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Preparing for the *Corporate Transparency Act*

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Overview

The beneficial ownership reporting requirements under the U.S. *Corporate Transparency Act* (the CTA) will go into effect on January 1, 2024. All entities formed or registered to do business in a U.S. state,¹ other than certain types of exempt entities, will be required to submit a beneficial ownership information report (BOI Report) to the U.S. Treasury's Financial Crimes Enforcement Network (FinCEN). The deadline for submitting an initial BOI Report depends upon the reporting company's date of formation, as outlined below. Subsequently, updated BOI Reports must be submitted after each time there has been a change in the beneficial ownership information previously reported.

The CTA was enacted on January 1, 2021 as part of the U.S. *Anti-Money Laundering Act* of 2020. The reporting requirements under the CTA are intended to help prevent and combat money laundering, terrorist financing, corruption, tax fraud and other illicit activity. BOI Reports submitted by reporting companies will not be made available to the public and are not subject to requests under the U.S. *Freedom of Information Act*.²

Who Must Report?

Unless exempt under the CTA, the following entities are considered "reporting companies" under the CTA and must submit a BOI Report:

- **Domestic reporting companies:** U.S. corporations, limited liability companies and other entities created by the filing of a document with a secretary of state or any similar office under the law of a U.S. state.³
- **Foreign reporting companies:** corporations, limited liability companies and other entities formed under the laws of a non-U.S. country that are registered to do business in a U.S. state by filing a document with the secretary of state or similar office under the laws of that U.S. state.

The CTA identifies 23 specific types of entities that are not considered "reporting companies" under the CTA and are therefore exempt from these requirements. Many of these exempt entities are already subject to substantial U.S. federal and/or state regulation or already must provide their beneficial ownership information to a U.S. governmental authority. Notable types of exempt entities include

- U.S. public companies (i.e., companies that are subject to the reporting requirements of the U.S. *Securities Exchange Act* of 1934);
- investment advisers (as defined in Section 202 of the U.S. *Investment Advisers Act* of 1940) and investment companies (as defined in Section 3 of the U.S. *Investment Company Act* of 1940) that are registered with the U.S. Securities and Exchange Commission;
- pooled investment vehicles, which include, among other entities, those that are operated or advised by registered investment companies or registered investment advisers;
- large operating companies, defined as entities that (i) employ more than 20 full-time employees in the U.S., (ii) have an operating presence at a physical office within the U.S. and (iii) filed a federal income tax or information return in the U.S. for the previous year demonstrating over US\$5,000,000 in gross receipts or sales;
- U.S. governmental authorities;

- registered brokers-dealers;
- banks, credit unions and insurance companies; and
- inactive entities, defined as entities that (i) were in existence on or before January 1, 2020, (ii) are not engaged in active business, (iii) are not owned by a foreign person, whether directly or indirectly, wholly or partially, (iv) have not experienced any change in ownership in the preceding 12-month period, (v) have not sent or received any funds in an amount greater than US\$1,000 in the preceding 12-month period and (vi) do not otherwise hold any kind or type of assets, whether in the U.S. or abroad, including any ownership interest in any corporation, limited liability company or other similar entity.

The determination of whether an entity is a reporting company for purposes of the CTA can be somewhat complex in the private funds context given the various structures used by registered investment advisers. A careful analysis should be taken to determine which entities in the private fund structure, if any, are exempt from the beneficial ownership reporting requirements under the CTA.

What Information Must Be Reported?

A reporting company must disclose specified information on all of its “beneficial owners,” including each beneficial owner’s full name, date of birth, address and photo ID with ID number shown. The CTA defines a beneficial owner of a reporting company as any individual who, directly or indirectly, either (i) exercises *substantial control* over such reporting company or (ii) owns or controls *at least 25%* of the ownership interests of such reporting company.

Under the CTA, an individual has “substantial control” over a reporting company if such individual (i) serves as a senior officer of such reporting company, (ii) has authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body) of such reporting company, (iii) directs, determines, or has substantial influence over important decisions made by such reporting company⁴ or (iv) has any other form of substantial control over such reporting company.⁵

When determining whether an individual owns or controls at least 25% of the ownership interests of a reporting company, all of the following instruments must be taken into account: (i) all equity and stock instruments, without regard to whether such instruments are transferable or confer voting power or voting rights, (ii) all capital or profit interests, (iii) all instruments convertible, with or without consideration, into any shares or instruments described above and all future on such instruments, (iv) all warrants and rights to purchase, sell or subscribe to shares or interests described above, regardless of whether characterized as debt, (v) all put, call, straddle and other options or privileges of buying or selling any of the items described above, unless the option or privilege is created and held by third parties without the knowledge or involvement of the reporting company and (vi) all other instruments, contracts, arrangements, understandings, relationships and mechanisms used to establish ownership. The calculation of ownership interests can be somewhat complex if a reporting company has multiple classes and types of equity interests.

The following persons and entities are not “beneficial owners” under the CTA:

- any minor child, provided that the reporting company must report the required information regarding the minor child’s parent or legal guardian
- any individual acting as a nominee, intermediary, custodian or agent on behalf of another individual
- any employee of the reporting company, acting solely as an employee, whose substantial control over, or economic benefits from, such reporting company are derived solely from the employment status, provided that the person is not a senior officer of such reporting company
- any individual whose only interest in a reporting company is a future interest through a right of inheritance
- any creditor of the reporting company that meets the requirements of a beneficial owner solely through rights or interests for the payment of a predetermined sum of money.

When is the Deadline to Report?

Reporting companies formed or registered to do business *before* January 1, 2024 will be required to submit an initial BOI Report on or before January 1, 2025.

Reporting companies formed or registered to do business *on or after* January 1, 2024 will be required to submit an initial BOI Report within 30 days after the earlier of (i) the date on which they receive actual notice that their creation has become effective or (ii) the date on which a secretary of state or similar office first provides public notice that the entity has been created.⁶

After the initial BOI Report is submitted, a reporting company must submit an updated BOI Report within 30 days after any change with respect to the information previously submitted to FinCEN concerning a reporting company or its beneficial owners, including any change with respect to who is a beneficial owner or information reported for any particular beneficial owner.

How to Prepare for Reporting and How Davies Can Assist

BOI Reports will be submitted via an online platform administered by FinCEN called the Beneficial Ownership Secure System, which is currently under development and is expected to be available before any BOI Report must be submitted. FinCEN is not accepting BOI Reports before January 1, 2024.

Companies should begin assessing whether they and the entities within their organizational structure are considered reporting companies under the CTA. If so, companies should prioritize efforts to identify their beneficial owners and gather the required information and documentation. Companies are also encouraged to update their governance compliance plan to ensure that changes to their beneficial ownership are reported to FinCEN as required by the CTA.⁷

Davies' corporate lawyers are available to assist companies in evaluating the applicability of the CTA and to advise on any questions related to the beneficial ownership reporting requirements under the CTA. Davies has also partnered with a service provider to facilitate an efficient and easy process for compiling the required information and completing and submitting BOI Reports, ensuring clients are able to comply with the reporting requirements of the CTA in a timely fashion.

¹ References to a U.S. state include any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, the United States Virgin Islands and any other commonwealth, territory or possession of the United States, including tribal territories.

² FinCEN is authorized to disclose information in BOI Reports in limited circumstances to a statutorily defined group of governmental authorities and, with the consent of the reporting company, financial institutions, to be used in furtherance of a national security, intelligence or law enforcement activity.

³ Limited partnerships, limited liability partnerships (LLPs), business trusts and statutory trusts are likely included in the definition of domestic reporting companies, as well as general partnerships to the extent they file a document with a secretary of state or similar office.

⁴ Important decisions include decisions about a reporting company's business (e.g., nature and scope of business, selection or termination of business lines or geographic focus and entry into or termination of significant contracts), finances (e.g., sale or lease of principal assets, major expenditures or investments, incurrence of significant debt and compensation of senior officers) and structure (e.g., reorganization, dissolution or merger and amendments to governing documents).

⁵ FinCEN has indicated that a particular director is not necessarily a beneficial owner, but rather this is a determination that a reporting company must make on a director-by-director basis. A director with specific veto rights is more likely to have substantial control.

⁶ FinCEN has recently proposed to extend the 30-day period to 90 days for reporting companies formed or registered to do business during 2024 (but not after 2024). As of the date of this client alert, this proposal has not yet been adopted.

⁷ This will require a high level of diligence, including with respect to changes in officers and directors, addresses of individuals and new licenses or passports for individuals.

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