

Corporate Transparency Act: Best Practices Part 1

The purpose of this Article is to provide practical guidance for senior executives and legal practitioners who are beginning to tackle the reporting requirements of the Corporate Transparency Act. This Article suggests a variety of helpful practices and tools, including the use of FinCEN Identifiers, to assist with going-forward compliance with the Act.

Background

Effective as of January 1, 2024, the Corporate Transparency Act (the “CTA”) together with recently finalized regulations being implemented by the Financial Crimes Enforcement Network (“FinCEN”) require entities that are formed or registered to do business in the United States and that do not qualify for applicable exemptions (“Reporting Companies”) to submit a report declaring beneficial ownership information (a “BOI Report”) to FinCEN. BOI Reports are required to be filed with respect to each “Beneficial Owner” and, for entities formed on or after January 1, 2024, up to two “Company Applicants.”

The CTA defines a Beneficial Owner as any natural person who directly or indirectly (i) exercises “substantial control” over a Reporting Company or (ii) owns or controls 25% or more of the ownership interests of a Reporting Company. Individuals with “substantial control” over a Reporting Company include managers and senior officers, such as a president, CEO, or CFO and persons who otherwise have substantial influence over important decisions made by the Reporting Company (which may be in the form of contractual rights).

A Company Applicant is the individual who directly files the formation/registration document that creates the Reporting Company (such as a business formation service) and if applicable, the individual who is primarily responsible for directing or controlling the filing (someone in-house at the Reporting Company or a third-party professional, such as an accountant, lawyer, or paralegal).

Practical Considerations

Whether an entity is a Reporting Company must be determined by way of an entity-by-entity analysis. While certain companies in a business’ organizational structure may be exempt from the requirements, others may not be, and if your business has joint venture partners, portfolio companies, or minority equity investments, you will also need to consider whether your entities may be pulled into other third-party Reporting Companies’ Beneficial Owner analyses. Given this, it is recommended that you (i) undertake a thorough review of your organizational and capital structure to determine the applicable Reporting Companies

and their Beneficial Owners and (ii) implement a process to gather the beneficial ownership information on an ongoing basis to ensure compliance with the CTA.

FinCEN Identifiers

In the BOI Report, the Reporting Company must provide information regarding each Beneficial Owner's and Company Applicant's¹ (i) full legal name, (ii) date of birth, (iii) current address, and (iv) unique identifying number from an acceptable identification document (e.g., driver's license or passport), and must also submit a copy of such identification document.

However, a Reporting Company can report the FinCEN identifier pertaining to a Beneficial Owner and/or a Company Applicant in lieu of such personal information about such individual(s). A "FinCEN identifier" is a unique identifying number that FinCEN will issue to an individual upon request after the individual provides to FinCEN their name, date of birth, address, unique identifying number and issuing jurisdiction from an acceptable identification document, and an image of the identification document – the same information the Reporting Company would have needed to submit about such individual as its Beneficial Owner/Company Applicant. After an individual submits an application, the individual will immediately receive a FinCEN identifier unique to such person. This FinCEN identifier should then be provided to the applicable Reporting Company to be reported by it in its BOI Report.

To note, while a Beneficial Owner is not required to obtain a FinCEN identifier, the FinCEN Identifier is a great alternative for Beneficial Owners who may be reluctant to provide personal information to the Reporting Company. Importantly, as a result of using the FinCEN Identifier, the individual providing such identifier (rather than the Reporting Company) would be responsible for updating FinCEN in the event of any changes or inaccuracies in their information. Further, the FinCEN Identifier is also very helpful for businesses that have large organizational structures that ultimately flow up to a single parent entity. Since each entity in the structure that is not exempt must submit its own BOI Report to FinCEN, having a FinCEN Identifier for the Beneficial Owners of the parent entity will reduce the burden of submitting the same personal information multiple times.

Company Applicants, including service providers that routinely assist with forming entities, such as attorneys, accountants, and business formation services, are likely to obtain FinCEN Identifiers for their personnel so that these can be passed along to clients for purposes of their BOI Reports. If you receive third party assistance to submit the state filing that forms an entity or registers it to do business, it is important to request the FinCEN Identifier of the person you are working with. To note, the Company Applicant may also be someone in-house at the Reporting Company or a third party professional, such as an accountant, lawyer, or paralegal, that ultimately authorizes a business formation service to act.

Utilizing FinCEN Identifiers is one good example a business should consider incorporating into its go-forward policies and procedures.

¹ Information regarding the Company Applicant is only required for Reporting Companies formed or registered to do business on or after January 1, 2024.

Incorporating Provisions in Organizational Documents

To the extent owners or executives of a Reporting Company don't have a FinCEN Identifier, companies should consider adding covenants (such as in Subscription Agreements, Operating Agreements and/or Executive Services Agreements) requiring such individuals to (i) promptly provide the requisite beneficial ownership information (and any subsequent changes thereto) and (ii) make representations and warranties that any such information is true, correct, and complete. This is important as the Reporting Company is the one ultimately responsible for ensuring that it submits complete and accurate beneficial ownership information to FinCEN (regardless that such information may have been provided to the Reporting Company by unaffiliated owners, for example).

[Please refer to our Article "Corporate Transparency Act: Best Practices Part 2" for suggested provisions that can be incorporated into common agreements.](#)

Best Practices for Acquisitions

Acquirors and investors should consider adding a CTA compliance assessment to their suite of typical acquisition due diligence. Whether completed internally or with the help of outside legal counsel, it is important to conduct due diligence regarding a target company's (i) historical compliance with the requirements of the CTA (including that they have timely filed the requisite BOI Reports) and (ii) internal procedures to ensure compliance on a go-forward basis. To support such diligence, consider expanding the customary "compliance with law" representations and warranties in the purchase agreement to include compliance with the CTA. The foregoing is particularly important when acquiring the equity of a Reporting Company and inheriting risks with respect to such entity's compliance with law.

Following the closing of a transaction, it is very important to report any changes to previously filed BOI Reports, in respect of the buyer and/or the target, as applicable. For example, following a majority or minority investment, or a full buy-out, there may be (i) a change of Beneficial Owners who hold 25% or more of the target, (ii) in the event of roll-over equity or equity-financing, a change of Beneficial Owners who hold 25% or more of the buyer², and (iii) in connection with negotiating the rights of going-forward members, there may be changes to the individuals who substantially control the target or the holding vehicle that now owns the target. If there is any change to the information included in a BOI Report about the Reporting Company or its beneficial owners, the Reporting Company must file an updated BOI report no later than 30 calendar days after the date of the change.

Monitoring Changes to Organizational and Capital Structure

All Reporting Companies will need to be mindful of (and incorporate a process to track) (i) formation of new vehicles and other restructurings, (ii) changes to their senior officers or

² For example, many special purpose vehicles formed for purposes of an acquisition are initially wholly-owned by a sponsor, who would need to be reported on the BOI Report of the vehicle, since the report is due within 30 days of its formation (or 90 days, in respect of Reporting Companies formed in 2024). Ultimately, upon the closing of the transaction, investors and others would typically be included in the SPV's capitalization.

executive or investment committees, and (iii) changes to their cap table (such as upon a financing or other transactions), as just a few examples, as these will all trigger the requirements under the CTA.

Ultimately, businesses need to begin thinking about the CTA and understand the scope of potential reporting requirements and the nature of what is required to be submitted to FinCEN. For some businesses, this may be an easy process if the entities in their organizational structure are all subject to applicable exemptions from the reporting requirements, but for other businesses, addressing the CTA will be a massive undertaking given the number of Reporting Companies and/or the number of Beneficial Owners, some of whom may be very sensitive regarding sharing the requisite information about their own structures and owners.

It is important to note that regulations to implement the CTA are still evolving. The first BOI Reports are just being filed now, and these will inevitably raise new questions and new concerns from the public. In response to these, FinCEN continues to issue new [FAQs](#) and additional guidance that will need to be carefully monitored.

For background on the Corporate Transparency Act, including regarding (i) the entities to which the regulations apply and applicable exemptions, (ii) further information on how Beneficial Owners are defined, and (iii) other reporting requirements and deadlines, please refer to our introductory article, "[FinCEN Reporting Requirements Under the Corporate Transparency Act: Guidance from the Business Transactions Group.](#)"

For guidance regarding language a Reporting Company may wish to include into its governing documents, please refer to our article "[Corporate Transparency Act: Best Practices Part 2.](#)"

Please reach out to your Seward & Kissel relationship attorney or a member of the S&K Corporate Transparency Act Committee if you would like more information on the CTA. Seward & Kissel can help you navigate this new law and its compliance obligations. We will share more information on the CTA and reporting requirements as these become available.

Update

On March 1, 2024, a federal district court in the Northern District of Alabama³, entered a final declaratory judgment, concluding that the Corporate Transparency Act exceeds the Constitution's limits on Congress's power and enjoining the Department of the Treasury and FinCEN from enforcing the Corporate Transparency Act against the plaintiffs in the case. The Justice Department, on behalf of the Department of the Treasury, filed a Notice of Appeal on March 11, 2024 and issued a public release stating that while the litigation is ongoing, FinCEN will continue to implement the Corporate Transparency Act as required by Congress, and would comply with the court's order solely with respect to the particular individuals and

³ *National Small Business United v. Yellen*, No. 5:22-cv-01448 (N.D. Ala.)

entities subject to the court's injunction. Otherwise, FinCEN's continuing guidance is that reporting companies are still required to comply with the law and file beneficial ownership reports as provided in FinCEN's regulations.