Updates
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June marked the six-month milestone for the implementation of the Corporate Transparency Act (CTA)—the landmark anti-money laundering law requiring beneficial ownership reporting for U.S. companies that became effective on January 1, 2024.

During this period, millions of newly formed companies have already filed their beneficial ownership information reports (BOIRs) with the U.S. Department of Treasury's Financial Crimes Enforcement Network (FinCEN). But tens of millions more companies that were created or registered to do business before January 1, 2024, will be required to file their initial reports by January 1, 2025. **With five months left to evaluate the complex legal issues surrounding application of and reporting under the CTA, as well as gather relevant beneficial ownership information, these existing entities should be taking steps *now* to prepare to file their reports by the deadline.**

Since the enactment of the CTA and the launch of the Beneficial Ownership Secure Filing System (BOSS), FinCEN has conducted outreach through forums and webinars to explain the complicated reporting requirements. They have issued more than 40 FAQs this year and provided support through a small business compliance guide to address some of the ambiguities in the rules. However, this guidance has sometimes raised more questions than answers, and FinCEN has yet to comment on many critical ambiguities under the CTA.

Adding to the challenges of navigating this new reporting regime, a small business industry group in the Northern District of Alabama mounted a successful constitutional challenge to the CTA (*National Small Business United et al v. Yellen et. al.*, (N.D. Ala. 2024)). While it is clear that the district court injunction of the application of the CTA applies narrowly to the plaintiffs in that case and that BOIRs are still required for everyone else, further uncertainty into the BOIR filing process continues to surface as the case winds its way through the courts.

This Update discusses some initial observations regarding the practical implementation of the CTA to date and the application of the guidance FinCEN has issued in practice. It will also lay out the steps existing companies should take in the remaining months of this year to ensure timely compliance. For a broader discussion of the CTA in application, please refer to our earlier Update.

Initial Observations: How's It Going so Far?

The CTA reporting forms and submission portals are simple; however, the law remains complex, and in many cases, ambiguities require extensive legal analysis in application. The filing process—as well as gaining access to the BOSS for making filings—has proven very simple, and FinCEN officials indicate that the BOIR filings for most companies should take no more than 20 minutes. Under the CTA, legal entities, beneficial owners, and company applicants may also obtain a FinCEN ID directly from FinCEN to maintain the confidentiality of personally identifiable information. Obtaining a FinCEN ID is also relatively simple and straightforward, with clear instructions provided to applicants through the login.gov secure process on FinCEN's webpage.

Completing and filing the BOIR requires several pieces of information concerning the legal entity and the determination as to its beneficial owners, in addition to the required information or the FinCEN IDs for each of the beneficial owners and company applicants. In situations involving joint ventures and partnerships, gathering this information can be particularly time-consuming. Many companies are already sending requests to their joint venture partners for the FinCEN IDs of those individuals that may be beneficial owners of the joint venture, and companies are also confirming which entity has responsibility for filing the BOIRs—a point that the CTA and FinCEN have been silent on. These requests will become more prolific as the year progresses and we get closer to the CTA due date.

Also, beyond the information required to be reported in the BOIR, the individual who submits the BOIR must certify that the submission is true, accurate, and complete, which injects another person into the process whose name and email address also need to be provided.

In many situations, the BOIR filings are challenging, especially with regard to complex corporate structures. There are also many remaining ambiguities as to the application of the CTA that arise frequently, such as when there is joint ownership with unaffiliated entities, the treatment of boards of directors and board committees, and facts and circumstances that have not yet been addressed by FinCEN in its FAQ guidance.

For a fee, some companies are leveraging the systems developed by third-party firms to manage the BOIR filings and to maintain the BOIR-related records for updating purposes. While these services are available, their utility is limited with regard to complex structures, as such services are prohibited from providing legal advice under relevant ethical rules.

Most complex corporate structures will have CTA reporting requirements given limitations on the CTA's 23 exemptions. Notwithstanding the significant number of exemptions granted under the CTA, including the large operating company exemption (for companies with $5 million in receipts/sales, more than 20 employees, and U.S. presence), in practice it seems that very few companies can ignore the CTA, as many companies have legal entities within their corporate organization structures that are not exempt. In many cases, this includes holding companies that cannot meet the large operating company employee threshold (which is not aggregated among entities in the same corporate structure). Sometimes, the thresholds are not met because entities are sister companies to a large operating company rather than subsidiaries of any exempt entity. Other times, an exempt public company may have a joint venture or partnership with a nonexempt entity. Another case in which the thresholds are not met is when disregarded entities are not included in applicable tax or securities reporting for an otherwise exempt corporate structure and, as such, may not be exempt from CTA reporting. The foregoing is not an exhaustive list of examples but, rather, a set of scenarios that have occurred.

2024 Game Changers: How New Laws and Regulatory Guidance Are Shifting the Landscape

New state laws. On a state law level, we continue to expect enactment of laws akin to the CTA. Companies should consider maintaining a placeholder for state law requirements in any CTA policies under development. In fact, the state of New York passed its own version of the CTA in March 2024, the New York LLC Transparency Act (NY LLCTA), which goes into effect on January 1, 2026, for limited liability companies formed or authorized to do business in the state. The NY LLCTA requires a report to be filed with the New York Department of State that identifies the beneficial owners of limited liability companies formed after the effective date of the law. Under the NY LLCTA, existing limited liability companies formed or authorized to do business in New York on or before the effective date do not have to file initial reports until 2027. Other states, such as California, Maryland, and Massachusetts, are actively considering or reviewing proposed legislation for their own CTA-like regulations. ***Given these developments, confirming state law beneficial ownership reporting requirements will be important in the coming years.***

CTA guidance. Some of the most significant CTA FAQs issued by FinCEN involved (1) application of the subsidiary exemption and (2) clarity on reporting requirements for dissolved entities.

Subsidiary exemption. With regard to the subsidiary exemption, the exemption on its face applies to entities with ownership interests either "wholly owned" or "wholly controlled" by exempt entities. In January, FinCEN clarified that this language does not exempt companies that are operationally controlled by exempt entities; rather, it applies narrowly to circumstances in which an exempt entity wholly controls the equity interests in the entity seeking the "subsidiary exemption." In this regard, the exemption appears to have quite limited application on the basis of "control" of an ownership interest—in circumstances where the "owner" would be essentially entirely passive (perhaps receiving distributions but with no other control rights over the interest) and some other party (perhaps another owner in the structure) has full discretion and control over transferability and disposition of the interest. In that limited case, if the transfer rights and other "control" rights over the interests are held by

an exempt entity, then the reporting company may be exempt on the basis that its ownership interests are "controlled" by an exempt entity, even where the reporting company is not technically 100% owned by exempt entities.

Dissolved entities. FinCEN also issued a list of FAQs concerning dissolved entities that requires dissolved entities to file reports even if they were formed in 2024 and dissolved within 90 days of formation and prior to the due date of its BOIR. This guidance further clarified that entities existing at any point in 2024 must file a BOIR by January 1, 2025, even if they are fully dissolved during 2024. This FAQ raises a number of questions concerning who should be reported as the beneficial owner of any entity that has been dissolved (given that other FinCEN guidance indicates that reports should be accurate as of the date of the BOIR filing), the use of the parent company's Employer Identification Number on the BOIR, whether a company that merges out of existence needs to report, and more. We expect further guidance from FinCEN on these matters.

Noncompliance. Unsurprisingly, there will be reporting companies that are unable to obtain beneficial ownership information either because the beneficial owner refuses to provide the information to the company or because the beneficial owner does not agree with the reporting company's determination that they are a beneficial owner. Unfortunately, the BOIR does not address situations in which a reporting company is unable to obtain information from a beneficial owner. In fact, in its original submission of the BOIR to the Office of Management and Budget for review and clearance in accordance with the Paperwork Reduction Act of 1995, FinCEN contemplated including a checkbox for situations in which information could not be obtained. FinCEN elected to not include this option in the final version of the BOIR. FinCEN has issued specific guidance indicating that they acknowledge the potential for beneficial ownership information to be missing but suggesting that the agency continues to view gathering such information as an obligation of the reporting company.

Notably, the BOIR requires the inclusion of at least one beneficial owner, as well as the certification that the report is "true, accurate and complete." In these situations, reporting companies should make best efforts to obtain the information needed for a BOIR and document these efforts carefully to create a record of good faith attempts to comply in the event of any later inquiry. Reporting companies must file a BOIR despite the lack of information and technically inaccurate certification. While there is ambiguity as to the appropriate details to be filed in these circumstances, reporting companies should strive to make submissions that are not misleading and as accurate as possible. In situations when information cannot be obtained, CTA liability accrues to the individual that is responsible for the inaccurate filing (*e.g.*, the beneficial owner who has refused to provide information) and, in theory, should not accrue to the reporting company that was forced to file an inaccurate report. However, we have not seen FinCEN enforcement of the CTA, resulting in a lack of clarity as to the persuasive factors in enforcement activities.

Next Steps To Meet Year-End Obligations

Existing companies that have not yet filed their BOIRs should take the following steps as soon as possible to prepare to comply with the CTA by January 1, 2025:

1. Inventory entities within the corporate organization structure and document exemption determinations. For simple structures, this will be easy, but if there are multiple entities in the corporate organization structure, this alone can be a challenge, particularly with joint ventures and partnerships in the mix.
2. For nonexempt entities, determine who is a "beneficial owner" under the CTA definitions, including equity and substantial control prongs. Determining substantial control will require the identification of "senior officers" as defined in the CTA, a review of any boards or committees, and a review of corporate documents and agreements—some of which may delegate major decisions to investors or other outside parties.

3. Gather beneficial owner information. This can be administratively burdensome because each beneficial owner will need to file with FinCEN to obtain a FinCEN ID. Additionally, gathering FinCEN IDs in the context of partnerships and joint ventures can be even more burdensome given the complex multilevel ownership structures that may be present. In these situations, there may be a need for communications to determine which entity will be responsible for filing the BOIR. They may also require negotiation and agreement on who meets the standards for beneficial ownership in ambiguous situations or on changing roles and whether to rearrange authorities to simplify reporting.

Where ambiguities exist, it will be critical for companies to consult with competent counsel regarding filing obligations and, for organizations with corporate structures that include numerous entities, to develop internal CTA reporting policies and procedures to ensure consistency across the organization's filings and timely updates. Documenting these efforts is crucial because the ability to demonstrate good faith efforts to comply with the CTA will be highly protective in the event of a misstep, given that liability under the CTA requires willfulness (or willful blindness) to support a penalty. Moreover, FinCEN senior officials have consistently and explicitly stated that CTA enforcement is not intended to be a "gotcha game."

However, it is notable that FinCEN has not provided much regulatory relief in its guidance this year and has been interpreting its rules strictly—the general tenor of the agency's communications is "when in doubt, report." With the volume of companies required to make CTA filings by the end of this year and the complex legal issues raised in connection with many of these filing decisions, companies should begin taking steps to comply as soon as possible to avoid being overwhelmed by the year-end blitz.

Please reach out to your Perkins Coie team with any questions or for support.

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