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## **Corporate Transparency – New Rules To Govern All Entities Doing Business in the United States**

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The United States Congress adopted the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 on December 10, 2020.<sup>1</sup> That Act included the Corporate Transparency Act (the “CTA”) at Sections 6401 through 6403. To discuss the intentions of the CTA, Section 6402 states “[i]t is the sense of Congress that:”

1. More than 2,000,000 corporations and limited liability companies are being formed under the laws of the states of the United States each year;<sup>2</sup>
2. Most or all states do not require information about the beneficial owners of the corporations, limited liability companies, or other similar entities; and
3. Malign actors seek to conceal their ownership of these entities “to facilitate illicit activity, including money laundering, the financing of terrorism, proliferation financing, serious tax fraud, human and drug trafficking, counterfeiting, piracy, securities fraud, financial fraud, and acts of foreign corruption, harming the national security interest of the United States and allies of the United States.

That section goes on to state the need for federal legislation “providing for the collection of beneficial information for corporations, limited liability companies, or other similar entities.” The CTA delegates the duty to collect, maintain, and audit such information to the Secretary of the Treasury who is responsible for issuing regulations to implement these beneficial ownership reporting requirements by December 31, 2021. In doing so, § 5336(b)(1)(F) tells the Secretary of the Treasury to “establish partnerships with State, local, and Tribal governmental agencies” and to “minimize burdens on reporting companies” in order to implement the requirements of the

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<sup>1</sup> 28 H.R. 6395. President Trump vetoed H.R. 6395, but it became law over his veto when the House approved it on December 28, 2020 by a 322-87 vote, and then the Senate, on January 1, 2021, by an 81-13 vote.

<sup>2</sup> In the United States, entities are formed under the laws of the states, Tribal authorities, and territories, not the federal government. As a result, each state, Tribal authority, and territory has different laws for business organizations. While many are based on “model acts”, each has its differences which are in some cases material.

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CTA. Section 6403 of the CTA establishes the “beneficial ownership information reporting requirements” by adopting 31 U.S.C. § 5336.

The CTA is based around the obligation of “Reporting Companies” to report information regarding their formation and beneficial owners to the Department of Treasury’s Financial Crimes Enforcement Network (“FinCEN”). 31 U.S.C. § 5336(b)(1) requires that each “reporting company . . . submit to FinCEN a report that contains the information described in paragraph 5336(b)(2).” This includes Reporting Companies that had been formed prior to the effective date of the rules to be promulgated by the Secretary of the Treasury and, in other cases, “any reporting company that has been formed or registered after the effective date of the regulations.”

The CTA, its rules, and the reporting obligations that it establishes will be important for every Reporting Company and their advisors -especially their lawyers and accountants. As discussed below and in the papers linked to this summary, there are strict time limits for filing the reports, there is a significant amount of personal information to be contained in the reports, and the reports will be available to law enforcement agencies, customer due diligence for financial institutions, and for other limited purposes as set forth in the rules. To some extent, the information will be available to offshore agencies as well. Since it is a law with which the Reporting Companies must comply, lawyers and accountants can expect to confirm compliance as a part of their normal entity due diligence.

While the CTA as originally adopted anticipated that its reporting requirements and rules would become effective on or before January 1, 2022 (a year after adoption), it now appears that the rules will become effective January 1, 2024. The Financial Crimes Enforcement Network (“FinCEN”) of the U.S. Department of the Treasury has been studying the issues and slowly publishing notices of proposed rulemaking.

In September 2022 FinCEN adopted its first set of final rules to implement the CTA beneficial ownership information (BOI) reporting provisions. Following its January 1, 2024 effective date, the rule will require most corporations, limited liability companies, and other entities created in or registered to do business in the United States (“Reporting Companies”) to report information about their beneficial owners. As defined in the final rules, “beneficial owners” are the persons who ultimately own or control the Reporting Company. The rule as adopted addresses the information that Reporting Companies are required to report (Beneficial Ownership Information or “BOI”) as well as the timing for filing the BOI reports.

For a much more detailed discussion about the final rule as adopted in September 2022, see Lidstone, Herrick K., *The Federal Corporate Transparency Act: The Answers are Here, in Part* (October 19, 2022), available at <https://ssrn.com/abstract=4236649> or <http://dx.doi.org/10.2139/ssrn.4236649>.

In December 2022, FinCEN proposed a second set of rules regarding access by authorized persons to the BOI reports. The proposed regulations would implement protocols to

protect the security and confidentiality of the BOI as required by the CTA to protect sensitive personal identifiable information (“PII”) reported to FinCEN in the BOI reports. FinCEN’s notice of proposed rulemaking explains the circumstances in which specified recipients would have access to BOI and outlines data protection protocols and oversight mechanisms applicable to each recipient category. It is intended that the disclosure of BOI to authorized recipients in accordance with appropriate protocols being defined by FinCEN and with some additional oversight will help law enforcement and national security agencies prevent and combat money laundering, terrorist financing, tax fraud, and other illicit activity, as well as protect national security.

For a much more detailed discussion about the rules as proposed in December 2022 (but not yet adopted), see Lidstone, Herrick K., *The Federal Corporate Transparency Act: More Answers are Proposed* (January 11, 2023), available at <https://ssrn.com/abstract=4313089> or <http://dx.doi.org/10.2139/ssrn.4313089>.

On and after January 1, 2024 and after, all newly formed entities which fit within the definition of “Reporting Company” and are not otherwise exempt (as explained in the rules and the articles) will have to file their BOI Reports with FinCEN within 30 days of formation. All entities that are non-exempt “Reporting Companies” existing before January 1, 2024 must file their BOI Reports before January 1, 2025. Thereafter, any changes or corrections to the BOI Reports must be filed within 30 days. There are significant civil and criminal penalties that can be assessed against those who fail to meet their BOI Reporting obligations. The CTA and the new rules requiring that Reporting Companies file their initial BOI Report within 30 days after formation or registration in the United States if on or after January 1, 2024. If the Reporting Company commenced business before January 1, 2024, its initial report will be due by January 1, 2025. Amendments and corrections must be filed within 30 days after the amendment occurred or the error to be corrected was identified.

In anticipation of the pending effectiveness of the rules under the CTA, FinCEN has published several explanatory releases. These include:

On January 17, 2023, FinCEN published for comment its expectation for the information to be included in the BOI Reports and the FinCEN Identifiers which are expected to form a significant part of the BOI Reports:

- The discussion and request for comments for the BOI reporting fields is available at <https://www.federalregister.gov/documents/2023/01/17/2023-00703/agency-information-collection-activities-proposed-collection-comment-request-beneficial-ownership>.
- The discussion and request for comments for the BOI reporting fields is available at <https://www.federalregister.gov/documents/2023/01/17/2023-00708/agency-information-collection-activities-proposed-collection-comment-request-individual-fincen>

On March 24, 2023, FinCEN published two one-page fact sheets about BOI Reports and filing dates which are available at:

- “Beneficial Ownership Information Report Filing Dates” available at [https://www.fincen.gov/sites/default/files/shared/BOI\\_Reporting\\_Filing\\_Dates-Published03.24.23\\_508C.pdf](https://www.fincen.gov/sites/default/files/shared/BOI_Reporting_Filing_Dates-Published03.24.23_508C.pdf)
- “Beneficial Ownership Reporting – Key Questions” available at [https://www.fincen.gov/sites/default/files/shared/BOI\\_Reporting\\_Key\\_Questions\\_Published\\_508C.pdf](https://www.fincen.gov/sites/default/files/shared/BOI_Reporting_Key_Questions_Published_508C.pdf)

Also on March 24, 2023, FinCEN published fourteen pages which it referred to as *Beneficial Ownership Information Reporting Frequently Asked Questions*. These FAQs are available at [https://www.fincen.gov/sites/default/files/shared/BOI\\_FAQs\\_FINAL\\_508.pdf](https://www.fincen.gov/sites/default/files/shared/BOI_FAQs_FINAL_508.pdf).

In light of the forthcoming requirements and the limited and scattered information available for lawyers, accountants, and their clients, I have attempted to gather the more significant information for the benefit of professionals and their clients with recommendations about the issues and concerns that professionals may have based on the information published to date. See Lidstone, Herrick K., *Considerations for Attorneys Resulting from the Corporate Transparency Act* (April 20, 2023), available at <https://ssrn.com/abstract=4414393>.

It is my best guess that there will be a significant amount of additional rule-making and interpretation to be published before the FinCEN rules become effective on January 1, 2024. All lawyers, accountants, and other professionals dealing with businesses doing business in the United States should be attuned to all of these new requirements.