitted to the Secretary of State would likely not be considered a company applicant; rather, the employee of the service would be a company applicant. In either case, the attorney would be the other company applicant because they are the person primarily responsible for directing the filing.

D. Content of the Report

The initial report of a reporting company formed or registered on or after January 1, 2024, must contain the reporting company information, beneficial owner information and company applicant information described below.[72] The initial report of a reporting company formed before January 1, 2024, must contain the reporting company

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[63] 31 U.S.C. §5336(a)(3)(b)(i); 31 C.F.R. §1010.380(d)(3)(i).
[64] 31 U.S.C. §5336(a)(3)(b)(ii); 31 C.F.R. §1010.380(d)(3)(ii).
[65] 31 U.S.C. §5336(a)(3)(b)(iii); 31 C.F.R. §1010.380(d)(3)(iii).
[66] 31 C.F.R. §1010.380(d)(3)(iii).
[67] 31 U.S.C. §5336(a)(3)(b)(iv); 31 C.F.R. §1010.380(d)(3)(iv).
[68] 87 Fed. Reg. 59,535 (Sept. 30, 2022).
[69] 31 C.F.R. §1010.380(d)(3)(v).
[70] 31 C.F.R. §1010.380(e).
[71] 87 Fed. Reg. 59,536 (Sept. 30, 2022).
[72] 31 C.F.R. §1010.380(b)(1).

information and the beneficial owner information described, but not company applicant information.[73]

1. Reporting Company Information
   The following information regarding the reporting company must be reported:

   1) the full legal name of the reporting company;
   2) any trade name or "doing business as" name of the reporting company;
   3) a complete current address consisting of (a) the street address of the principal place of business of the reporting company in the United States and (b) in all other cases, the street address of the primary location in the United States where the reporting company conducts business.[74] This requirement is not satisfied by supplying a P.O. Box or the address of a third party, such as a company formation agent;[75]
   4) the jurisdiction of formation (State, Tribal, or foreign);
   5) for a foreign reporting company, the State or Tribal jurisdiction where such company first registers; and
   6) the Internal Revenue Service Taxpayer Identification Number (TIN) (including an Employer Identification Number (EIN)), or where a foreign reporting company has not been issued a TIN, a tax identification number issued by a foreign jurisdiction and the name of such jurisdiction.[76]

2. Beneficial Owner & Company Applicant Information
   A reporting company must provide the following for each beneficial owner and, if applicable, company applicant:

   1) full legal name;
   2) date of birth;[77]
   3) complete current address (if a Company Applicant forms or registers entities in the course of the Company Applicant's business, the street address of such business may be used;[78] otherwise, the individual's residential street address is required[79]);
   4) a unique identifying number and the issuing jurisdiction from one of the following documents:

      - a non-expired passport issued to an individual by the United States government;
      - a non-expired identification document issued to the individual by a State, local government, or Indian tribe for the purpose of identifying that individual;
      - a non-expired driver's license issued to the individual by a State; or
      - only if the individual does not have a document described above, a non-expired passport issued by a foreign government ("Acceptable Identification Document"); [80] and

   5) an image of the document from which the unique identifying number was obtained, with the individual's photograph.[81]

The BOI Report Summary of Data Fields published in January, 2023, seems to indicate that reporting companies using the online system would be permitted say that the identity of the company applicant is "Unknown" or to select "Unknown" for all of the required fields with respect to a particular company applicant or beneficial owner.[82] This came as a surprise to many and has been vehemently opposed by those in favor of the CTA. It has been speculated that FinCEN will issue revised guidance to eliminate this option, but as of September 15th no additional instruction has been published.

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[73] 31 C.F.R. §1010.380(b)(2)(iv).
[74] 31 C.F.R. §1010.380(b)(1)(i)(C).
[75] 87 Fed. Reg. 59,516 (Sept. 30, 2022).
[76] 31 C.F.R. §1010.380(b)(1)(i).
[77] 31 U.S.C. §5336(b)(2); 31 C.F.R. §1010.380(b)(1)(ii).
[78] 31 C.F.R. §1010.380(b)(1)(ii)(C)(1).
[79] 31 C.F.R. §1010.380(b)(1)(ii)(C)(2). FinCEN recognizes that there may be situations in which the individual feels unsafe disclosing their residential street address, such as victims of domestic violence or other violent crimes. If general future guidance does not address this issue, FinCEN will review each situation on a case-by case basis.
[80] 31 U.S.C. §5336(a)(1); 31 C.F.R. §1010.380(b)(1)(ii)(D).
[81] 31 C.F.R. §1010.380(b)(1)(ii)(E).
[82] 88 Fed. Reg. 2763–2764 (January 17, 2023).

3. Special Reporting Rules

a. Reporting Company Owned by Exempt Entity

If an individual is considered a beneficial owner of a reporting company due solely to their ownership interest in an exempt entity with a direct or indirect ownership interest in the reporting company, the report may name the exempt entit(ies) instead of providing the information required above with respect to such beneficial owner.[83]

b. Minor Beneficial Owners

If a minor would otherwise be considered a beneficial owner, the company may report BOI for the minor's parent or legal guardian.[84]

c. Foreign Pooled Investment Vehicles

Pooled investment vehicles formed under the laws of a foreign country are considered reporting companies, except the report is only required to include BOI for one individual who exercises substantial control over the entity. If more than one person exercises substantial control over the entity, the entity must report BOI with respect to the individual with the greatest authority over strategic management of the entity.[85]

d. Company Applicant Information

A reporting company created or registered before January 1, 2024, is not required to include Company Applicant information in its reports.[86]

4. FinCEN Identifiers

The CTA authorizes individuals and reporting companies to obtain a "FinCEN Identifier" to use in lieu of BOI.[87] The use of a FinCEN Identifier may be more attractive for individuals with privacy concerns. Anyone who has obtained a FinCEN identifier must update or correct information reported within the same timeframe and in the same manner as required for updated or corrected BOI reports, thereby shifting the burden of updating or correcting to the individual.[88]

An individual may obtain a FinCEN identifier by submitting an application containing the information that would normally be required in a BOI report,[89] along with a certification that the information furnished is true, correct and complete.[90]

A reporting company may also obtain a FinCEN identifier by submitting an application at or after the time it submits its initial report.[91] Provisions proposed in the Proposed Access Rule severely limit the potential use of reporting companies' FinCEN Identifiers. While the CTA states that when an entity is a partial owner of a reporting company the reporting company can report that entity's FinCEN Identifier instead of the BOI for the entity's beneficial owners,[92] the Proposed Access Rule restricts the use of an entity's FinCEN Identifier to cases where the beneficial owners of the entity are the same as those of the reporting company.[93]

E. Reporting Timeline

1. Initial Report

The deadline for filing a reporting company's first BOI report depends on when the reporting company was created or registered, or in the case of an exempt entity, when the reporting company no longer qualifies for any exemption.

a. Reporting Companies Formed on or After January 1, 2024

A reporting company formed or registered on or after January 1, 2024 must submit its initial BOI report within 30 calendar days of the earlier of: (1) the date on which the reporting company receives actual notice that its creation (or registration) has become effective or (2) the date on which the 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 or the

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[83] 31 C.F.R. §1010.380(b)(2)(i).
[84] 31 C.F.R. §1010.380(b)(2)(ii).
[85] 31 C.F.R. §1010.380(b)(2)(iii).
[86] 31 C.F.R. §1010.380(b)(2)(iv).
[87] 31 U.S.C. §5336(b)(4)(ii)(A).
[88] 31 C.F.R. §1010.380(b)(4)(iii).
[89] 31 C.F.R. §1010.380(b)(4)(i)(A).
[90] 88 Fed. Reg. 2764 (January 17, 2023).
[91] 31 C.F.R. §1010.380(b)(4)(i)(B).
[92] 31 U.S.C. §5336(b)(3)(C).
[93] Proposed 31 C.F.R. §1010.380(b)(4)(ii)(B).

foreign reporting company has been registered.[94]

b. Reporting Companies Formed Before January 1, 2024

A reporting company created or registered before January 1, 2024, will have until January 1, 2025, to file its initial BOI report.[95]

c. Previously Exempt Entities

Entities that were exempt from reporting company status but no longer meet the criteria for any exemption must file a BOI report within 30 calendar days after the date that it no longer meets the criteria for any exemptions.[96] However, in the case of a tax exempt entity that ceases to be described in section 501(c) and exempt from tax under section 501(a), the entity shall be considered to be exempted from being a reporting company for the 180-day period beginning on the date of the loss of such tax-exempt status.[97]

2. Updates

An updated report must be filed within 30 calendar days from the occurrence of any of the following:

a. Company or Beneficial Ownership Change

Any change in information previously submitted to FinCEN concerning the reporting company or its beneficial owners, including changes with respect to the identity of a beneficial owner or the information reported for a beneficial owner requires the filing of an updated report.[98]

b. Company Becomes Exempt After Filing Initial Report

If a reporting company meets the criteria for an exemption after it has filed its initial report, this is deemed to be a change with respect to information previously submitted to FinCEN and the entity must file an updated report.[99]

c. Inherited Beneficial Ownership

An updated report must be filed to identify new beneficial owners following the death of a beneficial owner if the deceased individual was a beneficial owner by virtue of property interests or other rights subject to transfer upon death, not solely because the deceased beneficial owner owned or controlled 25% of the reporting company's ownership interests.[100] Ownership interests transferred by reason of a beneficial owner's death are deemed to occur when the estate of the beneficial owner is settled through operation of the intestacy laws of a jurisdiction within the U.S. or through a testamentary disposition. The updated report will identify the new beneficial owners to the extent necessary.[101] The successors to a deceased beneficial owner may or may not be beneficial owners themselves.

d. Minor Reaches Age of Majority

If the company previously reported information for a minor child's parent or guardian in lieu of the minor's information, a change requiring an update will be deemed to occur when the minor child reaches the age of majority.[102] The age of majority is determined according to the laws of the State or Indian tribe in which a domestic reporting company is created or a foreign reporting company is first registered.[103]

e. Identifying Document Change

A change is deemed to occur with respect to an image of an identifying document when the name, date of birth, address, or unique identifying number on such document changes.[104] Other changes in the information contained in an identifying document, such as expiration dates or personal characteristics (i.e., height, eye color, etc.), do not require

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[94] 31 C.F.R. §1010.380(a)(1).
[95] 31 C.F.R. §1010.380(a)(1)(iii).
[96] 31 C.F.R. §1010.380(a)(1)(iv).
[97] 31 C.F.R. §1010.380(c)(2)(xix)(A).
[98] 31 C.F.R. §1010.380(a)(2)(i).
[99] 31 C.F.R. §1010.380(a)(2)(ii).
[100] 87 Fed. Reg. 59,513 (Sept. 30, 2022).
[101] 31 C.F.R. §1010.380(a)(2)(iii).
[102] 31 C.F.R. §1010.380(a)(2)(iv).
[103] 31 C.F.R. §1010.380(d)(3)(i).
[104] 31 C.F.R. §1010.380(a)(2)(v).

submission of an updated image.[105]

The logistics of updating the image reported when identifying documents change may make it more desirable to use a passport rather than a driver's license when possible. For instance, an updated BOI report is due within 30 days of a beneficial owner moving to a new address; however, it is very unlikely that they will request and receive a new driver's license in that amount of time. If relying on a driver's license, an additional update would be required within 30 days of receiving the new license. Passports do not reflect an individual's address and would not result in this issue. Additionally, passports do not expire as often.

3. Corrections

A corrected report is due within 30 days after the date on which the reporting company becomes aware or has reason to know of the inaccuracy.[106]

F. Filing the Report

FinCEN will establish the form of the reports required, but as of September 15, 2023, no final guidance has been provided.

1. Certification

Each person filing a report shall certify that the report is true, correct and complete.[107] This may complicate the option of an attorney filing a report on behalf of an entity or even completing the report for the entity itself to file. It is not yet clear whether the reporting mechanism will be a web-based form like the IRS' website for EIN applications or simply a portal to which completed forms may be uploaded.

2. Electronic Filing

FinCEN has been tasked with creating an online database to collect, store and maintain BOI. The Supplementary Information refers to the database FinCEN is developing as the Beneficial Ownership Secure System or BOSS. FinCEN expects BOI reports to be submitted electronically but is considering how to address certain circumstances in which filing in paper form may be permitted.[108] The Access NPRM maintained that the initial build of the cloud-based infrastructure was complete at that time and the target date for the system to begin accepting BOI reports is January 1, 2024.[109]

G. Penalties

The CTA imposes civil and criminal penalties for reporting violations and unauthorized use or disclosure of BOI.

1. Reporting Violations

The CTA provides that it is unlawful for any person to willfully provide, or attempt to provide false or fraudulent reports or willfully fail to report complete or updated information, whether directly or indirectly, including by providing such information to another person for purposes of a report.[110] A person is considered to have failed to report BOI if (1) the entity is required to report the information; (2) the reporting company fails to report the information and (3) the person either causes the failure or is a senior officer of the entity at the time of the failure.[111] Senior officers are any individuals holding the position or exercising the authority of:

1) President
2) Chief financial officer
3) General counsel
4) Chief executive officer
5) Chief operating officer; or
6) Any other officer, regardless or official title, who performs a similar function.[112]

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[105] 87 Fed. Reg. 59,513 (Sept. 30, 2022).
[106] 31 C.F.R. §1010.380(a)(3).
[107] 31 C.F.R. §1010.380(b).
[108] 87 Fed. Reg. 59,508 (Sept. 30, 2022).
[109] 87 Fed. Reg. 77,407 (December 16, 2022).
[110] 31 U.S.C. §5336(h)(1); 31 C.F.R. §1010.380(g).
[111] 31 C.F.R. §1010.380(g)(4)
[112] 31 C.F.R. §1010.380(f)(8).

FinCEN declined to add protections for reporting violations due to negligence or other non-willful conduct; rather, addressing the issue in the Supplementary Information stating that "FinCEN will consider all facts relevant to a determination of willfulness when deciding whether to pursue enforcement action."[113]

2. Unauthorized Disclosure

Except as authorized elsewhere in the CTA, it is unlawful for any person to knowingly disclose or knowingly use the BOI obtained by the person through (a) a report submitted to FinCEN or (b) a disclosure made by FinCEN.[114]

3. Penalties

a. Reporting Violations

(1) Civil and Criminal Penalties

The CTA authorizes a civil penalty of up to $500 for each day that the violation continues or has not been remedied and a fine of up to $10,000 and/or imprisonment for not more than two years.[115]

(2) Safe Harbor

The CTA creates a safe harbor for persons who have reason to believe any report submitted by the person contains inaccurate information if they submit a report containing corrected information no later than 90 days after the date the incorrect report was submitted.[116] The safe harbor exempts any person who meets the requirements from penalties for reporting violations unless the person, at the time the incorrect report was submitted, acts for the purpose of evading the reporting requirements and had actual knowledge that any information contained in the report is inaccurate.[117]

b. Unauthorized Disclosure

The CTA also imposes penalties for the unauthorized use or disclosure of BOI of not more than $500 each day the violation continues and a fine of not more than $250,000 and/or up to five years' imprisonment.[118] If the unauthorized disclosure or use violation occurs while violating another federal law or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period, the CTA imposes a fine of not more than $500,000 and/or ten years' imprisonment.[119]

IV. ACCESSING BENEFICIAL OWNER INFORMATION

The database established pursuant to the CTA will not be accessible by the public. The CTA authorizes FinCEN to disclose BOI to the following categories of recipients only upon receipt of a request:

A. Federal Agencies

BOI may be disclosed to federal agencies engaged in national security, intelligence or law enforcement activity if the requested information is for use in the furtherance of such activity.[120]

B. Domestic Law Enforcement

State, local, or Tribal law enforcement agency if a court has authorized such agency to seek the information in a criminal or civil investigation.[121]

C. Foreign Law Enforcement

FinCEN may disclose BOI to a Federal agency in response to such Federal agency's request on behalf of foreign law enforcement agencies, judges, prosecutors, central authorities, and competent authorities ("Foreign Requesters") for transmission to the Foreign Requester who initiated the request if the following conditions are met: (1) the request is for assistance in a law enforcement investigation or for a national security or intelligence activity that is authorized under the laws of the foreign country and (2) made either (a) under an international treaty, agreement or convention or (b) by an official request made by law enforcement, judicial, or prosecutorial authorities in a trusted foreign country

[113] 87 Fed. Reg. 59,546 (Sept. 30, 2022).
[114] 31 U.S.C. §5336(h)(2).
[115] 31 U.S.C. §5336(h)(3)(A).
[116] 31 U.S.C. §5336(h)(3)(C)(i)(I).
[117] 31 U.S.C. §5336(h)(3)(C)(i)(II).
[118] 31 U.S.C. §5336(h)(3)(B).
[119] 31 U.S.C. §5336(h)(3)(B)(ii)(II).
[120] 31 U.S.C. §5336(c)(2)(B)(i)(I).
[121] 31 U.S.C. §5336(c)(2)(B)(i)(II).

(when no international treaty, agreement, or convention is available).[122]

D. Financial Institutions

Financial institutions using BOI to facilitate compliance with customer due diligence requirements under applicable law with the reporting company's consent.[123]

E. Federal Regulators

Federal functional regulators and other appropriate regulatory agencies acting in a supervisory capacity assessing financial institutions for compliance with customer due diligence requirements.[124]

F. Department of the Treasury

The CTA authorizes the Treasury personnel to access BOI for tax administration purposes or if their official duties require inspection or disclosure.

G. Notice of Proposed Rulemaking

The Access NPRM issued in December 2022 established the procedures FinCEN has proposed authorized users of BOI will follow to obtain access to BOI. FinCEN received comments from various organizations, including government representatives, criticizing the barriers and limitations to access created by the Access NPRM.[125] Other organizations submitted comments requesting FinCEN authorize members of their industry to access BOI.[126] No additional guidance has been made available by FinCEN at this time.

V. DRAFTING AND PRACTICAL CONSIDERATIONS

The Supplementary Information to the Final Rule makes it clear that FinCEN believes that it is ultimately the reporting company's obligation to ensure BOI reports are filed; however, practically speaking, an individual will be responsible for making the report and only individuals will be subject to penalties for the failure to do so.[127]

A. Company Documents

1. <u>Identify a Single Individual Responsible for Filing Reports</u>

Consider adding provisions requiring the entity's governing authority to name an individual to serve as the reporting person for the company. We have referred to this person as the Compliance Officer in the sample materials.[128] Ideally, this person would be technologically savvy enough to file reports and updates in the online system and to store previously filed reports and beneficial owner information in a secure manner. Even entities who envision themselves as being exempt may want to designate an individual whose responsibility it is to examine the entity's exemption status.

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122 31 U.S.C. §5336(c)(2)(B)(ii); Proposed 31 C.F.R. §1010.955(b)(3).

123 31 U.S.C. §5336(c)(2)(B)(iii).

124 31 U.S.C. §5336(c)(2)(B)(iv).

125 *See* Press Release, Senator Sheldon Whitehouse, Whitehouse, Grassley, Wyden, Rubio, Warren Push FinCEN to Improve Implementation of Corporate Transparency Act (March 18, 2023), available at https://www.whitehouse.senate.gov/news/release/whitehouse-grassley-wyden-rubio-warren-push-fincen-to-improve-implementation-of-corporate-transparency-act (requesting the relaxation and automation of BOI access requests to ensure timely and effective access and ensuring Treasury's Office of Inspector General and the Comptroller General of the United States have access to the directory); *see also* Press Release, National Association of Attorneys General (NAAG), Coalition of Attorneys General Urge Federal Treasury Bureau to Provide Timely Corporate Transparency Information to State, Local Entities, available at https://www.naag.org/press-releases/coalition-of-attorneys-general-urge-federal-treasury-bureau-to-provide-timely-corporate-transparency-information-to-state-local-entities/ (criticizing the steps non-federal law enforcement agencies would be required to take to obtain access to BOI); *see also* Joint ABA and State Bankers Association Letter to FinCEN on Beneficial Ownership Information Access and Safeguards (February 14, 2023), available at https://www.aba.com/advocacy/policy-analysis/joint-letter-to-fincen-on-boi-access.

126 *See* Letter from American Land Title Association to Acting Director Das (February 14, 2023), available at https://www.alta.org/file.cfm?name=ALTA-Comment---FinCEN-BOI-Access

127 *See* 87 Fed. Reg. 59,546 (Sept. 30, 2022).

128 Appendix A; Appendix B; *See* also Jonathan B. Wilson, The Corporate Transparency Act: What You Need to Know, AMERICAN LAW INSTITUTE CONTINUING LEGAL EDUCATION (Presentation Date: Feb. 10, 2023), https://www.ali-cle.org/course/Preparing-for-the-Corporate-Transparency-Act-Steps-to-Take-VCEA1110.

2. Empower the Individual to Determine the Identity of Beneficial Owners and Make Reports

The Compliance Officer should have the authority to take whatever steps necessary to gather the information they need to determine who the beneficial owners of the entity are.

An entity's governing documents should obligate its members, shareholders, partners, or control persons to provide their BOI to the Compliance Officer along with the BOI for the underlying owners in the case of an entity or trust. These persons should also be required to provide any documentation the reporting company needs to establish the identity of the beneficial owners, including ownership charts, underlying company ownership documents, trust documents, employment, or management contracts, etc.

If a person does not believe themselves to be a beneficial owner required to report BOI, discretion should be given to the Compliance Officer in the interest of expediently resolving the question. While the threshold for reporting a beneficial ownership is a twenty-five percent interest in the reporting company, a company may wish to require a lesser threshold for reporting to the Compliance Officer in its governing documents to ensure that the Compliance Officer has all available information for determination of both beneficial owners and those with substantial control.

Confidentiality clauses contained in a company's governing documents may need to be relaxed with respect to the Compliance Officer to allow them to make the necessary filings, possibly against the wishes of an individual who does not wish to report their BOI but whom the Compliance Officer has determined is a beneficial owner required to be reported. The Compliance Officer should also be permitted to seek legal advice regarding the identity of beneficial owners or the entity's status as a reporting company.

3. Regular Communication Regarding CTA Compliance

The appointment of a Compliance Officer is not a requirement of the CTA and there is no provision obligating the individual who files the report with FinCEN to communicate with other persons involved with the reporting company about such reporting activity. Our sample materials envision an annual update requirement for the dual purpose of holding the Compliance Officer accountable and reminding beneficial owners of their ongoing obligation to report changes to the Compliance Officer.

4. Require Compliance Officer to Safeguard Information

The Compliance Officer should retain copies of BOI reports and proof of filing. It is unclear whether a procedure will be established for companies to request transcripts of previously filed reports or who would be authorized to receive such information on the company's behalf. It may be up to the company to maintain its own record of what has been filed. As these reports will contain sensitive data, the method used to store copies should protect such information to the extent possible. The sample materials leave the methods employed to safeguard CTA data up to the Compliance Officer and company management's discretion; however, a particular company may want to establish specific guidelines for the Compliance Officer to follow when transmitting and/or storing BOI.

5. Updating Beneficial Owner Information

Governing documents should also require notification of any changes in BOI within a specified period of time. A reporting company has thirty days from a change of information to file updated BOI. Governing documents should contain a shorter period of time to ensure compliance.

6. Failure to Provide Required Information

Governing documents may want to provide for contractual remedies if a member or person with substantial control refuses to provide the necessary information, these may include economic sanctions, voting sanctions, and/or removal rights. Such sanctions may include:

- A suspension of rights to distributions;
- A suspension of rights to vote on matter to which the owner is otherwise entitled to vote; and/or
- An option for the reporting company to buy back the ownership interest.

7. Indemnification of the Compliance Officer

To the extent a beneficial owner provides false information or fails to provide information, such owner should be obligated to indemnify and defend the company and the Compliance Officer, to the extent the company or Compliance Officer has any liability for the failure.

As is often the case with the collection of personal information, there is a threat that such information will fall into the wrong hands. Attorneys may wish to create a standard by which the information must be maintained and provide a safe harbor for the company and Compliance Officer for any security breach so long as that standard is met.

B. Other Transactional Documents

In addition to the need to revise governing documents, additional provisions may need to be added to purchase agreements and conveyance documents. As discussed above, the obligation for ensuring compliance with the CTA is with the reporting company but the liability for failure to do so may be imposed on individuals. While it is unlikely that such liability would continue after the sale of an ownership interest, for purposes of providing notice and protection to both parties, attorneys may wish to address the need to comply with the CTA in purchase agreements and assignments of interest.

In purchase agreements, sellers may wish to obtain covenants from a buyer that the buyer will provide all required BOI to FinCEN upon the closing of the sale. Buyers may wish to obtain a representation and warranty that the target company of a purchase agreement has previously and is currently in compliance with CTA reporting obligations. Additionally, both sellers and buyers may wish to be indemnified to the extent either party's failure to comply with the CTA results in liability for the other party. Included in the sample materials are covenants and representations and warranties addressing these concerns.

In assignment of interest documents, an assignor may wish to provide notice to the assignee that the assignment triggers a reporting obligation to FinCEN under the CTA and require that the assignment be reported to the subject company within a certain time period. Included in the sample materials is language to include in assignment of interest documents addressing these concerns.

C. Client Relationship Considerations

1. Notifying Previous Clients

While attorneys have no affirmative duty to notify prior clients of changes in the law, you may decide to do so out of courtesy. Included in the sample materials is an example letter to send to prior or existing clients of their obligations with respect to entities already in existence on January 1, 2024. Due to the lack of practical guidance and delay of access to reporting mechanisms until the effective date, it is difficult to provide concrete advice to clients with respect to the steps they should take to meet reporting obligations.

2. Notifying Clients Forming Entities on or After January 1, 2024

The sample materials include a notice of new CTA requirements and a client acknowledgment of receipt of such notice. Because the timeframe to report is short and the penalties for failure to report are harsh, attorneys may want to delay filing with the Secretary of State until the client has provided all of the information required to be reported, including images of qualifying documents. This would allow the attorney to make the report required by the CTA as soon as the formation documents are accepted by the Secretary of State and a taxpayer identification number is issued by the IRS, or to provide the client with all the information they will need to file the report in a timely manner.

3. Notifying Clients to Update BOI

Attorneys may want to disclaim any perceived obligation to notify the Compliance Officer or other entity representative of changes to BOI. For instance, if an attorney forms an entity and learns of a change in BOI through the attorney's later representation of a beneficial owner in a divorce proceeding that ended with the client changing his or her name and moving to a different residence, any obligation to report such change to the company may conflict with the duty of confidentiality owed to the individual.

Attorneys may also want to disclaim any responsibility owed to individuals to notify them of the need to update BOI in many cases. In the case of the divorce example above, the attorney may wish to include a general notice that the outcome of their representation may trigger reporting obligations under the CTA but informing the client of any specific CTA requirements with respect a particular reporting company is outside the scope of the representation. A similar disclaimer may be relevant other matters, including but not limited to:

- Estate planning matters in which an attorney becomes aware of a client's interest in a reporting company or where interests in a reporting company are assigned to certain trusts (as a side note, a person acting as a beneficial owner's power of attorney would not have to be reported since they are acting as the beneficial owners agent; however, an individual serving as the trustee of an incapacitated beneficial owner's revocable trust would likely need to report their information as well as the owners');
- Civil litigation matters in which an attorney assists a client in the division of a reporting company as part of a settlement between former business partners; and
- Real estate matters in which an attorney assists clients in funding separate limited liability company series with different properties where each series is a registered series. (As a side note, it is unclear what reporting obligations must be satisfied for each separate series. A protected series does not require a separate filing with the Secretary

of State, and as such, likely is not a reporting company. A registered series does require a separate filing, and likely would be considered a reporting company. That matter is further complicated by the fact that the Texas Business Organizations Code permits different owners across the different series of a limited liability company.

4. Representation of Companies Outside of the Formation Context

If an attorney becomes involved with a reporting company after its formation, they will want to be certain their obligations related to the CTA are clearly defined. Confirming whether a reporting company has complied with CTA requirements may be difficult since reports are not available to the public. If the company hasn't maintained a record of the reports made, attorneys may want to require the company to file a report reflecting the current ownership, etc. before agreeing to accept the company as a client. Of course, this leads to the question of whether it is appropriate for an attorney to store copies of filed reports. If an attorney agrees to store such information, they may want to disclaim any responsibility for knowledge of the contents and be very clear about who can request such information on the company's behalf.

5. Attorney and Staff's Role as Company Applicants

While some attorneys may decide to file reports on behalf of their reporting company clients or to be partially involved in the preparation of the report, the only duty a company applicant has under the CTA is to report their BOI to the company to allow the company to make the report. Most attorneys and their staff will not be comfortable providing such information to clients. If that is the case, these individuals should obtain FinCEN identifiers to be used in lieu of their personal information. The first step in the process for obtaining a FinCEN identifier is to establish a login.gov account, which will be personal to the individual and should therefore be linked to their personal email account rather than a work account.

Anyone with a FinCEN identifier is required to update the information used to obtain the identifier within 30 days of a change. Firms will likely want to establish procedures for when an attorney or staff member's information changes. Because it is up to the individual to make those changes, law firm management may want to require proof of the update be provided to HR or have HR give a reminder to make appropriate updates when the department becomes aware of a change.

VI. CONCLUSION

The CTA is a drastic change in the level of federal involvement in entity formation and continued operation, which has historically been the domain of State and Tribal law. With so many unknown variables it is difficult to say to what extent attorneys will need to adjust their practices to account for the CTA. However, based on the information available now, we have provided some samples to use as a starting place going forward. These samples and example provisions should be revised as more guidance is hopefully provided by federal authorities.

APPENDIX A: SAMPLE COMPANY AGREEMENT PROVISION

ARTICLE I. COMPLIANCE WITH CORPORATE TRANSPARENCY ACT

The Members and Managers of the Company intend for the Company to comply with its obligations under the CTA and with CTA Regulations. Accordingly, the Members, Managers and the Company agree:

A. Compliance Officer.

A Manager, as designated by Management, will serve as the "Compliance Officer" with respect to the Company's duties under the CTA. The Compliance Officer may take any steps reasonably necessary or convenient to cause the Company to perform its obligations under the CTA and the CTA Regulations, including, without limitation, by causing the Company to file any beneficial ownership report that may be required thereunder.

B. Reports.

The Compliance Officer will provide written reports to the Company's Members from time to time regarding the Company's compliance with the CTA, but no less than once per year.

C. CTA Data.

Each Member and Manager, within fourteen (14) days of request, will provide to the Compliance Officer either such Manager or Member's FinCEN Identifier (as permissible by applicable CTA Regulations) or such Manager or Member's:

a. full legal name;

b. date of birth;

c. residential street address;

d. business street address; and

e. a unique identifying number from one of the following documents:

(1) a non-expired passport issued by the United States Government;

(2) a non-expired identification document issued to the individual by a State, local government, or Indian tribe for the purpose of identifying the individual;

(3) a non-expired driver's license issued to the individual by a State, or

(4) a non-expired passport issued by a foreign government to the individual, if the individual does not possess any of the documents described in ARTICLE I.C.e(1), ARTICLE I.C.e(2), or ARTICLE I.C.e(3) above; and

f. an image of the document from which the unique identifying number in ARTICLE I.C.e above was obtained which includes both the unique identifying number and photograph of the individual in sufficient quality to be legible or recognizable.

The information described in this ARTICLE I.C is hereinafter referred to as a Manager's or Member's "CTA Data".

In addition to the foregoing, each Member or Manager that is not a natural person (a "Non-Natural Person Participant"), such Non-Natural Person Participant shall provide CTA Data for each person that has "substantial control" over such Non-Natural Person Participant.

D. Indirect Ownership.

With respect to any (i) Non-Natural Person Member or (ii) natural person who owns an undivided interest in a Membership Interest held by a Member ("Undivided Interest Holder"), the Member shall provide CTA Data for (i) each natural person who owns, indirectly or beneficially, any economic interest in the Company through such Non-Natural Person Member (an "Indirect Owner") and (ii) each Undivided Interest Holder (an "Indirect Owner").

E. Substantial Control Data.

Each Member and Manager will also provide to the Compliance Officer any information or documents that may be required to determine whether such Member or any Indirect Owner has "substantial control" over the Company including, without limitation, by:

a. serving as a senior officer of this Company or serving as a senior officer, manager, director, general partner, trustee, or beneficiary of a Non-Natural Person Member;

b. having authority over the appointment or removal of any senior officer or a majority or dominant minority of the Managers of the Company, or of the appointment or removal of any senior officer, a majority or dominant minority of the managers or directors or similar body, general partner, or trustee of a Non-Natural Person Member;

c. having any direction, determination, or decision power over, or substantial influence over, important matters affecting the Company or a Non-Natural Person Member, including but not limited to:

(1) the nature, scope, and attributes of the business of the Company or of a Non-Natural Person Member, including the sale, lease, mortgage, or other transfer of any principal assets of the Company or of a Non-Natural Person Member;

(2) the reorganization, dissolution, merger, or termination of the Company or of a Non-Natural Person Member;

(3) major expenditures or investments, issuances of any equity, incurrence of any significant debt, or approval of the operating budget of the Company or of a Non-Natural Person Member;

(4) the selection or termination of business lines or ventures, or geographic focus, of the Company or of a Non-Natural Person Member;

(5) compensation schemes and incentive programs for senior officers of the Company or of the senior officers, general partners, managers, directors, trustees, or beneficiaries of a Non-Natural Person Member;

(6) the entry into or termination, or the fulfillment or nonfulfillment of significant contracts of the Company or of a Non-Natural Person Member; and/or

(7) amendments of any substantial governance documents of the Company or of a Non-Natural Person Member, including the articles of organization, certificates of formation, or similar formation documents, company agreement, partnership agreement, bylaws, trust agreement, or any other governing document, and significant policies or procedures of the Company or of a Non-Natural Person Member; and

d. any other form of substantial control over the Company or of a Non-Natural Person Member.

Information and documents provided by any Member for purposes of this ARTICLE I.E is hereinafter referred to as "Substantial Control Data".

F. Officers.

Management shall require, as a qualifying condition of appointment, that any person appointed to serve as an officer of the Corporation agree to provide such officer's CTA Data and provide such CTA Data to the Compliance Officer within the time limits prescribed by ARTICLE I.C.

G. Company Applicant.

The Compliance Officer will collect CTA Data and Substantial Control Data from each individual who is a "company applicant" with respect to the Company, as such term is defined in the CTA Regulations.

H. Safeguarding CTA Data.

The Compliance Officer will safeguard the CTA Data and Substantial Control Data collected from Members and any other persons in accordance with this Section through such methods and systems as the Compliance Officer and Management may determine; provided, however, that such information must be maintained for the minimum period required by CTA regulations. To the maximum extent permitted by law, under no circumstances, including the Company or Compliance Officer's own NEGLIGENCE, shall the Compliance Officer, the Company, its officers, directors, employees, subsidiaries, or affiliated companies be liable for any direct, indirect, incidental, special, consequential, or punitive damages arising from any security breach or any other security intrusion.

I. Duty to Promptly Report.

Each Member and Manager will promptly notify in writing the Compliance Officer of any change in CTA Data or Substantial Control Data previously provided by such Member to the Compliance Officer after such change occurs (but in any event no more than five calendar days after such change occurs).

J. Indemnification.

Each Member and Manager will indemnify and defend the Company against any third-party claim, loss or expense incurred by the Company as a result of:

a. any inaccuracy in any CTA Data or Substantial Control Data provided by such Member or Manager; or

b. any failure of such Member or Manager to provide amended CTA Data or Substantial Control Data to the Compliance Officer within the time period required by ARTICLE I.H above.

K. Failure to Provide Data.

If a Member does not provide CTA Data and Substantial Control Data to the Compliance Officer within the time period required by ARTICLE I.H above, that Member is a "Non-Complying Member"). On notice to the Non-Complying Member, the Company may exercise one or more of the following remedies:

a. Taking any action (including court proceedings) necessary to obtain the CTA Data and Substantial Control Data from the Non-Complying Member. Any action taken will be at the Non-Complying Member's cost and expense, including the recovery of the Company's reasonable attorney's fees.

b. Suspending the Non-Complying Member's right to vote on any matter for which a Member is entitled to vote.

c. Exercising an option to purchase the Non-Complying Member's Membership Interest. The purchase price for such Membership Interest shall be the lesser of (i) the original purchase price or capital contribution made by that Non-Complying Member for the Membership Interest or (ii) the fair market value of such Non-Complying Member's Membership Interest, as determined in the following manner:

   (1) By a qualified business appraiser who is experienced in valuations of businesses providing similar services and products to that of the Company that is agreed upon by the Company and the Non-Complying Member.

   (2) If the applicable parties are unable to agree upon a qualified business appraiser, then the fair market value of the applicable Membership Interest must be determined by two appraisers, one selected by the Non-Complying Member and one by the Company. If those two appraisers are unable to agree upon the fair market value of the Membership Interest within thirty (30) days after their appointment, then those appraisers must select an independent third appraiser, and the third appraiser will independently determine a fair market value of the Membership Interest. The average of the three appraised values will be considered the fair market value and

will be binding upon the parties to this Agreement for purposes of this ARTICLE I.K.c.

(3) The fair market value of the Non-Complying Member's Membership Interest will be adjusted so that the Membership Interest is classified as a minority interest, which value will take into consideration discounts for lack of control and lack of marketability.

(4) The fees of the appraisers will be paid by the Non-Complying Member.

(5) In the event a Membership Interest is purchased in accordance with this ARTICLE I.K.c., upon execution and delivery of the consideration as required by this ARTICLE I.K.c., the Non-Complying Member's Membership Interest will automatically transfer to the Company, and the parties must perform whatever may be necessary to effectuate and evidence the transfer.

(6) The purchase price as determined above may be paid either in cash or, at the Company's option, twenty percent (20%) of the purchase price may be paid in cash and the balance of the purchase price may be paid in accordance with the terms a negotiable promissory note in a form provided by the Company, and delivered at closing, providing for equal consecutive monthly installments of principal over a period of months not to exceed 120 months, and interest on the unpaid balance at a rate which will from month to month (as of the first business day of each month) be equal to the prime commercial rate of interest as published from time to time by the "The Wall Street Journal." If the Wall Street Journal publishes a range for the prime rate, the rate used will be the mid-point in the range.

d. Exercising any other rights and remedies available at law or in equity.

L. Defined Terms.

"FinCEN Identifer" means a unique identifying number assigned by FinCEN to a person by submitting to FinCEN an application containing the information about the person which would be required in report filed by a Reporting Company to FinCEN to comply with the CTA.

"CTA" means Corporate Transparency Act, as amended.

"CTA Regulations" means the regulations published by FinCEN establishing a reporting regime for compliance with the CTA.

"FinCEN" means Financial Crimes Enforcement Network.

APPENDIX B: SAMPLE SHAREHOLDER AGREEMENT PROVISION

ARTICLE I. COMPLIANCE WITH CORPORATE TRANSPARENCY ACT

The Shareholders of the Corporation intend for the Corporation to comply with its obligations under the CTA and with CTA Regulations. Accordingly, the Shareholders agree as follows:

A. Compliance Officer.[1]

An officer, as designated by the Board of Directors, will serve as the "Compliance Officer" with respect to the Corporation's duties under the CTA. The Compliance Officer may take any steps reasonably necessary or convenient to cause the Corporation to perform its obligations under the CTA and the CTA Regulations, including, without limitation, by causing the Corporation to file any beneficial ownership report that may be required thereunder.

B. Reports.[2]

The Compliance Officer will provide written reports to the Corporation's Board of Directors from time to time regarding the Corporation's compliance with the CTA, but no less than once per year.

C. CTA Data.

Each Shareholder, within fourteen (14) days of request, will provide to the Compliance Officer such Shareholder's FinCEN Identifier (as permissible by applicable CTA Regulations) or such Shareholder's:

a. full legal name;

b. date of birth;

c. residential street address;

d. business street address; and

e. a unique identifying number from one of the following documents:

(1) a non-expired passport issued by the United States Government;

(2) a non-expired identification document issued to the individual by a State, local government, or Indian tribe for the purpose of identifying the individual;

(3) a non-expired driver's license issued to the individual by a State, or

(4) a non-expired passport issued by a foreign government to the individual, if the individual does not possess any of the documents described in ARTICLE I.C.e(1), ARTICLE I.C.e(2), or ARTICLE I.C.e(3) above; and

f. an image of the document from which the unique identifying number in ARTICLE I.C.e above was obtained which includes both the unique identifying number and photograph of the individual in sufficient quality to be legible or recognizable.

The information described in this ARTICLE I.C is hereinafter referred to as a Shareholder's "CTA Data".

In addition to the foregoing, each Shareholder that is not a natural person (a "Non-Natural Person Shareholder"), such Non-Natural Person Shareholder shall provide CTA Data for each person that has "substantial control" over such Non-Natural Person Shareholder.

D. Indirect Ownership.

With respect to any (i) Non-Natural Person Shareholder or (ii) natural person who owns an undivided interest in a Shares held by a Shareholder ("Undivided Interest Holder"), the Shareholder shall provide CTA Data for (i) each natural person who owns, indirectly or beneficially, any economic interest in the Corporation through

[1] You may also wish to include this in a Corporation's bylaws.
[2] You may also wish to include this in a Corporation's bylaws.

such Non-Natural Person Shareholder (an "Indirect Owner") and (ii) each Undivided Interest Holder (an "Indirect Owner").

E. Substantial Control Data.

Each Shareholder will also provide to the Compliance Officer any information or documents that may be required to determine whether such Shareholder or any Indirect Owner has "substantial control" over the Corporation including, without limitation, by:

a. serving as a senior officer of the Corporation or serving as a senior officer, manager, director, general partner, trustee, or beneficiary of a Non-Natural Person Shareholder;

b. having authority over the appointment or removal of any senior officer or a majority or dominant minority of the Board of Directors of the Corporation, or of the appointment or removal of any senior officer, a majority or dominant minority of the Board of Directors or directors or similar body, general partner, or trustee of a Non-Natural Person Shareholder;

c. having any direction, determination, or decision power over, or substantial influence over, important matters affecting the Corporation or a Non-Natural Person Shareholder, including but not limited to:

(1) the nature, scope, and attributes of the business of the Corporation or of a Non-Natural Person Shareholder, including the sale, lease, mortgage, or other transfer of any principal assets of the Corporation or of a Non-Natural Person Shareholder;

(2) the reorganization, dissolution, merger, or termination of the Corporation or of a Non-Natural Person Shareholder;

(3) major expenditures or investments, issuances of any equity, incurrence of any significant debt, or approval of the operating budget of the Corporation or of a Non-Natural Person Shareholder;

(4) the selection or termination of business lines or ventures, or geographic focus, of the Corporation or of a Non-Natural Person Shareholder;

(5) compensation schemes and incentive programs for senior officers of the Corporation or of the senior officers, general partners, managers, directors, trustees, or beneficiaries of a Non-Natural Person Shareholder;

(6) the entry into or termination, or the fulfillment or nonfulfillment of significant contracts of the Corporation or of a Non-Natural Person Shareholder; and/or

(7) amendments of any substantial governance documents of the Corporation or of a Non-Natural Person Shareholder, including the articles of organization, certificates of formation, or similar formation documents, company agreement, partnership agreement, bylaws, trust agreement, or any other governing document, and significant policies or procedures of the Corporation or of a Non-Natural Person Shareholder; and

d. any other form of substantial control over the Corporation or of a Non-Natural Person Shareholder.

Information and documents provided by any Shareholder for purposes of this ARTICLE I.E is hereinafter referred to as "Substantial Control Data".

F. Officers.

The Board of Directors shall require, as a qualifying condition of appointment, that any person appointed to serve as an officer of the Corporation agree to provide such officer's CTA Data and provide such CTA Data to the Compliance Officer within the time limits prescribed by ARTICLE I.C.

G. Company Applicant.

The Compliance Officer will collect CTA Data and Substantial Control Data from each individual who is a "company applicant" with respect to the Corporation, as such term is defined in the CTA Regulations.

H. Safeguarding CTA Data.

The Compliance Officer will safeguard the CTA Data and Substantial Control Data collected from Shareholders and any other persons in accordance with this Section through such methods and systems as the Compliance Officer and Management may determine; provided, however, that such information must be maintained for the minimum period required by CTA regulations. To the maximum extent permitted by law, under no circumstances, including the Corporation or Compliance Officer's own NEGLIGENCE, shall the Compliance Officer, the Corporation, its officers, directors, employees, subsidiaries, or affiliated companies be liable for any direct, indirect, incidental, special, consequential, or punitive damages arising from any security breach or any other security intrusion.

I. Duty to Promptly Report.

Each Shareholder will promptly notify in writing the Compliance Officer of any change in CTA Data or Substantial Control Data previously provided by such Shareholder to the Compliance Officer after such change occurs (but in any event no more than five calendar days after such change occurs).

J. Indemnification.

Each Shareholder will indemnify and defend the Corporation against any third-party claim, loss or expense incurred by the Corporation as a result of:

a. any inaccuracy in any CTA Data or Substantial Control Data provided by such Shareholder; or

b. any failure of such Shareholder to provide amended CTA Data or Substantial Control Data to the Compliance Officer within the time period required by ARTICLE I.H above.

K. Failure to Provide Data.

If a Shareholder does not provide CTA Data and Substantial Control Data to the Compliance Officer within the time period required by ARTICLE I.H above, that Shareholder is a “Non-Complying Shareholder”). On notice to the Non-Complying Shareholder, the Corporation may exercise one or more of the following remedies:

a. Taking any action (including court proceedings) necessary to obtain the CTA Data and Substantial Control Data from the Non-Complying Shareholder. Any action taken will be at the Non-Complying Shareholder's cost and expense, including the recovery of the Corporation's reasonable attorney's fees.

b. Suspending the Non-Complying Shareholder's right to vote on any matter for which a Shareholder is entitled to vote.

c. Exercising an option to purchase the Non-Complying Shareholder's Shares. The purchase price for such Shares shall be the lesser of (i) the original purchase price or capital contribution made by that Non-Complying Shareholder for the Shares or (ii) the fair market value of such Non-Complying Shareholder's Shares, as determined in the following manner:

(1) By a qualified business appraiser who is experienced in valuations of businesses providing similar services and products to that of the Corporation that is agreed upon by the Corporation and the Non-Complying Shareholder.

(2) If the applicable parties are unable to agree upon a qualified business appraiser, then the fair market value of the applicable Shares must be determined by two appraisers, one selected by the Non-Complying Shareholder and one by the Corporation. If those two appraisers are unable to agree upon the fair market value of the Shares within thirty (30) days after their appointment, then those appraisers must select an independent third appraiser, and the third appraiser will independently determine a fair market value of the Shares. The average of the three appraised values will be considered the fair market value and will be binding upon the parties to this Agreement for purposes of this ARTICLE I.K.c.

(3) The fair market value of the Non-Complying Shareholder's Shares will be adjusted so that the Shares are classified as a minority interest, which value will take into consideration discounts for lack of control and lack of marketability.

(4) The fees of the appraisers will be paid by the Non-Complying Shareholder.

(5) In the event a Shares is purchased in accordance with this ARTICLE I.K.c., upon execution and delivery of the consideration as required by this ARTICLE I.K.c., the Non-Complying Shareholder's Shares will automatically transfer to the Corporation, and the parties must perform whatever may be necessary to effectuate and evidence the transfer.

(6) The purchase price as determined above may be paid either in cash or, at the Corporation's option, twenty percent (20%) of the purchase price may be paid in cash and the balance of the purchase price may be paid in accordance with the terms a negotiable promissory note in a form provided by the Corporation, and delivered at closing, providing for equal consecutive monthly installments of principal over a period of months not to exceed 120 months, and interest on the unpaid balance at a rate which will from month to month (as of the first business day of each month) be equal to the prime commercial rate of interest as published from time to time by the "The Wall Street Journal." If the Wall Street Journal publishes a range for the prime rate, the rate used will be the mid-point in the range.

d. Exercising any other rights and remedies available at law or in equity.

L. Defined Terms.

"FinCEN Identifer" means a unique identifying number assigned by FinCEN to a person by submitting to FinCEN an application containing the information about the person which would be required in report filed by a Reporting Corporation to FinCEN to comply with the CTA.

"CTA" means Corporate Transparency Act, as amended.

"CTA Regulations" means the regulations published by FinCEN establishing a reporting regime for compliance with the CTA.

"FinCEN" means Financial Crimes Enforcement Network.

APPENDIX C: ACCEPTANCE OF APPOINTMENT AND CONSENT TO SERVE

ACCEPTANCE OF APPOINTMENT AND CONSENT TO SERVE AS CORPORATE TRANSPARENCY ACT COMPLIANCE OFFICER

I acknowledge, accept, and consent to my designation or appointment as the Compliance Officer for [Name of Entity], a Texas [type of entity] (the “Company”) with respect to the Company’s compliance with the Corporate Transparency Act. I understand that it will be my responsibility to collect CTA Data and Substantial Contral Data (as those terms are defined in the Company’s Company Agreement), and report the same to the U.S. Treasury’s Financial Crimes Enforcement Network. I will immediately notify the Company and submit a statement of resignation if I resign.

Dated to be effective: ______________________, 20___.

____

Name: ___________________________________

APPENDIX D: SAMPLE SUMMARY LETTER & CLIENT ACKNOWLEDGEMENT

[date]

[client name]
[street name]
[city, state zip code]

RE: Corporate Transparency Act Guidance

Dear [Mr./Ms./Dr.] [Client Name]:

The purpose of this letter is to inform you of your reporting requirements under the Corporate Transparency Act ("CTA"). The CTA is a federal law aimed at improving the anti-money laundering efforts of the United States and it establishes reporting requirements for certain types of corporations, limited liability companies, limited partnerships, and other similar entities created, or registered to do business in the United States, which includes [Name of Entity Formed].

[Name of Entity formed] must provide information both about its "Beneficial Owners" and about itself. A Beneficial Owner includes anyone who directly or indirectly (i) exercises substantial control over [Name of Entity Formed] or (ii) owns or controls at least 25% of the ownership interest in [Name of Entity Formed]. Based on the information provided to [Name of Firm], the following are Beneficial Owners:

- [If an LP, the General Partner];
- [Each Person named an officer];
- [If a Corporation, each person named a director];
- [If a LLC, each person named a manager];
- [if owner is an entity, each beneficial owner of that entity]

For each Beneficial Owner, [Name of Entity Formed] must report the following:

- Full legal name;
- Date of birth;
- A picture of an official identification card (state issued driver's license, state issued identification card, or passport); and
- Residential address (not a P.O. Box or mailing address).

Additionally, [Name of Entity Formed] must report its own legal name, any trade name, its street address, its jurisdiction of formation, and its Federal Employer Identification Number. This information can be located within the Certificate of Formation (Tab 1), IRS Form SS-4 (Tab 3), and your Certificate of Assumed Name (Tab 4), if any.

[For entities formed before January 1, 2024:]

The initial report for [Name of Entity Formed] must be filed with the U.S. Treasury's Financial Crimes Enforcement Network ("FinCEN") before January 1, 2025. Currently, FinCEN has not provided a system by which you can satisfy the reporting requirements. While [Name of Firm] will make every effort to update you when the FinCEN filing system becomes available, it is your responsibility to ensure that the initial report is filed in a timely manner.

[For entities formed on or after January 1, 2024:]

The initial report for [Name of Entity Formed], which is due within thirty (30) days from formation of [Name of Entity Formed], will be completed by [Name of Firm] as part of the formation process. However, it will be your responsibility to keep all information provided to FinCEN current throughout the existence of [Name of Entity Formed]. [Name of Firm] will not be responsible for the ongoing reporting obligations of [Name of Entity].

[All entities]

In addition to the initial report, [Name of Entity Formed] has a continuing obligation to report to FinCEN of any changes in the information initially reported to FinCEN within thirty (30) days of such change. Accordingly, any time a new owner acquires an interest in [Name of Entity Formed], whether by purchase, inheritance, settlement, gift, or other means, the Beneficial Owner information of [Name of Entity Formed] must be updated with FinCEN within thirty (30) days. Additionally, if a new [general partner or director or manager] is named or a new senior officer is named, that information must be updated with FinCEN within thirty (30) days. Should you require assistance in determining whether a change triggers a filing a reporting requirement under the CTA, please do not hesitate to contact me.

Failure to comply with the CTA can result in civil fines up to $500 per day for as long as the reporting violation continues and can result in criminal fines up to $10,000 and imprisonment for up to two years. As such, it is important that [Name of Filing Entity] satisfies both its initial and continuing reporting requirements. Of course, [Name of Firm] is here to help if you need us. While it is unclear exactly how the reporting requirements of the CTA will be implemented and enforced at this time, as new guidance becomes available, [Name of Firm] will do its best to disseminate this information to you.

Should you have any questions with regard to this matter or if you need any additional information, please do not hesitate to contact me.

Sincerely,

[Sending Attorney]

[Date]

ACKNOWLEDGEMENT OF CORPORATE TRANSPARENCY ACT GUIDANCE

I, [Name of CTA Responsible Party], have received and reviewed the Corporate Transparency Act Advisory Letter, dated [Date], provided by [Name of Firm] (the "Letter"). I understand [Name of Entity Formed] must file an initial report with FinCEN on or before January 1, 2025. [OR] I understand that [Name of Entity Formed must file an initial report with FinCEN on or before [30th day following Certificate of Formation issuance]. Additionally, I understand that following that date, [Name of Entity Formed] must update the information provided to FinCEN in the event there is a change in ownership or management of [Name of Entity Formed] as detailed in the Letter.

____
[NAME OF CTA RESPONSIBLE PARTY]

APPENDIX E: SAMPLE STOCK PURCHASE AGREEMENT PROVISIONS

Seller Representations and Warranties

To Seller's knowledge, [Target Company] is in compliance with its reporting obligations arising under the Corporate Transparency Act, as amended (the "CTA"). [Target Company] has supplied all information required by the CTA to the U.S. Treasury's Financial Crimes Enforcement Network ("FinCEN") in the time periods prescribed by the CTA and all such information was supplied without any materially inaccurate information. Seller will indemnify, defend, and hold harmless Buyer and Buyer's officers, directors, owners, agents, and representatives, against and in respect to any damages, claims, actions, demands, losses, costs, expenses, liabilities (joint and several), penalties, and attorney's fees resulting from Seller's failure to comply with any reporting obligations arising under the CTA prior to the Closing Date. This providing shall survive Closing.

Buyer Covenant

Within thirty (30) days of Closing, Buyer will cause [Target Company] to provide updated beneficial ownership information (as defined in the CTA) to FinCEN. Buyer will indemnify, defend, and hold Seller and Seller's officers, directors, owners, agents, and representatives, against and in respect to any damages, claims, actions, demands, losses, costs, expenses, liabilities (joint or several), penalties, and attorney's fees resulting from Buyer's failure to maintain [Target Company]'s compliance with its reporting obligations arising under the CTA after Closing. This provision shall survive Closing.

APPENDIX F: SAMPLE ASSIGNMENT LANGUAGE

Assignor and Assignee hereby expressly acknowledge that they have been advised of reporting requirements imposed on the Company by the Corporate Transparency Act ("CTA"). Assignee acknowledges and agrees that Assignee will report this assignment and all of Assignee's CTA Data (as defined in the Company's governing documents) to either the Company's CTA Compliance Officer (as defined in the Company's governing documents) or for filing the updated beneficial ownership information of the Company with FinCEN. Such reporting must be completed to the Company's CTA Compliance Officer within five (5) days from the date of this Assignment and to FinCEN within thirty (30) days from the date of this Assignment. Assignor and Assignee further acknowledge that [Name of Firm], has not established or determined the correctness of any prior beneficial ownership reports filed by the Company or on the Company's behalf. Assignor and Assignee acknowledge that they have been advised by [Name of Firm] to conduct their own individual investigation of the Company's compliance with the CTA.

APPENDIX G: ENGAGEMENT LETTER EXCERPTS

These excerpts are intended to be inserted into Engagement Letters or Contracts for Legal Services for the formation of entities ***on or after January 1, 2024****. The headings provided below are suggested topics under which these excerpts may appear.*

Scope of Engagement

The following excerpts are intended to be used if the engagement relates to the formation of an entity.

[Name of Firm] represents you in connection with the formation of [Name of Entity]. . . .

[If your firm does not intend to assist clients with CTA compliance and reporting, use the following:]

[Name of Firm] does not represent you in connection with any Corporate Transparency Act ("CTA") reporting requirements nor is [Name of Firm] responsible for the preparation or submission of the beneficial ownership information reports the [Name of Entity] may be required to file with the Financial Crimes Enforcement Network ("FinCEN") pursuant to the CTA. You have been provided with the [Name of Firm]'s FinCEN Identifier Number and other relevant Company Applicant information. If [Name of Entity] is a reporting company pursuant to the CTA, you must prepare and file the initial report of [Name of Entity] with FinCEN within thirty (30) days of the formation of [Name of Entity].

[If your firm intends to include initial CTA compliance and reporting within its scope of engagement, use the following:]

The initial report requiring under the Corporate Transparency Act ("CTA") will be completed by [Name of Firm] as part of the formation process. This initial report filed with FinCEN will be based upon the information provided by you. It is assumed that the information provided by you is complete and accurate. You agree to gather any additional information required to complete the initial report and deliver such information to [Name of Firm] in a timely manner. You agree to execute any documents (digitally or otherwise) necessary to certify and submit such initial report to FinCEN.

[Name of Firm] does not represent you in connection with any ongoing reporting obligations arising under the CTA. It will be your responsibility ensure continued compliance with all CTA reporting obligations.

The following excerpts are intended to be used if the engagement is unrelated to the formation of an entity.

[Name of the Firm] has been engaged to assist you regarding certain [estate planning/real estate/litigation/general business] matters. [Name of Firm] does not represent you in connection with any income tax or federal reporting obligations arising under the Corporate Transparency Act, which may be triggered as a result of the [estate planning/real estate/litigation/general business] matter for which [Name of Firm] has been retained.

Client Responsibilities

An attorney can operate only upon the information the client elects to provide, and the attorney must assume that the information provided is complete and accurate. Your obligation to [Name of Firm] is to provide complete and accurate information, including all beneficial ownership information of the business. We will assume that the information you supply is complete and correct. [Name of Firm] may require that you provide all beneficial ownership information and any required supporting documentation prior to commencing this engagement or completing the formation of [Name of Entity]. Your failure to provide any such information may result in a decision by [Name of Firm] to terminate its representation of you.
You will be responsible for updating or correcting any information previously provided to FinCEN in connection with this engagement.

Our Right to Terminate

Subject to any applicable ethical rule or legal requirements, [Name of Firm] reserves the right to terminate its representation of you, subject to such permission from any court or tribunal as may be required under the circumstances. In such event, we will provide you with reasonable notice of our decision to terminate and afford you reasonable opportunity to arrange for successor lawyers, and we will assist you and your successor lawyers in effecting a transition of the engagements. Reasons for [Name of Firm]'s termination may include your breach of our Engagement Agreement including, without limitation, your failure to provide any required or requested beneficial ownership information for [Name of Entity] in a timely manner, as determined in [Name of Firm]'s sole discretion.

APPENDIX H: SAMPLE GENERAL NOTIFICATION LETTER

[DATE]

[NAME]
[ADDRESS]
[CITY, STATE, ZIP]

Re: Corporate Transparency Act & [CLIENT'S BUSINESS NAME]

Dear [CLIENT]:

I am writing to inform you of recent legal developments that may impact you. On January 1, 2021, Congress enacted the Corporate Transparency Act (CTA) to aid in the United States' anti-money laundering efforts. On September 30, 2022, the US Treasury's Financial Crimes Enforcement Network (FinCEN) published a Final Rule describing new reporting requirements of legal entities operating in the United States. FinCEN is still developing the infrastructure required to administer these reporting requirements.

The following types of legal entities are known as reporting companies (Reporting Companies) and are subject to the provisions of the Final Rule:

1. Corporations;
2. Limited Liability Companies;
3. Any entity created by the filing of a document with a secretary of state or any similar office under the law of a state or American Indian tribe (i.e., limited partnerships, limited liability partnership, etc.); or
4. A corporation, LLC or other entity formed under the law of a foreign country and 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 American Indian tribe.

While there are various exemptions excepting certain entities from being a Reporting Company, many of those exemptions only apply to entities which are already subject to a high degree of regulation or reporting, such as banks, security issuers, and insurance producers or companies that are large operating companies, which must have 20 or more full-time employees in the United States, an operating presence at a physical office in the United States, and filed a tax return in the previous year showing more than $5 million in United States-sourced gross receipts or sales. If you believe your company falls under one of the exceptions and is not subject to the CTA, please contact us to confirm.

Because many of our clients are small business owners, it is our expectation that most of our clients will be subject to the CTA reporting requirements. Each Reporting Company will be responsible for providing information about its beneficial owners. Beneficial owners include any individual who, directly or indirectly, exercise substantial control over the Reporting Company or owns or controls at least twenty-five percent of the ownership interest of the reporting company. An individual exercises substantial control over a Reporting Company if the individual (i) serves as a senior officer; (ii) has authority over the appointment or removal of any senior officer or a majority of the governing body of the Reporting Company; or (iii) directs, determines or has substantial influence over important decisions made by the Reporting Company; or (iv) has any form of substantial control over the Reporting Company. Additionally, contractual rights entitling an individual to the profits of a Reporting Company or rights arising through a trust agreement (as either a trustee or as a beneficiary) may cause an individual to be deemed a beneficial owner of a Reporting Company. If you would like assistance in determining the beneficial ownership of your company, please do not hesitate to contact us.

For each beneficial owner of the Reporting Company, the Reporting Company must report the following:

1. Full legal name;
2. Date of birth;
3. A picture of an official identification card (state issued driver's license, state issued identification card, or passport); and

4. Residential address (not a P.O. Box or mailing address).

Additionally, each Reporting Company must report its own legal name, any trade name, its street address, its jurisdiction of formation, and its Federal Employer Identification Number.

If your entity is already in existence, you have until January 1, 2025 to report. As I have previously mentioned, the mechanisms and procedures for how a Reporting Company must report to FinCEN have not yet been determined. If you would like to receive additional information on these procedures as they become available, please email CTAlistserv@lawfirm.com and you will be placed on a listserv to receive updates as they become available.[1] However, being placed on the listserv does not enroll you or any entity for assistance in complying with the reporting requirements of the CTA. If you would like assistance with such matters, please contact us after January 1, 2024 to make an appointment.

For any entities created on or after January 1, 2024, beneficial owner information must be reported within 30 days of filing the Articles or Certificate of Formation for the entity. As such, if you have formed entities with the assistance of [Name of Firm] in the past, you may notice that we are requiring additional information to form entities going forward. Specifically, beginning on July 1, 2023 [Name of Firm] will adjust the information requested when forming an entity to include the information required to be reported under the CTA. Please be aware that this will require more time than many clients are accustomed to. As of January 1, 2024, [Name of Firm] will not file formation documents with the Secretary of State's office unless we have been provided with all of the information necessary to report to FinCEN.

This letter is not intended to and shall not create any attorney-client relationship between an [Name of Firm] and the recipient of this letter. This letter is intended to inform you of some of the common issues arising out of the CTA; however, the information provided herein is non-exhaustive. Any and all information contained in this letter is provided for informational purposes only and is not to be relied upon as a professional opinion whatsoever. The content herein does not constitute professional advice and is not guaranteed to be accurate, complete, reliable, current, or error-free. I strongly recommend that you meet with [Name of Firm] at least once annually to ensure that the required steps have been taken for CTA compliance.

If you have any questions or concerns regarding the CTA and your business, please feel free to contact my office.

Sincerely,

[SENDING ATTORNEY]

[1] This is just an example of one way to keep clients informed; however, at this point in time, official updates have been few and far between.