

**IDENTIFYING BENEFICIAL OWNERS UNDER THE
CORPORATE TRANSPARENCY ACT**

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- Young Leader, American College of Trusts and Estates Counsel, 2017 – 2019
- Fellow, American Bar Association Section of Real Property, Trust & Estate Law, 2015 – 2017
- President's Award for Outstanding Service, Houston Bar Association, 2017 – 2018
- Outstanding Council Member, Tax Section of the State Bar of Texas, 2017 – 2018
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- American Bar Association, Section of Real Property, Trust & Estate Law
 - International Tax Planning Committee, Chair 2019 – 2020, Vice-Chair 2017 – 2019
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- I was the Night Manager for the Four Seasons Hotel in Austin for three years before starting law school.
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IDENTIFYING BENEFICIAL OWNERS UNDER THE CORPORATE TRANSPARENCY ACT

I. OVERVIEW

Congress enacted the Corporate Transparency Act (“CTA”) under the Fiscal Year 2021 National Defense Authorization Act on January 1, 2021.¹

The requirements of the CTA are being implemented “to help prevent and combat money laundering, terrorist financing, corruption, tax fraud, and other illicit activity, while minimizing the burden on reporting entities.”² That said, even FinCEN acknowledges the enormous reporting burden imposed by the CTA, which it most recently estimated to be over 118 million hours in 2024, with an annual burden of over 18 million hours thereafter.³

The CTA added 31 USC §5336 to the Bank Secrecy Act with the title, “Beneficial ownership information reporting requirements”. The CTA has three core elements:

1. Reports to FinCEN—The CTA requires certain entities (each a “reporting company”) to identify itself, its primary owners and officers (each a “beneficial owner”), and certain professionals who helped to form or register the reporting company (each a “company applicant”). The reporting company must then report to the Financial Crimes Enforcement Network (“FinCEN”) information sufficient to identify the reporting company, its beneficial owners, and any company applicants (“beneficial owner information” or “BOI”).
2. Control Access to Information—FinCEN will provide BOI to government regulatory and investigatory bodies, but it will not be made available to the general public. In addition, there are specific procedural requirements for government actors to access this information, along with civil and criminal penalties for improperly accessing or using such information.
3. Revised Due Diligence Requirements—The Secretary of the Treasury is required to revise Customer Due Diligence requirements for financial institutions to conform to the CTA, and account for the ability of financial institutions to access beneficial ownership information.

These materials explain the key terms and concepts of the CTA.

II. REPORTING COMPANY

A reporting company can be a domestic reporting company or a foreign reporting company.⁴ A reporting company, and only a reporting company, is required to file reports under the CTA⁵ disclosing BOI with regard to beneficial owners and company applicants.⁶

A. Domestic Reporting Company

A domestic reporting company is defined as (1) a corporation, (2) a limited liability company, or (3) any other entity that is created by the filing of a document with a secretary of state or a similar office under the law of a state or Indian Tribe.⁷

The preamble to the proposed regulations clarifies that that limited partnerships, limited liability partnerships, and business trusts (a/k/a statutory trusts) are expected to fall into the category of “other similar entity” because each requires a state filing to exist.⁸

A general partnership is generally not formed through a filing, and therefore is not a domestic reporting company. This appears to be true even if that general partnership subsequently registers to do business in a state, since registering to do business does not result in the creation of the entity. Similarly trusts are no reporting companies and therefore do not have to file under the CTA.

III. FOREIGN REPORTING COMPANY

A foreign reporting company is any entity that is a corporation, limited liability company, or other entity that is formed under the law of a foreign country and that is registered to do business in the United States by the filing of a document with a secretary of state or equivalent office under the law of a state or Indian Tribe.⁹

IV. EXEMPTIONS FOR COMPANIES

The CTA specifically excludes from the definition of “reporting company” twenty-three types of entities.¹⁰ The statute also authorizes the Secretary of the Treasury, with the written concurrence of the Attorney General and the Secretary of Homeland Security, to exempt, by regulation, additional entities for which collecting BOI would neither serve the public interest nor be highly useful in national security, intelligence, law enforcement, or other similar efforts.¹¹ As of April

⁴ 31 CFR §1010.380(c)(1). See also 31 U.S.C. §5336(a)(11).

⁵ 31 CFR §1010.380(a)(1).

⁶ 31 CFR §1010.380(b).

⁷ 31 CFR §1010.380(c)(1)(i).

⁸ 86 Fed. Reg. 69938 (December 8, 2021).

⁹ 31 CFR §1010.380(c)(1)(ii).

¹⁰ 31 U.S.C. §5336(a)(11)(B). See also 31 CFR §1010.380(c)(2).

¹¹ 31 U.S.C. §5336(a)(11)(B)(xxiv).

¹ See Sections 6401-6403 of H.R. 6395.

² 88 Fed. Reg. 2761 (January 17, 2023).

³ *Id.* at 2762.

2023 FinCEN has not added any exemptions to those specifically mentioned in the statute.

The exemptions generally apply to business that, for various reasons, are highly unlikely to be used for money laundering or other criminal enterprises. They include (i) an issuer of securities registered under section 12 of the Securities Exchange Act of 1934, (ii), domestic governmental authorities, (iii) banks, (iv) credit unions, (v) a bank holding company or savings and loan holding company, (vi) money transmitting businesses registered with FinCEN under 31 U.S.C. 5330, (vii) a broker or dealer registered under section 15 of the Securities Exchange Act of 1934, (viii) a securities exchange or clearing agencies, (ix) other entities registered under the Securities Exchange Act of 1934, (x) registered investment companies and advisers, (xi) venture capital fund advisers, (xii) insurance companies, (xiii) state licensed insurance producers, (xiv) Commodity Exchange Act registered entities, (xv) accounting firms registered in accordance with section 102 of the Sarbanes-Oxley Act, (xvi) public utilities, (xvii) a financial market utility designated by the Financial Stability Oversight Council under section 804 of the Payment, Clearing, and Settlement Supervision Act of 2010, (xviii) pooled investment vehicles operated by a person described in (iii), (iv), (vii), (x), or (xi), (xix) tax exempt entities, (xx) entities assisting tax exempt entities, (xxi) large operating companies, (xxii) subsidiaries of most exempt entities, and (xxiii) inactive businesses.

Entities exempt under categories (xix) through (xxii) are detailed more fully below.

V. EXEMPTION—TAX EXEMPT ENTITIES

Some tax exempt entities are exempted from being reporting companies. Organizations described in Section 501(c) of the Internal Revenue Code (“IRC”) and exempt from tax under IRC Section 501(a), political organizations defined in IRC Section 527(e)(1), and trusts described in IRC Sections 4947(a)(1) and (2) are all exempt.¹² As a result private foundations, charitable lead trusts, and charitable remainder trusts should not be reporting companies.

In addition an entity that “operates exclusively to provide financial assistance to, or hold governance rights over” such tax exempt entities will also be exempted as long as that entity (1) is a United States person, (2) is beneficially owned or controlled exclusively by one or more U.S. citizens or green card holders, and (3) derives a majority of its funding or revenue from U.S. citizens or green card holders.¹³ This definition should include most supporting organizations under IRC §509(a)(3).

VI. EXEMPTION—LARGE OPERATING COMPANIES

An entity falls into this category, and therefore is not a reporting company, if it: (1) “Employs more than 20 employees on a full-time basis in the United States”; (2) “filed in the previous year Federal income tax returns in the United States demonstrating more than \$5,000,000 in gross receipts or sales in the aggregate,” including the receipts or sales of other entities owned by the entity and through which the entity operates; and (3) “has an operating presence at a physical office within the United States.”¹⁴

The final regulations clarify several aspects of this exemption.¹⁵ Employing someone on a full-time basis is made equivalent to the Internal Revenue Service definition of “full-time employee” and related determination methods at 26 CFR 54.4980H-1(a)(21) and 54.4980H-3. These regulations generally count as a full-time employee anyone employed an average of at least 30 service hours per week or 130 service hours per month, with adaptations for non-hourly employees.

Regarding the \$5,000,000 filing threshold, the final regulations exclude gross receipts or sales from sources outside the United States, as determined under federal income tax principles. The statute does not make any reference to the source of the gross receipts, but the preamble to the proposed regulations explains this further. “FinCEN’s proposal to exclude gross receipts or sales from sources outside the United States reflects the CTA’s domestic focus in requiring that a qualifying entity have filed ‘Federal tax returns *in the United States.*’ This focus on the United States is reinforced in other prongs requiring that an entity’s 20 or more employees be employed in the United States, and that the entity have an operating presence at an office within the United States. FinCEN believes that focusing on gross receipts or sales from U.S. sources would maintain consistency with the exemption’s overall United States-centric approach...”¹⁶

While the final regulations do not contain any clarification on the requirement for an “operating presence at a physical office within the United States”, the preamble to the proposed regulations did. FinCEN views this as requiring the office be “owned or leased by the entity, is not a residence, and is not shared space (beyond being shared with affiliated entities)—in short, a genuine working office of the entity.”¹⁷

VII. FOREIGN POOLED INCOME VEHICLES

An entity exempt under 31 C.F.R. §1010.380(c)(2)(xviii) as a foreign pooled

¹² 31 U.S.C. §5336(a)(11)(B)(xix). See also 31 CFR §1010.380(c)(2)(xix).

¹³ 31 U.S.C. §5336(a)(11)(B)(xx). See also 31 CFR §1010.380(c)(2)(xx).

¹⁴ 31 U.S.C. §5336(a)(11)(B)(xxi).

¹⁵ 31 CFR §1010.380(c)(2)(xxi).

¹⁶ 86 Fed. Reg. 69940 (December 8, 2021).

¹⁷ 86 Fed. Reg. 69939 (December 8, 2021).

investment vehicle owned by certain other exempt entities is only partially exempt from the CTA reporting requirements. Such an entity does not need to disclose its 25% owners, but must still disclose “an individual who exercises substantial control over the entity. If more than one individual exercises substantial control over the entity, the entity shall report information with regard to the individual who has the greatest authority over the strategic management of the entity.”¹⁸

VIII. SUBSIDIARIES

An entity “whose ownership interests are controlled or wholly owned, directly or indirectly, by one or more” exempt entities will almost always be exempt from the reporting obligations of a reporting company.¹⁹ The only exempt entities that do not benefit from this rule are a money service business under (c)(2)(vi), a pooled investment vehicles under (c)(2)(xviii), and entities assisting tax exempt entities under (c)(2)(xx).

IX. COMPANY APPLICANT

Under the CTA, a reporting company must disclose and report BOI on each company applicant.²⁰ A company applicant is any individual who (i) directly files a document that creates a domestic reporting company, (ii) directly files a document that first registers a foreign reporting company, or (iii) who is primarily responsible for directing such filing.²¹ It is not necessary to disclose the company applicant of an entity created or registered before January 1, 2024.²² That is a change from the proposed regulations, which suggested we would have needed to track down attorneys and paralegals from decades ago to provide current mailing addresses and other BOI.

The preamble to the proposed regulations explain that anyone who directs the formation of a reporting company is also considered to be a company applicant because “in many cases, the company applicant may be an employee of a business formation service or law firm, or an associate, agent, or family member who is filing the document on behalf of another individual. In such a case, the individual directing or controlling the formation of a legal entity should not be able to remain anonymous simply by directing another individual to file the requisite paperwork, and must therefore disclose his or her identity to FinCEN along with the individual that made the filing.”²³

Under the proposed regulations any individual who directed or controlled a filing would be a

company applicant, meaning it was possible a large number of individuals could be reported under this category. The final regulations limit the number of company applicants to two, being the individual who made the filing and the individual who “is primarily responsible” for directing the filing.

The preamble to the final regulations provides some surprising guidance with regard to business formation services. “Where business formation services provide software, online tools, or generally applicable written guidance, the employees of such services are not company applicants. However, employees of such services may be company applicants if they are personally involved in the filing of a document to form a particular company.”²⁴

For example, assume an attorney directs a paralegal to form an LLC and the paralegal uses a business formation service. The attorney is a company applicant as the person primarily responsible for directing the filing. Is the other company applicant the paralegal or an employee at the service? According to the preamble, that depends on whether the paralegal used an online tool (in which case the paralegal is the company applicant) or if they faxed a form to the service and an employee submitted that form to the secretary of state (in which case the employee is the company applicant).

X. BENEFICIAL OWNERS

Under the CTA, a reporting company must disclose its beneficial owners. The CTA defines a beneficial owner as “an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise—(i) exercises substantial control over the entity; or (ii) owns or controls not less than 25% of the ownership interests of the entity...”²⁵

As a result, to be a beneficial owner under the CTA you must either (i) have substantial control over or (ii) be a 25% owner of a reporting company. The statute, however, does not define “substantial control” or “ownership interests.” The final regulations attempt to clarify these terms so that a reporting company has sufficient guidance to identify and report its beneficial owners.

XI. SUBSTANTIAL CONTROL

Under 31 C.F.R. §1010.380(d)(1), an individual has substantial control over a reporting company if that individual (1) serves as a senior officer²⁶, (2) has authority over the appointment or

¹⁸ 31 C.F.R. §1010.380(b)(2)(iii). See also 31 U.S.C. §5336(b)(2)(C).

¹⁹ 31 U.S.C. §5336(c)(2)(xxii).

²⁰ 31 U.S.C. §5336(b)(2)(A).

²¹ 31 C.F.R. §1010.380(e).

²² 31 C.F.R. §1010.380(b)(2)(iv).

²³ 86 Fed. Reg. 69938 (December 8, 2021).

²⁴ 87 Fed. Reg. 59536 (September 30, 2022).

²⁵ 31 U.S.C. §5336(a)(3)(A).

²⁶ 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

removal of any senior officer or a majority²⁷ of the board of directors (or similar body), or (3) can direct, determine, or has substantial influence over important decisions made by the reporting company.

Important decisions include, but are not limited to:

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 equity, incurrence of significant debt, or approval of the operating budget;
4. selection or termination of business lines or ventures or geographic focus;
5. compensation schemes and incentive programs for senior officers;
6. the entry into or termination of significant contracts; and
7. amendments of governance documents.

Note this is not an exhaustive list of “important decisions”.²⁸

The regulations also includes a catch-all provision to make clear that substantial control can take additional forms not specifically listed.²⁹

“Each of these indicators supports the basic goal of requiring a reporting company to identify the key individuals who stand behind the reporting company and direct its actions. The first indicator identifies the individuals with nominal or de jure authority, and the second and third indicators identify the individuals with functional or de facto authority.”³⁰ The catch-all provision “recognizes that control exercised in novel and less conventional ways can still be substantial.”³¹

XII. INDIRECT SUBSTANTIAL CONTROL

Substantial control can be held indirectly. Specifically, the regulations state “An individual may directly or indirectly, including as a trustee of a trust or similar arrangement, exercise substantial control over a reporting company through:” (a) board representation, (b) ownership or control of a majority of voting rights, (c) rights associated with a financing arrangement or interest in a company, (d) control over one or more intermediary entities that “separately or collectively exercise substantial

control over a reporting company”, (e) through individuals or entities acting as nominees, or (f) “any other contract, arrangement, understanding, relationship or otherwise.”³²

It's worth noting the final regulations added the phrase “including as a trustee of a trust or similar arrangement” to this provision.

XIII. OWNERSHIP OR CONTROL OF OWNERSHIP INTERESTS

The second category of beneficial owner includes individuals who own or control at least 25 percent of a reporting company's ownership interests.³³ The final regulations define “ownership interests,” very broadly, so that the term includes both equity in the reporting company and other types of interests, such as capital or profit interests or convertible instruments, warrants or rights, or other options or privileges to acquire or sell equity, capital, or other interests in a reporting company.³⁴

The final regulations contain two significant changes from the proposed regulations. First, the definition of ownership interest excludes an option or similar arrangement “created and held by a third party or third parties without the knowledge or involvement of the reporting company...”³⁵ This is a helpful recognition that owners of equity interests may grant options or engage in other arrangements with third parties without informing the reporting company.

The final regulations also added a catch all provision, stating that an ownership interest includes “Any other instrument, contract, arrangement, understanding, relationship, or mechanism used to establish ownership.”³⁶

XIV. INDIRECT OWNERSHIP

The CTA is not interested in form, and the regulations make clear a reporting company should seek out true owners even if their ownership is indirect. The regulation includes a non-exhaustive list of examples to further emphasize that an individual can own or control ownership interests through a variety of means including joint ownership, through a nominee, intermediary, custodian, or agent, through a trust (as detailed below), or through intermediary entities.³⁷

The preamble to the proposed regs makes clear, “FinCEN's proposed approach requires reporting companies to consider all facts and circumstances when making determinations about who owns or controls ownership interests. FinCEN believes that the specific examples will illustrate

official title, who performs a similar function.” 31 C.F.R. §1010.380(f)(8).

²⁷ The proposed regulations referred to a “dominant minority” of the board of directors, but the final regulations eliminated this peculiar and undefined term.

²⁸ Under 31 C.F.R. §1010.380(d)(1)(i)(C).

²⁹ 31 C.F.R. §1010.380(d)(1)(i)(D).

³⁰ 87 Fed. Reg. 59526 (September 30, 2022).

³¹ *Id.* at 59527.

³² 31 C.F.R. §1010.380(d)(1)(ii).

³³ 31 U.S.C. 5336(a)(3)(A)(ii).

³⁴ 31 C.F.R. §1010.380(d)(2)(i).

³⁵ 31 C.F.R. §1010.380(d)(2)(i)(D).

³⁶ 31 C.F.R. §1010.380(d)(2)(i)(E).

³⁷ 31 C.F.R. §1010.380(d)(2)(ii).

what FinCEN believes to be relevant to an ownership-interests analysis.”³⁸ In some instances this obligation to identify indirect owners will place a heavy burden on a reporting company.

With regard to trusts, 31 CFR §1010.380(d)(2)(C) specifies that an individual may directly or indirectly own or control an ownership interest in a reporting company:

1. As a trustee with authority to dispose of trust assets;
2. As the sole income and principal beneficiary of a trust OR as a beneficiary with the “right to demand a distribution of or withdraw substantially all of the assets from the trust”; or
3. As a grantor if the right to revoke the trust has been retained

As a result, the trustee of a trust will almost always be a beneficial owner of a reporting company if the trust holds a large enough ownership interest.

Regulators often find trusts challenging because they come in such a wide range of forms and this was acknowledged in the preamble to the proposed regulations. “FinCEN believes that these circumstances comport with the general understanding of ownership and control in the context of trusts and furthers the CTA’s objective of identifying true beneficial owners regardless of formalities that may vary across different jurisdictions. However, FinCEN acknowledges that these concepts do not map easily onto every trust or similar arrangement.”³⁹

This language was not changed in the final regulations, but it should be noted these are examples of how the ownership of a reporting company through a trust may be attributed to various parties. It’s not exhaustive, and the overarching principal that indirect ownership or control must be reported remains.⁴⁰

XV. BENEFICIAL OWNER EXCEPTIONS

The CTA includes five exceptions to the definition of beneficial owner,⁴¹ each of which is clarified under the final regulations.

XVI. BO EXCEPTION—MINOR CHILDREN

The term beneficial owner does not include a minor child, provided “the reporting company reports the required information of a parent or legal guardian of the minor child...”⁴² That report must indicate the information is for a parent or legal guardian.⁴³

Whether someone is a minor is determined by the law of the state where the reporting company is formed, not where the child or their guardian resides.⁴⁴

XVII. BO EXCEPTION—NOMINEES

A reporting company should not report a nominee, intermediary, custodian, or agent acting on behalf of another individual.⁴⁵ Rather, that reporting company must report real parties in interest who exercise control indirectly.

XVIII. BO EXCEPTION—EMPLOYEES

A beneficial owner does not include an employee of a reporting company, “acting solely as an employee,” whose “control over or economic benefits from” a reporting company are derived solely from the employment status of the person.⁴⁶ The regulations clarify that a person acting as a senior officer of a reporting company could not avail himself of this exception.⁴⁷

Under the CTA, only employees who are “acting solely as an employee” may be exempt. The preamble to the proposed regulations notes “In the common law of agency and corporate law, senior officers have long been distinguished from employees, with officers often regarded as principals and employees regarded as agents.”⁴⁸ The preamble to the final regulations provide a further, and perhaps simpler, explanation, “if senior officers were considered to be employees in this sense, it would swallow the substantial control provision for senior officers who exercise a great deal of control over a reporting company, and thus undermine FinCEN’s ability to determine who in fact exercises substantial control over an entity.”⁴⁹

XIX. BO EXCEPTION—INHERITANCE

The statute excludes an individual whose only interest in a reporting company “is through a right of inheritance...”⁵⁰ The regulations clarify that this exception refers to a “future” interest associated with a right of inheritance.⁵¹ FinCEN wanted to make clear “that once an individual has inherited an ownership interest in an entity, that individual owns it. Individuals who may in the future come to own ownership interests in an entity through a right of inheritance do not have ownership until the inheritance occurs.”⁵²

³⁸ 86 Fed. Reg. 69935 (December 8, 2021).

³⁹ Id.

⁴⁰ 87 Fed. Reg. 59532 (September 30, 2022).

⁴¹ 31 U.S.C. §5336(a)(3)(B).

⁴² 31 C.F.R. §1010.380(d)(3)(i).

⁴³ 31 C.F.R. §1010.380(b)(2)(ii).

⁴⁴ 31 U.S.C. §5336(a)(3)(B).

⁴⁵ See 31 U.S.C. §5336(a)(3)(B)(ii) and 31 C.F.R. §1010.380(d)(3)(ii).

⁴⁶ 31 U.S.C. §5336(a)(3)(B)(iii).

⁴⁷ 31 CFR §1010.380(d)(3)(iii).

⁴⁸ 86 Fed. Reg. 69937 (December 8, 2021).

⁴⁹ 87 Fed. Reg. 59534 (September 30, 2022).

⁵⁰ 31 U.S.C. §5336(a)(3)(B)(iv).

⁵¹ 31 CFR §1010.380(d)(3)(iv).

⁵² 86 Fed. Reg. 69937 (December 8, 2021).

When exactly does an individual's ownership interest begin? For example, if I inherit an interest in a reporting company under a specific bequest in the Will of my uncle Jim, have I "inherited an ownership interest in an entity" as soon as Jim dies? When the Will is admitted to probate? When the interest is retitled in my name? When there is a final accounting and the probate proceeding closes? Does it matter if there is some contest associated with the Will? The regulations do not provide any guidance, but the preamble to the final regulations states, "The precise moment at which an individual acquires an ownership interest in an entity through inheritance may be subject to a variety of existing legal authorities, such as the terms of a will, the terms of a trust, applicable state laws, and other valid instruments and rules."⁵³

XX. BO EXCEPTION—CREDITORS

The final statutory exception to the definition of beneficial owner is "a creditor" of an entity "unless the creditor meets the requirements of subparagraph (A)", meaning the creditor also exercised substantial control over the entity or owned twenty-five percent or more of the entity.⁵⁴

The statute does not define the term "creditor." Proposed 31 CFR §1010.380(d)(4)(v) clarified that an exempt creditor is an individual whose rights or interests in the reporting company are limited to the payment of a predetermined sum of money, such as a debt and the payment of interest on such debt. "[A]ny capital interest in the reporting company, or any right or interest in the value of the reporting company or its profits" would not benefit from this exception. Similarly, debt convertible into equity falls outside this exception and will be taken into account in determining if the owner of that "debt" has a reportable beneficial interest.

The final regulations were modified and now state, "a creditor is an individual who meets the requirements of paragraph (d) [being a beneficial owner] of this section solely through rights or interests for the payment of a predetermined sum of money, such as a debt incurred by the reporting company, or a loan covenant or other similar right associated with such right to receive payment that is intended to secure the right to receive payment or enhance the likelihood of repayment."⁵⁵

Notice that there is no longer a reference to a right associated with the profits of a company, nor is there any allusion to convertible debt. The final regulations also add language clarifying that loan covenants associated with securing a loan do not move a creditor outside of this exception.

The preamble to the final regulations explain the rationale for these changes, "The revisions are intended to address the point made by commenters

that the interests of a creditor routinely include rights or obligations—such as the right to require the debtor to adhere to specific covenants with respect to the management of the debtor's business or the obligation to maintain the collateral securing a loan—that go significantly beyond the bare right to receive a sum of money, but are not commonly considered to amount to ownership or control of a company. FinCEN considered a number of options for creating regulatory language that would make this point administrable, and ultimately concluded that it would be fruitless to attempt to enumerate, or even describe, the universe of creditor rights that do not amount to ownership or control."⁵⁶

XXI. INDIRECT OWNERSHIP THROUGH AN EXEMPT ENTITY

If an individual is a beneficial owner of a reporting company "exclusively" because they own an interest in one or more entities that are themselves exempt from being reporting companies, the name of the exempt entity may be reported instead of the BOI of that individual beneficial owner.⁵⁷

For example, assume Mary owns 50% of Large Co. Large Co. is not a reporting company because it has more than 20 full time employees in the United States and more than \$5 million in U.S. sourced income. Large Co. in turn owns 50% of Joint Venture. Joint Venture is a reporting company and would normally have to disclose Mary as a beneficial owner since she indirectly owns 25% of Joint Venture. Because her interest in Joint Venture is exclusively by virtue of her ownership in an exempt entity (Large Co), Joint Venture can simply disclose the name of Large Co when making its report under the CTA.

While not entirely clear, it appears that Joint Venture should still confirm who owns Large Co. to ensure this narrow exception applies. For example, if Mary owned another 5% interest in Joint Venture she would not benefit from this reporting exception because she does not own her interest in a reporting company (Joint Venture) "exclusively" through an entity that is itself exempt from being a reporting company. Joint Venture could only know that if (1) it confirmed the owners of Large Co. or (2) it provided the names of other owners to Large Co. and asked Large Co. to confirm if any of those other owners of Joint Venture owned an interest in Large Co. Option 2, of course, raises other issues about disclosing confidential information.

XXII. CALCULATING OWNERSHIP OF A REPORTING COMPANY

As detailed above, an individual may have an ownership interest in a reporting company either

⁵³ 87 Fed. Reg. 59535 (September 30, 2022).

⁵⁴ 31 U.S.C. §5336(a)(3)(B)(v).

⁵⁵ 31 C.F.R. §1010.380(d)(3)(v).

⁵⁶ 87 Fed. Reg. 59535 (September 30, 2022).

⁵⁷ 31 C.F.R. §1010.380(b)(2)(i). *See also* 31 U.S.C. §5336(b)(2)(B).

directly or indirectly. Once those ownership interests are identified, how can the reporting company determine if they aggregate to twenty-five percent or more? That task is simple where there is only one type of equity, but it's not unusual to have voting and non-voting interests, as well as equity with different distribution rights. Capital structures can become even more exotic. The final regulations provide some guidance in this area, but more is needed.

Any options or similar interest of an individual are treated as exercised.⁵⁸

If an entity issues both capital and profit interests, "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 interest of the entity[.]"⁵⁹ The preamble does not provide any further clarification on how capital and profit interests are to be made equivalent so the aggregate can be compared.

For corporations, and those taxed as corporations, an individual holds the greater of his/her total combined voting power or total combined value.⁶⁰ While more certain than the rules for capital and profits interest, there are still common questions left unaddressed. For example, if Class A stock votes on all issues and Class B stock only votes on certain issues (like liquidation or incurring debt above \$x), do we consider both classes of stock in calculating voting power?

Finally, there is a catch all provision. If the equity structure means the foregoing rules do not allow a calculation "to be performed with reasonable certainty, any individual who owns or controls 25 percent or more of any class or type of ownership interest of a reporting company shall be deemed to own or control 25 percent or more of the ownership interests of the reporting company."⁶¹ I would expect most reporting companies with any complexity in their equity structure will ultimately end up here, and report as a beneficial owner any individual who owns twenty-five percent or more of any equity class.

XXIII. INFORMATION TO BE REPORTED— BENEFICIAL OWNERS, COMPANY APPLICANTS, AND FINCEN IDENTIFIER NUMBERS

The CTA requires each reporting company to submit to FinCEN a report identifying each beneficial owner of the reporting company and each company applicant by: (1) Full legal name, (2) date of birth, (3) current residential address (a business street address may be used for a company

applicant), and (4) a unique identifying number from an acceptable identification document.⁶²

Acceptable documents are (1) a non-expired passport issued by the United States, (2) a non-expired identification document issued by a State, local government, or Indian tribe, (3) a non-expired driver's license issued by a State, or (4) a non-expired foreign passport if the individual doesn't pose one of the other acceptable documents.⁶³ The regulations also require an image of the identifying document be provided.⁶⁴ Collectively this is referred to as beneficial ownership information or BOI.

To help address privacy concerns, instead of providing BOI to each reporting company an individual can supply that information to FinCEN in exchange for a FinCEN identifier, which is a unique identifying number assigned by FinCEN to a person.⁶⁵ An individual can supply a FinCEN identifier to a reporting company in lieu of BOI.⁶⁶

FinCEN identifier numbers are useful for several reasons. First, they increase privacy by reducing how many parties have access to BOI. That information can be provided directly to FinCEN, thereafter a beneficial owner or company applicant only has to provide the FinCEN identifier to a reporting company instead of providing BOI to each separate reporting company. Second, they make the reporting process more efficient since a reporting company only has to obtain a single piece of information, the FinCEN identifier, instead of obtaining and verifying all required BOI. Third, it shifts some of the reporting burden from reporting companies to individual beneficial owners and company applicants. An individual with a FinCEN identifier is responsible for updating any changed BOI with FinCEN, thus removing that burden from a reporting company.

In January 2023 Treasury provided additional guidance on what information will be required before a FinCEN identifier will be issued.⁶⁷ This will include a first and last name (middle names are also required if the individual has one), date of birth, address (residential for a beneficial owner, business for a company applicant, or both if the identifier will be used for both purposes), image of an identifying document, and a certification that the information furnished is true, correct, and complete.

In that same guidance, FinCEN indicated the online portal will allow a reporting company to state that they cannot identify all company applicants. In

⁵⁸ 31 C.F.R. §1010.380(d)(2)(iii)(A).

⁵⁹ 31 C.F.R. §1010.380(d)(2)(iii)(B).

⁶⁰ 31 C.F.R. §1010.380(d)(2)(iii)(C).

⁶¹ 31 C.F.R. §1010.380(d)(2)(iii)(D).

⁶² 31 U.S.C. §5336(b)(1)(A) (reporting requirement); 31 U.S.C. §5336(b)(2) (required information).

⁶³ See 31 U.S.C. §5336(a)(1) and 31 C.F.R. §1010.380(b)(1)(ii)(D).

⁶⁴ 31 C.F.R. §1010.380(b)(1)(ii)(E).

⁶⁵ 31 U.S.C. §5336(a)(6). See also 31 C.F.R. §1010.380(b)(4).

⁶⁶ See 31 U.S.C. §5336(b)(4)(ii)(A) and 31 U.S.C. §5336(b)(3).

⁶⁷ See 88 Fed. Reg. 2764 *et seq.* (January 17, 2023).

the alternative, a reporting company may say that the following information is “Unknown” about a particular company applicant: (1) first and last name, (2) date of birth, (3) part or all of an address, (4) type of identifying document, (5) identifying number from that document, (5) jurisdiction issuing that document, and (6) an image of the identifying document.⁶⁸

Similarly, a reporting company can say “Unkown” for the following information associated with a beneficial owner: (1) first and last name, (2) date of birth, (3) part of all of an address, (4) type of identifying document, (5) identifying number from that document, (5) jurisdiction issuing that document, and (6) an image of the identifying document.⁶⁹

It was surprising, to say the least, that FinCEN intended to allow a CTA registration to be made despite missing information that is required by statute. On April 3, 2023 a bi-partisan group of twelve Members of Congress (including Seven committee chairman and three Ranking Members) wrote to Janet Yellen, as Secretary of the Treasury, and Mr. Himamauli Das, Acting Director of FinCEN, to express their concern. Specifically they said the phrases “Unable to identify”, “unable to obtain”, “Unkown”, and “unable to obtain” are an “escape hatch” and not consistent with a statute that says such information “shall” be provided to FinCEN. It has been reported that the intake form will be revised to eliminate this language, but as of Mid-April 2023 no updated guidance has been provided.

XXIV. INFORMATION TO BE REPORTED—REPORTING COMPANY

Each reporting company must file an initial report, must update that report if there is a change to information previously submitted, and must correct any inaccurate reports.

Domestic reporting companies created before January 1, 2024 and foreign reporting companies registered to do business in the United States before January 1, 2024 must file an initial report before January 1, 2025.⁷⁰ Domestic reporting companies formed January 1, 2024 or after must file an initial report within 30 calendar days of creation, and foreign reporting companies that register to do business after January 1, 2024 must file an initial report within 30 calendar days.⁷¹

An entity that was not a reporting company because it qualified for an exception must file an initial report within 30 calendar days after it no longer meets that exception.⁷² This can lead to some strange situations. For example, if someone quits an

entity that is exempt from reporting because it has 20 full time employees the exemption could be lost (at least until another employee is hired).

The initial report for each reporting company must contain (1) the full name of the company, (2) any trade name or “doing business as” name, (3) the business street address, (4) the jurisdiction of formation, and (5) the taxpayer identification number.⁷³ The reporting company must also disclose BOI for every beneficial owner and company applicant. Recall beneficial owners include those who exercise substantial control (such as officers) as well as 25% owners.

XXV. UPDATING AND CORRECTING REPORTS

A reporting company must file an updated report within 30 calendar days of any change in:

1. Information previously reported about the reporting company;
2. The beneficial owners of the reporting company; or
3. BOI with regard to a beneficial owner.⁷⁴

This is potentially quite burdensome, as the reporting company is obligated to report within 30 days of a change occurring, not 30 days of the reporting company learning of a change. For example, if a beneficial owner changes their address the reporting company could easily find itself out of compliance.

Note there is no need to update information about a company applicant after the initial report is filed. In addition, if a beneficial owner provided a FinCEN identifier it is up to the beneficial owner, not the reporting company, to update FinCEN on any changes to their BOI.

A reporting company must also file an updated report when (i) a reporting company first meets the requirements for an exception to being a reporting company, (ii) when the estate of a deceased beneficial owner is settled, (iii) when a beneficial owner who is a minor attains the age of majority, and (iv) if the unique identifying number provided by a beneficial owner changes (perhaps because a new drivers license or passport has been issued).⁷⁵

Finally, if an initial report or updated report was inaccurate when filed, the reporting company must file a corrected report with 30 calendar days of becoming aware or having reason to know of the inaccuracy.⁷⁶

⁶⁸ 88 Fed. Reg. 2763-2764 (January 17, 2023).

⁶⁹ 88 Fed. Reg. 2764 (January 17, 2023).

⁷⁰ 31 C.F.R. §1010.380(a)(1)(iii).

⁷¹ 31 C.F.R. §1010.380(a)(1)(i) and (ii).

⁷² 31 C.F.R. §1010.380(a)(1)(iv).

⁷³ 31 C.F.R. §1010.380(b)(1).

⁷⁴ 31 C.F.R. §1010.380(b)(2).

⁷⁵ 31 C.F.R. §1010.380(a)(2)(ii) through (v).

⁷⁶ 31 C.F.R. §1010.380(a)(3).

XXVI. FINCEN IDENTIFIER NUMBERS AND REPORTING COMPANIES

The CTA states a reporting company may report the FinCEN identifier of an entity that is the partial owner of the reporting company instead of providing the BOI of an individual.⁷⁷ If implemented as written this would have dramatically simplified reporting because each reporting company would only have to identify entities that owned it (assuming each had a FinCEN identifier). In the most recent proposed regulations, however, FinCEN has dramatically decreased the utility of FinCEN identifiers for entities.

Instead of providing BOI for individuals, a reporting company can report another entities FinCEN identifier only if the beneficial owners of the entity and the reporting company are the same.⁷⁸ This will be helpful to reduce the reporting burden on related entities that tree up to the same beneficial owners, but will otherwise provide very little relief.

The rationale given for this is that relying on entity FinCEN Identifiers could over report and under report information. Ultimately, however, I think the concern was that it would prove difficult for those accessing the database to work through layers of entities to identify individual beneficial owners if FinCEN identifiers were used.⁷⁹ As a result that task has been left to each reporting company.

XXVII. ACCESSING THE BOI REGISTRY

The BOI registry will not be accessible to the public. The CTA is focused on national security, effective regulation, and anti-money laundering activities. As a result access to BOI information is limited to individuals and entities who need to access the information for those purposes. Specifically, under the CTA FinCEN may only disclose BOI upon receipt of a request from:

1. A Federal agency engaged in national security, intelligence, or law enforcement activity, for use in furtherance of such activity;
2. A State, local, or Tribal law enforcement agency, if a court of competent jurisdiction authorizes the law enforcement agency to see the information in a criminal or civil investigation;
3. A federal agency on behalf of a law enforcement agency, prosecutor, or judge of another country that request assistance in an investigation or prosecution;
4. A financial institution, with the consent of the reporting company, to facilitate the compliance of the financial institution with customer due diligence requirements; and

5. A request made by a Federal regulator authorized by law to assess, supervise, enforce, or otherwise determine the compliance of a financial institution with customer due diligence.⁸⁰

In addition, the CTA specifically authorizes Department of Treasury personnel to access BOI “for tax administration purposes” or if their “official duties require such inspection or disclosure...”⁸¹

Proposed regulations regarding access to BOI were recently promulgated, a thorough discussion of which is beyond the scope of these materials.⁸²

XXVIII. PENALTIES—REPORTING

It is unlawful to (1) “willfully provide, or attempt to provide, false or fraudulent beneficial ownership information, including a false or fraudulent identifying photograph or document...” or (2) to “willfully fail to report complete or updated beneficial ownership information...”⁸³

The final regulations make clear that providing false or fraudulent information includes a beneficial owner who provides false or fraudulent information to the reporting company.⁸⁴ It is not, however, clear if there is any penalty for a beneficial owner who refuses to provide BOI to a reporting company. The preamble to the proposed regulations acknowledged this ambiguity. “While the CTA requires reporting companies to file reports and prohibit failures to report, it does not appear to specify who may be liable if require information is not reported.”⁸⁵ The final regulations remain vague on this point, stating a person fails to report if “such person either causes the failure, or is a senior officer of the entity at the time of the failure.”⁸⁶

The CTA defines “willfully” to mean “the voluntary, intentional violation of a known legal duty.”⁸⁷

A person who makes such a willful filing is liable for a civil penalty of up to \$500 for each day the violation continues, and a criminal penalty of up to \$10,000 and two years in prison.⁸⁸

It’s interesting to note that the preamble to the final regulations makes clear that it is the reporting company itself that is ultimately responsible for making an accurate filing. “While an individual may file a report on behalf of a reporting company, the reporting company is ultimately responsible for the filing. The same is true of the certification. The reporting company will be

⁷⁷ 31 U.S.C. §5336(b)(3)(C).

⁷⁸ Proposed 31 C.F.R. §1010.380(b)(4)(ii)(B).

⁷⁹ 87 Fed. Reg. 77424 (December 16, 2022).

⁸⁰ See 31 U.S.C. §5336(c)(2)(B).

⁸¹ 31 U.S.C. §5336(c)(5).

⁸² 87 Fed. Reg. 77404 *et seq.* (December 16, 2022).

⁸³ 31 U.S.C. §5336(h)(1).

⁸⁴ 31 C.F.R. §1010.380(g)(3).

⁸⁵ 86 Fed. Reg. 69944 (December 8, 2021).

⁸⁶ 31 C.F.R. §1010.380(g)(4)(iii).

⁸⁷ 36 U.S.C. §5336(h)(6).

⁸⁸ 36 U.S.C. §5336(h)(3)(A).

required to make the certification, and any individual who files the report as an agent of the reporting company will certify on the reporting company's behalf."⁸⁹

XXIX. PENALTIES—IMPROPER ACCESS OR USE OF BOI

The CTA does impose meaningful penalties for government actors who misuse BOI. Anyone who “knowingly” discloses or uses BOI is liable for a civil penalty of up to \$500 a day for each day the violation continues or has not been remedied and a criminal penalty of up to \$250,000 and five years imprisonment.⁹⁰ If a violation of the CTA occurred while violating another federal law or as part of a pattern of illegal activity, the criminal penalties may increase to a \$500,000 fine and ten years in prison.

⁸⁹ 87 Fed. Reg. 59514 (September 30, 2022).

⁹⁰ 36 U.S.C. §5336(h)(3)(B).