



ICSC+LAW SYMPOSIUM OH/KY/IN/MI/PA
Hilton Columbus/Polaris, Columbus, OH
February 29 - March 1, 2024

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Hilton Columbus/Polaris
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2:50 - 3:50 pm

Session 4B: Corporate Transparency Act – What It Is & What to Expect

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OUTLINE & SUSTANTIVE MATERIALS

The Corporate Transparency Act (CTA) may be the most transformative piece of legislation in recent memory. Its goal is to create, for the first time, a nationwide database of companies and their beneficial owners in order to assist law enforcement in detecting and preventing terrorism, money laundering and other misconduct through business entities. The CTA is the culmination of more than a decade of congressional efforts. Prior to CTA, the burden of collecting beneficial ownership information was squarely on financial institutions. Now, the CTA will shift this burden to those business entities that fall under the purview of the CTA. This session will explore how the CTA came about, what the framework looks like, who is bound by the CTA, and the impact we can expect after the CTA is fully implemented.

I. Setting the Stage – How did we get here?

1. Worldwide effort to encourage countries to adopt laws providing transparency on entity ownership.
2. Many countries have enacted provisions to date and the US is joining that effort with the enactment of CTA.
3. Goal of the enactment is to make it harder for bad actors to hide or benefit from their ill-gotten gains through shell companies.

II. Key Features of the CTA

A. FinCEN

1. Rules require certain entities to report identifying information about their beneficial owners to FinCEN.
2. This information will be maintained on a non-public database that will generally only be accessible to certain law enforcement personnel and only for authorized activities related to national security, intelligence, and law enforcement.
3. The information will not be publicly available.

B. BOI Reporting

1. BOI reporting is required of reporting companies that are not exempt. These companies will be required to disclose identifying information about their beneficial owners and, for entities created after Jan. 1, 2024, company applicants. They will also be required to file updated reports whenever any information on the report changes. The deadlines to file such reports vary throughout 2024.

C. Reporting Companies

1. Only a reporting company is required to file a BOI report.
2. A reporting company is defined as any domestic legal entity, regardless of tax treatment, created by the filing of a document with a secretary of state or any similar office.



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3. Foreign entities are also considered reporting companies if they're registered to do business in any state through the filing of a document with the secretary of state or similar office.

4. However, the rules carve out 23 exemptions. The exemptions generally revolve around entities where the government already has information regarding ownership (e.g., public companies, regulated insurance companies, regulated banks, certain investment funds or investment advisors registered with the SEC, subsidiaries of certain entities exempt from reporting, etc.), entities that have a low likelihood of being used for illegal activities (e.g., dormant entities), or those whose beneficial ownership information would be little value (e.g. tax exempt entities).

D. Beneficial Owners

1. A beneficial owner includes two categories of individuals: (1) those holding or controlling 25% or more of the entity's ownership interests and (2) those in substantial control of the entity. An ownership interest is defined very broadly and, depending on the circumstances, can include equity, voting rights, profits/capital, convertible instruments, options/warrants, or any other arrangement that provides indicia of ownership.

2. Substantial control has a similarly broad definition to include an individual who, directly or indirectly, exercises substantial control of the company. This includes (1) senior officers, (2) individuals with authority to appoint or remove certain officers or a majority of directors, (3) an individual who's an important decision-maker, or (4) an individual with any other form of substantial control over the reporting company. Minor children, agents, individuals acting solely as an employee, individuals who only hold a future interest through a right of inheritance, and creditors are exempt from the definition of a beneficial owner.

E. Company Applicants

1. If an entity is created after Jan. 1, 2024, company applicants are also required to be included in the report. The company applicant is the individual who directly filed the document to create the entity, or, in the case of a foreign company, the document to register to do business in the United States, as well as the person supervising the direct filer. Furthermore, entities don't need to update company applicant information even if it changes after the original BOI filing.

F. Information Reported

1. The report must include several pieces of information for each beneficial owner or company applicant: full legal name, date of birth, home address, a unique ID number (typically from a driver's license or passport), and a copy of the document where the unique ID number originated. Company applicants can use their business address instead of their home address.

G. Obligations of Exempt Companies

1. Companies that qualify for an exemption to the filing requirements prior to the deadline to file a BOI report don't need to file anything to prove that they are exempt.



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III. The CTA's Exemptions for Reporting Companies

A. Overview of the 23 Statutory Exemptions. The Reporting Rule exempts 23 specific types of entities from the reporting requirements. An entity that qualifies for any of these exemptions is not required to submit BOI reports to FinCEN. Most of the exempt entities are already subject to significant federal and state regulations. The entities that are exempt from the reporting requirements are:

1. Securities reporting issuer
2. Governmental authority
3. Bank
4. Credit union
5. Depository institution holding company
6. Money services business
7. Broker or dealer in securities
8. Securities exchange or clearing agency
9. Other Exchange Act registered entity
10. Investment company or investment adviser
11. Venture capital fund adviser
12. Insurance company
13. State-licensed insurance producer
14. Commodity Exchange Act registered entity
15. Accounting firm
16. Public utility
17. Financial market utility
18. Pooled investment vehicle
19. Tax-exempt entity
20. Entity assisting a tax-exempt entity
21. Large operating company
22. Subsidiary of certain exempt entities
23. Inactive entity

FinCen has detailed these exemptions and the criteria for qualifying for each in their "Small Entity Compliance Guide" at the following link:

https://www.fincen.gov/sites/default/files/shared/BOI_Small_Compliance_Guide.v1.1-FINAL.pdf

B. Exemption Most Relevant to Real Estate Related Businesses. The exemption that will be most relevant to businesses holding real estate assets will be the "large operating company" exemption. A "large operating company" is any entity that: (i) employs more than 20 full time employees in the U.S.; (ii) filed federal income tax returns showing more than \$5,000,000.00 in gross receipts or sales in the previous year; and (iii) has an operating presence at a physical office in the U.S. A newly formed entity will never satisfy the criteria for this exemption.



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IV. What Must Be Reported by Reporting Companies (For this Section, please see the slides incorporated to the end of this outline)

- A. Data to Be Reported**
- B. Issues for Determining who is a Beneficial Owner**
 - 1. Equity Ownership Prong**
 - 2. Substantial Control Prong**
 - 3. Exceptions for BOI Disclosure**
 - 4. Dealing with the Noncooperative Beneficial Owner**

V. Timelines for Compliance

A. Newly Formed Entities. Entities formed during 2024 will have 90 calendar days after receiving actual or public notice that their company's creation or registration is effective to file their initial BOI reports. Entities formed after 2024 will have 30 calendar days after receiving actual or public notice that their company's creation or registration is effective to file their initial BOI reports. The reporting deadline runs from the time the company receives actual notice that its creation or registration is effective, or after a secretary of state or similar office first provides public notice of its creation or registration, whichever is earlier.

B. Existing Entities. Entities in existence before 2024 will have until January 1, 2025 to file their initial BOI reports.

C. Updating Previously Disclosed Information

1. Changes to Exemption Status. A reporting company that qualifies for an exemption after filing an initial BOI report is required to file an updated report indicating that it is now exempt from the filing requirements.

2. Changes in a Disclosed Person's Previously Supplied Information. A reporting company does not have to file any reports after an initial report is filed unless a change occurs with respect to the information included on the report or information is determined to be incorrect. Any updated reports are due within 30 days of the event. Some common changes to information that will cause an update include the addition or removal of a beneficial owner (such as the hiring of a new chief executive officer), a change in the legal name of a beneficial owner, a change to a reporting company's address or a beneficial owner's address or an update to a beneficial owner's document previously supplied (e.g., driver's license or passport reissued with a new name, address or unique identification number).

VI. Penalties for Noncompliance

- A. Civil Penalties**
- B. Criminal Penalties**
- C. Anticipated Standards for Penalty Assessments**

VII. What's next under the CTA?

- A. Beneficial Ownership Information Reporting Rules**
COMPLETE
- B. Access to CTA Database & Security Procedures**
COMPLETE
 - 1. Rules Effective February 20, 2024**
 - 2. Access Rules Unique to Financial Institutions**



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3. Security and Sharing Guidelines
4. Revisions to Bank Secrecy Act's "Customer Due Diligence" for financial institutions - NOT COMPLETED

C. Third Set of Anticipated Regulations Expected From FinCEN

VIII. Practical CTA Considerations for Law Firms.

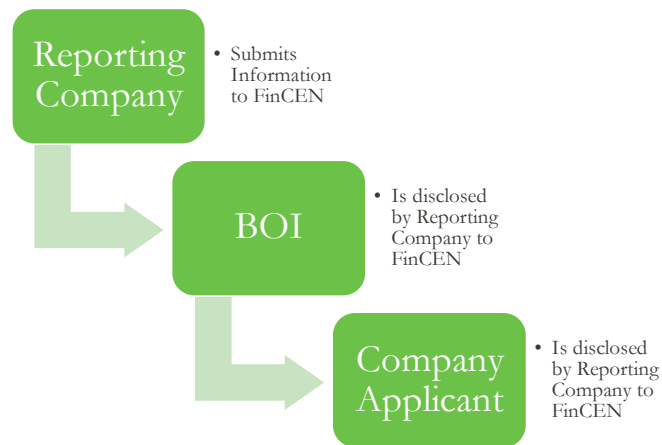
- Consider updating your client engagement letter (for entity formation matters) to include a provision requiring the client to timely provide the information necessary to file a BOI Report.
- Limit the number of individuals in your firm who are responsible to act as "Company Applicants".
- Modify your form of Operating Agreement/Limited Partnership Agreement/By-Laws to obligate Members/Partners/Shareholders to provide the information necessary to comply with the CTA Reporting Requirements, including any updates and the consequences for failure to comply.
- Consider including in entity governance documents definitions and designations of those who will have "control" responsibilities.
- Designate in entity governance documents who will be responsible for preparing, maintaining and updating beneficial ownership information.

IX. Audience Questions and Latest Developments

- A. Digital "bad actors" and "threat actors" attempting to steal/phish for personal information of reporting companies. BOIs and company applicants.
- B. Retention requirements for BOI held by a reporting company.

SLIDES IN CONNECTION WITH SECTION IV:

FinCEN's Reporting Overview



FinCEN Reporting ~ About the entity

Reporting Company

- Full legal name
- Any trade name
- Complete street address; street address for principal place of business in the United States
 - P.O. box or “agent for process” NOT allowed
- State, Tribal or foreign jurisdiction of formation of the Reporting Company
- Foreign reporting companies must report the state or Tribal jurisdiction where first registered
- The IRS Taxpayer Identification Number, including the Employer Identification Number
 - Foreign entities without a TIN may supply its foreign tax identification number and issuing jurisdiction.

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FinCEN Reporting ~ BOI

Beneficial Owners (both Equity and Substantial Control BOI's)

- Full legal name of the individual
- Date of birth
- Current address (business or residential)
- A unique identifying number and the issuing jurisdiction
 - Examples - driver's license, U.S. or foreign passport
- An image of the document from which the unique identifying number was obtained

*Note ~ Social Security Numbers should NOT be included.

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FinCEN Reporting - Company Applicants

Company Applicant

- Full legal name of the *individual*
- Date of birth
- The individual's residential street address
 - In the case of a Company Applicant who forms or registers an entity in the course of such Company Applicant's business, the street address of the business
- A unique identifying number and the issuing jurisdiction
 - Driver's license, U.S. or foreign passport
 - An image of the document from which the unique identifying number was obtained
- The Company Applicant information is required on the initial report for companies formed January 1, 2024 and after. *Companies formed prior to January 1, 2024 do not report Company Applicant information.*

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Beneficial Ownership

What is beneficial ownership?

A beneficial owner is any natural person who, directly or indirectly:

- Owns 25% or more of the equity interest in the Reporting Company; or
- Exercises "substantial control" over the Reporting Company; or
- Receives substantial economic benefits from the assets of a company.

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Beneficial Ownership

What is substantial control?

- Serving as a senior officer of the company.
 - A senior officer is defined as exercising the authority of a president, CFO, general counsel, CEO, COO or any other officer regardless of title who performs a similar function described above.
 - A secretary or treasurer will not be considered a senior officer under the CTA based on such officer's title *alone*.
- Having authority over the removal of any senior officer or a majority of the board of directors (or similar body).
- Directing, determining or having substantial influence over "important decisions" made by the company.
- Having "any other form of substantial control" over the Reporting Company.

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Beneficial Ownership – Substantial Control

The term "*important decisions*" includes the following:

- 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;
- The reorganization, dissolution, or merger of the Reporting Company;
- **Major expenditures** or investments, issuance of any equity, **incurrence of any significant debt**, or **approval of the operating budget** of the Reporting Company;
- The selection or termination of business lines or ventures, or geographic focus, of the Reporting Company;
- Compensation schemes and incentive programs for senior officers;
- The entry into or termination, or the fulfillment or non-fulfillment, of significant contracts;
- **Amendments of any substantial governance documents** of the Reporting Company, including the articles of incorporation or similar formation documents, bylaws, and significant policies or procedures.

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Beneficial Ownership – Exceptions

These individuals are not Beneficial Owners, regardless of financial interests or control:

- Minors
- Nominee, intermediary, custodian or agent
E.g., attorneys and tax professionals
- Employees
- Inheritor
- Creditors
Springing loss of exception

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Collecting BOI from Your Beneficial Owners

Do your organizational documents allow the collection of BOI or require the owners/members to provide it?

- Existing entities: Amend the documents to allow management to gather necessary information, and require beneficial owners to provide BOI and update BOI when there are changes.
- New entities: Include these provisions at the outset

But if the Beneficial Owner(s) still won't cooperate?

- Dilemma is that BOSS disclosures must be both timely and complete.
- When the info is not known on the deadline?
 - BOSS drop-down menu options, e.g., “Cannot Contact BO,” “BO Unresponsive” & “BO Refused to Provide”

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Company Applicant – *Never more than 2*

1(a). For a *domestic* Reporting Company, a Company Applicant is the individual who directly **files** the document that creates the domestic Reporting Company with the state or tribal authority. *E.g., law firm paralegal or outside vendor.*

1(b). For a *foreign* Reporting Company, a Company Applicant is the individual who directly **files** the document that first registers the foreign Reporting Company with the state or tribal authority.

2. Whether a domestic or foreign Reporting Company, a Company Applicant also includes the ***individual who is primarily responsible for controlling*** the above-described filings, if more than one individual is involved. *E.g., the lawyer at an outside law firm that supervises the work.*