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## The Corporate Transparency Act: Implications and Challenges for Foreign Companies and Foreign Owners

The Corporate Transparency Act<sup>1</sup> (the “CTA”) went into effect on January 1, 2024. The CTA seeks to counteract money laundering, fraud and other illegal activity by imposing ownership disclosure requirements on private companies in the United States to an unprecedented extent. While its primary aim is to deter illicit financial activities and promote transparency in corporate ownership, the CTA’s impact on foreigners doing business in the United States may be significant. This Client Alert considers the implications of the CTA for foreign companies and foreign owners of US companies.

### I. Background and Summary

Enacted in 2021, the CTA instituted a beneficial ownership information (“BOI”) reporting database administered by the United States Treasury Department’s Financial Crimes Enforcement Network (“FinCEN”). Beginning January 1, 2024, companies that are either incorporated or registered to do business in the United States must file certain beneficial ownership information on the FinCEN BOI database, unless an exemption applies. Failure to comply with the CTA may result in stiff penalties, including criminal liability.

Information reported to FinCEN under the CTA will not be made public but may be shared with other U.S. government agencies, law enforcement, the judiciary, and financial institutions and their regulators (with consent of the reporting company).<sup>2</sup>

Although the CTA overtly targets traditional vehicles of money laundering, such as foreign shell companies,<sup>3</sup> it applies to a far wider range of companies that traditionally have not been subjected to extensive ownership disclosure requirements, including closely held companies and U.S. subsidiaries and affiliates of foreign private companies, who themselves may or may not be doing business in the United States. Larger and more heavily regulated companies are mostly exempt from the CTA.

### II. Who Must Comply?

Companies required to report BOI (“reporting companies”) are corporations, limited liability companies, or other similar entities that are either (i) created in the United States<sup>4</sup> (“domestic reporting companies”<sup>5</sup>) or (ii) formed in a foreign country and registered to do business in the United States (“foreign reporting

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<sup>1</sup> 31 USC 5336. See also n. 3 *infra*. The CTA was established by the National Defense Authorization Act for Fiscal Year 2021, PL 116-283.

<sup>2</sup> See generally 31 USC 5336(c)(2).

<sup>3</sup> See [Federal Register :: Beneficial Ownership Information Reporting Requirements](#)

<sup>4</sup> For purposes of this Client Alert, “United States” means any of the 50 States; the District of Columbia; Puerto Rico; Guam; the U.S. Virgin Islands; any other commonwealth, territory or possession of the United States; and any Indian or Alaska Native tribe listed as such under U.S. federal law.

<sup>5</sup> See 31 USC 5336(a)(11)(A)(i) (“created by the filing of a document with a secretary of state or a similar office under the law of a State or Indian Tribe”).

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companies”<sup>6</sup>). For purposes of the CTA, creation or registration specifically requires the filing of a document with a secretary of state or similar office in the United States. Certain entities that may be created without such a filing—e.g. trusts and partnerships—are therefore excluded from the definition of reporting company. Foreign companies that are not registered to do business in the United States are not required to report.<sup>7</sup> The CTA does not appear to extend to foreign companies that should register in the United States but have not. Such foreign companies may be in violation of state laws where they are illegally doing business but not of the CTA per se. However, as discussed below, a foreign company that is not otherwise registered but is doing business in the United States through a subsidiary or affiliate that itself is a reporting company may be required to submit and regularly update its BOI to FinCEN.

## Exempt Entities:

There are 23 specific categories of companies that are exempt from reporting under the CTA.<sup>8</sup> These are mostly institutions and companies already subject to significant regulation. They include (i) issuers of registered securities; (ii) financial institutions<sup>9</sup>; (iii) certain brokers and advisers<sup>10</sup>; and (iv) tax-exempt companies, among others. Among the less obvious categories of exempt companies are:

- a) Large operating company: An entity qualifies for this exemption if all of the following conditions are met:
  - o The entity employs more than 20 full-time employees employed in the United States;
  - o The entity has an operating presence at physical offices in the United States; and
  - o The entity has over \$5,000,000 in gross receipts or sales from sources in the United States, as declared to the IRS in a U.S. income tax or information return.<sup>11</sup>
- b) Pooled investment vehicle: An entity qualifies for this exemption if both of the following conditions are met:
  - o The entity either (i) is an investment company required to register under the Investment Company Act of 1940 (the “ICA”) or (ii) would be an investment company but for its exclusion from the definition of investment company under Section 3(c)(1) or 3(c)(7) of the ICA and is identified by the applicable investment advisor in a Form ADV filed with the SEC; and
  - o The entity is operated or advised by a bank, credit union, broker or dealer, investment company, investment advisor, or venture capital fund, in each case as defined in other categories of exempt companies.<sup>12</sup>

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<sup>6</sup> See 31 USC 5336(a)(11)(A)(ii) (“formed under the law of a foreign country and registered to do business in the United States by the filing of a document with a secretary of state or a similar office of a State or Indian Tribe”).

<sup>7</sup> FinCEN interprets registration to do business in any State or Indian Tribe as registration to do business in the United States. Also, these terms are interpreted by reference to the requirement to register to do business in the United State by filing of a document in a State or Indian Tribe. See *supra* n. 3, at Part III, Section E(ii).

<sup>8</sup> See 31 USC 5336(a)(11)(B)(i) – (xxiii).

<sup>9</sup> Including banks, credit unions, bank holding or savings and loan holding companies, and money transmitting businesses. *Id.* at subparagraphs (B)(iii) – (vi).

<sup>10</sup> Including securities broker dealers, investment companies, investment advisers; venture capital fund advisers. *Id.* at subparagraphs (B)(vii), (x) – (xi).

<sup>11</sup> *Id.* at subparagraph (B)(xxi).

<sup>12</sup> *Id.* at subparagraph (B)(xviii). See also 31 CFR 1010.380(f)(7). See also the special rule for foreign pooled investment vehicles at “Special Rules” *infra*.

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- c) **Subsidiaries of Exempt Companies:** A company that is controlled or wholly owned by one or more exempt entities other than by: (i) a pooled investment vehicle; (ii) money transmitting or money services business; (iii) an entity that operates exclusively to provide financial assistance to, or hold governance rights over, tax-exempt entities; or (iv) an inactive entity.<sup>13</sup>
- d) **Inactive entity:** An entity qualifies for this exemption if all of the following conditions are met:
  - In existence over a year;
  - Not engaged in an active business;
  - Not owned by a foreign person, whether directly or indirectly, wholly or partially;<sup>14</sup>
  - Has not experienced any change in ownership in the preceding 12 months;
  - Has not sent or received over \$1,000, either directly or indirectly through an affiliate, within the preceding 12 months; and
  - Holds no assets anywhere, including ownership of any other entity.<sup>15</sup>

It follows that a U.S. entity that would otherwise qualify for the inactive entity exemption will nonetheless be required to report if it is even partially and indirectly owned by a foreign person. For example, administratively dissolved U.S. companies that are directly or indirectly, wholly or partially owned by a foreign person may be required to report under the CTA, unless another exemption applies.

### III. What Information Must Be Provided?

A reporting company must report and provide basic identifying information about itself and the following information for each beneficial owner and (where applicable) company applicant:

- Full legal name and date of birth
- Residential street address, except for company applicants who form or register companies in the course of their business—e.g. paralegals—for whom a business street address may be reported.
- Unique identification number, issuing jurisdiction, and image of any of the following:
  - U.S. passport
  - State driver’s license
  - Identification issued by state, local government or Indian tribe
  - Foreign passport, but only if none of the preceding three items are available
- If the individual has applied for and obtained a FinCEN identifier,<sup>16</sup> the reporting company may report the FinCEN identifier instead of the individual’s BOI.

#### FinCEN Identifiers:

The CTA allows for the use of unique identifying numbers issued by FinCEN to an individual or reporting company, which may be reported instead of the required information about beneficial owners or company applicants.<sup>17</sup> These “FinCEN identifiers” are meant to simplify the reporting process for individuals and

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<sup>13</sup> Id. at subparagraph (B)(xxii).

<sup>14</sup> Id. at subparagraph (B)(xxiii). See also 31 CFR 1010.380(c)(2)(xxiii), which includes partial ownership. [eCFR :: 31 CFR 1010.380 -- Reports of beneficial ownership information.](#)

<sup>15</sup> Id. at subparagraph (B)(xxiii).

<sup>16</sup> See *infra* “FinCEN Identifiers.”

<sup>17</sup> 31 USC 5336(b)(3)(C).

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entities that may own or control multiple reporting companies. By a separate rule, FinCEN allows a reporting company to report another entity's FinCEN identifier and full legal name instead of its BOI if:

- The other entity has obtained a FinCEN identifier and provided it to the reporting company;
- An individual is or may be a beneficial owner of the reporting company by virtue of an *ownership interest* in the other entity (as opposed to other forms of control); and
- The beneficial owners of the other entity and the reporting company are the same individuals.<sup>18</sup>

## Updates and Corrections:

If and when information reported to FinCEN under the CTA changes or is determined to be inaccurate, the reporting company must file an updated or corrected report within 30 days of the change or when the inaccuracy was detected.<sup>19</sup> If a reporting company becomes exempt from reporting subsequent to having filed a report, it must file an updated report.<sup>20</sup> The CTA also provides a safe harbor for any person who voluntarily corrects an inaccurate report within 90 days of filing the report.<sup>21</sup>

## Special Rules:

The following special reporting rules apply to the following entities:

- a) **Subsidiary of exempt entities:** If a reporting company is itself owned only by other exempt entities, then only information on the exempt entities need be reported. BOI of individuals who indirectly own the subsidiary through such exempt entities need not be reported.<sup>22</sup>
- b) **Minor child:** BOI of a minor child need not be reported; provided that BOI of the child's parent or legal guardian is reported instead.<sup>23</sup>
- c) **Foreign pooled investment vehicle:** Foreign companies that qualify for the pooled investment vehicle exemption must only report BOI of the individual who exercises the greatest authority over the strategic management of the company.<sup>24</sup>
- d) **Companies created or registered before January 1, 2024:** Company applicants need not be reported by such companies.<sup>25</sup>

## Who is a Beneficial Owner?

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<sup>18</sup> 31 CFR 1010.380(b)(4)(ii)(B). See also [Federal Register :: Use of FinCEN Identifiers for Reporting Beneficial Ownership Information of Entities](#)

<sup>19</sup> 31 CFR 1010.380(a)(2) and (a)(3) [eCFR :: 31 CFR 1010.380 -- Reports of beneficial ownership information](#). Note that this requirement does not include updating previous information about company applicants. It does include corrections of inaccurate information about company applicants. Id. at Section (b)(3).

<sup>20</sup> Id.

<sup>21</sup> 31 USC 5336(h)(3)(C).

<sup>22</sup> 31 CFR 1010.380(b)(2)(i). FinCEN has clarified that a reporting company that does not wish to report an exempt entity owner has the option of reporting the individuals whose interests in the exempt entity would make them beneficial owners of the reporting company. *Supra* n. 3 at Section IV, A.

<sup>23</sup> 31 CFR 1010.380(b)(2)(ii).

<sup>24</sup> 31 CFR 1010.380(b)(2)(iii).

<sup>25</sup> 31 CFR 1010.380(b)(2)(iv).

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A beneficial owner is any individual who, directly or indirectly, (i) exercises “substantial control” over a reporting company or (ii) owns or controls at least 25% of the “ownership interests” of a reporting company.<sup>26</sup> Every individual meeting this criterion must be reported, and there is no maximum number of individuals who must be reported.

“Substantial control” means any of the following criteria:

- The individual is a senior officer, such as a C-suite executive, or performs the functions of such an officer, regardless of title;
- The individual has authority to appoint or remove certain officers or a majority of directors from the reporting company;
- The individual is an “important decision-maker”—i.e. has substantial influence over important decisions made by the reporting company, such as regarding its business, finances, or structure;
- The individual has any other form of substantial control over the reporting company. This could include managers and authorized members of a limited liability company that do not otherwise have the requisite ownership interest to be a beneficial owner.<sup>27</sup>

“Ownership interest” includes equity, stock, voting rights, capital interests, profits interests, convertible instruments, options or other non-binding privileges to buy or sell any of the foregoing, and any instrument, contract or other mechanism to establish ownership.<sup>28</sup>

Ownership or control may also be exerted by contract, arrangement, understanding, relationship or otherwise, including: (i) joint ownership; (ii) through a nominee, intermediary, custodian or agent; (iii) as a trustee or as a beneficiary with certain rights; or (iv) through other intermediary entities that separately or collectively own or control ownership interests of the reporting company.<sup>29</sup>

It follows that a foreign entity that does not qualify for an exemption under the CTA may be required to report BOI if the foreign entity “substantially controls” a reporting company or owns or controls at least 25% of the “ownership interests” of a reporting company (as defined above), whether or not the reporting company is domestic or foreign, and even if the foreign entity is not registered or otherwise doing business in the United States. In particular, control may be evidenced by contractual or non-contractual relationships (including, for example, family relationships).

## Beneficial Owner Exceptions:

There are five exceptions to the definition of beneficial owner whereby an individual who would otherwise be considered a beneficial owner need not be reported as such by the reporting company. These are:

- Minor children, provided that the child’s parent or guardian is reported instead.
- Nominees, intermediaries, custodians, or agents acting on behalf of an actual beneficial owner—e.g. tax advisors, lawyers, and other individuals who perform advisory services—provided that the actual beneficial owner is reported.

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<sup>26</sup> 31 CFR 1010.380(d).

<sup>27</sup> 31 CFR 1010.380(d)(1).

<sup>28</sup> 31 CFR 1010.380(d)(2).

<sup>29</sup> 31 CFR 1010.380(d)(2)(ii).

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- Employees that are not senior officers and whose control over, or benefits from, the reporting company are derived solely from their employment status.
- An heir to a future interest, such as pursuant to a will. Once the individual inherits the interest, this exception no longer applies.
- A creditor of the reporting company, provided that the individual has no other ownership interest in the reporting company in addition to the debt.<sup>30</sup>

## Company Applicants:

Reporting companies formed after January 1, 2024 (if a domestic reporting company) or registered to do business in the United States after January 1, 2024 (if a foreign reporting company) are required to also report its company applicants to FinCEN.<sup>31</sup>

Company applicants are (i) individuals who directly filed the document that created a domestic reporting company or registered a foreign reporting company to do business in the United States (a “direct filer”) and (ii) individuals who were primarily responsible for directing or controlling the filing of the formation or registration document, even though such individual did not actually file the document themselves (such individual “directs or controls the filing action”).<sup>32</sup> At most, a reporting company may have two company applicants, a direct filer and an individual who directs or controls the filing action.

## IV. What are the Consequences of Non-Compliance?

The willful failure to report or update BOI to FinCEN or the willful provision of false or fraudulent BOI (including false or fraudulent information about a person in a BOI report) may result in civil penalties of up to \$500 per day or criminal penalties including imprisonment for up to two years and/or a fine of up to \$10,000.<sup>33</sup> Senior officers of an entity that fails to file required BOI may be held accountable for such failure. Any person (including a beneficial owner or a company applicant) who willfully causes a company not to file a required BOI report or to report incomplete or false BOI may also be subject to civil and/or criminal penalties.<sup>34</sup>

## V. Filing Deadlines

Reporting companies must file their initial BOI report as follows:

- a) If the reporting company was formed or registered to do business in the United State before 2024, by January 1, 2025.<sup>35</sup>
- b) If the reporting company is formed or registered to do business in the United States in 2024, within 90 days after receiving actual or public notice of its formation or registration.<sup>36</sup>

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<sup>30</sup> 31 CFR 1010.380(d)(3).

<sup>31</sup> 31 CFR 1010.380(b)(1)(ii). *See also* 31 CFR 1010.380(b)(2)(iv).

<sup>32</sup> 31 CFR 1010.380(e).

<sup>33</sup> 31 USC 5336(h)(3)(A).

<sup>34</sup> 31 USC 5336(h)(1).

<sup>35</sup> 31 CFR 1010.380(a)(1)(iii).

<sup>36</sup> See [Federal Register :: Beneficial Ownership Information Reporting Deadline Extension for Reporting Companies Created or Registered in 2024](#) (extending the reporting rule from 30 to 90 days for reporting companies created or registered on or after January 1, 2024 and before January 1, 2025).

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- c) If the reporting company is formed or registered to do business in the United States in 2025 and thereafter, within 30 days after receiving actual or public notice of its formation or registration.<sup>37</sup>

## VI. What Should Companies Do Now?

U.S. companies with U.S. or foreign ownership and foreign companies that have any direct or indirect connection to the United States should first determine if they or any of their subsidiaries or affiliates are a reporting company under the CTA or qualify for an exemption from reporting. Companies that are or may be reporting companies under the CTA should at a minimum formally (i) designate an officer responsible for CTA reporting to FinCEN, (ii) set out the rights and responsibilities of both the CTA reporting officer and the owners of the reporting company to furnish required BOI for reporting to FinCEN,<sup>38</sup> (iii) prepare a confidential database of such information to be managed by the CTA reporting officer, and (iv) file the reporting company's initial BOI report to FinCEN within the applicable deadline, which for most reporting companies will be before January 1, 2025.

PierFerd attorneys are knowledgeable in corporate and compliance matters and are available to assist you with your CTA reporting obligations. For additional information, please contact any of the following or your regular PierFerd contact for assistance:

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<sup>37</sup> Id.

<sup>38</sup> Formalizing these roles, rights and responsibilities may require *inter alia* amending the reporting company's corporate bylaws, shareholders agreement, operating agreement, partnership agreement, or trust agreement, as the case may be.