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## U.S. Corporate Transparency Act beneficial ownership reporting regulations take effect January 2024

The U.S. Congress enacted the Corporate Transparency Act (CTA) in 2020. The CTA for the first time created a federal obligation to report beneficial ownership information for most U.S. entities (and foreign entities doing business in the United States), unless exempted. Pointing to the lack of transparency that may facilitate fraud, drug trafficking, corruption, tax evasion, organized crime or other illicit activity, the CTA mandated the Financial Crimes Enforcement Network (FinCEN), a component of the U.S. Department of the Treasury, with implementing the regulations governing the new disclosure regime. FinCEN finalized these regulations in September 2022, which are referred to collectively in this alert as the “Beneficial Ownership Information Reporting Rule” or “BOI Reporting Rule.”

**The BOI Reporting Rule takes effect on January 1, 2024. All U.S. entities or non-U.S. entities that are registered to do business in the United States are potentially impacted by the BOI Reporting Rule and should review whether they are required to file a report with FinCEN under the BOI Reporting Rule.**

### Which entities are affected

Both U.S. and non-U.S. entities may be “Reporting Companies” subject to the BOI Reporting Rule.

- A domestic (U.S.) Reporting Company is any entity that is (i) a corporation, (ii) a limited liability company or (iii) otherwise created by the filing of a document with a secretary of state or any similar office under state or tribal law.
- A foreign (non-U.S.) Reporting Company is any entity that is (i) a corporation, limited liability company or any other entity, (ii) formed under the law of a foreign (non-U.S.) country and (iii) registered to do business in any U.S. state or tribal jurisdiction by the filing of a document with a secretary of state or any similar office under state or tribal law.

All Reporting Companies will be required to file reports with FinCEN unless they qualify for an exemption. There are 23 exemptions to the definition of Reporting Company. These exemptions are designed to cover entities that already report BOI-type information to the U.S. government. We have provided more details about some of the exemptions below.

### Timing

FinCEN will begin accepting BOI reports on January 1, 2024.

- **Entities created or registered to do business on or after January 1, 2024:** Non-exempt Reporting Companies created (or registered to do business) on or after January 1, 2024 through December 31, 2024 must file their BOI reports with FinCEN within 90 days after receiving actual or public notice that the entity’s creation or registration is effective. This 90-day timeline will be reduced to 30 days for non-exempt Reporting Companies created or registered to do business on or after January 1, 2025.

- **Entities created or registered to do business before January 1, 2024:** Non-exempt Reporting Companies created or registered to do business before January 1, 2024 must file their initial reports with FinCEN by January 1, 2025 (within one year from the date FinCEN begins accepting the BOI reports).

Date of entity formation	Deadline to file
Before January 1, 2024	January 1, 2025
January 1, 2024 through December 31, 2024	Within 90 calendar days
On or after January 1, 2025	Within 30 calendar days

After a Reporting Company's initial filing, any updates or revisions to the beneficial ownership information previously reported to FinCEN must also be filed within 30 calendar days. Failure to meet the reporting requirements can result in civil or criminal penalties, including the potential for significant fines or even imprisonment.

#### Information to be filed

Non-exempt Reporting Companies will be required to submit three types of information to FinCEN: (i) company information; (ii) beneficial ownership information (BOI); and, for only those Reporting Companies created or registered on or after January 1, 2024, (iii) Company Applicant information.

- **Company information:** Each Reporting Company must provide FinCEN with its name, address, jurisdiction of formation/registration, taxpayer identification number or the like for any foreign entity as well as certain information regarding all beneficial owners. Reporting Companies created or registered on or after January 1, 2024 must also provide certain information regarding at least one Company Applicant.
- **BOI:** A beneficial owner is any individual who directly or indirectly exercises substantial control over a Reporting Company OR owns or controls at least 25% of the ownership interests of a Reporting Company. The BOI report must include each and every beneficial owner's: (i) full legal name, (ii) date of birth, (iii) complete current address, (iv) unique identifying number/issuing jurisdiction and image of an identification document issued by a state, local government or tribe (e.g., U.S. passport, state driver's license or foreign passport). There is no maximum number of beneficial owners to be reported and anyone who qualifies as a beneficial owner must be reported. We have addressed below in more detail how to determine a Reporting Company's beneficial owner(s).
- **Company Applicant(s):** Reporting Companies created on or after January 1, 2024 must also identify to FinCEN the "direct filer," the person who directly filed the document that created or first registered a Reporting Company. This is the person who physically or electronically filed the document with the secretary of state or similar office. If another person was primarily responsible for directing or controlling the filing of the creation document/first registration document, this individual must also be reported as a Company Applicant, even if they did not physically or electronically complete the filing themselves. The maximum number of Company Applicants to report is two. The Company Applicant(s) must provide the same information that is required from beneficial owners.

Individuals whose information would need to be reported in a Reporting Company's filing, as beneficial owners or Company Applicants, have the option (but are not required) to electronically apply for "FinCEN identifiers." FinCEN identifiers are unique identifying numbers that FinCEN will issue to individuals upon request after the individual provides the same information directly to FinCEN that would have been included about such individual in the applicable Reporting Company filing(s). This is a method for individuals to provide their personal information directly to FinCEN rather than through one or more Reporting Company filings. The Reporting Company filings would reference the individual's FinCEN identifier rather than providing the required information about such individual. If the information an individual provided to FinCEN when obtaining his or her FinCEN identifier changes, he or she must update the reported information, which shifts some compliance obligations to the individual rather than the Reporting Company.

Non-exempt Reporting Companies owned by an exempt entity (in whole or in part) need not provide the beneficial ownership information above that exempt entity, but instead merely provide the name of the exempt entity.<sup>1</sup> If a non-exempt Reporting Company, however, has one or more other beneficial owners in addition to the exempt entity, the Reporting Company would need to provide information about these other beneficial owners.

In addition, a final updating report is required for a Reporting Company that has previously filed a BOI Report with FinCEN and then becomes newly exempt, indicating that the entity is no longer a Reporting Company.<sup>2</sup>

### Determining who must file (and relevant exemptions)

As noted above, all U.S. entities and foreign entities doing business in the United States that meet the definition of “Reporting Company” are required to file with FinCEN unless they meet one of 23 statutory exemptions.<sup>3</sup>

A discussion of some of the more wide-ranging exemptions follows below.

#### A. Broad-based exemptions

Certain entities will be automatically exempt on a relatively straightforward basis. Those include, among others, issuers of public securities – including non-U.S. publicly traded companies, so long as they are (i) registered under Section 12 of the U.S. Securities Exchange Act of 1934 (the Exchange Act) or (ii) required to file supplementary and periodic information under Section 15(d) of the Exchange Act; banks, credit unions and bank holding companies; insurance companies; non-profit companies (including 501(c)(3) companies); broker-dealers and others registered under the Exchange Act; commodity pool operators (CPOs), commodity trading advisers (CTAs) and other entities registered under the Commodity Exchange Act; governmental entities (though this exemption does not encompass non-U.S. governmental entities) and public utilities (that provide telecommunications services, electrical power, natural gas, or water and sewer services within the United States).

#### B. Large operating companies

An entity defined as a “large operating company” is exempt from the reporting requirements if it (i) employs more than 20 full-time employees in the United States; (ii) has an operating presence at a physical office within the United States; and (iii) filed a federal income tax return in the United States for the previous year demonstrating more than \$5 million in gross receipts or sales (net of returns and allowances), excluding gross receipts or sales from sources outside the United States.<sup>4</sup> Notably, for purposes of the \$5 million test, for an entity that is part of an affiliated group of corporations that filed a consolidated return, the applicable amount shall be the amount reported on the consolidated return. For purposes of counting employees, however, the employees of affiliated entities should not be included; rather, FinCEN has instructed that only the actual entity’s employees should be included.<sup>5</sup>

This exemption, in particular, may be useful to operating companies across many industries, though it will be less useful to non-operating companies (such as holding companies and some special purpose vehicles) and those foreign Reporting Companies that do not meet the U.S. jurisdictional requirements.

<sup>1</sup> 31 CFR 1010.380(b)(2)(i).

<sup>2</sup> 31 CFR 1010.380(b)(3)(ii).

<sup>3</sup> The full list of exemptions under 31 CFR 1010.380(c)(2) is as follows: (i) securities reporting issuer, (ii) governmental authority, (iii) bank, (iv) credit union, (v) depository institution holding company, (vi) money service business, (vii) broker-dealer registered under the U.S. Securities Exchange Act of 1934 (the Exchange Act), (viii) securities exchange or clearing agency, (ix) other Exchange Act registered entity, (x) registered investment company or investment adviser, (xi) venture capital fund adviser, (xii) insurance company, (xiii) state-licensed insurance producer, (xiv) Commodity Exchange Act registered entity, (xv) accounting firm, (xvi) public utility, (xvii) financial market utility, (xviii) pooled investment vehicle, (xix) tax-exempt utility, (xx) entity assisting tax-exempt entity, (xxi) large operating company, (xxii) subsidiary of certain exempt entities, and (xxiii) inactive entity.

<sup>4</sup> 31 CFR 1010.380(c)(2)(xxi).

<sup>5</sup> 31 CFR 1010.380(f)(1) defines “employee” by reference to the definition in 26 CFR 54.4980H-1(a)(15), i.e. the definition used in the Internal Revenue Code that generally defines an employee as an “employee under the common-law standard,” which will exclude, at a minimum, leased employees. In light of the definition, Reporting Companies should be consistent as to reporting this number for both tax and CTA purposes. While detailed Treasury regulations provide more detail about the employer-employee relationship under this definition, generally, independent contractors should not be included as “employees.” In some cases, a facts-and-circumstances test may be necessary.

## C. Subsidiaries of exempt entities

Any entity whose ownership interests are controlled or wholly owned, directly or indirectly, by most categories of exempt entities, will also be exempt from the FinCEN requirements as a “subsidiary” of an exempt entity. The determination of whether the ownership interests of an entity that is not a wholly-owned subsidiary of an applicable exempt entity are “controlled” by such an entity is fact-specific. If this exemption may be applicable to an entity, a review of such entity’s unique ownership and governance structure must be made. Note that subsidiaries of certain exempt entities (money services businesses, accounting firms and pooled investment vehicles (PIVs), discussed below) are not permitted to avail themselves of this subsidiary exemption.<sup>6</sup>

## D. Investment advisers and pooled investment vehicles

For many fund advisers, the explicit exemptions for (i) SEC-registered investment advisers (RIAs) and (ii) venture capital fund advisers (VC Advisers) under the U.S. Investment Advisers Act of 1940, in particular, will be relevant and useful.<sup>7</sup> Note that private fund advisers (who, like, VC Advisers, are “exempt reporting advisers” that file an abbreviated version of the Form ADV) are not exempted. Nor are foreign private advisers or advisers registered or otherwise regulated by a U.S. state. Each of these entities, however, may qualify for other exemptions. It is also possible that Congress may add new categories of exemptions in the future as the FinCEN reporting requirements take effect.

In addition, any pooled investment vehicle (PIV) that is operated or advised by a bank, credit union, registered broker-dealer, registered investment company under the U.S. Investment Company Act of 1940, RIA or VC Adviser will be exempt from the FinCEN requirements.<sup>8</sup> A PIV includes (i) any investment company, as defined under Section 3(a) of the Company Act or (ii) any company that (A) would be an investment company but for the exclusions provided under Section 3(c)(1) (i.e. the exemption for entities with fewer than 100 beneficial owners) or Section 3(c)(7) (i.e. the exemption for entities whose owners are all “qualified purchasers”) under the Company Act and (B) is identified by its legal name by the applicable investment adviser in its Form ADV.<sup>9</sup>

This exemption will apply to the vast majority of private funds, though it excludes a minority of private funds that invest in certain commodities or real estate. Finally, under a special rule for foreign PIVs, any PIV that is formed under the laws of a foreign country that would otherwise be exempt shall nonetheless be deemed a Reporting Company, except that such entity’s report need only include information with respect to one individual (and not the full disclosure otherwise required) – either (i) the one individual who exercises substantial control over the entity or (ii) if more than one such individual, the individual who has the greatest authority over the strategic management of the entity.<sup>10</sup>

### Determining who is a beneficial owner

Before making their reports to FinCEN, non-exempt Reporting Companies will have to consider each natural person who constitutes a beneficial owner. Broadly, the term “beneficial owner” is defined to include any individual who, directly or indirectly, either exercises “substantial control” over the Reporting Company or owns or controls at least 25 percent of the ownership interests of such Reporting Company.<sup>11</sup>

<sup>6</sup> 31 CFR 1010.380(c)(2)(xxii).

<sup>7</sup> 31 CFR 1010.380(c)(2)(x) exempts any entity that is (A) an investment company as defined in Section 3 of the U.S. Investment Company Act of 1940 (the Company Act) or is an investment adviser as defined in Section 202 of the Advisers Act and (B) registered with the Securities and Exchange Commission (the SEC) under the Company Act or the Advisers Act.

31 CFR 1010.380(c)(2)(xi) exempts any investment adviser that (A) is described in Section 203(l) of the Advisers Act (i.e. VC Advisers) and (B) has filed Item 10, Schedule A, and Schedule B of Part 1A of Form ADV with the SEC (i.e. aspects of Form ADV that disclose).

<sup>8</sup> 31 CFR 1010.380(c)(2)(xviii).

<sup>9</sup> 31 CFR 1010.380(f)(7).

<sup>10</sup> 31 CFR 1010.380(b)(2)(iii).

<sup>11</sup> 31 CFR 1010.380(d).

An individual will exercise “substantial control” over the Reporting Company under the BOI Reporting Rule if the individual:<sup>12</sup>

- serves as a senior officer of the Reporting Company;<sup>13</sup>
- has authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body);
- directs, determines or has substantial influence over important decisions made by the Reporting Company;<sup>14</sup> or
- has any other form of substantial control over the Reporting Company.

The BOI Reporting Rule provides that an individual may directly or indirectly, including as a trustee of a trust or similar arrangement, exercise substantial control over a Reporting Company through the following:<sup>15</sup>

- Board representation;
- Ownership or control of a majority of the voting power or voting rights of the Reporting Company;
- Rights associated with any financing arrangement or interest in the Reporting Company;
- Control over one or more intermediary entities that separately or collectively exercise substantial control over a Reporting Company;
- Arrangements or financial or business relationships, whether formal or informal, with other individuals or entities acting as nominees; or
- Any other contract, arrangement, understanding, relationship, or otherwise.

Certain individuals are excluded from the term “beneficial owner,” however, including minor children, as well as individuals acting as nominee, intermediary, custodian or agent.<sup>16</sup>

## Looking ahead

Hogan Lovells has a broad, global team of corporate and finance attorneys as well as regulatory experts in anti-money laundering, sanctions, banking regulations and international trade and investment. We continue to monitor developments with respect to the BOI Reporting Rule, including any new guidance FinCEN or Treasury may provide (including pursuant to a [specially-designated FinCEN FAQ](#) on BOI Reporting Rule compliance).

We recognize that each client’s structure may present complex questions, on an entity-by-entity basis, as to the applicability of an exemption or the required information to be provided. We are happy to discuss any questions or aspects of CTA compliance in greater detail either before or after the January effective date.

<sup>12</sup> 31 CFR 1010.380(d)(1)(i).

<sup>13</sup> 31 CFR 1010.380(d)(8) defines “senior officer” to include 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 official title, who performs a similar function. Though not explicitly listed, a fund advisory entity’s chief compliance officer would also likely meet the definition of “senior officer.”

<sup>14</sup> As defined, these important decisions will include, without limitation: (i) 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; (ii) the reorganization, dissolution, or merger of the Reporting Company; (iii) major expenditures or investments, issuances of any equity, incurrence of any significant debt, or approval of the operating budget of the Reporting Company; (iv) the selection or termination of business lines or ventures, or geographic focus, of the Reporting Company; (v) compensation schemes and incentive programs for senior officers; (vi) entry into or termination, or the fulfillment or non-fulfillment, of significant contracts; and (vii) 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.

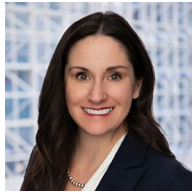
<sup>15</sup> 31 CFR 1010.380(d)(1)(ii).

<sup>16</sup> 31 CFR 1010.380(d)(3).

While entities created or registered to do business in the United States before January 1, 2024 will have until January 1, 2025 to make their initial filings under the BOI Reporting Rule, new entities created or registered to business in the United States beginning on January 1, 2024 will need to make their initial filings more immediately. Accordingly, BOI Reporting Rule compliance will be particularly important for transactions in 2024 if new entities are formed as part of a merger or acquisition, joint venture, or other transaction structure.

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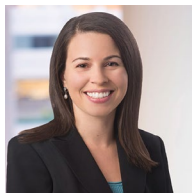
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